

50 CFR Part 17

Determination that *Mirabilis macfarlanei* is an Endangered Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The Service determines *Mirabilis macfarlanei* (MacFarlane's four o'clock) to be an Endangered species. This species occurs in Idaho and Oregon. This plant is known only from three populations with a total of 20-25 individual plants. Two populations occur on Forest Service land; one occurs on Bureau of Land Management land. One population occurs adjacent to a main hiking trail along the Snake River. Recreational use of this area will increase since the area has been designated a National Recreation Area. Taking would be a serious threat for the continued existence of this plant considering the small number of individual plants; this species does have a very showy pink flower. This action will extend to this plant the protection provided by the Endangered Species Act of 1973, as amended in 1978.

DATE: This rulemaking becomes effective on November 28, 1979.

FOR FURTHER INFORMATION CONTACT: Mr. John L. Spinks, Jr., Chief, Office of Endangered Species, Fish and Wildlife Service, U.S. Department of the Interior, Washington, D.C. 20240, (703) 235-2771.

SUPPLEMENTARY INFORMATION:**Background**

The Secretary of the Smithsonian Institution, in response to Section 12 of the Endangered Species Act, presented his report on plant species to Congress on January 9, 1975. This report, designated as House Document No. 94-51, contained lists of over 3,100 U.S. vascular plant taxa considered to be Endangered, Threatened, or extinct. On July 1, 1975, the Director published a notice in the *Federal Register* (40 FR 27823-27924) of his acceptance of the report of the Smithsonian Institution as a petition to list these species under Section 4(c)(2) of the Act, and of his intention thereby to review the status of the plant taxa named within as well as any habitat which might be determined to be critical.

On June 16, 1976, the Service published a proposed rulemaking in the *Federal Register* (41 FR 24523-24572) to determine approximately 1,700 vascular plant species to be Endangered species pursuant to Section 4 of the Act. This list of 1,700 plant taxa was assembled on the basis of comments and data

received by the Smithsonian Institution and the Service in response to House Document No. 94-51 and the above mentioned *Federal Register* publication.

Mirabilis macfarlanei was included in both the July 1, 1975, notice of review and the June 16, 1976, proposal. A public hearing on the June 16, 1976, proposal was held on July 22, 1976, in El Segundo, California.

In the June 24, 1977, *Federal Register*, the Service published a final rulemaking (42 FR 32373-32381, to be codified at 50 CFR Part 17) detailing the regulations to protect Endangered and Threatened plant species. The rules establish prohibitions and a permit procedure to grant exceptions to the prohibitions under certain circumstances.

The Department has determined that this rule does not meet the criteria for significance in the Department Regulations implementing Executive Order 12044 (43 CFR Part 14) or require the preparation of a regulatory analysis.

Summary of Comments and Recommendations

Hundreds of comments on the general proposal of June 16, 1976, were received from individuals, conservation organizations, botanical groups, and business and professional organizations. Few of these comments were specific in nature in that they did not address individual plant species. Most comments addressed the program, or the concept of Endangered and Threatened plants and their protection and regulation. These comments are summarized in the April 26, 1978, *Federal Register* publication which also determined 13 plant species to be Endangered or Threatened species (43 FR 17909-17916). The comments in response to the June 7, 1976, proposed rule (41 FR 22915) on prohibitions and permit provisions for plants under Section 9(a)(2) and 10(a) of the Act were summarized in the June 24, 1977, *Federal Register* final prohibitions and permit provisions. The Governors of Idaho and Oregon were notified of the proposed action. The Governors themselves submitted no comments on the proposed action; several departments within the State of Oregon responded to the proposed action with programmatic, not specific, comments. Recently, the Native Plant Society of Oregon recommended that *M. macfarlanei* be listed as an Endangered species without the determination of Critical Habitat.

Conclusion

After a thorough review and consideration of all the information available, the Director has determined that *Mirabilis macfarlanei* is in danger

of becoming extinct throughout all or a significant portion of the range due to one or more of the factors described in Section 4(a) of the Act.

These factors and their application to *Mirabilis macfarlanei* are as follows:

1. *The present or threatened destruction, modification, or curtailment of its habitat of range.* This plant is known only from three populations with approximately 20-25 individual plants. The Idaho population has an estimated 10 plants covering a 5-10-meter length. One Oregon population has an estimated 15 plants covering an area approximately 30 x 50 meters; the other Oregon population that is next to a hiking trail consists of two plants. This trail is a main recreation trail along the Snake River. There will certainly be increased recreational use of the river trail now that this area has been designated a National Recreation Area.

2. *Overutilization for commercial, sporting, scientific, or educational purposes.* Collecting can be a serious threat to the continued existence of this species considering the number of known individual plants. Other species of *Mirabilis* are cultivated and prized as garden ornamentals. *M. macfarlanei* is an attractive plant with a very showy pink flower. As if limited distribution and small population size were not enough, the horticultural statement in C. L. Hitchcock's *Vascular Plants of the Pacific Northwest* places the plant in further jeopardy. Hitchcock recommends that the "rather attractive" plants are worth a try in the wild garden. *Vascular Plants of the Pacific Northwest* is the definitive text on flora of the area and is widely read by botanists including commercial plant collectors.

3. *Disease or predation* (including grazing). The effect of grazing on this species is not known. Grazing does occur near the Oregon populations and should be monitored to see if *M. macfarlanei* is being grazed on. At least two species of fungi have been observed on the vegetative parts of the plants in Idaho. A lepidopteran (which may be a species of *Lithiarepteryx*) may also be working on the buds and leaves. Examination of some of the nearly-open flowers reveal ovaries eaten away and other parts missing.

4. *The inadequacy of existing regulatory mechanisms.* Neither Idaho nor Oregon have legislation to protect Endangered or Threatened plants or official State lists of such plants. Forest Service regulations prohibit removing, destroying, or damaging any plant that is classified as a threatened, endangered, rare or unique species, 36 CFR 261.9(b). The Bureau of Land Management does

have authority under the Federal Land Policy and Management Act of 1976 (the BLM Organic Act) to restrict taking of vegetative resources under certain circumstances. Present regulations (43 CFR 6010.2) prohibit the removal, destruction, and disturbance of vegetative resources unless such activities are specifically authorized. These regulations make no specific reference to Threatened or Endangered plants and provide no framework to allow an over-all program for management and protection of native plants. These various regulations, however, may be difficult to enforce. The Endangered Species Act will offer additional protection to this species, especially as other Federal agencies will then be required to use their authorities to protect listed species pursuant to Section 7 of the Act.

5. *Other natural or manmade factors affecting its continued existence.* This species is known from three small populations with a total of 20-25 individual plants. Extensive searches by both professional and amateur botanists over the past six years have not revealed additional plants. It is an attractive garden subject. This species' showiness and accessibility make the few remaining individuals vulnerable to collection and eventual extinction.

Effect of the Rulemaking

Section 7 (a) of the Act as amended in 1978 provides:

The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultations with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to Section 4 of this Act. Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") does not jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section.

Provisions for Interagency Cooperation were published on January 4, 1978, in the *Federal Register* (43 FR 870-876) and codified at 50 CFR Part 402. These regulations are intended to assist Federal agencies in complying with Section 7(a) of the Act. This

rulemaking requires Federal agencies to satisfy these statutory and regulatory obligations with respect to this species.

Endangered species regulations in Title 50 of the Code of Federal Regulations set forth a series of general prohibitions and exceptions which apply to all Endangered species. The regulations which pertain to Endangered plant species, are found at §§ 17.61-17.63 (42 FR 32378-32381).

Section 9(a)(2) of the Act, as implemented by Section 17.61 would apply. With respect to any species or plant listed as Endangered, it is, in general, illegal for any person subject to the jurisdiction of the United States to import or export such species; deliver, receive, carry, transport, or ship such species in interstate or foreign commerce by any means and in the course of a commercial activity; or sell or offer such species for sale in interstate or foreign commerce. Certain exceptions apply to agents of the Service and State conservation agencies.

Section 10 of the Act and regulations published in the *Federal Register* of June 24, 1977 (42 FR 32373-32381, 50 CFR Part 17), also provide for the issuance of permits under certain circumstances to carry out otherwise prohibitive activities involving Endangered plants.

Effect Internationally

In addition to the protection provided by the Act, the Service will review the status of this species to determine whether it should be proposed to the Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora for placement upon the appropriate Appendices to the Convention and whether it should be considered under other appropriate international agreements

National Environmental Policy Act

A final Environmental Assessment has been prepared and is on file in the Service's Washington Office of

§ 17.12 Endangered and threatened plants.

Species		Range		Status	When listed	Special rules
Scientific name	Common name	Known distribution	Portion endangered			
Nyctaginaceae—Four o'clock Family:						
<i>Mirabilis macfarlanei</i>	MacFarlane's Four o'clock.	U.S.A. (ID, OR).....	Entire.....	E	b4	N/A

Dated: October 22, 1979.

Robert S. Cook,
Acting Director, Fish and Wildlife Service.

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Endangered Species. The assessment is the basis for a decision that this determination is not a major Federal action which significantly affects the quality of the human environment within the meaning of section 102(2)(C) of the National Environmental Policy Act of 1969.

Endangered Species Act Amendment of 1978

The Endangered Species Act Amendments of 1978 added the following provision to subsection 4(a)(1) of the Endangered Species Act of 1973:

At the time any such regulation [to determine a species to be Endangered or Threatened species] is proposed, the Secretary shall by regulation, to the maximum extent prudent, specify any habitat of such species which is then considered to be Critical Habitat.

Mirabilis macfarlanei is threatened by taking and the taking of plants is not prohibited by the Endangered Species Act of 1973. Publication of Critical Habitat maps would make this species more vulnerable to taking and therefore it would not be prudent to determine Critical Habitat.

Mirabilis macfarlanei was proposed for listing as an Endangered plant on June 16, 1976. Since it has been determined to be imprudent to designate Critical Habitat for this species at this time, and all listing requirements of the Act have been satisfied, the Service now proceeds with the final rulemaking to determine this species to be Endangered under the authority contained in the Endangered Species Act of 1973, as amended (16 USC 1531-1543).

The primary author of this rule is Mrs. Lorraine Williams, Office of Endangered Species, U.S. Fish and Wildlife Service, Washington, D.C. 20240, (703/235-1975).

Regulation Promulgation

Accordingly, § 17.12 of Part 17 of Chapter I of Title 50 of the U.S. Code of Federal Regulations is amended as follows:

1. Section 17.12 is amended by adding, in alphabetical order by family, genus, species, the following plant: