



Environmental
Law Centre

January 15, 2015

Via email

Alberta Environment and Parks

Planning Branch

Scott Milligan, Executive Director

Regional Planning Section

Christine Sweet, Planning Lead - South

Chad Willms, Planning Lead - Central

Cumulative Effects Assessment Section

Sarah Depoe, Lead, Evaluation and Improvement

Shannon White, Biodiversity Specialist

Re: Biodiversity Management Frameworks

The Environmental Law Centre (ELC) is a charity founded in 1982 to provide information, education, research and law reform services concerning environmental law. Its mission is to champion for strong laws and rights so that all Albertans can enjoy a healthy environment. The ELC has been involved with the Land Use Framework (LUF) and *Alberta Land Stewardship Act (ALSA)* from the beginning. Its activities have included commenting on several cumulative effect management frameworks and conducting research on this topic.

The following feedback on the draft biodiversity management framework (“the framework”) for the South Saskatchewan Regional Plan (SSRP) is relevant to the same initiative in the North Saskatchewan, further regions, and to cumulative effects management generally. We ask that it be shared accordingly.

The ELC’s recommendations are based on criteria for the evaluation of cumulative effects management frameworks. These criteria are appended to this letter. The ELC has also considered feedback from the Miistakis Institute, the Oldman Watershed Council, the Alberta Wilderness Association, the Porcupine Hills coalition, and agrees with the main points of those organizations.

Summary Comments

The cumulative effects management frameworks are one of the more promising developments under the LUF as they embody a shift from the prior system and could achieve a purpose of *ALSA*. The biodiversity framework for the SSRP makes the significant step of recognizing the impact of land disturbance on biodiversity.

The framework includes the necessary components and reflects one best practice by endorsing choice of management actions. The monitoring approach is generally acceptable and the proposed actions include underused tools to reduce land disturbance.

However, the framework lacks most of the best practices for cumulative effects management, including:

- measurable objectives;
- the precautionary principle;
- clear limits;
- mandatory action; and
- a focus on proactive action before thresholds are exceeded.

Without these fundamentals the technical details will matter little. Concerning the details:

- The indicators avoids species at risk in specific sub-regions and sub-basins;
- The thresholds are vague, complicated and unprincipled; and,
- The management responses are mostly reactive, favor inaction, and the proposed actions receive no direct enablement from the framework itself.

The framework does not fix the current system of patchwork legislation, uncoordinated decision making, and inadequate conservation tools as intended by the LUF. Nor does it fill the provincial gap around species at risk. It actually perpetuates some negative features of *ALSA* and the SSRP, including: lack of substantive guidance, broad discretion, limited accountability for outcomes and limited participation in implementation. The framework is fairly concerned with causation and therefore may avoid regulatory impact on cumulative effects. Nor does it offer regulatory certainty, support or incentives to help overcome the socio-economic barriers to cumulative effects management.

In sum, the draft framework is unlikely to achieve the environmental outcomes of the LUF. The Alberta Government needs to take a step back and imagine the use of *ALSA* to implement regional plans and fill gaps in the current system. The ELC's recommendations respond to that need.

Environmental Law Centre

Summary recommendations on SSRP biodiversity management framework

By section:

Purpose:

- Define biodiversity.

Key concepts:

- Confirm monitoring capacity.
- Establish sub-regional objectives, indicators, thresholds and actions.
- Include the precautionary principle.

Current system:

- Focus on implementing regional plans.
- Require all decision makers and statutory instruments to comply.

Objectives:

- Set measurable objectives.
- Distinguish biodiversity objectives from stewardship strategies.

New biodiversity management system:

- Indicators: use species at risk.
- Thresholds: set clear limits.
- Actions: make direct use of *ALSA* to support voluntary action, enable market based instruments, and as regulation for conservation purposes.

Implementation:

- Re-affirm the mandates of the Stewardship Minister, Stewardship Commissioner, and Land Use Secretariat.
- Provide clear roles for non-government organizations.

1. **Purpose of the framework**

The ELC supports this initiative. The LUF is a significant step for Alberta in recognizing the finite capacities of our land base, stating environmental outcomes for regional plans and proposing cumulative effects management at the regional level. *ALSA* provides a legislated mandate to pursue this direction as its purposes include promoting sustainable development by responding to cumulative effects. The *SSRP* provides a sound definition of cumulative effects as the combined effects of past, present, and reasonably foreseeable future land use activities on the environment. The *SSRP* and this framework recognize that the human footprint is a leading cause of biodiversity loss that conservation areas alone are insufficient. This recognition is consistent with the Convention on Biological Diversity to which Canada is a party. The framework is outcome-based and endorses new tools for ecosystem services, which is consistent with the Canadian Biodiversity Strategy.

The Framework should not avoid defining biodiversity simply because it is complex. A definition would help oust debate on what the framework is about and where it applies. This is important if the framework is to have legal weight as it should.

Recommendation:

- Include a definition of biodiversity.

2. **Key concepts**

a. Monitoring:

Monitoring by AMERA, the Alberta Biodiversity Monitoring Institute, and “other” sources such as Watershed Planning and Advisory Councils is appropriate subject to these organizations’ capacity and methodology. While government monitoring is the established best practice for cumulative effects management, this is as opposed to industry monitoring done for project-specific compliance purposes. Third party monitoring on the regional or watershed scale meets the underlying needs.

Recommendations:

- Confirm capacity for all monitoring bodies consistent with reliance on these bodies.

b. Scale:

The size and diversity of the South Saskatchewan region creates risk that sub-regional impacts may not be identified and managed if the only scale is the whole region. The framework will fail to provide inadequate guidance for the proposed sub-regional linear, recreation and range planning under the *SSRP*, and for the other instruments and decisions that should have to comply.

Recommendation:

- Establish sub-regional areas, objectives, indicators, thresholds and management actions.

c. Principles:

ALSA and the SSRP lack substantive principles or criteria to guide future planning and decisions. The need to fill this gap falls on the framework.

The key principle for biodiversity conservation, cumulative effects management and risk-based approaches to environmental decision making is the **precautionary principle**. The framework represents all of these things so including this principle is crucial. The precautionary principle is:

When there is a risk of serious or irreversible damage to the environment, the lack of full scientific certainty shall not be used as a reason to postpone cost-effective measures to prevent environmental degradation.

Alberta lags behind other relevant jurisdictions in adopting the precautionary principle. The principle already appears in:

- the Convention on Biological Diversity;
- the species at risk and/or wildlife management legislation of at least five Canadian provinces and territories;
- federal sustainable development and environmental assessment legislation; and,
- federal fisheries policies.

The precautionary principle is relevant throughout the framework. Regarding:

- indicators: It fits with the rationale for using composite indicators;
- thresholds: It provides assurance for the risk-based approach; and,
- management actions: It provides guidance for administrative discretion.

Recommendation:

- Include the precautionary principle as a key guiding principle in this and all cumulative effects management frameworks.

3. The Current System

a. Legislation and policies:

The framework should not focus on complementing a current biodiversity management system. The list of relevant legislation and policies provided reveals a patchwork not a system. This patchwork includes numerous land use regulators with divergent mandates, none of which have clear direction to pursue biodiversity conservation outside of parks and protected areas. The province lacks species at risk legislation, species recovery plans under the *Wildlife Act* lack legal weight, and the emergency protection orders in question are federal orders.

The framework concedes this patchwork problem by noting a provincial biodiversity strategy under development. However, even if this strategy emerges it will be weightless against the legislated mandates of the land use regulators.

Of most concern, the Land Use Framework and *ALSA* appear simply as more items in this laundry list. The Land Use Framework is supposed to fix this patchwork problem, not become part of it. Thus, *ALSA* allows regional plans to require all decision makers and statutory instruments to comply in pursuit of the common objectives. The framework states that it is “linked to” further planning initiatives within the region such as linear footprint, recreational access and forest management planning. However, it does not provide real guidance for future decisions or indicate its effect on other instruments.

Describing the current system also reveals that current legislation is not used to its potential for biodiversity management. The list omits legislation that would be most useful for pursuing sub-regional objectives. For example, the *Forests Reserves Act* has a purpose of conserving forest vegetation and enables regulations to replace the general public lands and forests regime. The *Special Areas Act*, and *Municipal Government Act* also apply to sub-regions and could be used for biodiversity conservation to a greater extent than is likely to occur under the “current system”.

Recommendations:

- The framework should focus on implementing the SSRP, not on the current (i.e. old) system.
- The framework should be included in the regulatory details of the SSRP and require that all decision makers and statutory instruments comply.

4. Objectives

The SSRP and framework improve on prior regional plans in Alberta by stating objectives of sustaining biodiversity. However, there are issues with the measurability, scope, and framing of these objectives.

The objectives are not measurable. Potential measurable objectives include:

- No net loss of native grassland;
- Limits on land disturbance or the density of linear features;
- Area of habitat conserved, enhanced or restored; or
- Water quality objectives that mirror habitat needs for aquatic species.

Basically some of the currently proposed “indicators” and “thresholds” could be moved up to become “objectives.” One or two of the above measurable objectives will be more useful than a numerous unmeasurable objectives.

The objective of not designating any new species at risk can be met by ignoring species decline and doing nothing unless the framework imposes duties to designate species at risk.

Regional scale objectives provide inadequate guidance for the numerous local, sub-regional and industry-specific planning exercises in the region.

The framework qualifies the objective as “biodiversity sustained through shared stewardship”. Shared stewardship is a strategy not an objective. Framed as an objective, it creates a condition that erodes or misdirects accountability. Shared stewardship may be unnecessary or impossible in many situations as wildlife and much habitat is the legal property of the provincial Crown.

Recommendations:

- Set a small number of measureable, action-oriented objectives for the region and sub-regions.
- Remove “shared stewardship” from the objectives and make it a strategy with further details.

5. **New Management System**

a. Indicators:

There is scientific uncertainty concerning the approach to indicators. Some science-focused stakeholders endorse composite indicators while others prefer specific keystone species as indicators of overall ecosystem health. This uncertainty may justify the tiered approach. It also affirms need for the precautionary principle.

The issue of regional scale could result in the regional indicator system missing impacts at the sub-regional level. There should be no need to show impacts on moss in the mountains before taking action on bird extirpation in the grasslands. Likewise, the health of native areas is very important, but this focus may miss increasing impacts in areas already altered by humans.

Creating the Tier 3 indicators (the species of conservation concern) may not be as difficult as represented, nor does it warrant the proposed delay. The framework already notes several species that are already listed provincially or federally. Using currently listed species that inhabit specific sub-regions or sub-basins will be simpler and faster than developing more formulas.

Using existing species at risk for tier 3 indicators would:

- provide guidance for the proposed sub-regional planning under the SSRP; and,
- Help fill the provincial regulatory gap around species at risk under the current system.

The expedient creation of clear Tier 3 indicators could also help: provide regulatory certainty for industry, reduce the probability of future federal orders, identify lands where voluntary action will be incentivized and, spur the use of market based instruments.

Recommendations:

- Use provincially and federally listed species at risk that inhabit sub-regions or sub-basins as the Tier 3 indicators without further delay or formulas.

b. Thresholds:

ELC supports the focus on general biodiversity health subject to the above comments on indicators. It also supports the implied recognition that the thresholds for some species and habitats may already be exceeded or will be soon. However, the approach to identifying when thresholds are exceeded is too vague, complicated and unprincipled.

The ELC notes that:

- approaches to risk assessment are generally unsettled;
- whether or not a species can tolerate change may raise scientific uncertainty; and,
- including social, political and economic factors in risk assessment without identifying what these factors are sends the decision into a “black box” and favors findings of no exceedance;

All of the above features indicate the potential for shifting thresholds and need for the precautionary principle.

The approach to identifying when thresholds are exceeded should also:

- be simple enough to be understood by the Minister charged with this decision, the regulators who should have to comply, and the land users who may be affected; and,
- assist in the pursuit of measurable objectives.

The simplest option is a quantifiable limit on land disturbance, water quality, or loss of habitat. These limits should be taken from existing recovery plans and monitoring information on species at risk.

The framework can allow shifting baselines as does not appear to set any reference points against which to measure the conditions of indicators other than the present.

Recommendations:

- Set clear, quantifiable limits based on species recovery plans and habitat needs.
- Create baselines against which to measure change by establishing reference conditions at a point in time.

c. Management responses:

The framework shows increased commitment to monitoring which is positive. The chart of “measures” is a good start at identifying and providing choice of action. The chart also implies a mitigation hierarchy which is the proper foundation if measures are to include conservation offsets. Many measures could be moved closer to the front end, by which we mean that many “reduction” measures could and should be used as “avoidance” measures. The ELC supports use of *Public Lands Administration Regulation* to set disturbance standards, require restoration or make integrated land management mandatory. These tools are underused due partly to lack of guidance from plans or policies. However, there are several concerns with the proposed management responses:

- i. General approach: The approach is fairly reactive and favors monitoring and investigation over action. There are no clear situations where action is mandatory or inaction must be justified. Stating that regulatory action will occur only at the highest levels of cumulative effects is a restriction on discretion that does not fit with the broad discretion not to act.
- ii. Investigations: The approach to investigations suggests needs to prove causation to some standard so as to lay fault on specific actors. These concepts come from the “backward looking” world of litigation. They may have some place in conventional environmental regulatory enforcement but they do not belong in the “forward looking” world of cumulative effects management.
- iii. Regulatory tools: The framework simply lists existing tools without stating how they will be used to pursue biodiversity objectives. Public Land Use Zones have limited potential as they lack a clear conservation purpose and lack weight against the natural resource industries. Their potential is mostly to manage public access, and even then their effectiveness depends on the pre-existing footprint. Zoning tools under the *Wildlife Regulation* are equally flexible and more conservation-focused.
- iv. Voluntary action: Committing to exclusively voluntary action on private lands is practically a roll back of legitimate action under the current system. The framework ignores the need for regulation to support voluntary action, for example by protecting private conservation projects from incompatible land uses.
- v. Market based instruments: the framework provides no actual guidance for the use of market based instruments. There is need for regulations to spur the use of such tools.
- vi. Not using ALSA: The framework avoids measures under *ALSA* and therefore misses the best platform to: support voluntary action, guide the use of market based instruments, and deploy regulations with a conservation purpose.

Recommendations:

- Use *ALSA* to:
 - support voluntary action by protecting private conservation projects from other land uses on the same or adjacent parcels;
 - provide direct guidance and pressure for the use of market based instruments; and,
 - deploy regulatory tools with conservation purposes, either those provided by *ALSA* or by through guidance for a broader suit of tools under other legislation.

6. **Implementation roles**

The framework relies excessively on the Ministry of Environment & Parks for implementation. This Ministry lacks authority over numerous land uses that impact biodiversity and it does not have a clear record of intervening in the regulatory processes of other provincial agencies. The original intention was for an administrative structure separate from the line departments to lead on implementation of *ALSA*. Under the leadership of a Stewardship Minister, a Stewardship Commissioner had a mandate to enforce regional plans and to oversee a Land Use Secretariat responsible for development of the conservation tools provided by *ALSA*. While the current organizational structure is for individuals to wear multiple hats, sufficient independence and capacity may be needed to realize on the LUF.

A second concern is the uncertain roles for non-government organizations. Non-government organizations will be crucial to assist with management actions outside of site-specific industry regulation. Examples include: restoring legacy land disturbances, managing recreational use of public land, and carrying out private conservation projects. All of these functions are thwarted by inadequate support or barriers in the system. *ALSA* is very restrictive of public participation, focusing mostly on the rights of affected private parties. Non-government organizations have limited ability to lead on regional plan implementation, especially when it comes to forming partnerships as proposed by the LUF. The SSRP and the framework both name several organizations for future involvement but provide no details.

Recommendations:

- Re-affirm the mandates of the Stewardship Minister, Stewardship Commissioner and Land Use Secretariat, and provide this agency with sufficient resources and independence to deliver on this mandate.
- Provide clear roles and structure for the participation of non-government organizations in biodiversity management actions.

7. Additional comments

Non-implementation of environmental legislation and policies has been an issue in Alberta for some time prior to the LUF. While cumulative effects management is needed to fill gaps in the current system, much could be done for biodiversity and other components of the environment by using the laws in place. Two examples would be following through on political promises to create new protected areas and to increase enforcement.

Recommendations:

- Pass the orders in council needed to legally protect the conservation areas in the SSRP.
- Create a permanent, specialized public lands enforcement force.

8. Conclusions

While this framework is fairly complete and shows promise as a new approach, it does not demonstrate many best practices of cumulative effects management and so is unlikely to achieve the environmental outcomes of the LUF. The risk is yet another “plan to plan” that avoids key decisions, does not make the best use of *ALSA*, and faces barriers to implementation. The ELC’s recommendations are for a simpler, more principled approach that favors action in pursuit of measurable objectives.

The ELC would be happy to discuss these recommendations further. Please do not hesitate to contact us at your convenience.

Sincerely,



Adam Driedzic
Staff Counsel

Attached: criteria for evaluating cumulative effects management frameworks

Environmental Law Centre

Criteria for evaluating cumulative effects management frameworks

- a. The framework must have specific components including:
 - a geographic region;
 - indicators;
 - tiers including a baseline, intermediate levels and a “threshold”; and
 - management responses when thresholds are reached.

- b. The framework should demonstrate best practices including:
 - the precautionary principle;
 - measurable objectives;
 - monitoring by government;
 - clear limits on cumulative effects;
 - mandatory action;
 - choice of actions; and,
 - proactive actions before thresholds are reached.

- c. The framework should overcome any legal barriers. For example:
 - the nature of the relevant legislation;
 - excessive discretion;
 - crown liability, affected interests or litigation;
 - inadequate monitoring; and
 - shifting baselines and thresholds.

- d. The framework should overcome any social, economic and political barriers. For example:
 - perceptions that the initiative is “anti-growth”;
 - potential to increase conflict for land;
 - debate on whether or not thresholds should be strictly science-based;
 - excessive influence by the regulated industries; and,
 - need to tackle the effects of currently unregulated activities.