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Sent by electronic mail to permitsR3ES@fws.gov

Regional Director, Midwest Region
Attn: Lisa Mandell
U.S. Fish and Wildlife Service
Ecological Services
5600 American Boulevard West, Suite 990
Bloomington, MN 55437-1458

Re: Comments of Spectra Energy Corp on Draft Environmental Impact Statement and Multi-Species Habitat Conservation Plan; Receipt of Application for Incidental Take Permit; NiSource, Inc., 76 Fed. Reg. 41,288 (July 13, 2011); Docket No. FWS-R3-ES-2011-N109; 30120-1122-0000-F2

Dear Ms. Mandell:

Spectra Energy Corp ("Spectra" or "Spectra Energy") appreciates the opportunity to submit the following comments in response to the July 13, 2011 U.S. Fish and Wildlife Service ("FWS" or "Service") Federal Register notice regarding NiSource, Inc.'s ("NiSource") application for an incidental take permit ("ITP") under the Endangered Species Act ("ESA" or the "Act"). *See* Draft Environmental Impact Statement and Multi-Species Habitat Conservation Plan; Receipt of Application for Incidental Take Permit; NiSource, Inc., 76 Fed. Reg. 41,288 (July 13, 2011). NiSource's ITP application is supported by a Multi-Species Habitat Conservation Plan ("MSHCP"), a draft Environmental Impact Statement ("DEIS"), an implementing agreement, and the Service's biological assessment ("BA").

I. Introduction

Spectra is one of North America's premier midstream natural gas companies. For close to a century, Spectra Energy and its predecessor companies have developed critically important pipelines and related energy infrastructure connecting natural gas supply sources to premium markets. Spectra has an interest in the NiSource MSHCP because Spectra owns and operates a large and diversified portfolio of natural gas-related energy assets in a geographical area similar to that covered by the MSHCP. Spectra Energy's U.S. pipeline systems consist of more than 14,000 miles of transmission pipelines, with seven primary transmission systems located in 25 states: Texas Eastern Transmission, L.P.; Algonquin Gas Transmission, LLC; East Tennessee Natural Gas, LLC; Ozark Gas Transmission, L.L.C.; Maritimes & Northeast Pipeline, L.L.C.; Southeast Supply Header,

LLC and Gulfstream Natural Gas System, LLC. For the purpose of these comments, “Spectra” refers to Spectra and its subsidiary pipelines.

Spectra’s comments focus on four primary issues: (i) preservation of existing permitting practices; (ii) utilization of the MSHCP with other agencies; (iii) avoidance of establishing new industry standards; and (iv) clarifications. In particular, Spectra first asks the Service to confirm that the MSHCP will not affect other permitting approaches companies, such as Spectra, have utilized, including programmatic biological opinions and categorical exclusion letters. Second, we recommend that the Service explain, perhaps by walking through a specific example, how other federal agencies may utilize the MSHCP to expedite ESA compliance. Third, we ask for confirmation that any conclusions regarding the specific avoidance and minimization measures (“AMMs”) required for the MSHCP species, the conservation frameworks for not likely to adversely affect (“NLAA”) species, and the additional species analyzed by the Service in the BA not be assumed automatically applicable to other situations. Spectra and other natural gas pipeline companies have not had the opportunity to participate in the process through which these conclusions were reached, and, therefore, it is not appropriate to apply these conclusions more broadly. Finally, Spectra has some specific comments on the MSHCP, including the AMMs, and suggestions for additional definitions and clarifications.

II. Comments on the MSHCP

A. The Service Should Confirm that the MSHCP Will Not Affect Other Streamlined ESA Permitting Approaches.

Spectra asks the Service to confirm that the MSHCP will not impact Spectra’s (and other pipeline companies) use of other currently utilized ESA permitting approaches, such as categorical exclusions or programmatic biological opinions. Because Spectra’s natural gas pipeline maintenance activities are often driven by tight timelines under regulatory mandates, Spectra has long supported efforts to develop streamlined or alternative permitting procedures for projects that are no effect or NLAA listed species under the ESA. Indeed, Spectra has worked with several Service field offices to streamline its ESA permitting through the use of programmatic biological opinions and categorical exclusion letters and relies on these permitting approaches to perform routine operations and maintenance on its pipelines without burdening the Service with unnecessary consultations where it is clear that the routine operations would have no effect or are NLAA listed or threatened species.¹

¹ NiSource, for example, states that it typically had 400 annual projects that required ESA review, including routing right-of-way, maintenance, facility inspection, upgrade and replacement, forced relocations, and expansion projects. MSHCP ch. 1.1.3, at 4. Most of these consultations were informal and resulted in a determination that the

Spectra also supports broader scale efforts, like the MSHCP, to develop comprehensive permitting plans. Creative thinking to improve ESA consultation is of benefit to all, and Spectra appreciates the Service's efforts to minimize administrative expense and promote efficiency while better protecting the species. Streamlined permitting mechanisms are of particular importance given the Service's budgetary constraints and will enable the Service to better manage its increasing workload despite reductions in staff and resources. However, it is critical that there be a wide range of acceptable and workable options to further these goals, recognizing that the "no one size fits all" approach is best. Indeed, despite the time and money expended to develop the MSHCP, the MSHCP will not be fully protective for all of NiSource's activities in the covered area. This is because the Service's BA identifies 46 species that are not covered by the MSHCP and are known to occur or potentially occur within the proposed project area,² and there are 374 additional species currently under consideration for listing by the Service, which, if listed, will also not be covered by the MSHCP. 76 Fed. Reg. 59,836 (Sept. 27, 2011). Therefore, we ask the Service to confirm that the MSHCP will not affect other companies' utilization of other proven streamlining ESA approaches, including, for example, categorical exclusion letters and programmatic biological opinions.

B. Spectra Recommends Explaining More Thoroughly How Other Agencies May Rely on the MSHCP to Streamline ESA Compliance.

In addition to streamlining consultation with the Service, the MSHCP is expected to expedite the ESA process for other agencies (such as the U.S. Army Corps of Engineers ("Corps") and the Federal Energy Regulatory Commission ("FERC")) when those agencies are issuing permits required for pipeline activities. MSHCP ch. 1.1.3.5; *see also* MSHCP ch. 1.4.2 (describing ESA section 7 consultation process). Spectra believes that

project would not affect or was NLAA listed species or critical habitat. *Id.* This is consistent with Spectra's experience as well. The majority of Spectra's routine right of way operations and maintenance activities result in either no effect or NLAA determinations and, thus, are typically handled through informal consultation, programmatic biological opinions, or categorical exclusion letters.

² The Service's BA analyzed an additional 46 listed, proposed, or candidate species, which are known to occur or potentially occur within the proposed project area and are not covered by the MSHCP. *See* DEIS App. F. We understand that NiSource may amend the MSHCP in the future to include these species (and, such an amendment would undergo another round of public comment), but we believe that the decision to exclude these species could result in a huge gap in coverage under section 7 of the ESA because the BA concludes that some of these species are likely to be adversely affected by the proposed actions. Therefore, excluding these species may undercut the efficiency purposes set forth in the MSHCP.

the MSHCP would benefit from a more thorough description of how other federal agencies anticipate utilizing the MSHCP to comply with the ESA.

The MSHCP states that “other federal action agencies processing aspects of the gas transmission system *may* also need to consult with the Service. ... [T]he consultation and resulting BO will cover such agencies with regard to covered activities, and provide a programmatic mechanism to guide any future consultations that are not already covered by the MSHCP and BO.” MSHCP ch. 1.4.2, at 14 (emphasis added). However, it is unclear when, and under what circumstances, the MSHCP will take the place of separate ESA section 7 consultation. Therefore, we believe the MSHCP could be improved by further explaining how other agencies, such as the Corps, would utilize the document. This could be done by working through an example of the steps that will be taken when a specific project is proposed. For example, if a Clean Water Act section 404 permit is required from the Corps, under what circumstances may the Corps rely on the MSHCP and avoid a separate consultation when issuing a nationwide permit authorization or individual permit. Is independent consultation required for all projects or just certain projects (and, if so, which ones)? Will the Service need to do a separate project specific biological assessment or biological opinion for any “covered activities” that require separate permits or just certain ones (and, if so, which ones)? Do the Service and other agencies anticipate that the MSHCP will “accelerate” consultation where it is required? Finally, if there is a proposed project that is covered by the MSHCP but also includes a non-MSHCP species, and thus requires consultation for possible impacts to that species, does the Service anticipate that the MSHCP will accelerate review of that project for any non-covered species (including newly listed species)? If so, how?

Spectra also notes that, in Chapter 4 of the DEIS, the coordinating agencies indicate they will finalize a memorandum of understanding (“MOU”) describing their respective regulatory authorities and process for undertaking coordinated National Environmental Policy Act (“NEPA”) reviews through the duration of the ITP. *See* DEIS at 4-2. Will there be an opportunity to comment on the final MOU? In addition to coordinating review under NEPA, have the coordinating agencies considered whether a similar MOU would be appropriate for other permitting analyses (*e.g.*, required FERC authorizations or Corps permits)?

C. The Service Should Confirm that the MSHCP AMMs, Conservation Frameworks for “Not Likely To Adversely Affect” Species, and AMMs for the Additional Species Analyzed in the BA may not be Appropriate in Other Situations.

Spectra asks the Service to confirm that the AMMs adopted in the MSHCP, the conservation frameworks for nine listed species where the covered activities are NLAA, and the AMMs for the species analyzed in the BA will not be assumed to be appropriate in all other situations. In the BA, the Service acknowledges that consultation for the 46

additional species covered in the BA was “based on necessarily conservative assumptions.” DEIS App. F at 9. These measures have not been thoroughly vetted by other pipeline companies and rely in part on NiSource’s Environmental Construction Standards, which may differ from standards adopted by other natural gas pipeline companies. The AMMs have been drafted exclusively by one company and discussed in a series of one-on-one meetings between the Service and NiSource. Spectra and other pipeline companies have not had the same opportunity as NiSource to provide their expertise and input on these measures. Therefore, the conclusions reached in the BA may not be appropriate in all other situations.

Spectra believes that certain of these AMMs may be difficult, if not impossible, to implement. For example, MSHCP App. F, Attach. F-3 at F-33 to 34, the Conservation Framework for the Louisiana Black Bear, requires that, for construction activities during the denning season, “[a] constant level of noise/disturbance (generally equivalent in type and volume to that created by the proposed covered activities) is maintained throughout the project area ... until work has finished. The amount of disturbance/noise shall be generated for at least 24 continuous hours every 14 days in all portions of the project area that are within 750 feet of the active construction site.” Spectra has not previously seen this requirement on other projects in areas of Louisiana Black Bear habitat. We believe that it could be very difficult to comply with this AMM considering that pipeline construction does not involve continuous activities in one area for long periods of time. We, therefore, are concerned that it not become more broadly required without the input of other pipeline companies.

Because Spectra and other natural gas pipeline companies have not had an opportunity to participate in the decisionmaking process that led to the development of these AMMs, Spectra asks the Service to confirm that any AMMs adopted in the MSHCP, the conversation frameworks for the NLAA species, and the BA apply solely to this undertaking and are not intended to be automatically applied in other situations. The applicability of such measures, if at all, should be determined on a project-specific basis.

D. Clarifications on the AMMs.

The MSHCP relies on a conservation strategy centered on “avoiding, minimizing, and mitigating adverse effects of covered activities on MSHCP ‘take’ species.” MSHCP ch. 5.2.1. NiSource will utilize AMMs, developed to address, to the maximum extent practicable, specific effects that each covered activity might have on individual MSHCP species, before employing other mitigation measures. *Id.* Most of the AMMs are mandatory and must be applied to all covered activities. *Id.* Examples of AMMs include: horizontal directional drilling (“HDD”) under river bottoms where feasible, abandoning pipelines in place rather than disturbing habitat for pipe removal, and avoiding work outside the existing 50 foot right-of-way in certain species’ habitat.

Spectra notes, that, in those circumstances where there are options as to which AMM may be utilized, it appears to be within NiSource's discretion to choose which AMM it will implement. *See, e.g.*, MSHCP ch. 5.2.1.1 (describing the waterbody crossing method selection process). For example, in order to choose which waterbody crossing method to utilize, NiSource states that it "will complete a site-specific review of the crossing, an environmental assessment, ..., a design and engineering assessment, and a balanced economic evaluation." *Id.* at 8. The language in the MSHCP is ambiguous, however, as to how much of a factor economics may play. The MSHCP states that "*in rare occasions* it may not be economically practical for NiSource to implement a somewhat more protective, but significantly more expensive, crossing method." *Id.* at 10 (emphasis added). The example given refers to HDD, which the MSHCP states could cost up to \$2,500,000 to avoid impacts versus a dry-ditch crossing that would cost \$150,000. *Id.* at 10 n.3. In this circumstance, presumably, the economic evaluation would weigh against requiring HDD. Indeed, it is our experience that HDD would, in almost all circumstances, be the far more expensive option. Thus, we believe it would be the norm that HDD would not be economically practical, not the exception. Because the MSHCP does not provide a very detailed explanation regarding how the economic evaluation will be weighed, we recommend providing some clarification regarding the relative role economics plays.

The MSHCP further states that "[w]hen implementation of a waterbody crossing method that would reduce impacts to a MSHCP species would be impracticable from a financial standpoint, NiSource will completely mitigate for any impacts on the species resulting from the selected crossing method." MSHCP ch. 5.2.1.1. We recommend that the Service clarify what is meant by "completely mitigate" in this context to avoid future uncertainty.

Further, as part of its monitoring and reporting obligations, NiSource will submit details regarding which AMMs were selected in its yearly report. This annual report will be reviewed by the Service for general compliance with the MSHCP. However, NiSource and the Service do not appear to have drafted a process to govern any possible disagreements or disputes about which AMMs have been selected, including the extent to which NiSource relies on economic considerations in selecting the appropriate AMM. It could be of benefit to include a discussion regarding potential consequences.

Finally, the MSHCP includes a number of non-mandatory AMMs. MSHCP ch. 5.2.1. These non-mandatory AMMs are optional, and it is stated that "[a] decision to apply a non-mandatory measure will ... be made on a case-by-case basis taking into account practicality in terms of other requirements of the project" based on factors described in the MSHCP. *Id.* at 5. It is clear that some of the non-mandatory AMMs could be quite difficult to implement. For example, one non-mandatory AMM for Indiana bat summer habitat is to "[r]etain snags, dead/dying trees, and trees with exfoliating (loose) bark ≥ 5

inches dbh [diameter at breast height] in areas identified as known maternity colony summer habitat and \leq one mile from water.” MSHCP ch. 6.2.1.3, at 31. Where there is a need to clear workspace for construction, leaving the trees in place could be impossible. Since incidental take has been calculated based on the assumption that no non-mandatory AMMs will be implemented, MSHCP ch. 5.2.1, at 5 n.1, we recommend that the Service explain why implementation of the non-mandatory AMMs is conditionally required under the MSHCP.

E. Suggestions for Improving the MSHCP by Providing Additional Definitions and Clarifications.

- In Chapter 2, the MSHCP defines the “covered activities.” *See* MSHCP ch. 2.4. While there are lengthy descriptions of “general operation and maintenance” (“O&M”) and “expansion activities,” the category of activities falling under “safety-related repairs, replacements, and maintenance” of natural gas systems does not appear to be further described in the MSHCP. We recommend including some description of the activities that fall into this category. Further, Spectra could not determine whether there is any meaningful consequence as to these categories. Does it matter, practically speaking, what category of activities a project falls into?
- The covered activities appear to distinguish between limited earth disturbances, which fall under the category of general O&M, and significant earth disturbances, which amount to expansion activities. *See* MSHCP chs. 2.4.1; 2.4.2. However, the MSHCP does not provide definitions for these terms. Does NiSource make its own determination whether something amounts to a “limited earth disturbance” or a “significant earth disturbance”?
- The ITP only provides ESA coverage for NiSource and its “designated agents.” MSHCP ch. 1.2.5. We recommend providing a definition of “designated agents.” NiSource’s partnerships and partners are specifically excluded from coverage. *Id.* Why are these third parties excluded? Was this a commercial decision made by NiSource, or is there a prohibition against applying an HCP to joint ventures and third-party owners?
- MSHCP chs. 6, 7, and 10 describe the various monitoring and reporting requirements. Has any estimate been prepared as to the time and staff that will be required to comply with these provisions? Has NiSource undertaken an analysis to determine the expected average annual cost of compliance with the MSHCP and what the anticipated cost of compliance is expected to be over the 50 year term of the ITP?

- Is the web tool IPaC available to the public? *See* MSHCP ch. 7.3. If so, how might other parties utilize this mechanism?
- With respect to certain species, there is a limit to the number of times under the ITP that NiSource can assume species are present (and, thus a requirement to survey if that number is exceeded). For example, for the Indiana Bat, NiSource can either perform surveys to determine the presence of habitat or habitat use or altogether avoid doing surveys and assume presence. NiSource is allowed to assume the presence of Indiana bats within identified suitable winter habitat a maximum of ten times (five times on linear projects and five times on storage field projects) throughout the life of the ITP. How was this limit reached, and why?

III. Conclusion

Spectra appreciates the opportunity to comment on the MSHCP and associated documents. Spectra recognizes that developing this proposal required an extensive commitment of time and resources by NiSource and the Service, and we commend you for undertaking this effort. It reflects a very thorough process. To further advance the goals of protecting species while reducing administrative burdens, Spectra encourages the Service to adopt the suggestions it has presented in these comments.

Spectra looks forward to working with the Service collaboratively in the future to develop streamlined authorizations for its projects. We appreciate the Service's willingness to utilize programmatic biological opinions and categorical exclusion letters and rely on those streamlined permitting approaches to undertake critical natural gas pipeline activities, which enable us to continue supplying the nation with clean and reliable sources of energy. Given the budgetary constraints faced by the FWS and reduced levels of staffing both at Headquarters and the local field offices, we believe that adopting streamlined ESA permitting approaches will become even more critical in the future. If you have any questions regarding these comments, we welcome the opportunity to discuss them further.

Respectfully submitted,

Handwritten signature of Patrick J. Hester in cursive, with the initials "PHB" written below the signature.

Patrick J. Hester
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