

MARINE MAMMAL COMMISSION
4340 EAST-WEST HIGHWAY, ROOM 905
BETHESDA, MD 20814

1 December 2006

Mr. Horst Greczmiel
Associate Director for NEPA Oversight
Council on Environmental Quality
722 Jackson Place, NW
Washington, DC 20503

Dear Mr. Greczmiel:

On 19 September 2006 the Council on Environmental Quality (CEQ) published a *Federal Register* notice seeking comments on proposed guidelines for establishing, revising, and using categorical exclusions under the National Environmental Policy Act (NEPA). The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed that notice and offers the following comments.

The Commission believes that the proposed guidelines are clear and straightforward. They do a good job of explaining what categorical exclusions are, why they are useful, and how an agency should go about establishing, substantiating, and implementing categorical exclusions. However, the proposed guidelines are largely procedural. They provide little substantive guidance to assist agencies in determining when a category of actions will not individually or collectively have significant environmental effects beyond that already set forth in CEQ's regulatory definition of the term "categorical exclusion." Perhaps the situations where categorical exclusions may be appropriate are too varied across agencies or the analyses required to support categorical exclusion determinations are too fact-specific to be reduced to generic guidelines. Nevertheless, to the extent possible, CEQ should consider expanding the proposed guidelines to provide additional substantive criteria for determining when categorical exclusions are appropriate.

The Commission notes that there may be some situations in which the basis for a categorical exclusion stems from the provisions and requirements of the statute(s) under which agency action is being taken. One such case is the issuance of incidental take authorizations under section 101(a)(5) of the Marine Mammal Protection Act (MMPA). Before the National Marine Fisheries Service or the Fish and Wildlife Service can issue such an authorization, it must determine that any authorized taking will have a negligible impact on the affected marine mammal species and stocks and will not have an unmitigable adverse impact on the availability of marine mammals for authorized subsistence uses. In addition, the authorizing agency is to specify permissible methods of taking so as to effect the "least practicable impact" on the affected species and stocks and their habitat. By complying with these underlying statutory mandates, the authorizing agency ensures that issuance of an incidental take authorization will not have significant effects on at least some elements of the human environment—i.e., marine mammals, marine mammal habitat, and subsistence hunters. Although it is still possible that other components of the ecosystem could be adversely affected by the issuance of a taking authorization (e.g., fish, seabirds, invertebrates, etc.), the need for at least some of the analyses that would be conducted under NEPA is obviated by compliance with the provisions of the MMPA. Thus, a categorical exclusion, or at least a partial categorical exclusion with

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respect to those components of the environment subject to the MMPA analyses, seems appropriate. Possible effects on other components of the environment could be identified as “extraordinary circumstances” linked to the categorical exclusion that warrant preparation of a NEPA document. Presumably, there are other statutes where compliance with the substantive requirements reduces potential environmental effects to insignificant levels. This should be reflected in the guidelines for categorical exclusions.

Among the sources of information for substantiating categorical exclusions identified in the proposed guidelines are professional staff and expert scientific opinions. The Marine Mammal Commission and its Committee of Scientific Advisors have considerable experience and expertise with respect to marine mammals, marine ecology, and the possible effects of federal actions on marine resources. As such, the Commission may be a good source of information and expert opinion on possible categorical exclusions pertaining to such matters. We invite other agencies to consult with us when considering categorical exclusions within our areas of expertise.

Please let me know if you have any questions concerning these comments.

Sincerely,

A handwritten signature in black ink that reads "Timothy J. Ragen". The signature is written in a cursive, slightly slanted style.

Timothy J. Ragen, Ph.D.
Executive Director