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May 28, 2021

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Potential Regional Assessment of Coal Development
and Exploration Activity in Southwest Alberta
Impact Assessment Agency of Canada
160 Elgin St., 22nd floor
Ottawa, ON K1A 0H3

Dear Dr. Bonnell, Manager – Strategic and Regional Assessments, Impact Assessment Agency
of Canada,

**Re: Submissions regarding the “Potential Regional Assessment of Coal Development and
Exploration Activity in Southwest Alberta” pursuant to s. 93(1) and s. 97(1) of the
Impact Assessment Act**

1. INTRODUCTION

I write to you on behalf of Niitsítapi Water Protectors (“NWP”), Canadian Parks and Wilderness Society Southern Alberta Chapter (“CPAWS S AB”) and Livingstone Landowners Group (“LLG”) regarding the “Potential Regional Assessment of Coal Development and Exploration Activity in Southwest Alberta.”

NWP is a grassroots collective of Niitsítapi water and land protectors. NWP’s mission is to protect the water and land within the traditional and Treaty lands of the Blackfoot Confederacy. NWP was formed in response to the threat of coal development projects within Blackfoot traditional territory and the headwaters of the Oldman River. Since its formation in 2020, NWP has been leading on-reserve community awareness campaigns, lobbying provincial and federal governments, and mobilizing grassroots initiatives to stop proposed open-pit coal development projects. NWP is continuing the legacy of the Blackfoot ancestors by protecting the land and water from molestation. NWP is not an organization elected by Indigenous or First Nations members, does not represent nor speak for the Blackfoot Tribal governments (Blood

Tribe/Kainai, Siksika and Piikani First Nations) or the Blackfoot Confederacy, and recognizes that the Crown’s constitutional duty to consult is owed to the Tribal governments.

CPAWS is a nationwide non-profit charitable organization dedicated to the protection and sustainability of public lands across Canada. The Southern Alberta chapter has been active for over 50 years working collaboratively with provincial and federal governments, industry, Indigenous Peoples, and others to provide landscape-scale, science-based support and advice for the protection and proper management of our parks and wilderness areas. CPAWS S AB is staffed by a diversity of Albertans with a passion for the outdoors and Alberta’s wilderness, and supported by members and donors across the province.

LLG represents more than 150 landowners and supporters of the Livingstone-Porcupine Hills area in southwest Alberta, some of the most biodiverse and sensitive ecosystems in the province. Since its formation in 2004, LLG has been a strong advocate for ongoing land stewardship, protection of the region’s critical headwaters and ensuring the sustainability of existing and future land and water uses in this fragile and important area of the Eastern Slopes. LLG actively engages with industry and governments on land use planning and policy and was a registered intervener in the federal/provincial joint review process for the proposed Grassy Mountain project.

On 16 April 2021, the Honourable Jonathan Wilkinson MP, Minister of Environment and Climate Change (hereinafter the “Minister”), instructed that the Impact Assessment Agency of Canada (the “Agency”) to consider the 22 March 2021, presentation to the House of Commons of a “Petition to the Minister of Environment and Climate Change (No. 432-00681)¹ (the “Petition”) as a formal request for a regional assessment pursuant to s. 97(1) of the *Impact Assessment Act*, SC 2019, c 28, s 1 (the “IAA”), and “to commence a review and analysis of it to inform my eventual decision on whether or not to conduct such a regional assessment.”²

The Petition was initiated on 11 February 2021 by Latasha Calf Robe, who is a principal of my client NWP, and, **by 13 March 2021, 18,333 Canadians had signed it in support.**

My clients appreciate this opportunity to provide submissions on the scope of this regional assessment, to inform both the Agency’s review and analysis and the Minister’s decision on whether or not to conduct one.

My clients request that the Agency recommend that the Minister enter into an agreement or arrangement with a jurisdiction to jointly establish a committee of independent experts to conduct a regional assessment of the potential adverse effects of existing or future metallurgical coal mining activities that fall within federal jurisdiction over a geographical region that includes the Rocky Mountains and the Eastern Slopes of southwest Alberta and the Elk Valley of southeast British Columbia, and include an analysis of different scenarios regarding the pace and scale of future development of metallurgical coal mining in the region and an analysis the future global market for metallurgical coal.

¹ Petition to the Minister of Environment and Climate Change (Presented to the House of Commons on 22 March 2021; accessed on 20 May 2021), online: <https://petitions.ourcommons.ca/en/Petition/Details?Petition=e-3178>.

² Correspondence from the Honourable Jonathan Wilkinson MP, Minister of Environment and Climate Change, to Heather McPherson, MP, Edmonton-Strathcona (16 April 2021; accessed on 20 May 2021), online: <https://iaac-aeic.gc.ca/050/documents/p81540/138671E.pdf>.

My clients further request that the Minister should order a short, time-limited 45-day extension of time to the information-gathering phase, prior to making his decision on whether or not to order this regional assessment.

2. BACKGROUND

According to the Agency’s Canadian Impact Assessment Registry website for the regional assessment:

The Impact Assessment Agency of Canada is reviewing a request to conduct a regional assessment of the impacts of proposed coal developments and exploratory activity in southwest Alberta.

April 16, 2021 — On March 22, 2021, the Impact Assessment Agency of Canada received a request for a regional assessment for the Potential Regional Assessment of Coal Development and Exploration Activity in Southwest Alberta. The Minister’s response, with reasons, must be provided within 90 days of receiving the request for a regional assessment.³

The Minister has stated that, pursuant to the *Information and Management of Time Limits Regulations* established under the IAA, “a response to the regional assessment request, with reasons, must be provided within 90 days of its receipt” and “[y]ou will therefore receive notification of my decision by June 18, 2021, at which time it will also be posted publicly to the [Agency’s Registry website]”.

The Rocky Mountains and Eastern Slopes in Alberta and the Elk Valley region in British Columbia are ecologically-sensitive regions and function as the headwaters for many major river systems which flow across Canada and into the United States. Active and proposed metallurgical coal mining activities in the region have the potential to directly and irreversibly damage this critical area and contribute to growing cumulative impact concerns related to multiple coal exploration programs and proposed mine developments across the region.

The policy of the Alberta Government regarding coal mining in the Rocky Mountains and their Eastern Slopes has been opaque and erratic at best. In May 2020, the Energy Ministry, after only consulting with coal mining companies and their lobby group, the Coal Association of Canada,⁴ rescinded 1976 Coal Policy that categorized all lands in the Rocky Mountains and the Eastern Slopes into four categories (Coal Categories 1-4).⁵ Lands in Categories 1 and 2 were largely protected from coal mining (some exploratory and even underground mining was allowed in

³ The Agency’s “Canadian Impact Assessment Registry – Potential Regional Assessment of Coal Development and Exploration Activity in Southwest Alberta” (accessed on 20 May 2021), online: <https://iaac-aeic.gc.ca/050/evaluations/proj/81540?culture=en-CA>.

⁴ “Government records and other sources document the Alberta and international coal industry’s intense lobbying attempts to change Alberta’s regulatory system in the months leading into the changeover to the United Conservative Party government and in the year after, which eventually led to rescinding the 1976 Coal Policy” – from “Records show excessive lobbying to rescind 1976 Coal Policy,” *Medicine Hat News* (9 March 2021; accessed on 2 April 2021), online: <https://medicinehatnews.com/news/local-news/2021/03/09/records-show-excessive-lobbying-to-rescind-1976-coal-policy/>.

⁵ Nigel Bankes, “Coal Law and Policy in Alberta, Part One: the Coal Policy and Its Legal Status” (8 February 2021; accessed on 2 April 2021), online: ABlawg, <https://ablawg.ca/2021/02/08/coal-law-and-policy-in-alberta-part-one-the-coal-policy-and-its-legal-status/>.

Category 2 lands, but it was expected and understood by the industry that no mining would effectively be allowed there). This 1976 Coal Policy rescission then allowed the Alberta Energy Ministry to grant to industry proponents all the coal mining lease applications for Category 2 lands that were in the queue since 1976 (amounting to hundreds of thousands of hectares), and the Alberta Energy Regulator (the “AER”) began approving exploration permits for coal companies, many in just 24 hours.⁶ The Energy Ministry then quietly granted 11 new coal mining leases in Category 2 lands in December 2020.

Concern amongst industry experts and then the Alberta public mounted, and opposition to the rescission of the 1976 Coal Policy and the Alberta Government’s plans for new coal mines across the Rockies and Eastern Slopes intensified, across all sectors of society, from First Nations to ranchers to rural and urban municipalities (that rely on the potentially affected rivers for their drinking water) to urban hikers and campers to country music stars. At least five southern Alberta First Nations launched or intervened in judicial reviews of the rescission of the 1976 Coal Policy, along with a group of ranchers. These legal actions and public outcry forced Energy Minister Sonya Savage to belatedly announce a “reinstatement” of the 1976 Coal Policy and a cancellation of the 11 new coal mining leases granted in December. This “reinstatement,” however, only cancelled a tiny fraction of the area of leases on Category 2 lands the Alberta Government had issued, and did not affect all the coal exploration permits granted in the interim by the AER pursuant to a “complex and byzantine” regulatory scheme,⁷ and, crucially, all the hundreds of thousands of hectares of coal mining leases granted by the Energy Ministry between June and December 2020.⁸ The Alberta Government also offered flimsy, unsupportable pretenses for rescinding the 1976 Coal Policy to begin with, as commented by University of Calgary Faculty of Law Professor Nigel Bankes:

The government could not have reasonably concluded that the [1976 Coal Policy] had been completely superseded or rendered obsolete. *The government’s own briefing papers make this abundantly clear. The government went ahead and rescinded the [1976 Coal Policy] in order to encourage investment in coal exploration and development, all the while knowing that the ground rules necessary for ensuring healthy functioning ecosystems at the landscape level were not in place. This is a shaky foundation on which to build the respectful consultation framework that the Department of Energy now promises.*⁹ [bold emphasis added; italicized emphasis in original]

⁶ Nigel Bankes, “Coal Law and Policy in Alberta, Part Two: The Rules for Acquiring Coal Rights and the Royalty Regime” (11 February 2021; accessed on 2 April 2021), online: ABlawg, <https://ablawg.ca/2021/02/11/coal-law-and-policy-in-alberta-part-2-the-rules-for-acquiring-coal-rights-and-the-royalty-regime/>.

⁷ Drew Yewchuk & Nigel Bankes, “Coal Law and Policy, Part Four: The Regulation of Coal Exploration” (9 March 2021; accessed on 2 April 2021), online: ABlawg, <https://ablawg.ca/2021/03/09/coal-law-and-policy-part-four-the-regulation-of-coal-exploration/>.

⁸ Nigel Bankes, “Coal Law and Policy in Alberta, Part One: the Coal Policy and Its Legal Status” (8 February 2021; accessed on 2 April 2021), online: ABlawg, <https://ablawg.ca/2021/02/08/coal-law-and-policy-in-alberta-part-one-the-coal-policy-and-its-legal-status/>.

⁹ Nigel Bankes, “Coal Law and Policy in Alberta, Part Three: Was the Public Rationale for Rescinding the Coal Policy Ever Convincing?” (15 February 2021; accessed on 2 April 2021), online: ABlawg, <https://ablawg.ca/2021/02/15/coal-law-and-policy-in-alberta-part-three-was-the-public-rationale-for-rescinding-the-coal-policy-ever-convincing/>.

At her media conference announcing this “reinstatement”, Minister Savage also promised to order the AER to ban “mountain top removal coal mining” in Alberta. It later became clear, however, that this pronouncement only applied to Category 2 lands, and it is not even clear what type of mining it applies to: for example, whether her edict bans the type of open-pit mining that removes the sides of a whole mountain in stages (perhaps leaving the top), or strip-mining in non-mountainous areas.

At the same media conference, Minister Savage promised a new consultation process would be created to consult with Albertans on the development of a “modern” coal policy. This consultation process was announced on March 29, 2021, and will be headed by a committee of four men and one woman, including a municipal councillor from a town that relies on the coal mining industry (Hinton), and lacking any representatives from the environmental community.

There will apparently be a “parallel track” of consultations with First Nations “communities,” but this process is even more vague, and First Nations have very little faith in the Alberta Government’s track record in consulting with them.

It is this lack of public trust in the Alberta Government’s coal mining policies that has led to widespread public outcry and the need for this regional assessment.

In developing these submissions, my clients and I have reviewed the *IAA* and regulations established thereto, relevant federal and provincial legislation, and the Agency’s “Operational guide: Requesting a regional or strategic assessment under the *IAA*”¹⁰ and “Fact sheet: Regional assessment under the *Impact Assessment Act*.”¹¹

3. REGULATORY FRAMEWORK

The Minister has the authority, pursuant to s. 93(1) of the *IAA*, to order that a regional assessment of the effects of existing or future physical activities be carried out in a region that is comprised of federal and/or provincial lands. The Minister may enter into an agreement or arrangement with the provincial government(s) whose provincial lands are within the region to jointly establish a committee to conduct the assessment, or may authorize the Agency to conduct the assessment, in which case the Agency must offer to consult with the provincial government(s):

Definitions

2 The following definitions apply in this Act.

...

jurisdiction means

...

¹⁰ The Agency’s “Operational guide: Requesting a regional or strategic assessment under the *IAA*” (date modified 02 July 2020; accessed on 20 May 2021), online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/requesting-regional-strategic-assessment-iaa.html>.

¹¹ The Agency’s “Fact sheet: Regional assessment under the *Impact Assessment Act*” (date modified 11 March 2021; accessed on 20 May 2021), online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/regional-assessment-impact-assessment-act.html>.

(a) a federal authority;

...

(c) the government of a province;

...

e) any body — including a co-management body — established under a land claim agreement referred to in section 35 of the Constitution Act, 1982 and that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project;

...

(f) an Indigenous governing body that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project

(i) under a land claim agreement referred to in section 35 of the Constitution Act, 1982, or

(ii) under an Act of Parliament other than this Act or under an Act of the legislature of a province, including a law that implements a self-government agreement;

(g) an Indigenous governing body that has entered into an agreement or arrangement referred to in paragraph 114(1)(e);

...

Regional assessments — other regions

93 (1) If the Minister is of the opinion that it is appropriate to conduct a regional assessment of the effects of existing or future physical activities carried out in a region that is composed in part of federal lands or in a region that is entirely outside federal lands,

(a) the Minister may

(i) enter into an agreement or arrangement with any *jurisdiction* referred to in paragraphs (a) to (g) of the definition *jurisdiction* in section 2 respecting the joint establishment of a committee to conduct the assessment and the manner in which the assessment is to be conducted, or

(ii) authorize the Agency to conduct the assessment;

Agency's obligation to offer to consult

94 If the Agency conducts an assessment referred to in subsection 92 or 93, it must offer to consult and cooperate with any *jurisdiction* referred to in paragraphs (a) to (g) of the

definition jurisdiction in section 2 that has powers, duties or functions in relation to the physical activities in respect of which the assessment is conducted.¹²

Anyone may make a request for a regional assessment of the Minister pursuant to s. 97(1) of the IAA, who must respond within the time prescribed in regulations (within 90 days of receiving the request¹³), and must post their response on the Agency’s Registry website:

Minister’s obligations — request for assessment

97 (1) The Minister must respond, with reasons and within the prescribed time limit, to any request that an assessment referred to in section 92, 93 or 95 be conducted. The Minister must ensure that his or her response is posted on the Internet site.¹⁴

The Agency’s “Fact sheet: Regional assessment under the *Impact Assessment Act*” describes regional assessments:

What are Regional Assessments?

Regional assessments are studies conducted in areas of existing projects or anticipated development to inform planning and management of cumulative effects and inform project impact assessments.

Regional assessments allow the Government of Canada to go beyond project-focused impact assessments to understand the regional context and provide more comprehensive analyses to help inform future impact assessment decisions.

A regional assessment can be used to inform and identify:

- A baseline against which to assess the incremental impact of a discrete project
- Thresholds to support future project decisions
- Standard mitigation measures for future projects
- Potential impacts on rights and interests of Indigenous peoples
- Guidance for land- or marine-use planning and other initiatives for managing cumulative effects that may be undertaken by various jurisdictions

...

The IAA also requires that the results of regional assessments be considered at the following points in future project impact assessments:

- If the Minister is considering designating a physical activity under s.9(1) of the IAA
- When the Agency decides if an impact assessment is required for a designated project

¹² *Impact Assessment Act*, SC 2019, c 28 (accessed on 20 May 2021), online: <https://laws.justice.gc.ca/eng/acts/I-2.75/page-3.html#h-1160225>.

¹³ The Agency’s “Operational guide: Requesting a regional or strategic assessment under the IAA” (date modified 02 July 2020; accessed on 20 May 2021), online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/requesting-regional-strategic-assessment-iaa.html>.

¹⁴ *Impact Assessment Act*, SC 2019, c 28 (accessed on 20 May 2021), online: <https://laws.justice.gc.ca/eng/acts/I-2.75/page-3.html#h-1160225>.

- As a factor to be considered in impact assessments

...

Regional Assessment Approach

The Agency is developing a policy to clarify the conduct of regional assessments under the IAA. A key driver for regional assessments under the IAA is to inform future project impact assessments. **Using regional assessment to address issues that are best considered at a regional level will improve both the effectiveness and efficiency of the impact assessment process.**

Regional assessments would be undertaken cooperatively with provincial, territorial and Indigenous jurisdictions that have responsibilities within the region. The Government of Canada would work with jurisdictions to identify opportunities to partner on regional assessments that would be mutually beneficial.

Indigenous peoples and the public would be engaged throughout the regional assessment process to ensure meaningful participation and the integration of scientific information and Indigenous knowledge during the conduct of regional assessments. This would include engagement in the planning, undertaking and final reporting for the regional assessment.

Types of Regional Assessment

Regional assessments should be flexible. They can be designed to allow a better understanding of and response to regional issues. As a result, the goals and activities of regional assessments may be different. A range of approaches could be used in regional assessments, including filling data gaps and analyzing trends, **establishing thresholds and standard mitigation, or supporting the identification of regional development objectives and scenarios.**

A regional assessment could include multiple activities and/or project-types within a region, **or it could focus on a specific sector or activity within a region.** For example, the ongoing regional assessment in the offshore of Newfoundland and Labrador is focused on the existing and anticipated effects of offshore oil and gas exploratory drilling.

All types of regional assessment can improve impact assessment processes and decisions and support a better understanding of effects and how best to manage them.¹⁵

[emphasis added]

The Agency analyses the request for a regional assessment and advises and makes a recommendation to the Minister with respect to their decision on whether to conduct a regional assessment under the *IAA*:

For a regional assessment, the recommendation would be informed by a number of considerations, including whether:

1. the regional assessment could inform future federal impact assessment decisions;

¹⁵ The Agency's "Fact sheet: Regional assessment under the *Impact Assessment Act*" (date modified 11 March 2021; accessed on 20 May 2021), online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/regional-assessment-impact-assessment-act.html>.

2. there is the potential for effects from development within federal jurisdiction, including cumulative effects, in the region;
3. there are opportunities for collaboration with jurisdictions in the region;
4. there is the potential for impacts, including cumulative impacts, to the rights of Indigenous people in the region; and
5. there has been considerable public interest related to development or cumulative effects in the region.

To inform the recommendation, the Agency may seek information from stakeholders, solicit advice from federal departments, consult with provinces, other jurisdictions and Indigenous groups, and seek further input from the requester and any other person or entity. In seeking information, the Agency will not undertake a formal comment period.

In developing a recommendation for the Minister, the Agency may also take into account a number of other factors, including:

1. whether an existing or planned initiative would adequately address the issues raised in the request;
2. information from proponents, provinces, territories or Indigenous groups that the Agency might have from other areas of its work, including from project impact assessments either underway or completed; and
3. available resources to conduct regional or strategic assessments.

Once the Minister decides whether to conduct a regional or strategic assessment, the response with reasons will be posted on the Registry. In addition, the Agency will provide notification to the requester, along with the Minister’s reasons for the determination.¹⁶

A request for a regional assessment should address the following questions:

1. Is large-scale development, including potential designated projects under the Act, expected in the next 5–10 years in the region?
2. Are there environmentally or otherwise sensitive areas or components located in the region that might be affected by development?
3. Does current and future development in the region have the potential to cause adverse effects, including cumulative effects, that fall within federal jurisdiction? Effects that fall within federal jurisdiction include:
 - a. effects on fish and fish habitat;
 - b. effects on aquatic species, as defined in subsection 2(1) of the *Species at Risk Act*;
 - c. effects on migratory birds;
 - d. changes to the environment on federal lands;

¹⁶ The Agency’s “Operational guide: Requesting a regional or strategic assessment under the IAA” (date modified 02 July 2020; accessed on 20 May 2021), online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/requesting-regional-strategic-assessment-iaa.html>.

- e. changes to the environment that occur in a province or territory other than the one where the project is taking place;
 - f. changes to the environment that occur outside of Canada;
 - g. changes to the environment that could affect the Indigenous peoples of Canada;
 - h. any change occurring to the health, social or economic conditions of the Indigenous peoples of Canada; and
 - i. changes to components of the environment, health, social or economic matters set out in Schedule 3 of the Act.
4. Does development in the region have the potential to cause adverse impacts on the rights of Indigenous people?
 5. How would the regional assessment inform future federal impact assessments?

4. ANALYSIS

My clients request that the Agency recommend that the Minister enter into an agreement or arrangement with a jurisdiction (preferably with an Indigenous jurisdiction or federal department or ministry, or with the provinces of Alberta and British Columbia) to jointly establish a committee of independent experts to conduct a regional assessment of the potential adverse effects (including and especially cumulative effects) of existing or future metallurgical coal mining activities (including exploration, development, transportation, and end use of coal) that fall within federal jurisdiction, including:

1. impacts on fish and fish habitat and aquatic species, especially selenium pollution;
2. impacts on critical habitat of species at risk;
3. impacts on the exercise by First Nations and Indigenous peoples of their s. 35 constitutionally protected Treaty and Aboriginal rights;
4. impacts on greenhouse gas emissions, including fugitive methane emissions; and
5. transboundary impacts.

My clients recommended that the geographical region that this regional assessment should study should include the Rocky Mountains and the Eastern Slopes of southwest Alberta and the Elk Valley of southeast British Columbia.

The independent committee should be mandated to ensure meaningful public and Indigenous consultation, and collaboration with Indigenous authorities.

This regional assessment should include an analysis of different scenarios regarding the pace and scale of future development of metallurgical coal mining in the region and include an analysis of the future global market for metallurgical coal.

The Minister should order a short, time-limited 45-day extension to the information-gathering phase, prior to making his decision on whether or not to order this regional assessment.

My clients' specific recommendations follow.

a) Geographical scope

The regional assessment should examine all lands in the Rocky Mountains and the Eastern Slopes of southwest Alberta that are covered by the Alberta Government's 1976 provincial government policy (the "1976 Coal Policy") (discussed in more detail in the next section) that categorized those lands into four categories (Coal Categories 1-4).¹⁷ Lands in Categories 1 and 2 were largely protected from coal mining. The 1976 Coal Policy was rescinded in May 2020 by the Alberta Government, then reinstated in December 2020, due to significant public outcry. This region includes all areas in which there are metallurgical coal mining leases, exploratory activity, or mine proposals, and includes areas of Treaty Nos. 6, 7 and 8.

The assessment area should also include Elk Valley in southeastern British Columbia, where similar large-scale metallurgical coal mine exploration and development is already happening, but on a much larger scale. My clients believe this is a reasonable and logical enlargement of the geographical scope of the regional assessment proposed in the Petition.

b) Conceptual general scope

The regional assessment should examine all aspects of project activities related to metallurgical coal mining (exploration, development, transportation and end use of coal), and impacts of these activities on areas of federal jurisdiction. This is a manageable scope, which allows the regional assessment to really focus on the significant public concerns around metallurgical coal mining, which is the type of coal mining attracting public concern in the areas covered by the 1976 Coal Policy.

c) Independent committee and meaningful public and Indigenous consultation, and collaboration with Indigenous authorities

This regional assessment should be conducted by a committee, rather than the Agency, to ensure independence and breadth of experience. Pursuant to s. 93(1)(i) of the IAA, the Minister may enter into an agreement or arrangement with a jurisdiction to jointly establish a committee to conduct the regional assessment. It is our understanding that such a "jurisdiction" can include an Indigenous jurisdiction, or another federal government ministry or department. However, it is also our understanding that regulations to allow for Indigenous jurisdiction are several years away from being finalized. As such, if an agreement with Indigenous jurisdictions in the delineated study area are not possible at this time, the Minister should enter into an agreement with one or more federal ministries or departments, such as Fisheries & Oceans Canada, Environment and Climate Change Canada, or Natural Resources Canada, to jointly establish a committee.

Further, such a committee should be independent, i.e., comprised of independent experts in the area of environmental impact assessments and regional studies, with the Agency providing secretariat support. This committee must include Indigenous/First Nations members.

Moreover, my clients encourage the Minister to ensure that robust processes for meaningful public, Indigenous and key stakeholder consultation are incorporated within the terms of reference, to ensure that public participation is valued as the assessment progresses. There should be a requirement for the Committee to meaningfully engage the public and Indigenous peoples,

¹⁷ Nigel Bankes, "Coal Law and Policy in Alberta, Part One: the Coal Policy and Its Legal Status" (8 February 2021; accessed on 2 April 2021), online: ABLawg, <https://ablawg.ca/2021/02/08/coal-law-and-policy-in-alberta-part-one-the-coal-policy-and-its-legal-status/>.

and collaborate with Indigenous authorities. There should be minimum requirements of engagement prescribed, including:

- Early engagement with the public and Indigenous peoples on how they wish to be engaged;
- Publication of draft engagement plans, with a comment period on those plans;
- Ongoing engagement that includes both comment periods and in-person, facilitated dialogue sessions;
- Appointment of a working group of experts, environmental groups, Indigenous peoples and industry;
- Participant and Indigenous funding; and
- Requirement to indicate in each step how public and stakeholder comments have been addressed, and justification for departure from those recommendations.

It is possible that issues raised in this regional assessment will require expert advice beyond the ability of federal departments or Committee members to provide. Therefore, the Committee should be empowered to commission expert reports to publicly inform deliberations.

d) Specific areas or concepts that should be examined

i) Thresholds in the Schedule to the *IAA Regulations*

The intent of the thresholds contained in the Schedule to the *IAA Regulations* was to capture major projects, to ensure they undergo a federal impact assessment to examine their impacts on areas of federal jurisdiction. In practice, these thresholds are too high to capture major projects. Coal proponents employ creative math to scale proposed production of waste rock and raw and processed (or clean) coal and calculate the expansion of the area of mining activities to ensure their proposed projects are below the Schedule thresholds. However, the real associated effects of coal mining are related to the amount of rock or raw coal mined, not the amount of coal processed. The increasing number of s. 9(1) designation requests is indicative of this concern, and issues routinely arise in these s. 9(1) designation requests related to the amount of coal produced and the area of mining operations. An important recent example of this is the proposed Vista Phase 2 Expansion Project, which would become the largest thermal coal mine in Canada, but was not captured by the Schedule thresholds, requiring several s. 9(1) requests to be made before it was finally designated by the Minister, despite its massive production capacity and size.

An examination of the thresholds in the Schedule could lead to a reduction in the number of s. 9(1) designation requests and a more predictable situation where the Minister is not regularly considering these designation requests and examining individual projects' production capacity and area of mine expansions, and Proponents aren't incentivised to try and skirt thresholds.

ii) Cumulative effects of potential projects across the region

There are numerous metallurgical coal mining projects at various stages of planning, exploration and development across the region, in addition to those projects already operating. The scale of current metallurgical coal mining in the Elk Valley in southwest British Columbia is massive, and there are five more projects under development in that area. This level of development has been avoided in the Alberta side of the region, but the rescission of the 1976 Coal Policy in 2020

and the granting of hundreds of thousands of hectares of coal leases and many exploration permits since then means this is rapidly changing. Below is a table summarizing the amount of metallurgical coal mining in development or being proposed in Alberta:

Exploration – current or completed since 2017 (7)	Mine Applications in Progress (2)	Planned Future (12) <i>Identified in company investor reports but no known development activity to date</i>
<p>Atrum Coal Ltd. (Elan)</p> <ul style="list-style-type: none"> • Elan South Project • Isolation South Project <p>Cabin Ridge - Cabin Ridge Project</p> <p>Montem Resources - Chinook Project</p> <p>NOIR Resources Inc - Pallisades Project</p> <p>Ram River Coal Corp. – Aries Project</p> <p>Valory Resources (Black Eagle Mining) – Blackstone Project</p>	<p>Montem Resources – Tent Mountain Project</p> <p>Riversdale Resources (Benga) – Grassy Mountain Project</p>	<p>Blairmore (CIP) – Blairmore Project</p> <p>Montem Resources</p> <ul style="list-style-type: none"> • 4-Stack Project • Isola Project • Oldman Project <p>NOIR Resources Inc - Moberly Creek Project</p> <p>Oros Coal (CIP)</p> <ul style="list-style-type: none"> • Bighorn Project • Haven Creek Project • Ram River West Project • Scurry South Project • TVI Nordegg Project <p>Phalanx Coal (CIP)</p> <ul style="list-style-type: none"> • Clearwater Project • Ram River East Project

If a project-by-project environmental impact assessment approach is taken, proponents can argue the effects of each project in isolation can be managed with hypothetical solutions like dilution of pollutants and deployment of new technologies.

Deficiencies in analyses of cumulative effects have plagued the federal assessment process for decades,¹⁸ even though individual project impact assessments ostensibly must examine

¹⁸ See discussion of this issue in these sections of the 2009 (https://www.oag-bvg.gc.ca/internet/english/parl_cesd_200911_01_e_33196.html#hd5h), 2011 (https://www.oag-bvg.gc.ca/internet/english/parl_cesd_201110_02_e_35761.html#ex2) and 2014 (https://www.oag-bvg.gc.ca/internet/English/parl_cesd_201410_04_e_39851.html#hd4k) Reports of the Commissioner of the Environment and Sustainable Development (accessed on 20 May 2021).

cumulative effects. Assessing cumulative effects at the regional level would provide decision makers with information that could contribute to an understanding of the wider implications of development and environmental change, and would make this aspect of individual project impact assessments more rigorous and better address that requirement of the *IAA* and its goals.

iii) Cumulative effects impacts on areas of federal jurisdiction

Given the scope and scale of potential projects/developments in the Rocky Mountains and the Eastern Slopes in southwest Alberta and in the Elk Valley in southeast British Columbia, no single project impact assessment would be able to sufficiently assess the cumulative effects impact on any of the following areas of federal jurisdiction. This regional assessment would be an opportunity to generate projections and take stock of the wider impacts of foreseeable projects within the delineated region, and to then set thresholds or budgets for each specific project that comes along.

In other words, this regional assessment would improve future project impact assessments by providing critical knowledge of potential impacts and by providing a basis upon which to set thresholds or allocate permissible impacts/pollution. Further, it would also generate better understanding, particularly with respect to species at risk and selenium pollution issues, and studies (for example, generating specific data and knowledge regarding selenium contamination and impacts on headwaters and downstream jurisdictions) developed in one area (for example, in the Elk Valley in British Columbia) could be applied in other areas (for example, in the Oldman river system in southern Alberta, and further north in the North and South Saskatchewan river systems). This regional assessment might also uncover specific adjacent or proximate areas to be protected, particularly in relation to species at risk and the exercise of Treaty and Aboriginal rights.

For the following reasons, my clients submit that an assessment of the cumulative effects impacts of metallurgical coal mining activities across the proposed region on areas of federal jurisdiction would not be adequately carried out by existing provincial legislative or regulatory mechanisms or project-specific impact assessments. Indeed, even existing federal regulatory processes and protections are not be adequate to protect areas of federal jurisdiction from potential impacts of metallurgical coal mining in the region.¹⁹

(1) Impacts on fish and fish habitat, especially selenium pollution

According to leading scientists, it is undisputed that open-pit coal mining contaminates nearby water, with potentially disastrous results for downstream ecosystems.²⁰ Coal mining leaches toxic concentrations of selenium and arsenic into the water,²¹ and the risks increase due to the

¹⁹ Drew Yewchuk, “Coal Law and Policy Part 5: What is the Role of the Federal Government in Relation to Alberta Coal Mines?” (24 March 2021; accessed on 2 April 2021), online: ABlawg, <https://ablawg.ca/2021/03/24/coal-law-and-policy-part-five-what-is-the-role-of-the-federal-government-in-relation-to-alberta-coal-mines/>.

²⁰ A. Dennis Lemly, “Aquatic hazard of selenium pollution from coal mining,” in *Coal mining: Research, Technology, and Safety*, ed. G.B. Fosdyke (New York: Nova Science Publishers, 2008), 167-183 (accessed on 30 March 2021), online: <https://www.fs.usda.gov/treesearch/pubs/33826>.

²¹ Mark Wayland and Robert Crosley, “Selenium and Other Trace Elements in Aquatic Insects in Coal Mine–Affected Streams in the Rocky Mountains of Alberta, Canada,” *Archives of Environmental Contamination and Toxicology* 50 (2006: 511–522), (accessed on 30 March 2021), online: <https://link.springer.com/article/10.1007/s00244-005-0114-8>.

cumulative effects of multiple mines operating in the same watershed.²² The Alberta Government itself has data that demonstrate that selenium levels are already dangerously high in some Alberta waterways because of previous coal mine development.²³ Previous catastrophic mine failures in Alberta have been found to create long-term pollution damage.²⁴

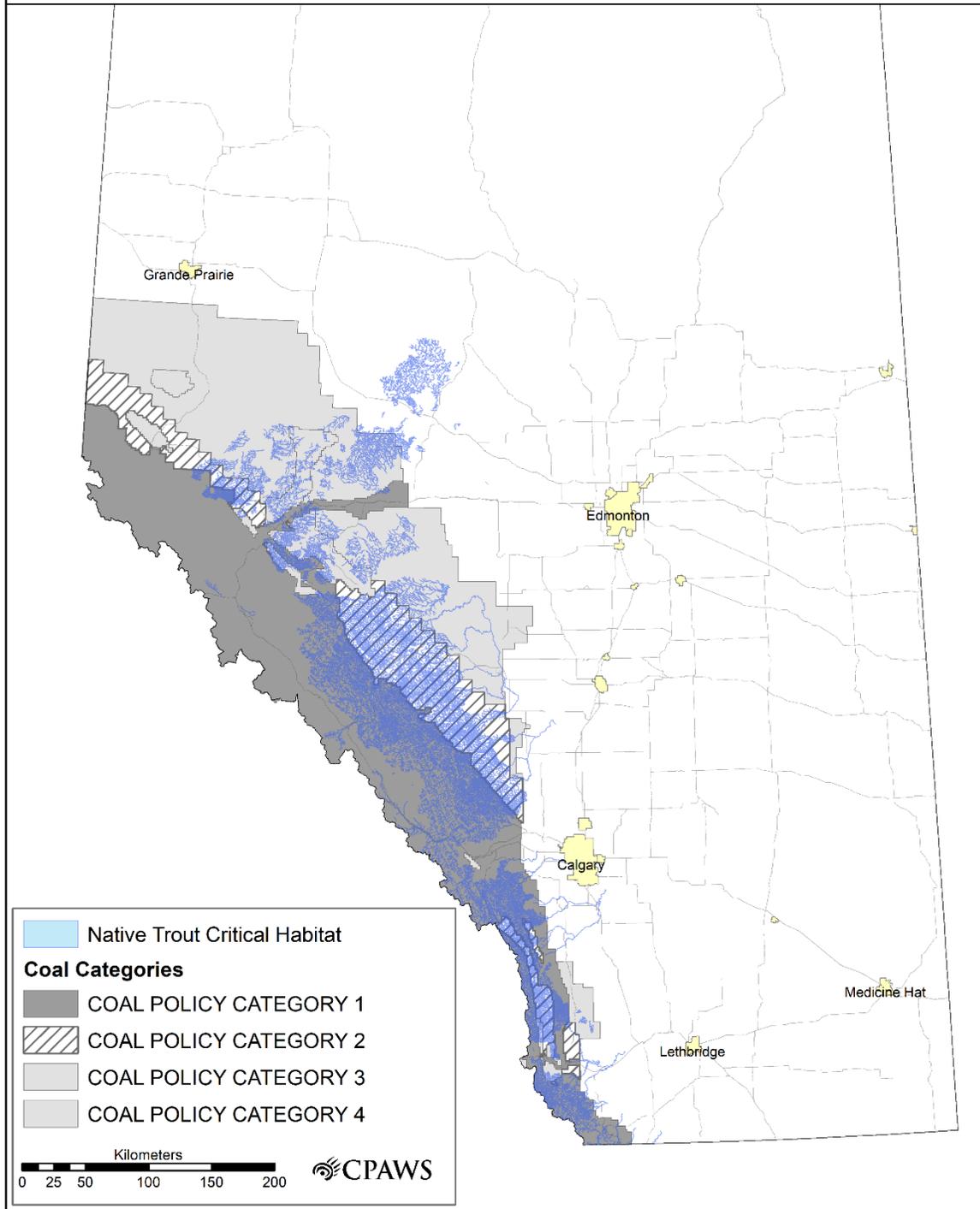
Headwaters areas across the region and associated aquatic habitat are critical to the survival of the westslope cutthroat trout and bull trout populations. Bull trout and westslope cutthroat trout are listed as “Threatened” in Alberta, pursuant to provincial legislation. The Alberta population of westslope cutthroat trout is also listed federally as Threatened under the *Species at Risk Act* (“SARA”) and bull trout in the North and South Saskatchewan River basins are recommended to be listed as Threatened by the Committee on the Status of Endangered Wildlife in Canada (“COSEWIC”). The following map from CPAWS, shows the range of Threatened westslope cutthroat trout, bull trout and Athabasca rainbow trout in relation to the Coal Policy Categories.

²² “Navigating Our Future” Coal Mining In The Oldman Watershed – Part 2,” Oldman Watershed Council (26 January 2021; accessed on 30 March 2021), online: <https://oldmanwatershed.ca/blog-posts/2021/1/26/navigating-our-future-coal-mining-in-the-oldman-watershed-part-2>.

²³ “Contaminant from coal mines already high in some Alberta rivers: unreported data,” *CTV News* (25 January 2021; accessed on 30 March 2021), online: <https://edmonton.ctvnews.ca/contaminant-from-coal-mines-already-high-in-some-alberta-rivers-unreported-data-1.5280626>.

²⁴ “Scientist expects ‘long-term damage’ from coal spill,” *Northern Journal* (09 December 2013; accessed on 30 March 2021), online: <http://norj.ca/2013/12/scientist-expects-long-term-damage-from-coal-spill/>.

Coal Policy Categories and Native Trout Critical Habitat (Athabasca Rainbow Trout, Bull Trout, and Westslope Cutthroat Trout)



For instance, in the Elk Valley in British Columbia (where coal mining has been active for decades), reports on selenium concentrations in area waterways show levels up to four times British Columbia's maximum for drinking water, and monitoring stations near the mines have reported levels 50 times what is recommended for aquatic health.²⁵ Proposed projects across the region will need to manage selenium levels due to the threat of impacts on fish and waterways, and the cumulative effects of selenium pollution from current and proposed mines and pose a very serious potential impact on this area of federal jurisdiction.

In the proposed study region, bull trout (*Salvelinus confluentus*), Saskatchewan-Nelson Rivers populations, was listed as Threatened under the *Species at Risk Act* (SARA) in 2019, and has been functionally extirpated in parts of the region,²⁶ as has westslope cutthroat trout.²⁷ Since we know water pollution from coal mines flows for centuries, it is imperative cumulative effects of current and proposed coal mining activity across the region on bull and westslope cutthroat trout critical habitat be assessed to ensure future recovery is possible.

In addition, the federal government is currently developing new regulations under the *Fisheries Act* for coal mining effluent to reduce the risk of contaminants including selenium. Current national selenium regulation was set in the 1980s, and should be stricter, but, instead, the Alberta and British Columbia governments have loosened their provincial regulations. Selenium and other contaminants cause serious pollution in Alberta and British Columbia waterways (see the cumulative effects testing downstream of current Alberta mines,²⁸ and in the Fording and Elk river systems in the Elk Valley in British Columbia), and tighter regulations on selenium and other contaminants should reflect the science of their effects on human health, animals and the environment. All proposed coal developments must be held to these new federal standards as a minimum, including examining all proposed metallurgical coal mining activity in the region in the regional assessment with this lens. There is no indication that the provincial assessment process will lead to parallel, equivalent standards; therefore, by not assessing these cumulative effects of this development across the region in light of these potential impacts on federal jurisdiction, the federal government would be deferring to a lesser regulatory standard on a key area of federal jurisdiction.

(2) Impacts on critical habitat of species at risk

Cumulative effects of proposed metallurgical coal mining activities across the region must be considered in a federal context, recognizing the impact of coal mining in the Eastern Slopes of the Rocky Mountains in Alberta and in the Elk Valley in British Columbia on Canada's

²⁵ "U.S. demands explanation from province over river pollution from B.C. mines," *CTV News* (11 May 2020; accessed on 30 March 2021), online: <https://www.cbc.ca/news/canada/british-columbia/us-epa-pollution-rivers-teck-mines-bc-1.5564269>.

²⁶ Fisheries and Oceans Canada. 2020. Recovery Strategy for the Bull Trout (*Salvelinus confluentus*), Saskatchewan-Nelson Rivers populations, in Canada [Proposed]. *Species at Risk Act* Recovery Strategy Series. Fisheries and Oceans Canada, Ottawa. vii + 126 pp (accessed on 29 March 2021), online: <https://www.canada.ca/en/environment-climate-change/services/species-risk-public-registry/recovery-strategies/bull-trout-proposed-2020.html>.

²⁷ Blackburn, J. 2011. Crowsnest River drainage sport fish population assessment, 2010. Technical Report, T-2011-001, produced by the Alberta Conservation Association, Lethbridge, Alberta, Canada. 27 pp + App, at page 31, online: https://www.ab-conservation.com/downloads/report_series/Crowsnest_River_Drainage_Sport_Fish_Population_Assessment.pdf.

²⁸ "Contaminant from coal mines already high in some Alberta rivers: unreported data," *CTV News* (25 January 2021; accessed on 30 March 2021), online: <https://edmonton.ctvnews.ca/contaminant-from-coal-mines-already-high-in-some-alberta-rivers-unreported-data-1.5280626>.

commitments to preserving intact ecologically important areas and headwaters. Following a 2019 United Nations report²⁹ that the planet is losing species at a shocking rate, 50 countries, including Canada, pledged to protect 30% of the planet by 2030.³⁰ This requires bold action to preserve the incredible biodiversity of species native to the Eastern Slopes of the Rocky Mountains and begs the question of how the federal government can continue to either not designate proposed metallurgical coal projects for federal impact assessments or approve them when they have direct, adverse impacts on species at risk, without an understanding of the cumulative effects of these projects across the region on this habitat critical for their survival.

Each project's effects on critical habitat and on species at risk may be minimized, but the cumulative effects on the region from multiple projects (cumulative impacts) are not adequately examined in individual impact assessments, either provincial or federal. The regional assessment should examine whether current federal regulations concerning the protection of streams and critical habitat are satisfactory to ensure species at risk are protected. In addition, Alberta's and British Columbia's species at risk legislation and associated recovery plans are very weak, and this should be factored into the assessment of cumulative effects impacts on critical habitat and species at risk in the regional assessment.

The ranges of Whitebark Pine and Limber Pine, both listed as federally Endangered, are found across the region. While critical habitat for these species has not been defined, COSEWIC assessments state:

Whitebark Pine:

This long-lived, five-needled pine is restricted in Canada to high elevations in the mountains of British Columbia and Alberta. White Pine Blister Rust alone is projected to cause a decline of more than 50% over a 100-year time period. The effects of Mountain Pine Beetle, climate change, and fire exclusion will increase the decline rate further. Likely, none of the causes of decline can be reversed. The lack of potential for rescue effect, life history traits such as delayed age at maturity, low dispersal rate, and reliance on dispersal agents all contribute to placing this species at high risk of extirpation in Canada.

Limber Pine:

Limber Pine is imminently and severely threatened throughout its Canadian range by White Pine Blister Rust (an introduced species), Mountain Pine Beetle, and climate change. While each taken singly poses a significant threat, they interact to further increase the severity of the impacts. With climate change, the frequency, intensity, and duration of drought is projected to increase, and fire is projected to be more frequent and severe. Stressed trees are likely to be more susceptible to pathogens and insects.

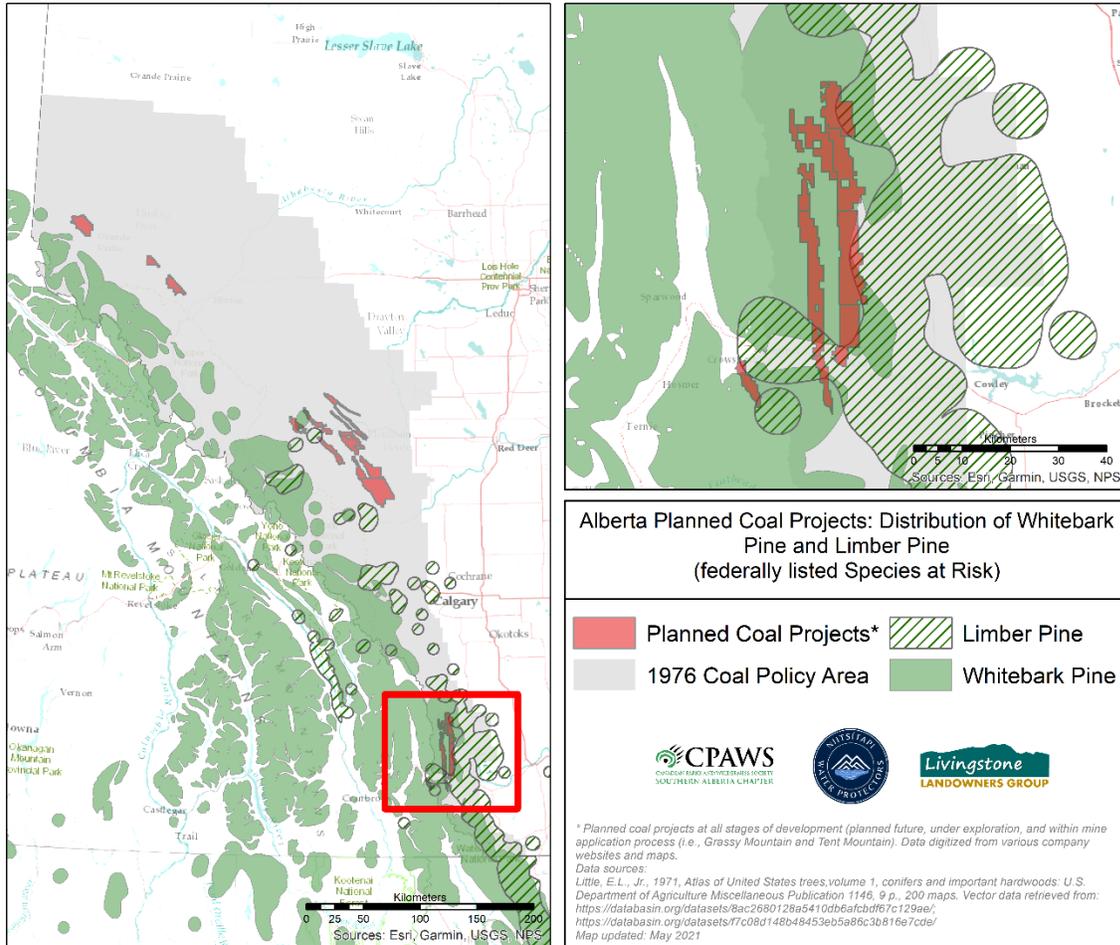
Both Limber Pine and Whitebark Pine are also listed as Endangered in Alberta under the *Wildlife Act*; however, the COSEWIC assessments of both species state that no provisions exist under

²⁹ “UN Report: Nature’s Dangerous Decline ‘Unprecedented’; Species Extinction Rates ‘Accelerating’” (6 May 2019; accessed on 29 March 2021), online: <https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/>.

³⁰ “More than 50 countries commit to protection of 30% of Earth's land and oceans,” *The Guardian* (11 January 2021; accessed on 29 March 2021), online: <https://www.theguardian.com/environment/2021/jan/11/50-countries-commit-to-protection-of-30-of-earths-land-and-oceans>.

that Act to provide broad legal protection for either individuals or habitat. Given the lack of provincial protection, the cumulative impacts of proposed metallurgical coal mining activities across the study region on these species must be assessed.

The following map from our clients shows the distribution of Whitebark Pine **and** Limber Pine, **both** federally listed Species at Risk, which are **both** found on and around the sites of proposed metallurgical coal mining projects in the study region:

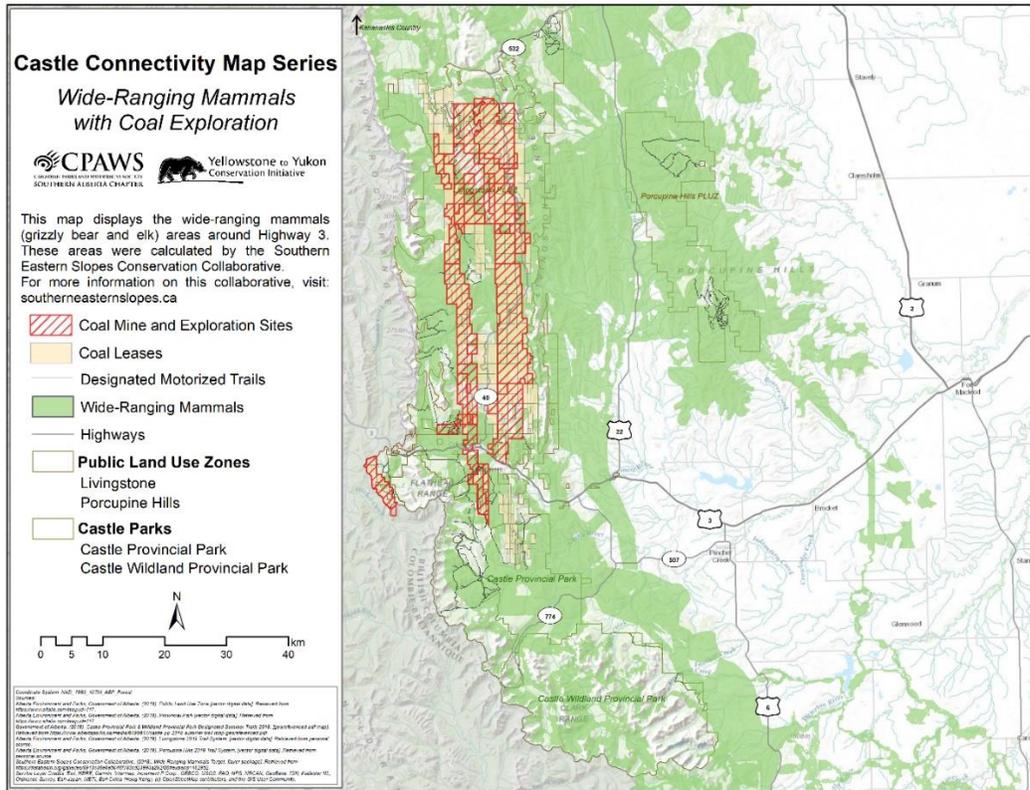


The grizzly bear (*Ursus arctos*) population in western Canada was listed as a species of Special Concern in Schedule 1 of SARA. COSEWIC estimated the Canadian population to be 26,000, but concluded the number of mature bears was uncertain and “could be close to 10,000.” Provincially, in 2002, Alberta’s Endangered Species Conservation Committee recommended assigning a Threatened designation to the province’s grizzly bear population under the *Wildlife Act*.³¹

Healthy grizzly bear populations require contiguous ranges that have connections to other populations in British Columbia, Alberta and the state of Montana, U.S.A. Metallurgical coal

³¹ In Alberta, a *Threatened* species is “(a) species likely to become endangered if limiting factors are not reversed.” An *Endangered* species describes “(a) species facing imminent extirpation or extinction.” Marco Festa-Bianchet, *Status of the Grizzly Bear (Ursus arctos) in Alberta: Update 2010*, (Government of Alberta, February 2010), 43.

Figure 2:



Cumulative effects impacts on other species at risk in the region that should be examined by the regional assessment include Athabasca rainbow trout and mountain caribou populations.

(3) Impacts on the exercise by First Nations and Indigenous peoples of their constitutionally protected Treaty and Aboriginal rights

The First Nations of Treaty Nos. 6, 7 & 8 were never consulted when the original 1976 Coal Policy was developed and implemented by the Alberta Government, and never consulted before its rescission. First Nations were not even advised that this decision was going to be made, nor were they advised once the decision had been made. Rather, First Nations across Alberta learned of the decision by way of reports in the media. The Government of Alberta basically delegates decision-making authority for new mine exploration and development to the AER, which has a track record of proponent-friendly approvals and is prevented by law (and its own narrow interpretation of its mandate) to consider the constitutionally protected rights of First Nations and Indigenous peoples in its decision-making processes.

Alberta, as the Crown, has a legal obligation to consult with Aboriginal peoples where it contemplates decisions or actions that may adversely impact asserted or established Aboriginal or Treaty rights. Aboriginal and treaty rights are protected under section 35 of the [Constitution Act, 1982](#). The Crown (Alberta in this instance) has a duty to consult with all First Nations and Métis who have traditional Aboriginal rights or title or Treaty claims over the areas impacted by the removal of the 1976 Coal Policy.

Areas previously protected by 1976 Coal Policy are critical to First Nations' current and future ability to exercise their Treaty and Aboriginal rights. The rescission of the 1976 Coal Policy has resulted in an increase in coal mining exploratory activity across the region, including in areas of cultural significance.

On June 29, 2020, the Kainai/Blood Tribe and Siksika Nations wrote to the Government of Alberta expressing their concerns with the decision to rescind the 1976 Coal Policy and the failure of the Government of Alberta to consult with the Nations regarding this decision. The Nations also requested that they be engaged in consultation after the fact and proposed certain measures that could be taken to address their concerns and the failure to consult the Nations about the decision.

On August 25, 2020, the Kainai/Blood Tribe and Siksika Nations sent a follow-up memorandum to the Government of Alberta detailing their concerns with the rescission of the 1976 Coal Policy and providing suggestions for potential accommodation measures.

To date, the Government of Alberta has not responded to this correspondence sent by the Kainai/Blood Tribe and Siksika Nations or engaged in any post-decision consultation.

Similarly, First Nations were also not consulted on or included in the decision to "reinstate" (with exceptions) the 1976 Coal Policy.

There are real concerns, too, about the Alberta Government's history of regulation of and ability to safely regulate the coal mining industry, especially with respect to clean up/remediation costs, which are significant with any type of coal mining. In fact, there is evidence coal exploration approvals already exceed legal road thresholds:

Road-building approvals for coal exploration already exceed disturbance thresholds for a number of species at risk, including grizzly bear and native trout, in some parts of Alberta's Rocky Mountains and foothills, suggest documents from the province's energy regulator.

"It's part of why we are calling on this government to stop all exploration... until we have a new plan in place that actually directs the future of this landscape," said Katie Morrison of the Canadian Parks and Wilderness Society.

The region where exploration leases have been sold is home to endangered species and holds the headwaters of much of Alberta's drinking water. Exploration and potential mines are opposed by area First Nations, municipalities, ranchers and many others.³³ [emphasis added]

A Professional conservation Biologist, retired Provincial Riparian Specialist for Alberta Cows and Fish and Adjunct Professor with the University of Calgary, and concerned citizen, Lorne Fitch, recently wrote to the AER, asking, *inter alia*, questions about the AER's process for environmental assessments of coal mining projects, watershed protection and water quality protection, linear road density of exploratory road permits and cumulative effects on wildlife, and reclamation/restoration of coal mining exploratory activity. The AER did not answer several of Mr. Fitch's questions in detail (much of the response was simply outlining the specific

³³ "Coal exploration approvals already exceed legal road thresholds, data suggests," *Global News* (24 March 2021; accessed on 3 April 2021), online: <https://globalnews.ca/news/7715790/coal-exploration-approvals-exceed-legal-road-thresholds/>.

legislation and regulations it claims to follow), but it did confirm that it “**does not assess cumulative effects of overall impacts of all proposed CEPs** [“coal exploration programs”],” “**does not have requirements pertaining to linear density of roads and associated surface infrastructure for exploration activities,**” and while it “also requires CEP approval holders to reclaim disturbed areas,” the AER “**does not collect any bonds or security for CEPs**” [emphasis added]. Copies of this correspondence are attached as Appendix “A”.

The AER has never included the necessary internal expertise to understand and evaluate cumulative impact assessments. They have a very limited role in this regard that forces them to focus only on the merits of a proponent's project specific plans to mitigate their site-specific impacts. The idea that one can assess the cumulative impacts of an industry on the broader landscape and on a provincial scale by looking at it on a project-by-project basis is the glaring weakness in the AER's role. They do not set provincial policy or legislation and they are not responsible for determining what is in the broader public interest **or what is adequate consultation and accommodation of Indigenous s. 35 rights.**

Given the Alberta Government's clear intent to forge ahead on coal development in the Eastern Slopes (which is apparent, in spite of their temporary reprieve on issuing more coal leases), the AER is now going to be operating in an even greater legislative and policy vacuum unless there is either a full reinstatement of the previous ban on coal mining in Category 1 and 2 lands or a new coal policy that more adequately assesses all the environmental, social, and economic pros and cons of expanding this activity. Such a policy will need to identify appropriate mitigation measures that are to be applied immediately (or in the very short term) by the Alberta Government such as no-go areas for mining and those that will and/or might also be required by mining proponents if they were to get a mining approval. That new policy should also, if it determines there is some room for any amount of new mining in the Eastern Slopes, establish all of the necessary environmental thresholds for monitoring and any enforcement or other additional measures to be applied when critical thresholds are being approached and/or exceeded. The proposed regional assessment would be a critical tool in developing such a policy.

In addition, the AER provincial review is insufficient to adequately identify the project-specific and cumulative effects impacts of projects on First Nations' Aboriginal and Treaty rights.

The AER is precluded by section 21 of Alberta's *Responsible Energy Development Act* to “**assess the adequacy of Crown consultation** associated with the rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act*” [emphasis added].³⁴

The AER and its predecessor, the Alberta Energy Resources Conservation Board (the “ERCB”), have also been heavily criticized for their lack of consistency, transparency and efficiency, and for defining their mandates narrowly and declining to consider constitutional questions related to Aboriginal and Treaty rights and adequacy of consultation (the discharge of the Crown's duty to consult and accommodate).³⁵ The AER has also been criticized for neglecting to adequately assess or dismissing concerns related to the cumulative effects of resource development on Aboriginal and Treaty rights and First Nations and Indigenous peoples (the constitutional and

³⁴ *Responsible Energy Development Act*, SA 2012, c R-17.3, s. 21, online: <https://www.canlii.org/en/ab/laws/stat/sa-2012-c-r-17.3/latest/sa-2012-c-r-17.3.html?resultIndex=1>.

³⁵ Nigel Bankes, “Constitutional Questions and the Alberta Energy Regulator” (24 October 2013; accessed on 2 April 2021), online: ABlawg, <https://ablawg.ca/2013/10/24/constitutional-questions-and-the-alberta-energy-regulator/>.

cumulative effects issues being inextricably linked).³⁶ Last year, the Alberta Court of Appeal finally released its decision in *Fort McKay First Nation v Prosper Petroleum Ltd.*, 2020 ABCA 163³⁷ (“*Prosper*”), holding that the AER is required to consider the Honour of the Crown when determining whether the Prosper Petroleum oil sands project is in the public interest. But this is only in relation to the Honour of the Crown and Fort McKay First Nation’s negotiations and agreement with the Government of Alberta with respect to the regional plan that covered the area of the proponent Prosper’s Rigel oilsands project and the Nation’s reserves and traditional territories, and a promise to protect an important area for the Nation.

Therefore, “[w]hile the AER does not have jurisdiction to determine the adequacy of Crown consultation pursuant to section 21 [of the *Responsible Energy Development Act*], the AER does have a broad implied jurisdiction to consider the honour of the Crown and whether or not it was engaged. In the case before it, the AER was required to address the honour of the Crown as part of its consideration of whether the Rigel project was in the public interest giving credence to the specific context of the MLAMP negotiations.”³⁸

As Professor Nigel Banks of the University of Calgary Faculty of Law concluded of the *Prosper* decision:

This decision has the potential to be a game-changer in numbered treaty litigation. There will, no doubt, be attempts to limit the impact of the decision to the specific facts of the case, in particular the MLAMP negotiations and the “Prentice Promise”. But, as Justice Greckol demonstrates in her valuable and well-reasoned concurring opinion, **treaty implementation of the right to hunt requires the engagement of the Crown with affected treaty nations to address the problem of cumulative and landscape level impacts**. This is also consistent with Canada’s obligations under Article 27 of the [International Covenant on Civil and Political Rights](#); see my earlier post: “[Grassy Narrows, Division of Powers and International Law](#)”.³⁹

[emphasis added]

As such, my clients submit that the AER is precluded from, or incapable of, fairly and adequately assessing the effects of even a given metallurgical coal mining project on First Nations or Indigenous peoples or their constitutionally protected Aboriginal and Treaty rights, never mind the cumulative effects of such projects across the whole region on those rights and interests. For this reason alone, this regional assessment is of critical importance.

The cumulative impact of various activities including agricultural development, the development and expansion of municipalities, the transfer of lands to private landholders, the creation and

³⁶ *Ibid.*

³⁷ *Fort McKay First Nation v Prosper Petroleum Ltd.*, 2020 ABCA 163 (24 April 2020; accessed on 1 April 2021), online: <https://www.canlii.org/en/ab/abca/doc/2020/2020abca163/2020abca163.html?resultIndex=1#document>.

³⁸ JoAnn P. Jamieson, “Canada: AER To Consider Honour Of The Crown In Redetermination Hearing,” McLennan Ross LLP (8 December 2020, accessed on 2 April 2020), online: <https://www.mondaq.com/canada/oil-gas-electricity/1013576/aer-to-consider-honour-of-the-crown-in-redetermination-hearing>.

³⁹ Nigel Banks, “The AER Must Consider the Honour of the Crown” (28 April 2020; accessed on 20 May 2021), online: ABLawg, <https://ablawg.ca/2020/04/28/the-aer-must-consider-the-honour-of-the-crown/>.

See also: Nigel Banks (2015), “The implications of the *Tsilhqot’in* (William) and *Grassy Narrows* (Keewatin) decisions of the Supreme Court of Canada for the natural resources industries”, *Journal of Energy & Natural Resources Law*, 33:3, 188-217, DOI: 10.1080/02646811.2015.1030916 (20 May 2015; accessed on 20 May 2021), online: <https://www.tandfonline.com/doi/abs/10.1080/02646811.2015.1030916>.

expansion of conservation areas and for tourism and recreation, and mining and other industrial activities have resulted in much of First Nations' traditional territories in British Columbia and Alberta being taken up by activities that are inconsistent with the practice of First Nations' constitutionally protected Aboriginal and Treaty rights and culture. The Rocky Mountains and Eastern Slopes in Alberta and the Elk Valley in British Columbia comprise a region that is one of the few remaining areas that can still support these practices.

In this context, a critical function of the regional assessment is to examine the cumulative effects impact of all current and proposed development in the region on the effective exercise by First Nations and Indigenous peoples of their s. 35 Treaty and Aboriginal rights. The law in this area continues to evolve; however, there is reasonably strong authority to suggest that the federal government has an obligation to continually monitor potential and actual impacts to Treaty and Aboriginal rights in a regional area like the Rocky Mountains and Eastern Slopes of Alberta and the Elk Valley of British Columbia. The Supreme Court of Canada has ruled that there are limits on governments' authority to authorize activities where such authorizing would render an Indigenous community's Treaty or Aboriginal rights meaningless (i.e., leaving no meaningful ability to hunt, fish, trap, or harvest in their traditional territories, due to the cumulative effects impact on those territories):

[50] I conclude that as a result of [ss. 109, 92\(5\)](#) and [92A](#) of the [Constitution Act, 1867](#), Ontario and only Ontario has the power to take up lands under Treaty 3. This is confirmed by the text of Treaty 3 and legislation dealing with Treaty 3 lands. **However, this power is not unconditional.** In exercising its jurisdiction over Treaty 3 lands, the Province of Ontario is bound by the duties attendant on the Crown. It must exercise its powers in conformity with the honour of the Crown, and is subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests. These duties bind the *Crown*. When a *government* — be it the federal or a provincial government — exercises Crown power, the exercise of that power is burdened by the Crown obligations toward the Aboriginal people in question.

[51] **These duties mean that for land to be taken up under Treaty 3, the harvesting rights of the Ojibway over the land must be respected.** Any taking up of the land for forestry or other purposes must meet the conditions set out by this Court in *Mikisew*. As explained by the Ontario Court of Appeal (at paras. 206-12), the Crown's right to take up lands under Treaty 3 is subject to its duty to consult and, if appropriate, accommodate First Nations' interests beforehand (*Mikisew*, at para. 56). This duty is grounded in the honour of the Crown and binds the Province of Ontario in the exercise of the Crown's powers.

[52] **Where a province intends to take up lands for the purposes of a project within its jurisdiction, the Crown must inform itself of the impact the project will have on the exercise by the Ojibway of their rights** to hunt, fish and trap, and communicate its findings to them. It must then deal with the Ojibway in good faith, and with the intention of substantially addressing their concerns (*Mikisew*, at para. 55; *Delgamuukw v. British Columbia*, [1997 CanLII 302 \(SCC\)](#), [1997] 3 S.C.R. 1010, at para. [168](#)). **The adverse impact of the Crown's project (and the extent of the duty to consult and accommodate) is a matter of degree, but consultation cannot exclude accommodation at the outset.** Not every taking up will constitute an infringement of the harvesting rights set out in Treaty 3. **This said, if the taking up leaves the Ojibway with no meaningful right**

to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished, and trapped, a potential action for treaty infringement will arise (*Mikisew*, at para. 48).⁴⁰

[emphasis added]

Governments must have an informed overall assessment of the cumulative effects impacts of past, present and future project activities in a region to ensure that the “taking up” of lands in First Nations’ traditional territories is not passing the threshold beyond which those constitutionally protected Treaty and Aboriginal rights have been effectively and illegally extinguished, without constitutionally adequate consultation with First Nations and accommodation of their rights. Certainly, the Alberta Government is not alive to this critical issue, the AER is incapable of such an examination, and this dimension of future metallurgical coal developments across the region quite clearly goes well beyond what any single project impact assessment process could assess.

This regional assessment would be a critical tool in ensuring the Crown (both provincial and federal) fulfills its duty to consult First Nations and Indigenous peoples and accommodate their constitutionally protected interests and ensure they are not illegally left with “no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished, and trapped.”

(4) Impacts on greenhouse gas emissions and fugitive methane emissions

Proposed metallurgical coal mining project activities across the proposed study region will result in significant coal greenhouse gas (“GHG”) emissions, both “upstream” project-related and “downstream” end-use.

(a) “Upstream” emissions

Upstream emissions include CO₂ emissions from fuel used in mining operations (primarily diesel for heavy equipment) and fugitive methane emissions found within the coal formations, which typically make up nearly half of total emissions for surface coal mines. [They also include the significant GHG emissions from rail transport of the coal to the British Columbia coast]. Measurements of GHG emissions from coal mining are documented as being woefully inadequate. A recent international study⁴¹ has concluded Canada’s coal mining activities will be a major source of GHG emissions:⁴²

CHINA LEADS, CANADA PLACES SEVENTH IN METHANE OUTPUT FROM FUTURE COAL MINES

With 12 new coal mines now at a pre-construction phase, Canada has vaulted into seventh place among the countries with the highest output of climate-busting

⁴⁰ *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48 (CanLII), [2014] 2 SCR 447 (11 July 2014; accessed on 20 May 2021), at paras. 50-52, online:

<https://www.canlii.org/en/ca/scc/doc/2014/2014scc48/2014scc48.html>.

⁴¹ “Coal Mine Methane On the Brink,” *Global Energy Monitor* (March 2021; accessed on 2 April 2021), online:

<https://globalenergymonitor.org/report/coal-mine-methane-on-the-brink/>.

⁴² “CHINA LEADS, CANADA PLACES SEVENTH IN METHANE OUTPUT FROM FUTURE COAL MINES”, *The Energy Mix* (19 March 2021; accessed on 2 April 2021), online: [https://theenergymix.com/2021/03/19/china-leads-canada-places-seventh-in-methane-output-from-future-coal-mines/#:~:text=With%202012%20new%20coal%20mines,Global%20Energy%20Monitor%20\(GEM\)](https://theenergymix.com/2021/03/19/china-leads-canada-places-seventh-in-methane-output-from-future-coal-mines/#:~:text=With%202012%20new%20coal%20mines,Global%20Energy%20Monitor%20(GEM).).

methane from new mining projects, according to a new analysis released this morning by Global Energy Monitor (GEM).

...

Counting carbon dioxide as well as methane, emissions from new Canadian coal mines under construction or proposed total 39 Mt per year.

And that renewed embrace of coal mining is part of a much bigger global trend.

“A frenzy of new mine projects and proposals in some of the world’s gassiest coal seams could emit enough methane to rival the current CO₂ emissions from coal plants in the United States,” GEM writes in a new briefing paper. “Unless mitigated, methane emissions from these proposed mines, currently in construction or pre-construction planning, **would amount to 13.5 million tonnes of methane annually, a 30% increase over current emissions.**”

...

GEM warns that its estimates will likely rise as it expands its coverage of operating mines. [emphasis added]

This study also puts Canada in a tie for sixth place, alongside the United States, for the number of new mines in pre-construction, the Global Energy Monitor reports. To put this in context, Canada’s current CO₂-equivalent⁴³ emissions of methane are **17 Mt a year**, so developing all the coal mines proposed in Canada would **add another 39 Mt annually** to our total GHG emissions.

It is clear that proposed coal mining activities in Canada will generate a massive amount of GHG emissions. On this basis alone – and based on the well-documented high level of methane emissions from coal mining operations – this constitutes a very significant potential cumulative effects impact on an area of federal jurisdiction requiring this regional assessment, given the potential impact on Canada’s environment (and on Canada’s ability to meet its climate change targets and its international commitments on climate change).

Based on very conservative emissions estimates from Teck's Fording River mine in the Elk Valley in British Columbia, **this one project** emits at least approximately 670 Kt CO₂ equivalent annually, well above the threshold required for reporting GHG emissions under the federal Greenhouse Gas Reporting Program.⁴⁴ The estimated fugitive methane emissions specifically **from this one project** are approximately 8.6 Kt of CH₄ per year or 240 Kt CO₂ equivalent.⁴⁵ Along with the estimated emissions for these proposed projects being significant, there are also uncertainties around emissions generally that critically need to be assessed.

⁴³ CO₂e is a quantification of warming caused by a greenhouse gas. This GEM article reports there would be 13.5 Mt of methane which works out to be 1,135 Mt of CO₂e. This is because methane has a higher warming potential than CO₂. Therefore, emitting that much methane has the same warming potential as emitting the equivalent amount of CO₂.

⁴⁴ Based on 0.67Mt CO₂ equivalent annually and an approximate production rate of 27 400 t cleaned coal from Teck's Fording River mine. Teck Coal Limited, “Initial Project Description: Castle Project” (October 2020), online: <https://iaac-aeic.gc.ca/050/documents/p80702/136273E.pdf>. [Castle Initial Project Description] at 38.

⁴⁵ With a daily production of 27 400 t coal, an emissions factor of 0.86 t CH₄ /kt coal mined from ECCC, “2020 National Inventory Report 1990-2018: Greenhouse Gas Sources and Sinks in Canada” (2020), online: http://publications.gc.ca/collections/collection_2020/eccc/En81-4-2018-2-eng.pdf at 39.

As noted, fugitive methane emissions from coal mining are poorly quantified, as the above emissions factor applied to all bituminous surface coal mines in Alberta is estimated based on data from a single coal mine in the northwest of the province.⁴⁶ It is well known that fugitive methane from coal mines varies widely, and there is some evidence that methane emissions from coal mines in the southern Rockies may significantly exceed those found in the northwest of Alberta.⁴⁷ The global warming potential of methane also varies greatly depending on the timescale considered. A shorter timescale for warming effects would be warranted when considering methane emissions, as we now understand that the threat of climate change is more immediate than the next 100 years.⁴⁸ Federal assessment is necessary to evaluate the climate impacts of the proposed projects given the poor current understanding of fugitive methane emissions.

The cumulative effects of GHG emissions from the proposed projects may hinder Canada's ability to meet its current 2030 commitments under the Paris Agreement, let alone the recently announced target of a 40-45% reduction by 2030 and the long-term target of net zero emissions by 2050. A regional assessment is necessary to analyze whether potential coal mining development is compatible with Canada's international climate commitments.

(b) "Downstream" emissions

In addition to the local and cumulative impacts of "upstream" GHG emissions of proposed metallurgical coal mining projects in the region, they will result in significant "downstream" GHG emissions. Metallurgical coal, when burned in the steelmaking process, is a major source of carbon emissions, accounting for 5% of total worldwide emissions. The total lifecycle emissions from the coal produced by all the proposed projects in Canada would be approximately **3 Mt annually** when accounting for the end use of the coal in steelmaking.⁴⁹ Federal assessment should evaluate the overall carbon impact of proposed projects – including the end use of coal – as global emissions must be significantly reduced to avoid catastrophic climate change with devastating impacts across Canada.

There can be no dispute that GHG emissions are a potential significant adverse effect on areas of federal jurisdiction. The IAA, and its predecessor legislation, the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19 ("CEAA, 2012"), requires considering changes to the

⁴⁶ *Ibid.*

⁴⁷ Based on high emissions from the Elk Valley coal storage piles, as the geographically closest data shown in Western Climate Initiative, "Final Essential Requirements of Mandatory Reporting, Amended for Canadian Harmonization," Government of British Columbia (17 December 2010), online: <https://www2.gov.bc.ca/assets/gov/environment/climate-change/ind/quantification/wci-2011.pdf> at Table 100-2.

⁴⁸ The above emissions estimate is based on a global warming potential of 28 for methane (i.e., methane is 28 times as potent as carbon dioxide). Current IPCC global warming potentials for methane are 28 over 100 years and 84 over 20 years, not including climate-carbon feedbacks. See Intergovernmental Panel on Climate Change, "Synthesis Report: Climate Change 2014" (2014), online: <https://www.ipcc.ch/report/ar5/syr/>.

⁴⁹ The figure of 3Mt was arrived at by taking 1.2 Mt of annual cleaned coal production, subtracting 28% for non-carbon content in the coal (both moisture and other elements), and subtracting 1% for carbon that ends up in the steel. Carbon dioxide is 3.67 times the mass of carbon itself, so we estimate a rough total of 3 MT, not including extraction and transport emissions.

environment that occur extra-provincially or internationally as effects within federal jurisdiction.⁵⁰ The Agency has considered GHGs under this definition on various occasions.⁵¹

It is also clear that GHGs impact the environment in Canada and must be reduced. In *Reference re Greenhouse Gas Pollution Pricing Act*, the Supreme Court of Canada found that climate change is real, poses a grave threat to humanity's future, and must be addressed by reducing GHG emissions.⁵²

The Court of Appeal for Ontario similarly recognized that climate change resulting from human-caused GHGs is causing or exacerbating rising sea levels, ocean acidification, species loss and extinction, and threatening the ability of certain First Nations to maintain their traditional way of life or continue to exist as self-determining people.⁵³ Indeed, Canadian courts are increasingly recognizing the serious adverse effects that GHG emissions cause on areas of federal jurisdiction and hence the importance of properly considering GHG impacts in environmental assessments.⁵⁴

Notably, the effects on federal jurisdiction of GHG emissions are the same regardless of whether these emissions occur as a direct or indirect result of the projects being considered. In the Prime Minister's words, "the impact on our climate is the same...the atmosphere doesn't care where carbon is emitted."⁵⁵ The IAA applies so long as that impact on federal jurisdiction arises as a direct or indirect effect of these projects. It is for this reason that past decision-makers have seen it well within their jurisdiction to consider downstream GHG emissions in environmental assessments⁵⁶ – including when those emissions take place outside of Canada.⁵⁷

The issue before the Minister and the Agency is not whether the emissions occur outside of Canada or not, it is whether the GHG emissions from the proposed projects may cause adverse effects within *federal jurisdiction*. And there can be little doubt that GHG emissions arising from the proposed projects will do that. Further, the GHG emissions from the proposed projects will not be appropriately managed through the existing federal and provincial regulatory processes –

⁵⁰ IAA, s 2; *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, s 5(1)(b)(2).

⁵¹ Nathalie J Chalifour, "Drawing Lines in the Sand: Parliament's Jurisdiction to Consider Upstream and Downstream Greenhouse Gas (GHG) Emissions in Interprovincial Pipeline Project Reviews" (2018) 23:1 Rev Const Stud 129 at 158; Impact Assessment Agency of Canada, "Analysis Report: Whether to Designate the Coalspur Mine Ltd. Vista Coal Mine Phase II Project in Alberta" (December 2019), online: <https://ia- and aeic.gc.ca/050/documents/p80341/133221E.pdf> at 17-18.

⁵² *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 2, 167 and 188 [*SCC Reference*], online: <https://www.canlii.org/en/ca/scc/doc/2021/2021scc11/2021scc11.html?resultIndex=1>.

⁵³ *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at paras 11-14 [*Ontario Reference*].

⁵⁴ *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at paras 4, 16-17; *Ontario Reference*, *supra* note 109 at paras 6-17; *Synchrude Canada Ltd. v Canada (Attorney General)*, 2016 FCA 160 at paras 9, 12, 42 and 62; *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302 at paras 78-80.

⁵⁵ Jason Fekete, "Trudeau to meet with Indian prime minister in hopes of convincing him to reduce country's emissions" (28 November 2015), *National Post*, online: <http://news.nationalpost.com/news/canada/trudeau-to-meet-with-indian-prime-minister-in-hopes-of-convincing-him-to-reduce-countrys-emissions>.

⁵⁶ Minister of Environment, Government of Canada, "Foundation for a Sustainable Northern Future: Report of the Joint Review Panel for the Mackenzie Gas Project Volume 1", (December 2009) at 215 [*Mackenzie Gas Project Report*], online: http://reviewboard.ca/upload/project_document/EIR0405-001_JRP_Report_of_Environmental_Review_Executive_Volume_I.PDF.

⁵⁷ See National Energy Board, "Letter to Interested Persons - Lists of Issues and Factors and Scope of the Factors for the Environmental Assessments – Energy East and Eastern Mainline" (23 August 2017), online: https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/2432218/2540913/2543424/3322976/A85619-1_NEB_Letter_to_Interested_Persons_-_List_of_Issues_and_EA_Factors_Document_-_Energy_Est_and_Eastern_Mainline_-_A5T4L9.pdf?nodeid=3320560&vernum=-2.

because none of them require consideration of the impact of downstream GHG emissions. As such, these potential adverse cumulative effects must be considered by the proposed regional assessment.

(5) Transboundary impacts

The proposed study region includes the headwaters of drainage areas of several major river systems in western Canada, which flow north into the Beaufort Sea, east into the Hudson's Bay, and south into the United States. Water is a critical issue in much of this region, including the semi-arid region in southwest Alberta, where the water basin has been closed to new allocations since 2006.⁵⁸ It is extremely important for the federal government to play a role in protecting these important watersheds, recognizing that this water supplies virtually all of the Prairie Provinces – including First Nations reserves – southeast British Columbia and several U.S. States, and is subject to a water sharing agreement with the provinces of Saskatchewan and Manitoba. Water supplies in both Canada and the United States are at risk from increased coal mining in the region.

One of the major known risks associated with coal mining is water pollution, particularly selenium contamination. This issue was explored in significant detail during the recently-completed Grassy Mountain mine project joint review process, with multiple experts noting that there is no proven field-scale technology available to fully mitigate against selenium leaching. This is already a serious problem with the current Teck Resources coal mines in the Elk Valley in British Columbia, and has led to international concern with the United States as selenium leaching from Canadian coal mines continues to pollute waters downstream in the state of Montana. Endangered fish populations in the Elk River system have been subject to significant fish kills and ongoing deformities from selenium concentrations far higher than the legal limits downstream of the Teck mines.

This risk is compounded by the disparity between the much tighter selenium standards set by the U.S. Environmental Protection Agency (“EPA”) and the guidelines currently in place in British Columbia and Alberta.

For years, the provinces, territories, and the federal government have recognized the importance of protecting shared waters through transboundary water agreements. The Rocky Mountains supply drinking water to millions of Canadians living in the Prairies. They are also integral to aquatic life in the headwaters and downstream, including for threatened species.

In the Prairies, the Master Agreement on Apportionment (MAA) has for more than half a century ensured that the provinces of Alberta, Saskatchewan, and Manitoba collaborate on the best uses of the waterways that connect them. But increased metallurgical coal developments on the Eastern Slopes of the Rocky Mountains, at the headwaters of major rivers and tributaries that

⁵⁸ *Water Allocation Policy for Closed River Basins in the South Saskatchewan River Basin Directive* (30 August 2006; accessed on 30 March 2021), online: <https://open.alberta.ca/dataset/80929751-96f2-4cf7-b34f-6f817c0d92ae/resource/fa23a09a-5edf-4d52-8fbd-766a5e7641aa/download/waterallocationsouthsaskatchewan-sep2016.pdf>.

supply water to millions of people across all three provinces, are now threatening this agreement, and the spirit of collaboration and consultation that the agreement has tried to foster.

Under the MAA, the province of Alberta has agreed to direct one-half of the natural flow of its water into the province of Saskatchewan.⁵⁹ But coal mining in the Eastern Slopes could put a significant strain on that commitment, directly affecting the water flows available for entering Saskatchewan, and then Manitoba — be it for irrigation, food production, ecosystem support, hydroelectricity, the drinking water supply, or the maintenance of a healthy aquatic environment.

This is a dangerous proposition at a time when the region is already subject to droughts, and when seasonal water shortages are expected to only worsen due to the climate crisis.

Meanwhile, the Alberta government has proposed new water allocations⁶⁰ that would make it easier for coal companies to draw water from the headwaters of these watersheds.⁶¹ The impact of coal mining in this region is expected to place a new stress on the already stressed water resources. And, this stress will be most acute during times of drought, when the potential for conflict between on-site water demands and between water license holders will be elevated relative to the present situation.⁶² These changes could also endanger the health of small headwater streams and rivers that are critical habitat for at-risk populations of bull trout and westslope cutthroat trout (as further detailed above).

Coal mining in Alberta's headwaters also has implications for the province's water quality commitments made under the MAA. As further detailed below, according to leading scientists, it is undisputed that open-pit coal mining contaminates nearby water, with potentially disastrous results for downstream ecosystems, municipalities, and agricultural and ranching operations.⁶³ One of North America's top experts on pollution from coal mines has warned Albertans about the dangers of expanding the industry in the province's Rocky Mountains:

Expansion of coal-mining up the Alberta Rockies chain will absolutely produce an environmental disaster for fish and wildlife health in what are now pristine, high-quality watersheds. Have you ever seen an environmentally clean coal mine? I haven't in my

⁵⁹ *Master Agreement on Apportionment* (30 October 1969; accessed on 30 March 2021), online:

<https://www.ppwbc.ca/about-us/what-we-do/1969-master-agreement-on-apportionment/master-agreement-on-apportionment>.

⁶⁰ Nigel Bankes and Cheryl Bradley, "Water for Coal Developments: Where Will It Come From?" (04 December 2020; accessed on 30 March 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2020/12/Blog_NB_CB_Coal_Water.pdf.

⁶¹ "Alberta's 'back door' plan to free up billions of litres of water for coal mines raises alarm," *The Narwhal* (01 February 2021; accessed on 30 March 2021), online: <https://thenarwhal.ca/alberta-coal-mining-rockies-oldman-river/>.

⁶² Chris Hopkinson, "Does the Water Licence for a Coal Mine Capture its Impact on the Water Resource? Examining Benga Mining Limited's Proposed Grassy Mountain Mine in the Headwaters of the Oldman River Basin" (08 March 2021; accessed on 30 March 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/03/Blog_CH_Grassy_Mountain_Water.pdf.

⁶³ A. Dennis Lemly, "Aquatic hazard of selenium pollution from coal mining," in *Coal mining: Research, Technology, and Safety*, ed. G.B. Fosdyke (New York: Nova Science Publishers, 2008), 167-183 (accessed on 30 March 2021), online: <https://www.fs.usda.gov/treearch/pubs/33826>.

investigations with Canada, the U.S. and other countries around the world for the past 45 years.⁶⁴

He also concluded that the provincial AER regulator has failed to seriously assess and guard against environmental pollution from mines:

Leaching of selenium and resultant biological impacts is an undisputed fact of open-pit mountain top coal-mining. It will inevitably happen.

Effective treatment doesn't exist.

These [tailings] ponds are notorious for breaching.

To date, there has been no demonstration of effective treatment of leachate wastewater to render it safe to aquatic life in receiving waters at the scale and flows emanating from coalmines.

The proposed methods and techniques to protect water quality are simply hollow promises that carry no legitimate demonstration of prior success.

Despite the scientific documentation of detrimental pollution impacts, it seems that this has been a long-running case of, 'Don't ask, don't tell' by government regulators in Alberta.

Current policy by (the Alberta Energy Regulator) reveals an extremely poor understanding and recognition of the key aquatic pollutant emanating from coal mines.

There is no need for history [what has happened in British Columbia due to selenium and other pollution in waterways from intensive coal mining there] to repeat itself [in Alberta].⁶⁵

Coal mining leaches toxic concentrations of selenium and arsenic into the water.⁶⁶ That risk is only multiplied when there is a possibility of several mines operating in the same watershed.⁶⁷

⁶⁴ "Top coal scientist warns Albertans of contamination from mining", *CBC News* (16 February 2021; accessed on 2 April 2021), online: <https://www.cbc.ca/news/canada/calgary/coal-scientist-alberta-mining-rocky-mountains-contamination-ucp-1.5915245>.

⁶⁵ A. Dennis Lemly, "Environmental hazard assessment of Benga Mining's proposed Grassy Mountain Coal Project," *Environmental Science & Policy*, Volume 96, June 2019, pages 105-113 (accessed on 2 April 2021), online: <https://www.ceaa.gc.ca/050/documents/p80101/132193E.pdf>.

⁶⁶ Mark Wayland and Robert Crosley, "Selenium and Other Trace Elements in Aquatic Insects in Coal Mine-Affected Streams in the Rocky Mountains of Alberta, Canada," *Archives of Environmental Contamination and Toxicology* 50 (2006: 511-522), (accessed on 30 March 2021), online: <https://link.springer.com/article/10.1007/s00244-005-0114-8>.

⁶⁷ "Navigating Our Future" Coal Mining In The Oldman Watershed – Part 2," Oldman Watershed Council (26 January 2021; accessed on 30 March 2021), online: <https://oldmanwatershed.ca/blog-posts/2021/1/26/navigating-our-future-coal-mining-in-the-oldman-watershed-part-2>.

This, at a time when selenium levels are already dangerously high in some Alberta waterways because of previous coal mines development.⁶⁸

Leaching of selenium is an environmental disaster for fish and wildlife health, causing deformities, nerve damage, and reproductive failure in fish, mammals and migratory birds — even long after the coal mines are gone. **In British Columbia’s Elk Valley (part of the recommended study region), home to four coal mines, selenium levels have reached 50 times the safe limit for aquatic health.**⁶⁹ New remediation methods currently lack long-term studies on efficacy at the scale and in field conditions of currently proposed mines.

Catastrophic failures of mining infrastructure are also a great risk to downstream water quality. The Obed mine disaster in northern Alberta in 2013 released 670 million litres of contaminated water into tributaries of the Athabasca river, and the plume of tailings water travelled more than 1,100 km downstream. This release is expected to cause long-term damage, as spring runoff mobilizes contaminants each year.⁷⁰ Alberta, Saskatchewan, Manitoba and Canada signed the MAA in a spirit of consultation and cooperation, to reach common goals around shared water resources. But my clients believe that the decision by the Alberta government to allow coal exploration and mining activities across the region, which have inevitable consequences for other Prairie provinces, violates that spirit.

While the Alberta government is in the process of conducting public consultations about a new, updated coal policy, the scope of these consultations must be expanded to include *all* those affected downstream — including in other provinces – which clearly requires federal involvement.

This lack of consultation is not without precedent. Last summer, the Alberta government temporarily suspended water quality monitoring on rivers that flow through oilsands and into the Northwest Territories, without informing that jurisdiction — a clear violation of its transboundary obligations.⁷¹ The Minister must ensure that the province never again fails in its responsibility to consult and cooperate with its neighbours.

The Minister must also ensure that both the Province and Canada honour their obligations to consult meaningfully with First Nations — who have protected their land and water since time immemorial — and ensure their rights are not unjustifiably infringed as a result of authorizing new coal mines on public lands located in their traditional territories along the Eastern Slopes of the Rocky Mountains and in the Elk Valley and downstream, across Western Canada.

⁶⁸ “Contaminant from coal mines already high in some Alberta rivers: unreported data,” *CTV News* (25 January 2021; accessed on 30 March 2021), online: <https://edmonton.ctvnews.ca/contaminant-from-coal-mines-already-high-in-some-alberta-rivers-unreported-data-1.5280626>.

⁶⁹ “U.S. demands explanation from province over river pollution from B.C. mines,” *CBC News* (11 May 2020; accessed on 30 March 2021), online: <https://www.cbc.ca/news/canada/british-columbia/us-epa-pollution-rivers-teck-mines-bc-1.5564269>.

⁷⁰ “Scientist expects ‘long-term damage’ from coal spill,” *Northern Journal* (09 December 2013; accessed on 30 March 2021), online: <http://norj.ca/2013/12/scientist-expects-long-term-damage-from-coal-spill/>.

⁷¹ “Alberta failed to flag N.W.T. about suspending oilsands monitoring despite agreement: emails,” *Global News* (13 July 2020; accessed on 30 March 2021), online: <https://globalnews.ca/news/7169261/alberta-suspending-oilsands-monitoring-north-west-territories/>.

Allowing coal mines to be built in the headwaters of some of Canada’s and North America’s most important water sources without even subjecting them to an impact assessment flies in the face of the stated policy objectives of the new Canada Water Agency, recently created by the Minister “to find the best ways to keep our water safe, clean and well managed.”⁷². This factor, as well as the watersheds shared by at least four provinces and two territories, the MAA governing water flows between the Prairie provinces, the arid and drought-susceptible regions of southern Alberta, the demand on existing water allocations (by agriculture, industry and municipalities, irrigation, ecosystem support, hydroelectricity, the drinking water supply, or for the maintenance of a healthy aquatic environment), concerns over water quality and selenium and arsenic pollution, and lack of consultation by the Government of Alberta with other jurisdictions and First Nations, demonstrate need for this federal regional assessment.

The proposed metallurgical coal mining activities across the proposed study region have the potential to adversely impact areas of federal jurisdiction: the region straddles a provincial border and has the potential for international impacts, and these will not only **not** be addressed by provincial environmental impact assessments, they include impacts that fall squarely within federal jurisdiction and would be *ultra vires* the provinces to consider. The AER (and provincial regulatory bodies generally) do not have the constitutional jurisdiction to assess or regulate extra-provincial projects or issues.⁷³

iv) The future global market for metallurgical coal

This regional assessment should consider the future global market for metallurgical coal, used in the steelmaking industry. To address the global climate crisis, these steelmaking emissions (accounting for 5% of total worldwide GHG emissions) will need to be drastically reduced. Fortunately, natural gas and electricity-based steelmaking processes are already in use around the world today, with significantly lower carbon emissions than coal-based steelmaking. Partially hydrogen-based steelmaking is already possible using existing plants and fully renewable hydrogen-based steelmaking is being developed at pilot facilities,⁷⁴ with one Swedish company recently announcing plans for commercial hydrogen-based steelmaking without coal by 2024.⁷⁵

This shrinking market for metallurgical coal will really dictate the viability of current and proposed metallurgical coal mines in the region. Jurisdictions around the world are already examining the reduction of metallurgical coal in steelmaking. In the United Kingdom, the Climate Change Committee (the “CCC”) recommended to the U.K. government, in its “Sixth Carbon Budget”⁷⁶ published in December 2020, that “coking coal should only be used in

⁷² “Government of Canada launches consultations on new Canada Water Agency,” Government of Canada (17 December 2020, accessed on 2 April 2021), online: <https://www.canada.ca/en/environment-climate-change/news/2020/12/government-of-canada-launches-consultations-on-new-canada-water-agency.html>.

⁷³ “Canada: Energy and Natural Resources Law Overview,” Stikeman Elliott LLP (31 July 2018; accessed on 2 April 2021), see page R2, online: <https://www.stikeman.com/-/media/files/kh-guides/dbic/dbic-energy-and-natural-resources.ashx>.

⁷⁴ A detailed article on this issue with sources is available on Wildsight’s website: Lars Sander-Green, “Do We Really Need Coal to Make Steel?” (1 June 2020), online: <https://wildsight.ca/blog/2020/06/01/do-we-really-need-steelmaking-coal/>.

⁷⁵ “Hydrogen to Power Large Green-Steel Plant in Sweden From 2024,” *BNN Bloomberg* (23 Feb 2021), online: <https://www.bnnbloomberg.ca/hydrogen-to-power-large-green-steel-plant-in-sweden-from-2024-1.1567329>.

⁷⁶ <https://www.theccc.org.uk/publication/sixth-carbon-budget/>.

steelmaking beyond 2035 if a very high proportion of the associated carbon emissions is captured and stored.” Beyond 2035, the CCC recommended that the use of coal in steelmaking should be phased out entirely, to be replaced with the existing technologies of hydrogen direct reduction and electric arc furnace technology.

There is therefore a risk that metallurgical coal projects will lead to stranded assets: whereby the value of coal-related assets decreases due to shrinking global demand. Detailed market analysis through the regional assessment is necessary to assess and where possible manage this risk.

There is an increasing trend of insolvency and bankruptcy of coal companies, with eight major coal companies in the United States declaring bankruptcy in 2019 alone.⁷⁷ In order to properly assess the impacts of metallurgical coal mining in Canada, the market analysis must consider how market forces may lead to stranded assets and industry bankruptcies as well as associated impacts on the environment, health and Indigenous peoples.

Particularly, the market analysis must consider how decreases in demand may increase the risk of a mine operator’s inability to meet environmental responsibilities should a project become financially unstable, and related effects on the environment, health and Indigenous peoples. This requires an analysis not only of the risks of bankruptcy, but also of potential policies, practices and conditions that could be attached to approvals of future metallurgical coal mines that would ensure such impacts do not occur or are minimized should they arise.

This market analysis of projected demand for metallurgical coal should include an overview of Canada’s current and metallurgical coal mines, an assessment of the economic importance of the metallurgical coal mining sector in Canada, and projections of future domestic and global demand for metallurgical coal mined in Canada, and examine international agreements on climate change and other pressures and trends affecting metallurgical coal demand.

This analysis should also examine how metallurgical coal is exported now and in the future. Coal export is associated with numerous potential local, pan-Canadian and international impacts including airborne coal dust from transport trains and coal stockpiled for shipment, toxic contaminants in runoff rainwater that can end up in environmentally sensitive waters and risks relating to fire and spillage from accidents which are often of great concern to local communities.⁷⁸ Such impacts should fall within the scope of this regional assessment. In particular, this regional assessment should:

- Consider the 17-20 MT/year⁷⁹ currently exported through Canadian ports, and seek to inform federal policy respecting such exports;
- Consider future increases to metallurgical coal exports from existing Canadian mines, including increases that may result from domestic producers shifting towards production

⁷⁷ Clifford Krauss, “Murray Energy Is 8th Coal Company in a Year to Seek Bankruptcy”, *The New York Times* (29 October 2019; accessed on 22 May 2021), online: <https://www.nytimes.com/2019/10/29/business/energy-environment/murray-energybankruptcy.html>

⁷⁸ James Kerr, “Canada should not be shipping coal overseas for the U.S.” (16 February 2019; accessed on 20 May 2021), *Vancouver Sun*, online: <https://vancouver.sun.com/opinion/op-ed/james-kerr-canada-should-not-be-shipping-coal-overseas-for-the-us>.

⁷⁹ Port of Vancouver, “2019 Statistics Overview” (Port of Vancouver, 2019), online: (<https://www.portvancouver.com/wp-content/uploads/2020/03/Statistics-overview-2017-to-2019.pdf>) at 11; Godwin, Tyler “Alberta coal production falls to 12-year low in July” SPG Global (15 Sept 2020).

for export through existing export capacity, and identify preferred policy direction for such potential exports; and

- Consider any expansions to coal export facilities, and seek to guide impact assessments of those expansions.
- v) Analysis of different scenarios regarding the pace and scale of development (analysis of different future outcomes)

This regional assessment could also examine different alternative scenarios regarding the pace and scale of development of metallurgical coal mining in the proposed study region, and conduct a cost-benefit analysis of these different scenarios (for example: no new metallurgical coal mines or expansions of existing mines, approval of 50% of currently-proposed new mines and expansions as measured by daily coal production capacity, and approval of all currently-proposed and likely new mines and expansions; or no, moderate and high development scenarios). This scenario analysis must also include a scenario in which projected demand is consistent with global decarbonization and the successful implementation of the Paris Agreement. This analysis should examine salient factors such as:

- the claimed employment generated and economic spinoffs of proposed coal mining in the region (Socioeconomic considerations)
- provincial regulatory processes that govern site reclamation
- costs of mine reclamation and cleanup, and liabilities post-operation (life-cycle costs)
- impacts and costs relating to bankruptcy, write downs and impacts associated with operators' inability to meet their environmental responsibilities
- long-term costs related to environmental and human health impacts
- included to provide a full picture of the costs of thermal coal development.
- costs of increased GHG emissions, including transportation and end-use of coal
- the factors listed under s. 22(1) of the IAA

However, my clients understand that these kinds of assessments can be time-intensive and burdensome, and this would fit on the “upper” end of the “complexity and cost” spectrum in the Agency’s current “Fact sheet: Regional assessment under the *Impact Assessment Act*”.⁸⁰ We understand this regional assessment is critical and needs to be completed in an expeditious manner.

However, this regional assessment should at a minimum examine the International Energy Agency’s report, “Net Zero by 2050: A Roadmap for the Global Energy Sector”, which sets out a roadmap to limit global temperature rise to 1.5 degrees Celsius, and, specifically with respect to coal and “coking” (metallurgical) coal, finds:

⁸⁰ The Agency’s “Fact sheet: Regional assessment under the *Impact Assessment Act*” (date modified 11 March 2021; accessed on 20 May 2021), online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/regional-assessment-impact-assessment-act.html>.

Coal

No new coal mines or extensions of existing ones are needed in the NZE as coal demand declines precipitously. Demand for coking coal falls at a slightly slower rate than for steam coal, but existing sources of production are sufficient to cover demand through to 2050. Such a decline in coal demand would have major consequences for employment in coal mining regions (see Chapter 4). There is a slowdown in the rate of decline in the 2040s as coal production facilities are increasingly equipped with CCUS: in the NZE, around 80% of coal produced in 2050 applies CCUS.⁸¹

[emphasis added]

In other words, at a minimum, this regional assessment should examine the effect on global temperature rise scenarios if Canada and other countries do not restrict further new metallurgical coal mines or expansion of existing mines.

- vi) The Minister should order a short, time-limited 45-day extension of time to the information-gathering phase, prior to making his decision on whether or not to order this regional assessment

As set out above in the “Introduction” and “Background” sections, the Minister instructed the Agency to consider the Petition as a formal request for a regional assessment on 16 April 2021, but this request was dated 22 March 2021, meaning almost half the 90-day period pursuant to the *Information and Management of Time Limits Regulations* established under the IAA had elapsed before the Minister is required to issue his decision on whether or not to conduct this regional assessment. As such, stakeholders, the public, ENGOs and First Nations and Indigenous groups had very limited time to engage in the process and provide submissions, and, given the short timelines, there has been no public comment period and the Agency has not actively solicited comments or feedback or submissions.

It is my understanding that the Blood Tribe/Kainai and Siksika Nations, who asked for a similar regional assessment on coal mining activities in their traditional territories in Treaty No. 7 lands a few years ago, have not yet been consulted by the Agency and are requesting an extension of time to be consulted and provide detailed submissions.

As such, The Minister should order a short, time-limited 45-day extension of time to this information-gathering phase, prior to making his decision on whether or not to order this regional assessment.

This will allow more organizational engagement. Alberta and British Columbia ENGOs, municipalities, First Nations and Indigenous groups have been recently overwhelmed by the volume of engagement opportunities and policy issues in Alberta related to coal (for example, the Grassy Mountain Coal Mine Joint Review Panel Hearings, the Tent Mountain Mine designation request process, and the Alberta Government’s Coal Policy Consultation Committee engagement process). Extending the information-gathering phase for a short, time-limited period of a further 45 days will allow for broader input from impacted organizations and municipalities,

⁸¹ International Energy Agency, “Net Zero by 2050: A Roadmap for the Global Energy Sector” (May 2021; accessed on 20 May 2021), at 103, online: <https://iea.blob.core.windows.net/assets/ad0d4830-bd7e-47b6-838c-40d115733c13/NetZeroBy2050-ARoadmapfortheGlobalEnergySector.pdf>.

and especially affected First Nations, while ensuring the process continues in an expeditious and efficient fashion.

5. CONCLUSION

For the reasons set out in this letter, my clients request that the Agency recommend that the Minister enter into an agreement or arrangement with a jurisdiction (preferably with an Indigenous jurisdiction or federal department or ministry, or with the provinces of Alberta and British Columbia) to jointly establish a committee of independent experts to conduct a regional assessment of the potential adverse effects (including and especially cumulative effects) of existing or future metallurgical coal mining activities (including exploration, development, transportation, and end use of coal) that fall within federal jurisdiction, including:

1. impacts on fish and fish habitat and aquatic species, especially selenium pollution;
2. impacts on critical habitat of species at risk;
3. impacts on the exercise by First Nations and Indigenous peoples of their s. 35 constitutionally protected Treaty and Aboriginal rights;
4. impacts on greenhouse gas emissions, including fugitive methane emissions; and
5. transboundary impacts.

My clients recommended that the geographical region that this regional assessment should study should include the Rocky Mountains and the Eastern Slopes of southwest Alberta and the Elk Valley of southeast British Columbia.

The independent committee should be mandated to ensure meaningful public and Indigenous consultation, and collaboration with Indigenous authorities.

This regional assessment should include an analysis of different scenarios regarding the pace and scale of future development of metallurgical coal mining in the region and include an analysis of the future global market for metallurgical coal.

The Minister should order a short, time-limited 45-day extension to the information-gathering phase, prior to making his decision on whether or not to order this regional assessment.

Ecojustice and my clients sincerely appreciate this opportunity to provide submissions on the scope of this regional assessment and would welcome a meeting with you and your team to discuss them further.

Sincerely,

<Original signed by>

David Khan
Barrister & Solicitor

cc: The Honourable Jonathan Wilkinson MP
Minister of Environment and Climate Change
200 Sacré-Coeur Boulevard
Gatineau, QC K1A 0H3

Carys Burgess, Impact Assessment Agency of Canada

Barbara Pullishy, Alberta Regional Director, Impact Assessment Agency of Canada

clients

APPENDIX

[A] Appendix “A”: Lorne Fitch, P. Biol., correspondence to Laurie Pushor, President and Chief Executive Officer of the AER, 4 February 2021; Martin Foy, Chief Operating Officer of the AER, reply correspondence to Lorne Fitch, 15 March 2021

APPENDIX "A"

Laurie Pushor,
President and Chief Executive Officer of the Alberta Energy Regulator
Suite 1000 250 – 5th Street SW
Calgary, Alberta
T2P 0R4
Email: SOC@aer.ca

February 4, 2021

Subject: Questions related to coal exploration in the Oldman River headwaters

Dear President Pushor,

I am seeking some insight and clarification on the decision-making process and procedures the AER follows with respect to the environmental impacts of coal exploration, in particular approvals provided to a number of coal companies with leases in the headwaters of the Oldman River in southwestern Alberta.

When the AER receives an application for coal exploration what requirements are provided to the company that obligates them to undertake environmental impact assessments of their proposed activities? In the case of the coal companies undertaking exploration in the Oldman River headwaters, what was asked of them and what was provided to AER?

I am assuming the AER is following the linear disturbance density thresholds set out in the Livingstone-Porcupine Hills Land Footprint Management Plan (2018). What was the linear density of roads and trails prior to these coal exploration programs? What is the current linear density with new and re-opened roads? How many kilometers of new and re-opened roads has resulted from coal exploration programs to date?

Has the AER undertaken a cumulative effects assessment to determine the overall impact of all current and proposed coal exploration programs to ensure critical ecological thresholds will not, or have not been exceeded? If so, can you share that information?

What water quality monitoring has been asked of coal companies to ensure the impact of new and re-opened roads and drill sites will not, or has not affected

receiving streams containing trout species at risk? If so, can you share that monitoring information? For drilling programs, is there a requirement for water and if so, from where has the water been obtained? If it is from local sources, was a water license obtained by the coal company(s)? Did any of the water sources contain trout species at risk?

What is the timing and specifications for reclamation/restoration of the coal exploration footprint? What is the end target for restoration of new and re-opened roads and drill sites? What is the anticipated success of restoring these disturbed sites back to native vegetation, as would have existed before construction? Have performance bonds been requested of these companies, to ensure restoration is accomplished? If so, what is the dollar amount of such bonds?

I note that the AER has provided variances to allow coal exploration activities to occur within critical wildlife timing windows. Can you provide me with the rationale for allowing such variances and what wildlife studies were undertaken to ensure wildlife species were not put at risk by such decisions? Were provincial Fish and Wildlife biologists contacted and advice sought on such variances? If there were wildlife studies undertaken, please share this information with me.

Has the AER learned from these initial coal exploration programs and will the process and procedures change with any new exploration applications to ensure cumulative effects are assessed?

I would appreciate a timely and fulsome response to my questions.

Sincerely,

Lorne Fitch, P. Biol.

<Personal information removed>

March 15, 2021

By email only

Lorne Fitch, P. Biol

<Personal information removed>

Martin Foy

Chief Operations Officer

martin.foy@aer.ca

tel 403-297-6131

cell 587-581-3549

www.aer.ca

Email: <Personal information removed>

Coal Exploration in the Oldman River Headwaters

Dear Mr. Fitch:

Thank you for your letter dated February 4, 2021, to Laurie Pushor about the Alberta Energy Regulator's (AER) regulatory process on coal exploration in the Oldman River headwaters in southwestern Alberta, which has been forwarded to me for response.

You asked several questions about the AER's application requirements as well as environmental impacts and cumulative effects assessments for coal exploration, in particular for the Oldman River headwaters area.

The AER ensures that energy development is safe, environmentally responsible, and meets all requirements. The AER regulates the use of **public land** for coal exploration activities using the [Environmental Protection and Enhancement Act](#) and its *Code of Practice for Exploration Operations* and section 20 of the [Public Lands Act](#), which authorizes use of public land for exploration. Under section 3.1 of the *Code of Practice for Exploration Operations*, companies must notify us of coal exploration activities on **private/patented** lands.

Coal companies may apply for exploration programs without having the coal rights. *Manual 008: Oil Sands and Coal Exploration Application Guide* details our application requirements, processes, and timelines for all coal exploration programs (CEP). For both public and private lands, companies must provide all documentation listed in Schedules 1 and 2 of the *Code of Practice for Exploration Operations*.

With respect to exploration in southwestern Alberta, which includes the Oldman River headwaters, the AER considers all relevant policies established by the Government of Alberta. This includes the *Alberta Land Steward Act (ALSA)* and the regional plans under the *ALSA*, such as the [South Saskatchewan River Basin water management plan](#) and the [Oldman River Basin Water Allocation Order](#). All land-use

management plans are developed by Alberta Environment and Parks (AEP) and any questions regarding these plans should be directed to them.

The AER does not assess cumulative effects of overall impacts of all proposed CEPs as this is done by AEP through their land management framework and regional plans.

The AER does not have requirements pertaining to linear density of roads and associated surface infrastructure for exploration activities. AEP is responsible for implementing the Livingstone-Porcupine Hills Land Footprint Management Plan and managing the footprint allowance within the plan area. The AER's role is to ensure that proposed activities meet plan requirements including thresholds and to support AEP with footprint management.

When the AER receives an application for a CEP within the Livingstone-Porcupine plan area, the proposed access is added by AEP to a linear disturbance calculation tool to determine if the access falls within the access density threshold. The Livingstone-Porcupine plan provides direction when, and if, a proposed activity would cause the threshold to be exceeded.

The AER applies conditions to CEP approvals for maintaining water quality that are specific to the exploration program. A temporary diversion license (TDL) is required when there is a need to access water for exploration drilling. AER specialists review TDL applications against regulations in the *Water Act* and the *Water Ministerial Regulations*, water management frameworks under provincial land-use regional plans, and orders established by the Government of Alberta.

The AER thoroughly reviews all applications for CEPs and approvals are issued based on the merits of the application. The AER also requires CEP approval holders to reclaim disturbed areas. The specifics of reclamation are based on the conditions in the approval, which are determined based on the application's details. The AER does not collect any bonds or security for CEPs.

AEP has identified multiple sensitive wildlife zones within the Eastern Slopes and the Oldman River headwaters. The AER uses these sensitive wildlife zones to inform decisions and approval conditions for coal exploration activities. Some of these zones have timing restrictions associated with them, such as the Mountain Goat and Bighorn Sheep zone where activities must occur during the least sensitive time period between July 1 and August 22 each year. Companies can apply for a variance of these timing restrictions, but must include appropriate justification for why they need the waiver, the time needed within the timing restriction, as well as appropriate mitigation to address impacts to wildlife that could occur as a result of this activity.

Variance applications are reviewed by AER specialists, including wildlife biologists. If a waiver is approved, there are specific requirements for a wildlife monitoring and mitigation plan to minimize risk to wildlife and a time period within which this is done. In addition, the variance approval would also specify for how long the extension would be granted. Further information on the sensitive wildlife zones in Alberta can be found at: <https://www.alberta.ca/wildlife-sensitivity-maps.aspx>. Information on timing restrictions and approval conditions associated with these wildlife zones can be found in the Master Schedule of Standards and Conditions available at: <https://open.alberta.ca/publications/master-schedule-of-standards-and-conditions>.

Thank you again for taking the time to write. As the single regulator for energy development in the province, we are committed to ensuring that development is carried out in a manner that protects public safety and the environment. Please visit our [Coal](#) page at aer.ca if you have further questions.

Sincerely,

<Original signed by>

Martin Foy
Chief Operations Officer

cc: Laurie Pushor, President and Chief Executive Officer, Alberta Energy Regulator
Jason Nixon, Minister of Environment and Parks