United States Department of the Interior

FISH AND WILDLIFE SERVICE

5600 American Boulevard West, Suite 990
Bloomington, Minnesota 55437-1458

IN REPLY REFER TO:

FWS/AES

AUG 12 2013

Mr. Mark Frazier
Chief, Regulatory Branch
Kansas City District Office
U.S. Army Corps of Engineers
635 Federal Building, Room 402
Kansas City, Missouri 64106

Mr. Danny McClendon
Chief, Regulatory Branch
St. Louis District Office
U.S. Army Corps of Engineers
1222 Spruce Street
St. Louis, Missouri 63103

Mr. G. Ward Lenz
Chief, Regulatory Branch
Kansas City District Office
U.S. Army Corps of Engineers
P.O. Box 2004 Clock Tower Building
Rock Island, Illinois 61204

Mr. Robert Impson
Regional Director,
Eastern Oklahoma Regional Office
Bureau of Indian Affairs
P.O. Box 8002
Muskogee, OK 74402-8002

Mr. Jerrid Anderson
Senior Project Director, Flanagan South Pipeline Project
4628 Mike Colalillo Drive
Duluth, MN 55807

Dear Sirs:

On July 24, 2013, the U.S. Fish and Wildlife Service (Service) issued a biological opinion (BO) on the proposed construction, operation, and maintenance of Enbridge Pipelines FSP L.L.C.'s (Enbridge) Flanagan South Pipeline, in accordance with section 7 of the Endangered

Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*). The Flanagan South Pipeline (FS Pipeline) is a new crude petroleum pipeline in the States of Illinois, Missouri, Kansas, and Oklahoma.

After further review of the BO, the U.S. Army Corps of Engineers (Corps) requested that the Service modify the Incidental Take Statement (ITS) to clarify that the Corps is responsible for the conditions of the ITS only within their permit areas. The Corps has also stated that their jurisdiction under the Clean Water Act only applies to discharges of dredged or fill material into waters of the U.S. in association with construction of the pipeline and does not include operation and maintenance activities that do not fall within the agency's jurisdiction. Therefore, we have amended the ITS and provided the updated version below (Enclosure). All other portions of the biological opinion remain unchanged.

Incidental take authorizations under section 7 of the Act extend to applicants without the need for a section 10 permit provided the actions in question were contemplated by the ITS and conducted in compliance with the conditions of the ITS. The BO and ITS considered the construction, operation, and maintenance of the entire FS Pipeline. Provided that Enbridge implements the action as described in the BO and complies with the conditions of the ITS, any taking described in the ITS is permitted. This coverage includes operation and maintenance of the pipeline that may occur in the future.

Thank you for your cooperation during this consultation. Questions or comments should be referred to Karen Herrington (850-348-6495) of this office.

Sincerely,

Lynn Lewis

Lynn Lewis
Assistant Regional Director

Enclosure

cc: Assistant Regional Director, Ecological Services, Albuquerque, NM
Assistant Regional Director, Ecological Services, Denver, CO
Rock Island Ecological Services Field Office, FWS, Rock Island, IL
Columbia Ecological Services Field Office, FWS, Columbia, MO
Kansas Ecological Services Field Office, FWS, Manhattan, KS
Oklahoma Ecological Services Field Office, FWS, Tulsa, OK
Karen Herrington, FWS, St. Charles, MO

# 7 INCIDENTAL TAKE STATEMENT

Section 9 of the Act and federal regulations pursuant to section 4(d) of the Act prohibit the take of endangered and threatened species without special exemption. 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 is further defined by the Service to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Harass is defined by the Service as an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering [50 CFR §17.3]. Incidental take is defined as take that is incidental to, and not the purpose of, an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered prohibited taking under the Act provided that such taking is in compliance with the terms and conditions of an Incidental Take Statement (ITS).

Sections 7(b)(4) and 7(o)(2) of the Act generally do not apply to listed plant species. However, limited protection of listed plants from take is provided to the extent that the Act prohibits the removal and reduction to possession of Federally listed endangered plants or the malicious damage of such plants on areas under Federal jurisdiction, or the destruction of endangered plants on non-Federal areas in violation of State law or regulation or in the course of any violation of a State criminal trespass law.

The measures described below are non-discretionary, and the Corps and BIA must insure that they become binding conditions of any contract or permit issued to carry out the proposed action for the exemption in section 7(o)(2) to apply. The BIA is responsible for all Reasonable and Prudent Measures, and Terms and Conditions for the American burying beetle (ABB). The Corps is responsible for all Reasonable and Prudent Measures, and Terms and Conditions for the Indiana bat. The Corps and BIA have a continuing duty to regulate the action covered by this incidental take statement as it relates to their permit and easement actions. If the Corps and BIA: (1) fail to assume and implement the terms and conditions or, (2) fail to require any contracted group to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to the permit, easement, or lease documents, the protective coverage of section 7(o)(2) may lapse. In order to monitor the impact of incidental take, the Corps and BIA must report the progress of the action and its impact on the species to the Service as specified in the ITS [50 CFR §402.14(I)(3)].

## 7.1 AMOUNT OR EXTENT OF TAKE ANTICIPATED

### 7.1.1 American Burying Beetle

Incidental take of American burying beetles is reasonably certain to occur as a result of the construction, operation, and maintenance of Enbridge's Flanagan South Pipeline (FS Pipeline). Harassment to individual beetles may occur from construction activities conducted within occupied areas. Harm to the species may occur through activities that kill individual ABBs as well as those that alter the suitability of the habitat to support ABBs. Take of ABBs is anticipated to occur on all affected occupied habitat (measured in acres).

It is difficult to predict the number of ABBs that will be taken because there is no density estimate for the Action Area, and presence/absence surveys conducted cannot be used to estimate abundance. Take, in the form of killing, harming, and/or harassment, is also difficult to precisely quantify and usually cannot be measured in terms of numbers of individuals of ABBs for the following reasons: 1)

the ABB has a small body size making it hard to locate, which makes encountering dead or injured individuals unlikely; 2) ABB losses may be masked by annual fluctuations in numbers and highly concentrated movements; and 3) ABBs spend a substantial portion of their lifespan underground. These factors make it extremely difficult to detect the amount of take that will occur. Although we cannot estimate the number of individual ABBs that will be incidentally taken, the Service is providing a mechanism to quantify when take would be considered to be exceeded. For purposes of this biological opinion, the Service defines incidental take in terms of the number of acres disturbed. The Service considers using acres of habitat disturbed as an appropriate surrogate, because habitat disturbance is the primary cause of take associated with the project.

The Service concludes that the incidental take of ABB will be considered to be exceeded if the total number of occupied acres disturbed during the construction of the FS Pipeline, access roads and aboveground facilities is more than 115.5 acres. In addition, take will be exceeded if more than 90 acres of occupied habitat is disturbed during the operation and maintenance activities of the pipeline over the next 50 years. The BIA is required to reinitiate consultation with the Service if changes in the construction, operation and maintenance of the FS Pipeline exceed the number of acres anticipated to be affected.

### 7.1.2 Indiana Bat

Despite the conservation measures, we anticipate that some male, female, and juvenile Indiana bats may be killed or injured during clearing that occurs during construction of the FS Pipeline in the active season from August 7, 2013 to October 31, 2013 (or October 1, 2013 from MP 0 to 164). This is likely to occur if an occupied roost tree is felled during summer roosting/foraging or migration; however, we expect that most of this potential impact would occur during migration to hibernacula. We anticipate that clearing during the active season will result in take, in the form of death, harm, or harassment, of no more than 19 male, female, or juvenile Indiana bats. Take will be detected by observing mortality or injury.

We also anticipate the loss of two active (i.e., occupied in the summer) maternity roost trees and/or their 100-ft buffer during the inactive season. We anticipate that removal of maternity roost trees during the inactive season will result in harm and harassment of no more than 120 reproductive female Indiana bats. Take will be measured by the number of active maternity roost trees removed.

The Corps must reinitiate consultation with the Service if more than 19 Indiana bats are killed or injured or if more than two active maternity roost trees and/or the 100 ft buffer are removed during the Project.

## 7.2 EFFECT OF THE TAKE

### 7.2.1 American Burying Beetle

Approximately 115.5 acres of occupied ABB habitat will be disturbed during the construction of the FS Pipeline, and up to 90 acres of habitat in Oklahoma and Kansas may be impacted during O&M activities. This is a small percentage of the ABB range within the total Action Area. Some ABBs may be disturbed or killed during FS Pipeline construction and related ground disturbance activities, but most of the effects are expected to be infrequent, of short duration, and reversible. Habitat loss will have a negative impact, but mitigation is expected to reduce the impact. In the accompanying opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the ABB.

### 7.2.2 Indiana Bat

Overall, the harm and harassment of 120 reproductive female Indiana bats and death, harm, or harassment of 19 individuals over two maternity colonies and 621 acres of Indiana bat habitat is not likely to cause population-level (maternity and hibernaculum) effects. In the accompanying opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the Indiana bat.

## 7.3 REASONABLE AND PRUDENT MEASURES

The Service believes the following reasonable and prudent measures are necessary and appropriate to minimize the impacts of incidental take of ABBs and Indiana bats during the construction, operation, and maintenance of the FS Pipeline.

### 7.3.1 American Burying Beetle (ABB)

To minimize potential take of the ABB, the Service recommends the following RPMs to BIA:

1. The BIA will ensure the lessee will monitor the level of take associated with the construction of the FS Pipeline.

2. The BIA will ensure the lessee will take every precaution to minimize the potential for direct killing of American burying beetles occurring in soil in the impact area, before, during, and after project implementation.

### 7.3.2 Indiana Bat

To minimize potential take of the Indiana bats, the Service recommends the following RPMs to the Corps:

1. The Corps will ensure the permittee will monitor take to verify that the authorized level of take has not been exceeded within their permit areas during construction of the pipeline. Enbridge must comply with this RPM in areas outside of the Corps' permit areas.

2. The Corps will ensure that the permittee will monitor Indiana bats to determine their response to the proposed actions and the efficacy of the Conservation Measures within their permit areas. Enbridge must comply with this RPM in areas outside of the Corps' permit areas.

## 7.4 TERMS AND CONDITIONS

In order to be exempt from the prohibitions of section 9 of the Act, the Corps and BIA must comply with the following terms and conditions, which implement the RPMs described above. These terms and conditions are mandatory.

### 7.4.1 American Burying Beetle (ABB)

RPM 1.

1. The BIA will ensure that Enbridge track the amount of O&M activity and soil disturbance conducted over the life of the project. The total amount of habitat disturbance during

O&M activities cannot exceed 90 acres. Enbridge can chose to survey for ABBs prior to the O&M activity following the Service's guidelines that are currently accepted at the time the surveys occur (likely to change over the 50 years of the project). If no ABBs are found, the O&M activity and impacted acreages would not be counted towards the total 90 acres. However, if no surveys are conducted, ABBs will be assumed to be present.

2. The BIA will ensure that Enbridge provides the Service an annual report detailing the area (acres) impacted by soil disturbance through pipeline construction and O&M activities. This report must include a copy of all ABB survey results and reasonable and prudent measures implemented.

3. If a dead or impaired ABB is found, care should be taken in its handling to preserve biological materials in the best possible state for later analysis of cause of death. In conjunction with the care of injured endangered or threatened species or preservation of biological materials from a dead animal, the finder has the responsibility to ensure that evidence associated with the specimen is not unnecessarily disturbed. The dead or impaired ABB should be photographed prior to disturbing it or the site. The Service is to be notified within three (3) calendar days upon locating a dead or injured ABB. Initial notification must be made to the nearest U. S. Fish and Wildlife Service Office of Law Enforcement, at (918) 581-7469, then the Oklahoma Ecological Services Field Office, at (918)581-7458. Notification must include the date, time, precise location of the injured animal or carcass, and any other pertinent information. Formal written notification also must be submitted within seven (7) calendar days.

4. All dead or moribund adults should be salvaged by placing them on cotton in a small cardboard box as soon as possible after collection. The date and location of collection should be included with the container. Specimens should then be furnished to the Sam Noble Museum of Natural History at the University of Oklahoma in Norman for deposition in their collection of invertebrates, or to another suitable site approved by the Service.

RPM 2.

5. Excavated soil from the pipeline trench shall be removed as carefully as possible, with as little mixing as possible, and set aside and not disturbed. When replacing excavated material avoid over-compacting the soil. Avoid compacting at all where possible.

6. Fill dirt, if necessary for any phase of project activity, shall come from areas of non-native vegetation where the beetle is not expected to be present. Soil should not have been treated with insecticides recently prior to use.

7. If construction concludes during the dormant season, disturbed areas will be temporarily stabilized immediately following soil ripping by broadcasting cool season species such as annual rye grass or wheat seed. These grasses are annual species that will not become permanently established. Where necessary, clean, weed-free straw mulch, hydromulch, or erosion control blanket will be used to protect seed and conserve soil moisture. During the first growing season following construction or immediately following soil ripping if construction concludes during the growing season, a mixture of native warm season grasses will be planted within the ROW. This will include species such as little bluestem (*Schizachyrium scoparium*), big bluestem (*Andropogon gerardii*), Indiangrass (*Sorghastrum nutans*), and switchgrass (*Panicum virgatum*).

### 7.4.2 Indiana Bat

RPM 1.

1. Take by injury and mortality during pipeline construction when trees are being cleared from the construction ROW during the active season will be monitored. This will include ensuring that all contractors, ROW managers and others present during clearing activity are fully informed of the potential to encounter dead or injured bats and of Enbridge's responsibilities if dead or injured bats are encountered. Individuals present during clearing activities will be diligent in their efforts to locate dead or injured bats. If dead or injured bats are encountered, the number and location will be reported through the chain of command to Enbridge. The procedures outlined in #4 will also be followed. In addition to encountering dead or injured bats, those present on the ROW during clearing activities will be diligent and aware of other factors that might indicate bat presence such as watching for bats flying away from areas where trees are cleared. These data will be reported to the Service as described below.

2. Take by harm and harassment when active maternity trees are removed during the inactive season will be monitored through documentation of the number of active roost trees removed. The number of trees and amount of 100 ft buffer removed will be provided to the Service along with the number of individuals known to occupy the tree(s) during the active season from results of exit counts during 2013 surveys. These data will be reported to the Service as described below.

3. The Corps will ensure that Enbridge provides the Corps with an annual report detailing the area (acres) of forested habitat removed, number of active maternity roost trees and/or the 100 ft buffer removed, and the number of Indiana bats killed or injured during the construction of the FS Pipeline. This report must include a copy of all Indiana bat survey results and reasonable and prudent measures implemented. The Corps will verify that the report covers their permit areas prior to submitting it to the USFWS. The Corps will submit the full report by December 31 every year.

4. If a dead or impaired Indiana bat is found, care should be taken in its handling to preserve biological materials in the best possible state for later analysis of cause of death. In conjunction with the care of injured endangered or threatened species or preservation of biological materials from a dead animal, the finder has the responsibility to ensure that evidence associated with the specimen is not unnecessarily disturbed. The dead or impaired Indiana bat should be photographed prior to disturbing it or the site. The Service is to be notified within three (3) calendar days upon locating a dead or injured Indiana bat. Initial notification must be made to the nearest U. S. Fish and Wildlife Service Office of Law Enforcement, at (636) 441-1909, then the Columbia Missouri Ecological Services Field Office, at (573)234-2132 and the Rock Island Field Office at (309) 757-5800. Notification must include the date, time, precise location of the injured animal or carcass, and any other pertinent information, including age, sex, and reproductive condition of the individual(s). Formal written notification also must be submitted.

RPM 2.

5. The Corps will ensure the permittee will monitor for Indiana bat presence in previously occupied non-maternity roosting habitat (i.e., where males and non-reproductive females were

captured) to determine the response to the proposed actions and the efficacy of the Conservation Measures by conducting acoustic surveys in survey areas where male or non-reproductive female Indiana bats were captured. The acoustic surveys will take place the second survey season after construction is complete to determine if Indiana bats remain present in the area. Enbridge is responsible for complying with this term and condition in areas outside of the Corps' permit areas.

6. The Corps will ensure the permittee will monitor presence and habitat use of maternity colonies documented during 2013 survey efforts to determine the response to the proposed actions and the efficacy of the Conservation Measures by conducting roost tree and mist net monitoring as follows below. Enbridge is responsible for complying with this term and condition in areas outside of the Corps' permit areas.

    a. Occupied maternity trees (i.e. roost trees to which reproductive females or juveniles were tracked) located during initial surveys will be relocated and monitored on three occasions following construction. The first monitoring event should be conducted during the maternity season after the construction of the FS Pipeline. Additional surveys should also be conducted two and five years after the first monitoring survey. Monitoring will include documentation of the presence and condition of the roost tree and conducting exit counts to document whether or not bats are still occupying the roost tree. In order to adequately monitor the response of the maternity colony, all surveys should encompass the same scope for three consecutive survey efforts to ensure scientific comparability.

    b. In all survey areas where reproductive females or juveniles were captured during initial mist net surveys (i.e., presence of a maternity colony), follow-up mist net surveys, telemetry, and exit counts will be conducted on three occasions. The first monitoring event should be conducted during the maternity season after completion of the construction of the FS Pipeline. Additional surveys should also be conducted two and five years after the first monitoring survey. In order to adequately monitor the response of the maternity colony, all surveys should encompass the same scope for three consecutive survey efforts to ensure scientific comparability. All active maternity roost trees located initially and in follow-up surveys will be monitored in the subsequent years' survey. New maternity roost trees located during the third survey iteration (5 years post-construction) will not require subsequent monitoring, only exit counts during the current survey effort.

    c. To determine the location of occupied roost trees, researchers federally permitted to place radio transmitters on Indiana bats, and who capture the species within the project area during mist-net surveys are required to place a radio transmitter on the first reproductive female Indiana bat captured following permit conditions outlined in approved Section 10 (a)(1)(A) Federal permit and report such activities within 24 hours to either the Columbia Missouri Ecological Services Field Office or the Rock Island Field Office of the Service, depending on the state in which the individual was captured.

7. All monitoring results shall be submitted to both the Columbia Missouri Ecological Services Field Office and the Rock Island Field Office of the Service by December 31 of the year in which the monitoring event occurred. Reports must contain:

a. Any management or habitat manipulations that have occurred to date;
b. The results of the acoustic surveys;
c. The results of the mist netting survey, including number, sex, age (mature or juvenile) and reproductive status of all bat captured, including Indiana bats, if any;
d. Status and occupancy of previously documented maternity roost trees;
e. Location and occupancy of newly documented maternity roost trees.

The reasonable and prudent measures, with their implementing terms and conditions, are designed to minimize the impact of incidental take that might otherwise result from the proposed action. The Service believes that the action will result in the following:

1. disturbance of 115.5 acres of occupied ABB habitat during pipeline construction
2. disturbance of no more than 90 acres of ABB habitat throughout the ABB range in Oklahoma and Kansas during O&M activities
3. the mortality, harm, and harassment of no more than 19 Indiana bats, and
4. the harm and harassment of an additional 120 female Indiana bats through the removal of two active maternity roost trees and/or the 100 ft buffer.

If, during the course of the action, these numbers are exceeded, such incidental take represents new information requiring the reinitiation of consultation and review of the reasonable and prudent measures provided. The Corps (for Indiana bats) or BIA (for ABBs) must immediately provide an explanation of the causes of the taking, and review with the Service the need for possible modification of the reasonable and prudent measures.