



**COUNTY OF DEL NORTE**  
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**DATE:** April 29, 2022

**AGENDA DATE:** May 10, 2022

**TO:** Del Norte County Board of Supervisors

**FROM:** Heidi Kunstal, Director of Community Development *Heidi Kunstal*

**SUBJECT:** Proposed Ruling of the U.S. Fish and Wildlife Service for a Change in Species Status for the Sand Dune Phacelia and Designation of Critical Habitat.

**RECOMMENDATION FOR BOARD ACTION:** Approve and Authorize the Chair to sign and send a letter on behalf of the County regarding the proposed ruling to list the sand dune phacelia as a threatened species and designate critical habitat under the Endangered Species Act of 1973.

**SUMMARY/DISCUSSION:** On March 22, 2022, the US Fish and Wildlife Service (US FWS) posted public notice for a proposed ruling to list the sand dune phacelia (*Phacelia argentea*), as a threatened species and designate critical habitat under the Endangered Species Act of 1973, as amended. The comment periods ends on May 23, 2022.

Four areas or units have been identified in Del Norte County that would be affected by the critical habitat designation. Attached to this Board Report are summaries of the units and maps. Full documentation regarding the proposed listing may be found at the following Federal Register web address: <https://www.regulations.gov/document/FWS-R1-ES-2021-0070-0001>.

Initially, the County had concerns about impacts of the critical habitat designation to private property owners, retention of existing public access on public lands and countywide flood control and road maintenance activities. Following a review of the information materials along with a phone conversation with US FWS staff, many of the concerns were addressed. Per communication with US FWS staff and as documented on page 16337 of the proposed ruling, the protections provided by the critical habitat designation apply solely to the actions of federal agencies; critical habitat has no regulatory effect on private landowners or other public agencies unless a federal action is required. In most cases, a federal action is not needed for maintaining public roads, providing continued access to public lands or maintaining private land.

For the County's Flood Control District, a Department of Army Permit must be obtained from the US Army Corps of Engineers in order to breach Lakes Earl and Tolowa when lake levels cause flooding along Kellogg Road and Lower Lake Road. The breach site and access to the breach site are located within the proposed critical habitat area. Additionally, the area is already designated as critical habitat for the western snowy plover. As part of the permit process, the County is already required to consult with the US FWS under section 7 of the Endangered Species Act. The addition of the critical habitat for the sand dune phacelia will likely result in additional protection measures being added to the Department of Army permit. The purpose would be to avoid any impacts caused by the mobilization of the equipment or other vehicles associated with the breach activity. Alternative mobilization plans may be made to comply with protection measures, as needed. The breach regime should not be affected by the designation as prolonged higher lake levels would negatively impact the sand dune phacelia.

The US FWS is also proposing a 4(d) rule for the sand dune phacelia. Section 4(d) of the Endangered Species Act directs the US FWS to issue regulations deemed necessary and advisable to provide for the conservation of threatened species. The 4(d) rule is meant to ensure that non-federal landowners are not unduly burdened by regulations that do not further conservation of a species. Such a rule is often used to clarify or simplify what forms of "take" are prohibited for a threatened species. It is important to note that the 4(d) rule does 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 state criminal trespass law.

In the proposed ruling, the US FWS provides twelve specific examples of subject-matter for comments with an emphasis on providing new scientific data to either support or exclude conclusions made in the proposed ruling. Item number 8 – Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat is the primary example listed that the County has the most knowledge and standing to address. The attached letter addresses existing land use activities within the four designated habitat areas as well as reaffirms the County's stance that existing public access to public lands not be affected either directly or indirectly as a result of the listing or critical habitat designation.

**ALTERNATIVES:** Decline to send a comment letter or proposed revised content for the letter.

**FINANCING:** N/A

**CHILDREN'S IMPACT STATEMENT:**

**This section meets 0 of the following outcome measures for children in Del Norte County:**

- Children ready for and succeeding in school.
- Children and youth are healthy and preparing for adulthood.
- Families are economically self-sufficient.
- Families are safe, stable and nurturing.
- Communities are safe and provide a high quality of life.
- No impact to Children as a result of this action.

**OTHER AGENCY INVOLVEMENT:** U.S. Fish and Wildlife Service

**SIGNATURE REQUIRED:** None.

**ADMINISTRATIVE SIGN-OFF:**

- AUDITOR: Honorable Clinton Schaad
- COUNTY ADMINISTRATIVE OFFICER: Neal Lopez
- COUNTY COUNSEL:

**PRINTING ACCOUNT:**

- Planning 101-258-20221

May 10, 2022

Public Comments Processing  
Attn: FWS-R1-ES-2021-0070  
U.S. Fish and Wildlife Service,  
MS: PRB/3W  
5275 Leesburg Pike, Falls Church, VA 22041-3803

Submitted electronically to the Federal eRulemaking Portal

Subject: Endangered and Threatened Wildlife and Plants; Threatened Species Status with Section 4(d) Rule for Sand Dune Phacelia and Designation of Critical Habitat

To Whom it May Concern:

Thank you for the opportunity to comment on the U.S. Fish and Wildlife Service's proposal to list the sand dune phacelia (*Phacelia argentea*), as a threatened species and designated critical habitat under the Endangered Species Act of 1973, as amended. Four areas have been identified in Del Norte County for designation as critical habitat. The purpose of this letter is to inform the US FWS of the existing land use patterns and activities within these areas and the County's desire to maintain these activities to the extent they do not impact conservation efforts for the sand dune phacelia.

Unit 10: Pacific Shores

The northernmost area is identified as Unit 10: Pacific Shores. The Pacific Shores Subdivision, with over 1,500 lots, was created in the 1960s but never developed due to lack of public services and environmental constraints. Today, many of the lots have been acquired and transferred to the California Department of Fish and Wildlife for inclusion in the Lake Earl Wildlife Area. According to the proposed ruling, 93.2 acres of the subdivision are being considered for critical habitat designation with 54.4 of the acres being privately owned and 37.9 acres being publically owned. The entire subdivision area is identified as an Area of Deferred Certification in the County's Local Coastal Program leaving retained permitting authority by the California Coastal Commission. Much of the subdivision is already informally designated as an Environmentally Sensitive Habitat Area (ESHA) due to the existing coastal vegetation and wetlands. Development within this area is already highly regulated with the Coastal Act being the measure for any proposed development.

The County maintains a network of roads within the subdivision that serves as access to recreational points along Lakes Earl and Tolowa and the Pacific Ocean. Maintenance of the existing, traversable roads within is allowed used. The ability of the County to continue to maintain the roads is essential for public access to designated recreational areas as well as to private lands.

Annually, the County seeks permits to artificially breach Lakes Earl and Tolowa when lake levels rise to a level that flooding occurs on Lower Lake Road and Kellogg Road. A Department of the Army permit is one of the four permits required in order to breach the lake. The breach site is designated as critical habitat for the western snowy plover and consultation under Section 7 of the Endangered Species Act occurs for each permit requested. The County understands that similar consultation will be required once the same area is designated as critical habitat for the sand dune phacelia. We are optimistic that adjustments may be made in the mobilization for this effort to avoid any conflicts with the conservation of the sand dune phacelia. Additionally, the continued ability of the County to breach the lake is imperative for public safety to have local roads open to safe travel. Higher lake levels may impact sand dune phacelia if flooding is allowed to reach higher levels for prolonged periods of time.

Overall, the County opposes any actions which will limit public access to public lands. Based on the information provided to our staff and expressed in the ruling, this should not be a concern unless federal action is required. Additionally, there is no indication or evidence in the proposed listing that legal public recreation on or through the areas proposed for critical habitat designation has caused or will cause a significant threat to the species proposed to be protected. These activities include hunting, fishing, hiking, horseback riding, beachcombing, and the like depending on their location. Curtailment of those legal activities on or through public lands by a very small number of local people should not occur without specific evidence of an ongoing significant threat in a specific area where the species exists. While much of this land is owned by the California Department of Fish and Wildlife, the County will be closely monitoring any additional regulations or limitations applied within this area that may impact the ability of recreationists and hunters to access the lakes.

Only about 30% of Unit #10 contains the species based on the provided mapping. The County has concerns as to why the area is so large. Are there future plans for this area with regard to restoration and rehabilitation and if so, is there a timeframe? Is that area possibly too large to accomplish significant work in the shortest amount of time to mitigate the effects on public access and recreation, as well as to restore the species quickly?

There is nothing in the proposed listing that looks at the long term effects of European beach grass removal to support this species' growth and the resulting changes to the coastal and near coastal environment from dunes becoming wider and flatter and therefore making them more susceptible to erosion by normal tidal and wave influence as well as overtopping and breaching by king tides, winter storms, climate change-driven sea-level rise, and the occasional tsunami. Given the normal seasonally high water levels of the directly adjacent Lakes Earl and Tolowa during winter, the possibility of barrier dune failure would further endanger the not too distant homes, businesses, wells, septic systems, public roadways, and communication systems adjacent to and in close proximity of the lakes. Add in flooding from a high water level on the Smith River just to the north at the same time and the problem for thousands of adjacent acres would be even worse.

### Unit 11: Tolowa Dunes

The second unit identified is Unit 11: Tolowa Dunes. This area encompasses 69.9 acres of land proposed for critical habitat designation. All of this land is owned and managed by state agencies. Critical Habitat Designation Unit #11 contains about 4 acres of land on the Lake Earl Wildlife Area with the remainder in Tolowa Dunes State Park. The County has concerns that the California Department of Fish and Wildlife plans to create an additional buffer area adjacent to and around the Critical Habitat Designation area and fence it off. While this action is not under the purview of the US FWS, there is no evidence that a buffer or fencing is needed.

### Unit 12: Point St. George

The third unit is identified as Unit 12: Pt. St. George. The area proposed for critical habitat designation is roughly 1.1 acres with .1 acre in private ownership and 1.0 acre owned by the County. Similar to the Pacific Shores Subdivision, the 1.0 acre of County-owned land is in an area of Deferred Certification under the County's Local Coastal Program with the Coastal Commission retaining permitting authority over any development activity. Much of the Pt. St. George area is already considered ESHA due to wetlands and other coastal resources. Additionally, the area has significant importance to the local Tolowa people. At some future time, the County would like to extend the Coastal Trail within the Pt. St. George Area. Prior planning can ensure impacts to the sand dune phacelia are avoided. It is important to the County that existing public access on the County's land is maintained.

### Unit 13: Pebble Beach

The final unit is Unit 13: Pebble Beach. According to the ruling, this unit includes 1.7 acres of land with .4 belonging to the County and the remaining to Caltrans. In fact, the entire acre belongs to the County with no land belonging to Caltrans. The public road that was implied to be owned and managed by Caltrans is Pebble Beach Drive, a major collector road in the unincorporated County. Within the ruling, it notes that road development or maintenance activities could impact sand dune phacelia individuals. While the County has no immediate plans to widen or improve the road beyond the existing roadbed, continued, ongoing maintenance of the road is necessary. The County is generally aware of the location of the existing sand dune phacelia individuals and will avoid conflicts.

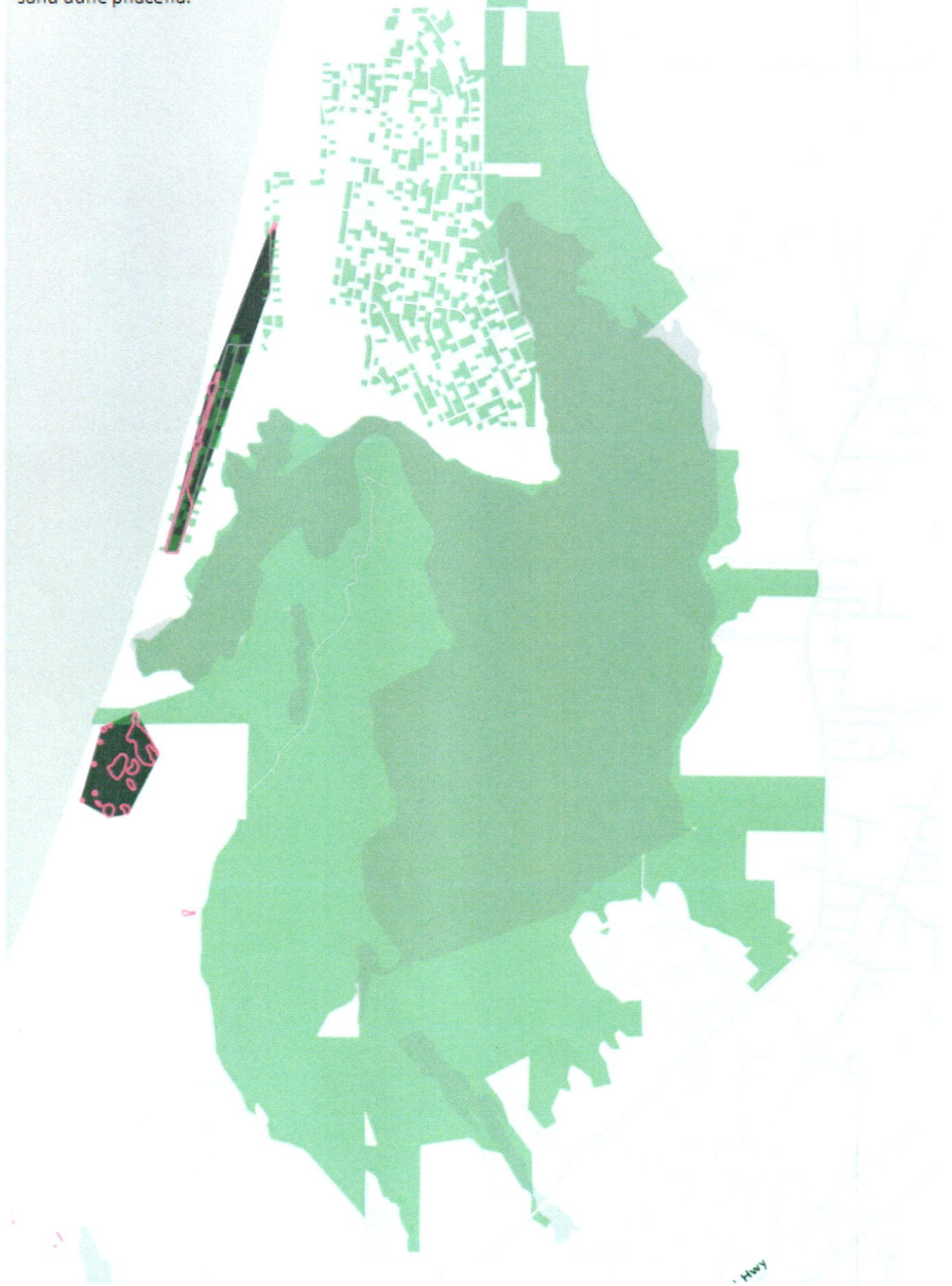
Within the proposed critical habitat area is an existing parking area with an existing pathway to the ocean. The pathway has iceplant (*Carpobrotus edulis*) to the north and to the south. The County is in the process of obtaining a local Coastal Development Permit to improve the surface of the pathway and to improve the parking lot area to have both be fully accessible for persons with disabilities. Through botanical studies done for the permitting, the County is already aware of the location of the plants and fully intends to avoid any impacts.

Thank you for the opportunity to comment on the proposed ruling. If you have any questions, please contact Heidi Kunstal, Community Development Director, by email at [hkunstal@co.del-norte.ca.us](mailto:hkunstal@co.del-norte.ca.us) or by phone at 707-464-7254.

Respectfully submitted,

Gerry Hemmingsen, Chair

Attached is a more detailed map of the critical habitat in the area of Lake Tolowa, which also shows the boundaries of the State wildlife area. The dark green is the lake, the lighter green is the wildlife area, the black blocks are the proposed critical habitat units, and the pink polygons are known occurrences of sand dune phacelia.



## SITES IN DNC

### Unit 10: Pacific Shores

Unit 10 consists of 92.3 ac (37.4 ha) in Del Norte County, California. State lands make up 37.9 ac (15.3 ha) of this site, with the remaining 54.4 acres (22 ha) in private ownership at this time. This area represents an abandoned real estate venture, where lands were subdivided into 0.5-ac (0.20-ha) lots in the 1960s for residential development. Over 1,500 lots were sold and approximately 27 miles of road and electric transmission line were constructed. However, the area remains undeveloped due to permitting issues, and the empty lots are now being acquired for conservation by a coalition of entities for inclusion into the State's Lake Earl Wildlife Area. Approximately 430 lots remain in private ownership. Invasive species are a threat here, and therefore invasive species management may be required. In addition, because much of the sand dune phacelia population in the unit occurs adjacent to roadways or other readily accessible areas, the unit is considered heavily impacted by human activities that include OHV use. Special management considerations to mitigate the impact to sand dune phacelia habitat from these activities may be required.

### Unit 11: Tolowa Dunes

Unit 11 consists of 69.6 ac (28.2 ha) in Del Norte County, California, and currently supports the second largest population of sand dune phacelia rangewide. The unit is State-managed in part by California State Parks (on Tolowa Dunes State Park) and the California Department of Fish and Wildlife (on Lake Earl Wildlife Area). Invasive species are a threat here and OHV use also impacts this site. As such, managing OHV use and invasive species may be required. The relatively high abundance of sand dune phacelia in Unit 11 is attributed to a concerted restoration program that has removed invasive species, particularly European beachgrass. These efforts have made this population the stronghold for the species in California and an important contributor to sand dune phacelia resiliency and redundancy rangewide. However, much of the restoration at this site has been conducted by volunteers, and funding to continue maintaining restored habitat is uncertain.

### Unit 12: Point Saint George

Unit 12 consists of 1.1 ac (0.4 ha) in Del Norte County, California. The vast majority of the land (1 ac (0.4 ha)) is county-managed by Del Norte County Parks, and the other 0.1 ac (0.04 ha) is privately owned. Invasive species, particularly annual grasses, are prolific in this unit and therefore invasive species management may be required. However, a large proportion of the sand dune phacelia population at this site occurs near a hiking trail where disturbance has kept the area relatively free of invasive species.

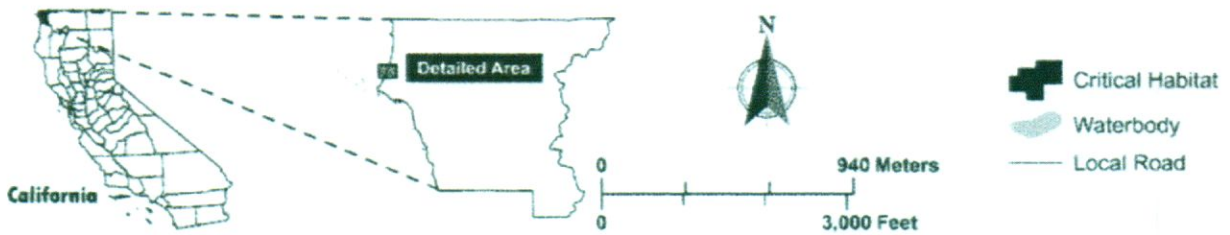
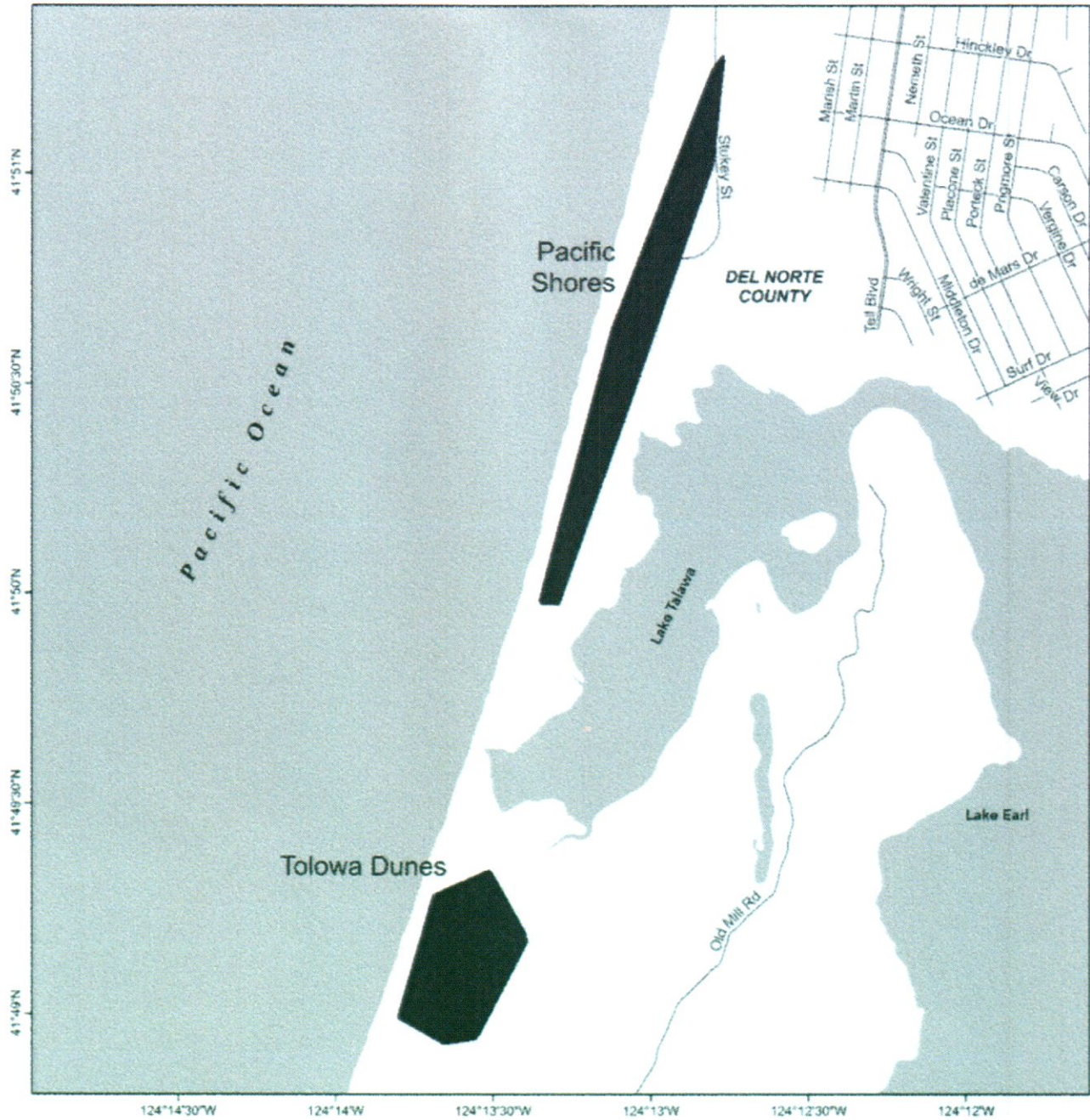
### Unit 13: Pebble Beach

Unit 13 consists of 1.7 ac (0.7 ha) in Del Norte County, California. While 0.4 ac (0.2 ha) of the land here is county land, the rest (1.3 ac (0.5 ha)) is State-managed by the California Department of Transportation. Invasive species pose a substantial threat at this site, primarily Hottentot fig or iceplant ( *Carpobrotus edulis* ), and therefore invasive species management may be required. Additionally, much of this unit is located within a road right-of-way, and therefore road development or maintenance activities could impact sand dune phacelia individuals, some of which are quite large and productive. As such, special management to mitigate the impact to sand dune phacelia habitat from these activities may be required.



# Critical Habitat for Sand Dune Phacelia (*Phacelia argentea*)

California, Units: Pacific Shores and Tolowa Dunes

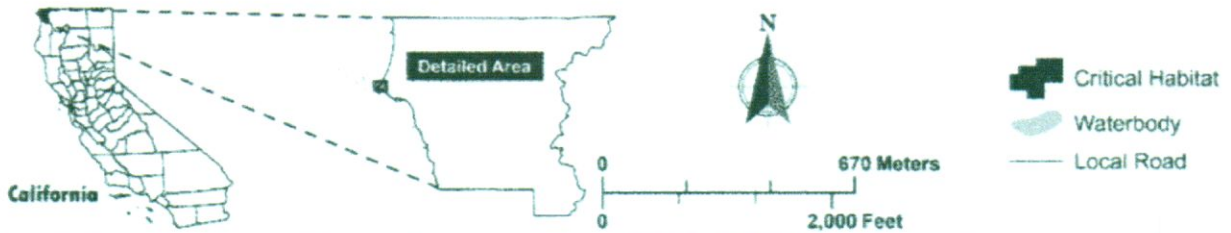
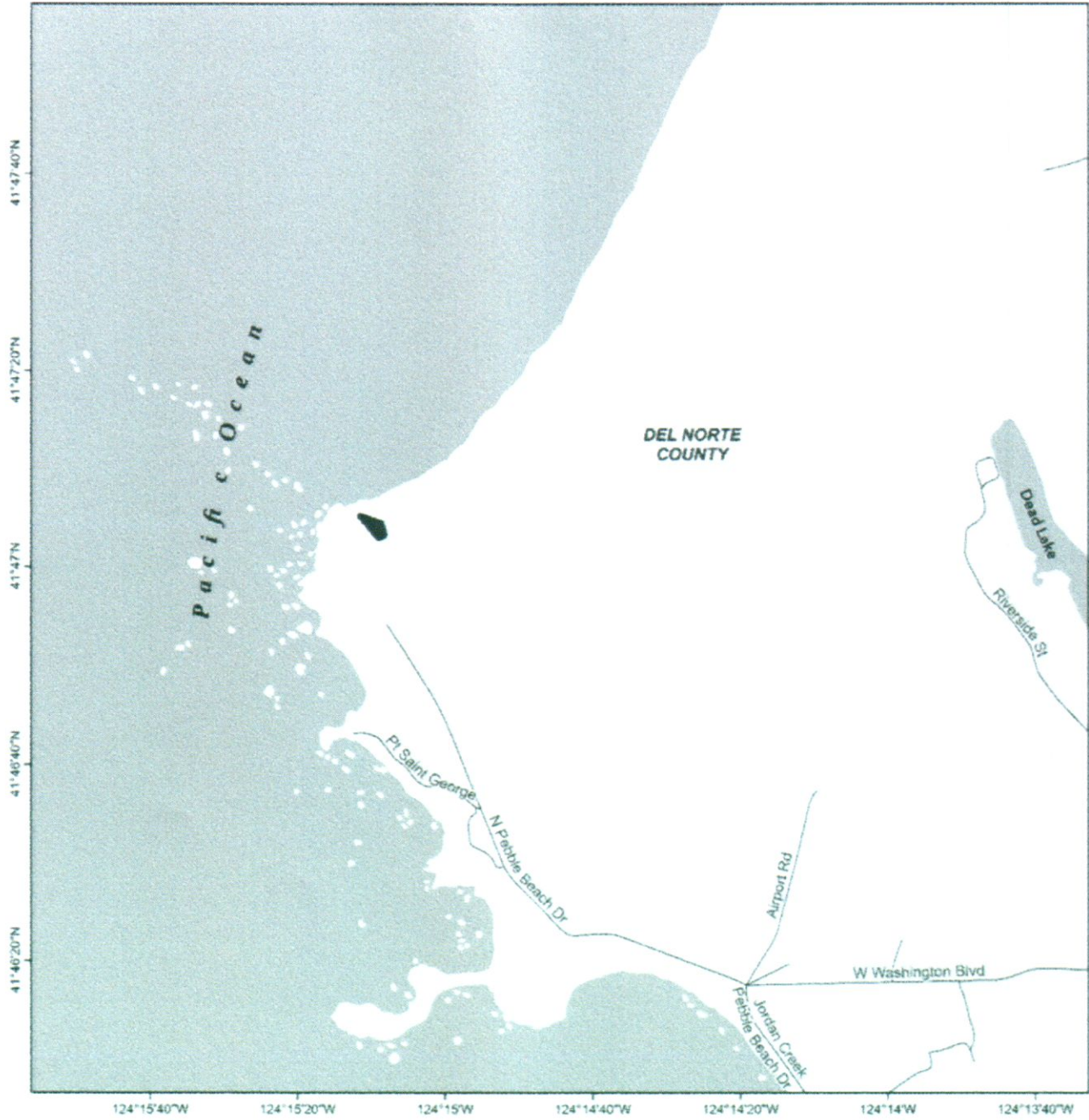


(<https://s3.amazonaws.com/images.federalregister.gov/EP22MR22.012/original.png>)

(15) Unit 12: Point Saint George, Del Norte County, California.

# Critical Habitat for Sand Dune Phacelia (*Phacelia argentea*)

California, Unit: Point St. George

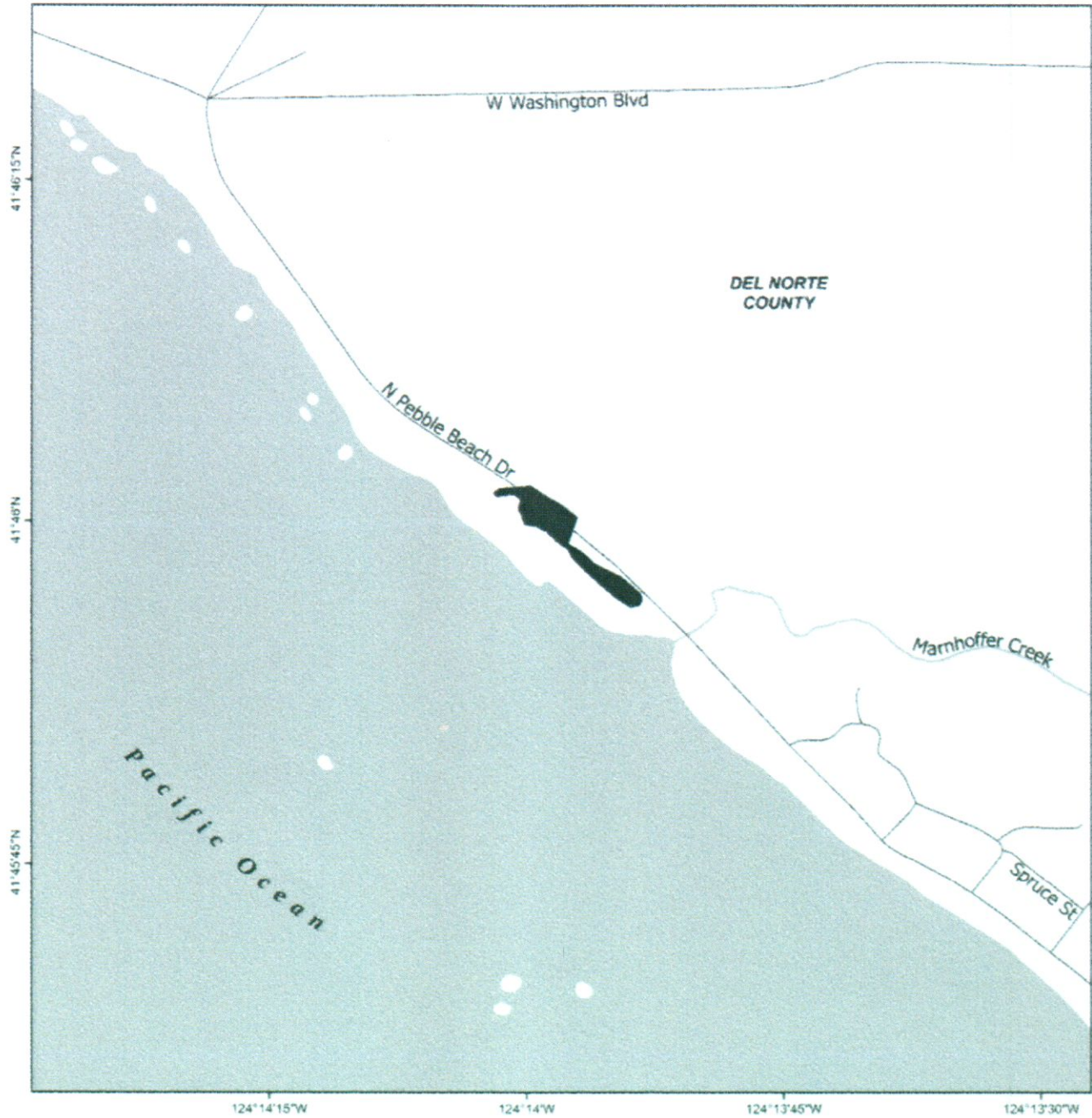


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(16) Unit 13: Pebble Beach, Del Norte County, California.

# Critical Habitat for Sand Dune Phacelia (*Phacelia argentea*)

California, Unit: Pebble Beach



(<https://s3.amazonaws.com/images.federalregister.gov/EP22MR22.014/original.png>)

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Martha Williams,



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><b>Table 1.</b> Proposed critical habitat units for sand dune phacelia, broken down by state, population, and land ownership type.</p>
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	Private (ac (ha))	Federal (ac (ha))	State (ac (ha))	County (ac (ha))	Total (ac (ha))
<b>Oregon</b>					
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)
<b>California</b>					
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)
<b>TOTALS</b>	<b>116 (46.9)</b>	<b>6.6 (2.8)</b>	<b>128.2 (51.9)</b>	<b>1.4 (0.6)</b>	<b>252.2 (102.1)</b>

### 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.



U.S. Fish & Wildlife Service

# Critical Habitat

## *What is it?*

When the Fish and Wildlife Service proposes a species for listing under the Endangered Species Act, we are required to consider whether there are geographic areas that contain essential features on areas that are essential to conserve the species. If so, we may propose designating these areas as critical habitat.

Here are answers to some of the most frequently asked questions about critical habitat.

### **What is critical habitat?**

Critical habitat is the specific areas within the geographic area, occupied by the species at the time it was listed, that contain the physical or biological features that are essential to the conservation of endangered and threatened species and that may need special management or protection. Critical habitat may also include areas that were not occupied by the species at the time of listing but are essential to its conservation.

An area may be excluded from critical habitat designation based on economic impact, the impact on national security, or any other relevant impact, if we determine that the benefits of excluding it outweigh the benefits of including it, unless failure to designate the area as critical habitat may lead to extinction of the species.

Critical habitat designations affect only Federal agency actions or federally funded or permitted activities. Critical habitat designations do not affect activities by private landowners if there is no Federal "nexus"—that is, no Federal funding or authorization. Federal agencies are required to avoid "destruction" or "adverse modification" of designated critical habitat. The ESA requires the designation of "critical habitat" for listed species when "prudent and determinable."

### **What provisions of the Endangered Species Act relate to critical habitat?**

To protect endangered and threatened species, the ESA makes unlawful

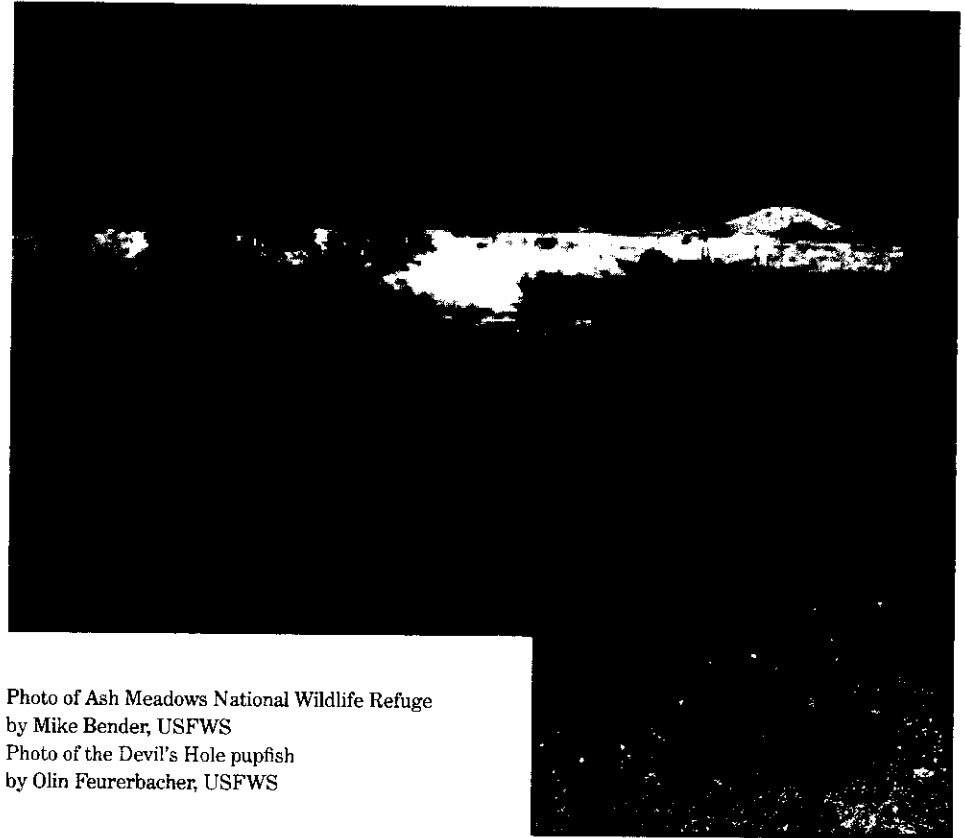


Photo of Ash Meadows National Wildlife Refuge by Mike Bender, USFWS  
Photo of the Devil's Hole pupfish by Olin Feurerbacher, USFWS

a range of activities involving such species without a permit for purposes consistent with conservation goals of the ESA. These activities include take, import, export, and interstate or foreign commerce. "Take" includes kill, harm, harass, pursue, hunt, capture, or collect or to attempt to engage in any such conduct.

The ESA requires Federal agencies to use their authorities to conserve endangered and threatened species and to consult with the Fish and Wildlife Service about actions that they carry out, fund, or authorize to ensure that they will not destroy or adversely modify critical habitat. The prohibition against destruction and adverse modification of critical habitat protects such areas in the interest of conservation.

### **How does the Fish and Wildlife Service determine areas to designate as critical habitat?**

Biologists consider physical and biological features that the species needs for life processes and successful reproduction. These features include:

- space for individual and population growth and for normal behavior;
- cover or shelter;
- food, water, air, light, minerals, or other nutritional or physiological requirements;
- sites for breeding and rearing offspring, germination, or seed dispersal; and

## *Myths & Realities*

### **Does designating critical habitat mean no further development can occur?**

No. A critical habitat designation does not necessarily restrict further development. It is a reminder to Federal agencies of their responsibility to protect the important characteristics of these areas.

### **Does a critical habitat designation affect all activities that occur within the designated area?**

No. Only activities that involve a Federal permit, license, or funding, and are likely to destroy or adversely modify critical habitat will be affected. If this is the case, we will work with the Federal agency and landowners—including private landowners—to amend their project to enable it to proceed without adversely affecting critical habitat. Most Federal projects are likely to go forward, but some may be modified to minimize harm.

■ habitats that are protected from disturbances or are representative of the historical geographical and ecological distributions of the species.

### **What is the process for designating critical habitat?**

The Service may propose to list a species and concurrently propose to designate critical habitat, or it can address a species' critical habitat up to a year after the date of its listing. The Service proposes a critical habitat designation, publishing it in the *Federal Register* and requesting public comments. We may modify a proposal as a result of information provided in public comments. We base our final designation of critical habitat on the best scientific data available, after taking into consideration the probable economic and other impacts of the designation. After reviewing the comments, the Service responds to them and publishes a rule, including final boundaries, in the *Federal Register*.

### **Are Federal agencies required to consult with the Fish and Wildlife Service outside critical habitat areas?**

Yes, even when there is no critical habitat designation, Federal agencies are required to fulfill their conservation responsibilities by consulting with the Service if their actions "may affect" listed species. The requirement helps to ensure that Federal agencies do not contribute to the decline of endangered and threatened species or their potential for recovery.

### **What is the purpose of designating critical habitat?**

Designating areas as critical habitat does not establish a refuge or sanctuary for a species. Critical habitat is a tool to guide Federal agencies in fulfilling their conservation responsibilities by requiring them to consult with the Service if their actions may "destroy or adversely modify" critical habitat for listed species. A critical habitat designation helps to protect areas—occupied and unoccupied—necessary to conserve a species. Critical habitat has value in requiring the Service to gather more detailed information about a species than what is required for listing, thereby increasing knowledge to share with Federal agencies—and, in turn, increasing their effectiveness to conserve a listed species.

### **Are all the areas within the mapped boundaries considered critical habitat?**

No. Our rules typically exclude developed areas such as buildings, roads, airports, parking lots, piers, and similar facilities. Accompanying text describes those areas.

Critical habitat is designed to protect the essential physical and biological features of a landscape and essential areas in the appropriate quantity and spatial arrangement that a species needs to survive and reproduce and ultimately be conserved.

### **Does the ESA require consideration of economic impacts as part of designating critical habitat?**

Yes. The Service is required to consider potential economic impacts, as well as any other benefits or impacts of designating critical habitat—and may exclude an area if the benefits of excluding it outweigh the benefits of including it unless that would result in the extinction of the species.

### **Do economic considerations affect decisions to list a species as an endangered or threatened species?**

No, the Act requires listing decisions to be made solely on the basis of the best available scientific and commercial information.

### **What is the impact of a critical habitat designation on economic development?**

Most activities that require consultation by Federal agencies proceed without modification. In areas where the species is not present, some project modifications that would not have occurred without the critical habitat designation may be required. For example, the U. S. Army Corps of Engineers may schedule a beach renourishment project—that is, adding sand to a beach to stabilize it—before or after the nesting season of sea turtles to avoid harm to the sea turtles, their eggs, or their hatchlings.

### **Which species have critical habitat designated?**

A list of all ESA protected species with designated critical habitat can be viewed online at <https://ecos.fws.gov/ecp/report/table/critical-habitat.html>

**U. S. Fish and Wildlife Service  
Endangered Species Program  
5275 Leesburg Pike  
Falls Church, VA 22041  
703-358-2171  
<http://www.fws.gov/endangered/>**

**March 2017**