

Special Areas Planning Meeting
October 22, 2013
2pm

Mike Daigneault
Tammy Massie
Ian Gill
Randy Bates (by phone)
Al Ott (by phone)

Randy began by stating that the purpose of the meeting was to make himself available to staff for clarification of the directive outlined in his recent email (sent on Oct. 17, 2013) so that staff can make a plan "for the process," and he said he appreciates that Mike has already started the process (in an email reply to Vanessa Lamantia at Department of Law (DOL) on Oct. 21, 2013) that he has committed the Division to and suggested proceeding directly to any questions we had.

Mike suggested going point by point through the email with relevant questions for each item. Regarding Item 1, about setting aside all current planning work, Mike noted that it would be a professional courtesy to inform our agency collaborators on the various planning teams to let them know the plans had been suspended and asked how we would go about getting an approved message we can provide to those folks.

Randy stated he would like staff to put together a draft reply to all planning teams, which he would review, edit, and approve, leaving it to staff whether that would be best in the form of a letter or an email.

Mike noted that each planning effort has a mailing list of interested members of the public that signed up at public meetings to be kept informed of the plans' progress, and would that be the same process for them?

Randy stated that the same letter for the planning teams may be appropriate, and he directed staff to draft a public statement that he would review, edit, and approve, indicating that he was to be informed of any responses from the public.

Mike asked for clarification on whether or not Randy would prefer to be the contact point for all communication with the public?

Randy stated he was fine with staff being the contact point as long as our communication adheres to the communication instructions in the Oct. 17 email, stating that he doesn't "want a dialogue between members of the public and yourselves on what these changes are," and "if that's the type of dialogue you're getting back, that will come to me."

Tammy noted that we've typically communicated with the public about the planning process through the state's online public notice system, and asked if we should also public notice that the current plans are being set aside.

Randy asked for clarification on whether we were using the ADF&G Special Areas planning website for those announcements or the state website.

Tammy clarified that we have used the statewide online public notice system, though there is a "short blurb" about currently active plan revision on the ADF&G planning page.

Randy suggested that staff draft a short paragraph or two, reading similar to planning team letter, for his review and approval, stating that public noticing was "certainly beyond what is necessary," but adding that in the interest of communication it was something he would consider. He asked if we had a sense of how many people we might reach with an online notice that wouldn't be on one of our email lists.

Tammy stated that would be difficult to judge.

Randy directed staff to draft one statement for all four plans being set aside that could be used as a public notice.

With no other questions on Item 1, Mike moved on to Item 2, asking for guidance and clarification from Randy in understanding how he would like the plans prioritized into three phases, and whether or not Randy had any expectation about which plan would be reviewed when.

Randy stated that he had no idea which plans would go in which phase, and that he would leave that up to staff. He indicated that originally he wanted to revise all 14 existing special area management plans in one comprehensive regulatory package by September 1, 2014, but that in communicating with the commissioner's office that timeline got pushed back to two and then three years, with one phase each year. He stated that "if you guys think we can get all 14 done in one swoop, great. He indicated that Item 2 in his email provided some general guidance that staff was to use in selecting the plans for each phase, and that he was looking for recommendations on how this directive can be accomplished. He indicated that "given the governor's desires" as expressed in Administrative Order 266 (AO266), the most controversial plans with the most over-reaching policies should probably be the focus of the first phase, and that the Izembek, Redoubt, and Kachemak were all good examples of controversial policies.

Mike asked for clarification on Randy's definition of "over-reach" in this context.

Randy indicated that he was contemplating completing the edits to the Dude Creek CHA (DCCHA) plan that staff submitted to him a few months back so staff could see what he had in mind.

Al suggested that one example might be the prohibition on jetskis in the Kachemak Bay CHA (KBCHA) and asked, "would that be over-reach?"

Randy stated he thought that was a fair example, as well as Goal 1B in the DCCHA plan.

Mike asked for clarification from Al on whether his question was rhetorical or if he thought the jetski prohibition was an over-reach.

Al stated that in his opinion that was an example of over-reach.

Mike clarified that Al felt the stand-alone regulation was an over-reach of our authority?

Al replied that it "may not be an over-reach of our authority, maybe with respect to that CHA." He stated we must have the authority if we adopted that regulation to begin with, but stated there was no biological reason for the prohibition.

Mike summarized that staff would do the best they could on the prioritization, noting that Randy could adjust the draft list as he sees fit.

Randy indicated that would be acceptable, and asked staff to have a sense of how they'd prioritize the plans in Phase 1 to discuss in person on Monday, October 28.

With no other questions on Item 2, Mike moved on to Item 3, asking Randy for clarification on how he saw the management planning process taking place under this directive. For example, does Randy envision any involvement of the public or other agencies, or would these plan updates be internal only?

Randy stated that the process would follow the requirement of the Administrative Procedures Act (APA, AS 44.62) by putting the regulatory revisions out for review, refining them if necessary, and "moving them through." He stated that what led up to the APA review was yet to be decided and would depend on the specific plan. He instructed staff to develop an outline of the process that would fit into the timeline of September 1, 2014. He stated that there "will probably be some interaction with other agencies" but that he did not know "if there will be federal agency interaction" He also stated he was envisioning a 30-45 day public review period for each phase's regulatory packet, as per the APA.

Mike clarified that staff were to develop the outline of the process leading up to the APA public comment period and run that by Randy, who would decide what, if any, agency interaction would need to occur.

Randy indicated that was correct, adding that he was open to suggestions of what agency interactions might be appropriate for a given plan while pointing out that "we don't have to interact with USFWS." He stated that the minimum the APA calls for is public comments and review, and that is "all that we have to do regulatorily, legally."

Mike noted that special area management plans have traditionally had two parts: the first being the Goals and Policies, which are adopted into regulation by reference, and the second being the Resource Inventory, which is a current-day biological description of the resources in each area. He asked Randy if he was anticipating that the Resource Inventory gets updated as well through this process?

Randy stated that was "not my expectation or intention," and that what he focused on with this commitment was "revising those components that are regulatorily adopted." He stated that if we can update the Resource Inventories when we revise a plan that would be fine, but "that should

not be our focus." He also stated that he was open to not adopting the Goals of a plan into regulation as well, depending on the area.

Mike asked whether Randy's expectation was that staff would be re-writing only specific, controversial policies in each plan, or would all the policies in a given plan get revised as each went through its phase.

Randy stated he had an expectation that "we're revising all the policies." Randy also added that DOL would be "integrally involved with this" but that he wanted to make sure staff "funnels your questions through me." He stated they were aware of his directive but that any legal questions would be put to DOL through Randy.

Mike noted that we had a couple of legal questions and asked Randy to check with Vanessa to see how long DOL would like to review our annual regulatory packet for each phase so that we could calculate that into the timeline. He stated that in the past they have asked for 2-3 months to review each plan, so with, so with multiple plans being evaluated each phase we would need to know how much time they'll need.

Randy stated that he would check, and that Vanessa is "committed to giving us the support we need." He recommended getting DOL to review our regulatory packet before it gets public noticed, which can cut down on revisions afterward.

Tammy noted that it would be nice to know how much time they would need for review prior to public notice as well.

Randy stated that "we can dictate that," and that he would try to involve her as much as he could but that any delays in an informal review by DOL wouldn't hold up the process.

Al noted that "our experience with Vanessa is that she's very efficient and very timely."

Randy agreed.

With no further questions on Item 3, Mike moved on to Item 4. He asked Randy for clarification on Items 4A and 4B, where the former references "statutory purpose" and the latter references "specific authority."

Al stated that he thought the statutory purpose of the DCCHA was for lesser sandhill cranes.

Randy asked for the DCCHA statute.

Mike indicated it was AS 16.20.610.

Randy read AS 16.20.610. He then mentioned Goal 1B, which references minimizing harmful disturbance to fish and wildlife. Randy stated that Goal 1B "is an overreach, going beyond what the specific statutory purpose of the area." He stated that he wants to limit each CHA's plan to purposes mentioned in its specific statute, rather than the general CHA statute at AS 16.20.500.

Mike pointed out that we've always interpreted 16.20.500 as the general statement for all CHAs, which specifically references all the specific CHA statutes, making AS16.20.500 the over-arching authority for all CHAs, which would supersede and be complementary to anything in AS 16.20.610. He asked if Randy viewed the statutes differently.

Randy stated that he did view them differently, and that he viewed AS 16.20.500 as the umbrella policy for the DCCHA, and AS.16.20.610 as the "specific thing that we build the plan around, focusing the plan specifically on its specific statute," and that he did not want to expand the plans to "include our full authority."

Tammy asked what would be considered habitat under that interpretation.

Randy stated he didn't understand her question.

Tammy rephrased her question as: is there any expectation that certain components of habitat will be addressed in a plan and not others?

Randy stated that he expects that for DCCHA the plan will focus on sandhill cranes only and habitat important to cranes. He stated that "to protect the area for moose is not what the DCCHA is designed for."

Mike noted that the DCCHA plan would be shelved for a few years according to Randy's directive, so we could come back to that specific example later. He asked what purpose Randy saw the over-arching purpose statute, AS 16.20.500, serving in the new process.

Randy said he didn't have a different answer to that, and that AS 16.20.500 was the broad umbrella policy that provides the general authority, and that each area is created only for a specific purpose captured in its statute.

Mike asked if AS 16.20.500 or the session law could be used for those areas where the specific statute is only a legal description.

Randy stated that he didn't think session law would make a difference, since it is only intent versus the statute itself, which is law. He stated he wants staff to focus each area's plan on the reason the area was developed.

Mike pointed out that the statute doesn't always provide specific reasons, but that the session law sometimes does.

Randy asked for an example.

Mike pointed out that KBCHA was one.

Tammy added that the Fox River Flats CHA was another example of an area that only had legal descriptions in the statute.

Randy stated he would think about this issue and that Mike had "raised some good questions" about AS 16.20.500 and its relation to the other statutes.

Mike asked about Item 4C, which mentions consideration of compliance impact and burden on affected public, and whether or not we needed to hold public meetings to identify the public affected by each plan and what burden they might be under.

Randy noted that the language was from AO266, and mentioned examples of policies in the Izembek State Game Refuge (ISGR) with the recent unpermitted aircraft landing, in the Redoubt Bay Critical Habitat Area (RBCHA) with the "folks wanting the rocks out of the toe of the hill," and in the KBCHA "with the jetski club." He stated that in those cases, "the burdened public can't reasonably accomplish their project," and "that's something we have to give consideration to." He stated that he wanted staff to use the question of whether our regulations were burdening industries or the public unnecessarily "as a filter as you look at these policies."

Tammy noted that public outreach on the issue might bring new issues to light rather than just those that we'd heard about to date.

Randy stated that he was asking staff to look critically at the policies from different angles, stating that he could "look at them and come up with a reasonable interpretation from many different angles." He stated that in the case of the KBCHA jetski prohibition he did not know why it existed, and stated "why would you single out a user group when those types of engines are all throughout water sports, from jet boats to big boats." He stated that a user group being excluded from an area was a cost to them that was not necessary or appropriate.

Mike asked for clarification on the use of the term "implementable" in Item 4E, given that in the past Randy's guidance has been to write enforceable policies.

Randy stated that the gravel policy in the RBCHA plan was not a clear policy. He stated that the test is "can you stick a biologist on a policy and have them figure it out."

Mike clarified that he meant "implementable" from a permitting biologist's perspective.

Randy indicated that was correct, and added that the industry's ability to read and understand a policy was also important.

Mike asked about the language in Item 4F that referenced limiting strict prohibitions. He noted that in previous discussions DOL had advised policy language that generally prohibited an activity and allowed certain exceptions and asked Randy if he had gotten any other guidance from DOL.

Randy indicated that he had discussed that issue with Vanessa. He stated he did not have any formal guidance from DOL on the topic, but that his goal was to promote a case-by-case evaluation of each project, and that he had "written a great number of prohibitive policies and never heard that from DOL."

Tammy asked if Vanessa had any other suggestions for policy language that would allow only very

specific exceptions to a generally prohibited activity.

Randy stated Vanessa "has said our existing policies are poorly written," and that the issue might be best addressed by lead-in language such as "except in the cases noted below."

Mike asked about Item 5, which addresses public hearings under the APA, and whether Randy envisioned holding public hearings only in major population centers around the state, or would they only be held in the affected communities of the plans in each phase.

Randy stated that "a public hearing is not required under APA, but we could hold it if there's a compelling reason to do so." He also noted that public hearings are not to engage with the public, but for the public to enter their testimony. He stated he was open to holding informational meetings before public hearings, but that DOL had advised that public hearings were not for us to dialogue with the public. He suggested it might be appropriate to have a meeting in Homer for the KBCHA, but that going to Cold Bay for a hearing on the ISGR might not make sense.

Mike asked who, in the event we held a public hearing, would be in attendance?

Randy stated that department staff would lead the meetings, and that he "may not be the front and center, you guys might be presenting," but that he didn't "want to put you in a position to take a whupping from the public."

Mike clarified that Randy would plan to attend the public hearings.

Randy stated he "would most likely plan on attending all of them," but that he "would not plan on being the spokesperson for this." He stated that "this may be a directive, this may be an initiative that I came up with, but you guys are going to lead it."

Mike stated there were no questions on Items 6-8.

Al asked if we thought we could do this process policy-by-policy, or if we would have to stick to doing it plan-by-plan.

Mike stated that we hadn't thought that far yet, but that seeing as how the regulations we'd be amending were organized by plan we would likely have to approach it plan-by-plan.

Al asked if all the camping policies, for example, were generic and the same every time.

Mike stated they were similar but not identical across all plans.

Mike then asked Randy about the communication directions in the next-to-last paragraph of the Oct. 17 email. He noted that the paragraph describes communication "outside the Habitat division," then references "department communication", and asked how exactly these two differed. Also, he noted that "external communication" was mentioned separately and that he wanted to make sure we understood the instructions.

Randy stated that staff interactions with the Wildlife division would adhere to the instructions in first sentence, limited to facts, within your area of expertise, no interpretation or speculation. He pointed out that he does understand how sensitive this issue is, and that it "is changing what you believe in and what you have based your work on." He stated that he does not "dismiss that this might be hurtful or challenging to embrace," but that he does not want staff to engage with wildlife and debrief about that challenge. He directed staff to summarize all conversations with Wildlife staff immediately with all salient facts and forward that for his review. He also stated that if we are contacted by anyone outside the department, including the media, the public, and other agencies, that he would review any response before it was sent. He stated that his intent was to minimize internal speculation about the bigger issues that might be driving this new initiative.

Mike asked if there were any bigger related issue that he needed to know about.

Randy stated that he did not understand the question.

Mike stated that he was "just not aware of bigger picture issues" and wasn't clear on what Randy had meant.

Randy stated: "I don't know that I have any hidden big issues here, just don't speculate on why we're doing this, don't speculate on changes in policy, just don't do it."

Mike indicated he understood.

Tammy asked for clarification on whether or not the communication instructions applied only to the special areas planning process.

Randy stated that yes, this covered only "essentially from what I can tell your world as we move forward here."

Mike asked Randy about funding issue, noting that the State Wildlife Grant (SWG) funding for special areas planning has specific restrictions and cannot be used to pay for the development of State regulations, so he was not clear how Randy wanted to fund staff time for this regulatory revision project.

Randy stated he would take a look at the SWG requirements and asked how staff has accomplished special areas management plan revisions to date given the funding restrictions.

Mike clarified that the SWG guidelines specifically reference an overall planning process that is collaborative and has as a goal the improvement of communication between state and federal agencies. He noted that SWG funding had never been used to pay for staff time devoted to adopting plans into regulation, only the collaborative, inter-agency development of those plans.

Randy requested that Mike send him the SWG requirements, stating that "it may just be a creative writing exercise where we have to justify how what we're doing now will improve communication with federal agencies down the road." He noted that Doug (Vincent-Lang, Director of the Wildlife Division), "has not indicated this is a problem and is fully on board," and was not aware of any

funding restrictions, either.

Mike stated: "to be completely honest, Randy, given the fact that we'd be the ones charging our time, I'd have an ethical problem with that."

Randy stated: "if I decide to go forward with it, then that's my issue, but if you choose not to do the work, then that's an issue you and I will have to deal with."

Mike said he had no further questions and asked if Randy had anything further.

Randy stated that he would be in Anchorage on Monday, Oct. 28, and to plan on meeting just after 10am that day to discuss the draft timeline for Phase 1. He stated that he appreciated staff efforts to date, appreciated our questions, and would follow up with DOL on the issues we'd raised. He also noted that "anything that comes out of this process will be considered confidential and deliberative," as instructed staff to "keep it internal as appropriate."