

Chapter 1 Introduction

1.1 Overview

The U.S. Fish and Wildlife Service (USFWS or Service) is in receipt of an application from NiSource Gas Transmission and Storage (NiSource) for an Incidental Take Permit (ITP), pursuant to Section 10(a)(1)(B) of the Endangered Species Act of 1973 (ESA or Act), as amended. Specifically, NiSource filed an application on July 16, 2009, seeking authorization for incidental take of certain federally-listed and proposed¹ species that would result from NiSource's otherwise lawful interstate natural gas transmission (INGT) activities across a 14-state operating territory. One aspect of that application is the associated Habitat Conservation Plan (HCP). NiSource's HCP evaluates effects to 43 species. Of these, NiSource anticipates take of nine ESA-listed species and one ESA proposed species, for which it seeks take coverage. The HCP concludes that NiSource's activities will not cause the take of the remaining 33 species. Twenty-four of these species will not be impacted at all, and NiSource's implementation of Avoidance and Minimization Measures (AMMs) will eliminate the likelihood of take for the remaining species analyzed in the HCP. The combined set of requested authorizations discussed above is hereby referred to NiSource's "Proposed Action".

The HCP outlines specific conservation and mitigation activities associated with either the avoidance and/or minimization of the expected take, or preservation and conservation of habitats associated with the species addressed in the HCP (herein referred to as HCP Species). Species addressed in the HCP total 43 (41 threatened and endangered (T&E), 1 proposed, 1 candidate) and represent nine taxonomic groups (see Chapter 2 for a complete description of HCP Species). The HCP also describes what are considered Covered Activities, or those activities associated with the operation of the NiSource pipeline system that would fall under the purview of the ITP. The proposed Covered Activities, which include a wide range of operation, maintenance, and new construction activities (described more fully in Chapter 2), are specific only to NiSource Inc.'s wholly owned pipeline subsidiaries, Columbia Gas Transmission, LLC, Columbia Gulf Transmission Company, Crossroads Pipeline Company, Central Kentucky

¹ Candidate species at the time of application; proposed for listing 1-19-11

Transmission Company, and NiSource Gas Transmission and Storage Company (companies referred to collectively as “NiSource”). NiSource has applied for the ITP for a term of 50 years.

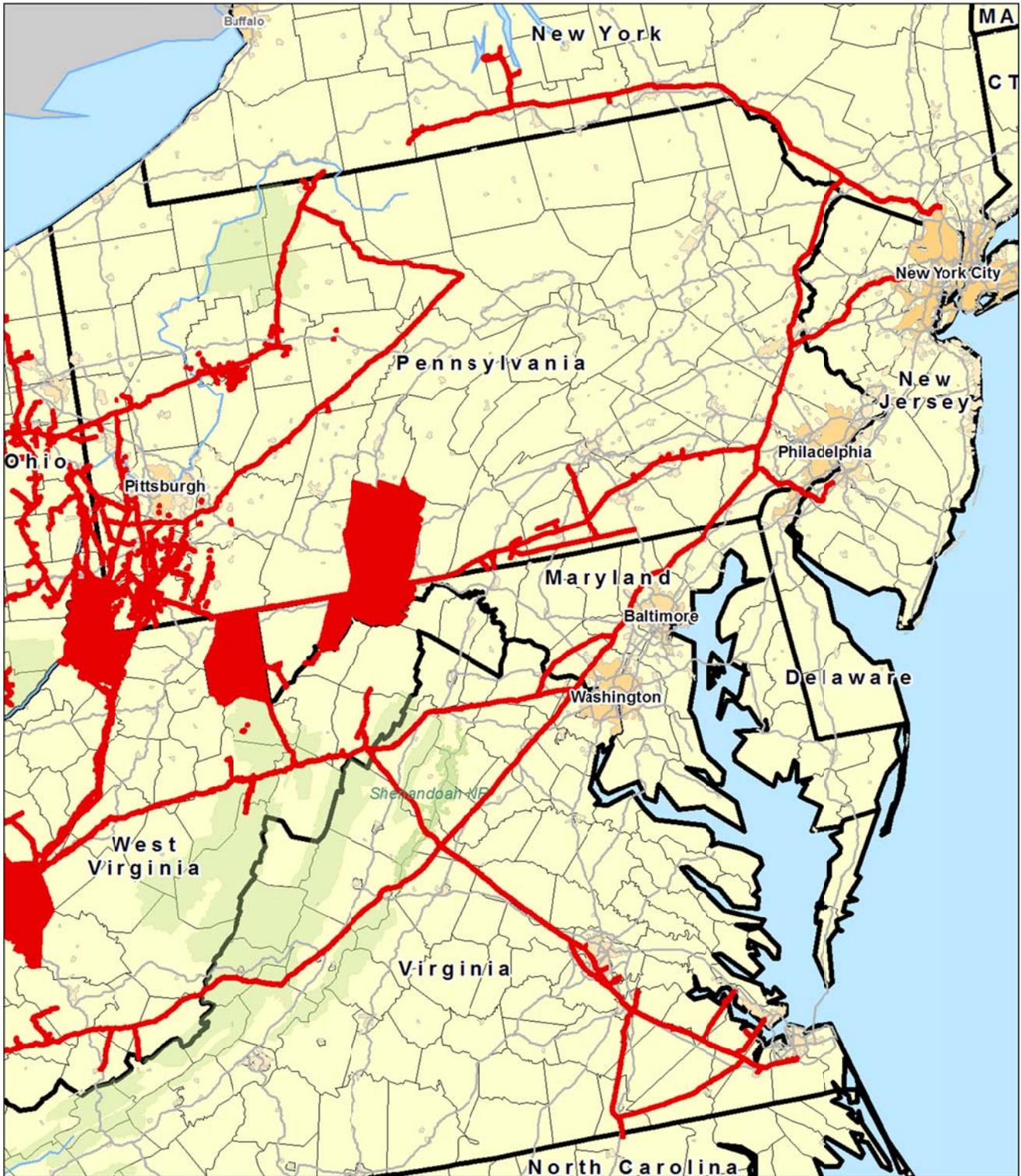
The USFWS determined that the issuance of an ITP (for the Proposed Action) would constitute a major federal action requiring review under the National Environmental Policy Act (NEPA) 42 U.S. Code (USC) § 4321 et. seq.), and, as such, the USFWS elected to develop an Environmental Impact Statement (EIS) under NEPA to analyze its action on the ITP Application and associated HCP. This Draft EIS (DEIS) analyzes and discloses potential impacts to the human environment that would be caused if the USFWS approves NiSource’s Proposal; specifically issuance of the ITP and the subsequent implementation of the HCP. These activities include operation and maintenance; new construction; and certain expansion activities within the covered lands. As required by NEPA, this DEIS evaluates alternatives to the Proposed Action, developed in response to public, stakeholder, and agency comments (see Scoping, below). The DEIS also includes a No Action Alternative as a baseline for comparison of potential impacts of the Proposed Action and any alternatives. Preparation of this DEIS has been conducted in accordance with the requirements of NEPA, its implementing regulations (40 Code of Federal Regulations (CFR) Parts 1500-1508), the U.S. Department of the Interior’s (USDOl) NEPA Procedures (43 CFR Part 46), and other USFWS guidance for compliance with those regulations.

The USFWS is the lead federal agency for preparation of this DEIS. The Federal Energy Regulatory Commission (FERC), the U.S. Army Corps of Engineers (USACE), the U.S. Department of Agriculture (USDA) Forest Service (USFS) Eastern Region and Southern Region, and the National Park Service (NPS) Southeast Region have cooperated with the USFWS on the production of this DEIS.

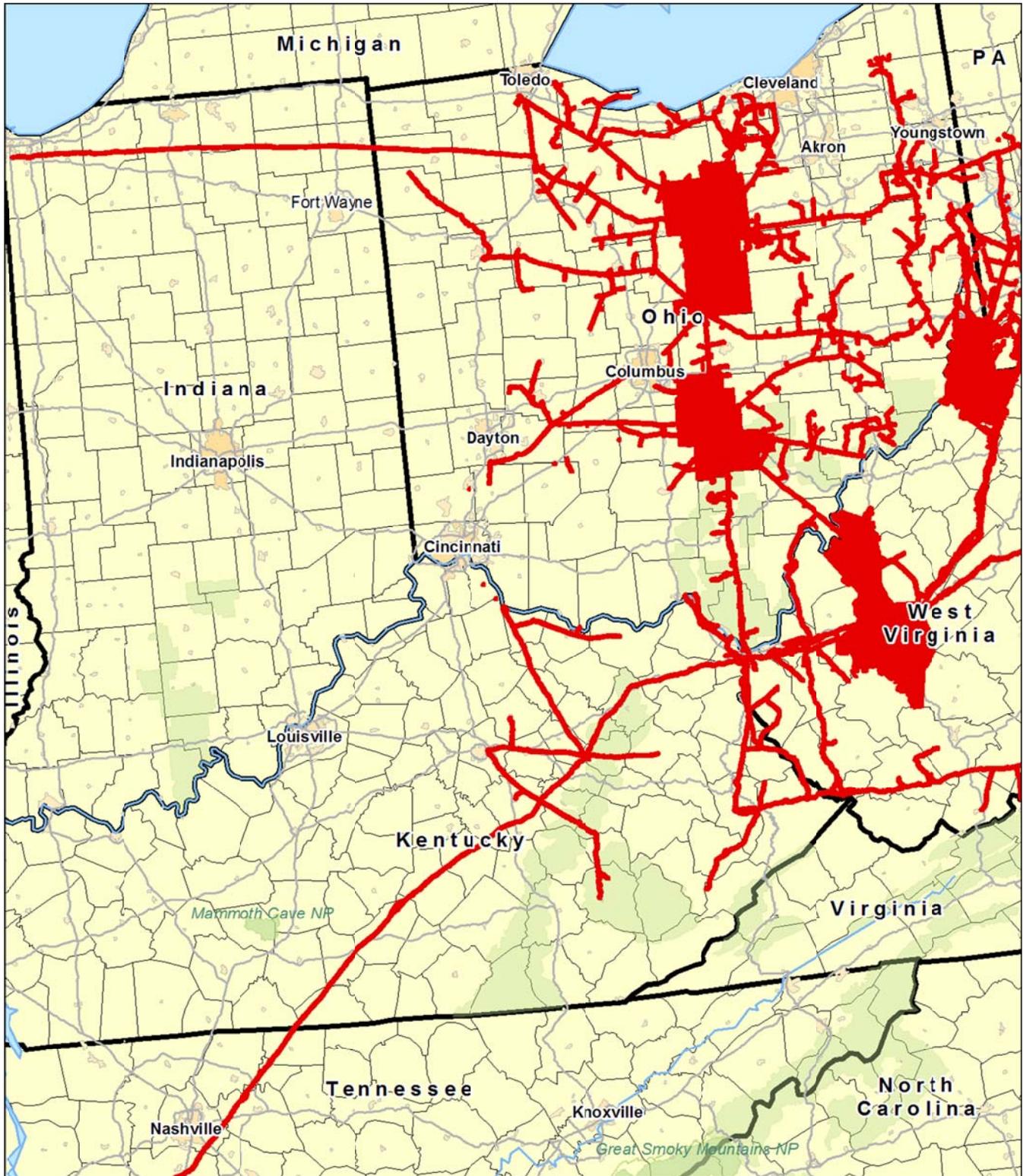
In addition to the 43 aforementioned species that NiSource included in its HCP, 46 additional ESA-listed, proposed or candidate species are known to occur or potentially occur within the proposed project area, hereafter referred to as NiSource Covered Lands (NCL) (see **Figures 1.1-1** through **1.1-4**). Impacts to these additional species will be assessed in this DEIS and the Service’s Biological Assessment, which is described more fully in Chapter 2).



Source: ESRI 2004



Source: ESRI 2004



Source: ESRI 2004



Source: ESRI 2004

The NiSource HCP has been developed to cover a 50-year time period. NiSource has requested ESA coverage for activities to occur within 14 states along its operating pipeline system. The specific project areas have not yet been identified, but fall within a one mile wide corridor over 15,562 miles of right-of-way, and 12 storage field counties. Due to the temporal and geospatial scale at which this plan has been designed, it is impossible to predict the breadth of environmental effects in a manner that fully analyzes those effects from a site-specific perspective. Impacts in this programmatic EIS are, by necessity, discussed at a regional scale. Therefore, a tiered approach to NEPA compliance is appropriate to ensure full and timely analysis of all environmental impacts at the site-specific level.

The CEQ regulations (40 CFR 1502.20) and Department of the Interior regulations (43 CFR 46.140) encourage tiering of NEPA analysis. Tiering refers to the coverage of general matters in broader environmental documents (i.e. EISs) followed by subsequent, environmental analyses focusing on site-specific environmental issues and incorporating by reference the general discussions in the broader document. Tiering is appropriate when the initial analysis involves a broad program, plan (such as this HCP EIS), or policy-oriented environmental impact statement tiering to a later program, plan, or policy statement or analysis of lesser scope (in this case future FERC, USFS, COE, or NPS site-specific NEPA). Traditionally tiered NEPA analyses are completed by the agency that issues the programmatic EIS and a Record of Decision (ROD). Here, the U.S. Fish and Wildlife Service will issue a ROD for its incidental take permit. But we do not anticipate that the cooperating agencies will sign or adopt that ROD. Rather, pursuant to CEQ NEPA regulations, they will be encouraged to “tier” off the programmatic EIS by adopting relevant portions of that document (see Section 1.8 for further details about the approach to programmatic tiering).

1.2 Purpose

The purpose of ITP issuance is to comply with the ESA by providing protection and conservation of certain listed species while enabling NiSource to conduct legally authorized activities associated with (1) construction and expansion; (2) general operation and maintenance activities that do not require excavation or significant earth disturbance; and (3) safety-related repairs, replacements, and maintenance. The ITP

would also require implementation of the HCP. The decision whether to issue the ITP will be primarily based upon the statutory and regulatory criteria, further detailed in **Section 1.6.1**. In applying these criteria, the Service will also analyze the effect of proposed activities on identified species within the NCL and proposed conservation measures. Consistent with Service guidance, it will also consider among other things, the appropriateness of the proposed permit duration, and adaptive management strategy. These determinations will be documented in the ESA Section 10 Findings document, the NEPA Record of Decision (ROD), and the Intra/Inter-Service ESA Section 7 consultation and resulting Biological Opinion (BO), which will be developed at the conclusion of the NEPA and ESA permit issuance processes.

1.3 Need

Section 9 of the ESA (Prohibited Acts) describes the prohibitions for listed species (T&E) and what may constitute a “take.” The primary need for the Proposed Action is based on otherwise lawful activities conducted by NiSource that may result in the take of listed species, thus the need for an ITP. Take of a listed species, that is incidental to otherwise lawful activities, can be authorized under Section 10 of the ESA with preparation of an HCP and issuance of an ITP. In the ITP, the Service would authorize incidental take of nine listed species and one proposed species (See **Table 2.3-1**) that may occur as the unintended result of NiSource covered activities, and the Service may specify additional conservation measures as permit conditions. The Service must also find that NiSource will minimize and mitigate the impacts to federally-listed species to the maximum extent practicable. Through the Intra/Inter-Service Consultation, the Service will ensure that NiSource’s covered activities will not appreciably reduce the likelihood of survival and recovery of these, or other ESA-listed species, in the wild.

In addition to the incidental take authorization provided under Section 10 of the ESA, the HCP would provide significant practical benefits to conservation of HCP species and would improve efficient use of resources of the Service, FERC, USACE, USFS, NPS, and NiSource.

The Service and the cooperating agencies are responsible for completing an adequate analysis of project impacts under NEPA. Due to the scope of activities, and the inability of NiSource to identify the precise location of future projects over the proposed HCP

timeframe, the Service's analyses are necessarily limited. Further description of the scope of the analysis is provided in Section 1.8 of this Chapter. Within this DEIS, the evaluation of potential impacts from future NiSource activities on HCP species is more robust than the analysis of impacts to other aspects of the human environment. In addition, analyses are presented in the DEIS on those other federally listed species that NiSource could potentially encounter, with the intent that future ESA consultation would be streamlined. Potential impacts to other aspects of the human environment (e.g., air quality, vegetation, wildlife, etc.) are discussed on a more programmatic and less precise basis. This will require subsequent NEPA analysis when the location and scope of projects are disclosed to cooperating agencies in the future. Although these activities are reasonably certain to occur, the Service is unable to analyze site specific or project-specific impacts in this DEIS, other than at a coarse level. Due to the need to analyze future projects as impacts become known, the cooperating agencies to this DEIS will engage in a tiered analysis for future activities. This will ensure full and timely evaluation of site-specific environmental impacts.

The CEQ regulations (40 CFR 1502.20) and Department of the Interior regulations (43 CFR 46.140) encourage tiering of NEPA analysis. Tiering refers to the coverage of general matters in broader environmental documents (i.e. EISs) followed by subsequent, narrower environmental analyses focusing on site-specific environmental issues. Tiering is appropriate when the initial analysis involves a broad program, plan (such as this HCP DEIS), or policy-oriented environmental impact statement tiering to a later program, plan, or policy statement or analysis of lesser scope (in this case future FERC, USFS, COE, or NPS site-specific NEPA).

1.4 Proposed Action

The Proposed Action being evaluated by this DEIS is the request by NiSource for USFWS to issue a 50-year ITP for 9 federally listed species and 1 proposed species within the NCL (Take Species), including NiSource's implementation of its HCP.

1.4.1 Scope of Analysis

Due to the geographic breadth of the proposed covered lands, the inability of NiSource to identify the precise location of future projects, and the temporal scale for the proposed permit, the Service's analyses are necessarily limited. One main focus of this Draft EIS is the potential for future impacts from NiSource activities on those ESA species analyzed in the MSHCP that accompanied NiSource's application for the ITP. Because NiSource presents reasonable worst case analyses for these species, the EIS is more robust in this area than for other aspects of the human environment. Additional analyses are presented in the EIS on those other federally listed species that NiSource could potentially encounter, with the intent that future ESA consultation would be streamlined for those species based on the analysis presented in this EIS and ESA consultation for the proposed action. Additionally, potential impacts to those "other" components of the human environment (e.g., air quality, vegetation, wildlife, etc.) are discussed on a more programmatic and less precise basis. This will require subsequent NEPA analysis when the location and scope of projects are disclosed to cooperating agencies in the future. Although these activities are reasonably certain to occur, the Service is unable to analyze site specific or project-specific impact in this EIS, other than at a coarse level.

1.5 Regulatory Overview

The protection of federally-listed T&E species is the responsibility of numerous federal agencies that operate under various statutory and regulatory authorities. Although NiSource's activities generally fall within FERC jurisdiction, they may be subject to the review and oversight of other federal agencies (such as USACE, USFS, and NPS). The following section provides information regarding the governing legal authorities and the overlap with this the NEPA document and the ITP process.

1.5.1 National Environmental Policy Act

NEPA is the basic national charter for protection of the environment. It establishes policy, sets goals, and provides a means for carrying out the policy. NEPA and the CEQ *Regulations for Implementing NEPA* (40 CFR 1501) contain "action-forcing" provisions to ensure that all federal agencies act according to the letter and spirit of NEPA.

The NEPA process is intended to help federal agencies make decisions that are based on an understanding of potential environmental consequences, and take actions that protect, restore, and enhance the environment. NEPA regulations provide the direction to achieve that purpose.

NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

NEPA implementation requires that every federal agency prepare an EIS for proposed legislation or other federal actions “significantly affecting the quality of the human environment” (40 CFR 1501). As described above, the Service, as the Lead Federal Agency, has determined that an EIS should be prepared prior to action on the ITP Application. The FERC, USACE, USFS, and NPS are cooperating with the Service on the production of this EIS. A cooperating federal agency has jurisdiction by law or special expertise with respect to environmental impacts involved with the proposal and is involved in the NEPA analysis.

The CEQ regulations (40 CFR 1502.20) and Department of the Interior regulations (43 CFR 46.140) encourage tiering of NEPA analysis. Tiering refers to the coverage of general matters in a broad environmental document (EIS) followed by subsequent analyses that focus on site-specific issues. Additional discussion of NEPA tiering that is anticipated to occur under this EIS is described in Section 1.8.

1.5.2 Endangered Species Act

The purpose of the ESA is to provide a means whereby the ecosystems upon which T&E species depend may be conserved, and to provide a program for the conservation of such T&E species. Both the Service and the National Oceanic and Atmospheric Administration (NOAA) Fisheries Service have responsibilities for the conservation and protection of T&E species under the ESA. NOAA-Fisheries is responsible for enforcing provisions of the ESA for most marine and anadromous species. All of the species which would be the subject of the Proposed Action are under the sole jurisdiction of the

Service. Therefore no further discussion of NOAA-Fisheries in the implementation of the ESA is included in this EIS (NOAA-Fisheries 2010).

ESA Section 9

Section 9 of the ESA and its implementing regulations prohibit the take of animal species listed as T&E. The definition of take under the Act includes the following activities: to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect listed animal species, or attempt to engage in such conduct (16 USC § 1538). Section 9 also prohibits the removal and reduction to possession of any listed plant species “under federal jurisdiction,” as well as the removal, damage, or destruction of such plants on any other areas in knowing violation of any state law or regulation or in violation of state trespass law. The Service’s implementing regulations at 50 CFR 17 further define the term “harm” to mean an act which actually kills or injures wildlife, which may include significant habitat modification. The regulations also define “harass” as an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns.

ESA Section 10

Section 10 of the ESA establishes a program whereby persons seeking to pursue activities that otherwise could give rise to liability for unlawful “take” of federally-protected species as defined in Section 9, may receive an ITP, which exempts them from such liability.

To obtain an ITP, the applicant must submit an application that includes an HCP (16 USC § 1539(a)(1)(B) and 1539(a)(2)(A)). The submission and issuance criteria are detailed in Section 1.6.1.

Since it was originally made available in December 1996, the Service also considers the *Handbook for Habitat Conservation Planning and Incidental Take Permitting Process* (USFWS and NOAA 1996) (Handbook) during HCP development, review, and implementation processes. Its purpose is to provide policy and guidance for Section 10(a)(1)(B) procedures to promote efficiency and nationwide consistency within and between the Service and NOAA-Fisheries. However, as noted in **Section 1.5.2**, all species which would be the subject of the Proposed Action are under the sole jurisdiction of the Service.

An addendum to the Handbook was published in the Federal Register (FR) on June 1, 2000 (FR 65-106). This addendum, also known as the “Five Point Policy”, provides additional guidance on HCPs, specifically regarding: (1) biological goals; (2) adaptive management; (3) monitoring; (4) permit duration; and (5) public participation. The addendum was created in order to incorporate lessons learned, recommendations received, and methods the Service and NOAA-Fisheries were using to strengthen the HCP process since the original issuance of the Handbook.

The Service and NiSource considered the applicable statutory and regulatory criteria, the Handbook and Five Point Policy when developing the HCP.

ESA Section 7

Section 7 of the ESA requires all federal agencies, in consultation with the Service, to ensure that any action “authorized, funded, or carried out” by any 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. NiSource currently addresses issues related to federally listed for its projects pursuant to Section 7, through FERC or USACE authorizations, certifications or permits.

Before initiating an action, the federal action agency, or their designated nonfederal representative, must determine whether the proposed project may affect listed or proposed species and/or their critical habitat. If the action agency determines that their proposed project would have no effect on listed or proposed species or their critical habitat, no further consultation is required under the ESA. If the determination is that a project may have an effect, further consultation is required.

If the action agency determines (and the Service concurs) that the project is neither likely to adversely affect any listed or proposed species nor adversely modify designated critical habitat, the consultation (informal to this point) is concluded and the Service’s concurrence is put in writing. If the action agency determines that a project may adversely affect a listed or proposed species and/or listed or proposed designated critical habitat, formal consultation for listed species or a conference for proposed or candidate species is required.

During formal consultation, the Service prepares a biological opinion (BO) in response to the information provided by the federal agency (normally provided as a biological assessment or BA). The BO analyzes the effects on the listed species and analyzes whether the Proposed Action would be likely to jeopardize the continued existence of the species or destroy or adversely modify designated critical habitat. If the BO reaches a jeopardy or adverse modification conclusion, the opinion must suggest “reasonable and prudent measures” that would avoid that result. If the BO concludes that the project, as proposed, would involve the take of a listed species, but not to an extent that would jeopardize the species’ continued existence, the BO includes an incidental take statement and specifies reasonable and prudent measures to minimize the impact of the take. The incidental take statement specifies an amount of take that the Service believes may occur as a result of the action. The Service may also make conservation recommendations, which are non-binding suggestions: identifying additional discretionary measures to reduce take: identifying additional needed studies, monitoring or research, and recommending how the action agency might assist species conservation in furtherance of ESA Section 7(a)(1). If the action complies with the BO and the incidental take statement, it may be implemented without violation of the ESA, and the take is thereby exempted.

The issuance of an ITP to NiSource with implementation of the associated HCP would be a federal action that triggers a Section 7 consultation. We refer to this as an Intra-agency consultation because the Service essentially consults with itself. But the future federal actions of the cooperating agencies over the proposed HCP activities also trigger a need for consultation between the Service and these agencies. This is referred to as an Inter-Agency consultation. The Service, as the federal action agency, will complete a combined Intra- and Inter-Agency consultation to perform the analysis. The resulting BO will encompass the issuance of the ITP and implementation of the HCP, along with any anticipated actions by cooperating agencies. Because the action agencies’ approvals will occur in the future, the BO will necessarily be programmatic to some degree, as is the intended EIS.

1.5.3 Natural Gas Act

The FERC, under the authority of the Natural Gas Act (NGA), has the mission to oversee energy industries in the economic, environmental, and safety interests of the

American public. As provided by the NGA (15 USC § 717 *et seq.*), FERC has the sole authority to grant Certificates of Public Convenience and Necessity (18 CFR 157), which allow for the construction and operation of INGT facilities.

FERC oversees environmental matters related to INGT projects, including the evaluation of project impacts under NEPA. During its project review, FERC consults with the Service when those projects have the potential to affect federally listed species. The Service does not directly authorize placement or operation of those INGT facilities; rather, the Service provides direction related to listed species within the project area. In cases where FERC determines that the project impacts do not have an effect on any federally listed species, ESA consultation is not required.

Projects that qualify for coverage under blanket certificates may not include construction in areas that include sensitive species or their habitats unless further review is completed. In the event that sensitive species (or habitats) occur within an area, NiSource would be required to file additional reports with FERC if any incidental take were likely to occur during construction. Pursuant to 18 CFR 157, activities in sensitive areas (including areas containing listed species or their habitats) would not proceed without additional evaluation under ESA (Section 7).

This EIS evaluates project impacts broadly and sets the stage for future evaluation through NEPA tiering, which is described more fully in Section 1.8. To the extent that the full effects of an action contemplated in the MSHCP are described and evaluated, the action would be authorized to proceed without further review. However, any action that is not fully evaluated in this EIS and the Service's biological opinion on the MSHCP would be subject to future review by the Cooperating Agencies, including FERC, under NEPA and Section 7 of the ESA. That said, NiSource would be required to file additional reports with FERC in the event an incidental take is likely to occur during construction activities conducted under its blanket certificate program pursuant to 18 CFR Section 157.208, 210, 211, 212 and 216.

1.5.4 Natural Gas Pipeline Safety Act

The Natural Gas Pipeline Safety Act of 1968 (PSA), as amended, 49 USC § Chapter 601, authorizes the U.S. Department of Transportation (USDOT), through the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety

(OPS), to regulate pipeline transportation of natural gas and other gases. The federal pipeline safety regulations promulgated under the PSA (1) assure safety in design, construction, inspection, testing, operation, and maintenance of pipeline facilities; and (2) set out parameters for administering the pipeline safety program (49 CFR parts 190-199). The regulations are written as minimum performance standards.

NiSource's activities must achieve compliance under the PSA and its associated regulations. When there is a federal permit involved under other legislation, the activities themselves are typically under the purview of other federal agencies (e.g., FERC, USACE regulatory authorities, USFS Special Use Permit, or NPS authorization).

1.5.5 Other Federal Environmental Acts and Related Requirements

USACE Regulatory Authorities

The USACE mission is to serve the U.S. Armed Forces and the American public by providing vital engineering services and capabilities, as a public service, across a full spectrum of operations in support of national interests. This spectrum of services includes water resources and the environment, among others.

The USACE is authorized to issue permits to allow the discharges of dredged or fill material into Waters of the U.S. pursuant to Section 404 of the Clean Water Act (CWA) (33 USC § 1344; 33 CFR 320-332). Other activities are also regulated under other permit authorities of the USACE, including certain structures or work in or affecting navigable Waters of the U.S. pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 USC § 403; 33 CFR 320-332).

NiSource's INGT activities often require such permits from the USACE. Also, in some instances, the USACE may represent the lead federal agency over NiSource activities not otherwise under the purview of the FERC, which may impact Waters of the U.S. In all cases the USACE must comply with NEPA and the ESA as part of their regulatory review. To the extent that impacts are not fully analyzed in this EIS and the Service's biological opinion on the MSHCP, a future tiering of the analysis must occur. The USACE will continue to evaluate impacts under their purview. Some streamlining may occur with respect to ESA consultation, provided that the Service's BO provides the

Cooperating Agencies with take authorization for species that occur in the specific area in which the future project occurs.

Migratory Bird Treaty Act

The Migratory Bird Treaty Act (MBTA), 16 USC § 703 *et seq.*, implements various treaties and conventions between the U.S. and Canada, Japan, Mexico, and Russia for the protection of migratory birds. Under the MBTA, taking, killing, or possessing migratory birds is unlawful as is taking of any parts, nests, or eggs of such birds.

FERC and the Service entered into a Memorandum of Understanding under Executive Order 13186 relative to migratory bird conservation on March 30, 2011. This MOU will enhance protection for birds over the long term for projects that fall under FERC jurisdiction. FERC has committed to evaluate environmental impacts for projects they fund or authorize with special consideration for effects on migratory birds and an emphasis on birds that are species of special concern, priority habitats, and key risk factors. It is important to note that this consideration will be broader than simply looking at federally-listed birds under the ESA. For this EIS, we evaluate impacts to migratory birds in addition to listed bird species.

For those species that are listed as threatened or endangered under the ESA and also protected by the MBTA, an ITP can function as a Special Purpose Permit under the MBTA (50 CFR § 21.27). A Special Purpose Permit would be valid for three years from the effective date of the permit, provided that the ITP remains in effect for that period. The Special Purpose Permit is renewed provided that the permittee continues to fulfill its obligations under the MSHCP and Implementation Agreement (IA). Each renewal would be valid for the maximum period allowed by 50 CFR § 21.27 or its successor at the time of renewal.

NiSource's HCP has analyzed the effects on one federally-listed migratory bird, the Interior least tern (*Sterna antillarum*), which is proposed as an MSHCP Species in the NCL area. The MSHCP provides measures to avoid potential effects to the species, therefore, no take is anticipated or requested. Since the ITP would not authorize take of the Interior least tern, a Special Purpose Permit would not be required in this case. Should other federally-listed bird species be requested for inclusion in the future, the

Service would evaluate whether the ITP would serve as a Special Purpose Permit for those species as part of the ITP amendment request.

Bald and Golden Eagle Protection Act

The Bald and Golden Eagle Protection Act (BGEPA), 16 USC § 668 *et seq.*, as amended, prohibits anyone, without a permit issued by the Secretary of the Interior, from taking bald or golden eagles, including their parts, nests, or eggs. Take is defined in the Act as “pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb.” In the context of the NiSource pipeline operations, anticipated take would come in the form of disturbance. FWS has defined the term “disturb” to mean “to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity by substantially interfering with normal breeding, feeding, or sheltering behavior, or 3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior”. BGEPA Regulations (50 CFR 22) require that a project proponent apply for a non-purposeful take permit in the event that a new activity near an eagle nest may disturb eagles.

This EIS includes discussion of potential impacts associated with implementing the HCP as it relates to bald and golden eagle disturbance and/or protections.

Federal Lands Administration

NiSource’s facilities cross lands administered by the USFS, USACE, USFWS, and NPS. In those instances, depending on the scope or nature of NiSource’s activities, those activities may require independent agency authorization. These approvals are sometimes referred to as “Special Use Permits.” Since these permit issuances would represent “federal actions”, they would be subject to both NEPA and ESA compliance (among others laws).

Specific to the USFS, the National Forest Management Act (NFMA) reorganized, expanded and otherwise amended the Forest and Rangeland Renewable Resources Planning Act of 1974, which called for the management of renewable resources on national forest lands. The NFMA requires the Secretary of Agriculture to assess forest lands, develop a management program based on multiple-use, sustained-yield principles, and implement a resource management plan for each unit of the National

Forest System (NFS). It is the primary statute governing the administration of national forests.

The Act requires the Secretary of Agriculture to specify guidelines for developing management plans (also known as Forest Plans) that ensure consideration of both economic and environmental factors, provide for wildlife and fish and recreation, provide for diversity of plant and animal communities, ensure timber harvesting will occur only where water quality and fish habitat are adequately protected from serious detriment, ensure timber harvesting will be done where it may be done in a manner consistent with the protection of soil, watersheds, fish, wildlife, recreation, aesthetic resources, and regeneration of timber resources. The Forest Plans must be updated when significant new information or conditions are identified or at least once every 15 years.

In the event NiSource must implement one or more of the Covered Activities on NFS lands, the USFS, through its special use permitting process, currently assesses whether the activities are allowed by that unit's Forest Plan, and then conducts project-specific NEPA analysis to identify and display effects to various resources. As part of the site-specific analysis, a Biological Evaluation is conducted (Forest Service Manual 2670.31) to determine the potential for effect on T&E species, species proposed for listing, and Regional Forester Sensitive Species. The USFS initiates consultation or conference with the USFWS (through a tiered consultation approach on some units) when the USFS determines that proposed activities may have an effect on T&E species; are likely to jeopardize the continued existence of a proposed species; or result in the destruction or adverse modification of critical or proposed critical habitat.

In addition to Section 10 and 404 permits, the USACE, under Army Regulation 405-80 (Management of Title and Granting Use of Real Property), may require real estate instruments (including modifications to existing instruments, if any, or new temporary construction easements) wherever the NCL area crosses government fee property and flowage easements (i.e., Cumberland River, Old Hickory Lake, Tennessee). Real estate management activities may include third-party use of Army and Civil Works property including use under instruments such as leases, easements, licenses or permits. USACE Engineer Regulation 405-1-12, The Real Estate Handbook, (USACE 1985) requires compliance with NEPA and other environmental laws prior to the issuance of any real estate instrument. Through NEPA tiering, the USACE will evaluate

future transactions to determine whether this EIS satisfies permitting and land management regulations. If further NEPA analysis is warranted at that time, such analysis will be completed with additional site-specific information for the proposed action (permit, lease, license, etc.).

National Wildlife Refuge System (NWRS) lands managed by the USFWS are generally closed to public use unless expressly authorized and opened by USFWS. Under the National Wildlife Refuge System Improvement Act, and its implementing regulations, a refuge may be opened for use as a right-of-way provided certain criteria are satisfied (50 CFR Part 25 and Part 29, subpart B). Authorization is also required to knowingly disturb, injure, cut, burn, remove, destroy, or possess real or personal property of the U.S., including natural growth; take or possess any fish, bird, mammal, wild vertebrate or invertebrate animal, or part, nest or egg; enter, use, or occupy a System area. Additional findings may be required in determining whether proposed or existing uses of National Wildlife Refuges are appropriate or compatible with their establishing purposes and the mission of the NWRS. All recreational activities and economic or other uses of a Refuge by the public or other non-Service entity require compatibility determinations, which must include an analysis of all facilities, structures, and improvements associated with the uses. Economic uses must also contribute to achieving refuge purposes and the mission of the NWRS. Activities authorized under a Special Use Permit on NWRS lands are subject to review under NEPA and Section 7 of the ESA, in accordance with the regulations and policy.

Lands under NPS management are managed individually under the enabling legislation established for that particular property. As presented in the U.S. Department of the Interior's (USDOI) NPS Management Policies (NPS 2006a), "A right-of-way is a special park use allowing a utility to pass over, under, or through NPS property. It may be issued only pursuant to specific statutory authority, and generally only if there is no practicable alternative to such use of NPS lands." Before a written application is submitted to the NPS, potential applicants for a right-of-way permit should meet with the NPS to discuss the proposed project. Once an application for a right-of-way is submitted, a compliance analysis must be conducted according to NEPA, NHPA, and other statutory compliance requirements as appropriate. As such, NiSource covered activities would have to comply with all authorized uses as determined by each individual

NPS property crossed by the NCL area. NPS regulations pertaining to the issuance of rights-of-way are found in 36 CFR Part 14 and NPS Reference Manual 53: Special Park Uses.”

1.5.6 Relationship to All Other Plans and Regulations

In addition to the regulatory requirements discussed above, NiSource’s INGT activities are also subject to various other federal, state, local, and private regulatory or easement-related requirements. The EIS and subsequent issuance of the ITP would not conflict with or supersede those requirements. In fact, NiSource must be in compliance with other applicable laws for an ITP to be valid. All requirements beyond the direct scope of this EIS and the associated action are separate and solely the responsibility of NiSource to ensure compliance.

1.6 Decisions and Related Actions

1.6.1 U.S. Fish & Wildlife Service

The decision to be made by the Service is whether to issue NiSource an ITP. Section 10(a)(2)(B) of the ESA and the implementing regulations found in 50 CFR Part 17 require that specific criteria be met for the permit to be issued. The determination as to whether and how the criteria have been achieved will be described in the Service’s decision documents.

Application and HCP Submission Criteria

An applicant must prepare and submit to the Service for approval an HCP containing the mandatory elements of Section 10(a)(2)(A) and 50 CFR 17.22(b)(1)/17.32(b)(1) before an ITP can be issued. As such, the HCP must specify the following:

- The impact that will likely result from the taking;
- What steps the applicant will take to monitor, minimize, and mitigate such impacts; the funding available to implement such steps; and the procedures to be used to deal with unforeseen circumstances;
- What alternative actions to such taking the applicant considered and the reasons why such alternatives are not proposed to be used; and

- Other measures that the Service may require as being necessary or appropriate for the purposes of the plan.

Permit Issuance Criteria

The issuance criteria for an ITP are contained in Section 10(a)(2)(B) of the ESA and the implementing regulations for the ESA (50 CFR 17.22(b)(2)/17.32(b)(2)). These issuance criteria are listed below:

- All taking of federally-listed fish and wildlife species must be incidental to otherwise lawful activities;
- The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
- The applicant will ensure that adequate funding for the HCP and procedures to deal with changed circumstances, including adequate funding to address such changes will be provided;
- The taking will not appreciably reduce the likelihood of survival and recovery of the species in the wild;
- The applicant will ensure that other measures that the Service may require as being necessary or appropriate will be provided; and
- The Service has received such other assurances as may be required that the HCP will be implemented.

Further, the Service's regulations require that "the Director also consider the anticipated duration and geographic scope of the applicant's planned activities, including the amount of listed species habitat that is involved and the degree to which listed species and their habitats are affected..." (50 CFR 17.22(b)(2)(ii))

NiSource has worked with the Service to develop an HCP that covers a wide array of natural gas pipeline activities over a broad geographic region, provides numerous AMMs for the MSHCP Species, and identifies mitigation needs for species for which take is likely to occur.

As detailed in Section 1.5.2, issuance of a Section 10 permit involves a federal authorization and is therefore subject to Section 7 of the ESA. In this case, the Service will conduct a Section 7 consultation that is both intra- and inter-agency in nature. The results of this multiple-agency consultation will be documented in a BO. The BO must be issued prior to the Service's action on the ITP application.

1.6.2 National Environmental Policy Act

As detailed in earlier sections, issuance of an ITP is a federal action subject to NEPA compliance. An EIS is required when a major federal action has the potential to significantly affect the quality of the human environment, though an agency may produce an EIS at its discretion even in cases where significant effects are not likely to occur. The Service has determined that the issuance of the NiSource ITP is a major federal action likely to result in a significant impact on the environment, and preparation of an EIS is warranted. The NEPA process culminates in a ROD, which documents the Service's decision on the HCP and the Service's final EIS.

1.6.3 Federal Energy Regulatory Commission

For project activities under FERC's authority pursuant to the NGA, the analysis contained in this EIS will provide valuable information to the FERC when it conducts project-specific NEPA analysis on any NiSource activities that are filed. As a cooperating agency, FERC is providing expertise as it relates to projects under FERC's jurisdiction pursuant to the NGA. When future site-specific reviews are conducted, FERC will determine the extent to which NiSource's compliance with an ITP satisfies the Commission's NEPA requirements and Section 7 responsibilities. FERC would consider the project impacts in light of the AMMs and other terms of the ITP/MSHCP that would be part of the site-specific project at that time. This provides FERC with a mechanism to streamline project review and expedite the ESA consultation process.

1.6.4 U.S. Army Corps of Engineers

For projects under the authority of the USACE, the analysis contained in this EIS will provide valuable information for future site-specific project review and USACE permitting. The USACE will conduct site-specific analysis when NiSource proposes projects within the HCP covered lands footprint involving activities that fall under USACE

permitting jurisdiction. As a cooperating agency, the USACE will utilize the EIS analysis and the Service's BO to expedite its project review. USACE reviews would consider the site-specific action in light of the AMMs and other MSHCP terms that are in effect for the project area. In this manner, it is the intent of the USACE, as a cooperating agency, to have a mechanism to expedite NEPA and ESA review for those future projects.

1.6.5 U.S. Forest Service

It 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. This compliance will only be relevant for those NiSource activities that occur on lands administered by the USFS.

The USFS will conduct site-specific analysis as projects within the covered lands footprint are proposed on national forest lands. They will be able to use this EIS for valuable information and they will have the ability to adopt or incorporate the AMMs in the HCP when authorizing those projects. The intent of the Service and the USFS is to provide a mechanism to streamline the project review and concurrence process.

1.6.6 National Park Service

It is the intent of the FWS and NPS that NiSource's receipt of an ITP, and their compliance with the HCP, will expedite NPS's regulatory obligations under NEPA, specific to Section 7 of the ESA, for the purposes of formal consultation on permitted activities under NPS authorities. However, this will only be relevant for those NiSource activities that occur on lands administered by the NPS.

When the NPS conducts site-specific project reviews, the analysis contained in this EIS will provide valuable information to the NPS and they would have the ability to adopt, or incorporate by reference, the AMMs in the HCP when approving site-specific activities proposed by NiSource.

1.6.7 National Wildlife Refuge System

It is the intent of the FWS to use the NiSource ITP and associated documents to expedite future NEPA and ESA Section 7 analysis when evaluating site-specific projects.

The FWS anticipates that tiered analysis will occur for certain covered activities where uncertainty exists regarding the effects of those activities and/or exact location in which they may occur when analyzing at the scale of this EIS. As site-specific effects are known, the FWS will work with NiSource to determine whether any impacts require further analysis.

In terms of lands that are managed by the FWS within the National Wildlife Refuge System, a Special Use Permit would be required to authorize NiSource activities on those lands. Refuge managers issue Special Use Permits by the authority of the National Wildlife Refuge System Administration Act (16 USC 668dd-ee). At the time of application for such a permit, the manager will be able to reference this EIS and the Section 7 analysis to expedite the Special Use Permitting process. Through this process, the FWS will evaluate the NiSource request, including AMMs in the HCP as part of the proposed action, when it issues the Special Use Permit.

1.7 Public/Stakeholder Participation

Scoping is a crucial step in the early planning stage of an environmental document. The objectives of scoping are to identify significant issues and to translate these into the purpose for the action, the needs for the action, the action or actions to be taken, alternatives to be considered in detail, alternatives not to be considered in detail, and impacts to be addressed. Scoping is used to design the EIS, and if effective should reduce paperwork, delays, and costs; and improve the effectiveness of the NEPA process. Scoping is a public participation process that begins with the publication in the Federal Register of the Notice of Intent (NOI) to prepare an EIS (FR, Vol. 72, No. 196, pp. 57953 – 57956).

1.7.1 NEPA Public Outreach

NOI

On October 11, 2007, the Service published an NOI in the Federal Register to solicit participation of responsible federal, state, and local agencies, Tribes, and the public in determining the scope of this EIS. Publication and distribution of the NOI initiated the process of public scoping for this EIS. Copies of the NOI can be found in **Appendix A**.

EIS Scoping

As noted, scoping refers to the process used to determine the focus and content of an EIS. Scoping solicits input and comments from the public and stakeholders on the potential topics to be addressed in an EIS, the range of project alternatives, and possible mitigation measures. Scoping is also helpful in establishing methods of assessment and in selecting the environmental effects to be considered in detail. The Service consulted with state and federal agencies, and Tribes. Tools used in scoping this EIS included informal stakeholder and agency consultations, numerous public scoping meetings, and publication of the NOI.

The scoping period began with publication of the NOI, and extended to December 8, 2007. On October 18, 2007, a public scoping/*Dear Interested Party* letter was sent to over 1,300 known interested parties including agencies, organizations, and the public. In addition, the public scoping letter was sent to federally recognized Native American Tribes in each of Louisiana, Maine, Massachusetts, Mississippi, and New York. The letter provided information on the project and the EIS, and included the dates of the 13 scoping meetings with the times and locations of the scoping meetings provided on a separate enclosed “*Venues for Open Houses*” document. Notification was given that written comments would be received until December 8, 2007, through either U.S. Postal Mail, facsimile or the Service website.

For those people requiring further information, the names, e-mail addresses, and telephone numbers of two key Service representatives, along with a 1-800 number, were also provided.

Thirteen public scoping meetings were held during the scoping period between 5 and 15 November 2007. The meetings were held in the cities of Portsmouth, New Hampshire; Lafayette, Louisiana; Binghamton, New York; Lexington, Kentucky; Jackson, Mississippi; Philadelphia, Pennsylvania; Columbus, Ohio; Nashville, Tennessee; Charleston, West Virginia; Washington, D.C.; Cleveland, Ohio; Richmond, Virginia; and Pittsburgh, Pennsylvania. The Scoping Report, including specific time and location information for the scoping meetings can be found in **Appendix A**; Scoping Report appendices are available at

<http://www.fws.gov/midwest/endangered/permits/hcp/nisource/scopingreport.html>

The scoping meetings provided an opportunity for the attendees to learn about the Proposed Action and comment on environmental issues of concern and the alternatives that should be discussed in the EIS. Scoping comments and letters are also described in **Appendix A**.

The Scoping Report includes the following information related to the scoping process and development of the draft EIS:

- Background information on the regulatory framework relative to the issuance of an ITP to NiSource or any of its interstate natural gas transmission subsidiaries;
- Definition, and Purpose and Need for the Proposed Action;
- Description of the preliminary alternatives, including the no-action alternative;
- Summary of the scoping process and comments received; and
- Summary of impact areas and issues to be addressed in the EIS.

We received 43 written responses during the scoping period: 25 from federal, state, and local agencies and 18 comments from the public or non-governmental organizations. The comments and input obtained during the scoping process were considered in developing this EIS. In some cases, specific issues were raised with respect to individual species or locations. In other cases, more generic issues or questions were raised with respect to the overall scope of the HCP or the ITP. Where appropriate, input from the scoping process is discussed in the relevant section of the EIS.

Chapter 2 of the EIS details the process used to respond to comments received during scoping and to develop alternatives to the Proposed Action that are analyzed in subsequent chapters of the EIS.

Draft EIS Public Review

In accordance with NEPA, this Draft EIS is being circulated for public review and comment. The public review period is initiated with the publication of the Notice of Availability (NOA) in the FR and the public comment period will extend for 90 days from the date of publication.

1.8 Programmatic and Future Site-Specific Analysis

Unlike a traditional incidental take permit (ITP), the proposed action entails 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. And they will be required to comply with NEPA when doing so.

In this case, given the limitations of this EIS, considerable environmental analysis will be required of subsequent NEPA documents. In other words, 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. This EIS is not “sufficiently comprehensive or adequate” to allow it to simply be adopted in its entirety. 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. Although this EIS provides only the most general analysis, it offers some guidance as factors that should be examined in agencies’ subsequent NEPA analyses. The agencies, however, are responsible for fully evaluating the environmental consequences, and determining the level of impacts and their significance.

In furtherance of their continuing NEPA obligations, the cooperating agencies intend to explore 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. Incidental take coverage under the terms of the permit will be conditioned on NiSource having obtained all necessary government approvals, permits or licenses, which will include any required NEPA compliance prior to undertaking a covered activity.