

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AB52

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Silver Rice Rat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The Service designates 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.

Federal actions that may affect critical habitat will be subject to section 7(a)(2) of the Endangered Species Act of 1973, as amended (Act). As required by section 4 of the Act, the Service has considered the economic and other relevant impacts prior to making a final decision on areas to be included as critical habitat. Some areas have been excluded from critical habitat designation based on comments received on the proposed rule. The final critical habitat designation includes both Federal and private lands.

EFFECTIVE DATE: September 30, 1993.

ADDRESSES: The complete file for this rule is available, for inspection, during normal business hours at the U.S. Fish and Wildlife Service, Jacksonville Field Office, 3100 University Boulevard South, Suite 120, Jacksonville, Florida 32216.

FOR FURTHER INFORMATION CONTACT: Dr. Michael M. Bentzien at the above address (904/232-2580).

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 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 from 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* rule.

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 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 gave notice of its intent to propose critical habitat for the silver rice rat on August 1, 1991 (56 FR 36753) and proposed to designate critical habitat on May 7, 1992 (57 FR 19585).

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), the May 7, 1992, proposal for critical habitat included 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 consisted of Federal (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 424.12(b) include, but are not limited to, the following:

- (1) Space for individual and population growth, and for normal behavior;
- (2) Food, water, or other nutritional or physiological requirements;
- (3) Cover or shelter;
- (4) Sites for breeding, reproduction, rearing of offspring; and,
- (5) 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 marshes, contain the primary constituent elements in 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 ox-eye (*Borrchia frutescens*), keygrass (*Monanthochloë 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.

The Service prepared a draft economic analysis in conjunction with the proposal of critical habitat for the silver rice rat, and the resulting comments and information have been incorporated into a final analysis. The conclusion of that analysis is that while there is no justification for excluding areas from the proposed critical habitat for economic reasons, two areas should be excluded from critical habitat because they no longer support significant silver rice rat habitat.

The two areas total 1,032 acres and consist of 460 acres on Summerland Key

and 572 acres on Cudjoe Key. Both areas are located south of U.S. Highway 1. Based on comments from the Florida Game and Fresh Water Fish Commission and the Monroe County Environmental Resources Department, these areas have been extensively developed and have little remaining habitat suitable for the silver rice rat. The exclusion of these areas therefore will not affect the survival or recovery of the silver rice rat. The critical habitat designation has been modified for the final rule to reflect these exclusions.

Due to the relatively large extent of Federal land (National Wildlife Refuges and some military lands) in the Lower keys, the Service has considered whether available habitat on Federal lands would be sufficient for conservation of the silver rice rat. However, only three of the eight currently identified populations of the silver rice rat (Johnston, Little Pine, and the Water Keys) are protected by being located entirely on refuge or other Federal lands; the other five are partly or entirely dependent on private lands. Known populations of the silver rice rat are few, scattered, and usually at low numbers and density. All eight populations need protection in order to conserve the silver rice rat.

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 now be required to consult within the agency on any actions that are likely to result in destruction or adverse modification of its 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 (see Summary of Comments and Recommendations below). The

endangered status of the silver rice rat already requires the Service to address the conservation needs of the species on refuge lands, through the Act and existing National Wildlife Refuge System policy. Critical habitat designation is not expected to significantly affect current management of refuge lands.

Another potential 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 was 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 contended that FEMA's provision of Federal flood insurance facilitates development that may result in the destruction or adverse modification of Florida Key deer habitat. The case was tried in U.S. District Court in Key West in April, 1993, and was submitted to the court for decision thereafter. The decision is expected soon. If FEMA is unsuccessful in the lawsuit, the agency 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. Section 7 consultations involving the provision of Federal flood insurance could, in some instances, lead to "jeopardy" or "adverse modification of critical habitat" determinations by the Service. In these cases, FEMA could decide not to provide Federal flood insurance in certain areas of the Keys.

The permitting program of the U.S. Army Corps of Engineers (Corps) under section 404 of the Clean Water Act may be affected by critical habitat designation. The Corps must now insure that issuance of such permits is not likely to result in the destruction or adverse modification of critical habitat for the silver rice rat; however, Corps permitting actions in those areas of the Keys where the species occurs would require consultation under section 7 of the Act, regardless of whether or not such areas are designated as critical habitat. 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. Private activities that do not require a Federal permit or do not involve Federal

funding would not be affected by this rule.

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 activity fragments and eliminates 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 critical habitat for the silver rice rat, such issuance requires consultation between the Corps and the Service under section 7(a)(2) 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 actions authorized under the 404 program. Further, existing and anticipated Monroe County regulations and ordinances do not allow new development in silver rice rat habitat. Section 9.5-343 of the Monroe County Code requires a 100 percent "open space ratio" in mangrove and freshwater wetlands, and an 85 percent ratio in salt marsh and buttonwood habitats. Policy 204.2.1 of the Monroe County Comprehensive Plan will require a 100 percent open space ratio in all of the wetland habitats used by the silver rice rat; this policy was adopted by the Monroe County Commission in March 1993 and will be included in the Comprehensive Plan once approved by the State. The only fill or structures to be permitted in such wetlands will be utility pilings, pilings for elevated walkways and docks, and accessways to structures on uplands or already disturbed wetlands for which there is no other means of access.

The "Dwelling Unit Allocation Text Amendment", Monroe County Ordinance No. 016-1992, was passed and adopted by the Monroe County Commission on June 23, 1992, and became effective July 1, 1992. The ordinance addresses the need to improve and maintain reasonable hurricane evacuation times from the county by regulating population growth. It limits the number of building permits issued in the county annually to 255 units, a reduction from an average 552 new single family unit permits issued

per year since 1972. The annual dwelling unit allocation for the Lower Keys is 155 units. Among the large number of factors to be considered by the county in ranking and issuing permits are the habitat type present on the proposed building site and the likely presence of listed species. The only type of wetlands for which building permits would currently be considered are saltmarsh and buttonwood wetlands, but receiving a building permit would be difficult to accomplish in wetland habitat types, especially if silver rice rats (or other listed species) are known or suspected to occur on the site. As discussed above, new development even in these wetlands will soon be prohibited.

The U.S. Air Force operates a tethered aerostat radar system on a 36-acre tract on Cudjoe Key. Ongoing and planned activities at the site occur in developed areas and will not impact silver rice rat habitat. The Air Force expects no economic impacts from the designation of critical habitat.

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 (1987a) 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 were supposed to be caged to minimize environmental effects on the vegetation of Raccoon Key. Recent information from the National Key Deer Refuge (John Andrew, pers. comm.) indicates there are still free-ranging monkeys on Raccoon Key, and they still appear to be damaging red mangroves. Due to the lack of Federal involvement in maintaining the monkey colony, critical habitat will not affect this situation. However, destruction of habitat resulting in taking of silver rice rats could violate section 9 of the Act, which prohibits take of endangered species.

Summary of Comments and Recommendations

In the May 7, 1992, proposed rule and associated notifications, the Service requested all interested parties to submit factual reports or information that might contribute to the development of this final rule.

Appropriate state agencies, county government, Federal agencies, scientific organizations, and other interested parties were contacted and requested to comment. A newspaper notice was published in the Key West Citizen on May 24, 1991. Ten comments were received in response to the proposal. Issues raised by commenters are discussed below.

Issue 1: The U.S. Army Corps of Engineers (Jacksonville District) reported the number of their permit (Clean Water Act) actions since 1989 on Summerland Key (45 actions), Cudjoe Key (75 actions), Torch Key (2 actions), and Raccoon Key (6 actions). The Corps stated that critical habitat designation would increase the time needed to obtain permits and result in higher costs to the applicants and the involved Federal agencies (the Service and the Corps) due to section 7 of the Act.

Response: The economic implications of critical habitat designation are discussed in the Critical Habitat section above and in the economic documents prepared in conjunction with this final rule. Wetland permitting actions on any of the Keys designated as critical habitat for the silver rice rat would be likely to result in section 7 consultation even if the keys were not so designated. Federal agency actions likely to affect listed species require consultation under section 7(a)(2) of the Act regardless of whether or not critical habitat is designated for the species. Federal agencies are required to ensure that their actions are not likely to jeopardize the continued existence of any endangered or threatened species regardless of whether critical habitat has been designated for that species. Furthermore, the county regulations and ordinances discussed above under Critical Habitat should decrease the number of future wetland permit applications under the Clean Water Act.

Issue 2: Several comments suggested modifying the proposed critical habitat by adding or deleting areas:

The Florida Game and Fresh Water Fish Commission (Commission) suggested that portions of Cudjoe and Summerland Keys were so extensively developed that they could be deleted from proposed critical habitat, but that a number of other keys might be worthy of inclusion. The Monroe County Environmental Resources Department supported the Commission's suggestions, indicated that there was a rice rat population on north Saddlebunch Key that should be included in critical habitat, and stated that, due to existing and proposed county regulations concerning the filling or developing of wetlands, they

anticipated little impact from the designation of critical habitat.

Dr. James D. Lazell, Jr., co-describer of the silver rice rat in 1978, stated that the proposed critical habitat was too small and should include Sugarloaf Keys and U.S. Navy lands north of U.S. Highway 1 on Saddlebunch Key. Dr. Numi C. Goodyear (then Spitzer), senior author of the species description, stated that the silver rice rat currently occurs on a number of keys or groups of keys additional to those proposed as critical habitat, and that all of these keys should be included as critical habitat. Two conservation organizations supported Dr. Goodyear's recommendations.

Response: As discussed earlier in this rule, areas south of U.S. Highway 1 on Summerland and Cudjoe Keys have been deleted from critical habitat. The Service has considered adding keys to the proposed critical habitat. While many keys contain one or more of the habitats used by silver rice rats, there is currently no evidence to show that they occur there. Wolfe (1987b) believed that the silver rice rat did not currently occur on Geiger and Boca Chica Keys, but that these keys provided a corridor for movement during times of high population density. Though there is no direct evidence of silver rice rats on keys aside from the nine where they were trapped by Goodyear (1987), the Service agrees that other keys may provide important habitat. Silver rice rat populations may be found on additional keys, and some keys may serve as "stepping stones" for movement between currently known populations. The Service will consider proposing additional critical habitat areas as information becomes available and as recovery plan development proceeds. Recovery plan development is currently scheduled for the silver rice rat; the plan will address the need to gather more distributional information. Addition of areas beyond those identified in the May 7, 1992, proposed rule will require a new proposal to be made. The occurrence on U.S. Navy lands on Saddlebunch Key (Wolfe 1987b) is not included in current critical habitat, but would be appropriate for addition. At this time, the Service has decided to proceed with critical habitat designation including the keys where the species is known to occur. Based on further information, the Service may propose to add or delete critical habitat for the silver rice rat, or to reclassify the species.

Issue 3: The Service's prescribed burning practices in National Key Deer Refuge threaten the silver rice rat.

Response: The Service disagrees that current burning practices in the

National Key Deer Refuge threaten the silver rice rat. Burning is necessary to maintain the pine rockland ecosystem on upland areas, and is carried out so as to mimic natural burns that, before the presence of human fire control, would have occurred in such habitat. The Service does not anticipate that this burning program will damage wetlands or transitional habitats on which the silver rice rat depends.

Issue 4: A private individual stated that the critical habitat designation for the silver rice rat was ridiculous and was being used to steal land.

Response: Most endangered and threatened species, including the silver rice rat, are threatened by habitat loss. Critical habitat is intended to alert Federal agencies to their responsibilities to conserve essential habitat for listed species. Critical habitat designation does not take private property, or establish a nature reserve, but rather requires Federal agencies to ensure that their actions are not likely to destroy or adversely modify critical habitat.

Issue 5: A corporate representative requested that a development on Cudjoe Key be deleted from the critical habitat designation because of his concern that county and State agencies "follow" the Federal designation and this would cause a major financial setback to his corporation.

Response: The Service has considered deleting this area from critical habitat based on economic reasons, but has concluded that such a deletion is not warranted. Based on the lack of Federal agency involvement and the fact that existing county planning requirements are not likely to allow development in silver rice rat habitat, the Service does not find any economic benefits in excluding the area from critical habitat. This decision is discussed in the Service's economic analysis of designating critical habitat for the silver rice rat.

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)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of listed 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.

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).

Regulatory Flexibility Act and Executive Order 12291

The Department of the Interior has determined that designation of critical habitat for this species will not constitute a major rule under Executive Order 12291 and certifies that this determination will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Based on the information discussed in this rule concerning public projects and private activities within critical habitat, no significant economic impacts are expected from critical habitat designation. Also, no direct costs, enforcement costs, information collection, or recordkeeping requirements are imposed on small entities by this designation. Further, the rule contains no recordkeeping

requirements as defined by the Paperwork Reduction Act of 1980.

Takings Implication Assessment

The Service has analyzed the potential takings implications of designating critical habitat for the silver rice rat in a Takings Implication Assessment prepared pursuant to requirements of Executive Order 12630, "Governmental Actions and Interference With Constitutionally Protected Property Rights". The Takings Implication Assessment concludes that the designation does not pose significant takings implications.

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. 1987a. 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.
- Wolfe, J.L. 1987b. A survey for the silver rice rat on U.S. Naval property in the Lower Florida Keys. Final report to Southern Division Naval Facilities Engineering Command. Contract No. N2467-86-M-3975. 8 pp., 5 maps.

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, Transportation.

Regulation Promulgation

Accordingly, part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, is amended 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. Section 17.11(h) is amended by revising the "Critical habitat" entry for the "Rat, rice (=silver rice)", under MAMMALS, to read "17.95(a)".

3. Section 17.95(a) is amended by adding critical habitat of the silver rice rat, immediately following the entry for the Morro Bay Kangaroo Rat, as follows:

§ 17.95 Critical habitat—fish and wildlife.

(a) * * *

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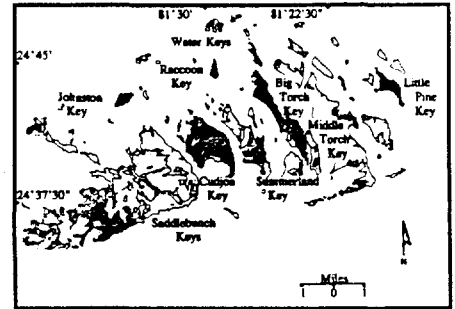
Silver Rice Rat (*Oryzomys palustris natator* (= *O. argentatus*)).

Monroe County, Florida: Little Pine Key, Water Keys, Big Torch Key, Middle Torch Key, Summerland Key north of U.S. Highway 1, Cudjoe Key north of U.S. Highway 1, Johnston Key, Raccoon Key, and Lower Saddlebunch Keys, south of U.S. Highway 1 but not including lands in T. 67 S., R. 27 E., Section 8 and north 1/2 of Section 17. 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 (*Monanthochloe littoralis*), and coastal dropseed (*Sporobolus virginicus*); and fresh water marshes containing cattails (*Typha domingensis*), saw-grass (*Cladium jamaicense*), and cordgrass (*Spartina* spp.).

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Dated: June 8, 1993.

Bruce Blanchard,
 Acting Director, Fish and Wildlife Service.
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