



# MARINE MAMMAL COMMISSION

18 December 2017

Mr. Timothy J. Van Norman, Chief  
Branch of Permits, MS: IA  
Division of Management Authority  
U.S. Fish and Wildlife Service  
5275 Leesburg Pike  
Falls Church, Virginia 22041-3803

Re: Permit Application No. 32831C  
(University of California, Davis)

Dear Mr. Van Norman:

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). The University of California, Davis (UC Davis) is requesting authorization to import, receive, and possess samples from nine marine mammal species worldwide during a five-year period. The purpose of the research is to conduct stable isotope analyses to contribute to the understanding of marine mammal biology and ecology.

## Application requirements

The Commission notes that UC Davis's application lacks basic information required by the Fish and Wildlife Service's (FWS's) permit application instructions for research activities involving marine mammal parts. In addition to other information, permit applicants are required to specify—

- the number of individuals of each species per year and/or the number of samples per year expected to be imported or otherwise obtained;
- the age class and sex of the individuals from which samples would be obtained, the country of origin, the origin of the animals (e.g., wild, captive-born, captive-bred), and the current locations of the specimens;
- the source of the specimens, including those that originate in the United States;
- an explanation why the proposed activities cannot be accomplished using similar species not listed under the Endangered Species Act (ESA) and a description regarding how the proposed activities will enhance or benefit the wild population; and
- the name of the foreign exporter and country of export, origin of each specimen to be imported and the names of the facilities that currently hold them, a description of the manner in which each specimen was taken from the wild, and a copy of the foreign collection authorizations, if applicable.

UC Davis did not provide all required information in its application<sup>1</sup> and, in some places, indicated that the information would be determined on a case-by-case basis. For example, FWS suggested in its *Federal Register* notice that UC Davis plans to import samples from museum collections and wild-caught and salvaged specimens<sup>2</sup>. However, the manner in which those specimens were or will be taken<sup>3</sup> was not specified. The Commission believes that all of the information solicited in the application instructions is relevant and should have been provided prior to FWS determining that UC Davis's application was complete or publishing notice of the application in the *Federal Register* for public review and comment. Absent all the information, it is unclear how FWS can make the required findings under section 104(b)(2)(B) of the MMPA that the manner of taking was humane or under section 102(c) that the marine mammal was taken in accordance with applicable foreign laws.

The Commission notes that new applicants, and even some applicants who have held permits for many years, may need additional guidance regarding the information required by the relevant application instructions. It is the responsibility of the FWS to provide such guidance and to ensure that all necessary information is submitted before publishing notice of the application in the *Federal Register*. The Commission believes that all applicants should be held to the same standards and that those standards should ensure that each applicant provides all of the information necessary to make the required statutory findings, including all of the information required by FWS's regulations and permit application instructions. Therefore, the Commission recommends that FWS suspend further consideration of UC Davis's permit application until it has received all of the necessary information set forth in the application instructions<sup>4</sup> and that information has been made available for comment by the Commission, other FWS reviewers, and the public<sup>5</sup>.

The Commission notes that applications for permits have increasingly lacked the required information, even the most basic information required by FWS's application instructions, and should have been considered incomplete pending receipt of that information. To reverse this trend, the Commission recommends that FWS take the steps necessary to ensure that all applicants<sup>6</sup> abide by the current application instructions, which include the revisions finalized in summer 2017. FWS staff need to ensure that all required information is present, is consistent with FWS policies<sup>7</sup>, makes sense, and is in a format<sup>8</sup> that facilitates review by the Commission and the public. Otherwise FWS

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<sup>1</sup> For many items, the applicant indicated that the information was "N/A."

<sup>2</sup> The information in the application contradicts this suggestion. UC Davis indicated that samples would be imported only from academic researchers. It did, however, state that the appropriate collection permits would be required of its clients, but many of those activities do not require permits outside the United States.

<sup>3</sup> i.e., dead-stranded animals, wild-caught animals during permitted research, captive animals during research or husbandry activities, animals killed in legal commercial fishing activities, animals killed during legal subsistence hunts, etc.

<sup>4</sup> At the time this application was submitted the applicable instructions were from February 2014.

<sup>5</sup> If FWS has received application requests from the public.

<sup>6</sup> This has been a problem with all other types of permits as well.

<sup>7</sup> Including accurately distinguishing which activities constitute Level A or B harassment and which activities constitute directed vs. incidental taking.

<sup>8</sup> The relevant information should be set forth clearly in the final application. Reviewers should not have to search what may be extensive email correspondence between applicants and FWS staff, lengthy attachments, or extraneous materials to determine what activities will be conducted, the manner in which they would be conducted, and how they might impact marine mammal stocks or individuals. Research plans and Institutional Animal Care and Use Committee protocols are intended to support the information contained in the application—they are not to be provided in lieu of the information required in the application.

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should return the application and require the applicant to correct those deficiencies before processing the application further.

### **Permit conditions**

FWS may decide to compensate for shortcomings in permit applications by including more restrictive terms and conditions in the permits it issues. That approach may work in situations where information is ambiguous and the terms and conditions clarify that ambiguity by affording more protection to the marine mammals that would be taken or imported. However, not all deficiencies in permit applications can be overcome in such a manner, particularly when they undermine FWS's ability to make the findings required under the MMPA and its implementing regulations. Moreover, adopting more stringent permit conditions could prove to be unnecessarily burdensome or inappropriate for some types of activities (e.g., marine mammal parts or photography permits). Conversely, missing or inadequate information regarding an applicant's proposed activities, particularly for permits involving invasive research, might lead to neglecting significant risks and adopting terms and conditions that are not stringent enough. The Commission contends that these issues can best be avoided by FWS ensuring that applications are clear and complete before providing them for Commission and public review.

Kindly contact me or Peter Thomas, who will be assuming the position of Executive Director as of 2 January 2018, 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