

# Nationwide Candidate Conservation Agreement for Monarch Butterfly on Energy and Transportation Lands

## Guidelines for Implementing Section 7 Consultation under the Monarch CCAA/CCA

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### Document Purpose

The purpose of this document is to provide guidance for Partners on the implementation of Section 7 consultations under the Nationwide Candidate Conservation Agreement with Assurances (CCAA)/Candidate Conservation Agreement (CCA) for Monarch Butterfly on Energy and Transportation Lands (Agreement) authorized by U.S. Fish and Wildlife Service (Service) in April, 2020.

### Description of the Agreement

The CCAA/CCA is a voluntary agreement intended to provide a net conservation benefit to monarch butterflies within energy and transportation lands. Implementation of the Agreement is directed by two integrated conservation agreements consisting of the CCAA for activities conducted on non-Federal lands and an integrated CCA for conservation measures and covered activities implemented on Federal lands, or under other Federal permits or authorizations. The Agreement encompasses monarch habitat within the species range across the lower 48 states of the U.S. Within this Agreement, Partners may enroll their owned, leased, or easement lands managed for energy and transportation purposes (enrolled lands) that are included within the covered area. Within enrolled lands, Partners have committed to adopting a targeted amount of habitat conservation based on the extent of enrolled lands (referred to in the Agreement as adopted acres). Conservation measures consist of activities expected to yield a net conservation benefit for monarch breeding and foraging. The Service defines net conservation benefit (for CCAA) as the cumulative benefits of specific conservation measures designed to improve the status of a covered species by removing or minimizing threats so that populations are stabilized, the number of individuals is increased, or habitat is improved.

The net conservation benefit resulting from the Agreement is the on-the-ground conservation of the Partners’ adopted acres maintaining a network of monarch habitat across both non-Federal and Federal lands. Signatories to the CCAA receive assurances from the Service, on non-Federal lands, that the Service will not require additional conservation measures beyond those in the Agreement on non-Federal lands. Nor will additional limitations be imposed.

## Enhancement of Survival Permit (EOS Permit)

The Service has issued an EOS Permit to University of Illinois Chicago (UIC) pursuant to Section 10(a)(1)(A) of the ESA. If the monarch is listed, the Permit will provide incidental take authority for covered activities of Partners enrolled under the CCAA/CCA through a Certificate of Inclusion. The permit will be effective upon any final rule listing the monarch. The EOS Permit conveys incidental take coverage to Partners (including their authorized representatives) for their covered activities on non-Federal lands (within the sideboards of their existing owned lands, as well as leases, easements, and permits).

Partners do not receive assurances for activities on Federal lands. However, we expect the Service's Biological Opinion (Opinion) completed for this Agreement will help streamline Section 7 consultations conducted on Federal lands for covered activities described herein.

## Section 7 Consultations under the Agreement

The Service assessed the adverse effects or potential risks to the monarch and its habitat from implementation of the Agreement. The findings of the assessment are detailed within the Opinion. Specifically, the Opinion considered impacts and take effects of covered activities on monarchs, species listed or proposed as threatened or endangered, and proposed or designated critical habitat.

After reviewing the proposed CCAA/CCA, its implementing regulations, the effects of the proposed action, and the cumulative effects, the Opinion states that the Monarch CCAA and associated covered activities conducted in accordance with appropriate Federal and State regulatory programs are not likely to jeopardize the continued existence of the monarch. When considered in light of the conservation commitments under the Agreement, a net benefit for monarchs is expected. Similarly, the Service found that its approval of the CCAA and issuance of the EOS permit would not jeopardize the continued existence of any listed or proposed species and would not be likely to result in the destruction or adverse modification of designated or proposed critical habitats. These findings were based primarily on the requirement that Partners:

- 1) Develop and implement measures to avoid and minimize effects to listed and proposed plants and to designated and proposed critical habitat when implementing covered activities and monarch conservation measures and
- 2) Ensure that the activities that they implement under the CCAA and EOS permit do not cause take of any listed or proposed animal species.

The Opinion is available online at: <http://rightofway.wpengine.com/wp-content/uploads/Monarch-CCAA-Biological-Opinion-Final-4-3-20-1.pdf>

## How Does the CCAA's Section 7 Consultation Help Streamline Other Consultations?

In addition to the Opinion, the Service conducts a second tier of review for the Partner's proposed avoidance and minimization measures (AMMs) for plants and critical habitat. These measures may include processes that the Partner has already established to help conserve listed and proposed species and critical habitats. This review is completed during the Partner's initial application to the CCAA, then updated periodically during the Service's annual reinitiation review. These reviews ensure that the CCAA, EOS permit, and Partners remain in compliance with Section 7 of the ESA.

This review, its accompanying determination, the Opinion, and an associated template memo for Federal land managers may be provided to a Federal agency by the Partner, Service, or UIC upon request. Together, these documents can demonstrate fulfillment of consultation requirements for CCAA covered activities, and thus help to avoid or minimize additional need to consult on these activities.

The Service envisions consultations to be carried out in the following manner:

- **Activities on non-Federal lands not already subject to Section 7 consultation** via other Federal nexus<sup>1</sup> are expected to follow the internal Partner-specified environmental review processes and to include any applicable avoidance or minimization measures outlined in the Partner's application, which has been reviewed and approved by USFWS as part of their application. Additional AMMs may be developed by the Partner (with Service assistance, if needed) and approved by the Service after the application period if, for example, one or more plant species are proposed for listing that were not listed when UIC issued the Certificate of Inclusion.

The CCAA itself does not serve as a Federal nexus, absent any other. The EOS permit authorizes the take of monarch, should it be listed under the ESA, as a result of CCAA activities; it does not authorize the activities themselves, and thus does not qualify under the definition of a federal nexus.

- **Activities on non-Federal lands that are already subject to Section 7 consultation** due to the Partners' need for other Federal authorizations or permits or because the activities are funded by a Federal agency are expected to continue following previously established Section 7 processes and procedures, including those required of the CCAA. The CCAA provides streamlining of Section 7 reviews and regulatory assurances specific to the monarch butterfly in the event the species is listed.
- **Activities on Federal lands already subject to Section 7 consultation** are expected to continue following those existing processes and procedures already established. Under these scenarios, if and when monarch is listed, the Opinion and rationale used in issuing the CCAA's EOS permit could help streamline or preclude the need for the Federal land management agency to consult separately with the Service on the activities' effects to monarchs. The land management agency would still need to consult or confer with the Service, however, if the activities may affect other listed or proposed species or designated or proposed critical habitats. However, the AMMs developed for plants and critical habitat, and the requirement of to avoid incidental take of animal species, may again help streamline the consultation process.

### **Can the CCAA's Opinion Help Streamline Consultation for Activities Not Covered in the Monarch CCAA?**

The scope of the Opinion focuses on the potential for take of monarch butterflies (including eggs, larvae, pupae, and adults) as a result of operations, maintenance, and modernization activities on energy and transportation lands. Other activities like new construction were not considered in the effects analysis included in the Opinion. Still, the assumptions and analysis included in the Opinion may be useful for other consultations for activities that may affect monarchs. Expectations regarding the types and extent of impacts, gains in milkweed and nectar plants resulting from conservation measures, an individual Partner's enrollment and documented habitat gains, and resulting effects may help inform other consultations.

For organizations interested in using the CCAA Opinion to help inform their own consultations, we encourage you to review and share the Opinion with the local Service field office with whom you are consulting with to determine the applicability and use of the analysis conducted for the Monarch CCAA and covered activities. The Service's Midwest Regional Office may also help coordinate or otherwise inform this process.

### **How is Potential Take of a Federally-listed Species Considered for Covered Activities in the CCAA/CAA?**

Partners in the CCAA/CCA must implement the AMMs and avoid take of other listed/proposed animal species when implementing covered activities and conservation measures unless the activity and species is covered by an approved incidental take permit (Habitat Conservation Plan), or subject to a separate federal nexus for which Section 7 consultation is carried out. When subject to another federal nexus, standard consultation procedures should be carried out with the

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<sup>1</sup> Actions have a federal nexus to section 7 if they are funded, authorized, or carried out by a federal agency. This includes actions that are located on Federal lands.

appropriate field office. The Partner may apply any relevant AMMs that were developed for their CCAA application to facilitate a smooth consultation. Conversely, an existing consultation may also inform development of AMMs for a subsequent CCAA application. The decision tree included in this document was prepared to help guide Partners through decisions on when it is appropriate to coordinate or consult with the Service under the CCAA. The local USFWS field office is always available to provide assistance to help ensure that any activity implemented pursuant to the CCAA will not cause take of a listed or proposed species other than monarch.

### **When is Potential Take of a Federally-listed Species Considered “Reasonably Certain”?**

As defined by the Service’s Habitat Conservation Planning Handbook, “reasonably certain” is a term that is described as a result of a step-wise process:

*...application of the “reasonable certainty” standard is done in the following sequential manner in light of the best available scientific and commercial data to determine if incidental take is anticipated: (1) A determination is made regarding whether a listed species is present within the area affected by the proposed Federal action; (2) if so, then a determination is made regarding whether the listed species would be exposed to stressors caused by the proposed action (e.g., noise, light, ground disturbance); and (3) if so, a determination is made regarding whether the listed species’ biological response to that exposure corresponds to the statutory and regulatory definitions of take (i.e., kill, wound, capture, harm, etc.). Applied in this way, the “reasonable certainty” standard does not require a guarantee that a take will result, rather, only that the Services establish a rational basis for a finding of take. [...] The standard is not a high bar and may be readily satisfied as described above. See, e.g., Arizona Cattle Growers’, 273 F.3d at 1244 (noting that the standard the court applies in reviewing whether the Services may issue an incidental take statement is a “very low bar to meet”) (see the HCP Handbook Toolbox).*

**Decision Tree for Potential Take Considerations under the Monarch CCAA/CCA**

