



# MARINE MAMMAL COMMISSION

22 September 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. 25563  
(Marine Mammal Laboratory)

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). The Marine Mammal Laboratory (MML) is seeking to renew its permit to conduct research on cetaceans during a five-year period—permit 20465 authorized similar activities.

MML proposes to conduct research on numerous species of cetaceans in the North Pacific Ocean, Bering, Beaufort and Chukchi Seas, and Gulf of Maine. The purpose of the research is to investigate (1) abundance and distribution, (2) foraging ecology, (3) social and genetic structure, (4) movement patterns and habitat use, (5) disease and health, and (6) acoustic behavior and hearing. Researchers would harass, observe, photograph/videotape, and conduct playbacks on, sample<sup>1</sup>, and/or instrument<sup>2</sup> numerous cetaceans of both sexes and various age classes (see the take tables for specifics). MML would implement various measures to minimize impacts on cetaceans and also would be required to abide by the National Marine Fisheries Service's (NMFS) standard permit conditions. MML's Institutional Animal Care and Use Committee has reviewed and approved the research protocols.

On 9 August 2021, NMFS published MML's application in the *Federal Register* (86 Fed. 43258) for public comment. Based on its informal review of the application available online, the Commission found that some of the information required in NMFS's 2016 application instructions and its implementing regulations was missing, inconsistent, or not clearly articulated in the application and provided to NMFS a list of comments on the application. Similar to other recent applications<sup>3</sup>, NMFS did not provide the Commission with a final, revised application. Instead, the Commission received only the applicant's responses to its comments and questions, and thus the

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<sup>1</sup> Including biopsies and exhaled air. Environmental DNA, sloughed skin, and feces could be collected opportunistically from free-ranging cetaceans.

<sup>2</sup> With either suction-cup, dart, and/or implantable tags.

<sup>3</sup> e.g., see the Commission's [24 August 2021 letter](#) for Dr. Daniel Costa.

application is still missing information<sup>4</sup> and includes inconsistent<sup>5</sup> or not clearly articulated content<sup>6</sup>. As one example, MML indicated in the application text that it would ensure that the *Level A harassment zones* or exclusion zones would be clear of non-target species before and during playback activities, while Figure 6 in the application specified that MML would ensure that the *Level B harassment zones* would be clear of non-target species before and during playback activities. MML clarified that the application text was correct and that Figure 6 would be removed from the final application. As another example, MML omitted from the take table Level B harassment takes of numerous non-target species (e.g., harbor seals, ice seals, Steller sea lions, humpback whales, killer whales, etc.) for playback activities, even though some of those species were mentioned in the application text as non-target species that could be present during playback activities. MML indicated that the take table would be revised but did not indicate for which species takes would be included.

Due to NMFS's revised permit review process, NMFS no longer makes available complete, corrected applications until a decision on the permit has been made. Thus, it is currently impossible for the Commission or the public to ascertain what is considered part of MML's "final" application. Since some of the information in the initial application remains inconsistent or unclear and some information was omitted altogether, the Commission considers the application incomplete. Neither the Commission nor the public can provide informed comments on an incomplete application<sup>7</sup>. The Commission recommends that NMFS refrain from issuing a permit to MML until NMFS (1) revises the final application based on responses to the Commission's comments and questions and (2) provides the final application, including the various playback spreadsheets, for review and comment.

It is NMFS's responsibility to ensure that applicants provide consistent information, abide by the application instructions, and provide the information necessary to establish that an application is complete prior to publishing a notice of availability in the *Federal Register*. By continuing to publish applications with information missing, or with insufficient or inconsistent information, NMFS perpetuates a review process that lacks transparency and makes it difficult for the Commission and the public to provide meaningful reviews. Therefore, the Commission recommends that, prior to publication of any application in the *Federal Register*, NMFS staff review each application in light of the applicable instructions to ensure that all required information is

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<sup>4</sup> For example, MML omitted whether and how it intended to implement exclusion zones for phocids and otariids, including whether those species would be binned with a different functional hearing group (e.g., low- or high-frequency (HF) cetaceans). MML also omitted an example accumulated playback scenario and associated exclusion zones for the maximum proposed timeframe of 5 hours of non-impulsive sound per day—an example accumulated playback scenario of 2.6 hours per day was provided.

<sup>5</sup> For example, MML indicated that playback source levels *may exceed* the peak sound pressure level (SPL<sub>peak</sub>) threshold for mid-frequency cetaceans and in the next sentence indicated that the source levels *would not exceed* the SPL<sub>peak</sub> threshold. Inconsistencies aside, the SPL<sub>peak</sub> threshold for impulsive sources is irrelevant as the cumulative sound exposure level threshold was used for estimating Level A harassment zones.

<sup>6</sup> For example, MML indicated that it would use two different versions of spreadsheets (an accumulated unweighted spreadsheet and NMFS's user spreadsheet that utilizes weighted thresholds) but did not indicate which spreadsheet applied to which playback scenario. MML later clarified that both versions of spreadsheets would use unweighted thresholds but not which spreadsheet would be used for which scenario.

<sup>7</sup> For discussion on the potential implications of the issuance of a permit based on inaccurate or inconsistent information in the final application, see the Commission's [26 June 2021 letter](#) for Dr. Terrie Williams, its [31 July 2020 letter](#) for Dr. Daniel Costa, its [14 July 2020 letter](#) for U.S. Geological Survey, its [17 June 2020 letter](#) for Hamilton James, and its [16 June 2020 letter](#) for Wild Space Productions.

Ms. Jolie Harrison  
22 September 2021  
Page 3

included, is internally consistent, is consistent with NMFS's policies, and is in a format that facilitates review by the Commission and the public.

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" in the middle name.

Peter O. Thomas, Ph.D.  
Executive Director