

Habitat Law in Alberta

*Current approaches,
Future opportunities*

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Habitat Matters Project Objectives

1. Set out general foundations of current habitat laws and regulations
2. Create a foundation for future work in focusing on specific legislation (example water act, forests act, public lands act)
3. Assess systemic problems and approaches to overcome shortcomings in habitat management

**important underlying theme – evaluation of the current system in a given instance is extremely difficult due to the discretionary and policy nature of habitat management measures

The State of Habitat Laws in Alberta (Volume 1)

**Barriers to Habitat Management and Protection in Alberta
(Volume 2)**

Jurisdictional Review of Habitat Laws (Volume 3)

Recommended Reforms (Volume 4)



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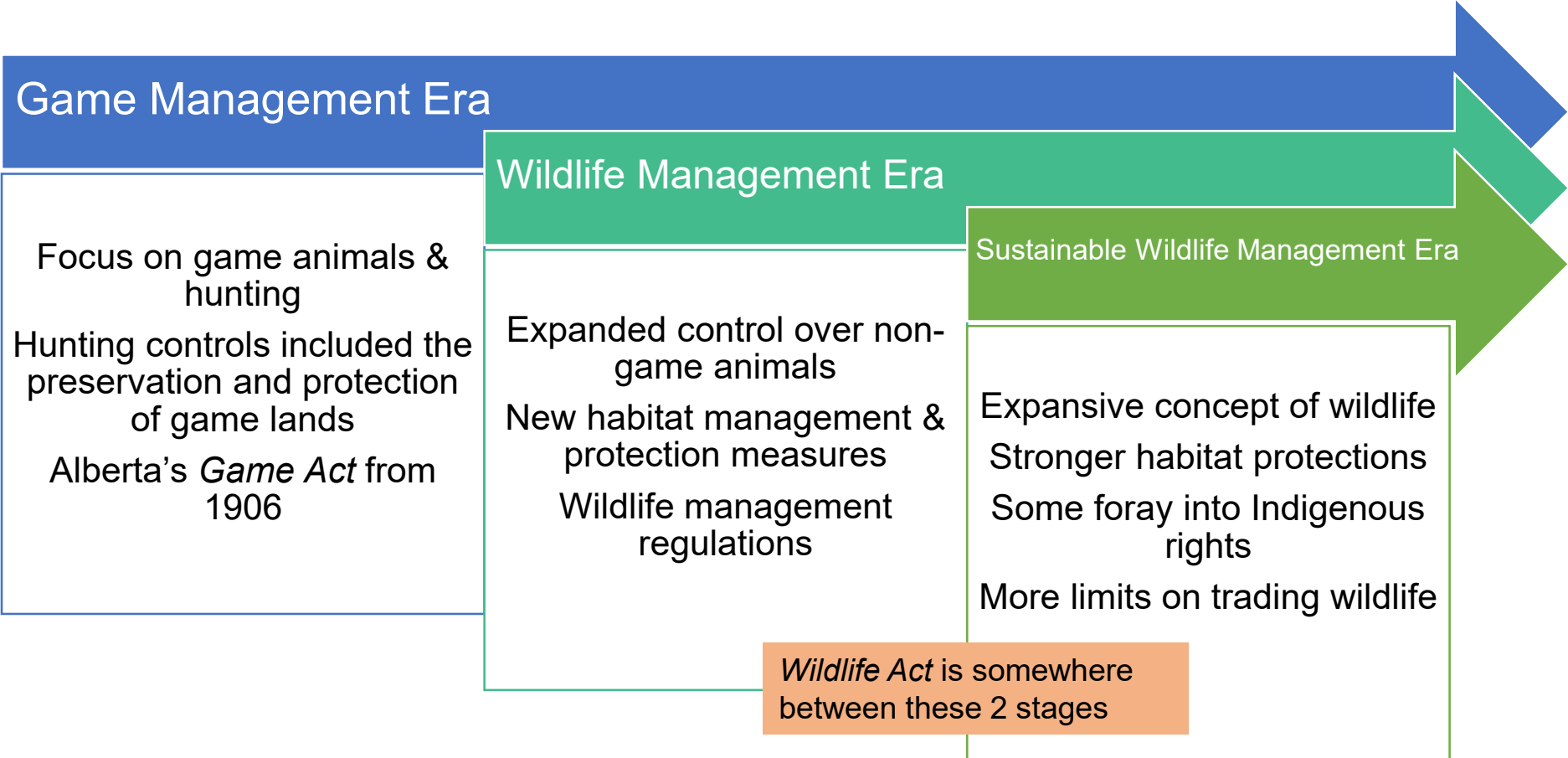
The State of Habitat Laws in Alberta

Volume 1



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A History of Habitat Law in Alberta



The Division of Powers*

Federal (Canada)

- Laws for the Peace, Order and Good Government of Canada
- Sea Coast & Inland Fisheries
- Criminal Law (species at risk)
- International treaties

Provincial (Alberta)

- Management & Sale of Public Lands
- Municipal Institutions
- Local Works & Undertakings
- Property & Civil Rights
- All Matters of a merely local or private nature
- Non-Renewable Natural Resources

*no specific mention of environment let alone habitat or wildlife

According to common law & confirmed in the *Wildlife Act*, ownership of all wildlife in AB is vested in the Crown.



How is habitat managed & protected in Alberta?



Planning & Assessment

- Recovery strategies
 - Planning for habitat protection and other tools for species at risk (mandated provincially and federally – but provincially it basically ends there)
- Land-use planning
 - From small-scale zoning to larger scale regional planning
- Environmental assessments
 - Evaluating projects before approval - with habitat considerations in mind (the challenge is seeing assessments translate into clear enforceable habitat provisions in authorizations)

Area Based Conservation

- Hunting limits
 - Limits or bans in certain areas
- Protected and management areas
 - Designated areas protected from development/interference – to differing degrees
- Habitat protection
 - SARA - tools and application (federally focused)
 - Provincial management areas (Habitat conservation areas/Wildlife sanctuaries under the *Wildlife Act* – protection in these areas is discretionary)
- Land-use planning
 - Planning tools that enable some degree of protection in certain areas

Localized/Biophysical Conservation

- Overall habitat function and supporting attributes are not a focus of law. In AB the focus is more on direct impacts on organisms. Federally, the *SARA* enables more broad supporting habitat requirements through recovery strategies – still discretionary
- Prohibitions re: nests & dens
 - Limits on destruction of specific attributes necessary for species
- Prohibitions against actions within protected areas
 - Prohibiting actions such as installing equipment on protected land or otherwise altering the landscape
- Prohibitions against general damage to plant/animal life

Habitat Consideration in Decision Making

- In law, decisions are not narrowed by habitat mandated factors. There is broad discretion to serve or underserve habitat including through:
 - Exemptions to prohibitions allow decision-makers to approve otherwise prohibited activities, despite impacts on habitat
 - Limits on dispositions in protected areas – limits dependent upon type of protected area
 - Regulations can be used to govern habitat use and/or development or make other decisions regarding impacts – no requirement for regulations to be habitat focused
 - Habitat considerations may be included in a project assessment – not required

Effective Compliance Regime

- Contravention of prohibitions = offence
 - Makes it an offence to contravene certain prohibitions in the Act including some habitat management provisions
 - Are fines/sentences a deterrent?
 - Lake Louise fined \$2M for removal of whitebark pine under *SARA* vs. *Public Land Act* fines range from \$115 - \$575 for public land offences
 - Administrative penalties and their effectiveness?
 - What if the costs of fines is less than the cost of an approval?
- Monitoring & reporting requirements
 - Regional planning is set up to do this but is limited by lack of regional plans.
- Administrative orders
 - Enables the use of protection orders if it is found that an activity is adversely affecting the environment – which may include habitat (both provincial and federal)
 - Highly discretionary

Some Takeaways...

- Habitat Protection (or lack thereof) takes many forms
- Habitat management and protection remains highly discretionary. This means that it is extremely difficult to assess, monitor, and enforce without diving into statutory consents.
- No overarching endangered species legislation in AB

Barriers to Habitat Management and Protection in Alberta Volume 2



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Barriers to Habitat Management & Protection

- Alberta has a “quilt” of legislation that either directly and expressly deals with habitat (parks legislation), or deals with matters that have inevitable impacts on habitat (resource management)
- Adopting an ecosystem management approach and assuming that biological and ecological diversity should be encouraged, several challenges arise

Fragmented Planning & Decision-Making

- Fragmented planning and decision-making:
 - multiple decision-makers often with conflicting mandates and objectives
 - multi-use approach to planning and decision-making
 - sector-by-sector regulatory regimes
- Ecosystem management:
 - principles and operational guidelines for managing human activities in a manner that allows co-existence with ecological processes
- *Alberta Land Stewardship Act*:
 - an incomplete response to fragmented planning and decision-making
- Need effective integration across jurisdictions and agencies

A Key Legislative Gap: Endangered Species

- endangered species managed under the *Wildlife Act* and the *Wildlife Regulation* which provides minimal, discretionary legislative framework
 - no mandate for protection of critical habitat
 - no mandate for recovery plans
- results in a very heavy reliance on policy to address endangered species

Public Land Dispositions

- Use of public lands managed via *Public Lands Act* and the *Public Lands Administration Regulation*
- there are a variety of disposition types – essentially granted to enable resource extraction and access to public lands
- the disposition process is highly discretionary, with little public input, and does not address habitat needs proactively or effectively

Timid Approach to Habitat Management & Protection

- Disconnects between law and science (for example in the selection and level of protection provided by protected areas, and listing of species at risk)
- Lack of flexibility and resiliency to respond to rapidly changing ecosystem conditions and knowledge
- Excessive discretion in decision-making that impacts upon habitat and a lack of sufficient mechanisms for democratic accountability, providing limited avenues for individuals to challenge, question or require laws to be upheld

Jurisdictional Review of Habitat Laws Volume 3



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Jurisdictional Learning

- Ontario
- Nova Scotia
- US Endangered Species Act
- EU and Germany



[William Hartman](https://www.flickr.com/photos/william_hartman/25843351968)

https://www.flickr.com/photos/william_hartman/25843351968

Ontario

- Very similar to SARA
- Prescribed planning and assessment
- Significant penalties

- Environmental Commissioner of Ontario, the MNRF “utterly failed” in this regard – reducing “what should have been a robust system for protecting species at risk to what is largely a paper exercise”
 - Environmental Commissioner of Ontario, Good Choices, Bad Choices: Environmental Rights and Environmental Protection in Ontario (2017 Environmental Protection Report) (Toronto: Environmental Commissioner of Ontario, October 2017)
 - “The MNRF has never denied an ESA permit to any applicant” (at p. 22).
- 2019 proposals “pay to slay” and other changes (see Environmental Registry of Ontario <https://ero.ontario.ca/notice/013-5033>)

Nova Scotia

- ESA
 - Listing is based on peer-reviewed science
 - Precautionary principle
 - ID core habitat

- Analysis - Still no core habitat ID'd

- No regulations

Jamie Simpson, Steven Evans & Lisa Mitchell, "Protected on Paper Only: Evaluation of Nova Scotia's legal obligations to protect and recover mainland moose and other species-at-risk" (February 2015), East Coast Environmental Law at 2-3, online: <https://www.ecelaw.ca/research-reports/protected-onpaper-only-evaluation-of-nova-scotia-s-legal-obligations-to-protect-and-recover-mainland-mooseand-other-species-at-risk.html>

NS Biodiversity Act

- Bill No. 116, An Act to Provide for the Conservation and Sustainable Use of Biodiversity in Nova Scotia, 2nd Sess., 63rd General Assembly, Nova Scotia, 2019 (First Reading March 14, 2019) (**Did not proceed to third reading**)
- Allows creation of “biodiversity management zones” on crown land or (with consent) private land
 - Regulations governing activities and management
- A wide variety of agreements enabled, including
 - Conservation of biodiversity, enforcement agreements, research
- Education programming
- Mandatory “state of” reporting and data sharing

US Endangered Species Act

- Long history of administration (1973)
- Litigious and controversial
 - Listing
 - Critical habitat ID
- Commentaries
 - Prohibitions (“jeopardy” and “take”) are a focus over recovery
 - Critical habitat ID often delayed
 - Safe harbor agreements and habitat conservation plans – private land success?
 - Where there is \$ there is some success

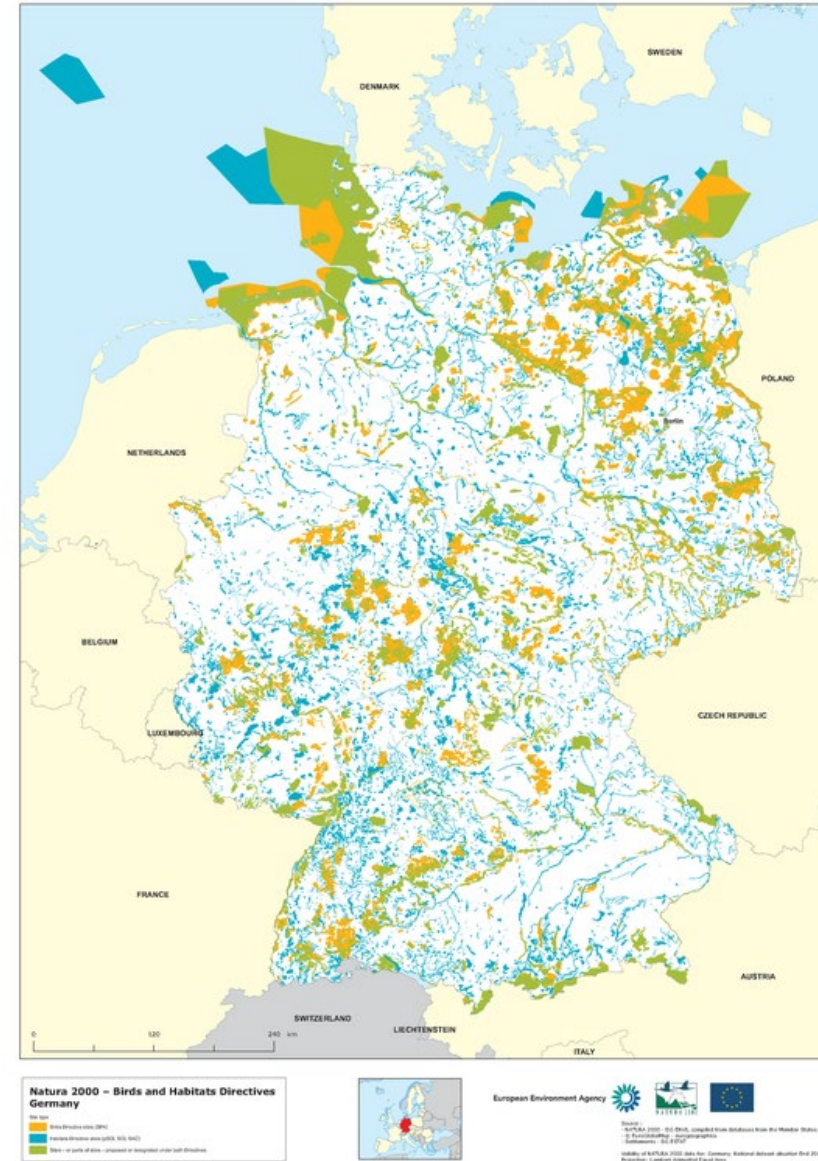
Examples of spending (US)

- 1989-2014 - \$30 billion in federal and state spending on species recovery
- 2016
 - ESA spending (excluding land acquisition) \$1.3 billion
 - Land Acquisition
 - 2016 \$103 million
 - 2015 \$111million
 - 2014 \$121 million
 - (Source: <https://www.fws.gov/endangered/esa-library/index.html>)
 - But funding is disproportionate
 - 80 % of funding → 5% of species
- U.S. Federal expenditures in 2013-2014 roughly corresponded to CAD \$5.70 per capita, whereas the government of Canada only spent around \$2.50 per capita on SARA implementation that same year
 - Smart Prosperity Institute (February 2018) Species In The Balance: Partnering On Tools And Incentives For Recovering Canadian Species At Risk Smart Prosperity Institute (February 2018) <https://institute.smartprosperity.ca/sites/default/files/sr-02-01-18-final.pdf>

EU and Germany

- Birds Directive— includes provisions for preserving, maintaining or re-establishing...habitat (of article 1 birds). (protected areas, special management and establishing and re-establishing biotopes)
- Habitat Directive –drives “ecological network of special areas of conservation” under Natura 2000. –establishing measures and plans for sites, avoidance of deterioration of sites, determination of adverse effects to drive plans and projects, and providing for compensation for impacts
- Dependent upon state implementation
- Federal Nature Conservation Act (Germany)
 - Habitat protection areas
 - Types of access are limited
 - Connectivity of biotypes is important – protected through declarations.

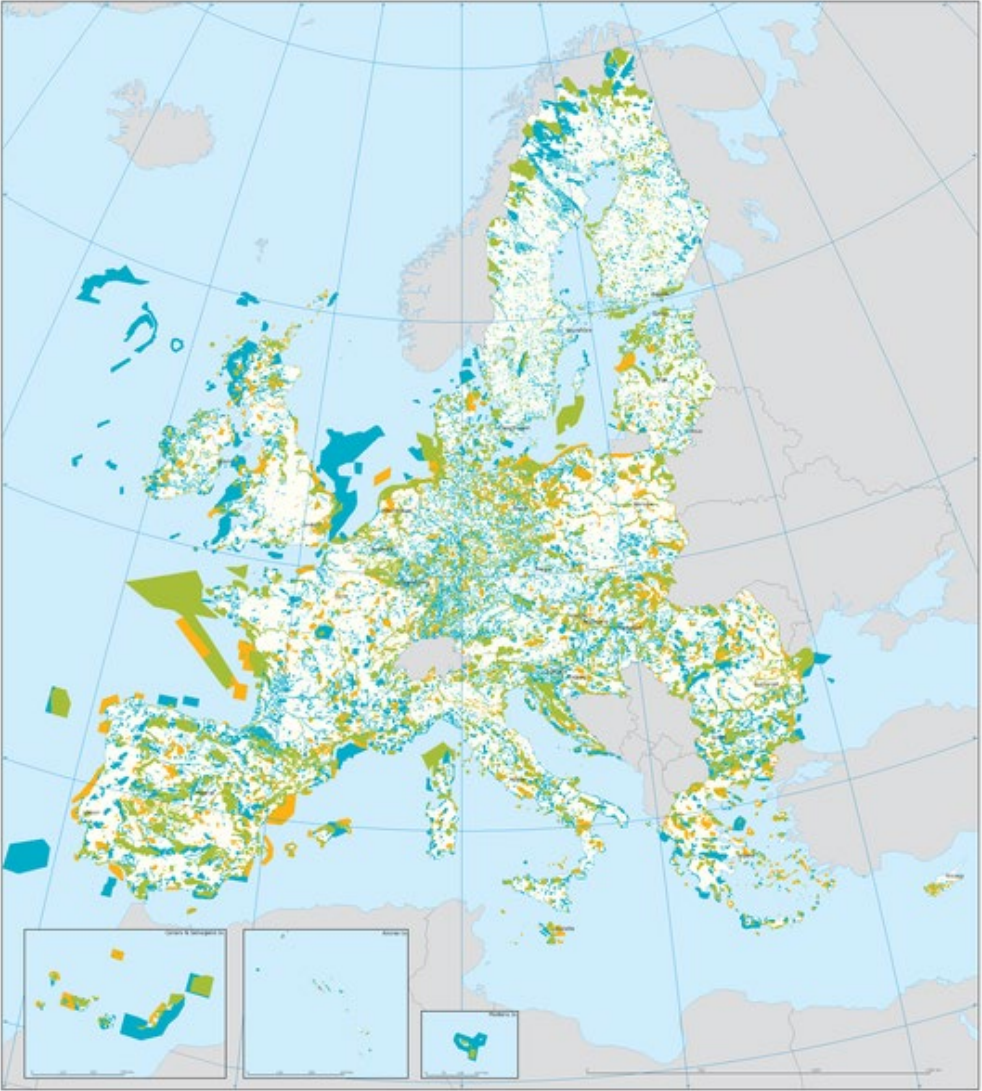
- By end-2017, the network covered 15.5 % of Germany's land area (EU average: 18.2 %), with Special Protection Areas (SPAs) under the Birds Directive amounting to 11.3 % (EU average: 12.4 %) and Sites of Community Interest (SCIs) under the Habitats Directive 9.4 % (EU average: 13.9 %)
 - The EU Environmental Implementation Review 2019 Country Report – GERMANY https://ec.europa.eu/environment/eir/pdf/report_de_en.pdf



Orange – Bird Directive
 Blue – Habitat Directive
 Green – Combined and proposed

[Natura, End -2018, Germany https://www.eea.europa.eu/data-and-maps/figures/natura-2000-birds-and-habitat-directives-10/germany/image_large](https://www.eea.europa.eu/data-and-maps/figures/natura-2000-birds-and-habitat-directives-10/germany/image_large)

<https://www.eea.europa.eu/data-and-maps/figures/natura-2000-birds-and-habitat-directives-10/eu28-birds-and-habitats-directives>



NATURA 2000 - EUROPEAN UNION
Birds Directive sites (SPA)
Habitats Directive sites (pSCI, SCI, SAC)
Sites - or parts of sites - belonging to both Directives

European Environment Agency



Source:
Natura 2000 - 2019 data, coordinated by Member States and the European Commission. Data provided by the Member States and the Commission. Data provided by the Commission and the Member States.
Map produced by the European Environment Agency.

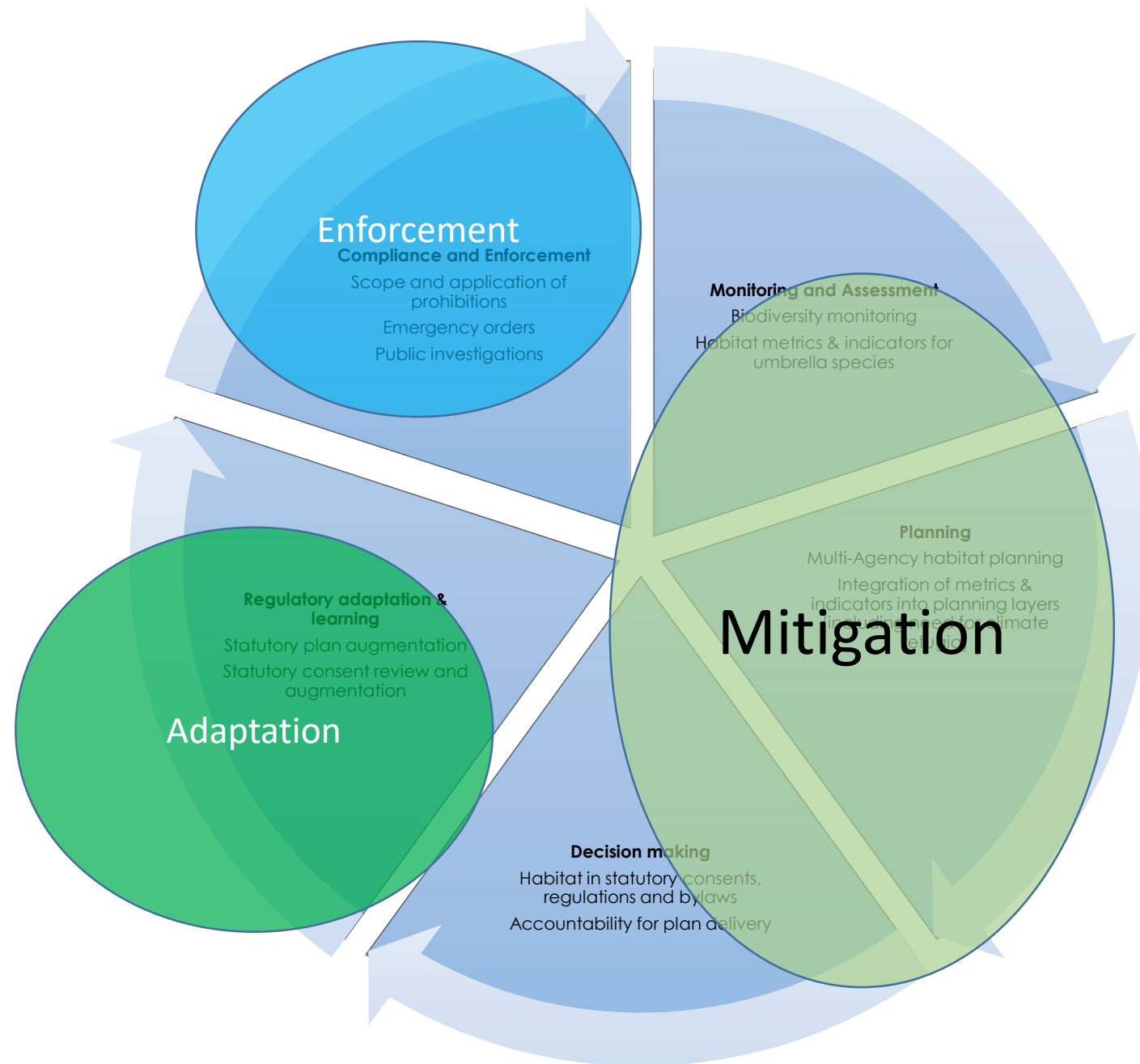
Jurisdictional learning

- EU and Germany approach to connectivity can be a model of moving beyond protected areas.
- Mechanisms to engage in “alternative” approaches to management may be needed in certain instances
- Contentious → requires social consensus/licence

Recommended Reforms Volume 4



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- **Clarify** provincial and regional **habitat policy objectives**;
- **Ensure regulatory coverage** of all relevant habitat-related factors;
- Create a **governance system for monitoring, assessment, and planning** around habitat policy objectives;
- **Ensure integration of habitat policy objectives and plans into decisions, regulations, statutory plans, and policies, by:**
 - Identification of relevant **regulatory tools**, whether that is regional plans, statutory consents, conservation easements, conservation agreements, or municipal statutory plans and bylaws;
 - **Integration of habitat objectives into planning and decision making** of relevant habitat planning layers and decision-making criteria;
 - Creating a habitat governance system that has the technical, scientific, financial and governance capacity to monitor, assess, inform and augment the management and protection measures (i.e. a learning and adaptable governance system); and
- Ensure compliance and enforcement systems are comprehensive and effective.

Governance

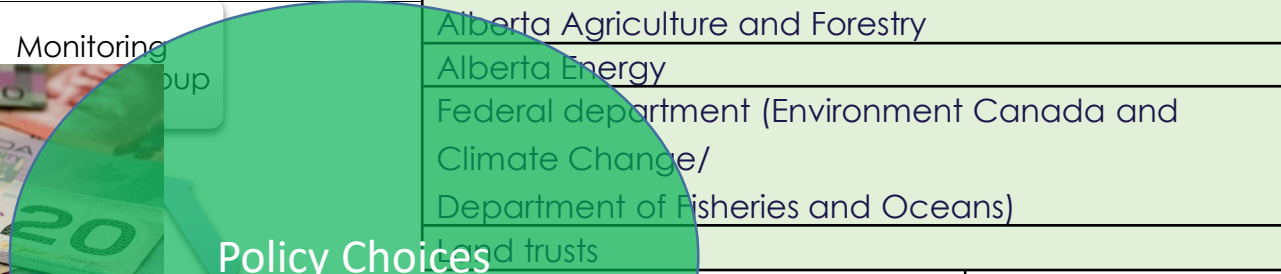
Primary sources of habitat monitoring and assessment
Alberta Biodiversity Monitoring Institute (ABMI)
Alberta Environment and Parks
Alberta Agriculture and Forestry
Indigenous knowledge advisors
Academic institutions
Federal and provincial technical/scientific committees (COSEWIC/ESCC)
Municipal and NGO monitoring agents (e.g. WPACs, land trusts, municipal monitoring programs)
Industry monitoring initiatives (both impact assessment related and ongoing monitoring initiatives)

European Commission 2018 **Mapping and Assessment of Ecosystems and their Services: An analytical framework for mapping and Assessment of ecosystems** EU Discussion Paper

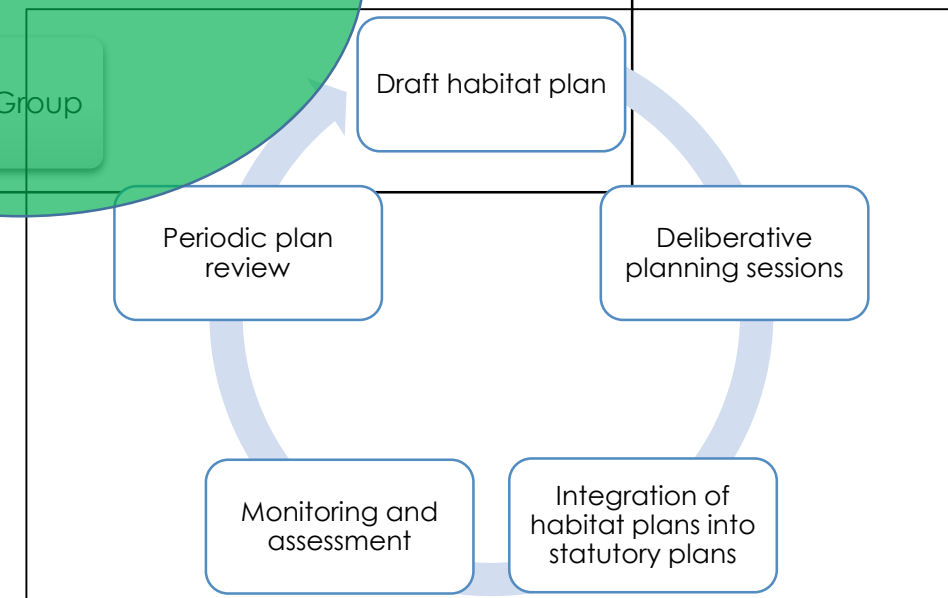
Table 2.2. Hierarchical structure and classification of pressure and condition

Pressures
Habitat conversion and degradation (land conversion)
Introductions of invasive alien species
Pollution and nutrient enrichment
Over-exploitation
Climate change
Other pressures

Ecosystem Condition	Environmental quality (physical and chemical quality)	
	Ecosystem attributes (biological quality)	Structural ecosystem attributes
Structural ecosystem attributes based on species diversity and abundance		
Functional ecosystem attributes		Structural ecosystem attributes monitored under the EU nature directives
		Structural soil attributes
Functional ecosystem attributes	Functional ecosystem attributes (general)	
	Functional soil attributes	



Initial Habitat Plan Development	
AEP	Science Advisory Panel
	Indigenous Wisdom Advisory Panel
Municipalities (regional)	
Regional Indigenous government	
Alberta Agriculture and Forestry	
Alberta Energy	
Federal department (Environment Canada and Climate Change/ Department of Fisheries and Oceans)	
Land trusts	



Adaptation and Compensation

AEP budget in 19/20 \$36m increase
Emissions management + \$84m →
\$48m as reallocation from other
departments

New mechanisms are needed!

Ministry of Environment and Parks – Operating Expense

(millions of dollars)

	2018-19 Actual	2019-20 Estimate	2020-21 Target	2021-22 Target	2022-23 Target
Operating Expense					
Ministry Support Services	24	20	20	20	20
Air	22	20	19	19	19
Land	43	42	41	41	42
Water	70	66	63	62	64
Fish and Wildlife	41	36	36	36	38
Integrated Planning	51	31	31	31	31
Parks	87	81	76	64	64
Land Use Secretariat	6	5	5	5	5
Science and Monitoring	69	70	70	70	70
Emissions Management	147	231	206	202	189
Quasi-Judicial Bodies	14	7	7	7	7
Total Operating Expense	574	610	575	559	550

Fiscal Plan A plan for jobs and the
economy 2019–23

<https://open.alberta.ca/dataset/3d732c88-68b0-4328-9e52-5d3273527204/resource/2b82a075-f8c2-4586-a2d8-3ce8528a24e1/download/budget-2019-fiscal-plan-2019-23.pdf>

Using Existing Tools

- Formalize a system of regulation and management of conservation offsets for use toward valued habitats.
- Develop a triage approach to establishing land disturbance standards using the best available knowledge and integrating cumulative effects.

Compliance

- Legislate clear enforcement powers across sectors for habitat management outcomes.
 - Administrative orders (w/ procedural fairness, i.e. right of appeal)
- Review, evaluate and, as needed, amend administrative penalties and fines to foster deterrence. (more analysis needed)
- Legislate a public investigation trigger process for alleged offences of habitat standards and rules.

Conclusion

- Increase focus on “early phase” avoidance and mitigation. Habitat knowledge must be integrated into plans and decision making to avoid costly emergency measures and adaptation .
 - e.g. Greater Sage Grouse habitat and energy development → government action can contribute to lack of certainty
- Transparency is essential
- Sustainable fiscal measures are needed for governance and operationalization

Learning with habitat outcomes in mind

- Frances E.C. Stewart, John P. Volpe, Brian R. Eaton, Glynnis A. Hood, Dragomir Vuljonvic, Jason T. Fisher “Protected areas alone rarely predict mammalian biodiversity across spatial scales in an Albertan working landscape” (2019) *Biological Conservation* 240 (108252)
<https://www.sciencedirect.com/science/article/pii/S0006320719308584?dgcid=author>
- Erin R. Tattersall, Joanna M. Burgar, Jason T. Fisher, A. Cole Burton “Mammal seismic line use varies with restoration: applying habitat restoration to species at risk conservation in a working landscape” (2019) *Biological Conservation* 108295
<https://www.sciencedirect.com/science/article/abs/pii/S0006320719307013?via%3Dihub>

Questions?

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