



**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
NATIONAL MARINE FISHERIES SERVICE  
Silver Spring, MD 20910

Robert K. Wood, Director  
Engineering and Analysis Division  
Office of Water  
Environmental Protection Agency

JUL 23 2013

Dear Mr. Wood:

On June 18, 2013, we received your request for formal consultation on the proposed "Final Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities," pursuant to Section 7(a)(2) of the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1536(a)(2)). We also received your biological evaluation, the draft regulation, and the draft preamble.

The Environmental Protection Agency (EPA) concluded that its proposed action was "not likely to adversely affect" endangered or threatened species or critical habitat designated for those species. Nonetheless, EPA requested initiation of formal section 7 consultation to ensure full and expeditious consideration of the impacts to listed species and critical habitat. At this time, we do not concur with your determination. After review of the draft proposed regulation and biological evaluation, we have determined that the proposed action is likely to adversely affect listed endangered and threatened species and critical habitat that has been designated for those species. As of June 18, 2013, we confirm initiation of formal consultation and conference (for proposed species) on the issuance and implementation of the proposed regulations, under the Clean Water Act, Section 316(b) (40 CFR 122 and 40 CFR 125).

The ESA requires that after initiation of formal consultation, the Action Agency may not make any irreversible or irretrievable commitment of resources that would preclude the formulation or implementation of any reasonable and prudent alternatives that would avoid violating section 7(a)(2) (50 CFR 402.09). This prohibition is in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied (in this instance, the issuance of our biological opinion).

During consultation, we will work with EPA to recommend language to incorporate into its regulation and/or to implement additional activities to minimize impacts of the proposed action on ESA species and critical habitat. As described in our consultation plan, which we provided to you on December 19, 2012 and March 18, 2013, we will evaluate the direct and indirect effects of the action on threatened and endangered species and designated critical habitat. We will use this information, along with the environmental baseline and cumulative effects, to formulate our biological and conference opinion as to whether EPA has insured that its action is not likely to jeopardize the continued existence of any listed or proposed species or result in the destruction or adverse modification of designated or proposed critical habitat.

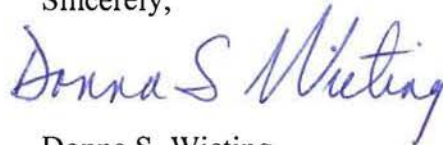


We will deliver our biological and conference opinion ("opinion") to EPA on October 31, 2013, unless we mutually agree upon an extension of the deadline. If we issue a "jeopardy" opinion, it will include a reasonable and prudent alternative(s), unless none exist. The opinion may also include an incidental take statement.

Following the issuance of our opinion, EPA determines whether and in what manner to proceed with the action in light of its section 7 obligations and our conclusions. If we issue a "jeopardy" opinion, EPA must notify us of its final decision on the action. If EPA determines that it cannot comply with the requirements of section 7(a)(2) after consultation, you may apply for an exemption under section 7(g) of the ESA. You are required to request reinitiation of section 7 consultation if: authorized take is exceeded; new information reveals effects that were not previously considered; the action is subsequently modified to cause effects that were not previously considered; or if newly listed species or designated critical habitat may be affected by the action.

If you have any questions, please contact Jennifer Schultz (301-427-8443). We look forward to working with you and your staff on this consultation.

Sincerely,



Donna S. Wieting  
Director  
Office of Protected Resources