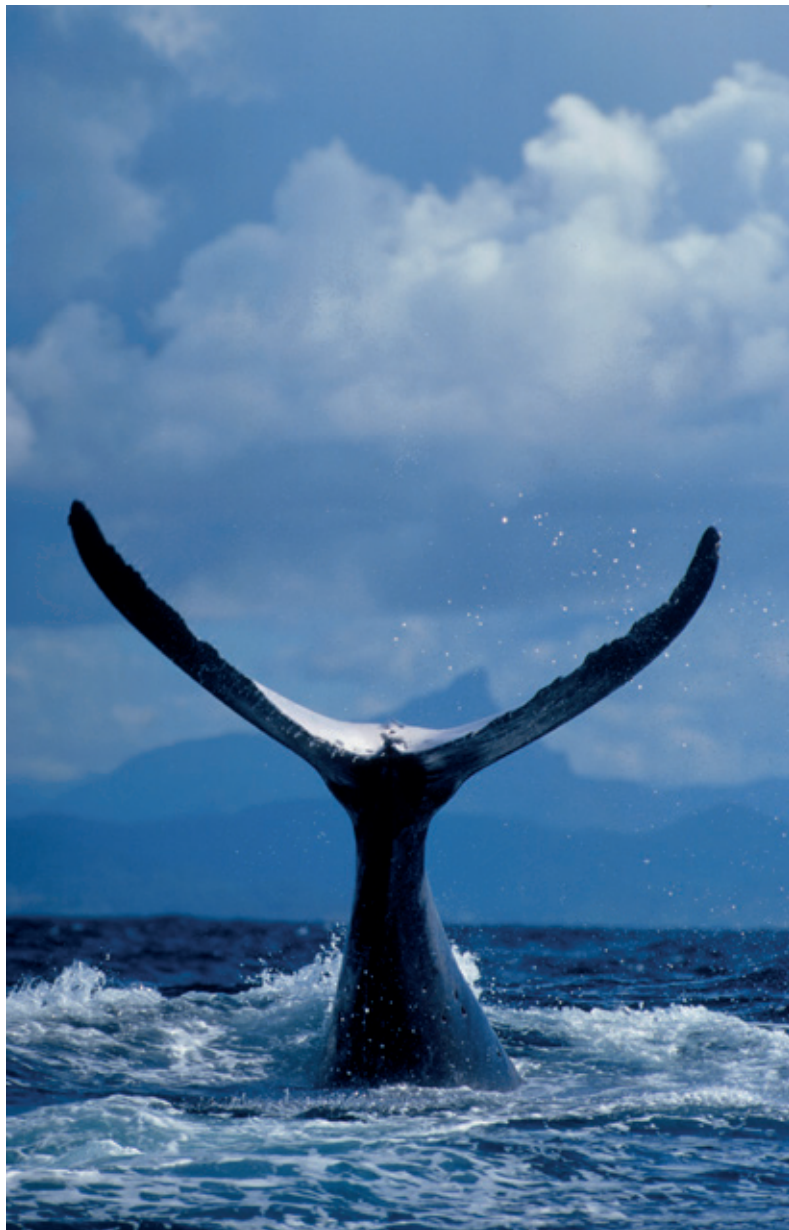


Report of the Consultation Requirements for Operators Technical Working Group

Part of the 2015–2016 Seismic Code of Conduct Review
process



Technical Working Group members, in alphabetical order:

Ian Angus (DOC); Craig Barry (Woodside); Maria Bartlett (Te Rūnanga o Ngāi Tahu); Colin Dall (Northland Regional Council); Jessica Escaip (MfE); Sera Gibson (ERM and multiple Taranaki iwi); Dan Govier (SLR); Angeline Greensill (Tainui hapū); Daren Grover, Louisa Hawkes (Project Jonah); Tanya Johnstone (TGS); Jane Kent (DOC); Alison Lane (ERM); AJ Millward (MBIE); Tikitu Tutua-Nathan (TPK); Ronald Nepe (Te Runanga o Tūranganui a Kiwa); Haami Piripi (Te Rūnanga o Te Rarawa); Bev Purdie (Ngāti Tama); Anna Ririnui (NZOG); Andrew Saunders (PEPANZ); Tony Seymour (TPK); Dan Shenton (MfE); Ngaio Tiuka (Ngāti Kahungunu); Will Trusewich (Auckland Regional Council); Peter Vaughan (Chevron).

Additional input from Richard Wells (Deepwater Group Ltd, Fisheries Inshore NZ Ltd).

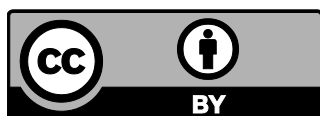
Support from: Andrew Wright, Dave Lundquist and William Arlidge (DOC)

Cite as: DOC (Ed) 2016. Report of the Consultation Requirements for Operators Technical Working Group. Marine Species and Threats, Department of Conservation, Wellington, New Zealand. 21 p.

Publishing information:

Author: Department of Conservation (Ed)
Published by: Marine Species and Threats
Department of Conservation, National Office
PO Box 10420, Wellington 6143
Marine@DOC.govt.nz

ISBN: 978-1-98-851406-2



This work is licensed under the Creative Commons Attribution 4.0 international licence. In essence, you are free to: share ie copy and redistribute the material in any medium or format; adapt ie remix, transform and build upon the material. You must give appropriate credit, provide a link to the licence and indicate if changes were made. To view a copy of this licence, visit <http://creativecommons.org/licenses/by/4.0/nz/>.

Cover photo: Humpback whale fluking. Photo: © Blue Planet Marine

Contents

Preface: Background to the Technical Working Group	4
The review of the Code	4
Role of the Technical Working Groups	4
Scope of work for the Consultation Requirements for Operators TWG	5
Part 1: Engagement as part of the Code	6
1. Introduction and summary of initial conclusions	6
1.1 Expressed general reservation	6
Part 2: Engagement under the current Code	8
2. Stakeholder expectations of consultation	8
2.1 Government expectations and requirements	8
2.2 Iwi expectations and requirements	8
2.3 Regional council expectations and requirements	9
2.4 Industry expectations and requirements	10
2.5 Fisheries expectations and requirements	10
2.6 Additional public disclosure needs	10
3. Consultation experiences	11
3.1 Variability of consultation efforts and successes under the current Code	11
3.2 Non-engagement by iwi	11
3.3 The value of DOC's Pou system for facilitating consultations	11
3.4 Consultation under different frameworks	12
4. Effective consultation	12
Part 3: Engagement requirements under a revised Code	14
5. Developing new consultation requirements	14
5.1 The objectives of consultation under the Code	14
5.1.1 Recording consultation	14
5.1.2 Consideration of Marine Mammal Sanctuaries	15
5.1.3 Minimum requirements and best practice	15
5.1.4 Consultation principles and guidance	16
5.2 Possible solutions	17
5.2.1 Consultation steps	17
5.2.2 Information content	18
5.2.3 A seismic survey advisory group	18
5.3 Specific edits recommended to language within Appendix 1 of the 2013 Code: Marine Mammal Impact Assessment	19
6. Conclusions	20
Appendix: Legal opinion on consultation	21

Preface: Background to the Technical Working Group

The review of the Code

In 2012, the Department of Conservation (DOC) developed a voluntary Code of Conduct for Minimising Acoustic Disturbance to Marine Mammals from Seismic Survey Operations ('the Code'), in consultation with international and domestic stakeholders representing industry, operators, observers and marine scientists. The Code (and its supporting reference document) aims to provide effective, practical measures to minimise the acoustic disturbance of marine mammals during seismic surveys. It was updated in 2013 after being incorporated by reference into the Exclusive Economic Zone and Continental Shelf (Environment Effects – Permitted Activities) Regulations 2013 ('the EEZ Regulations'; see SR2013/283).

At the time the 2012 Code was implemented, DOC committed to a review of the Code after three years. Accordingly, the review of the 2013 Code began in July 2015, with a request for feedback from numerous stakeholders (the Seismic Code Review Group; SCRG) on the Code. In August 2015, the comments received were combined with feedback gained during the three years since implementation.

Role of the Technical Working Groups

In August 2015, DOC established nine technical working groups (TWGs) to address the technical issues raised in the feedback and to provide expert advice on the most suitable methods for addressing them. It was intended that DOC would then draw on this advice when redrafting the Code. The TWGs were:

1. Marine Mammal Observer/Passive Acoustic Monitoring Requirements
2. Marine Mammal Observer/Passive Acoustic Monitoring Observer Data
3. Marine Mammal Impact Assessments/Marine Mammal Mitigation Plans
4. Consultation Requirements for Operators
5. Sound Propagation and Cumulative Exposure Models
6. Acoustic Ground-truthing
7. Non-Standard Surveys
8. Non-Commercial Surveys
9. Biologically-Relevant Sound Levels

The work of these TWGs was supplemented by two workshops co-hosted by DOC in association with scientific conferences in 2015 to discuss the appropriate mechanisms to facilitate the integration of methodological and technological advances into the revised Code.

The nine TWGs worked until January 2016 to provide feedback on the issues assigned to them. This is the report of the fourth TWG: Consultation Requirements for Operators.

Scope of work for the Consultation Requirements for Operators TWG

The current Code provides limited direction for operators to carry out consultation when planning surveys; as a result, there is a lack of consistency across the industry. This TWG was requested to outline an appropriate process for consultation by industry with tangata whenua (indigenous peoples) and other relevant organisations. The TWG was also to determine what activity information should be provided to appropriate regional entities with a specific interest in the activity, as well as the process for this dissemination. These have been identified as areas where a consistent consultation process by operators is needed. Advice from this TWG will be incorporated into the impact assessment components of the Code.

As well, specific issues raised in the review of the current Code indicate the need for the TWG to:

- 1) Establish options for a process to notify regional entities of upcoming seismic work in their area
- 2) Discuss the merits of establishing a web page (internal at least) to distribute information about location and timing of surveys, and provide options for a procedure to populate any such website
- 3) Provide guidance on the consultation expected, and procedures that should be followed, as part of impact assessment and other such processes

Part 1: Engagement as part of the Code

1. Introduction and summary of initial conclusions

This TWG was asked to consider the issues raised during the earlier review of the current Seismic Survey Code of Conduct, on the topic of consultation and outreach.

The initial conclusion of the Consultation TWG is that although the existing consultation provisions in the Code appear to be working reasonably well in practice, they need to be supplemented and refined to increase certainty for proponents and stakeholders¹. The central information of interest for consultation is the marine mammal impact assessment (MMIA) produced on application.

Some TWG members consider the Code should have both schedule-based components, such as the requirement to notify councils and mana whenua iwi with all information provided to DOC or the Environmental Protection Authority (EPA), as well as more ad-hoc components, such as where changes to operational practice evolve as new information becomes available. This action-planning, iterative learning approach would allow constructive dialogue to continue between stakeholders, increasing the effectiveness of mitigation measures.

Some TWG members felt that consultation with mana whenua iwi and councils falls short of the benefits of true public notification, and called for wider community consultation – reasoning that public concerns should be allayed through transparency and data availability. However, not all the TWG agreed wider consultation was the best approach, believing that efforts should be focussed on the most relevant parties above. It was also noted that work is already underway to make data more easily available.

With these diverse perspectives in mind, this report is split into two further parts:

- Engagement under the current Code (Part 2)
- Engagement requirements under a revised Code (Part 3)

Part 2 considers the expectations and requirements of the different parties; Part 3 provides options for moving forward to improve the situation for stakeholders.

1.1 Expressed general reservation

Some TWG members noted that all Crown Minerals permits are subject to iwi consultation. Also, because most seismic surveys are conducted in the Exclusive Economic Zone (EEZ), they must comply with iwi notification requirements within the EEZ Regulations. These members stated that these iwi notification requirements should be kept in mind when considering alternative options. They therefore consider extra consultation requirements within the Code unnecessary.

¹ Stakeholders include the Ministry for the Environment (MfE), EPA, DOC, regional councils, iwi, seismic operators and other potentially-affected marine users, such as the fishing industry.

For example, these TWG members believe that a requirement to ‘consult/engage’ contradicts and goes beyond the ‘notification’ requirements already set in the EEZ Regulations for seismic surveying. It was noted that exploration drilling for petroleum requires ‘notification’ to iwi rather than ‘consultation/engagement’. These TWG members suggested that additional requirements within the Code would create uncertainty by having different requirements (both to ‘notify’ under one regulation and to ‘consult/engage’ under the Code) applying at the same time.

These TWG members are also concerned that the following recommendations do not include any cost-benefit analysis or assessment of compliance costs. They consider the proposed changes add little value, while increasing operators’ costs and acting as a potential barrier to investment. They therefore opposed the following recommendations.

Part 2: Engagement under the current Code

2. Stakeholder expectations of consultation

Several TWG members offered their opinion of the ideal consultation process, without consideration of the current process or the specific vehicle of implementation (eg MMIA, etc). The following represents the expectations from a consultation process regarding a planned seismic survey, for the various stakeholder groups involved.

2.1 Government expectations and requirements

To be considered a successful consultation, TWG members from government agencies stated the process should:

- Provide information useful to decision-making processes
- Ensure that interested parties' and iwi views have been involved, as early is possible
- Be undertaken in an efficient and transparent manner
- Meet agreed government policy and legal obligations (where relevant), as well as other protocols for engagement and consultation
- Be meaningful for 'consultees', who should have their views reflected and easily found within final reports
- Have record-keeping requirements that are adhered to, fit for purpose and not cumbersome
- Improve community relations

2.2 Iwi expectations and requirements

To be considered a successful consultation, TWG members from iwi stated that:

- Proponents listen to what iwi are asking for and be ready to provide it (ie one size does not fit all)
- Iwi should receive sufficient details of different elements of mitigation and what they entail
- Iwi should receive sufficient details of the key actions being taken to address various effects of the seismic survey
- Non-technical communication tools should be used for audiences with varying levels of familiarity with the material
- Proponents should provide information on why mitigation is needed and what it achieves

- Consultation schedules conform to iwi timeframes, as specified by each iwi. These timeframes (which typically operate around monthly marae committee schedules) likely require more than one month to be effective. Also, kaitiaki may be engaging on many issues at once – no single issue can be assumed to take precedence.
- Iwi should have input into consideration of ‘sensitive environments’: tangata tiaki are obliged to look after the environment (including sensitive marine spaces and the species that dwell there) and need to be informed about proposed activities so they can respond appropriately. Spawning, breeding and feeding areas should be avoided at certain times. Coastal hapū (with rohe moana) should have hard-copies of information documents to share at meetings so feedback can be given.
- The process should develop a common understanding of risks (and their likelihood) that are trying to be mitigated.
- Information on how industry has responded to consultation feedback should be shared back with iwi and councils, and potentially also the wider public.

These TWG members also noted there is no real measure of the effectiveness of the DOC Pou system – either for supporting consultations, or for ensuring sufficient outreach and engagement.

2.3 Regional council expectations and requirements²

To be considered a successful consultation, TWG members from regional councils stated that they expected:

- Input into which ‘sensitive environments’ and ‘sensitive species’ should be considered in impact analyses.
- Public notification from the earliest stages of planning. If this is not possible, it is appropriate for both a council and iwi (with rohe moana adjacent to proposals in the coastal marine area (CMA) or even nearby EEZ waters) to be party to all information as it arises, whether this be before, during or after the survey. This would include the same information provided to central government agencies.
- Consultation should include discussions of appropriate buffers around waters of council jurisdiction, even if the source is beyond those waters, given sound propagation.³

Regional councils and iwi often have mutual interests in harbours and coastal areas, and thus existing relationships. A more fluid dialogue with both iwi and councils, rather than discrete consultation, is therefore needed for more effective engagement processes.

² It was noted by some in the TWG that this is heavily influenced by the situation in Auckland. These views may not fully represent those of all councils.

³ Some TWG members suggested that this lies outside the scope of the Code, and thus also the review.

2.4 Industry expectations and requirements

Industry considers a consultation process regarding a planned seismic survey to be successful if:

- Respondents (iwi, councils and other interest groups) have nominated a person/people/forum to engage with) – ie industry is talking to the right people. This is at times transient so an effective consultation system involves understood need for updates from all parties. A schedule of contacts should be kept up to date by each organisation, but held centrally (at DOC or through other government systems such as the TKM) and accessible to each organisation for editing. This removes the burden on industry of communicating to the ‘right’ people representing each organisation (including iwi and hapū, councils and key NGOs and community groups with an interest).
- There is an agreed framework or set of guiding principles to which industry can refer our engagement activities. That is, industry works broadly to outcomes or principles (not prescriptive) contained in the regulatory framework, as these mitigate harm to marine mammals and other marine life more effectively.
- Industry has provided appropriate information to relevant iwi and other parties to enable them to clearly describe how the proposed activity may affect their own functions, interests or activities.
- Information/feedback has been received from those consulted (ie they feel well-informed and motivated enough to provide useful feedback).
- Industry has considered the feedback and demonstrated how it has been dealt with (eg questions answered, any changes made due to feedback).

2.5 Fisheries expectations and requirements

The fishing industry already acts in a regulatory environment where collaborative processes are increasingly present (eg Sea Change, IKHMG, Manukau Harbour Forum). However, it is important to note that the Ministry for Primary Industries (MPI) is increasingly working with councils, Māori customary fishers and iwi involved in commercial fishing, and recreational fishers, to resolve problems collaboratively. Thus, the term ‘fisheries’ should not be assumed to be limited to commercial operations.

It is critical that any seismic survey consultation process should ensure MPI and fishing stakeholders are informed early, so collaborative processes can occur.

2.6 Additional public disclosure needs

In addition to the main stakeholders in an engagement process, others may benefit from information about, or produced by, seismic surveys. For example, academics should be able to engage in independent research on the effects of seismic surveys on marine mammals, which would require sufficient advance notification. However, it was noted that seismic surveying is already subject to more disclosure requirements than most other maritime activities.

3. Consultation experiences

3.1 Variability of consultation efforts and successes under the current Code

The TWG noted that responsiveness in a company is a good thing – it encouraged proponents to work with iwi and other stakeholders to ensure their concerns are heard and addressed. However, some TWG members also noted that councils (who may be subject to downstream costs⁴), and other stakeholders (including some iwi) are not typically notified of planned activities. These members reported that although some individual companies are beginning to reach out to councils, ‘consultation’ tends to lack detail, being limited to broad intentions to explore a given region.

Other TWG members noted that only about 60 Mandated Iwi Organisations (which are related specifically to fisheries assets) are listed on the Te Puni Kōkiri (TPK) website as the environmental organisations for hapū, leaving many off the list. Although all iwi are also represented on TPK’s Te Kahui Mangai maps and contacts lists, these resources are not convenient to access for national or other widespread surveys.

3.2 Non-engagement by iwi

If iwi do not engage, companies should investigate iwi management plans, settlement mechanisms, rohe moana, and other publicly-available statements of iwi interests. Many iwi and hapū are represented by volunteers (who respond to company applications and block offers), and lack the resources to engage in consultation every time.⁵

‘Consultation fatigue’ is likely when multiple surveys are running in the same area in one season or over successive years. In such cases, iwi will want to determine the purpose of any contact. Fatigue may still be common, due to a) the number of government agencies and businesses seeking to consult, and b) limited iwi capacity; iwi will set priorities, and these will need to be respected.

An awareness and sensitivity to each iwi’s situation in terms of Treaty settlement and resourcing will help build an understanding of why some seem reluctant to engage.

3.3 The value of DOC’s Pou system for facilitating consultations

The Pou system for consultation has limitations that need to be recognised. For example, some TWG members noted that reliance on the Pou system for engaging iwi in the Code review process itself appears to have missed connecting with iwi that may have been

⁴ ‘Downstream costs’ may be incurred when: (1) responding to information requests, including media enquiries, made to a council about seismic surveys; (2) questions are raised about a company’s prospecting activities/seismic surveys (during council engagement with the public, including iwi and hapū) which subsequently require council follow-up; (3) seismic surveys take place within coastal waters that fall under council jurisdiction (ie within the territorial sea) – they therefore need to be assessed against the relevant regional coastal plan and RMA provisions to determine if a resource consent is required; and (4) briefing the council (councillors and council staff) on seismic surveys.

⁵ Unlike consultants and many experts.

interested. However, without more information on how the system works, it is impossible to recommend improvements to it.

These TWG members suggested that staff in government and industry instead need to be proactive to ensure information flows out of the office and into the community. For example, in all commercial surveys companies require a permit from New Zealand Petroleum & Minerals (NZPAM) at the first stage of the regulatory process; companies should seek guidance at that stage and engage with relevant iwi from then on.⁶ However, other TWG members noted that even the 'official' list of iwi/hapu on the TKM website is incomplete, and difficult to extract information from in bulk.

3.4 Consultation under different frameworks

There are advantages and disadvantages to consultation under different possible legal frameworks, such as under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 ('the EEZ Act'), the Marine Mammals Protection Act 1978, etc. Some TWG members believe all consultation activity should occur at one step, if possible. However, given that (for example) consent for a well may not be sought for years after an exploratory survey is undertaken, it is clearly not possible to consult once on every aspect of a long-running project.

As NZPAM are the first step in a long process, some in the TWG suggested that it would make sense for engagement with iwi to begin at that point to enable ongoing information exchange as the project develops. NZPAM outlined its role as being to facilitate introductions, bearing in mind the earlier principle of iwi choice regarding the desired level of engagement. However, no further details were provided.

4. Effective consultation

Consultation is effective when both parties feel they have received appropriate information and have enough time to consider and develop a response, and where 'consultees' understand what they can influence, and how their concerns were addressed. This feedback loop is important. Some TWG members felt there needs to be collaborative consultation featuring collective dialogue with central government within and beyond the Code, rather than discrete one-to-one consultation. Frequently-used environmental consultants can help build and maintain the necessary bridges for seismic operators to maintain these relationships.

⁶ Refer to Best Practice Iwi Engagement Guidelines, available from NZPAM: <http://www.ruanui.co.nz/environmental.aspx>

Some guidance is provided by the *Wellington International Airport Limited and others v Air New Zealand* [1993] 1 NZLR 671 case ruling at p. 675. Judgment of the Court of Appeal delivered by McKay J quoting McGechan J in the High Court in *Air New Zealand and others v Wellington International Airport Limited and others*, HC, Wellington, CP 403-91, Jan 6, 1992. However, some TWG members noted that this legal analysis (which is based on other legislation) should not substitute for clear expectations and direction in the Code that is tailored to the context of marine seismic surveys and the local regulatory environment. See **Appendix 1** for further details.

The TWG generally agreed that the best engagement model would be to develop long-term relationships between seismic companies and iwi, as well as communities and their elected representatives (ie councils), in regions where seismic surveys are common. Such longer-term relationships are only practical for companies with exploration permits, as future production is expected. In contrast, such relationships cannot be developed for most multi-client and scientific research seismic operations, as these generally consist of only the survey itself. Despite this, the TWG strongly recommends such an approach, where possible.

However, the TWG did not agree whether such relationships and engagement with iwi should be formalised within the Code. Some members felt this is not needed as when other relevant regulatory instruments exist, such as the Crown Minerals Act 1991 and EEZ Act). Other TWG members felt there would be no accountability if engagement is not explicitly included.

In any case, there needs to be recognition of the difference between prospectors and explorers. It is therefore important to ensure iwi and other parties know the nature of the company, to set appropriate relationship expectations.

Part 3: Engagement requirements under a revised Code

5. Developing new consultation requirements

The TWG agreed that the consultation aspect of the current Code is not fundamentally flawed, but could be enhanced with:

- Clarity around objectives
- Improvements to processes to make them more efficient
- More explicit consultation requirements

5.1 The objectives of consultation under the Code

Some TWG members felt that the main aim of consultation is to ensure iwi know what is happening and who to talk to, and to address iwi issues, concerns and aspirations as far as possible. However, the scope of these consultations also needs to be clarified – for example, whether consultation should consider only seismic components or whether it should (if appropriate) extend also to drilling.

If the latter, the TWG agreed the Code is not suited to the task as it pertains only to seismic surveys, and there should be no attempts to try to expand its coverage. However, in practice it may often be difficult to separate the two. It is also not clear how an operator can effectively limit the scope of consultation to seismic surveys from wider discussions about drilling impacts and future development scenarios (which are also likely to be raised in consultation), but also to be equipped to discuss these issues.

Regardless, several TWG members noted that although clarity of purpose is important, it is also necessary to understand the long-term view of iwi to build long-term relationships on this basis. It is thus necessary to be able to continue to kōrero (discuss) as the project develops, and companies should therefore be willing to talk widely. Even when discussions occur at an early prospecting/exploration phase, iwi will always be mindful of the potential outcome. Several TWG members noted that this needs to be acknowledged by industry, even if consultations under the Code are limited to seismic surveys.

5.1.1 Recording consultation

The TWG also discussed the need for keeping and submitting a detailed record of the consultation. Many believed the current requirement for operators to include copies of all consultation-related correspondence (including emails) in the MMIA is superfluous. The Code should focus on objectives and outcomes, and thus require only a summary of such information – provided that iwi (as Treaty partners and as tāngata tiaki) and their objectives are clearly included. It should not just be operator or Crown objectives driving outcomes from the process – iwi aspirations for outcomes are equally important.

However, some TWG members expressed a belief that copies of correspondence or evidence of consultation are not superfluous, and that the requirement noted above should be retained to ensure full awareness of the effectiveness of consultation.

Regardless, it was noted that including all emails in raw form in the MMIA (which is then publicly released) can be difficult. A summary of written material may be sufficient, and would be more consistent with other regulatory regimes. It should be possible for a regulator to interrogate the proponent's consultation/engagement process for more detail if required.

5.1.2 Consideration of Marine Mammal Sanctuaries

Some TWG members consider that Marine Mammal Sanctuaries (MMSs) should, like marine reserves, be excluded from seismic survey activity and that a reasonable buffer area be established due to the acoustic propagation. Ngāi Tahu takiwā expect that there will be no surveying for commercial activity. It is their belief (not necessarily supported by others in the TWG) that sanctuaries are unsuitable locations for oil extraction, making them also unsuitable for surveys for petroleum prospecting or exploration.

Although establishing any such position is beyond the scope of the Code review,⁷ some TWG members believe establishing increased protections in these areas should be considered. These members called for seismic surveys to be prohibited in MMSs by the Code, especially the Maui dolphin MMS, as well as within 20 nm of the edge of the MMS/CMA.

However, other TWG members felt the Code should not contradict the apparent support for such surveys to be conducted, subject to controls in the established rules. Finally, it was noted that there is an ongoing legislative process around marine protected areas that might affect this aspect of the Code.

5.1.3 Minimum requirements and best practice

In general, good information and public notification, if it truly is based on the best mitigation-driven outcomes, should allay the concerns of many stakeholders. The Code should thus set out base requirements for consultation that ensure it is acceptable to all parties; however, companies should be encouraged to treat any guidance as a minimum standard, and to conduct the best consultation possible. Effective consultation is described above, and the Best Practice Iwi Engagement Guidelines contain extra guidance.⁸

Iwi always expect this level of respect. Government agencies have Treaty partnership responsibilities to facilitate introductions and guide engagement practice, and it is industry's responsibility to meet national and international standards for working with tangata whenua.

⁷ Surveys are allowed subject to specific rules under the Marine Mammals Protection (West Coast North Island Sanctuary) Notice 2008.

⁸ <http://www.ruanui.co.nz/environmental.aspx>

Acknowledging the different regulatory framework in Australia, another useful resource is the NOPSEMA review of consultation and engagement,⁹ which includes (for example) a useful summary process flow chart.¹⁰

5.1.4 Consultation principles and guidance

The TWG broadly supports the NOPSEMA consultation principles:¹¹

- Continuous: stakeholder groups should be sought proactively, and consultative relationships built whenever possible.
- Broad-based: consultation should capture the diversity of stakeholders affected by the proposed changes. This includes diverse business interests, segments of the wider population, and state, territory and local government.
- Accessible: channels for consultation should be relevant to the groups being consulted, and strategies should be in place to assist stakeholders who might be significantly affected by the activity but do not have the resources and/or ability to respond.
- Not burdensome: the consultation process should not place unreasonable demands on stakeholders. For stakeholder groups subject to frequent consultation, consideration should be given to consulting jointly with other titleholders to minimise the burden.
- Transparent: explain the objectives of the consultation process and the context in which consultation is taking place, including when and how the final decision will be made. Feedback should be welcomed and responded to, even if it is not adopted.
- Consistent and flexible: consistent consultation processes convey experience and professionalism. Be open to change, however, if a simpler way to consult is available.
- Evaluation and review: consultation processes should be evaluated to ensure ongoing relevance and effectiveness.
- Not rushed: ensure people have enough time to understand, consider and respond to detailed information (not less than 30 days). Give people a reasonable time to absorb and understand the information you provide so they can offer a considered view.
- A means rather than an end: use consultation to improve decisions, not as a substitute for making decisions.
- The effectiveness of consultation can be measured by adherence to these principles in a fair process of engagement, rather than by stakeholders' remaining views at the end of the process.

The TWG also notes that there is extensive guidance for consultation under the Resource Management Act 1991 (RMA) (eg the MfE guidance).

⁹ Draft Guidance note -04750-GN1567 Revision No 0 12 August 2015.

¹⁰ <http://www.nopsema.gov.au/environmental-management/work-programs/stakeholder-engagement-and-transparency/invitation-for-comments/>

¹¹ <http://www.nopsema.gov.au/environmental-management/work-programs/stakeholder-engagement-and-transparency/>

5.2 Possible solutions

The TWG offers the following potential amendment to improve specific guidance around seismic survey consultations, as the Code's existing consultation provisions are not detailed enough to provide certainty to proponents and stakeholders.

5.2.1 Consultation steps

The following consultation steps were discussed:

- When filing for a prospecting permit from NZPAM, seismic operators are provided with contacts for local iwi. The TWG recommends that consultation efforts begin at this stage, to help operators assess timeframes and general requirements for the iwi (the TWG acknowledges that this can only be a recommendation, rather than a requirement, under the Code).
- Some TWG members consider that when filing a notice of intent to DOC, seismic operators should also file a brief consultation plan, outlining who the seismic operator plans to contact and when, as well as a list of iwi (and other entities) already engaged about the specific survey. The operator should append the list of iwi contacts provided by NZPAM to give DOC the chance to suggest additions or note contact changes.

However, it was noted that it is premature to introduce further regulatory requirements in the absence of a clear problem to fix. The idea of a consultation plan is new to New Zealand; it was noted that DOC would need to be resourced to consider it – presumably also assuming some responsibility for whether sufficient engagement was subsequently undertaken. Some TWG members noted that no regulatory body is responsible for approving the proposed consultation plan, and this lack of enforceability negates the proposal's usefulness.

Despite these concerns, the TWG fully encourages both: (a) discussion between regulators and prospective operators; and (b) further guidance from government agencies that helps operators carry out effective and genuine engagement activities.

- Some TWG members recommended that seismic operators should provide a brief consultation report in the MMIA, which would make it publicly available on DOC's website.¹²
 - This report should include: (a) a summary of all comments received, and details of how these comments were considered; and (b) any responses or modifications made as a result.¹³
 - In any cases of unsuccessful dialogue, operators would provide a summary of outreach attempts. Operators would thus show they had tried to consider relevant iwi opinion and cultural values, where they are publicly available in iwi

¹² It was noted that this may be better considered by the Marine Mammal Impact Assessments/Marine Mammal Mitigation Plans Technical Working Group, but this suggestion was made too late to be included by that TWG.

¹³ For example, the report should demonstrate how the operator worked with iwi to address issues associated with marine mammals raised by the incorporation of traditional knowledge (mātauranga) into their survey design (eg avoid certain areas at specific times of the year).

management plans and regional council documents. Any written comments from iwi would be appended to this report, but a full record of email and phone exchanges is not required.¹⁴

Such lack of engagement may also represent consultation fatigue, combined with an increasing familiarity with seismic surveys – but this does not mean that iwi interests should not be respected.

5.2.2 Information content

At a minimum, the operator should provide details of location, duration, basic vessel details, summary of the effects of the planned survey, and planned mitigation – including how this will reduce impacts. However, companies should also provide any extra information requested by iwi during initial discussions.

In addition to iwi consultations, results of sound modelling, if applicable, should also be provided to councils so they can consider effects of noise at the border of the CMA, where relevant.

In terms of feedback, the consultation summary should cover final location, duration and other basic survey data, changes made because of consultation feedback, what the next stages/timeframes could be, and operator contact details. It should also include any information requested that is not commercially sensitive. It was noted that the consultation report in the MMIA would not include post-survey feedback of interest, such as MMO sightings/information and results of ground-truthing, if appropriate. Such information should be provided directly to interested parties as soon as it is available, if requested.

5.2.3 A seismic survey advisory group

The TWG also suggested that the Code should encourage (although not require) more collaborative approaches beyond project-by-project consultation. Although outside the Code, one TWG member suggested a quarterly review forum could be set up, with representation from all iwi, councils, NGOs, community groups, academics and industry – similar to the Maui's Research advisory group, which has been useful for advancing that issue.

¹⁴ Although operators are, however, advised to maintain this record in case of challenge to the details in the summary, it was noted that companies generally have record management policies and so specifically requesting this is probably unnecessary.

5.3 Specific edits recommended to language within Appendix 1 of the 2013 Code: Marine Mammal Impact Assessment

The TWG proposed adding the following to section 3.2 of the Code, or create as a new section 3.3:

In developing the MMIA the survey proponent should [consult/engage] with organisations and persons with specific interests or expertise relevant to the proposed survey including iwi authorities,¹⁵ commercial interests¹⁶ and government agencies.¹⁷

The purpose of [engagement/consultation] is to:

- *Identify organisations or persons with specific interests or expertise relevant to the proposed survey and provide such persons with sufficient information about the proposed survey (including the nature and scope of activity and planned mitigations) and adequate opportunity to evaluate and convey how it may impact on their interests and activities.*
- *Identify any potential conflicts with existing interests.*
- *Identify information relevant to evaluating or reducing the potential impacts on marine mammals.*

However, some TWG members consider the term ‘should’ may be problematic. This is because in the EEZ the Code is compulsory and ‘should’ is an unclear term from a legal perspective.

The TWG also proposed specific edits to the text in Appendix 1 of the Code (shown **with emphasis** below).

An MMIA will:

- *Describe the activities related to the proposed marine seismic survey*
- *Describe the state of the local environment in relation to marine species and habitats, with particular focus on marine mammals, prior to the activities being undertaken*
- *Identify the actual and potential effects of the activities on the environment and existing interests, including any conflicts with existing interests*
- ***Identify all tangata whenua with existing interests in the area potentially affected by the proposed activity***
- *Identify the significance (in terms of risk and consequence) of any potential negative impacts and define the criteria used in making each determination*
- *Identify persons, organisations or tangata whenua with specific interests or expertise relevant to the potential impacts on the environment*

¹⁵ ‘Iwi authorities’ used to align with relevant legislation such as the Crown Minerals Act and the Resource Management Act, and the Te Kāhui Māngai directory.

¹⁶ ‘Commercial interests’ includes marine users such as the fishing and maritime industries and tourism operators.

¹⁷ ‘Government agencies’ includes both central government departments and agencies, and regional authorities relevant to the proposed survey.

- *Describe any consultation undertaken with persons described above and specify those who have provided written submissions on the proposed activities*
- *Specify any possible alternative methods for undertaking the activities to avoid, remedy, or mitigate any adverse effects*
- *Specify the measures that the operator intends to take to avoid, remedy, or mitigate the potential adverse effects identified*
- *Specify a monitoring and reporting plan*
- *Specify means of coordinating research opportunities, plans, and activities relating to reducing and evaluating environment effects*

6. Conclusions

At present the expectations regarding consultation by a proponent are not clearly set out in the Code of Conduct. There are some broadly-appropriate provisions relating to consultation in Appendix 1 of the Code in the context of MMIA development, but they are not clearly set out.

The initial conclusion of the Consultation Requirements for Operators TWG is that the Code's existing consultation provisions need to be supplemented and refined to increase certainty for proponents and stakeholders. The proposed solutions and text above are an attempt to do this. This text is simple, and designed to provide clarity on expectations without being too prescriptive.

Appendix: Legal opinion on consultation

Some guidance on consultation was provided by the *Wellington International Airport Limited and others v Air New Zealand* [1993] 1 NZLR 671 case ruling at p 675. Judgment of the Court of Appeal delivered by McKay J., quoting McGechan J. in the High Court in *Air New Zealand and others v Wellington International Airport Limited and others*, HC, Wellington, CP 403-91, Jan 6, 1992:

*Consultation must allow sufficient time, and a genuine effort must be made. It is a reality not a charade. The concept is grasped most clearly by an approach in principle. To 'consult' is not merely to tell or present. Nor, at the other extreme is it to agree. Consultation does not necessarily involve negotiation toward an agreement, although the latter not uncommonly can follow, as the tendency in consultation is to seek at least consensus. Consultation is an intermediate situation involving meaningful discussion. Despite its somewhat impromptu nature I cannot improve on the attempt at description, which I made in *West Coast United Council v Prebble*, at p 405:*

Consultation involves the statement of a proposal not yet fully decided upon, listening to what others have to say, considering their responses and then deciding what will be done.

Implicit in the concept is a requirement that the party consulted will be (or will be made) adequately informed so as to be able to make intelligent and useful responses. It is also implicit that the party obliged to consult, while quite entitled to have a working plan already in mind, must keep its mind open and be ready to change and even start afresh. Beyond that, there are no universal requirements as to form. Any manner of oral or written interchange which allows adequate expression and consideration of views will suffice. Nor is there any universal requirement as to duration. In some situations adequate consultation could take place in one telephone call. In other contexts it might require years of formal meetings. Generalities are not helpful.