

# DRAFT Model Alaska Native Procedures for Marine Mammal Consultation Handbook

We are seeking comments on the Handbook design and content. Please contact Kathryn Mengerink ([mengerink@eli.org](mailto:mengerink@eli.org)) or David Roche ([roche@eli.org](mailto:roche@eli.org)) to provide comments and feedback.

MARCH 31, 2015

Drafted by the  
Environmental Law  
Institute in partnership  
with the Indigenous  
Peoples Council for  
Marine Mammals and  
with support from the  
Marine Mammal  
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# MODEL ALASKA NATIVE PROCEDURES FOR MARINE MAMMAL CONSULTATION HANDBOOK

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## I. Introduction

### 1. PURPOSE OF HANDBOOK

The purpose of this Handbook is to serve as a resource. It is meant to provide Alaska Native communities with guidance on how they can design their own policies and procedures for **government-to-government consultation (“consultation”) with federal agencies**. This Handbook specifically focuses on consultation as it relates to federal actions that affect marine mammals and the communities that depend upon them. It includes consideration both of consultation with agencies responsible for marine mammal management (the National Oceanic and Atmospheric Administration and the U.S. Fish and Wildlife Service), as well as agencies whose actions may affect marine mammals, including for example, the Bureau of Ocean Energy Management, the Environmental Protection Agency, and the U.S. Coast Guard, among others.

The goal of this Handbook is to support the leadership of Alaska Native communities in the federal actions that affect them and to enhance the role of Alaska Natives in the consultation process in order to positively influence the way consultation occurs and improve the management of marine mammals. The goal also is to support consultation that enhances other types of tribal self-governance, including co-management.

Marine mammal co-management is of particular importance. It is authorized under the U.S. Marine Mammal Protection Act (MMPA) and provides one of the most robust mechanisms for Alaska Natives to manage the resources they depend upon. Consultation and co-management are necessary to achieve sustainable management and are mechanisms that the federal government uses to satisfy its trust obligations to Alaska Natives. However, consultation faces numerous obstacles in practice, and the relationship between consultation and co-management is not clarified in the MMPA provisions on co-management or the presidential directives calling for consultation. This Handbook and model procedures seek to support Alaska Native communities in addressing these challenges by developing model procedures for consultation that are both designed to accommodate Alaska Native concerns and priorities and that explicitly address linkages to co-management.

While this Handbook and model procedures focus specifically on consultation related to federal actions that affect marine mammals, many of the elements and provisions contained within this model have potentially broader application and could be used as a template to design more general consultation policies and procedures.

#### CONSULTATION: A BRIEF OVERVIEW

##### What is consultation?

**Consultation** is designed to ensure that appropriate consideration is given to the views and perspectives of tribes during federal decision-making. It derives from the trust relationship that the

federal government has with tribes. It is a process that applies to federal agencies when they develop policies and actions that affect the interests of federally-recognized Indian tribes, including Alaska Natives, and consultation should be **meaningful and timely**. It occurs in response to a wide variety of federal actions, including when federal agencies make decisions that affect marine mammal resources.

### Who is involved in consultation?

Federal agencies<sup>1</sup> must consult on a **government-to-government basis** with tribal officials<sup>2</sup> and authorized intertribal organizations.<sup>3</sup> The agencies should be represented by federal officials with decision-making authority for the proposed action at issue.

### When does consultation happen?

Federal agencies must consult **when developing actions with tribal implications**.<sup>4</sup> Tribal implications include effects on tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.<sup>5</sup> Among Alaska Natives' rights are rights to natural resources,<sup>6</sup> including marine mammals.<sup>7</sup>

### What are the agency requirements?

A fundamental principle of consultation is that tribes have an equal role in establishing the principles and practices of consultation with the federal agencies. The current federal consultation policy was strengthened in November 2000 by Presidential Executive Order 13175 and further enhanced by Presidential Memorandum in 2009.<sup>8</sup> These presidential directives call upon **all federal agencies** to adhere to a set of consultation procedures.

Agencies are required to develop written procedures to ensure that they have **accountable** consultation processes.<sup>9</sup> The written procedures must show how agencies will identify policies that may have tribal implications and how they will ensure “**meaningful and timely** input” into the development of agency policies.<sup>10</sup> If appropriate, federal agencies should use consensual mechanisms for developing regulations on issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights.<sup>11</sup>

The Executive Order states the fundamental principle that “[w]hen 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; [and] (2) **where possible, defer to Indian tribes to**

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<sup>1</sup> *Consultation and Coordination with Indian Tribal Governments*, Exec. Order 13175, § 1(c), 65 Fed. Reg. 67249 (Nov. 9, 2000).

<sup>2</sup> “Tribal officials” are defined as “elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.”

<sup>3</sup> Exec. Order 13175, *supra* note 1, § 1(b) (definition of “Indian tribe”).

<sup>4</sup> *Id.* § 5.

<sup>5</sup> *Id.* § 5(d).

<sup>6</sup> *See, e.g., Frequently Asked Questions*, BUREAU OF INDIAN AFFAIRS, [www.bia.gov/FAQs/](http://www.bia.gov/FAQs/) (last visited Mar. 31, 2015) (describing tribal rights to land and natural resources).

<sup>7</sup> *See* 16 U.S.C. § 1388 (providing for “co-management of subsistence use by Alaska Natives”).

<sup>8</sup> *Id.*; Presidential Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation (Nov. 5, 2009).

<sup>9</sup> Exec. Order 13175, *supra* note 1, § 5(a); Presidential Memorandum, *supra* note 6, at 1.

<sup>10</sup> Executive Office of the President, Office of Management and Budget, Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, *Guidance for Implementing E.O. 13175, Consultation and Coordination with Indian Tribal Governments* (July 30, 2010), § 8.

<sup>11</sup> Exec. Order 13175, *supra* note 1, § 5(g).

**establish standards...**” (emphasis added). Therefore, federal agencies should defer to Alaska Native standards, including policies and procedures related to consultation, where possible.

Each agency must have a designated tribal consultation official to coordinate and implement tribal consultation.<sup>12</sup> This official must facilitate “a meaningful and timely form of consultation” concerning regulations with tribal implications. The official also is to provide yearly progress reports to the federal Office and Management and Budget showing that the agency is complying with consultation requirements.<sup>13</sup>

## 2. HOW THIS HANDBOOK IS DESIGNED AND HOW TO USE IT

The concept for this Handbook arose from a 2012 meeting hosted by the Marine Mammal Commission and the Indigenous Peoples Council for Marine Mammals (IPCoMM), which focused on marine mammal consultation. One outcome of the meeting was a recommendation by IPCoMM to work with the Environmental Law Institute (ELI) to develop model Alaska Native consultation procedures for marine mammals. With support from the Marine Mammal Commission, ELI collaborated with IPCoMM and an Advisory Group to design and develop this Handbook. The Advisory Group included experts from co-management organizations, statewide bodies, Alaska Native corporations, and those involved in consultation with federal agencies.

This Handbook includes model language as well as explanations for why specific language is suggested. It is meant to serve as a resource for Alaska Native communities to support their efforts to design consultation policies and procedures that work for them. There is no one-size-fits-all approach, so some provisions may be useful in some circumstances for some communities, but not others. The Handbook considers both internal procedures within a community and external procedures between communities and federal agencies.

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<sup>12</sup> *Id.* § 5(a); Presidential Memorandum, *supra* note 6; OMB Guidance, *supra* note 9, § 3.

<sup>13</sup> OMB Guidance, *supra* note 9.

## II. Model Alaska Native Procedures for Marine Mammal Consultation

Each of the following sections includes *model consultation procedure language* and a sidebar with an *explanation of the purpose of the language*. Information italicized and in brackets (e.g., [*tribe/authorized tribal organization*]) is designed to be updated according to the needs of the communities developing their own policies and procedures. In some instances, more than one option for model language is provided with an explanation of the pros and cons of each approach.

### PART I. PURPOSE, POLICY & DEFINITIONS

#### 1. Purpose of procedures

These Consultation Procedures describe the consultation policy and process developed by [*tribe/authorized tribal organization*] to carry out the goals and objectives of the government-to-government consultation process as described in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (2000) (EO 13175) in actions that affect marine mammal resources and the tribal activities associated with those resources. The intent is to facilitate a more meaningful consultation process.

#### 2. Consultation policy

The following represents the consultation policy of the [*tribe/authorized tribal organization*]:

- a) The objective of consultation is to promote the interests of the [*tribe/authorized tribal organization*] in marine mammal resources. Specifically, the objective of consultation is to express the views, perspectives, and interests of the tribe as they relate to marine mammals, and identify, avoid, and mitigate negative impacts to tribes;
- b) Federal agencies are responsible for initiating consultation when proposed actions may affect marine mammals and Alaska Native communities. Such federal actions may affect management decisions about marine mammals, the ecosystem and resources upon which marine mammals rely, or the ability of Alaska Natives

### PART I. Purpose, Policy and Definitions

*Section 1 provides the reader with an explanation of the purpose and scope of the consultation procedures.*

*Section 2 provides the foundational policy principles that should guide the consultation process.*

to harvest and utilize marine mammals. Tribes reserve the right to initiate consultation whenever deemed necessary;

- c) Consultation is part of a spectrum of engagement between federal agencies and Alaska Native communities, which ranges from informal communication to co-management and cooperative decision-making. The consultation process should enhance and not undermine other types of engagement between the federal government and Alaska Natives;
- d) Trust, respect, and ongoing relationships are keys to success in consultation. In cultivating these, meaningful dialogue between Alaska Natives and federal agencies should be ongoing;
- e) Consultation with tribes is conducted on the basis of a government-to-government relationship. This relationship is based on the recognition of tribal sovereignty, and tribes and federal agencies are equal participants in the consultation process;
- f) Consultation should involve parties who have decision-making authority;
- g) Consultation should be initiated early at the time when actions are first contemplated, well before decisions are made, and must occur often in the decision-making process. Consultation obligations continue until the federal action is final;
- h) Once consultation is initiated, there is an agency obligation to communicate if and how consultation affected agency decision-making;
- i) Meaningful discussions involve a two-way exchange of information and perspectives, and the information provided will be considered and incorporated in the design, development, implementation, and revision of federal government actions;
- j) Exchange of information and perspectives should be conducted in a style and language appropriate for the community involved and if needed translators should be provided by the consulting agency; and



- k) Appropriate funding for consultation is critical to success, and therefore the consulting agency should provide funding for the participation of tribal representatives and for other key expenses in consultation process, where appropriate.

### 3. Definitions

Definitions of key words or phrases included in these Procedures include the following:

**“Agency”** is a federal agency as defined in EO 13175, meaning “any authority of the United States that is an ‘agency’ under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).”

**“Alaska Native Corporation”** means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, et seq.) to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of members of a Native group.

**“Alaska Native Nonprofit Corporation”** (or Association) is an organization under the laws of the State of Alaska as a nonprofit corporation in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, et seq.) to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of members of a Native group.

**“Alaska Native Organization”** is a group designated by law or formally chartered which represents or consists of Athabascans, Tlingit, Haida, Tsimshians, Alutiiq, Unangan, Inupiat, Yup'ik, and Saint Lawrence Island Yupik people indigenous to Alaska.

**“Co-Management Organization”** is a marine mammal ANO which is authorized to and has entered into co-management agreements with a federal agency under the Marine Mammal Protection Act Section 119.

**“Consultation”** is a formal *process* involving communication between tribal officials and federal agencies, as well as between Alaska Native Corporations and federal agencies pursuant to Pub. L. 108-199, 118

*Section 3 defines key terms and phrases that are used in the Procedures.*

Stat. 452, as amended by Pub. L. 108-447, 118 Stat. 3267, about possible federal agency action. As described by EO 13175, consultation is an agency’s “accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.”

**“Consultation Procedures”** are the detailed steps in the [tribe/authorized tribal organization] consultation process and are part of the tribal standards for consultation.

**“Consultation Meetings”** consist of all meetings in the consultation process, including those that focus on information sharing/exchange and those that focus on the specific policies at issue. Meetings should include at least the following:

- **“Planning meetings”** establish agreed upon agenda, processes, and timelines
- **“Information sharing meetings”** include technical meetings, meetings to solicit information from stakeholders, and other types of meetings to share information between tribes and agencies
- **“Formal consultation meetings”** are meetings between tribal officials or authorized tribal organizations and designated federal officials

When appropriate and agreed upon by both parties, information-sharing meetings and formal consultation meetings may co-occur.

**“Designated Consultation Official” or “DCO”** is the “tribal official” referred to in EO 13175 with which agencies must consult, who is an elected or duly appointed official of an Alaska Native tribal government or an authorized intertribal organization.

**“Designated Federal Official”** is the federal official with decision-making authority related to the proposed federal action who participates in formal meetings and other steps in the consultation process.

**“Federal Action”** is any federally funded or permitted activity that affects marine mammals.

**“Tribal Consultation Policy”** is the [*tribe/authorized tribal organization*] policy herein that includes any implementing consultation procedures that are promulgated.

**“Tribal Delegation of Authority”** is a written delegation of authority from an Alaska Native tribe to an individual or an entity to represent the tribe in the consultation process for all consultation issues that are specified in the delegation document. The scope or timing of the delegation is at the discretion of the tribe.

**“Tribal Liaison”** is a designated point of contact in a federal agency or office who supports the agency in its engagement with Alaska Natives in the consultation process, including but not limited to notice of tribal consultation requests, meeting and agenda planning, and communication about the outcome of the consultation process.

**“Tribe”** is a federally-recognized tribe having a government-to-government relationship with the United States with the responsibilities, powers, limitations, and obligations attached to that designation, and possessing inherent rights of self-government.

## **PART II. AUTHORIZED TRIBAL ORGANIZATION & MULTI-PARTY CONSULTATION**

### **4. Authorized tribal organization consultation**

- a) Authorized tribal organizations, as identified by tribal resolution, including but not limited to co-management organizations, Alaska Native Organizations, or other tribal organizations with marine mammal management authority, may consult with federal agencies on behalf of the authorizing tribes with regard to federal decisions that affect marine mammal management.
- b) The authorized tribal organization may request consultation with the agency on any action that may impact the marine mammals with which it is concerned.
- c) Consultation under this section does not preclude participation by individual tribal councils or their designees for issues that are

## **PART II. Authorized Tribal Organization and Multi-Party Consultation**

*To support flexibility, this Part provides approaches for authorized tribal organizations and collaboration in the consultation process.*

*Section 4 is a model provision focused on consultation with authorized tribal organizations.*

relevant to the proposed agency action but outside of delegated authority of the authorized tribal organization.

## 5. Multi-party approach to consultation

- a) One or more tribal councils, co-management organizations, Alaska Native corporations, Alaska Native non-profit corporations, and authorized tribal organizations may consult collaboratively with agencies in instances that benefit from a multi-party approach.
- b) In considering whether a multi-party approach is beneficial, potential Alaska Native parties should consider the following questions:
  - i. What other tribal councils, co-management organizations, Alaska Native corporations, Alaska Native non-profit corporations, and authorized tribal organizations may share an interest in consulting on the federal action?
  - ii. What advantages exist to collaboration?
  - iii. What disadvantages exist to collaboration?
- c) For issues under subsection (a), the parties will seek to ensure that
  - i. The agency provide adequate notice to all parties during the consultation process; and
  - ii. A collaborative process is utilized that is inclusive of parties to the agreement.
- d) For multi-party approaches, the consulting agency should include all parties on official emails, consultation meetings including planning, information-sharing, and formal meetings, conference calls, and other activities undertaken in the consultation process.
- e) To establish a multi-party approach, the parties will:
  - i. Work collectively to identify relevant tribal councils, co-management organizations, Alaska Native corporations, Alaska Native non-profit corporations, and authorized tribal organizations to participate in the process;
  - ii. Seek to develop a memorandum of understanding among the Alaska Native participants setting out the parameters of the Alaska Native collaboration in the consultation process;

*Section 5 creates a model for a multi-party approach to consultation.*

- iii. Once Alaska Native participants are confirmed, give notice to the agency of the process desired based on the terms of the memorandum of understanding; and
- iv. Take measures to ensure ongoing communication among Alaska Native participants during the process outside of the meetings and communications with agency officials.

### **PART III. ACTIVITIES APPROPRIATE FOR CONSULTATION**

#### **6. Types of actions**

- a) Federal actions that may affect marine mammals, the ecosystem and resources upon which marine mammals rely, or the ability of Alaska Natives to harvest and utilize marine mammals initiate the Marine Mammal Consultation Procedures.
- b) The following federal activities shall trigger the consultation process:
  - Legislation, regulations, rules;
  - Policies, guidance documents, directives;
  - Budget and priority planning development;
  - Legislative comments;
  - Permits;
  - Civil enforcement and compliance monitoring actions;
  - Response actions and emergency preparedness;
  - State or tribal authorizations or delegations; and
  - Activities implementing U.S. obligations under treaties, statutes, regulations, or policies
  - Negotiation of co-management agreements

that are expected to affect marine mammals, the ecosystem and resources upon which marine mammals rely, or the ability of Alaska Natives to harvest and utilize marine mammals.

- c) The following types of federal actions may trigger the consultation process:
  - Regulations and policies that affect the geographic region where marine mammals live or where harvest occurs;
  - Permits that affect the geographic region where marine mammals live or where harvest occurs;

### **PART III. Activities Appropriate for Consultation**

*Section 6 provides the type of actions that could trigger a consultation process.*

- Research projects and studies that affect the geographic region where marine mammals live or where harvest occurs; and
- Communication actions, including but not limited to press releases, interviews with media, news reports, and publication in scientific or technical journals that relate to subsistence harvest or the use of marine mammals.

## 7. Evaluation of interests affected

- a) When determining whether a proposed federal action affects tribal interests per section 6, the DCO should consider the following questions:
- Does the federal action have the potential to affect the geographic area where marine mammals live or migrate or may it affect hunting and use of marine mammals?
  - Could the federal action potentially affect harvest or sustainability of marine mammals?
  - Could the federal action affect resources that marine mammals depend upon?
  - Could the federal action affect how communities access or utilize marine mammals?

## PART IV. INITIATING CONSULTATION

### 8. Points of contact

- a) To facilitate communication with federal agencies, *[tribe/authorized tribal organization]* will designate a Designated Consultation Official and make DCO contact information available to agencies, including the following information: name, address, phone number, and email address.
- b) To facilitate communication with tribes, agencies should notify the tribe of the designated federal official and tribal liaison and make contact information available to tribal entities, including the following information: name, address, phone number, email address, and position.

*Section 7 provides a process for evaluating the interests affected and determining whether to initiate the consultation process.*

## PART IV. Initiating Consultation

*Part IV provides model approaches to initiating the consultation process.*

*Section 8 includes provisions focused on points of contact for tribes and federal agencies in the consultation process.*

## 9. Agency-initiated consultation

*[Tribe/authorized tribal organization]* requests that agencies utilize the following procedures to notify *[tribe/authorized tribal organization]* of consultation requests:

- a) As early as possible at the consultation planning stage, an agency should begin the consultation process by notifying the *[Chair/President]* of *[tribe/authorized tribal organization]* and the DCO or other representative of the governing body of the request for consultation.
- b) An agency should notify *[tribe/authorized tribal organization]* using the contact information provided as identified in Section 12. Initial notice should be by hard copy mail and email.
- c) If the *[tribe/authorized tribal organization]* does not confirm receipt of the notice within 21 days, the agency should follow up with one or more phone calls, including to the contact phone number, to ensure receipt. If the action is expected to have a significant impact, the agency should continue to make efforts to contact the tribe until the agency receives a response to the consultation request.
- d) In addition to providing notice directly to *[tribe/authorized tribal organization]*, the agency should publicize the consultation requests using one or more of the following: *[insert preferred publication method: e.g., regional newsletter, radio shows, and/or Alaska Native entity and agency websites]*.
- e) Invitation to consult should occur early enough in the agency planning stage to schedule consultation prior to substantial agency action, including but not limited to the following:
  - i. Consulting prior to initiation of drafting policies, regulations, guidance, or other relevant documents;
  - ii. Decision-making and/or substantial commitment of resources; and
  - iii. Public participation.
- f) The request for consultation should include the following:

*Section 9 focuses on agency-initiated consultation and model language for a process that would be suitable for a tribe or tribally authorized organization.*

- i. State in bold: “Request for Government-to-Government Consultation”;
  - ii. Describe the issue or proposed action and possible impacts to be discussed in non-technical language;
  - iii. Provide sufficient technical detail for tribal entities to understand the scope and location of the potential impacts of the action, including providing maps and other visuals where appropriate;
  - iv. Signed by an individual with decision-making authority with respect to the proposed action;
  - v. Addressed to the *[Chair/President]* of *[tribe/authorized tribal organization]* and the DCO or other representative of the governing body;
  - vi. Provide the name of the designated federal official with whom further consultation arrangements can be made, including responding to the notice;
  - vii. Provide timelines and schedules for the proposed action; and
  - viii. Request dialogue with *[tribe/authorized tribal organization]* regarding the consultation plan and timeline.
- g) When requesting government-to-government consultation concerning actions or policies that may affect marine mammals, the invitation should be sent to *[tribe]* and *[authorized tribal organization]* that may be affected the agency action.
- h) The agency should provide at least *[x]* days for *[tribe/authorized tribal organization]* to respond with the decision regarding the request for consultation, recognizing the need for flexibility and recognizing community schedules and other factors that may affect the ability of the *[tribe/authorized tribal organization]* to respond during the given timeframe.

#### **10. Response to request for consultation**

- a) Within *[x]* days of the receipt of notice of a federal consultation opportunity or notice that a federal action or decision may affect tribal interests, the DCO or other designated tribal official will undertake the following actions:
  - i. Evaluate if and how the proposed federal action may affect tribal interests;

*Section 10 describes the process for Alaska Native community response to a request for agency-initiated consultation.*



- ii. Based on tribal interests affected, determine if consultation is recommended and provide such recommendation to the Tribal Council, relevant delegated tribal authorities, and other relevant tribal authorities; and
  - iii. Within [x] days of a determination by the Tribal Council or delegated tribal authority that consultation is needed, submit an official consultation request to the appropriate federal official.
- b) Within [x] days of receipt of consultation recommendation from the DCO, the Tribal Council or delegated tribal authority will notify the DCO of its determination that consultation is warranted or not warranted.
- c) If after [x] days, a decision has not been made, the DCO will contact the federal agency to indicate that the tribe is still considering the action.
- d) If consultation invitations arrive during a time of year when the opportunity to make internal decisions is limited, including but not limited to times of year with subsistence activities and significant local events, the [tribe/authorized tribal organization] may extend the decision-making schedule. If this occurs, the DCO will contact the federal agency inviting consultation to provide notice of the longer timeline.
- e) Failure to request consultation within [x] days of receipt of federal notice of consultation request does not preclude future determinations by the [tribe/authorized tribal organization] that consultation is required.

#### **11. Tribe or tribal entity initiation of consultation**

- a) [Tribe/authorized tribal organization] may initiate a consultation process at any time by request to the relevant agency.
- b) [Tribe/authorized tribal organization] will send a written request for consultation signed by the DCO or other tribal government representative to the head of the relevant agency or a designated federal official and include the tribal liaison if known.

*Section 11 describes the process for Alaska Native community initiation of consultation.*

- c) The request will set out the reasons for and scope of the requested consultation.
- d) The agency should respond within 30 days to consultation request.

## **PART V. INFORMATION SHARING**

### **12. Information-sharing and information-sharing meetings**

- a) Information-sharing meetings alone do not constitute formal consultation. They are designed to exchange any potentially relevant information that may be important during the consultation process, including technical information.
- b) During information-sharing meetings, the [tribe/authorized tribal organization] expects the agency to supply appropriate information in order to understand the proposed federal action and its potential impacts on [tribe/authorized tribal organization].
- c) Information-sharing meetings should occur as early as possible in the consultation process so that they are able to inform the consultation process, including formal consultation.
- d) Information-sharing should occur throughout the consultation process as needed.

### **13. Participants in information sharing process**

The information-sharing process should include all relevant parties, included but not limited to:

- a) Tribal entity with which consultation is taking place
- b) Technical staff, cultural experts, and traditional knowledge holders designated by [tribe/authorized tribal organization]
- c) Co-management organizations, Alaska Native organizations, or other tribally authorized entities with expertise on the proposed action
- d) Technical staff of agency proposing action

## **PART V. Information Sharing**

*Part V describes the types of information shared, when the information is to be shared, confidentiality concerns, and record-keeping.*

*Section 12 describes technical and information-sharing meetings*

*Section 13 describes the participants in the information-sharing process.*

- e) Other persons whom tribe, authorized tribal organization, or agency deem necessary to appropriately inform the consultation process.

#### **14. Type of information**

The types of information to share during the consultation process may include but are not limited to the following:

- a) Technical and scientific information from the agency about the proposed action and its potential impacts, conveyed in an understandable manner;
- b) Information, including traditional knowledge, held by the *[tribe/authorized tribal organization]*, its members, and other relevant parties; or
- c) Information related to the consultation process and scheduling.

#### **15. Confidentiality and record-keeping**

- a) Prior to providing tribal information, *[tribe/authorized tribal organization]* and agency will determine what, if any, information shared during the consultation process should be held confidential to the extent allowable under the law.
- b) Prior to information-sharing meetings, *[tribe/authorized tribal organization]* and the agency will agree on the method of recording the information that is shared in information meetings and how meeting proceedings and information will be shared after the consultation process is concluded.

### **PART VI. MEETING PROCEDURES**

#### **16. Location of consultation meetings**

- a) Initial consultation meetings should take place in the community or communities consulting.

*Section 14 describes the types of information that may be appropriate to share during the consultation process.*

*Section 15 addresses confidentiality and record-keeping policies that relate to information shared during consultation meetings.*

### **PART VI. Meeting Procedures**

*This section describes procedures related to the scheduling, planning, and content of consultation meetings.*

*Section 16 addresses location of consultation meetings.*

- b) For consultation that involves *[list of issues]*, *[tribe/authorized tribal organization]* requests consultation take place in face-to-face meetings.
- c) The parties will jointly decide when it is appropriate to conduct consultation by telephone or video conference or meet in a location other than the location of the *[tribe/authorized tribal organization]*.

#### **17. Planning for the consultation process**

- a) *[Tribe/authorized tribal organization]* and Federal agency DFO will establish a process for how the consultation meeting(s) will be conducted.
- b) A consultation plan or a memorandum of understanding between *[tribe/authorized tribal organization]* and consulting agency may be developed for complex consultation processes.
- c) *[Tribe/authorized tribal organization]* and consulting agency will discuss and agree on the following items during the planning process:
  - i. Timing and location of the consultation meeting(s);
  - ii. Participants in the consultation meeting(s);
  - iii. Amount and distribution of funding provided by the agency to support the consultation process;
  - iv. Agenda and issues to be discussed in the consultation meeting(s);
  - v. Protocol to be followed in the Consultation meeting;
  - vi. Method of recording the meeting(s);
  - vii. Translation needs for the meeting(s);
  - viii. Periods of time and locations reserved for the tribe or authorized tribal organization and the consulting agency to meet separately during consultation meetings;
  - ix. Issues pertaining to confidentiality. However, no agreement made prior to a consultation meeting will preclude *[tribe/authorized tribal organization]* from requesting confidentiality to the extent allowable by law at any other time during the consultation process.

*Section 17 provides details for a process to establish a consultation schedule, agenda, and address other key issues.*

#### **PART VII. ACCOUNTABILITY**

## 18. Documentation following consultation meeting

[Tribe/authorized tribal organization] requests that the agency provide the following documents within 30 days of any consultation meeting:

- a) Final list of consultation participants;
- b) Draft minutes of the consultation meeting to be reviewed and revised by the parties to the consultation;
- c) List of agreed upon next steps and items for action discussed in the consultation meeting;
- d) Timeline for completion of each of the action items;
- e) Brief description of how input received during the consultation meeting may influence the management decision or policy discussed; and
- f) Responses to questions and concerns raised by the parties during the consultation process.

## 19. Meeting minutes

- a) Meeting minutes will be considered final and valid only upon review and agreement by all parties to the consultation.
- b) Draft meeting minutes will only be shared with parties to the consultation meeting.

## 20. Documentation following final agency action

[Tribe/authorized tribal organization] requests that the agency provide a document with the following information within 30 days after the final agency action is made or policy issued that was the subject of the consultation process:

- a) Explanation of how the consultation process informed the management decision, including how any recommendations developed during the consultation process were incorporated into the final agency decision;

## PART VII. Accountability

*EO 13175 calls for consultation to be an “accountable process.”*

*This section provides procedures to ensure agency accountability.*

*Section 18 addresses information that should be shared with consultation participants following meetings.*

*Section 19 addresses meeting minutes.*

*Section 20 explains what information should be shared with consultation participants following a management decision that was the subject of a consultation process.*

- b) If recommendations were not incorporated into the final agency decision, an explanation of why it did not address the recommendations.

## **21. Reporting and record-keeping requirements**

- a) *[Tribe/authorized tribal organization]* shall share relevant documents or meeting summaries with appropriate tribal members following a consultation meeting.
- b) *[Tribe/authorized tribal organization]* requests that the agency send *[semi-annual/annual/bi-annual]* summary reports to *[tribe/authorized tribal organization]* of all consultations conducted during the specified period of time.
- c) Summary reports should include an explanation of the proposed agency action triggering the consultation process, a list of the parties in the consultation, and a short explanation of the major issues addressed.

*Section 21 provides an approach to reporting and record-keeping requirements.*

## APPENDIX A. Authorizing Co-Management Organization to Consult on Behalf of Tribes

### OPTION 1. PASS NEW RESOLUTION FOCUSED ON TRIBAL AUTHORIZATION RELATED TO CONSULTATION ONLY

*The following provides model language for a consultation authority provision that would be separate and in addition to existing resolutions delegating authority for co-management to co-management organization or other designated tribal official [add this throughout].*

#### **RESOLUTION [name/number]**

**A Resolution of the [name of tribe] authorizing the [name of co-management body] to engage in government to government consultation with federal agencies regarding marine mammals management and utilization of marine mammals.**

WHEREAS, The **[name of tribe]** is a federally recognized tribe and is governed by **[name of tribal council]**; and

WHEREAS, The **[name of tribal council]** is authorized to represent its members in government-to-government consultation with federal agencies as described in Executive Order 1375 “Consultation and Coordination with Indian Tribal Governments” (2000); and

WHEREAS, The **[name of co-management organization]** represents the **[name of tribe]** on matters related to the management, harvest and utilization of **[name of species]**;

THEREFORE BE IT RESOLVED, That the **[name of tribal council]** authorizes the **[name of co-management organization]** to consult with federal agencies regarding the management, harvest, and utilization of marine mammals on behalf of the **[name of tribe]**;

BE IT FURTHER RESOLVED, That the consultation authority extends to all federal actions that may affect marine mammal management, harvest, and utilization;

BE IT FURTHER RESOLVED, That **[name of tribal council]** reserves the right to engage in government-to-government consultation on other matters;

BE IT FURTHER RESOLVED, That nothing in this resolution is intended to diminish the existing tribal delegation of authority to the **[name of co-management organization]**.

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[name and title of tribal council representative]

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[name and title of tribal council representative]

OPTION 2. AMEND EXISTING TRIBAL DELEGATION OF AUTHORITY TO CO-MANAGEMENT ORGANIZATION TO INCLUDE PROVISION ON CONSULTATION AUTHORITY

*The following provides model language for a consultation authority provision that could be included in an amended tribal delegation of authority resolution.*

...

BE IT FURTHER RESOLVED, That the **[name of tribal council]** authorizes the **[name of co-management organization]** to consult with federal agencies regarding the management, harvest, and utilization of marine mammals on behalf of the **[name of tribe]**;

BE IT FURTHER RESOLVED, That the consultation authority extends to all federal actions that may affect marine mammal management, harvest, and utilization;

...

DRAFT



## APPENDIX B. Resources

- Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (Nov. 6, 2000), <http://www.gpo.gov/fdsys/pkg/FR-2000-11-09/pdf/00-29003.pdf>
- Presidential Memorandum for the Heads of Executive Departments and Agencies, “Tribal Consultation “ (Nov. 5, 2009), <http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>
- Office of Management and Budget Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, Guidance for Implementing E.O. 13175, “Consultation and Coordination with Indian Tribal Governments” (July 30, 2010), <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2010/m10-33.pdf>
- Executive Order 13084, Consultation and Coordination with Indian Tribal Governments, (May 14, 1998), [http://www.nps.gov/nagpra/AGENCIES/EO\\_13084.HTM](http://www.nps.gov/nagpra/AGENCIES/EO_13084.HTM)
- Presidential Memorandum for the Heads of Executive Departments and Agencies, “Government to Government Relationships with Native American Tribal Governments” (April 29, 1994), [http://www.nps.gov/nagpra/AGENCIES/Clinton\\_Memorandum.htm](http://www.nps.gov/nagpra/AGENCIES/Clinton_Memorandum.htm)
- Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations (Feb. 11, 1994), [http://epa.gov/environmentaljustice/resources/policy/exec\\_order\\_12898.pdf](http://epa.gov/environmentaljustice/resources/policy/exec_order_12898.pdf)
- Executive Order 13007, Indian Sacred Sites (May 24, 1996), <http://www.gpo.gov/fdsys/pkg/FR-1996-05-29/pdf/96-13597.pdf>
- National Historic Preservation Act of 1966 (NHPA) section 106, <http://www.nps.gov/history/local-law/nhpa1966.htm>; (16 U.S.C. 470f), 36 CFR Part 800, <http://www.achp.gov/regs-rev04.pdf>
- American Indian Religious Freedom Act and Amendments of 1994 (AIRFA) (42 U.S.C. 1996), <http://www.lectlaw.com/files/drg25.htm>
- Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. 3001 et seq), [http://www.cr.nps.gov/local-law/FHPL\\_NAGPRA.pdf](http://www.cr.nps.gov/local-law/FHPL_NAGPRA.pdf)
- Archaeological Resources Protection Act of 1979 (ARPA) (16 U.S.C. 470aa-470mm), <http://www.nps.gov/archeology/tools/Laws/arpa.htm>
- National Environmental Policy Act regulations 40 CFR 1500, [http://energy.gov/sites/prod/files/NEPA-40CFR1500\\_1508.pdf](http://energy.gov/sites/prod/files/NEPA-40CFR1500_1508.pdf); January 30, 2002, Memorandum for the Heads of Federal Agencies from James Connaughton re: “Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act,” <https://ceq.doe.gov/nepa/regs/cooperating/cooperatingagenciesmemorandum.html>; February 4, 2002, Memorandum for Tribal Leaders from James Connaughton, <http://corpslakes.usace.army.mil/employees/cultural/pdfs/exchange/2-4-02.pdf>
- Marine Mammal Protection Act, <http://www.nmfs.noaa.gov/pr/pdfs/laws/mmpa.pdf>, section 119 (16 U.S. C. 1388) (Co-management provision), <http://www.law.cornell.edu/uscode/text/16/1388>

- Individual agency policies and procedures
  - National Oceanic and Atmospheric Administration, NOAA Procedures for Government-to-Government Consultation with Tribes (E.O. 13175 Policy) (Nov. 12, 2013), <http://www.legislative.noaa.gov/policybriefs/NOAA%20Tribal%20consultation%20handbook%20111213.pdf>
  - Department of the Interior (final) Policy on Consultation with Indian Tribes (2013), <http://www.doi.gov/cobell/upload/FINAL-Departmental-tribal-consultation-policy.pdf>
  - NMFS- Alaska Region, Sustainable Fisheries Division, Tribal Consultation Process (revised Nov. 14, 2014), <http://alaskafisheries.noaa.gov/tc/sfprocess.pdf>
  - U.S. Fish and Wildlife Service, Tribal Consultation Handbook (Dec. 6, 2011), [http://www.fws.gov/mountain-prairie/tribal/documents/Tribal\\_Consultation\\_Guide\\_Apr\\_2013.pdf](http://www.fws.gov/mountain-prairie/tribal/documents/Tribal_Consultation_Guide_Apr_2013.pdf)
  - U.S. Environmental Protection Agency, EPA Region 10 Tribal Consultation and Coordination Procedures (Oct. 2011), [http://www.epa.gov/region10/pdf/tribal/consultation/r10\\_tribal\\_consultation\\_and\\_coordination\\_procedures.pdf](http://www.epa.gov/region10/pdf/tribal/consultation/r10_tribal_consultation_and_coordination_procedures.pdf)
  - National Park Service Management Policies 2006, <http://www.nps.gov/policy/mp2006.pdf>
- Memorandum of Agreement for Negotiation of Marine Mammal Protection Act Section 119 Agreements among U.S. Department of Commerce, National Marine Fisheries Service; U.S. Department of Interior, Fish and Wildlife Service,; and Indigenous Peoples Council for Marine Mammals (Oct. 30, 2006), <http://www.ipcommalaska.org/pdfs/Umbrella%20Agreement.pdf>
- Aleut Community of St. Paul Island Tribal Government, Policies and Procedures, Consultation Policy, Policy No. 100-0300-001 (Oct. 15, 2014)
- Native Village of Tanacross, IRA Tribal Government, Government-to-Government Relationship Policy (Dec. 31, 1999), <http://www.denix.osd.mil/na/upload/Native-Village-of-Tanacross-Gov-to-Gov-Relationship-Policy.pdf>
- Native Village of Atka, IRA Tribal Council, Resolution 2004-01 (delegation of authority to Aleut Marine Mammal Commission)
- Co-management agreements
  - Alaska Beluga Whale Committee- National Marine Fisheries Service (Jan. 2000), <http://alaskafisheries.noaa.gov/protectedresources/whales/beluga/abwcagrefinal.pdf>
  - Alaska Eskimo Whaling Commission – National Oceanic and Atmospheric Administration [http://www.nmfs.noaa.gov/ia/species/marine\\_mammals/inter\\_whaling/aewc\\_cooperative.pdf](http://www.nmfs.noaa.gov/ia/species/marine_mammals/inter_whaling/aewc_cooperative.pdf) (2013)
  - Alaska Native Harbor Seal Commission – National Marine Fisheries Service (1999), [https://alaskafisheries.noaa.gov/protectedresources/seals/harbor/cie/bkgrnd\\_ref\\_4\\_manage.pdf](https://alaskafisheries.noaa.gov/protectedresources/seals/harbor/cie/bkgrnd_ref_4_manage.pdf)
  - Aleut Community of St. George Island – National Marine Fisheries Service (2001), <http://alaskafisheries.noaa.gov/protectedresources/seals/fur/stgeorge.pdf>

- Aleut Community of St. Paul Island – National Marine Fisheries Service (2000), <http://alaskafisheries.noaa.gov/protectedresources/seals/fur/stpaul.pdf>
- Aleut Marine Mammal Commission – National Marine Fisheries Service (2006), <https://alaskafisheries.noaa.gov/protectedresources/agreements/ammc06.pdf> , <http://www.aleutmarinemammal.org/documents/nmfsc0.pdf>
- Cook Inlet Marine Mammal Commission – National Marine Fisheries Service (2006), <http://alaskafisheries.noaa.gov/protectedresources/whales/beluga/2006cimmcagreement.pdf> (note: CIMMC disbanded 2012)
- Eskimo Walrus Commission: FWS Co-Management for Subsistence Use of Pacific Walrus grant announcement (2011), <http://www.federalgrants.com/Co-Management-for-Subsistence-use-of-Pacific-Walrus-31598.html>
- Ice Seal Committee – National Marine Fisheries Service (2006), <http://alaskafisheries.noaa.gov/protectedresources/seals/ice/comanagement/agreement1006.pdf>
- Cooperative Agreement between US FWS and The Alaska Sea Otter and Steller Sea Lion Commission (2004) (note: FWS no longer has a cooperative agreement with the Commission)
- Indigenous Peoples Council for Marine Mammals: FWS sea otter co-management grant announcement (2012), <http://www.federalgrants.com/Sea-Otter-comanagement-with-Alaska-Natives-36263.html>
- Alaska Nanuuq Commission: FWS co-management grant announcement (2012), <http://www.federalgrants.com/Alaska-Nanuuq-Commission-Co-Management-of-Polar-Bears-36488.html>