

Comment on the Proposed Section 4(d) Rule and Critical Habitat Designation for the Monarch Butterfly

Property and Environment Research Center (PERC)

Bozeman, Montana

March 12, 2025

Main Points:

- Recovering the majestic monarch butterfly depends on the voluntary conservation efforts of millions of landowners—large and small; agricultural, suburban, and urban—across the entire continent.
- The proposed 4(d) rule’s exemptions will reduce conflict and improve incentives for monarch recovery. But the Service should continue to listen to the concerns of landowners interested in voluntary habitat restoration and conservation.
- The Endangered Species Act requires the Service to consider the costs imposed by a Section 4(d) rule and critical habitat designation, especially where those costs affect incentives for recovery efforts.
- In finalizing critical habitat, the Service should ensure that the benefits of designation to the monarch butterfly exceed the costs imposed on landowners.

The Property and Environment Research Center (PERC) respectfully submits this comment regarding the Fish and Wildlife Service’s (Service) proposed rule to list the monarch butterfly as threatened, along with a proposed tailored Section 4(d) rule and critical habitat designation. PERC supports tailored 4(d) rules that are specific to the conservation needs of the species, incentivize species and habitat conservation, and consider and mitigate the economic impacts of the listing on regulated non-federal entities. And we appreciate that the Service’s proposed 4(d) rule seeks to encourage landowners to participate in monarch recovery by minimizing burdens imposed on landowners who maintain or create milkweed habitat.

Monarch butterflies present a unique recovery challenge. While the key to the species’ recovery is relatively straightforward—plant more milkweed—recovery depends on the actions of millions of landowners and local and state governments across the nation. To ensure the collaboration of the millions of stakeholders and to comply with the Endangered Species Act’s (ESA) text and purpose, the

final rule should encourage and reward voluntary conservation efforts by states, local government entities, and private landowners. The proposed rule contains important regulatory exceptions that encourage conservation activities. But the Service should continue to listen to the concerns of landowners, especially their concerns about the costs the rule may impose on states and landowners that maintain or restore monarch habitat.

The Property and Environment Research Center

PERC is the national leader in market solutions for conservation, with over 45 years of research and a network of respected scholars and practitioners. Through research, law and policy, and innovative field conservation programs, PERC explores how aligning incentives for environmental stewardship produces sustainable outcomes for land, water, and wildlife. Unlike other conservation groups, PERC is firmly committed to private property rights and pursuing conservation through voluntary markets and incentives, rather than top-down regulation. PERC has produced extensive research on how the ESA could be better implemented to achieve its ultimate goal of recovering species by providing incentives for states and landowners to contribute to species recovery.¹ Founded in 1980, PERC is nonprofit, nonpartisan, and proudly based in Bozeman, Montana.

Proactive conservation efforts by private landowners and state and local governments are crucial to recovering the monarch butterfly

The orange and black monarch butterfly is one of the most iconic species in North America. While this butterfly is spread across “90 countries, islands, and island groups, . . . over 90 percent of monarchs worldwide continue to live and migrate in their native range in North America.”² This range covers approximately 2.8 billion acres across the continent, from southern Canada to Mexico.³ It is found in every state outside of Alaska, and some segments of the monarch butterfly population migrate over 2,000 miles a year.⁴ Throughout its range and migration route, the monarch butterfly performs an invaluable service, pollinating “many of the flowers and dietary staples that we enjoy, like squash and blueberries.”⁵ The species used to be so numerous that it appeared “in such vast numbers as to darken the air by the clouds of them.”⁶ Unfortunately, the population has precipitously declined in recent decades, with the

¹ See, e.g., PERC, *A Field Guide for Wildlife Recovery: The Endangered Species Act’s Elusive Search to Recover Species—and What to Do About It* (2023); Katherine Wright and Shawn Regan, *Missing the Mark: How the Endangered Species Act Falls Short of Its Own Recovery Goals*, PERC (July 26, 2023); Jonathan Wood & Tate Watkins, *Critical Habitat’s “Private Land Problem”: Lessons From the Dusky Gopher Frog*, 51 *Envtl. L. Rep.* 10,565 (2021); Jonathan Wood, *The Road to Recovery: How Restoring the Endangered Species Act’s Two-Step Process Can Prevent Extinction and Promote Recovery*, PERC Policy Report (2018).

² Threatened Species Status With Section 4(d) Rule for Monarch Butterfly and Designation of Critical Habitat, 89 *Fed. Reg.* 100,662, 100,666 (proposed Dec. 12, 2024).

³ *Id.* at 100,680.

⁴ *Id.* at 100,684, 100,668.

⁵ The Nature Conservancy, *Monarch Butterflies Bring Together Conservation and Culture Between U.S. and Mexico* (Sept. 6, 2021).

⁶ Tate Watkins, *The Once and Future Monarch*, PERC (Dec. 6, 2019).

eastern population falling by about 80 percent, and the western population decreasing by more than 95 percent.⁷

In response to the monarch butterfly’s decades-long decline, the Service has proposed to list the species as threatened under the ESA.⁸ It has also proposed a tailored Section 4(d) rule that would implement the take prohibitions under Section 9 of the ESA, with extensive exceptions to these prohibitions to “incentivize conservation actions” to help recover the butterfly.⁹ These exceptions include: (1) “activities that may maintain, enhance, remove or establish milkweed and nectar plants”; (2) implementation of conservation plans; (3) maintenance of overwintering habitat; and (4) non-lethal scientific research and education activities.¹⁰ Importantly, the Service emphasizes that the first exception would cover “[l]ivestock grazing and routine ranching activities, . . . [r]outine agricultural activities, . . . and other mechanical manipulation and management of lands already in use for agricultural production.”¹¹

Tailored 4(d) rules such as this one are crucial to achieving the ESA’s dual goals of preventing extinctions and recovering species. The ESA and the Service’s past regulations, while often effective at preventing extinctions, have not encouraged habitat restoration or other conservation efforts at the scale needed to recover listed species. This has led to a recovery rate of only 3 percent of all domestically listed species under the Act.¹² The key to recovering species is positive incentives for proactive, voluntary conservation efforts, and not strict regulatory mandates.¹³

Congress authorized the Service to prohibit take of threatened species by regulation if “necessary and advisable to provide for the conservation” of that species.¹⁴ This “necessary and advisable” standard unambiguously requires consideration of the costs Section 4(d) rules impose on landowners.¹⁵ In addition, this Section’s reference to “conservation” requires a consideration of how the regulation and the costs associated with it affect the incentives for private landowners, states, and local agencies to conserve the species and its habitat. Put simply, any regulation imposed under Section 4(d) must create incentives necessary to recover species and delist them.

This is especially true for the monarch butterfly. While the butterfly does not require its 2.8-billion-acre range nor its 2,000-mile migration route to be continuous habitat, it does require little pockets of habitat

⁷ U.S. Fish and Wildlife Serv., *Fish and Wildlife Service Proposes Endangered Species Act Protection for Monarch Butterfly: Urges Increased Public Engagement to Help Save the Species* (Dec. 10, 2024).

⁸ See Section 4(d) Rule for Monarch Butterfly, 89 Fed. Reg. 100,662.

⁹ *Id.* at 100,684–87.

¹⁰ *Id.* at 100,703.

¹¹ *Id.*

¹² *Missing the Mark*, *supra* n.1.

¹³ *The Road to Recovery*, *supra* n.1.

¹⁴ 16 U.S.C. § 1533(d).

¹⁵ See *Michigan v. EPA*, 576 U.S. 743, 752 (2015) (“One would not say that it is even rational, never mind ‘appropriate,’” to ignore costs.). Additionally, other statutes require consideration of specific types of costs imposed by 4(d) rules. See Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (requiring analysis of costs imposed on a substantial number of small entities, such as family farms, ranches, and timber operations).

throughout this range and migration route.¹⁶ Providing adequate habitat for the monarch butterfly throughout North America provides conservation opportunities and regulatory risk for everyone from large farmers to people in cities. For example, up to 31 percent of milkweed habitat needed for eastern monarchs could be grown in metropolitan areas.¹⁷ Because of the number of people and lands that will be affected by any finalized monarch butterfly 4(d) rule, the Service must ensure any final rule emphasizes incentives and cooperation, instead of stifling regulations.

Accordingly, we applaud the Service for proposing a tailored 4(d) rule that prioritizes “incentiviz[ing] landowners to add milkweeds and nectar resources and [to] implement actions to maintain this habitat.”¹⁸ The take exceptions proposed provide needed flexibility to private landowners, states, and local governments to conduct conservation projects to conserve monarch butterflies and their habitat. For example, the exception that allows for the removal of milkweed for habitat restoration projects protects activities such as “mowing, haying native rangeland, prescribed and cultural burning, and control of invasive plants or noxious weeds” that may “result in take of monarchs in the short term but would also increase the overall quality and quantity of breeding habitat,” in the long term.¹⁹ The proposed rule also exempts any conservation activities under a comprehensive state conservation plan, without requiring federal approval of those plans.²⁰ This gives states flexibility to develop and adapt their plans over time, as they learn how to best encourage private, voluntary conservation efforts for the monarch.²¹ These proposed exceptions also ensure that people who planted milkweed habitat will not be punished for routine agricultural activities or habitat restoration projects that then result in incidental take of butterflies in the planted habitat. The final rule must include at least these exceptions to prevent violating Section 4(d) and preserve incentives for non-federal entities working to preserve the monarch butterfly.

However, the proposed 4(d) rule has a few shortcomings. First, the final rule should incentive the monarch’s recovery by providing a path for federal regulation to sunset as the monarch butterfly’s population improves. This would provide clear incentivizes for the recovery of the species by tying population numbers to the degree of regulation. For example, when the monarch butterfly reaches a certain population benchmark, the 4(d) rule could give states the authority to permit take. Off-ramps like this will incentivize and reward conservation by private landowners, states, and local governments and will ensure that the 4(d) rule promotes the recovery of monarch butterflies.

Second, the proposed rule omits any discussion of the economic impacts of the 4(d) rule. Under the “necessary and advisable” standard, the Service is required to give “at least some attention to cost.”²² This

¹⁶ *The Once and Future Monarch*, *supra* n.6.

¹⁷ *Id.*

¹⁸ Section 4(d) Rule for Monarch Butterfly, 89 Fed. Reg. at 100,672.

¹⁹ *Id.* at 100,685.

²⁰ *Id.* at 100,703.

²¹ *Id.* The proposed rule is not entirely supportive of these state efforts, however. While acknowledging the ambitious plans states have developed but only begun to implement, the Service declines to apply its Policy for Evaluating Conservation Efforts in its listing analysis. *Id.* at 100,677.

²² *See Michigan*, 576 U.S. at 752.

analysis of the cost the regulation imposes on states and landowners must “include[] more than the expense of complying with regulations; any disadvantage” caused by the regulation “could be termed a cost.”²³ To fully comply with Section 4(d), the Service must include some consideration in the final rule of the economic impacts the regulation imposes.

The Service must consider whether the benefits to the species of the proposed critical habitat designation justify the costs imposed on landowners

With the butterfly’s range encompassing 2.8 billion acres, the Service showed commendable judgment in proposing only 4,400 acres of critical habitat.²⁴ This area is used by the more vulnerable western population of the monarch butterfly as overwintering habitat. However, this proposed designation comes with significant challenges because this critical habitat includes very little federal land, with 71 percent of it being privately owned, and most of the remainder being owned by local governments and California.²⁵ Without some federal hook to trigger consultation, the designation may do little to promote the species recovery, while alienating key landowners.

When designating critical habitat, the Service is required to take “into consideration the economic impact” of the designation.²⁶ Although the proposed rule has a section for the economic impact of the proposed critical habitat, this discussion is cursory and focuses on the economic impact to federal lands. As discussed above, the vast majority of the proposed critical habitat is non-federal lands, and not analyzing the economic impact on private landowners, California, or local governments when they would be the most impacted by the designation is contrary to the ESA’s structure and purpose. Instead, the final critical habitat designation must include a discussion of the lands proposed, the benefit of designating these lands to the monarch butterfly, and the costs this designation will impose on all of the landowners in the area, not just the effect on federal lands.

Conclusion

PERC supports the Service proposing a tailored Section 4(d) rule for the monarch butterfly that exempts habitat restoration and management, routine agricultural and ranching activities, and other exceptions from take that protect proactive actions taken to recover the butterfly and its habitat. By tying reduced regulations to certain population benchmarks, the Service could provide more incentives for states, local governments, and private landowners to work toward recovering the butterfly. And while the Service deserves credit for only designating overwintering habitat for the western population of the monarch butterfly as critical habitat, the final rule must include the economic impacts on private landowners, states, and local governments. It must also ensure that the benefits of this designation to the monarch butterfly outweigh the costs to the landowners. PERC suggests these changes to the proposed rule to

²³ *Id.*

²⁴ Section 4(d) Rule for Monarch Butterfly, 89 Fed. Reg. at 100,692–93.

²⁵ *Id.*

²⁶ 16 U.S.C. § 1533(b)(2).

ensure that the monarch butterfly does not end up being another species stuck on the Endangered Species' list, and instead advances toward sustainable recovery and delisting.