

Guidance for Section 7 Determinations for the Monarch Butterfly and Monarch CCAA/CCA Covered Activities

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Document Purpose

This document provides guidance for U.S. Fish and Wildlife Service (Service) and other federal agency representatives with Section 7 review responsibilities tasked with reviewing actions undertaken by organizations enrolled in the Nationwide Candidate Conservation Agreement with Assurances (CCAA)/Candidate Conservation Agreement (CCA) for Monarch Butterfly on Energy and Transportation Lands (Monarch CCAA; Agreement)¹. Organizations enrolled in the Monarch CCAA (i.e. Partners) receive incidental take authorization for the monarch through a Section 10 Enhancement of Survival Permit (EOS Permit)³ for conservation measures and covered activities within the Agreement. These same activities may require consultations through Section 7 of the Endangered Species Act (ESA) (hereafter Section 7) due to funding or authorization from another federal agency. This guidance, including the decision key provided, describes how enrollment in the Agreement can streamline future site-specific Section 7 consultations for monarch butterfly for federal actions if the species is listed as threatened or endangered.

If the monarch is listed as threatened or endangered, additional Section 7 coordination for the monarch would only be necessary for activities covered by the Monarch CCAA if they involve a federal action unrelated to the Agreement. Section 7 consultations are required when a federal agency authorizes (e.g., permits), funds, or carries out an action that may affect a listed species or critical habitat.² The EOS Permit issued by USFWS to the University of Illinois Chicago (UIC) and extended subsequently to Partners authorizes the take of monarch butterfly as a result of covered activities, should the monarch butterfly be listed under the ESA. Before issuing the EOS permit, the Service conducted a conference following the procedures for a formal consultation and determined that the its issuance and implementation of the Agreement would not jeopardize the continued existence of the monarch. If the monarch is listed, the Service plans to adopt the conference opinion as a biological opinion, thereby providing Section 7 coverage for the effects to monarchs of activities carried out by Partners under the Agreement. Because some of these activities may involve separate federal funding or authorization, we provide guidance below to coordinate the Service's consultation on the Agreement with the need to document Section 7 compliance for the related federal actions.

Streamlining regulatory procedures is cited as a motivating factor for enrollment by many Monarch CCAA Partners. In exchange for voluntary actions that contribute to monarch conservation, participating Partners receive formal assurances that "*no additional conservation measures, nor additional land, water, or resource use restrictions for the monarch butterfly on enrolled non-federal*

Key Takeaways

- Streamlining regulatory procedures is a motivating factor for conservation by Monarch CCAA Partners.
- The Service's Biological and Conference Opinion on the Monarch CCAA may help streamline Section 7 consultations for the Agreement's covered activities.
- Section 7 reviews triggered by covered activities should be approached as consistency determinations rather than separate, project-specific Section 7 consultations.
- The decision key provided helps determine whether an action is consistent with the previous analyses and determinations for the Agreement.

¹ Online at: https://rightofway.erc.uic.edu/wp-content/uploads/Final-CCAA_Signed-4.7.20.pdf

² Online at: <https://www.fws.gov/service/esa-section-7-consultation>

lands, beyond those described herein, will be required should the monarch become listed in the future."³ The EOS Permit authorizing the Agreement, and its accompanying conference and biological opinion (Opinion)⁴, considered the benefits of avoidance, minimization, and offsetting provided by the Partner's conservation commitments relative to expected effects to and incidental take of monarch butterflies resulting from covered activities under the Agreement. By fulfilling the procedures in this guidance document, the Service fulfills their commitments to the Agreement, its Partners, and Section 7 of the ESA.

The Service's "Biological and Conference Opinion on the Service's approval of a Candidate Conservation Agreement with Assurances and Candidate Conservation Agreement and its issuance of an associated Endangered Species Act Section 10(a)(1)(A) Permit (TAILS No. 03E00000-2020-F-0001)" (Opinion)⁵ may also help streamline Section 7 consultations for the Agreement's covered activities that are authorized on federal lands or under other federal authorizations or funding.

Description of the Agreement

The Monarch CCAA was authorized by USFWS in April 2020 as a voluntary agreement intended to provide a net conservation benefit to the monarch butterfly on energy and transportation lands. Implementation of the Agreement is directed by two integrated conservation agreements consisting of a CCAA for activities conducted on non-federal lands and a CCA for conservation measures and covered activities implemented on federal lands, or under other federal permits or authorizations. The Agreement encompasses monarch butterfly habitat within the species' range across the contiguous 48 states of the U.S.⁶ Partners may enroll their owned, leased, or easement lands managed for energy and transportation purposes (enrolled lands). Once enrolled, Partners commit to adopting habitat conservation measures on a subset (percentage) of their enrolled lands, as specified, by sector, in the Agreement. These conservation commitment areas are referred to as "adopted acres".⁷

Conservation measures consist of activities expected to yield a net conservation benefit for monarch butterfly and its habitat. At the time of authorization, the Service defined net conservation benefit as:

*The cumulative benefits of the CCAA's 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.*⁸

The Agreement's net conservation benefit results from the on-the-ground conservation on Partners' adopted acres where conservation actions occur. These measures reduce key threats, create or sustain habitat, and maintain a network of habitat across both non-federal and federal lands. In exchange, Partners receive assurances on non-federal lands that in the event the monarch butterfly is listed under the ESA, the Service will not require additional conservation measures beyond those specified in the Agreement, nor will additional limitations be imposed.

³ The EOS Permit is available online at: <https://rightofway.erc.uic.edu/wp-content/uploads/TE74464D-0-Monarch-CCAA-final.Signed-by-RD.pdf>

⁴ Online at: <http://rightofway.wpengine.com/wp-content/uploads/Monarch-CCAA-Biological-Opinion-Final-4-3-20-1.pdf>. Note that USFWS would convert this document to a biological opinion for the monarch if the species is listed, with updates as appropriate.

⁵ Online at: <http://rightofway.wpengine.com/wp-content/uploads/Monarch-CCAA-Biological-Opinion-Final-4-3-20-1.pdf>

⁶ As defined in the Agreement, covered area includes the area included in the programmatic Section 7 consultation and eligible for enrollment into the Agreement and EOS Permit. The covered area for this Agreement is represented by lands managed by energy and transportation partners within the migratory and breeding range of the monarch butterfly across the lower 48 states of the U.S. The covered area excludes documented overwintering sites.

⁷ See Section 6 (Conservation Measures) within the Agreement.

⁸ The Agreement was authorized in March 2020. The 2016 Candidate Conservation Agreements with Assurances Policy, 81 Fed. Reg. 95,164, 95,171 (Dec. 27, 2016) was the standard used for approving the CCAA, issuing the EOS Permit, and discussed in the programmatic Section 7 accompanying the Agreement authorization. The former policy is online at: <https://www.federalregister.gov/documents/2016/12/27/2016-31061/candidate-conservation-agreements-with-assurances-policy>

The Service has issued an EOS Permit (permit number TE74464D-0) to the University of Illinois Chicago (UIC) pursuant to Section 10(a)(1)(A) of the ESA. If the monarch butterfly is listed, the EOS Permit provides incidental take authorization for conservation measures and covered activities of Partners on non-federal lands (as allowable on Partners' existing owned lands, as well as leases, easements, and permits). The permit will be effective upon any final rule listing the monarch butterfly.

Section 7 Consultation for the Monarch CCAA

The Service assessed the effects to monarch butterflies and its habitat expected from implementation of the Agreement. The findings of the assessment are detailed within the Opinion. The Opinion states that the Agreement and associated conservation measures and covered activities conducted in accordance with appropriate federal and state regulatory programs are not likely to jeopardize the continued existence of the monarch and that the conservation commitments made under the Agreement are expected to produce a net conservation benefit for monarch butterfly.⁹ These determinations considered the covered activities that may result in takings of monarchs, as well as conservation commitments made by the Partner that benefit monarchs to produce a net increase in habitat and/or species population.

Section 7 Consultations for Partner Actions

As described in the Opinion, the Service conducts a review of each Partner's application to determine whether their inclusion in the Agreement and the authorization of the related monarch incidental take allows for the Service's ongoing compliance with sections 7(a)(2) and section 7(a)(4).¹⁰ This review is completed during the Partner's initial application to enroll in the Agreement, then updated periodically during the Service's reinitiation reviews in keeping with the Opinion¹¹. These reviews (both the initial and subsequent reinitiations) ensure that the Agreement, EOS Permit, and Partners remain in compliance with Section 7 of the ESA with respect to covered activities and implementation of the monarch conservation measures. The accompanying determination, the Opinion, and an associated template memo for federal land managers¹² may be provided to a USFWS Field Office or other federal agency by the Partner, Service, or UIC upon request. These documents demonstrate existing consultation for conservation measures and covered activities. Thus, Section 7 reviews triggered by covered activities should be approached as consistency determinations rather than separate, project-specific Section 7 consultations. For example, a highway agency enrolled as a Partner in the Agreement may plan minor grading in potential monarch habitat. The effects of this action, in conjunction with the Partner's Monarch CCAA conservation commitments, were previously analyzed and determined as part of the Agreement approval and accompanying Opinion. That previous analysis and determination included the expectation that the Partner would implement agreed-upon measures to avoid and minimize effects to any listed or proposed plant species present in the action area and to any proposed or designated critical habitat that may be affected. In addition, the action could not include any activity that could take any listed or proposed animal species. The action-specific review by the Service's Field Office personnel is then simply a determination of whether the action is consistent with those previous analyses and determinations for the Agreement.

The Service envisions consultations for monarch butterfly related to covered activities (i.e. operations, maintenance, and modernization actions on energy and transportation lands) proceeding in the following manners, dependent on whether the Service is the lead federal agency or not. The approach may vary based on the lead federal agency and the action's context in reference to federal lands.

⁹ See the authorizing cover letter and Section 6 (Conclusion) on page 47 of the Opinion.

¹⁰ See *Section 1.4.3.1.1 Reviews of Applications for Certificates of Inclusion* on page 7 of the Opinion.

¹¹ See *Section 8. Reinitiation Notice* on page 53 of the Opinion.

¹² Online at: <https://rightofway.erc.uic.edu/wp-content/uploads/CCAAs-Federal-Lands-Memo-Generic-Version.pdf>

When the Service is the Lead Federal Agency for Consultations

For **activities on non-federal lands not already subject to Section 7 consultation** via another federal nexus¹³, Partners are expected to follow their own existing Partner-specified internal environmental review procedures and include any applicable avoidance, minimization, or conservation measures outlined in the Partner's application, which has been reviewed and confirmed already by the Service as part of their application. Personnel should use the decision key provided in this document to streamline their Section 7 review of covered activities for take considerations relative to monarchs.

When the Service is Not the Lead Federal Agency for Consultations

For **activities on non-federal lands that are already subject to Section 7 consultation** due to a need for federal authorizations (e.g., permits), or funding from a federal agency, Partners should continue following existing agency Section 7 processes and procedures. Partners are encouraged to notify the lead federal agency of their CCAA enrollment and the accompanying Opinion, EOS Permit, and supporting documents to help streamline Section 7 reviews and regulatory assurances specific to the monarch. The Service recommends the reviewing federal agency personnel use the decision key provided in this document to streamline their Section 7 review of covered activities with respect to effects to monarchs.

For **activities on federal lands that are already subject to Section 7 consultation**, Partners are expected to continue following existing agency Section 7 processes and procedures. Partners must notify and coordinate with the reviewing agency of their CCA enrollment. If or when the monarch butterfly is listed, the Opinion and rationale used in issuing the Agreement's EOS Permit are intended to help streamline consultation with the Service on the activities' effects to monarch butterfly. The Service recommends the reviewing federal agency personnel use the decision key provided in this document to streamline their Section 7 review of covered activities for take considerations relative to monarchs.

Under all scenarios described here, a federal agency is still obligated to consult with the Service if the activities may affect other listed species or critical habitats. However, enrollment in this Agreement also includes development of avoidance and minimization measures (AMMs) for listed or proposed plants and designated or proposed critical habitat when they may be impacted by covered activities or by monarch conservation activities pursuant to the Agreement. Enrollment also requires avoidance of incidental take of listed or proposed animal species, unless authorized by another federal permit or consultation. These measures may be proposed by the Partner as AMMs for applicable species and reviewed by the land management agency during the consultation.

¹³ Actions have a federal nexus subject to Section 7 if they are funded, authorized, or carried out by a federal agency. This includes actions located on federal lands. Enrollment in the Agreement does not, in itself, create a federal nexus.

Decision Key for Monarch Butterfly Consultation on Agreement Covered Activities

The following decision tree is intended for USFWS Field Offices and other federal agency personnel with designated Section 7 review responsibilities. This key is intended to streamline the consultation process for effects on monarch butterfly caused by a federal action:

- 1. Could the action cause any effects to the monarch butterfly or its habitat?**
 - a. Yes. Proceed to Question 2.
 - b. No. Effects to the monarch are not expected. Document the *No Effect* determination. The review of effects on monarch butterfly is complete.¹⁴

- 2. Is the action being undertaken by a Partner in good standing¹⁵ under the Agreement?**
 - a. Yes. Proceed to Question 3.
 - b. No. Follow conventional consultation or coordination in accordance with other Service policies.

- 3. Has the action considered and its effects to the monarch already been addressed by a separate Section 7 consultation (i.e., not the Opinion associated with the Agreement)?**
 - a. Yes. Refer to the separate consultation for its determination of effects to the monarch. If necessary, consult with the Service's Monarch CCAA Coordinator or UIC's Conservation Program Manager for additional consideration.
 - b. No. Proceed to Question 4.

- 4. Is the action considered a "covered activity"¹⁶ under the Agreement?**
 - a. Yes. The Service has already completed intra-Service consultation for the effects of the activity on the monarch butterfly (see the Opinion). Proceed to Question 5 to determine if there is another federal agency involved with the action and whether they may require additional measures for the monarch.
 - b. No. Effects to the monarch associated with the action is neither covered, nor considered by the Agreement or its EOS Permit. Follow typical consultation or coordination in accordance with other Service policies.

- 5. Is a federal agency other than U.S. Fish and Wildlife Service involved with this action?**
 - a. Yes. Proceed to Question 6.
 - b. No. No further action is required with respect to the monarch.

- 6. Does the other federal agency (i.e. not the Service) require any AMMs for the monarch beyond the conservation measures specified in the Agreement or already specified under the Partner's Certificate of Inclusion?**
 - a. Yes. Incorporate requested measures into determination. Proceed to Question 7.
 - b. No. No further action is required with respect to the monarch.

¹⁴ If other federally listed species or critical habitats may be affected, then those species and habitats must be consulted on outside of this decision key.

¹⁵ "In good standing" implies that a Partner is in compliance with and meeting Agreement commitments, as described in their Certificate of Inclusion. Not being "in good standing" occurs when a Partner is issued a Notice of Noncompliance (see Section 16.1.4 in the Agreement). If unsure of a Partner's status, contact the USFWS Monarch CCAA Coordinator or UIC's Conservation Program Manager.

¹⁶ Covered activities consist of a broad suite of operations, maintenance, and modernization actions as described in Section 5 of the Monarch CCAA. Note that not every covered activity is listed by name. Review Section 5 (Covered Activities) and subsection 5.4 (Covered Activities Checklist) to verify applicability. If unsure of a Partner's status, contact the USFWS Monarch CCAA Coordinator or UIC's Conservation Program Manager.

- 7. Has a Biological Assessment or other ESA determination document for the action been prepared and submitted to the Service?**
- a. Yes. Document the action, a brief description of effects, enrollment verification, and decision key determination as part of the consultation documentation or submittal for the Service. Also note that the Service has previously evaluated the effects of the covered activities to the monarch along with the effects of the conservation measures to the species in the Opinion. Consultation is complete once the Service has confirmed and documented (1) that the other federal agency has agreed that the Service is the lead agency for consultation on the effects of the action on the monarch and that the consultation requirement with respect to the monarch is satisfied by the Opinion and (2) the action will not cause adverse effects to the monarch beyond what was considered in the Opinion.
 - b. No. Action agency will submit documentation of the action, a description of the effects to the monarch, enrollment verification, and decision key determination to the Service. If the Service, they will either:
 - i. Request more information, or
 - ii. The Service will strive to provide a written verification within 60 days that (1) the Service is the lead agency for consultation on the effects of the action on the monarch, if agreed to by the other federal agency, and that the consultation requirement with respect to the monarch is satisfied by the Opinion and (2) the action will not cause adverse effects to the monarch beyond what was considered in the Opinion.,

While available to offer clarification, Field Office personnel or other federal representatives with Section 7 responsibilities do not need confirmation from the Service's Monarch CCAA Coordinator to complete determinations.

Frequently Asked Questions

How does the Agreement help streamline consultations for actions affecting monarch butterfly?

As noted in the guidance above, the Service assessed the effects to monarch butterflies and their habitat expected from implementation of the Agreement. The findings of the assessment are detailed within the Opinion. The Opinion states that the Agreement 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 butterfly.

When analyzing effects specific to monarch butterflies for activities covered by the Agreement, a reviewer can use this guidance, the Agreement, and its Opinion, to streamline their determinations by:

1. Reducing ambiguity and uncertainty when reviewing actions that may be covered by the Agreement.
2. Using the decision key to quickly and consistently review actions, their possible effects, and relation to Agreement compliance and to the section 7 consultation completed on the Agreement.
3. Reducing the need to conduct site assessments or additional evaluations to support routine consultations on actions whose effects have already been analyzed in the Service's Opinion.
4. Recognizing the conservation commitments made under the Agreement are expected to produce a net conservation benefit for the monarch. While the covered activities may result in takings of monarchs, conservation commitments made by the Partner that benefit monarchs are expected to result in a net gain of habitat and/or species population numbers. For individual actions, this results in a *Not Likely to Jeopardize* determination.

Can the CCAA's Opinion help streamline consultation for activities not covered in the Agreement?

The scope of the Opinion focuses on effects to the monarch, including 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, as minimized and offset by the Partners' conservation measures. Other activities such as new construction projects were not considered in the effects analysis included in the Opinion. Still, the assumptions and analysis included in the Opinion may be useful for consultations for other activities that may affect monarchs but are not covered activities under the Agreement. Expectations regarding the types and extent of impacts, increases in milkweed and nectar plants (habitat) resulting from conservation measures, an individual Partner's enrollment status and compliance, and resulting net effects to the monarch may help inform these consultations for activities not covered by the Agreement.

For agencies interested in using the Agreement's Opinion to help inform their own consultations, it may be helpful to share the Opinion with the local Service Field Office to determine the applicability and use of the analysis conducted for the Agreement and covered activities. The Service's Midwest Regional Office may also help coordinate or otherwise inform this process.

How does the Agreement fulfill Section 7 obligations to avoid, minimize, or offset the level of take for the monarch?

The Consultation Handbook notes that minimization of the level of take on the individuals affected is required for incidental take considerations under Section 7. Enrollment in the Agreement includes several ways in which Partners have taken measures to avoid and minimize take of monarch butterfly:

- The previous CCAA Policy (81 Fed. Reg. 95164, December 27, 2016) defined net conservation benefit (for CCAAs) as *"the cumulative benefits of the CCAA's 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 conservation measures identified for monarch butterflies were designed with the Service to meet this standard and programmatically address Section 7 obligations to avoid, minimize, and offset take of individual monarch butterflies (including eggs, larvae, pupae, and adults). The updated definition of net conservation benefit (previously noted under Description of the Agreement) also emphasizes the benefits of conservation measures applied.
- The EOS Permit issued with the Agreement specifies:
 - All of the necessary and appropriate measures – in addition to those in the Agreement – that the Partners must implement to minimize and mitigate to the maximum extent practicable the impacts of the anticipated incidental taking.
 - The amount of authorized incidental take for monarch butterflies is contingent upon Partners maintaining, enhancing, and creating monarch habitat on a specified proportion of enrolled lands annually, in order to achieve a net conservation benefit.
- Partners adjust or alter the timing or treatment methods of vegetation management activities where possible to avoid or minimize adverse effects to monarchs while maintaining or improving resources important to the species.
- Partners have programmatically reduced the amount of monarch breeding habitat that could be exposed to adverse management and fostered management that provides a net conservation benefit across the adopted acres. For example, in some years, Partners will not actively manage parts of the adopted acres but instead forego management in those locations to facilitate the maintenance or improvement of conditions favorable to the monarch.

In addition to monarch butterflies, enrollment also includes avoidance and minimization measures for proposed or listed plant species, as well as proposed or designated critical habitats, that were developed in collaboration with the Service as part of its Section 7 reviews for each Certificate of Inclusion. Partners develop and implement avoidance and minimization measures when they apply for a Certificate of Inclusion to ensure that covered activities do not jeopardize listed or proposed plants or destroy or

adversely modify designated or proposed critical habitat of plants or animals. Enrollment in the Agreement requires that activities for which take of monarch is covered do not take other listed or proposed fish and wildlife species unless such take was authorized previously under Service-issued permits or incidental take statements¹⁷.

Where can I find more information on the Monarch CCAA and its supporting regulatory documents?

The Agreement, EOS Permit, Opinion, and the Service’s Findings and Recommendations can be found under the “Final CCAA Documents” on the Monarch CCAA Toolkit available online at:

<https://rightofway.erc.uic.edu/working-group-access/monarchccaatoolkit>

The Monarch CCAA Toolkit also contains other reference materials, tools, and case studies highlighting program and Partner implementation.

¹⁷ See subsection 5.4 (Covered Activities Checklist) in the Agreement for additional details.