



# MARINE MAMMAL COMMISSION

14 July 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. 672624  
(U.S. Geological Survey)

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).

U.S. Geological Survey (USGS) is requesting to renew its permit to conduct research on southern sea otters in California during a five-year period. Researchers would harass, observe, sample, and instrument<sup>1</sup> individuals of any age class and either sex. USGS requested up to two unintentional mortalities<sup>2</sup> of sea otters over the course of the permit. The purpose of the research is to investigate (1) population trends, (2) demography, (3) movement patterns and habitat use, (4) foraging ecology, and (5) disease and health of sea otters. USGS would implement various measures to minimize impacts on sea otters. USGS's Institutional Animal Care and Use Committee (IACUC) has reviewed and approved the research protocols.

## **Completeness and accuracy of USGS's application**

In September 2019, FWS asked the Commission to review informally USGS's application and provide any comments or questions. The package of application materials provided to the Commission was 970 pages long and consisted of USGS's original application, clarifying questions from FWS to USGS, USGS's responses to those questions, and a revised application<sup>3</sup>, among other documents, some of which were not inserted in any particular order. It was not clear why FWS had provided the original application and whether it intended the Commission to review that version<sup>4</sup> as well. However, after spending a considerable amount of time determining which documents were relevant to its review of USGS's application, the Commission noted numerous deficiencies and inconsistencies. The Commission provided a list of comments and questions to FWS with the

<sup>1</sup> With flipper, passive integrated transponder (PIT), and surgically-implanted VHF radio transmitter tags.

<sup>2</sup> Including euthanasia for humaneness purposes.

<sup>3</sup> The Commission appreciates that USGS provided a revised application, even though FWS did not request that it do so.

<sup>4</sup> Other agencies, such as the National Marine Fisheries Service, only provide the most recent version of the permit application to the Commission for review.

understanding that the agency would send them to USGS and ask USGS to address the Commission's concerns, and incorporate all relevant responses into a third and final version of the application.

On 25 June 2020, FWS published USGS's application in the *Federal Register* (85 Fed. Reg. 38152) for public comment. The Commission requested that FWS provide the final application and responses to its comments and questions. In the absence of any response from FWS, the Commission resorted to finding the final documentation on regulations.gov. The package of application materials is now 1,491 pages in length and includes USGS's original application, dozens of clarifying email exchanges, and *two* identical copies of the previously-revised application that had been sent to the Commission in 2019. As such, it is very difficult to ascertain exactly which activities are considered part of USGS's "final" application, and it does not appear that FWS made any attempt to ensure that the application was in a format that could facilitate review by the Commission or the public.

The application materials also contain responses to some, but not all, of the Commission's concerns. It is apparent that FWS had not provided all of the Commission's comments and questions to USGS, and thus critical pieces of information are still missing from the application. Some of the comments and questions had been altered, resulting in responses from USGS that were not relevant and did not adequately address the Commission's original concerns. As stated in previous Commission letters<sup>5</sup>, the Commission poses questions or seeks additional information during its reviews when either (1) the applicant has not provided all of the information required under the relevant (i.e., 2017) application instructions or (2) the information provided is not complete or sufficiently clear to support the findings required under the MMPA and FWS's implementing regulations or to serve as the basis for recommending appropriate permit conditions for inclusion in furtherance of MMPA section 104(b)(2). The Commission provides its informal comments and questions with the expectation that either FWS will send them in their entirety to the applicant and require that the applicant provide the requested clarifications and additional information, or FWS will provide the requested information itself in a revised application.

FWS did not ask USGS to incorporate the responses it received to Commission comments and questions into a third version of the application<sup>6</sup>. Instead, responses from USGS were accepted in supplementary documentation appended to the previously-revised version of the application, creating a situation in which the supplemental documentation often contradicts the information in both the final and the original version of the application. Since the final application is intended to inform the public review of the permit and of FWS's decisions on whether to issue and how to condition the permit, it is imperative that the application contain accurate, complete, and consistent information. Condition 11.A., included in each FWS research permit, states that "all activities authorized herein must be carried out in accord 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

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<sup>5</sup> See, for example, its [10 December 2019 letter](#) for USGS, [27 March 2019 letter](#) for Florida Fish and Wildlife Conservation Commission, [18 December 2018 letter](#) for USGS, and [18 December 2018 letter](#) for Dr. Karyn Rode.

<sup>6</sup> In fact, based on email correspondence included in the "application", FWS explicitly told USGS that, in an effort to streamline the application process, a revised application was not necessary.

because of the lack of clarity regarding which information the agency thought it had approved in the permit. Moreover, an application that contains over 1,000 pages of inaccurate and inconsistent information creates a review process that lacks transparency and makes it impossible for the Commission or the public to provide a meaningful assessment.

### **General outstanding issues**

Although some of the responses received from USGS via FWS regarding the previously-revised version of USGS's application addressed the Commission's initial concerns, the application is still technically incomplete until those responses have been incorporated. More importantly, basic information required in FWS's 2017 application instructions is still lacking, and deficiencies still exist.

For example, the Commission requested that USGS indicate the activities (e.g., capture, handle/restrain, flipper tag, etc.) that the principal investigator (PI) and each co-investigator (CI) would be authorized to conduct under the permit<sup>7</sup>. Unfortunately, FWS did not provide this comment to the applicant. In response to other items of the application instructions, USGS did provide the names of those CIs who would administer drugs<sup>8</sup>, surgically implant tags<sup>9</sup>, and sample<sup>10</sup> sea otters—however, one of those CIs who would be authorized to sample sea otters is not a veterinarian or a vet tech and does not describe any prior experience in her CV regarding collecting samples from any marine mammal species. Thus, she should not be authorized to collect samples from sea otters under the permit. Moreover, it remains unclear whether those CIs listed to administer drugs, surgically implant tags, and sample sea otters would conduct other activities under the permit, and which activities the other 19 personnel would be authorized to conduct. Without such information, it is impossible to assess whether the experience described in CVs for the PI and each CI adequately demonstrate his or her ability to conduct an activity under the permit. As such, a PI or CI could be authorized to conduct a procedure, such as capturing a sea otter with a Wilson trap, without the requisite experience, thus placing both the animal and the researcher at risk of harm or injury. In addition, multiple different CVs were provided for one researcher in the application materials, and so even if the duties of each researcher had been designated, it is unclear which CV should be used to assess this individual's experience to conduct the relevant procedures. Only one CV, resume, or biosketch should be provided for each researcher to be authorized under the permit.

In another example, the Commission provided extensive comments specific to USGS's two take tables<sup>11</sup>; these were not provided to the applicant. It is clear that USGS was unsure how to structure and populate the take table and inadvertently provided two of them. USGS specifically asked FWS about the information to be included in the take table when it responded to FWS's concerns with the original application. For example, USGS asked to what column h, "Max. # of non-target conspecifics incidentally harassed", referred. In one email, an FWS permit specialist incorrectly responded that it referred to the maximum number of non-target species that could be

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<sup>7</sup> Item 30 in FWS's 2017 application instructions.

<sup>8</sup> Item 20aiii of the application instructions.

<sup>9</sup> Item 20ev of the application instructions.

<sup>10</sup> Item 20fxii of the application instructions.

<sup>11</sup> Items 21a-j of the application instructions.

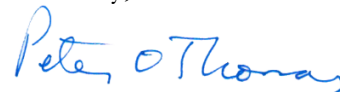
incidentally harassed by its research activities. In another email, a different permit specialist told USGS that it referred to the maximum number of non-target sea otters that could be incidentally harassed, which is correct. Such conflicting information clearly confused the applicant and likely led to the inclusion of additional inaccurate and inconsistent statements in the application materials. This, along with numerous other issues, could have been resolved if FWS had provided all of the Commission's comments on the take tables to USGS. The Addendum to this letter suggests how to resolve the numerous issues that remain within the take tables.

Other inconsistencies remain in USGS's package of application materials. In the previously-revised version of the application, USGS did not request any takes of sea otters during vessel surveys. However, when the Commission commented that harassment of sea otters could still occur during vessel surveys and that takes needed to be authorized, USGS responded to FWS that it would request 25 takes of sea otters. That information is still missing in the application itself. As a second example, USGS described in the previously-revised version of the application that "both" *types* of tags could be implanted in a sea otter, and thus one would assume it could implant *two different types* of tags. However, in response to the Commission's question about the types of tags that could be implanted, USGS stated that only VHF radio transmitter tags would be used. That clarification was not incorporated into the application. Such discrepancies create a situation in which it is unclear what the permit is actually authorizing, potentially placing the permit holder in a position to inadvertently violate its permit.

Based on the remaining deficiencies with USGS's application, the Commission recommends that FWS refrain from issuing a permit to USGS until (1) responses provided in supplementary documentation are incorporated into the final application, (2) inconsistencies between supplementary documentation and the final application are rectified, (3) all outstanding questions from FWS's 2017 application instructions are addressed and incorporated into the final application, and (4) FWS ultimately determines whether the *bona fide* and humaneness criteria are met under section 104 of the MMPA.

Kindly contact me if you have any questions concerning the Commission's recommendation.

Sincerely,



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

## Addendum

At a minimum, the take table in USGS's application should—

- be a single take table with five rows representing sea otters that could be (1) captured, anesthetized, tagged, and sampled, (2) captured, anesthetized, flipper/PIT tagged, sampled, and instrumented, (3) incidentally captured or captured and not retained (i.e., for pups less than 11 lbs), (4) harassed during vessel surveys, and (5) unintentionally killed;
- in column b, specify the procedures in the first row as capture, weigh, anesthesia, flipper/PIT tag and sample and the second row as capture, weigh, anesthesia, flipper/PIT tag, sample, and instrument;
- in column c, define the rows that include capture, incidental capture, weighing, anesthetization, flipper/PIT tagging, sampling, and instrumenting as “Level A harassment”, the row that includes harassment during surveys as “Level B harassment”, and the row that includes sea otters that could be unintentionally killed as “Mortalities”. Numbers should not be listed in column c;
- in column d, (1) define the age classes accordingly and (2) include statements or footnotes specifying that (a) only pups that weigh at least 11 lbs would be anesthetized, sampled, tagged, or instrumented, (b) only pups that weigh at least 20 lbs would be instrumented, and (c) only pregnant females that are not near-term would be instrumented<sup>12</sup>. A statement should also be included that near-term pregnant females would be determined as such based on mass, length, abdominal palpation, teat characteristics, auscultable fetal heartbeat, and ultrasound or radiographs, if necessary<sup>13</sup>;
- in column f, specify the total number of sea otters for the five-year duration of the permit that could (1) have the respective procedures conducted on them in the Level A harassment rows, (2) be harassed during vessel surveys in the Level B harassment row, and (3) be unintentionally killed in the Mortalities row;
- in column g, specify in the Level A harassment rows the number of times over the course of the permit that the respective procedures could be conducted on a given sea otter; and
- in column h, specify in the Level A harassment rows the number of non-target sea otters that could be harassed during capture activities over the course of the permit.

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<sup>12</sup> Based on information provided by USGS in response to the Commission's informal comments and questions.

<sup>13</sup> Based on information provided by USGS in response to the Commission's informal comments and questions.