

COMPATIBILITY DETERMINATION

Use: Commercial Wildlife and Landscape Filming, Photography, and Audio Recording

Refuge Name: Nomans Land Island National Wildlife Refuge (NWR; refuge)

Date Established: April 29, 1970

Establishing and Acquisition Authority(ies):

Migratory Bird Conservation Act (16 U.S.C. § 715d) Public Law 91-504, 16 USC § 1132(c)

Refuge Purpose(s):

“...for use as an inviolate sanctuary, or for any other management purpose, for migratory birds.”
(16 U.S.C. § 715d).

National Wildlife Refuge System Mission:

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.

Description of Use:

(a) What is the use? Is the use a priority public use?

The use is commercial photography, filming (including videography), and audio recording (collectively called “commercial filming” for the purposes of this compatibility determination). This use has not previously occurred on the refuge, but we have received a request for this use and it is possible that we will receive additional requests in the future. The use typically involves filming (both still and motion) natural landscapes or wildlife or recording natural sounds for commercial or educational purposes. “Commercial filming” means the film, electronic, magnetic, digital, or other recording of a moving image by a person, business, or other entity for a market audience that involves the advertisement of a product or service, the creation of a product for sale, or the use of actors, models, sets, or props. For the purposes of this definition, creation of a product for sale includes a film, video, television broadcast, or documentary of historic events, wildlife, natural events, features, subjects, or participants in a sporting or recreation event created for the purpose of generating income, such as for a documentary, television or feature film, advertisement, or similar project. “Still photography” conducted on lands managed by Department of the Interior (DOI) agencies requires a permit when it involves models or props that are not a part of the site’s natural or cultural resources or administrative facilities, or when it takes place at a location where members of the public generally are not allowed, or where additional administrative costs are likely. The land use fee for still photography would apply only to still photography that requires a permit.

At Nomans Land Island NWR, the primary focus of the production should be related to natural resources or history. Use of actors, models, sets, or props will not be authorized. Commercial filming would be allowed by special use permit (SUP) only when there is a direct benefit to the refuge or the U.S. Fish and Wildlife Service (Service). The final creation would be produced for sale or distribution as a commercial product. This use is regulated by Refuge Manual (RM) Part 8, Chapter 16 and the Code of Federal Regulations (CFR), Title 43, Subtitle A, Section 5.1.

Commercial filming is considered to be an economic use under 50 CFR. 29.1. Therefore, this use must contribute to the purposes for which the refuge was established or the mission of the National Wildlife Refuge System (Refuge System). This is not a priority public use (National Wildlife Refuge System Improvement Act of 1997 (Refuge Improvement Act); Public Law 105-57); however, it may support and enhance other priority public uses.

Commercial photography is guided by the following policies:

- 16 U.S.C. 668dd, 50 CFR 27.71. Motion or Sound Pictures The taking or filming of any motion or sound pictures on a national wildlife refuge for subsequent commercial use is prohibited except as may be authorized under the provisions of 43 CFR part 5.
- 16 U.S.C. 668dd, 50 CFR 27.97. Private Operations Soliciting business or conducting a commercial enterprise on any national wildlife refuge is prohibited except as may be authorized by special permit.
- 16 U.S.C. 668dd, 50 CFR, Subpart A, 29.1 Allowing Economic Uses on National Wildlife Refuges. We may only authorize public or private economic use of the natural resources of any national wildlife refuge, in accordance with 16 U.S.C. 715s, where we determine that the use contributes to the achievement of the national wildlife refuge purposes or the Refuge System mission.
- 8 RM 16, Audio Visual Productions 5 RM 17, Commercial & Economic Uses on National Wildlife Refuges
- 43 CFR Part 5, Making Pictures, Television Productions or Sound Tracks on Certain Areas Under the Jurisdiction of the Department of the Interior
- Public Law 106-206, Commercial Filming

(b) Where would the use be conducted?

This use could occur along the refuge shoreline or the maintained management trails on the refuge. This refuge is closed to the public due to the presence of unexploded ordnance, so access on the island is limited to areas that are subject to periodic review and cleanup action by the U.S. Navy.

(c) When would the use be conducted?

The use may occur during daylight hours during the year, unless otherwise specified in an SUP.

(d) How would the use be conducted?

Commercial filming requests will first be evaluated to determine whether an SUP should be granted. Each request must be presented with details of who, what, where, when, why, and how the commercial operation will be conducted. Requests must be submitted using the National Wildlife Refuge System Commercial Activities Special Use Application (FWS Form 3-1383-C) <http://www.fws.gov/forms/3-1383-C.pdf>. Each request will be reviewed on a case-by-case basis. If permission is given to proceed, it will include stipulations to minimize the impact on cultural or natural resources and ensure the safety of the permittee. Any access to the refuge will occur only when Service staff are present and can ensure permittees limit their access to areas that have previously been subject to unexploded ordnance review and clearance. Any approved SUP will outline the framework in which the use can be conducted and refuge staff will ensure compliance with the permit. There is a fee for issuance of commercial photography SUPs; the fee is adjusted on a case-by-case basis depending on the specific details of each permit.

(e) Why is this use being proposed?

Nomans Land Island NWR has a mystique associated with its location in the Atlantic Ocean off Martha's Vineyard in Massachusetts, its history including use as a training site for Navy pilots and a national wildlife refuge, and the fact that it is closed to the public. There is considerable interest by the public about what the island looks like. The Service can work with permittees to obtain quality footage that could be used to provide off-site interpretation. The use has the potential to support and enhance the priority public uses of wildlife photography, environmental education, and interpretation.

Availability of Resources:

In general, the refuge will normally incur no expense except administrative costs for review of applications, issuance of a SUP, and staff time to accompany permittees on the refuge. Commercial filming would need to be managed in coordination with the existing staff, which is anticipated to be sufficient for the expected permitting workload. Permittees will either travel to the refuge in conjunction with staff who will conduct regularly scheduled management activities, or will cover any travel-related costs incurred by refuge staff who accompany the permittee to the refuge. Requests for commercial filming are infrequent. There are no regularly recurring annual costs.

Anticipated Impacts of the Use:

Public uses, such as commercial photography, can produce short-term, negative, direct or indirect impacts on wildlife or habitats. However, we believe the long-term benefits from the conservation nature of the products could be important. Projects will be conducted at the appropriate time of year and conditions to minimize disturbances and incorporate other best management practices.

The majority of the impact from commercial photography will be disturbance caused to resting, feeding, or nesting migratory birds and resting seals. Access will be restricted to the rocky shoreline and mowed management trails. A double-crested cormorant colony is located at Stony Point on the refuge, American oystercatcher nests are found in a few locations along the shoreline, and piping plovers have historically nested on the refuge but are infrequently found now. It is unlikely that passerines or raptors will be impacted by commercial photographers. Seals are more likely to be impacted than birds, as they are skittish in the presence of people and occur more frequently throughout the year on the refuge.

Permittees engaged in commercial filming have a vested interest in minimizing disturbance to the wildlife they wish to film. However, photographers are known to disturb wildlife in an attempt to get closer looks or higher quality images of their subjects. Any SUPs issued by the refuge manager will clearly state the parameters of access and, if these conditions are found to be violated, the permit will be immediately voided and the permittee denied any future permits. There is a growing body of research related to the impacts of human disturbance on wildlife. These are summarized below, and highlight general impacts. Since there is only one large colony of seabirds (double-crested cormorants) on the refuge, and access for recreational purposes is not allowed, most of the disturbance summarized below is presented in acknowledgement that even occasional disturbance can have an impact. Conflicts arise when migratory birds and humans are present in the same areas (Boyle and Samson 1985). Response of wildlife to human activities includes departure from site (Owen 1973, Burger 1981, Kaiser and Fritzell 1984, Korschgen et al. 1985, Henson and Grant 1991, Kahl 1991, Klein 1993), use of sub-optimal habitat (Erwin 1980, Williams and Forbes 1980), altered behavior (Burger 1981, Korschgen et al. 1985, Morton et al. 1989, Ward and Stehn 1989, Havera et al. 1992, Klein 1993), and increase in energy expenditure (Morton et al. 1989, Bélanger and Bédard 1990).

Numerous studies have documented that migratory birds are disturbed by human activity on beaches. Erwin (1989) documented disturbance of common terns and skimmers and recommended that human activity be restricted to a distance of 100 meters around nesting sites. In studying waterbird response to human disturbance, Klein (1993) found that, as intensity of disturbance increased, avoidance response by the birds increased. In studying the effects of recreational use of shorelines on nesting birds, Robertson et al. (1980) discovered that disturbance negatively impacted species composition. Piping plovers are also impacted negatively by human activity. Pedestrians on beaches may crush eggs (Jenkins and Burger 1987, Hill 1988, Shaffer and Laporte 1992, Cape Cod National Seashore 1993, Collazo et al. 1994). Other studies have shown that if pedestrians cause incubating plovers to leave their nest, the eggs can overheat (Bergstrom 1991) or can cool to the point of embryo death (Welty 1982). Pedestrians have been found to displace unfledged chicks (Strauss 1990, Burger 1991, Hoopes 1993, Loegering 1992, Goldin 1993).

Several studies have examined the effects of recreation on birds using shallow water habitats adjacent to trails and roads through wildlife refuges and coastal habitats in the eastern United States (Burger 1981, 1986, Klein 1993, Burger et al. 1995, Klein et al. 1995, Rodgers and Smith 1995, 1997, Burger and Gochfeld 1998). Overall, the existing research clearly demonstrates that disturbance from recreation activities always has at least temporary effects on the behavior and movement of birds within a habitat or localized area (Burger 1981, 1986, Klein 1993, Burger et al. 1995, Klein et al. 1995, Rodgers and Smith 1997, Burger and Gochfeld 1998). The findings reported in these studies are summarized as follows in terms of visitor activity and avian response to disturbance.

Presence: Birds avoided places where people were present and when visitor activity was high (Burger 1981, Klein et al. 1995, Burger and Gochfeld 1998).

Distance: Disturbance increased with decreased distance between visitors and birds (Burger 1986), though exact measurements were not reported.

Approach Angle: Visitors directly approaching birds on foot caused more disturbance than visitors driving by in vehicles, stopping vehicles near birds, and stopping vehicles and getting out without approaching birds (Klein 1993). Direct approaches may also cause greater disturbance than tangential approaches to birds (Burger and Gochfeld 1981, Burger et al. 1995, Knight and Cole 1995, Rodgers and Smith 1995, 1997).

Type and Speed of Activity: Joggers and landscapers caused birds to flush more than fishermen, clammers, sunbathers, and some pedestrians, possibly because the former groups move quickly (joggers) or create more noise (landscapers). The latter groups tend to move more slowly or stay in one place for longer periods, and birds likely perceive these activities as less threatening (Burger 1981, 1986, Burger et al. 1995, Knight and Cole 1995). Alternatively, birds may tolerate passing by with unabated speed, but may flush if the activity stops or slows (Burger et al. 1995).

Noise: Noise caused by visitors resulted in increased levels of disturbance (Burger 1986, Klein 1993, Burger and Gochfeld 1998), though noise was not correlated with visitor group size (Burger and Gochfeld 1998).

The proposed use has the potential of interrupting the nesting and loafing coastal birds, but encounters between pedestrians and migratory birds will be limited and temporary. Commercial

filming also has the potential to disturb loafing seals. Nomans Land Island beaches are frequently used by gray and harbor seals. A 150-foot buffer around all seals is required by the National Oceanic Atmospheric Administration to ensure compliance with the Marine Mammals Protection Act.

This activity does not alter the natural, scenic condition of the land and will not occur at a scale large enough to diminish the environment for native plants and animals. Since the refuge will be utilizing an SUP process for all commercial filming and photography, the manager may revoke or deny any permits or applications if there is any question on disturbance to wildlife or if a permittee violates permit stipulations.

Public Review and Comment:

A draft of this compatibility determination will undergo a 14-day public comment period. It will be posted on the Nomans Land Island NWR website and a press release will be issued notifying the public of its availability for review.

Determination (check one below):

Use is not compatible.

Use is compatible with the following stipulations.

Stipulations Necessary to Ensure Compatibility:

Only commercial filming in support of natural and cultural resource conservation, refuge purposes, and the Refuge System Mission will be allowed. Requests for filming activities will be evaluated for potential impacts on agency resources, staffing, and operations. Stipulations listed as “Special Conditions” in the SUP will be included in the issuance of a permit. All permit holders must follow refuge regulations.

Applicants who wish to undertake commercial filming must submit a Commercial Permit Special Use Permit application (<https://www.fws.gov/forms/3-1383-C.pdf>) to the refuge manager. A fee of \$50 may be charged and paid before the SUP will be issued. Applicants may be required to post a bond and must provide the refuge manager with a copy of their current liability insurance policy. The United States of America must be named as an additional insured on the policy for the duration of the production.

The refuge is closed to the public due to the presence of unexploded ordnance on the island. Refuge staff must accompany the photographer and/or photography crew at all times while on the refuge. The permittee will be required to compensate the refuge for travel and labor costs incurred as a result of the filming activity on the refuge.

All commercial filming will avoid sensitive areas prone to disturbance (e.g., sensitive vegetation areas) or degradation (e.g., soil erosion), and will be designed to minimize impacts to nesting birds or other breeding, feeding, or resting wildlife. To ensure that this use remains compatible, meaning it does not materially interfere with or detract from the migratory bird purpose of the refuge, it may be necessary to restrict access through the implementation of seasonal and/or area closures. The location and size of these closures are not fixed and will vary over time.

No commercial filming activity should result in long-term negative alterations to species' behavior (e.g., result in wildlife leaving previously occupied areas for a long term, modifying their habitat use within their range, or causing nest or young abandonment). No project should degrade wildlife habitat, including vegetation, soils, and water. Nests must not be harmed. No commercial filming activities should result in soil compaction or erosion, degrade water quality, remove or destroy vegetation, involve off-road vehicle use, or result in collection and removal of animals or whole native plants.

All work with endangered species will require the proper permits from Federal or State government. Any commercial filming activities involving federally listed species may require Section 7 consultation under the Endangered Species Act. Permittee is responsible for acquiring and/or renewing any other necessary State and other Federal permits prior to beginning or continuing their project.

All food containers, bottles, and other waste and refuse must be taken out. Littering, dumping, and abandoning property are prohibited by Federal regulation at 50 CFR 27.93 and 50 CFR 27.94.

Permittee will provide the Service with at least one free copy of all commercial product(s) generated on the refuge. This product(s) will be available for use by the Service.

Proper credit should be given to the refuge and the Service for all commercial filming, including commercial recordings of images and sounds collected on the refuge.

The refuge manager or designee can suspend the project, modify conditions, and/or terminate the project that is already permitted and in progress should unacceptable, unforeseen, or unexpected impacts or issues arise or be noted.

The refuge shall also collect any costs incurred as a result of commercial photography activities, including but not limited to administrative, personnel costs, damage to facilities and resources, etc. All costs recovered shall be in addition to any use fee. Public Law 106-206 states that fees for commercial photography must be based on several criteria, including:

- The number of days the commercial photography or still photography takes place on Federal land.
- The size of the film crew present on Federal land.
- The amount and type of equipment present on Federal land.

The permit is not transferable.

Justification:

Commercial filming is considered to be an economic use under 50 CFR. 29.1. Therefore, this use must contribute to the purposes for which the refuge was established or the mission of the Refuge System. Commercial filming can support the mission of the Refuge System by promoting an understanding and appreciation of natural and cultural resources and their management within a national system of refuges. Commercial photography will reach many segments of the public to expand support for the refuge system, particularly as the refuge is closed to the public. Films and photography can be used to provide a view of the refuge that people cannot obtain independently.

We do not expect that commercial filming and still photography access will degrade the natural character of the area, materially interfere with or detract from the mission of the Refuge System, nor diminish the purpose for which the refuge was established. The volume of requests is anticipated to be low. It will not pose significant adverse effects on refuge resources or cause an undue administrative burden, as lack of staff resources will be adequate justification to deny a permit request. These uses would contribute to achieving refuge purposes and the Refuge System mission because commercial films, photographs, or recordings can be used to provide interpretative materials that can be viewed by the public.

This program as described is determined to be compatible. Any potential negative impacts of commercial wildlife and nature photography activities on refuge resources will be minimized by the restrictions included in the conditions of the SUP. In addition, the activities associated with commercial filming will be regulated and monitored by refuge staff.

The Service permits commercial filming where it would further outreach, education, or public understanding of the natural environment, refuge resources and management, wilderness, or the Refuge System and Service's missions. No approvals for a permit would occur until the refuge manager can insure those benefits would result.

As such, all approved commercial wildlife and landscape filming, photography, and audio recording will contribute to the goals of the refuge and Refuge System, and will not materially interfere with or detract from the mission of the Refuge System or the purposes for which the refuge was established.

Signature:

Refuge Manager: _____
(Signature) (Date)

Concurrence:

Regional Chief: _____
(Signature) (Date)

Mandatory 10-Year Re-Evaluation Date: _____

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