

your request via e-mail to: opp-docket@epa.gov. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 file format or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

B. When Will the Agency Grant a Request for a Hearing?

A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

VIII. Regulatory Assessment Requirements

This final rule establishes time limited tolerances under FFDC section 408. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104-4). Nor does it require any prior consultation as specified by Executive Order 13084, entitled *Consultation and Coordination with Indian Tribal Governments* (63 FR 27655, May 19, 1998); special considerations as required by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or require OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology

Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note). Since tolerances and exemptions that are established on the basis of a FIFRA section 18 petition under FFDC section 408, such as the tolerances in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. In addition, the Agency has determined that this action will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." This final rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDC section 408(n)(4).

IX. Submission to Congress and the Comptroller General

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

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides

and pests, Reporting and recordkeeping requirements.

Dated: January 7, 2000.

James Jones,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346(a) and 371.

2. Section 180.442 is amended, by adding and alphabetically inserting the following entries to the table under paragraph (b) to read as follows:

§ 180.442 Bifenthrin; tolerances for residues.

* * * * *
(b) * * *

| Commodity | Parts per million | Expiration/revocation date |
|-------------------|-------------------|----------------------------|
| * * * * * | * * * | * * * |
| Grapes | 0.2 | 12/31/01 |
| * * * * * | * * * | * * * |
| Peanuts, nutmeats | 0.05 | 12/31/01 |
| * * * * * | * * * | * * * |

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AE44

Endangered and Threatened Wildlife and Plants; Endangered Status for the Plant *Plagiobothrys hirtus* (Rough Popcornflower)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, have determined endangered status pursuant to the Endangered Species Act of 1973 (Act), as amended, for the plant *Plagiobothrys hirtus* (rough popcornflower). This species is restricted to wet swales and meadows in Douglas County, Oregon, where only 17 habitat patches exist for this species. Most populations are small with few individuals. The total

estimated number of plants is about 7,000 individuals within a combined area of about 18 hectares (45 acres). Threats to this species include destruction and/or alteration of habitat by development and hydrological changes (e.g., wetland fills, draining, construction); spring and summer grazing by domestic cattle, horses, and sheep; roadside maintenance; and competition from native and non-native plant species. This rule implements the Federal protection afforded by the Act for this plant.

EFFECTIVE DATE: February 24, 2000.

ADDRESSES: The complete file for this rule is available for inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Oregon State Office, 2600 S.E. 98th Ave., Suite 100, Portland, Oregon 97266.

FOR FURTHER INFORMATION CONTACT: Andrew Robinson, Botanist, at the above address, or by telephone at 503/231-6179.

SUPPLEMENTARY INFORMATION:

Background

Plagiobothrys hirtus is endemic to seasonal wetlands in the interior valley of the Umpqua River in southwestern Oregon (Amsberry and Meinke 1997b). *P. hirtus* was first collected by Thomas Howell in 1887 and described the following year as *Allocarya hirta* (Greene 1888). Subsequent taxonomic classification included *A. scouleri* var. *hirta*, *P. scouleri* var. *hirtus*, *A. calycosa*, and *P. hirtus* (Gamon and Kagan 1985). Johnston recognized two varieties of the species, *P. hirtus* var. *hirtus* and *P. hirtus* var. *collaricarpus* (Gamon and Kagan 1985). Later, Chambers (1989) considered the material included in the variety *collaricarpus* to be a variety of *P. figuratus*, which elevated the material assigned to *P. hirtus* var. *hirtus* to the full species *P. hirtus*.

A member of the borage family (Boraginaceae), *Plagiobothrys hirtus* is an annual herb on drier sites or perennial herb on wetter sites (Amsberry and Meinke 1997a). It reaches 30–70 centimeters (cm) (1–2 feet (ft)) in height and has a fairly stout stem with widely spreading, coarse, firm hairs on the upper part. The leaves of the main stem are opposite (paired), and the inflorescence (flower) is paired and without bracts (small leaf). The individual flowers are 1–2 millimeters (mm) (0.04–0.08 inches (in)) wide and white in color (Gamon and Kagan 1985). It grows in scattered groups and reproduces largely by insect-aided cross-pollination and partially by self-pollination. The species is distinguished

from other *Plagiobothrys* species by coarse, sparse hairs on the stem and branches (Gamon and Kagan 1985).

Plagiobothrys hirtus grows in open, seasonal wetlands in poorly-drained clay or silty clay loam soils (Gamon and Kagan 1985) at elevations ranging from 30 to 270 meters (m) (98 to 886 ft) (Amsberry and Meinke 1997b). The species appears to be closely associated with the soil type Ruch-Medford-Takilma, and all known naturally-occurring populations occupy this soil type. The taxon is considered dependent on seasonal flooding and/or fire to maintain open habitat and to limit competition with invasive native and non-native plant species, such as Himalayan blackberry (*Rubus discolor*), Oregon ash (*Fraxinus latifolia*), teasel (*Dipsacus fullonum*), and pennyroyal (*Mentha pulegium*) (Gamon and Kagan 1985, Almasi and Borgias 1996). *P. hirtus* occurs in open microsites within the one-sided sedge (*Carex unilateralis*)—meadow barley (*Hordeum brachyantherum*) community type within interior valley grasslands. Other frequently associated species include tufted hairgrass (*Deschampsia cespitosa*), American slough grass (*Beckmannia syzigachne*), great camas (*Camassia leichtlinii* var. *leichtlinii*), water foxtail (*Alopecurus geniculatus*), baltic rush (*Juncus balticus*), wild mint (*Mentha arvensis*), Willamette downingia (*Downingia yina*), and bentgrass (*Agrostis alba*) (Gamon and Kagan 1985).

The species was collected only four times between 1887 and 1961, all at sites within Douglas County, Oregon (Gamon and Kagan 1985). The taxon was considered possibly extinct (Meinke 1982) until it was rediscovered in 1983 as a result of intensive field surveys (Jimmy Kagan, Oregon Natural Heritage Program, pers. comm. 1997). The location of the first specimen, collected by Thomas Howell, was given only as the Umpqua Valley (Greene 1888). The sites of collections from 1932 and 1939 were from 16 kilometers (km) (10 miles (mi)) east of Sutherlin and 3 km (2 mi) north of Yoncalla, respectively (Siddall and Chambers 1978). Both of these sites were surveyed in 1983, but no plants were found (Gamon and Kagan 1985). At the time, the sites were heavily grazed by sheep, which led the botanists to speculate that grazing was the probable cause of extirpation of the species (Gamon and Kagan 1985). In 1961, a collection was made adjacent to Interstate 5 south of Yoncalla, a site which remains in existence today (J. Kagan, pers. comm. 1997).

Despite the few pre-1961 collections, *Plagiobothrys hirtus* was probably widespread historically on the floodplains of the interior valleys of the Umpqua River. Because *P. hirtus* occurs in low-lying areas, seeds were likely dispersed by flood waters, resulting in a patchy, clumped distribution on the floodplains (Gamon and Kagan 1985). Natural processes such as flooding and fire maintained open, wetland habitat (Gamon and Kagan 1985). Draining of wetlands for urban and agricultural uses and road and reservoir construction, however, has altered the original hydrology of the valley to such an extent that the total area of suitable habitat for *P. hirtus* has been significantly reduced. Gamon and Kagan (1985) indicate that fire suppression allows the invasion of woody and herbaceous species into formerly open wetland habitats.

Plagiobothrys hirtus is now limited to 17 isolated patches of habitat in the vicinity of Sutherlin and Yoncalla, Oregon (Oregon Natural Heritage Program 1996). These disjunct habitat patches range in size from 0.04 to 6.9 hectares (ha) (0.1 to 17 acres (ac)) with population sizes for an individual patch ranging from 1 to 3,000 plants. The 17 habitat patches are estimated to have a total of about 7,000 plants and a combined area of less than 18 ha (45 ac). Of the 17 habitat patches, 1 site is 7 ha (17 ac), 3 sites are between 2 and 4 ha (5 and 10 ac), 4 are between 0.4 and 2 ha (1 and 5 ac), and 9 are less than 0.4 ha (1 ac) in size. The size of the habitat patch had no correlation with the number of plants occupying the patch. For example, 3,000 plants occupied a 4 ha (1 ac) habitat patch and the 7 ha (17 ac) habitat patch had only 50 scattered plants.

All existing populations are at risk of extirpation due to a variety of threats (Almasi and Borgias 1996; J. Kagan, pers. comm. 1997; Robert Meinke, Oregon State University, pers. comm. 1997). In addition to the ongoing threat of direct loss of habitat from conversion to urban and agricultural uses, hydrological alterations, and fire suppression, other threats to the species include spring and summer livestock grazing, roadside mowing, spraying, competition with non-native vegetation, and landscaping (Gamon and Kagan 1985; J. Kagan, pers. comm. 1995).

Fifteen of the 17 occupied habitat patches occur on private or commercial land. Three of these parcels are owned and managed by The Nature Conservancy. The other 12 habitat patches have no protective management for the species and are at risk of extirpation from development,

incompatible grazing and farming practices, and recreational activities (J. Kagan, pers. comm. 1997; R. Meinke, pers. comm. 1997). The two remaining known sites occur on public land owned by the Oregon Department of Transportation (ODOT), with a portion of one site partially occurring on private land as well.

Previous Federal Action

Federal action on *Plagiobothrys hirtus* 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. On July 1, 1975, we published a notice in the **Federal Register** (40 FR 27823) of our acceptance of the 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 the plant species named in the report. As a result of this review, we published a proposed rule in the **Federal Register** on June 16, 1976 (41 FR 24523), to determine approximately 1,700 vascular plant species to be endangered pursuant to section 4 of the Act. This list, which included *P. hirtus*, 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. In 1978, amendments to the Act required that all proposals over 2 years old be withdrawn. A 1-year grace period was given to proposals already over 2 years old. On December 10, 1979, we published a notice in the **Federal Register** (44 FR 70796) of the withdrawal of that portion of the June 16, 1976, proposal that had not been made final, along with four other proposals that had expired.

We published an updated notice of review for plants on December 15, 1980 (50 FR 82480), including *Plagiobothrys hirtus* as a category 1 candidate species. At that time, category 1 candidates (now referred to as candidates) were those for which we believed we had substantial information to support a proposal to list the species as threatened or endangered. We changed the status of *P. hirtus* to category 2 in the November 28, 1983, supplement to the notice (45 FR 53657), and this species remained a category 2 in the September 27, 1985, notice of review (50 FR 39527). Category 2 candidates were those species for which we have enough information suggesting that listing is possibly appropriate, but conclusive data on vulnerability and

threat were not available to support a proposed rule. In the February 21, 1990, notice of review (55 FR 6185), we designated *P. hirtus* as a candidate. On February 28, 1996, we published a notice of review in the **Federal Register** (61 FR 7596) that discontinued the designation of category 2 species as candidates. In that notice of review, we retained *P. hirtus* as a candidate species.

Section 4(b)(3)(B) of the Act requires the Secretary to make 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. This provision applied to *Plagiobothrys hirtus* because of the acceptance of the 1975 Smithsonian Report as a petition. On October 13, 1983, we found that the petitioned listing of this species was warranted but precluded by other pending listing actions, in accordance with section 4(b)(3)(B)(iii) of the Act; notice of this finding was published on January 20, 1984 (49 FR 2485). Such a finding requires the petition to be reevaluated annually pursuant to section 4(b)(3)(C)(i) of the Act. The finding was reviewed annually in October of 1984 through 1996. On November 20, 1997, we published a proposed rule (62 FR 61953) for this species, and on January 22, 1998, we announced a notice of public hearing and extension of the comment period (63 FR 3301). Publication of this rule constitutes the final determination for the petitioned action.

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 is a Priority 2 action and is being completed in

accordance with the current Listing Priority Guidance.

Summary of Comments and Recommendations

In the November 20, 1997, proposed rule (62 FR 61953) and associated notifications, we requested interested parties to submit factual reports or information that might contribute to the development of a final listing decision. We sent announcements of the proposed rule and notice of a public hearing to appropriate State and Federal agencies, county governments, city governments, scientific organizations, private land owners, industrial land owners and other interested parties and requested comments. We also published announcements of the proposed rule in the *Oregonian* on December 8, 1997, and the *Roseburg News-Review* on December 8, 1997. We held a public hearing on February 10, 1998, in Roseburg, Oregon, and extended the public comment period to February 23, 1998 (63 FR 3301).

We received six written comments during the comment period following the publication of the proposed rule. One individual who submitted a set of written comments also testified at the public hearing. Three commenters opposed and three favored the listing of *Plagiobothrys hirtus* as endangered. Several commenters provided information on the status of and threats to various populations of *P. hirtus* that updated the information presented in the proposed rule. We considered all comments and incorporated the information provided into the Background and Summary of Factors sections of this final rule. Comments of a similar nature or point regarding the proposed rule have been grouped into issues and are discussed below.

Issue 1: One commenter stated the Federal regulation of the rough popcornflower under the Act fails to meet the constitutional test of substantial impact upon interstate commerce, and thus the rule should be withdrawn.

Our Response: The Federal government has the authority under the commerce clause of the U.S. Constitution to protect this species, for the reasons given in Judge Wald's opinion and Judge Henderson's concurring opinion in *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), cert. denied, 1185 S. Ct. 2340 (1998). That case involved a challenge to application of the Act's prohibitions to protect the listed Delhi Sands flower-loving fly (*Rhaphiomidas terminatus abdominalis*). As with *Plagiobothrys*

hirtus, the Delhi Sands flower-loving fly is endemic to only one State. Judge Wald held that application of the Act's prohibition against taking of endangered species to this fly was a proper exercise of Commerce Clause power to regulate—(1) use of channels of interstate commerce; and (2) activities substantially affecting interstate commerce, because it prevented destructive interstate competition and loss of biodiversity. Judge Henderson upheld protection of the fly because doing so prevents harm to the ecosystem upon which interstate commerce depends and regulates commercial development that is part of interstate commerce.

Moreover, a substantial amount of interstate commerce arises from the efforts of conservation organizations to protect rare species. The Nature Conservancy, a national organization that engages in substantial interstate commerce through fund-raising and sale of its publications, has sought to protect *Plagiobothrys hirtus* through voluntary agreements and land acquisitions.

Issue 2: A second commenter opposed listing *Plagiobothrys hirtus* until a thorough scientific search has been conducted for additional populations in an area east of Sutherlin called the Nonpareil area.

Our Response: We have used previously published soil maps for the State of Oregon (United States Department of Agriculture 1991) as a tool to assess the likelihood of locating additional populations of *Plagiobothrys hirtus* in the Nonpareil area. Although there is a possibility that additional populations of *P. hirtus* occur in the vicinity based on soil types, land use patterns in the Nonpareil area are similar to those found south of Sutherlin. Thus, if additional occupied habitat is found in the Nonpareil area, it probably would be facing similar threats and would not reduce the need for listing *P. hirtus*. The Act requires us to list species based upon the threats facing the species and not on the number of plants or populations, as in this case.

Issue 3: The same commenter suggested captive propagation techniques should be developed and used to prevent the endangerment of *Plagiobothrys hirtus*.

Our Response: We concur that captive propagation may be an important technique used to recover *Plagiobothrys hirtus*. In fact, biologists have initiated monitoring, life history studies, and transplantation experiments using field-collected seed within some habitat patches. However, the Act requires us to conserve the ecosystems upon which

endangered and threatened species depend and although these techniques are tools used by us and our cooperators to help reduce the threats to the species, these tools will not remove or reduce the threats to the level that the species will not require the protections of the Act.

Issue 4: The same commenter recommended additional public outreach and education, assuming the public will then come forward with information and locations of populations of *Plagiobothrys hirtus* presently unknown to us.

Our Response: In the proposed rule to designate *Plagiobothrys hirtus* as an endangered species published on November 20, 1997 (62 FR 61953), we requested public comments on “(2) The location of any additional occurrences of this species . . .”. The comment period was extended on January 22, 1998 (63 FR 3301). We also continually seek information from the public on possible new locations of rare and endangered species. We have developed a public outreach plan to inform the public of this listing concurrent with the publication of this rule.

Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we solicited the expert opinions of appropriate and independent specialists regarding pertinent scientific or commercial data relating to the biological and ecological information for *Plagiobothrys hirtus*. Two individuals responded to our request and supported the listing based upon the scientific data. We incorporated the comments as appropriate in this final rule.

Summary of Factors Affecting the Species

After a thorough review and consideration of all information available, we determine that *Plagiobothrys hirtus* should be classified as an endangered species. We followed procedures found at section 4(a)(1) of the Act and the regulations (50 CFR part 424) implementing the listing provisions of the Act. 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). These factors and their application to *Plagiobothrys hirtus* Greene (rough popcornflower) are as follows:

A. *The present or threatened destruction, modification, or curtailment of habitat or range.* *Plagiobothrys hirtus* has been, and continues to be, threatened by destruction and modification of its

wetland habitat (R. Meinke, pers. comm. 1997). Although the species is believed to have been more abundant in the past throughout the interior valleys of the Umpqua River, it is now limited to 17 small, isolated habitat patches. Direct loss of habitat from hydrological alterations, wetland filling, livestock grazing, or conversion to other uses pose a threat to all 17 occupied habitat patches.

Five habitat patches were recently known to occur on private land within the urban boundary of the town of Sutherlin, but only two populations continue to exist, and they make up about 4.5 percent of the remaining occupied habitat. Since 1997, 34 percent of *P. hirtus* urban populations have been lost to development. Plant populations in both remaining sites have continued to decline in recent years (J. Kagan, pers. comm. 1995, 1997; Amsberry and Meinke 1997b).

Two sites were, at one time, a single large habitat patch of about 5 ha (13 ac) with about 300 to 500 plants growing in openings when discovered in 1983 (J. Kagan, pers. obs. 1983). By 1985, this site had fill dirt dumped in the wetlands, and a series of drainage ditches installed (John Gamon, Washington Natural Heritage Program and J. Kagan, pers. obs. 1985). As a result, the population was divided into two, with the second population occurring a few hundred feet from the first population, just south of a trailer park in a commercially viable vacant lot. In 1997, biologists estimated the total amount of habitat occupied by the 2 populations as 1 ha (2.5 ac). Additionally, in 1997 biologists observed survey markers at the sites, and both sites are frequently mown. A local resident indicated that the property was for sale and that unspecified development plans were being formulated (Kelly Amsberry, Oregon State University and R. Meinke, pers. obs. 1997). In 1998, one population was eliminated by grading and dumping with fill. The other population continues to exist, though only a few plants are left (K. Amsberry, pers. comm. 1998). It is likely that the drainage ditches are contributing to the loss of habitat by changing the hydrology of the sites.

The other existing urban population was found in 1983 with 60 to 100 plants. This undeveloped site is located adjacent to two highways in an area that is considered to be very valuable for commercial development. The population was estimated to have about 40 to 50 plants in 1997 (K. Amsberry and R. Meinke, pers. obs. 1997). The current owner plans to develop the site

eventually into a mall (Danny Lang, landowner, pers. comm. 1997).

A fourth population located in 1986 in a horse pasture with 30 to 40 *Plagiobothrys hirtus* plants no longer exists (J. Kagan, pers. obs. 1986). A visit in 1997 found that the site was now a housing development with a single *P. hirtus* plant residing in a vacant lot that was for sale (K. Amsberry, pers. obs. 1997). This last remaining plant was lost when developers constructed a new house in late 1997 or early 1998 (K. Amsberry, pers. comm. 1998).

A fifth urban population was also known to exist until recently. In 1983, J. Gamon and J. Kagan discovered the site which consisted of 100 to 500 plants in 1985. The presence of sewer and storm drains above ground level at that time suggested there were plans to fill the site by about 1.5 m (3 ft). Construction workers plowed or graded the site and, by 1997, only one plant remained (K. Amsberry and R. Meinke, pers. obs. 1997). In 1998, the remaining plant was lost due to development (K. Amsberry, pers. comm. 1998).

Ten occupied habitat patches are known from private land just south of the town of Sutherlin to just north of Wilbur. Three of these 10 populations (or 56 percent of the remaining occupied habitat) of *Plagiobothrys hirtus* occur on TNC lands, and have exhibited wide variations in numbers of plants over the recent past. The population on TNC land at Popcorn Swale demonstrated a particularly volatile pattern of change in abundance. TNC did their first count in 1995 and estimated more than 16,000 individuals. However, in 1996, the population plummeted to only 394 plants, a drop attributed to an extensive period of standing water on the preserve that year due to a wet spring (Almasi and Borgias 1996). In 1997, TNC estimated a population size of 3,630 individuals. These large fluctuations are not unexpected for a species with a primarily annual life cycle. The dramatic fluctuation over the period from 1995 to 1997 appears to correspond to the variation in spring season precipitation received and subsequent depth and duration of inundation observed on the preserve over that period (Darren Borgias, TNC, *in litt.* 1998). *P. hirtus* prefers shallow, seasonal pools in open grassland (Almasi and Borgias 1996), and all three populations are threatened by shading and competition by non-native and native shrubs and trees.

Four of the 10 *Plagiobothrys hirtus* populations on TNC land occur south of Sutherlin and make up about 21 percent of the remaining occupied

habitat. Agricultural land conversion and livestock grazing have degraded the habitat of these populations. All four of these populations occur within fenced livestock pastures and are subjected to heavy grazing pressure (see Factor C).

The remaining 3 out of the 10 habitat patches south of Sutherlin account for approximately 3 percent of occupied habitat. Biologists have documented a decline over time at 1 site from 50 to 60 plants, to 10 to 20 plants. The other two sites tend to fluctuate in numbers. These three sites, as well as the TNC sites, are threatened by competition from invasion of non-native weedy vegetation and succession, which is causing a closure of the forest canopy (see Factor E).

Three other sites are known to occur outside of the town of Sutherlin. Two known habitat patches are located east of Sutherlin on private land. One site, about 2 ha (5.5 ac) in size, is by a road in an agricultural field and is estimated to be about 12.5 percent of the total remaining occupied habitat. The location of the site is in a wet depression in a hayfield. The hayfield was plowed and planted in grass hay, and biologists observed tractor tracks in the depression in which *Plagiobothrys hirtus* occurred after the grass hay was cut and baled. Cattle are turned out into the field in the fall. This population has at least 1,000 individual plants and is threatened by plowing, haying, and livestock grazing. The other site is much smaller, occupying less than 10 square meters (m²) (108 square feet (ft²)), and occurs in a seasonally wet roadside ditch along a private driveway. Only four or five individual plants occur at this site. Mowing and herbicide sprays threaten this population (K. Amsberry, pers. comm. 1998).

The third site is located west of Sutherlin, also in a roadside ditch, similar to the second population. This site contains a couple hundred plants, and site totals approximately 10 m² (108 ft²). Threats to this population are also mowing and herbicide spraying.

The last two habitat patches, which contain about 3 percent of the occupied habitat, occur in a marshy area on public and private land about 22 km (14 mi) north of Sutherlin, near the town of Yoncalla. In 1983, the Oregon Department of Agriculture rediscovered the collection made in 1961 at this site (see "Background" section). About 200 plants were present in 1988 in 2 separate habitat patches. The northern patch is completely managed by ODOT. The southern patch is partially managed by ODOT, but a portion also occurs on private land. Overall, the population has continued to increase under

management by ODOT. Although the population on public land appears vigorous, a portion of the population on the adjacent private land appears to have vanished (J. Kagan, pers. comm. 1997). The northern habitat patch contains 500 plants in a 2 by 20 m (6 by 65 ft) area (Amsberry and Meinke 1997b). The northern population appears stable; however, its small size and precarious location make predictions of its future stability risky (Amsberry and Meinke 1997b). Counts in 1997 estimated the number of plants in the southern patch to be 3,000 (Amsberry and Meinke 1997b).

Alterations in site hydrology pose the primary threat to the plants (R. Meinke, pers. comm. 1997). Right-of-way management also poses a threat to these two populations. For example, in early July of 1995, damage to the marked study plots of transplanted *Plagiobothrys hirtus* plants, established by the Oregon Department of Agriculture, occurred by ODOT maintenance activities. Inspection of the sites documented damage to the plants, revealing a near complete loss of all transplanted material and relevant plot location markers. The naturally occurring population received only superficial impacts (Nicholas Testa, ODOT, pers. comm. 1995). Since then ODOT has taken steps to prevent this situation from reoccurring (see "Available Conservation Measures" section and Factor D of this section for additional information).

B. Overutilization for commercial, recreational, scientific, or educational purposes. It is not known if the species is currently being collected. However, listing a species can precipitate commercial or scientific interest, both legal and illegal, which can threaten the species through unauthorized and uncontrolled collection for both commercial and scientific purposes. Listing species as threatened or endangered publicizes their rarity and may make them more susceptible to collection or trampling by researchers or plant enthusiasts (Mariah Steenson, Portland Nursery, Inc., pers. comm. 1997; Mark Bosch, U.S. Forest Service, *in litt.* 1997). This species occurs in locations that are easily accessed by road, and the small population sizes make them vulnerable to overcollection by botanical enthusiasts.

Plagiobothrys hirtus is an attractive plant with flowers similar in appearance to forget-me-nots. The species is easily propagated in an artificial setting and transplanted. The species is conspicuous when in massed populations (Amsberry and Meinke 1997b). As a member of the

Boraginaceae, a family which contains numerous traditional medicinal herbs, *P. hirtus* could have pharmaceutical potential, though no research has been conducted on this subject (Amsberry and Meinke 1997b). The species may be sought for collection if its rarity and population locations become well known. Also, many species of *Plagiobothrys* look very much alike, and collectors could confuse *P. hirtus* with other more common *Plagiobothrys* species (Amsberry and Meinke 1997b). Most of the remaining populations of the species are so small that even limited collecting pressure could have significant adverse impacts.

Vandalism seems to be a potential threat for some populations. For example, after *Plagiobothrys hirtus* was listed as endangered by the State of Oregon, a landowner contacted the Oregon Division of State Lands to obtain a permit to develop the wetlands on his property to put in a small housing development. In processing his permit, the State informed the landowner of a *P. hirtus* population occupying that site. State-employed botanists contacted the landowner about protective measures for the population. The landowner allegedly responded by blading the site to level the swale the population was occupying and destroyed the population (J. Kagan, pers. comm. 1997).

Vandalism also occurred at a site near Sutherlin a few years ago. The Nature Conservancy informed a landowner of *Plagiobothrys hirtus* growing on his property and offered to purchase the property. The landowner declined the offer and dumped fill onto a portion of the population (J. Kagan, pers. comm. 1998).

C. *Disease or predation.* Past grazing has likely been a contributing factor to declining *Plagiobothrys hirtus* numbers throughout its historic range (Gamon and Kagan 1985). The timing and intensity of grazing are important factors in the effect of grazing on the plant. Livestock grazing during spring and early summer likely causes the most damage to this species. When herbivores eat the flower or seed head of the plant, the reproductive output for the year for that individual is destroyed. This activity may be more significant at sites where the species functions as an annual (Gamon and Kagan 1985). Biologists believe that sheep grazing may have been the main reason why at least two historical *P. hirtus* locations were extirpated.

Livestock graze in pastures containing four of the known habitat patches (Amsberry and Meinke 1997b). Currently, the grazing pressure is heavy at three of those sites, as evidenced by

Plagiobothrys hirtus plants being restricted to bare ground between clumps of *Juncus* (Amsberry and Meinke 1997b). One site is grazed by horses, rather than by sheep or cattle, and the grazing pressure appears less intense than at the other sites as evidenced by larger, more vigorous patches of *P. hirtus* (Amsberry and Meinke 1997b).

However, where fires and flooding no longer occur, grazing may benefit the species. This species prefers open canopies and does not compete well with woody and non-native vegetation (Amsberry and Meinke 1997b). Fall grazing, in particular, may benefit the plant because it is dormant at this time and grazing can keep the habitat open by reducing the growth of weedy species (Gamon and Kagan 1985).

Herbivory due to small rodents has been observed on overwintering *Plagiobothrys hirtus* plants, but the long-term effects of this damage is not known (Amsberry and Meinke 1997b). This is particularly a problem in areas that have dense and overgrown vegetation. Amsberry and Meinke (1997b) documented aphids, which appear to prevent normal seed development and dispersal in some cases although rarely causing extensive damage, on scattered shoots and flowers. Amsberry and Meinke observed caterpillars on leaves and flowers of *P. hirtus*, but the effects are not believed to be significant (Amsberry and Meinke 1997b).

D. *Inadequacy of existing regulatory mechanisms.* Under the Oregon Endangered Species Act (ORS 564.100–564.135) and regulations (OAR 603, Division 73), the Oregon Department of Agriculture has listed *Plagiobothrys hirtus* as endangered (OAR 603–73–070). This statute prohibits the “take” of State-listed plants on State, county, and city owned or leased lands only. Most occurrences of *P. hirtus* occur on private land and are not subject to any current regulations. An occurrence adjacent to Interstate Highway 5, on lands managed by ODOT, was designated by the agency as a Special Management Area. The ODOT modified its mowing and spraying practices to protect the species at this site where the plant appears to be stable or increasing (N. Testa, pers. comm. 1997).

Section 404 of the Clean Water Act could provide some protection for *Plagiobothrys hirtus* under certain circumstances. Section 404 requires that a person proposing to discharge dredged or fill material into waters of the United States, including wetlands, must first obtain a permit from the U.S. Army Corps of Engineers (Corps). The Corps

can deny or restrict such permits where necessary to prevent adverse effects on various resources, including water supplies, fisheries, and wildlife.

Section 404 is not, however, adequate to ensure protection of the wetland habitat upon which *Plagiobothrys hirtus* depends. First, section 404 does not regulate all discharges that may harm wetlands. Section 404 exempts from the permit requirement many farming, ranching, and silvicultural practices; construction of certain farm, forest and mining roads; construction of stock ponds and irrigation ditches; and several other activities. Second, section 404 does not regulate activities that may alter wetland habitats but do not involve discharges of dredged or fill material, such as application of herbicides or introduction of competing vegetation. Third, even where section 404 does apply, many activities are permitted by regulation under “nationwide permits” issued by the Corps (December 13, 1996; 61 FR 65873; 63 FR 36040). Under several of these nationwide permits, persons are allowed to fill wetlands without giving prior notice to the Corps, provided the fill is within certain volume or acreage limits. Many of the sites where *P. hirtus* occurs are small wetlands that could fall below these acreage limits. Section 404 would provide greater protection if *P. hirtus* were listed, because nationwide permits are not applicable where a discharge would jeopardize or adversely modify the critical habitat of a listed species (33 CFR 330.4(f)).

E. *Other natural or manmade factors affecting its continued existence.* Five of 10 existing habitat patches of *Plagiobothrys hirtus* occur adjacent to major highways (Interstate 5 and/or State Route 99), and another 2 populations occur in roadside ditches. Herbicide and pesticide spraying and mowing are often a part of routine maintenance of roadways. As with livestock grazing, mowing or pesticide spraying during the spring and summer have a direct effect by reducing seed set, which negatively affects populations of the species. Pesticides and herbicides have an indirect effect on the species because most *P. hirtus* plants rely on insect pollinators to reproduce, and these insect pollinators are vulnerable to pesticides and herbicides (Amsberry and Meinke 1997b). In addition, roadside occurrences are at risk of toxic chemical spills and runoff containing oil and grease (N. Testa, pers. comm. 1997). Vehicle accidents also increase the risk of fuel contamination or fire; such an accident recently occurred adjacent to the ODOT population, but

the species was not affected (N. Testa, pers. comm. 1997).

With the exception of the *Plagiobothrys hirtus* populations in ODOT's Special Management Area and TNC's Popcorn Swale, none of the roadside occurrences are protected from herbicide spraying, landscaping, or early season mowing. Herbicide spraying and mowing has affected and reduced at least one *P. hirtus* population (J. Kagan, pers. comm. 1995). A landowner at another known site reported that the ditch line along the State Route 99 has been sprayed 20 times or more in the last 28 years (James and Florence Klingler, landowners, *in litt.* 1998). Late season mowing has benefited the *P. hirtus* population at the ODOT site, probably by reducing competition from other plants and herbivory by voles (R. Meinke, pers. comm. 1997).

Encroachment by native and non-native plant species increases when natural processes like fire or flooding are altered (J. Kagan, pers. comm. 1997; R. Meinke, pers. comm. 1997). Invasion of vernal pools and wet areas by exotic grasses and herbs, as well as encroachment by native ash that increase shading, has caused the decline of this species in at least two populations. This taxon prefers full exposure to sun, and succession in some locations has increased shading by Oregon ash, willow (*Salix*), and the non-native common pear tree (*Pyrus*) (Amsberry and Meinke 1997b). In an experimental transplanting of this species into two sites on Bureau of Land Management (BLM) lands in 1998, the plants located in an open wet area did well, but the population planted in a wet area in shade died out, indicating that the species does not tolerate shading (K. Amsberry, pers. comm. 1998).

After a 1985 fire at one of the sites in Sutherlin, the plants responded the following year with vigorous growth (J. Kagan, pers. comm. 1997). As with late season grazing or mowing, late season fire is likely to be of benefit to the species by reducing encroaching vegetation. Fire occurring prior to seed set may have negative effects on *Plagiobothrys hirtus*. The encroachment of weedy, and especially woody, species may also alter site hydrology by capturing more of the available water, an alternative explanation for the dramatic collapse of the population at the TNC preserve between 1995 and 1996 (R. Meinke, pers. comm. 1997). The apparent population decline at another habitat patch may be due to trees shading much of the site (Amsberry and Meinke 1997b).

However, the dramatic fluctuation in abundance, both up and down, appears to correspond more closely to dramatic annual fluctuation in precipitation and hydrology.

Because of the small, isolated nature of the occurrences and the few individuals present in most of them, *Plagiobothrys hirtus* is also more susceptible to random events, such as fires during the growing season, insect or disease outbreaks, or toxic chemical spills. The rapid, and as yet unexplained, collapse of the population at the TNC preserve argues for the protection of numerous patches to shield the species from random events that could cause the extinction of the species. Small, isolated populations may also have an adverse effect on pollinator activity, seed dispersal, and gene flow. Currently, 58 percent or 9 of the habitat patches are less than 0.4 ha (1 ac). Only the Popcorn Swale population is greater than 4 ha (10 ac). The existence of both annual and perennial populations in *P. hirtus* suggests that some local genetic differentiation may already exist among populations of the species. Genetic drift within small, isolated populations can lead to a loss of genetic variability and a reduced likelihood of long-term viability (Franklin 1980; Soule 1980; Lande and Barrowclough 1987).

We have carefully assessed the best scientific and commercial information available concerning the past, present, and future threats faced by this species in developing this final rule. *Plagiobothrys hirtus* is imperiled by the filling of wetland habitat for development, livestock grazing, invasion by competitive plant species as a result of hydrological alteration and fire suppression, and roadside spraying and mowing, all of which continue to reduce plant numbers and habitat. The small, isolated occurrences, with few individuals, make the species more vulnerable to all threats. Much of the habitat where this species occurs is unprotected from these threats. In addition, continued decreases in the number of occurrences and individuals could result in decreased genetic variability. The varied and cumulative threats to *P. hirtus* indicate the species is in danger of extinction throughout its range and meets the Act's definition of endangered. Because of the high potential for these threats, if realized, to result in the extinction of *P. hirtus*, the preferred action is to list *P. hirtus* as endangered. Threatened status is not appropriate because all of the existing occurrences of *P. hirtus* are small, and 15 of 17 habitat patches have no protection from mowing, herbicide

application, imminent urbanization, and grazing threats. In addition, one of the protected occurrences recently suffered a precipitous, and as yet unexplained, reduction in numbers.

Critical Habitat

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 geographical 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" means the use of all methods and procedures needed to bring the species to the point at which listing under the Act is no longer necessary.

Section 4(a)(3) of the Act, 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 designation of critical habitat is not prudent when one or both of the following situations exist—(i) the species is threatened by taking or other activity and the identification of critical habitat can be expected to increase the degree of threat to the species or (ii) such designation of critical habitat would not be beneficial to the species. We find that designation of critical habitat is prudent for the for the *Plagiobothrys hirtus*.

In the proposed rule, we indicated that designation of critical habitat was not prudent for *Plagiobothrys hirtus* 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 for *Plagiobothrys hirtus* would be prudent.

Due to the small number of populations, *Plagiobothrys hirtus* 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. We have examined the evidence available for *P. hirtus* and have found two documented cases of vandalism to two *P. hirtus* populations when the landowners were informed that the species occurred on their land (see factor B). No other specific evidence of taking, vandalism, collection, or trade of this species or any similarly situated species is available. 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 further increase the degree of threat of taking or other human activity above that of the listing of the species. The two documented cases of vandalism occurred as a result of the listing of the species as endangered by the State of Oregon. We don't expect that a designation of critical habitat will increase the threat of taking by landowners since they are already aware of the species presence on their property.

In the absence of a finding that designation of 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, there may be some benefits to designation of critical habitat. The primary regulatory effect of critical habitat designation 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, there may be instances where section 7 consultation would be triggered only if critical habitat is designated. Examples could include unoccupied habitat or occupied habitat that may become unoccupied in the future. There may also be some educational or informational benefits to designating critical habitat. Therefore, we find that

designation of critical habitat is prudent for *Plagiobothrys hirtus*.

The Final Listing Priority Guidance for FY 2000 (64 FR 57114) states, "The processing of critical habitat determinations (prudence and determinability decisions) and proposed or final designations of critical habitat 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 immediately complete all of the listing actions required by the Act. Deferral of the critical habitat designation for *Plagiobothrys hirtus* has allowed us to concentrate our limited resources on higher priority critical habitat (including court ordered designations) and other listing actions, while allowing us to put in place protections needed for the conservation of *Plagiobothrys hirtus* without further delay. However, because we have successfully reduced, although not eliminated, the backlog of other listing actions, we anticipate in FY 2000 and beyond giving higher priority to critical habitat designation, including designations deferred pursuant to the Listing Priority Guidance, such as the designation for this species, than we have in recent fiscal years.

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 the *Plagiobothrys hirtus* as soon as feasible, considering our workload priorities. Unfortunately, for the immediate future, most of Region 1's listing budget must be directed to complying with numerous court orders and settlement agreements, as well as due and overdue final listing determinations (like the one at issue in this case).

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 can encourage and result in public awareness and conservation actions by Federal, State, and local agencies, private organizations, and individuals. The Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required by 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 designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with us 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 subsequently listed, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or 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 consultation with us.

None of the known naturally occurring populations of *Plagiobothrys hirtus* occurs on Federal lands. Because *P. hirtus* occurs in wetlands, regulatory mechanisms under the Clean Water Act apply to this species. As part of our outreach efforts, we notify the Corps of known populations of *P. hirtus*.

Other Federal agencies' actions that may require consultation include the National Resource Conservation Service projects and Department of Housing and Urban Development and Veterans' Administration mortgage programs (Federal Home Administration loans). The Federal Highway Administration will become involved with *Plagiobothrys hirtus* when highway maintenance is funded, even in part, by the Federal government. Any State highway activity being implemented by ODOT that is partially funded by the

Federal government will be subject to consultation under the Act. In addition, sections 2(c)(1) and 7(a)(1) of the Act require Federal agencies to utilize their authorities in furtherance of the purposes of the Act to carry out conservation programs for endangered and threatened species.

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

Five of the 17 habitat patches currently receive some protective management. Two patches are owned and managed by ODOT and are conserved under State law. The ODOT physically delineated the sites with plastic markers and signs designating them as Special Management Areas (Amsberry and Meinke 1997b). Mowing is restricted to late in the fall when *Plagiobothrys hirtus* is dormant (N. Testa, pers. comm. 1997). Three patches are in private, protective ownership, owned and managed by TNC. These patches, which currently contain about 3,630 individual plants, are being actively managed for the protection and development of *P. hirtus* habitat (Almasi and Borgias 1996) by reducing grazing of sites and eliminating exotic vegetation. The Nature Conservancy and ODOT have initiated monitoring, life history studies, and transplantation experiments using field-collected seed within these five habitat patches. The objectives of these efforts are to increase population sizes, and establish protocols for seed collection, greenhouse propagation, and transplantation techniques (Amsberry and Meinke 1997b).

During the spring of 1998, we assisted the BLM with experimental introductions using 1,000 greenhouse-grown plants that were planted at 2 different sites on BLM lands in suitable wetland habitats. We established the plants on an upland soil type with which *Plagiobothrys hirtus* is not typically associated and in an area that is outside the historic range of the species. One of these populations did

well following the transplanting (K. Amsberry, pers. comm. 1998), but the plants need to persist for at least five years before the transplant can be considered a success. During the fall of 1998, the site was found to be under about 0.6 m (2 ft) of water, so the plantings may not survive. Two other transplants occurred at sites on ODOT and TNC properties into established populations to augment them.

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, 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 our agents and State conservation agencies.

As published on July 1, 1994 (59 FR 34272), our policy is to identify, to the maximum extent practicable, those activities that would or would not constitute a violation of section 9 of the Act at the time of listing. 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. Collection, damage, or destruction of this species on Federal land is prohibited, although in appropriate cases, we may issue a Federal endangered species permit for scientific or recovery purposes. We believe that, based upon the best available information, you can take the following actions without resulting in a violation of section 9, only if 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., wetland modification; powerline construction, maintenance, and improvement; highway construction, maintenance, and improvement; and permits for mineral exploration and mining) when such activity is conducted in accordance with any

reasonable and prudent measures given by us according to section 7 of the Act.

(2) Normal agricultural and silvicultural practices, including pesticide and herbicide use, that are carried out in accordance with any existing regulations, permit and label requirements, and best management practices.

(3) Normal landscape activities around your own personal residence.

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

(1) Removal, cutting, digging up, damaging, or destroying endangered plants on non-Federal land if conducted in knowing violation of Oregon State law or regulations or in violation of State criminal trespass law.

(2) Interstate or foreign commerce and import/export without previously obtaining an appropriate permit.

Questions regarding whether specific activities will constitute a violation of section 9 should be addressed to the State Supervisor of the Oregon State Office (see **ADDRESSES** section).

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 plants under certain circumstances. Such permits are available for scientific purposes and to enhance the propagation or survival of the species. Requests for copies of the regulations concerning listed plants and animals and general inquiries regarding prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Ecological Services, Endangered Species Permits, 911 N.E. 11th Avenue, Portland, Oregon 97232-4181 (telephone 503/231-2063; facsimile 503/231-6243).

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).

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 species, see 50 CFR 17.62.

References Cited

A complete list of all references cited herein is available upon request from the Oregon State Fish and Wildlife Office (see ADDRESSES section).

Author

The primary author of this final rule is Dr. Andrew F. Robinson, Jr., U.S. Fish and Wildlife Service, Oregon State Office (see ADDRESSES section).

List of Subjects in 50 CFR Part 17

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

Regulation Promulgation

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

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 § 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 | | | | | | | |
| * | * | * | * | * | * | * | * |
| <i>Plagiobothrys hirtus</i> | Rough popcornflower | U.S.A. (OR) | Boraginaceae | E | 678 | NA | NA |
| * | * | * | * | * | * | * | * |

Dated: November 30, 1999.
Jamie Rappaport Clark,
Director, Fish and Wildlife Service.
[FR Doc. 00-1562 Filed 1-24-00; 8:45 am]
BILLING CODE 4310-55-P

DEPARTMENT OF THE INTERIOR
Fish and Wildlife Service

50 CFR Part 17
RIN 1018-AE53

Endangered and Threatened Wildlife and Plants; Endangered Status for "Erigeron decumbens" var. "decumbens" (Willamette Daisy) and Fender's Blue Butterfly ("Icaricia icarioides fenderi") and Threatened Status for "Lupinus sulphureus" ssp. "kincaidii" (Kincaid's Lupine)

AGENCY: Fish and Wildlife Service, Interior.
ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service ("Service" or "we") determines endangered status pursuant to the Endangered Species Act (Act) of 1973, as amended, for a plant and a butterfly, *Erigeron decumbens* var. *decumbens* (Willamette daisy) and Fender's blue butterfly (*Icaricia icarioides fenderi*), and determines threatened status for a plant, *Lupinus sulphureus* ssp. *kincaidii* (Kincaid's lupine). These species are

restricted primarily to native prairie in the Willamette Valley of Oregon and are known currently from a few small remnants of a formerly widespread distribution. In addition to its Oregon occurrences, *L. sulphureus* ssp. *kincaidii* is known also from two small sites in southern Washington. Commercial and/or residential development, agriculture, silvicultural practices, road improvement, over-collection, herbicide use, and naturally occurring demographic and random environmental events threaten these three taxa. This final rule invokes the Federal protection and recovery provisions of the Act, as applicable for these plant and butterfly species.

EFFECTIVE DATES: February 24, 2000.

ADDRESSES: You may inspect the complete file for this rule, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Oregon State Office, 2600 SE 98th Ave, Suite 100, Portland, Oregon 97266.

FOR FURTHER INFORMATION CONTACT: Dr. Andrew F. Robinson, Jr., Botanist; or Diana Hwang, Fish and Wildlife Biologist, U.S. Fish and Wildlife Service (see ADDRESSES section or telephone 503-231-6179, Facsimile 503-231-6195).

SUPPLEMENTARY INFORMATION:

Background

Fender's blue butterfly (*Icaricia icarioides fenderi*), *Lupinus sulphureus* ssp. *kincaidii* (Kincaid's lupine), and *Erigeron decumbens* var. *decumbens* (Willamette daisy) are restricted primarily to the Willamette Valley of Oregon. The valley is a 209-kilometer (km) (130 miles (mi)) long and 32-64-km (20-40-mi) wide alluvial floodplain with an overall northward gradient (Orr *et al.* 1992). The valley is narrow and flat at its southern end, widening and becoming hilly near its northern end at the confluence of the Willamette and Columbia Rivers. We know of four sites containing *L. sulphureus* ssp. *kincaidii* approximately 60 km (38 mi) south of the Willamette Valley and within the Umpqua Valley of Douglas County, Oregon. In addition to its Oregon occurrences, *L. sulphureus* ssp. *kincaidii* is known from two small sites in Lewis County, southern Washington, 70 km (40 mi) north of the Willamette Valley.

The alluvial soils of the Willamette Valley and southern Washington host a mosaic of grassland, woodland, and forest communities. Fender's blue butterfly, *Lupinus sulphureus* ssp. *kincaidii*, and *Erigeron decumbens* var. *decumbens* occupy native grassland habitats within the Willamette Valley. Based on the limited available evidence, most Willamette Valley grasslands are early seral (one stage in a sequential