

Comments on implementation of the Annex P process in the JARPN II review

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INTRODUCTION

The Scientific Committee (SC) is tasked by the Commission to review permit proposals and research which results from special permit whaling. Since the moratorium on commercial whaling and prior to IWC60 (2008), five new permit proposals have been reviewed by the Scientific Committee (JARPA, 1987; JARPA II, 2005; JARPN, 1994; JARPN II, 2000; Iceland's scientific proposals; 2003) as well as two interim reviews (JARPA, 1997; JARPN, 2000) and one final review (JARPA, 2007). More than 12,000 whales have been killed as a part of these programs. Overall the review process was highly polarized and generally resulted in reports which included both staunch defence and criticism of the scientific aspects of the whaling programs. Few if any modifications were made to the programs in response to reviews. Commentary on these programs, and their reviews, has been equally polarized in the open scientific literature (Nagasaki 1990; de la Mare 1990; Brownell et al 2000; Normile 2000; Gales et al 2005, Clapham et al. 2007). Major concerns have included the contentions that the goals of these proposals are not needed for the future management of the whales killed under the rules of the Convention, and that sample sizes and species targeted have been increasing rapidly without scientific justification.

Many members of the SC have argued that a major problem with the reviews has been that they breach international norms of review processes in science by allowing the proponents (in this case the Governments of Japan and Iceland) to fully participate in all aspects of the review and its conclusions. In order to address these and other shortfalls in process the IWC recently developed and adopted by consensus a new review process: *Annex P – Process for the Review of Special Permit proposals and research results from existing and completed permits* (IWC 2009). The key features of this new process are:

- Limiting the role of the proponents to present the proposal and answer points of clarification;
- Establishing a panel of invited experts to review the proposal at a specialist workshop. Selection of the experts is to be conducted by the SC Chair, Vice-Chair, recent past SC Chairs, and IWC Head of Science. Composition of the panel is to be 'balanced and fair';
- The proposal will be reviewed by the specialist panel against the proposal's stated objectives, including their relevance to the work of the Scientific Committee.

This new procedure was implemented for the first time at the expert workshop to review the ongoing JARPN II program, hosted by the proponents at their National Research Institute of Fisheries Science in Yokohama, Japan from 26 to 30 January 2009.

It is important to note here that our observations are in no way intended to impugn the scientific standing or judgment of any of the scientists selected on the panel; indeed, we recognize that all are outstanding researchers in their fields. Furthermore, we have been careful not to associate particular comments with specific individuals.

Here, we comment upon issues that arose during the implementation of Annex P, in particular on the selection of the specialist panel, a lack of any process to resolve potential conflicts of interest among the panel's members, and the lack of access to the workshop for national delegates who wished to observe the process. Our commentary does not address the scientific conclusions within the report that resulted from the workshop (SC61-Rep1), nor comment upon the merits or otherwise of the JARPN II program. We do, however, draw upon some aspects of the report that address issues of process around the implementation of Annex P.

Selection of the specialist panel

During the development of Annex P, there was a great deal of discussion and a wide range of views on the mechanism by which the specialist panel would be selected. Perhaps as a result of the divergent views, the details by which candidate scientists would be deemed eligible for the review are stated only vaguely in Annex P. What was consistent from these discussions was the need to develop an unbiased and transparent review process comprised of a panel that was 'balanced and fair'. Given the failure of process in earlier reviews, it was also important to demonstrate a substantial change in approach from that which had been previously applied. In our view there are two core criteria that any candidate should satisfy in order to participate in an acceptable review process:

1. Candidates should be an international leader in an area of science that is relevant to the review, and
2. Candidates must be impartial and objective in their review (i.e. be independent of the research and have no conflict of interest with regard to the research program and/or its proponents).

While neither of these criteria are explicitly specified in Annex P, both are fundamental to international best-practice. This is a standard which is clearly the intent of Annex P, and which formed the basis of good-faith negotiations by those of us who participated in a small group convened by the SC Chair to develop the Annex.

We believe the Annex P process failed seriously in relation to satisfying the second of these criteria.

First, and most fundamental, is the degree of independence (perceived or otherwise) of the reviewers selected for the specialist panel. One obvious concern here is the degree to which some panel members had been involved in collaborative research with either the core program being assessed (JARPN II), with immediately associated research programs (in this case JARPAN, JARPA or JARPA II), or with the senior scientists who lead the research. A relatively cursory examination of IWC-related publications demonstrates that at least five members of the panel have published papers that either result from one of Japan's special permit whaling programs and/or with one or more of the senior scientists associated with these programs (number of publications are 1, 2, 3, 11 and 18). It is hard to provide a commentary on the relevance of these papers and relationships while avoiding particulars that are clearly attributable to individual panel members; consequently our comments are as general as possible. These relationships (through publications and/or representational roles and relationships, or through allegiance to organisations with a public advocacy position on scientific whaling) have the potential to affect independence and impartiality. The fact that half of the invited experts have direct links of these types with the program under review must raise concerns regarding the degree of perceived or real independence achieved through their selection. While none of this means that these individuals cannot be objective in the resulting review, it does too little to move the review process away from the old system, or to demonstrate an acceptable level of independence and transparency to the outside world.

When some of us were notified of the names of the invited experts we were concerned about this issue. On that basis, one of us requested that the SC Chair seek conflict of interest declarations from the panellists; this is a procedure that is standard in many scientific reviews. This request (made twice) went unanswered and no such declarations were required for the review. We regard this as a missed opportunity that would, at the very least, have provided some level of transparency in the process while allowing the review to go forward.

Our expectations, and we believe that of many other members of the SC, of how such a 'balanced and fair' panel might be constituted were substantially different from those who made the final selections.

The second issue regarding the selection of the panel relates to the degree to which this first implementation of Annex P represents a real paradigm shift from the previous contentious review processes. The full review panel consisted of 14 participants (including the 10 invited experts), of which 9 are regular, senior and highly influential members of the SC. At least four of the participants had also played senior roles in the earlier reviews of special permit whaling.

By any measure, the constitution of the review panel cannot be seen as a clear differentiation from those assembled in the past, nor can we claim to have achieved the intent contained in Annex P. We would note that in the small group discussions at SC60 regarding the formulation of Annex P, a suggestion by the SC Chair to have a review panel consisting of a 'balanced' mix of SC members who had been either strongly for or against scientific whaling was rejected; this was because it would have represented a

continuation of the polarized atmosphere that had existed for so long, and which indeed was the impetus for attempts to find a better way forward through the Annex P discussions.

Those of us who participated in those discussions did so in the expectation that, as occurs elsewhere in science, reviewers with as much independence as possible from the review program would be selected. We note here that the words in Annex P refer only to ‘balanced and fair’ in relation to panellists. It is now clear that the word ‘independent’ should be included, and defined. Further clarification of this kind in Annex P might avoid the apparent misunderstandings around the reasonable eligibility of future expert reviewers.

Transparent oversight of the new process

The SC conducts a substantial amount of its business intersessionally in focused workshops. These meetings are open to all SC members and this ensures an open and transparent process, particularly for sensitive and contentious issues. An important feature of Annex P was an attempt to limit the review panel to a small number of selected experts, as noted in the discussion above. In particular, a key outcome was to ensure that the proponents did not play an active role in the review beyond the presentation of their data and addressing points of clarification. Accordingly, it was recognized that allowing active participation by SC members in the review process would be inappropriate. However, attendance at the review for observers – who would play no role in discussions or conclusions – was regarded by us as an obvious and critically important right, and indeed has been a long-standing precedent at SC. Although Annex P is silent on the issue of observers, a break from normal procedures of open and transparent access to all SC sponsored meetings would, in our view, require a specific and defensible rationale to implement.

Two of us made formal requests to the Chair of the SC and the Chair of the Commission to attend the meeting as observers. We made it clear that we would take no role in any discussions, and further noted that we regarded this as an important right of all SC members, including the proponents of the program under review. We were refused any access to the meeting.

Relevant comments on review process in SC61-Rep1

Given our concerns in the process that has culminated in SC61-Rep1 we do not intend to refer to particular text on matters relating to JARPNII. However, notwithstanding our concerns it is interesting to note some general comments from the panel relating to the review process:

- It was noted that the review process was generally hindered by a lack of specific, shorter-term, quantifiable objectives, and
- That given these limitations, and some others on required calculations, the review has not yet been completed.

Conclusions and recommendations

Annex P was intended to be a genuine effort by the Scientific Committee to implement a new and defensible process for the review of whaling programs which operate under special permits. The serious concerns about lack of clarity on the basic principles of what constitutes a ‘balanced and fair’ panel, coupled with the failure of this new process to allow oversight – as observers – by IWC members, and the specific concerns that hampered the review and were highlighted in SC61-Rep1, indicate the important need to update Annex P in light of these experiences.

We believe that all of us who took part in the development of Annex P did so in good faith, and with the interest of achieving a defensible outcome. This notwithstanding, the review of the JARPN II program has been compromised by:

- the unaddressed potential for conflicts of interest among the review panel,
- the continued dominance of SC members in the review process,
- the inability of member nations to observe the new process in order to gauge their confidence in its outcomes, and
- the lack of short-term measurable objectives on which to structure a review (and some other issues identified in Rep1).

In order to ensure that future reviews demonstrably achieve the objective assessment sought in the new process, we strongly recommend that the SC modify Annex P to provide clarity on these key issues, as follows:

- that eligibility for specialist panel membership be clearly defined to ensure they are independent of the program and its proponents and are leaders in a required area of expertise.
- that potential panellists be required to make a conflict of interest declaration regarding their relationship, if any, with the special permit program, or its proponents.
- That, to the practical degree possible, the SC limit their role in the review by the specialist panel (noting that the SC have a full review function on the outcome of the specialist panel findings).
- that representatives of national delegations, including that of the proponents if desired, should be permitted to attend the review as observers. In this role they would not participate in discussions, nor observe the closed deliberations of the specialist panel.
- That national delegations who submit special permit applications be required to set short term measurable objectives.
- That the review process include a provision requiring that any revised methods, results or interpretations produced in response to specific recommendations in the original review be reviewed by the panel.

Finally, we emphasize that the critically important context of improving this review process is relevant only if the proponents in any future reviews respond in full to the review’s recommendations and modify their research program accordingly.

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