



c/o Edison Electric Institute  
701 Pennsylvania Avenue, NW  
Washington, DC 20004-2696  
202-508-5093  
[www.energyandwildlife.org](http://www.energyandwildlife.org)

**June 14, 2019**

**Comments regarding the April 15, 2019  
Receipt of Application for Enhancement of  
Survival Permit and Draft Candidate Conservation  
Agreement With Assurances/Candidate Conservation  
Agreement for Monarch Butterfly**

Submitted by:

**Energy and Wildlife Action Coalition**

Filed electronically to the attention of:

Public Comments Processing  
Attn: Docket No. FWS-R3-ES-2019-0007  
U.S. Fish and Wildlife Service  
MS: BPHC  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

The Energy and Wildlife Action Coalition (“EWAC”)<sup>1</sup> submits these comments in response to the U.S. Fish and Wildlife Service’s (“Service”) April 15, 2019 Notice of Receipt of Application for Enhancement of Survival Permit and Draft Candidate Conservation Agreement with Assurances/Candidate Conservation Agreement for Monarch Butterfly (“CCAA/CCA”).<sup>2</sup>

EWAC applauds the development of this CCAA/CCA and recognizes the tremendous effort undertaken by the University of Illinois-Chicago (“UIC” or “Program Administrator”), the Service, and dozens of collaborating entities to produce a framework for conserving the monarch butterfly. EWAC believes the conservation measures developed by the Service, UIC, and others can readily be implemented by the energy and transportation sectors and will provide a net benefit to the monarch. The beneficial effects to the monarch associated with anticipated enrollment of up to 26 million acres of energy and transportation lands, which could contribute over 300 million stems of milkweed and 2.3 million acres of monarch foraging habitat, cannot be understated. Moreover, because of the extensive collaboration across a wide range of interested parties, EWAC is confident that the suite of conservation measures identified in the CCAA/CCA is accessible and reasonable to a wide range of interests in the transportation and energy sectors. EWAC believes that many within these sectors will enroll in the program, receive regulatory certainty for critical infrastructure projects nationwide, and provide nationwide conservation of the monarch and its habitat.

EWAC has reviewed the CCAA/CCA and supports its finalization. However, EWAC offers a few comments for the Service’s consideration. These comments identify aspects of the CCAA/CCA that could be further clarified to assist potential enrollees in understanding how to participate in the CCAA/CCA, to assist UIC in administering the CCAA/CCA over the next 50 years, or to assist the Service in its processing of the enhancement of survival (“EOS”) permit application and ultimate ESA section 7(a)(4) conference opinion.

## **I. Greater distinction between CCA and CCAA aspects of the document**

EWAC appreciates the incorporation of the CCAA and CCA into a single, programmatic document, and agrees that such incorporation overall is beneficial for enrollees, the Program Administrator, and the Service. However, EWAC notes that the document provides little detail concerning the CCA aspects of the program and at times appears to coningle the concepts of the CCAA and CCA. Below, we address each issue in turn.

### **A. Consistent and clear use of terminology**

EWAC recommends that the document be thoroughly reviewed to ensure that terminology is used consistently throughout in order to avoid confusion concerning whether particular enrollments may result in incidental take authorization and assurances should the monarch be listed.

For example, the term “Agreement” is defined as “the Nationwide Candidate Conservation Agreement with Assurances for Monarch Butterfly on Energy and Transportation Lands,” and is frequently used in the CCAA/CCA in a way that implies it is referring only to the CCAA components of the document. Nevertheless, the Executive Summary uses the term “Agreement” to include both the CCAA and CCA components of the program, and the defined term is then

---

<sup>1</sup> EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States, and related trade associations. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner.

<sup>2</sup> 84 Fed. Reg. 15,229 (Apr. 15, 2019).

used inconsistently throughout the document.<sup>3</sup> By way of illustration, the definition of the term “Certificate of Inclusion” is somewhat unclear as to whether the term “Agreement” applies to the CCAA, the CCA, or both:

A certificate documenting the Partner’s voluntary agreement to enroll specified property in the CCAA/CCA. Certificates of inclusion *convey take authority and assurances* on non-Federal enrolled land, and document the Partners’ *participation in the Agreement, allowing for regulatory predictability under the programmatic Conference Opinion for monarch butterflies on Federal lands*. Through the Certificate of Inclusion, the Partner voluntarily commits to implement specific conservation actions and to otherwise comply with the terms and conditions of the Certificate of Inclusion, CCAA/CCA and the EOS Permit.<sup>4</sup>

In the definition above, it is not at all clear whether the term “Agreement” is being used to refer to the CCAA (which seems unlikely given the reference to federal lands) or to the CCA (also somewhat unlikely, given the clause immediately before refers to take authorization, which cannot be had under a CCA).

Because of the legal distinction between the CCAA (which, when combined with the EOS Permit, will authorize incidental take of monarchs and provide other regulatory assurances for participants) and the CCA (which, while providing a conservation benefit to the monarch provides no incidental take authorization to a federal agency or project proponent), EWAC recommends that the authors ensure usage of “Agreement” is used as is intended prior to finalization and that a clear distinction between the CCAA and CCA is made, where necessary. EWAC also specifically requests the Executive Summary be revised to reflect any changes to the meaning of defined terms, including the term “Agreement.”

B. Clear description of the CCA process, as well as its benefits to federal and non-federal project proponents

EWAC notes that the CCAA/CCA provides limited detail about the practical aspects of enrolling in the CCA. Because many energy and infrastructure projects cross federal lands, EWAC believes it critically important for the document to more thoroughly describe the CCA enrollment process, including how federal land management agencies who have enrolled in the CCA would be expected to interact with non-federal project proponents and the Service in connection with formal and informal ESA section 7 consultations in the event of a listing.

Moreover, and as mentioned briefly above, an important legal distinction between a CCAA and CCA is that the former, when coupled with the resulting EOS Permit, offers regulatory assurances to the permittee should the species addressed by the CCAA be listed. The CCAA/CCA, however, does not currently contain a clear description of how the CCAA and CCA aspects of the plan would differ if the monarch is listed in the future. For example, the CCAA/CCA does not explain whether projects occurring on non-federal lands, but requiring federal permitting or authorization,

---

<sup>3</sup> See, e.g., “This 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)...” CCAA/CCA at 1; “This Agreement includes both Federal and non-Federal lands to support its administrative and biological goals.” *Id.* at 3. “Implementation of this Agreement is directed by the 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.” *Id.* Section 3.1, describing the role of the program administrator, states that UIC “is applying for the EOS Permit that will establish this Agreement.” *Id.* at 8. “The net conservation benefit resulting from this 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.” *Id.* at 29.

<sup>4</sup> *Id.* at x (emphasis added).

could benefit from the CCAA or whether such a situation would fit squarely within the CCA component of the program. To provide federal agencies and the energy and transportation sectors greater clarity on the benefits and consequences of enrollment in the CCAA/CCA, EWAC requests the document be revised to provide a more detailed description of: (1) the types of projects that may receive incidental take and other assurances by enrolling in the CCAA and coming under the umbrella of the EOS Permit; and (2) the types of projects that may conserve the monarch by enrolling in the CCA, but will not receive assurances under the EOS Permit or ESA section 7 conference opinion. EWAC also requests that the draft certificate of inclusion be revised accordingly.

## **II. Clarification on where incidental take coverage may be granted**

EWAC requests clarification on whether the CCAA contemplates any restriction on the location of incidental take of monarchs authorized by the EOS Permit, in the event of listing. For example, the CCAA/CCA makes a distinction between “Enrolled Lands” (e.g., lands within the covered area that are identified in a Certificate of Inclusion, including federal and non-federal lands, on which conservation measures and covered activities occur) and “Adopted Acres” (e.g., enrolled lands on which conservation measures for the monarch are implemented and that are the primary measure of the net conservation benefit standard),<sup>5</sup> indicates that Adopted Acres will be the measure of the net benefit standard,<sup>6</sup> and then explains that the Adopted Acres may vary in location annually.<sup>7</sup> We assume, then, that incidental take of monarchs would be permissible on Adopted Acres; however the CCAA/CCA is not as clear as it could be with respect to this issue. EWAC requests that the document be revised to provide clarity on this critical point.

There also appears to be some question on whether non-federal project proponents with a federal nexus may receive incidental take authorization under the EOS Permit for the activities creating the nexus. For example, the Executive Summary states that the “integrated [CCA]” applies to “conservation measures and covered activities implemented on [f]ederal lands, or under other [f]ederal permits or authorization”,<sup>8</sup> but the term “Enrolled Lands” indicates federal lands may not receive the assurances provided under the CCAA/CCA. EWAC therefore recommends that greater clarity be provided concerning whether projects with a federal nexus could receive assurances and incidental take authorization under the EOS Permit.

## **III. Administrative Fees**

EWAC appreciates the explanation given in section 17 of the CCAA/CCA of the factors the Program Administrator will weigh to determine the appropriate administrative fees required of participation.<sup>9</sup> However, to assist project proponents in their initial assessments of whether participation in the CCAA/CCA may be practicable, EWAC suggests the CCAA/CCA include a range of the administrative fees that could be expected of participants. EWAC understands that any such range would be for demonstrative purposes only and would not limit the ability of the Program Administrator to require fees falling outside of that range.

## **IV. Enrollment Prioritization**

EWAC requests the CCAA/CCA describe with greater specificity what factors or types of factors the Program Administrator will use to prioritize participation applications in section 4.4 of the CCAA/CCA.<sup>10</sup>

---

<sup>5</sup> *Id.* at ix.

<sup>6</sup> *Id.* at ix.

<sup>7</sup> *Id.* at 29.

<sup>8</sup> *Id.* at vi.

<sup>9</sup> *Id.* at 68-69.

<sup>10</sup> *Id.* at 12.

## **V. Revise definition of “New Construction”**

EWAC notes that the CCAA/CCA defines “New Construction” as, among other things, “any project or activity determined through an [environmental impacts statement (“EIS”) under the National Environmental Policy Act] to pose significant environmental, socioeconomic, historic or cultural impacts...”<sup>11</sup> EWAC recommends that the definition of “New Construction” not be measured against whether an EIS is required, unless the intent of the CCAA/CCA is to allow new construction that has complied with the National Environmental Policy Act through preparation of an environmental assessment to participate in the CCAA.

## **VI. Confidentiality**

EWAC appreciates the way in which section 8 of the CCAA/CCA addresses issues of confidentiality. To further strengthen these provisions and protect sensitive proprietary business, safety, and reliability interests, EWAC suggests that where the Program Administrator receives a request for information under the federal or Illinois Freedom of Information Act for information identified as potentially confidential, and intends to share participant information in connection with such a request, the Program Administrator provide seven days prior written notice to the affected party. Providing prior written notice to an affected participant would allow that participant to make its own determination as to whether an exception from disclosure may apply, and to convey any concerns to the Program Administrator.

## **VII. Extent of Take Authorized by EOS Permit**

EWAC notes that neither the CCAA/CCA nor the EOS Permit application appear to address the method for calculating take of monarchs or provide an estimate of take that could occur thereunder. Because of the CCAA/CCA’s focus on preservation of varying types of monarch habitat, EWAC assumes that UIC and the Service will be using habitat as a proxy or surrogate for expressing the amount or extent of anticipated incidental take of monarchs, in accordance with Service regulations found at 50 C.F.R § 402.14(i).<sup>12</sup> EWAC recommends that this methodology be shared to inform participants as they implement conservation and projects across the monarch’s range.

## **VIII. EOS Permit Transfer**

The CCAA/CCA notes that if the plan is transferred to another program administrator after the monarch is listed, such transfer could require an amendment and, thereby, require a public review and comment process.<sup>13</sup> EWAC requests this statement be further clarified. It has been EWAC’s experience that, generally, a simple permit transfer (e.g., transfer of an incidental take permit under ESA section 10 to a new landowner) does not trigger the need for public review and comment and, instead, is typically processed as an administrative (or, minor) amendment to the relevant permit. This experience is consistent with Part 10 the Service’s 2016 Candidate Conservation Agreement with Assurances Policy,<sup>14</sup> and with the Service’s regulations governing permit transfers.<sup>15</sup>

In addition to the foregoing comment, EWAC is also interested in the statement at the end of section 9.8 of the CCAA/CCA indicating that transfer of the EOS Permit may be done as “a conversion into a Safe Harbor Agreement (SHA).”<sup>16</sup> EWAC requests additional information be

---

<sup>11</sup> *Id.* at xii.

<sup>12</sup> *See also Final Rule, Interagency Cooperation—Endangered Species Act of 1973, as Amended; Incidental Take Statements*, 80 Fed. Reg. 26,832 (May 11, 2015).

<sup>13</sup> CCAA/CCA at 45.

<sup>14</sup> 81 Fed. Reg. 95,164, 95,173 (Dec. 27, 2016).

<sup>15</sup> 50 C.F.R. § 13.25(d).

<sup>16</sup> CCAA/CCA at 45.

provided in the final version of the CCAA/CCA as to how the CCAA/CCA would be converted into a SHA, including: how UIC or future program administrator would determine the baseline of enrolled properties at the time the monarch is listed; whether the SHA would accept new enrollees after the monarch was listed; and whether other aspects of the CCAA/CCA would change should the document be converted to a SHA. While EWAC recognizes that the conservation standard (i.e., net benefit) is the same for CCAAs and SHAs, there are some differences between the programs, such as the fact that under a SHA, the permittee must establish the conservation baseline, which is not a requirement under CCAAs.<sup>17</sup>

#### **IX. National Historic Preservation Act Compliance**

EWAC requests that additional detail concerning application of the National Historic Preservation Act (“NHPA”) to projects that enroll in the CCAA/CCA be included in the final CCAA/CCA. EWAC appreciates that the programmatic nature of the program, when coupled with the impacts associated with Covered Activities (as that term is defined by the CCAA/CCA) under the EOS Permit, makes it somewhat unlikely that the consultation provisions of the NHPA would be triggered. However, EWAC has some concerns that the process for NHPA compliance described by the CCAA/CCA could make it difficult for some non-federal energy or transportation project proponents to justify enrolling in the plan. For example, as written, Appendix C to the CCAA/CCA could be interpreted to require non-federal project proponents conducting activities on non-federal lands to go through the consultation process under applicable provisions of the NHPA any time they enroll lands in the CCAA/CCA. EWAC requests the CCAA/CCA be revised to provide further clarity on how the Service and UIC envision NHPA compliance would be accomplished during the 50-year term of the CCAA/CCA.

#### **X. Conclusion**

EWAC again commends UIC, the Service, and the numerous stakeholders involved in developing the CCAA/CCA. The CCAA/CCA is the culmination of long-standing, practical, and widespread efforts to conserve the monarch, and implementation of this CCAA/CCA will certainly improve the status of the monarch nationwide. The broad range of energy and transportation interests involved in the development of the plan demonstrates the commitment energy and transportation sectors have made to find a workable conservation solution for the species while continuing to manage and maintain critical energy and infrastructure across the country. Additionally, EWAC believes that the recent delay of the Service’s proposed listing determination for the monarch will allow the Service, UIC, and others sufficient time to gauge whether the participation rate in the CCAA/CCA is consistent with expectations, and whether the conservation measures described in the CCAA/CCA are being implemented effectively across the plan area. EWAC looks forward to seeing the CCAA/CCA in place and the conservation that results. Please note that EWAC provides these comments solely for the purposes of strengthening the final version of the CCAA/CCA in order to create greater legal durability, to the benefit of all parties, and in no way is seeking to unduly delay or otherwise complicate the document’s finalization. EWAC thanks the Service for the opportunity to provide these comments and is available to discuss any questions the Service may have.

\*\*\*

Please feel free to contact the following EWAC representatives:

Tim Rogers, EWAC Policy Chair, [timothy.g.rogers@xcelenergy.com](mailto:timothy.g.rogers@xcelenergy.com), 612-330-6590

John M. Anderson, EWAC Executive Director, [janderson@eei.org](mailto:janderson@eei.org), 202-508-5093

Brooke M. Wahlberg, Nossaman LLP, [bwahlberg@nossaman.com](mailto:bwahlberg@nossaman.com), 512-813-7941

---

<sup>17</sup> See, e.g., Final Safe Harbor Agreement Policy, 64 Fed. Reg. 32,717 (June 17, 1999).