

March 9, 2021

## Coal Law and Policy, Part Four: The Regulation of Coal Exploration

By: Drew Yewchuk & Nigel Bankes

**Matter Commented On:** Information Letter 2021-07 “[Coal Policy Reinstatement](#)” (February 8, 2021) and attached Ministerial Order 054/2021

This is the fourth instalment in ABlawg’s series on coal law: for the background, see [Part One: the Coal Policy and Its Legal Status](#), the special edition: [What Are the Implications of Reinstating the 1976 Coal Development Policy?](#), [Part Two: The Rules for Acquiring Coal Rights and the Royalty Regime](#), and [Part Three: Was the Public Rationale for Rescinding the Coal Policy Ever Convincing?](#)

This post covers the *regulation* of coal exploration programs. On February 8, 2021 the Minister of Energy [ordered](#) the Alberta Energy Regulator (AER) not to “issue any new approvals for coal on Category 2 Lands” using the Minister’s authority to issue directions to the AER under section 67 of the *Responsible Energy Development Act*, [SA 2012, c R-17.3](#). This did not cancel ongoing coal exploration programs and hence the importance of considering at least some elements of the regulation of these activities.

### The Legal Framework

[Coal exploration programs](#) on public lands are reviewed and approved under the *Public Lands Act*, [RSA 2000, c P-40 \(PLA\)](#) section 20 and the [Code of Practice for Exploration Operations](#). This Code is incorporated into the *Conservation and Reclamation Regulation*, [Alta Reg 115/1993](#), a regulation under the *Environmental Protection Enhancement Act*, [RSA 2000, c E-12](#). Coal exploration programs on private lands only require notice under the *Environmental Protection Enhancement Act*, but they do not require an approval under the *PLA* since they do not involve public lands.

Section 20 of the *Public Lands Act* provides that:

- 20(1)** No person shall enter on and occupy public land for any purpose unless
- (a) the director has authorized that person to enter on and occupy the public land for a stated period for the purpose of
    - (i) conducting appraisals, inspections, analyses, inventories or other investigations of the natural resources or underground formations that might exist on the land,

The AER has issued two manuals dealing with coal exploration and mining: [Manual 008, Oil Sands and Coal Exploration Application Guide](#), issued in 2014, and [Manual 020 Coal Development](#), issued in August 2020. The AER withdrew its earlier and very dated Directive 61:

How to Apply for Government Approval of Coal Projects in Alberta (1983) in April 2020 (see [AER Bulletin 2020-07](#)) shortly before the Minister announced the revocation of the 1976 Coal Policy on May 15<sup>th</sup>.

If the coal exploration program requires a person to “drill holes to a depth in excess of 150 metres or develop an adit, tunnel, shaft or other excavation” the program also requires an approval under section 10 of the *Coal Conservation Act*, [RSA 2000, c C-17](#) and must provide the information prescribed by the *Coal Conservation Rules*, [Alta Reg 270/1981](#). These Rules apply to exploration activities with respect to both Crown coal rights and private (freehold) coal rights.

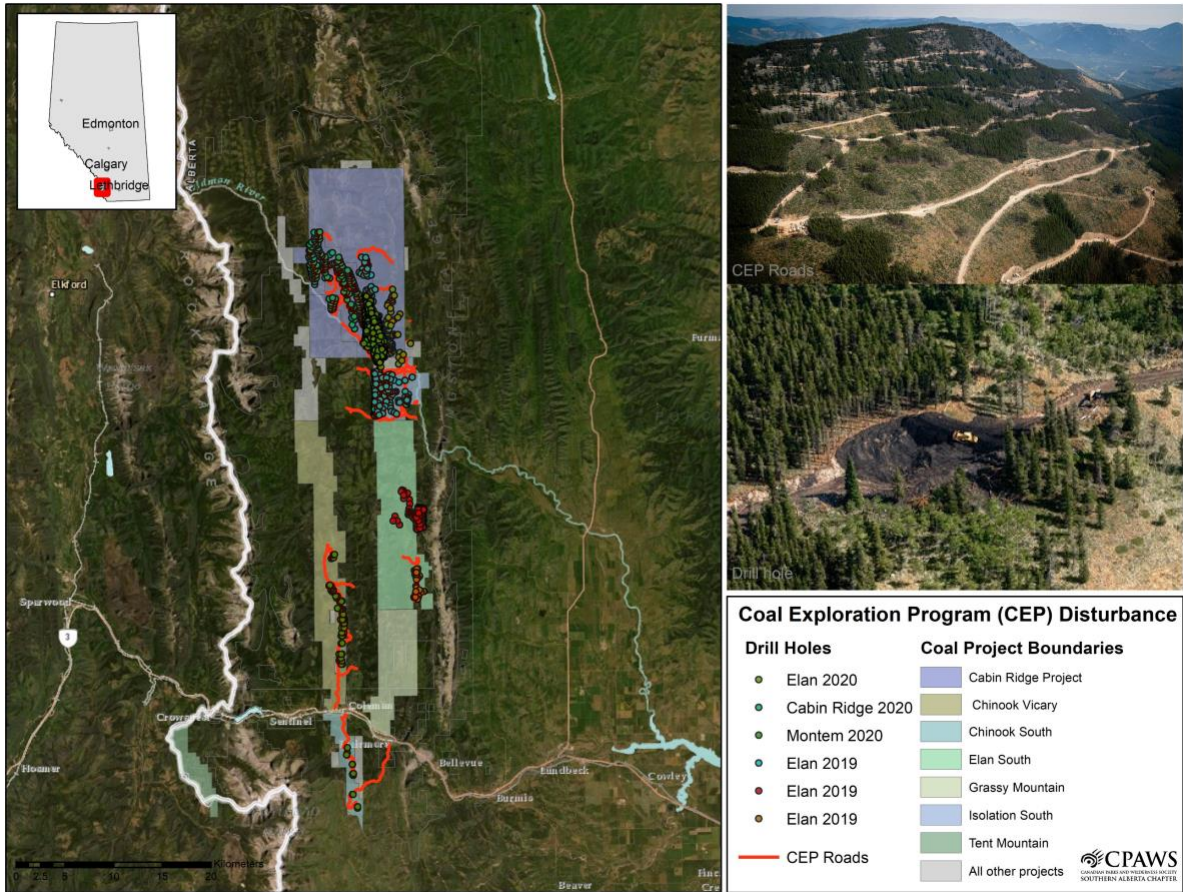
All of these approvals fall within the jurisdiction of the AER since all of these Acts and regulations are either “specified enactments” or “energy resource enactments” under the *Responsible Energy Development Act*, [SA 2012, c R-17.3, ss 1\(1\)\(j\), \(s\)](#). (For the purposes of AER jurisdiction, there is no distinction between metallurgical coal and thermal coal.)

There is one surprisingly tricky aspect of this regulatory scheme and that relates to the non-application of Part 8 “Exploration” of the *Mines and Minerals Act*, [RSA 2000, c M-17 \(MMA\)](#). A lay reader, and even a reader with a legal background might reasonably anticipate that a Part of the MMA that proclaims that it applies to “Exploration” would apply to coal exploration. But in fact this Part of the Act is made inapplicable to coal exploration by section 2(c) of the *Metallic and Industrial Minerals Exploration Regulation*, [Alta Reg 213/1998](#) (MIME Regulation) which exempts “any operation conducted to determine or evaluate the presence, extent, nature or quality of coal, oil sands, a surface material or water” from the application of Part 8 of the *Mines and Minerals Act* and thereby the *Exploration Regulation*, [Alta Reg 284/2006](#) (see section 1.1(2)(a)). What makes this so strange is that the MIME Regulation, by incorporating a definition from the *Metallic and Industrial Minerals Tenure Regulation*, [Alta Reg 145/2005](#), excludes coal from the “metallic and industrial minerals” that are the subject of the MIME Regulation. So we have the bizarre situation that the MIME Regulation does *not* apply to coal - except for the purpose of excluding Part 8 of the *Mines and Minerals Act* and the other regulations made under that Part from applying to coal exploration. This makes the entire coal regulatory regime extraordinarily opaque, complicated and difficult to unravel. And ultimately there is something very odd about the fact that a principal vehicle for regulating most preliminary coal exploration in Alberta is section 20 of the *Public Lands Act* and not regulation under the *Mines and Minerals Act*.

## **The Physical Aspect of Coal Exploration Programs**

The purpose of coal exploration is to determine the quantity, location, and quality of coal. Some generalizations can be made based on a review of recent approvals. Coal exploration programs in Alberta’s eastern slopes consist of drilling large numbers of core samples (somewhere in the 50-100 range), most of them in the 150m depth range and then a handful of cores much deeper (in the 350m depth). Coal exploration also involves bulk-sampling programs, requiring large test pits (in the range of 4m deep x 1m wide x 20m long) in order to dig up sufficient coal to run carbonization tests. Coal exploration programs also allow the construction of the access roads necessary to move equipment to the worksites. Some sense of the activities involved, and the associated landscape disturbance, can be gained by examining the maps and images below.

These images (captured from a CPAWS twitter feed available [here](#)) show the density of exploration drill holes (the black dots) on a number of coal projects in the Crowsnest area) as well as a exploration roads (the red lines).



### Exemptions from the Abandonment of Drillholes

Another special approval some coal companies have obtained is an exemption from the requirement to abandon drillholes (in the technical sense of cementing the drillhole closed). These approvals have been granted under section 21(4) of the *Coal Conservation Rules*, on the grounds that the coal discovered is recoverable by modern surface mining methods – in other words, that cementing it shut would be pointless because the company will return to mine the entire area up in the next few years anyways. Presumably the AER is collecting sufficient security to ensure abandonment, and will compel these companies to properly abandon these drillholes at some point if their planned mines are not constructed.

### Conclusion

The detailed assessment of the damage to the landscape and environment, including the aquatic environment, caused by coal exploration programs is principally a question for engineers and

scientists and not for lawyers – but it is well understood that exploration involves significant drilling, digging, surface disturbance, and water use. Coal exploration does not consist of going for a hike and poking the dirt with a stick or a banging a few rocks with a geologist’s hammer. What this post suggests is that the regulatory scheme governing coal exploration in Alberta is complex and byzantine, and needs to be comprehensively and transparently assessed to ensure its fitness for purpose if coal exploration is to be allowed to continue on the eastern slopes of the Rockies. Such a review should be included as part of any consultation with respect to the future of coal exploration and development on the eastern slopes along with the landscape level dimensions referenced in previous posts [here](#) and [here](#).

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