MARINE MAMMAL COMMISSION

9 April 2010

Mr. Ted Boling
Senior Counsel
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, D.C. 20503

Dear Mr. Boling:

The staff of the Marine Mammal Commission has reviewed the proposed guidance published by the Council on Environmental Quality on 18 February 2010 concerning the establishment and application of categorical exclusions under the National Environmental Policy Act (NEPA). In general, the Commission supports the guidance and procedures set forth in the Chair's memorandum. Categorical exclusions, when used properly, eliminate the need to expend agency resources on evaluating and documenting the environmental impact of classes of federal actions that are not expected to have significant effects on the human environment, thereby freeing up those resources to focus on actions that will or may have significant environmental impacts. As we have discussed with you in the past, the Marine Mammal Commission believes that more efficient use of agency resources can similarly be achieved by doing a better job of coordinating and integrating the analyses and authorizations required under various resource statutes (e.g., the National Environmental Policy Act, the Endangered Species Act, and the Marine Mammal Protection Act) so that similar, somewhat redundant analyses are not conducted in isolation under each of the laws. Although the issue of coordinating NEPA analyses with those required under other environmental laws is beyond the scope of the guidance on categorical exclusions, we encourage the Council on Environmental Quality to work with the Commission and other resource agencies on this broader issue as part of its efforts to modernize and reinvigorate NEPA.

One area that we do not think is well captured in the proposed guidance on categorical exclusions is when a federal action (or category of federal actions) will not have a significant environmental impact by virtue of the application of the regulatory scheme established under another statute. For instance, the taking of marine mammals incidental to activities other than commercial fishing is authorized under section 101(a)(5) of the Marine Mammal Protection Act (16 U.S.C. § 1371(a)(5)), but only if the National Marine Fisheries Service or the Fish and Wildlife Service (depending on the species involved) determines that the taking will have a negligible impact on the affected species or stocks. Thus, by satisfying the underlying statutory requirements, the responsible agency has determined that issuance of an incidental take authorization will not have a significant impact on the affected marine mammal populations. Further, the Act directs the Service to prescribe in any such authorization the means of affecting the least practicable impact on the affected species and stocks and their habitat and on the availability of marine mammals for subsistence uses by Alaska Natives. In essence, these requirements direct the authorizing agency to consider alternatives to the proposed action just as it would need to in an environmental document prepared under NEPA. Although parallels can be drawn with the doctrine of functional equivalency—that is, the statutory scheme requires analyses that are so similar to those required under NEPA that preparation of a separate environmental assessment or environmental impact

statement should not be required—in this instance, the statutory scheme goes further. It actually requires the agency to determine that the taking would not have a significant impact. We do not know whether the Marine Mammal Protection Act is unique in this regard, but to the extent that the application of other laws would ensure that authorized activities will not have significant environmental effects, they also should qualify for a categorical exclusion.

The Commission recognizes that the determinations under the Marine Mammal Protection Act are limited to considering the impact of incidental taking on marine mammal species and stocks and on subsistence hunters. It is possible that issuing a taking authorization could have a significant impact on other components of the human environment. In such cases, the preparation of an environmental assessment or environmental impact statement might still be required. We believe that there are three possible situations that need to be considered. In the first case, resources other than marine mammals would not be affected by issuance of an incidental take authorization. In such cases, a categorical exclusion would be appropriate. The second case involves major federal actions. In those instances, the requirements of the National Environmental Policy Act already would have been triggered. Presumably, the issuance of an incidental take authorization would have no impact beyond those considered in the action agency's NEPA documents, except for those on marine mammals, which would be negligible. Here, too, a categorical exclusion on issuance of the incidental take authorization would be appropriate. Third are private actions that, except for the requirement to obtain a Marine Mammal Protection Act authorization, would not be considered federal actions and that otherwise would not be subject to the requirements of the National Environmental Policy Act. If one takes the view that, but for an incidental take authorization, the underlying activities could not proceed, then the full scope of environmental impacts would need to be assessed as part of the NEPA review of issuing that authorization. In such cases, a full-blown categorical exclusion would not be warranted. However, as discussed below, a limited exclusion might be appropriate.

The proposed guidance on categorical exclusions indicates that they can be limited based on physical, temporal, or environmental factors. In the case of an incidental take authorization under the Marine Mammal Protection Act, might it also be possible to construct a limited categorical exclusion that applies only with respect to the impact on marine mammals, but requires an assessment of the impact on other resources to the extent that they are not considered in another NEPA document? Admittedly, it is not clear whether such partitioning would be consistent with the regulatory definition of the term "categorical exclusion" set forth at 40 C.F.R. § 1508.4, which could be read to require that an exclusion be issued on an "all or nothing" basis for a particular category of actions. We defer to the Council on Environmental Quality to resolve this issue or to consider whether a regulatory change to accommodate such partitioning might be appropriate. However, to the extent that you can determine a way to have the agency responsible for issuing incidental take authorizations rely on its determinations under the Marine Mammal Protection Act without having to do parallel or redundant analyses under the National Environmental Policy Act, we think that this would be in keeping with the purposes and intent of the Council's guidance on categorical exclusions. We appreciate that resolving this issue may be somewhat complicated and of interest to multiple agencies. As such, the Commission staff would be happy to discuss this matter further with you or to meet with representatives from the involved agencies.

The Commission also recognizes the possibility that the issuance of several incidental take authorizations, although negligible when considered individually, could cumulatively have significant impacts on marine mammal populations. However, because negligible impact determinations are supposed to be made taking into account baseline conditions, they should already have taken into account the impact of other activities that may be affecting those marine mammal species and stocks. To the extent that this is not the case, the Council on Environmental Quality's guidance on cumulative effects would be applicable.

Please let me know if you have questions concerning these comments or would like to discuss them further.

Sincerely,

Timothy J. Ragen
Executive Director

cc: Ms. Lois J. Schiffer
Mr. Michael Young