



# MARINE MAMMAL COMMISSION

7 April 2022

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. 041309  
(U.S. Fish and Wildlife Service,  
Marine Mammals Management)

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). Marine Mammals Management (MMM) is requesting to renew and amend its permit to conduct research on northern sea otters in Alaska during a five-year period. The purpose of the research is to investigate (1) population trends, (2) reproductive rates, (3) movement patterns and habitat use, (4) foraging ecology, and (5) disease and health of sea otters. Researchers would harass, observe, photograph/video, capture, restrain, sedate, measure, sample, mark<sup>1</sup>, and conduct “ensonification studies” on and implant instruments in<sup>2</sup> individuals of any age class and either sex. MMM requested up to four unintentional or intentional<sup>3</sup> mortalities of sea otters over the course of the permit, as well as authorization to import and export samples from sea otters. MMM would implement various measures to minimize impacts on non-target marine mammals. It is not clear whether MMM has submitted its proposed research protocols to its Institutional Animal Care and Use Committee for review.

In March 2022, the U.S. Fish and Wildlife Service (FWS) asked the Commission to review informally MMM’s application and provide any comments or questions. The Commission understands that FWS had no clarifying questions and considered the application to be complete. During its review of the application, the Commission noted that the majority of the information required in FWS’s 2020 application instructions was lacking, unclear, or insufficient. The Commission is particularly concerned that the application included numerous invasive research

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<sup>1</sup> With flipper tags.

<sup>2</sup> With passive integrated transponder (PIT), life history (LHX2) and very high frequency (VHF) radio transmitter tags, and time-depth recorders (TDR). LHX2 and VHF tags and TDRs would be surgically implanted in sea otters. The application indicated that up to two instruments could be surgically implanted in an individual sea otter and that instruments could be implanted into an individual otter up to twice per year.

<sup>3</sup> Via euthanasia for humaneness purposes.

activities that would be conducted on sea otters<sup>4</sup> but did not provide adequate evidence that the humaneness and *bona fide* criteria under the MMPA would be met.

As an example, none of the persons who would be authorized as a principal investigator (PI) or co-investigator (CI) under the permit specify any experience in her or his curriculum vitae related to sampling, sedating, anesthetizing, instrumenting, or conducting ensonification studies on sea otters. Only one CI indicated that he had previously captured and handled sea otters. Moreover, even though MMM indicated that only a “qualified veterinarian surgeon” would surgically implant instruments in sea otters, currently no veterinarian would be authorized as a PI or CI under the permit. In a second example, MMM’s description of its proposed ensonification studies is far from sufficient and lacks details on the justification, objectives, methods<sup>5</sup>, and appropriate mitigation measures for such studies. In another example, it is unclear in the application which procedures could be conducted on pups based on different body masses, and MMM did not explicitly indicate the minimum pup mass that would be required for sampling, sedation, anesthesia, and surgical implantations of two instruments<sup>6</sup>. In addition, MMM did not state whether near-term pregnant females would be avoided for surgical implantations, consistent with similar applications on northern sea otters,<sup>7</sup> due to the risk of post-surgical dehiscence.

It is clear that MMM has not provided the information necessary for FWS to deem the application complete. FWS’s implementing regulations specify that an application *must contain* various types of information that MMM’s application still lacks (see 50 C.F.R. §18.31(a)(1)–(5)). There is nothing in the FWS’s regulations or application instructions that compels the agency to process an application that is incomplete or insufficient or to make it available for public review. Therefore, the Commission strongly recommends that FWS find MMM’s application to be incomplete, suspend its review, refrain from further processing, and withdraw any notice submitted to the *Federal Register* until MMM submits a complete application that addresses all of the items in FWS’s 2020 application instructions. If FWS decides to continue processing the application in its present form, then the Commission recommends that MMM’s application be denied for failing to demonstrate that it meets the issuance criteria under section 104 of the MMPA, particularly those regarding humaneness and whether the proposed research will further a *bona fide* scientific purpose.

The Commission also is concerned that MMM may have already conducted surgical implantations of LHX2 tags in northern sea otters without prior authorization. In the application, MMM indicated that it had deployed 20 LHX2 tags in adult female sea otters in Kachemak Bay in

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<sup>4</sup> Including near-term pregnant females.

<sup>5</sup> For example, MMM did not specify the types of sound (e.g., impulsive or non-impulsive, pile driving, drilling, etc.) to be emitted, whether the sound would be emitted in air, in water, or both, transducer and water depth, frequencies or frequency bands of the sound(s), maximum source levels and received levels, maximum duty cycle, maximum number of “cycles” (generally termed trials or sessions by other researchers) per day and maximum total duration of sound transmission per day, assumed transmission loss, Level A harassment thresholds and corresponding harassment zones, minimum distance from target and non-target otters that the sound would be emitted, Level B harassment zones based on the National Marine Fisheries Services’ thresholds for non-target, non-FWS species, post-activity monitoring, etc.

<sup>6</sup> MMM specified only that pups must be larger than 20 lbs to be considered for instrument implantation, which is less than the minimum mass requirement of 26 lbs for instrument implantation indicated in Monterey Bay Aquarium (MBAQ) permit 186914. Unless new data are available indicating otherwise, the same conditions from permit 186914 should have been used for this application.

<sup>7</sup> e.g., U.S. Geological Survey’s recent application to renew permit 067925.

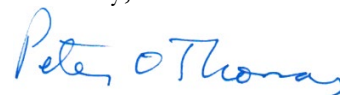
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2019 under permit 041309<sup>8</sup>. However, permit 041309 currently authorizes MMM to implant only TDR and VHF tags in sea otters<sup>9</sup>. It is unclear whether MMM is aware of which activities were authorized previously under its permit, as it stated in its application that the current request “modifies existing takes via addition of new transmitters (LHX2, TDR).” When the Commission inquired under what authority MMM had conducted the LHX2 tag deployments, FWS indicated that it would have to look into its records. The Commission has yet to hear anything further from FWS on this matter, including whether FWS has issued a minor amendment to the permit unbeknownst to the Commission.

In any case, a permittee is ultimately responsible for ensuring that the research activities are consistent with the terms and conditions of a scientific research permit issued under section 104(c) of the MMPA. The Commission reminds MMM that violations of the MMPA have subjected permit holders to various penalties, including fines, permit revocations, and suspensions of the opportunity to obtain new permits. Whether MMM’s actions were carried out knowingly by either the researchers or a veterinarian or were unintentional due to a failure to understand what the permit does and does not authorize, the actions likely constitute violations nonetheless. It is also FWS’s responsibility to ensure that permittees understand the terms and conditions of their permits<sup>10</sup> and take appropriate action in accordance with the MMPA and its implementing regulations if terms or conditions are violated. If FWS finds that MMM did in fact conduct unauthorized surgeries on sea otters to implant LHX2 tags, the Commission recommends that FWS advise MMM and any associated veterinarians that they must abide by the procedures and protocols specified in the original application or any amendment thereto for permit 041309 and all permit conditions.

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

Sincerely,



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

cc: Anna Seidman, Assistant Director for International Affairs, U.S. Fish and Wildlife Service  
Pamela Scruggs, Chief, Division of Management Authority, U.S. Fish and Wildlife Service

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<sup>8</sup> It is unclear who conducted the surgeries to implant LHX2 tags in sea otters.

<sup>9</sup> In fact, the implantation of LHX2 tags for research purposes is only currently authorized for southern sea otters under MBAQ permit 186914.

<sup>10</sup> Including the standard condition, “If a permittee desires to change study procedures from that previously described in the Permittee’s file, then a letter must be submitted to DMA describing the proposed changes, and confirmation that the proposed changes fall within the authorized TAKES in the permit must be received from DMA prior to undertaking the procedural modifications.”