

For paragraphs (a) and (c) of this section, the manufacturer shall submit information separately with respect to each make, model, and model year of medium-heavy vehicle and/or bus manufactured during the reporting period and the nine model years prior to the earliest model year in the reporting period, including models no longer in production.

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8. Amend § 579.24 by revising the section heading and by revising the first sentence of the introductory text to read as follows:

§ 579.24 Reporting requirements for manufacturers of 5000 or more trailers annually.

For each reporting period, a manufacturer whose aggregate number of trailers manufactured for sale, sold, offered for sale, introduced or delivered for introduction in interstate commerce, or imported into the United States, during the calendar year of the reporting period or during either of the prior two calendar years is 5000 or more shall submit the information described in this section. * * *

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9. Amend § 579.27 by revising the section heading to read as follows:

§ 579.27 Reporting requirements for manufacturers of fewer than 500 medium-heavy vehicles or motorcycles annually, for manufacturers of fewer than 5000 light vehicles or trailers annually, for manufacturers of original equipment, and for manufacturers of replacement equipment other than child restraint systems and tires.

* * * * *

10. Amend § 579.29 by adding paragraph (a)(3) to read as follows:

§ 579.29 Manner of reporting.

(a) * * *

(3) For each report required under paragraphs (a) through (c) of §§ 579.21 through 579.26 and submitted in the manner provided in paragraph (a)(1) of this section, a manufacturer must provide a make, model and model year that is identical to the make, model, model year provided in the manufacturer's previous report. A manufacturer that intends to provide a make, model, model year in its report that is not identical to the manufacturer's previous report, must notify NHTSA by populating the appropriate field in the template required under paragraph (a)(1) of this section.

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Issued on: November 26, 2008.

Daniel C. Smith,

Associate Administrator for Enforcement.

[FR Doc. E8-28873 Filed 12-4-08; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS-R2-ES-2008-0110; MO-9221050083 – B2]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Sacramento Mountains Checkerspot Butterfly (*Euphydryas anicia cloudcrofti*) as Endangered with Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding and initiation of a status review.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list the Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) as an endangered species and designate critical habitat under the Endangered Species Act of 1973, as amended (Act). We find the petition provides substantial scientific or commercial information indicating that listing this subspecies under the Act may be warranted. Therefore, with the publication of this notice, we are initiating a status review of the species, and we will issue a 12-month finding to determine if the petitioned action is warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial data regarding this species. We will make a determination on critical habitat for this subspecies if and when we initiate a listing action.

DATES: To allow us adequate time to conduct this review, we request that we receive information on or before February 3, 2009.

ADDRESSES: You may submit information by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- U.S. mail or hand-delivery: Public Comments Processing, Attn: FWS-R2-ES-2008-0110; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all information received on

<http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Information Solicited section below for more details).

FOR FURTHER INFORMATION CONTACT:

Wally "J" Murphy, Field Supervisor, New Mexico Ecological Services Office, 2105 Osuna NE, Albuquerque, NM 87113; by (telephone at 505-346-2525, or by facsimile at 505-346-2542. If you use a telecommunications devise for the deaf (TTD), you may call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Information Solicited

When we make a finding that a petition presents substantial information indicating that listing a species may be warranted, we are required to promptly commence a review of the status of the species. To ensure that the status review is complete and based on the best available scientific and commercial information, we are soliciting information on the status of the Sacramento Mountains checkerspot butterfly. We request information from the public, other concerned governmental agencies, Tribes, the scientific community, industry, or any other interested parties concerning the status of the Sacramento Mountains checkerspot butterfly. We are seeking information regarding the subspecies' historical and current status and distribution, its biology and ecology, its taxonomy, ongoing conservation measures for the subspecies and its habitat, and threats to either the subspecies or its habitat.

If we determine that listing the Sacramento Mountains checkerspot butterfly is warranted, we intend to propose critical habitat to the maximum extent prudent and determinable at the time we would propose to list the subspecies. Therefore, with regard to areas within the geographical range currently occupied by the Sacramento Mountains checkerspot butterfly, we also request data and information on what may constitute physical or biological features essential to the conservation of the subspecies, where these features are currently found, and whether any of these features may require special management considerations or protection. In addition, we request data and information regarding whether there are areas outside the geographical area occupied by the subspecies that are essential to the conservation of the subspecies. Please provide specific

information as to what, if any, critical habitat should be proposed for designation if the subspecies is proposed for listing, and why that proposed habitat meets the requirements of the Act (16 U.S.C. 1531 *et seq.*).

Please note that comments merely stating support or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species must be made "solely on the basis of the best scientific and commercial data available." Based on the status review, we will issue a 12-month finding on the petition, as provided in section 4(b)(3)(B) of the Act.

You may submit your information concerning this finding by one of the methods listed in the **ADDRESSES** section. We will not consider submissions sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit information via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <http://www.regulations.gov>.

Information and materials we receive, as well as supporting documentation we used in preparing this finding, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, New Mexico Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

Section 4(b)(3)(A) of the Act requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files at the time we make the determination. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our

notice of this finding promptly in the **Federal Register**.

Our standard for substantial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted" (50 CFR 424.14(b)). If we find that substantial information was presented, we are required to promptly commence a review of the status of the species.

In making this finding, we based our decision on information provided by the petitioners and information available in our files at the time of the petition review, and we evaluated that information in accordance with 50 CFR 424.14(b). Our process for making a 90-day finding under section 4(b)(3)(A) of the Act and §424.14(b) of our regulations is limited to a determination of whether the information contained in the petition meets the "substantial information" threshold.

Previous Federal Actions

On January 28, 1999, we received a petition from Mr. Kieran Suckling of the Southwest Center for Biological Diversity (now Center for Biological Diversity) requesting emergency listing of the Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) (butterfly) as endangered with critical habitat. On December 27, 1999, we published a 90-day finding that the petition presented substantial information that listing the butterfly may be warranted, but that emergency listing was not warranted; that document also initiated a status review of the subspecies (64 FR 72300). On September 6, 2001, we published a 12-month finding and proposed rule to list the butterfly as endangered with critical habitat (66 FR 46575). On October 7, 2004, we published a notice of availability of a draft of the Conservation Plan for the Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) (Conservation Plan) (69 FR 60178), which was finalized in 2005 (Service *et al.* 2005). On November 8, 2004, we published a notice of availability of a draft economic analysis and draft environmental assessment on our proposed designation of critical habitat for the butterfly (69 FR 64710). On December 21, 2004, we published a withdrawal of the proposed rule (69 FR 76428), concluding that the threats to the species were not as great as we had perceived when we proposed it for listing.

Petition

On July 5, 2007, we received a petition dated June 28, 2007, from Forest Guardians (now WildEarth Guardians) and the Center for Biological Diversity requesting that we emergency list the butterfly as endangered, and that we designate critical habitat concurrently with the listing. The petition clearly identifies itself as a petition, and includes the information required in 50 CFR 424.14(a). The petitioners assert that insect control, climate change, private development, roads, livestock grazing, wildfire, recreational impacts, and noxious weed management threaten the butterfly. The petitioners state that many of the threats identified in the September 6, 2001, proposed rule to list the species (66 FR 46575) are still valid. They claim that the Service erred in 2004 (69 FR 76428) when we withdrew the 2001 proposed listing rule. The petitioners also claim that insect control and climate change pose an imminent and significant risk to species and request that the Service emergency list the butterfly.

Emergency listing is not a petitionable action under the Act. Emergency listing is allowed under the Act whenever immediate protection is needed to address a significant risk to the species' well being. Based on currently available information evaluated below, we determine that emergency listing is not needed for the butterfly.

On July 26, 2007, we notified the petitioners that, to the maximum extent practicable, we would decide whether the petition presented substantial information that the petitioned action may be warranted. On October 16, 2007, we informed the petitioners that an emergency listing of the butterfly was not warranted at that time because the insect control that had been scheduled to occur had been postponed until later in the autumn when the butterfly larvae were likely to be inactive and not threatened by the insect control actions. On December 10, 2007, we notified the petitioners that funding was available to complete the 90-day finding in fiscal year 2008. On January 3, 2008, Forest Guardians filed suit against the Service for failure to issue a 90-day finding on the petition (*Forest Guardians, et al. v. Kempthorne*, 1:08-cv-00011-RMU (D. D.C.)). On April 15, 2008, a settlement was reached that requires the Service to submit to the **Federal Register** a determination of whether the petition presents substantial information indicating that the petitioned action of listing the butterfly may be warranted. The settlement stipulated that the determination would be submitted to

the **Federal Register** on or before November 28, 2008. This 90-day finding complies with the settlement agreement.

Species Information

The Sacramento Mountains checkerspot butterfly is a member of the brush-footed butterfly family (Nymphalidae). The adults have a wingspan of approximately 5 centimeters (cm) (2 inches (in)), and they are checkered with dark brown, red, orange, white, and black spots and lines. Larvae are black-and-white banded with orange dorsal bumps and black spines. Checkerspot larvae reach a maximum length of about 2.5 cm (1 in) (Pittenger and Yori 2003, p. 8). The taxon was described in 1980 (Ferris and Holland 1980).

The butterfly inhabits meadows within the mixed-conifer forest (Lower Canadian Zone) at an elevation between 2,380 to 2,750 meters (m) (7,800 to 9,000 feet (ft)) in the vicinity of the Village of Cloudcroft, Otero County, New Mexico. The adult butterfly is often found in association with the larval food plants *Penstemon neomexicanus* (New Mexico penstemon) and *Valeriana edulis* (valerian) and adult nectar sources, such as *Helenium hoopesii* (sneezeweed). *Penstemon neomexicanus* is a narrow endemic species (Sivinski and Knight 1996), restricted to the Sacramento and Capitan Mountains of south-central New Mexico.

Adult butterflies are only known to lay their eggs on *Penstemon neomexicanus* (Service *et al.* 2005, p.10), although the larvae feed on both *P. neomexicanus* and *Valeriana edulis* (Service *et al.* 2005, p.11). After hatching, larvae feed on host plants and, during the 4th or 5th instar (the period between molts in the larval stage of the butterfly), enter an obligatory and extended diapause (maintaining a state of extended inactivity), generally as the food plants die back in the autumn from freezing. Some larvae may remain in diapause for more than one year, depending on environmental conditions. During diapause, larvae probably remain in leaf or grass litter near the base of shrubs, under the bark of conifers, or in the loose soils associated with pocket gopher (*Thomomys bottae*) mounds (Service *et al.* 2005, p.10). Once the larvae break diapause, they feed and grow through three or four more instars before pupating (entering the inactive stage within a chrysalis) and emerging as adults. Diapause is generally broken in spring (March and April) and adults emerge in summer (June and July).

We do not know the extent of the historical range of the butterfly due to limited information collected on this subspecies prior to the time it was formally acknowledged as a new subspecies (Ferris and Holland 1980). The known range of the butterfly is restricted to the Sacramento Mountains and is bordered on the north by the Mescalero Apache Nation lands, on the west by Bailey Canyon at the mouth of Mexican Canyon, on the east by Spud Patch Canyon, and on the south by Cox Canyon (USFS 2000; Service *et al.* 2005, p. 12). The potential range of the butterfly to the east and west is likely restricted because the non-forested areas are below 7,800 ft in elevation and the checkerspot butterfly does not occur below this elevation (Service *et al.* 2005, p. 9).

The U.S. Forest Service (USFS) estimates that there are about 1,096 hectares (ha) (2,712 acres (ac)) of suitable butterfly habitat on USFS and private lands. Of this, 484 ha (1,196 ac) are occupied by the butterfly on USFS lands and 314 ha (777 ac) are occupied on private lands (USFS 2004a). About 298 ha (736 ac) of the 1,096 ha (2,712 ac) of suitable habitat are unoccupied, with 79 ha (194 ac) on USFS lands and 219 ha (542 ac) on private lands (USFS 2004a). This estimate is the best and most recent information we have regarding the range and distribution of the butterfly and the same information we used in our 2004 withdrawal of the proposed rule (69 FR 76428).

For more information on the butterfly, refer to the September 6, 2001, proposed rule (66 FR 46575); the November 1, 2005, Conservation Plan (Service *et al.* 2005); and the December 21, 2004, withdrawal of the proposed rule (69 FR 76428). Some of this information is discussed in our analysis below. The Conservation Plan (Service *et al.* 2005) with the Village of Cloudcroft, Otero County, USFS, and the Service was developed to identify and commit to implementing actions to conserve the butterfly so it would not warrant future listing under the Act.

Threats Analysis

Section 4 of the Act and implementing regulations at 50 CFR 424 set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may list a species on the basis of any of five factors, as follows: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or

predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

In making this 90-day finding, we evaluated whether information on threats to the Sacramento Mountains checkerspot butterfly, as presented in the petition and other information available in our files at the time of the petition review, is substantial, thereby indicating that the petitioned action may be warranted. Our evaluation of this information is presented below.

A. Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

The petition asserts that the following conditions under Factor A threaten the butterfly: recreational impacts; roads, corridors, and powerlines; livestock grazing; catastrophic wildfire and fire suppression; noxious weeds; and private property development and the potential expiration of the Otero County Subdivision Ordinance on July 1, 2011. The petitioners assert that, although development (residential, commercial, and recreational associated with residential) within the Village of Cloudcroft decreased following the 2001 publication of the proposed rule to list the butterfly (66 FR 46575), development has nonetheless continued and, combined with other threats to the butterfly, remains significant. The petitioners correctly note that, as passed, the amended Otero County Subdivision Ordinance of 2005 will expire on July 1, 2011 (Otero County 2005, p. 2). The ordinance requires that, for any new subdivision to be developed within potential butterfly habitat, a survey be conducted for the butterfly, its habitat, and its host plant *Penstemon neomexicanus*. If the survey is positive, the developer is required to submit plans to address wildfire control, avoidance of destruction of the butterfly and its habitat, and, if avoidance is not possible, relocation of butterflies and restoration of destroyed habitat. The ordinance also contains a section on enforcement, penalties, and remedies. The amendment to the subdivision ordinance was not in place when we made our withdrawal of the proposed listing rule in 2004, so we did not rely on it when we concluded that development was not a significant threat to the butterfly. The Village of Cloudcroft has received no permit applications for new subdivisions since the Ordinance became effective in 2005. This may be because it has experienced water shortages in recent years (Friederici 2007). The petition presents information on these issues that was

previously submitted in comments on the 2004 draft Conservation Plan (69 FR 60178), draft environmental assessment, and draft economic analysis (69 FR 64710) for the butterfly. The draft environmental assessment and draft economic analysis did not contemplate effects of the future ordinance.

In our 2004 draft economic analysis, we found that approximately 8 to 10 new homes had been constructed annually since 2000 within the boundary of the proposed critical habitat designation of approximately 140 square kilometers (54 square miles) in the vicinity of the Village of Cloudcroft (Service 2004). Based upon this trend of 8 to 10 new homes annually, over the next 20 years, approximately 160 to 200 new residential projects may occur within the boundary of the then-proposed critical habitat for the butterfly. Of these, the economic analysis assumed that 55 to 69 of the landowners may conduct butterfly surveys because they would be located within areas that were proposed as critical habitat and that provide butterfly habitat. Our draft economic analysis estimated that butterflies could be found in 8 to 24 of those 55 areas surveyed. Our draft economic analysis also estimated that the median lot size of these developments was 0.14 ha (0.34 ac), indicating that up to 3.4 ha (8.2 ac) of suitable butterfly habitat may be impacted from commercial and private development activities. For a detailed discussion see Service 2004. In the 2001 proposed rule, we described an additional 4 ha (10 ac) of impacts from a private development on the east side of the Village of Cloudcroft. Thus, we continue to estimate that about 2 percent of the suitable butterfly habitat on private lands (7.4 of 314 ha (18 of 777 ac), using the USFS (2004a, p.2) estimate of occupied acres on private lands) may be subject to commercial and private development. Based on this information, we continue to believe that this level of impact is not a significant threat to the butterfly. We find no substantial information provided by the petitioners or in our files supporting the claim that commercial and private development threaten the butterfly.

The petitioners acknowledge that USFS has taken measures to reduce recreational impacts to the butterfly at two campgrounds and has proposed measures to reduce impacts at five additional campgrounds where the butterfly is present. However, the petitioners assert that increasing recreation demands, including off-road vehicle use, camping, and mountain

biking, can result in harm to individual butterflies and to their food plants.

In our 2004 withdrawal of the proposed rule, we discussed increased efforts by the USFS to reduce off-road vehicle use in Bailey Canyon and campgrounds where the butterfly occurs, and we evaluated information on the extent and nature of off-road impacts to the butterfly and its food plants. We concluded that the actions the USFS had taken to reduce off-road vehicle impacts appeared to be effective, that only a small proportion of occupied habitat would be impacted annually by continuing off-road vehicle use, that the magnitude of the impact is low, and that off-road vehicle use does not significantly threaten the butterfly (69 FR 76428, December 21, 2004). The petitioners do not present information, and we have no information in our files, that off-road vehicle use has increased since 2004.

In our 2004 withdrawal of the proposed rule, we discussed increased efforts by the USFS to reduce impacts to the butterfly from dispersed camping and camping at established campgrounds. Although the petitioners acknowledge that USFS has taken measures to reduce recreational impacts to the butterfly at established campgrounds, they claim that increased camping can result in harm to the butterfly. We agree that increased camping can result in increased impacts to the butterfly. However, the petitioners did not present information that camping has increased in habitats occupied by the butterfly, and we have no information in our files that camping has increased.

In our 2004 withdrawal of the proposed rule, we acknowledged that butterfly larvae were known to occur on and adjacent to mountain bike trails, and we reviewed efforts routinely made by the USFS to address potential impacts to the butterfly, including larvae, during large events, such as mountain bike races (69 FR 76428). We concluded that, while mountain biking does impact the butterfly and its host plants to some extent, it did not appear that the impacts were likely significant to the butterfly. The petitioners do not present information that impacts from mountain biking have increased in habitats occupied by the butterfly, and we have no information in our files that such impacts have increased.

The petitioners discuss the impacts of roads, corridors, and powerlines by comparing our discussion of those impacts in our 2004 withdrawal of the proposed rule (69 FR 76428) to our discussion of those impacts in our 2001 proposed rule (66 FR 46575). Based on

the discussion in the petition, we assume they are addressing only service roads and corridors related to powerline construction and maintenance. In our withdrawal, we acknowledged that, although some restrictions were likely to be placed on a powerline company when constructing a new powerline, because of the linear nature of these impacts and the recognition that adjacent habitat will remain intact, we concluded that the activity represented only a limited threat to the species (69 FR 73428). We also noted that no new projects are currently planned by that company, indicating no other powerline-related threats were foreseeable. We have no new information in our files, and the petitioners presented no new information on increased impacts to the butterfly and its habitat from powerlines and associated roads and corridors, since our withdrawal was published in 2004.

The petitioners claim that livestock grazing continues to threaten butterfly habitat. In our 2004 withdrawal of the proposed rule, we found that, because the USFS is managing these allotments for medium-intensity grazing, the effects on the butterfly and its habitat will be minimal and will not result in the butterfly population being compromised (69 FR 76428). We concluded that the current and future occurrence of grazing does not represent a principal factor in the viability of the butterfly and its habitat. The petitioners present no new information about livestock grazing since our 2004 withdrawal of the proposed rule, and we have no new information in our files to indicate that the threat from livestock grazing has increased.

In addressing the threat of fire suppression and wildfire, the petitioners compare the analysis used in our 2001 proposed rule (66 FR 46575) to our analysis in the 2004 withdrawal of the proposed rule (69 FR 76428). In our withdrawal, we used information from the USFS, assessed new and continued efforts to reduce the risk of catastrophic wildfire in the Sacramento Mountains, and concluded that the threat to the butterfly from catastrophic wildfire had been reduced and was no longer significant. We found that fire and activities conducted to reduce the risk of fire may be beneficial by increasing connectivity between areas of suitable butterfly habitat. We have no new information in our files that the threat of wildfires has increased since our 2004 withdrawal of the proposed rule.

The petitioners assert that the manual weed-pulling program to control

noxious weeds does not fully address the threat of noxious weeds to the butterfly. The USFS began the weed-pulling program in 2001, and the program is described in the Conservation Plan (Service *et al.* 2005, p. 34). In our 2004 withdrawal of the proposed listing (69 FR 76428), we found that nonnative vegetation and the application of herbicides are currently being managed, and we concluded that the nonnative vegetation is a not significant threat to the butterfly. The petitioners present no new information since our 2004 withdrawal that the threat of nonnative or noxious weeds has increased.

To support their claims of any threats to the species under Factor A, the petitioners provided no information or references beyond those available to us when we withdrew our proposal to list the butterfly in 2004. We find that the petition does not present substantial information, and we have no information in our files, indicating that the petitioned action may be warranted due to the present or threatened destruction, modification, or curtailment of the habitat or range of the butterfly due to development (including the explanation of the Otero County subdivision Ordinance in 2011), recreation, powerlines and associated roads and corridors, livestock grazing, fire suppression and wildfire, and noxious weeds.

B. Overutilization For Commercial, Recreational, Scientific, or Educational Purposes

The petition asserts that collection threatens the butterfly, reiterating our preliminary finding from the 2001 proposed rule that the butterfly's life history characteristics, attractiveness to collectors due to rarity, and newspaper publications promote collection (66 FR 46575). In our 2004 withdrawal, we concluded that the closure of USFS lands to butterfly collecting in 2000 had reduced the threat of collection and that overcollection was no longer a threat. The petition presents no new information or explanation as to why the butterfly is threatened by collection. We have no new information in our files since the 2004 withdrawal indicating that overutilization for commercial, recreational, scientific, or educational purposes is a threat to the butterfly. Therefore, we find that the petition does not present substantial information indicating that the petitioned action may be warranted due to overutilization for commercial, recreational, scientific, or educational purposes.

C. Disease or Predation

The petitioners provide no information addressing this factor, and we have no information in our files indicating that the petitioned action may be warranted due to disease or predation. We agree that this issue is not applicable to the subspecies at this time.

D. Inadequacy of Existing Regulatory Mechanisms

The petition asserts that the subspecies' status as a Forest Sensitive Species does not provide the binding protections of listing under the Act. The butterfly has been designated by the Regional Forester as a Forest Sensitive Species. As a Forest Sensitive Species, the USFS is required to analyze the butterfly in all applicable National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et. seq.*) documents. In addition, the petitioners claim that new USFS regulations were recently passed that remove any species viability standard protections that were previously provided in 36 CFR 219.20, a regulation requiring the USFS to address ecological conditions necessary to maintain species viability. The petition also asserts that conservation measures resulting from section 7 (of the Act) conferencing no longer apply because the species is no longer proposed for listing. Additionally, the petitioners assert that the butterfly has no State protection, as New Mexico does not recognize insects as "wildlife."

On April 21, 2008, a new USFS planning rule (73 FR 21468) was made final. In that rule, species viability standard protections are removed and there is no requirement similar to section 7 consultation under the Act. However, as part of their multiple-use mandate, the National Forest Management Act (NFMA) requires the USFS to "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives" (16 U.S.C. 1604(g)(3)(B)). The NFMA does not mandate a specific degree of diversity nor does it mandate viability. In practice, the USFS has taken actions to conserve and avoid impacts to the butterfly and its habitat (see USFS 2004a, 2004b, 2007a, 2007b, 2007c, 2007f). As a Forest Sensitive Species, the butterfly has been analyzed in all applicable NEPA documents (USFS 2004b). We do not know whether the butterfly would be designated a species of interest by the USFS under the new planning rule, which would be applied when the Lincoln National Forest Plan is revised in the coming years. Species

of interest are those for which the responsible official determines that management actions may be necessary or desirable to achieve ecological or other multiple-use objectives (USFS planning rule; 73 FR 21468; April 21, 2008). The USFS's new planning rule indicated that once a USFS land and resource management plan has been revised, the sensitive species designation will no longer be needed because species of concern (listed, proposed, or candidate species under the Act) or species of interest will replace them. Although we have no information indicating when the plan might be revised, the USFS' new planning rule states that the responsible official would determine if the ecological conditions to support species of interest would be provided by the plan components for ecosystem diversity. If not, then additional species-specific plan components would be included (73 FR 21468; April 21, 2008). The Service's 2004 withdrawal of the proposed listing rule for the butterfly relied partly on the butterfly's inclusion in the Forest Sensitive Species designation for maintenance of certain protections for the butterfly through NEPA (69 FR 76428). Since these particular protections have been eliminated, and it is unclear whether the butterfly will be designated a species of interest under the new rule, it is unclear whether this change will be adequate to protect the butterfly.

The petitioners state that the butterfly has no State protection, because New Mexico does not recognize insects as "wildlife." This information is correct. We presented this information in the October 7, 2004, draft Conservation Plan for which we invited public comment (69 FR 60178), and we considered this information when we withdrew the proposal to list the species. State statute does not address habitat protection, threats to the larval food plant, or other threats that are not directly related to taking (killing or otherwise harming) individual butterflies. The petition does not indicate how a lack of State regulations threatens the butterfly with extinction. New Mexico State status as an endangered species would only convey protection from collection or intentional harm. As noted above, we believe the USFS' butterfly closure order adequately protects the species from collection. Moreover, the petition and information in our files do not contain substantial information that the butterfly is faced with current and future threats that could be addressed by current State statute.

In summary, the petitioners provide substantial information on changes in

USFS regulations that remove the butterfly from the Forest Sensitive Species status, but the petitioners provide no new information since our 2004 withdrawal of the listing rule on the inadequacy of other existing regulatory mechanisms. In light of all of this information, we find that the petition presents substantial information that the petitioned action may be warranted due to the inadequacy of existing mechanisms.

E. Other Natural or Manmade Factors Affecting the Species' Continued Existence

The petition asserts that insect control, climate change, and extreme weather threaten the butterfly under Factor E. The petitioners state that insect control on private lands was conducted within the Village of Cloudcroft. Newspaper articles provided by the petitioners substantiate that spraying of Confirm 2F was used on an area of private land in June of 2007. In the proposed rule (66 FR 46575; September 6, 2001), we estimated that there were about 4 ha (10 ac) of potentially suitable butterfly habitat within a private development on the east side of the Village of Cloudcroft. From information in our files, we believe this private development is the same area sprayed with Confirm 2F. It is unknown how much of the potentially suitable butterfly habitat was sprayed, because no further information is available in our files or the petition. That all of the 4 ha (10 ac) of potentially suitable butterfly habitat was sprayed is unlikely, because insect control was targeting a fir looper (*Nepytia janetae*) within mixed conifer forests, whereas the butterfly is found within open meadow habitat. If we assume a worst case scenario (that drift from the spray affected all of the 4 ha (10 ac) of potentially suitable butterfly habitat within this area), a small fraction (4 of 1,096 ha (10 of 2,709 ac)) of the suitable butterfly habitat throughout the subspecies' range was affected, and that is not significant. As described below, the fir looper population has declined (USFS 2008), and we do not have any information to indicate that spraying for fir looper control will continue.

The petitioners requested emergency listing due to the perceived immediate threats to the species' continued existence from a proposed aerial spraying in the autumn of 2007 of the biological insecticide *Bacillus thuringiensis* var. *kurstaki* (Btk) to control the fir looper. Btk is activated by the alkaline condition of the mid-gut of larvae that ingest it. Consequently, larvae must ingest Btk for it to be toxic.

During summer and autumn 2007, Otero County and the USFS requested, and we provided, technical assistance on appropriate measures to minimize or avoid impacts to the butterfly (USFS 2007a; Otero County 2007a, 2007b). We advised them that indirect effects to the butterfly from Btk could be significant if the insecticide were applied when larvae of the butterfly were actively feeding (Service 2007a, 2007b, 2007c, 2007d, 2007e, 2007f). The USFS conducted an environmental assessment under NEPA that analyzed the effects to private and Federal lands of Btk spraying on Federal lands (USFS 2007b, 2007c, 2007d). Following that environmental assessment, the USFS, Village of Cloudcroft, and Otero County waited until they and the Service determined from surveys that the larvae of the butterfly were in diapause (inactive and not feeding) to spray Btk to control the fir looper (USFS 2007e, 2007f; Service 2007g, 2007h). Surveys confirmed that larvae of the butterfly were in diapause prior to spraying Btk on November 5, 2007 (USFS 2007f, 2007g, Service 2007g). Btk is sensitive to sunlight, usually becoming inactive within 3 to 7 days after application (USFS 2007c). Therefore, Btk would have been inactive when larvae of the butterfly emerged from diapause in the spring of 2008, indicating that the spraying of Btk during November 2007 did not measurably impact the butterfly. Post-spraying monitoring in the autumn of 2007 determined that the fir looper population had declined to nearly undetectable levels on the Lincoln National Forest and adjacent lands (Anderson 2008). Therefore, the USFS concluded that no spraying was needed during March 2008 (Anderson 2008).

Similar to the spraying that occurred in November 2007, any future proposed insect control by the USFS would be analyzed under NEPA. However, because new USFS regulations remove the butterfly's Forest Sensitive Species status when the land management resource plan for the Lincoln National Forest is revised (see discussion under Factor D), we do not know whether the butterfly will be included in future NEPA analyses. A NEPA analysis is not required for non-Federal agency spraying on private lands, which comprise 49 percent of the butterfly's suitable habitat. We note that the Conservation Plan provided the framework under which the USFS and Otero County requested and received technical assistance on the avoidance of impacts to the butterfly. Through this framework and subsequent dialogue, we found that this process was successful

in avoiding impacts to the butterfly in the autumn of 2007. One conservation action agreed to in the Conservation Plan was for the Service to provide technical assistance on management of the butterfly when requested by a party to the plan. We acknowledge that if Btk or chemical insecticides, such as Carbaryl or Confirm 2F, are applied when larvae of the butterfly are actively feeding, insect control would pose a threat to the butterfly. That such spraying actually occurred in 2007 during the butterfly's active feeding period, although admittedly on only 4 ha (10 ac), indicates that private landowner spraying on private lands may be a threat. The petition does not present references or substantial information regarding insect spraying beyond the autumn of 2007 and spring of 2008. However, insect control may be a threat in the future, based on the fact that spraying occurred in 2007; that the delay of additional spraying to a time when the butterfly was inactive took considerable time and effort by the Village of Cloudcroft, Otero County, USFS, and the Service; and there is uncertainty over how the USFS will address insect control and the butterfly under the new USFS regulations.

The petition asserts that climate change is likely a greater threat to the butterfly than was previously considered by the Service. The petitioners assert that scientific information not considered in, or published subsequent to, the 2004 withdrawal indicates that the impact of climate change will be especially severe in New Mexico and the southwestern United States. They cite a State of New Mexico website, which states that the impacts of climate change and climate variability on the environment include the potential for prolonged drought, severe forest fires, warmer temperatures, increased snowmelt, and reduced snow pack (<http://www.nmclimatechange.us/background-impacts.cfm>). The petitioners also note that harm from climate change to butterflies has been particularly well documented for other species of checkerspot butterflies.

The petitioners cite Parmesan (1996) to support their claim that the Sacramento Mountains checkerspot butterfly will be imperiled by climate change. Parmesan (1996, p. 765) documented a range shift due to population extinctions in the non-migratory Edith's checkerspot butterfly (*Euphydryas editha*) in western North America and presented arguments on why the shift was attributable to climate change. The petition correctly indicates that *Penstemon neomexicanus*, the only plant on which the butterfly is known

to lay eggs, is known within portions of the Capitan Mountains, which are adjacent to and north of the current range of the butterfly in the Sacramento Mountains. The petition asserts that a slight shift in either the butterfly's or *P. neomexicanus*' distribution, productivity, phenology, or other factors resulting from climate change could imperil the butterfly. The apparent northward range "shift" in the Edith's checkerspot butterfly was due to greater population extinctions at southern latitudes, not to a northward expansion of its range (Parmesan 1996, p. 765). Parmesan (1996, pp. 765-766) discussed why these extinctions were most likely attributable to climate change rather than habitat destruction. If the Sacramento Mountains checkerspot butterfly were to respond similarly, it may decline at the southern portion of its range, but not expand northward to the Capitan Mountains.

As noted under Species Information, the elevational range for the Sacramento Mountains checkerspot butterfly is 2,380 to 2,750 m (7,800 to 9,000 ft), and that of *Penstemon neomexicanus*, on which the butterfly lays its eggs, is 1,830 to 2,750 m (6,000 to 9,000 ft) (New Mexico Rare Plant Technical Council 2008, webpage). Thus, the butterfly is at the upper elevational range of the plant on which it depends, so it would be dependent on an upward elevational shift of *P. neomexicanus* for the butterfly to shift to higher elevations.

The petition asserts that extreme weather threatens the butterfly. However, other than reiterating our preliminary finding from the 2001 proposed listing rule (66 FR 46575; September 6, 2001) that this may be a threat to the species, the petition presents no information or explanation regarding why the butterfly is threatened as a result of extreme weather. In our 2004 proposed listing withdrawal, we found that the butterfly can survive and persist despite natural events such as drought (69 FR 76428; December 21, 2004). Since our finding in that 2004 withdrawal, we have no new information in our files indicating that there is any such threat from extreme weather currently or in the foreseeable future.

In summary, the petition and information readily available to us do not provide substantial information that extreme weather threatens the butterfly. The petition and information readily available to us provide substantial information that indicate that the petitioned action may be warranted because pesticide spraying and climate change are other natural or manmade factors that may threaten the butterfly.

Finding

We have reviewed the petition and the literature cited in the petition, and evaluated the information to determine whether the sources cited support the claims made in the petition. We also reviewed reliable information that was readily available in our files to clarify and verify information in the petition. Based on our evaluation of the information provided in the petition, and in accordance with recent applicable court decisions pertaining to 90-day findings, we find that the petition presents substantial scientific information indicating that listing the Sacramento Mountains checkerspot butterfly may be warranted. Our process for making this 90-day finding under section 4(b)(3)(A) of the Act is limited to a determination of whether the information in the petition presents "substantial scientific and commercial information," which is interpreted in our regulations as "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted" (50 CFR 424.14(b)).

The petitioners present substantial information indicating that the butterfly may be threatened by Factor D (inadequacy of existing USFS regulatory mechanisms) and Factor E (pesticide spraying and climate change) throughout the entire range of the butterfly. The petitioners do not present substantial information that Factors A, B, and C are currently, or in the future, considered a threat to the butterfly. Based on this review and evaluation, we find that the petition has presented substantial scientific or commercial information that listing the butterfly throughout all or a portion of its range may be warranted due to current and future threats under Factors D and E. As such, we are initiating a status review to determine whether listing the butterfly under the Act is warranted. We will issue a 12-month finding as to whether any of the petitioned actions are warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial information regarding the butterfly.

It is important to note that the "substantial information" standard for a 90-day finding is in contrast to the Act's "best scientific and commercial data" standard that applies to a 12-month finding as to whether a petitioned action is warranted. A 90-day finding is not a status assessment of the species and does not constitute a status review under the Act. Our final determination as to whether a petitioned action is warranted is not made until we have

completed a thorough status review of the species, which is conducted following a positive 90-day finding. Because the Act's standards for 90-day and 12-month findings are different, as described above, a positive 90-day finding does not mean that the 12-month finding also will be positive.

We encourage interested parties to continue gathering data that will assist with the conservation and monitoring of the butterfly. The petitioners requested that critical habitat be designated for this species. If we determine in our 12-month finding that listing the butterfly is warranted, we will address the designation of critical habitat at the time of the proposed rulemaking.

References Cited

A complete list of all references cited in this finding is available upon request from the New Mexico Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Author

The primary authors of this rule are the New Mexico Ecological Services Office staff members (see **FOR FURTHER INFORMATION CONTACT**).

Authority

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

Dated: November 12, 2008.

Kenneth Stansell,

Acting Director, Fish and Wildlife Service
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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 680

RIN 0648-AW97

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands Crab Rationalization Program

Correction

In proposed rule document E8-28015 starting on page 71598 in the issue of Tuesday, November 25, 2008, make the following correction:

On page 71598, in the first column, under the **DATES** heading, in the second line "November 25, 2008" should read "January 26, 2009".

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