



MARINE MAMMAL COMMISSION

12 November 2020

Ms. Anna Seidman, Assistant Director
International Affairs
U.S. Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, Virginia 22041-3803

Dear Ms. Seidman:

As part of its responsibilities under sections 101(a)(1), 202(a)(2), and 203(c) of the Marine Mammal Protection Act (MMPA), the Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors, reviews permit applications¹ and provides associated recommendations to the permitting agency. The MMPA requires that, if an agency does not implement the Commission's recommendations, the agency explain, in a timely manner, why it has not done so. Specifically, section 202(d) of the MMPA requires that U.S. Fish and Wildlife Service (FWS) respond within 120 days after receipt of Commission recommendations and that if any recommendations are not followed or adopted, a detailed explanation of the reasons for not following or adopting those recommendations is provided.

The Commission's comments on permit applications range from minor revisions to recommending denial when the application does not meet applicable requirements, including the humaneness and *bona fide* research criteria, due to missing, incomplete, or inconsistent information. FWS has issued permits for multiple applications that the Commission recommended that FWS deny. While FWS has provided response letters for some of the issued permits, those letters generally have failed to respond, or did not respond adequately, to all of the Commission's recommendations².

In the most recent case, which prompted this letter, FWS did not address *any* of the recommendations in the Commission's 3 July 2018 letter regarding the U.S. Geological Survey's (USGS) permit application 791721 (included by reference herein). In fact, FWS ignored the substance of that letter entirely and, remarkably, cited a nine-year-old Commission letter on a previous USGS permit application (i.e., the Commission's [10 June 2011 letter](#)) as justification for issuance of USGS's current permit.

¹ For scientific research, public display, enhancing the survival or recovery of a species or stock, and commercial and educational photography.

² e.g., FWS's response letters for research permit 82088B to Marine Mammals Management (MMM) and photography permit 62285D to Wild Space Productions (WSP). The Commission provided comments in its [9 July 2018 letter](#) for MMM permit 82088B and in its [16 June 2020 letter](#) for WSP permit 62285D.

In the Commission's 3 July 2018 letter that was provided in response to the FWS's request for public comment in the *Federal Register* (83 Fed. Reg. 9748), the Commission described more than 20 specific deficiencies in USGS's permit application 791721. The Commission recommended that FWS return the application to USGS to address those deficiencies and, if FWS chose to process the application as it stood, that it be denied as not meeting the applicable requirements. Rather than accept the Commission's recommendations, FWS issued the permit to USGS and provided the Commission with a response letter on 20 October 2020³ (included by reference herein), citing the Commission's recommendations in its 10 June 2011 letter related to USGS's previous permit application.

FWS's response letter for the USGS permit completely ignored the content of the Commission's 3 July 2018 letter and does not fulfill the agency's obligations under the MMPA. The response letter did not include a detailed explanation of why the Commission's recommendations were not followed. As such, the Commission requests that FWS review this action and either provide responses as soon as possible to all of the Commission's recommendations in its 3 July 2018 letter or rescind the permit to USGS.

The Commission expects that FWS will address all of the Commission's recommendations in response letters related to permit issuance, justify its approval of any permit that the Commission recommends be denied, and address the Commission's recommendations for the application at hand, not one from nearly a decade ago.

Since 2017, FWS has issued several permits which have not followed the Commission's recommendations, but the agency has yet to provide responses to the Commission as required under the MMPA. FWS has yet to provide responses to permits issued for the National Park Service Glacier Bay 14763C⁴, Offspring Films 29633C⁵, BBC 53109C⁶, Mote Marine Laboratory 100361⁷, Sea to Shore Alliance 37808A, ABR, Inc. 75595C⁸, and Marine Mammal Health and Stranding Program 009526⁹. The Commission has asked for responses through informal emails and phone conversations and formally through its letters, with no satisfactory outcome¹⁰. As such, the Commission again recommends that FWS provide responses as soon as possible to the Commission's recommendations for all of the aforementioned permits, including a detailed explanation of why any given recommendation was not followed or adopted.

The Commission also provided recommendations on 14 permit applications that FWS has yet to issue, some of which have been in the agency's queue for more than three years¹¹. If and when

³ More than *two years* after it had received the Commission's letter on the permit application.

⁴ See the Commission's letters from [5 July 2017](#) and [25 October 2017](#).

⁵ See its [5 July 2017 letter](#).

⁶ See its [23 January 2018 letter](#).

⁷ See its [2 July 2018 letter](#).

⁸ See its [19 December 2018 letter](#).

⁹ See its letters from [19 December 2018](#) and [18 April 2019](#).

¹⁰ e.g., see the Commission's general 27 February 2020 letter on this matter (included by reference herein) and its [7 November 2018 letter](#) on Rode 85339C.

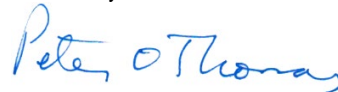
¹¹ University of California at Davis (UC Davis) 32831C ([18 December 2017 letter](#)), Rode 85339C ([7 November 2018](#) and [18 December 2018 letters](#)), USGS 690038 ([18 December 2018 letter](#)), National Wildlife Health Center 51164C ([19 December 2018](#) and [15 March 2019 letters](#)), Florida Fish and Wildlife Conservation Commission 773494 ([20 December 2018](#) and [27 March 2019 letters](#)), Alaska SeaLife Center (ASLC) 11219B ([2 December 2019 letter](#)), UC Davis 98121C ([3](#)

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FWS issues those permits, the Commission expects that FWS will provide detailed explanations for those recommendations that the agency does not follow. It is important to note that many of the 14 Commission letters were sent a number of years ago, underscoring FWS's lack of timeliness in issuing permits under the MMPA¹², and related import and export permits under the Convention on International Trade in Endangered Species of Wild Fauna and Flora. This has caused unnecessary and significant delays for numerous research projects, including those involving marine mammal health. The Commission recommends that FWS either issue or deny the 14 aforementioned permits and make a concerted effort to process permits more efficiently.

The Commission looks forward to your responses. Kindly contact me if you have any questions regarding the Commission's concerns and recommendations.

Sincerely,



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

cc: Ms. Pamela Scruggs, Division of Management Authority Chief
Ms. Diane Bowen, National Marine Mammal Coordinator
Ms. Shawn Finley, Esq., Department of Interior, Office of the Solicitor

[December 2019 letter](#)), Stanford University 02713D ([3 December 2019 letter](#)), USGS 33776D ([10 December 2019 letter](#)), SeaWorld of California 16657D ([13 January 2020 letter](#)), ASLC 73634A ([13 May 2020 letter](#)), Hamilton James 37058D ([17 June 2020](#) and [30 September 2020 letters](#)), Hamilton James 37946D ([17 June 2020](#) and [30 September 2020 letters](#)), and USGS 672624 ([14 July 2020 letter](#)).

¹² The statutorily-mandated timeframe to provide responses is 120 days.



MARINE MAMMAL COMMISSION

3 July 2018

Mary Cogliano, Ph.D.
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. 791721
(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 seeking to renew its permit to conduct research on manatees in the southeastern United States and Puerto Rico during a five-year period—USGS's previous permit authorized similar activities.

USGS proposes to conduct research on manatees in the southeastern United States and Puerto Rico year-round. Researchers would harass, observe/track, photograph/videotape, capture, collect morphometrics, mark, sample, and/or instrument numerous manatees of both sexes and various age classes (see the take table for specifics). USGS requests up to one manatee mortality per year. Researchers would use various measures to minimize impacts on manatees and also would be required to abide by the U.S. Fish and Wildlife Service's (FWS) standard permit conditions. USGS's Institutional Animal Care and Use Committee has reviewed and approved the research protocols.

General issues

USGS originally submitted its application to FWS in 2017, which was provided to the Commission for review in May 2017. At that time, the Commission noted deficiencies in the information contained in the application and provided specific questions that needed to be addressed. FWS provided the Commission a revised application for review in November 2017. The Commission reviewed the revised application, noted that the majority of the issues raised with respect to the original application remained, and requested additional information to resolve those and other questions on the revised application. FWS published the application for public comment in March 2018 in the *Federal Register* (83 Fed. Reg. 9748).

In June 2018, FWS finally provided the Commission with answers to a few, but not all, of the questions. The Commission notes that the final application is still far from sufficient, as USGS

did not provide the basic information as required in FWS's 2017 application instructions. *Some* of the issues include failing to—

- specify the purpose of the research;
- explain how its proposed research activities meet the *bona fide* scientific research requirement under section 104(c)(3)(A) of the MMPA and fulfill an enhancement permit under section 10(a)(1)(A) of the Endangered Species Act (ESA);
- specify which manatee species are the subject of the permit and for which activities;
- specify what the non-harmful and non-invasive behavioral and physiological studies are for both captive and wild manatees, including what methods would be employed, what samples would be taken, and what the source¹ of the animals would be;
- specify which of the proposed activities would be conducted on captive animals and under which authorization those activities would occur;
- specify the type and number of samples to be collected from dead animals;
- specify the type and source², including potential countries of origin, of samples to be imported;
- justify why a female and calf less than 2 m in length need to be captured and why it is necessary to sample (including biological sampling, tail notching, and needle biopsy), freeze brand, and PIT tag the calf—if these activities are retained, justify why they need to be conducted on neonates;
- justify why collection of two tail notch samples and four needle biopsy samples per animal is necessary;
- specify the method by which free-ranging manatees are sampled via a needle biopsy;
- specify the methods by which each sample would be collected from live-capture animals, including whether it proposes to collect teeth from live animals;
- clarify whether it would like to be able to euthanize an animal for humaneness purposes, if severely injured during capture activities;
- specify the type, dosage, and purpose (e.g., emergency, prophylactic, etc.) of each drug that could be used;
- specify the mass and dimensions of the TDR;
- specify the minimum approach distance for (1) vessels during tracking activities and (2) snorkelers and/or divers when deployed from a vessel and during observations;
- specify the measures that would be used to minimize the possibility of accidental drowning of manatees in capture nets;
- specify under what circumstances the welfare of the target animal would not be considered during live-capture activities;
- clarify under which authorization animals that are injured as a result of live-capture activities would be retained for rehabilitation;
- specify the maximum time that would be spent with an individual manatee during UAS operations;

¹ Captive animals include both temporarily (i.e., those undergoing rehabilitation) and permanently captive. This should be specified.

² Dead or live animals and captive or free-ranging animals.

- provide details on how impacts during vessel surveys and capture activities in general would be minimized;
- provide sufficient information in the principal investigator's (PI) and co-investigator's (CI) CVs³ to demonstrate the necessary expertise/experience to support authorizing them to conduct various activities and specify exactly which activities stipulated in the take table each PI or CI would conduct; and
- stipulate whether UAS duties include monitoring the animals for observed changes in behavior or serving as a spotter rather than actually piloting the UASs—provide FAA certification for the pilots.

Although the Commission initially raised these issues more than a year ago, in some cases FWS chose not to seek additional information from USGS to address them. In other cases, the Commission's questions⁴ were forwarded to USGS, but not sufficiently addressed. Given all of these shortcomings with the application and the difficulty it represents to the Commission and other reviewers to ascertain what activities are being proposed, how they would be conducted, and why, the Commission recommends that FWS return the application to USGS to address these deficiencies. Upon submission of a new or revised application that satisfies the requirements of FWS's permit application instructions, section 104(c)(3) of the MMPA, section 10(a)(1)(A) of the ESA, and the implementing regulations of these provisions, FWS should republish the application in the *Federal Register* with a new opportunity for public comment and review. If FWS decides to process the application in its present state, the Commission recommends that the application be denied as not meeting the applicable requirements.

The Commission's role

The Commission and its Committee of Scientific Advisors spend considerable time and effort reviewing permit applications and take their review responsibilities under sections 101(a)(1), 202(a)(2) and 203(c) of the MMPA seriously. The Commission expects FWS to take our role in permit application reviews equally seriously. The Commission poses questions or seeks additional information during its reviews because either (1) the applicant has not provided all of the information required under FWS's application instructions or (2) the information provided is not sufficiently complete or clear to support the findings required under the MMPA and FWS's implementing regulations or to recommend appropriate permit conditions for inclusion in furtherance of MMPA section 104(b)(2). As such, the Commission expects FWS to be responsive to our requests for clarifications and additional information, provide applicants with the Commission's questions and comments, and seek the requested information in a timely manner—all before further action is taken on the application.

Many of the problems associated with this and other recent applications, and the need for the Commission to seek additional information, could be avoided if FWS did a more thorough job of vetting applications to ensure that they contain all of the required information before sending them to the Commission or making them available for public review. It is FWS's responsibility to ensure that applicants abide by those instructions and provide the necessary information. Therefore,

³ Many of the PI/CIs likely have the necessary experience but that cannot be determined based on the information provided.

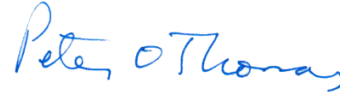
⁴ Some of FWS's questions were not sufficiently addressed either.

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the Commission reiterates the recommendation made in its [18 December 2017 letter](#) to FWS that, prior to publication, FWS staff review applications in light of the applicable instructions to ensure that all required information is present, is consistent with FWS policies, makes sense, and is in a format that facilitates review by the Commission and the public and if not, return the application to the applicant for revision.

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

Sincerely,



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



United States Department of the Interior



FISH AND WILDLIFE SERVICE
International Affairs
5275 Leesburg Pike, MS: IA
Falls Church, VA 22041-3803

October 20, 2020

In reply refer to PRT #: 791721

Peter O. Thomas, PhD, Executive Director
Marine Mammal Commission
4340 East-West Highway, Suite 700
Bethesda Towers
Bethesda, Maryland 20814

Dear Dr. Thomas:

This letter responds to your letter dated July 3, 2018, regarding the application from the United States Geological Survey (USGS)'s Southeast Ecological Science Center to take West Indian manatees (*Trichechus manatus*) for the purpose of scientific research throughout the species' U.S. range. This application is requested renewal of their authorization under the Marine Mammal Protection Act (MMPA).

The Marine Mammal Commission (Commission) was sent a copy of the USGS' application and the U.S. Fish and Wildlife Service (Service) requested that the Commission provide comments, questions, or concerns regarding the applications. Please note that USGS is requesting a renewal of their previously approved activities and an amendment to use unmanned aerial vehicles (UAVs). On June 10, 2011, the Commission recommended issuance of USGS's previous authorization with the following recommendations; please note our response in italics following the recommendation:

- (1) The activities are coordinated with other researchers to avoid duplication. *This was done through permit condition J.(1)(b);*
- (2) The applicant is advised to acquire State permits. *This was done through permit conditions F and K.*
- (3) The applicant is advised to obtain CITES permits. *This was done through conditions D.(1) and E.(4) of the permit.*
- (4) The Service should include 2 unintentional takes on the permit. *Although it was recommended that USGS include 2 unintentional takes, the USGS decided to only include 1 unintentional take.*

In conclusion, the Service found that the applicant's request meets the MMPA criteria for a scientific research permit. The Service has amended and reissued permit number 791721. A copy of the permit is enclosed.

If you would like to discuss the Service's decision, please feel free to contact me at Amy_Brisendine@fws.gov to set up a time to meet. We appreciate your input and review of applications we receive to conduct activities under Section 104 of the MMPA, and we look forward to working with you in the future.

Sincerely,

Amy Brisendine, Acting Chief
Branch of Permits
Division of Management Authority

Enclosure



MARINE MAMMAL COMMISSION

27 February 2020

Ms. Pamela Scruggs, Chief
Division of Management Authority
U.S. Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, Virginia 22041-3803

Dear Ms. Scruggs:

As part of its responsibilities under sections 101(a)(1), 202(a)(2), and 203(c) of the Marine Mammal Protection Act (MMPA), the Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors, reviews permit applications and formulates associated recommendations. The MMPA requires that, if an agency does not implement the Commission's recommendations, the agency explain why it has not done so in a timely manner. Specifically, section 202(d) of the MMPA requires that FWS respond within 120 days after receipt of Commission recommendations and that if any recommendations are not followed or adopted, a detailed explanation of the reasons why those recommendations were not followed or adopted must be provided.

In recent years, FWS appears to have issued permits which do not follow the Commission's recommendations but responses to the Commission's letters regarding those permit applications have yet to be received. The Commission has asked for responses informally through emails and phone conversations and formally through its letters¹. FWS has yet to provide them for the National Park Service Glacier Bay 14763C², Offspring Films 29633C³, BBC 53109C⁴, Mote Marine Laboratory (Mote) 100361⁵, Sea to Shore Alliance 37808A, U.S. Geological Survey (USGS) 791721⁶, and ABR, Inc. 75595C⁷ permits. As such, the Commission recommends that FWS provide responses as soon as possible to the Commission's recommendations for all of the aforementioned permits including detailed explanations regarding why any recommendation was not followed or adopted.

¹ e.g., the Commission's [7 November 2018 letter](#) on Rode 85339C.

² See the Commission's letters from [5 July 2017](#) and [25 October 2017](#).

³ See its [5 July 2017 letter](#).

⁴ See its [23 January 2018 letter](#).

⁵ See its [2 July 2018 letter](#).

⁶ See its [3 July 2018 letter](#).

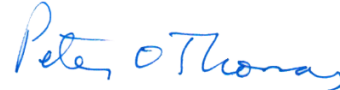
⁷ See its [19 December 2018 letter](#).

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Additionally, the Commission has provided recommendations on 12 permit applications that FWS has yet to issue⁸. When FWS does issue those permits, the Commission expects FWS to respond to the Commission's recommendations that they do not follow within the statutorily-mandated 120-day timeframe.

Kindly contact me if you have any questions regarding the Commission's concerns and recommendation.

Sincerely,



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

cc: Dr. Mary Cogliano, Branch of Permits Chief
Ms. Diane Bowen, National Marine Mammal Coordinator

⁸ University of California at Davis (UC Davis) 32831C ([18 December 2017 letter](#)), Marine Mammals Management 82088B ([9 July 2018 letter](#)), Rode 85339C ([7 November 2018](#) and [18 December 2018 letters](#)), USGS 690038 ([18 December 2018 letter](#)), Marine Mammal Health and Stranding Program 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](#)).