

**NATIONAL MARINE FISHERIES SERVICE
ENDANGERED SPECIES ACT SECTION 7
LETTER OF CONCURRENCE**

Title: Letter of Concurrence on the Issuance of Permit No. 18016-01 to Tamara McGuire for Close Vessel Approaches and Photography of Beluga Whales (Cook Inlet Distinct Population Segment)

Consultation Conducted By: Endangered Species Act Interagency Cooperation Division, Office of Protected Resources, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce

Action Agency: Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service

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Ms. Jolie Harrison
Chief, Permits and Conservation Division
Office of Protected Resources
National Marine Fisheries Service
1315 East West Highway
Silver Spring, Maryland 20910

Refer to NMFS No: FPR-2017-9192

MAY 10 2017

RE: Endangered Species Act Section 7(a)(2) concurrence letter for a major amendment to Permit No. 18016 to Tamara McGuire for close vessel approaches and photography of beluga whales (Cook Inlet Distinct Population Segment)

Dear Ms. Harrison:

On March 15, 2017, the National Marine Fisheries Service (NMFS), Office of Protected Resources, Endangered Species Act Interagency Cooperation Division received your request for written concurrence that a major amendment to Permit No. 18016 issued to Tamara McGuire, I GL Alaska Research Associates, Inc., pursuant to the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 et seq.) to increase the number of takes of beluga whales (*Delphinapterus leucas*, Cook Inlet Distinct Population Segment (DPS)) associated with close vessel approaches and photography is not likely to adversely affect ESA-listed species or designated critical habitat. This response to your request was prepared by NMFS pursuant to section 7(a)(2) of the ESA, implementing regulations at (50 CFR Part 402), and agency guidance for preparation of letters of concurrence.

This letter underwent pre-dissemination review using standards for utility, integrity, and objectivity in compliance with agency guidelines issued under section 515 of the Treasury and General Government Appropriations Act of 2001 (Data Quality Act; 44 U.S.C. 3504(d)(1) and 3516). The concurrence letter will be made available through NMFS' public consultation tracking system, refer to consultation number FPR-2017-9192. A complete record of this consultation is on file at the NMFS Office of Protected Resources, ESA Interagency Cooperation Division.

Below we describe the timeline of our informal consultation with the Permits and Conservation Division (hereafter the Permits Division), the proposed action, the ESA-listed species that may be affected by the proposed action including the Permit Division's determinations, and the minimization measures included in the proposed action to avoid adverse effects to these species. We then consider whether the proposed action is likely to adversely affect ESA-listed species or designated critical habitat.

Consultation History

On May 17, 2016, the Permits Division notified us that they received a request for a major amendment to Permit No. 18016 (resulting in Permit No. 18016-01) to increase the number of takes of Cook Inlet DPS beluga whales associated with close vessel approaches and photography. At this time, the Permits Division provided us with the applicant's written amendment request and a copy of the original permit (Permit No. 18016). In a follow up meeting with the Permits Division on June 6, 2016, we discussed the possibility that the proposed action was not likely to adversely affect ESA-listed species, in which case the Permits Division would request written concurrence from us on this determination. In subsequent meetings with the Permits Division on December 5, 2016, and January 5, 2017, we further discussed how the proposed research activities may constitute take under the MMPA, but not under the ESA.

Under the ESA take is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct." Harm under the ESA is defined by regulation (50 CFR §222.102) as "an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering." Harass under the ESA is defined by NMFS guidance as to "create the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering" (NMFS 2016a).

Under the MMPA take is defined as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal" (16 U.S.C. 1361 et seq.) and further defined by regulation (50 C.F.R. §216.3) as "to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill any marine mammal. This includes, without limitation, any of the following:

- the collection of dead animals, or parts thereof
- the restraint or detention of a marine mammal, no matter how temporary
- tagging a marine mammal
- the negligent or intentional operation of an aircraft or vessel
- the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal
- feeding or attempting to feed a marine mammal in the wild"

For purposes of this action, harassment is defined under the MMPA as any act of pursuit, torment, or annoyance which:

- has the potential to injure a marine mammal or marine mammal stock in the wild (Level A Harassment); or
- has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B Harassment).

Given the different definitions of take under the MMPA and ESA, there are circumstances in which an act may be considered take under one statute but not the other. Based on our evaluation of the applicant's amendment request (NMFS 2016b), the original permit application (NMFS 2014a), our previous biological opinion (opinion) on the original Permit No. 18016 (NMFS

2014b), and discussions with the Permits Division in the meetings on December 5, 2016 and January 5, 2017, we determined that the proposed action was such a case in which take was likely to occur under the MMPA but not the ESA.

This determination differs from our, and the Permits Division's, previous determination regarding the proposed action. The issuance of Permit No. 18016 previously underwent formal consultation (NMFS 2014b). At the time the original Permit No. 18016 was proposed (2014), we and the Permits Division conservatively considered that the effects of the proposed action were likely to result in take under both the ESA and MMPA. As a result, the proposed action was considered likely to affect Cook Inlet DPS beluga whales and we conducted formal consultation resulting in a biological opinion (NMFS 2014b). In our effects analysis in this opinion, we determined that Cook Inlet beluga whales were likely to exhibit a range of responses to the proposed close vessel approaches, from no response to sub-lethal, short-term behavioral responses (NMFS 2014b). After re-evaluating these effects, on January 5, 2017, we recommended the Permits Division consider the possibility that there would not be take under the ESA and thus, make a not likely to adversely affect determination and draft a letter of concurrence request, which we would review.

On January 30, 2017, the Permits Division sent us a draft memorandum requesting concurrence on their determination that the issuance Permit No. 18016-01 was not likely to adversely affect ESA-listed species or designated critical habitat. On February 6, 2017, we provided our review of the memorandum, and requested that the Permits Division conduct a more extensive effects analysis similar to the one we previously conducted in our opinion on the issuance of the original Permit No. 10816 (NMFS 2014b). On March 15, 2017, the Permits Division sent us a memorandum requesting concurrence on their determination that the issuance of Permit No. 18016-01 may affect, but was not likely to adversely affect ESA-listed species or designated critical habitat. At this time, they also provided us with a draft of Permit No. 18016-01. On March 23, 2017, we completed our initial review of the request for concurrence and informed the Permits Division the request was sufficient to initiate informal consultation.

In further review of the draft Permit No. 18016-01, we noted that even though the Permits Division did not propose to issue take in the form of harassment under the ESA (only the MMPA), they did propose to authorize take under the ESA in the form of pursuit. However, based on the action as proposed, we determined that take of any kind under the ESA was not likely to occur, and as such, on April 13, 2017, we suggested the Permits Division reconsider their determination. On April 20, 2017, the Permits Division notified us and NOAA General Counsel that they concurred with our assessment that the proposed activities did not constitute take, and would not authorize take under the ESA in this permit, as none was expected to occur. At that time, they informed us that they would provide an updated draft permit that would only authorize take under the MMPA. As a result, we informed the Permits Division that initiation of formal consultation was not required, and we would work toward completing informal consultation.

Proposed Action and Action Area

The proposed action for this consultation is the issuance of a scientific research permit (Permit No. 18016-01), which amends and replaces Permit No. 18016, to Dr. McGuire to authorize take of beluga whales (Cook Inlet DPS) in the form of harassment under the MMPA. Under the

MMPA, take of all age classes and both sexes would be authorized. No take of beluga whales (Cook Inlet DPS) under the ESA would be authorized since, as discussed above, the proposed research would not rise to the level of take under the ESA.

The proposed research involves close vessel approaches and photography of beluga whales within Cook Inlet, Alaska from late-spring to early-autumn. We have identified no interrelated or interdependent activities that would result from this action. The proposed issuance date for the permit is May 15, 2017, and the permit would expire on June 1, 2019. Researchers would be authorized to conduct up to ten vessel surveys within Cook Inlet in which they would attempt to approach up to the entire population of Cook Inlet DPS belugas (current best estimate: 340 individuals, Sheldon et al. 2015), resulting in an estimated 3,400 takes of Cook Inlet DPS beluga whales annually. During vessel surveys, researchers would navigate small vessels (typically 4.9 meter rigid-hull inflatable boats with four-stroke, 50 horsepower engines) throughout pre-determined areas within Cook Inlet in search of beluga whales. When a whale or group of whales is spotted, the vessel would approach the whale(s) at slow speeds (less than four knots) to within 50 to 700 meters, and follow the whale(s) slowly on a parallel course and speed that matches the whale(s) swimming speed in order to obtain collect observational data (e.g., counts of whales, behavior) and photographs. Whales would never be approached at full-throttle or chased. On occasion, whales are expected to approach the vessel, and if this occurs, researchers would place the engine in neutral and turn it off until the whales have moved further away. Once researchers have collected the desired data, or if it is determined that data collection is not possible given animal behavior or sea conditions, the vessel would leave the whale(s) and continue searching the area for more individuals. Individual whales and/or groups would only be intentionally approached once per day unless a group was initially difficult to photograph, abandoned by the survey vessel after less than five minutes, and encountered again later in the day. Based on encounter times from previous research seasons (2007 and 2008), it is anticipated that researchers would remain close to whales for approximately 30 to 60 minutes.

Minimization Measures

In the original application for Permit No. 18016, Dr. McGuire specifies the following measures designed to avoid adversely affecting ESA-listed species.

“The research activity consists of vessel-based photo-identification surveys for beluga whales. Every effort is made to avoid disturbing the whales while approaching closely enough (but greater than 50 meters) to allow identification photographs to be taken. Whale groups are approached at no-wake speed (less than four knots) by the survey vessel once per encounter, then followed slowly, parallel to the group, matching the speed and heading of the group in order to obtain images of lateral sides of all individual whales while minimizing disruption to the group. If a whale approaches within two meters of the boat, the engine is put into neutral and/or turned off (smaller gray beluga whales frequently approach the stationary boat and blow bubble under it). At no time are whales approached at full throttle, and whales are never chased. The survey boat will leave a whale group when it appears that all individuals have been photographed, or if the group appears to be avoiding the survey boat, and/or if the group is difficult to photograph. If groups appear to be sensitive to approach by the survey vessel, exhibiting behaviors such as tail slaps or "snorkeling behavior" (neither surfacing in the typical arch and roll nor diving, but remaining just

at or below the surface to breath), the survey vessel will note the behavior, leave the group, and look for other groups to photograph. Large beluga groups are often spread out along long sections of mudflats, and when this occurs the survey vessel concentrates on photographing individual whales as quickly as possible and then leaving them to photograph other whales in the group, thus limiting time spend with any one whale or sub-group of the larger group. Although photographing cow/calf pairs is a research priority, the survey vessel will not approach within 50 meters of cow/calf pairs. The survey vessel will never intentionally come between a cow/calf pair; if this happens accidentally, the survey vessel will slowly move away from the cow/calf pair. The survey vessel will not intentionally split whale groups. If mating or calving is observed, the behavior will be photographed quickly (beluga mating and calving have never been photographed in Cook Inlet), and the survey vessel will move away to a distance greater than 100 meters, then turn off the motor. The survey vessel takes care to avoid approaching groups in shallow areas on a falling tide, in order to avoid the risk of stranding to the whales and to the survey vessel.”

In addition, the Permits Division proposes to include the following terms and conditions designed to avoid adverse effects to ESA-listed species and designated critical habitat (based on draft permit provided on April 24, 2017):

1. No individual animal may be approached more than three times in one day.
2. Researchers must immediately stop permitted activities and the Permit Holder must contact the Chief, NMFS Permits and Conservation Division for written permission to resume:
 - a. If serious injury or mortality of protected species occurs. See Condition E.2 for reporting requirements.
 - b. If authorized take is exceeded, including accidental takes of protected species not listed in this permit. See Condition E.2 for reporting requirements.
3. To minimize disturbance of the subject animals the Permit Holder must exercise caution when approaching animals and must retreat from animals if behaviors indicate the approach may be interfering with reproduction, feeding, or other vital functions.
4. Where females with calves are authorized to be taken, Researchers:
 - a. Must immediately terminate efforts if there is any evidence that the activity may be interfering with pair-bonding or other vital functions;
 - b. Must not position the research vessel between the mother and calf;
 - c. Must approach mothers and calves gradually to minimize or avoid any startle response; and
 - d. Must not approach any mother or calf while the calf is actively nursing.
5. Researchers must cease approaching and/or following animals if they exhibit avoidance and/or evasive behaviors.
6. Researchers:
 - a. Must not approach within 92 meters (100 yards) of a Steller sea lion in the water or hauled out on land; and
 - b. Must maintain a vessel distance of at least three nautical miles (5.5 kilometers) of a Steller sea lion rookery site listed in 50 CFR 223.202.
7. Individuals conducting permitted activities must possess qualifications commensurate with their roles and responsibilities.

Affected ESA-listed Species

The species that may be affected by the proposed action are listed below in Table 2, along with links to the Federal Register (FR) notices for their ESA-listings and Recovery Plans, and the Permits Division determination regarding the effects of the proposed action to each species. These are the same species that were considered in our previous opinion on the issuance of Permit No. 18016 (NMFS 2014b). Beluga whales (Cook Inlet DPS) are the target species for this research. The remaining species (Steller sea lions (Western DPS), leatherback turtles, and various salmonid DPSs) may be present within the action area (i.e., Cook Inlet) but no interaction with these species would be authorized. In addition, designated critical habitat for Cook Inlet beluga whales occurs within the action area and may be affected by the issuance of Permit No. 18016-01.

Table 1: Endangered Species Act listed species that may be affected by the proposed action. E – Endangered, T – Threatened, NLAA – Not likely to adversely affect.

Species	ESA Status	Critical Habitat	Recovery Plan	Permits Division Determination
Beluga Whale (<i>Delphinapterus leucas</i>) – Cook Inlet DPS	E – 73 FR 62919	76 FR 20179	82 FR 1325	NLAA for species & designated critical habitat
Steller Sea Lion, (<i>Eumetopias jubatus</i>) – Western DPS	E – 62 FR 24345	58 FR 45269	3/2008	NLAA
Leatherback Turtle (<i>Dermochelys coriacea</i>)	E – 35 FR 8491	44 FR 17710 & 77 FR 4170	63 FR 28359	NLAA
Steelhead Trout, (<i>Oncorhynchus mykiss</i>) – Southern California DPS	E – 71 FR 834	70 FR 52488	77 FR 1669	NLAA
Steelhead Trout, (<i>Oncorhynchus mykiss</i>) – South-Central California Coast DPS	T – 71 FR 834	70 FR 52488	78 FR 77430	NLAA
Steelhead Trout, (<i>Oncorhynchus mykiss</i>) – Central California Coast DPS	T – 71 FR 834	70 FR 52488	81 FR 70666	NLAA
Steelhead Trout, (<i>Oncorhynchus mykiss</i>) – California Central Valley DPS	T – 71 FR 834	70 FR 52488	79 FR 42504	NLAA
Steelhead Trout, (<i>Oncorhynchus mykiss</i>) – Northern California DPS	T – 71 FR 834	70 FR 52488	81 FR 70666	NLAA
Steelhead Trout, (<i>Oncorhynchus mykiss</i>) – Lower Columbia River DPS	T – 71 FR 834	70 FR 52630	78 FR 41911	NLAA
Steelhead Trout, (<i>Oncorhynchus mykiss</i>) – Upper Wilamette River DPS	T – 71 FR 834	70 FR 52630	76 FR 52317	NLAA
Steelhead Trout, (<i>Oncorhynchus mykiss</i>) – Middle Columbia River DPS	T – 71 FR 834	70 FR 52630	74 FR 50165	NLAA
Steelhead Trout, (<i>Oncorhynchus mykiss</i>) – Upper Columbia River DPS	T – 71 FR 834	70 FR 52630	72 FR 57303	NLAA
Steelhead Trout, (<i>Oncorhynchus mykiss</i>) – Snake River Basin DPS	T – 71 FR 834	70 FR 52630	Draft Proposed Recovery Plan (2016)	NLAA
Steelhead Trout, (<i>Oncorhynchus mykiss</i>) – Puget Sound DPS	T – 72 FR 26722	81 FR 9251	72 FR 2493	NLAA
Chinook Salmon, (<i>Oncorhynchus tshawytscha</i>) – Sacramento River Winter-Run ESU	E – 70 FR 37160	58 FR 33212	79 FR 42504	NLAA
Chinook Salmon, (<i>Oncorhynchus tshawytscha</i>) – Central Valley Spring-Run ESU	T – 70 FR 37160	70 FR 52488	79 FR 42504	NLAA
Chinook Salmon, (<i>Oncorhynchus tshawytscha</i>) – California Coastal ESU	T – 70 FR 37160	70 FR 52488	81 FR 70666	NLAA

Species	ESA Status	Critical Habitat	Recovery Plan	Permits Division Determination
Chinook Salmon, (<i>Oncorhynchus tshawytscha</i>) – Upper Willamette River ESU	T – 70 FR 37160	70 FR 52630	76 FR 52317	NLAA
Chinook Salmon, (<i>Oncorhynchus tshawytscha</i>) – Lower Columbia River ESU	T – 70 FR 37160	70 FR 52630	78 FR 41911	NLAA
Chinook Salmon, (<i>Oncorhynchus tshawytscha</i>) – Upper Columbia River Spring-Run ESU	E – 70 FR 37160	70 FR 52630	72 FR 57303	NLAA
Chinook Salmon, (<i>Oncorhynchus tshawytscha</i>) – Puget Sound ESU	T – 70 FR 37160	70 FR 52630	72 FR 2493	NLAA
Chinook Salmon, (<i>Oncorhynchus tshawytscha</i>) – Snake River Fall-Run ESU	T – 70 FR 37160	58 FR 68543	Draft Recovery Plan (9/2015)	NLAA
Chinook Salmon, (<i>Oncorhynchus tshawytscha</i>) – Snake River Spring/Summer Run ESU	T – 70 FR 37160	64 FR 57399	Draft Proposed Recovery Plan (2016)	NLAA
Coho Salmon, (<i>Oncorhynchus kisutch</i>) – Central California Coast ESU	E – 70 FR 37160	64 FR 24049	77 FR 54565	NLAA
Coho Salmon, (<i>Oncorhynchus kisutch</i>) – Lower Columbia River ESU	T – 70 FR 37160	81 FR 9251	78 FR 41911	NLAA
Coho Salmon, (<i>Oncorhynchus kisutch</i>) – Southern Oregon & Northern California Coasts ESU	T – 70 FR 37160	64 FR 24049	79 FR 58750	NLAA
Coho Salmon, (<i>Oncorhynchus kisutch</i>) – Oregon Coast ESU	T – 73 FR 7816	73 FR 7816	81 FR 90780	NLAA

Effects of the Action

Under the ESA, “effects of the action” means the direct and indirect effects of an action on the ESA-listed species or designated critical habitat, together with the effects of other activities that are interrelated or interdependent with that action (50 CFR §402.02). The applicable standard to find that a proposed action is not likely to adversely affect ESA-listed species or designated critical habitat is that all of the effects of the action are expected to be discountable, insignificant, or completely beneficial. Beneficial effects are contemporaneous positive effects without any adverse effects to the species or critical habitat. Insignificant effects relate to the size of the impact and should never reach the scale where take (as defined by the ESA) occurs.

Discountable effects are those extremely unlikely to occur.

The proposed research would occur entirely within designated critical habitat for Cook Inlet beluga whales. This habitat contains the following physical and biological features essential to the conservation of Cook Inlet belugas:

- 1) Intertidal and subtidal waters of Cook Inlet with depths less than 9.14 feet and within eight kilometers of high and medium flow anadromous fish streams.
- 2) Primary prey: Pacific salmon (Chinook, sockeye, chum, and coho), Pacific eulachon, Pacific cod, walleye pollock, saffron cod, and yellowfin sole.
- 3) Waters free of toxins or other agents of a type and amount harmful to Cook Inlet beluga whales.
- 4) Unrestricted passage within or between the critical habitat areas.
- 5) Waters with in-water noise below levels resulting in the abandonment of critical habitat areas by Cook Inlet beluga whales.

As detailed in our previous opinion for Permit No. 18016 (NMFS 2014b), the proposed research would create minor and temporary noise and water disturbances during vessel surveys, but have

no effect on bathymetry, prey, or toxins. As such, we find that the effects of the proposed research on designated critical habitat for Cook Inlet DPS beluga whales are insignificant.

Steller sea lions (Western DPS) occur within the action area and may be encountered by researchers during vessel surveys. However, in our previous opinion for Permit No. 18016 we found that effects to Steller sea lions (Western DPS) were insignificant since in the unlikely event that researchers encounter a Steller sea lion, which are infrequently observed within the area, they would not be authorized to approach as specified in the terms and conditions of the permit (NMFS 2014b). Thus, any interactions with Steller sea lions would be at a distance that is not likely to have a measurable impact on Steller sea lion behavior. As the same condition would be included in Permit No. 18016-1, we again find that effects to the Western DPS of Steller sea lions are insignificant.

Leatherback turtles have been documented in the Gulf of Alaska and it is possible that they may be found within the action area. However, as noted in our previous opinion on Permit No. 18016 (NMFS 2014b), leatherback turtles are typically found offshore in deeper waters and to our knowledge, no leatherback turtles have ever been documented within Cook Inlet. As a result, interactions with leatherback turtles are extremely unlikely, and thus we determined that effects to leatherback turtles are discountable.

A variety of salmonid (steelhead, Chinook, coho, chum, and sockeye salmon) DPSs may occur within Alaska's coastal and marine waters as these salmonids migrate from the west coast of the United States to forage before returning to their natal streams to spawn. In our previous consultation on Permit No. 18016, we evaluated effects to these species and found them to be discountable since only a single vessel would be operating, completely on surface of the water, and interactions with these species are extremely unlikely to occur (NMFS 2014b). For Permit 18016-01, we adopt this same analysis and find that effects to ESA-listed salmonids within the action area are discountable.

Under the proposed permit, Cook Inlet beluga whales would be closely approached at slow speeds, by experienced researchers, in small vessels. We previously evaluated the effects of these close approaches during consultation on Permit No. 18016 and found that beluga whales may respond to close vessel approaches by exhibiting avoidance, attraction, possible habituation, site tenacity, and changes in calling behavior, and often return to normal behavior within two to 15 minutes (NMFS 2014b). In their request for concurrence and in follow up conversations, the Permits Division provided a similar effects analysis and concluded that the issuance of Permit No. 18016-01 would result in only minor, short-term behavioral responses that would be insignificant and not result in take under the ESA. We concur with this determination.

Conclusion

Based on this analysis, the NMFS ESA Interagency Cooperation Division concurs with the Permits Division that the proposed action may affect, but is not likely to adversely affect, ESA-listed species and designated critical habitat.

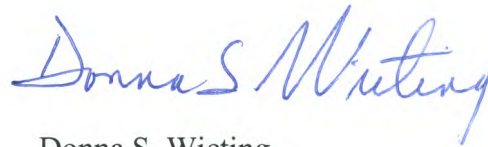
Reinitiation of Consultation

Reinitiation of consultation is required and shall be requested by the Federal agency, or by NMFS, where discretionary Federal involvement or control over the action has been retained or

is authorized by law and (1) new information reveals effects of the action that may affect an ESA-listed species or designated critical habitat in a manner or to an extent not previously considered; (2) the identified action is subsequently modified in a manner that causes an effect to the ESA-listed species or designated critical habitat that was not considered in this concurrence letter; or if (3) a new species is listed under the ESA or critical habitat designated that may be affected by the identified action (50 CFR §402.16).

Please direct questions regarding this letter to Eric Patterson, NMFS Office of Protected Resources, ESA Interagency Cooperation Division, 301-427-8415, eric.patterson@noaa.gov.

Sincerely,



Donna S. Wieting
Director, Office of Protected Resources

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