

Special Areas planning meeting  
July 16<sup>th</sup> @ 9 a.m.

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

Mike began the meeting by referencing Randy's email on 7/15 stating his desire to meet and discuss his intent for the Special Areas planning process.

Randy stated that he does think the edits he provided yesterday were current. He does not believe they have changed from his previous comments, but they may have been refined to provide more clarity on what he is seeking. He stated that he is aware that "this has gotten relatively out of control." He stated that the Public Records Request, the letter from The Nature Conservancy (TNC), the upheaval from Habitat and Wildlife Conservation staff, and his conversation with DNR are all the result of a misunderstanding. He stated that his intent is not to present a drastic policy and protocol overhaul with respect to the Special Areas management plans, and that "without question we need to manage that better."

Mike asked for clarification on whether Randy meant we need to manage the perception or manage the process better.

Randy stated that he "does not like how this has gone," and he feels like the public has been fed some level of information or understanding of this issue in order to create a fear factor. He stated that "there should not be a fear factor." Randy said he thinks the public records request is fine, and that he has let the reporter know he wants to reach the public in a way that is meaningful and informational. He thinks it's an interesting [public records] request, and he hopes it leads to an informative story. He reiterated that he "doesn't like how things have gone to date," and that he wants to "clean it up so we can work forward." Randy stated that his vision was accurately described in his recent email to Tammy (July 15, 3:15pm). Specifically, he wants to not include other authorities in our plans in situations when they have been included there for courtesy in the past. He clarified, though, that if there is overlap with another agency's authority, such as DNR or DEC, and we have shared authority to manage something, then we should include it in a management plan.

Tammy asked for clarification on whether that would include the authorities and concerns other divisions with ADF&G, such as Wildlife and Sport Fish.

Randy stated that was correct, and said that the interpretation that he thinks these plans should be Habitat only documents is inaccurate. He stated that these plans are departmental plans, and to the extent that Wildlife Conservation and Sport Fish have relevant issues those should be included in the management plans. Randy asked Tammy if she had an example of a specific concern when that would apply.

Tammy suggested a Public Access policy, which covers issues related to Habitat, Wildlife, and Sport Fish's interests in many special areas. She asked if a policy like that should it be included in a plan.

Randy stated that so long as a policy is enforceable within the context of what these plans are intended to do, then yes. Randy said he does understand that we want to create and maintain access for the public to special areas, but that he does not understand why that has to be a policy, which is adopted by regulation.

Mike asked for general clarification on the phrase "enforceable within the context of what these plans are intended to do."

Randy noted that it was a fair question, and asked for an example of a scenario in which someone would rely on a Public Access policy to do something in a Special Area.

Mike pointed out that Randy's question itself suggested that these plans would be intended to relate to Habitat permitting decisions only, as opposed to guiding general management.

Randy stated he thought that was a fair interpretation, and stated that he clearly understands how the policies relate to HAB permitting decisions but doesn't understand how a regulation/policy would be used by Sport Fish or Wildlife.

Tammy suggested that an example of that would be Sport Fish commenting to DNR on an easement in a Special Area, in which case they would refer to our policy in the plan to inform their comments.

Randy stated he could agree with that and was aware that other agencies have the authority to comment on DNR reviews, so he can see how and why he would need something in the plan to inform those comments. He clarified that he was considering "permitting" review in the broader sense of any applicable agency's authority to review a project in Special Areas.

Tammy proposed the example of a third party wanting to install a boat ramp as a project that it would be helpful for ADF&G to have a policy to refer to. Randy pointed out that a boat ramp would require a permit. Mike suggested that a boat launch could be just outside a Special Area but would still increase the public's access to the area's resources. He also noted that there may have been access concerns at DCCCHA, and Tammy clarified that the concern was in balancing multiple uses of the area, such as bird watching and hunting, which don't require permits, but may need to be managed in a broader sense. Randy pointed out that this example would still fall within the broader sense of "permitting" by an agency with applicable authority.

Mike asked about DNR's role, which would be to manage commercial uses in an area, and pointed out that an Access policy would provide them with guidance on managing

multiple uses. He also noted that one of the primary past purposes of these plans is to provide that type of guidance.

Randy asked for clarification whether there was a situation in which DNR would require a permit but ADF&G wouldn't. Tammy suggested the example of staking a mining claim before working it. Randy noted that any activity under 5 AAC 95 that would impact the habitat would need a permit from us, such as when someone wanted to work that claim.

Mike asked for clarification on 5 AAC 95.420's authority vs. a management plan's authority, and how Randy saw the role of the plan in making 5 AAC 95.420 more specific.

Randy stated that he views 5 AAC 95.420 as the authority that determines when a permit is required from Habitat, and he views the management plan as providing specificity for how we condition a permit required by that regulation. He stated that he thinks 5 AAC 95.420 provides enough guidance for a biologist to review a project, and that technically we don't need a management plan, but that a plan is helpful because it gives specific guidance even though the authority comes from 5 AAC 95.420.

Randy asked if there were any other questions on that point, then proceeded to the second bullet point from his 07/15 email to Tammy, stating that he would like to see unenforceable language removed from our management plan policies, and that he would like to "clean up" the language so it is clear and enforceable.

Tammy asked for clarification on what Randy meant by "enforceable," and whether he meant in the sense of managing the public or our permit decision. She noted that Habitat's permitting decisions aren't typically clear-cut, enforceable situations.

Randy noted as an example his edits from the DCCHA draft plan, removing words such as "recognize" and "encourage" because there are not implementable by permittees.

Ian asked for clarification on how to write a policy that would be enforceable but yet only provide guidance to a permittee.

Randy asked about Jackie Timothy's edits to the draft DCCHA plan. Tammy clarified that Jackie's edits took the plan in an entirely different direction and added language from the evaluation section to each policy in a way that didn't clarify the issue.

Mike returned to Ian's question and asked Randy for further clarification. Randy noted that much of the relevant information for a permit decision could be contained in the Resource Inventory of a plan, and stated that if someone needed to find the intent of a policy it should be spelled out in the Resource Inventory. He stated that policy language should include the rule for enforcement and not be the history of what led up to the policy. The example language from the DCCHA plan was non-enforceable, and from his perspective it was not appropriate for a policy that would be adopted into a regulation.

Tammy attempted to summarize Randy's perspective as: policies adopted by regulation must be applicable to permitting situations. Randy agreed, but clarified that he meant it in the broader sense of "permitting," including reviews and comments by other agencies, too.

Ian asked if we were over-interpreting his meaning of the phrase "intent language," such as the words cut from the DCCCHA draft, because we are having difficulty determining what falls in between not restricting a permitter's discretion and not providing any intent or guidance type language.

Randy agreed that it might be the case. He stated that he is not opposed to saying we should avoid impacts in a policy, and that using the term "consider" could be reasonable in certain circumstances. Randy stated that he is not trying to fully restrict a plan's policy language, and that he understands there must be some language in a plan's policy that would give guidance. He stated that he thinks anything adopted into regulation needs to be tightly written and enforceable. He stated that he would like it if the public would know the level of compliance based on reading our policy, and that he wants the permitters to know how to apply the intent appropriately. He stated that in the best case scenario, an applicant would get all the guidance they would need to know exactly how to develop a project that minimizes impacts from the plan. An applicant should be able to come to a permitter with a completely fleshed out proposal that minimizes impacts, so that the permitter does not have to condition the project during the review.

Ian asked about the example of oil and gas policies in the Susitna Flats State Game Refuge (SFSGR) plan, pointing out that the current permits for that area get guidance for conditions from DNR's mitigation measures rather than our management plan.

Randy stated that he does believe if the mitigation measures included within DNR's leases do include appropriate measures for the refuge and address a resource/issue that we regulate, then they should be included in our permit conditions.

Mike stated that it might be preferable for us to have the mitigation measures spelled out in the new draft of the management plan, rather than relying on DNR's mitigation measures. Randy stated that he was not sure he agreed, as he was not sure that a Habitat division permitter would be limited only to only considering our policy when they condition an activity. Mike asked what other sources they could consider. Randy stated that his understanding was that under 5 AAC 95.420 we have broad general authority to evaluate and determine compliance and condition our permits, and that the policies in our management plans supplement our authority and provide an implementation technique to hone in on specific activities. He stated that in that view, conditioning our permit based on something developed by DNR would be appropriate.

Ian asked if it would be appropriate in Randy's view to include a reference to DNR's mitigation measures in our revised management plan policies, possibly adding specific consideration for the SFSGR. Randy stated that he did not think it would be appropriate to refer to DNR's mitigation measures in the actual policy. Mike asked why not, if we are

providing guidance to the permitter with the policy, and Randy replied that we should avoid citing DNR's authority in our policy because we can't enforce it.

Ian stating that he was having difficulty understanding how to write a policy that avoids any prohibition and intent language, but still offers guidance. Tammy clarified that including the reference to DNR in the SFSGR oil and gas example would help to communicate the context to a Special Area Permit applicant. Ian noted that redundancy can be helpful in communicating a consistent message to the public.

Randy asked to see an example of an SFSGR oil and gas policy draft in writing in order to get a better sense of the issue. He also indicated that he wanted to review the draft SFSGR plan before the public review draft was circulated.

Randy proceeded to bulleted items #3 and #4 from his 07/15 email, noting that they should be self-explanatory. Mike asked for clarification on bulleted item # 3 from his email. Randy clarified that he did not intend for the management plans to be Habitat division documents, and that he meant "permitting" in the broader sense of any agency review. Mike asked for clarification on whether or not a plan's policies themselves were to only refer to Habitat Division permit decisions, and Randy clarified that the policies were to refer to permit decisions by DNR or any other related agency permitting issue. Tammy clarified that Randy meant any agency with management authority in a given Special Areas, and Randy agreed. He noted that some of the concern that had been generated in the public fervor is around this concept, and that he is not trying to limit these policies to relate to the Habitat Division only.

Mike moved on to bulleted item #4 from Randy's email, asking for clarification on Randy's use of the term "history" not being included in the policies. Randy stated that this was still a developing issue and that he would like to see an example policy from the SFSGR before discussing it any further. He stated that to the extent that policy language can help a permitter condition a permit, then it's necessary and important. Mike noted that helping folks condition a permit and make a decision is a helpful clarification on Randy's vision for Special Area management plans.

Tammy brought up an example from the Willow Mountain Critical Habitat Area (WMCHA) draft plan, asking about intent language in that area's Trails policy that Randy had edited. She asked if in that example changing the policy language to state "the number of trails in the CHA will be minimized" rather than "the intent of this policy is to minimize the number of trails in the CHA" would be acceptable. Randy stated that change seemed reasonable and agreed that it would be acceptable.

Randy moved on to bulleted item #5 from his email, which he stated was a key and critical piece. He noted that certain recent projects had brought to light that in some cases management plans were restricting Habitat permitters, and that he would like to retain as much authority for these decisions as possible for our division biologists. He stated that "we have a pretty doggone good track record in Habitat with conditioning projects and still moving them forward," and he said he wanted to allow the biologist to make the

decision. He stated that even though the public may want to see prohibitions to address their social expectations for the area, prohibitions to manage socially perceived impacts are not acceptable. He stated he was concerned about socially-related impacts of certain activities restricting permittees instead of policies founded in biological impacts to habitat.

Ian pointed out that the role of the planning team is much bigger in shaping a plan's policies than the role of the public, and that a planning team, which includes the area permitting biologist, was designed to streamline the decision-making process by getting everyone the permitting biologist would potentially consult on a permit together to talk about the issues all at once. Randy stated that he agreed with that approach to a certain extent, but would also point out that the plans are in place for too long for that to work properly. He stated that as technology changes the impacts of an activity can be reduced, as in the case of ATVs. He stated that he was not for or against ATV use, but outright prohibitions on them might not always be appropriate in all areas. He also noted the example of jet skis in Kachemak Bay, where a number of changes in their manufacturing over the years may make them more compatible with the Kachemak Bay Critical Habitat Area (KBCHA). He also noted the example of drill rig storage in Kachemak Bay, which was prohibited despite the fact that there was a relatively small impact on the habitat, and that the permitting biologist for that area should have been able to permit and manage drill rig storage, instead of us running afoul of the law. He stated that that was problematic for him, and given the time span on these management plans, outright prohibitions just won't work.

Mike clarified that in Randy's view prohibitions on an activity might be acceptable if there is a clear biological reason for it, but not just for social purposes, and Randy agreed.

Tammy pointed out that development activities occasionally conflicted with the recreational uses of a Special Area, and Mike followed up by noting that each area has multiple goals, including public use and enjoyment, which were included in statutes, so it would seem to follow that we have the authority to prohibit activities that interfere with those activities.

Randy pointed out that continued public use as a statutory requirement did not by nature conflict with development in all cases, particularly if DNR has authority to issue a lease for the activity. He noted that the development may need to occur, as in the case of subsurface mineral rights, and that's the "black box" of what we do is figure out how to make those two activities compatible. He stated that he understood Mike's point, as the lakes he used to fish in the valley in Juneau now have houses on them. He said he knows we've lost a lot of areas to development, and that he "feels it, sees it, knows it, lives it." He stated that this is the job we in the Habitat Division have to do, and that we don't preclude development from happening but have to figure out how it can proceed compatibly with recreational uses and habitat concerns. He pointed out that on the North Slope they deal with similar issues where pipelines oppress the "ambience of subsistence uses."

Mike made a joke about using the word "ambience" in all future plans.

Tammy pointed out that on the North Slope the pipelines run across general state land, and noted that we should have a higher standard of protection on Special Area for these activities. Randy agreed, but stated that he didn't want to take any activities off the table. He mentioned the example of Chevron cleanup of Ivan River, within the SFSGR, where he had observed many birds in the area while Chevron was in full-on operational mode there. Randy stated that he wants our staff to determine if an activity is compatible, and only as a last result would we ever prohibit an activity.

Mike thanked Randy for clarifying his positions and moved on to the issue of Department of Law (DOL) input, which was mentioned in the 07/15 email from Randy to Tammy. Tammy offered to summarize the legal situation with respect to TNC and the DCCHA. Mike clarified that we had provided Randy with the background info for him to check with DOL on the land status and grant restrictions issue.

Tammy pointed out that she had a related question, which was how to respond to TNC's question about the draft management plan for the DCCHA. Randy stated that the plan would implement the statute and that was all that needed to be said.

Mike asked about whether Randy had a chance to discuss the TNC/DCCHA land transaction with DOL yet, and Randy stated that he hadn't. Mike noted that it would be relevant to the TNC response he and Tammy were drafting. Randy said to draft the letter assuming we wouldn't get the guidance from DOL in time to give a timely reply, but that he would try to get DOL's input soon.

Tammy asked one last clarification, which was whether the draft reply to TNC could indicate that we have developed the legislative proposal for adding the lands in question to the DCCHA. Randy stated that he would prefer we not mention that we've drafted that legislation yet, as that might lead TNC to ask why it hasn't been forward to the governor. Randy stated that he wanted the reply to indicate that it a legislative change would need to occur to add these lands to the DCCHA, and that the process would play itself out in 2014. Randy stated that at all costs we need to protect the commissioner and the administration and not box them in or take a position on this legislation at this point. He stated that he and Doug Vincent-Lang are hopeful that the legislation will be approved, but that it's a much bigger game than just their wishes. Mike clarified why we couldn't take a position on this, and Randy replied that the commissioner would make her decisions on legislation in August, and that it wasn't our place to get out in front of them on that process, as he would get crucified for that. Tammy noted that the department is obligated by the agreements already in place to propose the boundary changes, and Mike pointed out that it seemed as though we have committed to something that we can't control. Randy agreed, and mentioned that even if the administration or the commissioner didn't approve, he and Doug Vincent-Lang would be looking for a friendly legislator to push this through. He stated that the bigger picture was whether or not the governor would support this change or support us looking for a legislator, which Randy described

as high politics well above his position. He stated that he wanted to find a way to make it happen, but that it was not his decision.

Mike stated that he understood and asked if Randy had any other questions. Randy said that he appreciates our time and working through this with him. He was well aware of the angst this new vision has created, and that he was not happy with the angst and hoped our conversation has created some clarity. He stated he would be happy to discuss more and looked forward to seeing the SFSGR example policy and talking again.