

establishes procedures for 49 U.S.C. 5309 ("Section 5309") capital investment project sponsors to apply for and receive incentive awards if their project meets eligibility criteria for both cost and ridership estimates.

#### § 612.3 Definitions.

As used in this part, the following definitions apply:

*Before and After Study* refers to the project sponsor's comparison and analysis of planning assumptions, forecast results, and existing transit system characteristics "before" implementation of a New Starts project with the project costs and benefits realized "after" two years of revenue service.

*Contractor Performance Assessment Report* refers to an annual report to Congress, in which FTA reports the accuracy of contractor projections for cost and ridership from entry into Preliminary Engineering (PE) through two years after the system is open for service.

*Full Funding Grant Agreement (FFGA)* refers to an instrument that defines the scope of a project, the Federal financial contribution, and other terms and conditions for funding New Starts projects as required by 49 U.S.C. 5309(d)(1) and (g)(2).

*Project Construction Grant Agreement (PCGA)* refers to an instrument that defines the scope of a project, the Federal financial contribution, and other terms and conditions for funding Small Starts projects as required by 49 U.S.C. 5309(e)(7).

*Section 5309 capital investment project* refers to a new fixed guideway system or an extension to an existing fixed guideway system, but does not include rail modernization or non-corridor bus capital projects funded under 49 U.S.C. 5309.

#### § 612.5 Eligible candidates.

All Section 5309 capital investment project sponsors who will or have receive(d) a Full Funding Grant Agreement (FFGA) or a Project Construction Grant Agreement (PCGA) after August 10, 2005, are eligible to receive incentive awards.

#### § 612.7 Payment mechanism.

(a) Full Funding Grant Agreements (FFGA) and Project Construction Grant Agreements (PCGA) for Section 5309 capital investment projects will include an incentive clause that will allow for an amendment to either increase the Federal funding contribution, allow for the addition of scope, or provide a financial award, when the criteria of § 612.9 have been met.

(b) Upon submission of its "before and after" data documenting that the project meets the cost and ridership criteria, the project sponsor may request that FTA award the project sponsor a performance incentive.

#### § 612.9 Incentive award standards.

(a) For a project sponsor to be eligible to receive a performance incentive award, the project must meet criteria for both cost and ridership estimates.

(1) Actual opening year ridership shall be not less than 90 percent of that forecast; and

(2) Actual capital costs, adjusted for inflation, shall be not more than 110 percent of those estimated; at the time the project entered Preliminary Engineering (PE).

(b) FTA will base its incentive award eligibility determination on the cost and ridership information provided by the project sponsor to FTA for the purposes of the "Before and After Study" and the "Contractor Performance Assessment Report."

#### § 612.11 Incentive amount.

FTA will determine the amount of the performance incentive award based on the size and complexity of the project and may award up to an additional five percent of the federal grant amount identified in the FFGA or PCGA.

#### § 612.13 Funding source.

Incentive funds will be available from New Starts funds available under 49 U.S.C. 5309(d) or 5309(e).

#### § 612.15 Eligible uses of award.

The performance incentive award may be:

(a) used to fund any item eligible under 49 U.S.C. 5309(b)(1) or (b)(4); or

(b) shared with contractors that prepared reliable cost and ridership estimates for the project.

Issued in Washington, DC, this 12th day of February 2008.

**James S. Simpson,**

*Administrator.*

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[FWS-R1-ES-2008-0016; 1111 FY07 MO-B2]

RIN 1018-AV00

#### Endangered and Threatened Wildlife and Plants; Listing *Phyllostegia hispida* (No Common Name) as Endangered Throughout Its Range

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

**ACTION:** Proposed rule; request for public comments.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to list *Phyllostegia hispida* (no common name), a plant species from the island of Molokai in the Hawaiian Islands, as endangered under the Endangered Species Act of 1973, as amended (Act). If we finalize this rule as proposed, it would extend the Act's protections to this species. We have determined that critical habitat for *Phyllostegia hispida* is prudent but not determinable at this time.

**DATES:** We will accept comments received or postmarked on or before April 21, 2008. We must receive requests for public hearings, in writing, at the address shown in the **ADDRESSES** section by April 4, 2008.

**ADDRESSES:** You may submit comments by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: RIN 1018-AV00; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222, Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Public Comments Solicited section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Patrick Leonard, Field Supervisor, U.S. Fish and Wildlife Service, Pacific Islands Fish and Wildlife Office, 300 Ala Moana Boulevard, Box 50088, Honolulu, HI 96850; telephone 808-792-9400; facsimile 808-792-9581. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:**

## Public Comments

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule. We particularly seek comments concerning:

(1) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to this species and regulations that may be addressing those threats;

(2) Additional information concerning the range, distribution, and population size of this species, including the locations of any additional populations of this species;

(3) Any information on the biological or ecological requirements of the species;

(4) Current or planned activities in the areas occupied by the species and possible impacts of these activities on this species;

(5) Which areas would be appropriate as critical habitat for the species and why they should be proposed for designation as critical habitat; and

(6) The reasons why areas should or should not be designated as critical habitat as provided by section 4 of the Act (16 U.S.C. 1531, *et seq.*), including whether the benefits of designation would outweigh threats to the species that designation could cause, such that the designation of critical habitat is prudent.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section. We will not accept anonymous comments; your comment must include your first and last name, city, State, country, and postal (zip) code. Finally, we will not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked, by the date specified in the **DATES** section.

We will post your entire comment—including your personal identifying information—on <http://www.regulations.gov>. If you provide personal identifying information in addition to the required items specified in the previous paragraph, such as your street address, phone number, or e-mail address, you may request at the top of your document that we withhold this

information from public review. However, we cannot guarantee that we will be able to do so.

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

## Background

*Phyllostegia hispida* is known only from the island of Molokai, Hawaii. Molokai is approximately 38 miles (mi) (61 kilometers (km)) long and up to 10 mi (16 km) wide, and encompasses an area of about 260 square (sq) mi (674 sq km) (Foote, *et al.* 1972, p. 11; Department of Geography 1998, p. 13). Three shield volcanoes make up most of the land mass, dividing the island into roughly three geographic segments—West Molokai Mountain, East Molokai Mountain, and a volcano that formed Kalaupapa Peninsula (Department of Geography 1998, pp. 11, 13).

The taller and larger East Molokai Mountain which makes up eastern Molokai rises 4,970 ft (1,514 m) above sea level on the island's summit at Kamakou and comprises roughly 50 percent of the island's land area (Department of Geography 1998, p. 11; Foote, *et al.* 1972, p. 11). *Phyllostegia hispida* is known only from the wet forests of eastern Molokai, at elevations from 2,300 to 4,200 feet (ft) (700 to 1,280 meters (m)) (Wagner, *et al.* 1999, p. 819). The wet forests where *Phyllostegia hispida* has been recorded are found only on the windward side of East Molokai, which differs topographically from the leeward side. Precipitous cliffs line the northern windward coast, with deep inaccessible valleys dissecting the coastline. The annual rainfall on the windward side ranges from 75 to over 150 inches (in) (200 to over 375 centimeters (cm)), distributed throughout the year. The soils are poorly drained and high in organic matter. The gulches and valleys are usually very steep, but sometimes gently sloping (Foote, *et al.* 1972, p. 14).

The native habitats and vegetation of the Hawaiian Islands have undergone extreme alterations because of past and present land use, as well as the intentional or inadvertent introduction of nonnative plant and animal species. Introduced mammals, particularly pigs (*Sus scrofa*), have greatly impacted native Hawaiian plant communities. Pigs have been described as the most pervasive and disruptive nonnative

influence on the unique native forests of the Hawaiian Islands, and are widely recognized as one of the greatest threats to forest ecosystems in Hawaii today (Aplet, *et al.* 1991, p. 56; Anderson and Stone 1993, p. 195; Loope 1999, p. 56). Introduced (nonnative) plant species, which now comprise approximately half of the plant taxa in the islands, have come to dominate many Hawaiian ecosystems, and frequently outcompete native plants for space, light, water, and nutrients, as well as alter ecosystem function, rendering habitats unsuitable for native species (Cuddihy and Stone 1990, pp. 73–91; Vitousek 1986, pp. 29–41).

The plant *Phyllostegia hispida*, known only from the island of Molokai, has only a few recorded occurrences, and for a short period of time recently, was thought to be possibly extinct in the wild. Alteration of the plant's native habitat by feral pigs and nonnative plants are thought to be the primary threats to *P. hispida*, in conjunction with the threat of predation by feral pigs, competition with nonnative plants, and the negative demographic and genetic consequences of extremely small population size.

## Species Information

*Phyllostegia hispida* was first described by William Hillebrand in 1870 from a specimen collected from an area that he described as the “heights of Mapulehu” on the island of Molokai (Wagner, *et al.* 2005), and is recognized as a distinct taxon in Wagner, *et al.* (1999, pp. 817–819). Wagner, *et al.* describes the plant as a non-aromatic member of the mint family (Lamiaceae). *P. hispida* is described as a loosely spreading, many-branched vine that often forms large tangled masses. Leaves are thin and flaccid with hispid hairs and glands. The leaf margins are irregularly and shallowly lobed. Six to eight white flowers make up each verticillaster (a false whorl, composed of a pair of nearly sessile cymes in the axils of opposite leaves or bracts), and nutlets are approximately 0.1 in (2.5 millimeters (mm)) long (Wagner, *et al.* 1999, pp. 817–819). No life history information is currently available on this species.

The few documented specimens of *Phyllostegia hispida* are typically found in wet *Metrosideros polymorpha* (ohia)-dominated forest at an elevation between 3,650 and 4,200 ft (1,112 and 1,280 m). Associated native species included *Cheirodendron trigynum* (olapa), *Ilex anomala* (aiae), *Cibotium glaucum* (hapuu), *Broussaisia argutus* (kanawao), *Rubus hawaiiensis* (akala), *Sadleria cyatheoides* (amau), *Pipturus*

*albidus* (mamaki), *Nertera granadensis* (makole), *Athyrium microphyllum*, *Elaphoglossum fauriei*, and bryophytes (HBMP Database 2005).

From 1910 to 1979, there were a total of 8 recorded occurrences of *Phyllostegia hispida* in the wet forests of eastern Molokai (Hawaii Biodiversity and Mapping Program (HBMP) Database 2005). None of these historic occurrences have been relocated during surveys conducted in the wet forests of east Molokai over the past several years (The Nature Conservancy of Hawaii (TNCH) 1997b, pp. 1–19; Steve Perlman and Ken Wood, National Tropical Botanical Garden (NTBG), pers. comms. 2006). In 1996, two adult plants were found in eastern Molokai within TNCH's Kamakou Preserve, one next to the Pepeopae Boardwalk and the other east of Hanalilolilo growing along the fence within the State of Hawaii's Puu Alii Natural Area Reserve (NAR). Within only a few months of discovery, the individual growing along the Puu Alii fence died (HBMP Database 2005; TNCH 1997a, p. 2). In 1997, a single *Phyllostegia* individual was discovered on the rim of Pelekunu Valley in the Puu Alii NAR (HBMP Database 2005; TNCH 1997b, p. 6). There is some uncertainty, however, as to whether this individual was, in fact, *P. hispida*, as it was identified as *P. manni* by Hawaii Division of Forestry and Wildlife (DOFAW) staff based upon the size and lobing of its leaves (Robert Hobdy, Robert Hobdy Environmental Consultant, pers. comm. 2006; Joel Lau, HBMP, pers. comm. 2006; Torrie Nohara, DOFAW, pers. comm. 2006). This individual plant was protected from feral ungulates inside a fenced enclosure. Seeds were collected, and seedlings were produced by DOFAW and outplanted into the enclosure with the wild plant (T. Nohara, pers. comm. 2006).

In November 1996, TNCH erected an enclosure around the Pepeopae Boardwalk individual and began frequent, recurrent weeding and monitoring within the fenced area (TNCH 1997a, p. 2). They also built an enclosure approximately 656 ft (200 m) away for future outplantings of propagated individuals. Plants grown from leaf buds collected from the Pepeopae Boardwalk plant were outplanted into the enclosure in December 1997 (TNCH 1998a, p. 7). They survived through 1998 (TNCH 1998b, Appendix 1, dot 28), but have since been confirmed dead (Sam Aruch, TNCH, pers. comm. 2006; Ed Misaki, TNCH, pers. comm. 2006).

The Pepeopae Boardwalk individual died in 1998 or 1999 (HBMP Database

2005), and the wild plant and outplantings in Puu Alii NAR, which may possibly have been *Phyllostegia manni* and not *P. hispida* (see above; the question of taxonomic identity was never resolved), died several years ago (S. Perlman, pers. comm. 2005; K. Wood, pers. comm. 2005; Guy Hughes, Kalaupapa National Historic Park (KNHP), pers. comm. 2006). The University of Hawaii's Lyon Arboretum has material from the individual that was growing along the Puu Alii fence and from the Pepeopae Boardwalk individual in micropropagation (Service Captive Propagation Database (SCPD) 2005).

Surveys have been conducted in the wet forests of east Molokai over the years, but failed to locate additional *Phyllostegia hispida* plants. The species was thought to have been extirpated from the wild until 2005, when two seedlings were found in a Hanalilolilo stream bank in Kamakou Preserve, indicating the possible presence of a mature plant, or plants, somewhere in the vicinity (TNCH 1997b, pp. 1–19; S. Perlman, pers. comm. 2005; S. Perlman and K. Wood, pers. comms. 2006). One of the seedlings was collected by a botanist with HBMP and provided to Lyon Arboretum in Honolulu, which in turn provided it to KNHP on Molokai for attempted propagation. That plant has since died (G. Hughes and Bill Garnett, KNHP, pers. comms. 2006). The other seedling was collected by a botanist with NTBG. Cuttings were propagated from this seedling and provided to KNHP for growing out (S. Perlman, pers. comm. 2006).

*Phyllostegia hispida* was again thought to be extirpated from the wild until a single juvenile plant was discovered in May 2006 within the Puu Alii NAR along the Puu Alii fenceline at 4,100 ft (1,250 m) elevation (S. Perlman, pers. comm. 2006). Although protected within a 10-ft (3-m) diameter fenced enclosure (Bryan Stevens, Maui DOFAW, pers. comm. 2006), that individual has died for unknown reasons (H. Oppenheimer, Maui Plant Extinction Prevention Program (PEP), pers. comm. 2007). However, 10 new wild plants were discovered within the Puu Alii NAR in April 2007; although most are seedlings, one of these individuals is mature and has fruited and produced seeds (H. Oppenheimer, pers. comm. 2007). Seeds were collected from the mature plant and sent to the Lyon Arboretum, and cuttings were taken from some of the other plants for propagation. Four of the newly discovered seedlings were found next to the Puu Alii fence, and are enclosed with temporary fencing material.

In addition to the newly identified wild plants, 12 of the cuttings that were grown out at KNHP were outplanted into an enclosure in TNCH's Kamakou Preserve in April 2007, and 11 of these were still doing well as of June 2007. Another 12 were outplanted into a second enclosure in Kamakou Preserve in June 2007 (H. Oppenheimer, pers. comm. 2007), bringing the total number of *Phyllostegia hispida* plants in the wild to 10 naturally occurring and 23 recently outplanted individuals.

#### Previous Federal Action

We first identified *Phyllostegia hispida* as a candidate for listing in the September 19, 1997, Notice of Review of Plant and Animal Taxa that are Candidates or Proposed for Listing as Endangered or Threatened Species (Notice of Review) (62 FR 49397). Candidates are those taxa for which we have on file sufficient information on biological vulnerability and threats to support preparation of a listing proposal, but for which development of a listing regulation is precluded by other higher priority listing activities.

On May 4, 2004, the Center for Biological Diversity petitioned the Service to list 225 species of plants and animals as endangered under the provisions of the Act, including *Phyllostegia hispida*. In our Notice of Review, dated September 12, 2006, we retained a listing priority number of 2 for this species, in accordance with our priority guidance published on September 21, 1983 (48 FR 43098). A listing priority of 2 reflects threats that are both imminent and high in magnitude, as well as the taxonomic classification of *P. hispida* as a full species. We determined that publication of a proposed rule to list the species was precluded by our work on higher priority listing actions during the period from May 2, 2005, through August 23, 2006 (71 FR 53756). However, we have since completed those actions. As such, we had available resources to initiate the proposal to list this species.

#### Summary of Factors Affecting the Species

Section 4 of the Act and its implementing regulations (50 CFR part 424) set forth the procedures for adding species to the Federal list of endangered and threatened species. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act. The five listing factors are: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial,

recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence.

#### A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

As with virtually every other native plant community in the islands, the wet forests of Molokai where *Phyllostegia hispida* occurs have been impacted by introduced (nonnative) pigs and introduced (nonnative) plants (DOFAW 1991, pp. 3, 14–23; TNCH 1994, pp. 6, 9–12; HBMP Database 2005). The poor reproduction and survivorship of *P. hispida* clearly indicate that the current conditions are less than optimal for this species, although we do not yet fully understand the specific mechanisms that are undermining its viability.

#### Feral Pigs

European pigs, introduced to Hawaii by Captain James Cook in 1778, hybridized with domesticated Polynesian pigs, became feral, and invaded forested areas, especially wet and mesic forests and dry areas at high elevations. They are currently present on Kauai, Niihau, Oahu, Molokai, Maui, and Hawaii. These introduced pigs are extremely destructive and have both direct and indirect impacts on native plant communities. While rooting in the earth in search of invertebrates and plant material, pigs directly impact native plants by disturbing and destroying vegetative cover, trampling plants and seedlings, and may reduce or eliminate plant regeneration by damaging or eating seeds and seedlings (further discussion of predation is under Factor C, below). Pigs are a major vector for the establishment and spread of competing invasive nonnative plant species, by dispersing these plant seeds on their hooves and coats as well as through their digestive tracts, and by fertilizing the disturbed soil through their feces. Pigs feed preferentially on the fruits of many nonnative plants, such as *Passiflora mollissima* (banana poka) and *Psidium cattleianum* (strawberry guava), thereby facilitating the spread of these invasive species, and also contribute to erosion by clearing vegetation and creating large areas of disturbed soil, especially on slopes (Aplet, *et al.* 1991, p. 56; Smith 1985, pp. 190, 192, 196, 200, 204, 230–231; Stone 1985, pp. 254–255, 262–264; Medeiros, *et al.* 1986, pp. 27–28; Scott, *et al.* 1986, pp. 360–361; Tomich 1986, pp. 120–126; Cuddihy and Stone 1990,

pp. 64–65; Loope, *et al.* 1991, pp. 1–21; Wagner, *et al.* 1999, p. 52).

Feral pigs are present in the wet forest habitat formerly and currently inhabited by *Phyllostegia hispida* within Puu Alii NAR and Kamakou Preserve, and their impacts continue to degrade the condition of the forest there (DOFAW 1991, pp. 3, 14–23; TNCH 1994, pp. 6, 9–12; HBMP Database 2005). They are considered a major threat to native species and to the overall health of the watershed in which *P. hispida* occurs (DOFAW 1991, pp. 3, 14–23; TNCH 1994, pp. 6, 9–12). Significant management actions are directed at feral ungulate control in the area where *P. hispida* has been found within Puu Alii NAR and Kamakou Preserve on Molokai, such as large-scale watershed fencing, construction of ungulate exclosures around rare plants, public hunting, and staff hunting (TNCH 1997a, pp. 2–3; TNCH 1998a, pp. 1–2, 7; DOFAW 2000, pp. 3, 12; HBMP Database 2005). When the individual *P. hispida* was discovered in 1996 next to the boardwalk at Pepeopae, TNCH noted pig signs (*e.g.*, droppings, evidence of rooting, wallows) in the vicinity (HPMP Database 2005) and immediately erected a fenced exclosure around the plant to protect it (TNCH 1997a, pp. 2–3). Similarly, a fenced exclosure was erected around the individual that was discovered within the Puu Alii NAR in 1997 to protect it from feral pigs (T. Nohara, pers. comm. 2006). The juvenile plant discovered within the Puu Alii NAR in 2005 was immediately fenced to protect it from feral pigs (B. Stevens, pers. comm. 2006), as were four of the most recently discovered plants along the fenceline at Puu Alii NAR (H. Oppenheimer, pers. comm. 2007). Due to the well-documented negative impacts of feral pigs on native Hawaiian plant communities, the known habitat degradation caused by pigs in the habitat occupied by *P. hispida*, and the continuing presence of pigs in the limited area where *P. hispida* is found, we consider habitat modification and degradation by feral pigs to be a significant and immediate threat to this species.

#### Nonnative Plants

Introduced nonnative plant species are a pervasive threat to the native flora throughout the Hawaiian Islands. Of the current total of nearly 2,000 native and naturalized plant taxa, approximately half are introduced nonnative species from other parts of the world, and nearly 100 of these are considered invasive pest species (Smith 1985, p. 180). On the Hawaiian Islands and other tropical islands, studies have shown

that many of these introduced plant taxa outcompete and displace native plants, and often alter the habitat to the point that it is no longer suitable for the native plant species; these studies include nonnative pest plants found in habitat similar to that of *Phyllostegia hispida* (Smathers and Gardner 1978, pp. 274–275; Smith 1985, pp. 196, 206, 230; Loope and Medeiros 1992, pp. 7–8; Medeiros, *et al.* 1992, pp. 30–32; Ellshoff, *et al.* 1995, pp. 1–5; Meyer and Florence 1996, pp. 777–780; Medeiros, *et al.* 1997, pp. 30–32; Loope, *et al.* 2004, pp. 1472–1473). In particular, nonnative pest plants may make habitat less suitable for native plants by modifying availability of light, altering soil-water regimes, modifying nutrient cycling, or altering fire characteristics of native plant communities (Smith 1985, pp. 206, 217, 225, 227–233; Cuddihy and Stone 1990, p. 74). Although there is no empirical evidence specific to *P. hispida* due to the lack of research on the species, scientists familiar with *P. hispida* believe it does not handle either shade or competition well (H. Oppenheimer, pers. comm. 2007), and nonnative plants are likely to contribute to both of these conditions. Examples of some of the nonnative plants documented in the area occupied by *P. hispida* include *Axonopus fissifolius* (narrow-leaved carpetgrass), *Clidemia hirta* (Koster's curse), *Erechtites valerianifolia* (fireweed), *Juncus effusus* (Japanese mat rush), *Rubus rosifolius* (thimbleberry), and *Sacciolepis indica* (Glenwood grass). Because of demonstrated habitat modification and resource competition by nonnative plant species in habitat similar to the wet forest habitat of *P. hispida*, and the ongoing presence of high numbers of invasive nonnative plant species in the area currently occupied by *P. hispida*, we consider habitat modification and degradation by nonnative plants to be a significant and immediate threat to this species.

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

Overutilization for commercial, recreational, scientific, or educational purposes is not known to be a threat to *Phyllostegia hispida*, and as such is not addressed in this proposal.

#### C. Disease or Predation

Because the native vegetation of Hawaii evolved without any browsing or grazing mammals present, many plant species do not have natural defenses against such impacts (Carlquist 1980, pp. 173–175; Lamoureux 1994, pp. 54–55). Native plants such as

*Phyllostegia hispida* do not have physical or chemical adaptations, such as thorns or noxious compounds, to protect them, thereby rendering them particularly vulnerable to predation by introduced pigs or other ungulates (Department of Geography 1998, pp. 137–138; Carlquist 1980, p. 175). Browsing by ungulates has been observed on many other native plants, including common and rare or endangered species (Cuddihy and Stone 1990, pp. 64–65). In a study of feral pig populations in the Kipahulu Valley on the island of Maui, pigs were observed feeding on at least 40 plant species in the rainforest ecosystem, 75 percent of which were native plants occurring in the herbaceous understory and subcanopy layer (Diong 1982, p. 160). Therefore, even though we have no evidence of direct browsing for *P. hispida*, given the presence of pigs in the area where *P. hispida* occurs, we consider it likely that pigs may impact the species directly through predation. Therefore, we believe feral pigs pose a potentially significant and immediate threat to the species.

#### D. The Inadequacy of Existing Regulatory Mechanisms

Currently, there are no Federal, State, or local laws, treaties, or regulations that specifically conserve or protect *Phyllostegia hispida* from the threats described in this rule.

#### E. Other Natural or Manmade Factors Affecting Its Continued Existence

The most significant threat to *Phyllostegia hispida* is its extremely low numbers. A total of 33 plants, only one of which is reproductively mature, are currently known to exist in the wild. Twenty-three of these are only recently outplanted. Although propagules of *P. hispida* have been collected on an opportunistic basis and some controlled propagation of the species has taken place, there is no dedicated funding for propagation of the species and no formal plan exists for outplanting and reintroduction. Outplantings have been attempted on an *ad hoc* basis, but unfortunately none of these outplantings has yet proven successful for more than the short-term.

Species that are known from few wild individuals and are endemic to a single, small island are inherently more vulnerable to extinction than widespread species because of the higher risks posed to a few populations and individuals by genetic bottlenecks, random demographic fluctuations, and localized catastrophes, such as hurricanes and disease outbreaks (Mangel and Tier 1994, pp. 607–614;

Pimm, *et al.* 1988, pp. 757–785). In the case of *Phyllostegia hispida*, the entire population of the species is small and restricted to a highly localized geographic area, rendering it highly vulnerable to the risk of extinction in the wild due to the lack of redundancy in populations. Although some species are naturally rare, the poor survivorship of *P. hispida* suggest that the requisite biological or ecological needs of the species are not being met under current conditions. Deterministic factors, such as habitat alteration or loss of a key pollinator, may have reduced this population to such a small size that it is now vulnerable to a stochastic extinction event (Gilpin and Soulé 1986, pp. 24–25). Small population size has therefore become a primary and immediate threat to this species.

#### Proposed Determination

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to *Phyllostegia hispida*. The species' extremely low numbers and highly restricted geographic range make it particularly susceptible to extinction at any time from random events such as hurricanes. There is only one plant known to exist in the wild that is reproductively mature. Although several individuals have recently been outplanted, no outplanting effort for this species has yet been successful. Therefore, the future of these propagated individuals is highly uncertain. Although the species is found on protected lands, it nonetheless faces immediate and continuing threats from habitat destruction and degradation due to feral pig activity, competition with nonnative plant species, and predation by nonnative mammals, as well as the threat of extinction at any time from a random stochastic event such as a hurricane.

The Endangered Species Act (Sec. 3(5)(C)(6)) defines an endangered species as “any species which is in danger of extinction throughout all or a significant portion of its range.” Based on the immediate and ongoing significant threats to *Phyllostegia hispida* throughout its entire limited range, as described above, and the fact that there is only one adult reproductive individual of the species known, we consider the species *P. hispida* to be in danger of extinction throughout all of its range. Therefore, on the basis of the best available scientific and commercial information, we are proposing to list *P. hispida* as an endangered species.

#### Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness and conservation by Federal, State, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States 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, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, 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 the species or destroy or adversely modify its critical habitat. If a Federal action may adversely affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

For *Phyllostegia hispida*, Federal agency actions that may require consultation as described in the preceding paragraph include the provision of Federal funds to State and private entities through Federal programs, such as the Service's Landowner Incentive Program, State Wildlife Grant Program, and Federal Aid in Wildlife Restoration program, as well as the various grants administered by the U.S. Department of Agriculture, Natural Resources Conservation Service. Other types of actions that may require consultation include Army Corps of Engineers activities, such as the construction or maintenance of boardwalks and bridges subject to section 404 of the Clean Water Act (33 U.S.C. 1344, *et seq.*).

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply

to endangered plants. All prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.61, 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 the species to possession from areas under Federal jurisdiction. In addition, for plants listed as endangered, the Act prohibits the 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, including State criminal trespass law. Certain exceptions to the prohibitions apply to agents of the Service and State conservation agencies. Although Hawaii has a strong Endangered Species law (HRS, Sect. 195-D), *Phyllostegia hispida* is not currently protected under that law. Federal listing of *Phyllostegia hispida* will automatically invoke State listing under Hawaii's Endangered Species law and supplement the protection available under other State laws. The Federal Endangered Species Act will, therefore, offer additional protection to this species.

The Act and 50 CFR 17.62 also provide for the issuance of permits to carry out otherwise prohibited activities involving endangered plants under certain circumstances. Such permits are available for scientific purposes and to enhance the propagation or survival of the species. We anticipate that the only permits that would be sought or issued for *Phyllostegia hispida* would be in association with recovery efforts, as this species is not common in cultivation or the wild. Requests for copies of the regulations regarding listed species and inquiries about prohibitions and permits may be addressed to U.S. Fish and Wildlife Service, Ecological Services, Eastside Federal Complex, 911 NE. 11th Avenue, Portland, OR 97232-4181 (telephone 503-231-6158; facsimile 503-231-6243).

### Critical Habitat

#### Background

Critical habitat is defined in section 3 of the Act as (i) the 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 geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7(a)(2) requires consultation on Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow government or public access to private lands. Section 7(a)(2) is a purely protective measure and does not require implementation of restoration, recovery, or enhancement measures, although conservation measures are required under section 7(a)(1) of the Act.

#### Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, we designate critical habitat at the time the species is determined to be endangered or threatened. Our regulations (50 CFR 424.12(a)(1)) state that the designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or (2) such designation of critical habitat would not be beneficial to the species.

There is no documentation that *Phyllostegia hispida* is threatened by taking or other human activity. In the absence of finding that the designation of critical habitat would increase threats to a species, if there are any benefits to a critical habitat designation, then a prudent finding is warranted. The potential benefits include: (1) Triggering consultation under section 7 of the Act, in new areas for actions in which there may be a Federal nexus where it would not otherwise occur because, for example, it is or has become unoccupied or the occupancy is in

question; (2) focusing conservation activities on the most essential features and areas; (3) providing educational benefits to State or county governments or private entities; and (4) preventing people from causing inadvertent harm to the species.

The primary regulatory effect of critical habitat is the section 7(a)(2) requirement that Federal agencies refrain from taking any action that destroys or adversely affects critical habitat. At present, the only known extant individuals of *Phyllostegia hispida* occur on State and private land, and all previously known occurrences have been on State and privately owned lands. Further, there are no Federal lands or lands under Federal jurisdiction in the forests of east Molokai, the historic range of this species. Therefore, it is unlikely that this species currently occurs, or would occur in the future, on Federal lands. Nevertheless, lands that may be designated as critical habitat in the future for this species may be subject to Federal actions that trigger the section 7 consultation requirement, such as the granting of Federal monies for conservation projects and/or the need for Federal permits for projects, such as the construction and maintenance of boardwalks and bridges subject to section 404 of the Clean Water Act (33 U.S.C. 1344, *et seq.*). There may also be some educational or informational benefits to the designation of critical habitat. Educational benefits include the notification of land owners, land managers, and the general public of the importance of protecting the habitat of this species. In the case of *Phyllostegia hispida*, these aspects of critical habitat designation would potentially benefit the conservation of the species. Therefore, since we have determined that the designation of critical habitat will not likely increase the degree of threat to the species and may provide some measure of benefit, we find that designation of critical habitat is prudent for *Phyllostegia hispida*.

#### Primary Constituent Elements

In accordance with sections 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas to propose as critical habitat, we must consider those physical and biological features (primary constituent elements in the necessary and appropriate quantity and spatial arrangement) essential to the conservation of the species. We must also consider those areas essential to the conservation of the species that are outside the geographical area occupied by the species. These primary

constituent elements include, but are not limited to, space for individual and population growth and for normal behavior; food, water, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and habitats that are protected from disturbance or are representative of the historical geographical and ecological distributions of a species.

We are currently unable to identify the primary constituent elements for *Phyllostegia hispida*, because information on the physical and biological features that are considered essential to the conservation of this species is not known at this time. As discussed in the "Species Information" section of this proposed rule, between the years 1910 and 1996 only 10 occurrences of *P. hispida* were documented, and the location information for these occurrences was recorded at a relatively coarse scale. Elevations are known only for the few individuals discovered within the last 10 years. From 1996 through 2005 a total of only 6 plants (3 adults, 2 seedlings, and 1 juvenile) were located, all existing only as single individuals in disparate locations. All of the previously known adults have died without reproducing naturally in the wild; the first mature plant to be observed fruiting was just discovered in April 2007. The two seedlings discovered in 2005 were collected and deposited with propagation facilities to attempt production of additional seedlings for outplanting in the future. The reasons for the deaths of the three adult and one juvenile plants are unknown, as are the reasons for poor natural reproduction in the wild. Key features of the plant's life history, such as longevity, dispersal mechanisms, or vectors for pollination, are unknown.

The plant community where the few remaining wild individuals of *Phyllostegia hispida* are found has been highly modified by the presence of nonnative plants and feral pigs, and the poor viability of the species occurrences observed in recent years indicates that current conditions are not sufficient to meet the basic biological requirements of this species. Because *P. hispida* has never been observed in an unaltered environment, the optimal conditions that would provide the biological or ecological requisites of the species are not known. Although, as described above, we can surmise that habitat degradation from a variety of factors has contributed to the decline of the species, we do not know specifically what essential physical or biological features

of that habitat are currently lacking for *P. hispida*. As we are unable to identify the physical and biological features essential to the conservation of *P. hispida*, we are unable to identify areas that contain these features.

Therefore, although we have determined that the designation of critical habitat is prudent for *Phyllostegia hispida*, since the biological requirements of the species are not sufficiently known, we find that critical habitat for *P. hispida* is not determinable at this time.

#### Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure that our proposed rule is based on scientifically sound data, assumptions, and analyses. We will send these peer reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposal to list *Phyllostegia hispida* as endangered and our decision regarding critical habitat for this species.

We will consider all comments and information received during the comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

#### Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days after the date of publication of this proposal in the **Federal Register**. Such requests must be made in writing and be addressed to the Field Supervisor at the address in the **ADDRESSES** section.

#### Clarity of the Rule

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to

understand if it were divided into more (but shorter) sections? (5) Is the description of the rule in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the emergency rule? What else could we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this rule easier to understand to Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You also may e-mail the comments to this address: [Exsec@ios.goi.gov](mailto:Exsec@ios.goi.gov).

#### Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et seq.)

This rule does not contain any new collections of information that require approval by Office of Management and Budget (OMB) under the Paperwork Reduction Act. This rule will not impose recordkeeping 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.

#### National Environmental Policy Act

We have determined that environmental assessments and environmental impact statements, 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).

#### References Cited

A complete list of all references cited in this rule is available on the Internet at <http://www.regulations.gov> or upon request from the Field Supervisor, Pacific Islands Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section).

#### Author(s)

The primary author of this document is staff from the Pacific Islands Fish and Wildlife Office (see **ADDRESSES**).

#### List of Subjects in 50 CFR Part 17

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

**Proposed Regulation Promulgation**

Accordingly, we propose to 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; Public Law 99–625, 100 Stat. 3500, unless otherwise noted.

2. In § 17.12(h) add the following to the List of Endangered and Threatened Plants in alphabetical order under Flowering 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							
*	*	*	*	*	*		*
<i>Phyllostegia hispida</i>	None .....	U.S.A. (HI) .....	Lamiaceae—Mint ....	E	TBD	NA	NA
*	*	*	*	*	*		*

Dated: February 5, 2008.  
**Kenneth Stansell,**  
 Deputy Director, U.S. Fish and Wildlife Service.  
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**BILLING CODE 4310–55–P**