



MARINE MAMMAL COMMISSION

1 October 2012

Dee Alexander
Senior Advisor on Native American Affairs
Office of Legislative and Intergovernmental Affairs
U.S. Department of Commerce
1401 Constitution Avenue, NW, Room 5422
Washington, D.C. 20230

Dear Ms. Alexander:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the Department of Commerce's draft policy on "American Indian and Alaska Native Consultation and Coordination" (77 Fed. Reg. 39464, 3 July 2012) and provides the following recommendations and rationale.

RECOMMENDATIONS

The Marine Mammal Commission recommends that the Department of Commerce revise its draft tribal consultation policy to—

- include reference to the policymaking criteria outlined in Executive Order 13175 and explain how it will apply those criteria when formulating and implementing policies that have tribal implications;
- provide additional guidance on the process it will use to determine whether policies have tribal implications and when consultation would be impracticable or precluded by other legal requirements, and include examples of Department actions that have been subject to consultation in the past;
- provide more detailed guidance on how consultations will be conducted to ensure meaningful and timely input by tribal officials;
- include specific guidance for consultation and the preparation of tribal impact summary statements for regulations that have tribal implications and either impose substantial direct compliance costs on tribal governments and are not required by statute, preempt tribal law, or both;
- require that the Department's tribal consultation official or his or her designee certify to the Office of Management and Budget that any draft final regulation or proposed legislation that has tribal implications is in compliance with Executive Order 13175; and
- include reference to and consider relevant regulations, statutes, Presidential memoranda, Executive Orders, and other documents with bearing on tribal consultations.

The Marine Mammal Commission further recommends that the Department of Commerce include in its final tribal consultation policy and supporting information (1) a description of efforts

made to coordinate and consult with tribal officials on the draft policy, (2) a complete summary of comments received, especially from tribal members, and (3) a description of how the Department has addressed or incorporated comments received into the final policy.

RATIONALE

The Department of Commerce has developed its draft tribal consultation policy to guide implementation of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments” (6 November 2000). The Order sought to (1) establish regular and meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications, (2) strengthen government-to-government relationships with Indian tribes, and (3) reduce the imposition of unfunded mandates on Indian tribes. The Order required accountability by each agency to ensure that the Order’s requirements are met in a meaningful and timely manner.

President Barack Obama reaffirmed the policies of the Executive Order in a 5 November 2009 Presidential Memorandum on tribal consultation, and reinforced the Order’s accountability provisions by requiring each federal agency to develop a detailed plan of actions to be taken to implement the Order’s policies and directives. The Department of Commerce submitted its “Plan to Develop a Tribal Consultation and Coordination Policy” to the Office of Management and Budget in February 2010, gathering information and feedback on the plan through listening sessions, conference calls, and regional dialogue sessions with tribes and representative committees. In response to the President’s memorandum, the Department has now issued its draft policy, which is intended to establish the manner in which the Department will work with Indian tribes and Alaska Natives on a government-to-government basis.

In the Commission’s view, the draft policy does not completely address several key elements of the Executive Order and related guidance from the Office of Management and Budget (30 July 2010). It does not refer to the Order’s policymaking criteria or discuss how these criteria will be followed when formulating and implementing policies that have tribal implications. It does not guide key aspects of the consultation process regarding (1) identification of policies that have tribal implications, (2) procedures to ensure meaningful and timely input by tribal officials, and (3) procedures for consulting with tribal officials regarding the promulgation of regulations that impose unfunded mandates or that preempt tribal law. Also, although called for in the Order, the draft policy does not require the Department’s tribal consultation official to certify that regulations or legislation that have tribal implications comply with the Order.

In addition, the policy would be more useful if it described the kinds of Department regulations, legislation, policy statements, and actions that have tribal implications, other Department-specific statutes or policies that may apply to consultations, and the primary components of a typical tribal consultation. Finally, the policy or accompanying documentation would be more informative if it described how the Department has addressed or incorporated comments and other feedback gathered to date on its February 2010 plan of action to develop a tribal consultation and coordination policy.

Lack of reference to policymaking criteria

Executive Order 13175 directs agencies to follow the fundamental principles of the Order and, to the extent permitted by law, to adhere to certain criteria when formulating and implementing policies that have tribal implications. Those criteria state that—

- (a) agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the federal government and Indian tribal governments;
- (b) with respect to federal statutes and regulations administered by Indian tribal governments, the federal government shall grant Indian tribal governments the maximum administrative discretion possible; and
- (c) when undertaking to formulate and implement policies that have tribal implications, agencies shall—
 - (1) encourage Indian tribes to develop their own policies to achieve program objectives;
 - (2) where possible, defer to Indian tribes to establish standards; and
 - (3) in determining whether to establish federal standards, consult with tribal officials as to the need for federal standards and any alternatives that would limit the scope of federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

The Department's draft tribal consultation policy does not reference the above-listed policymaking criteria or discuss how those criteria will be followed when formulating and implementing policies that have tribal implications. Those criteria provide important guidance for establishing the nature and tone of the government-to-government relationship, and for addressing situations that require discretion and deference to tribal government authorities. The Executive Order also states that agencies shall not submit legislative proposals to Congress that are inconsistent with the policymaking criteria, yet that requirement is not reflected in the Department's draft policy. The Marine Mammal Commission recommends that the Department of Commerce revise its draft tribal consultation policy to include reference to the policymaking criteria outlined in Executive Order 13175 and explain how it will apply those criteria when formulating and implementing policies that have tribal implications.

Guidance on key aspects of the consultation process

The Department is required to establish "regular and meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications." That phrase is defined by the Executive Order as "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes." The Department's draft tribal consultation policy reiterates that definition but does not provide additional guidance on the pertinent types of effects (e.g., effects on tribal governments, trust resources, or treaty or other rights), what it considers to be a "substantial direct effect," how to analyze or evaluate potential effects, or who is responsible for determining that an action could have

tribal implications. Also, the draft policy does not discuss the factors that might limit consultation opportunities under the Executive Order—i.e., what factors might make consultation impracticable or when consultation might conflict with other legal requirements. To address those omissions, the Marine Mammal Commission recommends that the Department of Commerce revise its draft tribal consultation policy to provide additional guidance on the process it will use to determine whether policies have tribal implications and when consultation would be impracticable or precluded by other legal requirements, and include examples of Department actions that have been subject to consultation in the past.

Once the Department determines that a proposed policy has tribal implications, the tribal consultation process should be initiated promptly to ensure meaningful and timely input by tribal officials. The Department's draft consultation policy provides no guidance on how such consultation should proceed to ensure that input is meaningful and timely. How will the Department determine which tribes may be affected? How will those tribes be notified? How will it provide information to the tribes regarding the proposed action and its potential effects? How will it engage tribes in the development or refinement of proposed actions, or otherwise incorporate tribal views? Will the Department provide resources to facilitate consultation? And how will the Department ensure transparency in its consultations? These and other issues should be addressed by the Department in its final coordination and consultation policy. With that in mind, the Marine Mammal Commission therefore recommends that the Department of Commerce revise its draft tribal consultation policy to provide more detailed guidance on how consultations will be conducted to ensure meaningful and timely input by tribal officials.

The draft consultation policy also omits reference to two types of regulatory actions that require specific consultation procedures—regulations that have tribal implications and (1) impose substantial direct compliance costs on tribal governments and that are not required by statute, or (2) preempt tribal law. In both cases, the Executive Order directs agencies to (1) consult with tribal officials early in the process of developing the proposed regulation and (2) prepare a tribal summary impact statement for inclusion in the preamble to the regulation as issued in the *Federal Register*. The Office of Management and Budget also refers to those two types of regulations in its guidance document and the required components of a tribal impact summary statement. To ensure that the Department's policy is clear with regard to those components, the Marine Mammal Commission recommends that the Department of Commerce revise its draft tribal consultation policy to include specific guidance for consultation and the preparation of tribal impact summary statements for regulations that have tribal implications and either impose substantial direct compliance costs on tribal governments and are not required by statute, preempt tribal law, or both.

Accountability

Executive Order 13175 requires that federal agencies have “an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” To achieve that objective, the Order requires that each agency designate an official with principal responsibility for the agency's implementation of the Order. The designated agency official is responsible for certifying to the Office of Management and Budget that any draft final regulation or proposed legislation that has tribal implications is in compliance with the Order, i.e., that the requirements of the Order have been met in a meaningful and timely manner. The

agency official also is responsible for conferring with tribal officials to ensure that the Order is being implemented properly and effectively.

In its draft consultation policy, the Department refers to the appointment of a tribal consultation official, within the Office of the Secretary, responsible for ensuring compliance with the Department's policy, the associated Department Administrative Order on consultation and coordination with Indian tribal governments (DAO 218-8), and the Executive Order. The draft policy also states that the tribal consultation official is responsible for tribal consultations and coordination for the Office of Secretary Programs, and for engaging tribal officials in periodic dialogue to discuss the Department's implementation of the policy. However, no mention is made of the official's responsibility to certify to the Office of Management and Budget that any Department draft final regulation or proposed legislation that has tribal implications is in compliance with the Order. The certification process is required by the Executive Order and is essential for ensuring accountability in the consultation process. Therefore, the Marine Mammal Commission recommends that the Department of Commerce revise its draft tribal consultation policy to require that the Department's tribal consultation official or his or her designee certify to the Office of Management and Budget that any draft final regulation or proposed legislation that has tribal implications is in compliance with Executive Order 13175.

Supplementary information

The Department and its operating units implement various regulations, statutes, Presidential memoranda, and Executive Orders, many of which may have tribal implications. For example, with respect to marine resources, the National Oceanic and Atmospheric Administration's National Marine Fisheries Service is charged with implementation of the Marine Mammal Protection Act, the Endangered Species Act, and the Magnuson-Stevens Fishery Conservation and Management Act. Regulations to implement the provisions of those laws often have direct effects on Indian tribes and Alaska Natives. In addition, both the Marine Mammal Protection Act and the Endangered Species Act have specific exemptions that allow for the taking of protected species by Alaska Natives. The Marine Mammal Protection Act also provides specifically for cooperative efforts to conserve marine mammals and for the co-management of the subsistence use of marine mammals by Alaska Natives by the Department of Commerce (National Marine Fisheries Service) and Alaska Native organizations. The Department also has issued Secretarial Order 3225 to establish a consultation framework for the Alaska Native subsistence exemption under the Endangered Species Act. Those and other documents are relevant to the Department's mandates and responsibilities and should be referenced in the Department's tribal consultation policy to ensure that the Department's various policies are consistent and that its employees are aware of and operate in accordance with those directives. For those reasons, the Marine Mammal Commission recommends that the Department of Commerce revise its draft tribal consultation policy to include reference to and consider relevant regulations, statutes, Presidential memoranda, Executive Orders, and other documents with bearing on tribal consultations.

Addressing and incorporating tribal input

In developing its draft consultation policy, the Department used listening sessions, conference calls, and regional dialogue sessions with tribes and representative committees to gather

the information needed to ensure tribal participation in policy matters that may affect tribal members.¹ The Department lists some of the recommendations received from tribal members on its website. They include, for example, developing tribal consultation plans that have measurable outcomes, establishing tribal advisory councils, surveying existing Department programs for appropriate tribal inclusion, using and supporting regional tribal groups, and creating a network of tribal contacts that have the authority or can designate authority to request or engage in consultation. However, the policy and other supporting information provided in the *Federal Register* notice do not indicate if or how the Department has addressed or incorporated feedback and comments gathered to date. In reviewing the draft policy, the Commission found little indication that recommendations received from tribal members were considered or incorporated in any meaningful way. In the Commission's view, the Department's tribal consultation policy should outline an inclusive, transparent, and responsive tribal consultation process that reflects the spirit and intent of the Executive Order. The Marine Mammal Commission recommends that the Department of Commerce include in its final tribal consultation policy and supporting information (1) a description of efforts made to coordinate and consult with tribal officials on the draft policy, (2) a complete summary of comments received, especially from tribal members, and (3) a description of how the Department has addressed or incorporated comments received into the final policy.

Marine Mammal Commission workshop on consultation with Alaska Natives

The Marine Mammal Commission is convening a workshop in December 2012 on the federal government's tribal consultation process, particularly as it applies to actions affecting the subsistence take of marine mammals in Alaska. One of the goals of the workshop is to work toward improved approaches to government-to-government consultation with Alaska Natives on these and other actions. Invited participants include representatives from several Alaska Native Organizations; officials from the Fish and Wildlife Service, the National Marine Fisheries Service, and other federal agencies; representatives from the Environmental Law Institute and the Alaska Federation of Natives; and others with expertise on Alaska Native subsistence issues. The Commission hopes that the workshop will provide useful information for the Department as it finalizes its tribal consultation policy, and will forward to the Department a copy of the Commission's final workshop report when it is completed.

Please contact me if you have questions about the Commission's recommendations or rationale.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director

¹ <http://www.commerce.gov/office-secretary/native-american-affairs/plan-develop-tribal-consultation-and-coordination-policy>