



MARINE MAMMAL COMMISSION

17 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. 37058D
Permit Application No. 37946D
(Charlie Hamilton James,
National Geographic Partners)

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 applications with regard to the goals, policies, and requirements of the Marine Mammal Protection Act (the MMPA). Mr. Hamilton James proposed to photograph non-depleted northern sea otters in Alaska under permit 37058D and southern sea otters in California under permit 37946D for six-month periods for an upcoming story in National Geographic Magazine.

Under permit 37058D, Mr. Hamilton James could harass non-depleted northern sea otters of either sex and any age class during photography activities¹ in Alaska during a 28-day period (see the application and take table for specifics). Under permit 37946D, he could harass southern sea otters of either sex and any age class during photography activities² in Monterey Bay, California, during a 21-day period (see the application and take table for specifics). The applicant would implement various measures to minimize impacts on sea otters.

Background

In January 2017, the Commission was asked by the Fish and Wildlife Service (FWS) to informally review an application from Mr. Hamilton James for permit 17428C to photograph southern sea otters in Monterey Bay, California. FWS also provided the Commission with a list of questions it planned to ask the applicant. The Commission subsequently reviewed and supplemented those questions and sent them back to FWS. Shortly thereafter, FWS informed the Commission that the application had been “abandoned”, and it closed the application file. It was not clear whether

¹ Including photography from a vessel, on shore, and with unmanned aircraft systems (UAS).

² Including photography from a vessel, on shore, and underwater.

FWS had passed along to Mr. Hamilton James the full list of questions developed by FWS and the Commission.

In August 2019, FWS asked the Commission to informally review an application from Mr. Hamilton James for permit 37945D requesting authorization to conduct the same photography activities on southern sea otters as those requested in permit application 17428C. The only change to the application is that it had been updated using FWS's 2017 application instructions. In its review of the application, the Commission noted that some of its prior questions remained unaddressed, including whether Mr. Hamilton James had consulted with FWS's regional biologists in developing his photography protocols for southern sea otters and whether biologists with the Monterey Bay Aquarium (MBAQ), U.S. Geological Survey (USGS), and/or FWS would accompany Mr. Hamilton James in the field. It also appeared unfeasible for Mr. Hamilton James to complete his activities within the proposed timeframe of August 2019 to October 2019. When the Commission raised the latter issue with FWS and inquired whether he could film in 2020 instead, FWS relayed that they had not heard from Mr. Hamilton James about his availability and so were closing the application file, agreeing that the timeframe was unachievable.

In May 2020, the Commission was again asked by FWS to informally review the application for permit 37945D. The application sent to the Commission had not been updated from the version it received in 2019. FWS also asked the Commission to review an application from Mr. Hamilton James for permit 37058D to conduct similar photography activities on northern sea otters in Alaska, which it claimed had been previously sent to the Commission. In fact, the Commission had never received the application for permit 37058D.

Based on the Commission's review of the two applications, supplementary documents, and questions from FWS to be addressed by Mr. Hamilton James, it is clear that FWS has not (1) ensured that the applications are complete and consistent with FWS's 2017 application instructions, (2) ensured that information in the applications is consistent with that in supplementary documents, or (3) processed the applications in a timely manner and advised the applicant about the timeframe of his projects relative to processing time.

Completeness and accuracy of applications

In its review of the applications for permits 37058D and 37945D, the Commission notes that information required in FWS's 2017 application instructions is lacking and there are numerous deficiencies and inconsistencies within each application. *Some* of the outstanding issues with both applications are specified in the Addendum to this letter. For example, on the most basic level, both applications still state that Mr. Hamilton James would conduct his photography activities in 2019³. More concerning, Mr. Hamilton James requested to approach and photograph two-week-old northern and southern sea otter pups and their mothers. He would identify such pups by avoiding those that "are clearly very young" and would only "work with slightly larger pups—taking advice and reading up on distinctive age markers to ensure I don't work with pups that are too young"⁴. To avoid harassment that could result in pup abandonment or injury, he would "avoid getting close to

³ Item 7 in FWS's 2017 application instructions.

⁴ Item 11b in the application instructions.

animals that appear concerned by my presence and only work with animals that appear and remain relaxed with my presence”⁵. These mitigation measures are sorely insufficient when approaching sea otter females with pups in a sensitive life stage, and it is not clear, based on his vague responses, whether Mr. Hamilton James has the requisite ability to determine that a pup was in fact at least two weeks of age before he approached it.

Many of Mr. Hamilton James’ proposed methods are also less restrictive than previous conditions that FWS has included in its photography permits to limit harassment of sea otters. For example, he would approach two-week-old pups, but previous permits have set the minimum age of a pup that could be approached at three weeks⁶. The Commission is unsure whether FWS has changed its standard permit conditions⁷, it was unaware that some of the activities proposed in Mr. Hamilton James’ applications had not been authorized under previous photography permits, or it plans to require Mr. Hamilton James to implement its standard permit conditions regardless of what was stipulated in the applications.

In addition, the Commission is concerned that Mr. Hamilton James did not explicitly indicate in either application whether he would consult with or bring into the field an advisor or researcher with expertise in sea otter behavior⁸. As mentioned above, the Commission had asked FWS in 2017 about this matter, yet FWS has not provided a response. Thus, the Commission assumes that he does not plan to work with outside experts when photographing sea otters and that FWS concurs with such an approach. Mr. Hamilton James’s resume indicates that he has experience photographing river otters but has never worked around sea otters in the wild. The Commission contends that all applicants proposing to photograph or film marine mammals who do not have experience filming them should bring marine mammal experts into the field at the beginning of a project, particularly if a very young animal is being targeted. Such experts can advise photographers about the various types of marine mammal behaviors that constitute disturbance, enable them to identify behaviors that would necessitate a retreat, and most importantly determine a young animal’s age and suitability for filming. The inadequate mitigation measures proposed by Mr. Hamilton James and his lack of experience with sea otters make it clear that he would benefit from an expert’s advice regarding how to approach sea otters and conduct the various proposed photography activities safely. The Commission believes that it is FWS’s responsibility to assist applicants in identifying advisors who could help ensure the success of photography projects while minimizing harassment of target and non-target marine mammals.

Inconsistencies between applications and supplementary documents

As part of its request to the Commission to review the applications, FWS provided dozens of email exchanges, which included clarifying questions from FWS to the applicant and Mr. Hamilton James’s responses subsequent to submitting his applications in 2019. It appears that FWS

⁵ Item 11c in the application instructions.

⁶ e.g., BBC permit 53019C and 59492B, Offspring Films permit 29633C, and Silverback Films permit 92150B.

⁷ For example, requiring photographers to cease an approach to resting sea otters by divers or snorkelers if an animal alerted and dove, prohibiting vessel approaches to resting southern sea otters and closer than 20 m to resting northern sea otters closer than 50 m, and requiring efforts to be aborted if the photographer appears to be interfering with a female-pup pair or disturbing a sea otter that is resting, feeding, breeding or nursing.

⁸ Item 24 in the application instructions.

concluded that the email messages had addressed at least some of the missing and insufficient information in the two applications. However, many of Mr. Hamilton James's responses remain inadequate. Moreover, some of the information in the email exchanges now contradicts the information in the applications, and it is not possible to ascertain which information should be considered part of the applications. For example, it is unclear which personnel would be authorized to harass sea otters under permit 37945D, which lists only Mr. Hamilton James and a boat driver⁹. However, in email exchanges between FWS and Tom Stephens, a filmmaker with Wildstar Productions, provided to the Commission by FWS, Mr. Stephens includes the curriculum vitae (CVs) of multiple cameramen, directors and dive safety personnel and appears to be requesting their addition as co-investigators under the permit. Mr. Hamilton James also mentions in supplementary documents for the permit application that he "will not be present when [Tom Stephens and Wildstar Productions] are filming – so I'm not sure how this affects permitting", thus implying that Mr. Stephens and other filmmakers with Wildstar Productions may occasionally photograph southern sea otters in his stead under his permit.

Since the application underpins the photography permit, it is imperative that the application contains accurate, complete, and consistent information. Condition 11.A., included in each FWS photography permit, requires that "all activities 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. With regards to the personnel issue, only personnel listed in the application, with a summary of the activities he or she would perform, and for whom copies of the CV, resume, or biosketch¹⁰ have been provided, should be allowed to approach and photograph marine mammals under a permit. Any other personnel who seek to photograph sea otters for the same project should be included under a separate authorization or added to the permit through a minor amendment. Otherwise, personnel who had not been authorized to approach and photograph marine mammals may be at risk of violating the MMPA. Reviewers, whether from the Commission or the public, should not have to wade through complex, unsorted email exchanges to discern what an applicant plans to do, how and when activities would be carried out, or who would be authorized to conduct which activities.

Due to all of the shortcomings in permit applications 37058D and 37945D, the Commission recommends that FWS return both applications to Mr. Hamilton James with instructions to address the deficiencies stipulated herein and submit revised applications. Upon submission of revised applications that satisfy the requirements of FWS's 2017 permit application instructions, section 104(c)(3) of the MMPA, and applicable implementing regulations, FWS should process the revised applications expeditiously and provide them to the Commission for formal comment and review once notices have been published in the *Federal Register*. If FWS decides to process the applications

⁹ Item 23 in the application instructions.

¹⁰ As required by FWS's 2017 application instructions.

in their present states, the Commission recommends that the applications be denied as not meeting the applicable requirements.

As the Commission has stated in prior letters¹¹, many of the problems associated with recent applications could be avoided if FWS ensured that they contain all of the required information before sending them to the Commission. The same holds true for these two applications. It is FWS's responsibility to ensure that applicants abide by the application instructions and have provided the information necessary for a complete application. Therefore, the Commission reiterates the recommendation made in previous letters¹² that, prior to publication in the *Federal Register*, FWS staff review applications in light of the applicable instructions to ensure that all required information is provided, is consistent with FWS policies, and is in a format that facilitates review by the Commission and the public.

Proposed timeframe of photography activities

Based on email correspondence included with the applications, it seems that FWS formally closed the application files for permits 37058D¹³ and 37945D in September 2019 at the request of Mr. Hamilton James. He knew his photography activities would not be completed in the proposed timeframes¹⁴ and he was uncertain of his availability for 2020. Abiding by guidance from FWS to allow for at least six months before his proposed start date, Mr. Hamilton James requested on 1 October 2019 that FWS set the new dates for both permits to cover July 2020 through November 2020. However, it appears that FWS only began to process his applications in March 2020¹⁵ for publication in the *Federal Register*. As such, even if FWS disregarded the Commission's recommendation and issued a permit to Mr. Hamilton James, he would likely not be able to meet his intended start dates to photograph northern and southern sea otters, putting the applicant back in the same position that he was in 2019. It is not clear why it took six months for FWS to reprocess applications that were identical to those submitted in 2019. Furthermore, FWS could have avoided the issue entirely if it had advised Mr. Hamilton James to extend the project dates into 2022 or 2023 to account for unforeseen delays. The Commission is concerned that the failure to process permit applications in a timely manner or provide advice on adjusted timeframes unfairly burdens applicants, and in the case of Mr. Hamilton James, could entirely prevent him from conducting the activities when planned.

Thus, the Commission recommends that FWS (1) expeditiously process and review all marine mammal permit applications and (2) work with applicants to ensure that realistic timeframes are established to account for unforeseen delays in the permitting process.

¹¹ e.g., its [3 July 2018 letter](#) for Sea to Shore Alliance.

¹² e.g., its [18 December 2017 letter](#) for University of California at Davis (UC Davis).

¹³ Which had been submitted in April 2019.

¹⁴ The proposed dates for permit 37058D were July 2019 through September 2019 and those for permit 37945D were August 2019 through October 2019.

¹⁵ Based on email correspondence dated 13 March 2020 from FWS requesting a signed copy of permit application 37058D from Mr. Hamilton James.

Application review process

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 assist FWS in ensuring that the applicants have followed and adequately addressed the requirements set forth in FWS's application instructions and to identify any significant concerns. This process is intended to identify and resolve issues early and facilitate a smooth formal review by the Commission and the general public when an application is published in the *Federal Register*. The intended purpose of this process has been hindered because FWS continues to ask the Commission to review permit applications that have not been carefully vetted for basic missing, inconsistent, unclear or insufficient information prior to their submission. The Commission's extensive informal comments and questions are not consistently provided, or only provided in part, to applicants. This results in responses from applicants that are not relevant or do not adequately address the Commission's original comments and questions. Most recently, as noted in the Commission's [16 June 2020 letter](#) for Wild Space Productions, it appears that FWS is no longer providing *any* of the Commission's informal comments to applicants. As the Commission has discussed in at least 13 previous letters¹⁶, despite this informal vetting process, FWS continues to publish applications in the *Federal Register* that contain missing, inconsistent, unclear or insufficient information.

Regarding the Commission's formal letters, FWS continues to issue permits for applications that appear not to follow or adopt the Commission's formal recommendations and has yet to provide detailed explanations as to why the Commission's recommendations were not followed or adopted¹⁷. The Commission is still waiting on responses to eight of its letters for which permits have already been issued¹⁸ and anticipates responses will be provided for the 12 permit applications that FWS has yet to issue¹⁹.

The Commission has been trying to follow the permit review process agreed to by FWS. Given the ongoing disconnect between provision of informal comments and lack of resolution of those comments in final applications and the lack of assurance that Commission questions and comments will be addressed, the Commission will continue to recommend denying the issuance of

¹⁶ e.g., its 18 December 2017 letter for UC Davis, [2 July 2018 letter](#) for Mote Marine Laboratory (Mote), 3 July 2018 letter for Sea to Shore Alliance, [3 July 2018 letter](#) for USGS, [9 July 2018 letter](#) for Marine Mammals Management (MMM), [18 December 2018 letter](#) for Rode, [18 December 2018 letter](#) for USGS, [19 December 2018 letter](#) for ABR, Inc., [19 December 2018 letter](#) for Marine Mammal Health and Stranding Program (MMHSRP), letters from [20 December 2018](#) and [27 March 2019](#) for Florida Fish and Wildlife Conservation Commission (FFWCC), [3 December 2019 letter](#) for Stanford University, [3 December 2019 letter](#) for UC Davis, and [10 December 2019 letter](#) for USGS.

¹⁷ As required by section 202(d) of the MMPA and as discussed in the Commission's [27 February 2020 letter](#).

¹⁸ See the Commission's letters from [5 July 2017](#) and [25 October 2017](#) for National Park Service Glacier Bay, [5 July 2017 letter](#) for Offspring Films, [23 January 2018 letter](#) for BBC, 2 July 2018 letter for Mote, 3 July 2018 letter for Sea to Shore Alliance, 3 July 2018 letter for USGS, and 19 December 2018 letter for ABR, Inc.

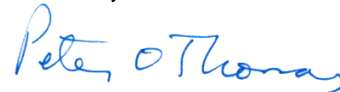
¹⁹ UC Davis 32831C (18 December 2017 letter), MMM 82088B (9 July 2018 letter), Rode 85339C ([7 November 2018](#) and 18 December 2018 letters), USGS 690038 (18 December 2018 letter), MMHSRP 009526 (19 December 2018 and [18 April 2019 letters](#)), National Wildlife Health Center 51164C ([19 December 2018](#) and [15 March 2019 letters](#)), Florida Fish and Wildlife Conservation Commission 773494 (20 December 2018 and 27 March 2019 letters), Alaska SeaLife Center 11219B ([2 December 2019 letter](#)), UC Davis 98121C (3 December 2019 letter) Stanford University 02713D (3 December 2019 letter), USGS 33776D (10 December 2019 letter), and SeaWorld of California 16657D ([13 January 2020 letter](#)).

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permits even before they are published in the *Federal Register*, when it believes the application is inadequate or incomplete.

The Commission remains committed to working with FWS to improve the quality of applications and efficiencies associated with the permitting process. Please contact me if you have any questions regarding the Commission's comments and 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 a distinct "O" before "Thomas".

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

Addendum

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

- justify the need to photograph an ESA-listed species and elaborate on why the activities are not appropriate for a similar non ESA-listed species²⁰;
- indicate updated start and end dates of the projects²¹;
- clarify which subspecies of sea otter would be photographed under each permit, as both state that photography would be “limited to US populations – both northern and southern”²²;
- clarify whether biologists from MBAQ, USGS or FWS have been contacted and invited into the field to accurately determine which pups are old enough to be approached for photographing, as it is not sufficient to state that you will be “taking advice and reading up on distinctive age markers” to avoid pups²³;
- specify the specific procedures that would be used for avoiding harassment of non-target pairs, and ensure that the number of takes are sufficient should harassment occur²⁴;
- specify whether a safety swimmer would be present for all underwater photography²⁵;
- clarify the minimum altitude of UAS passes above sea otters and the intent of the statement that UAS would be launched “from a distance over around 200m”²⁶;
- specify whether photographers would approach female and pup pairs with a UAS and if so, how they would minimize disturbance to pairs²⁷;
- indicate the correct number of requested total takes²⁸;
- clarify what was meant by the statement that the responses are “answers for 13”²⁹;
- consistently specify minimum approach distances for underwater photography³⁰;
- indicate whether land-based photography would be conducted on sea otters both hauled out on land and at sea³¹;
- define the age range or mass of sea otters considered pups, juveniles, and adults³²;
- clarify how deviations of 50 m would be feasible either on shore or underwater to avoid non-target otters—rather than attempting to make deviations around sea otters to avoid

²⁰ Item 6 in the application instructions.

²¹ Item 7 in the application instructions.

²² Item 9 in the application instructions.

²³ Item 11b in the application instructions.

²⁴ Item 12 in the application instructions.

²⁵ Item 13Bi in the application instructions.

²⁶ Items 13Eix and 14Eb in the application instructions. The statement that the altitude of the UAS would be reduced to a “height to a distance that could achieve a satisfactory image without disturbing the otters” is not consistent with the minimum altitude provided in response to Item 14Eh of the instructions.

²⁷ Item 13Eix of the application instructions.

²⁸ Items 14Af, 14Bf, 14Cf, and 14Ef. For example, based on 28 days of photography under permit 37058D with 200 topside vessel takes per day, 5,600 total takes should have been requested, not 1,000.

²⁹ Item 14 in the application instructions.

³⁰ Items 14Bb and 14Bh in the application instructions.

³¹ Item 14Cb in the application instructions.

³² Item 15 in the application instructions.

- harassing them, it would make more sense to request incidental harassment takes of non-target sea otters for photography activities³³;
- list the full species names for all marine mammals and other ESA-listed species that could be encountered in the vicinity of the photographing activities under each permit³⁴;
 - specify the minimum distance that would be maintained to a non-target species and whether photographers would cease their activities and move away from a non-target species if it was encountered within that distance³⁵;
 - indicate whether photographers would coordinate with FWS regional biologists³⁶;
 - specify whether the cameramen, directors and dive safety personnel listed in the supplementary documents would be authorized under the permit as co-investigators and if so, describe their duties and include either CVs, resumes or biosketches that describes their qualifications to perform those duties— if they are not to be authorized under the permit and still want to photograph sea otters, they would need to be authorized under a different permit³⁷; and
 - provide the names of biologists from MBAQ, USGS or FWS with expertise in sea otter behavior that would accompany photographers into the field to accurately determine which pups are old enough to be approached for photographing and which sea otter behaviors constitute disturbance and would necessitate a retreat³⁸.

³³ Item 17a in the application instructions.

³⁴ Item 17b in the application instructions.

³⁵ Item 17C in the application instructions.

³⁶ Item 22 in the application instructions.

³⁷ Item 23 in the application instructions.

³⁸ Item 24 in the application instructions.