

October 13, 2023

## **The AER Does Not Have the Jurisdiction to Consider New Coal Applications for the Grassy Mountain Coal Deposit**

**By:** Nigel Bankes

**Matter commented on:** Applications by Northback Holdings Corporation for a Coal Exploration Program on the Grassy Mountain Coal Deposit, including [Application Number 1948547, Deep Drilling Permit](#)

On September 5, 2023, Northback Holdings Corporation filed an application with the Alberta Energy Regulator (AER) for a Deep Drilling Permit in support of a coal exploration program on the Grassy Mountain coal deposit. This deposit is located north of Blairmore, Alberta on a combination of Crown coal lands and Northback's privately owned land. Northback proposes to commence its exploration program as soon as possible. Northback's applications have triggered an outpouring of opposition from the coalition of interests that fought the original Grassy Mountain coal project: see [here](#) (CPAWS) and [here](#) (Corb Lund). There has also been considerable media coverage of this latest development: see [here](#) (Bob Weber) and [here](#) (Andrew Nikiforuk). My purpose in writing this post is to make the case that (1) Northback was not entitled to make these applications to the AER, and (2) the AER has no business considering the merits of these applications because Northback's new applications are subject to the general "no new coal rule" contained in a [2022 Ministerial Order](#) directed at the AER (details below). Others have also made this case, including Canadian Parks and Wilderness Society (Southern Alberta Chapter) ([CPAWS-SAB](#)) and the [Timberwolf Wilderness Society](#), but it still seems useful to summarize the arguments.

This is not new territory for ABlawg. Readers will recall that we launched an extended [coal law and policy series](#) in 2021 when the Minister of Energy first revoked the [Lougheed coal development policy](#) of 1976.

### **Benga's Grassy Mountain Coal Project**

Northback is the successor corporation to Benga Mining. Benga Mining was the proponent for the original Grassy Mountain Coal Project. Benga submitted an environmental impact assessment (EIA) application for the Grassy Mountain Coal Project to the AER and the Canadian Environmental Assessment Agency (the Agency) on November 10, 2015, and submitted an updated EIA application on August 15, 2016. Benga sought various approvals under provincial and federal laws, including approvals under the *Coal Conservation Act*, [RSA 2000, c C-17](#) (CCA).

The CCA application was considered by a Joint Review Panel (JRP) of the AER and the Agency. Acting as the AER, the JRP had to assess whether the project was in the public interest under the terms of s 8.1 of the CCA and s 3 of the *Responsible Energy Development Act General Regulation*,

[Alta Reg 90/2013](#). The JRP concluded that the project was not in the public interest and accordingly it denied Benga's applications under the CCA: [JRP Report](#) at para 3050, June 17, 2021.

In reaching that assessment, the JRP concluded *inter alia* that:

- the project is likely to result in significant adverse environmental effects on surface water quality (at para 3039), and
- the project is likely to have significant adverse environmental effects on westslope cutthroat trout [listed as threatened under both provincial and federal legislation] and their aquatic habitat. (at para 3041)

The JRP was also extremely critical of Benga's application material, noting that it systematically underestimated the negative environmental impacts of its project (at para 3038) and at the same time, systematically overestimated both its ability to mitigate those impacts and the positive economic benefits of the project (at para 3046).

It is important to emphasise that the JRP, acting as the AER, is the *final* decision maker for applications under the CCA. The AER does not make a recommendation to a minister or to cabinet for a project governed by the CCA. It makes the final decision, and the decision of the AER was to "deny Benga's applications 1844520 and 1902073 under the *Coal Conservation Act*" (at para 3050). At that point, therefore, the project that Benga had initiated with its 2015 EIA application was dead. Benga attempted to revive the project by seeking permission to appeal the AER's decision to the Alberta Court of Appeal, but that court denied permission: *Benga Mining Limited v Alberta Energy Regulator*, [2022 ABCA 30 \(CanLII\)](#). Benga's further application for leave to appeal to the Supreme Court of Canada was also denied: *Benga Mining Limited v Alberta Energy Regulator, et al*, [2022 CanLII 88683](#) (SCC). Benga still has an outstanding application in the Federal Court (File no. T-1270-21) in relation to the federal side of the JRP, but that application is of no consequence for the validity of the AER's decision that terminated Benga's project.

### **Northback's Current Applications**

In the ordinary course of things, Benga (whether acting as Benga or under the name of Northback) would be able to start again and file new applications with the AER under the CCA and any other relevant provincial and federal legislation. And this I suppose is what Northback thought it was doing in August and September of this year when it purported to apply to the AER for a deep drilling permit in support of a coal exploration program on its private and Crown coal leases associated with the Grassy Mountain coal deposit.

But the ordinary course of things changed on March 2, 2022 when then Minister of Energy, Sonya Savage, issued [Ministerial Order \(MO/002/2022\)](#) (the MO) to the AER under the terms of s 67 of the *Responsible Energy Development Act*, [SA 2012, R-17.3 \(REDA\)](#). Minister Savage issued this MO as part of the government's determination to walk back its decision the previous year to revoke the Loughheed Coal Development Policy (the revocation decision) and open up new areas of the eastern slopes of the Rockies to coal exploration and mining. Civil society pushed back vigorously against the revocation decision; the government heard those concerns and reinstated the 1976

Policy. The government implemented that reinstatement in part through the MO. And in at least one respect, the MO was actually more restrictive than the 1976 Policy - specifically with respect to what are referred to in that Policy as the Category 4 lands. Category 4 lands are lands on which the 1976 Policy considered that coal exploration could generally be permitted “under appropriate control”. Most of the footprint of the original Grassy Mountain project fell within Category 4 (see JRP Report at paras 2097 – 2102).

So far as relevant to the category 4 lands, the MO provides that:

... AND WHEREAS, Albertans expect coal exploration and development in the Eastern Slopes (as defined in the 1976 Coal Policy and depicted in Annex 1) to remain suspended until such time as sufficient land use clarity has been provided through a planning activity.

THEREFORE, pursuant to s. 67 of REDA, and to the land use categories in the 1976 Coal Policy, the Minister of Energy hereby directs the AER to take steps to ensure that:

[paragraphs 1 and 2 are omitted, and deal with Category 1 and 2 lands]

3) With the exception of lands subject to an advanced coal project or an active approval for a coal mine, all approvals (as defined by REDA) for coal exploration or development on Category 3 and 4 lands in the Eastern Slopes shall be suspended and no new applications will be accepted until such time as written notice is given by the Minister of Energy and/or Minister of Environment and Parks.

4) Nothing in this direction restricts abandonment and reclamation or security and safety activities at active coal mines or related to coal exploration.

5) For the purposes of this Directive, an 'active approval for a coal mine' is a licence under the Coal Conservation Act.

6) For the purposes of this Directive, 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.

In sum, the new general rule, even for Category 4 lands, is no new applications for coal mining exploration or development.

The effect of the MO is to require the AER “to ensure” that it will not accept any new applications for approvals for coal exploration or development activities on category 3 or 4 lands unless an applicant could establish that the lands in question are “subject to an advanced coal project or an active approval for a coal mine” or “until such time as written notice is given by the Minister of Energy and/or Minister of Environment and Parks.” The MO defines each of the relevant terms: advanced coal project (see para 6) and active approval (see para 5).

It is obvious that neither Benga nor Northback has an active approval, since Benga’s application for a licence to operate a coal mine under the CCA was definitively rejected by the AER acting as

part of the JRP. But in my view, it is equally obvious that Northback cannot bring itself within the definition of an advanced coal project. To repeat the definition from above, an advanced coal project for the purposes of the Directive 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.”

I am prepared to assume that Benga submitted such a summary to the AER sometime before 2015. After all, we know that Benga actually submitted an EIA application to the AER in November 2015. That EIA application was filed to support Benga’s *CCA* and other regulatory applications that were considered by the JRP. As already stated, the AER, acting through the JRP, rejected those applications. Accordingly, there is no live project for which the AER has a project summary for the purposes of determining whether an EIA is required. And if there is no such live project, then Northback cannot bring itself within any of the exceptions contained within the MO. Northback undoubtedly still has coal rights to both Crown and private lands, but the MO as drafted no longer allows Northback to make any applications for coal exploration or development activities and the AER has a legal duty to ensure that it does not accept any such applications.

But given that these applications are currently filed within the AER's integrated application system, where does this leave us? First, it seems obvious in hindsight that in order to fulfil its duty “to ensure” under the MO, the AER ought to have put in place a screening process for all future coal applications, including applications for Category 4 lands, so as “to ensure” that it did not accept new applications unless and until it was satisfied that the applications could be brought within one of the two exceptions to the general rule that the AER must not accept new coal applications.

Second, having failed to do that, and having registered Northback’s applications, the AER still has a duty not to further process those applications, nor to consider the merits of those applications, until it has concluded that those applications were properly filed. The AER cannot reach that conclusion since there is no live project for which the AER has a project summary for determining whether an EIA might be required. The AER did have such a summary for a project which subsequently proceeded through the review and decision-making process. But that project was definitively rejected by the AER itself. There is no basis on which the AER can now turn around and assert that a project that it has already rejected is still a live and advanced project entitled to the benefit of the grandparenting exceptions in the MO. The only projects that are (wrongly) before the AER are the applications for a coal exploration program and for deep drilling permits – and these applications do not fall within the exceptions articulated in the MO. Accordingly the AER has no jurisdiction to consider the merits of these applications.

### **What is the AER’s Position?**

The AER has yet to make a formal decision with respect to Northback’s applications, but comments provided to the media by an AER spokesperson give rise to concerns that the AER has already prejudged the matter. There are at least two such comments. First, in response to an inquiry from [Bob Weber](#), Teresa Broughton, an AER spokesperson, suggested that:

"The (regulator) can accept and process applications for matters related to coal mining if they are considered to be an 'advanced coal project,'" she wrote in an email. "Whether this project is an 'advanced coal project' is something that will be considered as part of the (regulator's) full technical review of the application."

This is problematic because it ignores the terms of the MO that instruct the AER not to accept applications for category 4 lands unless they fall within an exception. The AER has no business engaging in a technical review of an ineligible application, and it needs to make that determination before it engages in a technical review.

The same spokesperson provided additional observations to [The Tyee](#):

"Northback previously submitted a project summary and an Environmental Impact Assessment Report (EIA report)," explained Broughton. "While that project summary and EIA was submitted for its previous coal mine applications (Benga Grassy Mountain), that project summary and EIA can be used for any future applications for coal development."

This commentary is even more problematic since it suggests that the AER (or at least Ms. Broughton) has already formed the opinion that Northback's applications fall within the advanced coal project exception - even though the AER has yet to issue a reasoned decision on the point. The impression of prejudgment of this important matter is further reinforced by comments provided to the media by Brian Jean, Minister of Energy and Minerals who is reported to have told [CityNews](#) "that an environmental impact assessment for the Grassy Mountain Project was filed several years before the restriction was put into place, which qualified it as an advanced coal project." While the Minister's comments cannot bind the AER (it is the AER who must interpret the MO) it is unfortunate that the Minister made these comments since this can only add to concerns of prejudgment in this case.

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This post may be cited as: Nigel Bankes, "The AER Does Not Have the Jurisdiction to Consider New Coal Applications for the Grassy Mountain Coal Deposit" (13 October 2023), online: ABlawg, [http://ablawg.ca/wp-content/uploads/2023/10/Blog\\_NB\\_Grassy\\_Mountain\\_Application.pdf](http://ablawg.ca/wp-content/uploads/2023/10/Blog_NB_Grassy_Mountain_Application.pdf)

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