

APPENDIX D:

IMPLEMENTING AGREEMENT

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by and between

**NORTHERN INDIANA PUBLIC SERVICE COMPANY
"NIPSCO"**

**INDIANA - AMERICAN WATER COMPANY, INC
"INAWC"**

**U.S. FISH AND WILDLIFE
"Service"**

**TO ESTABLISH A MITIGATION PROGRAM FOR THE ENDANGERED
KARNER BLUE BUTTERFLY**

AT THE PROPOSED NIPSCO & INAWC RIGHTS-OF-WAY

**NIPSCO MILLER ROW located in Section 1, Township 36 North, Range 8 West,
Lake County, Indiana**

**NIPSCO AETNA ROW located in Section 12, Township 36 North, Range 8 West,
Lake County, Indiana**

**NIPSCO STAGECOACH ROAD ROW located in Sections 2&3 Township 36 North,
Range 7 West, and Sections 35&36 Township 37 North, Range 7 West, Porter
County, Indiana; and**

**INAWC OGDEN DUNES ROW
located in Section 35, Township 37 North, Range 7 West, Porter County, Indiana.**

This Implementing Agreement ("Agreement"), made and entered into as of the ____ day of _____, 2005 by and among NIPSCO, INAWC and the Service hereinafter collectively called the "Parties," defines the Parties' roles and responsibilities and provides a common understanding of action that will be undertaken to minimize and mitigate the effects on the Karner Blue Butterfly and its habitats within the proposed NIPSCO MILLER ROW, NIPSCO AETNA ROW, NIPSCO STAGECOACH ROAD ROW and INAWC OGDEN DUNES ROW (sometimes referred to herein collectively as the "Rights of Way").

1.0 RECITALS

This Agreement is entered into with regard to the following facts:

WHEREAS, the proposed Rights of Way locations have been selected after an environmental review has determined them to be current or potential habitat for the federally listed Karner Blue Butterfly; and,

WHEREAS, NIPSCO and INAWC, with technical assistance from the Service, has developed a series of measures, described in the Conservation Plan (as defined herein), to minimize and mitigate the effects upon the Karner Blue Butterfly and its associated habitats arising due to usage of the proposed Rights of Way; and,

THEREFORE, the Parties hereto do hereby understand and agree as follows:

2.0 DEFINITIONS

The following terms as used in this Agreement shall have the meanings set forth below:

- 2.1** The term "Permit" shall mean an incidental take permit issued by the Service to NIPSCO and INAWC pursuant to Section 10(a)(1)(B) of the Endangered Species Act ("ESA").
- 2.2** The term "Permit Area" shall mean the areas consisting of: approximately 37 acres of the NIPSCO MILLER ROW, located in Section 1, Township 36 North, Range 8 West, Lake County, Indiana; approximately 15 acres of the NIPSCO AETNA ROW located in Section 12, Township 36 North, Range 8 West, Lake County, Indiana; approximately 32 acres of the NIPSCO STAGECOACH ROAD ROW located in Sections 2&3, Township 36 North, Range 7 West, and Sections 35&36, Township 37 North, Range 7 West, Porter County, Indiana, and the INAWC OGDEN DUNES ROW located in Section 35, Township 37 North, Range 7 West, Porter County, Indiana; all as more specifically depicted in Appendix A, Figures 2 & 3 of the Conservation Plan.
- 2.3** The term "Permittee" shall mean NIPSCO and INAWC individually and the term "Permittees" shall mean NIPSCO and INAWC collectively.
- 2.4** The term "Conservation Plan" shall mean the Karner Blue Butterfly Habitat Conservation Plan prepared by the Permittees for the proposed routine usage of the Permit Areas of the Rights-of-Way.
- 2.5** The term "Plan Species" shall mean the Karner Blue Butterfly as covered in the Conservation Plan.
- 2.6** The term "unforeseen circumstances" means any significant, unanticipated adverse change in the status of the Karner Blue Butterfly addressed in the Conservation Plan or in its habitats; or any significant unanticipated adverse change in impacts of the project or in other factors upon which the Conservation Plan is based. The term "unforeseen circumstances" as defined in this Agreement is intended to have the same meaning as "extraordinary circumstances" as used in the Services' so called "No Surprises" policy.

3.0 CONSERVATION PLAN

Pursuant to the provisions of Section 10(a)(1)(B) of the ESA, the Permittees have prepared the Conservation Plan and submitted it to the Service with a request that the Service issue a Permit to allow the Plan Species to be incidentally taken within the Permit Area as depicted and described in Appendix A, Figures 2 & 3 of the Conservation Plan. The Conservation Plan proposes a mitigation program for the subject Plan Species and its habitats.

4.0 INCORPORATION OF CONSERVATION PLAN

The Conservation Plan and each of its provisions are intended to be, and by this reference are, incorporated herein. In the event of any direct contradiction between the terms of this Agreement and the Conservation Plan, the terms of this Agreement shall control. In all other cases, the terms of this Agreement and the terms of the Conservation Plan shall be interpreted to be supplementary to each other.

5.0 LEGAL REQUIREMENTS

In order to fulfill the requirements that will allow the Service to issue the Permit, the Conservation Plan sets forth measures that are intended to ensure that any take occurring within the Permit Area will be incidental; that the impacts of the take will, to the maximum extent practicable, be minimized and mitigated; that procedures to deal with unforeseen circumstances will be provided; that adequate funding for the Conservation Plan be provided; and that the take will not appreciably reduce the likelihood of the survival and recovery of the Plan Species in the wild. It also includes measures that have been suggested by the Service as being necessary or appropriate for purposes of the Conservation Plan.

6.0 COOPERATIVE EFFORT In order that each of the legal requirements as set forth in Paragraph 5.0 hereof are fulfilled, each of the Parties to this Agreement must perform certain specific tasks as more particularly set forth in the Conservation Plan. The Conservation Plan thus describes a cooperative program by and among the Service and private interests to mitigate the effects of the proposed activities on the Plan Species.

7.0 TERMS USED

Terms defined and utilized in the Conservation Plan and the ESA shall have the same meaning when utilized in this Agreement, except as specifically noted.

8.0 PURPOSES

The purposes of this Agreement are:

- 8.1** To ensure implementation of each of the terms of the Conservation Plan;
- 8.2** To describe remedies and recourse should any Party fail to perform its obligations, responsibilities, and tasks as set forth in this Agreement; and,
- 8.3** As stated in paragraph 12.3.a hereof, to provide assurances to the Permittees and other non-Federal landowner(s) participating in the Conservation Plan that as long as the terms of the Conservation Plan and the Permit issued pursuant to the Conservation Plan and this Agreement are fully and faithfully performed, no additional mitigation will be required except as otherwise expressly provided for in this Agreement or required by law.

9.0 TERMS AND CONDITIONS

- 9.1** Stated Term. This Agreement shall become effective on the date that the Service issues the Permit requested in the Conservation Plan and shall remain in full force and effect for a period of 25 years or until termination of the Permit, whichever occurs sooner (the "Term").

10.0 FUNDING

10.1 NIPSCO & INAWC will each provide such funds as may be necessary to carry out its obligations under the Conservation Plan. Each Permittee should notify the Service, if the Permittee's funding resources have materially adversely changed, including a discussion of the nature of the change, from the information provided in section 6 of the Conservation Plan.

11.0 RESPONSIBILITIES OF THE PARTIES IN MITIGATION PROGRAM IMPLEMENTATION AND MONITORING RESPONSIBILITIES OF THE PERMITTEE

11.1 Responsibilities of each Permittee.

- a. Each Permittee acknowledges that the Conservation Plan will be properly functioning if the terms of this Agreement have been or are being fully implemented.
- b. Each Permittee shall undertake all activities set forth in the Conservation Plan in order to meet the terms of the Conservation Plan and to comply with the Permit, including adaptive management procedures described in subparagraph (c) below, if applicable.
- c. Upon the written request from the Service, each Permittee shall describe the adaptive management process agreed to by the Parties to ensure the terms of the Conservation Plan are fully implemented, if applicable.
- d. The Permittees shall submit an annual report describing its activities and an analysis of whether the terms of the Conservation Plan were met for the reporting period. The report shall provide all reasonably available data regarding the incidental take, and where requested in writing by the Service, changes to the overall population of Plan Species that occurred in the Permit Area during the reporting period. In the case of a corporate Permittee, the report shall also include the following certification from a responsible company official who supervised or directed the preparation of the report: Under penalty of law, I certify that, to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of this report, the information submitted is true, accurate, and complete in all material respects.

11.2 Responsibilities of the Service.

- a. The Service shall cooperate and provide, to the extent funding is available, technical assistance to each Permittee. Nothing in this Agreement shall require the Service to act in a manner contrary to the requirements of the Anti-Deficiency Act.
- b. After issuance of the Permit, the Service shall monitor the implementation thereof, including each of the terms of this Agreement and the Conservation Plan in order to ensure compliance with the Permit, the Conservation Plan and this Agreement by each Permittee.

12.0 REMEDIES AND ENFORCEMENT

12.1 REMEDIES IN GENERAL

Except as set forth below, each Party shall have all remedies available at law and in equity to enforce the terms of this Agreement, the Permit, and the Conservation Plan, and to seek remedies for any breach hereof, subject to the following:

a. NO MONETARY DAMAGES

No Party shall be liable in damages to any other Party or other person for any breach of this Agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement or any other cause of action arising from this Agreement. Notwithstanding the foregoing:

(1) Retain Liability

All Parties shall retain whatever civil liability they would possess to any other Party or other person for their present and future acts or failure to act without existence of this Agreement.

(2) Land Owner Liability

All Parties shall retain whatever liability they possess as an owner of interests in land.

(3) Responsibility of the United States

Nothing contained in this Agreement is intended to limit the authority of the United States government to seek civil or criminal penalties or otherwise fulfill its enforcement responsibilities under the ESA.

The Parties acknowledge that any take of endangered or threatened species in compliance with this Agreement, the Conservation Plan, and the Permit shall not be a violation of the ESA.

b. INJUNCTIVE AND TEMPORARY RELIEF

The Parties acknowledge that the Plan Species are unique and that their loss as species would result in irreparable damage to the environment and that therefore injunctive and temporary relief may be appropriate to ensure compliance with the terms of this Agreement.

12.2 THE PERMIT

a. SEVERABILITY

The violation of the Permit by any Permittee with respect to any one or more particular parcels of land or portions thereof owned or controlled or within the jurisdiction of any such Permittee including the Rights of Way shall not adversely affect or be attributed to, nor shall it result in a loss or diminution of any right, privilege, or benefit hereunder, of any other Permittee.

b. PERMIT SUSPENSION OR REVOCATION

Except as otherwise expressly provided for under the terms of this Agreement, the Permit shall be suspended or revoked to the extent required by and in conformance with the provisions of 50 CFR 13.27 through 13.29 (1994), as the same exists as of the date hereof.

12.3 LIMITATIONS AND EXTENT OF ENFORCEABILITY

a. NO SURPRISES POLICY

Subject to the availability of appropriated funds as provided in Paragraph 14.6 hereof, and except as otherwise required by law, no further mitigation for the effects of the proposed activity upon the Plan Species may be required from a Permittee who has otherwise abided by the terms of the Conservation Plan, except in the event of unforeseen circumstances; provided that any such additional mitigation may not require additional land use restrictions or financial compensation from the Permittee without his/her written consent.

b. PRIVATE PROPERTY RIGHTS AND LEGAL AUTHORITIES UNAFFECTED

Except as otherwise specifically provided herein, nothing in this Agreement shall be deemed to restrict the rights of a Permittee to the use or develop those lands, or interests in lands, constituting the Permit Area; provided, that nothing in this Agreement shall absolve a Permittee from such other limitations as may apply to such lands, or interests in lands, under other laws of the United States and the State of Indiana.

13.0 AMENDMENTS

Except as otherwise set forth herein, this Agreement may be amended consistent with the ESA and with the written consent of each of the Parties hereto.

14.0 MISCELLANEOUS PROVISIONS

14.1 NO PARTNERSHIP

Except as otherwise expressly set forth herein, neither this Agreement nor the Conservation Plan shall make or be deemed to make any Party to this Agreement the agent or the partner of any other Party.

14.2 SUCCESSORS AND ASSIGNS

This Agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the Parties hereto and their respective successors and assigns.

14.3 NOTICE

Any notice permitted or required by this Agreement shall be delivered personally to the persons set forth below or shall be deemed given five (5) days after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows or at such other address as any Party may from time to time specify to the other Parties in writing:

Robyn Thorson
Regional Director
United States Fish and Wildlife Service
Federal Building
1 Federal Drive
Fort Snelling, Minnesota 55111
612-713-5301

Brian Kortum
Natural Resources Specialist
Northern Indiana Public Service Company
NiSource EH&S
801 East 86th Street
Merrillville, IN 46410
219-647-5273

R. Douglas Mitchem

Vice President of Operations
Indiana-American Water Company, Inc.
535 North New Ballas Rd.
St. Louis, MO 63141
314.996.2357

14.4 ENTIRE AGREEMENT

This Agreement, together with the Conservation Plan and the Permit, constitutes the entire agreement between the Parties. It supersedes any and all other agreements, either oral or in writing among the Parties with respect to the subject matter hereof and contains all of the covenants and agreements among them with respect to said matters, and each Party acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by any other Party or anyone acting on behalf of any other Party that is not embodied herein.

14.5 ELECTED OFFICIALS NOT TO BENEFIT

No member of or delegate to Congress shall be entitled to any share or part of this Agreement, or to any benefit that may arise from it.

14.6 AVAILABILITY OF FUNDS

Implementation of this Agreement and the Conservation Plan by the Services is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any money from the U.S. treasury. The Parties acknowledge that the Services will not be required under this Agreement to expend any Federal agency's appropriated funds unless and until an authorized official of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

14.7 DUPLICATE ORIGINALS

This Agreement may be executed in any number of duplicate originals. A complete original of this Agreement shall be maintained in the official records of each of the Parties hereto.

14.8 THIRD PARTY BENEFICIARIES

Without limiting the applicability of the rights granted to the public pursuant to the provisions of 16 U.S.C. § 1540(g), this Agreement shall not create any right or interest in the public, or any member thereof, as a third party beneficiary hereof, nor shall it authorize anyone not a Party to this Agreement to maintain a suit for personal injuries or property damages pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third parties shall remain as imposed under existing Federal or State law.

14.9 RELATIONSHIP TO THE ESA AND OTHER AUTHORITIES

The terms of this Agreement shall be governed by and construed in accordance with the ESA and other applicable laws. In particular, nothing in this Agreement is intended to limit the authority of the Service to seek penalties or otherwise fulfill its responsibilities under the ESA. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of the Service as an agency of the Federal government.

14.10 REFERENCES TO REGULATIONS

Any reference in this Agreement, the Conservation Plan, or the Permit to any regulation or rule of the Service shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

14.11 APPLICABLE LAWS

All activities undertaken pursuant to this Agreement, the Conservation Plan, or the Permit must be in compliance with all applicable State and Federal laws and regulations.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Agreement to be in effect as of the date last signed below.

BY _____ Date _____
Robyn Thorson, Regional Director
United States Fish and Wildlife Service

BY _____ Date _____
Ronald J. Ragains, Director, Construction
Northern Indiana Public Service Company

BY _____ Date _____
R. Douglas Mitchem
Vice President of Operations
Indiana-American Water Company, Inc