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**MEMORANDUM**

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| **TO:** | Stephanie Crawford<br>National Rural Electric Cooperative Association | **DATE:** | May 6, 2020 |
| **FROM:** | Karma B. Brown | **FILE:** | 037373.0000277 |

**Analysis of Monarch Candidate Conservation Agreement with Assurances**

## Background

On April 3, 2020, the U.S. Fish and Wildlife Service (FWS) approved a Monarch Butterfly Candidate Conservation Agreement with Assurances (CCAA or Agreement).[1] Currently, the monarch butterfly is a candidate species, meaning that it is a candidate for listing under the Endangered Species Act (ESA or the Act). Candidate species are not subject to protections of the ESA, and proactive conservation efforts could eliminate a future need to list the species under the Act. FWS is expected to reach a final decision whether to list the monarch butterfly by December 2021.

One of the goals of the CCAA program is to encourage the public to implement specific conservation measures for declining species, to avoid a future listing under the ESA. A CCAA provides incentives to engage in voluntary conservation activities, by providing partners with an ESA § 10(a)(1)(A) enhancement of survival (EOS) permit. The permit contains assurances that, if the partner engages in certain conservation actions that reduce or eliminate threats to species as covered by the CCAA, they will not be required to undertake any additional conservation measures than those agreed to, nor be subject to additional resource use or land use restrictions. Those assurances are guaranteed even if subsequent information indicates that additional or revised conservation measures are needed for the species, or if a species covered by the CCAA becomes listed in the future under the ESA.

The Monarch CCAA is a voluntary agreement intended to provide a net conservation benefit to monarch butterflies, and to address the potential effects of maintenance and modernization activities within energy and transportation lands on the monarch butterfly and its populations. The Agreement encompasses monarch habitat within the monarch's range, across the lower 48 states. NRECA co-ops may enroll their lands, included within the covered area, and commit to adopt a targeted amount of conservation measures for the monarch butterfly based on the extent of lands enrolled. Conservation measures include activities such as maintaining and modernizing existing electric infrastructure that are expected to sustain, enhance, and restore conditions favorable for monarch breeding and foraging.

[1] The CCAA is integrated with a Candidate Conservation Agreement (CCA), which addresses covered activities on Federal lands. The CCA is discussed further below.

Signatories to the CCAA receive assurances for enrolled non-Federal lands that no additional conservation measures (beyond those required by the CCAA) will be required for the monarch butterfly, and additional restrictions or limitations will not be imposed upon signatories for covered activities in enrolled areas should the monarch be listed in the future. FWS has issued an EOS permit, pursuant to § 10(a)(1)(A) of the ESA, to the University of Illinois at Chicago (UIC or Administrator). The EOS permit will not go into effect unless the monarch is listed because the ESA does not prohibit take of non-listed species. Partners, however, will be expected to carry out specific measures to conserve the monarch before a listing occurs, when UIC issues a certificate of inclusion (CI).

The EOS permit would become effective upon any final rule listing the monarch. In that case, the EOS permit will provide incidental take authority for covered activities of partners enrolled in the CCAA through a CI.

**Questions and Responses**

- **Does becoming party to the CCAA permit create a federal nexus?**

Yes. The CCAA will be administered by UIC, as the Administrator and permit holder, with regulatory oversight by FWS. UIC will work with any NRECA co-ops that seek to enroll lands in the CCAA through CIs. The CI will document the co-op's voluntary agreement to enroll specified property in the CCAA, convey take authority and assurances on non-Federal lands, and allow for regulatory predictability for enrolled lands under Federal ownership where a non-Federal partner maintains a property interest for support of energy and transportation infrastructure.[2] Through the CI, the Partner voluntarily commits to implement specific conservation actions and to otherwise comply with the terms and conditions of the CI, CCAA, and the EOS permit.

A federal nexus will be established for "covered activities" on enrolled lands included in an applicant's CI under the CCAA. "Covered activities" are activities that are reasonably certain to cause take of monarch butterfly habitat (e.g., impacts to open habitat that may include milkweed, nectar plants, or both while monarchs are present), or take of monarchs directly, including harm or mortality of eggs, larva, or adults. Covered activities include general operations, routine maintenance and modernization of infrastructure on enrolled lands occurring in areas suitable for monarch butterfly habitat (low-growing, early successional vegetation with milkweed or flowering plants used by monarchs for nectar).

Thus, there will be a federal nexus for covered activities included in the applicant's CI in locations *where* and *when* take of monarchs is reasonably expected. Where there is a federal nexus, the applicant will need to comply with all other Federal, State, local and tribal laws. Specifically, covered activities (when occurring in locations where take of monarchs is "reasonably certain") must comply with Section 106 of the National Historic Preservation Act (NHPA) and the ESA. Accordingly, NRECA members should carefully consider the specific lands they choose to enroll and the covered activities when entering into a CI.

[2] Assurances and incidental take coverage are not authorized through the EOS permit for Federal lands, but Partners receive incidental take coverage and regulatory predictability through the § 7 consultation conducted in association with the CCAA.

- **If so, are the requirements in the CCAA for Section 7 and Section 106 consistent with what one could expect for such a federal nexus?**

The requirements are generally consistent with proposed federal activities that trigger ESA § 7 consultation and NHPA Section 106 consultation.

There are certain additional tasks, such as enrollment, coordination with the Administrator, completion of the application, compliance tracking, and annual report compliance that would not typically be associated with ESA § 7. By joining the Agreement, Partners agree to conduct effectiveness monitoring within a subset of locations where they have implemented conservation measures and to provide FWS and the Administrator access to the enrolled property to identify or monitor monarchs and their habitat, evaluate conservation measures, and monitor effectiveness and compliance. As requested, Partners may allow the Administrator to share with FWS or other Partners, habitat and other planning or monitoring information related to enrolled properties. Although enrollment is voluntary, the Agreement will be in effect for 25 years. Partners enrolling in the Agreement are asked to commit to an initial implementation period of five years to achieve the full adoption rate.

There will be additional level of review, by the Administrator, and FWS, rather than just FWS (in the typical §7 consultation). FWS relies on the structure of the Agreement to ensure compliance with the ESA. Therefore, before the Administrator may issue a CI, FWS will review the information provided by each applicant to determine whether the inclusion of the applicant in the Agreement and the authorization of any related monarch incidental take through the EOS Permit would allow for FWS's ongoing compliance with §7(a)(2) and §7(a)(4) of the ESA.

In addition, there are administrative fees to support permit administration, reporting requirements, and collaboration to manage implementation and reporting requirements, which would not otherwise be required for § 7 compliance.

To the extent the monarch is not listed under the ESA, undertaking these activities would not otherwise be required, and NRECA members may wish to evaluate how burdensome compliance would be in that circumstance.

The issuance of a permit by FWS triggers an undertaking, which requires NHPA Section 106 compliance. For purposes of Section 106 compliance, there is a specific protocol, set forth in Appendix C to the CCAA, to assist FWS in Section 106 compliance obligations for those activities and lands specified in the CIs. It is worth emphasizing that *most* covered activities and conservation measures in the Agreement do *not* have the potential to cause effects on historic properties. FWS considers its federal handle "weak" because many of the activities proposed are outside its direct control, and, for purposes of compliance with Section 106 of the NHPA, FWS should only be considered the lead Federal agency when no other Federal agency is involved with the proposed activity. Where another Federal agency is involved, the Partner would follow the procedures outlined by that Federal agency, and FWS will automatically accept that other Federal agency as lead and adopt their Section 106 compliance conclusions.

If no other Federal agency is involved, FWS will be the lead and follow the procedures set forth in Appendix C. Pursuant to these procedures, covered activities and conservation measures in the Agreement are determined not likely to affect historic properties and not require further Section 106 review if they do not involve ground, or building/ structure, or infrastructure disturbance. FWS considers activities identified in Appendix C.1. Step 2 (including surveys and

inspections, hand removal or introduction of plants and animals, other non-construction activities) as having no potential to cause effects on any historic property and thus exempt from further review. For activities involving ground, building / structure, or infrastructure disturbance, the Partner would assess whether the activities occur within a known cultural site. If so, FWS has identified a number of activities that have no potential to cause effects on historic property, including seeding and planting, herbicide application, brush removal, mowing, invasive species control, and maintenance and modernization construction, including construction within previously disturbed lands.

- **If the CCAA permit is a co-op's only federal nexus, what risks do you open yourself up to by providing the FWS with info under the Section 7 and Section 106 provisions? For example, details on other listed species on your system, proposed avoidance and minimization measures (AMMs), possibility for field offices to disagree with AMMs or apply AMMs to listed animals (outside scope of CCAA), apply AMMs retroactively to co-op projects (statute of limitations issues), pursue enforcement actions against the co-op for species aside from monarch based on info provided under Section 7 analysis for CCAA.**

Issuance of the CCAA and the EOS permit focuses on take of monarchs. The EOS permit would authorize Partners to take monarchs in accordance with the Agreement and the conditions of the permit. FWS issued a biological and conference opinion concluding that the CCAA and permit will result in a net benefit to the monarch, and the proposed action is not likely to jeopardize species' continued existence because Partners will implement measures under the Agreement and in accordance with the permit to ensure that consequences caused by the Agreement or permit are not likely to jeopardize the continued existence of any endangered, threatened, or proposed species and will not destroy or adversely modify proposed or designated critical habitat.

Actions that pose threats of loss to other listed animal species are outside the scope of the Agreement. They would not be covered by the Agreement.

When applicants apply for CIs, they must generate a list of (1) the endangered, threatened, and proposed species that may occur within the extent of the lands they propose for enrollment and (2) any designated or proposed critical habitats that overlap with those lands. The applicant is asked to identify activities that are not subject to § 7.[3]

Actions caused by the Agreement or Permit that are not already subject to § 7 review will be subject to specific avoidance and minimization measures (AMMs) for listed and proposed plants and for designated and proposed critical habitat. The agreed upon AMMs would be attached to the CI. The applicant should propose the AMMs they would use for plants and critical habitats that may potentially overlap areas of monarch habitat affected by conservation measures or covered activities. FWS will review those measures to ensure that no activity carried out pursuant to the Agreement or that is authorized by the permit is likely to jeopardize any listed or proposed plant species, or would be likely to destroy or adversely modify proposed or designated critical habitat.

[3] FWS expects that the vast majority of prior federal actions would have undergone consultation under §7(a)(2).

Applicants will not be required to provide AMMs or conservation measures for listed and proposed animals. As they implement the Agreement, however, Partners will be required to ensure for each conservation measure and activity covered by the Agreement that the activity is not reasonably certain to cause take of federally listed or proposed species, other than monarch, *unless that take is covered under another existing § 7 consultation or § 10 permit.* For actions not covered by a § 7 consultation or § 10 permit, there must be information on record to conclude that: (1) no listed or proposed animal species are likely to be exposed to the activity directly or to any stressors generated by the activity; or (2) one of more listed or proposed animal species may be exposed to the activity directly or to one or more stressors generated by the activity, but that exposure will not result in the incidental take of one or more individuals. Field offices will not be expected to provide concurrence or non-concurrence with the Partner's determination, but will be available to provide technical assistance.

FWS anticipates that the preclusion of any take will be sufficient to ensure compliance with § 7. If FWS determines that additional measures would need to be adopted with respect to any wildlife species to ensure such compliance, it will work with the applicant and the Administrator to ensure that sufficient measures are incorporated in the CI. Accordingly, there seems to be slight possibility that field offices will seek to incorporate conservation measures for listed species, but only under these limited circumstances and subject to discussion with UIC and the applicant.

There does not seem to be a likelihood that field offices would apply AMMs retroactively given the scope of the Agreement. But if that issue is raised by a field office, it should be elevated to UIC and the FWS lead for the CCAA.

Even if the Agreement is the co-op's only federal nexus, ESA § 9 prohibits take of endangered species. FWS expects that the vast majority of prior federal actions would have undergone § 7 consultation. For prior non-federal activities that would result in the incidental take of listed species, the co-op should have a § 10 permit. Prior actions, therefore, with or without a federal nexus, should have undergone the appropriate review.

If a co-op is aware of unlawful take that has occurred that would be identified to FWS through participation in the CCAA, the co-op should carefully consider the implications. An enforcement action under the ESA would be subject to a six year statute of limitations. Beyond the enforcement context, however, there are other considerations, such as how the co-op would be perceived by FWS, whether that triggers other investigations, and how such disclosure would impact the co-op's relationship with the regulators.

[Note that Section 106 risks are addressed below]

- **What could FWS impose if there is not a lot of info on AMMs for the species in question? If you have a listed plant 'take' on non-federal lands, what is the level of measures you can reasonably be expected to mitigate under ESA?**

The CI application and enrollment process require applicants to provide a list of AMMs for listed and proposed plant species that are likely to be present on their enrolled lands and for any overlapping critical habitats, designated or proposed. AMMs must only be developed for plant species and critical habitats that potentially overlap areas of suitable monarch habitat that will be affected by conservation measures or covered activities. An AMM does not need to be developed for plants or critical habitats that do not overlap with monarch habitat.

In many cases, existing AMMs will be available for listed or proposed plant species that overlap with areas of potential monarch habitat. These measures would be implemented in conjunction with covered activities and conservation measures, as appropriate and necessary to avoid and minimize impacts to the relevant species and critical habitat within areas of potential monarch habitat. For example, Partners may look to the local FWS ecological services field offices or their websites, previous FWS §7 consultations or coordination from past projects, species guidelines accessible through the IPaC resources list, and other conservation plans, including state AMMs.

If there are no existing AMMs, the Partner should propose a suitable set of AMMs, which can be adapted from those developed for a similar species. FWS will review and consult with the local field office to determine the sufficiency of the AMMs. The conservation measures master list (Figure 4 to the Guidelines for Section 7 Consultation Application Requirements) provides general measures and examples of adaptation for individual species.

For example, the types of measures that may be required are: coordination with FWS when needed to ensure that activities avoid affecting areas where protected species may be present; appropriate training to personnel; measures to reduce or prevent surface runoff and flooding of terrestrial habitats; use of materials that are free of invasive species; targeted application of herbicide applications; restoration of disturbed areas of potential habitat using native, non-invasive seed mixes, timing restrictions designed to minimize or avoid the effects of certain activities; and avoiding known individual plant locations.

Upon receipt of the AMMs and before a CI is issued, FWS will review the AMMs to confirm they are sufficient to ensure that activities implemented under the Agreement or the EOS permit would neither jeopardize the continued existence of any listed or proposed plants or destroy or adversely modify any proposed or designated critical habitat. FWS will document its finding before the Administrator issues a CI.

- **Where there are multiple federal agencies with a nexus, is the FWS's interpretation of their role as the federal action agency consistent with ESA and past agency actions?**

We understand FWS will explain its position in writing through a consultation memo that will be available at some point in the near future. FWS may also develop standard language Partners can use in their consultation requests.

Private or public actions that are covered activities under the Agreement may also be subject to separate ESA § 7 consultations, if those actions are on Federal lands, are authorized, or are funded by Federal agencies. FWS has analyzed the incidental take of monarchs that may occur due to actions taken under the Agreement. Thus, FWS would be the lead federal agency where there are multiple federal agencies. This is consistent with how we would expect consultation to be conducted, if the monarch is listed in the future, under these circumstances.

In these instances, incidental and direct take of monarch butterflies for covered activities carried out by Partners is authorized through the incidental take statement issued with the Service's § 7 conference opinion and conveyed to Partners through the CI. Because this take is authorized, Federal action agencies need not consult on impacts to monarch butterflies for covered activities carried out by Partners. Incidental and direct take of monarch butterflies for covered

activities carried out by Partners is conveyed through the CIs and is subject to the obligations in the CI and the Agreement.

This question also appears to be directed at actions that Partners could carry out pursuant to the Candidate Conservation Agreement (CCA) on Federal lands. The CCAA is integrated with a CCA for conservation measures and covered activities implemented on Federal lands. Applicants may have property interests in Federal lands (through easements, leases, or permits). Thus, enrolled properties may include both Federal and non-Federal lands. Assurances and incidental take of the monarch are not authorized through the Permit on CCA lands, that is Federal lands, but Partners and other Federal agencies reviewing their activities receive regulatory predictability through the § 7 consultation conducted with the CCAA / CCA.

FWS has adopted a reasonable and prudent measure (coordinate with affected Federal land management agencies) for activities on Federal lands. Partners are to coordinate with the relevant Federal land agencies to reduce negative effects to monarchs and to minimize the extent of incidental take. The coordination will allow Partners to ensure that the Federal land management agencies are aware of their enrollment in the CCA and of the incidental take statement. For Federal lands, if the monarch is listed as threatened or endangered, FWS will review the Section 7 conference opinion for the CCAA and may adopt the conference opinion as a biological opinion (if no new information is developed), which would authorize incidental take on Federal lands.

- **Regarding Section 106, what are the risks for co-ops that have not consulted before and as a result of the CCAA it is brought to FWS's attention they are operating in an area with a known cultural site or conducting activities that have the potential to affect a historic property?**

Section 106 of the National Historic Preservation Act (NHPA) requires federal agencies to "take into account the effect of" their "undertaking[s] on any historic propert[ies]." *See* 54 U.S.C. § 306108. The implementing regulations provide that the first step in the Section 106 process is determining whether the proposed Federal action is an "undertaking," as defined in the regulations. *See* 36 CFR § 800.3(a); 36 CFR § 800.16(y) ("undertaking" means "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.").

Accordingly, Section 106 consultation is only triggered by a federal "undertaking." *See United Keetoowah Band of Cherokee Indians in Oklahoma v. Fed. Commc'ns Comm'n*, 933 F.3d 728, 734 (D.C. Cir. 2019) ("Only a federal 'undertaking,' not a state or purely private one, triggers the Section 106 Tribal consultation process"); *McMillan Park Comm. v. Nat'l Capital Planning Comm'n*, 968 F.2d 1283, 1289 (D.C. Cir. 1992) ("an agency need not satisfy the § 106 process at all…unless it is engaged in an undertaking.").

Section 106 consultation is not triggered due to the mere presence of a known cultural site, or purely state or private actions. If co-ops have not consulted before, because there has not been a Federal undertaking, Section 106 consultation was not triggered, regardless of whether the activity occurred in an area with a known cultural site, or if the activities had the potential to affect an historic property.

There is a low risk that participation in the CCAA would lead to some sort of liability or further Section 106 requirements for any prior activities that did not trigger Section 106 consultation. Any assertion of liability for prior actions that did not involve a Federal undertaking would be outside the bounds of the NHPA. We are not aware of any provision in the NHPA that would allow FWS to take the position that the co-op would need to address prior impacts to historic properties or cultural sites that would have occurred where there was no Federal undertaking.

In an abundance of caution, however, members who are aware of known cultural sites that may have been impacted by prior activities, can carefully evaluate and balance the risks of participating in the CCAA versus any additional questions that may be raised. The scope of the enrolled lands could be limited to those areas with no probability for cultural or historic resources, thus reducing the potential for added review. The co-op can also limit the scope of covered activities. The co-op should evaluate CCAA Section 106 Protocol (Appendix C) to determine which covered activities are exempt from agency review under the Section 106 protocol.

- **Do any of the risks assessed above change if you are a primary consortium applicant?**

It does not appear that any of the risks analyzed above would change for a primary consortium applicant.

The key risk with the consortium approach is that all Partners in the consortium are named applicants and named permittees on the CI. Thus, all Partners in a consortium are responsible for maintaining compliance. If one consortium member is out of compliance, all members are out of compliance.

FWS has not developed a specific application for primary consortiums, which might better set out the respective roles and responsibilities among the Partners in a consortium. Any co-ops considering this approach may wish to enter into an agreement amongst themselves that sets forth the terms and understandings as to how compliance and liabilities among the Partners will be addressed.