

# Committee on Resources

## Subcommittee on Fisheries Conservation, Wildlife and Oceans

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### Statement

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**TESTIMONY OF  
PENELOPE DALTON  
ASSISTANT ADMINISTRATOR FOR FISHERIES  
NATIONAL MARINE FISHERIES SERVICE  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION  
U.S. DEPARTMENT OF COMMERCE  
ON  
SECTION 119 OF THE MARINE MAMMAL PROTECTION ACT OF 1972  
BEFORE THE  
COMMITTEE ON RESOURCES  
SUBCOMMITTEE ON FISHERIES CONSERVATION, WILDLIFE AND OCEANS  
U.S. HOUSE OF REPRESENTATIVES  
APRIL 6, 2000**

Mr. Chairman and members of the Subcommittee, thank you for inviting me to testify before the Subcommittee today on the development of co-management agreements with Alaska Natives for the conservation and management of marine mammals under the Marine Mammal Protection Act. I am Penelope Dalton, Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration (NOAA).

The National Marine Fisheries Service (NMFS, along with the U.S. Fish and Wildlife Service (FWS), administers the Marine Mammal Protection Act of 1972 (MMPA), which is the principal Federal legislation that guides marine mammal protection and conservation policy. Under the provisions of the MMPA, NMFS is responsible for the management and conservation of over 140 stocks of whales, dolphins and porpoises, as well as seals, sea lions and fur seals, 40 of which are classified as strategic, and 29 of which are listed under the Endangered Species Act. The remaining marine mammal species, such as polar bears, walruses, sea otters and manatees, fall under the jurisdiction of the FWS.

Section 119 of the MMPA authorizes the Secretaries of Commerce and Interior to enter into cooperative agreements with Alaska Native Organizations (ANOs) for the co-management of marine mammal subsistence harvests by Alaska Natives. This provision, added in 1994, created a new opportunity to develop and formalize partnerships between NMFS and Alaska Natives to conserve the marine mammal stocks that are a significant part of their culture and traditional subsistence lifestyle. Of the 32 marine mammal stocks recognized and managed by NMFS in Alaska, 16 are utilized for subsistence purposes by Alaska Natives. Joint activities pursued under these agreements can have substantial positive impacts on marine mammal conservation in Alaska.

I welcome the opportunity to discuss the efforts NMFS has taken to develop co-management agreements, the structure and status of these agreements, and challenges that we face in implementing section 119. I will

also touch on one area that NMFS, in consultation with other agencies and constituents, has identified for possible improvements to section 119. **Structure and Development of Co-management Agreements**

Section 119 states that cooperative agreements may be entered into with ANOs to conserve marine mammals and provide for the co-management of subsistence use by Alaska Natives. Prior to this amendment, NOAA had entered into a cooperative agreement with the Alaska Eskimo Whaling Commission (AEWC) to co-manage the subsistence harvest of bowhead whales under the Whaling Convention Act of 1949. This agreement has been in place since 1986, and was noted by Congress during the 1994 MMPA re-authorization to be an ideal example of what was envisioned for co-management agreements.

In an attempt to establish common principles for section 119 agreements, NMFS, the U.S. Fish and Wildlife Service, the Marine Mammal Commission, the U.S. Geological Survey, and the Indigenous Peoples Council for Marine Mammals began a series of discussions and negotiations to establish the scope and framework for future agreements applicable to specific species or stocks. The result of these negotiations was the AMemorandum of Agreement for Negotiation of Marine Mammal Protection Act Section 119 Agreements," signed in August 1997.

This "umbrella agreement" contains the guiding principles for the negotiation of subsequent agreements. The signatories to the umbrella agreement supported the goal that marine mammal stocks should be maintained at a level that can accommodate a sustainable subsistence harvest and preserve the animals' role in the ecosystem. Another fundamental point is that the best way to conserve marine mammal populations in Alaska is to provide full and equal participation by Alaska Natives in decisions affecting subsistence management to the maximum extent allowed by law. Shared decision-making is achieved through consensus between ANO representatives and NMFS.

The umbrella agreement establishes guidelines for the required elements of individual agreements, as well as the types of actions that individual agreements can prescribe. Individual co-management agreements may include provisions relating to the collection and analysis of population data, ANO infrastructure, enforcement to ensure compliance with agreements, harvest practices, information and education activities, management plans, research, and training. The umbrella agreement also called for the establishment of funding panels comprised of Alaska Native tribal government officials representing their governments and ANOs and officials from FWS and NMFS. The purpose of the panels is to develop protocols for establishing co-management priorities and for the application, review, and award of any section 119 funds.

Subsequent co-management agreements have built upon the principles developed in the umbrella agreement. To ensure shared decision-making and provide a formal route for Alaska Native input, agreements have provisions to create co-management committees comprised of officials from the participating ANO and NMFS. These committees provide a formal mechanism to discuss joint efforts to conserve marine mammal populations and maintain a sustainable harvest for subsistence uses.

Agreements are negotiated by teams drawn from our Alaska Regional Office, the Alaska Fisheries Science Center, the National Marine Mammal Laboratory, our Office of Protected Resources, and NOAA General Counsel. After initial discussions with the ANO, smaller teams are created to craft the agreement. Upon reaching a satisfactory agreement, the draft is cleared by the ANO membership and the Department of Commerce and ultimately signed by the Alaska Regional Administrator of NMFS.

### **Status of Co-management Agreements**

Co-management agreements have been developed for beluga whales, harbor seals, Steller sea lions, and northern fur seals.

***Beluga whales.*** In December 1999, NMFS entered into an agreement with the Alaska Beluga Whale Committee (ABWC) to conserve the western Alaska populations of beluga whales, protect Alaska Native beluga whale subsistence hunting traditions and culture, and promote scientific research on beluga whales. The western Alaska population includes beluga whales occurring in the Beaufort, Chukchi, and Bering Seas (including Bristol Bay). The ABWC has secured resolutions from 26 tribal village governments or traditional councils authorizing ABWC representation for beluga whale issues. With this agreement, NMFS and ABWC will co-manage the western Alaska beluga whale subsistence harvest through regional management plans that set forth principles governing beluga whale conservation, subsistence harvesting, use, reporting and monitoring, research, as well as public involvement and enforcement. NMFS and ABWC have been working together for years prior to this agreement conducting joint research and monitoring programs. This agreement formalized much of the work that was already being performed. This type of partnership is one which NMFS hopes can be repeated in other agreements.

An agreement to co-manage this year's harvest of the Cook Inlet stock of beluga whales has been negotiated with the Cook Inlet Marine Mammal Commission (CIMMC) and is currently in the NOAA clearance process. CIMMC operates under tribal resolution from eight tribal village governments or traditional councils in the Cook Inlet region. This agreement was negotiated under the separate authority of Public Law 106-31 and provides for the allocation of one whale to the Native Village of Tyonek, through a permit system operated by CIMMC. The agreement describes specific harvest practices that must be followed as conditions of the harvest permit. Because this agreement specifically permits a harvest, it is subject to environmental analysis under the National Environmental Policy Act. We are currently developing an Environmental Impact Statement for public review and comment before signing the agreement. A new agreement will be negotiated for harvests in 2001 and beyond dependent upon the outcome of the proposed depletion determination and the agency's response to a petition to list the beluga as endangered under the Endangered Species Act.

***Harbor seals.*** In April 1999, NMFS entered into an agreement with the Alaska Native Harbor Seal Commission (ANHSC) to set forth an operational structure for the conservation and management of harbor seals throughout their range in Alaska. The ANHSC has received authorizing resolutions from 22 tribal, village or traditional councils and associations. The operational structure of the agreement creates a co-management committee, comprised of ANHSC officers and NMFS staff, that will develop action plans for harbor seals specifying or recommending activities to be undertaken by the parties for population monitoring, harvest management, education, and research. Through a biosampling program, the ANHSC has fostered the collection of seal tissue samples for genetic and other analyses. Collaborative programs such as this are greatly increasing our understanding of harbor seal biology in Alaska.

***Steller sea lions.*** A draft agreement with the Tribal Government of St. Paul (TGSP) to co-manage subsistence harvests of Steller sea lions and northern fur seals on St. Paul Island is currently in the NOAA clearance process. This agreement provides for a co-management committee similar to those established under the agreements with ABWC and ANHSC. The committee will develop management plans that include actions to be taken by either party for monitoring and research, disentanglement programs, maintenance of fur seal rookeries, co-management of subsistence harvests, and education programs. Since NMFS and TGSP have had a long working relationship, this agreement essentially formalizes our ongoing partnership to manage these harvests.

NMFS has discussed entering into agreements with other ANOs to address other parts of the Steller sea lion range, including the Aleutian Islands and Kodiak Island.

### **Other Agreement Discussions**

NMFS is exploring regional, rather than stock-specific, approaches to section 119 agreements with several ANOs. For example, we are working with the Bureau of Indian Affairs Integrated Resource Management Planning Program, the Native Village of Quinhagak, and with a group comprised of representatives from western Alaska tribal village governments to coordinate section 119 agreements and tribal natural resource management plans. To date, none of these discussions have developed into agreements.

### **Challenges to the Negotiation and Implementation of Agreements**

The overall negotiation process tends to be lengthy, due to both Native and agency procedures. NMFS continues to strive to improve the process by which we negotiate and finalize agreements to reduce delays in implementation.

A more significant issue is determining which Alaska Native groups should be party to an agreement. Section 119 statutory language and the accompanying House report suggest that any ANO or tribal government that represents subsistence users can be party to an agreement. However, administration policy directs activities by agencies affecting Native American tribal rights or trust resources be implemented in a manner respectful of tribal sovereignty, and provide an effective process to provide meaningful input by tribal government officials or representatives. In an effort to reconcile these directives, NMFS adopted the position that, as far as possible, an ANO entering into a section 119 agreement should be a tribal government or an organization that has obtained resolutions of tribal authorization for representation.

Our preference for entering into co-management agreements with tribally authorized organizations (as opposed to non-tribally authorized organizations) stems from the need to develop enforcement mechanisms for the agreements. All the co-management agreements developed so far have contained enforcement elements. In general, these elements mirror the arrangement that exists for the AEWK bowhead whale agreement, in part because this Committee highlighted the AEWK agreement as an ideal model for co-management agreements. The AEWK agreement, however, is authorized under legislation other than the MMPA. The MMPA currently does not provide authority for a federal adjudicatory process to support ANO enforcement and adjudication of violations.

Under the MMPA and tribal law, NMFS has no authority to regulate Native marine mammal harvests prior to a depletion finding unless the take is found to be wasteful. Thus, the only current possibility of enforcement is for a tribal government or council to adopt ordinances that reflect provisions contained within an agreement or management plan, and then adjudicate violations through whatever traditional conflict resolution process is applicable. However, for statewide commissions representing many villages, it could be particularly cumbersome to attempt to gain passage of such ordinances from all member tribes. Such ordinances would also not be applicable to hunters unaffiliated with the member tribes.

A third area of difficulty has been the status of committees established through co-management agreements under the Federal Advisory Committee Act (FACA). The Unfunded Mandates Act granted FACA exemptions to meetings with elected tribal government officials or their designated employees.

NMFS interprets this to mean that officers of the Native marine mammal commissions (authorized by tribal

resolution) qualify for this exemption. However, this interpretation probably would not apply to non-tribally authorized organizations.

Finally, in regards to the funding of Section 119 agreements, NMFS has interpreted direct line-item appropriations made by Congress to Alaska Native marine mammal commissions as distinct from funding for co-management agreements. The funding of co-management agreements through the agency budget process has met with limited success due to the wide range of critical needs and priorities.

NMFS has been involved in discussions regarding the above issues with the Indigenous People=s Council of Marine Mammals and the U.S. Fish and Wildlife Service, and the parties agree that some changes to section 119 may improve our ability to more fully develop partnerships between Federal agencies and ANOs. In these discussions there is unanimous agreement that strengthening the ability to enforce harvest provisions agreed to in section 119 agreements, or within their associated management plans, would greatly improve the use of section 119 agreements as conservation tools. Specifically, the parties have agreed that it is worthwhile to explore options for allowing the Secretaries and ANOs jointly to regulate marine mammal subsistence harvest by Alaska Natives prior to depletion, but only through mutually acceptable agreements. All parties currently are working together on the details of how such an authority could work.

### **Conclusion**

Mr. Chairman, section 119 provides important authority for communicating and sharing decisions for the co-management of subsistence harvests, and taking joint action to conserve stocks of marine mammals in Alaska. Though there have been challenges in developing and implementing co-management agreements, the agreements that are in place are fostering improved working relationships between NMFS and ANOs in performing research, monitoring, and harvest management activities.

I welcome the opportunity to discuss these issues in detail with you, stakeholders and our co-management partners to work toward effective resolution of these and other important marine mammal conservation issues.

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