

## **Summary of Comments Received on the Marine Mammal Commission's Revised Tribal Consultation Action Plan, and Changes Made in Response**

**October 2021**

The Marine Mammal Commission provided its revised Tribal Consultation Action Plan to the Office of Management and Budget on 26 April 2021, in response to the 26 January 2021 Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships. As noted in its transmittal memo, the Commission reached out initially to the Indigenous People's Council for Marine Mammals and other Alaska Native Organizations (ANOs) whose members have been authorized by their respective tribes to represent them on issues pertaining to marine mammals.

A total of 22 ANOs, Alaska Tribal villages, and Alaska regional organizations were sent letters requesting comments on the revised action plan. The Commission also sent the action plan to the Makah Tribe of Neah Bay. The Makah Tribe is the only treaty Tribe outside of Alaska that the Commission is aware of whose treaty specifically reserves hunting rights for marine mammals. Six responses were received, five with comments and one with no comments (see attached spreadsheet). One formal consultation was conducted.

Following are the comments and recommendations received on the Commission's revised action plan, and corresponding changes made to the action plan in response.

### **Alaska Nannut Co-management Council (ANCC)**

Comments and recommendations:

- The ANCC expressed its appreciation for reinvigorated engagement with ANOs to strengthen marine mammal co-management, and for its efforts to help amplify Tribal voices in polar bear co-management.
- The action plan must acknowledge the Commission's position and strengthen the unique role it plays in marine mammal management decisions that impact Alaska Native subsistence practices. The Commission's policy positions and recommendations have the potential to significantly impact Alaska Native subsistence practices. As such, the Commission's action plan should require compliance with specific consultation standards and schedules.
- The Marine Mammal Protection Act (MMPA) obligates the Commission (at section 202) to recommend to the Secretary "measures...necessary or desirable to further the policies of the Act, including provisions for the protection of the Indians, Eskimos, or Aleuts whose livelihood may be adversely impacted by actions taken pursuant to the Act." The Commission should therefore include in the action plan reference to the Commission's responsibilities under section 202(a)(7) of the MMPA to make recommendations to the Secretaries of Commerce and the Interior measures to further policies which provide for the protection of Alaska Natives whose livelihood may be adversely affected by actions taken pursuant to the MMPA.
- The action plan must also account for the Commission's role in international policy recommendations for management processes, and establish clear consultation requirements prior to the development of policy positions concerning subsistence practices of Alaska Natives. The action plan should include requirements for the Commission to:

- Consult with ANOs on the formulation of proposals or policy positions for international decision-making processes or treaty actions which, if adopted, could have tribal implications; and
- Consult with ANOs prior to implementation of policies or actions taken pursuant to U.S. international treaty obligations where those policies have Tribal implications.
- The action plan should establish clear requirements for consultation with ANOs and Tribes prior to the Commission's engagement with federal agencies on proposed changes to subsistence harvest practices and co-management agreements, and include language in the action plan accordingly.

Changes to the action plan in response:

- A statement was added to the Background section indicating that the Commission recognizes the potential impact and influence of its recommendations on policies and procedures proposed by other Federal agencies, and strives to coordinate and communicate with those agencies, to the extent possible, regarding the formulation and implementation of policies and procedures that have Tribal implications.
- A statement was added to the section on Commission Planned Activities indicating that information regarding the Commission's consultation process, consultation requests, and timelines for conducting consultations on legislative proposals or other actions that have Tribal implications will be posted on the Commission's website, in an effort to provide greater transparency regarding planned and ongoing consultations.

### **Aleut Marine Mammal Commission**

The Aleut Marine Mammal Commission reviewed the action plan and had no comments.

### **Eskimo Walrus Commission (EWC)**

Comments and recommendations:

- The EWC recognized the important role the Commission has in ensuring livelihood protection for Alaska Native communities under the MMPA, and that this directs much of the Commission's activity. The Commission's work on co-management issues through the years is evidence of this role.
- The action plan should reinforce the Commission's commitment to consultation with ANOs on any legislative proposals that would have implications for Native subsistence rights or co-management activities under the MMPA and for also including any legislative proposals that might have tribal implications outside of the MMPA. Alaska Native food security concerns involve many issues related to subsistence use of marine mammals, like the health of the waters and ecosystems.
- The Commission should continue to support the importance of sufficient, consistent funding for co-management organizations. This continues to have significant implications for ensuring Alaska Native subsistence rights are protected.

Changes to the action plan in response:

- The Commission's commitment to consultation with ANOs on any legislative proposals that would have implications for Native subsistence rights or co-management activities under the MMPA is addressed under item 3 of the section on Commission Planned Activities. That

section was expanded to include consultation on legislative proposals regarding ecosystem issues that have implications for subsistence hunting and food security.

## **Kawerak**

Kawerak submitted essentially the same comments as the EWC.

## **Native Village of Kotzebue (NV Kotzebue)**

Comments and recommendations:

- The NV Kotzebue noted that federal agency decisions have the potential to impact their citizens' ability to carry out their cultural prerogatives in as unfettered manner as possible.
- The NV Kotzebue expressed its appreciation for the Commission's 2016 site visit and its efforts to investigate the state of the government-to-government relationship between Tribes in Alaska, ANO's, Alaska Natives, and the federal agencies that manage the marine mammal resources on which they depend.
- The NV Kotzebue believes that the Commission's revised action plan would be an effective approach to addressing Executive Order (E.O.) 13175. One issue it highlighted for emphasis is a robust and effective communication strategy, an area it found to be consistently lacking or in need of improvement across federal agencies. Tribes cannot engage if they are unaware of opportunities to do so.
- It is a continuing challenge for Tribes to become aware of opportunities to review and comment on proposed federal actions taking place within specific topic areas and with finite response periods (e.g., proposed rules in the *Federal Register* regarding marine mammals). Tribes need to have the capacity to review and understand what is being proposed and how that may affect the Tribe's interests in order to respond effectively or engage with the issue.
- The Commission should review its communication systems (such as its email listserv for its newsletter) to assess whether improvements could be made to the frequency and/or the thoroughness of communications with represented Tribes.
- The Commission should also advocate for the National Oceanic and Atmospheric Administration and its National Marine Fisheries Service to improve their outreach system using listservs to communicate directly and in a timely manner with individual Alaska Tribes on marine mammal issues and actions, as detailed in the NV Kotzebue's comments to the Department of Commerce on this matter (which they shared with us).
- The Commission is conscientiously responding to the many challenges related to effectively implementing E.O. 13175 (especially the spirit of the Order) and is expending the appropriate amount of effort on trying to improve engagement between the Alaska Native community and those in the federal government responsible for implementing marine mammal management.
- The NV Kotzebue recommends that the Commission:
  - continue to engage on the issue of the effectiveness of co-management of marine mammals in Alaska; and
  - work with those federal agencies responsible for marine mammal management on improving their communication with all Alaska Tribes on an individual basis, beyond the ANO structures.

Changes to the action plan in response:

- A statement was added to the Commission Planned Activities section indicating that the Commission will review periodically the contact information it maintains for ANOs and tribal governments to ensure that the information is updated and preferred methods of communication are used.

## **Makah Tribe of Neah Bay**

Comments and recommendations:

- The Tribe stated that the Commission holds a trust responsibility to the Makah Tribe in actions and/or policies that could affect Makah treaty rights and resources.
- The Tribe appreciates nearly two decades of communication with the Commission regarding the Tribe's MMPA waiver process, and looks forward to continuing to work together on this and other important topics.
- The MMPA recognizes the importance of marine mammals to Native culture and subsistence, and the Commission should acknowledge in its interactions, publications, policies, and communications that those same values pertain to the Makah Tribe.
- The Tribe recommends that the Commission support the establishment of a relationship between the Makah Tribe and the agency's Alaska Native Liaison and Special Advisor on Native Affairs so that the Tribe can rely on these individuals concerning future issues and consultations.
- The revised action plan is almost entirely focused on the Commission's policies, actions, and relationship with Alaska Natives, rather than treaty tribes like Makah. The Tribe urged the Commission to increase the emphasis it places on the Makah Tribe with respect to the agency's development of actions, policies, comments, and recommendations that may have implications for the Makah and other federally recognized tribes.
- The Tribe recommended that the Commission recognize the Makah Tribe's treaty right to hunt whales, seals, and other marine mammals through the Commission's website, correspondence, comments on proposed rules and legislation, and in other contexts.
- The Commission should remove the statement "To a lesser extent, ..." when referencing the Makah Tribe in its action plan.
- The Commission's comments on proposed actions that involve the exercise of treaty rights or potential impacts to treaty rights may have substantial direct effects on the Makah Tribe. The Commission should consult with the Tribe to ensure that the agency understands the potential effect of its comments, recommendations, or other actions on the Tribe and the Tribe's exercise of treaty rights. In that process, the Commission should place particular weight on the Tribe's view of whether the Commission action at issue has tribal implications. The Commission should thoroughly consider how it can limit any adverse effect on the Tribe from the Commission's action and reflect that consideration in the final action.
- The draft action plan includes only a brief mention of treaty rights. This narrow consideration of the Makah's treaty whaling right does not fully consider the breadth of impacts that the Commission's actions under the MMPA may have on the Tribe's treaty rights.
- The Commission needs to be cognizant that its actions involving marine mammals that occur in waters of the Pacific Northwest have the potential to adversely affect the exercise of treaty fishing rights and treaty whaling and sealing rights, and should consult accordingly.

- The Tribe suggests that the Commission include the Northwest Indian Fisheries Commission on communications regarding actions with Tribal implications to ensure that information is distributed to other interested treaty tribes.
- The action plan should include more details regarding the Commission’s consultative process.

Changes to the action plan in response:

- A paragraph was added to the Background section of the plan that describes the provisions of the 1855 Treaty of Neah Bay, which secured for the Tribe the right of taking fish, whales, and seals.
- The statement “To a lesser extent, ...” was removed from the action plan.
- A section was added to the action plan on “Activities related to non-Alaska Treaty Tribes” describing actions that the Commission has taken to consult on the Makah Tribe’s whaling proposal, and the need to strengthen lines of communication between the Commission and the Makah Tribe and other Treaty Tribes in the Pacific Northwest that rely on salmon and other fishery resources.
- The Commission stated that it intends to schedule periodic meetings with the Tribe to discuss matters of mutual interest, and intends to establish communications with other Pacific Northwest Treat Tribes that rely on salmon and other fishery resources.
- The Commission amended the Planned Actions section to indicate its intention to establish/strengthen lines of communication with the Makah Tribe and the Northwest Indian Fisheries Commission.