

HPA Citizens Advisory Group – Meeting Notes

Date: November 29, 2018

Time: 10 am to 3 pm

Place: PUD Association Building, Olympia, Washington

Summary: Follow-up actions

Item	Follow-up
Briefing by Scott Bird mid-way through next year on pending cases	Randi will schedule
Issue of voting and recommendations by the CAG	Randi will discuss internally and get back to the CAG
Update on Orca Task Force	Schedule for next meeting
Roundtable agenda item	Add to future agendas

Attendance:

Amy Carey	Brandon Roozen
Scott Brown	Stephen Whitehouse
Stephan Dillon	Lisa Willis
Kim McDonald	

Staff: Randi Thurston, Dan Doty, Teresa Scott, Scott Bird, Allison Cook, Neil Aaland

Welcome/Introductions/Agenda Review: Neil Aaland, Facilitator, opened the meeting. Introductions were made around the room. The agenda was reviewed. Teresa noted that documents are being uploaded to the HCICAG website as requested by members.

HCICAG Roles, responsibilities and moving forward: Randi led this topic. A revised charter was handed out. When the CAG was formed, WDFW wanted feedback on HPA program implementation. It was not intended to discuss statutes and rules, but rather policies and procedures. The bylaws also indicate that CAG members are appointed for three years. WDFW is opening up membership and will issue a press release in December soliciting applications. Members attending the meeting were given “term termination” letters (if their terms were to be terminated). Kim asked Randi what specifically WDFW was looking for in membership, Randi said that WDFW was looking for more members from the regulated community. Randi noted that it’s also important to have advocacy group representatives to ensure their values and perspectives are represented.

Comments and observations:

- Steve wonders where perspectives from the CAG go [They go through Randi to Jeff Davis, who discusses them with the Senior Management Team. Randi is accountable for getting back to the CAG with outcomes.]
- There is no agency request legislation related to HPAs this session; others may introduce legislation but she is not aware of any
- Recommendations go to staff because of the operational aspects; DFW has used advice from this group
- Brandon agrees there is value in hearing from the regulated community
- Stephan wonders if the role is more advisory, is there a way to bring issues up for consideration?
- Lisa noted the issues from her constituents focus on finding mitigation; solutions may be a policy change

- Amy thinks charter redraft is okay, but notes that discussion may lead staff to think a statutory change is needed; she wonders about having roundtable part of every agenda [Neil says we can include that]
- Kim wonders what is meant by implementation? [Randi provided examples of permit intake, how we provide information to public, do we have the right information]

Randi suggested that people can propose topics with an e-mail to her and Neil. Neil noted the agency document on advisory groups says consensus or a vote is not required. Brandon thinks it is important to get perspectives, this can be more helpful than a vote. Randi committed to getting back to the CAG with the results of a discussion.

Compliance: Started with a discussion about Orca Task Force recommendations. There are 36 recommendations. #3 (Apply and enforce laws that protect habitat) comes out of goal 1 (increase Chinook abundance). Randi said this will be a legislative request; intention is to grant WDFW reasonable civil penalty as other agencies have. Comments and questions:

- Are different agencies in silos? [this might be an implementation suggestion]
- Lisa noted as a permittee she thinks this means “increased prosecution”; will WDFW be getting into water quality issues? [No, that jurisdiction is with Ecology]
- Amy noted the agencies need to get on the same page regarding their authority

The discussion then moved to background on WDFW compliance authority. The agency first tries to work with violators. The goal of civil enforcement is to deter, not to punish. The goal of criminal enforcement is to punish. They don’t have the tool of “orders” (e.g. stop work orders). Other agencies don’t have the “per day” civil penalty. It can be difficult to convince a local prosecutor to take cases (they are the ones who do enforce these laws).

Stephen Whitehouse thinks the \$100/day is problematic; over three months it is \$9,000. A straight fine would be better. Amy said the current interpretation is there is not an end to the \$100/day fine, no upper limit in the statute. Randi said they provide technical assistance to the regulated community and seek voluntary compliance. Fines and penalties cannot be used to fix the problem, they go into local and state funds. Brandon is concerned that heightening enforcement can get too much into the mode of other agencies that use too much regulatory enforcement. Lisa compared DFW with Ecology enforcement, thinking that DFW fixes are not expensive and not a deterrent.

There are obstacles to doing enforcement. WDFW doesn’t think the \$100/day is a deterrent. The statute is unclear, there are competing priorities with staff. Unpermitted work is often not found. The lack of criminal prosecution is a problem, and there are not positive outcomes for the time invested.

A lunch break was taken at approximately noon.

Discussion: What steps should WDFW make to increase compliance?

Brandon is concerned about unintended consequences. He is not sure that increased HPA enforcement would help. Amy thinks that the issue is not really “increased enforcement” but what tools are needed; might need more staff. Lisa noted WDFW is not very visible outside of hunting and fishing licenses.

Additional comments:

- Consider adding a place on the permit application for “project manager” to identify someone as a contact who is actually involved in the work
- Randi noted that the number of inspections (before, during, after) is problematic; is there a way to triage the highest priority?

- Stephan wonders about developing a specific checklist and having brief “ocular” inspections
- Kim thinks the priority needs to be on critical habitat
- Amy thinks DFW needs to figure out what new staff capacity they need on compliance

Compliance and enforcement by local officials

Scott Bird, WDFW, came to discuss. He had a handout titled “Fish and Wildlife enforcement at a glance”. One big issue is emergency rules; WDFW issues an average of one emergency rule per day. They are trying to manage behavior with compliance. The officers also serve as backup to local officials. It takes about two years to prosecute a case starting from the date of the action. He does continuing education on enforcing natural resources cases for local prosecutors.

Brandon wondered if there are statistics on which types of cases are tried; there are no current statistics. The number of cases prosecuted is low; hydraulics cases are a small subset. Scott said he could come back during the next year and review the pending cases. Randi agreed to schedule this and it’s on the “to do” list.

Some concern was expressed that prioritizing orcas over other things might reduce prosecution of otherwise significant violations. Lisa agrees and had a suggestion to have WDFW work with local paralegals instead of attorneys. Stephen noted that local courts are really busy, and hydraulics matters are tricky. WDFW could provide direct assistance, e.g. preparing paperwork for use by prosecuting attorneys. Randi asked if they had to be an attorney; Scott noted that in-court work has to be an attorney but supporting work does not. Amy wants to keep reminding us that there is poor wording in the recommendation from the Orca Task Force. We need to stop telling people that prosecutions are rare. Perhaps the department could draft memos to prosecuting attorneys explaining why this enforcement is important.

Brandon said that orcas are federally protected species and should be a priority; Amy noted that prosecuting by local prosecuting attorneys is not the best tool.

After the Fact Permits – Proposal from Stephen Whitehouse

Stephen said he had some comments by e-mail from CAG members. He thinks WDFW should pursue this. Brandon thinks it is worthy of moving forward. Lisa looks favorably on the recommendations.

Amy appreciates the work but doesn’t support the proposal, thinks it is a slippery slope. Kim agreed that it is great information. Her issue is more temporal; timing may have impacted fish life already. Scott is concerned that contractors are not information the homeowners of the need to get permits and what that means. He can’t agree and thinks the contractors should be liable. Stephan is also not supportive of the request.

Next steps

Neil noted the following points:

- Good to allocate the time for discussion, but need more of that time
- Members need to review the meeting notes carefully and provide feedback to Neil
- Members said it works well to have things early
- We did not spend enough time on Orca Task Force (this is worthy of expanded discussion). We should discuss at next meeting.

The meeting adjourned at 3:00 pm.

Next meeting: March 14, 2019 – Location TBD

Attachments (submitted by CAG members in advance of meeting)

Attachment 1 From Norm Peck: Options for Increasing Compliance

Attachment 2 from Shannon Moore: Text of E-mail regarding several agenda topics

Attachment One
From Norm Peck

Options for increasing compliance by WDFW

Virtually all options for increasing capacity for meaningful enforcement to assure compliance would require legislative action. I.e. simply amending regulations would not be feasible without statutory authority changes. They may therefore be outside the charter of this body.

- 1.) Restore civil penalty authority of WDFW. Another natural resource agency, the Department of Ecology, has civil authority to issue Notices of Violation, Orders and Administrative Penalties under various statutory authorizations (e.g. DW law, WQ law, MTCA et. al.). There are statutory and regulatory stipulations to seek voluntary compliance before relying on enforcement, provide technical assistance, etc. Provision of such authority to WDFW would provide the classic “carrot and stick” approach to compliance that is the model for most effective regulatory agencies.
- 2.) Consider establishing a quasi-judicial board similar to the Pollution Control Hearings Board (e.g. a Fish and Wildlife Management Hearings Board) specifically to hear first-level appeals to administrative actions by the agency, reducing caseloads in the Court systems.
- 3.) Seek authority for WDFW to be represented by the Office of the Attorney General in administrative and civil matters rather than relying on County Attorneys to carry out prosecutions. (In working with County Prosecutors while working for the Department of Ecology, primarily on criminal cases, prosecutors voiced concerns about the technical complexity of environmental cases compared to most other cases they work with, a lack of familiarity with both law and regulations and case law related to environmental matters and staffing issues with existing caseloads, much less adding more highly complex cases to their workload).
- 4.) Draft clear compliance and enforcement guidelines and provide training to appropriate staff in their use if enhanced enforcement authority is granted to the agency, and to support (with the draft) seeking authority from the legislature. Such guidance should include baseline penalty guidelines (and alternatives to monetary penalties, such as public service), escalation of penalty guidance, etc.
- 5.) Seek collaboration with federal agencies such as the U.S. Army (Civilian) Corps of Engineers, U.S. Fish and Wildlife Service and National Marine Fisheries Service in significant enforcement actions regarding matters under their authority.
- 6.) Meet with local planning/code enforcement authorities to find whether there are ways to work with them. For example when working for Ecology, I worked extensively with King County DDES to make meeting Model Toxics Cleanup Standards at sites under development by making compliance either a SEPA condition (prior to moving to permitting) or a condition of permit(s) such as Fill and Grade, Construction or other local permits. When practicable, this placed compliance and appeals within established administrative practices.

Note: In addition to WA state investigator and enforcement training, I have about 86 contact hours of training at DOJ/EPA criminal investigative at the Federal Law Enforcement Training Center, Glynco, GA: HWITP-701, Hazardous Waste Investigations Trng. (1986) and Advanced Environmental Crimes (1996).

1) What steps should WDFW take to increase compliance? See above...

- **Which project types should be inspected?** I suspect different drainage systems will have different priorities; e.g. the Columbia River above Grand Coulee will probably have different management priorities vs. the lower Columbia/Snake system. Projects that are related to watershed priorities should be emphasized. Where appropriate (i.e. current or historic anadromous fish habitat) emphasis should be on fish passage maintenance, enhancement or improvement, especially where there is potential for restoring or improving runs and habitat for longer stream reaches. **How frequently?** Frequently enough to assure compliance, obviously...and hopefully frequently enough to correct problems timely.
- **What is compliance?** Compliance is meeting the conditions of regulation and statute, including those set out explicitly in HPA and background documents as determined by the Agency (WDFW) **Should there be tolerances?** Every agency can and should have a measure of prosecutorial discretion, preferably documented in enforcement guidance documents. Exceptional conditions outside the reasonable control of the permittee would be one example, e.g. a violation caused primarily by an 800-yr. storm event should allow leeway to correct post-storm, etc.
- **If we use our existing capacity, what work should decreased or go away to increase compliance inspections?** Without statutory authority to levy administrative penalties, except to completely demonstrate the futility of pursuing civil actions in county Superior Courts, the question is ludicrous.

2) What steps should WDFW take to improve prosecution? WDFW has a slight advantage in that enforcement agents (Fish and Wildlife limited jurisdiction law enforcement personnel) have previously worked with prosecutors. However hunting and fishing violations are generally fairly simple violations with less complex evidentiary requirements. In seeking to engage county prosecutors for over 8 years at Ecology's NWRO (1987-95), only one county prosecutor (Snohomish Co., with support from the Fire Marshall on a DW violation case) actually engaged a criminal environmental case. The King County Fraud Division said they might "...take the right case..", but never did. Reasons given were that county prosecutors had a high enough simple case load (rape, murder, burglary, etc.) already, environmental cases were highly technical and both difficult for the prosecutors to understand and even more difficult for juries and judges. I would not expect HPA violations involving fairly complex technical and habitat matters at issue to be more successful than Ecology's efforts in that direction (of getting county prosecutors to take cases). See recommendations to seek statutory authority for an administrative civil penalty authority above. It is true that Ecology never had more than one criminal investigator state-wide, though 4 employees with special training were part of the state-federal joint task force on Environmental Crimes and assisted on federal criminal warrant development and service by the Deputy U.S. Marshalls from the EPA Region X Office of Criminal Enforcement.

- **When should a violation be civil and when should it be criminal?** Generally "first" or minor violations without prior history of violations should be civil (after technical assistance effort). There should be a gradation of increasingly severe civil penalties. Criminal violation citations should result from either egregious or

repeated, knowing violations (or those defined in statute as criminal), particularly where prior civil efforts to gain compliance have failed to successfully change behavior. Criminal cases should generally be investigated by the WDFW limited-jurisdiction enforcement personnel, as their background is better suited to successfully meet the burden of proof required for criminal cases. They may also have more familiarity with local prosecutors.

- **What compliance or prosecution information should be publicly viewable?** All case information during case development is exempt from Public Disclosure Act requirements, and should remain so until a case is completed (i.e. served upon the suspect/defendant or filed with the court). A clear separation of civil and criminal investigations should be maintained to assure evidence is admissible. In both types of cases, generally evidence/case materials are discoverable by attorneys for the defendant, but should remain non-disclosable to the public until case resolution is achieved. In some cases Courts may order some information sealed or exempt from disclosure. Also, some information that is 'proprietary' business information may be exempt from release to the public. Follow PDA requirements. Upon resolution, information about violations and supporting information can and should be available to the public upon receipt of a PDA request, and may be advisable via the agency PIO to inform the public about case status. Maintenance of an internal record is critical to escalation of enforcement for repeat violators.

Attachment Two
E-mail from Shannon Moore

After the fact permits. After discussing this with the Fisher's caucus, both treaty tribe managers in the area, and other resource groups in the community, I got a resounding no. Way too slippery

So what to do? I did field one solution. Ask for a hearing with the Directors office to seek solution. Area bio should be involved. Let's not change the law.

Compliance? Well our area Bio years ago refused to sign (dredging) Permits processed by County Government. Reason? Permit conditions were never implemented. Riparian rehabilitation was done, over a 4-5 year time frame. Past sins had to be taken care of before moving forward.

Hydraulic Permits: Contractors working for County Government should be required to carry a bond. This could be attached if need be. Same in the private sector.

I have to carry 2 bonds for my business, not to mention a pile of insurance.

Please pass these thoughts on to the Group.

I look forward to the meeting notes,

--S.Moore