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Coal Law and Policy Part Eight: The Results of the Coal Consultation and the Return to the *Alberta Land Stewardship Act*

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Reports and Ministerial Order Commented On: [Engaging Albertans About Coal, Final Report: Recommendations for the Management of Coal Resources in Alberta, Ministerial Order 002/2022](#)

On March 4, 2022, the Alberta government released the two reports of the Coal Policy Consultation Committee (the Committee), as well as a ministerial order from the Minister of Energy implementing part of the Committee's recommendations. This post continues ABlawg's coverage of coal law and policy issues. ABlawg's last post on this topic, "[Coal Development Consultation Terms of Reference Revisited](#)", contains links to our previous posts.

This post summarizes key points of the Committee's reports and reviews the actions government has taken so far in response to the reports.

The Committee Reports

After the public outcry and [court challenge](#) about [the sudden rescinding of the 1976 Coal Policy for Alberta](#), the Committee was struck on March 29, 2021 to consult with Albertans and provide the Alberta government advice for future policy decisions. The Committee's two reports are not law, regulations, or official government policy. The first report describes the Committee's engagement with Albertans, and the second report is intended as advice to the Minister of Energy in making future policy decisions about coal.

Both reports are thorough and cover a wide scope of issues. The Committee managed to carry out a respectable consultation process, despite the general challenges of establishing an ad hoc process and the special challenges of doing so during COVID-19.

The Committee's [Engagement Report](#) describes how the Committee consulted Albertans, and lists those who were consulted (at 13-15). The report provides the results of several surveys (at 15-18), a summary of engagement with Indigenous communities and organizations (at 19-23), and a summary of the different positions on coal the committee heard (at 24-46).

The key recommendation of the Committee's [Recommendations Report](#) is that coal development activity should not be permitted until the 1976 Coal Policy is replaced with legally binding regional or subregional plans completed under the *Alberta Land Stewardship Act*, [SA 2009, c A-26.8](#) (ALSA). The eight recommendations are:

1. Modernize Alberta's coal policy.
2. Meaningfully involve Alberta's Indigenous communities in the land use planning process.
3. Articulate land use guidance for coal exploration and development through planning under the Alberta Land Stewardship Act to provide certainty and bind the Crown.
4. Undertake a review of Alberta's coal tenure and royalty regimes.
5. Address the issue of freehold coal mineral rights.
6. Assess proposed new coal projects with rigorous net benefit tests that include extensive public consultation.
7. Resolve uncertainties regarding responsibility for reclamation liabilities relating to coal exploration and development activities.
8. Address reclamation liabilities for legacy coal mines.

The Recommendation Report includes a history of the coal policy and the tangle of land use laws, plans, and policies that have since been created in Alberta (at 13-17). It ends with:

The most recent policy documents have articulated a common expectation that regional plans (and associated plans) created under the Alberta Land Stewardship Act will reconcile this dispersed guidance in a unified way. Yet in 2021, only one of the four land use regions covering the Eastern Slopes has a regional plan; and even in that case, considerable work remains outstanding. (at 17)

This history is important. Alberta's land-use policies are an awful tangle of unenforceable aspirational statements and unfulfilled promises of future protections that leaves Ministers [far too much discretion to remove land protections without explanation](#). *ALSA* was meant to fix that by planning for the future, co-ordinating land use, and accounting for the cumulative effects of developments. [The neglect of *ALSA*](#) is a giant failure. Alberta's recent attempts at land use planning have been undertaken only [where there was a threat the federal government would need to bring in an Emergency Protection Order](#) under section 80 of the *Species at Risk Act*, [SC 2002, c 29](#).

The Committee's key recommendation that the modernization of Alberta's coal policy be made under *ALSA* is a reasonable position. Decisions on [land use relating to coal are squarely within the purpose of *ALSA*](#). Alberta's coal policy situation is now where we should have been more than two years ago when the government initially started to consider replacing the 1976 Coal Policy. Frustratingly, records obtained through FOIP requests strongly suggest that bureaucrats at Alberta Energy recommended the government 'conduct a coal categories review project' and use *ALSA* to replace the 1976 Coal Policy back in January of 2020 – the records do not explain why this advice was not followed because of the heavy redactions in the FOIP records.

The Government's Response

[Ministerial Order 002/2022](#) from the Minister of Energy is the beginning of the government acting on the coal policy committee's recommendations. It uses the Minister's power to give directions to the Alberta Energy Regulator (AER) under section 67 of the *Responsible Energy Development Act*, [SA 2012, c R-17.3](#). It continues the suspension of applications for coal exploration of

development throughout the eastern slopes, except for on lands subject to “an advanced coal project or an active approval for a coal mine.”

The definition of an ‘advanced coal project’ is generous: “an ‘advanced coal project’ is a project for which the proponent has submitted a project summary to the AER for the purposes of determining whether an environmental impact assessment is required.” (Ministerial Order 002/2022 at section 6). This reflects the recommendations of the coal policy committee (Recommendations Report at 7 & 40). On this definition, Tent Mountain counts as ‘advanced’. But the project is not at all imminent, and years of work are likely to be necessary before a federal impact assessment hearing will be held for the project. Tent Mountain is still in the very early stages of the process under the federal *Impact Assessment Act*, [SC 2019, c 28, s 1](#).

The suspension of activity under Ministerial Order 002/2022 lasts “until such time as written notice is given by the Minister of Energy and/or Minister of Environment and Parks.” While this drafting could have more clearly stated that the suspension would run until a new plan under *ALSA* exists for each area covered by the 1976 Coal Policy, this drafting is probably for expediency as the government’s statements indicate their intention is to make plans under *ALSA*. This approach to drafting is another example of how Alberta’s land use policies got so convoluted. To properly understand the Ministerial Order, you need to refer to the Committee Recommendations Report, and the Ministerial Order *could* be rescinded any time, if the government of the day is willing to pay the political price for doing so. Instead of a clear promise of an *ALSA* plan we get a vague recognition that Albertans expect the Ministerial Order to be in force until “sufficient land use clarity has been provided through a planning activity”.

Pursuant to the Ministerial Order, Alberta Energy released [Information Letter 2022-09](#) stating that it would not accept any new coal lease applications in the Eastern Slopes until further notice. The Alberta Energy Regulator, in turn, published [Bulletin 2022-04](#) and six [Reconsideration and Suspension Letters](#) (Application Numbers 1936029 through 1936034) to coal development companies informing them their exploration permits would continue to be suspended. Although the Ministerial Order is clear that abandonment and reclamation activity can take place, it is not clear whether the suspensions mean the timelines for the exploration approvals are paused and therefore abandonment and reclamation does not need to be done until after the suspension ends, or if the timelines continue to run despite the exploration activity being suspended, meaning that the abandonment and reclamation will need to take place as scheduled.

Commentary

The engagement report noted the concerns the Committee heard about the AER’s current approach of not collecting security for the remediation of damage caused by coal exploration activities. This issue does not re-appear in the recommendation report. Hopefully the AER has taken some steps to ensure funds are available for the remediation of coal exploration work done in the Eastern slopes. On a related note, the AER is still investigating a contravention of approval conditions by one coal company that occurred in August 2020 (search [Reference No. 2020-040 here](#)). The AER has declined to share any information on this contravention while the investigation is ongoing, so the public has no way of knowing if remediation work is necessary in relation to that possible contravention.

Conclusion

There is a lesson in this for any government willing to learn it. Skipping over consultation processes when changing policy is often counterproductive, as it leads to litigation and political resistance that reverses the initial decision and restarts the process, producing more delay, more uncertainty, and more waste.

This is not the end of the dispute over coal policy in Alberta. Questions about whether and where coal development will take place in the eastern slopes will now be decided under the land planning process under *ALSA* in coming years. The 10-year review of the South Saskatchewan Regional Plan under *ALSA* must start by September 2024, but the government has not provided more clarity on when public consultation on *ALSA* plans will start.

CORRECTION of March 17, 2022

I wrote in the blog that the issue of security for remediation of coal exploration does not appear in the Recommendation Report - it was brought to my attention that this is incorrect. Page 43 of the Recommendation Report has the recommended action:

"8.2 Review the adequacy of regulation and enforcement of reclamation requirements for exploration activities and consider the use of reclamation bonding for exploration activities."

I regret the error.

This post may be cited as: Drew Yewchuk, "Coal Law and Policy Part Eight: The Results of the Coal Consultation and the Return to the *Alberta Land Stewardship Act*" (March 15, 2022), online: ABlawg, http://ablawg.ca/wp-content/uploads/2022/03/Blog_DY_Coal_Law_Policy_Eight.pdf

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