



MARINE MAMMAL COMMISSION

12 June 2017

Ms. Jolie Harrison, Chief
Permits and Conservation Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910-3225

Re: Permit Application No. 21170
(Keith Ellenbogen,
Keith Ellenbogen Photography, LLC)

Dear Ms. Harrison:

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the above-referenced permit application with regard to the goals, policies, and requirements of the Marine Mammal Protection Act (the MMPA). Mr. Ellenbogen proposes to film marine mammals from the Gulf of Maine to Hudson Canyon during a five-year period.

Mr. Ellenbogen could take up to 10 species of marine mammals of either sex and any age class by Level B harassment during filming activities¹. Filming activities would occur on up to 60 days per year. Mr. Ben Haskell, Dr. Howard Rosenbaum, Ms. Merry Camhi, Mr. Matthew Lawrence, and Ms. Alison Nolan would serve as advisors. If any of the filming activities cause any change in an animals' natural behavior², the activities would cease including returning to the boat as discreetly as possible. A female also would not be separated from her calf. Boat operators would avoid sudden course changes and reduce vessel speed to an idle as necessary. In addition, filmmakers would not follow animals including when filming them underwater.

The original application that was provided for public comment had missing and contradictory information and proposed methods that are inconsistent with standard practices for photography and filming activities conducted under scientific research or other photography permits. The specific issues associated with the original application are delineated in the Addendum to this letter.

The Commission believes all of these issues should have been addressed prior to the application being considered complete and being published in the *Federal Register* notice. Some of these issues stem from the applicant not following National Marine Fisheries Service's (NMFS) application instructions. Other issues should have been identified by NMFS as inconsistent with applicable policies or past permits for similar activities. Previously applicable application instructions

¹ Filming would be conducted from a small boat (including using a pole camera) and using snorkelers or divers.

² Including behavior of females with calves.

expired in September 2016, and the new instructions have yet to be finalized. Many of the issues described in the Addendum could be rectified once NMFS finalizes, and ensures that each applicant follows, those application instructions. As such, the Commission recommends that NMFS finalize its application instructions as soon as possible and ensure that all applicants abide by them. If an applicant does not provide the necessary information, NMFS should return the application and not publish it in the *Federal Register* until all of the required information has been provided. NMFS also should review the information in the application to determine if it makes sense and is consistent with applicable policies and precedents. For example, the original application indicated that humpback whales could be filmed underwater from a distance as close as a few feet. That distance likely would cause undue harassment of the whales and is a safety concern for both the whales and the snorkelers or divers.

Mr. Ellenbogen amended portions of his application (see the revised application) to address some of the issues described, however questions remain. Although he did state that he would enter the water no closer than one boat's length³ from larger whales, Mr. Ellenbogen has not specified the distance at which he would enter the water to film small odontocetes. In general, other permits⁴ that authorize underwater photography or filming activities specify that snorkelers or divers would enter the water at least 25–50 m from the animals. These distances are reasonable because animals are less likely to be disturbed when snorkelers or divers enter the water and slowly approach them. Therefore, the Commission recommends that NMFS require Mr. Ellenbogen to enter the water at least 25–50 m from any cetacean during underwater photography and filming activities. Mr. Ellenbogen also indicated he would approach the animals underwater no closer than a whale's or dolphin's length. Most cetaceans will not allow snorkelers or divers to approach that close. Mr. Ellenbogen further stated that he would allow the animals to approach him and would not follow or pursue them. That restriction should be reflected in the permit conditions.

In addition, the Commission questions the need to be 15–30 m from a haul-out site to obtain high-quality photographs or video of seals using a telephoto lens. At those distances, Mr. Ellenbogen has a very good chance of disturbing and flushing the entire seal haul-out site. Whether or not a vessel is idling or drifting, seals are likely to react to a vessel that close. Further, once a vessel gets that close to shore while idling or drifting, the engine will have to be engaged to avoid the haul-out site. If he has to engage the engine that close to shore with seals swimming nearby, Mr. Ellenbogen runs the risk of unintentionally striking an animal. Other permittees have opted not to conduct photography or filming activities or various surveys during the pupping season or to conduct those activities at a distance sufficient to avoid disturbing females with pups and then, only for short periods of time. For these reasons, the Commission recommends that NMFS require Mr. Ellenbogen to (1) have one of his pinniped advisors accompany him during photography and filming activities to ensure he is not causing undue harassment of the seals, (2) not approach any haul-out site closer than 50 m, and (3) if females with pups are disturbed, leave the area immediately and increase the close approach distance to greater than 50 m for future activities.

Mr. Ellenbogen based his revised take estimates on conducting 60 days of activities in one part of the revised take table. However, in another portion, he included detail on various encounter rates and varying days of activities that do not correspond to a total of 60 days of

³ This could be 21 ft for the smallest boat specified in the application.

⁴ Both photography and scientific research.

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activities. The Commission recommends that NMFS clarify whether Mr. Ellenbogen intends to use the various encounter rates and varying days of activities to derive his take estimates and, if so, require him to re-calculate the numbers of takes accordingly.

Photography permits often are the most simple and straightforward applications to review and for applicants to obtain. The Commission continues to believe that NMFS needs to ensure that the relevant information is provided in each application prior to deeming it complete and publishing it in the *Federal Register* for comment by the Commission and the public.

Kindly contact me if you have any questions concerning the Commission's recommendations.

Sincerely,

A handwritten signature in blue ink that reads "Rebecca J. Lent". The signature is written in a cursive style with a large initial 'R'.

Rebecca J. Lent, Ph.D.
Executive Director

Addendum

The issues associated with the original application include that it—

- did not specify whether the applicant had experience photographing or filming marine mammals and whether his advisors would accompany him during the proposed activities;
- did not specify the age class and sex of the species proposed to be photographed;
- did not specify the minimum approach distance(s) during topside photography for larger whales⁵ or smaller odontocetes⁶;
- did not specify the distance at which snorkelers/divers would enter the water when conducting underwater photography or filming activities on small odontocetes;
- indicated that the minimum and maximum in-water approach distances would range from 1–100 ft, which are necessary to take underwater images of the various marine mammal species due to underwater visibility ranges from 2–20 ft in the Northeast—the optimum distance for underwater photography for these large whales would be 5–20 ft;
- provided contradictory information regarding the amount of time Mr. Ellenbogen would spend with the same animals during underwater photography and filming activities up to one hour in one part of the application and up to three hours in another part of the application;
- indicated that photography and filming activities would be conducted from land but gave no details on minimum approach distances;
- indicated that Mr. Ellenbogen would approach seal haul-out sites by drifting or idling slowly to a distance of 50–100 ft from the shore line and take photographs using a telephoto lens—he indicated he would maintain a distance that does not disturb the colony but did not explain how those proposed approach distances would ensure that the seals are not disturbed or propose any measures to minimize disturbance to females with pups;
- indicated that snorkelers would position themselves no less than 20 ft from the seals but did not specify at what distance they would enter the water from either seals that are swimming or hauled out;
- indicated that dolphins that approach the boat are not considered a take—NMFS’s policy is that any dolphin approached within 50 yards is considered taken;
- indicated that seals that move more than two body lengths would be considered a take—that policy is correct for hauled-out animals, but NMFS’s policy for in-water takes of pinnipeds is that any seal approached within 50 yards is considered taken;
- specified various encounter rates and numbers of days of proposed activities that were not used or were used inconsistently when estimating the numbers of takes; and
- requested numbers of takes based on (1) illogical group sizes of cetaceans (i.e., five short-beaked common dolphins) and (2) unreasonably low numbers of seals (i.e., 20 seals).

⁵ Humpback whales and long-finned pilot whales.

⁶ Delphinids and harbor porpoises.