

FINDINGS AND RECOMMENDATIONS
FOR THE AMENDMENT OF A SECTION 10(a)(1)(B)
INCIDENTAL TAKE PERMIT
FOR
NISOURCE, INC., MULTI-SPECIES HABITAT CONSERVATION PLAN

I. Description of the Proposed Action

The U.S. Fish and Wildlife Service (Service) proposes to amend NiSource Inc.'s Incidental Take Permit (ITP) under the authority of section 10(a)(1)(B) and section 10(a)(2) of the Endangered Species Act of 1973, as amended (ESA) to add the northern long-eared bat (*Myotis septentrionalis*) (hereafter "NLEB") to the ITP. There will be no other changes to the original ITP or MSHCP. NiSource's existing permit has a 50 year term, expiring on December 31, 2064. The permit expiration will not change with this amendment. Documents used in the preparation of this Statement of Findings and Recommendations include the original final Multi-Species Habitat Conservation Plan (MSHCP) prepared by NiSource (NiSource, 2013), revised Multi-Species Habitat Conservation Plan (MSHCP) prepared by NiSource (NiSource, 2015), the draft and final Environmental Impact Statement(s) prepared by the Service (Service, 2011 and Service, 2013a) for the original MSHCP, the Environmental Assessment (EA) prepared by the Service (Service, 2015) for the ITP amendment, and the Service's amended Biological Opinion (BO), Incidental Take Statement, Informal Consultation, and related documents (Service, 2015).

II. Background

NiSource is a natural gas pipeline company that is engaged in gas transmission, storage, and distribution. Its pipeline system includes a number of components, including the pipeline itself, located almost entirely underground, with compressor stations every 40 to 100 miles along the transmission pipelines, metering stations, data communication systems, access roads, and mainline valves. In addition, the system includes underground natural gas storage fields in conjunction with its gas delivery system.

On September 13, 2013, the Service issued NiSource Inc.¹ an ITP for 10 federally listed species that are likely to be adversely affected by construction, operation, and maintenance of their natural gas pipeline network. On October 2, 2013, the Service proposed listing the NLEB under the ESA. Although 42 species were analyzed in the original MSHCP and an additional 47 species were considered by the Service during its ESA Section 7 consultation on the ITP application, the NLEB was not included in the analysis as it was not a candidate for potential listing under the ESA at that time. The NLEB was listed as threatened on April 2, 2015. The Service also established an interim rule under the authority of section 4(d) of the ESA. For areas of the country affected by white-nose syndrome (WNS), the measures provided in the interim

¹ The permit also covers these NiSource Inc.'s subsidiaries: NiSource Gas Transmission and Storage Company, Columbia Gas Transmission, LLC, Columbia Gulf Transmission, LLC, Crossroads Pipeline Company, and Central Kentucky Transmission Company.

4(d) rule exempt take resulting from forest management practices, maintenance and limited expansion of transportation and utility rights-of-way (ROW), removal of trees and brush to maintain prairie habitat, and limited tree-removal projects, provided these activities protect known maternity roosts and hibernation caves. The interim 4(d) rule also exempts take resulting from removal of hazardous trees, removal of NLEBs from human dwellings, and research-related activities. In areas not yet affected by WNS, all incidental take resulting from any otherwise lawful activity is excepted from prohibition. The NLEB listing and interim 4(d) rule go into effect on May 4, 2015.

Several NiSource activities (e.g., rights-of-way maintenance; upgrade and replacement of pipelines; relocations; and routine expansions) addressed in the revised MSHCP, and for which incidental take of the NLEB is requested, could be excepted by the interim 4(d) rule provided certain conservation measures are met. NiSource elected to revise the MSHCP and apply for the ITP amendment due to uncertainty in the listing decision and the 4(d) rule. In addition, the interim 4(d) rule does not alter in any way the ESA's section 7 procedural requirements, and additional section 7 consultation would be required for all NiSource activities with a federal nexus that may affect the NLEB. Therefore, the revised MSHCP and proposed amended ITP and BO covers all NiSource activities that may affect the NLEB, and does not distinguish take that is already excepted by the interim 4(d) rule.

III. Covered Lands

The covered lands in the original MSHCP and ITP are unchanged. They include a one-mile wide corridor centered upon a majority of NiSource's existing interstate natural gas transmission system in 14 states (Louisiana, Mississippi, Tennessee, Kentucky, Virginia, West Virginia, North Carolina, Indiana, Ohio, Pennsylvania, New York, New Jersey, Delaware and Maryland) for approximately 15,562 miles. In addition to the designated one-mile corridor, the ITP and associated MSHCP cover 12 counties in Ohio, Pennsylvania, Maryland, and West Virginia collectively, where NiSource operates some of its underground natural gas storage fields. NLEBs are found in each of the 14 states associated with the NiSource Covered Land.

IV. Covered Species

The original MSHCP included 42 species; however, only 10 of those species were covered by the ITP. Those species include: the Indiana bat (*Myotis sodalis*), bog turtle (*Glyptemys muhlenbergii*), Madison Cave isopod (*Antrolana lira*), clubshell mussel (*Pleurobema clava*), northern riffleshell mussel (*Epioblasma torulosa rangiana*), fanshell mussel (*Cyprogenia stegaria*), James spinymussel (*Pleurobema collina*), sheepnose mussel (*Plethobasus cyphus*), Nashville crayfish (*Orconectes shoupi*), and the American burying beetle (*Nicrophorus americanus*). The remaining 32 species were not anticipated to be incidentally taken as a result of NiSource's activities. The revised MSHCP includes the 42 original species and the NLEB. The amended ITP would cover the same 10 species and also the NLEB.

V. Covered Activities

The covered activities in this permit are those activities connected with the operation of NiSource's pipeline system, and there are no changes to the covered activities from the original MSHCP and ITP. The covered activities generally can be divided into three main categories: (1) general operation and maintenance (O&M); (2) safety-related repairs, replacements, and maintenance; and (3) certain pipeline expansion activities. Over the 50-year permit term, NiSource anticipates its Covered Activities will result in 904 acres of new disturbance and 18,505 acres of disturbance on previously disturbed land (most of which is vegetation maintenance) on an annual basis. This equates to a total annual disturbance of approximately 0.2% of the total Covered Land (0.19% within the existing ROW and 0.0092% in areas outside of its existing ROWs).

The following O&M and new construction activities could adversely impact the NLEB: tree clearing associated with a wide variety of activities, tree side-trimming, access roads maintenance and construction, well plugging, presence of the pipeline corridor, construction and maintenance of waste pits, and herbicide application.

VI. Length of the MSHCP and ITP

As described above, the proposed action is the amendment of NiSource Inc.'s 50-year permit to include the NLEB under the authority of section 10(a)(1)(B) and section 10(a)(2) of the ESA. The existing ITP includes a provision to suspend No Surprises Assurances at year 25 of the permit to address uncertainty inherent in the 50-year planning horizon. At year 25, the Service and NiSource will review the permit and Conservation Program to assure it is functioning as intended. At this point any revisions needed to assure an adequate Conservation Program and permit will be made. Once we have completed this review and made any changes to the MSHCP to address new information or circumstances, No Surprises Assurances will be reapplied and the permit will continue to the end of the 50 years.

In the EA, we considered the alternative of issuing the amended ITP without additional restrictions to No Surprises Assurances for the NLEB beyond the 25-Year No Surprises suspension already built into the existing ITP. However, there is a high degree of uncertainty in assumptions for the NLEB in the revised MSHCP, including uncertainty in the take analysis and the near-term status of the species resulting from the ongoing spread of WNS. In the revised MSHCP, NiSource proposed forgoing No Surprises Assurances for the NLEB beginning five years from the date of the permit amendment. At that time, the Service and NiSource will review the NLEB portions of the permit and Conservation Program to assure it is functioning as intended. At this point, any revisions needed to assure an adequate NLEB Conservation Program will be made. Following the NLEB 5-year review and any necessary amendments or changes (if applicable), NiSource Inc. will be afforded "No Surprises" assurances for the NLEB until they are removed for the entire permit at the 25th year of the permit term.

Although we evaluated the alternative to issue the ITP amendment without additional restrictions to No Surprises Assurances, we believe that the strategy of forgoing No Surprises Assurances for the NLEB after five years will adequately address the concern relative to uncertainty and the adequacy of the adaptive management strategy that is built into the MSHCP. Therefore, the Service has determined that the 50-year conservation program for the NLEB should be permitted as requested.

VII. Relationship to Section 7 of the ESA

Pursuant to section 7(a)(2), all federal agency actions (including the Service's issuance of the amended ITP) must be reviewed to determine whether such actions are likely to jeopardize the continued existence of any federally listed or proposed species or likely to cause destruction or adverse modification to designated or proposed critical habitat. The original consultation conducted for this ITP and MSHCP implementation addresses all listed species and any proposed or candidate species that are in the action area. The biological opinion (BO) summarizes and documents this section 7(a)(2) review.

In conjunction with the action of ITP issuance, the MSHCP involves federal actions carried out, or authorized by, the U.S. Army Corps of Engineers, Federal Energy Regulatory Commission, U.S. Forest Service, National Park Service, and National Wildlife Refuges. As provided for in the section 7 implementing regulations (50 CFR 402), consultation and conference responsibilities may be fulfilled through the lead federal agency. The Service has the lead role for this consultation, and we have amended the BO to include the NLEB. The other cooperating agencies have reviewed the amended BO package.

Federal agencies that authorize covered activities for NiSource will use the information within the BO to condition their authorizations. Incidental take coverage for the NLEB for the federal action agency is granted through the incidental take statement issued with the BO. The Service conveys the authority for incidental take to NiSource for its MSHCP "take" species through the issuance of the Section 10 Incidental Take Permit.

VIII. Public Comments

A complete description of the steps taken to assure public input for the amended ITP is found in the Finding of No Significant Impact (FONSI). In short, we published a Notice of Availability for the EA and the revised MSHCP with a 30-day public comment period. We also sent "Dear Interested Party" letters to assure that those who had expressed interest in the original MSHCP knew of the application to amend the ITP to include the NLEB, along with availability of the EA and revised MSHCP. We only received one comment expressing general concern with issuing ITPs to industry.

IX. Summary of Changes Between Draft and Final

Since the release of the draft EA, the Service listed the NLEB as threatened. The EA now reflects this revised status in several places.

X. Incidental Take Permit Criteria – Analysis and Findings

X.1. The taking will be incidental.

The Service finds that the requested take of the NLEB by NiSource is incidental to and not the purpose of the activities associated with operating a natural gas distribution system. The covered activities are associated with operation of natural gas facilities within the identified covered lands, as described above. Take of the NLEB resulting from the temporary loss of habitat through disturbance or its conversion to ROW or gas storage fields, and any habitat loss due to operation and maintenance will be incidental to, and not the purpose of, these lawful activities.

X.2. The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such takings.

Minimization and Mitigation

The Service finds that NiSource will minimize and mitigate the impacts of take on the NLEB to the maximum extent practicable. The company has developed the revised MSHCP pursuant to the incidental take permit requirements codified at 50 CFR 17.22(b)(1) and 50 CFR 17.32(b)(1). Under the provisions of the MSHCP the impacts of take on the NLEB will be minimized, mitigated, and monitored in accordance with the MSHCP and requirements of ITP #TE02636A through the following measures:

- (1) Identification and implementation of incidental take minimization measures to minimize impacts to the NLEB (see Chapters 5 and 6 of the MSHCP).
- (2) Establishment of a NLEB mitigation package that fully compensates for the impact of the taking. The mitigation package includes (1) protection (fee title or easement) of maternity colony habitat as mitigation for linear impacts to 36 maternity colonies, (2) protection (fee title or easement) of maternity colony habitat as mitigation for storage field impacts to 15 maternity colonies, and (3) protection of one or two hibernacula and associated habitat to compensate for all impacts to spring staging and fall swarming habitat.
- (3) Establishment of monitoring and reporting to gauge the anticipated biological success and effectiveness of the MSHCP for the NLEB and to provide information for the Adaptive Management Plan for the NLEB, which is designed to improve the biological success of the MSHCP as new information becomes available or conditions change.
- (4) Implementation of a funding mechanism that contains assurances that the MSHCP will be implemented and fully funded.
- (5) To assure that uncertainty is properly addressed, NiSource will voluntarily forgo “No Surprises” five years from the date of the permit amendment to determine if any changes are needed to the NLEB bat portions of the MSHCP, including but not limited to the

AMMs, take analysis, impact of the take, mitigation, monitoring, or adaptive management. NiSource will also assure that any necessary amendments or changes will be made (if applicable).

The minimization and mitigation measures proposed for the NLEB were developed based on a comprehensive evaluation of impacts to the NLEB from practices that will occur in the permit area. A Monitoring Plan will evaluate the effectiveness of the NLEB conservation program over the life of the Permit. To make the finding that the conservation measures included in the MSHCP minimize and mitigate the impacts of take to the maximum extent practicable, the Service must first evaluate whether the conservation measures are rationally related to the level of take anticipated under the plan. In effect, the minimization and mitigation measures need to address the biological needs of the NLEB in a manner that is commensurate with the impacts to the species anticipated under the MSHCP. The Service believes the amount of minimization and mitigation provided for in the MSHCP compensates for the impacts of take for the NLEB that may occur under the plan.

Impacts

The primary form of take of each of the NLEB anticipated under the revised MSHCP is harm and harassment resulting from the disturbance or change in habitat type from operation and maintenance activities along the pipeline right-of way. In addition, take may occur due to disturbance or habitat change resulting from new construction and storage well maintenance and construction. "Harm" is defined in the regulations as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering" (50 C.F.R. 17.3). Loss of habitat, in and of itself, does not result in take; however, take results when the loss of habitat causes injury or death to a species by significantly impairing essential behavioral patterns of the species. Some limited NLEB mortality is also expected when occupied trees are cleared and waste pits are operated during the NLEB active season.

Having evaluated the effects of pipeline operations and new construction to the NLEB, along with avoidance and minimization measures and NiSource's commitment to utilize the "non-mandatory" avoidance and minimization measures whenever possible, the Service concludes that the amount of NLEB take compared to that calculated through the "reasonable worst case scenario" will be low. Take was calculated assuming none of the "non-mandatory" avoidance and minimization measures were being used. The Service further concludes that the impacts of take to the NLEB will be mitigated effectively by the mitigation. The mitigation involves preservation, conservation, enhancement, or restoration of habitat in and along the covered lands as well as in other locations throughout the range of the NLEB. The impacts to the species is low, in part, because (1) the pipeline is a small linear feature (excluding storage fields) in a landscape containing the species and their habitats; (2) the Covered Lands constitutes a small portion of the NLEB's range; (3) habitat remains available both within the ROW and outside of the ROW to satisfy the NLEB's essential behavioral needs; and 4) the value of the mitigation to

the species together with restoration of disturbed habitat will result in a net positive for the NLEB.

Because of the rarity of the NLEB in the Covered Lands, the probability of occurrence of these species at the location where a specific covered activity is implemented is low. The impact of taking however is based on an assumption of presence in some number at each location, unless NiSource chooses to survey for the species. Therefore, the Service believes the conservation plan will over compensate for these impacts by requiring minimization and mitigation measures for each event, whether the species is known to be present or assumed to be present. The species rarity in the Covered Lands, combined with the take avoidance, minimization and mitigation measures incorporated into the MSHCP, renders the potential for take of NLEB low. For these reasons, impacts of take on the species will also be low. The measures incorporated into the MSHCP to minimize and mitigate impacts on the NLEB should effectively offset the impacts of any future take under the MSHCP.

Summary of NLEB Incidental Take Authorized over the 50-Year Permit Duration

Species	Summary of Take
Northern long-eared bat	Up to 93,500 acres of summer and/or spring staging/fall swarming habitat that could support up to 4,618 Northern long-eared bat individuals

Maximum Extent Practicable

What does “minimize and mitigate to the maximum extent practicable” mean? This issuance criterion requires the Service to first examine and predict the efficacy of the applicant’s proposed minimization and mitigation measures to understand what would fully mitigate for the take. Once that metric is known, impacts to the species that are not avoided or eliminated due to project planning must be mitigated. The maximum extent practicable (MEP) standard is applied both at the level of “minimizing” effects and at the level of “mitigating” for any effects that remain (the take).

The MEP evaluation is based on (1) a biological determination of the impacts of the taking as anticipated in the proposed project; (2) what would further minimize those impacts; (3) and then what would biologically compensate for those remaining impacts. It is the Service’s obligation to provide or approve a biologically based suite of avoidance, minimization, and mitigation options that allow the applicant to fully neutralize and/or compensate for the impacts of the taking. If the applicant provides these minimization measures and mitigation measures that are fully commensurate with the level of impacts, then it has met that issuance criterion and detailed discussion of “practicability” is not required.

The NiSource conservation program for the NLEB, including its minimization and mitigation measures, fully compensates for impacts of the take of the NLEB. In fact, the mitigation will be calculated based on occupied or presumed occupied habitat loss and has the potential to over

compensate for their effects. We have determined that the implementation of the NLEB conservation program by NiSource will not disrupt, in any way, implementation of our NLEB Recovery Program. In fact, the NiSource conservation program will assist in recovery of the NLEB. For example, NiSource will mitigate for direct and indirect effects to NLEBs associated with habitat loss in the covered lands by conserving, preserving, or restoring forested habitat in areas of known occupancy. We believe the NLEB recovery will be enhanced due to this mitigation. Those areas containing known maternity colonies are the areas the Service believes will most benefit the NLEB through conserving, preserving or restoring suitable habitat.

The Service finds that the MSHCP minimizes and mitigates the impacts of take of the NLEB to the maximum extent practicable, based on the information provided above, because:

(1) the MSHCP's minimization and mitigation measures effectively compensate for the impacts of NLEB take that may occur under the plan; (2) the plan provides for adaptive management to adjust to changing habitat conditions and (3) the plan adjusts for mitigation costs over the life of the plan to assure full funding is available for implementation, including mitigation.

X.3. The applicant will ensure that adequate funding for the conservation plan and procedures to deal with unforeseen circumstances will be provided.

Although NiSource will have the ability to directly undertake mitigation activities through its operating budget, mitigation and associated tasks will primarily be assured through a trust account established by NiSource into which NiSource will make scheduled payments (Mitigation Account). Mitigation and other costs also will be assured through a secondary trust fund account established by NiSource that will serve as a replenishing reserve in the event that the primary fund becomes overdrawn (Reserve Account) or emergency funds are needed for any other reason. Both accounts will be administered by the National Fish and Wildlife Foundation (NFWF) and are collectively called the "MSHCP Fund." NiSource will be obligated to ensure annually that both accounts contain sufficient monies to compensate for cost increases for such circumstances as underestimates, changed circumstances, and adaptive management measures. All other costs of implementing the MSHCP will be assured through NiSource's credit facility, or, as necessary, through a letter of credit (MSHCP Section 8.4.2).

The NiSource Credit facility also provides assurance that sufficient funds for mitigation and other MSHCP obligations will be available. If the credit facility lapses or the amount becomes too low, NiSource will obtain a letter of credit of sufficient duration and amount to assure its obligations. During May 2012, NiSource Finance amended its \$1.5 billion revolving credit facility with a syndicate of banks led by Barclays Capital. The amendment extended the termination date of the facility to May 15, 2017, and reduced the borrowing costs under the facility. As of September 30, 2012, \$1.439 billion of credit was available under the credit facility. The facility provides a reasonable cushion of short-term liquidity for general corporate purposes, including meeting cash requirements driven by volatility in natural gas prices. NiSource Inc. anticipates that it will maintain large credit facilities throughout the term of the ITP, absent a significant structural change in the natural gas industry.

Upon receiving an ITP from the Service, NiSource Inc. has agreed to guarantee all funding obligations under this MSHCP, including, if necessary, to borrow from its \$1.4 billion credit facility to secure funding for the MSHCP. NiSource Inc. also agreed that, should the available balance in NiSource Inc.'s credit facility ever fall below \$25 million or should the credit facility be allowed to lapse, NiSource will notify the Service in writing within 7 days and will obtain a \$250,000 letter of credit, in a form acceptable to the Service, within 30 days of such fall or lapse. Should NiSource fail to obtain this letter of credit, such failure would provide valid grounds to suspend and/or revoke the permit in accordance with 50 C.F.R. §§ 13.27 and 13.28.

X.4. The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

The Service finds that the taking to be authorized under the proposed permit will not appreciably reduce the likelihood of the survival and recovery of the NLEB in the wild. The ESA's legislative history establishes the intent of Congress that this issuance criterion be identical to a finding of "no jeopardy" pursuant to section 7(a)(2) of the ESA and its implementing regulations. As a result, the Service has reviewed the NLEB under section 7 of the Act. In the amended BO, which is incorporated herein by reference, the Service has concluded that the issuance of the proposed permit is not likely to jeopardize the continued existence of the NLEB. There is no critical habitat for the NLEB. The Service's finding that the NLEB will not be jeopardized as a result of the take authorized under the proposed permit is discussed in detail in the amended BO.

X.5. Other measures that the Director may require as being necessary or appropriate for the purposes of the plan.

The Service finds that all additional measures required by the Service as necessary or appropriate for the MSHCP are included in the revised MSHCP, the amended permit, and the amended Biological Opinion.

X.6. The Director has received assurances that the plan will be implemented.

The Service finds that the revised MSHCP provides the necessary assurances that the plan will be carried out by NiSource and its subsidiaries. By accepting the permit NiSource is bound to fully implement the provisions of the revised MSHCP in accordance with the Implementing Agreement, as well as the terms and conditions of the BO.

X.7. General Criteria and Disqualifying Factors

The Service has no evidence the ITP application should be denied on the basis of criteria and conditions set forth in 50 CFR § 13.21(b)-(c).

Recommendation on Permit Issuance

Based on the foregoing findings with respect to the proposed action, I recommend issuance of the amendment to Permit Number TE02636A-1 in accordance with the NiSource MSHCP, and in accordance with all terms and conditions of the biological opinion and associated consultation documents.

Scott Hicks

Scott Hicks, Acting Chief
Endangered Species, Region 3

5-1-2015

Date

Concur:

Lynn M Lewis

Lynn M. Lewis
Assistant Regional Director - ES

5/1/15

Date