Collaborative Decisionmaking in the Arctic Under the Marine Mammal Protection Act and a Proposal for Enhanced Support From the Federal Government

by Christopher G. Winter

Chris Winter is the Co-Director of the Crag Law Center, a public interest environmental law firm based in Portland, Oregon. Since 2007, he has represented Native subsistence users on the North Slope of Alaska, including the Alaska Eskimo Whaling Commission, regarding proposals for offshore oil and gas activities in the American Arctic. Chris is a former Adjunct Professor of Law at the Northwestern School of Law at Lewis and Clark College and is a frequent speaker on environmental law and policy.

Summary

The Alaska Native communities of the American Arctic rely upon their ancient subsistence practices for their food security, the continuation of their cultural traditions, and their physical and spiritual well-being. Industry interest in offshore resources will inevitably lead to potential conflicts with the historic subsistence uses of Alaska Natives. In order to resolve those conflicts, the federal government and stakeholders must bring to the table a clear understanding of the legal context as well as the unique community-led dispute resolution processes that have developed within that setting.

The Alaska Native communities who have lived in the Arctic since time immemorial now find themselves in the middle of an historic debate about their culture, their economy, and their traditional subsistence way of life. For thousands of years, to provide food for their families and to carry on their cultural traditions, the Native people who live on the North Slope of Alaska have hunted marine mammals in the Arctic Ocean using traditional means. These same subsistence hunting grounds, and the Arctic Ocean more broadly, including the Beaufort and Chukchi Seas, are predicted to hold billions of barrels of oil and trillions of cubic feet of natural gas.[1]

With a rapidly warming climate, a shrinking summer ice pack and rising oil prices, a chaotic rush to open the American Arctic to oil and gas development has marked the past decade. Millions of acres of the Beaufort and Chukchi Seas were leased to multinational oil companies in a very short period of time, and industry pressed to begin exploration in the Arctic well before the federal government had a fully developed regulatory system in place that was prepared to cope with the dramatic increase in industrial activity. The debate during this time period has to a great extent focused on how to protect the traditional subsistence uses of Alaska Natives from the potential adverse impacts of industrial offshore activity and whether the federal government will implement an ecosystem-based management regime. And the outcome of that debate, which is still very much in question, will have a profound affect on the people who live in the Arctic.

To this point in time, the oil and gas industry has faced a number of significant logistical challenges that have limited its ability to conduct operations in the Arctic despite the fact that the Administration made a policy decision to promote development in the region. Lawsuits led by Alaska Native organizations resulted in injunctions against the first round of drilling proposals.[2] Once the courts and the federal agencies cleared the way for drilling to commence, industry experienced a number of well-publicized setbacks resulting from the practical challenges of operating in harsh Arctic conditions. Over the last decade, not

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1. The U.S. Geological Service estimates that the Alaskan Arctic holds 29.96 billion barrels of undiscovered oil and 221,397 billion cubic feet of undiscovered natural gas. U.S. Geological Survey, Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle (2008) (USGS Fact Sheet 2008-3049) (providing mean estimated undiscovered, technically recoverable, oil and gas resources).
2. *See, e.g.*, *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815 (9th Cir. 2008), *withdrawn by* 559 F.3d 916 (9th Cir. 2009), *dismissed as moot* 57 F.3d 859 (9th Cir. 2009) (granting stay against 2007 offshore drilling proposal in the Beaufort Sea); *In re Shell Gulf of Mexico, Inc., Shell Offshore, Inc.*, 15 E.A.D. __, 2010 WL 5478647 (EAB 2010) (remanding to Region 10 of EPA two Outer Continental Shelf Clean Air Act permits).

a single well has been completed on the outer continental shelf under the most recent round of lease sales.

Looking forward, there is little question that the oil and gas industry will continue to look to the American Arctic as a potentially profitable new frontier. Industry interest in offshore resources will inevitably lead to potential conflicts with the historic subsistence uses of Alaska Natives. In order to resolve those conflicts, the federal government and stakeholders must bring to the table a clear understanding of the legal context as well as the unique community-led dispute resolution processes that have developed within that setting. These tools are already at hand.

In amending the Marine Mammal Protection Act (MMPA)[3] in 1983, the U.S. Congress put in place a dominant use regime, granting a protected status and heightened protections to the subsistence use of marine mammals by Alaska Natives. Congress was also explicit that the "primary objective" for management of marine mammals is to "maintain the health and stability of the marine ecosystem."[4] For the past 25 years, local co-management organizations led by Native hunters and the Alaska Eskimo Whaling Commission (AEWC) have worked in collaboration with the oil industry to develop conflict-avoidance practices and mitigation measures that have proven successful in allowing certain industrial activity to move forward while still protecting subsistence uses and habitat for marine mammals. Those agreements have been negotiated on an annual basis and are memorialized in the AEWC's Open Water Season Conflict Avoidance Agreement (CAA).[5] It is this structure—a strong statutory framework combined with a collaborative and adaptive conflict avoidance process led by the local impacted communities—that holds the greatest promise for management of the Arctic moving forward.

This Article argues that to realize this promise, the federal government, and in particular the National Marine Fisheries Service (NMFS), must continue to improve upon its leadership in implementing the dominant use paradigm of the MMPA by better incorporating the conflict-avoidance process into government decisionmaking. By taking concrete steps that support the stakeholder-led conflict-avoidance agreement process, NMFS can facilitate the development of adaptable mitigation measures tailored to a changing environment and increasing industrial activity while also building greater certainty into the process for both industry and the impacted communities. By doing so, the federal government will faithfully implement the will of Congress, as expressed in the MMPA, while pursuing the Administration's policy decision to allow for the exploitation of fossil fuels in the Beaufort and Chukchi Seas.

Part I of this Article describes the background and history of the dominant use regime established by the MMPA and, in particular, the protected status granted to the subsistence use of marine mammals by Alaska Natives. Part I also describes how NMFS has implemented these statutory directives through the applicable regulations. In Part II, this Article describes briefly how these provisions have been applied in the Arctic over the past decade and how NMFS has incorporated the CAA into its decisionmaking under the MMPA. Part III then sets forth practical recommendations for how NMFS and the federal government can improve upon its implementation of the MMPA and suggests that by adopting these fairly modest recommendations the federal government can facilitate a much more collaborative approach to managing the Arctic, and, in the process, can greatly increase the likelihood that the outcomes will adhere to the will of Congress while also meeting the interests of the impacted Alaska Native communities, the oil industry, and the American people.

I. The Dominant Use Paradigm of the MMPA

A. *The Statutory Structure*

The MMPA, both its plain language and its history, reflects an intentional effort on the part of Congress to protect the subsistence practices of Alaska Natives and to facilitate ecosystem-based management in the context of offshore industrial activity.[6] As contrasted with other resource-based statutory regimes, the MMPA clearly grants a priority status and heightened protections to a single use of Alaska's marine waters, namely the subsistence practices of Alaska Natives. Congress used a variety of tools to implement this dominant use paradigm, which include a specific exemption for Alaska Natives from the otherwise broadly applicable moratorium on the taking of marine mammals, a co-management structure, and spe-

3. 16 U.S.C. §§1361-1421h, ELR Stat. MMPA §§2-410.
4. 16 U.S.C. §1361(6).
5. In this issue of *ELR*, Jessica Lefevre provides an historical overview of the CAA process and its use today, as well as an overview of the bowhead whale subsistence practices of Alaska Natives and the ways in which potential adverse effects of offshore oil and gas activities are mitigated through the CAA process. *See* Jessica Lefevre, *A Pioneering Effort in the Design of Process and Law Supporting Integrated Arctic Ocean Management*, 43 ELR 10893 (Oct. 2013).
6. "Dominant use" has been described as a law in which the legislature has provided to an agency an explicit mandate to prioritize one use above others. *See, e.g.*, John Eagle, *Regional Ocean Governance: The Perils of Multiple-Use Management and the Promise of Agency Diversity*, 16 Duke Envtl. L. & Pol'y F. 143, 148 n.23 (2006). For a discussion of the evolution of the dominant use paradigm in American natural resources law, see Jan G. Laitos & John A. Carver Jr., *The Multiple Use to Dominant Use Paradigm Shift in Natural Resources Management*, 24 J. Land Resources & Envtl. L. 221 (2004). *See also* Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 Ecology L.Q. 140, 207 (1999) (noting examples of modern dominant use natural resources statutes).

cific statutory standards that apply to the authorization of offshore industrial activities.[7]

At the outset, it is important to note the explicit statements of congressional findings and policy set forth in the MMPA, which reflect an intentional focus on ecosystem-based management. First, Congress stated that species and population stocks should be managed to maintain the role of marine mammals as a "significant functioning element in the ecosystem of which they are a part . . . ."[8] Congress further recognized that ecosystem-based management of marine mammals requires more than a narrow focus on populations, but must necessarily extend to the protection of the important habitat elements relied upon by the species. "In particular, efforts should be made to protect essential habitats, including rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effect of man's actions."[9] The statutory findings conclude by setting forth the primary objective for management of marine mammals: "to maintain the health and stability of the marine ecosystem."[10]

To achieve these policy objectives, and to reverse the decline in marine mammal populations, Congress implemented an immediate moratorium on the taking of marine mammals.[11] At the same time, however, Congress also wrote into law an explicit "exemption" from this moratorium for the subsistence activities of Alaska Natives.[12] Congress also included a backstop provision, delegating to the Secretary of the National Oceanic and Atmospheric Administration (NOAA) the authority to issue regulations proscribing the time, location, and other means of subsistence uses upon a finding, with advance public notice and an opportunity for hearing, that a species or stock is depleted.[13] So long as the subsistence use of marine mammals is conducted in a sustainable manner, the general prohibitions of the statute do not apply, and Congress narrowly circumscribed the authority of the Secretary to regulate subsistence uses.

The statute also reflects a unique structure in which Congress authorized Alaska Natives to participate directly in the management of the subsistence use of marine mammals in partnership with the federal government.[14] In MMPA §119, Congress issued a broad grant of authority to the Secretary to enter into co-management agreements with Alaska Native organizations to "conserve marine mammals and provide co-management of subsistence uses by Alaska Natives."[15] NOAA has entered into a series of co-management agreements with Native organizations, which, among other roles, provides for the incorporation of traditional knowledge into management decisions affecting marine mammals and subsistence uses.[16]

The final key component of the dominant use regime implemented by Congress is the incidental take provisions that govern industrial operations in the Arctic. In contrast with the exemption to the moratorium granted to subsistence uses, Congress also implemented certain exceptions that could be authorized by NOAA only under specific conditions. One of those exceptions—known as the "small take" exception—is for the "incidental, but not intentional, taking" by citizens engaged in a specified activity other than commercial fishing.[17] The Secretary may issue an authorization to take "small numbers" of marine mammals only if finding, after notice and an opportunity for comment, that the proposed activity will not have an "unmitigable adverse impact" on the availability of marine mammals for the subsistence uses by Alaska Natives.[18] The Secretary must also find that the proposed incidental taking will have no more than a "negligible impact on" the species or stock.[19] The statutory regime implemented by Congress therefore sets forth a clear hierarchy among potentially competing uses for marine resources, with subsistence uses granted special protections under the law.

B. The History of the Subsistence Protections in the MMPA

Beginning with the passage of the original statute in 1972, Congress has built upon and reaffirmed this dominant use structure numerous times over the intervening 40 years. The original statute passed in 1972 included the exemption from the generally applicable moratorium for subsistence

7. For an argument in favor of utilizing dominant-use zones in marine spatial planning, see James N. Sanchirico et al., *Comprehensive Planning, Dominant-Use Zones, and User Rights: A New Era in Ocean Governance*, 86 Bull. Marine Scientists No. 2 (2010).
8. 16 U.S.C. §1361(2).
9. *Id.*
10. 16 U.S.C. §1361(6).
11. 16 U.S.C. §1371(a). "Take" is defined broadly to include "harass, hunt, capture or kill, or attempt to harass, hunt, capture or kill any marine mammal." 16 U.S.C. §1362(13).
12. 16 U.S.C. §1371(b) (stating that the "provisions of this chapter shall not apply with respect to the taking of any marine mammal by any Indian, Aleut or Eskimo, who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean. . . .").
13. *Id.*
14. 16 U.S.C. §1388.
15. 16 U.S.C. §1388(a).
16. Information on co-management under the MMPA and the co-management agreements can be found at National Marine Fisheries Service, Alaska Regional Office, Co-Management of Marine Mammals in Alaska, *available at* http://alaskafisheries.noaa.gov/protectedresources/comanagement.htm. The AEWC operates under a cooperative agreement with NOAA pursuant to §112 of the MMPA. 16 U.S.C. §1382. The NOAA-AEWC Cooperative Agreement predates the 1994 passage of §119. Under the framework of its §112 agreement, AEWC regulates the subsistence harvest of bowhead whales, implements and enforces the international quotas established by the International Whaling Commission, and collects data on the landed and struck whales. The Cooperative Agreement also includes a consultation provision, whereby NOAA agrees that it shall consult with the AEWC on any activities undertaken by the federal government that may affect the bowhead whale or subsistence uses. *See* Cooperative Agreement Between the National Oceanic and Atmospheric Administration and the Alaska Eskimo Whaling Commission as amended 2008 at ¶ 8.
17. 16 U.S.C. §1371(a)(5)(A)(i), (D)(i). The statute includes two separate incidental take provisions, one that governs incidental take for a period of not more than one year (Subsection D), and the other that governs for incidental take for a period of up to five years (Subsection A). Incidental take under Subsection A must be issued by regulation. NMFS has further clarified in its regulations when these two subsections apply. Incidental taking that results from commercial fishing operations is governed by 16 U.S.C. §1371(a)(2).
18. 16 U.S.C. §1371(a)(5)(A)(i)(I), (D)(i)(I).
19. 16 U.S.C. §1371(a)(5)(A)(i)(I), (D)(i)(II).

uses by Alaska Natives.[20] The original Act also authorized the Secretary to issue regulations and permits governing the incidental take of marine mammals; however, there were no statutory criteria in place that explicitly conditioned the issuance of permits upon a finding that the proposed activities would protect subsistence uses.[21]

In 1981, Congress amended the Act and implemented a more fully developed delegation of permitting authority to the Secretary.[22] Congress created the "small take" authorization and explicitly conditioned the issuance of permits upon a finding that the taking would have a "negligible impact on such species or stock and its habitat, and on the availability of such species or stock for taking for subsistence uses. . . ."[23]

In passing these amendments, Congress was keenly aware of the potential conflicts between offshore oil and gas operations and the subsistence practices of Alaska Natives and narrowly channeled the discretion of the Secretary by implementing specific standards protecting not only the species themselves, but also the protected subsistence practices of Alaska Natives. The federal government started offshore leasing in the Beaufort Sea in 1979,[24] and Congress knew full well that the provisions in the 1981 Amendment would govern offshore activity in the Arctic. The U.S. House of Representatives Report that accompanied the 1981 Amendments discussed the intent of the new incidental take provisions and stated that the proposed activities must be "narrowly identified" and that "it would not be appropriate for the Secretary to specify an activity as broad and diverse as outer continental shelf oil and gas development."[25] The "small take" program was therefore crafted at approximately the same time as oil and gas activity commenced in the Arctic, and from the beginning, Congress intended to ensure that those industrial activities would not disrupt the prior existing subsistence uses.

Congress again reaffirmed the dominant use structure of the MMPA in 1986, when it amended the statute to include the "no unmitigable adverse impact" standard for small take authorizations.[26] Again, these amendments were made in the context of active industrial operations in the Arctic, as the federal government had held additional lease sales in the Beaufort Sea in 1982 and 1984 in which more than 9.5 million acres of the Beaufort Sea were offered to industry.[27]

Finally, in 1994, Congress again amended the MMPA and reinforced the key protections for subsistence uses that apply to small take authorizations.[28] Congress at this time implemented the one-year small take authorization and applied the same "no unmitigable adverse impact" standard for protection of subsistence uses.[29] The legislative history reflects Congress' direction to the agency that an authorization "may only be granted if" the agency determines that the proposed activity "will not cause an unmitigable adverse impact on the availability of animals in such stock for taking for subsistence purposes."[30] The sponsors also stated their intention that "the Secretary will encourage extensive consultation between affected parties on appropriate monitoring, reporting and mitigation measures in granting authorizations under this paragraph."[31]

Moreover, Congress strengthened those protections by implementing a peer review process for industry monitoring plans, a proposal that was spearheaded by local hunters and western scientists who had experience testing the reliability of traditional knowledge using the techniques of western science.[32] The peer review process provides a venue in which scientists, regulators, and stakeholders, including subsistence hunters, can review and assess in a neutral setting the monitoring and mitigation measures proposed by industry, based upon the information gained from both traditional knowledge and western science.

Finally, Congress further strengthened the protections granted to subsistence users by adding a new section shifting the traditional burden of proof in judicial actions challenging agency decisions. The burden of proof applies to any "determination of depletion . . . or finding regarding unmitigable adverse impacts" under the statute and it requires the Secretary to demonstrate that the finding "is supported by substantial evidence on the basis of the record as a whole."[33] The legislative history further reflects the intent of Congress to place on the Secretary the obligation "to demonstrate in each case that [the subsistence protection standard] has been met."[34] Moreover, the heightened burden of proof is only applicable "in an action brought by one or more Alaska Native organizations representing persons to which" the MMPA's subsistence exemption applies.[35]

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20. Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, §101(b), 86 Stat. 1027 (1972). In 1971, one year before passage of the MMPA, Congress authorized the Alaska Native Claims Settlement Act (ANSCA), which largely extinguished aboriginal hunting and fishing rights. Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688. §4(b) of ANSCA provides that all "aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy . . . both inland and offshore . . . are hereby extinguished." *Id.* §4(b).
21. Pub. L. No. 92-522, §§103-104.
22. Act to Improve the Marine Mammal Protection Act, Pub. L. No. 97-58, 95 Stat. 979 (1981).
23. *Id.* §2.
24. *See* Bureau of Land Management, Beaufort Sea Final Environmental Impact, Alaska Outer Continental Shelf Office, Federal/State Oil & Gas Lease Sale (1979).
25. H.R. Rep. No. 97-228, §2, *reprinted in* 1981 U.S.C.C.A.N. 1458.
26. Act to Amend Certain Provisions of the Law Regarding Fisheries of the United States, Pub. L. No. 99-659, §411(a)(2), 100 Stat. 3706 (1986).
27. Bureau of Ocean Energy Management, Alaska OCS Region, Lease Sales (Sept. 1, 2011), *available at* http://www.boem.gov/uploadedFiles/BOEM/About_BOEM/BOEM_Regions/Alaska_Region/Leasing_and_Plans/Leasing/Alaska%20Region%20Lease%20Sales%20To%20Date.pdf.
28. Marine Mammal Protection Act Amendments of 1994, Pub. L. No. 103-238, 108 Stat. 532 (Apr. 30, 1994).
29. *Id.* §4(a)(5).
30. 140 Cong. Rec. S3288, S3294 (1994).
31. *Id.*
32. Pub. L. No. 103-238, §4(b); *see also* Lefevre, *supra* note 5.
33. 16 U.S.C. §1371(b).
34. 140 Cong. Rec. at S3294.
35. 16 U.S.C. §1371(b). In the absence this unique statutory provisions, Alaska Natives who seek judicial review of an agency decision regarding impacts to subsistence activities would carry the burden to demonstrate under the Administrative Procedure Act, 5 U.S.C. §706(2), that the action is "arbitrary,

Taken together, these amendments, placed in the proper context of the first Arctic lease sale and then progressing through a time of increasing activity in the Beaufort Sea, demonstrate that Congress not only reaffirmed the priority status and protections granted to subsistence uses but, in fact, clarified and strengthened those protections over a period of more than 20 years. What first started out as an exemption for subsistence uses from the moratorium on taking developed into a specific statutory standard that applies to every small take authorization issued for industrial activity that could impact a species or stock used for subsistence purposes. In 1994, Congress then built upon that structure by creating an additional peer review process for monitoring plans and strengthened the protections by articulating a specific burden of proof that applied to the government when issuing findings on impacts to subsistence uses.

Throughout this history, Congress was consistent in establishing a clear hierarchy of uses in the marine waters that are critical to food security in northern Alaska. The marine mammal subsistence harvest that existed since time immemorial, and which provided the foundation of the culture and social structure of this region, were granted a priority and protected status.

This statutory structure and its history are critical in assessing how best to regulate offshore industrial activity moving forward. In contrast to other statutes that reflect a less defined "multiple use" objective and which grant to the federal government much more discretion in determining precisely how to balance those uses, the MMPA reflects a deliberate decision to protect subsistence practices in Alaskan marine waters and allows for industrial activity to take place if and only if the food security and traditional uses of Alaska Natives are protected. The burden rests on the federal government to show that these protective standards have been met prior to authorizing industrial activities. Industry is a visitor to the far North, while the people who live there have been granted by Congress certain important rights, including cooperative agreements and the co-management structure and the protections for subsistence uses that apply to small take authorizations. These policy decisions reflect the reality that Alaska Natives and the Inupiat people have utilized and managed the resource since time immemorial and that industry, while an important stakeholder, is a visitor.

C. *History of NMFS Regulations*

The history of regulatory development under the MMPA largely reflects the dominant use structure of the statute and the long history of cooperative dispute resolution processes led by the local subsistence communities. Starting as early as 1989, the regulations implemented by NMFS parallel and build upon the strong statutory protections implemented by Congress. In addition, and from the beginning, NMFS has encouraged industry to work collaboratively with the affected communities of the Arctic, consistent with congressional intent under the MMPA.

In 1989, NMFS published a final rule that put into place what is still the controlling definition for "unmitigable adverse impact."[36]

> "Unmitigable adverse impact" means an impact resulting from the specified activity (1) that is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by (i) causing the marine mammals to abandon or avoid hunting areas, (ii) directly displacing subsistence users, or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.[37]

The concept of mitigation under this definition is particularly important, because it is narrowly defined by reference to the availability of marine mammals for subsistence uses. Mitigation measures must protect the actual subsistence practices, as opposed, for instance, to providing an alternative supply of food. NMFS was explicit in issuing this initial regulatory definition that "[m]itigation measures are intended to ensure the availability of enough animals to meet subsistence needs. . . ."[38] NMFS was also explicit that those specific measures must be included in the specific regulations and letters of authorization governing industrial activities.[39] Consistent with the statute, NMFS implemented strong protections for subsistence uses in Alaska.

Early on in the process of developing implementing regulations, NMFS recommended that offshore operators and federal agencies engage with the local affected subsistence users in developing appropriate mitigation measures. As NMFS stated in the preamble to the 1989 final rule:

> Those conducting the specified activity, the involved Federal agencies, and the affected subsistence users are encouraged to meet and develop mutually agreeable conditions which satisfy the operation, scientific or other needs of the activity and the requirements of the subsistence users.[40]

In response to a specific comment regarding coordination with subsistence users, NMFS reiterated that industry should be working directly with the impacted community to identify appropriate mitigation. "Such coordination could be effective in identifying and achieving consensus regarding subsistence mitigation measures to be incorporated into specific regulations." NMFS concluded by stating it not only "encourages" but also "as appropriate will participate in, such cooperative ventures."[41] NMFS even went so far as to include in the regulation specific language stating that the "applicant and those conducting

capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* §706(2)(A).

36. 54 Fed. Reg. 40338 (Sept. 29, 1989).
37. *Id.* at 40347-48 (originally codified at 50 C.F.R. §18.27(c)).
38. *Id.* at 40345.
39. *Id.*
40. *Id.* at 40344.
41. *Id.*

the specified activity and the affected subsistence users are encouraged to develop mutually agreeable mitigating measures that will meet the needs of subsistence users."[42] And again, these statements all need to be understood within the history and context of the AEWC's CAA, which by 1989 had already been in place for four years.[43] From the beginning, NMFS therefore intended that strong substantive standards would help to stimulate collaborative discussions on mitigation.

Following the 1994 statutory amendments, NMFS undertook a new round of rulemaking in 1995, which focused primarily on developing regulations for the expedited process of issuing single-year small take authorizations.[44] Consistent with Congress' reaffirmation and expansion of the protections for subsistence uses in the statute, NMFS designed and implemented new provisions that were intended to provide additional safeguards for subsistence users. Those new provisions include requirements for the scientific peer review of applicant's monitoring plans and the submission that was coined a "plan of cooperation" if the activity may affect subsistence uses.[45]

The requirement that applicants prepare a plan of cooperation (POC) reflected the operational reality that the AEWC and offshore operators had already been collaborating on these issues through the CAA process. The way in which NMFS incorporated that requirement into the regulations, however, has created substantial confusion in the past several years and has effectively undermined efforts by the oil industry and local communities to collaborate on meaningful mitigation measures, as will be discussed.

NMFS originally proposed in the draft rule to require that operators submit with their application a *completed* POC that "identifies what measures have been taken and will be taken to minimize any adverse effects on the availability of marine mammals for subsistence uses."[46] The final POC submitted with the application would have included a specific description of the "measures the applicant has taken and will take to ensure that proposed activities will not interfere with subsistence whaling or sealing. . . ."[47] The POC would have also included statements that the operator met with affected communities and how it would continue this communication to avoid and resolve potential conflicts.[48]

The original draft rule reflected the intent of Congress that NMFS would take the lead on providing incentives for offshore operators to consult directly with local stakeholders in developing plans for "monitoring, reporting and mitigation measures," as had been taking place prior to the 1994 Amendments pursuant to the CAA process. Since that time, however, NMFS has struggled over the course of various Administrations in determining precisely how to incorporate this collaborative process into the agency's regulatory functions. At times, NMFS has focused on whether it can mandate that a company *sign* a CAA, as opposed to merely requiring collaborative discussions before the application is submitted, whether or not those discussions lead to an agreement.[49]

The regulation as it reads now states that a POC is optional; the "applicant must submit *either* a plan of cooperation *or* information that identifies what measures have been taken and/or will be taken to minimize any adverse effects" to subsistence uses.[50] A POC, if submitted, must include a "statement that the applicant has *notified* and provided the subsistence community with a *draft plan of cooperation*" and then "a schedule for meeting with the affected subsistence communities to discuss proposed activities and to resolve potential conflicts. . . ."[51] The plan must also include a description of the measures that the applicant has taken or will take to avoid interference and then plans for future meeting with subsistence communities.[52]

The weakened POC provisions in the final rule have functionally undermined the collaborative process between offshore operators and the local affected communities. The regulation sets up an unworkable sequence in which the deadline for the applicant to submit a final POC to the agency is the same as the deadline for submitting a draft POC to the community. By the time the affected community has a chance to even review the proposed mitigation measures, industry has already developed its proposal, it has likely communicated closely with the agency, and it has crafted its application, which NMFS will then have to process according to a compressed time line for a one-year small-take authorization. Industry may therefore fully formulate its project before ever taking input from the local affected community through the POC process, as opposed to working with the community at the front end to shape the project to meet local needs. Under the regulations, the affected community is then left with little more than the traditional opportunity for public notice and comment, which is often ineffective for building consensus around complex projects.

As a result, the POC requirement has been implemented inconsistently and with questionable results. Just as one example, in 2013, offshore operators were taking inconsistent approaches in how they sequenced the preparation of the POC and their application to NMFS. In the first case, the operator submitted its POC to NMFS before notification of the proposed Incidental Harassment Authorization (IHA) was published in the *Federal Register*.[53] In the second case, the operator provided a "draft" POC along with its application.[54] Although NMFS did not address the differ-

42. *Id.* at 40349 (codified at 50 C.F.R. §18.27(d)(1)(v) and 228.4(a)(9)).
43. Lefevre, *supra* note 5.
44. 60 Fed. Reg. 28379 (May 31, 1995) (proposed rule).
45. *Id.* at 28380.
46. 60 Fed. Reg. at 28384.
47. *Id.*
48. *Id.*
49. *See, e.g.*, National Marine Fisheries Service, Effects of Oil and Gas Activities in the Arctic Ocean, Supplemental Draft Environmental Impact Statement at 2-22 (Mar. 2013) (stating that "[n]either NMFS nor BOEM can require agreements between third parties").
50. 61 Fed. Reg. at 15888 (emphasis added).
51. *Id.* (emphasis added).
52. *Id.*
53. 78 Fed. Reg. 35508, 35517 (June 12, 2013).
54. 78 Fed. Reg. 35851 (June 14, 2013).

ences in the published *Federal Register* notices, the agency appears to have treated both approaches as consistent with the regulations.

The original draft rule was intended to and would have provided certainty for operators to participate in the CAA process by requiring collaborative discussion to have taken place before an application was submitted to NMFS. Indeed, that was the very purpose behind the 1994 revisions to the MMPA. And yet, the current POC regulations have effectively undermined the collaborative CAA discussions by creating an overlapping, weakened, and uncertain process that creates confusion and not clarity. Congress never intended to have multiple collaborative discussions taking place side-by-side. NMFS was charged with supporting the CAA process and not recreating the wheel.

II. NMFS' Recent Approach to Incorporating a Collaborative Stakeholder Conflict Avoidance Process Into Agency Decisions Under the MMPA

Although the CAA process was in place prior to the legislative creation of the one-year small-take program, NMFS has never established a clear policy on what weight, if any, the agency will give to an agreement between industry and the subsistence community. Industry, in particular, has a substantial interest in knowing to what extent the agency will adopt the substantive mitigation measures from the CAA into the permit and what analysis the agency must undertake prior to making that determination. If an applicant knows that NMFS will use the CAA in a consistent way in support of the permitting process, the company is much more likely to invest the time and money necessary to engage in the process year-after-year. Conversely, if a company knows that the outcome of the permitting process is more uncertain in the absence of a collaboratively agreement, that too will provide an incentive for industry to participate.

The community also needs certainty in understanding how the CAA will be used by NMFS. For one, the community needs to know that if it invests the time and resources needed to engage directly with the companies, the agency will incorporate into the regulatory decision making these agreements in the IHAs themselves. The community also benefits by having one focal outlet for participating in a collaborative discussion about how to mitigate offshore activities. This will help to alleviate the confusion and burden of trying to understand and participate in overlapping and duplicative public comment processes that are run by the Bureau of Ocean Energy Management, the U.S. Environmental Protection Agency, and the U.S. Fish and Wildlife Service under a wide variety of federal environmental laws. And, if NMFS succeeds in fostering an effective collaborative model, it can achieve significant savings of government resources while producing a result that is much more likely to be supported by the affected subsistence users.

Those outcomes, however, all hinge upon NMFS articulating in a clear and consistent way its policy for incorporating the outcome of a community-based collaborative process into the agency's regulatory decisionmaking. To date, NMFS has not done so, instead making many important policy decisions on an ad hoc basis in the context of individual applications for an IHA or when preparing National Environmental Policy Act[55] documents.

For a period of time several years ago, shortly after the most recent round of lease sales, NMFS was fairly consistent in its treatment of the CAA, either requiring full implementation of the CAA in the IHA itself, and/or using the terms of the CAA to support its finding of no unmitigable adverse impacts required by statute. For example, in 2006, Shell Offshore, Inc. agreed on a CAA that set forth mitigation measures for Shell's proposed seismic operations. In the IHA, under §6.a.vi., entitled Mitigation, NMFS required Shell to "operate in full compliance with the agreed upon Conflict Avoidance Agreement."[56] Section 11 of the IHA then included a separate clause requiring that the CAA "must be implemented."[57] There was never any question at that time that NMFS could simply cross reference the CAA and thereby incorporate the agreed-upon mitigation measures into the requirements of the federal permit.

NMFS also based its statutory finding explicitly upon the existence of the CAA and its mitigation measures. When issuing the IHA to Shell, NMFS stated that the "CAA provides NMFS with information to make a determination that the activity will not have an unmitigable adverse impact on the subsistence use of marine mammals."[58] Similarly, in the same year, when NMFS issued an IHA to BP for the Northstar facility, NMFS stated that a "signed CAA indicates to NMFS that, while there might be impacts to the subsistence hunt by Northstar, they do not rise to the level of having unmitigable adverse impacts."[59] The CAA therefore provided the factual predicate for the agency's required statutory determination under the MMPA.

The next year, Shell applied for separate IHAs for its drilling and seismic operations before it had signed the CAA. NMFS again stated at that time that an agreement on the CAA would support the agency's statutory finding under the MMPA. NMFS reaffirmed that "a signed CAA assists NMFS in making a determination that the activity will not have an unmitigable adverse impact on the subsistence uses of marine mammals. . . ."[60] NMFS also dis-

55. 42 U.S.C. §§4321-4370h, ELR Stat. NEPA §§2-209.
56. National Marine Fisheries Service, Incidental Harassment Authorization, Issued to Shell Offshore, Inc. and WesternGeco, Inc. (July 5, 2006) (on file with author).
57. *Id.*
58. 71 Fed. Reg. 50027, 50043-44 (Aug. 24, 2006).
59. 71 Fed. Reg. 11314, 11318 (Mar. 7, 2006).
60. 72 Fed. Reg. 31553, 31561 (June 7, 2007); *see also* 72 Fed. Reg. 17864, 17873 (Apr. 10, 2007) (NMFS stating that if the "mitigation measures contained in the CAA are agreed upon by the involved parties . . . NMFS proposes to issue an IHA to [Shell]").

cussed what could happen in the absence of an agreement, stating that if one or both parties fail to sign the CAA that the agency "may require that the IHA contain additional mitigation measures" in order to reach a decision on the statutory standard.[61]

Starting in 2010, however, NMFS began to make a series of statements that appeared to call into question how the agency intended to incorporate the CAA into its decisionmaking process moving forward. In that year, an offshore operator applied for an IHA and informed NMFS that it would not sign the CAA. Relying on the earlier statements noted above, the AEWC stated to NMFS "that the CAA has historically formed the basis for NMFS' statutorily required determination of no unmitigable adverse impacts to subsistence activities. . . ."[62] NMFS responded by stating that this "is incorrect."[63] NMFS also stated that "Federal laws do not require consultation with the native coastal communities until after offshore exploration and development plans have been finalized, permitted, and authorized," which implies that the POC is optional and, as discussed above, can simply be provided to local subsistence users in draft form when the final application is submitted to NMFS.[64]

The very next year, in its 2011 draft Environmental Impact Statement for Oil and Gas Activities in the Arctic, NMFS stated again that an agreement with the local impacted community can provide the necessary record in support of the agency's statutory findings.

> Input from the impacted bowhead whale subsistence communities indicates that they have historically found that the CAA process, through its highly interactive aspects, has effectively resulted in the development and implementation of measures that will ensure no unmitigable adverse impact. Based on this, for many years, NMFS generally assumed, with some associated analysis, that if a company and the AEWC signed a CAA (which typically contained the components of a POC), then it was possible for a company to conduct their activity without having an unmitigable adverse impact on the subsistence hunt.[65]

In 2012, however, NMFS made another round of statements that conflicted with its earlier treatment of the CAA. When issuing an IHA to Shell Offshore, Inc. for its proposed offshore drilling program, NMFS stated that it "has no role in the development or execution of the" CAA.[66] This statement contrasts markedly with the agency's position in 1989 that it would "participate in, such cooperative ventures" as appropriate.[67] NMFS historically encouraged offshore operators to engage in the CAA process and took steps to facilitate that process, which is far different from playing "no role" in the discussions.

NMFS went even further, however, and also stated that it would not be able to "enforce the provisions of CAAs because the Federal government is not a party to the agreements."[68] This position is particularly problematic, because in the past, NMFS has simply required compliance with the CAA as a condition of the IHA, demonstrating how it can adopt the CAA into the IHA so that is indeed federally enforceable. It is a simple and straightforward matter for NMFS to require compliance with a previously agreed-upon CAA as a specific condition in the IHA. By doing so, NMFS supports the CAA process by ensuring that the agreed-upon mitigation measures are adopted by the agency as binding requirements, which builds certainty into the process for both the oil companies and local community.

In sum, the agency's approach to how it will utilize the CAA process has changed over time on an ad hoc basis. Starting shortly after the most recent round of lease sales, NMFS explicitly required compliance with the CAA as a term and condition of the IHA, rendering the agreement federally enforceable.[69] NMFS also relied upon the CAA as its basis for issuing the IHA and finding that the statutory criteria relating to subsistence had been met. In more recent years, however, NMFS has made conflicting statements, suggesting it cannot make the CAA an enforceable requirement of an IHA and also calling into question what role a signed CAA will play in the analysis required by the statute. This shifting landscape undercuts the efficacy of the collaborative process, because neither the oil industry nor the local affected community knows how the agency will utilize the outcomes of the collaborative process, which creates uncertainty and provides a disincentive for stakeholders to participate in the process.

III. Improving NMFS Support of the CAA Process

The Arctic is changing quickly, and all the stakeholders, including the oil and gas industry and the communities who live in the Arctic, will look to the federal government for leadership in regulating human activity in the face of great uncertainty. With potentially significant reserves of oil and gas, a warming climate, and reductions in the extent of sea ice, interest in Arctic resources will not abate in the near future. The dialogue over the future of the Arctic will continue to involve great scientific uncertainty, potential conflicts between local traditional food gathering practices and new industrial activity, and substantial social and economic interests. The federal government, and

61. *Id.*
62. 75 Fed. Reg. 49710, 49729 (Aug. 13, 2010).
63. *Id.*
64. *Id.*
65. National Marine Fisheries Service, Draft Environmental Impact Statement, Effects of Oil and Gas Activities in the Arctic Ocean at ES-33 (2011).
66. 77 Fed. Reg. 27322, 27335 (May 9, 2012).
67. 54 Fed. Reg. 40344.
68. *Id.* at 27335.
69. This discussion is not intended to be a comprehensive survey of the agency's statements regarding the CAA process, and certainly there are other examples that could be discussed as to how NMFS discussed the CAA vis-à-vis the IHA program. The point here is only that NMFS has yet to articulate a clear policy and that the statements made in the context of individual permit decisions have often lacked consistency from year to year.

in particular NMFS, faces a great challenge in determining how to manage competing uses in the Arctic as we look to the future.[70] While the environmental and social context is evolving, the statutory protections of the MMPA for the subsistence activities for Alaska Native have been in place for decades.

Given the environmental, social, and legal context, it is incumbent upon NMFS to implement the statute and the regulatory program in a way that facilitates participation by the local stakeholder community. The agency is being asked here to perform concurrently numerous functions, including regulator and a unique type of facilitator, which presents unusual challenges for its staff.[71] It should therefore come as no surprise that certain changes need to be made to the process, even after many years of experience. It is worth repeating that the sponsors of the 1994 Amendments to the MMPA intended for the agency to play an expanded role beyond that of just a top-down regulator, stating that the Secretary "will encourage extensive consultation between affected parties. . . ."[72] In a rapidly changing context, the agency must continue to adjust to the evolving dynamics inherent in managing a complex ecosystem and a diverse set of stakeholders.

The CAA is therefore a critical tool—the best one available—in promoting collaborative management efforts in the Arctic. The agency and the stakeholders have a rich, 25-year history of successes (and challenges) from which to draw. In its recent report, the Interagency Working Group specifically highlighted the CAA as one of the most promising approaches for integrating the "needs of ecosystems, economies, and cultures. . . ."[73] The Marine Mammal Commission has also called on NMFS to facilitate the development of more comprehensive conflict-avoidance processes that address the concerns of other subsistence user groups.[74] This collaborative model, managed and implemented by the local stakeholder community, must be a key component of the management regime moving forward.

NMFS will therefore continue to wrestle with the question of how to integrate the CAA, and stakeholder-based management decisionmaking more broadly, into the work of the agency. The rest of this Article offers constructive suggestions for how federal government can better support the CAA process with the objective of implementing the MMPA and the Administration's policy decisions on management of the Arctic in a way that is true to congressional intent and most likely to reduce conflict and to promote collaboration.

A. *Up-Front and Collaborative Discussions With the Impacted Communities*

NMFS can make great strides toward stability and consistency in the program by clarifying that industry must engage with the local community in a cooperative manner before submitting an application for a small-take authorization. As discussed above, the draft 1995 regulations required the applicant to submit a final POC that detailed what steps that company had already taken to meet with the local community and what mitigation measures resulted from those discussions.[75] The final rule, however, weakened those requirements and instead left it up to the applicant to decide whether to submit voluntarily a POC. As an alternative, an applicant can now simply submit a list of mitigation measures without ever having presented those to the local community for review and input.

The existing regulations therefore allow a company to bypass the local community altogether, and even when a POC is prepared, a company only needs to provide a draft POC to the community by the time the final application for an IHA is submitted to the agency. These rules of engagement create too much confusion and uncertainty as to whether a collaborative process is required by law and/or expected by the agency. With a clear set of ground rules in place, both industry and the local stakeholders community will know that conflict avoidance discussions will occur each year regarding all industrial operations proposed in the Arctic. That structure will allow the stakeholders and the agency to invest the resources necessary in further developing and institutionalizing long-term collaborative processes.[76]

B. *The CAA and the POC*

The POC process, which is established by MMPA regulation, has created additional confusion, because it has in recent years been carried out by industry separate and apart from the CAA. Combined with questions as to when and in what form a POC must be presented to the community and to NMFS, these overlapping processes leave the community and industry without clear direction from the agency on what is expected and how the collaborative process should be structured. The community has also, in the past, raised serious concerns about whether the POC process is effective at producing meaningful mitigation and substantive agreements on proposed industry operations.

NMFS can address the confusion and uncertainty by simply clarifying, either by regulation or otherwise, that submitting a signed CAA with a co-management organization satisfies the regulatory requirement to provide a POC

70. The federal government recently released a report that discusses the challenges inherent in managing the Arctic during a time of great change and uncertainty. *See* Interagency Working Group on Coordination of Domestic Energy Production and Permitting in Alaska, Managing for the Future in a Rapidly Changing Arctic—A Report to the President (2013).

71. *See, e.g.*, Steven L. Yaffee & Julia M. Wondolleck, *Collaborative Ecosystem Planning Processes in the United States: Evolution and Changes*, 31 Environments—A Journal of Interdisciplinary Studies 2 (2003).

72. *See supra* note 28.

73. Interagency Working Group, *supra* note 70, at 41.

74. *See, e.g.*, 77 Fed. Reg. 27284, 27296 (May 9, 2012).

75. *Id.*

76. This may require a minor amendment to the MMPA regulations akin to the original draft language that was published in 1994.

in conjunction with an application for a small-take authorization. The CAA process as it currently exists addresses potential conflicts with the subsistence hunt of bowhead whales, but many stakeholders have called for industry to enter into similar agreements with other subsistence use groups. In any event, the bowhead hunt is more often than not the focal point for industry when planning offshore activities. Industry may have to rely upon the CAA for the bowhead hunt, while still employing the POC process for other subsistence activities. But, by clarifying that an agreement with a co-management organization meets the regulatory requirement for a POC, NMFS can facilitate the existing CAA process while providing an incentive for the development of similar collaborative processes that involve other subsistence user groups.

C. Timing of CAA Discussions and NMFS' Public Notice-and-Comment Process

The one-year small-take authorizations place NMFS and industry in the difficult position of proposing, reviewing, and permitting complex operations under tight time lines. The need for peer review of industry monitoring plans, required by statute, further complicates the time lines. In past years, with a rapidly increasing number of industry proposals, the agency has struggled to manage the workload while still providing adequate time to accept and then respond to public comments before industry operations commence in the Arctic. The CAA process, if managed and synchronized with the agency's schedule and industry's annual plan for operations, can reduce the agency's workload while providing regularity to the yearly process of reviewing applications for small-take authorizations.

The key to sequencing the timing is to recognize that the local communities structure their yearly schedule based upon their subsistence activities. By April, people who live on the North Slope are preparing for the spring and summer harvests and are engaged in a host of other subsistence-based activities, which prevents them from engaging with industry and other stakeholders in what can be a time-consuming process of collaboration.

It is therefore of the utmost importance for industry to participate with the co-management organization in collaborative discussions as early as possible in advance of the spring season. For the AEWC, the CAA negotiations typically begin in December with a meeting between the AEWC's Board of Commissioners and offshore operators planning work for the following open-water season. Discussions of planned operations and potential mitigation measures are ongoing through the first of the year, and culminate in February at a meeting in Barrow. The annual CAA meeting is hosted by the AEWC and attended by representatives of the AEWC's member villages, the North Slope Borough, offshore operators, and others with an interest in the proceedings. At this meeting, the AEWC's Board of Commissioners and village representatives review industry proposals and make recommendations, where needed, for appropriate mitigation measures to avoid conflicts with the subsistence hunt of bowhead whales.

Shortly after that meeting, industry should be in a position to represent that the companies completed their consultations and signed the CAA (or decided to proceed in the absence of an agreement). NMFS must then work to publish the notice for the proposed IHA, allow for meaningful public comment, and respond to comments before industry operations commence, which often occurs by the middle of July.

Although these time frames are tight, they are workable for all parties, and, if institutionalized, will become more manageable over time. NMFS can help to guide this process by establishing and articulating clear expectations for the timing and sequence of activities. The stakeholder discussion must occur first and be completed with enough time remaining for the agency to conduct its review before operations commence. Once NMFS provides clear expectations as to when it must receive from industry a completed application and an agreement with a co-management organization, all stakeholders will be able to plan for a consistent schedule year-after-year.

D. Mitigation Measures to Support the Agency's Finding of No Unmitigable Adverse Impact to Subsistence Activities

The collaborative process offers to NMFS the substantial benefit of potentially reducing the workload of the agency by producing an agreement between the local impacted community and industry as to the appropriate mitigation measures. This agreement saves NMFS the resources necessary to make this determination on its own, which is potentially time-consuming, contentious, and subject to appeal. The company and the local community can, in effect, deliver to the agency a project that has already been vetted and approved by the local interests that are protected under the statute.

Historically, NMFS has cited to a signed CAA as an indication that the project will not have an unmitigable adverse impact on protected subsistence activities. These determinations, however, have been made on a project-by-project basis without any clear articulation of how the agency will use the collaborative agreements in its analysis of industry proposals. By articulating a clear policy on this issue, NMFS will provide additional incentive for industry and the local community to participate in the existing CAA process and to initiate new collaborative discussions addressing other subsistence user groups.

E. Terms and Conditions of the Small-Take Authorizations

The final step in the process is for NMFS to incorporate the specific mitigation measures developed between industry and the subsistence users into the terms and conditions of the IHA or letter of authorization. Doing so serves a

number of purposes, but perhaps most importantly, it provides assurance to industry that companies will not be subject to overlapping and potentially inconsistent obligations. It also provides assurances to the local community that agreements and promises made by industry will be federally enforceable.

At different times, NMFS has appeared to express different perspectives on whether it is able to enforce agreements on mitigation measures that result from a collaborative, community-based dialogue. While NMFS cannot do so directly, there is nothing in the statute or the regulations that prohibit the agency from simply cross-referencing the CAA and requiring that the applicants who have a signed agreement comply with its terms and conditions. The agency did just this in 2006 when issuing an IHA for seismic activities.

NMFS also has options other than a straightforward cross-reference that it can employ. One alternative would be for the agency, with the assistance of the community and the company, to identify the specific sections of the agreement that set forth the applicable mitigation measures and to cross-reference only those sections of the agreement in the terms and conditions of the IHA. A final alternative would be to simply take verbatim the applicable language, to state in the public notice that this language comes from the collaborative agreement, and to then include that language in the IHA itself. Whichever direction the agency chooses, by simply clarifying how it intends to move forward, it can create certainty for the stakeholders.

IV. Conclusion

The current situation in the American Arctic presents a unique opportunity to assess how a community-based collaborative decisionmaking model can operate within a regulatory program to resolve potential conflicts over ecosystem management and resource use. The dominant use paradigm of the MMPA provides a strong legal structure that supports the development and operation of co-management organizations that are equipped to represent a local impacted community and that provides an incentive for industry to participate in a collaborative process. The changing conditions in the Arctic and industry's interest in the region will continue to test the ability of a collaborative process to produce consensus-based results that provide systematic protections for the ecosystem while addressing social and economic interests in development. Because the CAA has been in place for 25 years, there are few other examples, if any, where the federal government has a better opportunity to support community-based decisionmaking.

This process, however, deserves a fair shot at working. NMFS is in the position to set the ground rules for how the process is structured and how the outcomes are used by the agency in making decisions under the MMPA. With a few modest and intentional changes to agency policy and/or regulation, NMFS has an opportunity over the next short period of time to improve upon the federal government's support for this collaborative model. The recommendations set forth here are all consistent with past agency practice, can be implemented by the agency without the need for additional statutory authorities, and will greatly improve how the community-based process is coordinated with the agency's regulatory operations. With those changes in place, the ultimate success of this unique collaborative model will rest upon its own merit and the efforts of the stakeholders who stand to benefit from the process.