

Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866. This action will not impose any collection of information subject to the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, other than those previously approved and assigned OMB control number 2060-0243. For additional information concerning these requirements, see 40 CFR part 70. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

In reviewing state operating permit programs submitted pursuant to title V of the Clean Air Act, EPA will approve state programs provided that they meet the requirements of the Clean Air Act and EPA's regulations codified at 40 CFR part 70. In this context, in the absence of a prior existing requirement for the state to use voluntary consensus standards (VCS), EPA has no authority to disapprove a state operating permit program for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews an operating permit program, to use VCS in place of a state program that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective on November 30, 2001.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 28, 2002. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it

extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

#### List of Subjects in 40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Operating permits, Reporting and recordkeeping requirements.

Dated: November 21, 2001.

**Robert W. Varney,**

*Regional Administrator, EPA New England.*

Part 70, title 40 of the Code of Federal Regulations is amended as follows:

#### PART 70—[AMENDED]

1. The authority citation for part 70 continues to read as follows:

**Authority:** 42 U.S.C. 7401, *et seq.*

2. Appendix A to part 70 is amended by revising the entry for Vermont to read as follows:

#### Appendix A to Part 70—Approval Status of State and Local Operating Permits Programs

\* \* \* \* \*

Vermont

(a) Department of Environmental Conservation: submitted on April 28, 1995; interim approval effective on November 1, 1996; revised program submitted on November 15, 2001; full approval effective November 30, 2001.

(b) [Reserved]

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#### DEPARTMENT OF THE INTERIOR

##### Fish and Wildlife Service

#### 50 CFR Part 17

**RIN 1018-A118**

#### Endangered and Threatened Wildlife and Plants; Emergency Rule To List the Carson Wandering Skipper as Endangered

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

**ACTION:** Emergency rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), exercise our emergency authority to list the Carson wandering skipper (*Pseudocopaeodes eunus obscurus*) in California and Nevada as endangered under the

Endangered Species Act of 1973, as amended (Act). The Carson wandering skipper is currently known from only two populations, one in Washoe County, Nevada, and one in Lassen County, California. The subspecies is found in grassland habitats on alkaline substrates.

Extinction could occur from naturally occurring events or other threats due to the small, isolated nature of the remaining populations of the Carson wandering skipper. These threats include habitat destruction, degradation, and fragmentation due to agricultural practices (such as excessive livestock grazing and wetland habitat modification), urban development, and non-native plant invasion. Other threats include collecting, livestock trampling, water exportation projects, road construction, recreation, pesticide drift, and inadequate regulatory mechanisms. We find these threats constitute immediate and significant risk to the Carson wandering skipper.

This emergency rule provides Federal protection pursuant to the Act for the Carson wandering skipper for a period of 240 days. A proposed rule to list the Carson wandering skipper as endangered is published concurrently with this emergency rule in this issue of the **Federal Register** in the proposed rule section.

**DATES:** This emergency rule becomes immediately effective November 29, 2001 and expires July 29, 2002.

**ADDRESSES:** The complete file for this emergency rule is available for inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Nevada Fish and Wildlife Office, 1340 Financial Boulevard, Suite 234, Reno, Nevada 89502.

**FOR FURTHER INFORMATION CONTACT:** Robert D. Williams, Field Supervisor, Nevada Fish and Wildlife Office (see **ADDRESSES** section; telephone 775/861-6300; facsimile 775/861-6301), or Wayne White, Field Supervisor, Sacramento Fish and Wildlife Office, 2800 Cottage Way, Room W-2605, Sacramento, California 95825-1846 (telephone 916/414-6000; facsimile 916/414-6712).

#### SUPPLEMENTARY INFORMATION:

##### Background

The genus *Pseudocopaeodes* in the family Hesperidae and subfamily Hesperinae (grass skippers) contains only one species, *Pseudocopaeodes eunus*. Members of Hesperidae are called skippers because of their powerful flight. While their flight may be faster than other butterflies, they

seldom fly far and few species migrate (Scott 1986).

The species *Pseudocopaodes eunus* consists of five subspecies. The Carson wandering skipper (*Pseudocopaodes eunus obscurus*) is locally distributed in grassland habitats on alkaline substrates in eastern California and western Nevada. *Pseudocopaodes eunus eunus* is located in western desert areas of southern California; *Pseudocopaodes eunus alinea* is found in eastern desert areas of southern California and in southern Nevada; and *P. eunus flavus* is found in western and central Nevada (Brussard 2000). In 1998, what is believed to be an undescribed fifth subspecies of *P. eunus* was found in Mono County, California. Efforts to formally describe this fifth subspecies are being conducted by Mr. George Austin of the Nevada State Museum and Historical Society in Las Vegas, Nevada (Brussard 2000). Except for the Carson wandering skipper, none of these other subspecies of *P. eunus* have common names.

The Carson wandering skipper was collected in 1965 by Peter Herlan, Nevada State Museum, at a location north of U.S. Highway 50, Carson City, Nevada. It was first described by George Austin and John Emmel (1998), based on 51 adult specimens. The body is tawny orange above except for a narrow uniform border and black veins near the border at the outer edge of the wing. The upper forewing and hindwing are orange with darker smudging. The lower surface of the hindwings is pale creamy orange with two creamy rays extending from the base of the wing to its margin. There may be dusky suffusions along the wing veins (Howe 1975). Males tend to average 13.1 millimeters (mm) (0.52 inches (in)) in size (ranging from 12.0–13.9 mm (0.47–0.55 in)). Females average 14.7 mm (0.58 in) in size, and range from 13.4–15.6 mm (0.53–0.61 in). The female's dorsum (upper surface) is similar to the male's but with heavier dusting on the discal (relating to a disk) area of the hindwing. The female's venter (undersurface of the abdomen) is similar in appearance to the male's.

The Carson wandering skipper can be distinguished from the other subspecies of *Pseudocopaodes eunus* by a combination of several characteristics. The Carson wandering skipper is browner and less intensely orange on its dorsal surface (the insect's back), with thicker black coloring along the veins, outer margin, and on both basal surfaces; and it is duller, overall, with an expanse of bright yellow and orange ground color, especially on the ventral surface, interrupted by broadly

darkened veins (Austin and Emmel 1998).

Carson wandering skipper females lay their cream-colored eggs on salt grass (*Distichlis spicata* var. *stricta*), the larval host plant for the subspecies (Scott 1986). This is a common plant species in the saltbush-greasewood community of the intermountain west. Salt grass usually occurs where the water table is high enough to keep its roots saturated for most of the year (West 1988, as cited in Brussard *et al.* 1998).

No other observations have been made of the early life stages of the Carson wandering skipper. However, the Carson wandering skipper's life cycle is likely similar to other species of Hesperinae. Larvae (immature, wingless, often worm-like form) of the subfamily Hesperinae live in silked-leaf nests, and some species make their nests partially underground. Larvae are usually green or tan and have a dark head and black collar. Pupae (intermediate stage between larvae and adult) generally rest in the nest, and larvae generally hibernate (Scott 1986). Some larvae may be able to extend their period of diapause (period of dormancy) for more than one season depending on the individual and environmental conditions (Dr. Peter Brussard, University of Nevada, Reno, pers. comm., 2001). Carson wandering skippers may differ from other *Pseudocopaodes eunus* in producing only one brood per year during June to mid-July (Austin and Emmel 1998). The other subspecies produce a second brood in late July to late September (Austin and Emmel 1998). Additional research is needed to confirm that the Carson wandering skipper produces only one brood per year, however.

Little is known about the specific habitat requirements of the Carson wandering skipper beyond the similarities recognized among known locations of this subspecies. As a result, the habitat requirements stated could apply to the species as a whole (Brussard *et al.* 1999). Habitat requirements for butterflies in general include: (1) Presence of a larval host plant; (2) appropriate thermal environment for larval development and diapause, and adult mate location and oviposition (to lay eggs); and (3) a nectar source (Brussard *et al.* 1999). Based on commonalities of known, occupied sites, suitable habitat for the Carson wandering skipper has the following characteristics: elevation of less than 1,524 meters (5,000 feet); located east of the Sierra Nevada; presence of salt grass; open areas near springs or water; and geothermal activity.

There are no data in the literature on the micro-habitat requirements of the Carson wandering skipper (Brussard *et al.* 1999). However, it is likely that suitable larval habitat is related to the water table. Many salt grass areas are inundated in the spring, and larvae do not develop under water. During wet years, larval survival depends on salt grass areas being above standing water. In dry years, survival is probably related to the timing of the host plant senescence (aging). Therefore, micro-topographic variation (slight irregularities of a land surface) is probably important for larval survival because it provides a greater variety of appropriate habitat over time (Brussard *et al.* 1999). Since the few historic collections of the Carson wandering skipper have been near hot springs, it is possible this subspecies may require the higher water table or ground temperatures associated with these areas (Brussard *et al.* 1999) to provide the appropriate temperatures for successful larval development (Brussard *et al.* 1999).

Adult Carson wandering skippers require nectar for food. Few plants that can serve as nectar sources grow in the highly alkaline soils occupied by salt grass. For a salt grass area to be appropriate habitat for the Carson wandering skipper, an appropriate nectar source must be present and in bloom during the flight season. Plant species known to be used by the Carson wandering skipper for nectar include a mustard (*Thelypodium crispum*), racemose golden-weed (*Pyrrcoma racemosus*), and slender birds-foot trefoil (*Lotus tenuis*) (Brussard *et al.* 1999). If alkaline-tolerant plant species are not present, but there is a fresh-water source to support alkaline-intolerant nectar sources adjacent to the larval host plant, the area may provide suitable habitat (Brussard *et al.* 1999).

No information is available on historic population numbers of the Carson wandering skipper. It is possible that a fairly large population of the subspecies occurred from the Carson Hot Springs site to the Carson River. Outflow from the springs likely supported a water table high enough to support salt grass and a variety of nectar sources. Urban development, water diversions, and wetland manipulations have eliminated most of the habitat type in this area (Brussard 2000).

Likewise, it is possible that appropriate habitat once existed for the Carson wandering skipper between the existing populations in Lassen County, California, and Washoe County, Nevada (P. Brussard, pers. comm., 2001). The population locations are approximately

120 kilometers (km) (75 miles (mi)) apart, and while the dispersal capability of the Carson wandering skipper is unknown, it is unlikely that any current genetic exchange occurs between the two populations. Over time, the habitat between the two populations has become unsuitable and fragmented due to agriculture and development, and the two populations have become isolated from one another. The subspecies likely represents a remnant of a more widely distributed complex of populations in the western Lahontan basin (Brussard *et al.* 1999).

#### Population Sites

Historically, population locations included the type locality found near the Carson Hot Springs in Carson City, Douglas County, Nevada, and one other site in Lassen County, California. When described in Austin and Emmel (1998), specimens from two additional sites, Dechambean Hot Springs at Mono Lake and Hot Springs, Mono County, were assigned, with uncertainty due to their small numbers, to the Carson wandering skipper subspecies. Based on 1998 surveys (Brussard *et al.* 1999), these Mono County specimens would be more appropriately assigned to the currently undescribed subspecies (George Austin, Nevada State Museum and Historical Society, pers. comm., 2001).

Surveys conducted in 1998 throughout potential, suitable habitat in Nevada and California found two new nectar sites occupied by the Carson wandering skipper. One site was located in Washoe County, Nevada, and the other site (two locations) was found in Lassen County, California. The site in Lassen County could be a rediscovery of the area where skippers were collected in the 1970s; however, the collection record is too vague to be certain (P. Brussard, pers. comm., 2001). Despite additional, more limited attempts at finding other populations in 2000 and 2001, none have been found (P. Brussard, pers. comm., 2000; Rebecca Niell, University of Nevada-Reno (UNR), pers. comm., 2001).

#### Carson City, Douglas County Site

The Carson City site was surveyed for the Carson wandering skipper by the UNR from 1997 to 2001. Only five individuals (four males and one female) were observed during surveys in June 1997. One possible sighting of a Carson wandering skipper occurred at a project site in 1998 (Brussard *et al.* 1999). No individuals were observed at this site in 1999 or in 2000 (P. Brussard, pers. comm., 2000). In 2001, searches were again conducted with no individuals observed (R. Niell, pers. comm., 2001).

Habitat changes resulting from drainage manipulations for residential and commercial development are likely responsible for this possible extirpation (Brussard *et al.* 1999). Construction of a freeway bypass will eliminate and fragment the remaining habitat (5 ha (12 ac)) of the Carson wandering skipper at this site.

An area just south of the Carson Hot Springs site was also surveyed in 1997 and 1998. Twelve hectares (ha) (30 acres (ac)) of potential habitat were present (Paul Frost, NDOT, *in litt.* 1998), however, no Carson wandering skippers were found during the surveys (Brussard *et al.* 1999). Approximately 5 ha (12 ac) of this potential habitat will be impacted by the construction of the Carson Highway 395 bypass (Alan Jenne, Nevada Department of Transportation (NDOT), pers. comm., 2001).

Because of habitat degradation and fragmentation, the Carson wandering skipper has probably been extirpated from the Carson Hot Springs site.

#### Washoe County Site

The nectar site in Washoe County occurs on Bureau of Land Management (BLM) administered lands and adjacent private lands. This nectar site is estimated to be about 10 to 12 ha (25 to 30 ac), with approximately half of the site occurring on BLM lands and half on private lands (Brussard *et al.* 1999). The nectar source at this site (racemose golden-weed) is abundant, as is salt grass. A few Carson wandering skippers were seen approximately 1.6 km (1 mi) northeast of the nectar site. This suggests the Carson wandering skipper may occur in small numbers elsewhere in the valley (Brussard *et al.* 1999). Surveys were not conducted in 1999 or 2000 at this site. In 2001, searches of this area were made to confirm the Carson wandering skipper's presence. Five individuals were found at the nectar site on BLM lands; private lands were not searched (Virginia Rivers, Truckee Meadows Community College, pers. comm., 2001).

#### Lassen County Site

The new site found in 1998 in Lassen County, California, occurs on public lands (one location) managed by the California Department of Fish and Game (CDFG) and private lands (one location). In 1998, two individuals were observed on the public lands, while several individuals were observed at a nectar site less than 2 ha (5 ac) in size on the private lands. UNR did not conduct surveys at this site in 1999. Surveys were conducted in 2000, and, while several individuals were seen on the

private property nectar site location, none were seen on the public lands. Salt grass is abundant in this area but the attraction appears to be the nectar source, which is slender birds-foot trefoil. In 2001, searches were conducted to confirm the Carson wandering skipper's presence. A few sightings (three one day and four on another day) were observed on the private property nectar site, but again, none were observed on the nearby public lands (V. Rivers, pers. comm., 2001).

In 1998, collections of four of the *Pseudocopa eodes eunus* subspecies were made for a genetic study. In addition to collections made of the Carson wandering skipper at the Washoe County site (24) and the Lassen County site (25) by UNR researchers, individuals of three other *P. eunus* subspecies (173) were also collected. *Pseudocopa eodes eunus eunus* individuals were not collected due to their scarcity. Genetic analysis was based on an analysis of allozyme (i.e., protein) variation (Brussard *et al.* 1999). Levels of heterozygosity (genetic variability) were low in all but two populations of *P. eunus*, and the average heterozygosity over the nine populations was also low. The low levels of heterozygosity in many of the populations is likely due to repeated extirpation events, recolonizations, and population and genetic bottlenecks throughout the Holocene geologic period to present time (Brussard *et al.* 1999).

#### Previous Federal Action

On May 22, 1984, we published an invertebrate wildlife Notice of Review in the **Federal Register** (49 FR 21664) designating *Pseudocopa eodes eunus* as a category 2 candidate. Category 2 candidates were those species for which we had information indicating that listing may be appropriate, but for which additional information was needed to support the preparation of a proposed rule. The population known as the Carson wandering skipper was included in *P. eunus eunus*; however, in early 1995, we were informed by Mr. George Austin that the Carson wandering skipper was a distinct subspecies, not yet described (G. Austin, pers. comm., 1995). On February 28, 1996, the designation of category 2 species as candidates for listing under the Act (61 FR 7596) was discontinued.

Following an updated assessment of the status of the Carson wandering skipper and its increased vulnerability to threats in 1998, we included this taxon as a candidate species in the

Notice of Review published in the **Federal Register** on October 25, 1999 (64 FR 57533).

On November 10, 2000, we received a petition dated November 9, 2001, from Mr. Scott Hoffman Black, Executive Director, The Xerces Society, to emergency list the Carson wandering skipper as an endangered species throughout its range, and to designate critical habitat concurrent with the listing. We responded in a letter dated February 20, 2001, that we would not publish a petition finding for the Carson wandering skipper because it was already listed as a candidate species in the most recent Notice of Review (64 FR 57533). This meant that we had already determined that its listing was warranted. We indicated we would continue to monitor the status of the Carson wandering skipper, and if an emergency listing was warranted, we would act accordingly, or list the species when not precluded by higher priorities.

In addition, the petitioner requested emergency listing of the entire species. We responded in our February 20, 2001, letter to the petitioner that we did not believe that an emergency situation existed at the time for the remaining subspecies, other than the Carson wandering skipper. Surveys for *Pseudocypselus eunus* spp. were conducted in 1998 throughout potential, suitable habitat in Nevada and California (Brussard *et al.* 1999). Of the 78 sites (48 new; 30 historic) visited, *P. eunus* spp. were found at 14 sites. Of the 30 historic sites, *P. eunus* spp. were found at 8 sites. Seven areas (2 in Nevada; 5 in California) which were historic sites for this species were not visited. We conducted additional status surveys in 2001 for these other subspecies of *P. eunus*, and results of these surveys are pending. These surveys will assist in more appropriately determining their status. If our ongoing status review indicates a listing of the remaining subspecies is warranted, we will act accordingly.

On August 28, 2001, the Service reached an agreement with the Center for Biological Diversity, Southern Appalachian Biodiversity Project, and the California Native Plant Society to complete work on a number of species proposed for listing. Under this agreement, we will issue several final listing decisions, propose a number of other species for listing, and we will review three species for emergency listing, including the Carson wandering skipper (Center for Biological Diversity, *et al. v. Norton*, Civ. No. 01-2063 (JR) (D.D.C.), entered by the Court on October 2, 2001).

### Summary of Factors Affecting the Species

Section 4 of the Act and the regulations (50 CFR part 424) issued to implement the listing provisions of the Act set forth the procedures for adding species to the Federal list. We may determine that a species is endangered or threatened due to one or more of the five factors described in section 4(a)(1) of the Act. These factors and their application to Carson wandering skipper are as follows.

A. *The present or threatened destruction, modification, or curtailment of its habitat or range.* The primary cause of the decline of the Carson wandering skipper is loss of salt grass and wetland habitats from human activities, primarily agricultural uses and development. This includes habitat fragmentation, degradation, and loss due to agricultural uses (such as livestock over-grazing and wetland habitat modification), urban development, non-native plant invasion, road construction, water exportation projects with their subsequent change in water table levels and plant composition, and recreation. Threats at each known or historic site are discussed below.

#### Carson City, Douglas County Site

Habitat at the original Carson City site has been greatly modified over time, and most of it was destroyed by construction of a shopping center (Brussard *et al.* 1999). Several years later, an extension of this population was discovered north of the original location (Brussard *et al.* 1999). The current site includes about 10 ha (24.7 ac) of known and potential Carson wandering skipper habitat (P. Frost, *in litt.* 1998). Collections were made at this site from the late 1960s through the early 1990s, though population numbers were small (Austin and Emmel 1998; Brussard *et al.* 1999). In the 1990s, additional urban development further reduced the remaining habitat, and the site is now completely surrounded by development. Adult Carson wandering skippers have not been observed at this location since 1997.

The Carson wandering skipper has likely been extirpated from the Carson City site due to development and habitat changes resulting from drainage manipulations for residential and commercial development (Brussard *et al.* 1999). Not only has direct loss of habitat occurred, but adjacent development appears to have also impacted the groundwater table, and the salt grass community is being invaded with non-native, upland species such as

cheatgrass (*Bromus tectorum*). Adjacent lands surrounding this site will continue to be developed for commercial and residential use.

The remaining habitat at the type locality will also be fragmented or destroyed by construction of a freeway bypass and associated flood control facilities being planned by the NDOT. The bypass was approved and the right-of-way corridor was purchased several years ago. At the time, this was the only known site occupied by the Carson wandering skipper. The only suitable nectar source available during the Carson wandering skipper's flight season at this site was the native mustard, *Thelypodium crispum* (Brussard *et al.* 1999). Construction of the bypass began in 2000 and impacts to Carson wandering skipper habitat will likely occur in 2002 (Julie Ervin-Holoubek, NDOT, pers. comm., 2001). The alignment will impact approximately 2.4 ha (6 ac) of previously occupied habitat and about 8 ha (20 ac) of the potential habitat remaining at both areas north and south of U.S. 50 (P. Frost, *in litt.* 1998). According to Brussard (2000) this will leave inadequate habitat to support a restored population.

Habitat loss and modifications of the Carson City site have also occurred due to the construction of a wetland mitigation area in the early 1990s to mitigate for wetlands lost approximately 0.8 km (0.5 mi) southwest of this site. This site is located in a highly developed area, with recreational use by walkers and bikers in the remaining open area. The U.S. Army Corps of Engineers (Corps) issued a section 404 permit on March 10, 1993, for a residential housing and golf course project, impacting about 2 ha (5 ac) of wetlands. Mitigation for these impacts involved the creation of 9 ha (22 ac) of intermittent, seasonal, and semi-permanent wetlands adjacent to the existing wetlands (Robert W. Junell, Corps, *in litt.* to Charles L. Macquarie, Lumos and Associates, Inc. 1993; Lumos and Associates, Inc. 1993). To date, this mitigation site has not met its objectives to provide high-value urban wetlands and enhance wetland function (Nancy Kang, Corps, *in litt.* to Dwight Millard, J.F. Bawden and Stanton Park Development 2001).

#### Washoe County Site

Threats at the Washoe County site include excessive livestock grazing and trampling, residential development, increased potential recreational use, such as by off-road vehicles (ORV), a proposed water export project, and impacts associated with pesticide drift.

Current grazing practices on BLM-administered lands at the Washoe County site allow for a November to March grazing season. Although this season of use avoids impacts to adult Carson wandering skipper nectar sources and salt grass during spring and summer, high livestock densities can cause larval mortality through trampling during the winter. On adjacent private lands, cattle densities and timing are not regulated, and cattle have access to nectar sources during the Carson wandering skipper's flight season. While the level of grazing on salt grass has not been measured at this site, cattle readily utilize this dominant forage species (Walt DeVours, BLM, pers. comm., 2001).

Residential development is occurring in the area surrounding the Washoe County site. Increases in domestic wells could impact the water table in the area, resulting in changes to the salt grass community in the valley. As this area becomes more populated, fragmentation and degradation of the Carson wandering skipper's habitat is expected to increase through development and recreational activities. Also, public lands will likely see additional recreational use as the area becomes more developed.

The Nevada State Engineer's Office recently approved change-in-use applications (agricultural to municipal and industrial use) (Hugh Ricci, Nevada Department of Conservation and Natural Resources, Division of Water Resources, *in litt.* 2001) for a private landowner plan to export water from this valley to a neighboring one. This project will involve the collection of up to 2,900 acre-feet per year of surface and ground water through a system of ditches, natural channels, diversion structures, collection facilities, and recovery wells. The recovered water will be treated and exported via pipeline to a neighboring valley (Stantec Consulting, Inc. 2000). Implementation of this project could result in the lowering of the water table in the valley and loss of the salt grass community upon which the Carson wandering skipper population at this site depends. In addition, the construction of facilities could result in direct impacts to Carson wandering skipper habitat in the valley.

Another potential threat is pesticide drift from alfalfa fields located adjacent to the occupied nectar site. Pesticides are used to control pests such as aphids, cutworms, grasshoppers, and mites (Carpenter *et al.* 1998.). Pesticide drift from these fields to the nectar site could eliminate a large part of the Carson wandering skipper population (Brussard 2000).

#### *Lassen County Site*

Threats at the Lassen County site include the invasion of the non-native plant species tall whitetop (*Lepidium latifolium*), and excessive livestock grazing on host plants and trampling of larvae. A water development project, affecting the ground water table, is also of concern.

Whitetop, which was first noted in 2000, has encroached onto the nectar site on private property and has become established in patches of slender birds-foot trefoil, this site's nectar source. Whitetop is a perennial native to Europe and Asia which grows in disturbed sites, wet areas, ditches, roadsides, and cropland. Spreading roots and numerous seeds make this plant difficult to control (Stoddard *et al.* 1996). While visits during 2001 showed no further advancement of whitetop into the nectar site (V. Rivers, pers. comm., 2001), the surrounding countryside, including both public and private lands, is severely infested. Failure to control this invasive species could quickly result in the loss of this small nectar site. Depending on the control methods used (herbicide treatments or mechanical means) and timing, efforts to control this plant species could also impact the Carson wandering skipper population and its habitat at this site.

Cattle have access to the Lassen County site; however, it is unknown at this time what management scenarios are being implemented. As at the Washoe County site, timing of use and densities of livestock can affect the availability of nectar sources and larval survival.

Additional potential threats include attempts to export water from the area to other locations. In 1991, the Nevada State Engineer approved exportation of 13,000 acre-feet of groundwater per year from Honey Lake Valley, in Lassen and Washoe Counties to Lemmon and Spanish Springs Valleys, Washoe County. In 1993, a draft Bedell Flat Pipelines Rights-of-Way, Washoe County, Nevada Environmental Impact Statement was prepared (BLM 1993). If this project, or other similar projects, are implemented, lowering of the water table could occur and result in changes to the salt grass community upon which the Carson wandering skipper depends.

*B. Over-utilization for commercial, recreational, scientific, or educational purposes.* Rare butterflies and moths are highly prized by collectors, and an international trade exists for insect specimens for both live and decorative markets, as well as the specialist trade that supplies hobbyists, collectors, and researchers (Morris *et al.* 1991; Williams

1996). The specialist trade differs from both the live and decorative market in that it concentrates on rare and threatened species (U.S. Department of Justice 1993). In general, the rarer the species, the more valuable it is, and prices may exceed US \$2,000 for rare specimens (Morris *et al.* 1991).

Simply listing a species can result in an increase in commercial or scientific interest, both legal and illegal, which can threaten the species through unauthorized and uncontrolled collection for scientific and/or commercial purposes. The listing of species as threatened or endangered publicizes their rarity and may make them more susceptible to collection by researchers or other interested parties. Even limited collection pressure on small populations can have adverse impacts on their viability.

While there have been no studies on the impact of the removal of individuals from natural populations for this subspecies, it is possible that the Carson wandering skipper has been adversely affected. At the Carson City site, individuals of the Carson wandering skipper are known to have been collected for personal butterfly collections during the late 1960s until the early 1990s, though populations were small (Austin and Emmel 1998; Brussard *et al.* 1999). From 1965 to 1989, at least 86 males and 90 females were collected during 7 different years by various collectors (Austin and Emmel 1998). During this time, this was the only known site on which Carson wandering skipper occurred. The Carson wandering skipper is now believed to have been extirpated from the site. While habitat degradation and loss have occurred at this site, collecting may have also contributed to this extirpation.

In 1998, Carson wandering skipper was collected at the Washoe County and Lassen County sites by UNR researchers for genetic analysis. Only males were collected, and these were taken late in the flight season to minimize impacts to the population (Brussard *et al.* 1999).

The two populations of Carson wandering skipper that remain could face strong pressure from collectors. Since the nectar sites occur along public roadsides, the subspecies is easily accessible, and the limited number and distribution of these populations make this subspecies vulnerable to collectors. Even limited collection from the small populations of Carson wandering skipper could have deleterious effects on its viability and lead to the eventual extinction of this subspecies.

C. *Disease or predation.* Disease is not known to be a factor affecting this subspecies at this time.

Cattle grazing, as discussed under Factor A, is a threat to the species due to grazing impacts to adult nectar sources and the larval host plant. Livestock can also trample the salt grass, causing direct mortality of diapausing larvae. Predation by other species, such as birds or insects, on larvae or adult Carson wandering skippers is likely, but it is unknown how this may affect the population's viability.

D. *The inadequacy of existing regulatory mechanisms.* The Carson wandering skipper occurs on Federal, State, and private lands. Existing regulatory mechanisms do not fully protect this subspecies or its habitats on these lands. Existing regulatory mechanisms that may provide some protection for the Carson wandering skipper include: (1) Federal laws and regulations including the Clean Water Act (CWA); and (2) State laws including the California Environmental Quality Act (CEQA).

#### Federal Laws and Regulations

The Carson wandering skipper appears to be closely associated with wetland habitats. Current regulatory mechanisms, such as section 404 of the CWA, have not precluded development and alteration of these habitats. Section 404 regulations require that applicants obtain a permit from the Corps for projects that place fill material into waters of the United States. Whether an individual or nationwide permit may be required depends upon the activity and the amount of fill proposed. Regulatory mechanisms addressing alterations to stream channels, riparian areas, springs and seeps from various activities such as agricultural activities, development, and road construction have been inadequate to protect the Carson wandering skipper habitat in Nevada and California.

Until publication of this emergency rule, we considered the Carson wandering skipper a candidate species; this designation carries no formal Federal protection under the Act.

Some protection is afforded to the Carson wandering skipper on lands administered by the BLM at the Washoe County site due to their commitment to assist in the conservation of this subspecies through the Cooperative Agreement (CA) signed in 1999. This CA was signed by the Service, NDOT, the Federal Highway Administration (FHWA), and BLM in October 1999. It was developed to outline the actions necessary for the conservation and management of the Carson wandering

skipper. Development of a conservation plan was one activity outlined by the agreement. UNR was contracted by NDOT to prepare a draft conservation plan, which was prepared by UNR in 2000. Additional biological information and agency commitment are needed before this plan can be finalized. However, since signing the CA in 1999, BLM has designated 98 ha (243 ac) of their lands at the Washoe County site as an Area of Critical Environmental Concern. This designation allows BLM discretion in determining actions which can occur within this area (BLM 2001). However, these protections only cover a portion of Carson wandering skipper habitat in the area and are insufficient to protect the species throughout the site.

#### State Laws and Regulations

Although California State laws may provide a measure of protection to the subspecies, these laws are not adequate to protect the Carson wandering skipper and ensure its long-term survival. CEQA pertains to projects on non-Federal lands and requires that a project proponent publicly disclose the potential environmental impacts of proposed projects. Section 15065 of the CEQA Guidelines requires a "finding of significance" if a project has the potential to "reduce the number or restrict the range of a rare or endangered plant or animal" including those that are eligible for listing under CESA. However, under CEQA, where overriding social and economic considerations can be demonstrated, a project may go forward despite significant adverse impacts to a species.

The California Natural Diversity Data Base classifies the Carson wandering skipper as a S1S3 species, which identifies this subspecies as one that is extremely endangered with a restricted range within California (California Natural Diversity Data Base 2001). This designation provides no legal protection in California. The CDFG is unable to protect insects under its current regulations (Pete Bontadelli, CDFG, *in litt.* 1990).

In Nevada, there are no local or State regulations protecting the Carson wandering skipper on State or non-Federal lands. The Nevada Natural Heritage Program ranks the Carson wandering skipper as S1, meaning it is considered in the State of Nevada as critically imperiled due to extreme rarity, imminent threats, or biological factors (Nevada Natural Heritage Program 2000). This designation provides no legal protection in Nevada. The Nevada Division of Wildlife is unable to protect insects under its

current regulations (Nevada Revised Statutes 1999).

E. *Other natural or manmade factors affecting its continued existence.* This subspecies is highly susceptible to extinction as a result of naturally occurring stochastic (random or chance variables) environmental or demographic events because the Carson wandering skipper occurs at only two known isolated locations and in small numbers. These events may be wildfire, increase in disease or predation, or severe weather events such as flooding. Additionally, random demographic effects (e.g., skewed sex ratios) and loss of genetic variability may result in individuals and populations being less able to cope with environmental change, and could cause the loss of one or both of the populations.

In addition, the loss of habitat compromises the ability of the Carson wandering skipper to disperse. Populations remain isolated with no opportunity to migrate or recolonize if conditions become unfavorable.

A wetlands mitigation bank is being established near the Lassen County site. It is located adjacent to existing CDFG lands. This parcel of land has been recently grazed and farmed. The bank is intended to create a minimum of 37 ha (92 ac) of emergent wetlands at this site to mitigate for wetland losses in sagebrush scrub and juniper woodland habitats due to road construction in Lassen and Modoc counties, and the eastern portion of Plumas County. This bank will be managed by CDFG (California Department of Transportation (CalTrans) and CDFG 1998). The site has not been surveyed for the Carson wandering skipper, but potential habitat exists. Depending upon the location of constructed wetlands, loss of Carson wandering skipper habitat could occur. We will continue to work with CalTrans and CDFG regarding implementation of this bank in consideration of the Carson wandering skipper.

#### Reasons for Emergency Determination

Under section 4(b)(7) of the Act, and regulations at 50 CFR 424.20, we must consider development of an emergency rule to list a species if threats to the species constitute an emergency posing significant risk to its continued survival. Such an emergency listing expires 240 days following publication in the **Federal Register** unless, during the 240-day period, we list the species through our normal listing procedures. We discuss below the reasons why emergency listing of the Carson wandering skipper as endangered is necessary. In accordance with the Act,

we will withdraw this emergency rule if, at any time after its publication, we determine that substantial evidence does not exist to warrant such a rule.

The immediate concerns for the Carson wandering skipper are associated with the extremely small number of populations, habitat fragmentation, and significant decrease in its historical range in Nevada and California. While historic population numbers are not known, current population sizes at the two locations appear small. As discussed in the Summary of Factors Affecting the Species, a number of threats face the subspecies. These include habitat destruction, degradation, and fragmentation due to agricultural uses (such as excessive livestock grazing and wetland habitat modification), and non-native plant invasion. Other immediate threats include impacts from collecting, livestock trampling, pesticide drift, and inadequate regulatory mechanisms. Another threat is the approved and proposed water exportation projects. These projects could severely impact Carson wandering skipper habitat through lowering of the water table, and degrading or eliminating the salt grass community upon which the Carson wandering skipper depends.

This subspecies is also vulnerable to chance environmental or demographic events, to which small populations are particularly vulnerable. The combination of only two populations, small range, and restricted habitat makes the subspecies highly susceptible to extinction or extirpation from a significant portion of its range due to random events such as fire, drought, disease, or other occurrences (Shaffer 1981, 1987; Meffe and Carroll 1994). Such events are not usually a concern until the number of populations or geographic distribution become severely limited, as is the case with the subspecies discussed here. Once the number of populations or the population size is reduced, the remnant populations, or portions of populations, have a higher probability of extinction from random events (Primack 1993).

Because the Carson wandering skipper remains at only two known locations, and because both locations are subject to various immediate, ongoing, and future threats as outlined above, we find that the Carson wandering skipper is in imminent danger of extinction throughout all or a significant portion of its range and warrants immediate protection under the Act. Emergency listing the Carson wandering skipper as endangered will increase the regulatory protections and resources available to the subspecies.

### Critical Habitat

Critical habitat is defined in section 3 of the Act as the—(i) specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species, and (II) that may require special management considerations or protection, and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species. “Conservation” means the use of all methods and procedures needed to bring the species to the point at which listing under the Act is no longer necessary.

Section 4(a)(3) of the Act and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, the Secretary of the Interior (Secretary) designate critical habitat at the time the species is determined to be endangered or threatened. Our implementing regulations (50 CFR 424.12(a)) state that critical habitat is not determinable if information sufficient to perform the required analysis of impacts of the designation is lacking, or if the biological needs of the species are not sufficiently well known to allow identification of an area as critical habitat. Section 4(b)(2) of the Act requires us to consider economic and other relevant impacts of designating a particular area as critical habitat on the basis of the best scientific data available. The Secretary may exclude any area from critical habitat if she determines that the benefits of such exclusion outweigh the conservation benefits, unless to do so would result in the extinction of the species.

Because information relevant to the specific biological needs of the Carson wandering skipper is not currently available, we are unable to adequately perform the analysis required to designate critical habitat. Therefore, we find that critical habitat for the Carson wandering skipper is not determinable at this time. We are also concerned that the designation of critical habitat could increase the degree of threat to the species through collecting or from intentional habitat degradation. In the Public Comments Solicited portion of the proposed rule published concurrently with this emergency rule, we specifically solicit information on potential critical habitat, biological information, and information that

would aid our prudence analysis. When a “not determinable” finding is made, we must, within 2 years of the publication date of the original proposed rule, designate critical habitat, unless the designation is found to be not prudent.

We will protect the Carson wandering skipper and its habitat through section 7 consultations to determine whether Federal actions are likely to jeopardize the continued existence of the subspecies, through the recovery process, through enforcement of take prohibitions under section 9 of the Act, and through the section 10 process for activities on non-Federal lands with no Federal nexus.

### Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, development of recovery actions, requirements for Federal protection, and prohibitions against certain activities. Recognition through listing encourages conservation actions by Federal, State, and local agencies, private organizations, and individuals. The Act provides for possible land acquisition and cooperation with the States, and requires that recovery actions be carried out for listed species. We discuss the protection required of Federal agencies, considerations for protection and conservation actions, and the prohibitions against taking and harm for the Carson wandering skipper, in part, below.

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed to be listed or is listed as endangered or threatened, and with respect to its critical habitat, if any is being designated. Federal agencies are required to confer with us informally on any action that is likely to jeopardize the continued existence of a proposed species, or result in destruction or adverse modification of proposed critical habitat. If a species is subsequently listed, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species, or to destroy or adversely modify its critical habitat. If a Federal agency action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with us. Federal agency actions that may require consultation include, but are not limited to, those within the jurisdictions of the Service, BLM, Corps, FHWA, and Natural Resources Conservation Service.



We believe that protection and recovery of the Carson wandering skipper will require reduction of the threats from habitat destruction, degradation, and loss of salt grass and wetland habitats due to excessive livestock grazing, development, water exportation projects, non-native plant invasion, and road construction. Threats from collection, livestock trampling, pesticide drift, and recreation must also be reduced. These threats should be considered when management actions are taken in habitats currently and potentially occupied by the Carson wandering skipper, and areas deemed important for dispersal, and connectivity or corridors between known locations of this subspecies. Monitoring should also be undertaken for any management actions or scientific investigations designed to address these threats or their impacts.

Listing the Carson wandering skipper provides for the development and implementation of a recovery plan for the subspecies. This plan will bring together Federal, State, and regional agency efforts for conservation of the subspecies. A recovery plan will establish a framework for agencies to coordinate their recovery efforts. The plan will set recovery priorities and estimate the costs of the tasks necessary to accomplish the priorities. It will also describe the site-specific management actions necessary to achieve conservation and survival of the subspecies.

Listing will also require us to review any actions that may affect the Carson wandering skipper for lands and activities under Federal jurisdiction, State plans developed pursuant to section 6 of the Act, scientific investigations of efforts to enhance the propagation or survival of the subspecies, pursuant to section 10(a)(1)(A) of the Act, and conservation plans prepared for non-Federal lands and activities pursuant to section 10(a)(1)(B) of the Act.

Federal agencies with management responsibility for the Carson wandering skipper include the Service, in relation to Partners for Fish and Wildlife projects and issuance of section 10(a)(1)(B) permits for habitat conservation plans, and other programs. Other activities on BLM lands could include livestock grazing and associated management activities, sale, exchange, or lease of Federal land containing suitable habitat, recreational activities, or issuance of right-of-way permits for various projects across lands administered by them. Occurrences of this subspecies could potentially be affected by projects requiring a permit

from the Corps under section 404 of the CWA. The Corps is required to consult on permit applications they receive for projects that may affect listed species. Highway construction and maintenance projects that receive funding from the FHWA would be subject to review under section 7 of the Act. Activities authorized under the Natural Resources Conservation Service's Emergency Watershed Protection program, such as fire rehabilitation projects, would also be subject to section 7 review. In addition, activities that are authorized, funded, or administered by Federal agencies on non-Federal lands will be subject to section 7 review.

The Act and implementing regulations found at 50 CFR 17.21 set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. These prohibitions, codified at 50 CFR 17.21, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or attempt any such conduct), import or export, transport in interstate or foreign commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to our agents and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22 and 17.23. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify, to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effects of the listing on proposed and ongoing activities within the subspecies' range. We believe the following actions would not be likely to result in a violation of section 9:

(1) Possession, delivery, including interstate transport and import or export from the United States, involving no commercial activity, of dead Carson wandering skipper that were collected prior to the date of publication of this

emergency listing rule in the **Federal Register**;

(2) Any actions that may affect the Carson wandering skipper that are authorized, funded or carried out by a Federal agency when the action is conducted in accordance with the consultation requirements for listed species pursuant to section 7 of the Act;

(3) Any action taken for scientific research carried out under a recovery permit issued by the Service pursuant to section 10(a)(1)(A) of the Act; and

(4) Land actions or management carried out under a habitat conservation plan approved by the Service pursuant to section 10(a)(1)(B) of the Act, or an approved conservation agreement.

Activities that we believe could potentially result in a violation of section 9 include, but are not limited to:

(1) Unauthorized possession, trapping, handling, or collecting of Carson wandering skipper. Research efforts involving these activities will require a permit under section 10(a)(1)(A) of the Act;

(2) Possession, sale, delivery, carriage, transportation, or shipment of illegally taken Carson wandering skipper;

(3) Activities authorized, funded, or carried out by Federal agencies that may affect the Carson wandering skipper, or its habitat, when such activities are not conducted in accordance with the consultation requirements for listed species under section 7 of the Act; and

(4) Activities (e.g., habitat conversion, excessive livestock grazing, farming, road and trail construction, water development, recreation, development, and unauthorized application of herbicides and pesticides in violation of label restrictions) that directly or indirectly result in the death or injury of adult Carson wandering skippers, or their larvae or eggs, or that modify Carson wandering skipper habitat and significantly affect their essential behavioral patterns including breeding, foraging, sheltering, or other life functions. Otherwise lawful activities that incidentally take Carson wandering skipper, but have no Federal nexus, will require a permit under section 10(a)(1)(B) of the Act.

Questions regarding whether specific activities risk violating section 9 should be directed to the Field Supervisor of the Nevada Fish and Wildlife Office or the Field Supervisor of the Sacramento Fish and Wildlife Office (see **ADDRESSES** section). Requests for copies of the regulations on listed wildlife, and general inquiries regarding prohibitions and issuance of permits under the Act, may be addressed to the U.S. Fish and Wildlife Service, Ecological Services, Endangered Species Permits, 911 N.E.



11th Ave., Portland, Oregon 97232-4181 (telephone 503/231-2063; facsimile 503/231-6243).

### National Environmental Policy Act

We have determined that an environmental assessment and environmental impact statement, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

### Paperwork Reduction Act

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This rule will not impose record keeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor and a person is not required to respond to a collection of

information unless it displays a currently valid OMB control number. The existing OMB control number is 1018-0093 and expires 3/31/2004.

### Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O. 13211) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

### References Cited

A complete list of all references cited herein, as well as others, is available upon request from the Nevada Fish and Wildlife Office (see **ADDRESSES** section).

### Author

The primary author of this emergency rule is Marcy Haworth, U.S. Fish and Wildlife Service, Nevada Fish and Wildlife Office (see **ADDRESSES** section).

### List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

### Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below:

### PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500, unless otherwise noted.

2. In § 17.11(h), add the following, in alphabetical order under INSECTS, to the List of Endangered and Threatened Wildlife:

### § 17.11 Endangered and threatened wildlife.

\* \* \* \* \*

(h) \* \* \*

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
* INSECTS	*	*	*	*	*		*
* Skipper, Carson wandering.	* Pseudocopaedeos eunus obscurus.	* U.S.A. (CA, NV) .....	* U.S.A., (Lassen County, CA; Washoe County, NV).	* E	* 716	* NA	* NA
*	*	*	*	*	*		*

Dated: November 21, 2001.

**Marshall P. Jones, Jr.,**

*Acting Director, Fish and Wildlife Service.*

[FR Doc. 01-29614 Filed 11-28-01; 8:45 am]

**BILLING CODE 4310-55-P**