

Appendix N. Dispute Resolution Process for Fishery Management Plans

The Marine Life Management Act (MLMA) requires the Department of Fish and Game (DFG) to prepare dispute resolution processes appropriate to each element in the marine life and fishery management process (Section 7059). The DFG's goal is to limit disputes by providing meaningful, and constructive public involvement from the early stage of deciding which fisheries need management plans through the development, implementation, and amendment of those plans. Disputes, however, are inevitable in any process. People need to recognize that underlying conflicts should not be avoided. Without understanding and accepting their differences, people cannot jointly solve problems.

Major obstacles hinder dispute resolution processes for marine fisheries management. In many cases, user groups are extremely broad-based. Conflicts between different groups, such as sport fishing, commercial fishing, and environmental, are compounded by differences within each group. Individuals within a group may ally themselves based on gear types, fishing locations, or various other reasons.

In many cases, it is physically difficult to reach all concerned parties due to their sheer numbers. While it is relatively simple to reach coordinated and organized public groups, individuals who are not affiliated with a group can be overlooked. These individuals, if left out of the dispute resolution process, may not feel bound to agree with management decisions and may seek action after an FMP and regulations are enacted. We cannot "alter the basic fact that many of the interests of participating parties are inherently competitive and that often one party's interests can only be satisfied at the expense of another's" (Burgess and Burgess, 1994). In other words, it is impossible to fulfill everyone's needs and reach consensus without compromise.

A formal dispute resolution process recognizes underlying differences between members of the public and may help them reach consensus. Consensus processes require that all involved parties must agree to a decision for it to move forward. This does not necessarily mean the decision is the favored one for all parties, but one that is acceptable and fair. In a consensus decision there is no majority vote and each member's concerns must be addressed. If any member of the process cannot accept a decision, they are required to state their concerns and offer a constructive solution that addresses their concerns while recognizing those of other members.

The dispute resolution process should recognize all parties' needs and differences early on and treat them fairly in the final management decisions. The formal dispute resolution process outlined here will seek binding agreement from all parties. This should not only limit future conflict but increase compliance with regulations. Both of these results should reduce costs in time and money to the DFG and result in better management of the state's resources.

The DFG's intent is to limit disputes through effective public involvement, as required by the MLMA. Dispute resolution, however, may be necessary to meet the concerns of one or more affected parties. The following preliminary recommendations will help determine if a formal process should continue.

Determination of applicability of dispute resolution

The DFG must consider whether issues are suitable for, or require negotiated dispute resolution. Consensus-based negotiation of an issue must not countermand the DFG's primary mission and responsibilities. Many factors are involved in this determination including: suitability of issues, ripeness for decision, time available, political climate and especially the nature of past or current controversies among the interest groups. The following factors should be met in the initial screening before proceeding with dispute resolution: (a) The issues are identifiable and negotiable; (b) The various interest groups are identifiable and willing to openly discuss the issues; (c) The issues are sufficiently developed so parties are reasonably informed and willing to negotiate; (d) The outcome is genuinely in doubt (if parties are willing to compromise, without a formal process, time should be spent on more pressing issues); (e) Appropriate time is made available to successfully complete the negotiations; and (f) Possible outcomes do not countermand the DFG's primary mission and responsibilities.

If the factors above are met, the DFG must prepare for the dispute resolution process. This preparation includes decisions on the DFG's role in the process, the desired outcome (consensus, majority, or recommendation to higher authority) and the proposed participants.

Willingness to participate

In order for the dispute resolution process to be credible and legitimate, representatives from all parties involved or affected by the decision must agree to participate. Representation may take the form of a single representative from each group. In this case, however, the DFG must be certain that the representative is acceptable to the group they are expected to represent. A group may not participate, so long as they do not object to the process continuing without their direct input. The acceptance of the process is critical so that the final decision is credible. If a group is not willing to participate and will not support the process, the final decision must include input on their concerns and differences.

Before beginning, the DFG should actively seek participation from interested parties. This includes not only the public and consumptive users, but also other government agencies. The involvement of outside agencies may be critical to successfully resolving disputes and implementing the chosen decisions. The burden of assuring that participants have the ability to voice concerns falls on the DFG. While this does not mean the DFG must financially support participants, it does mean that meetings and activities should be planned with all participants in mind.

It is critical that the DFG itself is willing to participate. Clear endorsement of the process should be sought from the DFG Directorate before proceeding. This endorsement will ensure that not only the proper staff and funding are provided for the dispute resolution process, but that the final outcome will not be changed at a higher level. Support of the process will encourage concerned parties to participate fully and work toward an agreement.

Agreement to format

While the basic needs of dispute resolution processes can be outlined, the actual format of individual processes will vary. All participants in the process should be involved in developing and agreeing to the final format. This format should include objectives, ground rules and facilitation. The DFG should ensure that any facilitator is acceptable to the participants and accountable to the group. If it is determined that formal facilitation is necessary, the facilitator must be a neutral party. It is preferable that all participants share in selection of the facilitator. If this is not practicable, the participants must formally endorse the chosen facilitator. If the facilitator does not serve the group as a whole, or becomes partisan in the discussion, the participants must have the right to replace him/her.

If an outside facilitator is contracted for a dispute resolution, the decision should be made early enough so they can participate in the pre-negotiation assessment and planning. Participants must be made aware of the fact that facilitators may be paid through the DFG and accept their neutrality. Selection criteria should be based on experience, skill, ability and acceptability to participants.

Finally all participants must commit to an agreement. If the involved parties do not believe their decision will be binding, they will not feel the need to participate fully. The end decision will have more validity if the parties involved agree to abide by the final outcome.

Formulating Ground Rules for Agreement Seeking Process*

Ground rules usually address the following issues:

1. The purpose and scope of the process.
2. Participation: roles of agency staff; whether participation of alternates is permissible; provision for inclusion of new parties; observers; public participation; other interested parties.
3. The roles of participants: whether all participants will have equal status.
4. Decision rules: the meaning of consensus or majority as well as what will happen if consensus is not reached. It is also important for participants to know if they are making a recommendation that may be changed, or whether their decision will be final.
5. The end product gaining ratification; what the agency will do with the agreement; the degree of commitment by participants to abide by the agreement.
6. Understandings about participants' activities in other proceedings: whether "good faith" participation will constrain the activities of participants or their constituents in other forums, such as a legislative session, administrative hearing, or judicial proceeding.
7. Responsibilities of representatives: keeping their constituencies informed and gaining ratification of agreements reached at the negotiating table.
8. Informing those not at the table: who will be kept informed of progress and how this will happen.

9. Organization and conduct of the meetings: agendas; record keeping; responsibilities of the facilitator.
10. Selection and removal of the facilitator: the role of participants in the selection, evaluation and/or payment of a mediator or facilitator. Provision for replacing the facilitator if the participants feel he or she is biased or ineffective.
11. Withdrawal of a participant: If a participant withdraws, everyone left at the table should determine whether the process can go forward. If the participants want some other default procedure, they should agree to it beforehand and include it in the protocols.
12. Communications with the media: how this will occur; whether a chosen spokesperson will be referred to for all communications; how the other participants will be informed.
13. The timetable or schedule.
14. Provisions for the use of caucuses.
15. Information: provisions for sharing of information; confidentiality of data.

*Adapted from: Bourne, et al. 1997.

Dispute resolution process

If it is determined that a formal dispute resolution process is necessary and applicable, the following guidelines will be used. It should be noted that each individual process will necessarily be different and these guidelines are only a starting point.

Information gathering

Often data concerns are at the core of disputes among the public. Much of the fisheries information used by the DFG is collected in ongoing programs and will likely be valuable for dispute resolution processes. If, however, other critical information is needed, it should be collected in an open manner, so that all involved parties understand and accept the methods. Not only should the DFG gather information itself, but it should seek all sources of advice and assistance. By involving the disputing parties in information gathering and actively seeking information from other sources, the DFG will fulfill its portion of a cooperative process.

The scope of information gathering should not be so great as to hinder the process. If new data is not available, the process should continue using the best available sources. It is important, however, to consider all available sources. The validity of available data can be assured in the review and oversight steps of the process. The DFG should not make judgements on the validity of outside data without consultation, review and oversight from qualified scientists.

External review and oversight

Data gathered for a dispute resolution process should be handled in a similar, if not more critical, manner than all other data. This includes review by the public and scientific peers. Depending on the level of controversy, it may be useful to establish a data review panel, consisting of qualified members from the scientific community. Review panels should be accepted by all parties involved to ensure credibility of their findings. If a panel is not necessary, all data should be peer reviewed either during or prior to the process, to insure its validity. If a review panel or peer review deems any data unacceptable, the finding should be clearly stated and available to participants in the process, as well as the general public.

Public review is also necessary, but should not supercede scientific review. Within the data gathering and review process the public should be made aware of the available data. This will allow concerned parties to input other data, if available, or to suggest sources of new data.

Public presentation of data

Formal presentation of the final data gives participants, the DFG, and the public the ability to assimilate it before negotiations begin. This presentation may be made through a variety of methods. If public meetings are used, they should be easily accessible to all interested parties, have early announcement and a clear structure. Data presentations should be clearly separate from discussions of

solutions or formal scoping. The data collection and oversight process should be reviewed and reasons for rejecting certain data, if any, described.

Other methods may be used to distribute data. Because of the separation of data presentation and option development, this may be more appropriate than actual public meetings. It must be assured, however, that all participants agree to the method used and that a sincere effort to inform the public at large is made.

Option development and professionally mediated consensus building

The DFG must be clear in its role in a dispute resolution process and make this role clear to the assembled representatives. A formal dispute resolution process differs from normal scoping, input, and decision-making in that the preferred option will be determined by the group as a whole. The substantive agreement of the group should be used as the basis for the preferred management option. The assembled representatives must agree to use the gathered data and negotiate openly. If a representative disagrees with the preferred alternative, they must explain their reasoning and offer an alternative. The level of initial commitment is important to ensure agreement with the final decision. Participants must feel bound by the group's decision to encourage honest input and avoid future dispute.

This phase of the process will rely heavily on neutral facilitation and mediation. For consistency it is important to involve any professional facilitators early in the process. This includes involvement during the planning stages to assist in public analysis, identifying issues, and convening an appropriate public panel. It is the facilitator or mediator's role to keep the negotiation focused, productive and moving forward. It is desirable to have the person who assisted in convening the group serve as the continuing facilitator, as they will have developed rapport and credibility with the group.

Option development must be based on the gathered and reviewed data, each party's interests, including the DFG's, and the agreed scope of issues. While other processes and management should be considered and incorporated, the final agreement must focus on the issues at hand.

Consensus-based management decisions

At the completion of a consensus-based dispute resolution the final agreement should have the support of all participants. It is important to recognize this consensus and the information and negotiation used to form it. The DFG, as an active participant, must also agree with the consensus decision. When agreement is reached, the DFG will publish the consensus-based option as the preferred alternative. If total agreement is not reached in the time allotted, the DFG will publish the most acceptable option as preferred along with any opposing options as secondary. In this case, the overall value of dispute resolution will be lessened, but not completely lost. As long as the concerns of each participant are clearly displayed and related to the facts, an informed decision can be made. Consensus, however, should be strived for as the ultimate goal.

Management based on a consensus will benefit from higher compliance and less controversy upon implementation. Affected parties will be more likely to accept management measures when they have actively participated in their formulation. Savings in time and costs will be achieved by lessening future disputes.