

MARINE MAMMAL COMMISSION  
ACTION PLAN FOR THE IMPLEMENTATION OF EXECUTIVE ORDER 13175 REGARDING  
CONSULTATION AND COORDINATION WITH TRIBAL GOVERNMENTS

The Marine Mammal Commission developed its original action plan pursuant to President Obama's 5 November 2009 memorandum concerning Tribal consultation and coordination under Executive Order 13175. This plan incorporates revisions in furtherance of President Biden's 26 January 2021 memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships.

Background

The Marine Mammal Commission is defined as an agency under 44 U.S.C. § 3502(1) and is therefore considered an agency for purposes of Executive Order 13175. However, the Commission is not a regulatory agency and does not routinely formulate or implement "policies that have Tribal implications" as that term is defined in section 1(a) of the Executive Order. Rather, the Commission provides recommendations to other "action" agencies that possess regulatory authority and that are subject to the consultation and coordination requirements of the Executive Order.

Although the Commission takes its responsibilities under the Executive Order seriously, it considers them to be narrow in scope. The Commission recognizes that its recommendations to other federal agencies can influence the policies and actions of those agencies concerning marine mammal issues, but also that those recommendations generally do not have Tribal implications unless and until adopted or implemented by the action agency. As such, consultation responsibilities under the Executive Order rest largely with the agency making the decision on a policy or carrying out the action rather than the Commission in formulating its recommendations, particularly when those recommendations are made in response to a proposed agency action rather than at the Commission's initiative. The Commission will consult as required under Executive Order 13175 in cases in which it is the action agency, including submission for Administration review of any legislative proposals that have Tribal implications. On other matters, the Commission will continue to solicit and consider the views of Tribes and Tribal representative in other ways, as discussed elsewhere in this action plan. The Commission also would be willing to work with action agencies and Tribes to explore ways in which the Commission could participate in or receive input from Tribal consultations conducted by those agencies that the Commission could then take into consideration when commenting on and formulating its recommendations on those policies and actions to other agencies.

The Marine Mammal Protection Act takes special notice of the importance of marine mammals to Alaska Natives. It includes provisions that allow for traditional subsistence uses and the continuation of cottage industries that fashion handicrafts using marine mammal parts and that govern those practices. The Act also calls for cooperation between federal management agencies and organizations representing Alaska Natives on marine mammal issues and provides for them to enter into agreements to monitor marine mammal populations and Native harvest, conduct joint research efforts, and establish co-management structures. Section 202 of the Act, which sets forth the duties of the Commission, directs the Commission, among other things, to recommend to the Secretary of Commerce, the Secretary of the Interior, other appropriate federal officials, and Congress such measures "as it deems necessary or desirable to further the policies of [the] Act, including provisions for the protection of the Indians, Eskimos, and Aleuts whose livelihood may be adversely affected by actions taken pursuant to [the] Act." Thus, the Commission has a responsibility to consider the needs of Tribal governments and Tribal members in Alaska independent of the Executive Order, a duty that it has been carrying out since its inception.

Given the Marine Mammal Protection Act's provisions specific to marine mammal use by Alaska Natives, this has been a focus of the Commission's involvement on Tribal issues historically. Although not

specifically addressed in the Act, certain treaties between the United States and Tribes outside of Alaska may also warrant the Commission's attention. One that clearly does is the 1855 Treaty of Neah Bay. While many treaties reserved generalized Tribal hunting and fishing rights, the Treaty of Neah Bay is unique in that it secured for the Makah Tribe the "right of taking fish *and of whaling or sealing* at usual and accustomed grounds and stations...in common with all citizens of the United States" (emphasis added). As far as the Commission is aware, this is the only such treaty that specifically mentions marine mammals or that explicitly reserves hunting rights related to them. As such, in addition to Tribal villages in Alaska, the Commission specifically recognizes the Makah Tribe for inclusion in the Commission's action plan.

#### Activities related to Alaska Natives

The Commission has adopted several initiatives and undertakes a variety of actions to meet its responsibilities specific to Alaska Natives. For the past 30 years, the Commission has retained a Special Advisor on Native Affairs, with whom the Commission consults along with the Commission's Committee of Scientific Advisors on Marine Mammals before making recommendations pertaining to Alaska Native issues. The Commission's Special Advisor has always been a respected member of the Alaska Native community with close ties to Alaska Native organizations that have a special interest in subsistence uses and marine mammal conservation and management.

The Commission rotates the venue of its annual meetings to focus attention on issues in a particular region. As a result, the Commission meets periodically in Alaska, where it is able to explore in detail issues of particular concern to Alaska Natives. Representatives of Alaska Native Organizations (ANOs)<sup>1</sup> with marine mammal interests or co-management responsibilities for marine mammals attend these meetings and are afforded time to discuss matters of interest directly with the Commissioners, members of the Committee of Scientific Advisors on Marine Mammals, and the Commission staff. Often, the Commission funds travel associated with such participation by Alaska Natives who otherwise would not be able to attend. In 2016, the Commission held a series of listening sessions in subsistence hunting villages across Arctic Alaska in addition to convening a meeting in Anchorage to review input from the listening sessions. The 2016 listening sessions were focused on hearing firsthand from Tribal leaders and residents of a cross-section of Alaska Native communities about issues related to marine mammals, including how climate change is affecting the availability of marine mammals to subsistence hunters. Those multi-day sessions provided the Commission with an opportunity to engage with community members in detail and on a more substantive level to gain a greater appreciation of the challenges associated with subsistence lifestyles in a rapidly changing environment subject to increasing human activities.

The Commission also has established a strong working relationship with the Indigenous People's Council on Marine Mammals (IPCoMM). IPCoMM serves as the central point of contact for federal and state government agencies to interact collectively with the majority of active ANOs with marine mammal interests or co-management responsibilities. The Commission also works directly with individual ANOs with species-specific or regional focus that have co-management or cooperative agreements with either the National Marine Fisheries Service (NMFS) or the U.S. Fish and Wildlife Service (FWS), the two federal agencies that have management responsibility for marine mammals. Commissioners and senior staff routinely attend IPCoMM meetings and those of other ANOs when possible, to keep apprised of activities and concerns regarding marine mammal issues and to discuss federal actions and policies that could have Tribal implications. As appropriate, Commission staff may also participate in working groups with IPCoMM, other ANOs, or other governmental or non-governmental organizations representing Alaska Natives to develop research or harvest management plans or legislative proposals to clarify or strengthen co-management authorities under the Marine Mammal Protection Act.

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<sup>1</sup> Defined in the Marine Mammal Protection Act as "a group designated by law or formally chartered which represents or consists of Indians, Aleuts, or Eskimos residing in Alaska." Although most ANOs are authorized by Tribal governments to represent them on marine mammal issues, this is not a specific requirement under the Act.

The Commission undertakes special projects to explore in depth certain topics related to marine mammal conservation, science, and management of particular concern to Congress or the agencies responsible for implementing marine mammal programs. Beginning in the late 2000s, many of these projects have focused on topics of particular importance and concern to Alaska Native communities. The following is a summary of key projects and activities—

- In 2008, the Commission convened a *Review of Co-management Efforts in Alaska*, which identified ways to strengthen co-management of marine mammal resources between federal agencies and ANOs under section 119 of the Marine Mammal Protection Act. The final report is [available here](#).
- In 2012, the Commission, in collaboration with IPCoMM and the Environmental Law Institute (ELI), undertook a review to identify ways to improve the Tribal consultation process. Meeting participants included representatives of various federal agencies, ANOs, other Alaska Native Tribal representatives and leaders, and public and private stakeholders. Several participants recommended that Alaska Native communities independently develop guidance on how they would like federal agencies to conduct Tribal consultations related to actions that may affect marine mammals. A summary of the meeting and other recommendations are available as part of the [meeting report](#).
- In 2014, the Commission contracted with ELI to work with IPCoMM, ANOs, additional Tribal representatives, and others to develop model procedures for government-to-government consultations with Alaska Native Tribes under Executive Order 13175 and related directives. The objective of the project was to assist Alaska Native communities in developing and documenting a set of model consultation procedures regarding policies, regulations, legislation, or other federal actions that have Tribal implications. ELI convened an advisory group made up of Tribal members and others with expertise in marine mammal consultation and co-management to help guide the project, with assistance from IPCoMM. The draft procedures were reviewed by Alaska Natives and several federal agencies. ELI issued a [final handbook outlining model consultation procedures](#) in January 2016.
- As noted above, the Commission, in lieu of its traditional annual meeting, in 2016 held a series of [listening sessions](#) in Alaska Native communities to discuss a variety of marine mammal issues, including how climate change is impacting the Arctic marine environment and subsistence hunting of marine mammals by Alaska Natives. The listening sessions concluded with a “wrap-up” session in Anchorage, convened in conjunction with a meeting of IPCoMM, at which the Commission discussed what it had heard and identified potential responsive actions.
- In 2018, the Commission received a grant from the North Pacific Research Board to review co-management arrangements and identify the essential components for, and key impediments to, effective co-management of marine mammals in Alaska. The overall goal of the review was to strengthen co-management relationships, and thereby improve the benefits to co-management partners while also promoting conservation of marine mammals. Three ANOs were chosen by a steering committee that involved Alaska Natives to serve as case studies for the review, and interviews were conducted with NMFS and FWS staff, ANO members, Alaska Native hunters, and resource users. The Commission published a [project report](#) identifying common themes derived from the interviews and making recommendations to address study findings.
- In 2019, the Commission participated in a Capitol Hill event convened by [Kawerak, Inc.](#), along with the Alaska Eskimo Walrus Commission, Alaska Native hunters and craftspeople, and others concerning possible amendments to the Marine Mammal Protection Act. The Commission’s Executive Director made a presentation to the participants, including Senator Dan Sullivan (Alaska), Congressional staff, and Alaska Tribal representatives, reviewing the Commission’s responsibilities under the Marine Mammal Protection Act and expressing support for co-management arrangements as effective mechanisms to promote the conservation of marine mammals in a region where they are of critical cultural, ecological, social, nutritional, and economic importance to Alaska Native communities.

### Activities related to the Makah and other Treaty Tribes

As noted above, activities under the Marine Mammal Protection Act and by the Commission may impact treaty Tribes outside of Alaska, primarily in the Pacific Northwest. Given the Makah Tribe's explicit treaty rights concerning marine mammals, this Tribe has been the focus of the Commission's consultation responsibilities outside of Alaska. Most notably, the Commission has consulted closely with members and representatives of the Makah Tribe on the Tribe's application for a waiver under the Marine Mammal Protection Act seeking authorization to take gray whales for subsistence and ceremonial purposes. The Commission reviewed the Tribe's whaling proposal during at least three of its annual meetings and has met periodically with the Tribe to consult on that proposal. During a two-day visit to Neah Bay in July 2015, a Commissioner, the Chair of the Commission's Committee of Scientific Advisors, and senior staff met with the Makah Tribal Council to discuss the whaling proposal.

In consulting with the Makah Tribe on this action plan, the Tribe and the Commission agreed that strengthening lines of communication would help ensure that the Commission, in meeting its responsibilities under the Marine Mammal Protection Act, is aware of and considers the views of the Tribe. Toward this end, the Commission and the Tribe intend to schedule periodic meetings, much as the Commission currently does with IPCoMM and ANOs, to discuss matters of mutual interest. The Makah Tribe also stressed that actions taken under the Marine Mammal Protection Act, such as the adoption and implementation of marine mammal conservation programs and practices, could have implications for other important tribal activities, including fisheries. This concern goes beyond the Makah Tribe and applies to other Tribes in the Pacific Northwest that rely on salmon and other fishery resources for their livelihoods. As such, the Commission also intends to establish regular channels of communication with the Northwest Indian Fisheries Commission, as recommended by the Makah Tribe.

### Action Plan Goals

In accordance with Executive Order 13175, the goals of this action plan are to—

- establish regular and meaningful consultation and collaboration with Tribal officials and their representatives in the development of Federal policies that have Tribal implications;
- strengthen the government-to-government relationships with Indian Tribes;
- reduce the imposition of unfunded mandates on Tribal governments;
- recognize the unique relationship with Indian Tribal governments as set forth in the Constitution, treaties, statutes, Executive Orders, and court decisions;
- honor Tribal treaty and other rights;
- grant the maximum administrative discretion possible regarding federal statutes and regulations administered by Tribes; and
- encourage Tribes to develop their own policies to achieve program objectives, and encourage Tribes to establish standards.

### Actions under the Plan

The Marine Mammal Commission will take the following actions to implement the policies and directives of Executive Order 13175—

1. The Commission and its staff will continue to meet periodically with officials from IPCoMM and other ANOs, Alaska Tribal village governments, and treaty Tribes whose interests are affected by the Marine Mammal Protection Act, to exchange views on issues of mutual interest and to identify opportunities for coordination and cooperation.

2. The Commission and its staff will expand or establish similar lines of communication with the Makah Tribe and the Northwest Indian Fisheries Commission to consult on issues of mutual interest and to identify opportunities for coordination and cooperation.
3. The Commission will consult with ANOs and/or Tribal village governments and, as appropriate, treaty Tribes on any legislative proposals that have implications for Native subsistence rights or co-management activities under the Marine Mammal Protection Act or that otherwise have Tribal implications, including proposals regarding other statutes that would have implications for subsistence hunting under the Marine Mammal Protection Act. No such legislative proposal will be submitted to the Office of Management and Budget for clearance unless such consultations have been conducted.
4. The Commission's Executive Director, with guidance from the Commissioners, will oversee the Commission's formulation and implementation of policies to identify those that have Tribal implications. In making such determinations, the Executive Director may consult and will consider any input received from the Commission's Special Advisor on Native Affairs, ANOs, and/or Tribal leaders. Whenever the formulation or implementation of agency policies are identified by the Executive Director as having Tribal implications, the Commission will engage in consultations with appropriate ANOs and/or Tribal officials before implementing those policies or taking those actions.
5. The Commissioners or the Commission's Executive Director will designate a senior staff member (or members) to serve as the agency's Tribal liaison(s). The liaison(s) and/or other appropriate agency officials will represent the agency at meetings with ANOs or other Tribal representatives. The liaison(s) will also assist the Executive Director in determining when the formulation or implementation of agency policies has Tribal implications.
6. The Commission will continue to consult with its Special Advisor on Native Affairs concerning agency actions and proposed agency recommendations that pertain to Alaska Native issues. The advice of the Special Advisor will be factored into the final recommendations.