

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17**

RIN 1018-AE52

**Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for the Silver Rice Rat****AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Fish and Wildlife Service proposes to designate critical habitat for the endangered silver rice rat (Lower Florida Keys population of *Oryzomys palustris* or *O. argentatus*). This species was listed as endangered on April 30, 1991. Critical habitat was not designated at that time because it was not deemed prudent. If this proposed action is made final, Federal actions that may affect critical habitat will be subject to section 7(a)(2) of the Endangered Species Act of 1973, as amended. The Service solicits data and comments from the public on all aspects of this proposal, including additional information on the economic impacts (costs and benefits) of the designation, methods of evaluating costs and benefits accruing from the designation, the amount and distribution of silver rice rat habitat, and why any particular lands should or should not be designated as critical habitat.

**DATES:** Comments from all interested parties must be received by September 4, 1992. Public hearing requests must be received by June 22, 1992.

**ADDRESSES:** Comments and materials on this proposal should be sent to the Field Supervisor, U.S. Fish and Wildlife Service, 3100 University Boulevard South, suite 120, Jacksonville, Florida 32611. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** Mr. David J. Wesley at the above address.

**SUPPLEMENTARY INFORMATION:****Background**

In a final rule published April 30, 1991, in the *Federal Register* (56 FR 19809), the Service determined endangered status for the Lower Keys population of the rice rat, or silver rice rat (*Oryzomys palustris natator*, or *O. argentatus*), pursuant to the Endangered Species Act of 1973, as amended (Act). This small mammal is restricted to wetlands of the Lower Keys of Monroe County, Florida.

The silver rice rat is known to occur on eight keys, is believed to be extirpated from one key, and likely has been extirpated on two other keys. It is endangered by conversion of its wetland habitat for commercial and residential purposes. Further details can be obtained from the 1991 *Federal Register* entry.

In the final rule listing the silver rice rat as an endangered species, the Service concluded that critical habitat designation was not prudent. A re-examination of potential threats to the species has led the Service to conclude that the risk of illicit takings arising from publication of critical habitat may not be so serious as to render designation of critical habitat imprudent. The Service accordingly proposes to designate critical habitat for the silver rice rat.

**Critical Habitat**

Critical habitat, as defined by section 3 of the Act, means:

(i) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection and;

(ii) Specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Based on information provided by Goodyear (1984), critical habitat for the silver rice rat is being proposed for nine keys or groups of keys occupied by the species, totalling about 10,062 acres: Little Pine Key, Water Keys (north of Big Torch Key, not the Water Key west of Little Pine Key), Big Torch Key, Middle Torch Key, Raccoon Key, Summerland Key, Cudjoe Key, Johnston Key, and Saddlebunch Keys. About 5,003 acres of the proposed critical habitat consists of National Key Deer Refuge or Great White Heron National Wildlife Refuge lands.

The Service's listing regulations 50 CFR 424.12(b)(5) require the Service to consider those physical and biological attributes essential to the conservation of the species. Such requirements, as stated in 50 CFR 424.(b)(5) include, but are not limited to, the following:

- (a) Space for individual and population growth, and for normal behavior;
- (b) Food, water, or other nutritional or physiological requirements;
- (c) Cover or shelter;

(d) Sites for breeding, reproduction, rearing of offspring; and,

(e) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The Service has determined that physical and biological habitat features (referred to as the primary constituent elements) that support nesting, foraging, cover and dispersal are essential to the conservation of the silver rice rat. Goodyear (1984, 1987) described essential habitat for the silver rice rat as areas containing contiguous mangrove swamps, saltmarsh flats, and buttonwood transition vegetation. These vegetational types, as well as fresh water cattail marches, contain the primary constituent elements in the proposed critical habitat for the silver rice rat. These vegetational types can be generally identified by the presence of the following species:

- Mangrove swamp containing red (*Rhizophora mangle*), black (*Avicennia germinans*), and white (*Laguncularia racemosa*) mangroves and buttonwood (*Conocarpus erectus*);
- Salt marshes, swales, and adjacent transitional wetlands containing saltwort (*Batis maritima*), perennial glasswort (*Salicornia virginica*), saltgrass (*Distichlis spicata*), sea oxeye (*Borrchia frutescens*), keygrass (*Monantheochloe littoralis*), and coastal dropseed (*Sporobolus virginicus*); and,
- Fresh water marshes containing cattails (*Typha domingensis*), sawgrass (*Cladium jamaicense*), and cordgrass (*Spartina* spp.).

Section 4(b)(2) of the Act requires the Service to designate critical habitat on the basis of the best scientific data available and after consideration of the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned. The Act thus requires the Service to evaluate those economic and other impacts likely to take place due to the designation of critical habitat.

Section 4(b)(8) of the Act requires, for any proposed or final regulation that designates critical habitat, a brief description and evaluation of those

activities (public or private) that may adversely modify such habitat or may be affected by such designation. By definition, critical habitat affects only Federal agency actions and does not apply to private, or local or state government activities that are not subject to Federal authorization or funding. The principal public activity in the proposed critical habitat is the operation of the Service's National Key Deer Refuge. Seven of the nine keys proposed as critical habitat are totally or partially included in existing National Key Deer Refuge boundaries. As discussed above, in addition to the existing requirement to consult within the agency on actions that may affect the silver rice rat, the Service will also be required to confer within the agency on any actions that are likely to result in destruction or adverse modification of proposed critical habitat. These effects are judged to be minimal: the Service manages the refuge for the maintenance of endangered species, primarily the Key deer; the needs of the silver rice rat are not expected to conflict with any existing refuge management practices. The current endangered status of the silver rice rat already requires the Service to address the conservation needs of the silver rice rat on refuge lands, through the Act and existing National Wildlife Refuge System policies and priorities. Critical habitat designation is therefore not expected to affect current management of refuge lands.

A second possible Federal agency involvement is the National Flood Insurance Program administered by the Federal Emergency Management Agency (FEMA). FEMA believes that its implementation of the flood insurance program is not an action that is subject to Section 7 of the Endangered Species Act, but this legal position is being contested in a lawsuit filed by the National Wildlife Federation. *Florida Key Deer v. Stickney*, Civ. No. 90-10037 (S.D.Fla., complaint filed April 2, 1990). In the lawsuit, the National Wildlife Federation contends that FEMA's provision of Federal flood insurance facilitates development that may result in the destruction or adverse modification of Florida Key deer habitat. If FEMA is unsuccessful in the lawsuit, FEMA may be required to consult regarding the impact that providing flood insurance to eligible communities has on listed species and designated critical habitat within the Florida Keys. This might result in eligible communities having to adopt stricter zoning requirements for the protection of the silver rice rat critical habitat or possibly even the withdrawal of flood insurance

availability in certain areas. In the Florida Keys, exclusionary areas have been established, without critical habitat designation, for water delivery and electrical service subsidized by loans from the Farmers Home Administration (FmHA) and the Rural Electrification Administration (REA), respectively.

A third Federal activity that may be affected by critical habitat designation is the permitting program of the U.S. Army Corps of Engineers under section 404 of the Clean Water Act. If a final designation is made, permit review by the Corps would need to insure that issuance is not likely to result in the destruction or adverse modification of critical habitat for the silver rice rat. Only private activities that require permit review and may affect the critical habitat for the silver rice rat would be affected; these activities include the filling of transitional wetlands for residential development. Other private activities that do not require a Federal permit or do not involve Federal funding would not be affected by this rule if made final. Some platted subdivisions within proposed critical habitat are located partially in transitional wetlands used by the silver rice rat. In order to prepare these sites for construction, filling for house pads and driveways is often necessary. This fill eliminates and fragments silver rice rat habitat. Potential indirect impacts of such development include increased numbers of free-ranging or feral domestic dogs and cats, raccoons, and black rats; the latter two species are attracted by increased food availability around human residences. Some of these fill activities require permits from the U.S. Army Corps of Engineers through section 404 of the Clean Water Act. If permit issuance is likely to result in the destruction or adverse modification of proposed critical habitat for the silver rice rat, such issuance would have to be preceded by a conference between the Corps and the Service under section 7(a)(4) of the Act. The current endangered status of the silver rice rat already requires Federal agencies to consult on any action that may affect this species, including the Corps' 404 program.

The Charles River Laboratories maintains a breeding colony of rhesus monkeys on Raccoon Key. Monkeys were formerly supplied to the U.S. Food and Drug Administration, but that arrangement terminated in 1989; there is currently no Federal involvement with this project. Goodyear (1984) expressed concern about the damage monkeys were doing to red mangroves by

stripping them of leaves, and the indirect effect this might have on the silver rice rat. Wolfe (1987) was unable to find any evidence that the monkeys were affecting the silver rice rat. Based on a consent order from the Florida Department of Environmental Regulation, the monkeys are now being caged and maintained in a way that will minimize environmental effects on the vegetation of Raccoon Key. Therefore, the monkey colony is not expected to affect the silver rice rats on Raccoon Key.

Section 4(b)(2) of the Act requires the Service to consider economic and other impacts in structuring the area designated as critical habitat. The Service's initial economic analysis does not fully analyze the entire range of the economic impacts, both positive and negative, of the proposed designation. To allow for the completion of the analysis and the fullest possible public comment on the economic effects of the proposed designation, the Service is requesting public comment concerning several specific economic issues. (See discussion under "Public Comments Solicited," below. The Service will consider all additional relevant information on such impacts in deciding which areas should be included in or excluded from critical habitat.

#### Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, state, and private agencies, groups, 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. Such actions have been initiated by the Service following the listing of the silver rice rat as an endangered species. The protection measures provided to listed species by Federal agencies are summarized 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) requires Federal agencies to confer informally with the Service on any action that is likely to jeopardize the continued existence of a

proposed species or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) requires Federal agencies to insure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Four Federal agencies with known or probable jurisdiction in the proposed critical habitat for the silver rice rat have been identified. Known or potential projects that will require consultation are summarized in the Critical Habitat section above.

#### Public Comments Solicited

The Service intends that any final action resulting from this proposal will be as accurate and effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. Comments are particularly sought concerning:

- (1) The reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act;
- (2) Current or planned activities in the subject area and their possible impacts on this species; and
- (3) Any foreseeable economic and other impacts resulting from the proposed designation of critical habitat.
- (4) Economic values associated with benefits of designating critical habitat for the silver rice rat.
- (5) The methodology the Service might use, under section 5(b)(2) of the Act, in determining whether the benefits of excluding an area from critical habitat outweigh the benefits of specifying the area as critical habitat.

The final decision on this proposed regulation to designate critical habitat for the silver rice rat will take into consideration the comments and any additional information received by the Service, and such communications may lead to a final regulation that differs from the proposal.

Requests for a public hearing on this proposal must be received within 45 days of the date of publication of the proposal. Such requests must be made in writing and addressed to the Supervisor of the Service's Jacksonville Field Office (see ADDRESSES section).

#### National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the Federal Register on October 25, 1983 (48 FR 49244).

#### Required Determinations

The Service has determined that this is not a major rule as defined by Executive Order 12291, and that the rule would not have a significant economic effect on a substantial number of small entities as described in the Regulatory Flexibility Act (5 U.S.C. 601, et seq.). Based on the information currently available and discussed in this rule and the draft economic analysis concerning public projects and private activities within critical habitat, it does not appear that significant economic impacts will result from the critical habitat designation. However, the Service is requesting additional information on anticipated activities within the proposed critical habitat area and the potential economic impacts that may result from designating critical habitat. The Service will prepare a final economic analysis after receipt of additional information and prior to a final determination on this proposed rule.

Executive Order No. 12630 requires that Federal actions which may affect the value or use of private property be accompanied by a "Takings Implications Assessment." Although Takings Implications Assessments are not required prior to endangered and threatened species listing decisions, which must be based solely on biological information, such assessments may be appropriate for certain rulemakings involving critical habitat designation. The Act does not automatically restrict all uses of critical habitat, but only imposes restrictions under section 7(a)(2) on Federal agency actions that are likely to result in destruction or adverse modification of designated critical habitat. The proposed regulation, if made final, would impose an additional regulatory requirement on Federal agencies to insure that their actions are not likely to destroy or adversely modify critical habitat for the silver rice rat. This is not likely to significantly change the existing situation, because Federal

agencies are already required to insure that their actions are not likely to jeopardize the continued existence of the silver rice rat. However, the Service will prepare a Takings Implications Assessment prior to a final decision on the proposed designation.

The rule does not require a federalism assessment under Executive Order 12612 since it will not have any significant federalism effects as described in the order. The rule only relates to Federal lands and other lands where there is Federal involvement; no intrusion on State policy or administration is expected, and roles and responsibilities of Federal and State governments will not change, and fiscal capacity will not be substantially affected.

The rule contains no collections of information that require approval by the Office of Management and Budget under 44 U.S.C. 3501, et. seq. Finally, the rule contains no recordkeeping requirements as defined by the Paperwork Reduction Act of 1980.

#### References Cited

- Goodyear, N.C. 1984. Final report on the distribution, habitat, and status of the silver rice rat (*Oryzomys argentatus*). Unpubl. report to Jacksonville Office, U.S. Fish and Wildlife Service under Contract No. 14-16-0004-83-57. 59 pp.
- Goodyear, N.C. 1987. Distribution and habitat of the silver rice rat, *Oryzomys argentatus*. J. Mamm. 68:692-695.

Wolfe, J.L. 1987. Survey for silver rice rats (*Oryzomys argentatus*) on Raccoon Key, Monroe County, Florida, 12-15 December 1986. Unpubl. report to Key Lois Division of Charles River Laboratories, Inc., Wilmington, Mass. 4 pp.

#### Author

The primary author of this proposed rule is Dr. Michael M. Bentzien (see ADDRESSES section).

#### List of Subjects in 50 CFR Part 17

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

#### Proposed Regulation Promulgation

Accordingly, it is proposed to 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.

#### § 17.11 [Amended]

2. It is proposed to amend § 17.11(h) by revising the "Critical habitat" entry for the "Rat, rice (= silver rice)", under MAMMALS, to read "17.95(a)".

3. It is proposed to amend § 17.95(a) by adding critical habitat of the silver

rice rat, in the same alphabetical order as the species occurs in § 17.11(h).

#### § 17.95 Critical habitat—fish and wildlife.

(a) \* \* \*

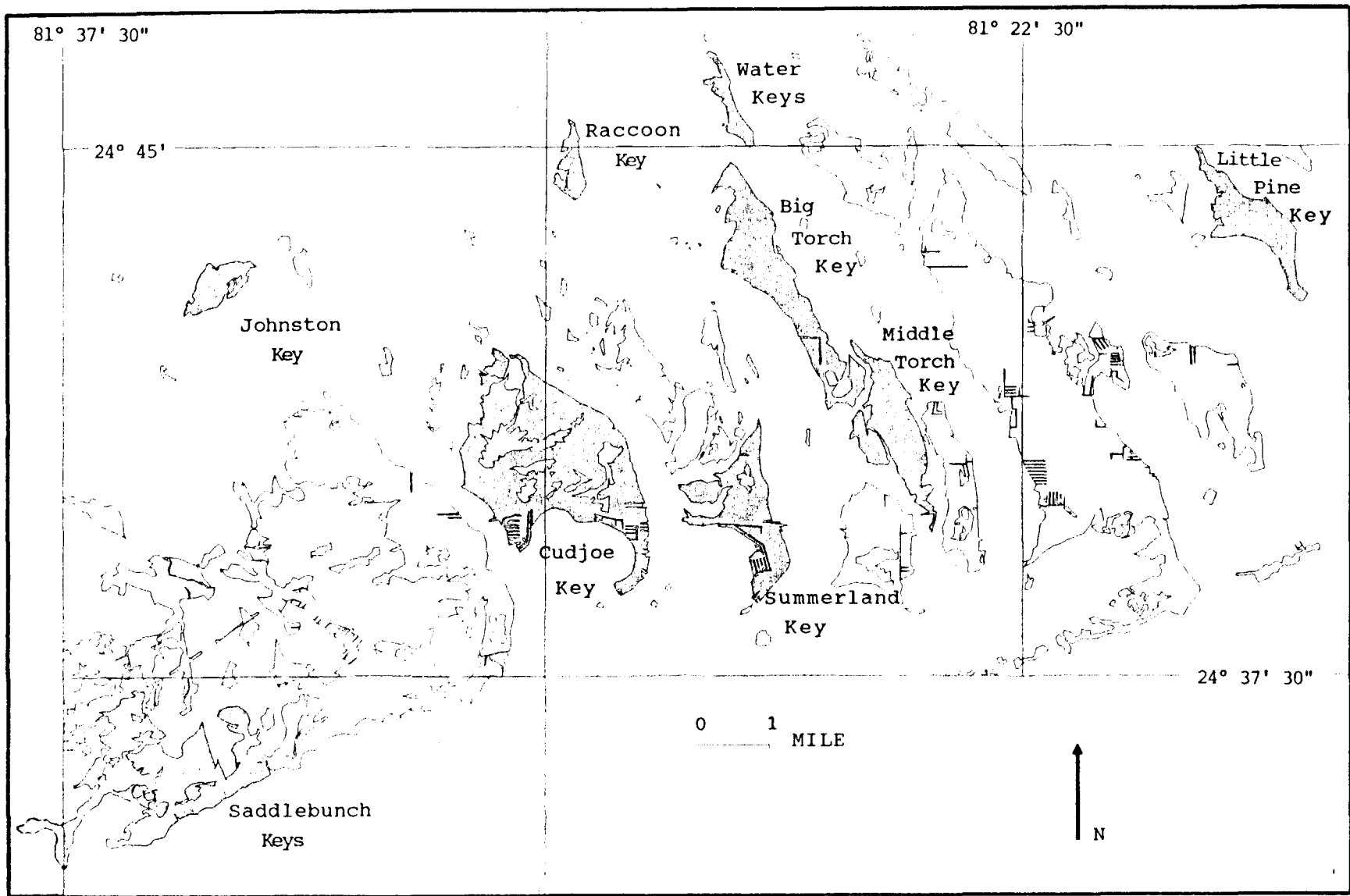
SILVER RICE RAT (*Oryzomys palustris natator* (= *O. argeniatatus*))

Monroe County, Florida: Little Pine Key, Water Keys, Big Torch Key, Middle Torch Key, Summerland Key, Cudjoe Key, Johnston Key, Raccoon Key, and Saddlebunch Keys. Included are all lands and waters above mean low tide.

Within these areas the major constituent elements that are known to require special management considerations or protection are mangrove swamps containing red (*Rhizophora mangle*), black (*Avicennia germinans*), and white (*Laguncularia racemosa*) mangroves, and buttonwood (*Conocarpus erectus*); salt marshes, swales, and adjacent transitional wetlands containing saltwort (*Batis maritima*), perennial glasswort (*Salicornia virginica*), saltgrass (*Distichlis spicata*), sea ox-eye (*Borrchia frutescens*), keygrass (*Monanthochloë littoralis*), and coastal dropseed (*Sporobolus virginicus*); and fresh water marshes containing cattails (*Typha domingensis*), saw-grass (*Cladium jamaicense*), and cordgrass (*Spartina spp.*).

\* \* \* \* \*

BILLING CODE 4310-55-M



BILLING CODE 4310-55-C

Dated: April 10, 1992.

**Richard N. Smith,**

*Acting Director, Fish and Wildlife Service.*

[FR Doc. 92-10707 Filed 5-6-92; 8:45 am]

**BILLING CODE 4310-55-M**