

# Draft Compatibility Determination

## Title

Draft Compatibility Determination for Commercial and Educational Recording (Photography, Videography, Filming, and Audio Recording), Sonny Bono Salton Sea National Wildlife Refuge.

## Refuge Use Category

Other Uses

## Refuge Use Type(s)

Commercial Recording (Photography, Videography, Filming, and Audio Recording)

Educational Recording (Photography, Videography, Filming, and Audio Recording).

## Refuge

Sonny Bono Salton Sea National Wildlife Refuge.

## Refuge Purpose(s) and Establishing and Acquisition Authority(ies)

" ... as a refuge and breeding ground for birds and wild animals;" Executive Order 5498 in 1930

" ... for use as an inviolate sanctuary, or for any other management purpose for migratory birds;" Migratory Bird Treaty Act (16 U.S.C., Section 715d)

" ... for the management and control of migratory waterfowl and other wildlife;" Lea Act of 1948 (16 U.S.C. § 695)

" ... primarily for the production of crops to provide wintering feed for waterfowl and to aid and assist in the control of depredation by waterfowl to commercial crops in the area." Fish and Wildlife Act of 1956 (16 U.S.C. 742a-742j)

## National Wildlife Refuge System Mission

The mission of the National Wildlife Refuge System, otherwise known as Refuge System, is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans (Pub. L. 105-57; 111 Stat. 1252).

## Description of Use

### **Is this an existing use?**

No

### **What is the use?**

The proposed use is photography, videography, filming, and audio recording (collectively referred to as "recording") conducted to capture images and sounds of natural, historic, or cultural subjects of the Refuge for: 1) commercial use, or 2) educational use. Commercial recording is visual recording (motion or still) by firms or individuals (other than news media representatives) who intend to distribute their photographic and/or audio content for money or other consideration. This includes the creation of entertainment or commercial enterprises as well as advertising audio-visuals for the purpose of paid product or services, publicity, and commercially oriented photo contests. Educational recording is visual recording (motion or still) by entities such as non-profit organizations, schools, and government agencies who intend to distribute their photographic and/or audio content free of charge for educational purposes. This Compatibility Determination (CD) does not apply to bona fide news gathering activities, as defined in 43 CFR 5.12.

Interpretation of Refuge resources, environmental education and wildlife photography are three of the six priority wildlife dependent public uses of the NWRS and are to be encouraged when compatible with the purposes of the Refuge. These uses are identified and discussed in detail in the Final Comprehensive Conservation Plan and Environmental Assessment (CCP/EA) (USFWS 2014) which are incorporated by reference.

### **Is the use a priority public use?**

No

### **Where would the use be conducted?**

Both recording use types may take place by foot, from blinds, using vehicles, or by landing or taking-off of drones (unmanned aerial systems; UAS) on Refuge lands. Areas used for obtaining recordings, modes of access and equipment used would be approved on a case-by-case basis under a special use permit (SUP) with terms and conditions. Recording activities and access on Refuge lands may be restricted (e.g., seasonal, location) to avoid impacts to sensitive wildlife or resources where disturbance could be detrimental.

### **When would the use be conducted?**

Both recording use types would be permitted seven days a week but would need to be closely coordinated with the Refuge if they occur during sensitive periods (e.g., breeding season).

## How would the use be conducted?

The use is typically conducted by a recording crew (preferably less than ten people) and if determined necessary by refuge staff, accompanied by a Refuge employee or a permitted partner approved by the Refuge.

### Commercial Recording

Commercial photography is conducted in accordance with Department of the Interior regulations. The regulation governing commercial filming and still photography is found at 43 CFR part 5 subpart A. The Service manages audio recording as governed within 50 CFR part 21.71. That rule implemented the requirements of P.L. 106-206 (16 U.S.C. 4601-6d), that directed the Secretaries of Interior and Agriculture to require permits and develop a consistent fee structure for commercial filming and some photography on federal lands. The final rule, which modifies regulations at 36 C.F.R. Part 5, defines commercial filming and still photography and explains which activities require a permit. In accordance with P.L. 106-206, the rule states that all commercial filming and certain photography activities require a permit. The rule also discusses the more limited circumstances when a permit is required for news-gathering activities. It states conditions under which a filming or photography permit may be denied: if the activity would cause resource damage; unreasonably disrupt public use; pose health or safety risks; or violate the Wilderness Act (16 U.S.C. 1131-1136) or other applicable laws or regulations. Commercial still photography only requires a permit in certain cases, per 43 CFR 5.2(b):

"Still photography does not require a permit unless:

- 1) It uses a model, set, or prop as defined in § 5.12; or
- 2) The agency determines a permit is necessary because:
  - (i) It takes place at a location where or when members of the public are not allowed; or
  - (ii) The agency would incur costs for providing on-site management and oversight to protect agency resources or minimize visitor use conflicts."

A permit for audio recording would be required under the same conditions as still photography.

Commercial recording requests are considered via an application to the Refuge Complex for a Commercial SUP. The application includes interpretive purpose of the recording, description of the proposed activities, dates and times, number of personnel, and equipment used. The U.S. Fish and Wildlife Service (Service) will evaluate the SUP application using the following criteria:

- 1) How does the interpretive message of the recording align with the mission of the Service and the NWRS?

- 2) How does the interpretive message of the recording align with the Refuge's goals and objectives?
- 3) Will the recording request conflict with any management programs?
- 4) Will the recording be intrusive in any way or cause undue disturbance to Refuge resources?
- 5) Depending upon the scale of the request, does the Refuge have available resources to manage the proposed SUP?

### **Educational Recording**

There are no current Department of the Interior regulations for educational recording. In most cases, we would require a permit for educational recording as described previously in the commercial recording section.

### **Why is this use being proposed or reevaluated?**

Appropriate commercial and educational recording on the Refuge will enhance the public's awareness of the Salton Sea watershed and the natural and cultural resources of the Refuge, while promoting awareness of the NWRS.

## **Availability of Resources**

The following areas show the annual cost required to administer and manage the activities described above. Costs are primarily administration, monitoring, and facilities. These are standard operating costs and are not typically attributed to costs for a specific public use. There are no construction costs associated with this use. The use is dependent upon adequate funding and resources. The listed employee position levels are examples and subject to change. SUPs would not be issued unless sufficient staff is available for oversight, without impacting other ongoing Refuge management.

### **Administrative**

\$2,690 (calculated as 0.02 full time employee GS-12, Step 5 (2022 locality pay area of Los Angeles-Long Beach, California + 30% for benefits)

### **Monitoring**

\$2,240 (calculated as 0.02 full time employee GS-11, Step 5 (2022 locality pay area of Los Angeles-Long Beach, California + 30% for benefits)

### **Facilities**

\$250 (vehicle use)

## **Offsetting revenue to recuperate costs (commercial recording only)**

Commercial recording permit applicants may be charged a fee for use of lands and to offset costs. Permit holders will be responsible for two types of payments: a location fee that provides a fair return to the nation for the use of federal land, and repayment of costs incurred by the government in processing the request and administering the permit. The Service has not finalized a fee schedule for commercial filming and still photography permits. Based on other local agencies such as the state and National Park Service, the following fee schedule has been developed:

### **Application fee (review of proposal)**

Simple production review fee (1-8 hours of review needed)- \$0

Complex Production review fee (>8 hours of review needed)- \$80

### **Location fee**

Motion Picture/Video- 1-2 people, minimal setup \$0; 3-10 people, moderate setup \$150; 11-30 people; moderate setup \$250; 31-49 people, large setup \$500

Still Photography/Audio Recording- 1-2 people, minimal setup \$0; 3-10 people, moderate setup \$50; 11-30 people, moderate setup \$150; 31-49 people, large setup \$250

### **Cost recovery**

Cost for FWS coordination and/or monitor(s) on-site for all types of recording, if required: GS-11, Step 5 hourly rate for locality pay area of Los Angeles-Long Beach, California + 30% for benefits (for 2022: \$53.74 per hour)

The fee schedule may be changed based on updated guidelines provided by the Department of the Interior and/or the Service.

## **No Offsetting revenue from educational recording**

As educational recording has no revenue from its production and supports the NWRS priority public uses of interpretation and environmental education, no fee will be charged to these type of permit applicants

## **Anticipated Impacts of the Use**

### **Potential impacts of a proposed use on the refuge's purpose(s) and the Refuge System mission**

#### **Short-term impacts**

The Refuge provides critical, productive wetland and cropland areas for migrating, staging, overwintering, and summer nesting seabirds, shorebirds, waterfowl, and

other waterbirds including the federally endangered Yuma Ridgway's rail (*Rallus obsoletus yumanensis*). The Salton Sea has been considered one of the most important wetland systems to wintering, migratory, and breeding waterbirds in North America (Jehl 1994, Shuford et al. 2002 [as cited by the USFWS 2014]). The Salton Sea provides habitat for species displaced by loss of wetlands elsewhere within the Pacific Flyway, a migratory pathway from Alaska to Patagonia, including California where over 90% of the historic wetland habitats has been lost to agriculture conversion and urban development (Yuhas 1996 [as cited by the USFWS 2014]). Because of the potential for disturbing migrating and breeding birds during sensitive periods of their lifecycle, access to the Refuge is restricted

The proposed use could cause temporary disturbance to wildlife, similar to wildlife observation and wildlife photography. Individual animals may be disturbed by human contact to varying degrees. Human activities on trails can result in direct effects on wildlife through harassment, a form of disturbance that can cause physiological effects, behavioral modifications, or death (Smith and Hunt 1995). Once considered "non-consumptive," it is now recognized that wildlife observation and wildlife photography can negatively affect wildlife by altering wildlife behavior, reproduction, distribution, and habitat (Purdy et al. 1987, Knight and Cole 1995). Purdy et al. (1987) and Pomerantz et al. (1988) described six categories of impacts to wildlife because of visitor activities. They are: 1) direct mortality; 2) indirect mortality; 3) lowered productivity; 4) reduced use of refuge; 5) reduced use of preferred habitat on the refuge; and 6) aberrant behavior/stress.

Of the wildlife observation techniques, wildlife photographers tend to have the largest disturbance impacts (Klein 1993, Morton 1995, Dobb 1998). While wildlife observers frequently stop to view species, wildlife photographers are more likely to approach wildlife (Klein 1993). Even slow approach by wildlife photographers tends to have behavioral consequences to wildlife species (Klein 1993). Other impacts include the potential for photographers to remain close to wildlife for extended periods of time, in an attempt to habituate the wildlife subject to their presence (Dobb 1998) and the tendency of casual photographers, with low-power lenses, to get much closer to their subjects than other activities would require (Morton 1995), including wandering off trails. This usually results in increased disturbance to wildlife and habitat, including trampling of plants. Because commercial photographers have high power lenses and video equipment, they are likely to have fewer disturbance effects to wildlife and habitat.

As noted above, human activity can have adverse impacts to wildlife species, particularly when reproductive or foraging activities are disrupted. Of particular concern are potential disturbances to the federally endangered Yuma Ridgway's rail (*Rallus obsoletus yumanensis*), which is supported by the cattail marsh habitat that occurs on the Refuge. Disturbance to this species as well as other secretive marsh bird species such as the State listed California black rail (*Laterallus jamaicensis* ssp. *coturniculus*) can be minimized by ensuring special use permits for recording include

restrictions on the timing and location of activities.

Since most commercial and educational recording activities would avoid areas that could support the endangered desert pupfish (*Cyprinodon macularius*), these activities are unlikely to adversely affect this species. The exception to this would be a specific request that proposed the recording of desert pupfish in wetland habitat. In this instance the disturbance to the wetland habitat would be considered too intrusive and as such commercial and educational recording activities would be denied.

Seabirds of concern such as the federally endangered California least tern (*Sternula antillarum browni*) when present occur in the managed open water habitats on the Refuge, on the nesting islands within this managed wetland habitats, and in and along the shoreline of the Salton Sea. Since commercial and educational recording activities will be restricted to areas along existing roads and trails where there is sufficient distance between where the activities will occur and the birds on the nesting islands, these birds are unlikely to be affected by these activities.

Other Federal and/or State listed species such as the least Bell's vireo (*Vireo bellii pusillus*), southwestern willow flycatcher (*Empidonax traillii extimus*), and little willow flycatcher (*Empidonax traillii brewsteri*) periodically occur on the Refuge during migration and have the potential to nest on the Refuge in areas where suitable habitat is present. Suitable nesting habitat is however very limited within those areas of the Refuge that are open for public use and nesting by these species has not been observed. If nesting of listed or sensitive species is documented, the nesting area and a suitable buffer zone around the nesting area would be closed during the nesting season.

Regarding habitat, there may be some localized impacts to vegetation from trampling by foot, vehicle or portable blind use for recording purposes. Humans and equipment can also be vectors for invasive plants by moving seeds or other propagules from one area to another.

Overall, any disturbance is expected to be localized and of short duration. Wildlife disturbed generally have abundant cover or escape routes and disturbance is likely to have impacts (fright and flight) of short duration. As the Refuge has restricted access, the proposed use is expected to have low potential to impact habitat and wildlife as it does not include unrestricted access to sensitive areas or allow activities outside of appropriate times of the year when the use may disturb wildlife and their habitat. Refuge staff will monitor and evaluate the effects of these potential impacts to discern if adverse effects to wildlife or habitats result from the uses. Service staff or a partner approved by the Refuge may actively supervise each permittee or allow permittees to shadow Service staff or the Refuge partner during conservation activities taking place on the Refuge, as the Service determines necessary to minimize disturbance. By restricting commercial and educational recording in this way, permittees are not likely to disturb federally endangered species. Adherence by the

permittee to the terms and conditions of the SUP will lessen or eliminate disturbance.

### Long-term impacts

Most commercial and educational recording activities will be approved for short periods (one day or less) and be restricted to certain areas of the Refuge (limited only to public use areas, or into closed areas if an escort is present). In the rare case that multiple parties request a permit within the same time frame, the Refuge Manager will either limit the number of users accessing the Refuge within that period or shorten the total duration of the activity taking place, per party. Because of the short duration period, interlude times between each activity, and the localized area of the activities taking place, there are no anticipated long-term impacts for commercial and educational recording activities.

## Public Review and Comment

This CD will be available for public review electronically from February 1, 2022 through February 8, 2022 on the Refuge website at: [https://www.fws.gov/refuge/Sonny\\_Bono\\_Salton\\_Sea/](https://www.fws.gov/refuge/Sonny_Bono_Salton_Sea/). Concerns expressed during the public comment period will be addressed in the final.

## Determination

### Is the use compatible?

Yes

### Stipulations Necessary to Ensure Compatibility

1. Recording activities and access on Refuge lands will be restricted (e.g., areas with threatened and endangered wildlife or sensitive habitats) to avoid impacts to sensitive wildlife or resources where disturbance could be detrimental.
2. All visitors must comply with NWRS-related regulations, including Prohibited Acts listed in 50 C.F.R § 27, and Public Entry Regulations in 50 C.F.R. § 26.
3. Permittee(s), designated representatives, and associates shall comply with terms and conditions within the SUP as provided by the Refuge Manager. The SUP will provide terms and conditions to eliminate or reduce impacts to Refuge resources.
4. Permittee(s) will contact the Refuge Manager and/or his/her designee prior to commencement of work, preferably four (4) weeks in advance to identify conflicts and sensitive areas/wildlife.
5. If a drone (UAS) is approved to land or take off from the Refuge, then the permittee shall follow all FAA regulations (Small UAS Rule; Part 107) and remain

in visual and operational control of the aircraft at all times. In addition, the permittee use of a drone must not take, disturb, harass, or chase wildlife as defined within the Endangered Species, Migratory Bird Treaty, and Airborne Hunting Acts, and the Code of Federal Regulations.

6. The Refuge Manager or designee may supervise permittee activities and can suspend, modify, or terminate any recording should unacceptable, unforeseen, or unexpected impacts or issues arise.

## **Justification**

The National Wildlife Refuge System Improvement Act of 1997 identifies interpretation, environmental education and wildlife photography as priority public uses for national wildlife refuges, along with hunting, fishing, and wildlife observation. As priority uses of the Refuge System, these uses take precedence over other potential public uses in Refuge planning and management. The Service strives to provide priority public uses when compatible with the purpose of the Refuge and the mission of the NWRS.

Allowing select commercial and educational recording activities to occur will enhance the Refuge's ability to provide interpretation to facilitate the public's understanding of the Service as well as the role of the Refuge and its biological resources. The Refuge is home to natural resources unique to the Salton Sea ecosystem; commercial and educational recording of this environment can result in increased publicity and advocacy for Service conservation and restoration programs.

After assessing the potential impacts, it was determined that commercial and educational recording within the Sonny Bono Salton Sea National Wildlife Refuge as described herein, will not materially interfere with or detract from the purposes for which the Refuge was established or the mission of the Refuge System. In the Service's opinion, allowing commercial and educational recording with associated stipulations will not conflict with the national policy to maintain the biological diversity, integrity, and environmental health of the Refuge.

## Signature of Determination

Refuge Manager Signature and Date

## Signature of Concurrence

Assistant Regional Director Signature and Date

## Mandatory Reevaluation Date

2032

## Literature Cited/References

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