



MARINE MAMMAL COMMISSION

23 January 2018

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. 53019C
(BBC, Natural History Unit)

Dear Mr. Van Norman:

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors (Committee) 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). BBC proposes to film southern sea otters in California from 2018-19 for its documentary, *First Year on Earth*.

BBC requested authorization to take up to 4 southern sea otter female-pup pairs by Level B harassment during filming activities¹ during three 14-day filming sessions. Personnel from the Monterey Bay Aquarium (MBAQ) would accompany the filmmakers and personnel from FWS would serve as additional advisors. BBC would use various measures to minimize impacts to the sea otters and also would be required to abide by FWS's standard permit conditions.

Application insufficiencies and permit conditions

The Commission noted in November 2017 that BBC's application lacked some basic information required by the Fish and Wildlife Service's (FWS's) permit application instructions for photography activities and needed by the Commission to conduct its review. For example—

- the minimum age of pups that could be filmed was not specified;
- the information provided regarding the use of divers (i.e., the number of divers in the water at a given time, close-approach distances during diver deployment and filming activities, proposed mitigation measures, and whether night-time filming would include divers) was insufficient;
- night-time filming methods (i.e., from a small boat, from shore, using underwater cameras, etc.) and associated mitigation measures were not described;

¹ Filming originally was proposed to be conducted from shore, from a small boat, using underwater cameras (pole- and bottom-mounted), and using divers.

- potential Level B harassment takes of non-target otters during filming activities² were not addressed;
- the specific personnel that would serve as underwater divers/cameramen and boat captains and their relevant experience were not specified;
- other cameramen, producers, and filmmakers appeared not to have experience filming sea otters or pinnipeds; and
- the frequency with which MBAQ personnel would be accompanying the filmmakers was not specified.

All of the information required by FWS's application instructions is relevant to making permitting decisions and developing appropriate terms and conditions. Both new and even experienced applicants, including BBC, may need additional guidance regarding the information required by the relevant application instructions. As such, FWS should ensure that all information specified in the instructions has been obtained prior to making a determination that an application is complete or publishing notice of the application in the *Federal Register* for public review and comment³.

In addition, some mitigation measures that have become standard for other photography activities were lacking in BBC's application and were not conveyed to BBC. Among other things, applicants should be made aware of FWS's standard permit conditions and how those conditions could affect the applicant's activities as proposed. FWS should provide such guidance and ensure that all necessary information is submitted before publishing notice of the application in the *Federal Register*. Therefore, the Commission recommends that FWS take the steps necessary to ensure that all applicants⁴ abide by the applicable application instructions, which currently include revisions finalized in summer 2017. This includes ensuring that all required information is provided in the application⁵, is consistent with FWS policies⁶, makes logical sense, and is in a format⁷ that facilitates review by the Commission and the public. The Commission further recommends that FWS take steps to ensure that applicants are made aware of relevant standard permit conditions and that those conditions are included, as appropriate, in the various types of permits.

In multiple instances for the BBC application, FWS chose to include various permit conditions rather than asking BBC to provide the necessary information or to clear up ambiguities. The Commission is concerned that this will become FWS's general practice. Not all deficiencies in

² Such takes could occur either when non-target otters are filmed subsequent to the target otters or when non-target otters occur in the vicinity of the activities and are harassed incidental to the proposed activities.

³ Similar issues were apparent in the recent application from the University of California Davis, see the Commission's [18 December 2017 letter](#).

⁴ This has been a problem with other types of permits as well.

⁵ FWS regional staff also have supported this premise.

⁶ Including those used to distinguish between activities that constitute Level A versus Level B harassment and those that constitute directed versus incidental taking.

⁷ The relevant information should be set forth clearly in the final application. Reviewers should not have to search through 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 will 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 should not be accepted in lieu of the information required in the application.

permit applications can be overcome through permit conditions, particularly when they undermine FWS's ability to make the findings required under the MMPA⁸ and its implementing regulations. Such conditions may be more restrictive than necessary or, if FWS does not have a sufficiently clear understanding of the proposed activities, misguided. Alternatively, missing or inadequate information regarding the proposed activities may lead to insufficient attention to significant risks, including possible takes by Level A harassment, and thus adoption of insufficiently stringent terms and conditions. Thus, the Commission recommends that FWS refrain from attempting to address shortcomings in permit applications by including terms and conditions in the issued permits in lieu of obtaining the necessary information as required by FWS's application instructions.

Procedural issues

The Commission has concerns with the manner in which FWS handled the Commission's comments and questions on BBC's permit application. The Commission staff reviewed BBC's application and provided comments to FWS in November, on the day FWS provided it for review. The Commission deferred drafting formal comments and recommendations until answers to the questions it posed during informal review were received. FWS did not respond until more than a month later and after the public comment period for the application had closed. At that time, FWS informed the Commission of its intention to issue the permit without further review, eliminating the Commission's opportunity to finalize its comments and recommendations⁹. The Commission's inability to submit comments and recommendations within the public comment period was caused largely by FWS's lack of responsiveness. Thus, FWS should have refrained from issuing BBC's permit until the Commission had submitted its comments and recommendations and FWS had a chance to review and respond to them. In addition, the Commission notes that, under applicable regulations (based on 50 C.F.R. § 18.31(b) in lieu of implementing regulations for photography permits) and long-standing agency practice, the Commission is provided with a 45-day review and comment period. The Commission therefore recommends that, prior to issuing BBC's or any other permit, FWS wait until either (1) it has received and considered the Commission's formal comments and recommendations or (2) the 45-day formal comment period¹⁰ afforded the Commission has lapsed.

Furthermore, as discussed herein, if FWS plans to use permit conditions to address information gaps or ambiguities in applications rather than obtaining the necessary information from the applicant, those proposed permit conditions should be provided to the Commission and the public for review and consideration. Without *all* of the relevant information, the Commission and public cannot provide informed comments within the prescribed timeframes. That is, the necessary information should be made available when the comment period begins, not after it has ended and FWS has issued the permit.

The Commission is committed to a constructive working relationship with FWS in which the Commission and FWS identify and address application questions and deficiencies up front,

⁸ For photography permits, those findings include limiting the taking to Level B harassment only (see section 104(c)(6) of the MMPA).

⁹ Section 203(c) of the MMPA requires the Commission to consult with its Committee on all recommendations it makes. Thus, there is some delay in finalizing those recommendations to accommodate consultation with its Committee.

¹⁰ In cases when the Commission is not provided with the permit application until after notice of availability is published in the *Federal Register*, the 45-day period should begin when the application actually is received.

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thereby reducing the likelihood that key issues and concerns that could have significant impacts on marine mammals or significantly alter an applicant's proposed activities are raised for the first time only during the formal comment period. However, regardless of when clarifying questions are raised (i.e., whether during the informal or formal comment period), the Commission believes FWS should find ways to obtain the necessary information to limit the possibility of adopting unnecessarily restrictive or potentially unnecessary permit conditions or denying approval of some activities outright on the basis of missing or unclear information.

In recent meetings, the Commission and FWS have discussed these issues, including the relative merits of addressing deficiencies and ambiguities in permit applications solely through additional terms and conditions or denials versus finding timely means to obtain the necessary information from applicants. We have committed to implementing review procedures to better facilitate the latter approach. With respect to future applications and those that have been submitted but have yet to be finalized, the Commission hopes to work with FWS to ensure that questions raised by Commission staff during our informal review are addressed before those applications are considered final and made available to the public for comment.

The Commission looks forward to working with FWS to resolve these matters. Kindly contact me if you have any questions concerning the Commission's recommendations.

Sincerely,



Peter O. Thomas, Ph.D.,
Executive Director