

Coal Law and Policy Part Five: What is the Role of the Federal Government in Relation to Alberta Coal Mines?

By: Drew Yewchuk

Legislation Commented On: *Impact Assessment Act*, [SC 2019, c 28, s 1](#); *Species at Risk Act*, [SC 2002, c 29](#); *Coal Mining Effluent Regulations* (forthcoming)

This is another installment in the continuing ABlawg series on the law and policy framework for coal projects in Alberta. This installment focuses on three statutes or regulations by which the federal government exercises authority over possible coal mining in Alberta's eastern slopes: the *Impact Assessment Act*, the *Species at Risk Act*, and the forthcoming *Coal Mining Effluent Regulations* (a regulation under the *Fisheries Act*).

It should be noted these three enactments are not exhaustive of federal powers that apply to coal mining. The federal government may be involved in other ways, including through the general protection for fish habitat under the *Fisheries Act*, limitation of greenhouse gas emissions from industrial projects, constitutional obligations to Indigenous peoples, or water allocation disputes between provinces.

The *Impact Assessment Act*

Under the *Impact Assessment Act*, [SC 2019, c 28, s 1](#) (*IAA*), the federal government conducts an impact assessment for “designated projects”, which are projects listed in Schedule A of the *Physical Activities Regulations*, [SOR/2019-285](#) (“Project List”) (see [here](#) for a general discussion of the *IAA*, and see [here](#) for a discussion of the project list). A new coal mine with a coal production capacity of 5,000 t/day or more is a designated project, as is an expansion to a coal mine that would “result in an increase in the area of mining operations of 50% or more and the total coal production capacity would be 5 000 t/day or more after the expansion” (see Project List sections 18(a), 19(a)). The Minister of the Environment also has discretion to designate a new coal mine or coal mine expansion below those thresholds as a “designated project” and require a federal assessment (*IAA*, s 9).

Some proposed coal mines are below the Project List thresholds. For instance, the [Tent Mountain Mine plans to produce 4,925 t/day](#) and is therefore not currently slated for a federal impact assessment, though the Minister may still decide to designate it. Phase I of the Vista Coal mine, near Hinton, Alberta, was not initially designated for a federal assessment, but when Vista Coal applied for a phase II expansion [the entire project was designated](#), partially out of the Minister's concern that the phase I/phase II process was “[an exercise in project-splitting for the purpose of avoiding a federal assessment.](#)” [The project developer is challenging that decision in court.](#) One instance where the federal Minister can be expected to designate mines falling below the 5000 t/day limit is where the project appears to be designed to deliberately avoid a federal assessment.

For each designated project, the Impact Assessment Agency of Canada must decide whether an impact assessment is required. This involves taking into account certain factors including “the possibility that the carrying out of the designated project may cause adverse effects within federal jurisdiction or adverse direct or incidental effects; and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by [section 35](#) of the [Constitution Act, 1982](#)” (see the *IAA*, s 16(2) for the full list of factors). This is typically referred to as the “screening decision.” In the context of large coal mines, where the federal assessment is triggered, the process is often done in tandem with the provincial process by the AER through a Joint Review Panel, as is the case for the [Grassy Mountain Coal Project](#), although that project is being reviewed under the previous federal statute, the *Canadian Environmental Assessment Act, 2012*, [SC 2012, c 19, s 52](#) (*CEAA 2012*). Both the *IAA* and its predecessor had substantially similar provisions for federal-provincial coordination for review panels (see *IAA*, s 39). Where an assessment is conducted by a review panel, the panel holds a public hearing, writes a final assessment report that sets out predicted impacts and their significance, as well as recommended mitigation measures and approval conditions, and sends the report to the Minister. The final decision on whether the project is in the public interest and should be approved or rejected lies with the Minister or the Governor in Council (*IAA*, ss 60-65).

The *IAA* also allows the Minister of the Environment to establish a committee — or authorize the Impact Assessment Agency — to conduct a regional assessment or strategic assessment (*IAA*, ss 92-95). In months or years to come, the federal Minister will need to decide whether or not they intend to use these powers in relation to metallurgical coal in Alberta, and post that decision publicly, after a formal request is submitted; [at least one group is preparing such a request](#) (*IAA*, s 97, and *the Information and Management of Time Limits Regulations*, [SOR/2019-283](#), s 9).

Previous regional and strategic assessments give some clues as to what a regional or strategic assessment relating to Albertan metallurgical coal would look like. A regional assessment assesses the effects of existing or future physical activities carried out in a particular region. Only one regional assessment has been started under the *IAA* so far, for Ontario’s [Ring of Fire Area](#), where the process is ongoing and has [faced delays due to COVID-19](#). Another regional assessment was started under *CEAA 2012* and completed under the *IAA* for [Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador](#). That assessment is facing a [legal challenge from environmental groups](#) on the basis that the assessment was deficient and did not comply with the *IAA*. It should be noted that the idea of regional assessments pre-exists *CEAA 2012*, and there have been [regional or strategic assessments done outside of CEAA 2012 and the IAA](#). In relation to Alberta’s metallurgical coal, a regional assessment could mean the federal Minister of the Environment would get the Impact Assessment Agency involved in the process of replacing Alberta’s 1976 Coal Policy, or assess coal mining in the Rocky Mountains in both Alberta and B.C.

The *Impact Assessment Act* describes strategic assessments as follows:

95 (1) The Minister may establish a committee — or authorize the Agency — to conduct an assessment of

- (a) any Government of Canada policy, plan or program — proposed or existing — that is relevant to conducting impact assessments; or
- (b) any issue that is relevant to conducting impact assessments of designated projects or of a class of designated projects.

The strategic assessment process has been used twice before. Once for a [strategic assessment of climate change](#), and the second for a strategic assessment of thermal coal mining (that assessment is still early in the process, [preparing their terms of reference](#)). A strategic assessment of metallurgical coal development would likely be very similar to the planned strategic assessment for thermal coal, meant to consider the risks and benefits of metallurgical coal development and consider the future of new metallurgical coal mine projects across Canada.

If a regional or strategic assessment takes place it would be taken into account in decisions on whether to designate projects (*IAA*, s 9(1)), whether to conduct full impact assessments for designated projects (*IAA*, s 16(2)(e)), and in the impact assessment process itself (*IAA*, s 22(1)(p)). Depending on the outcomes of the resulting report, a regional or strategic assessment can encourage or discourage future project applications.

It should also be noted that the constitutionality of the *Impact Assessment Act* is being challenged by the [Alberta government](#) (see Martin Olszynski and Nigel Bankes's post on constitutional dimensions [here](#)). The first opinion will come from the Alberta Court of Appeal, though it is almost certainly then headed to the Supreme Court of Canada.

The *Species at Risk Act*

One of the purposes of the *Species at Risk Act*, [SC 2002, c 29](#) (*SARA*) is to protect the habitat of endangered or threatened species as a key part of species conservation. To summarize this function of *SARA*, after a species is listed under *SARA* as endangered, threatened or extirpated (a process that can take years), the minister responsible for the species must issue a draft recovery strategy on the [SARA registry](#) within one year for endangered species, and within two years for threatened or extirpated species. A final version must then be issued 90 days (*SARA*, ss 42(1), 43). The recovery strategy must include an identification and description of critical habitat for a listed species. (*SARA*, s 41(1)) This identification triggers several legal outcomes.

Where the critical habitat is located on federal land or in water subject to federal jurisdiction, but is not within national park or other federal protected area, or otherwise sufficiently protected by other federal legislation, the responsible minister must issue a critical habitat order that designates the critical habitat identified in a recovery strategy and gives legal protection to that habitat by prohibiting any person from destroying any portion of it. (*SARA*, s 57, 58) If the species is not on land or water in federal jurisdiction (and is not a migratory bird subject to the *Migratory Birds Convention Act, 1994*, [SC 1994, c 22](#)), *SARA* offers no real protection for habitat unless the federal government exercises its safety net power (*SARA*, s 61) or issues an emergency order (*SARA*, s 80). *SARA*'s limited application is [why provinces were meant to enact their own provincial versions of species at risk legislation](#).

SARA only permits the destruction of critical habitat that is the subject of a section 58 critical

habitat order where a person has a license to do so issued by the responsible minister under section 73 in accordance with the stringent conditions set out in the section:

Powers of competent minister

73 (1) The competent minister may enter into an agreement with a person, or issue a permit to a person, authorizing the person to engage in an activity affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals.

Purpose

(2) The agreement may be entered into, or the permit issued, only if the competent minister is of the opinion that

- (a)** the activity is scientific research relating to the conservation of the species and conducted by qualified persons;
- (b)** the activity benefits the species or is required to enhance its chance of survival in the wild; or
- (c)** affecting the species is incidental to the carrying out of the activity.

Pre-conditions

(3) The agreement may be entered into, or the permit issued, only if the competent minister is of the opinion that

- (a)** all reasonable alternatives to the activity that would reduce the impact on the species have been considered and the best solution has been adopted;
- (b)** all feasible measures will be taken to minimize the impact of the activity on the species or its critical habitat or the residences of its individuals; and
- (c)** the activity will not jeopardize the survival or recovery of the species.

SARA should have a significant impact on potential coal development because numerous endangered or threatened species listed under *SARA* are found in the eastern slopes where proposed coal development would take place. Rather than attempt to put together an extensive list, I will use the example of three species of trout and two species of pine trees.

The critical habitat for the Alberta population of [Westslope Cutthroat Trout](#) is protected by a section 58 critical habitat order covering a number of watercourses threatened by proposed coal mines in the eastern slopes (a result of [judicial review applications to compel compliance with *SARA*](#)). For the other four species, documents that should have been issued under *SARA* have not been issued with no explanation, a clear breach of *SARA*. Critical habitat for the [Athabasca Rainbow Trout](#) and the [Bull Trout](#) was identified in the recovery strategies for the two species and they should have received critical habitat orders by March 9, 2021, but as of the date of writing, their critical habitat orders have yet to be issued.

The [Whitebark Pine](#) is an endangered species of pine tree in the eastern slopes. It is also one of the few species that has been the subject of a *SARA* prosecution. In 2018, the Lake Louise Ski Resort pled guilty under *SARA* for cutting down Whitebark Pine without a permit (*SARA* applied because the trees were inside Banff National Park – which also resulted in a fine under the *Canada National Parks Act*, [SC 2000, c 32](#)) and was sentenced to a fine of \$1.6 million under *SARA*. The Whitebark Pine received a draft recovery strategy in October 2017 and should have

had a final recovery strategy in January 2018, but no final recovery strategy has been issued. The second pine tree is the [Limber Pine](#), which the Committee on the Status of Endangered Wildlife in Canada recommended for listing as endangered in 2014. Environment and Climate Change Canada was planning to list the [Limber Pine in 2018](#), but then never did. The two pine tree species are not subject to *SARA* protections on provincial lands, but do factor into the assessment of environmental affects under the *IAA* process.

SARA protections interlock with the *IAA* process. Any activity that may result in the destruction of any part of the critical habitat can only be undertaken where “all reasonable alternatives to the activity that would reduce the impact on the species’ critical habitat have been considered and the best solution has been adopted; and all feasible measures will be taken to minimize the impact of the activity on the species’ critical habitat” (*SARA*, s 77). During an impact assessment for a project that will affect a listed species at risk or its critical habitat identified in a recovery strategy, the competent minister must be informed of the project, and if the project is built, measures consistent with *SARA* recovery strategies must be taken to to avoid or lessen those effects and to monitor them (*SARA*, s 79). The impacts of a proposed project on species at risk is often a key issue at environmental impact assessment hearings.

The usefulness of *SARA* is greatly reduced by the federal government’s failures to meet statutory timelines for issuing documents required under *SARA*, slowing the recovery process and leaving endangered and threatened species without the legal protections offered by *SARA*. The federal government’s long and unexplained delays in meeting their obligations under *SARA* leaves open the possibility that projects will go forwards without *SARA* protections in place.

The Coal Mining Effluent Regulations Under the Fisheries Act

The *Coal Mining Effluent Regulations* have not been enacted. They are a proposed regulation under the *Fisheries Act*, [RSC 1985, c F-14](#) to control the release of deleterious substances into water. They would set limits for contaminants (including selenium, nitrate, and acidity) in water released from coal mining operations. The government has been preparing the *Coal Mining Effluent Regulations* since at least 2016 with government holding [consultations held in 2017](#).

Environment and Climate Change Canada initially planned to have the regulations [published in 2018](#), but they have were delayed and have not yet been published in the Canada Gazette. It is not difficult to determine what happened – industry took issue with the proposed regulations and Environment and Climate Change Canada has chosen not to finalize them until they reach a compromise with industry. [Slides from coal industry meetings](#), [lobbying](#) registrations, and [Coal Association of Canada board meeting minutes](#) are pretty clear about their organized opposition to the new regulations. The April 2020 Board Meeting minutes of the Coal Association of Canada makes the point well:

Coal Mining Effluent Regulations: Environment and Climate Change Canada (ECCC) provided an update on effluent regulations in February, 2020 and the CAC/Guy Gilron of Borealis Environmental Consulting have collected feedback from all producers and developers. Final written submissions are being prepared and to be sent to ECCC in May. Meetings have been held with all the coal producing provinces asking for letters

advocating for the delay in the publishing of the regulations. President will be meeting with ECCC ADM J. Moffet and CMER managers seeking a commitment for technical meetings between the CAC and a delay in gazetting the regulations due to COVID...

So it seems the *Coal Mining Effluent Regulations* will arrive as soon as the government finishes consulting with the Coal Association of Canada. When the regulations come into force is important because of the phase-in rules for the regulations: the current plan is for mines that enter commercial operation within 3 years of the CMER to count as “existing mines” subject to higher release limits. For instance, an “existing mine” will be permitted to release double the selenium that a “new mine” will be permitted to ([Grassy Mountain Hearing Transcript Vol 22](#), at 4759-60). This odd proposed phase-in process drew the attention of the Joint Review Panel at the hearing for the Grassy Mountain Coal Project when the Panel realized the Grassy Mountain Coal Project, which has not yet been approved or built, will be an “existing mine” for the terms of the *Coal Mining Effluent Regulations* (at 4800-801). It seems lobbyists for the coal industry have managed to get a lot of coalmines that clearly do not exist – potentially all the planned Albertan coal mines – categorized as “existing mines” by delaying the finalization of the regulations for five years. Whatever their general feelings on red tape, Albertans might have appreciated a little more red tape protecting their water.

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