our ultimate determination as to whether a BOC's sales agency or other marketing arrangement causes its interests to be so intertwined with the interests of a particular alarm monitoring service provider that the BOC itself may be considered to be ''engag[ed] in the provision'' of alarm monitoring service.

7. In this Order, we clarify our rationale for taking into account whether a BOC's sales agency or other marketing arrangement is available on a non-discriminatory basis in assessing whether the BOC is engaged in the ''provision'' or alarm monitoring service We strongly disagree with SBC that the availability of sales agency or other marketing arrangements on a nondiscriminatory basis has no relevance in determining whether a BOC is engaged in the provision of alarm monitoring services. While the Commission may consider a variety of other factors as well, the presence of sales agency or other marketing arrangements with multiple alarm monitoring service providers is an indication that the BOC's interests in such arrangements are limited only to the provision of the sales agency or marketing component of the service. Alternatively, to the extent that a BOC makes a sales agency or other marketing arrangement available to any alarm monitoring service provider on the same terms and conditions, such availability is evidence that the BOC's interests are independent of, and not intertwined with, a particular alarm monitoring service provider. Therefore, in the absence of actual sales agency or other marketing arrangements with multiple alarm monitoring service providers, a commitment to make such arrangements available on a nondiscriminatory basis would be evidence—to be considered along with other factors—that a BOC's interests are independent of, and distinct from, any particular alarm monitoring service provider. Accordingly, we do not disturb our previous finding that the availability of sales agency or other marketing arrangements on a nondiscriminatory basis is relevant to whether a BOC is engaged in the provision of alarm monitoring services.

I. Ordering Clauses

8. Pursuant to sections 1–4, 201–205, 214, 275, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151–154, 201–205, 214, 275, 303(r), this Order on Reconsideration in CC Docket No. 96–152 is adopted.

9. The petition for reconsideration filed by Southwestern Bell Telephone Company is denied in its entirety, as described herein.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 00–2363 Filed 2–2–00; 8:45 am]

BILLING CODE 6712–01–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AE82

Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for the Plant Yreka Phlox from Siskiyou County, CA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine endangered status pursuant to the Endangered Species Act (Act) of 1973, as amended, for *Phlox hirsuta* (Yreka phlox). This perennial plant species is known only from two locations in Siskiyou County, California. A third location, near Etna Mills, California, has been searched, but no plants or habitats have been found since 1930. The primary threats to *P. hirsuta* include urbanization, inadequate State regulatory mechanisms, and extirpation from random events due to the small number of populations and limited range of the species. This rule implements the Federal protections and recovery provisions afforded by the Act for this plant.

DATES: Effective March 6, 2000.

ADDRESSES: The complete file for this rule is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 2800 Cottage Way, Suite W2605, Sacramento, California 95825–1846.

FOR FURTHER INFORMATION CONTACT: Kirsten Tarp or Jan Knight, Sacramento Fish and Wildlife Office (see **ADDRESSES** section) (telephone 916/414–6645; facsimile 916/414–6710).

SUPPLEMENTARY INFORMATION:

Background

Phlox hirsuta (Yreka phlox) is endemic to Siskiyou County, California, where it grows on serpentine slopes in the vicinity of the City of Yreka (California Native Plant Society (CNPS) 1985). Serpentine soils are rocky mineral soils consisting mostly of ultramafic rocks (rocks with unusually large amounts of magnesium and iron); the large amount of magnesium in the soil gives it a green mottled color. Ultramafic rocks are found discontinuously throughout California, in the Sierra Nevada and in the Coast Ranges from Santa Barbara County, California, to British Columbia. Soils produced from ultramafic rocks have characteristic physical and chemical properties, such as high concentrations of magnesium, chromium, and nickel, and low concentrations of calcium, nitrogen, potassium, and phosphorus. Serpentine soils alter the pattern of vegetation and plant species composition nearly everywhere they occur. While serpentine soils are inhospitable for the growth of most plants, some plants are wholly or largely restricted to serpentine substrates (Kruckeberg 1984).

Elias Nelson (1899) described *Phlox hirsuta* based on a collection made by Edward L. Greene in 1876 near Yreka, Siskiyou County, California. Willis L. Jepson (1943) reduced the species to varietal status, treating the taxon as *Phlox stansburyi* var. *hirsuta.* Edgar Wherry (1955) in his monograph of the genus *Phlox* and most recently Patterson and Wilken (1993) recognize this taxon as *Phlox hirsuta* E. E. Nelson.

Phlox hirsuta is a perennial subshrub in the phlox family (Polemoniaceae). The species grows 5 to 15 centimeters (cm) (2 to 5.9 inches (in)) high from a stout, woody base and is hairy throughout. Narrowly lanceolate to ovate leaves with glandular margins are crowded on the stem. The leaves are 1.5 to 3 cm (0.6 to 1.2 in) long and 4 to 7 millimeters (mm) (0.2 to 0.3 in) wide. Pink to purple flowers appear from April to June. The corollas (petals) of the flowers are 12 to 15 mm (0.5 to 0.6 in) long and are smooth-margined at the apex (tip) (CNPS 1977, 1985). The 5 to 8 mm (0.2 to 0.3 in) style (female reproductive organ in a plant) is contained within the corolla tube (tube formed by the flower petals) (CNPS 1977, 1985; Pattersen and Wilken 1993). Several other phlox species may occur within the range of *P. hirsuta.* Of these, *P. speciosa* (showy phlox) has notched petals and grows to 15 to 40 cm (5.9 to 15.8 in), considerably taller than *P. hirsuta. Phlox adsurgens* (northern phlox) is also larger than *P. hirsuta* growing to 15 to 30 cm (5.9 to 11.8 in). In addition, *P. adsurgens* blooms later (from June to August) than *P. hirsuta* and is glabrous (lacking hairs and glands) rather than hairy. Prostrate (lying flat on the ground) to decumbent (mostly lying on the ground but with

tips curving up) stems and herbage lacking glands separate *P. diffusa* (spreading phlox) from *P. hirsuta* (CNPS 1977, 1985). Although found at the same latitudes, *P. stansburyi* (Stansbury's phlox) occurs 112 kilometers (km) (70 miles (mi)) farther to the east in Lassen and Modoc Counties (CNPS 1977). *Phlox cespitosa* is glandular-hairy, has a matted growth habit, and is one of several species of phlox that forms mats (Hickman 1993 third printing with corrections 1996), which is unlike the erect stem, open branch habit of *P. hirsuta.*

Phlox hirsuta is found on serpentine soils at elevations from 880 to 1,340 meters (2,800 to 4,400 feet) in association with *Pinus jeffreyi* (Jeffrey pine), *Calocedrus decurrens* (incense cedar), and *Juniperus* spp. (junipers) (CNPS 1985; California Department of Fish and Game (CDFG) 1986; California Natural Diversity Data Base (CNDDB) 1997). *Phlox hirsuta* is known from only two locations in the vicinity of Yreka, California. One occurrence is an open ridge in a juniper woodland within the city limits of Yreka (CNPS 1977, 1985; CNDDB 1997). Estimates of the area occupied by the occurrence range from approximately 15 hectares (ha) (37 acres (ac)) (Grant and Virginia Fletcher, *in litt.* 1995) to approximately 36 ha (90 ac) (Nancy Kang, Service, *in litt.* 1995a). Other extreme serpentine sites searched in the area do not support additional populations of *Phlox hirsuta* (Adams 1987). The second occurrence is about 8 to 10 km (5 to 6 mi) southwest of Yreka along California State Highway 3 in an open Jeffrey pine forest (CNPS 1977, 1985; CNDDB 1997) and includes approximately 65 ha (160 ac) of occupied habitat (Service maps on file). A third location, where the species was last reported in 1930, is in the vicinity of Mill Creek near Etna Mills. The area was searched, but no plants or appropriate habitats were identified (CNPS 1985), and the location may be incorrect (CDFG 1986; Adams 1987). Surveys have been conducted on 80 percent of the potential habitat (defined as the presence of suitable soils) on Klamath National Forest (Ken Fuller and Diane Elam, Service, *in litt.* 1997; Barbara Williams, Klamath National Forest, pers. comm. 1997) and Bureau of Land Management (Joe Molter, Bureau of Land Management, pers. comm. 1997) lands within the Redding Resource Area; no new populations of *P. hirsuta* have been discovered.

Land ownership of the two occurrences of *Phlox hirsuta* is a mixture of private, the City of Yreka, and the US Forest Service (CNDDB 1997). The City of Yreka occurrence of *P. hirsuta* is the more vigorous and dense of the two occurrences (Linda Barker, Klamath National Forest, *in litt.* 1985; Adams 1987; CNDDB 1997). Part of the *P. hirsuta* occurrence in the City of Yreka is owned by the City of Yreka; the remainder is privately owned (Larry Bacon, City of Yreka, pers. comm. 1997). The Highway 3 occurrence is partially on US Forest Service lands on the Klamath National Forest, partially within a State highway right-of-way, and partially privately owned (CDFG 1986; CNDDB 1997). Approximately 50 percent of occupied habitat at the Highway 3 occurrence and 25 percent of the occupied habitat of the species is on land administered by the Klamath National Forest (based on maps in Service files; B. Williams, pers. comm. 1997). *Phlox hirsuta* is threatened by urbanization at the City of Yreka location and by inadequate State regulatory mechanisms throughout its range. The small number of populations and small range of the species also make it vulnerable to decline or extirpation due to random events throughout its range.

Previous Federal Action

Federal action on *Phlox hirsuta* began as a result of section 12 of the Act, which directed the Secretary of the Smithsonian Institution to prepare a report on those plants considered to be endangered, threatened, or extinct in the United States. This report, designated as House Document No. 94–51, was presented to Congress on January 9, 1975, and included *P. hirsuta* as an endangered species. We published a notice in the July 1, 1975, **Federal Register** (40 FR 27823), announcing our decision to treat the Smithsonian report as a petition within the context of section 4(c)(2) (now section 4(b)(3) of the Act) and our intention to review the status of *P. hirsuta.* On June 16, 1976, we published a proposal in the **Federal Register** (41 FR 24523) to determine approximately 1,700 vascular plant taxa as endangered species pursuant to section 4 of the Act. The list of 1,700 plant taxa, which included *P. hirsuta*, was assembled on the basis of comments and data received by the Smithsonian Institution and us in response to House Document No. 94–51 and the July 1, 1975, **Federal Register** publication.

We published an updated Notice of Review for plants on December 15, 1980 (45 FR 82480), that identified those plants currently being considered for listing as endangered or threatened. We included *Phlox hirsuta* as a category 1 candidate species. Category 1 candidates were defined as taxa for which we had on file substantial information on biological vulnerability and threats to support preparation of listing proposals. Our November 28, 1983, supplement to the Notice of Review (48 FR 53640) as well as the subsequent revision on September 27, 1985 (50 FR 39526), included *P. hirsuta* as a category 2 candidate. Category 2 taxa were those for which data indicated listing was possibly appropriate, but for which substantial data on biological vulnerability and threats were not currently known or on file to support a listing proposal.

We revised the plant notice of review again on February 21, 1990 (55 FR 6184), and September 30, 1993 (50 FR 51143). In both notices, we included *Phlox hirsuta* as a category 1 candidate. In our February 28, 1996, Notice of Review (61 FR 7596), we ceased using the category designations and included *P. hirsuta* as a candidate species. Candidate species are those taxa for which we have on file sufficient information on biological vulnerability and threats to support proposals to list the species as threatened or endangered.

Section 4(b)(3)(B) of the Act requires the Secretary to make certain findings on pending petitions within 12 months of their receipt. Section 2(b)(1) of the 1982 amendments further requires that all petitions pending on October 13, 1982, be treated as having been newly submitted on that date. That provision of the Act applied to *Phlox hirsuta*, because the 1975 Smithsonian report had been accepted as a petition. On October 13, 1982, we found that the petitioned listing of the species was warranted, but precluded by other pending listing actions, in accordance with section 4(b)(3)(B)(iii) of the Act; notification of this finding was published on January 20, 1984 (49 FR 2485). Such a finding requires the petition to be recycled, pursuant to section 4(b)(3)(C)(i) of the Act. The finding was reviewed annually in October of 1984 through 1997.

On April 1, 1998, we published a proposed rule to list *Phlox hirsuta* as an endangered species in the **Federal Register** (63 FR 15820). The comment period was open until June 1, 1998. With publication of this final rule, we now determine that *P. hirsuta* is endangered.

The processing of this final rule conforms with our Listing Priority Guidance published in the **Federal Register** on October 22, 1999 (64 FR 57114). The guidance clarifies the order in which we will process rulemakings. Highest priority is processing emergency listing rules for any species determined to face a significant and

imminent risk to its well-being (Priority 1). Second priority (Priority 2) is processing final determinations on proposed additions to the lists of endangered and threatened wildlife and plants. Third priority is processing new proposals to add species to the lists. The processing of administrative petition findings (petitions filed under section 4 of the Act) is the fourth priority. The processing of critical habitat determinations (prudency and determinability decisions) and proposed or final designations of critical habitat will no longer be subject to prioritization under the Listing Priority Guidance. This final rule for *Phlox hirsuta* is a Priority 2 action and is being completed in accordance with the current Listing Priority Guidance.

We have updated this rule to reflect any changes in distribution, status, and threats since publishing the proposed rule and to incorporate information obtained through the public comment period. This additional information did not alter our decision to list these species.

Summary of Comments and Recommendations

In the proposed rule published April 1, 1998, in the **Federal Register** (63 FR 15820) and associated notifications, we requested all interested parties to submit factual reports or information that might contribute to development of a final rule. We contacted and requested comments from appropriate Federal agencies, State agencies, county and city governments, scientific organizations, and other interested parties. We published an announcement of the proposed rule in the *Siskiyou Daily News* on April 3, 1998, which invited general public comment. The public comment period closed on June 1, 1998. We received no request for a public hearing.

During the public comment period, 22 individuals or agencies submitted comments. Four commenters supported the listing, 11 commenters opposed the listing, and 7 commenters were neutral. Supporting comments were received from the State and local chapter of the California Native Plant Society and two private citizens. Opposing comments were received from the Pacific Legal Foundation and 10 private citizens. Opposing comments and other comments questioning the proposed rule have been organized into specific issues. We summarized these issues and our response to each as follows:

Issue 1: One commenter opposed the listing of *Phlox hirsuta*, stating that the Federal Government lacks authority under the Commerce Clause of the Constitution to regulate this plant species.

Service Response: A recent decision in the United States Court of Appeals for the District of Columbia Circuit *National Association of Home Builders of the U.S.* v. *Babbitt,* 130 F.3d 1041 (D.C. Cir. 1997) makes it clear in its application of the test used in the United States Supreme Court case, *United States* v. *Lopez*, 514 U.S. 549 (1995), that regulation of endangered species limited to one State under the Act is within Congress' Commerce Clause power. On June 22, 1998, the Supreme Court declined to accept an appeal of this case (118 S. Ct. 2340 (1998)). Therefore, our application of the Act to *Phlox hirsuta* is constitutional.

Issue 2: Two commenters stated that existing State regulations, such as the California Environmental Quality Act (CEQA) regulatory mechanisms, were sufficient to protect *Phlox hirsuta*, and thought that federally listing *P. hirsuta* would be a duplication of effort.

Service Response: We believe that the existing State regulatory mechanisms are inadequate to protect *Phlox hirsuta*. Please see factor D in the ''Summary of Factors Affecting the Species,'' section in this rule.

We do not believe that federally listing *Phlox hirsuta* would be a duplication of effort. Federal and State regulations complement each other. As discussed further in factor D in the ''Summary of Factors Affecting the Species'' section, the CEQA and California Endangered Species Act (CESA) apply to actions on private and State lands. As applied to plant species, the Federal Endangered Species Act primarily covers Federal land and Federal actions that may affect proposed and listed species.

Issue 3: Three commenters questioned the rarity of *Phlox hirsuta*. One of the commenters, in response to seeing an article in the *Siskiyou Daily News*, stated there is a lot of Yreka phlox growing in Siskiyou and Shasta Counties. Another commenter provided a long list of places to check. A third commenter provided photos of *Phlox* occurring in Scott Valley, noting that these plants appear to be very similar to the photo of *Phlox hirsuta* published in the *Siskiyou Daily News* on April 3, 1998.

Service Response: We maintain that *Phlox hirsuta* is a very rare plant. As discussed in the ''Background'' section of this rule, several other *Phlox* species, that are much more abundant, may occur within the range of *Phlox hirsuta*. We sent the photos of *Phlox* from Scott Valley to Barbara Williams, Forest Botanist for the Klamath National Forest, who identified the *Phlox* as *Phlox diffusa*.

Issue 4: One commenter stated that we should consider the economic effects of the listing on the local economies where the plant occurs.

Service Response: Under section 4(b)(1)(A) of the Act, a listing determination must be based solely on the best scientific and commercial data available about whether a species meets the Act's definition of a threatened or endangered species. The legislative history of this provision clearly states the intent of Congress to ''ensure'' that listing decisions are ''based solely on biological criteria and to prevent non-biological considerations from affecting such decisions,'' H.R. Rep. NO. 97–835, 97th Cong., 2nd Sess. 19 (1982). As further stated in the legislative history, ''applying economic criteria . . . to any phase of the species listing process is applying economics to the determinations made under section 4 of the Act and is specifically rejected by the inclusion of the word 'solely' in the legislation,'' H.R. Rep. NO. 97–835, 97th Cong. 2nd Sess. 19 (1982). Because we are precluded from considering economic impacts in a final decision on a proposed listing, we did not examine such impacts.

Issue 5: Three commenters were concerned the listing would violate private property rights under the Fifth Amendment to the US Constitution. A fourth commenter stated that public and private property owners should be adequately compensated for setting aside land for *Phlox hirsuta*.

Service Response: We disagree that the listing of *Phlox hirsuta* would constitute a taking of private property in violation of the Fifth Amendment to the Constitution. The regulatory protection afforded listed plant species under the Act is limited. In particular, section 9 of the Act does not prohibit the ''take'' of listed plant species on private lands. Generally, as applied to private property, only the removal, damage, or destruction of listed plant species in violation of a State law or regulation or in the course of a violation of a State criminal trespass law is a violation of the Act. Further, the mere issuance of a regulation, like the enactment of a statute, is rarely sufficient to establish that private property has been taken unless the regulation itself appears to deny the property owner economically viable use of personal property. In order to establish that their properties have been taken as a result of a regulatory action, such as the listing of a species, property owners must first initiate an attempt to utilize their property and

receive a determination regarding the level of use that is less than allowed prior to the listing. Property owners must ordinarily apply for all available permits and waivers before takings could potentially be established. The commenters have not provided any cogent legal basis for their assertions that listing *Phlox hirsuta* will result in a Fifth Amendment taking of private property.

Issue 6: Several commenters were concerned about how private landowners may be affected by the listing of *Phlox hirsuta*.

Service Response: Portions of the two *Phlox hirsuta* populations do grow on private land. As noted above, Federal listing does not restrict the damage or destruction of listed plants due to otherwise lawful private activities on private land beyond any level of protection that may be provided under State law. Federal listing of plants does not restrict any uses of privately owned land unless Federal funding or a Federal permit is involved. Listing *Phlox hirsuta* as endangered likely will not affect logging, farming, or ranching operations, including cattle grazing, on private land. Other activities that do not violate the taking prohibitions of section 9(a)(2) of the Act, as well as prohibited activities, are discussed further under the ''Available Conservation Measures'' section of this rule.

Issue 7: Four commenters questioned the prudence of saving endangered species.

Service Response: The Act directs us to conserve endangered and threatened species. The Act reflects the value Congress and the American people place upon the biological diversity of the United States. When a species goes extinct, part of our natural heritage has been lost and cannot be replaced. Additionally, every species is part of the biological network that supports all life. A species in decline is a sign that something may be wrong in the environment. By addressing the causes of a plant or animal's decline we are protecting the environment on which we all depend.

Issue 8: One commenter asked how the threats to *Phlox hirsuta* might be eliminated.

Service Response: Generally, recovery strategies for plants focus first on protection and management of known populations. This process would involve working with landowners to avoid adverse effects to the species. If use of private land does not involve Federal funding or permitting, or violate a State law, we do not have the authority to prevent any action that might affect federally listed plants. In these situations, the Service hopes that private landowners will work with us voluntarily to minimize the effects of their projects to listed species. When actions involve Federal land (as with U.S. Forest Service land) or Federal funding (as may be the case with California Department of Transportation (Caltrans) activities), we work with the Federal agency involved to minimize effects to listed species. When plant species consist of very few populations and/or very small ranges, like *Phlox hirsuta*, recovery strategies also include collection of seed for storage in botanic gardens. This action is designed to prevent extinction of the species due to catastrophic events (such as a flood) and to provide seeds for introduction to other sites, should we find that introductions are appropriate.

Issue 9: Three commenters wanted to know the difference between *Phlox hirsuta* and other phloxes such as ''common phlox,'' *P. caespitosa* (tufted phlox), and *P. diffusa* (spreading phlox).

Service Response: The Jepson Manual, Higher Plants of California (Hickman 1993 third printing with corrections 1996), provides the technical description of differences in these species. We recognize The Jepson Manual as the most recently accepted taxonomic treatment of plants in California. The Jepson Manual is the most recent taxonomic identification key (or flora, *i.e.*, a treatise on the plants of an area) for plants of California, and the flora to which we refer for plant taxonomy. Earlier treatments of *P. caespitosa*, and its varieties, suggest it has smaller flowers than *P. hirsuta*. All of the treatments also describe *P. caespitosa*, and its varieties, as having a densely clumped (not open), tufted, or cushion-like growth form. In contrast, *P. hirsuta* is described as a subshrub (small shrub) having an erect stem and open branches. Please see the ''Background'' section of this rule for a discussion on how *P. hirsuta* differs from *P. diffusa* and other common phloxes.

Peer Review

In accordance with Interagency Cooperative Policy published on July 1, 1994 (59 FR 34270), we solicited formal scientific peer review and expert opinions of three independent and appropriate specialists regarding pertinent scientific or commercial data and assumptions relating to the taxonomy, population status, and supportive biological and ecological information for the proposed plant.

Only one of the three requested reviewers provided comments. This reviewer supported the listing of *Phlox hirsuta* and commented specifically on the rarity of *P. hirsuta*. The reviewer stated that a number of botanists and other professionals interested in *Phlox*, in addition to those mentioned in the proposed rule, have searched very carefully for *P. hirsuta* populations without success. The reviewer thought that finding additional sites for *P. hirsuta* is very unlikely.

Summary of Factors Affecting the Species

Section 4 of the Act (16 U.S.C. 1533) 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 lists. A species may be determined to be endangered or threatened due to one or more of the five factors described in section 4(a)(1). These factors and their application to *Phlox hirsuta* E.E. Nelson (Yreka phlox) are as follows:

A. *The present or threatened destruction, modification, or curtailment of its habitat or range.* The *Phlox hirsuta* population within the City of Yreka represents at least 18 percent, and possibly 45 percent, of occupied habitat for the species (calculated from Service records). This population is threatened by development, with the majority of the site already subdivided into lots for development (CNPS 1985; CDFG 1986). Eight of the subdivision lots support *P. hirsuta*; of these eight, seven have *P. hirsuta* on at least 75 percent of the lot (N. Kang, *in litt.* 1995a). Six of the eight lots are privately owned, and two are owned by the City of Yreka. Additionally, a smaller piece of land in the same area supports *P. hirsuta* and is also owned by the City (N. Kang, *in litt.* 1995a; L. Bacon, pers. comm. 1997). The *P. hirsuta* occurrence within the City of Yreka has been disturbed by road construction associated with the subdivision (CNPS 1985; CDFG 1986). An unmaintained roadway bisects the occurrence and likely represents permanent destruction of habitat at the site (N. Kang, *in litt.* 1995a). Additional disturbance resulted from grading for a house pad on one lot in 1994; *Phlox hirsuta* has not reinvaded the disturbed area (N. Kang, *in litt.* 1995a, 1995b). For most of the lots in the subdivision, ''the likely ones to be developed currently provide *P. hirsuta* habitat'' (N. Kang, *in litt.* 1995a, 1995b). Because *P. hirsuta* plants are fairly evenly distributed across the lots, strategic placement of development in occupied habitat would not necessarily minimize impacts to the species. Additionally, over the long-term, private landowners may not maintain their properties in a manner

consistent with protection of the plants and their habitat (N. Kang, *in litt.* 1995a). Formerly, some lots at the site were registered with The Nature Conservancy landowner contact program, but that program no longer exists (Lynn Lozier, The Nature Conservancy, pers. comm. 1997). While we are unaware of specific development plans on any lots at this time, a ''for sale'' sign was posted on the private property in May 1997 (K. Fuller and D. Elam, *in litt.* 1997).

The only other occurrence of *Phlox hirsuta*, located along California State Highway 3, has been disturbed in the past by logging and road construction. Although selective logging (CNPS 1985; Adams 1987) resulted in roads and bulldozer trails through the site (Adams 1987), logging is probably not a threat to *P. hirsuta* at this time (K. Fuller and D. Elam, *in litt.* 1997; B. Williams, pers. comm. 1997). Thirty years ago, the realignment of Highway 3 impacted part of this occurrence (Sharon Stacey, Caltrans, pers. comm. 1996). The area has since been designated by Caltrans as an Environmentally Sensitive Area (S. Stacey, pers. comm. 1998), which provides limited protection in that it requires acknowledgment of a sensitive species occurrence in project planning. Although road maintenance crews are to be made aware that no new ground is to be disturbed along this stretch of highway (Bob Sheffield, Caltrans, pers. comm. 1997), the portion of the occurrence within the Caltrans right-of-way could be disturbed by road maintenance (Charlotte Bowen, Caltrans, *in litt.* 1991). The area within the right-of-way consists of 5 small subpopulations with approximately 100 plants, occupying less than 0.8 hectare (2 ac) along 4 km (2.5 mi) of California State Highway 3. While encroaching development has been considered to be a potential threat to the plants occurring on private lands at the Highway 3 site (CNPS 1985; CDFG 1986), the threat from development at this site does not appear imminent.

B. *Overutilization for commercial, recreational, scientific, or educational purposes.* Overutilization is not known to be a threat to *Phlox hirsuta*, although it has been suggested that the species may be of interest to rock garden enthusiasts (CNPS 1977).

C. *Disease or predation.* Disease presents no known threat to Phlox hirsuta. Parts of the Highway 3 site have been grazed in the past, perhaps by trespassing cattle (CNPS 1985; Adams 1987). However, grazing is probably not a threat to *P. hirsuta* at this time (K. Fuller and D. Elam, *in litt.* 1997; B. Williams, pers. comm. 1997).

D. *The inadequacy of existing regulatory mechanisms.* The State of California Fish and Game Commission (CFGC) listed *Phlox hirsuta* as an endangered species under the California Endangered Species Act (CESA) (Chapter 1.5 section 2050 *et seq.* of the California Fish and Game Code and Title 14 California Code of Regulations 670.2). Although the ''take'' of State-listed plants has long been prohibited under the California Native Plant Protection Act (CNPPA) (Chapter 10 § 1908) and CESA (Chapter 1.5 section 2080), in the past these statutes have not provided adequate protection for such plants from the impacts of habitat modification or land use change. For example, under the CNPPA, after the California Department of Fish and Game notifies a landowner that a State-listed plant grows on his or her property, the statute requires only that the landowner notify the agency ''at least 10 days in advance of changing the land use to allow salvage of such a plant'' (CNPPA, Chapter 10 § 1913). Under recent amendments to CESA, a permit under Section 2081(b) of the California Fish and Game Code is required to ''take'' State-listed species incidental to otherwise lawful activities. The amendments require that impacts to the species be fully mitigated. However, these requirements have not been tested with respect to State-listed plant species, and several years will be required to evaluate their effectiveness.

CEQA requires full disclosure of potential environmental impacts of proposed projects, including impacts on State-listed plant species. Therefore, before proceeding with development of private and City of Yreka lands where *Phlox hirsuta* grows, the City of Yreka would require CEQA review (L. Bacon, pers. comm. 1997). The public agency with primary authority or jurisdiction over the project is designated as the lead agency and is responsible for conducting a review of the project and consulting with the other agencies concerned with the resources affected by the project. 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.'' Once significant effects are identified, the lead agency may require mitigation for these effects through changes in the project or a mitigation plan. When mitigation plans are required, they often involve transplantation of the plant species to an existing or artificially created habitat, followed by destruction of the original site. Therefore, if the mitigation effort fails, the resource has already been lost. Furthermore, CEQA does not guarantee that such conservation efforts will be implemented. Finally mitigation is at the discretion of the lead agency, which may decide that overriding considerations make mitigation infeasible. In the latter case, projects that cause significant environmental damage, such as destruction of endangered species, may be approved. Protection of listed species through CEQA is, therefore, dependent upon the discretion of the agency involved.

E. *Other natural or manmade factors affecting its continued existence. Phlox hirsuta* is known from only two small occurrences, which occupy fewer than 121 ha (300 ac) in a restricted habitat type (serpentine soils) over a very small range (approximately 65 square-km (25 square-mi)). The combination of only two populations, small range, and restricted habitat makes the species 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 *Phlox hirsuta*. Once the number of populations or the plant population size is reduced, the remnant populations, or portions of populations, have a higher probability of extinction from random events (Primack 1993).

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by *Phlox hirsuta* in determining to finalize this rule. Urbanization, inadequate State regulatory mechanisms, and extirpation from random events due to the small number of populations and small range of the species threaten *P. hirsuta*. The two occurrences of *P. hirsuta* total fewer than 121 ha (300 ac) of occupied habitat in the vicinity of the City of Yreka, Siskiyou County, California. The site within the City of Yreka is already subdivided, has been disturbed by activities associated with urbanization in the past, is situated in an area that is suitable for development, and is unprotected from this threat. In addition, both occurrences are at risk due to inadequate State regulatory mechanisms and due to potential extirpation of all or part of the occurrences due to random events. Therefore, the preferred action is to list *P. hirsuta* as endangered.

Alternatives to listing were considered before publication of this final rule. The other alternatives were

not preferred because they would not provide adequate protection and would not be consistent with the Act. Listing *Phlox hirsuta* as endangered would provide Federal protection for the species and result in additional protection as outlined under the ''Available Conservation Measures'' section.

Critical Habitat

In the proposed rule, we indicated that designation of critical habitat was not prudent for *Phlox hirsuta* because of a concern that publication of precise maps and descriptions of critical habitat in the **Federal Register** could increase the vulnerability of this species to incidents of collection and vandalism. We also indicated that designation of critical habitat was not prudent because we believed it would not provide any additional benefit beyond that provided through listing as endangered.

In the last few years, a series of court decisions have overturned Service determinations regarding a variety of species that designation of critical habitat would not be prudent (*e.g.*, *Natural Resources Defense Council* v. *U.S. Department of the Interior* 113 F. 3d 1121 (9th Cir. 1997); *Conservation Council for Hawaii* v. *Babbitt*, 2 F. Supp. 2d 1280 (D. Hawaii 1998)). Based on the standards applied in those judicial opinions, we have reexamined the question of whether critical habitat designation for *Phlox hirsuta* would be prudent.

Due to the small number of populations, *Phlox hirsuta* is vulnerable to unrestricted collection, vandalism, or other disturbance. We remain concerned that these threats might be exacerbated by the publication of critical habitat maps and further dissemination of locational information. However, we have examined the evidence available for *P. hirsuta* and have not found specific evidence of taking, vandalism, collection, or trade of this species or any similarly situated species. Consequently, consistent with applicable regulations (50 CFR 424.12(a)(1)(i)) and recent case law, we do not expect that the identification of critical habitat will increase the degree of threat to this species of taking or other human activity.

In the absence of a finding that critical habitat would increase threats to a species, if there are any benefits to critical habitat designation, then a prudent finding is warranted. In the case of this species, designation of critical habitat may provide some benefits. The primary regulatory effect of critical habitat is the section 7 requirement that Federal agencies refrain from taking any action that destroys or adversely modifies critical habitat. While a critical habitat designation for habitat currently occupied by this species would not be likely to change the section 7 consultation outcome (because an action that destroys or adversely modifies such critical habitat would also be likely to result in jeopardy to the species), in some instances, section 7 consultation might be triggered only if critical habitat is designated. Examples could include unoccupied habitat or occupied habitat that may become unoccupied in the future. Designating critical habitat may also provide some educational or informational benefits. Therefore, we find that critical habitat designation is prudent for *Phlox hirsuta*.

The Final Listing Priority Guidance for FY 2000 (64 FR 57114) states, ''The processing of critical habitat determinations (prudency and determinability decisions) and proposed or final designations of critical habitat will be funded separately from other section 4 listing actions and will no longer be subject to prioritization under the Listing Priority Guidance. Critical habitat determinations, which were previously included in final listing rules published in the **Federal Register**, may now be processed separately, in which case stand-alone critical habitat determinations will be published as notices in the **Federal Register**. We will undertake critical habitat determinations and designations during FY 2000 as allowed by our funding allocation for that year.'' As explained in detail in the Listing Priority Guidance, our listing budget is currently insufficient to allow us to complete immediately all of the listing actions required by the Act. Deferral of the critical habitat designation for *Phlox hirsuta* will allow us to concentrate our limited resources on higher priority critical habitat and other listing actions, while allowing us to put in place protections needed for the conservation of *P. hirsuta* without further delay.

We plan to employ a priority system for deciding which outstanding critical habitat designations should be addressed first. We will focus our efforts on those designations that will provide the most conservation benefit, taking into consideration the efficacy of critical habitat designation in addressing the threats to the species and the magnitude and immediacy of those threats. We will develop a proposal to designate critical habitat for *Phlox hirsuta* as soon as feasible, considering our workload priorities.

Available Conservation Measures

Conservation measures provided to species listed as endangered under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain activities. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Act provides for possible land acquisition and cooperation with the State and requires that recovery actions be carried out for all listed species. The protection required of Federal agencies and the prohibitions against certain activities involving listed plants are discussed, in part, below.

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR Part 402. Section 7(a)(1) requires Federal agencies to use their authorities to further the purposes of the Act by carrying out programs for listed species. 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 action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with us.

Listing *Phlox hirsuta* would provide for development of a recovery plan for the species. The plan would bring together both State and Federal efforts for conservation of the species. The plan would establish a framework for agencies to coordinate activities and cooperate with each other in conservation efforts. The plan would set recovery priorities and estimate costs of various tasks necessary to accomplish them. The plan also would describe site-specific management actions necessary to achieve conservation and survival of *P. hirsuta*. Additionally, pursuant to section 6 of the Act, we would be able to grant funds to the State of California for management actions promoting the protection and recovery of the species.

Federal activities potentially affecting *Phlox hirsuta* include issuance of special use permits and rights-of-way. Approximately one-half of the Highway 3 occurrence of *Phlox hirsuta* occurs on lands managed by the U.S. Forest Service. The U.S. Forest Service would be required to consult with us if any

activities they authorize, fund, or carry out may affect *P. hirsuta*. For example, consultations with U.S. Forest Service may be required on road maintenance and right-of-way authorizations for projects that include adjacent or intermixed private land.

Other Federal agencies that may become involved if this rule is finalized include the Federal Highway Administration through funding provided to Caltrans. In addition, when we issue a permit under section 10 of the Act for a habitat conservation plan (HCP) prepared by a non-Federal party, we must prepare an intra-Service section 7 biological opinion regarding the effects of issuance of the section 10(a) permit on affected listed plant species.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered plants. All prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.61 for endangered plants, apply. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale in interstate or foreign commerce, or remove and reduce to possession from areas under Federal jurisdiction any such plant. In addition, the Act prohibits malicious damage or destruction on areas under Federal jurisdiction, and the removal, cutting, digging up, or damaging or destroying of such plants in knowing violation of any State law or regulation or in the course of any violation of a State criminal trespass law. Certain exceptions to the prohibitions apply to our agents and State conservation agencies.

The Act and 50 CFR 17.62 and 17.63 also provide for the issuance of permits to carry out otherwise prohibited activities involving endangered plant species. Such permits are available for scientific purposes and to enhance the propagation and survival of the species. We anticipate that few trade permits would ever be sought or issued for this species because it is not common in cultivation or in the wild.

As published in the **Federal Register** on July 1, 1994 (59 FR 34272), it is our policy 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 effect of the listing on proposed and ongoing activities within a species' range. One of the two occurrences of *Phlox hirsuta* is on U.S. Forest Service lands. We believe that, based upon the best available information, the following actions will not likely result in a violation of section 9, provided these activities are carried out in accordance with existing regulations and permit requirements:

(1) Activities authorized, funded, or carried out by Federal agencies, (e.g., grazing management, agricultural conversions, wetland and riparian habitat modification, flood and erosion control, residential development, recreational trail development, road construction, hazardous material containment and cleanup activities, prescribed burns, pesticide/herbicide application, pipelines or utility lines crossing suitable habitat) when such activity is conducted in accordance with any reasonable and prudent measures given by us in a consultation conducted under section 7 of the Act, and

(2) Activities on private lands that do not involve Federal agency funding or authorization on private lands, such as construction of fences, livestock-water ponds, and livestock grazing, unless such activities are carried out in knowing violation of State law or regulation or in the course of any violation of a State criminal trespass law.

We believe that the following could result in a violation of section 9; however, possible violations are not limited to these actions alone:

(1) Unauthorized collecting of the species on Federal lands, and

(2) Interstate or foreign commerce and import/export without previously obtaining an appropriate permit. Permits to conduct activities are available for purposes of scientific research and enhancement of propagation or survival of the species.

Questions regarding whether specific activities will constitute a violation of section 9 should be directed to the Field Supervisor of the Service's Sacramento Fish and Wildlife Office (see **ADDRESSES** section).

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 as amended. 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 other than those already approved under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and assigned Office of Management and Budget clearance number 1018–0094. 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 control number. For additional information concerning permit and associated requirements for endangered plant species, see 50 CFR 17.62 and 17.63.

References Cited

A complete list of all references in this document is available upon request from the Field Supervisor, Sacramento Fish and Wildlife Office (see **ADDRESSES** section).

Author: The primary authors of this final rule are Diane Elam and Kirsten Tarp, U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office (see **ADDRESSES** section) (telephone 916/414–6645).

List of Subjects in 50 CFR Part 17

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

Regulation Promulgation

For the reasons given in the preamble, 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. Amend section 17.12(h) by adding the following, in alphabetical order under FLOWERING PLANTS, to the List of Endangered and Threatened Plants:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
*	*	*	*	*	*	*	*
Phlox hirsuta	Yreka phlox	U.S.A. (CA)	Polemoniaceae	E	683		NA
*	*	*	*	*	*	*	*

Dated: January 13, 2000.

Jamie Rappaport Clark,

Director, Fish and Wildlife Service.

[FR Doc. 00–2310 Filed 2–2–00; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 18

RIN 1018–AF87

Marine Mammals; Incidental Take During Specified Activities

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: This final rule reinstates our existing rule issued Thursday, January 28, 1999 (64 FR 4328), and codified at 50 CFR Part 18, Subpart J to authorize the incidental, unintentional take of small numbers of polar bears and Pacific walrus during oil and gas industry (Industry) exploration, development, and production operations in the Beaufort Sea and adjacent northern coast of Alaska. This final rule authorizes incidental, unintentional take of small numbers of polar bears and Pacific walrus only for activities covered by our existing regulations at 50 CFR Part 18, Subpart J; incidental take resulting from any subsea pipeline activities located offshore in the Beaufort Sea is not authorized. This final rule reinstates regulations at 50 CFR Part 18, Subpart J effective through March 31, 2000.

DATES: This rule is effective February 3, 2000 through March 31, 2000.

ADDRESSES: Comments and materials received in response to this action are available for public inspection during normal working hours of 8:00 a.m. to 4:30 p.m., Monday through Friday, at the Office of Marine Mammals Management, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Anchorage, AK 99503.

FOR FURTHER INFORMATION CONTACT: John Bridges, Office of Marine Mammals Management, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, AK 99503, Telephone (907) 786–3810 or 1–800–362–5148.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(A) of the Marine Mammal Protection Act (Act) gives the Secretary of the Interior (Secretary) through the Director of the U.S. Fish and Wildlife Service (We) the authority to allow the incidental, but not intentional, taking of small numbers of marine mammals in response to requests by U.S. citizens (you) [as defined in 50 CFR 18.27(c)] engaged in a specified activity (other than commercial fishing) in a specific geographic region. We may grant permission for incidental takes for periods of up to 5 years. On January 28, 1999, we published in the **Federal Register** (64 FR 4328) regulations to allow such incidental takes in the Beaufort Sea and adjacent northern coast of Alaska for the period January 28, 1999, through January 30, 2000. These regulations were based on the findings for the 1-year period that the effects of oil and gas related exploration, development, and production activities in the Beaufort Sea and adjacent northern coast of Alaska would have a negligible impact on polar bears and Pacific walrus and their habitat and no unmitigable adverse impact on the availability of these species for subsistence uses by Alaska Natives, if certain conditions were met.

Our present action reinstates the current regulations that expired on January 30, 2000, which are located at 50 CFR Part 18, Subpart J, effective through March 31, 2000. This rulemaking was intended to avoid a lapse in these regulations while we considered public comments on our proposed regulations published December 9, 1999 (64 FR 68973), the comment period for which closed on January 10, 2000. Those proposed regulations would allow the incidental, unintentional take of small numbers of polar bears and Pacific walrus for a 3-year period during year-round oil and gas activities, including incidental takes resulting from the construction and operation of a subsea pipeline associated with the offshore Northstar facility.

We are reinstating our now expired regulations through March 31, 2000, to ensure that we have adequate time to thoroughly review and respond to public input on our December 9, 1999, proposed rule. We believe it is important to maintain the coverage and protection for polar bears and Pacific walrus provided by those regulations. Existing Letters of Authorization, which require monitoring and reporting of all polar bear interactions as well as site-specific mitigation measures, will be reissued.

Prior to issuing regulations at 50 CFR Part 18, Subpart J, we evaluated the level of industrial activities, their associated impacts to polar bears and Pacific walrus, and their effects on the availability of these species for subsistence use. Based on the best scientific information available and the results of 6 years of monitoring data, we found that the effects of oil and gas related exploration, development, and production activities in the Beaufort Sea and the adjacent northern coast of Alaska would have a negligible impact on polar bears and Pacific walrus and their habitat. We also found that the activities as described would have no unmitigable adverse impacts on the availability of these species for subsistence use by Alaska Natives.

The regulations that we are reinstating include permissible methods of taking and other means to ensure the least adverse impact on the species and its habitat and on the availability of these species for subsistence uses along with other relevant sections. This includes requirements for monitoring and reporting. The geographic coverage is the same as the regulations we issued on January 28, 1999. All existing Letters of Authorization will be reissued.