

## PROPOSED RULES

comments from the Governors of Florida and Massachusetts must be received by August 17, 1978.

**ADDRESSES:** Comments and materials concerning this proposed rulemaking, preferably in triplicate, should be sent to the Director (FWS/OES), U.S. Fish and Wildlife Service, U.S. Department of the Interior, Washington, D.C. 20240. Comments and materials received will be available for public inspection during normal business hours at the Service's Office of Endangered Species, Suite 1100, 1612 K Street NW., Washington, D.C. 20240.

**FOR FURTHER INFORMATION CONTACT:**

Mr. Keith M. Schreiner, Associate Director—Federal Assistance, Fish and Wildlife Service, U.S. Department of the Interior, Washington, D.C. 20240, 202-343-4646.

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

On June 6, 1977, the Fish and Wildlife Service published a notice in the *FEDERAL REGISTER* (42 FR 28903-28904) to the effect that a review of the status of 12 turtles was being conducted. The Key mud turtle and the red-bellied turtles (*Chrysemys rubriventris*) were part of the review. As a result of the notice of review, responses were received from the State of Florida and professional biologists. The comments and supportive documents have been reviewed and a summary is presented below. This information has been considered and is incorporated into the administrative record of this proposal.

Mr. R. M. Brantly, Executive Director of the Florida Game and Fresh Water Fish Commission, supported Federal listing of the Key mud turtle and noted that Florida protects this subspecies. All five biologists that commented on the status of the Key mud turtle recommended that Federal protection be accorded this turtle. The chief threats to the species were cited as being uncontrolled development and the destruction of the few fresh water areas on the Keys by draining. One individual commented that other species of turtles have been introduced into some of the remaining fresh water lakes and that these species could be having an impact as competitors with the Key mud turtle. The biologists that recommended a status recommended consideration as endangered. Big Pine Key was most often cited as in need of critical habitat designation although an area on Cudjoe's Key was also suggested.

The five biologists that commented on the status of the Plymouth red-bellied turtle all noted that this species should be protected by the Endangered Species Act. The chief threats to

the species were cited as habitat modification and vandalism. Extant populations are known from Naushon Island, Billington Sea, Boot Pond, Gunner's Exchange Pond, Hoyt's Pond, Crooked Pond, and Island Pond, according to one individual. Most of the biologists commented on the taxonomic status of this subspecies.

A brief mention of the taxonomic status of these two subspecies should be given. The Plymouth red-bellied turtle was described in 1937 on the basis of measurements of the shell. Subsequent work by Roger Conant revealed that the measurements used by Babcock were invalid and, as such, the subspecific status of "bangsi" is in doubt. Ernst and Barbour ("The Turtles of the United States," Univ. Press, Kentucky, 1971), in the most recent review of U.S. turtle biology, retain the subspecies "bangsi"; letters from Dr. T. Graham and R. Conant, authorities on this turtle, also recommend retention of the name "bangsi". Turtle biologists generally feel that given the isolation of the Plymouth red-bellied turtle, future study will reveal valid reasons for recognizing *C. r. bangsi*. As such, the Service feels justified in proposing this turtle under a trinomial designation.

While the entire species *Chrysemys rubriventris* was part of the notice of review, no information has been received which would indicate that the subspecies *C. r. rubriventris*, known from New Jersey south to North Carolina, is in any way threatened under definitions of the Endangered Species Act.

The subspecific status of the Key mud turtle has been questioned by Dr. John Iverson of the Florida State Museum. Work in progress indicates that clinal variation may be involved and that it is unclear whether subspecific status is warranted. However, Dr. Iverson does recommend listing as a trinomial and supports Endangered status. As such, the Service feels justified in retaining the name *Kinosternon bauri bauri* for the Key mud turtle in this proposed rulemaking.

Section 4(a) of the Act states:

General.—(1) The Secretary shall by regulation determine whether any species is an endangered species or a threatened species because of any of the following factors:

- (1) The present or threatened destruction, modification, or curtailment of its habitat or range;
- (2) Overutilization for commercial, sporting, scientific, or educational purposes;
- (3) Disease or predation;
- (4) the inadequacy of existing regulatory mechanisms; or
- (5) Other natural or manmade factors affecting its continued existence.

This authority has been delegated to the Director.

[4310-55]

**DEPARTMENT OF THE INTERIOR**

Fish and Wildlife Service

[50 CFR Part 17]

**ENDANGERED AND THREATENED WILDLIFE AND PLANTS**

**Proposed Endangered Status and Critical Habitat for Two Species of Turtles**

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

**ACTION:** Proposed rule.

**SUMMARY:** The Service proposes to determine the Key mud turtle (*Kinosternon bauri bauri*) and the Plymouth red-bellied turtle (*Chrysemys rubriventris bangsi*) to be Endangered species and to identify critical habitat for these species. This action is being taken because the habitat where these species dwell is subject to intense alteration. The proposed action, if completed, would protect the populations of these turtles and their habitat. The Key mud turtle is known from several islands in the Florida Keys, Monroe County, Fla.; the Plymouth red-bellied turtle is known from Plymouth and Dukes Counties, Mass.

**DATES:** Comments from the public must be received by July 18, 1978.

SUMMARY OF FACTORS AFFECTING THE SPECIES

These findings are summarized herein under each of the five criteria of section 4(a) of the Act. These factors, and their application to the two turtles, are as follows:

1. *The present or threatened destruction, modification, or curtailment of its habitat or range.*—(1) Key mud turtle (*Kinosternon bauri bauri*) proposed endangered. The Key mud turtle is known from several islands in the lower Florida Keys. These areas are rapidly being developed, and the associated habitat modification has led to the decline of this species. Development in the Keys is often accompanied by draining the fresh water wetlands on which the turtle depends. As such, populations of the Key mud turtle are extremely sensitive to disturbance. Some of the populations may also be disturbed by road widening projects and the drainage of wetlands for mosquito control.

(2) Plymouth red-bellied turtle (*Chrysemys rubriventris bangsi*) proposed endangered. The Plymouth red-bellied turtle lives in an area that is increasingly being developed for housing. As such, a major threat to this species is the modification of ponds and associated wetlands on which it depends. Some areas may also be adversely affected by road widening projects.

2. *Overutilization for commercial, sporting, scientific, or educational purposes.*—Not applicable.

3. *Disease or predation.*—Not applicable.

4. *The inadequacy of existing regulatory mechanisms.*—Not applicable.

5. *Other natural or manmade factors affecting its continued existence.*—(1) Key mud turtle. This species is subject to being run over as it crosses roads in the Keys; often this is done wantonly when the turtles could be avoided. In addition, this species may be facing competition from introduced species of pond turtles into its habitat.

(2) Plymouth red-bellied turtle. This species has been subject to harassment by individuals that shoot it for "sport."

CRITICAL HABITAT

Section 7 of the Act, entitled "Inter-agency Cooperation," states:

"The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation 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 and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeop-

ardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical."

A definition of the term "Critical Habitat" was published jointly by the Fish and Wildlife Service and the National Marine Fisheries Service in the FEDERAL REGISTER of January 4, 1978 (43 FR 870-876) and is reprinted below:

"'Critical habitat' means any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion."

As specified in the regulations for interagency cooperation as published in the January 4, 1978, FEDERAL REGISTER (43 FR 870), the Director will consider the physiological, behavioral, ecological, and evolutionary requirements for survival and recovery of listed species in determining what areas or parts of habitat are critical. These requirements include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing of offspring; and generally;

(5) Habitats that are protected from disturbances or are representative of the geographical distribution of listed species.

With respect to the Key mud turtle and Plymouth red-bellied turtle, the areas proposed as critical habitat satisfy all known criteria for the evolutionary, ecological, behavioral, and physiological requirements of the species. Nesting and successful incubation of eggs occurs on areas immediately adjacent to the ponds inhabited by these species, and vegetation provides both cover for hatchlings and food for adult red-bellies. Mud turtles are carnivorous, and the ponds and associated wetlands provide a substantial range of potential food items. Logs and snags are present in ponds and provide basking sites for the Plymouth red-bellied turtle. Wintering areas are available in the ponds themselves and surrounding wetlands. The ponds also provide retreats and cover from human and

other predators. The areas included as critical habitat for these species include all known ponds inhabited by the Plymouth red-bellied turtle and major populations of the Key mud turtle.

The areas delineated do not necessarily include the entire critical habitat of these turtles, and modifications to critical habitat descriptions may be proposed in the future. In accordance with section 7 of the Act, all Federal departments and agencies would be required to insure that actions authorized, funded, or carried out by them do not result in the destruction or adverse modification of the critical habitat of the Key mud turtle and Plymouth red-bellied turtle.

All Federal departments and agencies shall, in accordance with section 7 of the Act, consult with the Secretary of the Interior with respect to any action which is considered likely to affect critical habitat. Consultation pursuant to section 7 should be carried out using the procedures contained in the January 4, 1978, FEDERAL REGISTER (43 FR 870-876).

There may be many kinds of actions which can be carried out within the critical habitat of a species which would not be expected to adversely affect that species.

This point has not been well understood by some persons. There has been widespread and erroneous belief that a critical habitat designation is something akin to establishment of a wilderness area of wildlife refuge, and automatically closes an area to most human uses. Actually, a critical habitat designation applies only to Federal agencies, and essentially is an official notification to these agencies that their responsibilities pursuant to section 7 of the Act are applicable in a certain area.

A critical habitat designation must be based solely on biological factors. There may be questions of whether and how much habitat is critical, in accordance with the above interpretation, or how to best legally delineate this habitat, but any resultant designation must correspond with the best available biological data. It would not be in accordance with the law to involve other motives; for example, to enlarge a critical habitat delineation so as to cover additional habitat under section 7 provisions, or to reduce a delineation so that actions in the omitted area would not be subject to evaluation.

There may indeed be legitimate questions of whether, and to what extent, certain kinds of actions would adversely affect listed species. These questions, however, are not relevant to the biological basis of critical habitat delineations. Such questions should, and can more conveniently, be dealt with after critical habitat has been designated.

EFFECT OF THE RULEMAKING

In addition to the effects discussed above, the effects of these determinations and this rulemaking include, but are not necessarily limited to, those discussed below.

Endangered species regulations already published in Title 50 of the Code of Federal Regulations set forth a series of general prohibitions and exceptions which apply to all endangered species. All of those prohibitions and exceptions also apply to any threatened species unless a special rule pertaining to that threatened species has been published and indicates otherwise. The regulations referred to above, which pertain to endangered species, are found at § 17.21 of Title 50, and are summarized below.

With respect to the Key mud turtle and the Plymouth red-bellied turtle in the United States, all prohibitions of section 9(a)(1) of the Act, as implemented by 50 CFR 17.21, would apply. These prohibitions, in part, would make it illegal for any person subject to the jurisdiction of the United States to take, import or export, ship in interstate commerce in the course of a commercial activity, or sell or offer for sale these species in interstate or foreign commerce. It also would be illegal to possess, sell, deliver, carry, transport, or ship any such wildlife which was illegally taken. Certain exceptions would apply to agents of the Service and State conservation agencies.

Regulations published in the FEDERAL REGISTER of September 26, 1975 (40

FR 44412) provided for the issuance of permits to carry out otherwise prohibited activities involving endangered or threatened species under certain circumstances. Such permits involving endangered species are available for scientific purposes or to enhance the propagation or survival of the species. In some instances, permits may be issued during a specified period of time to relieve undue economic hardship which would be suffered if such relief were not available.

Pursuant to section 4(b) of the act, the Director will notify the Governors of Florida and Massachusetts with respect to this proposal and request their comments and recommendations before making final determinations.

PUBLIC COMMENTS SOLICITED

The Director intends that the rules finally adopted will be as accurate and effective as possible in the conservation of any endangered or threatened species. Therefore, any comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, private interests, or any other interested party concerning any aspect of these proposed rules are hereby solicited. Comments particularly are sought concerning:

(1) Biological or other relevant data concerning any threat (or the lack thereof) to the species included in this proposal;

(2) The location of and the reasons why any habitat of these species should or should not be determined to

be critical habitat as provided for by section 7 of the act;

(3) Additional information concerning the range and distribution of these species.

Final promulgation of the regulations on the Key mud turtle and Plymouth red-bellied turtle will take into consideration the comments and any additional information received by the Director, and such communications may lead him to adopt final regulations that differ from this proposal.

A draft environmental assessment has been prepared in conjunction with this proposal. It is on file in the Service's Office of Endangered Species, 1612 K Street NW., Washington, D.C. 20240, and may be examined during regular business hours or can be obtained by mail. A determination will be made at the time of final rulemaking as to whether this is a major Federal action which would significantly affect the quality of the human environment within the meaning of section 102(2)(C) of the National Environmental Policy Act of 1969.

The primary author of this proposed rulemaking is Dr. C. Kenneth Dodd, Jr., Office of Endangered Species, 202-343-7814.

REGULATIONS PROMULGATION

Accordingly, it is hereby proposed to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

1. It is proposed to amend § 17.11 by adding, in alphabetical order, the following to the list of animals under the heading "Reptiles:"

§ 17.11 Endangered and threatened wildlife.

Species		Range			Status	When listed	Special rules
Common name	Scientific name	Population	Known distribution	Portion endangered			
Reptiles: Turtle, Key mud.	<i>Kinosternon bauri bauri</i> .....	N/A	U.S.A. (Florida).....	Entire.....	E.....	40	N/A
Turtle, Plymouth red-bellied.	<i>Chrysemys rubriventris bangsi</i> .....	N/A	U.S.A. (Massachusetts).....	do.....	E.....	40	N/A

2. Also, the Service proposes to amend § 17.95(c) by adding critical habitat of the Key Mud Turtle after that of the Plymouth red-bellied turtle as follows:

§ 17.95 Critical Habitat.

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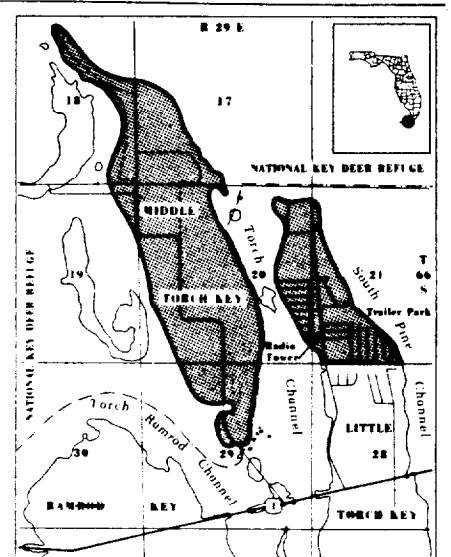
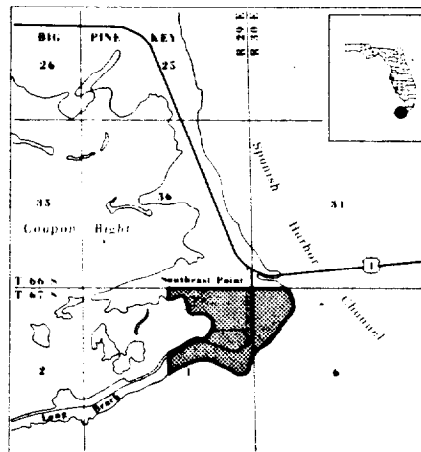
(c) Reptiles.

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KEY MUD TURTLE (*Kinosternon bauri bauri*)

Florida—Monroe County. (1) An area on Cudjoe's Key south of U.S. Highway 1 on SW¼ sec. 29, R. 28 E., T. 66 S.; (2) Middle Torch Key, entire island; (3) all areas north of the southern boundary of sec. 21, R. 29 E., T. 66 S., on Little Torch Key; (4) NW¼ sec. 6, R. 30 E., T. 67 S., and NE¼ sec. 1, R.

29 E., T. 67 S., on Big Pine Key; (5) SE¼ sec. 27, R. 25 E., T. 67 S., and SW¼ sec. 26, R. 25 E., T. 67 S., on Stock Island.



**PROPOSED RULES**

**21705**

3. § 17.95(c) is further amended by adding critical habitat of the Plymouth red-bellied turtle after that of the leatherback sea turtle as follows:

\* \* \* \* \*

**PLYMOUTH RED-BELLIED TURTLE (*Chrysemys rubriventris bangsi*)**

Massachusetts—Plymouth County. (1) Billington Sea; (2) Boot Pond; (3) Crooked Pond; (4) Duck Pond; (5) Gunners Exchange Pond; (6) Hallfield Pond; (7) Hoyts Pond; (8) Island Pond; (9) unnamed pond 0.1 km northwest of Island Pond; (10) Negro Pond; (11) Turtle Pond.

NOTE.—The Service has determined that this document does not contain a major proposal requiring preparation of an economic impact statement under Executive Order 11949 and OMB Circular A-107.

Dated: May 9, 1978.

**ROBERT S. COOK,**  
*Acting Director,*  
*Fish and Wildlife Service.*

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