



# MARINE MAMMAL COMMISSION

4 April 2018

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. 21321  
(Pacific Whale Foundation)

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). Pacific Whale Foundation (PWF) is seeking to renew its permit to conduct research on false killer whales in Hawaii during a five-year period—permit 16479 authorized similar activities.

PWF proposes to conduct research on false killer whales in Hawaii year-round. The purpose of the research is to investigate false killer whale (1) abundance and distribution, (2) movement patterns and habitat use, (3) foraging and social behavior, and (4) body condition and growth. Researchers would harass, observe/track, and photograph/videotape false killer whales of both sexes and all age classes (see the take table and application for specifics). PWF would implement various measures to minimize impacts on cetaceans and also would be required to abide by the National Marine Fisheries Service's (NMFS) standard permit conditions.

## **Incidental taking**

When a non-target species listed under the Endangered Species Act (ESA) is observed during a focal follow, PWF would place its vessel in neutral until the animal(s) has moved more than 100 yards from the focal false killer whales. For non-ESA-listed species for which PWF has authorization under its letter of confirmation (LOC) 18101, it plans to collect various data. Non-target, non-ESA-listed species were not discussed in the application. The Commission asked NMFS multiple times what measures PWF would take if it encountered non-target, non-ESA-listed species that could be harassed incidental to vessel activities, whether incidental taking should have been included (or not), and to include the relevant information in the application. NMFS does not appear to have provided the Commission's inquiries to PWF, instead it indicated that PWF provided sufficient information in its application and that it would be required to abide by the wildlife viewing guidelines.

The Commission asked similar questions<sup>1</sup> regarding the use of unmanned aerial systems (UAS), which are not authorized activities under LOC 18101. In that instance, non-target species (neither ESA- nor non-ESA-listed) were not discussed at all. Again, NMFS indicated that PWF provided sufficient information and that it would be required to abide by the wildlife viewing guidelines. Although abiding by the wildlife viewing guidelines would limit the potential for Level B harassment, PWF may have in fact chosen to request incidental taking of some of the species during the various activities had these questions been brought to its attention. Furthermore, NMFS's application instructions require that applicants (1) indicate the estimated number and type of non-target species that may be encountered in the study area annually, (2) indicate whether and how they may be incidentally harassed, and (3) explain how the applicant would avoid them or minimize impacts on them.

If PWF had been provided with the Commission's questions, PWF very likely would have provided responses<sup>2</sup> as it had for the Commission's other questions and comments. It is unclear why NMFS was reluctant or unwilling to ask PWF these questions<sup>3</sup> and/or update the application with the relevant information. However, these issues should have been addressed prior to the application being made available to the Commission and public for comment. The Commission recommends that NMFS (1) ask PWF whether it wants to include incidental taking of non-target species during both vessel surveys and UAS activities and (2) ensure that PWF is aware of the close approach limits stipulated in the viewing guidelines for the various activities and species that could be encountered if incidental taking is not included in the permit. The Commission also recommends that, prior to deeming an application complete, NMFS ensure all applications contain the required information based on its application instructions, including the necessary information regarding incidental taking.

Further, the Commission inquired why PWF did not include the activities currently authorized under its LOC in its scientific research permit application. NMFS again did not appear to ask PWF this question. Rather, NMFS stated that PWF only applied for takes of false killer whales under a research permit, as PWF had done previously under permit 16479. The Commission is fully aware of this. However, most permit holders obtain LOCs when they conduct research *only* on non-ESA-listed species in a specific area or when it is more efficient to obtain an LOC than obtain either a research permit or permit amendment for specific activities<sup>4</sup>. The Commission contends that it would have been prudent for PWF to include all of its activities under a single authorization rather than including takes of one species under a research permit and takes of all other species under an LOC for essentially the same activities in the same area. Since its LOC expires in the next year, the Commission strongly encourages PWF to amend its research permit to include the various activities to be conducted on non-ESA-listed species rather than apply for another LOC.

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<sup>1</sup> Including requesting that the relevant information be provided in the application.

<sup>2</sup> And updated the application accordingly.

<sup>3</sup> Or follow up with PWF if the questions were unanswered.

<sup>4</sup> In this instance, most permit holders include all activities in their next permit application.

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The Commission believes that the proposed activities are consistent with the purposes and policies of the MMPA. Kindly contact me if you have any questions concerning the Commission's recommendations.

Sincerely,

A handwritten signature in blue ink that reads "Peter O. Thomas". The signature is written in a cursive style with a large initial "P" and "T".

Peter O. Thomas, Ph.D.  
Executive Director

cc: Stephanie Stack, PWF