

# Consultation & Co-Management Meeting

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## *Summary of Marine Mammal Commission Meeting of December 2012<sup>1</sup>*

In December 2012, the Marine Mammal Commission (MMC) and the Indigenous Peoples Council for Marine Mammals (IPCoMM) worked with the National Oceanic and Atmospheric Administration (NOAA), the U.S. Fish and Wildlife Service (FWS), and the Environmental Law Institute (ELI) to host a three-day meeting to discuss federal government-to-tribal government consultation (consultation) in Alaska with a particular focus on consultation related to marine mammal resources and co-management.

The purpose of this meeting was to improve the consultation process between federal agencies and Alaska Natives with the ultimate goal of strengthening the voice of Alaska Natives in matters that affect them, their communities, and their cultures. To that end, the meeting participants focused on—

- (1) Identifying the essential elements of consultation and ways to improve the consultation process,
- (2) Exploring the relationship between consultation and co-management under the Marine Mammal Protection Act,
- (3) Examining what authority tribes have delegated to Alaska Native organizations (ANOs)<sup>2</sup> for the purpose of consulting and how this authority has been delegated,
- (4) Considering the existing and potential role of the Indigenous Peoples Council for Marine Mammals (IPCoMM) and ANOs in the consultation process,
- (5) Reviewing conflict avoidance agreements and plans of cooperation to glean from them means for strengthening the consultation framework, and
- (6) Identifying potential next steps for improving the consultation process for ANOs.

This summary presents a brief overview of some of the key issues discussed; identifies existing approaches to and examples of those issues in practice; reviews ideas shared for improving the process; and identifies potential next steps. Many specific examples were comprehensively discussed—for the purposes of this summary, most of these examples are distilled into general principles and concepts.

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<sup>1</sup> Prepared by the Environmental Law Institute.

<sup>2</sup> Of particular relevance to this meeting are the Alaska Native Organizations that are the marine mammal co-management organizations.

## I. Overview of Introductory Consultation Presentations

Several meeting participants gave formal presentations to set the stage for the meeting and to explain processes and programs. These are briefly summarized in this section.

### **Mr. Mike Miller, Chair, Indigenous People's Council for Marine Mammals**

In his opening remarks, Mr. Mike Miller provided an overview of IPCoMM membership and structure. Also, he provided his perspective on consultation. He focused on the need to engage in consultation in a way that does not undermine the co-management structures that are already in place. In part, Mr. Miller voiced concern that consultation could fracture the native voice.

Mr. Miller noted the challenge of keeping up with consultation opportunities, indicating that in Sitka, the Tribal Council aims to review and consider every consultation opportunity. Such an approach can amount to seven to eight consultations a month, and these efforts stretch staff resources and lead to consultation fatigue.

### **Dr. Tim Ragen, Executive Director, Marine Mammal Commission**

Dr. Tim Ragen gave a presentation on some of the challenges with consultation in Alaska as it is currently designed. He pressed the participants to think about how to build a better consultation framework by understanding its essential features. He pointed out that given the number of tribes and agencies with a role to play, the current construct will likely fail, because it is not possible for effective interaction among all of the parties involved. He questioned whether there is a way to give consultation authority a better chance to succeed by using regional or statewide bodies to coordinate and help streamline the consultation process.

### **Mr. Jon Kurland, Assistant Regional Administrator for Protected Resources, National Marine Fisheries Service, Department of Commerce**

Mr. Jon Kurland first summarized the National Marine Fisheries Service (NMFS) approach to engagement with Alaska Natives regarding marine mammals, including through co-management. Next, he described the consultation process: NMFS sends letters to tribes and Alaska Native corporations when contemplating or initiating actions, and if tribes request a consultation, the agency will do it. Usually, the consultation is via teleconference with one or more tribes. In recent years, the agency has established a more refined structure for consultation but still has no tribal liaison. He noted the goal of having a tribal liaison on staff and taking a more proactive approach to consultation, but recognized that the agency is not yet there.

### **Ms. Crystal Leonetti, Tribal Liaison, U.S. Fish and Wildlife Service, Department of the Interior**

Ms. Crystal Leonetti recognized the status of tribes as domestic dependent sovereigns. She explained the relationship between the Fish and Wildlife Service (FWS) and tribes as a pyramid structure with the managerial interactions making up the bulk of the relationship at the base of the pyramid and the government-to-government consultation among federal and tribal leadership at the top of the pyramid. She noted that the more time and effort that is spent at the managerial level, the less time that will be needed for government-to-government consultation among the leaders.

Ms. Leonetti stated that the Department of Interior is open to having a delegated person or entity consult on behalf of the tribe as long as appropriate and documented permission is granted by each tribal government represented. Also, she indicated she was hoping to have guidance developed to help FWS conduct consultations more effectively.

**Dr. Kathryn Mengerink and Ms. Jordan Diamond, Co-Directors for the Ocean Program, Environmental Law Institute**

Dr. Kathryn Mengerink and Ms. Jordan Diamond provided an overview of their research on consultation as it relates to marine mammal subsistence in Alaska. They described how consultation is defined according to Executive Order 13175 and discussed challenges to consultation related to geography of the state, timing of consultation, constraints of many Alaska Native communities, constraints of agencies, and challenges related to the consultation process such as transparency, accountability, staffing, and more. In addition, they presented key elements of consultation as identified through their research.

**Ms. Carol Daniel, Counsel for the Indigenous People's Council for Marine Mammals**

Ms. Carol Daniel gave a presentation on the legal framework for Alaska Native authority. She discussed the trust relationship between the federal government and federally recognized tribes, including Alaska Natives. She pointed out that tribal governments exercise inherent powers that have not been extinguished. She explained that tribes have authority to delegate just as federal or state governments can delegate authorities. She noted that, to that end, tribal governments can establish intertribal organizations, corporations, and tribally authorized organizations such as IPCoMM.

**Ms. Jessica Lefevre, Counsel for Alaska Eskimo Whaling Commission**

Ms. Jessica Lefevre first discussed the development of the conflict avoidance agreement and the lessons learned that could be applied to the consultation process. In addition, she distilled several principles for effective collaboration. These include the importance of community organization, a focus on two-way partnership and discussion between agencies and communities, and a consultation process working in tandem with general outreach designed to lead to consensus, rather than just a listening process.

**Mr. Brad Smith, Field Office Supervisor, National Marine Fisheries Service**

Mr. Brad Smith gave an overview of the requirements for plans of cooperation required by the Marine Mammal Protection Act (MMPA). He explained that in order to get an incidental take authorization under the MMPA in areas of traditional Arctic subsistence hunting, applicants must submit a plan of cooperation or other information that demonstrates measures to minimize adverse impacts to subsistence harvest of marine mammals. He discussed the pros and cons of the plan of cooperation approach and the related approach that oil and gas companies and the AEWC take through the development of conflict avoidance agreements.

## II. Key Consultation Issues

### 1. Defining Consultation

While the general elements of consultation may be understood, in practice the lines between the various communication processes blur. Public participation, consultation, informal communication, co-management, and more play a part in the framework of communication among Alaska Natives and federal agencies. Many discussions touched on the definition of consultation and what it means in practice, demonstrating the need for continued effort to clarify what is meant by consultation and how it links to other aspects of the broader communication framework.

In particular, the relationship between consultation and co-management was discussed. One element of confusion may stem from the fact that some co-management agreements have specific language about consultation occurring between the federal agency and co-management body. However, whether the consultation that occurs under co-management is equivalent to government-to-government consultation is a matter of debate. Some attendees indicated that such co-management consultation is part of government-to-government consultation, while others felt that it was something different. As one person with the latter perception described, consultation between tribal councils and agencies is “Big C” consultation while consultation between co-management bodies and agencies is “little c” consultation.

Another participant indicated that some engagement is formal and part of consultation and other types of engagement are informal. This participant further noted that an engagement is deemed consultation when both the agency and the tribe agreed that the engagement was consultation. However, the participant recognized that no bright line rule distinguishes consultation from other types of engagement. One participant emphasized the importance of strengthening consultation, but making sure it does not undermine the co-management process. Several specific ideas were presented on this broader topic.

### 2. Coordinating Consultation

Many meeting participants described the need for agencies to consolidate and coordinate their consultation processes, working within and across agencies. For example, one participant pointed out that there is so much happening in the Arctic, with many accompanying consultation processes. To minimize meeting fatigue, consultation meetings could be held during the same time period that other meetings occur (e.g., when the Alaska Eskimo Whaling Commission or the Nanuuq Commission gathers for meetings). The participants discussed the importance of agency size and priorities in the context of consultation. Also the participants noted that regional concerns can get lost in the national discussion.

### 3. The Logistics of Consultation: Timing and Location

Some attendees indicated concerns over when consultation is initiated. It is important that it is initiated early enough to allow for meaningful input. One participant said that this should be before a proposal is

developed. The work should occur from the ground-up, establishing a collaborative process to reach the final decision. Another participant said that the proposal should not be made *to* the community, but developed *with* them.

Others indicated concerns about the length of time from when a consultation is requested to when it occurs. One person noted that one tribal council has been waiting two years for consultation.

Another person stated that timing is a very important issue. In considering the role of ANOs in the consultation process, the fact that ANOs may only meet once a year would make it challenging for agencies to consult with ANOs on a timely basis. However, another participant pointed out that while there may only be a meeting once a year with an ANO commission, there would be an opportunity to meet with the program personnel more frequently.

In addition, many participants discussed the importance of face-to-face meetings and the mutual trust that develops over time by working with communities. One participant pointed out that a paradigm that streamlines or consolidates consultation activities would diminish face-to-face interactions and work with communities. One attendee responded to this concern by noting the importance of tribal liaisons to develop relationships and connections with communities.

An overriding issue for effective consultation, particularly related to face-to-face meetings, was a lack of sufficient funding. One participant pointed out that tribes are effectively in competition with one another due to funding constraints. Another participant emphasized the need to think creatively about using whatever resources that are available to maximize the benefit, including conducting discussions at regional meetings. One person discussed the EPA's Indian General Assistance Program in Alaska, a grant program that could be used to provide resources for consultation capacity-building.

#### **4. The Content of Consultation**

Participants discussed the content of consultation, including the importance of addressing all key issues related to resource management decisions. Many elements were discussed including the following:

- One participant noted the importance of taking a long-term perspective, with discussion of potential climate change impacts to resources, tools that currently exist to manage resources, and the role of effective risk management.
- Another participant agreed, emphasizing the importance of the current status of the resource, the full range of potential impacts to the resource, and conveying understanding to facilitate consensus.
- One participant discussed the importance of accountability, timeliness, and meaningfulness in the consultation process. It is important that agencies and communities are partners in the resource discussion.
- Another participant emphasized the importance of problem solving, focusing on oil and gas issues.
- Another person stated that consultation should not only encompass problem solving, but all actions.

- One participant summarized the importance of listening to ideas to gain perspectives that might otherwise not be present within the agencies.
- One person noted that more is needed than a process—there is a need to focus on the substance.
- Another noted that part of the necessary substance is conveying why a decision was made that did not coincide with certain opinions.

## **5. Quantity of Consultation**

Several participants discussed the need for consultation to be a multi-step, iterative process with one person pointing out that such an approach provides opportunities for adaptive management. Identified needs included:

- Meeting frequently (because more information is gathered and conditions change over time, iterative meetings stimulate new discussions and actions)
- Broader communication efforts to achieve success in consultation

The amount of the engagement effort varies according to the particular issue. As one participant pointed out, different topics merit different levels of consultation. For example, for a critical habitat decision under the Endangered Species Act, consultation should be broad. In addition, some participants noted the importance of institutionalization of robust consultation. One participant noted that for long-term success, the approach needs to be built into the day-to-day work of the agency. Some agencies, such as the North Pacific Fisheries Management Council, do not conduct consultation at all. One participant expressed the need for the NPFMC to engage in consultation, recognizing that fisheries decisions affect a wide range of natural resources, including target species.

## **6. Differences in Communication**

Another challenge with consultation noted by the meeting participants is that agencies and communities have different styles and approaches to communication. For example, members of communities may not always share what they know with federal agencies because an issue is widely understood at the community level. One person pointed out that community members must remind themselves to speak about their knowledge at meetings because of differences in familiarity with issues being discussed.

Another issue is that of traditional ecological knowledge. Participants discussed historical and traditional knowledge and how that knowledge is conveyed versus how the consultation process occurs and how regulatory decisions are made. They noted that it is important to reconcile the two means of communication.

Generally, participants focused on the need for honesty from all participants. Trust is built through mutual respect and relationships that develop over time.

## **7. The Role of Participants: Agencies and Liaisons**

Exploring the role of federal agencies in the consultation process, the participants discussed the tension between federal agency responsibilities. On the one hand, the federal agencies need to take a positive approach to ensure effective consultation, while on the other hand, the federal government must address the needs of the tribes as expressed by the tribes. Participants focused on the need to have the right parties participate in consultation. One participant mentioned the need to not be presumptuous. Others said that ensuring the right participation depends on the resource at issue—for example, marine mammal decisions or ESA listing decisions require broader participation.

In addition participants recognized tribal interest in marine resources extends beyond coastal communities, as sometimes marine resources are shared or traded with inland communities. Therefore, inland communities should also be given the opportunity to consult on actions that may affect marine resources.

Meeting participants discussed the role of a tribal liaison, with many agreeing about the important role liaisons play in facilitating dialogues and maintaining linkages with communities. At the same time, some meeting participants noted that a tribal liaison working for a federal agency is not a neutral party to the process. In exploring the need for a neutral facilitator, the idea of a third party liaison or an ombudsman was raised. One person agreed that the liaison plays an important role in consultation but also stated that what is equally if not more important is to have buy-in from senior management of the agency and commitment that the process will occur effectively.

There was discussion of the need for training of liaisons and staff. One participant noted the importance of working to understand Alaska Native culture and priorities. Training is important to move in between different cultures. Difficulties arise because there is not funding for this type of training. EPA has a training program for staff focused on interacting with tribal governments.

## **8. The Role of Participants: Tribes and ANOs**

The meeting participants explored the different types of tribal and agency representatives who participate or should participate in the consultation process. The participants discussed how and if tribes can delegate consultation authority to ANOs. One participant explained that tribes are governed by their own constitutions and laws. Delegation of authority typically occurs through resolution, but the question of how delegation occurs must be answered on a tribe-by-tribe basis.

One participant raised concerns regarding the tribal delegation of authority to ANOs, noting that delegation of authority to ANOs to manage species on their behalf has already been granted. At the heart of the issue was whether tribes needed to explicitly delegate consultation authority to ANOs or whether consultation authority was inherent in the broad delegation of authority to ANOs for marine mammal management. Concerns were raised over the requirement of additional statements of delegated authority because the effect could be interpreted as questioning the authority for a tribe to delegate authority altogether.

Participants raised issues regarding the process implications of delegated authority as well. It is difficult to know who to contact within tribes as consultation is currently constructed. Some participants felt delegation could complicate matters; others felt the process would be simplified. One attendee noted that tribes may want to delegate on specific issues, but not on others.

Building off the general delegation discussion, the meeting participants had rich and in-depth conversations over the course of the three-day meeting on the role of the marine mammal co-management bodies in the consultation process. On the one hand, some meeting participants felt that the marine mammal co-management bodies have a leading role to play in the consultation process for decisions that relate to marine mammals. Part of this perspective is based in the recognition that the marine mammal co-management bodies are tribally authorized bodies created to co-manage relevant resources on behalf of the tribe. In discussing the role of ANOs in the consultation process, one attendee pointed out that the ANOs are appointed representatives of the tribes that have the knowledge, experience, and expertise to engage in the consultation process. For these reasons, federal agencies need to recognize the tribes' authority to delegate authority to other bodies to implement co-management agreements and provide a framework for consultation on marine mammal issues.

On the other hand, many meeting participants recognized that there are costs associated with such delegation. Two specific elements of costs were identified: (1) the cost of doing the consultation; and (2) negative implications of transferring authority. Negative implications include a potential loss of tribal sovereignty. Some participants thought this concern was offset by efficiency and potentially better outcomes for the tribes; others did not share this perspective.

One participant outlined the need for clear guidelines from the tribe on who to consult with, depending on the outcome of delegation discussions. Another participant said that commissions like IPCoMM can play a role in helping agencies determine who they need to contact.

## **9. Regional Approaches to Consultation**

A regional approach to consultation would define different representative groups that can engage in the consultation process, and participants discussed pros and cons to such an approach. One participant raised concerns about the roles that different tribes and ANOs play. This participant pointed out that it is the agencies' duty to consult, and asking ANOs to take on the burden of coordinating consultation is inappropriate. Moreover, a key issue is that the agencies have paid staff available to undertake activities. Lack of paid staff limit tribes' role in coordinating consultation. One person noted that there is a risk of regionalization and lack of representation. Regionalization could dilute local knowledge and involvement. Another attendee noted that funding is a challenge for ANOs, and further noted that ANOs would not want to be a pass-through entity for funding consultation activities. In addition, one participant pointed out that many co-management organizations meet only one time per year, and waiting for once a year meetings may constrain other aspects of the consultation and decision-making process.

Myriad benefits were also discussed. Some participants noted the benefits of tribal delegation of authority for consultation include selecting tribal experts to represent groups on particular issues. On



this point, AEWG is an example of tribes transferring authority of bowhead whale management to its experts. Other benefits identified include the fact that regional nonprofits typically have greater resources available and could support, for example, hiring one individual with focused expertise, benefiting all tribes in a service area. Such an approach could be an efficient use of resources.

Responding to a hypothetical regarding NMFS consultation related to Arctic fishing operations, one person said the best way to conduct consultation would be to bring the tribal community together in one place. For example, the community could be brought to Barrow to talk about the issue. From a tribal perspective, the person thought it would be beneficial because the interests are so closely tied. It could also be beneficial to have other tribal perspectives in the room.

Another person noted that in the Aleutian Islands, tribes span the entire island chain, and it is cost effective to meet together to consult on issues under the Aleut Marine Mammal Commission. Another person mentioned that with the AEWG, one benefit is that it brings together multiple tribes, which minimizes conflict with people over the region for the shared resource. Another benefit of a collaborative approach is that everyone is at the table at the same time, so actions do not occur in a piecemeal way.

Another participant indicated that without a regional voice, there is a fractured voice. Meeting as a group allows everyone to overcome differences and figure out best course of action. At the same time, the process needs to ensure that the individual voice is not diminished while still enabling experts to work collaboratively. If only working at the tribal level, the tribal authority may be there but the experts may not. One participant noted that a consolidated voice has a better chance of being heard in the national policy discussion. Another participant said that it is better to be over-inclusive, rather than under-inclusive.

Another participant provided an example of five ANOs that came together to work on shipping in Northwest Alaska to develop a statement requesting the opportunity to consult on the issues going forward. The participant noted that this gives a strong message to the agencies of the strength of the coalition and its voice.

## **10. Consultation Policies**

Meeting participants discussed the need for clearer consultations policies. One attendee noted that the federal government does not provide clear guidance on how consultations are conducted. Often, high level policies exist but it is important to have consistency at the regional and local level. Another attendee noted the strategic advantage and need for government policies and plans to have provisions for a true two-way exchange during consultation, including allowing the tribes to bring issues to government. A participant noted that perhaps IPCoMM could come up with procedures for how federal agencies should consult with Alaska Natives in a flexibly consistent manner. Another participant responded that it might be best to work on agency and community consultation policies together. One participant noted the possibility of jointly drafting guidelines for effective communication between agencies and communities. A framework or road-map could make sure that the right voices are heard at the right time. Trust is an important component of the process and substance of consultation policies.

### III. Ways to Improve Consultation

Numerous ideas were presented on possible ways to improve the consultation process, building off of the key issues presented above. Some of the ideas were specific and some were general principles—however, all of the ideas are important to consider. Below, a sample of key ideas is presented:

- There is broad consensus over **the goal of engagement to result in the most meaningful input from tribal members** through the consultation, co-management, and communication and outreach processes.
- Many ideas were presented on ANOs and tribal consultation processes, as introduced above. Some participants supported delegation, while others did not. Most participants supported **further exploration of the role of ANOs and clarification of these ideas moving forward**.
- One participant noted that **consultation works when ideas are presented clearly** so that the community understands what the agency is requesting the communities to do or how they will be affected, **when respect is given**, and **when the participants are energized to complete the process together**. This participant called **for investment in funding tribes and ANOs** to enable them to develop their own consultation policies. Developing such consultation policies could strengthen relationships because confusion would be eliminated.
- Another participant stated that **the agency should initiate consultation** rather than wait for a tribal request to consult, recognizing that such an approach would better align with the spirit of the Executive Order.
- An attendee identified the NMFS Arctic Open Water Meeting—an annual meeting in Alaska designed to share results of monitoring programs, present monitoring plans, and allow input and comments related to offshore Arctic work that may affect marine mammals or subsistence uses of them—as a potential model for **a coordinated information sharing approach**. The attendee pointed out that while not a mechanism for consultation on individual activities, it could be a mechanism to coordinate and consult on large multi-agency projects.
- Another attendee supported the idea of **a third party tribal liaison or ombudsman** who could act as a neutral party to support tribal and federal agency engagement during the consultation process. The concern presented was that while the existing tribal liaisons play the role of facilitator, as paid federal employees they may be apprehensive to take a position that opposes the federal perspective.
- Another raised the idea of **having ANOs and tribal governments that they represent consult together** to ensure that everyone reaches agreement collectively.
- One participant said that consultation **should take the form of negotiation** and joint discussion of options, rather than a mere listening exercise.
- An attendee supported **having tribes develop their own consultation policies** in order to clarify aspects of the process.

- Multiple participants discussed **conducting consultation at regional meetings** in order to more effectively use tribal resources.
- One person supported **training of agency staff**, whether through a week-long course on culture or more informal person-to-person sessions on communicating across cultures.

#### IV. Next Steps

At the conclusion of the three-day meeting, participants discussed next steps that IPCoMM could take to address challenges related to consultation. IPCoMM could also play a role in helping to develop guidance on improved approaches for consultation related to actions that may affect marine mammals. During this discussion, several important observations were made about the potential for the development of guidance and IPCoMM's role in the process. These include the following:

- One participant noted that it is not the role of IPCoMM to do consultations but instead IPCoMM can play a role in developing a framework or roadmap to improve consultation.
- One person observed that while formal consultation policies are in place, what is needed are frameworks for more effective processes related to efficiency, utilizing the right people, and broader communication needs.
- Several people noted that IPCoMM should maintain its focus on marine mammal issues, so next steps should be narrowed to focus on consultation as it relates to marine mammal management.
- One participant noted that development of boilerplate language to help develop tribal consultation policies would be useful.
- A few participants made comments indicating that any approach that moves forward should be mindful of the different roles IPCoMM, ANOs, tribal councils and others.
- After a substantial discussion about the linkages between consultation and co-management and the role of IPCoMM in giving guidance related to consultation, several meeting participants agreed that instead of focusing specifically on government-to-government consultation, a broader communication framework was needed to improve the role of Alaska Native communities in marine mammal management.

One outcome of the meeting was the decision by IPCoMM and ELI to work together to draft and develop model policies related to marine mammal consultation, considering the linkages between consultation and co-management, with input from tribal governments, other Alaska Native organizations, and others as appropriate.