January 28, 2025

Coal Law and Policy Part Nine: Coal Moratoriums, They Come and Go

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Matter Commented On: AER Bulletin 2025-03, New Direction for Coal Activity in the Eastern Slopes of Alberta's Rocky Mountains, January 20, 2025, and Ministerial Order 003/25 (Energy)

This is another instalment in our ABlawg series on coal law and policy in Alberta. We have recently issued a compilation of our posts from 2020 – 2024 as an ebook, but clearly the story continues and at some point we will issue Volume 2!

This post critically examines the Order Minister Brian Jean sent the Alberta Energy Regulator (AER) in January 2025. This Ministerial Order (MO) ends the moratorium on coal development applications that was put in place in March 2022.

The Long Road to the January 2025 Coal Development Direction

On January 15, 2025, in the middle of a three-day hearings by the AER into Northback's applications for coal exploration permits on the Grassy Mountain site, Minister Brian Jean, the province's Minister of Energy and Minerals, issued a ministerial order providing new directions to the AER. Entitled the "Coal Development Direction" and in force until January 15, 2035 (unless varied earlier), the Direction rescinds three earlier Ministerial Orders (MO 054/2021, MO 093/2021, and MO 002/2022) and their associated directions.

Those earlier directions (and especially MO 002/2022 from March 2022 - the "Moratorium Order") had effectively placed a moratorium on all new coal exploration, suspending existing approvals and prohibiting the AER from issuing new approvals – except for so-called "advanced projects". The 2025 Coal Development Direction reverses all of that. This Direction ends the suspensions of existing approvals and extends the expiry dates of those approvals to account for the period of suspension. In addition, it authorizes the AER to consider new applications in line with the 1976 Coal Development Policy for Alberta but "with consideration of the Coal Industry Modernization Initiative policy guidance set out in the Government of Alberta News Release, titled 'Protecting the environment with tougher coal rules', dated December 20, 2024."

One of us described the 1976 Coal Development Policy in a 2021 post as follows:

> … the Policy established a four-fold classification of lands for coal exploration and development. Category 1 lands were lands in which no exploration or commercial development would be permitted. This category includes National Parks, present or proposed Provincial Parks, Wilderness Areas and some other lands of special significance (at 14). Category 2 lands were said to be

> … lands in which limited exploration is desirable and may be permitted under strict control but in which *commercial development by surface mining will not normally be considered at the present time*. … Underground mining or in-situ operations may be permitted in areas within this category where the surface effects of the operation are deemed to be environmentally acceptable." (at 15, emphasis added)

Categories 3 and 4 both contemplated access exploration and potential development, not only by underground mining or in-situ operations, but also by strip mining where appropriate. But as a matter of actual practice, the only lands for which coal leases continued to be issued in the ordinary course were for Category 4 lands.

But the 1976 Coal Policy also had implications for the Crown's approach to granting new leases. The Crown's leasing policy prior to 2020 was described in an Information Letter from 2014:

> Alberta Energy will continue to issue coal leases through the public offering process for lands classified as Category 4 …. *All applications for Crown coal rights in Category 2 and 3 will continue to be held as applications*. (IL 2014-07: "Public Offering of Crown Coal Rights in Alberta", emphasis added)

In many respects it was this "no new leases policy" that provided the most effective protection for the eastern slopes. Potential miners would not apply to the AER for exploration approvals on Crown land if they could not get a lease for Crown coal rights.

All that changed with the revocation of the 1976 Coal Policy in May 2020. In the next few months Alberta Energy and Minerals (the Department) granted leases for the applications that it had on hold. The Department described its new policy as follows:

> *With the rescission of the [1976] Coal Policy, all restrictions on issuing coal leases within the former coal categories 2 and 3 have been removed.* Alberta will continue to restrict coal leasing, exploration and development within public lands formerly designated as coal category 1. This prohibition on coal activities is being continued to maintain watershed, biodiversity, recreation and tourism values along the Eastern Slopes of Alberta's Rocky Mountains.
>
> Alberta Energy will be offering the right of first refusal to the holders of active coal lease applications. (IL 2020-23, Rescission of A Coal Development Policy for Alberta and new leasing rules for Crown coal leases, at 1, emphasis added)

The Northern Alberta Chapter of the Canadian Parks and Wilderness Society (CPAWS-NAB), for example, estimates that 186,187 hectares of Category 2 lands fell under lease as a result of the revocation of the 1976 Coal Policy.

We note in passing that there is nothing in the *Mines and Minerals Act*, RSA 2000, c M-15 that provides any authority for granting a right of first refusal to parties that have in the past filed an application with the Department. By granting leases in this way the Minister missed an opportunity

to engage companies in a competitive bidding process. While it is likely too late to challenge the validity of leases on this basis, the Minister's recognition of a fictional right of first refusal demonstrates how badly the Department wanted to accommodate mostly foreign coal mining investment interests.

While the government reinstated the 1976 Coal Policy in February 2021, due to massive and broadly-based opposition (for some details see here) the horse was already out of the stable since some of those new lessees quickly obtained exploration approvals from the AER during the eight months between the revocation of the Policy in May and its reinstatement in February 2021. In some cases, these companies began to drill exploration wells and construct kilometers of new access roads (see CPAWS-NAB, above). Minister Savage put a stop to *new* exploration approvals for Category 2 lands (Ministerial Order 054/2021) when she reinstated the 1976 Policy (see ABlawg post here) and later, in March 2022, she imposed a moratorium on *existing* approvals through Ministerial Order 002/2022 (the "Moratorium Order", and see ABlawg post here).

The Moratorium Order followed the release of the reports of the Coal Policy Consultation Committee. The Order contained an exception for so-called "advanced coal projects" but until January 15, 2025 it was generally effective in preventing new coal exploration activities on all the lands covered by the 1976 Coal Policy. That said, the province issued at least one new coal lease during the moratorium: in September 2024 (bidding documents and results here) for an area that contains sensitive habitat for burrowing owl, raptors, and sharp-tailed grouse! (For the only coverage of this that we know of, see Kim Siever's piece here).

The Impacts of the 2025 Coal Development Direction

The 2025 Coal Development Direction changes the situation again and unexpectedly reverses course from the direction set by the Moratorium Order following the reports of the Coal Policy Committee: members of the coal policy committee have spoken to the media about their shock at the reversal.

Here are the key implications of the 2025 Coal Development Direction.

First, it brings the moratorium in place since 2022 to an end by rescinding Ministerial Order 002/2022 (the Moratorium Order).

Second, existing coal exploration approvals are to be reinstated no later than the end of January 2025. Once their approvals are reinstated, coal mining corporations can immediately resume exploration activities on the lands covered by those existing approvals.

Third, the AER will resume processing coal exploration applications already filed with the AER. Processing had been paused by one or other of the above Orders. These applications may now be processed and potentially approved within a few short weeks.

Fourth, the AER will resume accepting and processing new applications for coal exploration or coal development since there is no longer any moratorium and no need to prove that your application is part of an advanced project.

Fifth, with the lifting of the Moratorium Order, issues about the application of the moratorium likely become moot. This probably means that the Court of Appeal will no longer hear the two cases brought by the MD of Ranchland. The first of those cases deals with the exception for so-called 'advanced projects' and the application of that exception to new exploration activities on the Grassy Mountain site *Municipal District of Ranchland No. 66 v Alberta Energy Regulator*, 2024 ABCA 274 (CanLII) (see ABlawg post here). With the lifting of the Moratorium Order it no longer matters whether a project is an advanced project or not, since the AER will be processing all new coal applications. We wait to see how the parties will deal with this change of circumstances. The MD of Ranchland's second case relates to the AER's decision to extend the time allowed for reclamation activities on coal exploration sites: *Ranchland (Municipal District No 66) v Alberta Energy Regulator*, 2024 ABCA 309 (CanLII), (see the ABlawg post here.) Together these cases demonstrate the risk assumed by those who take on government on sensitive issues – all your efforts and investment in time and money can be set to nought by sudden policy reversals.

Sixth, the AER is now instructed to apply the 1976 Coal Policy to its decision-making as informed by the terms of a news release. That may sound like a good thing but there are at least two problems with this new instruction.

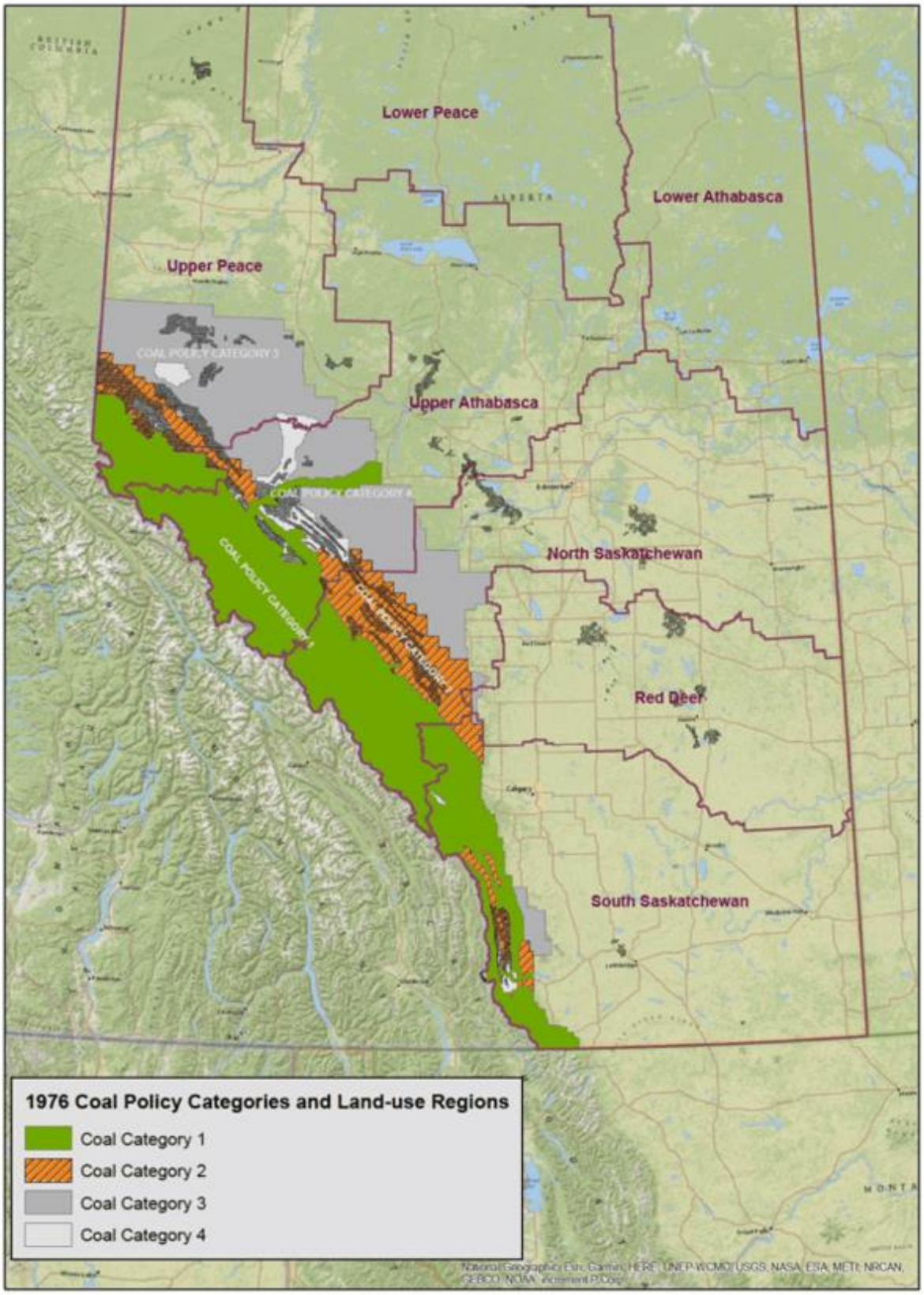
The first is that while this may look like the restoration of how things stood in May 2020 when Minister Savage rescinded the 1976 Coal Policy, that is most profoundly *not* the case as matter of both law and fact. It is not the case because there is nothing in this Direction that revokes the many coal leases (see above) that were granted in the weeks and months following the rescission to those with filed lease applications. With the end of the moratorium, all of those lessees are in a position to revive their applications with the AER (or file new applications) for the approval of coal exploration activities.

The second problem is simply a question of interpretation. How should we and the AER understand the instruction to consider "the Coal Industry Modernization Initiative policy guidance set out in the Government of Alberta News Release, titled 'Protecting the environment with tougher coal rules', dated December 20, 2024."? What are the principal messages contained within that News Release? By directing the AER to consider this, the ministerial order engages in governance and law-making by news release. But perhaps more significantly, how should we understand the Minister's claim that he "is satisfied that sufficient land use clarity is being provided through ongoing regional planning, including the South Saskatchewan Regional Planning review and engagement, and the Coal Industry Modernization Initiative [CIMI] announced December 20, 2024"?

Again, there are two problems with this claim. First, the claim that land use clarity is provided by the *ongoing* South Saskatchewan Regional Planning process is nonsense. How can an incomplete process provide any certainty when we have yet to learn the outcomes? Furthermore, there is broad consensus that the first version of the South Saskatchewan Regional Plan failed to deliver the necessary guidance: see the ABlawg post on that here. Second, the eastern slopes are more than just the South Saskatchewan Basin. As one of us previously pointed out, "lands within Categories 2 and 3 are included within no less than five of these planning regions, Upper Peace, Upper

Athabasca, North Saskatchewan, Red Deer, and South Saskatchewan." See map below (credit, Martin Olszynski). Land use planning in these other regions is either stalled or proceeding at a snail's pace: see "The Sad State of Regional Land Use Planning in Alberta". Neither is there anything in the Minister's claim that the CIMI process will somehow contribute to land use planning certainty. There are no references to land use planning in the CIMI announcement. Instead, the CIMI announcement simply promised "new coal regulations and legislation [that] will be drafted for government approval later in 2025." In sum, there is no chain of reasoning to support lifting the moratorium. And in particular, there is no chain of reasoning to support lifting the moratorium *now* when the CIMI process itself acknowledges that we will not see the new, supposedly more protective regime, until later in the year. The gap that necessarily ensues is even more obvious in the letters that Minister Jean has been sending to some of those who have written to raise concerns about lifting the moratorium:

> With the recommendations of the Coal Policy Committee as our guide, through 2025 we will engage directly with the industry to develop a new, comprehensive coal policy. We foresee that in late 2025 we will be proposing significant amendments to the *Coal Conservation Act*, the *Mines and Minerals Act*, and other associated regulations, rules, and directives to achieve the desired objectives.


Lower Peace
Lower Athabasca
Upper Peace
Upper Athabasca
North Saskatchewan
Red Deer
South Saskatchewan
1976 Coal Policy Categories and Land-use Regions
Coal Category 1
Coal Category 2
Coal Category 3
Coal Category 4

Why End the Moratorium Without Completed Land Use Plans?

Even Minister Jean's department seems to know that the logic doesn't work. The final preamble of the Moratorium Order (MO 002/2022) offered the rationale for the moratorium and its duration, namely, a moratorium until land use planning is completed.

> 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.

The new Coal Development Direction does not say that sufficient land use clarity "has been provided", instead it says the Minister "is satisfied that sufficient land use clarity *is being provided*" (emphasis added). In other words, the MO itself acknowledges that we have yet to obtain the promised clarity. Which raises the question, how could Minister Jean have reasonably reached the conclusion that it was appropriate to lift the moratorium? See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII), *Auer v Auer*, 2024 SCC 36 (CanLII) and Associated *Provincial* Picture Houses *Ltd* v Wednesbury Corporation [1948] 1 KB 223 (Eng CA).

Which brings us to the question of why Minister Jean, who had just promised a one-year legislative process through the CIMI, suddenly changed his mind and lifted the moratorium thereby opening the regulatory gap referenced above? In our view the only credible explanation is that the government was responding to the lawsuits brought by a number of mining companies. These claims include claims by (1) Black Eagle for the Blackstone Project (filed January 24, 2023), (2) Cabin Ridge (amended filing August 1, 2023), (3) Atrum Coal Ltd. (September 14, 2022), (4) Montem Resources (filed February 8, 2023) and (5) Northback Holdings (March 1, 2024).

We do not comment here on the merits of those claims except to to observe that Northback cannot possible have a valid claim for its original project. That project was resoundingly rejected by the Joint Review Panel in 2021 (and see ABlawg post here) on public interest grounds and government is not an insurer for the loss that follows when a proponent fails to make its case.

Suffice it to say that each of the claims listed above is a claim that the government has engaged in a regulatory taking (also known as constructive or *de facto* expropriation). According to the most recent Supreme Court authority a party seeking to claim compensation for a constructive expropriation must establish both that the government "has acquired a beneficial interest in the property or flowing from it (i.e. an advantage)" and that "state action has removed all reasonable uses of the property." *Annapolis Group Inc. v Halifax Regional Municipality*, 2022 SCC 36 (CanLII) at para 44 (underlining in original). Whatever one may think about the prospects of the plaintiffs proving that Alberta has obtained a beneficial interest or advantage in their property by its pattern of regulation, it seems pretty clear that the lifting of the moratorium will make it impossible for the plaintiffs to establish that "state action has removed all reasonable uses of the property."

If we are correct about the above, then it also follows that Minister Jean's ministerial order has traded protection against compensation claims in favour of exposing Albertans to renewed coal mining activities on the eastern slopes with all its attendant risks at the same time as postponing

putting in place the protections that he and Minister Schulz promised just a few weeks earlier. Coal before water.

As a fiscally protective measure, the new Coal Development Direction is also foolish. Why? Because if the basis for compensation turns out to be recovery of sunk costs rather than speculative market value, the government is simply encouraging coal mining companies to run up the bill by drilling more exploratory holes: see Mineral Rights Compensation Regulation, Alta Reg 317/2003.

Conclusion: We are Doomed to Repeat the Mistakes of the Past

Back in March 2022, one of us wrote:

> 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.

The government has not learned this lesson. The land use planning process promised by the *Alberta Land Stewardship Act*, SA 2009, c A-26.8, the pre-eminence of which the government appeared to have accepted when it adopted the Moratorium Order, is the correct consultation process for coal related land use decisions. By skipping that process in favour of governance by news releases and ministerial orders, the cycle of litigation, political opposition, and forced policy reversal begins again. Indeed, arguments for proper process based on legitimate expectations created by the Moratorium Order may well be litigated.. Public outrage has not been quelled by the government's confused statements. Are we meant to take seriously government claims that metallurgical coal is important because we need wind turbines when the same government has recently imposed a moratorium on wind power development in Alberta?

This post may be cited as: Nigel Bankes & Drew Yewchuk, "Coal Law and Policy Part Nine: Coal Moratoriums, They Come and Go" (28 January 2025), online: ABlawg, http://ablawg.ca/wp-content/uploads/2025/01/Blog_NBDY_Coal_Policy_9.pdf