



MARINE MAMMAL COMMISSION

23 September 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. 0003402
(BBC, Natural History Unit)

Dear Dr. Cogliano:

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors (Committee) 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). BBC proposes to film southern sea otters in California from 2021 to 2022 for its documentary, *The Americas*.

BBC requested authorization to take up to 10 southern sea otter female-pup pairs by Level B harassment during filming activities¹ during one 4-week filming session in 2021 and three 2-week filming sessions in 2022. Individuals of any age class and either sex could be harassed incidental to the filming activities. Personnel from the Monterey Bay Aquarium would accompany the filmmakers during a portion of the filming activities, and personnel from the U.S. Fish and Wildlife Service (FWS) have served as additional advisors. BBC would use various measures to minimize impacts on the sea otters.

Application insufficiencies and permit conditions

Based on its informal review of BBC's application, the Commission indicated that some of the information required in FWS's 2017 application instructions and its implementing regulations was missing, inconsistent, or not clearly articulated in the application and provided a list of comments and questions on the application to FWS. The Commission also noted that some of BBC's proposed filming methods (e.g., filming 2-week old pups) were less restrictive than methods authorized previously² and lacked sufficient justification. In addition, the Commission directed several questions to FWS about whether previous standard conditions³ would be included in this permit. The Commission expected that FWS would (1) provide responses to the Commission's

¹ Including filming from a vessel, on shore, underwater with divers, and from unmanned aircraft systems (UAS).

² e.g., BBC permit 53019C, Offspring Films permit 29633C, and Silverback Films permit 92150B.

³ For example, establishing three hours as the maximum amount of time an individual sea otter could be filmed in a given day, ceasing filming of a female-pup pair for at least one day after three days of filming, etc.

questions about including standard conditions in the final permit, (2) send the applicant all of the Commission's questions and comments, and (3) ask the applicant to address them and submit a revised application that incorporated responses to the Commission's and FWS's concerns.

On 10 September 2021, FWS published BBC's application in the *Federal Register* (86 Fed. Reg. 50734). The application included a document with responses from BBC⁴ to some of the Commission's comments and questions, but others were either omitted or modified and remain unanswered. Additionally, basic information required in FWS's 2017 application instructions is still lacking. For example, BBC did not explain the necessity of filming 2-week old pups for up to 12 hours a day underwater at distances as close as 1 ft⁵. BBC also failed to clarify the maximum number of days in a year it would film sea otters, which affects the total number of takes to be authorized⁶.

It is FWS'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 publishing applications with missing, insufficient, or inconsistent information, FWS 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*, FWS staff review each application in light of the applicable instructions to ensure that all required information is included, is internally consistent, is consistent with FWS's policies, and is in a format that facilitates review by the Commission and the public.

In regard to the Commission's questions to FWS about whether standard conditions would be included in the final permit, FWS informed the Commission that it could not provide answers now because doing so would be "pre-decisional and we are still reviewing the application." FWS also relayed that it would take any recommendations from the Commission "under strong consideration," but that "if our field office supports the filming of sea otter [*sic*] younger than 3 weeks old, then it is probable we would authorize it." This response leaves it unclear whether FWS has changed its standard permit conditions for sea otter photography permits, whether it will no longer include standard permit conditions, or whether it is relying entirely on recommendations from the Commission and/or its field office to formulate conditions for final permits on a case-by-case basis.

The Commission finds this concerning. Applicants rely on FWS for guidance as they develop applications that will enable FWS to make the necessary findings under the MMPA and its implementing regulations⁷. Among other things, applicants should be made aware of prior conditions included in southern sea otter photography permits and how those conditions could affect the applicant's proposed activities. Over the last decade, FWS has included the same

⁴ Which adequately addressed some of the Commission's initial concerns.

⁵ Nearly all previous southern sea otter photography permit applications and permits specified more restrictive mitigation measures. The Commission does not consider wanting to film "fluffier", younger pups for a certain filming sequence as sufficient justification.

⁶ In one portion of the application, BBC indicated that it would film sea otters for a maximum of 42 days in a year and in another portion, it indicated that it would film sea otters for a maximum of 70 days in a year. Its proposal of 1,400 targeted takes per year was based on the latter.

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

conditions in nearly all southern sea otter photography permits, including several permits issued to BBC⁸, to minimize harassment of sea otters during filming activities. The Addendum to this letter provides a list of these FWS standard permit conditions. The Commission considers the inclusion of such conditions across multiple permits for a certain species or stock a “standard” for which FWS has made the necessary findings. Any proposed measures in applications that are less restrictive than these standards must be adequately justified by the applicant to be authorized. It appears that FWS is no longer conditioning sea otter photography permits with standard permit conditions. For the two most recently issued southern sea otter permits⁹, both of which the Commission recommended denying¹⁰, FWS did not include the majority of the aforementioned standard permit conditions. As such, the Commission recommends that FWS clarify the permit conditions that it considers standard for southern sea otter photography permits.

BBC’s application includes adequate mitigation measures to be taken if any sign of disturbance is observed during filming (e.g., retreating and aborting filming activities if an animal reacts adversely to the presence of filmmakers). However, the inclusion of other mitigation measures is critical, especially for very young pups, in the event that signs of disturbance go unnoticed or animals do not display signs of disturbance. These measures would ensure that filmmakers do not unintentionally exceed Level B harassment and violate the permit. BBC’s proposed filming methods of very young pups at extremely short distances for long durations is very likely to exceed Level B harassment of sea otters and therefore put the animals’ welfare at risk.

If FWS decides to issue a permit to BBC, the Commission recommends that FWS condition the final permit in a manner consistent with previous southern sea otter photography permits and include all of the standard conditions specified in the Addendum. Given the lack of justification for the applicant’s stated need to approach sea otters to 1 ft underwater, the Commission also recommends that FWS require BBC to maintain a minimum distance of 10 ft from sea otters when filming them underwater. The Commission further recommends that FWS (1) require BBC to clarify the maximum number of days per year it intends to film southern sea otters, and (2) ensure that the total number of target and non-target takes of sea otters are estimated correctly for inclusion in any final permit, if issued.

Finally, in addition to FWS’s omission of its standard permit conditions, the agency omitted the number¹¹ of target and non-target animals authorized to be taken and/or the numbers of authorized takes from the three most recently issued photography permits¹². Those omissions are in direct violation of the MMPA. Section 104(b)(2)(a) requires that any permit issued specify the number and kind¹³ of animals which are authorized to be taken. As such, the Commission recommends that FWS include the number, age class, and sex of target and non-target animals

⁸ e.g., BBC permits 54942B and 53109C.

⁹ Hamilton James permit 37946D and Wild Space Productions permit 62285D.

¹⁰ In its letters from [17 June 2020](#) and [30 September 2020](#) for Hamilton James and its [16 June 2020 letter](#) for Wild Space Productions.

¹¹ As well as the age class and sex in multiple instances.

¹² Hamilton James permits 37946D and 37058 D and Wild Space Productions permit 62285D.


¹³ Including species, stock/distinct population segment, age class, and sex.

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authorized to be taken¹⁴ in BBC's permit, if issued, and in all succeeding permits issued by the agency.

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

Sincerely,



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

¹⁴ And/or the numbers of authorized takes.

Addendum

FWS has generally required as standard conditions in southern sea otter photography permits that applicants—

- only approach and film a sea otter pup that is at least 3 weeks old;
- maintain a minimum distance of 20 m from a vessel to a resting sea otter;
- take extra care when conducting filming activities near a female-pup pair and immediately terminate efforts if there is any indication that the activity might be interfering with the female-pup pair;
- cease activities immediately and move away from a sea otter if any filming activity disrupts an otter that is feeding, breeding, or nursing;
- not pursue any sea otter that moves away from the filmmakers;
- retreat and cease filming an otter for the day if the sea otter moves away or is disturbed more than twice on a given day;
- limit filming a sea otter to no more than 3 hours in a day;
- conduct filming activities of a given sea otter or female-pup pair for no more than 3 days followed by at least 1 day of rest; and
- not film from a vessel during the period from 1 hour after sunset to 1 hour before dawn.