

process, on its Web site (<http://www.nhtsa.dot.gov>).

Issued: July 6, 2011.

Christopher J. Bonanti,

Associate Administrator for Rulemaking.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R4-ES-2011-0012; MO 92210-0-0008]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Bay Skipper as Threatened or Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of petition finding and initiation of status review.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce a 90-day finding on a petition to list the Bay skipper (*Euphyes bayensis*) as threatened or endangered under the Endangered Species Act of 1973, as amended (Act), and to designate critical habitat. Based on our review, we find that the petition presents substantial scientific or commercial information indicating that listing this species may be warranted. Therefore, with the publication of this notice, we are initiating a review of the status of the species to determine if listing the species is warranted. To ensure that this status review is comprehensive, we are requesting scientific and commercial data and other information regarding this species. Based on the status review, we will issue a 12-month finding on the petition, which will address whether the petitioned action is warranted, as provided in section 4(b)(3)(B) of the Act.

DATES: To allow us adequate time to conduct this review, we request that we receive information on or before September 12, 2011. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** section, below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Daylight Time on this date. After September 12, 2011, you must submit information directly to the Field Office (see **FOR FURTHER INFORMATION CONTACT** section below). Please note that we might not be able to address or incorporate information that we receive after the above requested date.

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

(1) *Federal eRulemaking Portal:* <http://www.regulations.gov>. In the box that reads "Enter Keyword or ID," enter the docket number for this finding, which is FWS-R4-ES-2011-0012. Check the box that reads "Open for Comment/Submission," and then click the Search button. You should then see an icon that reads "Submit a Comment." Please ensure that you have found the correct rulemaking before submitting your comment.

(2) *U.S. Mail or Hand-Delivery:* Public Comments Processing, Attn: FWS-R4-ES-2011-0012; 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 we receive on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Request for Information section below for more details).

FOR FURTHER INFORMATION CONTACT:

Stephen Ricks, Field Supervisor, Mississippi Ecological Services Field Office, 6578 Dogwood View Parkway, Jackson, MS, or by telephone 601-321-1122, or facsimile 601-965-4340. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Request for Information

When we make a finding that a petition presents substantial information indicating that listing a species may be warranted, we are required to promptly review the status of the species (status review). For the status review to be complete and based on the best available scientific and commercial information, we request information on the Bay skipper from governmental agencies, Native American Tribes, the scientific community, industry, and any other interested parties. We seek information on:

- (1) The species' biology, range, and population trends, including:
 - (a) Habitat requirements for feeding, breeding, and sheltering;
 - (b) Genetics and taxonomy;
 - (c) Historical and current range, including distribution patterns;
 - (d) Historical and current population levels, and current and projected trends; and
 - (e) Past and ongoing conservation measures for the species, its habitat, or both.

(2) The factors that are the basis for making a listing determination for a species under section 4(a) of the Act, which are:

- (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.

If, after the status review, we determine that listing the Bay skipper is warranted, we will propose critical habitat (see definition in section 3(5)(A) of the Act), as per section 4 of the Act, to the maximum extent prudent and determinable at the time. Therefore, within the geographical range currently occupied by the Bay skipper, we request data and information on:

- (1) What may constitute "physical or biological features essential to the conservation of the species,"
- (2) Where these features are currently found, and
- (3) Whether any of these features may require special management considerations or protection.

In addition, we request data and information on "specific areas outside the geographical area occupied by the species" that are "essential to the conservation of the species." Please provide specific comments and information as to what, if any, critical habitat you think we should propose for designation if the species is proposed for listing, and why such habitat meets the requirements of section 4 of the Act. Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination. Section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or threatened species must be made "solely on the basis of the best scientific and commercial data available."

You may submit your information concerning this status review by one of the methods 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 Web site. If you submit a hardcopy that includes personal

identifying information, you may request at the top of your document that we withhold this personal identifying 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 supporting documentation that we received and used in preparing this finding will be available for you to review at <http://www.regulations.gov>, or you may make an appointment during normal business hours at the U.S. Fish and Wildlife Service, Jackson, MS, Ecological Services Field 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. 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 the finding promptly in the **Federal Register**.

Our standard for substantial scientific or commercial 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 scientific or commercial information was presented, we are required to promptly commence a review of the status of the species, which will be subsequently summarized in our 12-month finding.

The “substantial information” standard for a 90-day finding differs from the Act’s “best scientific and commercial data” standard that applies to a status review to determine whether a petitioned action is warranted. A 90-day finding does not constitute a status review under the Act. In a 12-month finding, we will determine whether a petitioned action is warranted after we have completed a thorough status review of the species, which is conducted following a substantial 90-day finding. Because the Act’s standards for 90-day and 12-month findings are different, as described above, a substantial 90-day finding does not mean that the 12-month finding will result in a warranted finding.

Previous Federal Actions

The Bay skipper was identified as a candidate for protection under the Act in the November 21, 1991, **Federal Register** (56 FR 58804). It was assigned a Category 2 status designation, which was given to those species for which there was some evidence of vulnerability, but for which additional biological information was needed to support a proposed rule to list as endangered or threatened. Assigning categories to candidate species was discontinued in 1996 (Notice of Candidate Review; February 28, 1996; 61 FR 7596), and only species for which the Service has sufficient information on biological vulnerability and threats to support issuance of a proposed rule are now regarded as candidate species. Due to a lack of information on the Bay skipper, it was no longer considered as a candidate species as of 1996.

Petition History

On January 4, 2010, we received a petition dated December 29, 2009, from WildEarth Guardians and Xerces Society for Invertebrate Conservation requesting that the Bay skipper be listed as threatened or endangered and that critical habitat be designated under the Act. The petition clearly identified itself as such and included the requisite identification information for the petitioners, as required by 50 CFR 424.14(a). In a January 25, 2010, letter to the petitioners, we acknowledged receipt of the petition, and stated that due to prior workload and limited funding, we would not be able to address the petition at that time, but would complete the action when workload and funding allowed. On May 6, 2010, we received a 60-day notice of intent (NOI) to sue under the provisions of the Act from the petitioners, alleging that we failed to make a 90-day finding on the petition to list the Bay skipper as threatened or endangered and to designate critical habitat for the species within 90 days of receipt of the petition. No lawsuit has been filed to date.

This notice constitutes the 90-day finding on the January 4, 2010, petition to list the Bay skipper as threatened or endangered and that critical habitat be designated under the Act.

Species Information

The Bay skipper, a small butterfly, was described as *Euphyes bayensis* by Shuey (1989) from Bay St. Louis, Hancock County, Mississippi. Shuey (1993) reported on the phylogeny (the history of the evolution of a species) within the *Euphyes* genus, finding that *E. bayensis* is a species in the *Euphyes*

dion complex. We accept the characterization of the Bay skipper as a species because the most recent taxonomic accounts currently consider the taxon as valid (e.g., Pelham 2008, p. 93).

The Bay skipper has a wingspan of 1.5 to 1.75 inches (in) (3.7 to 4.4 centimeters (cm)). Males are black with a large orange patch on the top of the wings, and have a prominent black stigma (defined mark) on the forewing. The females are dark brown with yellow spots on their forewing and a yellow streak on their hindwing. The ventral (bottom) sides of both front and hind wings are a shade of brown that is paler than the dorsal side of the female and have pale yellow spots on the forewing, with two yellow streaks from the base to the margin (Shuey 1989; Vaughan and Shepherd 2005; Butterflies and Moths of North America (BMNA) 2009). The Bay skipper is similar in appearance to the Dion skipper (*E. dion*), but is distinguished by a brighter shade of orange and narrower black borders on the dorsal (top) side of the wings.

The life history and habitat requirements of the Bay skipper are poorly known. The adult butterfly has two flight periods: late May and September. The gap between the flight periods suggests that the larvae may aestivate (become dormant) in the summer. The larvae also hibernate during the winter. Aestivating and hibernating larvae are probably in the third or fourth instar (period between molts). The larval foodplant is likely sawgrass (*Cladium* sp.); however, this has not been verified (NatureServe 2009 as cited in Petition).

The Bay skipper has been reported from only two locations: Bay St. Louis, Hancock County, Mississippi, and the Anahuac National Wildlife Refuge (NWR) (part of the Texas Chenier Plains NWR Complex), Chambers and Jefferson Counties, Texas. It is possible that it occurs in other locations within sawgrass marsh habitat in other Gulf coastal States, but this has never been verified. The lack of records suggests it has a very limited range and is very rare (Vaughan and Shepherd 2005; NatureServe 2009). The Bay St. Louis locality was severely damaged by Hurricane Katrina in 2005, and it is unknown if the species continues to survive in that locality. The Anahuac NWR and surrounding areas were inundated by Hurricane Ike in 2008, and no Bay skippers have since been found at that location (NatureServe 2009; Petition citing David Sarkozi 2009, pers. comm.).

Evaluation of Information for This Finding

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations at 50 CFR 424 set forth the procedures for adding a species to, or removing a species from, the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act:

(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 considering what factors might constitute threats, we must look beyond the mere exposure of the species to the factor to determine whether the species responds to the factor in a way that causes actual impacts to the species. If there is exposure to a factor, but no response, or only a positive response, that factor is not a threat. If there is exposure and the species responds negatively, the factor may be a threat and we then attempt to determine how significant a threat it is. If the threat is significant, it may drive or contribute to the risk of extinction of the species such that the species may warrant listing as threatened or endangered as those terms are defined by the Act. This does not necessarily require empirical proof of a threat. The combination of exposure and some corroborating evidence of how the species is likely impacted could suffice. The mere identification of factors that could impact a species negatively may not be sufficient to compel a finding that listing may be warranted. The information must contain evidence sufficient to suggest that these factors may be operative threats that act on the species to the point that the species may meet the definition of threatened or endangered under the Act.

In making this 90-day finding, we evaluated whether information regarding threats to the Bay skipper, as presented in the petition and available in our files, is substantial, thereby indicating that the petitioned action may be warranted. Our evaluation of this information is presented below.

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

Information Provided in the Petition

The petition asserts that the habitats of both known populations of the Bay skipper are threatened by sea level rise and extreme weather events, and that the Bay St. Louis population is threatened by development (WildEarth Guardians and Xerces Society 2009 (hereafter cited as Petition), p. 9). The petition asserts that the Comprehensive Conservation Plan (CCP) for the Texas Chenier Plains NWR Complex, which includes the Anahuac NWR (Service 2008), fails to mention or prescribe protections for the Bay skipper on the Anahuac NWR, and that many of the refuge's management actions (e.g., herbicide use, livestock grazing, prescribed fires, rice farming, water control, land management involving conventional farm machinery) may affect the Bay skipper if conducted in its current or potential habitat (Petition 2009, pp. 10–11).

Evaluation of Information Provided in the Petition and Available in Service Files

Information in the Service files is consistent with many of the assertions made in the petition. Habitat for the Bay St. Louis population was severely damaged by Hurricane Katrina in 2005, and the population may have been impacted. The Anahuac NWR was inundated by Hurricane Ike in 2008. In other words, both of the areas where the Bay skipper is found have experienced hurricane impacts in recent years.

Tropical storms and hurricanes frequently occur in the northern Gulf of Mexico (NOAA 1999), and some researchers believe an increase in hurricane intensity, duration, and frequency can be attributed to warming sea temperatures (Karl *et al.* 2009, pp. 5–6). Impacts from these storm events could be compounded by projected sea level rise (Karl *et al.* 2009, pp. 5–6). The Bay skipper is likely to continue to be subject to hurricane impacts and resulting habitat modification and destruction in these areas.

We have no information in our files on potential impacts to the species from management actions on the Anahuac NWR or any information on development threats to the Bay St. Louis population. While the CCP does not specifically address protections for the Bay skipper, pesticide use has been prohibited on the NWR, and wetlands are protected. Herbicides are used on the refuge to combat exotic plant species

(USFWS 2008; Chapter 3, p. 58; Chapter 4, p. 16).

In summary, in our evaluation of the petition and information in our files, we find that the petition provides substantial information indicating that listing the Bay skipper may be warranted due to present or threatened destruction, modification, or curtailment of the species' habitat or range by hurricanes or sea level rise.

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

Information Provided in the Petition

The petition asserts that collecting is a potential threat to the species (Petition 2009, p. 9). It also notes that small population size and limited distribution render the Bay skipper vulnerable to overutilization (Vaughn and Shepherd 2005).

Evaluation of Information Provided in the Petition and Available in Service Files

Although the petition notes that small population size and limited distribution render the Bay skipper vulnerable to overutilization, it does not provide information or evidence that collecting may be a threat now or in the foreseeable future. Furthermore, there is no information in our files on overutilization of the Bay skipper from collection. In our evaluation of the petition and information in our files, we have no substantial information indicating that listing the Bay skipper may be warranted due to overutilization.

C. Disease or Predation

Information Provided in the Petition

The petition notes that adult and larval butterflies are subject to predation by a wide variety of vertebrate and invertebrate wildlife (e.g., birds, reptiles, amphibians, other insects), and that the likely small size of Bay skipper populations increases their vulnerability to extirpation due to disease or predation (Petition 2009, p. 9).

Evaluation of Information Provided in the Petition and Available in Service Files

Although the petition notes that adult and larval butterflies are subject to predation, it does not provide any evidence to support the assertion that disease or predation may be a threat to the Bay skipper now or in the foreseeable future, and we have no information in our files about potential impacts to the Bay skipper due to disease or predation. In our evaluation

of the petition and information in our files, we find that there is no substantial information indicating that listing the Bay skipper may be warranted due to disease or predation.

D. The Inadequacy of Existing Regulatory Mechanisms

Information Provided in the Petition

The petition asserts that the Bay skipper is not adequately protected by Federal or State laws or policies to prevent its endangerment or extinction.

Evaluation of Information Provided in the Petition and Available in Service Files

The Bay skipper is classified as an S1 species in both Texas and Mississippi. The S1 designation means that the species is considered “critically imperiled—State level” under the NatureServe construct. However, no formal or regulatory consideration is provided to the species or its habitat as a result of this classification (NatureServe 2009). The Anahuac NWR is covered under a CCP, but this is a guidance document and not a statute or regulation, and therefore not a regulatory mechanism. Possible effects to the Bay skipper from Refuge management activities are addressed under *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range*. No other potential regulatory mechanisms are discussed in the petition and our review of readily available information indicated there are no existing regulations or laws providing for the protection of this species or its habitat. Because we have no information about existing regulatory mechanisms, we cannot conclude that regulatory mechanisms are inadequate. Therefore, we cannot find that the petition presents substantial

information indicating that listing the Bay skipper may be warranted due to the inadequacy of existing regulatory mechanisms. However, we will investigate this issue further during the status review.

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

Information Provided in the Petition

The petition provides information that effects of climate change threaten the Bay skipper, including the increased frequency of extreme weather events, such as hurricanes, as well as rising sea levels. The effects of hurricanes and sea level rise were addressed above in *A. The Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range*. The petition further asserts that the Bay skipper could be harmed by local pesticide and herbicide use, specifically on the Anahuac NWR (Petition 2009, pp. 11–14).

Evaluation of Information Provided in the Petition and Available in Service Files

We acknowledge that butterflies and their larvae are vulnerable to pesticides; however, the petition does not provide any evidence to indicate that the Bay skipper is being impacted or is likely to be impacted by chemical use, and we have no information in our files about potential impacts to the Bay skipper due to chemical use. In summary, in our evaluation of the petition and information in our files, we find that the petition does not provide substantial information indicating that listing the Bay skipper may be warranted due to other natural or manmade factors affecting the species' continued existence. We will investigate the potential impacts of pesticide and

herbicide use further during our status review.

Finding

On the basis of our determination under section 4(b)(3)(A) of the Act, we determine that the petition presents substantial scientific or commercial information indicating that listing the Bay skipper throughout its entire range may be warranted. This finding is based on information provided under factor A. The information provided under factors B, C, D, and E was not substantial.

Because we have found that the petition presents substantial information indicating that listing the Bay skipper may be warranted, we are initiating a status review to determine whether listing the Bay skipper under the Act is warranted.

References Cited

A complete list of references cited is available on the Internet at <http://www.regulations.gov> and upon request from the Mississippi Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Author

The primary author of this notice is Paul Hartfield of the Mississippi Ecological Services Field Office (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: June 27, 2011.

Gregory E. Siekaniec,
Acting Director, U.S. Fish and Wildlife Service.

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