

DEPARTMENT OF THE INTERIOR

50 CFR Part 17

RIN 1018-AB42

Endangered and Threatened Wildlife and Plants; Final Rule To List the Plant *Phlox nivalis* ssp. *texensis* (Texas Trailing Phlox) as Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The Fish and Wildlife Service (Service) determines *Phlox nivalis* ssp.

texensis (Texas trailing phlox) to be an endangered species under the authority of the Endangered Species Act of 1973 (Act), as amended. This plant presently is known from only 2 sites in east Texas, out of 17 sites that were known previously. The species is threatened by habitat loss from housing development, clearing for pine plantations, highway and pipeline construction, and fire suppression in a savanna ecosystem. This action will implement Federal protection provided by the Act for Texas trailing phlox. Critical habitat is not being designated.

EFFECTIVE DATE: October 30, 1991.

ADDRESSES: The complete file for this rule is available for inspection, by appointment, during normal business hours at the Service's Ecological Services Field Office, 17629 El Camino Real, suite 211, Houston, Texas 77058.

FOR FURTHER INFORMATION CONTACT: Kathy Nemeec (see **ADDRESSES**) at (713) 229-3681 or FTS 526-8700.

SUPPLEMENTARY INFORMATION:

Background

Phlox nivalis ssp. *texensis* is a trailing phlox that is known from only two sites in east Texas. The species is endemic to the Big Thicket area of Texas and associated with the following species: *Fagus grandiflora* (American beech), *Quercus* spp. (oak), *Magnolia* spp. (magnolia), *Pinus* spp. (pine), *Liquidambar styraciflua* (American sweetgum), *Bothriochloa* spp. (beardgrass), *Carya* spp. (hickory), and *Ilex vomitoria* (yaupon). Historically, Texas trailing phlox occurred in open, grassy, frequently burned, longleaf pine (*Pinus palustris*) savanna in sandy soil.

Texas trailing phlox is a short (30 cm.; 12 in.) clumpforming, perennial species with spreading, evergreen shoots. Sterile shoots have crowded, awl-shaped and needle-like leaves; fertile shoots have short, lance-shaped leaves. The flowers occur in a three-to-six flowered cyme; shoots and stems are pubescent with gland-tipped hairs. Flowers are purple-lavender, deep rose, pink, or white, and appear from late March to early April. The fruit is a three-seeded capsule. Little is known about the reproductive biology of this species.

Historically, Texas trailing phlox was known from Hardin, Tyler, and Polk Counties in east Texas. Seven collection sites were documented in the 1940's from Tyler County, five of those were multiple collections. Lundell (1942) described the species as " * * * abundant in the pine lands * * * between Woodville and Warren in Tyler County." Populations from the Big Thicket National Preserve, first documented in 1948, were not seen again until relocated by Geyata Ajilvsgi in 1972 (Mahler 1980).

Mahler (1980) documented five sites from Hardin and Tyler Counties in his status survey. Three populations of only a few clumps each, were located within a short distance of each other in Tyler County. In Hardin County, Texas trailing phlox occurs at two sites on and near Texas Nature Conservancy (TNC) land. The populations in Polk County were not relocated during Mahler's status survey (1980).

During 1989, a Texas Natural Heritage Program botanist relocated 2 out of 17

sites documented in the Heritage Program data base. The largest population occurs on TNC land in Hardin County, where several hundred plants are scattered across a former slash pine plantation in a sandy soil, fire-maintained pine savanna. A small population of only six flowering plants occurs at the edge of a pine plantation in Tyler County (Poole, Texas Parks and Wildlife Department, *in litt.*, 1989).

Texas trailing phlox was first collected in Hardin County, Texas, by Whitehouse in 1931. Lundell described the taxon as a subspecies of *Phlox nivalis* in 1942 and elevated it to the rank of species in 1945. Wherry (1955) in his monograph of *Phlox* and systematic treatment for the Flora of Texas (1966), recognized the taxon as a subspecies of *Phlox nivalis*.

Texas trailing phlox is known only from Texas. However, a disjunct relative, *Phlox nivalis* ssp. *nivalis*, occurs about 400 miles eastward in Florida. Texas trailing phlox differs from this subspecies in having minute, glandular hairs (Wherry 1955).

Section 12 of the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) directed the Secretary of the Smithsonian Institution to prepare a report of those plants considered to be endangered, threatened, or extinct. This report, designated as House Document No. 94-51, was presented to Congress on January 9, 1975. On July 1, 1975, the Service published a notice in the *Federal Register* (40 FR 27823) of its acceptance of the Smithsonian Institution report as a petition within the context of Section 4 of the Act and of its intention to review the status of the plant taxa named within. On June 16, 1976, the Service published a proposed rule in the *Federal Register* (41 FR 24523) to determine approximately 1,700 vascular plant species to be endangered species pursuant to Section 4 of the Act.

This list of 1,700 plant taxa was assembled on the basis of comments and data received by the Smithsonian Institution and the Service in response to House Document No. 94-51 and the July 1, 1975, *Federal Register* publication. Texas trailing phlox was included in the July 1, 1975, notice of review and in the June 16, 1976, proposal.

The Endangered Species Act Amendments of 1978 required that all proposals over two years old be withdrawn. A one-year grace period was given to those proposals already more than 2 years old. Subsequently, on December 10, 1979, (44 FR 70796), the Service published a notice of the withdrawal of the portion of the June 16, 1976, proposal that had not been made

final, along with other proposals that had expired; this notice of withdrawal included Texas trailing phlox.

On December 15, 1980, (45 FR 82480) and September 27, 1985, (50 FR 39526), the Service published updated notices reviewing the native plants being considered for classification as threatened or endangered. Texas trailing phlox was included in these notices as a category 1 species. Category 1 comprises taxa for which the Service has sufficient biological data to support proposing them as endangered or threatened.

Section 4(b)(3)(B) of the Endangered Species Act, as amended in 1982, requires the Secretary to make findings on certain pending petitions within one year of their receipt. Section 2(b)(1) of the Act's Amendments of 1982 further requires that all petitions pending on October 12, 1982, be treated as having been newly submitted on that date. Because Texas trailing phlox was included in the 1980 notice, the petition to list this species was treated as being newly submitted on October 12, 1982. In 1983, 1984, 1985, 1986, 1987, 1988, and 1989, the Service made the required one-year findings that the listing of Texas trailing phlox was warranted, but precluded by other listing actions of higher priority. Biological data, supplied by Mahler (1980), and Poole (*in litt.*, 1989), fully support the listing of Texas trailing phlox. A proposed rule to determine endangered status for this species was published in the *Federal Register* on May 29, 1990 (55 FR 21760).

Summary of Comments and Recommendations

In the May 29, 1990 proposed rule and associated notifications, all interested parties were requested to submit factual reports or information that might contribute to the development of a final rule. Appropriate State agencies, county governments, Federal agencies, scientific organizations, and other interested parties were contacted and requested to comment. Newspaper notices inviting public comment were published in the *Houston Post* on June 18, 1990; the *Houston Chronicle* on June 18, 1990; the *Beaumont Enterprise* on June 17, 1990; the *Polk County Enterprise* on June 18, 1990; the *Silsbee Bee* on June 21, 1990; and the *Woodsman Publishing* on June 21, 1990. Nine comments were received and are discussed below: One from a Federal agency, one from a private organization, and the remainder from individuals. All comments were supportive of the listing proposal.

Issue 1: One commenter mentioned the need to designate critical habitat for Texas trailing phlox.

Response: The threat of loss due to illegal collection remains a concern; publication of critical habitat descriptions and maps would make the plant more vulnerable and increase enforcement problems. Moreover, protection resulting from critical habitat designation is achieved through the section 7 process. Since Texas trailing phlox is currently known only from private lands where section 7 largely does not apply, the designation of critical habitat would not appreciably benefit the species. Critical habitat for Texas trailing phlox may be designated in the future if populations are found on Federal lands.

Issue 2: Some commenters requested additional surveys be done in the Big Thicket National Preserve to find other populations of the Texas trailing phlox.

Response: Based on the best scientific and commercial information available, the Service has determined that the Texas trailing phlox qualifies to be listed as endangered as explained in the "Summary of Factors" section of this rule. The necessity for further surveys that aid in the recovery of the plant will be addressed following the listing process.

Summary of Factors Affecting the Species

After a thorough review and consideration of all information available, the Service has determined that Texas trailing phlox should be classified as an endangered species. Procedures found at section 4(a)(1) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and regulations (50 CFR Part 424) promulgated to implement the listing provisions of the Act were followed. 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 *Phlox nivalis* ssp. *texensis* Lundell (Texas trailing phlox) are as follows:

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

Loss of habitat has caused this subspecies to decline within its range during the last 30 years. Because of the small number of plants within a small number of populations in only two general localities, the taxon is vulnerable to further loss of habitat (Mahler 1980). Housing development and large scale land clearing for pine plantations in Tyler County, Texas, have eliminated former populations of Texas trailing phlox. Pipeline construction adjacent to the TNC land recently destroyed a once thriving population.

The population on the TNC land could be negatively affected by aerial drift from herbicide spray that is often applied from low-flying aircraft in timber areas (Mahler 1980). Loss of additional habitat would be detrimental to this plant.

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

None known. Because of its rarity and potential use as an ornamental, Texas trailing phlox is of interest to botanists, plant breeders, and rare plant enthusiasts. Therefore, collection of plants is a potential threat.

C. Disease or Predation

None apparent.

D. The Inadequacy of Existing Regulatory Mechanisms

Texas trailing phlox is not currently protected by either Federal or State law. The Act would provide protection and encourage active management through the "Available Conservation Measures" discussed below.

E. Other Natural or Manmade Factors Affecting its Continued Existence

Fire suppression within the savanna ecosystem has reduced the amount of suitable habitat for this species. Much of the former habitat has deteriorated because of aggressive invasion of successional hardwoods into unburned pine savannas. A prescribed burning and slash pine removal program on the TNC land has enhanced habitat for Texas trailing phlox.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species in determining to make this rule final. Based on this evaluation, the preferred action is to list Texas trailing phlox as endangered, as the Service has determined it to be in danger of extinction throughout all or a significant portion of its range. With documented population declines and imminent threats, the species warrants protection under the Act. Critical habitat is not being designated for the reasons discussed below.

Critical Habitat

Section 4(a)(3) of the Act, as amended, requires, to the maximum extent prudent and determinable, that the Secretary designate critical habitat at the time the species is determined to be endangered or threatened. The Service finds that designation of critical habitat is not presently prudent for this species. There are only two sites known for Texas

trailing phlox. Loss of even a few plants to activities such as collection for scientific purposes could extirpate the species. As discussed under Factor B in the Summary of Factors Affecting the Species, Texas trailing phlox is threatened by taking, an activity difficult to enforce against and only regulated by the Act with respect to plants in cases of (1) removal and reduction to possession of endangered plants from lands under Federal jurisdiction, or their malicious damage or destruction on such lands; and (2) removal, cutting, digging up, or damaging or destroying in knowing violation of any State law or regulation, including State criminal trespass law. Such provisions are difficult to enforce. Publication of critical habitat descriptions and maps would make Texas trailing phlox more vulnerable and increase enforcement problems.

The populations of Texas trailing phlox are found on private lands where Federal involvement in land-use activities does not generally occur. Additional protection resulting from critical habitat designation is achieved through the section 7 consultation process. Since section 7 would not apply to the majority of land-use activities occurring within critical habitat, its designation would not appreciably benefit the species.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and result in conservation actions by Federal, State, and private agencies, groups, and individuals. The Endangered Species 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 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 being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. 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 a listed species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service. There are no known populations of Texas trailing phlox that either occur on Federal land and/or would be affected by activities authorized, funded, or carried out by a Federal agency.

The Act and its implementing regulations found at 50 CFR 17.61, 17.62, and 17.63 set forth a series of general prohibitions and exceptions that apply to all endangered plants. All trade 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 this species in interstate or foreign commerce, or to remove and reduce to possession the species from areas under Federal jurisdiction. In addition, for endangered plants, the 1988 amendments (Pub. L. 100-478) to the Act prohibit the malicious damage or destruction on Federal lands and the removal, cutting, digging up, or damaging or destroying of endangered plants in knowing violation of any State law or regulation, including State criminal trespass law. Certain

exceptions apply to agents of the Service and State conservation agencies. The Act and 50 CFR 17.62 and 17.63 also provide for the issuance of permits to carry out otherwise prohibited activities involving endangered species under certain circumstances.

It is anticipated that few trade permits would ever be sought or issued because the species is not common in cultivation or in the wild. Requests for copies of the regulations on plants and inquiries regarding them may be addressed to the Office of Management Authority, U.S. Fish and Wildlife Service, P.O. Box 3507, Arlington, VA 22201 (703/358-2104).

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment, 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 Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

Lundell, C.L. 1942. Studies of American spermatophytes-III. Contrib. Univ. Mich. Herb. 8:77-79.
 Mahler, W.F. 1980. Status report, *Phlox nivalis* ssp. *texensis*. Lundell. U.S. Fish and Wildlife Service, Albuquerque, NM. 12 pp.

Wherry, E.T. 1966. Polemoniaceae. in C.I. Lundell (ed.), Flora of Texas 1(3):283-321.
 Wherry, E.T. 1955. The genus *Phlox*. Morris Arboretum Monographs III. 174 pp.

Author

The primary author of this final rule is Sonja Jahrsdoerfer, U.S. Fish and Wildlife Service, 222 South Houston, suite A, Tulsa, OK 74127 (918/581-7458 or FTS 745-7458).

List of Subjects in 50 CFR Part 17

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

Regulation Promulgation

PART 17—[AMENDED]

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

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 the Family Polemoniaceae, to the List of Endangered and Threatened Plants:

§ 17.12 Endangered and threatened plants.

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 (h) * * *

Species		Historic range	Status	When listed	Critical habitat	Special rules
Scientific name	Common name					
Polemoniaceae—Phlox family:						
<i>Phlox nivalis</i> ssp. <i>texensis</i>	Texas trailing phlox	U.S.A. (TX)	E	440	NA	NA

Dated: September 20, 1991.
Bruce Blanchard,
 Director, Fish and Wildlife Service.
 [FR Doc. 91-23385 Filed 9-27-91; 8:45 am]
 BILLING CODE 4310-55-M