

**NMFS and Tribal Representatives Workgroup
Meeting Report and Recommendations**
November 9-10, 2009

Participants

Present in person:

Mike Miller, ANHSWG
David O. Osterback, APIA
Karen Plentikoff, APIA
Steve Totemoff, Chugachmiut
Julie Raymond-Yakoubian, Kawerak
Eugene Smith, Maniilaq
Jennifer Hooper, AVCP
Art Ivanoff, Native Village of Unalakleet
Floyd Kookesh, CCTHITA
Joeneal Hicks, HTSS
Mike Smith, TCC
Patty Schwalenberg, CRRC
Caroline Cannon, ASNA

Present via telephone:

Mitch Simeonoff, Sr., KANA
Andy Teuber, KANA (1/2 of Day 1)

Facilitator/Moderator

Heather Kinzie

Agency Staff

Sally Bibb, NMFS, AK Region
Nicole Kimball, NPFMC
Jay Ginter, NMFS, AK Region
Barb Mahoney, NMFS, AKRegion

Sarah Scanlan, RurAL CAP
Rebekah Lührs, RurAL CAP
Janice Berry, RurAL CAP

See the attached attendee list for additional contact information for participants.

The meeting began at 9:15 am. Sarah Scanlan greeted the group and participants introduced themselves. Sarah explained how the representatives were selected (each regional non-profit was asked to send a representative). Moderator Heather Kinzie described the goals and objectives of the meeting as follows:

The goal: provide an open discussion to help NMFS engage in a two-way tribal consultation process.

The objectives: to learn about the government agency process, to learn what tribal consultation means to the tribes, and to identify ways to improve the process.

Heather confirmed the meeting was designed for exchanging ideas and information and was not an actual "tribal consultation" as defined by Executive Order 13175.

Nicole Kimball presented an overview of the roles of the North Pacific Fisheries Management Council (NPFMC) and the National Marine Fisheries Service (NMFS) in creating fisheries regulations. Sally Bibb presented an overview describing what is required for tribal consultation under Executive Order (E.O.) 13175 and summarized President Obama's 11/5/09 memo requiring each federal agency to submit a plan within 90 days for how that agency is going to comply with the requirements of E.O. 13175.

The group discussed the difficulty of incorporating meaningful tribal consultations on fisheries issues into the decision making process required under the Magnuson-Stevens Act. The Magnuson-Stevens Act authorizes the NPFMC to develop fishery management plans and recommend fishery management measures to NMFS. NMFS is authorized to approve, disapprove, or partially approve the NPFMC's recommendations. NMFS may implement management measures independently of the NPFMC, but is likely to do so only if the NPFMC fails to act on a conservation issue. Therefore, the primary decision maker for Federal fisheries management issues is the NPFMC. However, the tribal consultation requirements apply to NMFS. Consulting with NMFS on issues under the authority of the NPFMC is not as effective as consultations may be in other Federal agencies where the agency is the primary decision maker. Consulting with NMFS late in the process after the NPFMC has already taken action also is not effective because NMFS's options for how to address NPFMC recommendations are limited under the Magnuson-Stevens Act. Frustration about the difficulty tribes have in achieving what they consider to be effective tribal consultations in this process led to many of the recommendations identified later in the meeting. One participant expressed his frustration as follows: "Tribal consultation with NMFS cannot be meaningful within the NPFMC process as outlined in the Magnuson-Stevens Act and interpreted by NMFS."

What is Tribal Consultation?

The group openly discussed their vision of the characteristics or "elements" of an "effective" tribal consultation process. Following are the requirements and characteristics of a tribal consultation from the perspective of the tribal representatives at the meeting:

- A tribal consultation is a meeting between NMFS representatives and tribal representative(s) who have decision-making authority on behalf of their agency or the tribe(s) they represent.
- Tribal consultation is not a letter or one meeting on an issue, but is an on-going relationship between NMFS and the tribes that empowers the tribes to participate in decision making. A letter is fine if it is part of a functional, on-going relationship.
- Tribal Consultation represents an ongoing, engaging relationship between NMFS and the individual tribe
 - a. Needs to be meaningful and valuable communication between the parties.
 - b. Follow-up has to occur.
 - c. Accountability is necessary.
- Collaboration must be the objective of the relationship.
- Timely engagement has to occur. Collaboration must be sought by NMFS well before decisions are made by the NPFMC. The tribal consultation process cannot be so cumbersome that intent/objective is watered down beyond being valuable.
- Tribal consultation process must be a consistent process, not subject to the whims or agenda of changing administrations.
- NMFS staff participating in tribal consultations must be as consistent as possible. It is frustrating to have new agency staff continually becoming involved. We keep hearing from the new guy "we're here to listen and learn".
- Meetings and discussion must not be "lip service" – true consultation is a two-way information exchange.
- Meetings and discussion must be continual – it is a process that circles back.
- Some participants interpret the appropriations act that requires consultation with "Alaska Native corporations" to include the regional non-profit corporations and the Alaska Federation of Natives, in addition to the ANSCA regional and village corporations.

Lunch was offered by RurAL CAP and time was allowed for participants to converse openly.

Success Stories

After lunch, the group engaged in a discussion regarding the tribal consultation processes that appeared to work well with other agencies and groups. Those mentioned were:

- Alaska Migratory Bird Co-Management Council. It has some success because it is a co-management arrangement, the board is comprised of multiple Alaska Native representatives but only entitled to one vote. It is Federally funded.
- Dept. of Defense (U.S. Army, Air Force). Goals and interests are shared. Tribe's participation in consultations is funded by DOD, DOD has a tribal liaison to maintain the relationship, and DOD leadership travels to communities and participates in the tribal consultations.
- Cooperative Agreements
- The Alaska Native Halibut Subsistence Working Group. It is not true tribal consultation, but it brings together stakeholder groups, is Federally funded, and the timing coincides with NPFMC meetings so participants are able to participate directly in that process as well.
- Indigenous People's Council for Marine Mammals (IPCOMM). All representatives are voting members and they have operating procedures to guide people on decision-making and communications.
- Bering Sea Fishery Coalition. Tribal representatives speak to issues based on conservation.
- Western Arctic Caribou Working Group. It works with various land managers in governmental agencies but also other stakeholders such as hunting guides. It is tribally-driven.
- The Alaska Eskimo Whaling Commission (AEWC). Of all the cooperative agreements, the AEWC is the only co-management system that allows Native Alaskans to make the decisions about resource management.
- The Census Bureau. It works directly with tribes. For the 2010 census, the tribes will be asked to review and approve the census for their communities.

Recommendations for Improvement

After the group discussed some elements of processes with other agencies that work well, they discussed their ideas and recommendations to NMFS for improving its tribal consultation process.

The first six bullets in the list below are those the tribal representatives believe are of primary importance and priority. The remaining 14 bullets, while numbered, are not in any particular order of importance.

1. In addition to the official representative each agency must appoint under E.O. 13175, NMFS Alaska Region must hire tribal liaisons responsible to be the contact and resource for the tribes. NMFS must comply with ANILCA, including Title 13, in hiring the liaisons.
2. NMFS Alaska Region must communicate to the Secretary of Commerce to recommend to Congress that it amend the Magnuson-Stevens Act to require voting seats for regional tribal representatives on the NPFMC.

3. NMFS must fund the tribes' participation in tribal consultations. Tribal consultations can't be an unfunded mandate or a low priority in the budget. NMFS needs to expedite the process of providing funding for tribes to participate in tribal consultations.
4. NMFS must engage with the tribes in the same way that it is engaging with the State of Alaska. Constant interaction, sharing of information and advice, sharing of resources, etc. In addition, participants recommend that NMFS withhold Federal funding from the State until it complies with federal law (e.g. recognize tribes, subsistence priority, comply with ANILCA, comply with E.O. 13175).
5. NMFS must create a Memorandum of Agreement (MOA) or a Memorandum of Understanding (MOU) with the NPFMC about how the NPFMC will engage with NMFS in consultations with the tribes; NMFS must create a separate MOA/MOU with the tribes about how the tribal consultation process will be conducted. Language must be clear and concise, not leaving room for error or misinterpretation. Timelines must be perpetual (the MOA/MOU must not expire). Use language such as "shall" and "will" in the MOA/MOU, as opposed to "may" and "should."
6. The NPFMC must hire tribal liaisons responsible to be the contact and resource to the tribes. Comply with ANILCA including Title 13, local hire.
7. NMFS must send these recommendations to its headquarters office and to meeting participants so participants can send to all appropriate government officials, including the Congress of American Indians and the Alaska Federation of Natives.
8. The Federal government, including NMFS, must acknowledge and recognize tribes as sovereign governments, having a government-to-government relationship with the federal government.
9. NMFS must communicate effectively with tribes (regularly and consistently, using effective mediums, etc., regularly update contact lists, using multiple mediums).
10. NMFS must keep all tribes/representatives of tribes notified of tribal consultations on all issues throughout the entire process.
11. The NPFMC must adhere or otherwise follow the tribal consultation requirements of E.O. 13175.
12. NPFMC meetings, when they do occur, must be during times of the year that are conducive to strong engagement. Having meetings during fishing seasons, for example, is not effective.
13. Do not usurp the authority of the tribes. Consult with regional non-profit corporations if you can't engage with individual tribes, but only if the tribes have delegated their authority to the region.
14. Allow tribal entities to participate in the scientific analysis stage of the decision making. Allow for traditional ecological knowledge (TEK) to be used in this phase of the process.
15. Create a consistent tribal consultation process. NMFS and NOAA must use ONE process for tribal consultations. The Alaska Region NMFS must develop one tribal consultation process that covers all issues dealt with by the region (fisheries, habitat, marine mammals). Ideally all Federal agencies must use a consistent tribal consultation process.
16. NMFS must seek tribal consultations at the beginning of the process, not at the end!

17. NMFS must bring its legal representation or someone who can explain/interpret their position on an issue. This will allow tribal representatives to ask meaningful questions of the person "in the know" as opposed to relying on the "messenger" to try to interpret the logic/reasoning.
18. Tribes must have designated seats on the Advisory Panel to the NPFMC.
19. When creating a contact list for the tribes, identify the contact person specific to the tribal consultation process.
20. NMFS must follow up with tribal representatives about what NMFS will do regarding the recommendations of this group.

The work group meeting adjourned for the day at 5:15 pm.

Day Two

The participants reviewed what had been discussed on Day One and sought to prioritize the recommendations listed above. In addition, they discussed what they believe must be an "ideal" tribal consultation process. The steps below summarize the recommendations of the tribal representatives for an ideal tribal consultation process:

"Ideal" NMFS Consultation Process

1. As NMFS or the NPFMC develop fishery management initiatives or policies, early in the process NMFS must think about and identify how the issue will impact tribes and their members.
2. An issue appropriate for tribal consultation could be identified by a tribe or by NMFS.
3. Communication about the issue must occur:
 - a. NMFS must send a letter to the tribes and Alaska Native corporations.
 - b. If there is no response to the letter, NMFS must follow-up via phone call with the non-respondents to see why there was no response. NMFS also must follow up by phone with respondents to see who must be involved in the issue and what level of involvement must occur.
 - c. NMFS also must contact the regional non-profit corporations about the issue if it needs assistance identifying which tribes it must consult with.
4. Tribes could request a tribal consultation meeting with NMFS.
 - a. NMFS must identify whether the consultation is with one tribe or with multiple tribes. The tribe requesting the consultation must decide whether other tribes would be invited to the consultation, and, if invited to participate in a joint consultation, the other tribe(s) must decide if they want to consult as a group or on their own.
 - b. Parties must decide who must be involved in the consultation. (Will the NPFMC be involved? If so, who would represent the NPFMC?)
5. The tribal consultation must be scheduled.
 - a. Timing of consultation would depend on the schedules of the tribal representative and NMFS staff who needed to participate.
 - b. The Alaska Regional Administrator (NMFS) must participate in the consultation.
 - c. The meeting must be in the community's village or if that is not possible, in the tribe's region.
 - d. The meeting must be in a neutral location, not at a NMFS office.
 - e. NMFS must provide funding for tribal representatives to attend if the consultation is not in his or her home town.
6. Prior to the tribal consultation, information must be disseminated.
 - a. NMFS must provide information and analysis about the issue.
 - b. Tribes must provide any questions or concerns to NMFS ahead of time.
 - c. Information must be as detailed, thorough, and specific as possible.
 - d. NMFS needs to be prepared for the consultation and needs to have thought about potential impact of the issue on tribes.
7. The tribe and NMFS must jointly develop an agenda for the tribal consultation.

8. Meet, discuss and decide (Lots of things happen here. It could go back and forth on documents, evidence, etc. Additional meetings may be needed.)
 - a. Identify actions that either party agrees to take.
 - b. Information requests must have been made prior to the consultation meeting and additional information requests may be made at the consultation.
 - c. NMFS must follow through on issues discussed, questions asked, or recommendations made at the consultation.
9. After the meeting, NMFS must write a summary of the consultation and send to it to all parties for review.
10. NMFS must revise the summary based on comments received from participants and issue a final summary of the consultation.
11. The parties must determine if additional meetings were needed.
 - a. NMFS must have to consider issues and concerns and respond to them.
 - b. NMFS's response to issues or concerns raised at the consultation could be done through inclusion in an analysis, in a separate document, or as a separate action, as appropriate.
12. NMFS must provide the tribe's position to the NPFMC (provide the written summary of the tribal consultation and any information about follow-up by NMFS).
13. Tribes would present their position separately to the NPFMC during public comment on the issue (either in writing or in person at a Council meeting).

The meeting adjourned at 12:20 pm. See paragraphs below for follow-up items.

Requests for Information from Tribal Representatives

(Responses since the meeting are noted below in italics.)

1. NMFS must provide a written explanation about why E.O. 13175 does not apply to the NPFMC. *(NMFS has requested NOAA General Counsel to assist in providing this explanation).*
2. Why does the Federal Advisory Committee Act (FACA) not apply to NPFMC? *(Nicole Kimball provided all meeting participants with an excerpt from section 302(i)(1) of the Magnuson-Stevens Act that specifically exempts the Councils from FACA. It states " The Federal Advisory Committee Act (5 U.S.C. App. 2) shall not apply to the Councils, the Council coordination committee established under subsection (l), or to the scientific and statistical committees or other committees or advisory panels established under subsection (g)."*

An electronic copy of the Magnuson-Stevens Act is available online at:

http://www.nmfs.noaa.gov/msa2005/docs/MSA_amended_msa%2020070112_FINAL.pdf)

3. NMFS must provide information about how the Magnuson-Stevens Act was amended to require that the Pacific Fishery Management Council have one voting member representing a tribe.

(Section 302(a)(1)(F) requires that the Pacific Fishery Management Council have one voting member appointed from an Indian tribe with Federally recognized fishing rights from California, Oregon, Washington, or Idaho in accordance with additional requirements in section 203(b)(5) about how that person must be selected.)

4. Get and review EPA's Region 10 Tribal Consult GAP report. *(On 11/12/09, Karen Pletnikoff provided this information to NMFS. It was forwarded to meeting participants on 11/30/09.)*
5. NMFS and the NPFMC staff must provide information about how social and economic impact analysis is conducted and whether or how the tribes would be involved in planning or conducting those analyses.
6. NMFS must provide meeting participants with a copy of IPCOMM operating guidelines. *(Sally Bibb provided this information via e-mail on 12/3/09.)*
7. NPFMC staff must provide information about how tribal representatives would be appointed to seats on the NPFMC's Advisory Panel (AP) and Scientific and Statistical Committee (SSC). *(Nicole Kimball provided all meeting participants with information about the NPFMC's recent request for applications for the AP and SSC. Interested tribal representatives may apply to the NPFMC for a seat on these committees during specific times of the year.)*

Next Steps (Recommended by Tribal Representatives)

(Steps taken since the meeting are noted below in italics.)

1. RurAL CAP must distribute draft minutes to participants for their comments. Once the minutes are final, RurAL CAP must provide a copy of them to NMFS and to the meeting participants.
2. NMFS and NPFMC staff must respond to the information requests. Some responses have already been provided.
3. NMFS must convene a follow up meeting with these participants to provide NMFS response to the recommendations. A higher level NMFS representative and someone from NOAA GC must attend this meeting.
4. NMFS must provide participants information about how the Department of Commerce will respond to the recent Presidential memo on tribal consultation (dated 11/5/09) and how these recommendations can be included in that process. *(On 11/13/09, Sally Bibb provided participants with the name and contact information for Don Chapman, Special Advisor to the Secretary of Commerce for Native American Affairs. Mr. Chapman is responsible for developing DOC's plan in response to the President's memo.)*
5. The NPFMC (during their outreach meeting) must also be provided this information. *(On 11/20/09, Sally Bibb provided a summary of this meeting to the NPFMC's Outreach Committee. This information also will be provided to the NPFMC at its December 2009 through the minutes of the outreach committee meeting that Nicole Kimball will present to the NPFMC.)*
6. NMFS must convey the recommendation of this group to the NPFMC and discuss how these recommendations and the NMFS recommendations would be addressed.
7. When NMFS is contacting tribes regarding the recent Presidential memo on tribal consultation (dated 11/5/09), NMFS must utilize this time to update contacts. *(Both NMFS and the NPFMC continuously update their address lists for tribes and corporations through information obtained from each mailing and by review and comparison with other mailing lists.)*