

Dated: December 9, 1999.

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Associate Director for Mitigation.

[FR Doc. 99-33008 Filed 12-21-99; 8:45 am]

BILLING CODE 6718-21-P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

#### RIN 1018-AE32

### Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for *Sidalcea oregana* var. *calva* (Wenatchee Mountains Checker-Mallow)

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

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), determine endangered species status under the Endangered Species Act (Act) of 1973, as amended, for *Sidalcea oregana* var. *calva* (Wenatchee Mountains checker-mallow). This plant species is endemic to meadows that have surface water or saturated soil in the spring and early summer at middle elevations in the Wenatchee Mountains of Chelan County, Washington. Although five populations of this plant are known, three of these have very few individuals. The estimated total number of plants is about 3,300. The primary threats to *S. oregana* var. *calva* include habitat fragmentation and destruction due to alterations of hydrology, rural residential development and associated activities, competition from native and alien plants, recreation, fire suppression, and activities associated with fire suppression. To a lesser extent, the species is threatened by livestock grazing, road construction, and timber harvesting and associated impacts including changes in surface runoff in the small watersheds in which the plant occurs. This rule implements the Federal protections provided by the Act for this plant.

**EFFECTIVE DATE:** This final rule is effective January 21, 2000.

**ADDRESSES:** The complete file for this rule is available for inspection, by appointment, during normal business hours at the Western Washington Office, North Pacific Coast Ecoregion, U.S. Fish and Wildlife Service, 510 Desmond Drive, Suite 102, Lacey, WA 98503-1273.

**FOR FURTHER INFORMATION CONTACT:** Gerry Jackson, Supervisor, at the above

address (telephone 360/753-4327; facsimile 360/753-9815).

#### SUPPLEMENTARY INFORMATION:

##### Background

*Sidalcea oregana* var. *calva* (Wenatchee Mountains checker-mallow) is known only from the Wenatchee Mountains of central Washington. Specimens assignable to var. *calva* were first collected from Icicle Creek near Leavenworth in Chelan County and from wet meadows near the town of Peshastin in Chelan County by Sandberg and Leiberger on July 25, 1893 (herbarium collection, stored in permanent collection at the Smithsonian Institution and the University of Oregon herbaria (Sandberg and Leiberger #586)). Occasional collections were made over subsequent decades until the type specimen was collected by Hitchcock on June 21, 1951, from Camas Land in Chelan County (herbarium collection, stored in permanent collection at Washington State University and the University of Oregon (Hitchcock #19,427)). The taxon was first recognized as a distinct variety named *S. oregana* ssp. *oregana* var. *calva* by Hitchcock and Kruckeberg (1957). Hitchcock and Cronquist (1973) reduced *S. oregana* ssp. *oregana* to varietal status (*S. oregana* var. *spicata*), thereby eliminating the need to include the subspecies *oregana* as part of the scientific name for this taxon. No further taxonomic revisions have been made for this taxon. In recent discussions, knowledgeable individuals confirmed the distinctness of this variety (Arthur Kruckeberg, University of Washington, pers. comm. 1995; John Gamon, Washington Natural Heritage Program, pers. comm. 1996).

A member of the mallow family (Malvaceae), *Sidalcea oregana* var. *calva* is a perennial plant with a stout taproot that branches at the root-crown and gives rise to several stems that are 20 to 150 centimeters (cm) (8 to 60 inches (in)) tall. Plants vary from glabrous (lacking hairs and glands) to pubescent (hairy) or stellate (with star-shaped hairs) below, are finely stellate above, and have flower clusters with one to many stalked flowers arranged singly along a common stem. The flowers have pink petals 1 to 2 cm (0.4 to 0.8 in) long. The flowers are borne on stalks ranging from 1 to 10 millimeters (mm) (0.04 to 0.4 in) in length; the calyx (outer whorl of floral parts) ranges from uniformly finely stellate to bristly with a mixture of longer, simple to four-rayed, spreading hairs sometimes as long as 2.5 to 3 mm (0.1 to 0.12 in) (Hitchcock and Cronquist 1961). Flowering begins in

the middle of June and peaks in the middle to end of July. Fruits are ripe by August. *Sidalcea oregana* var. *calva* is similar morphologically to *S. oregana* var. *procera*, which occurs in the same general region but with a more southerly distribution. *Sidalcea oregana* var. *calva* can be distinguished from var. *procera* by the type and degree of pubescence on the stems and calyx and its large, fleshy, basal leaves, which are smooth to the touch on both surfaces (Gamon 1987).

The historical site location of the 1893 collection near the town of Peshastin and three other early (pre-1940) collections in the Peshastin area have not been relocated (Gamon 1987). The location given for each of these early collections was too vague to allow for relocation. Conversion of the Peshastin and Leavenworth area to orchards or other agricultural uses and rural residential development has likely extirpated *Sidalcea oregana* var. *calva* from this area. Resurveying of three other locations thought to have *Sidalcea oregana* var. *calva* revealed plants found to be *S. oregana* var. *procera* (Gamon 1987). At another three sites where *S. oregana* var. *calva* was discovered in 1984, no plants were found in 1987, possibly because the few plants found in 1984 went undetected in 1987, the original location information was imprecise, or the few plants found in 1984 did not survive due to changes in the hydrologic regimes of the area (J. Gamon, pers. comm. 1997).

Currently, *Sidalcea oregana* var. *calva* is known to occur at five sites (populations). The largest population is located in an area called Camas Land, a wetland and moist meadow complex surrounded by ponderosa pine and Douglas-fir forests. The area is a mixture of private land, State of Washington land managed as the Camas Land Natural Area Preserve (NAP) by the Washington Department of Natural Resources (WDNR), and land administered by the Wenatchee National Forest (U.S. Forest Service). Camas Land is located and named on U.S. Forest Service and WDNR maps. Based on a recent inventory, about 2,470 individuals occur on 36 hectares (ha) (90 acres (ac)) of WDNR property in Camas Land (Washington Natural Heritage Program 1997). These plants are thought to represent about 75 percent of the Camas Land population (David Wilderman, WDNR, pers. comm. 1997). The second largest population, discovered in 1987 on private land at Mountain Home Meadow, consists of about 100 plants within a few hectares (Ted Thomas, Service, pers. obs. 1995). Two other populations on the Wenatchee National Forest have a total

of seven plants (Richy Harrod, U.S. Forest Service, pers. comm. 1997). The fifth population, on private land, has fewer than 30 plants (T. Thomas, pers. obs. 1995). The estimated total number of plants in these 5 populations is fewer than 3,300. The total area occupied by the 5 populations is approximately 50 ha (125 ac).

*Sidalcea oregana* var. *calva* is most abundant in moist meadows that have surface water or saturated upper soil profiles during spring and early summer, but it also occurs in open conifer stands dominated by *Pinus ponderosa* (ponderosa pine) and *Pseudotsuga menziesii* (Douglas-fir) and on the margins of shrub and hardwood thickets. Extant populations are found at elevations ranging from 600 to 1,000 meters (m) (1,970 to 3,300 feet (ft)). The soils are typically clay-loams and silty loams with low moisture permeability. Associated species include *Populus tremuloides* (quaking aspen), *Crataegus douglasii* (black hawthorn), *Symphoricarpos albus* (common snowberry), *Amelanchier alnifolia* (serviceberry), *Lathyrus pauciflorus* (few-flowered peavine), *Wyethia amplexicaulis* (northern mule's-ear), *Geranium viscosissimum* (sticky purple geranium) and *Veratrum californicum* (California false hellebore). Sixty percent of the *S. oregana* var. *calva* populations are found in association with *Delphinium viridescens* (Wenatchee larkspur), a former Federal category 1 candidate plant species.

#### Previous Federal Action

Federal action on *Sidalcea oregana* var. *calva* began when we published an updated Notice of Review for plants on December 15, 1980 (45 FR 82480). This notice included *S. oregana* var. *calva* as a category 1 candidate species. Category 1 candidates were defined as taxa for which we had on file substantial information on biological vulnerability and threats to support preparation of listing proposals. The Notice of Review published on September 27, 1985 (50 FR 39526), included *Sidalcea oregana* var. *calva* as a category 2 candidate species. Category 2 candidates were defined as taxa for which information indicated that proposing to list the taxa as endangered or threatened was possibly appropriate, but for which substantial data on biological vulnerability and threats were not currently known or on file to support a listing proposal. Later notices of review published on February 21, 1990 (55 FR 6185), and September 30, 1993 (58 FR 51144), identified the plant as a category 1 candidate species. Upon publication of the February 28, 1996, Notice of Review (61 FR 7596), we

ceased using the category designations and included *Sidalcea oregana* var. *calva* as a candidate species. Candidate species are those for which we have on file sufficient information on biological vulnerability and threats to support proposals to list the species as threatened or endangered.

Section 4(b)(3)(B) of the Act requires the Secretary to make certain 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. That provision of the Act applied to *Sidalcea oregana* var. *calva*, because the 1975 Smithsonian report had been accepted 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; notification of this finding was published on January 20, 1984 (49 FR 2485). Such a finding requires the petition to be recycled, pursuant to section 4(b)(3)(C)(i) of the Act. The finding was reviewed annually in October of 1984 through 1995.

On August 1, 1997, we published a proposed rule to list *Sidalcea oregana* var. *calva* as an endangered species (62 FR 41328). The comment period was open until September 30, 1997. With publication of this final rule, we now determine that *Sidalcea oregana* var. *calva* is endangered.

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 (prudence 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.

We have updated this rule to reflect any changes in distribution, status, and threats since publishing the proposed rule and to incorporate information obtained through the public comment period. This additional information did not alter our decision to list this species.

#### Summary of Comments and Recommendations

In the August 1, 1997, proposed rule (62 FR 41328) and associated notifications, we requested interested parties to submit factual reports or information that might contribute to the development of a final rule. We sent announcements of the proposed rule to appropriate Federal and State agencies, county governments, scientific organizations, and other interested parties. We also published announcements of the proposed rule in newspapers, including the *Seattle Times*, *Seattle Post-Intelligencer*, *Olympian*, *Wenatchee World*, *Leavenworth Echo*, *Bremerton Sun*, *Centralia Chronicle*, *Everett World*, *Longview World*, *Skagit Valley Herald*, *Peninsula Daily News*, *Spokesman Review*, *Yakima Herald*, *Aberdeen Daily World*, *Bellingham Herald*, *Bellevue Daily*, and *Vancouver Columbian*, on August 1, 1997, inviting public comment.

During the comment period, we received five comments, from one Federal agency, one State agency, one conservation organization, and two individuals or groups. All commenters, except one, supported the listing of *Sidalcea oregana* var. *calva* under the Act.

Because multiple respondents offered similar comments, we grouped comments of a similar nature or point. These comments and our responses to each are discussed below.

**Issue 1:** One commenter was concerned that listing this species would restrict further development of the commenter's property.

**Our Response:** Nothing prohibits "take" of plants on private land. Future construction activities on private land would not be restricted by any regulations under the Act, provided that there is no Federal agency involvement in the activities. If actions on private property require Federal funding, authorizations, or a Federal permit, the Federal action agency must consult with us. For further discussion on consultation requirements under section 7 of the Act, see the "Available Conservation Measures" section of this final rule.

**Issue 2:** One commenter questioned our authority to regulate interstate

commerce, as related to this endangered species.

*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 (*Rhaphiomidus terminatus abdominalis*). As with *Sidalcea oregana* var. *calva*, 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 applying the Act in that case 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.

The Federal Government also has the authority under the Property Clause of the Constitution to protect this species. *Sidalcea oregana* var. *calva* occurs on Federal land in the Wenatchee National Forest. If this species were to become extinct, the diversity of plant life in the Wenatchee National Forest would be diminished. The courts have long recognized Federal authority under the Property Clause to protect Federal resources in such circumstances. See e.g., *Kleppe v. New Mexico*, 429 U.S. 873 (1976); *United States v. Alford*, 274 U.S. 264 (1927); *Camfield v. United States*, 167 U.S. 518 (1897); *United States v. Lindsey*, 595 F.2d 5 (9th Cir. 1979).

#### Peer Review

In accordance with interagency policy published on July 1, 1994 (59 FR 34270), we solicited the expert opinions of independent specialists regarding pertinent scientific or commercial data and assumptions relating to the taxonomy, population status, and supportive biological and ecological information for the taxon under consideration for listing. The purpose of such review is to ensure that listing decisions are based on scientifically sound data, assumptions, and analyses, including input of appropriate experts

and specialists. Two scientists responded to our request for peer review of this listing action. Both responders provided information that was incorporated and is presented in the final rule.

#### Summary of Factors Affecting the Species

Section 4 of the Act and the regulations (50 CFR part 424) issued to implement the listing provisions of the Act set forth the procedures for adding species to the Federal Lists. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act. These factors and their applications to *Sidalcea oregana* (Nutt.) var. *calva* C.L. Hitchcock (Wenatchee Mountains checker-mallow) are as follows:

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

All known sites and habitats for *Sidalcea oregana* var. *calva* have undergone various alterations. Conversion of land to orchards or other agricultural uses and rural residential development are thought to have extirpated historical populations (Gamon 1987). Numerous houses already exist at Camas Land, the site of the largest population, and two houses have been built there since 1987 (T. Thomas, pers. obs. 1995). Current threats to this population are posed by further subdivision for residences and associated habitat modifications, such as alterations in hydrology, increased nutrient loads into the meadow from septic systems, introduction of non-native grasses, conversion of portions of the meadow to agricultural uses including pasture land and gardens, access road construction, and trampling by people and off-road vehicles (Gamon 1987; T. Thomas, pers. obs. 1995; D. Wilderman, pers. comm. 1997).

Natural drainage channels within Camas Land have been altered to direct water away from the primary wet meadow area for agricultural purposes (Gamon 1987; R. Harrod, pers. comm. 1996; D. Wilderman, pers. comm. 1997). Alterations in hydrology threaten the species by changing the amount, timing, duration, and/or frequency of the water supply to the habitat for the species. Most individuals of *Sidalcea oregana* var. *calva* in the Camas Land meadow are associated with the drainage channels or areas that retain moisture relatively longer (Gamon 1987).

Livestock occur in Camas Land, and the sheep, horses, and cows trample vegetation, compact soils, and serve as

vectors for introducing non-native plant seeds either directly or indirectly through their feed. Portions of the primary meadow have also been seeded to non-native grasses to increase forage for livestock. In addition, non-native grasses have been planted near residences for lawns and appear to be encroaching into the primary meadow area (T. Thomas, pers. obs. 1995). These introduced grasses are rhizomatous (forming a thick layer of matted roots), and tend to outcompete and, therefore, displace native species for nutrients and water (R. Harrod, pers. comm. 1996). *Sidalcea oregana* var. *calva* is generally absent from these areas except for occasional individuals along the periphery, suggesting that the introduced species are able to displace *S. oregana* var. *calva* (Gamon 1987).

The primary Camas Land meadow is used by recreationists, which has had detrimental effects on the population of *Sidalcea oregana* var. *calva* (Gamon 1987; D. Wilderman, pers. comm. 1997). People engaging in a variety of recreational activities, including trailbike riding, bow-hunting competitions, and camping, contribute to the species' decline by trampling plants and compacting the soil. Trampling of *S. oregana* var. *calva* plants has been documented (D. Wilderman, pers. comm. 1997).

Timber harvest has occurred throughout the general Camas Land area (R. Harrod, pers. comm. 1996). Local ground disturbance associated with timber harvest, such as log yarding and slash disposal, probably poses a greater threat than tree removal (Gamon 1987) by crushing plants and compacting the soil. Timber harvest may also have long-term effects on the hydrology in the small watershed and poses a threat to the species by increasing erosion and sedimentation in the wetlands where it occurs and changing the patterns of surface and subsurface water runoff.

A large portion of the two largest populations of *Sidalcea oregana* var. *calva* in Camas Land was adversely impacted by fire-suppression activities associated with the Rat Creek and Hatchery Creek fires during the fall of 1994 on the Wenatchee National Forest (Harrod 1994; T. Thomas, pers. obs. 1995). During construction of a fire safety zone in a small drainage flowing into the Camas Land Meadow, a bulldozer destroyed several hundred *S. oregana* var. *calva* plants. The plants were bladed and uprooted, the topsoil removed, and the site scraped to mineral soil. During a visit to the disturbed site in May of 1995, researchers observed no sprouts or seedlings of *S. oregana* var. *calva* (T.

Thomas, pers. obs. 1995). The likelihood of recovery of *S. oregana* var. *calva* within the disturbed portion of the population appears low (R. Harrod, pers. comm. 1996).

A second population, at Mountain Home Meadow, was also adversely impacted by fire-suppression activities associated with the Rat Creek Fire during 1994 (Harrod 1994). A fire safety area was constructed in the wetland supporting a population of *Sidalcea oregana* var. *calva*. Blading of the area by a bulldozer destroyed approximately 50 percent (more than 100 plants) of the population, disturbed the soil, and altered the hydrology of this wet meadow. One year after the disturbance, no *S. oregana* var. *calva* plants were observed at this location (T. Thomas, pers. obs. 1995). The likelihood of recovery of the destroyed portion of this population appears low (R. Harrod, pers. comm. 1996).

The potential for forest fires is high in the east side ponderosa pine and Douglas-fir forest type. Prior to 1900, historic fire frequency in the forests east of the Cascade Crest was approximately 13 years, with fire essentially absent from 1900 to 1990 (Everett *et al.* 1997). With the reduction of fires during this century, the structure of east-side forests has been altered with an increase in tree density and development into multiple canopy layers. Because of the changes in stand structure, these forests are highly susceptible to wildfire (Agee 1993). Because fires threatening private property and public structures are suppressed, the likelihood for further direct disturbance to *Sidalcea oregana* var. *calva* populations in the future remains high. Fire may play a role in the maintenance of suitable habitat for *S. oregana* var. *calva* (Gamon 1987), and fire suppression has probably resulted in less suitable habitat (R. Harrod, pers. comm. 1996). In the absence of fire, conifer recruitment and woody plant invasion may reduce the amount of habitat suitable for *S. oregana* var. *calva* by increasing competition for light, nutrients, and water. A significant increase in vegetative growth due to fire suppression outside of the immediate habitat for *S. oregana* var. *calva* may also adversely affect habitat suitability for the species by reducing the surface runoff within the small wetlands where it occurs.

Other current threats at Mountain Home Meadow, where the second largest known population of *Sidalcea oregana* var. *calva* occurs, include alteration of hydrology due to road construction, timber harvesting activities, and inadvertent trampling of the small population by guests at a

nearby resort lodge. The hydrology of the site may be altered by the main access road that borders the population on the west. Timber on the ridge immediately west of the main access road was harvested in 1987. This timber was within 50 m (164 ft) of the population, and the harvest temporarily modified the area's hydrology by increasing water flow from the hillside directly into the plant's habitat. Timber was also harvested from the ridge directly above and east of Mountain Home Meadow during the summer of 1995, and this harvest may have modified surface runoff (R. Harrod, pers. comm. 1996). Construction activities and facilities maintenance at the lodge may also alter the site hydrology and adversely impact the *S. oregana* var. *calva* population at this location (Gamon 1987; T. Thomas, pers. obs. 1995).

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

Seed of the full species *Sidalcea oregana* is collected by horticulturists. Some populations are small enough that even limited collecting pressure could have adverse impacts. *S. oregana* var. *calva* is an attractive plant and may be sought for collection if its rarity and population locations become well known. All perennial species in the genus are considered attractive plants with horticultural potential (Hitchcock and Cronquist 1961; Gamon 1987; Hill 1993). Wild-collected seed of the species, *S. oregana* (no variety given), is available through a seed exchange program offered by the international gardening society North American Rock Garden Society (North American Rock Garden Society 1996).

#### *C. Disease or Predation*

Large numbers of aphids have infested individuals of *Sidalcea oregana* var. *calva* at the Camas Land and Mountain Home Meadow populations (Gamon 1987). The effect of these aphids, or the relationship of the aphids to *S. oregana* var. *calva*, is not known. In 1987, researchers observed that weevils had eaten the majority of the seeds that had been produced (Gamon 1987); herbivory has also been observed more recently (R. Harrod, pers. comm. 1996). Livestock, especially sheep, have grazed the Camas Land meadow complex, and the southeast portion of the meadow is currently grazed by horses. Whether herbivory by livestock or wildlife has adversely impacted the *S. oregana* var. *calva* population is unknown, as is the potential threat herbivory may currently pose. Some

grazing by horses and wildlife (deer and elk) also has been observed, although the impact from grazing is unknown (Gamon 1987; R. Harrod, pers. comm. 1996).

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

*Sidalcea oregana* var. *calva* is included on the U.S. Forest Service Region 6 Sensitive Plant List and is listed as endangered by the WDNR's Natural Heritage Program (1994). The State of Washington has no State Endangered Species Act, and therefore, the WDNR designation provides no legal protection for this species.

The Wenatchee National Forest has developed a draft conservation agreement with us for another sensitive plant species, *Delphinium viridescens*, which would indirectly provide some measures for conserving *Sidalcea oregana* var. *calva* at the three sites where the two species occur together. Some protective mechanisms discussed in the draft agreement have been implemented and may serve to promote the recovery of *S. oregana* var. *calva* on Forest Service land. However, this agreement has not been finalized, does not address all of the threats to *S. oregana* var. *calva*, and is inadequate to protect and recover the species throughout its range (Gamon 1987; J. Gamon, pers. comm. 1997). Protection provided through this conservation agreement would not extend to private or State-owned land, where most of the individual plants occur, nor would it protect the species from alteration of hydrology, rural residential development and associated impacts, competition from non-native plants, fire and fire-suppression activities, insect outbreaks, and random events. The numbers of *S. oregana* var. *calva* plants are so low on Forest Service land that these two populations may not be viable, and little opportunity exists for genetic exchange between the Wenatchee National Forest populations and the other Camas Land populations. The area where the two populations occur is designated under the Northwest Forest Plan as matrix, which is land that is available to harvest. A small portion of the area does occur in a managed late-successional reserve, which provides some protection by limiting some of the activities that may occur there. The two populations on Forest Service land occur behind locked vehicle gates, so they are afforded some measure of protection. However, foot and bicycle traffic is permitted.

The wetland habitat of *Sidalcea oregana* var. *calva* is under the jurisdiction of the U.S. Army Corps of

Engineers (Corps). Under section 404 of the Clean Water Act, the Corps regulates the discharge of dredged or fill material into waters of the United States, including wetlands. Section 404 requires project proponents to obtain a permit from the Corps prior to undertaking activities (e.g., grading, discharge of soil or other fill material) that would result in the fill of wetlands under the Corps' jurisdiction. Denial or restriction of an activity under section 404 can occur if the effects of the activity would have an adverse effect on such things as municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas.

Generally, if a project falls below certain thresholds, such as the fill of wetlands less than 0.13 ha (0.33 ac) under Nationwide Permit 26 (33 CFR 330.5(a)(26)), the project is considered authorized. Projects meeting the criteria for a nationwide permit are normally permitted with minimal environmental review by the Corps.

Individual permits are required for the discharge of fill material into wetlands above the thresholds established by the nationwide permits. The review process for the issuance of individual permits is more rigorous than for nationwide permits. Unlike nationwide permits, for individual permit applications, an alternatives analysis and an assessment of cumulative wetland impacts and a 30-day public review period is required. Resulting permits may include special conditions that require the avoidance or mitigation of environmental impacts. In practice, the Corps rarely requires an individual permit when a project would qualify for a nationwide permit, unless the project has substantial or more than minimal impacts, or a species is listed as threatened or endangered, or other significant resources might be adversely affected by the proposed activity.

Three out of the five populations of *Sidalcea oregana* var. *calva* are very small, two occupying habitat less than a couple of meters in size, and one occupying a site of no more than 0.2 ha (0.05 ac). Any one of these three populations could conceivably be eliminated if the wetlands they occupy were covered by fill or discharged material. The remaining two populations could lose a large number of individuals, as well as have the hydrology of its habitat adversely modified by discharge of fill or dredged material. Because many activities that could cause modification or destruction of the wetland habitats of *S. oregana* var. *calva* could be authorized by nationwide permit, section 404 of the Clean Water Act provides insufficient

protection of the species. Following listing of the species, however, section 404 could provide greater protection.

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

Fewer than 5 individuals are present at each of 2 sites on Forest Service land, and fewer than 30 individuals are present at 1 of the sites on private land. When populations reach such low numbers of individuals, their vulnerability to extirpation from human-caused and random events increases (Gilpin and Soule 1986; Given 1994; Schemske *et al.* 1994). An outbreak of insects, soil disturbance from livestock grazing, or a fire during the growing season of *Sidalcea oregana* var. *calva* could extirpate these small populations or reduce the habitat suitability for this species. The small, isolated nature of these populations may also have an adverse effect on pollinator activity, seed dispersal, and gene flow. Small populations may lose a large amount of genetic variability because of genetic drift and, therefore, have a reduced likelihood of long-term viability (Soule 1980, as cited in Lesica and Allendorf 1992). The Mountain Home Meadow population has fewer than 100 plants and is also vulnerable to many of these same threats. An additional threat to the Mountain Home Meadow population from an adjacent gravel road is dust, which may hinder pollination of the plants nearest the road (Gamon 1987).

We have carefully assessed the best scientific and commercial information available concerning the past, present, and future threats faced by this species in making this rule final. Threats to *Sidalcea oregana* var. *calva*, including alterations of wetland hydrology, development of property for residential and agricultural use, habitat modification or destruction from fire-suppression and related activities, competition with native and non-native plant species, and impacts from recreational activities, imperil the continued existence of this species. Much of the habitat where this species occurs is suitable for development and for modification by logging or agriculture and is unprotected from these threats. The small populations of this species are particularly vulnerable to extirpation from random natural events. *Sidalcea oregana* var. *calva* is known from only five populations. The most likely random natural threat to *S. oregana* var. *calva* is wildfires, which remain a concern in the east-side Cascade forest ecosystem. Two of these populations have fewer than 5 individuals each, while 1 population

has fewer than 30 individuals. Another population has about 100 individuals remaining after being reduced 50 percent by fire-suppression activities. The largest population has about 2,470 individuals. *Sidalcea oregana* var. *calva* is in danger of extinction throughout its range and, therefore, meets the Act's definition of endangered. Because of the high potential for these threats, if realized, to result in the extinction of *S. oregana* var. *calva*, the preferred action is to list *S. oregana* var. *calva* as endangered. Other alternatives to this action were considered but not preferred; not listing *S. oregana* var. *calva* or listing it as threatened would not be in accordance with the Act.

#### **Critical Habitat**

In the proposed rule, we indicated that designation of critical habitat was not prudent for *Sidalcea oregana* var. *calva* 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 *Sidalcea oregana* var. *calva* would be prudent.

Due to the small number of populations, *Sidalcea oregana* var. *calva* 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. However, we have examined the evidence available for *S. oregana* var. *calva* and have not found specific evidence of taking, vandalism, collection, or trade of this species or any similarly situated species. 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 increase the degree

of threat to this species of taking or other human activity.

In the absence of a finding that 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 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 critical habitat is prudent for *Sidalcea oregana* var. *calva*.

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 be funded separately from other section 4 listing actions and 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 *Sidalcea oregana* var. *calva* 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 *S. oregana* var. *calva* 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 *Sidalcea oregana* var. *calva* 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 issue in this case).

#### 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 activities. 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. Funding may be available through section 6 of the Act for the State to conduct recovery activities. The protection required by Federal agencies and 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)(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 listed subsequently, section 7(a)(2) of the Act 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 destroy or adversely modify its critical habitat, if designated. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with us, pursuant to section 7(a)(2) of the Act.

Two of the five known populations of *Sidalcea oregana* var. *calva* are found entirely on Federal lands managed by the Wenatchee National Forest, while a third population lies partially within its boundaries. The U.S. Forest Service would be required to consult with us if any actions such as timber harvesting, road construction, fire-suppression/management, or grazing activities may affect *S. oregana* var. *calva*. Other Federal agency actions that may require conference and/or consultation include Army Corps of Engineers authorization of projects affecting wetlands and other waters under section 404 of the Clean Water Act (33 U.S.C. 1344 *et seq.*), Environmental Protection Agency authorization of discharges under the National Pollutant Discharge Elimination System, Natural Resource Conservation Service projects, and Department of Housing and Urban Development and Veterans Administration mortgage programs (Federal Home Administration loans). 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 as endangered would provide for development of a recovery plan for the plant. Such a plan would identify both State and Federal efforts for conservation of the plant and establish a framework for agencies to coordinate activities and cooperate with each other in conservation efforts. The plan would set recovery priorities and describe site-specific management actions necessary to achieve conservation and survival of the plant. Additionally, pursuant to section 6 of the Act, we would be able to grant funds to affected States for management actions promoting the protection and recovery of this species.

The Act and its implementing regulations 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 for endangered plants, would 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 such plants from areas under Federal jurisdiction. In addition, the Act prohibits the malicious damage or destruction on areas under Federal jurisdiction and the removal, cutting, digging up, damaging, or destroying of such plants in knowing violation of any State law or regulation, or in the course of a violation of State criminal trespass law. Certain exceptions to the prohibitions apply to our agents 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 plant species under certain circumstances. Such permits are available for scientific purposes and to enhance the propagation or survival of the species. We anticipate that few trade permits would be sought or issued because the species is not common in cultivation or in the wild.

As published in the **Federal Register** on July 1, 1994 (59 FR 34272), our policy is to identify, to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. 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. Two of the five known populations of *Sidalcea oregana* var. *calva* are found entirely on Federal lands managed by the Wenatchee National Forest, while a third population lies partially within its boundaries. Collection, damage, or destruction of this species on Federal lands is prohibited, although in appropriate cases a Federal permit could be issued to allow collection for scientific or recovery purposes. Such activities on non-Federal land would constitute a violation of section 9 of the Act if activities were conducted in knowing violation of Washington State law or regulations, or in the course of a violation of Washington State criminal trespass law.

We believe that, based upon the best available information, the following actions will not result in a violation of section 9, provided these activities are carried out in accordance with existing regulations and permit requirements:

(1) Activities authorized, funded, or carried out by Federal agencies (if the species were found on Federal lands), (e.g., grazing management, agricultural conversions, wetland and riparian habitat modification, flood and erosion control, residential development, recreational trail development, road construction, hazardous material containment and cleanup activities, prescribed burns, pesticide/herbicide application, pipelines or utility lines crossing suitable habitat,) when such activity is conducted in accordance with any reasonable and prudent measures given by the Service in a consultation conducted under section 7 of the Act;

(2) Casual, dispersed human activities on foot or horseback (e.g., bird watching, sightseeing, photography, camping, hiking);

(3) Activities on private lands that do not require Federal authorization and do not involve Federal funding, such as grazing management, agricultural conversions, flood and erosion control, residential development, road construction, and pesticide/herbicide application when consistent with label restrictions;

(4) Residential landscape maintenance, including the clearing of vegetation around one's personal residence as a fire-break.

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) Unauthorized collecting of the species on Federal lands;

(2) Interstate or foreign commerce and import/export without previously obtaining an appropriate permit. Permits to conduct activities are available for purposes of scientific research and enhancement of propagation or survival of the species.

Questions regarding whether specific activities will constitute a violation of section 9 should be directed to the Supervisor of the Western Washington Office (see **ADDRESSES** section). Requests for copies of the regulations on listed plants and inquiries regarding them may be addressed to the U.S. Fish and Wildlife Service, Ecological Services, Permits Branch, 911 N.E. 11th Avenue, Portland, Oregon 97232-4181 (telephone 503/231-6241).

#### National Environmental Policy Act

We have determined that an environmental assessment and environmental impact statement, 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 plant species, see 50 CFR 17.62 and 17.63.

This rule has not been reviewed by the Office of Management and Budget under C.O.12866.

#### References Cited

A complete list of all references cited herein, as well as others, is available upon request from the Western Washington Office (see **ADDRESSES** section).

#### Author

The primary author of this final rule is Ted Thomas, Western Washington Office of the North Pacific Coast Ecoregion (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 set forth below:

#### PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500, unless otherwise noted.

2. Amend section 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>Sidalcea oregana</i><br><i>var. calva.</i> | Wenatchee Moun-<br>tains checker-mal-<br>low. | U.S.A. (WA) ..... | Malvaceae—Mallow | E      | 673         | NA               | NA            |
| *                                             | *                                             | *                 | *                | *      | *           |                  | *             |

Dated: December 8, 1999.

**Jamie Rappaport Clark,**

*Director, U.S. Fish and Wildlife Service.*

[FR Doc. 99-33100 Filed 12-21-99; 8:45 am]

BILLING CODE 4310-55-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 981014259-8312-02; I.D. 121699B]

#### Summer Flounder Fishery

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Commercial quota transfer; commercial quota harvest reopening.

**SUMMARY:** NMFS announces that the State of North Carolina is transferring 70,000 lb (31,752 kg) of commercial summer flounder quota to the State of New York from its 1999 quota. By this action, NMFS adjusts the quotas and announces the revised commercial quota for each state involved. NMFS also announces that the summer flounder commercial fishery in the EEZ for the State of New York is reopened. Vessels issued a commercial Federal fisheries permit for the summer flounder fishery may land summer flounder in New York for the remainder of calendar year 1999, unless closed due to the State of New York harvesting its commercial quota before the end of the calendar year. Regulations governing the summer flounder fishery require the publication of this notification to advise the State of New York that the fishery has reopened and to advise vessel permit holders and dealer permit holders that commercial quota is available for landing summer flounder in New York.

**DATES:** Effective December 17, 1999 through December 31, 1999.

**FOR FURTHER INFORMATION CONTACT:** Paul H. Jones, Fishery Policy Analyst, (978) 281-9273.

#### SUPPLEMENTARY INFORMATION:

Regulations governing the summer flounder fishery are found at 50 CFR part 648. The regulations require annual specification of a commercial quota that is apportioned among the coastal states from North Carolina through Maine. The process to set the annual commercial quota and the percent allocated to each state are described in § 648.100.

After taking into account any overages of state quotas that occurred in 1998, the total commercial quota for summer flounder for the 1999 calendar year was set equal to 10,729,274 lb (4,866,717 kg), with a quota of 790,006 lb (358,341 kg) for New York and a quota of 3,044,589 lb (1,381,002 kg) for North Carolina (64 FR 46596; August 26, 1999).

The final rule implementing Amendment 5 to the FMP that was published on December 17, 1993 (58 FR 65936), provided the mechanism for summer flounder quota to be transferred from one state to another. Two or more states, under mutual agreement and with the concurrence of the Administrator, Northeast Region, NMFS, (Regional Administrator) can transfer or combine summer flounder commercial quota under section 648.100(e). The Regional Administrator is required to consider the criteria set forth in § 648.100(e)(1), in the evaluation of requests for quota transfers or combinations.

North Carolina has agreed to transfer 70,000 lb (31,752 kg) of its 1999 commercial quota to New York. The Regional Administrator has determined that the criteria set forth in § 648.100(e)(1) have been met, and publishes this notification of quota transfer. The revised quotas for the calendar year 1999 are: New York, 860,006 lb (390,099 kg); and North Carolina, 2,974,589 lb (1,349,274 kg).

NMFS issued a notification in the **Federal Register** on October 26, 1999 (64 FR 57586), announcing that the summer flounder commercial quota available to the State of New York had been harvested. The Regional Administrator has determined, based upon dealer reports and upon other available information, that the State of

North Carolina will not attain its quota for 1999 and, based on the 70,000-lb (31,752-kg) transfer of commercial summer flounder quota to the State of New York, that the State of New York commercial summer flounder fishery in the EEZ will reopen effective 0001 hours, December 17, 1999 through December 31, 1999. Therefore, vessels issued a commercial Federal fisheries permit for the summer flounder fishery may land summer flounder in New York for the remainder of calendar year 1999, unless closed due to the State of New York harvesting its commercial quota before the end of the calendar year. Effective December 17, 1999 through December 31, 1999, federally permitted dealers are also advised that they may purchase summer flounder from federally permitted vessels that land in New York for the remainder of the calendar year.

#### Classification

This action does not alter any of the conclusions reached in the environmental impact statement prepared for Amendment 2 to the FMP regarding the effects of summer flounder fishing activity on the human environment. Amendment 2 established procedures for setting an annual coastwide commercial quota for summer flounder and a formula for determining commercial quotas for each state. The quota transfer provision was established by Amendment 5 to the FMP and the environmental assessment prepared for Amendment 5 found that the action had no significant impact on the environment. Under section 6.03a.3(b)(1) of NOAA Administrative Order 216-6, this action is categorically excluded from the requirement to prepare additional environmental analyses. This is a routine administrative action that reallocates commercial quota within the scope of previously published environmental analyses. This action is taken under 50 CFR part 648 and is exempt from review under E.O. 12866.

**Authority:** 16 U.S.C. 1801 *et seq.*