

In consideration of the foregoing, we propose to amend 49 CFR, subtitle B, chapter I as follows:

## PART 171—GENERAL INFORMATION, REGULATIONS AND DEFINITIONS

1. The authority citation for part 171 continues to read as follows:

**Authority:** 49 U.S.C. 5101–5127, 44701, 49 CFR 1.45 and 1.53; Pub. L. 101–410 section 4 (28 U.S.C. 2461 note); Pub. L. 104–134 section 31001.

2. In § 171.2, revise paragraphs (a) and (b), to read as follows:

### § 171.2 General requirements.

(a) No person may offer or accept a hazardous material for transportation in commerce unless that person is registered in conformance with subpart G of part 107 of this subchapter, if applicable, and the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by applicable requirements of this subchapter, or an exemption, approval, or registration issued under this subchapter or under subchapter A of this chapter. There may be more than one offeror of a shipment of hazardous materials. Each offeror is responsible for complying with the requirements of this subchapter, or an exemption, approval, or registration issued under this subchapter or subchapter A of this chapter, with respect to any pre-transportation function that it performs or is required to perform; however, each offeror is responsible only for the specific pre-transportation functions that it performs or is required to perform, and each offeror may rely on information provided by another offeror, unless an offeror knows or, in the exercise of reasonable care, should know that the information provided by the other offeror is incorrect.

(b) No person may transport a hazardous material in commerce unless that person is registered in conformance with subpart G of part 107 of this subchapter, if applicable, and the hazardous material is handled and transported in accordance with applicable requirements of this subchapter, or an exemption, approval, or registration issued under this subchapter or subchapter A of this chapter. Each carrier who transports a hazardous material in commerce may rely on information provided by the offeror of the hazardous material or a prior carrier, unless the carrier knows or, in the exercise of reasonable care, should know that the information

provided by the offeror or prior carrier is incorrect.

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3. In § 171.8, add a definition for “person who offers or offeror” in appropriate alphabetical order, to read as follows:

### § 171.8 Definitions and abbreviations.

\* \* \* \* \*

*Person who offers or offeror means:*

(1) Any person who does either or both of the following:

(i) Performs, or is responsible for performing, any pre-transportation function required under this subchapter for transportation of the hazardous material.

(ii) Tenders or makes the hazardous material available to a carrier for transportation in commerce.

(2) A carrier that transfers, interlines, or interchanges hazardous material to another carrier for continued transportation is not an offeror when it does not perform any pre-transportation function.

\* \* \* \* \*

Issued in Washington, DC on September 21, 2004, under the authority delegated in 49 CFR part 106.

**Robert A. McGuire,**

*Associate Administrator for Hazardous Material Safety.*

[FR Doc. 04–21535 Filed 9–23–04; 8:45 am]

**BILLING CODE 4910–60–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

**RIN 1018–AJ07**

### Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Gaura neomexicana* ssp. *coloradensis* (Colorado Butterfly Plant)

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; extension of comment period and notice of availability of draft economic analysis and draft environmental assessment.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service) announce the availability of a draft economic analysis and draft environmental assessment for the proposed designation of critical habitat for *Gaura neomexicana* ssp. *coloradensis* (hereafter referred to as “Colorado butterfly plant”) under the Endangered Species Act of 1973, as amended (Act). In addition, we announce the extension of the comment

period on the proposed rule to designate critical habitat for the Colorado butterfly plant.

**DATES:** We will accept all comments received on or before October 25, 2004. Any comments that we receive after the closing date may not be considered in the final decision on this proposal.

**ADDRESSES:** If you wish to comment, you may submit your comments and materials concerning this proposed rule, the draft economic analysis, and the draft environmental assessment by any one of several methods:

(1) You may submit written comments and information to the Field Supervisor, U.S. Fish and Wildlife Service, Wyoming Field Office, 4000 Airport Parkway, Cheyenne, Wyoming 82001, or by facsimile (307) 772–2358.

(2) You may hand-deliver written comments to our office, at the address given above.

(3) You may send comments by electronic mail (e-mail) to [fw6\\_cobutterflyplant@fws.gov](mailto:fw6_cobutterflyplant@fws.gov). Please see the Public Comments Solicited section below for file format and other information about electronic filing. In the event that our Internet connection is not functional, please submit your comments by the alternate methods mentioned above.

Comments and materials received, as well as supporting documentation used in preparation of the proposed critical habitat rule, will be available for public inspection, by appointment, during normal business hours at the above address. You may obtain copies of the draft economic analysis and draft environmental assessment for the Colorado butterfly plant by contacting the Wyoming Field Office at the above address. The draft economic analysis, draft environmental assessment, and the proposed rule for critical habitat designation also are available on the Internet at <http://www.r6.fws.gov/species/plants/cobutterfly/>. In the event that our Internet connection is not functional, please obtain copies of documents directly from the Wyoming Fish and Wildlife Office.

**FOR FURTHER INFORMATION CONTACT:** Brian T. Kelly, Field Supervisor (telephone (307) 772–2374; facsimile (307) 772–2358), Wyoming Field Office, at the address listed above.

### SUPPLEMENTARY INFORMATION:

#### Public Comments Solicited

We intend any final action resulting from the proposed rule to be as accurate and as effective as possible. Therefore, we solicit comments or suggestions from the public, other concerned governmental agencies, the scientific

community, industry, or any other interested party concerning the economic analysis, the environmental analysis, or the proposed rule. We particularly seek comments concerning:

(1) The reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act, including whether the benefits of excluding outweigh benefits of including any area as critical habitat;

(2) Specific information on the amount and distribution of Colorado butterfly plant habitat and what habitat is essential to the conservation of this species and why;

(3) Land use designations and current or planned activities in the subject area and their possible impacts on proposed critical habitat;

(4) Any foreseeable economic or other impacts resulting from the proposed designation of critical habitat, in particular, any impacts on small entities or families;

(5) Whether the economic analysis identifies all State and local costs. If not, what costs are overlooked;

(6) Whether the economic analysis makes appropriate assumptions regarding current practices and likely regulatory changes imposed as a result of the designation of critical habitat;

(7) Whether the economic analysis correctly assesses the effect on regional costs associated with land use controls that derive from the designation;

(8) Whether the designation will result in disproportionate economic impacts to specific areas that should be evaluated for possible exclusion from the final designation;

(9) Whether the economic analysis appropriately identifies all costs that could result from the designation;

(10) Whether the environmental analysis accurately reports the environmental impact of designating critical habitat; and

(11) Whether our approach to critical habitat designation could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concern and comments.

All comments and information submitted during the previous comment period on the proposed rule need not be resubmitted. If you wish to comment, you may submit your comments and materials concerning this rule by any one of several methods (see **ADDRESSES** section). Please submit Internet comments to [fw6\\_cobutterflyplant@fws.gov](mailto:fw6_cobutterflyplant@fws.gov) and include "Attn: Colorado Butterfly Plant Critical Habitat" in your e-mail subject header, and your name and return

address in the body of your message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly by calling our Wyoming Field Office (see **FOR FURTHER INFORMATION CONTACT** section).

Our practice is to make comments, including names and home addresses of respondents, available to the public. Individual respondents may request that we withhold their home addresses from the administrative record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the administrative record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

#### Background

Colorado butterfly plant is a member of the evening primrose family and is a short-lived perennial herb with one to several reddish, pubescent stems. It is a regional endemic restricted to Laramie and Platte Counties in Wyoming, western Kimball County in Nebraska, and Weld County in Colorado. Of the known populations of the Colorado butterfly plant, the vast majority occur on private lands managed primarily for agriculture and livestock. Haying and mowing at certain times of the year, water development, land conversion for cultivation, competition with exotic plants, non-selective use of herbicides, and loss of habitat to urban development are the main threats to these populations (Mountain West Environmental Services 1985, Marriott 1987, Fertig 1994).

On October 18, 2000, the Colorado butterfly plant was designated as threatened throughout its entire range under the Act (65 FR 62302). On October 4, 2000, the Center for Biological Diversity and the Biodiversity Legal Foundation filed a complaint in the Federal District Court for the District of Colorado concerning our failure to designate critical habitat for the Colorado butterfly plant (*Center for Biological Diversity, et al. v. Norton, et al.* (Civ. Action No. 00-D-1980)). On

March 19, 2001, the Court approved a settlement agreement requiring us to submit a final critical habitat designation for the Colorado butterfly plant to the **Federal Register** on or before December 31, 2004. For more information on previous Federal actions concerning the Colorado butterfly plant, refer to the final listing rule (65 FR 62302). On August 6, 2004 (69 FR 47834), we published a proposed critical habitat designation for the Colorado butterfly plant.

Critical habitat identifies specific areas, both occupied and unoccupied, that are essential to the conservation of a listed species and that may require special management considerations or protection. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas designated as critical habitat must consult with us on the effects of their proposed actions, pursuant to section 7(a)(2) of the Act.

Section 4 of the Act requires that we consider economic impacts, impacts to National security, and other relevant impacts prior to making a final decision on what areas to designate as critical habitat. We have prepared a draft economic analysis for the proposal to designate certain areas as critical habitat for the Colorado butterfly plant. This analysis considers the potential economic effects of our proposed designation. It also considers the economic effects of protective measures taken as a result of listing the species under the Act, and other Federal, State, and local laws that aid habitat conservation in areas proposed for designation.

The majority of these areas occur on privately owned land. We know of no Federal, tribal, or military lands within proposed critical habitat. A small portion of land within Unit 7 is owned by the City of Cheyenne, Wyoming, and Unit 8 is owned by the City of Fort Collins, Colorado. The economic analysis and environmental assessment address the impacts of Colorado butterfly plant conservation efforts on activities occurring on lands proposed for designation. The economic analysis measures lost economic efficiency associated with conservation agreements, oil and gas development, real estate development, agriculture, road and bridge construction and maintenance projects, as well as other State law requirements, uncertainty, and project delay.

There is a great deal of uncertainty in estimating the impact of Colorado butterfly plant conservation activities in the future. For some activities the analysis estimates an upper-bound cost estimate, for others a conservative approach is taken to reach a best estimate. The implicit lower-bound cost estimate predicts very low impact.

Total efficiency costs (e.g., lost economic opportunities associated with restrictions on land use) for the upper-bound scenario of the preferred alternative are estimated to be \$286,700 from 2005 to 2024. The efficiency costs for the lower-bound scenario of the preferred alternative are estimated to be \$7,000 from 2005 to 2024. In both cases, the Service is estimated to experience the highest cost overall, followed by agriculture and natural gas pipeline construction projects.

The environmental analysis discusses four alternatives, including the "no action" alternative, and analyzes the following "impact areas"—physical environment; fish, wildlife, and plants; human environment; archaeological and cultural resources; environmental justice, and cumulative effects. The environmental analysis refers to and incorporates the economic analysis.

#### Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule because it may raise novel legal and policy issues. However, it is not anticipated to have an annual effect on the economy of \$100 million or more or affect the economy in a material way. Due to the tight timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed this rule.

#### Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*)

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities. However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration (SBA), small entities include small organizations, such as independent nonprofit organizations, and small governmental jurisdictions,

including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this proposed rule as well as types of project modifications that may result. In general, the term significant economic impact is meant to apply to a typical small business firm's business operations.

To determine if the proposed rule would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (e.g., housing development, oil and gas production, timber harvesting). We considered each industry individually to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by the designation of critical habitat. Designation of critical habitat affects only activities conducted, funded, permitted or authorized by Federal agencies; non-Federal activities are not affected by the designation.

If this critical habitat designation is made final, Federal agencies must consult with us if their activities may affect designated critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process. In areas where occupancy by Colorado butterfly plant is unknown, the designation of critical habitat could trigger additional review of Federal agencies pursuant to section 7 of the Act and may result in additional requirements on Federal activities to avoid destruction or adverse modification of critical habitat.

In reviewing past formal consultations under section 7 of the Act and the activities they involved in the context of the proposed critical habitat, we do not believe the outcomes would have been

different in areas designated as critical habitat.

An analysis of the effects of the voluntary conservation agreements for Colorado butterfly plant on small entities is conducted pursuant to the RFA as amended by the SBREFA in 1996, while the energy analysis is required by Executive Order No. 13211.

The draft economic analysis considers the extent to which the analytic results reflect impacts to small businesses. The small business analysis presented in this section is based on information gathered from the SBA, U.S. Census Bureau, U.S. Department of Agriculture, and Dun and Bradstreet, and comparisons with the results of the economic analysis. The following summarizes the sources of potential future impacts on small businesses attributable specifically to the rulemaking.

Based on the draft economic analysis results, activities undertaken by small businesses that are potentially affected by the rulemaking include agricultural production. The SBA small business size standard for farming and ranching is annual sales of \$750,000. Recent county-level farm sales data from the National Agricultural Statistics Service 2002 Agriculture Census was used to determine the number of small agribusinesses operating within the proposed critical habitat designation. The 2002 Agriculture Census data indicate that 95 percent of the farmers operating within the five counties encompassed by the proposed designation have annual sales less than \$500,000. In Laramie County, Wyoming, where more than 85 percent of the critical habitat is located, 736 of 755 farmers reported annual farm sales less than \$500,000. These data indicate that ranching operations in the area surrounding the proposed designation tend to be small. For the purpose of this small business analysis, because of the high percentage of farming operations with annual sales below \$500,000, all agriculture operations forecast to be impacted by the proposed designation of critical habitat for the Colorado butterfly plant are considered small.

Assuming all landowners within the proposed designation participate in the voluntary conservation agreement program with the Service, up to 37 agriculture operations could be impacted by conservation measures for the Colorado butterfly plant. Assuming an operation is required to implement all of the activities recommended to protect the species and its habitat, the annualized cost of the conservation measures to the operator (\$263) represents 0.1 of a percent of the average

annual farm's sales in the five counties surrounding the proposed designation. The annualized impact ranges between 0.1 of a percent of an average farm's sales in Weld County in Colorado, to 0.4 of a percent in Larimer County in Colorado, and Kimball County in Nebraska. In Laramie County, Wyoming, the annualized impact represents 0.3 of a percent of the average farmer's annual sales. Note that, we do not know the finances of the individual people that may be affected. Thus, the draft economic analysis used averaged industry data (see Exhibit 4-10) to estimate costs of ranching operations, and this table reflects the variability of this data. It is important to note that these costs will only be incurred by ranching operations to the extent that they agree to participate in the voluntary conservation agreement program with the Service.

In summary, we have considered whether this proposed rule would result in a significant economic impact on a substantial number of small entities, and we have concluded that it would not. We have no indication that the types of activities we review under section 7 of the Act will change significantly in the future. Therefore, we are certifying that this proposed designation of critical habitat for the Colorado butterfly plant is not expected to have a significant adverse impact on a substantial number of small entities, and an initial regulatory flexibility analysis is not required.

The preceding discussion is based on information regarding potential economic impacts that is currently available to us. This assessment of economic effect may be modified prior to publication of a final rule due to public comments received during the

public comment period. This analysis is for the purposes of compliance with the Regulatory Flexibility Act and does not reflect our position on the type of economic analysis required by *New Mexico Cattle Growers Assn. v. U.S. Fish & Wildlife Service* 248 F. 3d 1277 (10th Cir. 2001).

#### **Author**

The primary author of this notice is the Tyler Abbott, Wyoming Fish and Wildlife Office staff (see **ADDRESSES** section).

The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: September 17, 2004.

#### **Craig Manson,**

*Assistant Secretary for Fish and Wildlife and Parks.*

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