



MARINE MAMMAL COMMISSION

9 March 2021

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. 25498
(Titan Productions)

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). Titan Productions is requesting authorization to conduct filming activities on gray and killer whales and California sea lions in California and Alaska for an upcoming wildlife documentary series to be streamed on a global subscription service in 2023 highlighting the marine life of the Pacific coast.

Titan Productions proposes to film¹ gray and killer whales and California sea lions during several 14- and 30-day filming blocks between April 2021 and May 2022². Individuals of any age class and either sex could be harassed (see application and take table for specifics). Several pinniped and other cetacean species could be filmed opportunistically if encountered. John Durban, Fred Sharpe, Jim Darling, and Steven Swartz and Craig Matkin have served as advisors during the planning and development of the proposed filming activities. The filmmakers would implement various measures to minimize impacts on marine mammals and also would be required to abide by the National Marine Fisheries Service's (NMFS) standard permit conditions.

Filming predation events

In its application, Titan Productions proposed to film killer whales hunting female-calf pairs of gray whales. Filmmakers in a vessel could approach animals engaged in such an event to 40 m for topside filming (i.e., filming animals at the surface). They also requested to film predation events underwater using a polecam. For general filming of gray and killer whales with a polecam, Titan Productions specified that animals could be approached in a vessel to as close as 15 m, but the

¹ Including filming underwater with divers and a polecam, from a vessel, with unmanned aircraft systems (UAS) and with a drop cam from a UAS.

² The Commission understands that Titan Productions would coordinate its filming activities with Silverback Films and American Films, which would be authorized under separate permits to conduct similar filming activities of gray and killer whales along the California coast during similar timeframes.

application does not explicitly state whether 15 m would also be used as the minimum approach distance for polecam filming of a predation event or the 40-m minimum distance would be used as indicated for filming at the surface. The filmmakers would attempt to avoid positioning their vessel for either filming method in a way that could influence the outcome of a hunt, including not positioning the vessel between killer and gray whales or blocking an escape route for a female and calf pair. Regardless, consistent with its [13 January 2021 letter](#) for Silverback Films, the Commission is concerned that when positioning a vessel at close distances to a dynamic event involving large cetaceans, the filmmakers may inadvertently interfere with essential foraging and/or defense behavior. A female-calf pair already undergoing extreme stress may also be unintentionally further harassed. Based on these issues and consistent with the permit issued to Silverback Films, the Commission recommends that for any filming method, NMFS condition the permit to Titan Productions to specify 50 m as the minimum approach distance from a vessel to a gray whale being hunted or a killer whale engaged in a hunt.

In general, it would be prudent for Titan Productions and other filmmakers to use a laser range finder when evaluating approach distances from vessels to ensure that applicants are abiding by the requirements of their permits. Such a tool would be particularly useful during close approaches and approaches to animals in compromised or vulnerable states. It is thus strongly encouraged that, when feasible, Titan Productions use a laser range finder when assessing approach distances to target animals when filming from vessels.

Underwater filming of killer whales with divers

Titan Productions also proposed to approach and film killer whales underwater using divers³ in Alaska. This would only occur after a week of topside filming of a group of killer whales in which the whales seemed comfortable with the presence of the filmmakers. Divers would enter the water from a vessel positioned at least 15 m from a group of killer whales and approach the animals underwater to as close as 15 m. The application indicates that divers could spend up to ten minutes underwater before returning to the vessel, which could then be repositioned ahead of the whales at a distance of 15 m. Divers could then re-enter the water for a second dive, and up to ten unsuccessful dives could be conducted subsequently in such a manner. The application references that a dive would be considered “successful” if animals seemed interested in the divers, were within a filmable range, and/or exhibited natural behaviors. If whales exhibit disturbance behavior at any point, divers would abort the dive and return to the vessel. A second dive may be attempted if the whales return to a calm state, but if they resumed disturbance behavior, the filmmakers would leave the group for the day. Divers would conduct no more than 15 dives for up to four hours with a group of killer whales in a day.

It is clear that collecting usable footage of killer whales underwater will be a challenging task and may require multiple dives and multiple approaches from the vessel and underwater. However, close vessel approaches to a group of killer whales to reposition divers for subsequent dives may cause undue harassment of the whales, especially if whales are exhibiting fast traveling behavior. Based on the proposed mitigation measures in the application, filmmakers would need to retreat and could only attempt one additional vessel approach to the whales before they would be forced to abort approaching the group for the day. Moreover, by the time the vessel has repositioned to 15 m

³ Either freediving or using rebreathers for scuba.

ahead of a killer whale group and divers have re-entered the water, the whales likely would have moved on.

That Titan Productions could continue to carry out up to ten unsuccessful dives in a row to a minimum approach distance of 15 m, or potentially nine times in row followed by one successful dive and then five more unsuccessful dives to reach the 15-dive maximum, is excessive and concerning. If divers are unable because of evasive whale behavior to collect usable footage of killer whales underwater during a dive, it is likely that attempting multiple dives in the same manner would lead to more unsuccessful dives and also disturb the whales, and this would force the filmmakers to abort their activities. The proposed filming methods are also not consistent with those in previous permit applications for underwater filming of killer whales⁴. Titan Productions would undoubtedly minimize its harassment of the whales and collect the best underwater footage if killer whales were filmed milling or feeding on a carcass, divers entered the water further from the whales, divers spent more time underwater, and the numbers of unsuccessful and successful dives in a day were decreased. Therefore, the Commission recommends that for underwater diving activities around a group of killer whales, NMFS condition the final permit to (1) prohibit filming of whales exhibiting fast traveling behavior, (2) specify 30 m as the minimum distance for vessel approaches associated with diving, e.g., placing divers in the water, (3) specify 60 min as the maximum duration of a dive, rather than 10 min as proposed by Titan Productions, and (4) limit the total number of dives in a day to ten, of which no more than five could be unsuccessful.

Role of scientific experts

Titan Productions indicated in its application that it had consulted with several cetacean experts for its filming activities and referenced their guidance in the development of the filming methods. Titan Productions also stated that an expert might be present for the filming. Even though the filmmakers have experience filming cetaceans, the Commission feels that having a cetacean biologist knowledgeable of gray and killer whale behavior accompany them in the field during at least their first few days of filming gray and killer whales, including one attempted or successful hunt, would be prudent⁵. This would allow the filmmakers to learn firsthand about the types of behavior on their part that would constitute harassment and how to avoid interfering with the whales' foraging and defense behavior during a hunt. Therefore, the Commission recommends that NMFS condition the final permit to require a cetacean expert to accompany Titan Productions into the field for at least one initial day of filming (1) a gray whale female-calf pair, (2) a group of killer whales, and (3) an attempted or successful predation event involving a female-calf pair of gray whales.

⁴ e.g., the application for Red Rock Films permit 23169, in which killer whales could be approached in a vessel to a minimum distance of 30 m to drop divers in the water, with divers able to approach whales up to three times in a day.

⁵ The Commission has made similar recommendations in previous letters, including its [13 February 2020 letter](#) for Wall to Wall Productions.

Ms. Jolie Harrison
9 March 2021
Page 4

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 a distinct "O" before the last name.

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