

Petition for Rulemaking for a Section 4(d) Rule for the Monarch Butterfly



Submitted By

The University of Illinois Chicago in its capacity as Program Administrator of the Nationwide Candidate Conservation Agreement for Monarch Butterfly on Energy and Transportation Lands

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Via Email and Certified Mail

Director Aurelia Skipwith
U.S. Fish and Wildlife Service
1849 C Street, N.W.
Washington, DC 20240

Dear Director Skipwith:

Pursuant to section 553(e) of the Administrative Procedure Act (APA) and 7 C.F.R. § 1.28, the Energy Resources Center at the University of Illinois at Chicago, acting in its capacity as the Program Administrator of the Nationwide Candidate Conservation Agreement for Monarch Butterfly on Energy and Transportation Lands (hereafter “Petitioner”), is hereby petitioning the Secretary of the Interior through the U.S. Fish and Wildlife Service (FWS) to issue a final section 4(d) rule for the monarch butterfly (*Danaus plexippus*) under the U.S. Endangered Species Act (ESA) concurrent with any future decision to list the species as threatened under the Act. This rulemaking is necessary to ensure that any listing of the monarch butterfly results in timely and adequate ESA protections for the species, while providing flexibility for landowners to implement land use practices that are compatible with the species’ conservation.

I. Background

In April 2020, the FWS approved the Nationwide Candidate Conservation Agreement with Assurances for the Monarch Butterfly on Energy and Transportation Lands with an integrated Candidate Conservation Agreement (CCAA/CCA or Agreement). The Petitioner is the Program Administrator and Permit Holder of the Agreement, with responsibility for many aspects of the Agreement, including to enroll landowners using certificates of inclusion. If the butterfly is listed under the ESA, the contents of any section 4(d) protective rule for the species will affect incentives for participating in the Agreement. The Petitioner thus are “interested persons” within the meaning of 7 C.F.R. § 1.28, with a direct interest in whether FWS issues a 4(d) rule for the butterfly and the contents of that rule.¹

The Petitioner requests that, if FWS decides to list the butterfly as threatened under the ESA, the agency issue a final 4(d) rule for the species concurrent with its publication of a final listing rule for the species. Section 4(d) provides that “the Secretary shall issue such regulations as he deems *necessary and advisable* to provide for the conservation of [a threatened] species.”² If the monarch is listed as threatened, a 4(d) rule is “necessary and advisable” because the best available science indicates that the species faces a variety of threats, including habitat loss and

¹ The Attorney General’s Manual on the Administrative Procedure Act states that the right to petition “must be accorded to any ‘interested person’” and that “it will be proper for an agency to limit this right to persons whose interests are or will be affected by the issuance, amendment or repeal of a rule.” U.S. Attorney General Tom C. Clark, Attorney General’s Manual on the Administrative Procedure Act, 1947, p. 38.

² 16 U.S.C. § 1533(d) (emphasis added).

degradation, that can be best addressed through section 9 protections from unauthorized “take” of the species. For threatened species, those protections can only be offered through a 4(d) rule. Further, although federal actions that may affect the monarch would be subject to consultation under section 7(a)(2) of the ESA, those actions would not need to adopt conservation measures to minimize any incidental take unless a 4(d) rule prohibits take resulting from the actions. Thus, a 4(d) rule is needed to minimize documented threats to the species on federal and non-federal lands, and to incentivize enrollment in voluntary ESA conservation agreements to avoid violating the take prohibition.

As the Program Administrator of the CCAA/CCA, our goal is to ensure the Agreement has the opportunity to create a conservation benefit for monarchs. If a 4(d) rule precluded take prohibitions for activities covered by the Agreement’s permitted activities that decision could lead to unintended harm to monarchs. Such a decision could also undermine the take coverage and conservation benefit generated by the Agreement. Specifically, if an unclear or open-ended 4(d) rule allows many activities to occur without being subject to the take prohibition, then there is little to no regulatory incentive to participate in the CCAA/CCA. Without the take coverage and certainty provided through the Agreement, it is possible that current or future partners may not continue their participation. This could potentially stop conservation actions on hundreds of thousands of adopted acres currently committed in the CCAA/CCA. For these reasons, we ask FWS to be clear in any 4(d) rule to not exempt the full extent of activities covered in the CCAA/CCA.

II. Proposed Regulatory Language for a Section 4(d) Rule and Explanation

We propose the following language for the 4(d) rule for the monarch butterfly, recognizing that other components maybe be added as indicated by the italicized placeholder.

* * * * *

§ 17.47 Special rules - insects.

(d) Monarch butterfly (*Danaus plexippus*) –

(1) Prohibitions. The following prohibitions that apply to endangered wildlife also apply to monarch butterfly except as provided under paragraph (d)(2) of this section. It is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or cause to be committed, any of the following acts in regard to these species:

(i) Import or export, as set forth at § 17.21(b).

(ii) Take, as set forth at § 17.21(c)(1).

(iii) Interstate or foreign commerce in the course of commercial activity, as set forth at § 17.21(e).

(2) Exceptions from prohibitions. Incidental take of the monarch butterfly will not be considered a violation of section 9 of the Act if the take results from:

- (i) Activities conducted in accordance with a permit issued under § 17.32, including activities conducted under a Service-approved plan intended to create a net conservation benefit for the monarch butterfly;
- (ii) Activities taken by any employee or agent of the Service or a state conservation agency to conserve the monarch butterfly, provided the employee or agent is designated by that agency for such purposes;
- (iii) Activities taken by any person for the sole purpose of habitat restoration or enhancement for the monarch butterfly that results in a net conservation benefit as determined by a Service review and/or consultation;
- (iv) *[Placeholder for take exception for other activities that result in minimal or no adverse effects on the conservation of the monarch butterfly or that promote conservation of the species].*

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Our proposed language is consistent with the majority of species-specific 4(d) rules the FWS has issued, including for other insect species under 50 C.F.R. § 17.47. First, every species-specific 4(d) rule the agency has ever issued begins with a broad prohibition of most or all of the activities specified in section 9(a) of the ESA for endangered wildlife species. The first paragraph of our proposed language reflects this general practice, which is appropriate for the monarch butterfly in light of the variety of threats the species faces, except that we have not included possession and sale, recognizing that these are not currently recognized as threats to the species and that widespread appreciation for monarch butterflies and improvement to their habitat is often accompanied by temporary possession of monarch caterpillars for at home rearing and similar purposes.

Second, we propose four categories of exceptions to the general prohibitions.

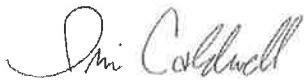
- First are activities authorized under a section 10 enhancement of survival permit or incidental take permit. If the FWS authorizes an activity through one of these permits, there is no reason to contradict that authorization in a 4(d) rule. Thus, for example, activities carried out under the Agreement would be authorized through its enhancement of survival permit and the proposed 4(d) rule.
- Second are activities to conserve the monarch butterfly carried out by an employee or agent of the FWS or a state conservation agency, provided that person is designated by the agency to act in his or her official capacity. These conservation activities can include habitat restoration, scientific research, and conservation education.
- Third are activities of any person to improve habitat for the monarch butterfly. This includes habitat restoration and creation with the goal of creating suitable habitat for the species. Given the significant amount of voluntary conservation for the species that private individuals, organizations, and government entities have carried out, it is

appropriate for the FWS to incentivize those actions by excepting them through a 4(d) rule.

- The fourth and final category covers activities that result in minimal or no adverse effects on the conservation status of the monarch butterfly or that promote the species' conservation. Because the monarch butterfly is widespread, a variety of common or routine activities may result in incidental take of the species. Some of those activities are likely to result in only minimal effects on the species' conservation status (*e.g.*, results in take of only a trivial percentage of the species' overall population numbers). It is appropriate for the FWS to consider excepting those activities through the 4(d) rule, and we encourage the agency to seek public comment on the specific activities that fall into this fourth category.

Thank you for considering this petition.

Kind regards,



Iris Caldwell, Program Manager Sustainable Landscapes
Energy Resources Center, University of Illinois Chicago

Cc: Gary Frazer, Assistant Director for Endangered Species
Charles Wooley, Regional Director, Region 3