



Sand dune phacelia

Credit: Sandra Jerabek, Tolowa Dunes Stewards

Frequently Asked Questions

Proposed Rule to List Sand Dune Phacelia as Threatened with Critical Habitat and a 4(d) Rule

What action is being taken by the U.S. Fish and Wildlife Service?

The U.S. Fish and Wildlife Service (Service) is proposing to list sand dune phacelia (*Phacelia argentea*), a coastal dune plant endemic to Oregon and northern California, as threatened under the Endangered Species Act (ESA). The Service is also proposing critical habitat and a special rule under section 4(d) of the ESA to provide for the conservation needs of the species. This announcement opens a 60-day public comment period.

What is sand dune phacelia?

Sand dune phacelia, also known as silvery phacelia, is an evergreen, herbaceous, flowering perennial in the forget-me-not family. It starts blooming in late April and May and continues flowering through August. This plant relies primarily on bees for its pollination.

Where is sand dune phacelia found?

Sand dune phacelia can be found in coastal dune habitat along the southern Oregon and

northern California coast at low elevations ranging from approximately 10 to 40 feet (33 to 131 meters). This plant is known to occur from about five miles (8 km) north of Bandon, Oregon, to Crescent City, California, a distance that spans approximately 100 miles of coastline. Whether the species was ever present or abundant elsewhere is unknown. Other than an historic report from Clatsop County, Oregon in 1933, and an unconfirmed report from Mendocino County in California, the species is only known from Coos and Curry counties in Oregon, and Del Norte County in California.

Why is the Service proposing to list sand dune phacelia as threatened and what has caused its decline?

After carefully assessing the past, present and future threats to sand dune phacelia, we determined this species is warranted for listing as threatened throughout all of its range. There are currently only 25 naturally occurring populations of sand dune phacelia. Seventeen of these are in poor condition and 12 of the sites contain fewer than 25 individual plants. Small populations are likely to disappear in the future without implementation of conservation measures.

The most significant threat to remaining populations is habitat loss due to the encroachment of invasive species. Sand dune phacelia requires open sand dune habitat that provides sufficient space and light for seedlings to establish and grow. Thus, this plant is management-dependent, relying on active and continuous removal of invasive species like European beachgrass and gorse. Climate change is expected to cause sea level rise and exacerbate the spread of invasive species, which would result in additional habitat loss.

How would sand dune phacelia benefit from an ESA listing?

Species listed as endangered or threatened under the ESA benefit from conservation measures that include recognition of threats to the species, implementation of recovery actions and federal protection from harmful practices on public lands.

Designation under the ESA generates public awareness and conservation by federal, state, tribal and local agencies as well as private organizations and individuals. The ESA encourages cooperation with the states and other partners to conserve listed species.

The ESA also requires the Service to develop and implement recovery plans for the conservation of threatened and endangered species. Recovery plans outline actions that are needed to improve the species' status such that it no longer requires protection under the ESA. The Service develops and implements these plans in partnership with species experts; other federal, state and local agencies; Tribes; non-governmental organizations; academia; and other stakeholders. Recovery plans also establish a framework for recovery partners to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Examples of typical recovery actions include habitat protection, habitat restoration (e.g., removal of invasive plants), research, captive propagation and reintroduction, and outreach and education.

Under the ESA, federal agencies must ensure that actions they approve, fund or carry out do not jeopardize the continued existence of any listed species or destroy its critical habitat. In addition, because we are proposing a 4(d) rule for the sand dune phacelia as a threatened species, all of the species-specific protections and exceptions that are deemed necessary and advisable for the conservation of sand dune phacelia are provided in that proposed 4(d) rule (see below).

What is critical habitat?

Critical habitat is defined by the ESA as the geographic areas occupied at the time a species is listed that contain the physical or biological features essential to the species' conservation. Critical habitat may also include areas outside the geographic area the species occupied when listed that are essential for conserving the species. The ESA defines "conservation" as the actions leading to a species' eventual recovery so that it no longer requires ESA protections. The protections provided by critical habitat apply solely to the actions of federal agencies; critical habitat has no regulatory effect on private landowners or other public agencies.

Critical habitat provides protection against "destruction or adverse modification" from actions carried out, funded or authorized by a federal agency. Such actions require [consultation with the Service under section 7 of the ESA](#). During consultation, the Service reviews the federal actions for how they affect the "physical or biological features essential to conserving a listed species," and how they affect the habitat's ability to support the species throughout its life cycle and to meet the species' recovery needs. The Service can then recommend ways to minimize any adverse effects. It imposes no requirements on state or private actions on state or private lands where no federal funding, permits or approvals are required.

Designating critical habitat does not establish specific land management standards or prescriptions, nor do designations affect land ownership or establish a refuge, wilderness, reserve, preserve, sanctuary, or any other conservation area where no active land management occurs.

Critical habitat designation has several benefits including: (1) triggering consultation under section 7 of the ESA in designated areas for actions in which there may be a federal nexus and where it would not otherwise occur. For example, the area has become unoccupied or the occupancy is in question. Additional benefits include (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.

How is critical habitat designated and/or excluded under the ESA?

Section 4(b)(2) states that the Secretary shall designate critical habitat and make revisions based on the best scientific data available after considering the economic, national

security or other relevant impacts of specifying any particular area as critical habitat. Additionally, the Secretary may exclude an area from critical habitat if the benefits of excluding the area outweigh the benefits of including the area, unless the Secretary determines that the failure to designate such an area will result in the extinction of the species concerned.

Under regulations implementing section 4(b)(2), the Service will consider probable economic, national security and other relevant impacts of revised exclusions for this critical habitat designation (50 CFR 424.19). The Service may also consider other relevant impacts on proposed or ongoing activities. These can include but are not limited to: (1) partnerships and conservation plans; (2) conservation plans permitted under section 10 of the ESA; (3) impacts to Tribal lands and activities; (4) impacts to federal lands and activities; and (5) ecological benefits of exclusion of lands including protection from increased likelihood of catastrophic wildfire.

What criteria were used in designating critical habitat for sand dune phacelia?

We reviewed the available information pertaining to the biological needs of the species and habitat characteristics where this species is located. This and other information represent the best scientific data available and were used to designate critical habitat. We considered only those populations supporting 25 or more individuals because we expect that populations with fewer than 25 individuals are nearing extirpation and not likely to contribute significantly to the conservation of the species. Specifically, areas that were designated had the following physical and biological features essential to conservation of the species:

- Sandy coastal dune habitat above the high tide line that provides a high light environment, room for growth and adequate moisture.
- A sufficiently abundant pollinator community (which may include leafcutter bees and bumble bees) for reproduction.

What areas are proposed for critical habitat designation for sand dune phacelia?

Based on these physical and biological features, we are proposing to designate approximately 252 acres (102 hectares) in 13 units as critical habitat for sand dune phacelia (Table 1). All proposed critical habitat is occupied by the species.

<p>Table 1. Proposed critical habitat units for sand dune phacelia, broken down by state, population, and land ownership type.</p>

	Private (ac (ha))	Federal (ac (ha))	State (ac (ha))	County (ac (ha))	Total (ac (ha))
Oregon					
North Bandon 1	0.6 (0.2)	0	0	0	0.6 (0.2)
North Bandon 2	54.4 (22)	0	6.9 (2.8)	0	61.3 (24.8)
Lost Lake	2.8 (1.1)	0.8 (0.3)	0.1 (0.04)	0	3.7 (1.5)
Floras Lake	0	5.8 (2.3)	0	0	5.8 (2.3)
Cape Blanco	0	0	2.0 (0.8)	0	2.0 (0.8)
Paradise Point	3.7 (1.5)	0	0	0	3.7 (1.5)
Pistol River North	0	0	3.2 (1.3)	0	3.2 (1.3)
Pistol River South	0	0	0.7 (0.3)	0	0.7 (0.3)
Lone Ranch	0	0	6.5 (2.6)	0	6.5 (2.6)
California					
Pacific Shores	54.4 (22)	0	37.9 (15.3)	0	92.3 (37.4)
Tolowa Dunes	0	0	69.6 (28.2)	0	69.6 (28.2)
Pt. St. George	0.1 (0.4)	0	0	1.0 (0.4)	1.1 (0.4)
Pebble Beach	0	0	1.3 (0.5)	0.4 (0.2)	1.7 (0.7)
TOTALS	116 (46.9)	6.6 (2.8)	128.2 (51.9)	1.4 (0.6)	252.2 (102.1)

What is the likely economic impact of the critical habitat proposal?

The Service considered the likely incremental economic impacts that may result from the proposed designation of critical habitat, and this information was used to develop a screening analysis (Industrial Economics, Inc. 2021). The analysis considers baseline costs (absent critical habitat designation). It also includes any likely incremental economic impacts where land and water use may already be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the federal listing status of the species. This approach allows us to focus our analysis on evaluating the specific areas or sectors that may incur incremental economic impacts as a result of the designation.

The incremental economic impacts from this proposed critical habitat designation would be limited to additional administrative effort. Specifically, there would be additional costs related to consultations and technical assistance related to section 7 consultation over the next ten years. Other than administrative costs for governmental agencies, additional incremental economic costs of critical habitat designation are unlikely.

We are seeking any additional information on the economic impact of this proposed critical habitat designation.

What is a 4(d) rule?

Section 4(d) of the ESA directs the Service to issue regulations deemed “necessary and advisable to provide for the conservation of threatened species.” It allows the Service to

promulgate special rules for species listed as threatened (not endangered) that provide flexibility in implementing the ESA.

We use 4(d) rules to target the take prohibitions to those that provide conservation benefits for the species. This targeted approach can reduce ESA conflicts by allowing some activities that do not harm the species to continue, while focusing our efforts on the threats that make a difference to the species' recovery.

In general, a 4(d) rule ensures that private landowners, state agencies and others are not unduly burdened by regulations that do not further the conservation of a species. Such a rule is often used to clarify or simplify what forms of "take" are prohibited for a threatened species.

How does the proposed 4(d) rule benefit the plant?

The proposed 4(d) rule would provide for the conservation of the sand dune phacelia by prohibiting the following activities applicable to an endangered plant, except as otherwise authorized or permitted: import or export; certain acts related to removing, damaging, and destroying on areas under federal jurisdiction; delivery, receipt, transport, or shipment in interstate or foreign commerce in the course of commercial activity; and sale or offering for sale in interstate or foreign commerce.

In addition to the protections that apply to federal lands, the 4(d) rule would prohibit a person from removing, cutting, digging up, or damaging or destroying the species on non-federal lands in knowing violation of any law or regulation of any State or in the course of any violation of a state criminal trespass law. As most populations of sand dune phacelia occur off federal land, these protections in the 4(d) rule are key to its effectiveness. For example, any damage to the species on non-federal land in violation of a state off-highway vehicle law would be prohibited by the 4(d) rule.

Exceptions to these prohibitions include activities authorized under a permit from the Service. A permit may be issued for the following: scientific purposes, to enhance propagation or survival, for economic hardship, for botanical or horticultural exhibition, for educational purposes, or for other purposes consistent with the purposes and policy of the ESA. Additional statutory exemptions from the prohibitions are found in sections 9 and 10 of the ESA.

What is being done to reduce or eliminate threats to this species?

Conservation measures to preserve or enhance sand dune phacelia populations are currently underway at several sites in Oregon and California on private, state and federal lands. These actions include habitat restoration through removal of invasive species, population augmentation and population reintroduction.

Since sand dune phacelia is a management-dependent species, restoration of dune habitat through ongoing control of invasive species is essential to the continuing viability of sand dune phacelia rangewide.

Now that the sand dune phacelia is proposed to be listed as threatened, what happens next?

The announcement on the proposed listing of sand dune phacelia opens a 60-day comment period to allow the public to review, comment, and provide additional information. The Service will be accepting comments on this proposal to list this species as threatened with a 4(d) rule and critical habitat through May 23, 2022.

Because we will consider all comments and information we receive during the comment period, our final determinations may differ from this proposal. After reviewing comments and new information received, the Service will either withdraw the proposal to list sand dune phacelia as threatened, revise the proposal, or draft a final rule to list this species as threatened. For critical habitat, our final designation may not include all areas proposed, may include some additional areas that meet the definition of critical habitat, and may exclude some areas if we find the benefits of exclusion outweigh the benefits of inclusion. In addition, we may change the parameters of the prohibitions or the exceptions to those prohibitions in the 4(d) rule if we conclude it is appropriate in light of comments and new information received. For example, we may expand the prohibitions to include prohibiting additional activities if we conclude that those additional activities are not compatible with conservation of the species. Conversely, we may establish additional exceptions to the prohibitions in the final rule if we conclude that the activities would facilitate or are compatible with the conservation and recovery of the species.

How can the public submit information on the proposal?

We will accept comments received or postmarked on or before May 23, 2022. We must receive requests for public hearings, in writing, at the address below by May 6, 2022.

Comments may be submitted by one of the following methods:

(1) *Electronically*: Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. In the Search box, enter FWS–R1–ES–2021–0070, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on “Comment Now!”

(2) *By hard copy*: Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R1–ES–2021–0070; U.S. Fish & Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041-3803.

We will post all comments on <http://www.regulations.gov>.

What information is the Service requesting?

We intend that any final action resulting from this proposed rule will be based on the best

scientific and commercial data available. Therefore, we are requesting comments or information from other governmental agencies, Tribes, the scientific community, industry, or any other interested parties concerning this proposed rule.

Some of the topics we are seeking comment on include:

- (1) The species' biology, range, and population trends, including:
 - (a) Biological or ecological requirements of the species;
 - (b) Genetics and taxonomy;
 - (c) Historical and current range, including distribution patterns;
 - (d) Historical and current population levels, and current and projected trends; and
 - (e) Past and ongoing conservation measures for the species, its habitat, or both.

- (2) Factors that may affect the continued existence of the species, which may include habitat modification or destruction, overutilization, disease, predation, the inadequacy of existing regulatory mechanisms, or other natural or manmade factors.

- (3) Any additional areas that should be included in the designation because they (a) are occupied at the time of listing and contain the physical or biological features that are essential to the conservation of the species and that may require special management considerations, or (b) are unoccupied at the time of listing and are essential for the conservation of the species.

- (4) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change.

For a complete list of information sought by the Service, please see the "Information Requested" section in the proposed rule.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.