



MARINE MAMMAL COMMISSION

30 March 2021

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. 0004910
(Titan 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). Titan Productions is requesting authorization to conduct filming activities¹ on southern sea otters in California and depleted northern sea otters in Alaska for a natural history television series focusing on wildlife along the Pacific coast of North America. It would film southern sea otters in Monterey Bay and Big Sur and depleted northern sea otters in the Aleutian Islands ending by December 2022. Individuals of any age class and either sex could be harassed.

Completeness and accuracy of application

Based on its informal review of the application, the Commission has determined that much of the information required in the Fish and Wildlife Service's (FWS) 2017 application instructions is lacking, unclear, inconsistent, or insufficient. Most critically, specification of mitigation measures to minimize the risk of disturbance to target and non-target female-pup pairs during the various filming activities is largely absent from the application. The Addendum to this letter provides a list of the major outstanding issues with this application. Many of these concerns have been raised in the Commission's informal comments and formal letters on previous sea otter photography permit applications². FWS's continued disregard for these comments is disappointing and perplexing. Due to all of the shortcomings in the application, the Commission recommends that FWS return the application to Titan Productions with instructions to address the deficiencies stipulated herein and submit a revised application. Upon submission of a revised application that satisfies 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 application expeditiously and,

¹ Including filming topside from a vessel, on land, underwater with divers and a polecam, and in air with unmanned aircraft systems (UAS).

² e.g., its [17 June 2020 letter](#) for Hamilton James, [16 June 2020 letter](#) for Wild Space Productions, and its [23 January 2018 letter](#) for BBC.

once a notice has been published in the *Federal Register*, provide it to the Commission for formal 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.

All of the information required by FWS's application instructions is relevant to making permitting decisions and developing appropriate terms and conditions. Applicants may need additional guidance regarding the information required by the relevant application instructions, and FWS has a responsibility to ensure that all information specified in the instructions has been obtained prior to making a determination that an application is complete. As stated in its 30 September 2020 letter regarding Hamilton James' application, the Commission will continue to recommend denying the issuance of permits even before they are published in the *Federal Register*, when it believes applications are inadequate or incomplete. Therefore, the Commission reiterates the recommendation made in previous letters³ that FWS staff review applications 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.

Finally, some of the Commission's concerns with the application relate to certain requests (e.g., filming "0 month old" pups) that do not comport with standard permit conditions⁴ included in previous permits⁵. It is not clear whether FWS was unaware that some of the activities proposed in Titan Productions' application had not been authorized under previous photography permits, or FWS has changed its standard permit conditions for sea otter permit conditions⁶, in whole or in part. As such, the Commission recommends that FWS clarify the permit conditions that it considers standard for both southern and northern sea otter photography permits.

The Service has often used permit conditions to overcome uncertainties regarding activities proposed in incomplete applications. As discussed in the Commission's 23 January 2018 letter regarding a BBC application, not all deficiencies in permit applications can be overcome through permit conditions, particularly when they undermine FWS's ability to make the findings required under the MMPA⁷ and its implementing regulations. Such conditions may be more restrictive than necessary or, if FWS does not have a sufficiently clear understanding of the proposed activities, misguided. Alternatively, missing or inadequate information regarding the proposed activities may lead to insufficient awareness of significant risks, including possible takes by Level A harassment, and thus adoption of insufficiently stringent terms and conditions. Thus, the Commission recommends that, in lieu of obtaining the necessary information as required by FWS's application instructions, FWS refrain from attempting to address shortcomings in permit applications by including terms and conditions in the issued permits.

³ e.g., its [18 December 2017 letter](#) for University of California Davis.

⁴ For example, prohibiting filmmakers from filming pups less than three months old, 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.

⁵ e.g., permits 11556C, 59492B, and 53019C for BBC and 29633C for Offspring Films.

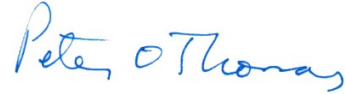
⁶ This confusion is compounded by the fact that standard conditions included in some previous sea otter photography permits were not included in permits recently issued to Wild Space Productions and Hamilton James.

⁷ For photography permits, those findings include limiting the taking to Level B harassment only (see section 104(c)(6) of the MMPA).

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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,

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 "T".

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

Addendum

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

- for measures to minimize harassment of female-pup pairs, specify—
 - which behaviors would indicate potential disturbance of a female-pup pair and whether filmmakers or filming platform would retreat;
 - 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;
 - whether filmmakers would avoid positioning themselves between a female and pup while filming underwater;
 - whether shore-based filmmakers would approach and film hauled-out pairs in addition to rafting animals;
 - minimum approach distances on shore to hauled-out pairs and rafting pairs and from vessels to hauled-out pairs;
 - how approaches would be made for each filming method (e.g., slowly and carefully), and how a pair would be monitored for any sign of disturbance;
- justify the need to film newborn sea otters, which could include pups just a few hours old⁸;
- specify whether and how non-target female-pup pairs would be avoided for the various filming activities;
- 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;
- 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 filmed⁹;
- sufficiently describe the objectives of the filming project and which sea otter behaviors would be targeted for filming;
- 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 sea otter behaviors constitute disturbance and would necessitate a retreat¹⁰;
- indicate minimum approach distances and altitude of UAS for each proposed filming activity and platform to each age class of sea otter and consistently specify distances and altitudes throughout the application¹¹;
- for each of the filming methods, 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

⁸ Titan Productions requests to film sea otter pups that are “0 months old”.

⁹ In response to some of the application questions, Titan Productions indicates that it would film up to 72 days in a year, while in response to another question, it indicates that it would film up to 58 days in a year.

¹⁰ Titan Productions explicitly states that no expert guides or scientists would accompany them in the field and does not provide the names of those advisors with whom it has consulted.

¹¹ In response to some of the application questions, Titan Productions indicates that it would approach sea otters to a minimum distance or altitude of 15 m, while in response to other questions it indicates that it would approach sea otters to a distance of 20 m. No minimum underwater approach distance is stated from divers to sea otters.

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 filming¹²;

- 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;
- 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, and from a UAS¹³;
- provide the names of all individuals who would be authorized under the permit¹⁴ and include either a curriculum vitae, resume, or biosketch for each that describes his or her qualifications to perform the intended duties.

¹² Titan Productions provides this information in one row for “all approaches” rather than separating the information into separate rows by filming method, as requested in the application instructions.

¹³ Titan Production indicates only that take numbers were estimated based on those from one its cameramen who has prior experience filming sea otters in the area.

¹⁴ It is not clear who would film sea otters underwater, drive the vessel, or serve as the UAS spotter.