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Monarch Butterfly: *Exploring the Proposed ESA Listing*

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About the NALC

- Since 1987, the National Agricultural Law Center is the nation's leading source for agricultural and food law research and information.
 - The NALC is a unit of the University of Arkansas System Division of Agriculture
 - In close partnership with the USDA Agricultural Research Service, National Agricultural Library
- Objective, non-partisan research and information regarding laws and regulations affecting agriculture

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Current Issue: Monarch Butterflies



- On December 10, 2024, FWS announced a proposed decision to list the monarch butterfly as “threatened” under the ESA
- This decision is the result of a long legal battle between FWS and environmental groups
- The proposed listing decision includes carve outs for agriculture and conservation activities that go further than any other proposed decision to list a species

But First...

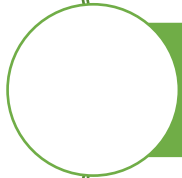
- The monarch butterfly has two populations
 - Eastern population is located east of the Rockies
 - Western population is located along the West Coast
- The Eastern population migrates from Canada to Mexico directly over the middle of the United States
- Monarchs depends on milkweed for survival
 - They rely on milkweed for food and as breeding habitat
- Monarchs overwinter in CA and Mexico
 - They overwinter by clustering together in trees



Overview



ESA Basics



Proposed Listing Decision



Looking Ahead

How to List a Species

In general, there are two ways to initiate listing a species under the ESA:

- FWS or NMFS decides to list a species
- Organizations or individuals petition FWS or NMFS to list a species

If FWS or NMFS decides to list a species, they will:

- Introduce a proposed listing rule to the Federal Register for a period of public comment, usually anywhere from 30 – 90 days
- Issue a final listing decision

If an organization or individual submits a listing petition:

- The ESA requires FWS & NMFS to respond to such petitions within 12 months
- If the Services fail to respond within 12 months, the petitioner may file a lawsuit and seek a court order or settlement directing the Service to respond
- Once the Services reach a decision, they will publish a proposal in the Federal Register for public comment then issue a final listing decision



Criteria to List a Species

FWS may list a species for any one of the following reasons:

- The present or threatened destruction, modification, or curtailment of its habitat or range
- Overutilization of the species for commercial, recreational, scientific, or educational purposes
- Disease or predation
- The inadequacy of existing regulatory mechanisms to protect the species
- Other natural or manmade factors affecting the species' existence

“Threatened” vs. “Endangered”

“Threatened”

- “Any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”

“Endangered”

- “Any species which is in danger of extinction throughout all or a significant portion of its range.”

“4(d) Rule”

When a species is listed as endangered, all ESA protections automatically apply to the species

When a species is listed as threatened, the Services must specify which protections apply

This is known as a “4(d) rule” and the ESA gives the Services a lot of leeway in drafting such a rule

Prohibition on “Take”

“Take”

“To harass, harm, pursue, hunt, shoot, wound, kill trap, capture, or collect, or attempt to engage in any such conduct.”

“Harass”

“An intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying to such an extent as to significantly disrupt normal behavior patterns[.]”

“Harm”

“An act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns[.]”



Critical Habitat

When a species is listed as either threatened or endangered, the listing Service may designate critical habitat for the species

- Critical habitat receives its own ESA protections
- Services designate critical habitat when it is essential to conserve the species

Critical habitat is defined as:

- (i) the specific areas within the geographical area occupied by the species at the time it is listed on which are found those physical or biological features essential to the conservation of the species and which may require special management considers or protection
- (ii) specific areas outside the geographical area occupied by the species at the time it is listed that are essential for the conservation of the species

ESA: Section 7 Consultation

- ESA Section 7 requires all federal agencies to ensure that any actions they take will not jeopardize listed species or destroy critical habitat
 - “Action” = any action an agency has “authorized, funded, or carried out”
- Informal consultation is the first step – here, the action agency determines whether its action “may affect” any listed species or critical habitat
 - Low threshold to clear, includes actions that are “not likely to adversely affect” and actions that are “likely to adversely affect”
- If the action agency finds that its action is “likely to adversely affect” listed species or critical habitat, then it should proceed to formal consultation



ESA Enforcement

- The ESA allows FWS & NMFS to carry out enforcement actions
 - Private citizens and organizations may also file citizen suits to enjoin violators and compel the government to enforce the ESA
- ESA violators can incur either civil or criminal penalties
- Civil penalties of up to \$25,000 may be imposed on person who “knowingly” violate the ESA, all other violations can incur up to \$500 in penalties
 - Civil penalties may not be imposed unless the alleged violator has received notice and given the opportunity for a hearing
- Criminal penalties of up to \$50,000 and one year in prison per violation may be imposed on anyone who “knowingly” violates the ESA
 - Criminal penalties are not available to unintentional violations
 - To succeed at criminal trial, the prosecutor must show that the defendant is guilty “beyond a reasonable doubt”



Overview

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- ✓ Proposed Listing Decision
- Looking Ahead

How Did We Get Here?

2014
Environmental groups petition FWS to list the monarch

2016
Environmental groups sue to enforce the petition – FWS settles the case, agrees to issue a decision

2020
FWS finds that the monarch is “warranted” for listing but precluded by higher priorities

2024
FWS proposes to list the monarch as threatened



Where is “Here”?



- FWS published a proposed rule to list the monarch butterfly as threatened under the ESA on December 12
- A 60-day comment period on the rule is open through March 12
- The monarch will not be formally listed until FWS issues a final rule

Why is the Monarch Proposed for Listing?

The monarch meets the definition of a threatened species due to the following threats:

Impacts from loss and degradation of breeding, migratory, and overwintering habitat

Exposure to pesticides, specifically insecticides

Effects of climate change



Goals of the Listing Decision

FWS highlights four conditions that it believes must be met in order to stabilize monarch populations:

- A significant increase in the availability of milkweed and nectar plants in monarch breeding and migratory areas
- Protection and enhancement of overwintering habitats
- Avoiding and minimizing impacts to monarchs and their habitats from insecticides and herbicides
- Maintaining public support for the conservation of monarch butterflies



Proposed 4(d) Rule

- FWS has proposed a highly detailed 4(d) rule for the monarch that would exempt various activities from being considered “take,” including:
 - Actions to maintain, enhance, remove, or establish milkweed and nectar plants within the breeding and migratory range of monarchs *that do not result in conversion of native or naturalized grassland, shrubland, or forested habitat*
 - Implementation of comprehensive monarch conservation plans and programs approved by either federal or state agencies
 - Maintenance or improvement of overwintering habitat
 - Vehicle strikes
 - Non-lethal collection, possession, captive-rearing and release of up to 250 monarchs
 - Non-lethal scientific research and education activities involving up to 250 monarchs
 - Possession of dead monarchs
 - Sale of up to 250 monarchs



Ag Exemptions

FWS proposes to exempt the following agricultural activities from being considered “take” of the monarch:

- Routine agricultural activities such as plowing, drilling, disking, mowing, mechanical manipulation of land, general maintenance, terracing, dikes, conservation tillage, etc.
 - **Note:** *This does NOT include conversion activities*
- Livestock grazing and routine ranching activities such as rotational grazing, patch-burn grazing, vegetation and invasive species management, construction and maintenance of fences and watering areas, etc.
- Normal silviculture and forest management practices
- Fire management
- Maintenance, enhancement, removal, and establishment of milkweed and nectar plants on residential or other developed properties
- Vegetation management activities that remove milkweed/nectar plants when monarchs are not present



Critical Habitat

The proposed rule includes a critical habitat designation

More limited than some expected – the proposed designation would cover ~4,400 acres on the California coast

The designation is focused largely on overwintering and breeding sites for the Western population that is considered especially at risk

No critical habitat has been proposed for the Eastern population

About Pesticides...

The proposed listing decision highlights that FWS is still considering how to address pesticide impacts to the monarch butterfly

It is one of the topics that FWS has requested comment on

However, FWS did address EPA's new policy for reducing pesticide impacts to listed species

According to FWS, this new policy will help to play a role in reducing risks to monarchs



Seeking Comment

A sixty-day public comment period on the proposed listing will be open through March 12, 2025

- Anyone can submit a comment
- Comments can address any topic related to the proposed rule

FWS is specifically seeking comment on the following:

- Which pesticide uses and application methods result in exposure and adverse effects to monarchs, and whether to exempt take from those uses in a 4(d) rule
- How to align any pesticide-related mitigation measures with EPA's work under FIFRA
- Information on the monarch's biology, range, and population trends
- Threats and conservation actions impacting the monarch
- Information concerning the historical and current status of the monarch
- Information related to critical habitat including any additional areas within the United States that should be included in the designation
- Any probably economic impacts of the proposed decision
- Whether any areas proposed for critical habitat designation should be excluded

Overview



ESA Basics



Proposed Listing Decision



Looking Ahead

Looking Ahead

- The approach to 4(d) is novel – if this rule is successful, it could be an indicator of things to come
 - FWS is explicitly seeking input from ag, we want that to continue
- A comment period and final rule are still ahead – changes may still be in the future!
 - Remember to keep March 12 circled on your calendar, but to keep an eye out in case the comment period is extended



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