



December 13, 2011

VIA U.S. MAIL AND ELECTRONIC MAIL:

U.S. Fish and Wildlife Service, Ecological Services

Attn: Lisa Mandell

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Bloomington, MN 55437-1458

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Re: Comments on the NiSource Draft Multi-Species Habitat Conservation Plan and the U.S. Fish & Wildlife Service Draft Environmental Impact Statement (TE02636A)

Dear Ms. Mandell:

On behalf of the Center for Biological Diversity and the undersigned conservation groups, please consider the following comments on the NiSource Gas Transmission and Storage (“NiSource”) draft multi-species habitat conservation plan (“HCP”) and the U.S. Fish & Wildlife Service (the “Service”) draft environmental impact statement (“EIS”).

As detailed below, NiSource fails to meet the permit issuance requirements, 50 C.F.R. § 13.21(b); the Service’s draft EIS fails to comply with the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321–4370H (2006); and the Service’s proposed issuance of an incidental take permit (“ITP”) would violate sections 7 and 10 of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531–1544 (2006). Accordingly, the Service should reject NiSource’s request for a 50-year ITP.

If any part of this project is allowed to move forward, we strongly urge the Service to more fully consider a reduced timeframe of 10 years or less, with a geographic area limited to NiSource’s existing right-of-way, compressor lands, and—to the extent such information has already been shared with the Federal Energy Regulatory Commission (“FERC”)—storage field expansion areas. In addition, we urge the Service to address the deficiencies identified below, as well as those identified by other governmental authorities and conservation groups.

I. The NiSource Proposal is an Untested Experiment.

The proposed action is the Service’s issuance of a 50-year ITP for nine federally listed species and one proposed species, and NiSource’s implementation of its HCP. EIS at 1-9. The permit would cover nearly 9.8 million acres, stretching over 14 states. *Id.* at 3-1. This area

“includes almost every type of environment and land use found in the eastern United States . . . [f]rom the swamps of the Mississippi delta, to the fields of the central plains, to the parklands of the central Appalachians, and into the heavily urbanized northeastern states . . .” *Id.* Within this area are critical habitat and over 600 conservation lands where over 100 threatened, endangered, proposed, and candidate species make their home and forage for food.¹

This proposal—perhaps one of the largest incidental take permits ever requested²—is “unique,” in that it “hybridizes an [Endangered Species Act] Section 10 permitting process with Section 7 consultation processes and a [National Environmental Policy Act] process . . .” EIS at 2-5. Unlike a traditional ITP request, this proposal “entails [the] considerable involvement of other federal agencies in the authorization, approval or licensing of covered activities in the future. As such, the cooperating agencies, and perhaps other federal agencies, will be required to make separate and independent decisions regarding these future actions.” *Id.* at 1-28.

The Service’s programmatic EIS is also unconventional, in that it has not examined the “potential for localized and cumulative impacts . . .” *Id.* As the Service explains, a cumulative impacts analysis “is not feasible due to the extensive geographic scope and time frame defined for the Proposed Action.” *Id.* at 5-2. Accordingly, future action agencies “will be expected to provide thorough analyses of the affected environment and the environmental consequences, including cumulative effects, on a site-specific basis . . . [and] are responsible for fully evaluating the environmental consequences, and determining the level of impacts and their significance.” *Id.* at 1-28. At a November 3rd meeting between the Service, Center for Biological Diversity, and Earthjustice, the agency clarified that future action agencies would be expected to include an impacts analysis addressing all impacts within the covered lands area, and not simply the localized, site-specific cumulative impacts of each project.

As part of this approach and in furtherance of their NEPA obligations, the cooperating agencies—FERC, the Army Corps of Engineers, the Forest Service, and National Park Service—“intend to explore [the] development of an implementation agreement, which will further identify their respective regulatory authorities and identify processes for undertaking coordinated NEPA reviews through the duration of the ITP.” *Id.*; *see also id.* at 4-2 (referencing a memorandum of understanding, instead of an implementing agreement). The Service further

¹ *See* HCP App. E (identifying 600 conservation lands crossed by NiSource); EIS at 3-104–3-107 (identifying threatened, endangered, proposed, and candidate species within covered lands area), App. F (noting critical habitat for the Piping plover); U.S. Dep’t of the Interior, Fish and Wildlife Service, *HCPs in Development, NiSource Habitat Conservation Plan*, <http://www.fws.gov/midwest/Endangered/permits/hcp/nisource/scopingreport.html> (last updated Sept. 13, 2010) (noting that many NiSource projects occur in critical habitat).

² *See* Letter from Paul S. McCulla, County Administrator, County of Fauquier, Commonwealth of Virginia, to Regional Director, U.S. Fish & Wildlife Serv. (Dec. 7, 2007) (EIS App. A).

proposes issuing an ITP, but conditioning its coverage on NiSource “having obtained all necessary government approvals, permits or licenses, which will include any required NEPA compliance prior to undertaking a covered activity.” *Id.* at 1-28; *see id.* at 4-2-4-3.

II. NiSource Does Not Satisfy the Incidental Take Permit Requirements.

As a starting point, the Service should reject the presented proposal because NiSource and two of its applicant subsidiaries—Columbia Gas Transmission LLC (“Columbia Gas”) and Columbia Gulf Transmission Co. (“Columbia Gulf”)—fail to meet the general permit requirements. Similarly, because the Service’s EIS fails to address how such criteria apply to these companies, the EIS fails to comply with NEPA and the Service may not issue an ITP to these companies.

Under the permit issuance criteria, the Service cannot issue a permit to an applicant if any of the following apply:

- (1) The applicant has been assessed a civil penalty or convicted of any criminal provision of any statute or regulation relating to the activity for which the application is filed, if such assessment or conviction evidences a lack of responsibility;
- (2) The applicant has failed to disclose material information required, or has made false statements as to any material fact, in connection with his application;
- (3) The applicant has failed to demonstrate a valid justification for the permit and a showing of responsibility;
- (4) The authorization requested potentially threatens a wildlife or plant population, or
- (5) The Director finds through further inquiry or investigation, or otherwise, that the applicant is not qualified.

50 C.F.R. § 13.21(b); *see also* U.S. Dep’t of Interior, Fish & Wildlife Serv., U.S. Dep’t of Commerce, Nat’l Oceanic & Atmospheric Admin., Habitat Conservation Planning and Incidental Take Permit Processing Handbook, 7-1 (“HCP Handbook”), *available at* http://www.nmfs.noaa.gov/pr/pdfs/laws/hcp_handbook.pdf.

Here, NiSource, Columbia Gas, and Columbia Gulf have all been assessed civil penalties relating to the activities for which NiSource’s ITP application has been filed. Because these penalties evidence a lack of responsibility, the Service may not issue an ITP to NiSource in accordance with the general permit criteria. For example, in an uncontested action brought against NiSource, the U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration (“PHMSA” or “Pipeline Safety Administration”) last year assessed a civil

penalty of \$120,000 against the company for violating several federal regulations. In that action, the agency found that NiSource:

- failed to follow its own written integrity management plan;
- failed to address stress corrosion cracking in its pipelines, after having identified such pipelines;
- failed to immediately remediate conditions that required immediate repair;
- failed to take actions to ensure the safety of a pipeline segment;
- failed to notify the Pipeline Safety Administration that it could not meet its scheduled remediation or take other action to provide safety;
- failed to recognize and address a potential threat to its pipeline integrity, despite having sufficient information to make such a determination; and
- failed to maintain records showing compliance with the Gas Transmission Pipeline Integrity Management Regulations.³

In sum, these violations and civil penalties evidence NiSource's lack of responsibility. Because these penalties are furthermore related to the activities under the proposed ITP, the general permit issuance criteria prevent the Service from granting an ITP to NiSource.

The same requirements also prevent the Service from issuing an ITP that would include Columbia Gas. The Pipeline Safety Administration has assessed over \$1.1 million in civil penalties against the company⁴ and initiated 80 targeted inspections and investigations⁵ in the

³ *NiSource Gas Transmission and Storage*, CPF No. 3-2009-1018, at 2–4 (U.S. Dep't of Transp., Nov. 16, 2010) (final order), available at http://primis.phmsa.dot.gov/comm/reports/enforce/documents/320091018/320091018_Final%20Order%20%2011162010.pdf.

⁴ See generally U.S. Dep't of Transp., PMHSA, *Columbia Gas Transmission Corp., Federal Inspections, All Pipeline Systems, Start Year 2006–2011, Detail*, http://primis.phmsa.dot.gov/comm/reports/operator/OperatorIE_opid_2616.html?nocache=5605#_OuterPanel_tab_2 (updated Nov. 18, 2011) (identifying civil administrative actions and access to relevant documents).

⁵ U.S. Dep't of Transp., PMHSA, *Columbia Gas Transmission Corp., Federal Inspections, All Pipeline Systems, Start Year 2006–2011, Summary*, http://primis.phmsa.dot.gov/comm/reports/operator/OperatorIE_opid_2616.html?nocache=5605 (updated Nov. 18, 2011).

last five years alone. In one uncontested action, the federal agency assessed a \$400,000 penalty against the company for violating 17 federal regulations relating to the operation and maintenance of its gas pipelines—*e.g.*, failing “to take steps to minimize the danger of accidental ignition of gas” and “fail[ing] to have a patrol program to observe . . . indications of leaks, construction activity, and other factors affecting safety and operation”⁶ In another action, the agency assessed a \$246,000 civil penalty against the company for violating several federal regulations relating to the operation, inspection, and maintenance of its gas pipelines—*e.g.*, “failing to minimize the potential danger of accidental ignition in the presence of natural gas;” “failing to provide evidence of an inspection;” and “failing to comply with its own operations and maintenance manual”⁷ Indeed, for each of the past three years, the Pipelines Safety Administration has assessed civil penalties against Columbia Gas for its failure to comply *with its own written manual* of procedures for conducting operations and maintenance activities on its pipeline.⁸ Accordingly, because these civil penalties evidence Columbia Gas’s lack of responsibility, and furthermore relate to the activities for which it is applying for an ITP, the Service may not issue an ITP to Columbia Gas.

Similar penalties have also been assessed against Columbia Gulf, another NiSource subsidiary. Just this year, the Pipeline Safety Administration assessed a civil penalty against the company for over \$800,000 in connection with an explosion that killed one person, caused

⁶ *Columbia Gas Transmission*, CPF No. 1-2001-1002, at 2–3 (Dep’t of Transp., Mar. 29, 2002) (final order), available at http://primis.phmsa.dot.gov/comm/reports/enforce/documents/120011002/120011002_Revised%20Final%20Order_04112002.pdf.

⁷ *Columbia Gas Transmission*, CPF No. 1-2005-1003, at 1–2 (Dep’t of Transp., Sept. 1, 2006) (final order), available at http://primis.phmsa.dot.gov/comm/reports/enforce/documents/120051003/120051003_Final%20Order_09012006.pdf.

⁸ *Columbia Gas Transmission*, CPF No. 1-2010-1009, at 1–3 (Dep’t of Transp., Jan. 31, 2011) (final order), available at http://primis.phmsa.dot.gov/comm/reports/enforce/documents/120101009/120101009_Final%20Order_01312011.pdf; *Columbia Gas Transmission*, CPF No. 1-2008-1003, at 2 (Dep’t of Transp., Aug. 20, 2010) (final order), available at http://primis.phmsa.dot.gov/comm/reports/enforce/documents/120081003/120081003_Final%20Order_08202010.pdf; *Columbia Gas Transmission*, CPF No. 1-2007-1016, at 2 (Dep’t of Transp., Dec. 23, 2009) (final order), available at http://primis.phmsa.dot.gov/comm/reports/enforce/documents/120071016/120071016_FinalOrder_12232009.pdf.

extensive property damage, and resulted in the temporary closure of an interstate highway.⁹ The post-accident investigation found that Columbia Gulf had violated several federal regulations that contributed to the explosion, including (1) failing to follow its own procedures, by not recommending steps to prevent future explosions; (2) failing to report a pipeline leak that could have threatened the safety or security of the public; and (3) failing to act as a prudent gas pipeline operator, by not conducting additional testing on the pipeline's casing, again in violation of its own procedures.¹⁰

Taken together, these civil penalties evidence a lack of responsibility by NiSource, Columbia Gas, and Columbia Gulf. In numerous instances, these companies failed to follow their own written procedures, failed to address known problems with its pipelines, and failed to report incidents that endangered the safety of the public, and failed to take steps to prevent such failings in the future. These violations are clearly related to the "covered activities" — "operations, maintenance, and inspections" of gas pipelines owned and operated by NiSource, Columbia Gas, and Columbia Gulf — for which NiSource is requesting an ITP. See EIS at 1-1 (referring to App. B, which details the activities to be covered under the ITP), B-1. Accordingly, because NiSource and its subsidiaries fail to meet the general permit requirements, the Service must reject the presented proposal. And, because the Service's EIS fails to address how these companies meet the general permit requirements — which they do not — the Service's EIS fails to comply with NEPA.

III. The Draft EIS Violates NEPA.

The EIS, as drafted, also fails to comply with NEPA's requirements and its implementing regulations, 40 C.F.R. Pts. 1500-08 (2010). It is well-established that an EIS serves two purposes:

First, it should provide decision-makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in light of its environmental consequences. Secondly, the impact statement should provide the public with information on the environmental impact of a proposed project as well as encourage public participation in the development of that information.

Trout Unlimited v. Morton, 509 F.2d 1276, 1282 (9th Cir. 1974) (internal citations omitted); see also *Sierra Club v. Morton*, 510 F.2d 813, 819 (5th Cir. 1975); *Natural Res. Def. Council, Inc. v. Morton*,

⁹ *Columbia Gulf Transmission*, CPF No. 4-2009-1005, at 1 (Dep't of Transp., Mar. 21, 2011) (final order), available at http://primis.phmsa.dot.gov/comm/reports/enforce/documents/420091005/420091005_FinalOrder_03212011.pdf.

¹⁰ *Id.* at 6-7, 11.

388 F. Supp. 829, 838 (D.D.C. 1974) *aff'd*, 527 F.2d 1386 (D.C. Cir. 1976). By failing to consider adequately the impacts of the proposed action, including cumulative impacts, and failing to conduct an analysis of alternatives that “provides a clear basis for choice among options,” 40 C.F.R. § 1502.14, the EIS neither provides sufficient information to aid decision-making nor informs the public of the impacts of the proposed action.

A fundamental flaw underlying the Service’s analysis is a lack of clarity about what impacts of the proposed action need to be analyzed in this so-called programmatic EIS. *See* EIS at v. The Service notes as a caveat that “mere adoption of this EIS, will not suffice to comply with NEPA, especially given the potential for localized and cumulative impacts that have yet to be examined,” and emphasizes that “[a]ction agencies will be expected to provide thorough analyses of the affected environment and the environmental consequences, including cumulative effects, on a site-specific basis.” *Id.* at 4-2. We agree that *later, site-specific* NEPA reviews by action agencies may not merely adopt this EIS to comply with NEPA.¹¹ We clarify, however, that regardless of later site-specific NEPA review by action agencies, this EIS must *itself* satisfy the requirements of NEPA. *See, e.g., Sierra Club v. Morton*, 510 F.2d at 824 (noting the “rule that the sufficiency of an EIS must be determined without reference to possible future action”). As is discussed below, the Service’s lack of clarity leads to a muddled and inadequate description of environmental impacts that does not evidence the requisite “hard look” at the impacts of the proposed action. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

A. The EIS’s Analysis of Direct Impacts Is Inadequate.

NEPA is an “environmental full disclosure law.” *Monroe Cnty. Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 697 (2d Cir. 1972). It “ensures that an agency will not act on incomplete information, at least in part, by ensuring that the public will be able to analyze and comment on an action’s environmental implications.” *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng’rs*, 674 F. Supp. 2d 783, 792 (S.D. W.Va. 2009) (internal quotation marks and citations omitted). The information provided to the public “must be of high quality” because “[a]ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” 40 C.F.R. § 1500.1(b). The EIS fails to meet this standard because its discussion of direct impacts fails to include consideration of significant aspects of the proposed action.

¹¹ Accordingly, the EIS, ITP, HCP, and all implementing documents should clarify that NiSource’s receipt of the ITP and compliance with the HCP would merely *expedite*, but not in and of itself fully satisfy, the NEPA obligations of action agencies that later review and approve site-specific projects. *Contra* EIS at 1-24 (noting that “[i]t is the Service’s and the USFS intent that NiSource’s receipt of an ITP, and their compliance with the HCP, will *satisfy* USFS’s regulatory obligations under NEPA, specific to Section 7 of the ESA, for purposes of formal consultation on permitted activities under USFS authorities”).

The Service's analysis of the proposed action's impacts is simultaneously vague, on account of the allegedly programmatic nature of the EIS, and muddled. The lack of clarity translates into the failure to assess one obvious set of impacts—the impacts of implementing the HCP. The Service asserts that the “main focus” of the EIS is on “the potential for future impacts from NiSource activities on those ESA species analyzed in the MSHCP,” and warns that the impacts of NiSource's activities on other components of the human environment “are discussed on a more programmatic and less precise basis.” EIS at 1-10. What the Service appears to miss, however, is that consideration of the impacts of NiSource's *Covered Activities* are only one aspect of what must be considered in this EIS. The purpose of the EIS is to “assess environmental impacts associated with the issuance of an ITP to NiSource.” *Id.* at ii. Accordingly, the EIS should assess the full environmental impacts of implementing the HCP, which would result from issuing the ITP. *See* HCP Handbook at 5-5 (“discussion of effects should include analysis of both the impacts of the proposed HCP as well as other environmental effects that should be analyzed under NEPA”).

The EIS fails to undertake this analysis in a way that is well-supported by reason and data. It does not systematically analyze the impacts of implementing the HCP, including avoidance and minimization measures (“AMMs”), mitigation measures, and adaptive management measures, on various resources. Instead, the EIS makes impermissibly conclusory assumptions that measures implemented under the HCP “should produce a net benefit.” *See, e.g.,* EIS at 4-7.

A revised EIS must assess the environmental impacts of implementing the HCP, including the identified AMMs, whether mandatory or non-mandatory. Some AMMs were deemed non-mandatory because of their “potential adverse impacts to other trust resources.” *Id.* at 2-8. It stands to reason, then, that these potential adverse impacts should be evaluated to determine when and under what circumstances such non-mandatory AMMs *can* be implemented under the HCP without harm to other resources. Similarly, the potential adverse impacts of mandatory AMMs on other resources should be analyzed and disclosed to the public.

As part of this assessment, the Service should consider the impacts of an HCP that would allow certain AMMs to be non-mandatory. For instance, one non-mandatory AMM reads: “Do not drive across known or presumed occupied streams—walk these areas or visually inspect from bank and use closest available bridge to cross stream.” HCP Ch. 6 at 137. Analysis of an HCP that permits driving across streams should consider the environmental impacts of such an action, including its implications for invasive species introduction, erosion and sedimentation, and water quality.

Another non-mandatory AMM would prohibit “aerial application of herbicide on ROWs from April 15 to August 15 to protect maternity [Indiana bat] colonies in summer habitat.” HCP Ch. 6 at 31. Because this AMM is entirely voluntary, the HCP as drafted effectively permits NiSource to apply herbicides in summer Indiana bat habitat. An EIS evaluating the issuance of an ITP that would implement this HCP therefore must consider the impact of such

aerial application of herbicides – not only on endangered Indiana bats but on other resources. Given that herbicides and other biocides have adverse impacts, and that less-harmful means exist to clear right-of-ways, we request that any ITP issued to NiSource prohibit application of herbicides and biocides under all circumstances.

The EIS also does not, but should, analyze impacts on the human environment from mitigation measures, including operation and maintenance (“O&M”) mitigation. NiSource has proposed to undertake O&M mitigation for the entire 50-year permit duration within the first seven years of HCP implementation. The Service assumes that such front-loaded mitigation will provide a “benefit” and allows this assumption to factor into its analysis of alternatives, *see* EIS at 2-37, yet the Service provides no assessment or reasoned analysis to support this supposition. Is it possible to meaningfully mitigate 50 years worth of activities in seven years, without any further mitigation thereafter? Will such front-loaded mitigation be guaranteed to be effective over the entire course of the 50 year period? What are implications to not only wildlife, but other natural resources, of implementing mitigation for 50 years worth of O&M activities in seven years and not mitigating for such activities over the course of the next 43 years? The EIS does not answer these questions,¹² and its failure to do so raises doubt that the Service took the necessary steps to inform its decision-making. The Service’s failure to conduct this analysis also prevents the public from understanding the full implications of the issuance of a 50-year ITP to NiSource.

To adequately assess the net impact of AMMs and mitigation measures on the environment, the EIS must undertake a concomitant analysis of the impacts of the underlying Covered Activities. The Service attempts this analysis with the repeated caveat that its review is programmatic, *see, e.g.*, EIS at 1-7, 4-2, but its vague and generalized statements about potential impacts and repeated reliance on compliance with applicable laws as evidence of acceptable impacts, *see, e.g., id.* at 4-13, do not suffice as a “hard look.” NiSource’s longstanding record of implementing the Covered Activities through project-by-project consultations with the Service suggests that the Service can use existing and readily-accessible information about NiSource’s activities and track record of environmental impacts to better quantify the impacts of Covered Activities in this EIS.

The scope of an EIS does not excuse the agency from conducting a careful analysis. Where the Forest Service undertook an EIS of its efforts to inventory and allocate 62 million acres of the National Forest System among three planning categories, for instance, the reviewing court emphasized:

¹² The EIS notes that “FERC generally considers O&M activities routine in nature related to impacts; and therefore they are *arguably* insignificant contributors to cumulative impacts for *most* resources” EIS at 5-1 (emphasis added). The vague wording and conclusory assumptions here are unsupported by information and analysis, giving the public no confidence that the Service has reasonably analyzed and concluded that O&M activities actually will not contribute to cumulative adverse impacts on resources.

NEPA contains no exemptions for projects of national scope. Having decided to allocate simultaneously millions of acres of land to nonwilderness use, the Forest Service may not rely upon forecasting difficulties or the task's magnitude to excuse the absence of a reasonably thorough site-specific analysis of the decision's environmental consequences.

California v. Block, 690 F.2d 753, 765 (9th Cir. 1982) (citations omitted). Although we recognize that the EIS here is programmatic and that later site-specific review will be undertaken, this EIS nevertheless must contain sufficient analysis to inform the Service's decision whether and in what form to grant the ITP and to reassure the public that the Service has examined the impacts of the action it is proposing to undertake. To serve these purposes, the EIS should include at least an analysis of direct impacts that takes a hard look at (1) the impacts of the underlying Covered Activities, derived from a detailed and quantified analysis of impacts from similar past activities, and (2) the impacts of the proposed HCP, including the AMMs, mitigation measures, and adaptive management strategies. Without such analysis, the EIS fails to meet NEPA's requirements.

B. The EIS's Analysis of Cumulative Impacts Is Deficient.

NEPA requires that agencies consider a full range of environmental impacts, including "ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, [and] cultural" impacts, "whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8. Cumulative impacts are:

impact[s] on the environment which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

Id. § 1508.7. The Council on Environmental Quality ("CEQ") has emphasized that cumulative effects analysis includes a "[f]ocus on truly meaningful effects" of "past, present, and future actions" as well as "all federal, nonfederal, and private actions."¹³ The Service acknowledges that the Covered Activities to be undertaken by NiSource are "reasonably certain to occur." EIS at 1-9.

An EIS must include a "useful analysis" that "analyze[s] the combined effects of the actions in sufficient detail to be 'useful to the decisionmaker in deciding whether, or how, to alter the program to lessen cumulative impacts.'" *Muckleshoot Indian Tribe v. U.S. Forest Serv.*,

¹³ Council on Env'tl. Quality, *Considering Cumulative Effects Under the Nat'l Env'tl. Policy Act*, vii (1997), available at <http://ceq.hss.doe.gov/nepa/ccenepa/ccenepa.htm>.

177 F.3d 800, 810 (9th Cir.1999) (citation omitted). Consideration of cumulative effects pursuant to NEPA therefore requires “some quantified or detailed information,” because “[w]ithout such information, neither the courts nor the public, in reviewing the [agency’s] decisions, can be assured that the [agency] provided the hard look that it is required to provide.” *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379 (9th Cir. 1998); *see also Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993–94 (9th Cir. 2004) (“A proper consideration of the cumulative impacts of a project requires some quantified or detailed information; general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.”) (internal quotation marks and citations omitted). A mere listing of impacts without discussion of the underlying environmental data does not suffice. *See Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1151 (9th Cir.1998). A cumulative impact analysis must, moreover, be timely. “It is not appropriate to defer consideration of cumulative impacts to a future date when meaningful consideration can be given now.” *Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062, 1075 (9th Cir. 2002) (citing *Neighbors of Cuddy Mountain*, 137 F.3d at 1380).

The cumulative impact analysis in this EIS is inadequate because it attempts to avoid a meaningful review by deferring analysis to later NEPA processes; presents only general, conclusory statements that are unsupported by detailed information; and illogically equates unknown or uncertain impacts with *no* impacts. The root of these flaws appears to be the Service’s conflation of the cumulative impacts of its proposed action to issue the ITP with the cumulative impacts of NiSource’s Covered Activities. The Service concludes that because:

no ground disturbance or construction activity is directly authorized or included as part of the Service’s issuance of the ITP and approval of the HCP; therefore *the Service’s action (Issuing an ITP or approving the HCP) would not have significant cumulative impacts upon resources within the NCL area.*

EIS at 5-1 (emphasis added). The Service appears to rely on the same rationale to conclude that NiSource’s Covered Activities likely also will have no cumulative impacts:

No current or future ground disturbance or construction activity is directly authorized by the Service via selection of the Proposed Action (Service’s issuance of the ITP and approval of the HCP) or any of the Action Alternatives. As such, all future construction activities will be subject to future NEPA analysis and cumulative effects analysis by FERC at the time authorization for a project is sought. *NiSource’s Covered Activities are not expected to contribute cumulatively to loss of physical resources*

EIS at 5-10 (emphasis added); *see also id.* at 5-13, 5-15 (relying on the same language and rationale to conclude that NiSource’s Covered Activities are not expected to have cumulative impact on biological resources and social resources). This logic does not withstand scrutiny.

Just because the Service's issuance of an ITP would not directly authorize immediate construction of Covered Activities does not mean that issuance of the ITP, and implementation of the HCP, would not have cumulative impacts. As is detailed in Section III.A., *above*, implementing the HCP and its associated AMMs, mitigation measures, and other HCP provisions will have impacts on the environment that have not been examined in the EIS. These impacts can and should be viewed cumulatively with the impacts of other past, present, and reasonably foreseeable future actions. Without having undertaken such an analysis, the Service has no reasoned basis for its conclusion that issuing the ITP and approving the HCP would have no significant cumulative impacts.

Moreover, just because NiSource's Covered Activities will be subject to future NEPA analysis in no way leads to the conclusion that "NiSource's Covered Activities are not expected to contribute cumulatively to loss of . . . resources." EIS at 5-10. Here, the EIS contradictorily attempts to defer the cumulative impacts analysis to the action agency's future NEPA review and to conclude that the Covered Activities likely will not have cumulative impacts. The Service cannot have it both ways. The Service may not defer the cumulative impacts analysis to a future time "when meaningful consideration can be given now." *See Kern*, 284 F.3d at 1075. Here, no attempt at meaningful consideration has even been made. Although the Covered Activities include projects as large as the installation of multiple compressor station additions and the construction of a 200 mile pipeline in a new right-of-way, *see* HCP App. A at 6-7, for instance, the EIS breezily concludes that "future construction projects . . . would be *relatively small efforts*" that would "still be subject to future NEPA analysis." EIS at 5-1 (*emphasis added*).

Because NiSource has routinely consulted with the Service for its regularly-occurring activities and because both historic data and proposed projects provide the basis for some quantified analysis of impacts, including cumulative impacts, a meaningful consideration can, and should, be provided now. NiSource relied on "both historic data and future proposals" to predict affected acreage within the covered lands footprint. HCP App. A at 3. If such information allows for quantification of acreage impacts, it surely can allow for detailed and reasoned analysis of impacts on other resources. For instance, rather than simply acknowledging that past NiSource actions "have already considered cumulative effects to the extent required under law," EIS at 5-1, as a reason not to delve into these impacts, the Service could rely on past NEPA analyses of similar actions as a basis for a meaningful analysis of future Covered Activities. In any event, without having analyzed the site-specific impacts of NiSource Covered Activities, which the Service does not purport to do, or even taken a careful look at the precise impacts of these types of projects, the Service has no grounds to conclude that the Covered Activities likely will have no cumulative impacts.

C. The EIS's Analysis of Alternatives Is Insufficient.

Under NEPA, "all agencies of the Federal Government shall study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. §

4332(2)(E). The alternatives analysis is “the heart of the environmental impact statement.” 40 C.F.R. § 1502.14.

Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), [the alternatives analysis] should present the environmental impacts of the proposal and the alternatives in comparative form, *thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.*

Id. (emphasis added). The analysis of alternatives in the EIS fails to meet the requirements of NEPA because it does not fully consider the value of a flexible response and public participation in assessing various permit durations.

1. The Alternatives Section Adopts a Skewed Understanding of the Proposed Action and Rests on a Flawed Impacts Analysis.

To begin, the alternatives analysis appears to be informed by a skewed understanding of the purpose and need for the proposed action. *See* 40 C.F.R. § 1502.13 (requiring that the purpose and need statement “briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action”). Although the Service recognizes that the EIS is prepared “to assess environmental impacts associated with the issuance of an ITP to NiSource, Inc.,” EIS at ii (“Purpose and Need” section), elsewhere in the EIS, including in the alternatives analysis, the Service appears to prioritize facilitation of NiSource’s activities over commitment to the spirit and intent of the ESA. *See, e.g.,* EIS 2-6 (ruling out an alternative that would narrow the scope of Covered Activities by pointing to “the action’s intended purpose of enabling NiSource to conduct activities associated with [its gas transmission activities]”). An approach that prioritizes facilitation of NiSource’s Covered Activities over rigorous consultation true to the spirit of the ESA necessarily implicates the reasoning underlying the Service’s alternatives analysis.

Moreover, the insufficient alternatives analysis rests on a flawed impacts analysis, as described in Sections III.A. and III.B., *above*. The Service fails to assess the impacts of the HCP, including the implications of the adaptive management strategies, changed and unforeseen circumstances provisions, and amendment process, and instead appears to assume that these provisions will have only beneficial or no impacts. Given that the entire HCP, including the adaptive management strategies, would effectively be locked in for the duration of the permit term under the “no surprises” policy, an analysis of the efficacy and responsiveness offered by the HCP and the implications for the protection of resources should be part of any analysis of permit duration.

2. The Alternatives Section Also Fails to Comply with Section 10 of the ESA.

The EIS's alternatives analysis also fails to comply with section 10 of the ESA. *See* HCP Handbook at 5-5 (alternatives considered "should include alternatives that satisfy both the requirements of section 10 and NEPA"). Specifically, the analysis fails to show that NiSource will minimize and mitigate the impacts of its take "to the maximum" extent practicable. 16 U.S.C. § 1539(a)(2)(B)(ii). As explained in *Southwest Ctr. for Biological Diversity v. Bartel*,

If FWS finds that the HCP fails to mitigate and minimize harm to the species "to the maximum extent practicable"—because the applicant rejected another alternative that would have provided more mitigation or caused less harm to the endangered species and FWS determined in its expert judgment that the rejected alternative was in fact feasible—then FWS cannot approve the application for an ITP using that less protective proposal.

470 F. Supp. 2d 1118, 1158 (S.D. Cal. 2006). In other words, if the Service determines that the applicant may minimize its take through other feasible alternatives, then the Service may not issue NiSource's proposed ITP. In this case, such alternatives exist. As detailed below, NiSource may minimize its take by (1) reducing the size of the proposed area, and (2) reducing the length of the proposed permit.

a) Reducing the Size of the Proposed Area Will Minimize Take and Is Feasible.

Here, NiSource acknowledges that reducing the proposed area's size "would result in a smaller footprint . . . with less take and fewer species impacts . . ." HCP Ch. 11 at 2. The Service further acknowledges that this measure is a "viable" alternative. EIS at 2-5. Accordingly, because reducing the proposed area's size will minimize take and is feasible, the Service may not issue an ITP on the basis of the proposed HCP.

NiSource complains, of course, that reducing the size of the geographic area will (1) prevent it from addressing all of its planned projects (that have yet to be sited or identified), and (2) require it to seek take authorization from the Service through sections 7 and 10. HCP Ch. 11 at 2. But such complaints are irrelevant. Neither reason suggests that reducing the size of the proposed area is infeasible or will not minimize take.

The Service suggests that due to the hybridized nature of NiSource's proposal, evaluating this alternative "would not produce a meaningful comparison of environmental consequences." EIS at 2-5. But this is incorrect.

Reducing the geographic area (as well as the proposed time frame) will benefit the species by reducing take, and may benefit the Service by allowing it to conduct a proper impacts analysis, something that the draft EIS lacks now. *See* Sections III.A–B, *above*. As noted

earlier, the Service believes that an adequate cumulative impacts analysis is not feasible now “due to the extensive geographic scope and time frame defined for the Proposed Action.” EIS at 5-2. If, however, the Service reduced the 1-mile corridor to NiSource’s existing 50-foot right of way, the Service would reduce the covered lands corridor area by over 99%. Likewise, by reducing the size of the expansion field storage areas from entire counties to actual expansion field areas, the Service should be able to dramatically reduce take and species impacts. Finally reducing the proposed timeframe would significantly reduce the uncertainty associated with the current proposal in numerous respects. *See* Section IV.B.3, *below*. Accordingly, the Service should reject the current proposal and more fully consider its approach in accordance with NEPA and section 10 of the ESA.

Accordingly, the Service’s failure to more fully consider a reduced geographic area alternative fails to comply with NEPA, which requires the rigorous exploration and objective evaluation of “all reasonable alternatives” to the proposal. 40 C.F.R. § 1502.14(a). As the CEQ has explained, “the emphasis is on what is ‘reasonable’ rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative.” Council on Env’tl. Quality, *Forty Most Asked Questions Concerning CEQ’s Nat’l Env’tl. Policy Act Regulations*, 46 Fed. Reg. 18026, 18027 (Mar. 23, 1981) (“40 Most Asked Questions”), *available at* <http://ceq.hss.doe.gov/NEPA/regs/40/1-10.HTM#2>. Here, given NiSource’s view that a reduced geographic area would result in “less take and fewer species impacts” and the Service’s view that such an option remained viable, the Service’s draft EIS should have more rigorously explored an alternative including a reduced geographic area (in combination with a reduced timeframe, as discussed below).

Indeed, a more reasoned and considered approach would focus on the area where NiSource is certain that 95% of its projects will occur—*i.e.*, the existing 50 foot right of way and compressor station areas. *See* EIS at 2-11 (“95 percent of the disturbance would occur on existing rights-of-way”); HCP Ch. 2 at 2 (typical NiSource right-of-way is 50 feet wide). As noted by the Service, NiSource is unable to identify any specific projects over the next 50 years, but is certain that over 95% of its proposed activities will occur within these areas. *See* EIS at 1-10. Given these facts, the Service should more fully consider as an alternative, a project area limited to this footprint. When NiSource is able to identify where the remaining 5% of projects outside this area may occur, the Service and NiSource may revisit how those projects should be addressed—*e.g.*, by amending the HCP and ITP, by conducting a section 7 consultation at the later time, by revising the biological assessment, or some combination thereof. Until then, the Service should not allow the metaphorical tail to wag the dog.

The Service should also consider an alternative that reduces the geographic area associated with the storage field expansion areas, presently identified as 12 entire counties. NiSource refused to identify the specific locations of its nine storage fields and future expansion areas because it considered such information to be “highly-sensitive (for Homeland Security purposes) and . . . confidential business information.” HCP Ch. 2 at 2. The Service appears to have simply accepted NiSource’s explanation without doing anything more.

Such acquiescence is disturbing, and suggests a lack of independence and objectivity in evaluating the presented proposal. As recognized by FERC—the federal agency that primarily oversees NiSource’s activities and a cooperating agency in this project—“it would be nearly impossible for people to participate effectively in the NEPA process without access to specific information regarding the location of [a] proposed facility, the area it affects, and the resources it impacts.” Critical Energy Infrastructure Information, 68 Fed. Reg. 9857, 9863 (Mar. 3, 2003). Accordingly, FERC’s policy has been to release existing and project location information needed for the NEPA process. *Id.* at 9862–63; *see also* 18 C.F.R. § 388.113(d)(2) (allowing an employee of a federal agency to obtain more detailed project information “directly” from FERC staff).

In short, NiSource’s refusal to provide such information suggests a failure to disclose “material information” in violation of the permit issuance requirements. *See* 50 C.F.R. § 13.21(b)(2). At a minimum, the Service should have pressed NiSource on this claim, asked FERC to provide this information, and more rigorously explored a reduced geographic area alternative in accordance with NEPA and section 10 of the ESA.

b) Reducing the Timeframe Will Reduce Take and is Feasible.

The Service’s inadequate consideration of a reduced time frame of 10 years or less, also violates NEPA and section 10’s requirement for an applicant to minimize take “to the maximum extent” practicable.

Here, the Service fails to explore the value of the responsiveness offered by a shorter permit duration, and the corresponding high price of effectively locking in NiSource’s response under the “No Surprises” rule. In a time of rapid and unpredictable climate changes, we can at least be certain that conditions in 2061 will not be what they are today. Although the EIS acknowledges that a 10-year ITP would “somewhat reduce[]” the “uncertainty about the implementation of covered activities, take analysis, adaptive management, and environmental consequences,” and would allow the Service to “re-examine the operating conservation plan” and “consider any new information,” it provides no further analysis of the value such a reduction in uncertainty would provide.¹⁴ To meet its obligations under NEPA to “[r]igorously explore and objectively evaluate all reasonable alternatives,” 40 C.F.R. § 1502.14, the Service’s revised EIS must analyze the impacts of implementing the HCP, including any limitations on flexible and effective response, and base the alternatives analysis on an understanding of these limitations and the value provided by variable permit durations.

An ITP that is 10 years or less is furthermore viable and would minimize take. Here, although NiSource’s HCP fails to address the possibility of a reduced timeframe, the Service acknowledges that a 10-year permit would result in “less take than [the] Proposed Action due

¹⁴ As noted in Section III.A., the Service also fails to assess the impacts of mitigating all O&M activities up front. Nevertheless, it points to the “benefit from the ‘up front’ aspect of O&M mitigation” as a reason weighing against a 10-year permit term, as “NiSource has only agreed to that mitigation strategy provided they receive at 50-year permit.” EIS at 2-37.

to [the] shortened permit duration” EIS at 2-40. Similarly, a 10-year permit would reduce the uncertainty associated with a number of significant factors, including, “the implementation of covered activities, take analysis, adaptive management, and environmental consequences” *Id.* at 2-37.

Reducing the applicable timeframe is also feasible. The draft EIS notes that “inter-agency discussions have raised the 10-year timeframe as a potentially workable option based on prior HCP experience.” *Id.* at 2-36. At our November meeting with the Service, agency staff identified FERC—NiSource’s primary regulator—as the federal agency raising this “potentially workable option.” Thus, given that reducing the timeframe to 10 years would reduce take and is a feasible alternative, the Service’s proposed analysis violates NEPA by failing to more rigorously explore this alternative. In addition, the Service’s proposed issuance of this ITP as proposed by NiSource would violate section 10’s requirement that NiSource minimize harm to the species to the maximum extent practicable.

NiSource contends, however, that it would not agree to an ITP with a 10-year effective period. NiSource’s preference, however, is not determinative under a section 10 analysis. Rather, the focus is on whether the alternative option will minimize take and whether the option is a feasible one. Because reducing the timeframe is a feasible alternative, the Service should have more fully explored this alternative.

IV. The Service’s Proposed Issuance of an ITP Would Violate the ESA.

The EIS’s proposed issuance of an ITP would furthermore violate sections 7 and 10 of the ESA. Section 10 provides that the Service may not issue a permit unless each of the following ITP criteria is satisfied:

- (i) the taking will be incidental;
- (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
- (iii) the applicant will ensure that adequate funding for the plan will be provided;
- (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
- (v) the measures, if any, required under subparagraph (A)(iv) will be met;

and [the Secretary] has received such other assurances as he may require that the plan will be implemented

16 U.S.C. § 1539(a)(2)(B)(i)–(v). If the application fails to meet any of the criteria, the permit must be denied.

Section 7 further imposes a duty on each federal agency to ensure “that any action authorized . . . or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species” *Id.* § 1536(a)(2). Significantly, this duty may not be delegated. *See Nat’l Wildlife Federation v. Coleman*, 529 F.2d 359, 374 (5th Cir. 1976) (holding that the Federal Highway Administration violated section 7 by improperly relying on the future actions of other agencies to satisfy its non-delegable obligation under section 7); *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 6 F. Supp. 2d 1119, 1131 (D. Ariz. 1997).

A. NiSource Does Not “Ensure That Adequate Funding” for the Plan Will Be Provided.

Here, the Service’s analysis also fails to show that NiSource will “ensure that adequate funding” for the plan will be provided in accordance with section 10 of the ESA. 16 U.S.C. § 1539(a)(2)(B)(iii).

For example, the EIS fails to explain how NiSource’s presented costs, funding assurances, or proposed mitigation set-asides are “adequate” for a project of this size and scope. Nothing in the draft EIS suggests that such amounts or funding mechanisms are in line with similar projects, that the Service took steps to independently review any other projects or consult other agencies, or examined whether any conflicts of interests might exist with the National Fish and Wildlife Foundation. Nowhere in the draft EIS does the Service explain why the \$784,595 set aside for operations and management mitigation is reasonable or “adequate” under section 10, much less why such an amount would adequately cover 50 years of mitigation. *See* HCP Ch. 8 at 3. Similarly, nowhere in the EIS does the Service explain whether the \$100,000 to be placed in a Reserve Account is “adequate” for this proposed project. *See id.* at 8-5. In addition, the Service fails to explain why NiSource’s goal of maintaining this balance in 2010 dollars makes sense for this project given its proposed timeframe of 50 years. And, the Service makes no effort to explain why the set annual contribution amounts in 2010 dollars, might be “adequate” years from today.

In fact, NiSource’s suggested amounts pale in comparison to those suggested by the U.S. Department of Transportation for significant incidents occurring over a 20 year period. For example, between 1991 and 2010, pipeline operators reported over 850 onshore “significant incidents” —*i.e.*, incidents involving fatalities or injuries requiring in-patient hospital care, unintentional fires or explosions, substantial costs, or unintentional releases of highly volatile

liquids—dealing with gas transmission alone.¹⁵ Property damage from these incidents totaled over \$1 billion dollars. *Id.* NiSource’s track record for estimating costs and setting budgets is also troubling. As the Service is well aware, over 100 listed and candidate species make their home or forage within the currently proposed covered lands area, and over 70 were originally included for consideration during the earlier scoping phase. *See* EIS at 3-104, App. A (Scoping Report). NiSource’s HCP only addresses 43 of these species, however, because NiSource exhausted its budget for that project portion and did not wish to commit additional funds. E-mail from John H. Shafer, Manager, Sustainable Natural Resource Practices, NiSource to Patrick Mullen, Senior Biologist, AMEC Earth & Environmental (Oct. 7, 2008, 08:57 CST) (attached as Appendix A); *see also* HCP Ch. 4 at 3 (citing “business concerns”).

The Service’s lack of analysis here is particularly disquieting, given the importance of the “no surprises” policy, which provides an ITP applicant with assurances that, “even if circumstances subsequently changed in a such a way as to render the HCP inadequate to conserve listed species, the Services would not impose additional conservation and mitigation requirements that would increase costs or further restrict the use of natural resources beyond the original plan.” *Spirit of Sage Council v. Norton*, 294 F. Supp. 2d 67, 77 (D.D.C. 2003); *see also* 50 C.F.R. §§ 17.22(b)(5), 17.32(b)(5). Given the rapidly increasing rate of species extinction and the growing severity of climate change, it is imperative that the Service explain how HCP’s funding assurances meet the ITP criteria. The EIS’s lack of discussion on this point simply fails to provide the public with sufficient information to adequately weigh the risks and benefits of this proposed action. In sum, because the Service’s draft EIS presents no analysis on how it reached its preliminary decision that NiSource’s proposal would “ensure that adequate funding” will be provided over the length of the 50-year permit, the Service’s analysis of the proposed issuance violates NEPA.

B. The Service Fails to Show that the Taking “Will Not Appreciably Reduce” the Likelihood of the Survival and Recovery of the Species in the Wild.

The EIS also fails to show that the proposed take “will not appreciably reduce” the likelihood of the survival and recovery of the species in the wild. Over 100 listed and candidate species inhabit the currently proposed covered lands area. The following are simply but a few examples of how the HCP’s implementation plan suggests that the taking will appreciably reduce the likelihood of the survival and recovery of the species in the wild.

¹⁵ *See* U.S. Dep’t of Transp., Pipeline and Hazardous Materials Safety Admin. (“PHMSA”), *Natural Gas Transmission Onshore: Significant Incidents Summary Statistics: 1991–2010*, (last accessed Dec. 8, 2011) http://primis.phmsa.dot.gov/comm/reports/safety/SigPSI.html?nocache=7595#_ngtrans.

1. The “Reasonable Worst Case Scenario” is Unrealistic.

As an initial matter, the Service’s “conservative assumption” for the “reasonable worst case scenario” is unreasonable. At our November meeting with the Service, the Service provided a powerpoint with a slide noting that under the Service’s reasonable worst case scenario, NiSource would abide by all avoidance and minimization measures.¹⁶ Such a definition, however, is at odds with its commonly understood meaning, which suggests a predictable set of circumstances yielding the most adverse impacts. *See, e.g.*, 41 CFR § 102-80.150 (“Reasonable worst case . . . means . . . a significant adverse impact”); *Madison Elec. Works*, 115 FERC ¶ 62113 at *22 (May 1, 2006) (using the historic lowest flow month as a representative “worst case” migration scenario for adult salmon in the project area). The Service’s scenario is more properly characterized as an optimistic goal, and in any event, its conclusion appears to be unsupported by the presented materials. As noted earlier, the U.S. Department of Transportation has assessed a total of over \$1.8 million in civil penalties for NiSource’s violations of federal regulations related to pipeline safety and maintenance. *See* Section II., *above*. Thus, because the Service’s take calculations are based on an overly optimistic and unrealistic “worst case scenario,” the Service’s authorized take for NiSource will likely reduce the survival and recovery of species in the wild.

2. The Scope of the “Changed Circumstances” is Inadequate.

The Service’s identification of the “changed circumstances” is also inadequate. Changed circumstances are “changes in circumstances affecting a species or geographic area covered by a conservation plan or agreement that can reasonably be anticipated by plan or agreement developers and the Service and that can be planned for (*e.g.*, the listing of new species, or a fire or other natural catastrophic event in areas prone to such events).” 50 C.F.R. § 17.3. Here, the Service has identified nine such circumstances—climate change, droughts, floods, fires, tornadoes, disease, invasive species, species range expansion/contraction, and species listing/delisting—that, if they were to occur within the covered geographic area, would require NiSource and the Service to determine if additional conservation and mitigation measures are necessary. HCP Ch. 10 at 3.

Missing from NiSource’s list of threats to species are gas pipeline leaks and explosions (*e.g.*, caused by human error, corrosion, terrorism, earthquakes, or other threats). As noted in a report prepared for members and committees of Congress, gas pipelines “carry volatile or flammable materials with the potential to cause public injury and environmental damage. The nation’s pipeline networks are also widespread, running alternately through remote and densely populated regions; consequently, these systems are vulnerable to accidents and terrorist

¹⁶ PowerPoint, U.S. Dep’t of Interior, Fish & Wildlife Serv., *NiSource Multi-Species Habitat Conservation Plan*, Slide 10 (Nov. 3, 2011) (attached as Appendix B).

attack.”¹⁷ In 2006, for instance, there were 78 gas transmission pipeline accidents. *Id.* at CRS-2. A natural gas pipeline explosion near Carlsbad, New Mexico, killed 12 campers, including four children. *Id.* And last year, a natural gas explosion created a crater approximately 72 feet long by 26 feet wide, sending a 3000 pound section of pipe roughly 100 feet away from the crater.¹⁸ In many such incidents, corrosion of the gas pipeline is cited as a cause.¹⁹ Given that gas pipeline leaks and explosions can be reasonably anticipated to occur, the HCP should include additional conservation and mitigation measures to protect the identified species.

3. The Service’s Analysis of Impacts to the Species is Inadequate.

The Service’s analysis regarding the covered activities’ and HCP’s impacts to the species is also inadequate. Highlighted below are just a few of the many flaws contained within the EIS and HCP. As further noted below, a 50-year permit would drastically impact these species, pushing them even closer towards extinction.

a) A 50-Year Permit Would Devastate the Bog Turtle.

As explained by the incorporated comments of Professor Peter Rosenbaum, State University of New York at Otsego, the NiSource HCP “mis-represents the issues and data I have presented in peer reviewed publications.” Letter from Prof. Peter Rosenbaum to U.S. Fish & Wildlife Serv., at 2 (Dec. 13, 2011). The NiSource HCP’s assertion that new bog turtle habitat may be created “is fantasy.” *Id.* at 1. And, given that the next 50 years is likely to be associated with an even greater amount of change than the previous half-century, “[e]ven a 5 or 10-year permit would be too long” *Id.* at 4. The Service must be able to respond quickly to new information and take such measures as are appropriate to conserve and protect the species. The HCP, however, takes that discretion away, and would improperly allow for the local extermination of bog turtle populations.

b) A 50-Year Permit for the Indiana Bat is Indefensible.

The Indiana bat (*Myotis sodalis*) is one of ten species identified for issuance of an ITP in the NiSource HCP. The Indiana bat’s range overlaps considerably with the NiSource project

¹⁷ Paul W. Parfomak, *Congressional Research Service Report for Congress, Pipeline Safety and Security: Federal Programs*, at CRS-1 (Feb. 29, 2008), available at <http://www.fas.org/sgp/crs/homesec/RL33347.pdf>.

¹⁸ See Nat’l Transp. Safety Bd., *Pipeline Accident Report, Pacific Gas and Electric Company Natural Gas Transmission Pipeline Rupture and Fire, San Bruno, California, September 9, 2010*, at 1 (Aug. 30, 2011), available at <http://www.nts.gov/doclib/reports/2011/PAR1101.pdf>.

¹⁹ See John A. Beavers and Neil G. Thompson, *External Corrosion of Oil and Natural Gas Pipelines*, ASM Handbook, Vol. 13C, at 1015 (2006), available at <http://www.asminternational.org/content/ASM/StoreFiles/ACFAB96.pdf>.

area. The HCP projects a take of Indiana bat that is “low but immeasurable.” Some undetermined percentage of an estimated 2,637 individual Indiana bats in the project area would be harmed or killed, either from direct take or habitat loss.

Since 2006, the Indiana bat has been gravely threatened with a newly emergent disease known as white-nose syndrome (WNS). The HCP discusses but fails to fully grapple with the threat of white-nose syndrome (WNS), as well as the cumulative effects of WNS with other current and potential threats, such as the proliferation of wind energy projects in the species’ range²⁰, and climate change’s effects on the suitability of hibernacula. The HCP’s analysis is largely based on documents that have become badly outdated in the last three years²¹. WNS has rapidly spread across the species’ range, and last year (the winter of 2010-11) moved into the core portion of its range. Colony numbers have dropped precipitously – an average of 72 percent-- in areas affected the longest period of time.²² None of these developments are accounted for in the HCP.

²⁰ We could find no mention of wind energy and its potential impacts on the Indiana bat in either the HCP or DEIS, despite mounting evidence that industrial scale wind turbines do kill Indiana bats, and the fact that the Service itself is engaged in multiple projects assessing the impact of wind energy on federally listed bats. See, e.g., U.S. Dep’t Interior, Fish & Wildlife Serv., *Shaffer Mountain Wind Farm and the Monarch Wind Farm* (last updated Oct. 11, 2011), available at <http://www.fws.gov/midwest/Endangered/mammals/inba/inbaBOs.html>. Elsewhere in these comments, we discuss the overall inadequacy of the cumulative impacts analysis for the NiSource HCP. The failure to address wind energy’s potential cumulative harm to Indiana bat highlights one of the major shortcomings of the Service’s approach to the NiSource project; it improperly sidesteps cumulative analysis at the programmatic level, leaving it to action agency NEPA analysis to confront the cumulative effects of NiSource with all other potential impacts to the species.

²¹ The most recent data included in the Indiana bat assessment and impact analysis in the HCP is from 2009, with the exception of reference to the Service’s WNS webpage, which in April 2010 documented WNS in 12 eastern states largely outside the core of the species’ range. See <http://www.fws.gov/WhiteNoseSyndrome/>. In the winter of 2010-11, however, WNS was documented for the first time in Indiana and Kentucky, which, together with the WNS-epicenter state of New York, contain 72 percent of the range-wide hibernating population of Indiana bat.

²² See G. G. Turner, D. M. Reeder and J.T.H. Coleman, *A five-year assessment of mortality and geographic spread of white-nose syndrome in North American bats and a look to the future*, *Bat Research News* 52(2):13-27 (2011). Indiana bats have declined an average 72 percent in several dozen hibernacula in New York, Pennsylvania, Vermont, Virginia, and West Virginia since the advent of WNS. Scientists believe this figure is a reasonable proxy for overall population decline of the species in the Northeast, which prior to WNS was a region of population growth.

The species' rapidly shifting baseline, which can reasonably be expected to continue shifting over the next decade or longer, means that a 50-year period for an ITP is biologically indefensible. If the NiSource HCP is to include an ITP for the beleaguered Indiana bat, whose future in light of WNS and multiple other threats is far grimmer than it was even just a few years ago, then the only responsible approach is to reduce the timeframe to ten years, or less.

Even prior to WNS, the Indiana bat's prospects were uncertain. Despite significant gains in habitat protection since the species was first listed by the Service in 1967 (*e.g.*, reduction of human disturbance in hibernacula due to installation of bat-friendly gates), the range-wide population had fallen by nearly 50 percent.²³ The threshold for acceptable take may need to be lowered dramatically, if the species' regional or range-wide population continues to plummet.

Current monitoring protocols may well prove inadequate for detecting Indiana bats at very low densities. As the species declines, greater portions of the NiSource project area are likely to be surveyed without yielding any observations of the species. But these areas may in fact still harbor individuals of the species, albeit at much lower densities than prior to the onset of WNS. It may be that these few surviving bats are crucial for the species' continued existence and future recovery. Monitoring may need to be intensified, or conducted over a longer period of time, to detect the rare individuals that remain.

Protection standards will need to be more rigorous and conservative, to reflect the increased value of each individual to the survival of the species as a whole. Thus, the AMMs proposed in the HCP for Indiana bat may need to be modified to reflect a lower density population. Thus, for example, AMM #27 allows the removal of roost trees during the summer season if they are less than nine inches dbh. However, to test whether Indiana bats may indeed roost in trees less than nine inches dbh, the HCP proposes to cut trees between five and nine inches dbh, and observe whether any bats fly out or any are killed or injured by the felling. However, the failure to observe any escaping, injured, or dead bats does not prove that Indiana bats do not roost in these smaller dbh trees. In portions of the species range where WNS has already devastated local winter colonies, such as Pennsylvania and West Virginia, the likelihood that any particular site or particular potential roost tree would host an Indiana bat has decreased tremendously. Nonetheless, leaving these smaller dbh trees alone in the summer active season could be very important in order to protect the few bats that remain.

Bats already stressed by WNS may require stricter habitat protections, in order to increase the proportion that survive and successfully reproduce in the wake of disturbances such as forest clearing and the placement of drilling waste pits in their summer or fall habitats.

²³ U.S. Dep't Interior, Fish & Wildlife Serv., *Indiana Bat (Myotis sodalis), 5 Year Review: Summary and Evaluation* (Sept. 2009), available at http://www.fws.gov/midwest/Endangered/recovery/5yr_rev/pdf/INBA5Yr30Sept2009.pdf. In 1967, the range-wide population estimate for the Indiana bat was 880,000. In 2007, the population was estimated to be at 470,000.

Seasonal restrictions on covered activities at or near known habitat sites may be insufficient to assure adequate protection of Indiana bats. These activities may need to be much reduced in intensity or area, or they may need to be prohibited completely. These stricter protections may include the reduction of forest acreage that NiSource can clear, or an outright prohibition on logging of any sort, at any time of year, in known or suspected maternity roost areas, or other summer and fall habitats.

Individuals that could have been expected to emerge from hibernation and then readily tolerate the disappearance of traditional roosting areas that were logged during the hibernation period may now have lower margins of survival. Bats that survive a winter of WNS infection are likely to be in a weakened state that could predispose them to higher rates of mortality or reproductive failure from a variety of other causes. The HCP itself acknowledges that emergent bats forced to find new habitat may have to expend more energy than previously. It states, “The displaced bats may need to increase energy expenditures since they may be required to increase commuting distances to traditional foraging areas, and/or expend additional energy seeking new foraging and roost sites. The increased energy expenditure is anticipated to “harm” and “harass” individuals by affecting fitness, nutrition, and reproductive success.”²⁴ With the additional factor of WNS, the increased energy expenditure compelled by the loss of spring, summer, or fall habitat may be the difference between survival and death.

The HCP analysis of the Indiana bat relies primarily on a 2007 draft recovery plan, which was written before the enormous scope of WNS was understood by bat biologists. This document has not yet been updated or finalized to reflect the new information on WNS. The HCP also refers to a 2009 status review on the Indiana bat. However, this document reports only an estimated 30 percent decline of the species in the northeastern portion of its range. Data reported this year shows a further estimated decline of 72 percent in the Northeast,²⁵ and since 2009, WNS has been found in the core of the species’ range, in Indiana and Kentucky.

The HCP states that in light of WNS “even minimal impacts to Indiana bats in suitable summer and/or spring staging/fall swarming habitat may become important.”²⁶ We wholeheartedly agree. Therefore, until more information is available on how WNS will affect the Indiana bat population as a whole and how surviving individuals and sub-populations respond to and potentially recover from the bat disease, and new protocols for survey and monitoring are developed to reflect the shifted baseline of Indiana bat populations, the precautionary principle dictates an extremely conservative approach to authorizing any future, non-WNS losses through take.

²⁴ HCP Ch. 6 at 48.

²⁵ Turner, *et al.* at 13–27.

²⁶ HCP Ch. 6 at 53.

Effectiveness monitoring for the Indiana bat that is revisited only every five years²⁷ is not frequent enough in light of spreading WNS and the rapidly shifting Indiana bat baseline population. We recommend that effectiveness monitoring be re-evaluated every two or three years, at most.

We urge the Service to reject NiSource's request for a 50-year ITP for the Indiana bat. Furthermore, we ask you to withhold any issuance of an ITP for NiSource until a more thorough cumulative effects analysis is undertaken, and until surveying protocols are reviewed and revised to assure adequate protection of individual bats and their habitat in light of the devastation wrought by WNS. We applaud the willingness of NiSource to contribute \$150,000 to research the impact of new pipelines and storage fields on Indiana bat maternity colonies.²⁸ Whatever populations of Indiana bat survive this unprecedented wildlife disaster need to be granted the most rigorous protection, or we risk losing any chance of this species staging a successful recovery.

c) A 50-Year Permit Will Hinder the Protection of Mussel Colonies.

Freshwater mussels comprise one of the most endangered taxa in North America. Many species are extremely imperiled, holding on to survival in only one or a handful of stream reaches. ITPs lasting 50 years make no sense for freshwater mussel species reduced to a very few extant populations. Over a half-century, stochastic events alone will likely reduce or eliminate some mussel colonies. Mussel losses unrelated to NiSource activities, at locations outside the project area, may, over time, increase the relative importance of mussel habitat and mussel colonies within the project area. A 50-year HCP, even with adequate triggers and monitoring in place (which is currently questionable), will likely be more hindrance than help in making management adjustments to changed circumstances. For this reason and others described elsewhere in these comments, we urge the Service to either reject the HCP, or choose a shorter timeframe, such as five years. At most, the ITP/HCP should be authorized for 10 years.

Mussel survey and monitoring protocols were not completed at the time the draft HCP was released. Papers upon which the protocols will be based, at least "in part," were included in the HCP.²⁹ However, the lack of final protocols for detecting and monitoring mussel populations is a significant shortcoming in the HCP, especially considering that mussel species make up the majority of organisms for which ITPs are sought by NiSource. The success of multiple AMMs and BMPs upon which NiSource relies to avoid take cannot be determined without reliable survey and monitoring protocols. The public is once again denied the opportunity to make comments based on complete information. Key questions regarding

²⁷ HCP Ch. 7 at 6.

²⁸ *Id.*

²⁹ HCP App. L.

whether the plan actually provides the proper methodologies and strategies for delivering what it promises—*i.e.*, species protection over the 50-year lifespan of the project—are not answerable.

Seasonal restrictions on covered activities should be mandatory in freshwater mussel habitat. We are disturbed and perplexed by the fact that seasonal restrictions are in most cases non-mandatory AMMs (for HCP species) or non-mandatory BMPs (for non-HCP species).³⁰ Seasonal restrictions should be clearly spelled out, with precise dates or other explicit seasonal markers, as appropriate for the life strategies and cycles of each different species. Seasonality considerations are extremely important for the reproductive success and long-term survival of mussels. During spawning as well as the period when glochidia are released, activities that cause increased sedimentation can be especially detrimental. Higher levels of sediment in the water column, or any other disturbance that may reduce the likelihood of spawning or glochidia/fish host parasitization success, can have serious long-term impacts on the perpetuation of mussel colonies. Different mussel species spawn and release glochidia at different times of the year, so seasonal restrictions must be tailored to each location and the suite of listed mussels found there. The lack of mandatory seasonal restrictions for most mussels in the HCP and/or DEIS is reason enough to reject the current proposal.

Most BMPs for non-HCP mussels are non-mandatory, including timing restriction.³¹ The only mandatory BMP for these species is BMP 2, “Prepare an Environmental Management and Construction Plan.”³² Again, restrictions on the seasonality of covered activities in mussel habitat are necessary requirements; they should not be optional. It should be noted that mussel presence is assumed if no survey is conducted in suitable habitat. However, this means little if the only mandatory AMM/BMP is developing an EMCP.

Protections for freshwater mussels should include analysis and pre-planning for sudden, catastrophic events, such as toxic spills and mass streambank failure. NiSource should be required to guarantee sufficient funding for remediation and full restoration in the case of losses exceeding take allowances. NiSource should also be required to calculate the likelihood of lesser crises, such as unanticipated pipeline failures at stream crossings or frac outs, and assess the risk to mussels in the overall project area. Even if catastrophic events cannot be predicted with any degree of certainty at a particular site, the company’s engineers likely have a decent understanding of how often problems occur somewhere within the vast span of NiSource’s footprint, especially if the age of infrastructure and other relevant factors are considered. This analysis will offer a more realistic picture of the impact of the project on freshwater mussels, and provide a more reasonable basis for establishing funding mechanisms and amounts for remediation and restoration.

³⁰ EIS at Ch. 4.

³¹ EIS at 4-37-40.

³² *Id.* at 53.

Some of the responses planned for changed circumstances (triggers) regarding mussels seem to fall far short of what would be necessary to correct or mitigate in the new context. The most noticeable shortcoming is waiting too long to address the problem after it has occurred. NiSource intends, for example, to monitor mussel populations for *five years* following a potentially catastrophic six-month (minimum) drought event, and if “at the end of five years the average growth rate is <1.0” then NiSource will implement corrective actions.³³ Swifter corrective action would likely offer greater chance of success than waiting five years, during which time individuals may further weaken, the colony may fall below a critical, irreversible threshold, or multiple populations rangewide may also be compromised (*e.g.*, sources of stock for restoration measures disappear). NiSource also intends to monitor and wait for five years following a flood event and the incursion of invasive species. Waiting five years to address an invasive species (*e.g.*, the appearance of the zebra mussel) seems particularly foolhardy and irresponsible, as swift action in many cases would offer a higher chance of eliminating the problem altogether. The NiSource HCP does not even consider that a disease event could affect mussels directly, but only discusses contingencies in the event that riparian vegetation may be harmed by disease.³⁴ Finally, the HCP does not even address the potential for range contraction of a species, and how NiSource will respond in the instance that a mussel in its project area has become much more scarce in its range overall.³⁵

Cumulative impacts to mussels must be considered in the Service’s NEPA analysis.³⁶ For reasons enumerated elsewhere in these comments, the Service cannot postpone a thorough analysis of the cumulative effects of the NiSource project at this programmatic stage. Indeed, this is the most appropriate stage at which to consider how the combined effects of the proposed activity, along with other known or potential threats, such as new energy development or the spread of invasive zebra mussels, could affect the listed species. In the case of extremely imperiled mussels teetering on the edge of extinction, even small impacts from NiSource could cause species to pass irreversibly over critical thresholds. In order to better understand this context, the Service must conduct a cumulative impacts analysis and look at risks over the entire proposed timeframe of the HCP. If the Service is unable to do this, the timeframe should be reduced to a scope where impacts are more readily anticipated and measured.

³³ HCP Ch. 10 at 16.

³⁴ HCP Ch. 10 at 33.

³⁵ HCP Ch. 10 at 41.

³⁶ See Section III.B. (discussing overall inadequacy of cumulative impacts analysis).

We request that NiSource or the Service convert the figures for mussel take from acres of habitat to stream miles, accounting for differing stream widths. We would like the Service to at least provide stream miles as a complementary, and more readily grasped, number conveying the degree of impact on mussel habitat. Aquatic biologists tend to think in stream miles, not acreage.

C. The Mechanisms for Accountability and Oversight are Lacking.

At present, the draft implementing agreement states that NiSource, the Service and other unidentified stakeholders, “as appropriate, will convene as needed during the first year of implementation of the HCP, at least annually until the fifth year of implementation of the HCP, and at least every five years thereafter, unless the Service determines that more frequent meetings are needed.”³⁷

This proposal is inadequate for several reasons. As an initial matter, this project lacks the necessary detail to inform the public how this untested proposal will be implemented in the future. As noted above, the Service’s analysis fails to adequately explain the project’s direct or cumulative impacts. The cooperating agencies have yet to draft an implementing agreement, explaining how they might present such an analysis for the covered lands area in the future. If a 50-year ITP were issued to NiSource, most, if not all, of the current participants in this agreement will have moved on or passed away. Finally, climate change will only accelerate the enormous impacts we are already observing. In 50 years time, we will be living in a dramatically different world that, in all likelihood, will include fewer species.

Given the untested and unique nature of this proposal, we strongly urge the Service to meet annually with NiSource; identify conservation groups—both local and national—to provide for a balanced presentation of views and considerations; ensure formal opportunities for the public to provide written and oral comments; maintain the transparency of the meeting process; and make documents and summaries of meetings available to the public. *See* Council on Env’tl. Quality, *Collaboration in NEPA, A Handbook for NEPA Practitioners*, at 90–91 (October 2007) (describing best practices for public involvement). As recognized by the Council on Environmental Quality when discussing the benefits of federal advisory committees, incorporating such best practices may “be the best approach for achieving NEPA’s Section 101 objectives.” *Id.* at 90. In particular, if and when projects are sited, the Service should notify local conservation groups in the affected area and ensure their active participation, including acting as compliance monitors for NiSource projects. In addition, the Service should require NiSource to include funding for technical experts to assist the public.

³⁷ U.S. Dep’t of Interior, Fish & Wildlife Serv. *Draft Implementing Agreement for NiSource Multi-Species Habitat Conservation Plan*, at 14 (May 13, 2011), available at <http://www.fws.gov/midwest/Endangered/permits/hcp/nisource/2011NOA/pdf/NiSourceHCPImplementAgreement.pdf>.

D. The Service Lacks the Necessary Information to Determine Whether its Section 7 Duty is Being Violated.

For many of the same reasons cited earlier, the Service's proposed issuance of an ITP violates section 7 of the ESA. Section 7 requires each federal agency to ensure that its actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species" 16 U.S.C. § 1536(a)(2); *Nat'l Wildlife Federation v. Coleman*, 529 F.2d at 374 (section 7 duty is non-delegable); *Sw. Ctr. for Biological Diversity*, 6 F. Supp. 2d at 1131 (same). To fulfill this duty, an agency must consider the "interrelated, interdependent, and cumulative" impacts of its proposed decision. HCP Handbook at 1-14, *see also id.* at 5-5 (section 10 requires analysis of both impacts of proposed HCP and other environmental effects required for analysis under NEPA); Council on Env'tl. Quality, *Forty Most Asked Questions Concerning CEQ's Nat'l Env'tl. Policy Act Regulations*, 46 Fed. Reg. 18026, 18031 (Mar. 23, 1981), available at <http://ceq.hss.doe.gov/NEPA/regs/40/11-19.HTM#18>.

Here, the Service's presented analysis simply fails to consider the many reasonably foreseeable impacts created by its proposed decision. For example, the Service acknowledges that its decision may set a precedent,³⁸ but fails to examine this matter any further. Such an approach fails to comply with the ESA and NEPA. Given the gas industry's support of the NiSource proposal, the Service's analysis should examine how this agency's decision may affect the gas industry and any future development.³⁹ In addition, the Service should consider whether granting NiSource's request would encourage, *inter alia*, the Service's issuance of more ITPs to gas companies with civil penalties evidencing a lack of responsibility; more ITP requests asking for larger geographic areas (*e.g.*, 28 states instead of 14 states) or longer timeframes (*e.g.*, 150 years instead of 50 years); and more ITP requests that include an even smaller percentage of listed species within a proposed covered lands area (*e.g.*, addressing 13 species in an HCP from over 100 instead of addressing 43). By side-stepping these questions, the Service's analysis adopts an *ad hoc* approach to environmental planning that contravenes section 7 and NEPA. Without a proper impacts analysis, the Service lacks an adequate basis for determining whether its section 7 duty is being violated. Similarly, without an implementing agreement in place from the cooperating agencies (*see* EIS at 1-28), the Service cannot ensure that its section 7 duty is being fulfilled. In sum, the Service's analysis must fully consider all reasonably foreseeable

³⁸ U.S. Dep't of the Interior, Fish & Wildlife Serv., *HCPs in Development, NiSource Habitat Conservation Plan*, <http://www.fws.gov/midwest/Endangered/permits/hcp/nisource/scopingreport.html> (last updated Sept. 13, 2010) (noting that the Service elected to prepare an EIS based on the NiSource proposal's "long-term and far-reaching intent, and the potential precedence set by such a decision").

³⁹ *See, e.g.*, U.S. Energy Information Administration, *Annual Energy Outlook 2011 with Projections to 2035* (April 2011), available at [http://www.eia.gov/forecasts/aeo/pdf/0383\(2011\).pdf](http://www.eia.gov/forecasts/aeo/pdf/0383(2011).pdf).

impacts created by its proposed decision. Until such an analysis has been completed, the Service may not issue an ITP consistent with its duty under section 7.

V. Conclusion

Because NiSource and its subsidiaries do not meet the general permit issuance criteria, the Service should reject NiSource's request for an ITP. As noted above, the nearly \$2 million in civil penalties assessed against NiSource and its subsidiaries evidence a lack of responsibility that the Service should have no part of. In addition, the HCP and EIS violate the ESA and NEPA in numerous respects. Accordingly, if any part of this project is allowed to go forward, we strongly urge the Service to more fully consider the benefits of a reduced time frame of 10 years or less and a geographic area limited to the existing right of way, compressor lands and, to the extent that such information has already been shared with FERC, storage field expansion areas. We further encourage the Service to solicit the ongoing input and involvement of local conservation groups.

Sincerely,

/s/ Christopher Leung

Christopher Leung
Deborah Goldberg
Hannah Chang
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On behalf of:

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Board President
Allegheny Defense Project

Karen Feridun
Founder
Berks Gas Truth

Nathan G. Johnson
Staff Attorney
Buckeye Forest Council

Anne Harris Katz
Board Member
Coalition for Responsible Growth & Resource
Conservation

David Ferguson
Vice President
Croton Watershed Clean Water Coalition, Inc.

Tracy Carluccio
Deputy Director
Delaware Riverkeeper Network

Jennifer Krill
Executive Director
Earthworks

John Rumpler
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Dena Mottola
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Environment New Jersey

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Environment New York

Grady Avant
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FrackAlert, Inc.

Carole Satrina Marnier
Founding Member
Franklin Local

Judith Rodd
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Friends of Blackwater

Albert Crudo
Member
Friends of Sustainable Sidney

Yvonne Taylor
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Patti Wood
Executive Director
Grassroots Environmental Education

Ernie Reed
Council Chair
Heartwood

Guy Alsentzer
Staff Attorney
Lower Susquehanna Riverkeeper

Melinda Hughes-Wert
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Nature Abounds

Joe Levine
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NYH20

Julie Huntsman
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Otsego Neighbors

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Pennsylvania Forest Coalition

Pramilla Malick
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STOPMCS Coalition

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Executive Director
Tennessee Environmental Council

Marilyn Shoenfeld
Public Lands Chair
West Virginia Highlands Conservancy

Erika Staaf
Clean Water Advocate
PennEnvironment

Nathan Matthews
Associate Attorney
Sierra Club

Tom Salamone
Director
Sustainable Greenville

Bud Watson
Executive Director
Virginia Forest Watch

David Hannah
Conservation Director
Wild Virginia

Appendix A

2008 Email from John H. Shafer to Patrick Mullen

From: Forest_Clark@fws.gov
To: Mullen, Patrick
Cc: Tom_Magnuson@fws.gov
Subject: Fw: Covered Species
Date: Friday, December 12, 2008 11:43:53 AM

Pat,

I realize this came to you, but I thought it worth resending as it might help with the documentation of how we moved from the 103 species to the 42.

Best regards,

Forest

Forest Clark
U.S. Fish and Wildlife Service
620 South Walker Street
Bloomington, Indiana 47403

(812) 334- 4261 ext. 206----- Forwarded by Forest Clark/R3/FWS/DOI on 12/12/2008 01:42 PM -----

jshafer@nisource.com

10/07/2008 08:57 PM

To "Mullen, Patrick" <patrick.mullen@amec.com>

cc Forest_Clark@fws.gov, "Pfister, Laura" <Laura.Pfister@amec.com>, Lisa_Mandell@fws.gov, Tom_Magnuson@fws.gov, rhall@nisource.com

Subject Re: Covered Species

Pat

Here is my response to your request.

In April, 2008 the NiSource Gas Transmission & Storage management made a decision to reduce the number of species to be included in the HCP from a total of 76 to 42. The decision was based upon careful consideration of several criteria. One, was that the development of the pilot species (Indiana Bat, Bog Turtle, and Sheepnose Mussel) took much longer than was originally anticipated. Through no fault of anyone, the time needed for the development of the biological analysis of those species, the consultation and involvement of FWS State Field offices in that process, and communication of consultation with state freshwater mussel specialists took longer and infringed deeply into the project management schedule. It was determined by the NiSource management team that the HCP Project schedule had to be maintained to control cost and accomplish the goals and objectives established within the business plan for the HCP. Under this new direction for the HCP the covered species were reduced to include only the three pilot species, four plants found on federal land, fourteen species for which early and effective work with the FWS had determined a "no effect" determination based on the covered lands and covered activities, and sixteen species that closely follow the three pilot species template and also are more frequently encountered when performing the covered activities on the NiSource pipeline system. NiSource management agreed that this new direction would better maintain the HCP Project schedule and reflect the current business plan.

Thanks,
John H. Shafer
Manager
Sustainable Natural Resource Practices
(903)660-2820 (Home)
(337)501-0723 (Cell)

"Mullen, Patrick"
<patrick.mullen@amec.com>

10/07/2008 03:01
PM

<jshafer@nisource.com>

<Lisa_Mandell@fws.gov>, <Tom_Magnuson@fws.gov>, <Forest_Clark@fws.gov>, "Pfister,

To

cc

Laura" <Laura.Pfister@amec.com>
Subject
Covered Species

Hi John - We're trying to wrap up the next version of the EIS chapter 2 "Proposed Action and Alternatives" and I'd like your help, if possible. Could you provide a brief paragraph that outlines the process/rationale that got you from the original 76 species (that we included in the public scoping documents) to the now 42 species in the HCP? We'll need to include that in the EIS. Just a few sentences should suffice. Thanks and I hope all is well. Pat

Patrick Mullen
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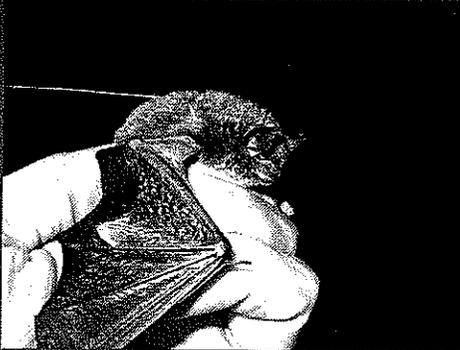
Appendix B

2011 USFWS PowerPoint Presentation

U.S. Fish & Wildlife Service



NiSource Multi-Species Habitat Conservation Plan



Slide 1

U.S. Fish & Wildlife Service



NiSource Inc.

- A Natural Gas Storage and Distribution Company
 - Third largest natural gas distribution system in the United States.
 - Operates and maintains 57,000 miles of distribution pipeline serving over 3 million customers.
 - Regional electric generation and transmission serving 450,000 customers.

Slide 2



U.S. Fish & Wildlife Service

Approached FWS in 2007

1. Streamline Future ESA and NEPA Compliance
2. Enhance the Conservation of Species
3. Develop and Coordinate Mitigation Opportunities
4. Foster Efficient Use of Time and Money
5. Gain Certainty in Project Planning

Slide 3



U.S. Fish & Wildlife Service

NiSource Vision

“... a legacy for sustained economic growth, social responsibility, and environmental stewardship reflective of a premier energy company”

- **Broad Scale Species Conservation**
- **Coordinated Mitigation Opportunities**

Slide 4

U.S. Fish & Wildlife Service



Scope of the NiSource MSHCP

Covered Lands – Over 9 million acres in 14-states

- 15,000 miles of linear ROW
- One-half mile buffer on each side of ROW

Covered Activities – O&M and Construction

Covered Species – MSHCP / non-HCP

- 43 in MSHCP - 10 "Take"; 33 Other
- 46 non-HCP spp

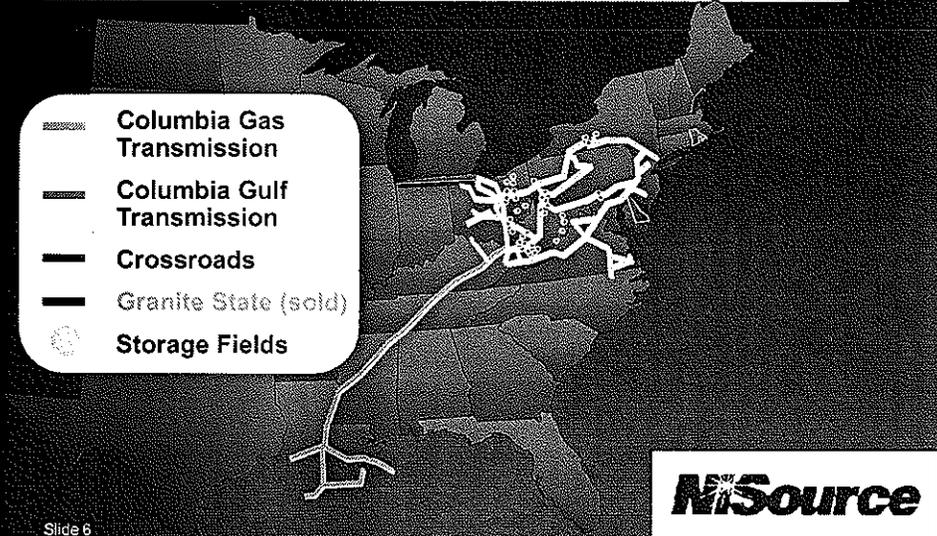
Requested Permit Duration – 50 Years

Slide 5

U.S. Fish & Wildlife Service



NiSource Project Area (14 States)



- Columbia Gas Transmission
- Columbia Gulf Transmission
- Crossroads
- Granite State (sold)
- Storage Fields



Slide 6



U.S. Fish & Wildlife Service

NiSource Covered Activities

- O&M
- Safety Repairs, Replacements, and Maintenance
- Expansion within One-Mile Corridor

Slide 7



U.S. Fish & Wildlife Service

NiSource Covered Species (Take)

Indiana Bat
Bog Turtle
Madison Cave Isopod
Nashville Crayfish
American Burying Beetle
Mussels (5)

Slide 8



U.S. Fish & Wildlife Service

NiSource HCP Species (No Take)

33 Additional Species Analyzed in the MSHCP

- NiSource and the FWS determined “no effect” for 24
- NiSource determined “no adverse impact” for 9 (through implementation of ECS and AMMs)

Slide 9



U.S. Fish & Wildlife Service

Take Calculations Based on Reasonable Worst-Case Scenarios

- Conservative Assumptions
 - Suitable Habitat Considered Occupied
 - All Covered Activities are Undertaken
 - Avoidance/Minimization Measures Fully Implemented

Slide 10



U.S. Fish & Wildlife Service

NiSource Conservation Program

- Species-based Biological Goals and Objectives
- Comprehensive ECS and AMMs
- Strategic Mitigation Planning
- Upfront Mitigation
- Adaptive Management

Slide 11



U.S. Fish & Wildlife Service

Strategic Mitigation Planning

Funded by a Section 6 HCP Planning Grant to the States and The Conservation Fund.

Identified science-based Mitigation Opportunities within a spatially-explicit Landscape Design.

Inclusive Stakeholder Involvement – Expert Workshops in 12 states involving 116 federal and state personnel.

Slide 12

U.S. Fish & Wildlife Service



Mitigation Projects Within a Landscape Design

- Best Available Science
- Identify mitigation opportunities within a network of lands
- Take Species were used to determine the structure of the networks.

Slide 13

U.S. Fish & Wildlife Service

Federal Indiana Bat Mitigation Opportunities

- State Focus Group ID
- 1/2 Mile Buffer of Priority US Habitat Conservation
- Known Summer Habitat Corridors
- Summer Occurrences (ESI Anabat 2009)

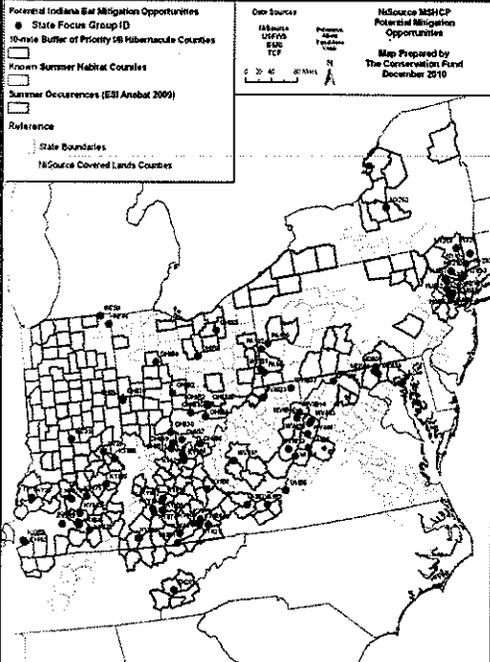
Reference

- State Boundaries
- NSource Covered Lands Counties

Other Sources

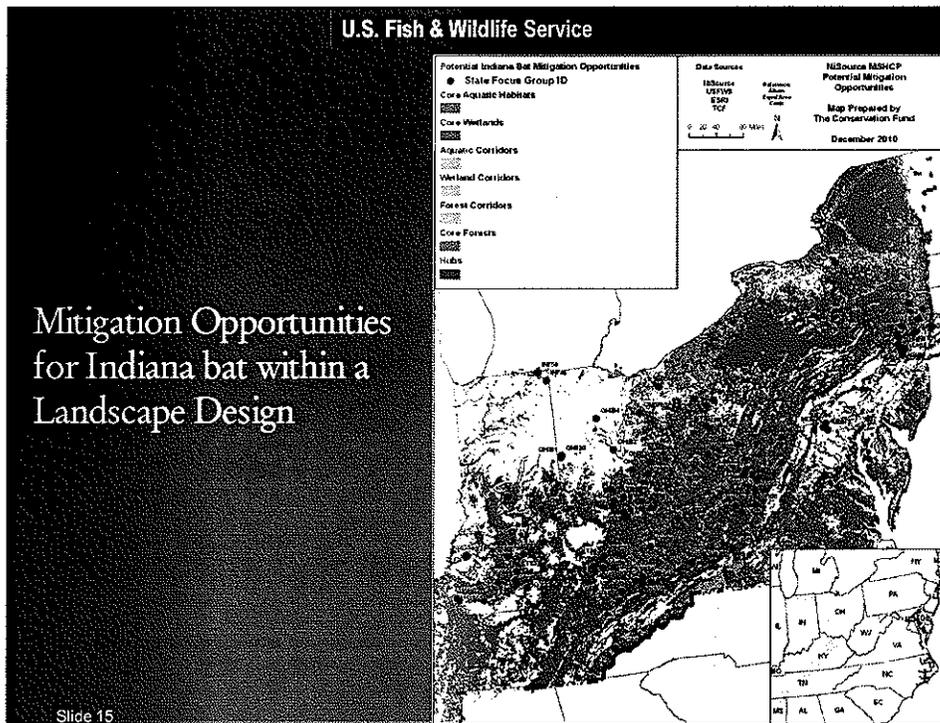
- NSource MSHCP Potential Mitigation Opportunities

Map Prepared by The Conservation Fund December 2010



Mitigation Opportunities for Indiana bat

Slide 14



U.S. Fish & Wildlife Service

Mitigation Panel - NFWF

- Will advise NiSource in the selection of mitigation projects that may be completed pursuant to a third-party solicitation (such as an RFP).
- Panel membership includes NiSource and two NGOs that are conservation based.
- NiSource will seek FWS concurrence with projects selected.

Slide 16



U.S. Fish & Wildlife Service

Section 7 Consultation

- Multiple federal agency, inter- and intra-service consultation.
 - FWS, USFS, USACE, NPS, FERC
- Consultation includes all species that may be affected, regardless of their status in the HCP.
- Concludes with the issuance of a concurrence letter and biological opinion.

Slide 17



U.S. Fish & Wildlife Service

NEPA

- FWS - Lead Agency
- Cooperating Agencies – FERC, USFS, USACE, NPS
- Programmatic EIS with NEPA Tiering

Slide 18



U.S. Fish & Wildlife Service

Monitoring and Reporting

Comprehensive Project Planning - At least annually

Includes Prior Notification - Minimizes risks

IPaC Module - Internet-based planning and reporting

Multiple Feedback Mechanisms - NiSource HCP
Coordinator and Annual Meetings

Slide 19



U.S. Fish & Wildlife Service

Summary

- Uncertainty Handled Through Implementation Strategies
- Meets ESA Application Requirements
- Public Comments

Slide 20



U.S. Fish & Wildlife Service

Additional Questions?

Slide 21



U.S. Fish & Wildlife Service

Contact Information

- USFWS - TJ Miller (612-713-5334)
Tom Magnuson (612-713-5467)
Lisa Mandell (612-713-5343)
Forest Clark (812-334-4261)
- NISource - John Shafer (337-501-0723)
- The Conservation Fund - Kris Hoellen (304-876-7462)

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