



# MARINE MAMMAL COMMISSION

16 June 2020

Dr. Mary Cogliano, 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. 62285D  
(Wild Space Productions)

Dear Dr. Cogliano:

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). Wild Space Productions (WSP) is requesting authorization to conduct filming activities<sup>1</sup> on southern sea otters in California for a Netflix series highlighting wildlife in national parks and marine sanctuaries around the world. It would film sea otters in Monterey Bay for a ten-week period in 2020 and a ten-week period in 2021 ending by June 2021. Individuals of any age class and either sex could be harassed. The filmmakers would implement various measures to minimize impacts on sea otters.

## **Application review process**

In March 2020, FWS asked the Commission to review WSP's application and note any comments or questions in addition to those it intended to ask WSP, which were also provided to the Commission. During its informal review of the application, the Commission noted that much of the information required in FWS's 2017 application instructions was lacking, unclear, or insufficient. For example, WSP did not specify adequate measures to minimize harassment of sea otters, including female-pup pairs, during many of its proposed filming activities. The Commission also directed several questions to FWS about whether conditions included in previous sea otter permits, such as prohibiting photographers from approaching pups less than 3 weeks old<sup>2</sup>, would be included in this permit. The Commission expected that FWS would (1) provide responses to the Commission's questions about including standard conditions in the final permit, (2) send the applicant the

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<sup>1</sup> Including filming from a vessel, on shore, underwater, and with a helicopter and unmanned aircraft systems (UAS).

<sup>2</sup> e.g., BBC permit 53019C, Offspring Films permit 29633C, and Silverback Films permit 92150B.

Commission's questions and comments, and (3) ask the applicant to address them and submit a revised application that incorporated responses to the Commission's and FWS's concerns.

On 22 May 2020, FWS published the original application unchanged in the *Federal Register* (85 Fed. Reg. 31204). No responses to informal comments from either FWS or the Commission had been provided or incorporated into a revised application. When the Commission asked FWS for responses to all of its questions and comments, FWS responded that the Commission's concerns had been reviewed and considered, but "the information was either included in the application that was published in the *Federal Register*, could be conditioned on the permit, or was beyond the scope of our regulatory abilities". FWS stated that responses had been provided to its own questions and comments, yet when the Commission requested that those responses be provided, FWS did not respond. Furthermore, FWS did not provide responses to the questions about whether standard permit conditions would be included in the final permit. As such, the Commission is unsure whether FWS has changed its standard permit conditions<sup>3</sup>, it was unaware that some of the activities proposed in WSP's application had not been authorized under previous photography permits, or FWS plans to require WSP to implement its standard permit conditions regardless of what was stipulated in the application.

FWS and the Commission agreed a number of years ago to a process under which the Commission would conduct an initial informal review of permit applications to (1) assist FWS in ensuring that applicants have followed and addressed sufficiently the requirements set forth in FWS's application instructions, and (2) identify any substantive concerns. This process is intended to identify and resolve issues early and facilitate the formal review by the general public and the Commission when a revised application is published in the *Federal Register*.

Given FWS's lack of response to the Commission's requests for additional information and the agency's publication of the unmodified and still incomplete WSP application, it appears that FWS may have abandoned the agreed upon practice of providing the Commission's informal comments to applicants for response prior to publication. This would reflect a significant break from the constructive process of informal review previously agreed to by both agencies. The Commission requests that FWS clarify whether it remains committed to the process whereby (1) the Commission conducts an informal initial review of permit applications to help FWS ensure that the applicants have followed and adequately addressed the requirements set forth in FWS's application instructions and to identify any substantive concerns, and (2) FWS seeks to resolve those issues prior to publication of applications.

Because none of the Commission's informal questions and comments were addressed or that responses to FWS questions and comments do not appear to have been incorporated into the final WSP permit application, basic information required under FWS's 2017 application instructions is still lacking, and numerous other deficiencies and inconsistencies remain. Since the application underpins the public review of and FWS decisions on whether to issue and how to condition the photography permit, it is imperative that the application contain accurate, complete, and consistent information. Condition 11.A., included in each FWS photography permit, requires that "all activities

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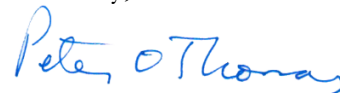
<sup>3</sup> For example, establishing three hours as the maximum amount of time an individual sea otter could be filmed in a day, prohibiting vessel approaches closer than 20 m to resting sea otters, requiring filmmakers to halt filming in one area or with one female-pup pair for one day after three days of filming, etc.

authorized herein must be carried out in accord [sic] with and for the purposes described in the application.” When a permit is issued on the basis of an application that contains inaccurate information, the permit holder risks unintentionally violating the terms of the permit. When an application contains inconsistent information, the permit holder could be in technical violation because of the lack of clarity regarding which information the agency thought it had approved in the permit. Moreover, applications that contain inaccurate and inconsistent information make it difficult, and sometimes impossible, for the Commission and the public to provide meaningful comments. The Addendum to this letter provides a list of the major outstanding issues with this application. For these reasons, the Commission recommends that FWS deny the requested WSP permit, while recognizing that the applicant may re-apply once these issues have been addressed.

It is FWS’s responsibility to ensure that applicants abide by the application instructions and have provided the information necessary for a complete application prior to publishing a notice of availability in the *Federal Register*. Therefore, the Commission reiterates the recommendation made in previous letters<sup>4</sup> that, prior to publication, FWS staff review each application in light of the applicable instructions to ensure that all required information is present, is consistent with FWS policies, and is in a format that facilitates review by the Commission and the public.

The Commission remains committed to working with FWS to improve the quality of applications and the efficiency of the permitting process. Please contact me if you have any questions regarding the Commission’s comments and recommendations.

Sincerely,



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

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<sup>4</sup> e.g., its [18 December 2017 letter](#) for University of California at Davis 32831C.

## Addendum

The Commission's concerns with the above-referenced permit application include its failing to—

- justify the need to film an ESA-listed species and elaborate on why the activities are not appropriate for a similar non-ESA-listed species<sup>5</sup>;
- provide an updated filming schedule<sup>6</sup>;
- consistently specify the number of days in a year that sea otters would be filmed, as well as the maximum number of hours in a day that an individual would be filmed<sup>7</sup>;
- clarify the age of pups that would be filmed at locations other than Elkhorn Slough<sup>8</sup>;
- specify which experts from the scientific community, including biologists from Monterey Bay Aquarium, U.S. Geological Survey, and FWS, would be consulted with and invited into the field to accurately determine which pups are old enough to be approached for filming and which sea otter behaviors constitute disturbance and would necessitate a retreat<sup>9</sup>;
- indicate minimum approach distances and altitudes (of aircraft) for each proposed filming activity and platform to each age class of sea otter and consistently specify distances and altitudes throughout the application<sup>10</sup>;
- for measures to minimize harassment of female-pup pairs, specify<sup>11</sup>—
  - whether shore-based filmmakers would approach and film rafting or hauled-out pairs;
  - minimum approach distances from shore to hauled-out pairs and from vessels to hauled-out and rafting pairs;
  - what measure(s) would be implemented if a pair appeared disturbed or if activities appeared to be interfering with nursing, pair-bonding, foraging, or any other vital function;
  - the distance at which the approach would begin for each activity, how those approaches would be made (e.g., slowly and carefully), and how the pair would be monitored for any sign of disturbance;
  - the distance from a pair that divers would enter the water;
  - the meaning of the statements, “divers halted by in water comms if deemed necessary” and “dives will be made in conjunction with otters”;
- specify whether and how non-target female-pup pairs would be avoided for the various filming activities<sup>12</sup>;
- specify the types and sizes of all vessels that would be used for filming<sup>13</sup>;

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<sup>5</sup> Item 6 in FWS's 2017 application instructions.

<sup>6</sup> Item 7 in the application instructions. The application currently states that filming would begin in January 2020.

<sup>7</sup> Items 8, 14g and 16 in the application instructions.

<sup>8</sup> Item 11a in the application instructions.

<sup>9</sup> Items 11b, 11c, 22, and 24 in the application instructions.

<sup>10</sup> Items 11c, 12, 13Aiii, 13Bv, 13Ciii, 13Div, 13Eiv, 13Eix, and 14h.

<sup>11</sup> Item 11c in the application instructions.

<sup>12</sup> Item 12 in the application instructions.

<sup>13</sup> Item 13Ai in the application instructions.

- clarify which measures would be implemented to minimize harassment of all sea otters encountered during filming from vessels or underwater<sup>14</sup>;
- specify for shore-based approaches of all hauled-out sea otters, (1) general protocols for filming, including the minimum approach distance and (2) measures that would be implemented to minimize harassment<sup>15</sup>;
- specify what measures would be implemented if sea otters were disturbed by the presence of filmmakers on land<sup>16</sup>, in a helicopter<sup>17</sup>, and when using a UAS<sup>18</sup>;
- indicate the dimensions of the UAS<sup>19</sup>;
- for approaches of sea otters on land and from a helicopter, indicate in the take table (1) which age classes would be filmed, (2) numbers of individuals that would be filmed in a day, (3) numbers of days per year during which the activities would occur, (4) total numbers of individuals that would be filmed in a year, (5) numbers of hours in a day during which individuals would be filmed, (6) minimum approach distances, (7) numbers of non-target sea otters that could be harassed daily, and (8) locations of filming<sup>20</sup>;
- for rows of the take table referring to pups, include “adult females” with “pups” to ensure that filmmakers would maintain a minimum approach distance to a female-pup pair, not just a pup<sup>21</sup>;
- clarify which filming methods would be used in which filming locations<sup>22</sup>;
- describe how the estimated numbers of non-target sea otters that could be harassed annually were determined for approaches from a vessel, on land, underwater, from a helicopter, and from a UAS<sup>23</sup>;
- specify how often archival monitoring cameras would be serviced and the length of time servicing could last<sup>24</sup>; and
- include either a curriculum vitae, resume, or biosketch for each person to be authorized under the permit that describes his or her qualifications to perform the intended duties, including whether he or she has the appropriate licenses, such as a Federal Aviation Administration Remote Pilot Certificate, and experience conducting the activities around marine mammals<sup>25</sup>.

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<sup>14</sup> Items 13Avii and 13Bvii in the application instructions.

<sup>15</sup> Item 13Ciii in the application instructions.

<sup>16</sup> Item 13Ciii in the application instructions.

<sup>17</sup> Item 13Div in the application instructions.

<sup>18</sup> Item 13Eix in the application instructions.

<sup>19</sup> Item 13Ei in the application instructions.

<sup>20</sup> Items 14c-j in the application instructions.

<sup>21</sup> Item 14c in the application instructions.

<sup>22</sup> Item 14j in the application instructions.

<sup>23</sup> Item 17a in the application instructions.

<sup>24</sup> Item 20 in the application instructions.

<sup>25</sup> Item 23 in the application instructions.