

**Guidelines for Achieving Compliance  
With the Migratory Bird Treaty Act and  
Executive Order No. 13186 Through Voluntary  
Conservation Measures**

**Developed by  
Rockies Express Pipeline LLC  
and  
U.S. Fish and Wildlife Service**

**Associated with the Construction and Operation of the  
Rockies Express Pipeline – East Project in  
Missouri, Illinois, Indiana, and Ohio**

**March 2008**

## PREFACE

Rockies Express Pipeline LLC (Rockies Express) proposes to construct and operate pipeline, compression, and ancillary facilities to transport natural gas produced in the Rocky Mountain basins for delivery primarily to other pipelines and distribution customers located in the upper Midwest and Eastern United States (U.S.). The proposed project, the Rockies Express Pipeline – East Project, or REX-East Project, falls under the jurisdiction of the Federal Energy Regulatory Commission (FERC) and FERC is the lead federal agency for the project. This project is the subject of these Guidelines for Achieving Compliance with the Migratory Bird Treaty Act and Accompanying Executive Order No. 13186 Through Voluntary Conservation Measures (Guidelines).

The REX-East Project will consist of approximately 639.1 miles of new pipeline facilities from Audrain County, Missouri, to a terminus in Monroe County, Ohio, five new compressor stations along the REX-East route, two new compressor stations along the REX-West and REX-Entrega pipeline routes, and ancillary facilities consisting of 36 mainline valves and 13 meter station locations.

Rockies Express filed for a Certificate of Public Convenience and Necessity (Certificate) with FERC to construct and operate the REX-East Project. As part of its review of the proposed project, FERC has prepared an environment impact statement (EIS) for the project (CP07-208-000). The EIS references these Guidelines as a means to avoid and minimize impacts to migratory birds and to minimize and mitigate habitat impacts from forest loss and fragmentation (Sections 4.4 and 4.5). The EIS recommends (Section 4.5.3) that Rockies Express and FWS follow these Guidelines as described below.

Habitat assessments were conducted by Natural Resource Group, LLC (NRG), consultant for Rockies Express, to identify the major types of vegetation communities that will be disturbed by construction of the REX-East Project. Rockies Express will typically use a 125-foot-wide construction right-of-way in upland areas to allow for the safe and efficient construction of its pipeline. Rockies Express will acquire a permanent right-of-way width of 30 to 50 feet depending on existing land use type, which is explained in more detail in this document. The REX-East Project will disturb approximately 14,349 acres. Nearly 74.4 percent of the acreage that will be disturbed consists of agricultural lands. Of the remainder, approximately 2,307 acres is made up of forested land. This vegetation community provides foraging, cover, and breeding habitat for a diversity of wildlife species, including migratory birds. The project will result in permanent alteration (i.e., 30 to 50 feet ROW width maintained in an herbaceous or shrub condition) of 433 acres of forested land with the remaining 1,874 acres of forested land being allowed to return to forested condition over time.

The primary impact on the forested vegetation community will be the cutting, clearing, and/or removal of existing vegetation within the construction work area. Impacts on woody vegetation communities will be long-term given the length of time needed for the communities to mature to pre-construction conditions (approximately 50 years). Some of these impacts, particularly on woody vegetation, will be permanent due to normal maintenance activities conducted in accordance with Rockies Express' Upland Erosion Control, Revegetation and Maintenance Plan (Plan) and Wetland and Waterbody Construction and Mitigation Procedures (Procedures). These maintenance activities include annual vegetation clearing over a 10-foot-wide corridor centered over the pipeline and clearing of trees greater than 15 feet tall every 3 years within the 50-foot-wide permanent right-of-way in non-riparian areas, and a 30-foot-wide permanent right-of-way in forested wetlands and upland forests noted as FWS areas of concern.

There is also the impact of forest fragmentation, which is often greater than the actual acreage cleared. Many species of migratory birds, and often those of greatest conservation concern, require large blocks of contiguous forest to successfully reproduce and survive. Construction and maintenance of pipeline rights-of-way through forests fragments the forest, with the resulting fragments sometimes losing or having reduced capacity to successfully sustain interior forest species. Much of the REX-East Project corridor is collocated with existing rights-of-way or in areas fragmented by agricultural or other development and, as such, will not fragment areas of contiguous forest.

Rockies Express anticipates beginning construction of the REX-East Project in the summer 2008 and completing construction in fall 2008. This construction schedule means that at least the months of June and July of the proposed schedule may coincide with the recognized nesting season of migratory birds protected under the Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703-712; Ch. 128 as amended).

The typical nesting season for migratory songbirds, game birds, and shorebirds in the four-state area where the REX-East Project is proposed ranges from April 1 through July 15. Some species and individuals within a particular species may begin nesting prior to April 1 or complete their nesting cycle shortly after July 15, but the vast majority will complete their initial nesting during this period. Depending upon the year and species, some bird pairs will typically undertake a second nesting effort, which could be impacted by forest clearing.

The Migratory Bird Treaty Act prohibits the taking, killing, possession, transportation, and importation of migratory birds, their eggs, parts, and nests, except when specifically authorized by the Department of the Interior. While the MBTA has no provision for allowing unauthorized take, the FWS recognizes that some birds may be taken during activities such as pipeline construction even if all reasonable measures to avoid take are implemented. The FWS's Office of Law Enforcement carries out its mission to protect migratory birds not only through investigation and enforcement, but also through fostering relationships with individuals and industries that proactively seek to eliminate their impacts on migratory birds. Although it is not possible under the MBTA to absolve individuals, companies, or agencies from liability (even if they implement avian mortality avoidance or similar conservation measures), the Office of Law Enforcement focuses on those individuals, companies, or agencies that take migratory birds with disregard for their actions and the law, especially when conservation measures have been developed but are not properly implemented.

Rockies Express recognizes that construction of the project and maintenance of the permanent right-of-way for the pipeline will result in temporary and/or permanent impacts to migratory birds and the habitats upon which they depend for various life requisites. Rockies Express also recognizes that due to the size of the project and the fact that some construction and operation will occur during the nesting season for a majority of migratory bird species found in the project area, take of active nests, (i.e., eggs and young) may occur in spite of all reasonable efforts to avoid such take.

Rockies Express desires to take all reasonable measures to comply with MBTA and also desires to provide for the restoration and preservation of habitats for migratory birds in the four states where the pipeline will be constructed, operated, and maintained. Accordingly, Rockies Express and the FWS have prepared, and will follow, these Guidelines for Achieving Compliance With the Migratory Bird Treaty Act and Executive Order No. 13186 Through Voluntary Conservation Measures (Guidelines):

## **GUIDELINES**

### **I. PURPOSE**

The purpose of these Guidelines is to set forth all reasonable measures that Rockies Express may take to comply with MBTA. Rockies Express and the FWS (the Parties) will work cooperatively to implement conservation measures that will provide benefits to bird species protected under MBTA within the states where the REX-East Project will be constructed, operated, and maintained. This document will remain in effect for the life of the Rockies Express Pipeline - East Project (FERC Docket #CP07-208-000). If these Guidelines are followed, the FWS does not anticipate the need for any additional mitigation for forest loss or forest fragmentation, not already described herein, for any future disturbance associated with this pipeline for the area in the existing construction route.

These Guidelines do not address issues related to the Section 7 review by the FWS for Federally listed species. That review and associated issues will be addressed in a separate Biological Assessment and appropriate response from the FWS. These Guidelines also do not address issues related to crossing of Wild and Scenic Rivers and their tributaries. Those issues are being addressed by the National Park Service under separate review.

### **II. ROLES OF THE PARTIES**

#### **A. Rockies Express Pipeline, LLC**

Rockies Express recognizes that construction, operation, and maintenance of the project will result in temporary and/or permanent impacts on migratory bird habitats. Accordingly, Rockies Express has taken, or will take, the following actions to minimize and/or offset these impacts:

- The pipeline route proposed by Rockies Express utilizes, to the degree possible, areas that have limited or no habitat suitable for migratory birds to nest. More than 59 percent of the REX-East Project facilities will be collocated with existing rights-of-way and approximately 74.4 percent of the proposed pipeline route occurs in areas that are utilized for agricultural production. By routing the proposed pipeline to areas that are predominantly agricultural and co-locating it with existing rights-of-way, Rockies Express has substantially reduced the project's impacts on habitats of value to migratory birds.
- To avoid impacts on riparian forests, Rockies Express will avoid those forested communities, as feasible, by staging horizontal directional drill (HDD) equipment outside of those areas where they occur adjacent to waterbodies crossed via HDD. Those areas avoided by HDD are summarized in Attachment 1.
- To reduce impacts on vegetation within the project footprint and to improve the probability of successful revegetation of disturbed areas, Rockies Express will implement the restoration measures included in the Rockies Express' Plan and Procedures.

Rockies Express recognizes that it must take all reasonable measures to comply with MBTA by avoiding the take of active nests (e.g., eggs and young) of migratory birds during the construction, operation, and maintenance of the REX-East Project. In a letter dated September 12, 2007, to Rockies Express, the FWS recognized specific migratory birds of conservation concern and specific habitat areas of concern for migratory birds. Subsequent correspondence with the Columbia, Missouri, Field Office and the Bloomington, Indiana, Field Office of the FWS identified additional areas of concern. Attachment 2 and its corresponding maps (Attachment 3) summarize the FWS's primary areas of concern for forest fragmentation and migratory birds along the proposed route. Additionally, Rockies Express analyzed its proposed route and isolated forest crossings greater than 0.25 mile in length that were not cited by the FWS. These areas are also included in Attachments 2 and 3. All other forest impacts not accounted for by these two analyses were totaled and also taken into account.

Rockies Express created a decision tree (Attachment 4) to assign mitigation ratios for forest impacts according to the quality of forest affected. Areas cited by the FWS as being of concern for migratory birds, forest fragmentation, and riparian corridors have been assigned to Categories A, B, and C, with A and B being the highest quality (unfragmented, with Category A longer than 0.5 mile and Category B shorter than 0.5 mile) and C being the lowest quality (collocated or previously fragmented). For the remaining areas not indicated by the FWS but of possible fragmentation concern, Rockies Express assigned the areas to Categories D, E, and F, with D and E being the highest quality (unfragmented, with Category D longer than 0.5 mile and Category E shorter than 0.5 mile) and F being the lowest quality (previously fragmented). All other forest impacts not accounted for by the flow chart were assigned to Category G, being of the lowest quality, so that all forest impacts incurred by the project would be taken into account. To summarize:

- Category A = Large intact block of forest in area of concern
- Category B = Small intact block of forest in area of concern
- Category C = Fragmented or collocated forest in area of concern
- Category D = Large intact block of forest not in area of concern
- Category E = Small intact block of forest not in area of concern
- Category F = Fragmented forest not in area of concern
- Category G = All other low-quality forest impacts, based on Land Use Land Classification data

Accordingly, Rockies Express has taken, or will take, the following actions in forested areas specified in the attached forest fragmentation table (Attachment 2):

- In non-collocated forested areas identified by the FWS as sensitive in the September 12 letter and whose combined length totals approximately 20 miles (Attachment 5 and footnoted in Attachment 2), Rockies Express will avoid construction prior to July 15, unless the FWS determines in writing, based upon current surveys, that it would be safe to do so.
- Restoration in forested stands of concern will include a 30-foot-wide maintenance area within a 50-foot-wide right-of-way for Categories A, B, D and E (Attachment 2). Ten (10) feet centered over the pipeline will be kept in an herbaceous state with the remaining 20 feet of the corridor to return to a scrub/shrub community.

Trees larger than 15 feet tall will be removed from the 30-foot right-of-way every three years.

- In forested areas categorized as A, B, and D (Attachment 2), Rockies Express will plant bare root seedlings (both hard- and soft-mast species, as identified through discussions with the FWS) within the temporary construction right-of-way to expedite the return of forest community, unless otherwise restricted by landowner easement conditions. Tree species will be primarily deciduous as identified for the various areas by the FWS.

Despite these efforts, Rockies Express recognizes that construction, operation, and maintenance of the project may still result in temporary and/or permanent impacts on migratory birds, namely as a result of habitat loss. Accordingly, Rockies Express has taken, or will take the following actions to offset these impacts:

- Rockies Express will install 24 bird houses on Blackburn Island in the Mississippi River during restoration in order to mitigate for potential prothonotary warbler nesting cavities that may be removed during tree clearing of the HDD staging area on the island (see site number 11 in Attachments 2 and 3). In accordance with established recommendations, the wooden bird houses will be 4x4x6-inches with a 1.5-inch-diameter entrance hole 4 inches from the bottom, and installed between 4 and 12 feet high on trees adjacent to open water. These bird houses will be installed prior to completing construction and hung at least 5 feet above the highest floodwater levels.
- To offset for impacts on forested and scrub-shrub wetlands, Rockies Express will provide on-site and off-site mitigation, including restoration and preservation of approximately 66.2 acres of forested communities in accordance with permit requirements from the U.S. Army Corps of Engineers (COE) (Summarized in Attachment 6) for construction in Missouri, Illinois, Indiana, and Ohio, and permit requirements for the Indiana Department of Natural Resources (IDNR) (Summarized in Attachments 7a and 7b). This number is subject to change as surveys and consultations continue.
- Rockies Express will cooperate with the FWS to mitigate for habitat impacts on migratory birds, forest loss, and for forest fragmentation by contributing funds to the FWS for impacts on approximately 2,307.4 acres of forestland that will be cleared in the four states where the REX-East Project will be constructed. This number is based on impacts as identified in Attachment 2. Construction and permanent forest impacts will be mitigated on a category basis using the following ratios:<sup>1</sup>
  - Category A: Construction: 2.2:1, Permanent: 6:1
  - Category B: Construction: 1.2:1, Permanent: 3:1
  - Category C: Construction: 1.2:1, Permanent: 2.2:1
  - Category D: Construction: 1.2:1, Permanent: 2.2:1
  - Category E: Construction: 1.2:1, Permanent: 2.2:1
  - Category F: Construction: 1.2:1, Permanent: 2.2:1
  - Category G: Construction: 1.2:1, Permanent: 2.2:1

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<sup>1</sup> Minimum ratios for construction and permanent impacts were determined using Habitat Equivalency Analysis

These mitigation ratios and the calculations used to reach the total number of forested acres that will be mitigated are summarized in Attachment 8. From that total, Rockies Express subtracted 66.2 acres because an additional 18.9 acres of permanent impacts on wetland communities will be mitigated through permit stipulations required by the COE (Attachment 6), and an additional 47.3 acres of permanent impacts on forests in floodways will be mitigated in Indiana through permit stipulations required by the IDNR (Attachments 7a and 7b). This total is subject to change as surveys and consultation continue, but the finalized total will be subtracted from Rockies Express' forest impacts mitigation total.

To accomplish this mitigation objective, Rockies Express will contribute funds to an account for the purpose of cooperating with the FWS to protect migratory bird habitat through the acquisition of lands (through fee title or perpetual conservation easements), implementation of habitat restoration, and management the lands for the benefit of migratory birds. The amount of the funds contributed by Rockies Express to ensure that the objectives of the habitat mitigation are met is based on land values, fee title costs, easement costs, habitat restoration costs, costs for administration of the fund, and other anticipated costs as necessary to meet the agreed upon mitigation acreage. Total acres for mitigation equal 3,785 (see Attachment 8). As explained above, Rockies Express is mitigating for 66.2 acres of forested impacts through other regulatory mechanisms. Subtracting these mitigated acres from the total number of acres results in the mitigation of 3,718 acres. Rockies Express will contribute \$4,150,000 in an effort to mitigate for the loss of forest habitat and to conduct appropriate studies. Accordingly, Rockies Express will contribute funds in this amount prior to the commencement of construction to be placed in an interest-bearing escrow account to be drawn upon by 1) qualified personnel, as described below, for pre-construction survey purposes at the successful completion of those surveys and, by 2) an appropriate conservation organization, as described below, for mitigation purposes and post-construction surveys at the successful completion and placement in-service of the project.

- Rockies Express will identify, with FWS concurrence, qualified personnel to conduct pre-clearing surveys to determine the number and species of nesting migratory birds along sensitive portions of the proposed right-of-way. Rockies will also assist the bird survey personnel in locating and identifying the routes. Based on the results of these surveys, the FWS may determine, in writing, that it would be safe to clear some areas prior to July 15. An appropriate conservation organization, as discussed above, will conduct post-construction surveys during subsequent years (years 2, 5, and 10 following construction) to determine if there is a reduction in utilization by nesting birds along non-located rights-of-way.

## **B. U.S. Fish and Wildlife Service**

The FWS will continue to cooperate with Rockies Express in an effort to provide for the conservation of migratory birds while the company proceeds with the construction of the REX-East Project. The FWS will do the following:

- The FWS will continue to cooperate with Rockies Express through technical assistance and guidance concerning reasonable measures to be taken by Rockies Express to comply with MBTA and avoid or minimize the impacts to

migratory birds during construction, operation, and maintenance of the REX-East Project.

- Rockies Express will identify, with FWS concurrence, an appropriate conservation organization to establish an account(s) into which Rockies Express will contribute funds for the conservation of migratory bird habitat.
- Rockies Express will identify, with FWS concurrence, qualified personnel to conduct pre-clearing surveys to determine the number and species of nesting migratory birds along sensitive portions of the proposed right-of-way. Rockies will assist the bird survey personnel in locating and identifying the routes. Based on the results of these surveys, the FWS may determine, in writing, that it would be safe to clear some areas prior to July 15. An appropriate conservation organization, as discussed above, will conduct post-construction surveys during subsequent years (years 2, 5, and 10 following construction) to determine if there is a reduction in utilization by nesting birds along non-located rights-of-way. Costs for these latter surveys will also be paid from the mitigation fund described above as they are incurred.

### **III. ACKNOWLEDGEMENT**

All promotional materials (i.e., signage, brochure, articles, etc.) for the Rockies Express Pipeline-East Project regarding migratory bird habitats preserved through acquisition of fee title or conservation easements and/or restored with contributed funds shall contain the following statement acknowledging the source of the contributed funds and technical assistance: “These lands are being conserved, in part, by funding and technical assistance made available as mitigation for impacts caused by construction and maintenance of Rockies Express Pipeline, LLC in partnership with the U.S. Fish and Wildlife Service.”

### **IV. GENERAL PROVISIONS**

#### Limitations on Authorities:

Nothing in these Guidelines shall be construed as affecting the authorities of any party or as binding them beyond their respective authorities or responsibilities. Nothing in these Guidelines shall be construed as obligating the United States, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law.

#### Third Party Challenges or Appeals

These Guidelines may not be the basis of any third party challenges or appeals.

#### No Restriction of Similar Agreement:

These Guidelines in no way restricts the Parties from participating in similar activities with other public or private agencies, organizations, or individuals. It is the express intent of the Parties that the contributed funds be leveraged to the maximum extent practicable by supplemental funding from any legally available source.

**V. CONTACTS**

Notifications required hereunder may be sent by first class mail, postage pre-paid, or by properly addressed electronic mail to the following principal contacts:

**Rockies Express Pipeline, LLC**  
**Alice Weekley**  
**Project Manager**  
**500 Dallas Street**  
**Houston, TX 77002**  
**[alice\\_weekley@kindermorgan.com](mailto:alice_weekley@kindermorgan.com)**

**U.S. Fish and Wildlife Service**  
**Robyn Thorson**  
**Regional Director, Region 3**  
**1 Federal Drive**  
**Fort Snelling, MN 55111**  
**[robyn\\_thorson@fws.gov](mailto:robyn_thorson@fws.gov)**

**VI. ATTACHMENTS**

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|---------------------|---|
| <b>ATTACHMENT 1</b> | Rockies Express Pipeline - East Project Summary of Riparian Impacts Avoided through use of Horizontal Directional Drill Crossing Method   |
| <b>ATTACHMENT 2</b> | Rockies Express Pipeline - East Project Construction and Permanent Acreage Impacts to Forested Areas by Category  |
| <b>ATTACHMENT 3</b> | Rockies Express Pipeline - East Project Maps of Impacted Forest Areas Summarized in Attachment 2  |
| <b>ATTACHMENT 4</b> | Rockies Express Pipeline - East Project MBTA Mitigation Decision Tree   |
| <b>ATTACHMENT 5</b> | Rockies Express Pipeline - East Project Areas of Fragmentation Concern and Pipeline Collocation for Migratory Birds as Outlined by the U.S. Fish and Wildlife Service on September 12, 2007                       |
| <b>ATTACHMENT 6</b> | Rockies Express Pipeline - East Project U.S. Army Corps of Engineers Preliminary Compensatory Mitigation Requirements for Permanent Impacts to Wetlands   |
| <b>ATTACHMENT 7</b> | Rockies Express Pipeline - East Project Indiana Department of Natural Resources Preliminary Compensatory Mitigation Requirements for Permanent Impacts to Forested Wetlands and to Forested Land within Floodways |
| <b>ATTACHMENT 8</b> | Rockies Express Pipeline - East Project MBTA Mitigation Requirements Summary  |

**SIGNATORY PAGE**

IN WITNESS WHEREOF, the Parties have caused these Guidelines to be executed by their respective authorized representatives.

Date: 3-24-08

By: Alice Weekley  
CB.

Alice Weekley, Project Manager  
Rockies Express Pipeline, LLC

Date: 3-25-08

By: Lynn M. Lewis for

Robyn Thorson, Regional Director,  
Region 3  
U.S. Fish and Wildlife Service