

option is chosen (for those pleadings and documents that are appropriate for e-filing, as determined by reference to the information on the Board's Web site), then the applicable requirements will be those specified on the Web site, and any requirements of 49 CFR part 1104 that are specifically applicable to filing of paper copies will not apply to the e-filed pleadings and documents (these requirements include, but are not limited to, number of copies, stapling or binding specifications, submission of compact disks or floppy diskettes for documents of 20 pages or more, signature "in ink," etc.). Persons are not required to e-file, and may continue to use the Board's processes for filing paper copies.

#### § 1104.2 [Amended]

■ 3. Amend the first sentence in § 1104.2(a) by adding the words " , except electronic filings," after the word "Documents".

#### § 1104.3 [Amended]

■ 4. Amend § 1104.3 as follows:

■ A. In paragraph (a), in the first sentence, remove the words "of every pleading," and add in their place "of every paper pleading,".

■ B. In paragraph (b), add the words "accompanying paper filings" after the words "Electronic submissions".

■ C. In paragraph (b)(1), remove the words "in WordPerfect 9.0 format or earlier releases".

■ 5. Amend § 1104.6 by adding the following sentence at the end of the section:

#### § 1104.6 Timely filing required.

\* \* \* If the e-filing option is chosen (for those pleadings and documents that are appropriate for e-filing, as determined by reference to the information on the Board's Web site), then the e-filed pleading or document is timely filed if the e-filing process is completed before 5 p.m. eastern time on the due date.

■ 6. Amend § 1104.12 by revising paragraph (a) to read as follows:

#### § 1104.12 Service of pleadings and papers.

(a) *Generally*. Every document filed with the Board should include a certificate showing simultaneous service upon all parties to the proceeding. Service on the parties should be by the same method and class of service used in serving the Board, with charges, if any, prepaid. One copy should be served on each party. If service is made on the Board in person, and personal service on other parties is not feasible, service should be made by first-class or express mail. If a document is filed with

the Board through the e-filing process, a copy of the e-filed document should be emailed to other parties if that means of service is acceptable to those other parties, or a paper copy of the document should be personally served on the other parties, but if email is not acceptable to the receiving party and personal service is not feasible, service of a paper copy should be by first-class or express mail. When a party is represented by a practitioner or attorney, service upon the practitioner is deemed to be service upon the party.

\* \* \* \* \*

[FR Doc. 04-8074 Filed 4-7-04; 8:45 am]

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

RIN 1018-AG09

#### Endangered and Threatened Wildlife and Plants; Determination of Endangered Status and Prudency Determination for Designation of Critical Habitat for Two Plant Species From the Commonwealth of the Northern Mariana Islands

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

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), determine endangered status and critical habitat prudency pursuant to the Endangered Species Act of 1973, as amended (Act), for two plant species: *Nesogenes rotensis* (no common name) and *Osmoxylon mariannense* (no common name). *Nesogenes rotensis* and *Osmoxylon mariannense* are found only on the island of Rota in the U.S. Commonwealth of the Northern Mariana Islands (CNMI). Based on a public comment, we have re-examined the basis of recognition of *Tabernaemontana rotensis* as a distinct endemic species on Rota and the U.S. Territory of Guam, and are not listing this species as endangered. This rule implements the protection and recovery provisions afforded by the Act for these species.

**DATES:** This rule is effective May 10, 2004.

**FOR FURTHER INFORMATION CONTACT:** Gina M. Shultz, Acting Field Supervisor, the Pacific Islands Fish and Wildlife Office; telephone, 808/792-9400; facsimile, 808/792-9581.

**SUPPLEMENTARY INFORMATION:**

## Background

*Nesogenes rotensis*, *Osmoxylon mariannense*, and *Tabernaemontana rotensis* all occur on the island of Rota in the CNMI; *Tabernaemontana rotensis* is also found in the U.S. Territory of Guam.

We provided detailed physical descriptions for these species and their habitats for Guam and Rota in the proposed listing rule (65 FR 35025, June 1, 2000).

### Discussion of the Three Plant Species

#### *Nesogenes rotensis*

Williams has observed *Nesogenes rotensis* in flower throughout the year; however, she has never observed it in fruit (Laura Williams, CNMI Division of Fish and Wildlife (DFW), pers. comm. 2004).

Biannual surveys for this species have been conducted since 2000. The species was observed in flower in February 2000, and a direct count was made on June 27, 2000 (L. Arriola, in litt. 2000). At that time there were 80 individuals within an approximate area of 960 yd<sup>2</sup> (800 m<sup>2</sup>). In May and November 2001, direct counts made by staff from CNMI DFW identified 458 and 579 adult plants, respectively. No individuals of *Nesogenes rotensis* were observed in May or November of 2003 following supertyphoon Pongsona; however, 34 adults were observed in December 2003 (L. Williams, pers. comm. 2004).

#### *Osmoxylon mariannense*

In 2000, a survey conducted by biologists with the CNMI DFW identified six living, and five dead, individual trees on Rota (L. Arriola, in litt. 2000). A survey conducted in 2002 by Taisacan confirmed eight occurrences in this same vicinity, again with only one living mature tree in each. *Osmoxylon mariannense* individuals were defoliated during supertyphoon Pongsona; however, are leafing out and appear to be recovering (E. Taisacan, pers. comm. 2003).

#### *Tabernaemontana rotensis*

*Tabernaemontana rotensis* has been recognized as an endemic species on Guam and Rota by most who have studied the flora of the Marianas (Fosberg in Stone 1980, Raulerson pers. comm., Herbst pers. comm.) and is recognized as distinct by the government of Guam. Nevertheless, in an authoritative monographic work on the genus in the Old World (Leeuwenberg 1991), it was submerged in an expansive interpretation of the widespread species *T. pandacaqui*, which was originally described from the

Philippines, but that in Leeuwenberg's interpretation ranges from southern China to Australia and includes several dozen previously recognized species. Differences of this sort are not uncommon regarding species or groups of related species that have broad and discontinuous ranges. Prompted in part by a comment from the Air Force, we have re-examined the basis for recognition of *T. rotensis* as a distinct endemic species and now consider Leeuwenberg's treatment to be the most credible taxonomic interpretation of the native *Tabernaemontana* of Guam and Rota. Since we have no authority to list plants at a level below subspecies or variety, and there is no indication that *T. pandacaqui* is endangered or threatened throughout all or a significant portion of its range, we are not listing *T. rotensis*. Despite this determination, we recognize that native *Tabernaemontana* is an important natural resource and an element of the native biodiversity of these two islands. It is perfectly appropriate that local authorities seek to conserve this species, but under our current understanding of its taxonomy, it does not qualify for protection under the Act. If further information becomes available that supports recognition of an endemic taxon, we will reconsider the need to list.

#### *Previous Federal Action*

On June 1, 2000, we published the proposed rule to list as endangered three plant species from the Mariana Islands (65 FR 35025). In that proposed rule (beginning on page 35027), we included a detailed summary of the previous Federal actions completed prior to publication of the proposal. We now provide updated information on the actions that we have completed since publication of the proposed rule. Our final listing decision for *Nesogenes rotensis*, *Osmoxylon mariannense*, and *Tabernaemontana rotensis* was deferred due to lack of resources because the Service's Pacific Islands Office (where the proposed listing was initiated) staff were under court orders to designate critical habitat for 255 Hawaiian plants and four Hawaiian invertebrates. Pursuant to a settlement agreement approved by the U.S. District Court for the District of Hawaii on August 21, 2002, the Service must make a final decision on whether to list these species and submit this decision to the **Federal Register** by April 1, 2004 (*Center for Biological Diversity v. Norton*, Civil No. 99-00603 (D. Haw.)).

#### *Summary of Comments and Recommendations*

In our June 1, 2000, proposed rule and associated notifications, we requested that all interested parties submit comments, data, or other information that might contribute to the development of a final rule. A 60-day comment period closed on July 31, 2000. Appropriate CNMI and Government of Guam agencies, Federal agencies, and other interested parties were contacted and requested to comment. A legal notice announcing the publication of the listing proposal was published in the Marianas Variety newspaper on June 16, 2000, and the Pacific Daily News on June 23, 2000. During this period we received one request for a public hearing from the CNMI DFW. On October 30, 2000, we gave notice in the **Federal Register** (65 FR 64649) and the Marianas Variety of the public hearing to be held on the island of Rota and reopened the public comment period until November 29, 2000. On November 16, 2000, we held a public hearing at the Rota Resort, Rota.

We reopened the public comment period on January 9, 2004, because we believed that additional review was warranted at this time since three years had passed since publication of the proposed rule (69 FR 1560). In order to address any additional comments received in response to reopening the comment period and to meet the August 21, 2002, court order to submit to the **Federal Register** a final listing decision for these three plants no later than April 1, 2004, the comment period was open for 18 days, closing on January 26, 2004. The reopening of the comment period gave all interested parties additional time to consider the proposed rule's information and submit comments on the proposal.

During the comment periods, we received a total of 18 letters, facsimile transmissions, comment cards, and e-mails from public agencies and individuals. Eleven of these written communications were from various departments of the government of the CNMI and Guam, two were from the Air Force, and the remaining five were from non-governmental entities. Of the written comments, four reviewers supported the listing of *Nesogenes rotensis*, *Osmoxylon mariannense*, and *Tabernaemontana rotensis*, ten opposed the listing, three provided information on the species but remained neutral on the listing, and one recommended delaying the listing of *Tabernaemontana rotensis*. Five persons provided testimony at the public hearing held on November 16,

2000. We received oral comments from a representative from the Mayor's office on Rota and four representatives from the CNMI DLNR at this public hearing. Representatives of the Mayor's office and the CNMI DLNR also responded by letter or e-mail during the first comment period.

This final rule has been revised and updated to reflect the comments and information received during the comment periods. We address those substantive comments concerning the rule in the summary that follows.

#### *Peer Review*

Our Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities published in the **Federal Register** (59 FR 34270) states that the Service will incorporate independent peer review in listing decisions during the public comment period in the following manner: (1) solicit the expert opinions of a minimum of three appropriate and independent specialists regarding pertinent scientific and commercial data and assumptions relating to the taxonomy, population models, and supportive biological and ecological information for species under consideration for listing; and (2) summarize in the final decision document the opinions of all independent peer reviewers received on the species under consideration. 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.

In accordance with our policy, we sought the expert opinions of seven independent reviewers regarding the proposed rule. The purpose of such review is to ensure that our decisions are based on scientifically sound data, assumptions, and analyses. We invited these peer reviewers to comment, during the public comment periods, on the accuracy of the data used regarding the proposed listing of *Nesogenes rotensis*, *Osmoxylon mariannense*, and *Tabernaemontana rotensis* and conclusions drawn from these data. We received comments from four peer reviewers during the comment period. Three reviewers concur with our determination to list based upon available information on the species. One peer reviewer recommended a delay in the listing of *Tabernaemontana rotensis* pending the collection and analysis of an additional five years of data. All of the reviewers agreed that the proposed rule was based on scientifically sound data, assumptions, and analysis. These experts' comments are incorporated in the final rule and

summarized in the following responses to comments.

#### Issue 1: Biological Justification and Methodology

*Comment 1:* One peer reviewer recommended that as additional individuals of *Tabernaemontana rotensis* have been found since the time of the proposed listing we continue to gather information on population data and monitor select groups of individuals of to determine local trends in numbers, seedling survival rates, and causes of mortality in populations on the islands of Guam and Rota. Based on the analysis of this new information, the status of the species would then be re-assessed after five years. Other reviewers also suggested that, based on the detection of new individuals, *Tabernaemontana rotensis*, may be more widespread than originally believed. The peer reviewer also believed that we had failed to incorporate information on a significant population of *Tabernaemontana rotensis* which occurs on an upper terrace of Tagua Point.

*Our Response:* The Service collected, collated, and analyzed that new information on the newly documented individuals of *Tabernaemontana rotensis* and distribution on Guam and Rota since the publication of the proposed listing rule in 2000. This included field observations and information from persons with direct knowledge of the species. The new information was provided by knowledgeable private individuals, Territory of Guam and Commonwealth biologists, and the Air Force. However, we are not listing *T. rotensis* on the basis of taxonomy.

#### Section 4(i) Comments Received From Commonwealth and Territorial Government Agencies

#### Issue 1: Biological Justification and Methodology

*Comment 2:* The Guam Department of Agriculture (GDOA) and the Air Force provided additional information on the locations and population numbers of *Tabernaemontana rotensis*. Several reviewers, including the GDOA, CNMI DLNR, and the Air Force commented, however, that listing of one or more of the three species should be based on the results of comprehensive, island-wide surveys as it would be premature to list them absent the results of such survey efforts.

*Our Response:* As required by the Act (section 4(a)(1)) and its implementing regulations, we must list species as endangered or threatened based on the best available scientific and commercial

information. We have determined that *Nesogenes rotensis* and *Osmoxylon mariannense* meet the definition of endangered. However, we are not listing *Tabernaemontana rotensis* on the basis of taxonomy.

As cited above in the response to Comment 1, since publication of the proposed listing in 2000, we have compiled new information on the numbers of individuals and distribution of *Nesogenes rotensis* and *Osmoxylon mariannense* and incorporated this information into the final rule. These two species have been the subject of searches conducted in the last 20 years on Rota by knowledgeable biologists and technicians, including staff from the CNMI DLNR and DFW. Biannual surveys for *Nesogenes rotensis* have been conducted on Rota since 2000 by biologists from the CNMI DFW to assess the health and status of the single known population at Poña Point Fishing Cliff; however, no surveys have been conducted for *Nesogenes rotensis* in other coastal habitat areas on Rota. *Nesogenes rotensis* is currently known from a single population of 34 individuals. Surveys between 1980 and 1995 on Rota located 20 individuals of *Osmoxylon mariannense* in the same limestone forest area that it had been reported from almost 50 years earlier (D. Grout and L. Mehrhoff, pers. comm. 1997; L. Raulerson, pers. comm. 1998). Surveys conducted in 1997 and 1998 in the same area following several typhoons located only eight individuals (E. Taisacan and G. Hughes, pers. comm. 1998). In a survey conducted in 2000, CNMI DFW identified six living and five dead trees (L. Arriola, in litt. 2000). And in a 2002 survey, eight living trees were reported in the same vicinity (E. Taisacan, pers. comm. 2003).

*Comment 3:* The CNMI DLNR requested that, in addition to comprehensive, island-wide surveys, the following issues be considered prior to listing: species distribution, identification of destructive pests and diseases, propagation techniques, land ownership rights, public education and awareness, management plans for existing populations, and short- and long-term recovery plans for the species.

*Our Response:* As cited above in response to Comment 2, since publication of the proposed listing in 2000, we compiled new information on the numbers of individuals and the distributions of *Nesogenes rotensis* and *Osmoxylon mariannense*, and have incorporated this information into this final rule.

To date, no specific diseases have been identified for these species, and we are not aware of any research on

destructive pests or diseases of these two species. Individuals of *Osmoxylon mariannense* have been reported to suffer defoliation by an unknown agent (L. Mehrhoff and C. Russell, pers. comm. 1997; E. Taisacan, pers. comm. 1997). Invertebrate pests, rats, or disease are suspected to be the cause for a lack of seedlings or juveniles of *Osmoxylon mariannense*, deleterious effects on the leaves, and the death of several mature individual trees (D. Grout, pers. comm. 1997).

We are aware of ongoing efforts by the CNMI DNLN to propagate *Osmoxylon mariannense* for outplanting on Rota (E. Taisacan, in litt. 2002). A summary of these efforts is provided in this final rule below under Factor 3. There is no species-specific management plan.

Currently, no Federal recovery plans exist for *Nesogenes rotensis* and *Osmoxylon mariannense* because such documents are prepared for species subsequent to their listing as endangered or threatened under the Act. Following the listing of *Nesogenes rotensis* and *Osmoxylon mariannense*, recovery plans will be completed pursuant to section 4(f)(1) of the Act for these three species. These plans will provide a framework for combining and coordinating Federal, State, and regional agency efforts for conservation of the species as well as establish recovery priorities and estimate the cost of tasks necessary to accomplish these priorities. They will also describe site-specific management actions necessary to achieve conservation and survival of these species.

*Comment 4:* The GDOA also commented that they did not feel that fire was a threat to *Tabernaemontana rotensis* because none of the trees occur in a fire-prone area, and fire is not known to occur in limestone forests on Guam or Rota. Rather, they point out that fires originate from human use of an area or vandalism. In addition, GDOA feels that few obvious threats to *Tabernaemontana rotensis* have been noted on Guam. Finally, GDOA suggests that clearings created by typhoons or humans might actually favor reproduction in this species and that the species, overall, appears to be quite hardy and resilient to adverse environmental and anthropogenic damage.

*Our Response:* The threat of fire is no longer an issue because we are not listing *T. rotensis* on the basis of taxonomy.

#### Issue 2: Effects of Listing

*Comment 5:* The CNMI DLNR commented that *Tabernaemontana rotensis* and *Osmoxylon mariannense*

are currently listed as endangered under CNMI public law and that stakeholders have taken the initiative, under local home rule, to protect the resources under their jurisdiction.

*Our Response:* Section 4 of the Act provides guidance regarding the listing of species. Listing decisions are based upon the best scientific and commercial data available and take into consideration those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction. With Federal protection as listed species, Federal agencies all insure that these species are not jeopardized pursuant to section 7 actions and Federal monies may be made available for their conservation pursuant to section 6 of the Act.

*Osmoxylon mariannense* and *Nesogenes rotensis* are endemic to Rota.

*Osmoxylon mariannense* is included on the "List of Protected Wildlife and Plant Species in the CNMI" (Table 3 of the 1999 revised DFW regulations implementing CNMI Public Law 2-51) for Rota; however, *Nesogenes rotensis* is not. Pursuant to these DFW regulations, protected species may not be hunted or harassed. These regulations do not, however, identify specific prohibitions regarding collection or possession of protected plant species or any requirements to analyze the effects of any proposed actions on such species. Cooperative efforts between the Service and the Rota DFW have resulted in the construction of fenced enclosures around several individuals of *Osmoxylon mariannense* on Rota. We are unaware of any other actions to protect the unfenced trees and to alleviate the threats posed by feral Sambal deer and pigs as well as invasive non-native plant species.

*Comment 6:* The Mayor of Rota commented that there are no Federal lands on Rota and asked if Federal protection would extend to private property.

*Our Response:* Federal protection of listed plants extends to private lands under two circumstances: (1) removal, cutting, digging up, damaging, or destroying endangered plants would constitute a violation of section 9 if conducted in knowing violation of State law or regulations or in violation of State criminal trespass law and (2) any activity that would be authorized, funded, or implemented by a Federal entity requires, pursuant to section 7(a) of the Act, that the Federal entity 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 designated (50 CFR part 402). If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service to ensure that its actions are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. Examples of Federal agency actions on private lands in the Commonwealth of the Northern Mariana Islands that may require consultation include the following:

Army Corps of Engineers projects, such as the construction of roads, firebreaks, and bridges; various U.S. armed forces activities on the northern Mariana Islands, including combat and mobility training and construction; Natural Resources Conservation Service projects; Federal Emergency Management Agency activities; and U.S. Department of Housing and Urban Development projects. Conservation of these plant species may be consistent with some ongoing operations at these sites; however, the listing of these species in the CNMI could result in some restrictions on certain Federal activities and the use of certain lands.

*Comment 7:* The Air Force and another reviewer commented that the Service should accept the taxonomic inclusion of *Tabernaemontana rotensis* into *Tabernaemontana pandacaqui* based on Leeuwenburg (1991) as it is the only peer-reviewed study directly applicable on Guam.

*Our Response:* We have re-examined the basis for recognition of *T. rotensis* as a distinct endemic species and now consider Leeuwenburg's treatment to be the most credible taxonomic interpretation of the native *Tabernaemontana* of Guam and Rota. Accordingly, we are not listing *T. rotensis*.

#### Non-Government Comments

*Comment 8:* One reviewer asked if the listing of *Nesogenes rotensis*, *Osmoxylon mariannense*, and *Tabernaemontana rotensis* would impede local recovery efforts with the need to obtain numerous Federal permits and extra paperwork that would be required by the Service policy regarding the propagation of listed species.

*Our Response:* Under the Act, the controlled propagation of animals and plants in certain situations is recognized as an essential tool for the conservation and recovery of listed species. In recognition of this, our "Policy Regarding Controlled Propagation of

Species Listed Under the Act" (65 FR 56916) addresses botanical facilities and others who may be involved in the propagation of listed species. The goals of this policy include coordinating recovery actions specific to controlled propagation activities; maximizing benefits to the listed species from controlled propagation efforts; assuring that appropriate recovery measures other than controlled propagation and other existing recovery priorities are considered in making controlled propagation decisions; and ensuring prudent use of funds. We have also made substantial efforts to avoid adverse impacts, economic or otherwise, in order that cooperative recovery partnership opportunities may be maintained or increased with qualified organizations and individuals. As such, no significant adverse impacts to persons or entities involved in the propagation of federally-listed plant species, including *Osmoxylon mariannense* and *Nesogenes rotensis*, are anticipated.

*Comment 9:* One reviewer commented that the Service should propose critical habitat for *Nesogenes rotensis*, *Osmoxylon mariannense*, and *Tabernaemontana rotensis* concurrent with the final rule to list the species.

*Our Response:* In this final rule, we find that critical habitat for *N. rotensis* and *O. mariannense* is prudent but not determinable at this time due to a lack of information regarding the physical and biological features or specific areas essential to the conservation of these three species. In accordance with section 4(b)(6)(C)(ii) of the Act, however, it is our intent, if funded, to gather this information and to propose critical habitat for these two plant species within one year of their listing. In the interim, we will protect the two plant species through the provisions provided pursuant to sections 7 and 9 of the Act. However, we are not listing *T. rotensis* on the basis of taxonomy.

*Comment 10:* One reviewer asked if the listing of *Nesogenes rotensis*, *Osmoxylon mariannense*, and *Tabernaemontana rotensis* would result in extra protection for these three species.

*Our Response:* This is discussed in Our Response to Comment 6. However, we are not listing *T. rotensis* on the basis of taxonomy.

#### Summary of Factors Affecting the Species

Section 4(a)(1) (16 U.S.C. 1531 *et seq.*) of the Act and regulations (50 CFR part 424) promulgated to implement the Act describe the procedures for adding species to the Federal lists. We may

determine a species to be endangered or threatened due to one or more of the five factors described in section 4(a)(1) of the Act. These factors and their application to *Nesogenes rotensis* and *Osmoxylon mariannense* are discussed in the following sections. The primary threats facing these two species are summarized in Table 1.

The only known population of *Nesogenes rotensis* at Poña Point Fishing Cliff occurs in an area adjacent to a trail that is subject to bonfires, collecting, trampling by fishermen and tourists, and potential expansion of the

park's facilities. *Casuarina equisetifolia* (ironwood), a large-stature, fast-growing non-native tree, is colonizing the Poña Point Fishing Cliff area. Ironwoods can reach heights of up to 65 ft (20 m) and form monotypic stands that can shade out other plant species. Dominance by *Casuarina equisetifolia* takes up much of the available nutrients, and the species is believed to release allelopathic chemicals that prevent understory growth (Neal 1965; Smith 1985). Ironwoods presence constitutes a major threat to *Nesogenes rotensis* through degradation of suitable habitat.

As such, given the current single population is comprised of only 34 individuals, *Nesogenes rotensis* is extremely vulnerable to other factors. For example, two typhoons have made landfall on Guam and Rota since this species was proposed for listing: typhoon Chataan in July 2002 and supertyphoon Pongsona in December 2002. While the species appears to be recovering from the effects of supertyphoon Pongsona, it remains extremely vulnerable during this recovery period (L. Williams, pers. comm. 2004).

TABLE 1.—SUMMARY OF PRIMARY THREATS TO *Nesogenes rotensis* AND *Osmoxylon mariannense*

Species	Feral animals	Rodents	Non-native plants	Invertebrate pests	Development/road work	Typhoons/storms	Trampling/collection	Van-dalism	Limited numbers
<i>Nesogenes rotensis</i> .	Unknown	Unknown	Yes .....	Unknown .....	Yes .....	Yes .....	Yes .....	Potential	Yes; 34 individuals.
<i>Osmoxylon mariannense</i> .	Yes .....	Potential	Yes .....	Potential .....	Yes .....	Yes .....	Unknown ..	Potential	Yes; 8 individuals.

The primary threat to *Osmoxylon mariannense* is degradation or disturbance of native forest habitat from a variety of factors including competition from invasive non-native species and feral ungulate activity. Rota has historically experienced typhoon disturbances that have opened the canopy of the sabana forest considerably, creating conditions favorable to invasive non-native shrubs and vines that compete with *Osmoxylon mariannense* (L. Mehrhoff, in litt. 1995). Feral pigs (*Sus scrofa*) and deer (*Cervus mariannus*) are abundant on Rota, and their browsing and trampling threaten unfenced individuals (G. Hughes, pers. comm. 1998; L. Williams, pers. comm. 2004). Predation of seeds that fall to the forest floor by insects, house mice (*Mus musculus*), and/or rats (*Rattus* spp.) is also a suspected cause of reduced or absent reproductive vigor. Since several individuals occur in close proximity to roadways, routine road maintenance and/or improvement also pose a threat to the species.

A. *The present or threatened destruction, modification, or curtailment of its habitat or range.* Native vegetation, including cloud limestone forest habitat for *Osmoxylon mariannense* and open coastal scrubland habitat for *Nesogenes rotensis* on Rota, has undergone extreme alteration due to past and present land use practices, including ranching, deliberate and unintentional non-native animal and plant introductions, agricultural, and military activities during World War II (Falanruw *et al.* 1989).

Rota was subject to extensive agricultural development (particularly cultivation of sugar cane in the lowland areas) by the Japanese prior to World War II. The island was not, however, invaded by allied forces during World War II. Rota retains less than 60 percent of its historic native forest (Falanruw *et al.* 1989). Continued loss of native forest is attributable to application of the Agricultural Homestead Act of 1990 that allows for the distribution of 2.5-ac (1-ha) parcels of public land to eligible participants. Land use plans have proposed that approximately 25 to 45 percent of Rota be designated private agricultural homestead land or as land likely to be converted to agricultural homesteads (Resources Northwest, Inc. 1997). In 2001, the Agricultural Homestead Act of 1990 was amended to allow agricultural homestead permitting on any public lands not required for government use or reserved for other purposes by any other provision of the law. Thus, individuals awaiting permits may choose many areas of Rota's public lands for agricultural homesteads, rather than areas planned and reserved specifically for those purposes (Pub. L. 12–53). Therefore, the potential for agricultural development continues to threaten the remaining limestone forests on Rota, which include habitat for *Osmoxylon mariannense*.

Throughout the Mariana Islands, goats, pigs, cattle, and deer have severely damaged forest vegetation by browsing on plants, causing habitat degradation and erosion (Kessler 1997; Marshall *et al.* 1995) that then retards forest growth and regeneration (Lemke

1992). Remaining habitat is threatened by fragmentation and degradation associated with resort development, agricultural activities, and road maintenance and construction (D. Grout and L. Mehrhoff, pers. comms. 1997). Individuals of *Osmoxylon mariannense* on Rota were almost lost during road-widening activities that occurred in the late 1990s (D. Grout and L. Mehrhoff, pers. comms. 1997). Coastal habitat is threatened by fragmentation and degradation associated with resort development, and potential beach park expansion and development of park facilities at the only known location of *Nesogenes rotensis*.

B. *Overutilization for commercial, recreational, scientific, or educational purposes.* At this time, overutilization of the two species is not known to be an important factor. Unrestricted scientific or horticultural collecting by interested individuals may significantly affect these species due to their extremely low numbers. The only population of *Nesogenes rotensis* is located in a public park and threatened by trampling by foot traffic and bonfires set by tourists and fishermen. Due to the small population size, reproductive vigor may also be depressed by a limited gene pool.

Propagation studies are ongoing only for *Osmoxylon mariannense* on Rota. Seeds were collected from wild individuals of *Osmoxylon mariannense* and planted in October 2001 and March 2002. From the October planting, approximately 150 individuals had germinated by November, and, as of March 2002, 11 are surviving in a

nursery. The seeds planted in March 2002, produced approximately 100 seedlings. Thirty-five of these individuals survived and are in good condition (Taisacan 2002).

**C. Disease and predation.** To date, no specific diseases have been identified for these species. Individuals of *Osmoxylon mariannense* have suffered defoliation by an unknown agent (E. Taisacan, pers. comm. 1997). Invertebrate pests, rats, or disease are suspected to have caused the defoliation due to the poor health of the leaves, the lack of seedlings or juveniles of *Osmoxylon mariannense*, and the death of several previously mapped older individual plants (D. Grout, pers. comm. 1997).

Feral ungulates threaten seedlings of *Osmoxylon mariannense* (G. Wiles, in litt. 1998; D. Janeke, pers. comm. 2003; L. Williams, pers. comm. 2004). Cooperative efforts between the Service and the Rota DFW have resulted in the construction of fenced exclosures around several individuals of *Osmoxylon mariannense*. The majority of individuals of *Osmoxylon mariannense* are not currently protected by fencing and are vulnerable to browsing or trampling by feral ungulates.

**D. The inadequacy of existing regulatory mechanisms.** *Osmoxylon mariannense* is on the list of protected species for the government of the CNMI but there are no specific prohibitions regarding collection or possession of protected plant species or requirement for the analysis of potential adverse effects associated with proposed projects. *Nesogenes rotensis* is not included on this list of protected species in the CNMI.

At the time of publication of the proposed rule, an island-wide multiple species habitat conservation plan for Rota was envisioned by the CNMI government and local Rota residents. This plan was to be prepared with technical assistance from the Service. The preparation of this plan has since been abandoned by the CNMI government in lieu of the development of a project-specific habitat conservation plan to address impacts to a single species, the Mariana crow (*Corvus kubaryi*) (Arlene Pangelinan, Service, pers. comm. 2003).

**E. Other natural or manmade factors affecting its continued existence.** The combination of storm disturbance and resultant competition from invasive, non-native plant species adversely affects the condition of habitat occupied by *Osmoxylon mariannense* (L. Williams, pers. comm. 2004). Rota has a long history of disturbances by

tropical typhoons (Weir 1991). While native biota are adapted to these events, these typhoons, in combination with anthropogenic disturbances, and the relatively new presence of invasive species threaten the continued existence of *Nesogenes rotensis* and *Osmoxylon mariannense*. Within the past decade, frequent typhoons have made landfall on Rota, severely affecting the islands. Most recently, super typhoon Pongsona affected the Mariana Islands, particularly Guam and Rota, with winds of up to 184 mph. While *Nesogenes rotensis* and *Osmoxylon mariannense* are expected to have adapted to high winds, typhoons, and storm surge, their distribution and numbers have been reduced significantly due to human activities and this makes the remaining individuals particularly susceptible to extirpation or extinction from a natural disaster. Destruction of the sabana forest canopy by typhoons has adversely affected *Osmoxylon mariannense* by altering sub-canopy vegetation conditions over the long-term by opening up and drying out older, closed forest habitat (E. Taisacan, pers. comm. 1998; L. Williams, pers. comm. 2004). The single population of *Nesogenes rotensis* is extremely vulnerable to typhoons, storm surge, and high surf because its open scrubland habitat is located in a coastal area. *Osmoxylon mariannense* is threatened by competition from one or more invasive, non-native plant species including *Momordica charantia*, *Mikania scandens*, and *Passiflora suberosa*. In opened forest areas, various opportunistic, weedy vines such as *Momordica charantia*, *Momordica scandens*, and *Passiflora suberosa* cover the ground (Fosberg 1960; G. Hughes, pers. comm. 1998) and may alter conditions necessary for seed germination and seedling growth provided in closed-canopy, high-stature forests covered with mosses and various epiphytic species. *Casuarina equisetifolia* is becoming established in the coastal scrubland habitat at Pona Point Fishing Cliff and will likely spread and change the coastal scrubland into a forest habitat with no understory due to restriction of available sunlight, restriction of available nutrients, and possibly release of a chemical agent that prevents other plants from growing beneath it and, thereby, adversely affecting the single remaining population of *Nesogenes rotensis* (Smith 1985; L. Williams, pers. comm. 2004).

Small population size and limited distribution make these species particularly vulnerable to extinction from reduced reproductive vigor or

random environmental events. On Rota, 8 individuals of *Osmoxylon mariannense*, and a single population of 34 individuals of *Nesogenes rotensis* are known. A single adverse environmental event or lack or decline of successful reproduction in *Nesogenes rotensis* or *Osmoxylon mariannense* could lead to the extinction of these two species. *Nesogenes rotensis* is found in the coastal zone where a single disturbance from storm surge could destroy a significant percentage of the individuals or the entire population. In addition, the continuing adverse impacts of trampling of *Nesogenes rotensis* by people and/or expansion of facilities at Pona Point could also destroy a significant percentage of the individuals or the entire population resulting in the extinction of this species.

We have carefully assessed the best scientific and commercial information available on the past, present, and future threats facing these species in determining the actions to take in this rule. Based on this evaluation, the appropriate action is to list *Nesogenes rotensis* and *Osmoxylon mariannense* as endangered. *Nesogenes rotensis* is endemic to the island of Rota and has one population with fewer than 34 individuals. *Osmoxylon mariannense* is endemic to the island of Rota and has eight occurrences, with only one living tree in each. These two species are threatened by one or more of the following: habitat degradation or destruction by feral ungulates; competition for space, light, water, and nutrients with invasive non-native plant species; road construction and maintenance activities; trampling by humans (*Nesogenes rotensis*); development; limited reproductive vigor; vandalism; natural disasters or random environmental events; and potentially disease or predation by insects, mice, or rats. Because these species are in danger of extinction throughout all or a significant portion of their ranges, they fit the definition of endangered as defined in the Act.

#### Critical Habitat

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time the species is determined to be endangered or threatened. Our implementing regulations (50 CFR 424.12(a)) state that critical habitat is not determinable if information sufficient to perform the required analyses of impacts of the designation is lacking, or if the biological needs of the species are not

sufficiently well known to permit identification of an area as suitable habitat.

We find that designation of critical habitat for *Nesogenes rotensis* and *Osmoxylon mariannense*, is not determinable at this time because we are unable to identify the physical and biological features essential to the conservation of these two species and we are unable to identify whether specific unoccupied areas are essential for their conservation. When a "not determinable" finding is made, we must, within one year of the publication date of the final listing rule, designate critical habitat, unless the designation is found to be not prudent.

We will continue to protect these two species and their habitat through the recovery process and section 7 consultations to assist Federal agencies in avoiding jeopardizing these species.

#### Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, development of recovery plans, requirements for Federal protection, and prohibitions against certain activities. Recognition through listing results in public awareness and encourages conservation actions by Federal, State, Tribal, and local agencies, non-governmental conservation organizations, and private individuals. The Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for listed species. Recovery planning and implementation, the protection required by Federal agencies and the prohibitions against certain activities involving listed species are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act requires the Service to develop and implement plans for the conservation of endangered and threatened species ("recovery plans"). The recovery process involves halting or reversing the species' decline by addressing the threats to its survival. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems, thus allowing delisting.

Recovery planning, the foundation for species recovery, includes the development of a recovery outline as

soon as a species is listed, and later, preparation of draft and final recovery plans, and revision of the plan as significant new information becomes available. The recovery outline—the first step in recovery planning—guides the immediate implementation of urgent recovery actions, and describes the process to be used to develop a recovery plan. The recovery plan identifies site-specific management actions that will achieve recovery of the species, measurable criteria that determine when a species may be downlisted or delisted, and methods for monitoring recovery progress. Recovery teams, consisting of species experts, Federal and State agencies, non-government organizations, and stakeholders, are often established to develop recovery plans. When completed, a copy of the recovery outline, draft recovery plan, or final recovery plan will be available from our Web site (<http://endangered.fws.gov>) or, if unavailable or inaccessible, from our office (see **FOR FURTHER INFORMATION CONTACT** section).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, non-governmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (e.g., restoration of vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands. To achieve the recovery of these species requires cooperative conservation efforts on private lands as many occur primarily or solely on private lands.

The funding for recovery actions can come from a variety of sources, including Federal budgets, State programs, and cost share grants for non-Federal landowners, the academic community, and non-governmental organizations. Additionally, pursuant to section 6 of the Act, we would be able to grant funds to the CNMI for management actions that promote the protection and recovery of these two plant species. Information on the Service's grant programs that are available to aid species recovery can be found on our Web site at: <http://endangered.fws.gov/grants/index.html>. In the event that our internet connection is inaccessible, please check [www.grants.gov](http://www.grants.gov) or check with our grants contact at U.S. Fish and Wildlife Service, Ecological Services, 911 NE 11th Avenue, Portland, OR 97232-4181 (telephone 503/231-2063; FAX 503/231-6243).

For additional information on available conservation measures, refer to Summary of Factors Affecting the Species, B.

Please let us know if you are interested in participating in recovery efforts for *Nesogenes rotensis* and *Osmoxylon mariannense* (see **FOR FURTHER INFORMATION CONTACT** section). Additionally, we invite you to submit any further information on these species whenever it becomes available or other information you may have for species' recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT** section).

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) 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 the species or destroy or adversely modify its critical habitat if any has been 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.

Federal agency actions that may require consultation for *Nesogenes rotensis* and *Osmoxylon mariannense* include, but are not limited to: Army Corps of Engineers projects, such as the construction of roads, firebreaks, and bridges; various U.S. armed forces activities on the northern Mariana Islands, such as combat and mobility training, and construction; Natural Resources Conservation Service projects; Federal Emergency Management Agency activities; and U.S. Department of Housing and Urban Development projects. Federal actions not affecting the two species, as well as actions on non-Federal lands that are not federally funded or permitted, would not require section 7 consultation.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered plants. All prohibitions of section 9(a)(2) of the Act implemented at 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 these two species in interstate or foreign

commerce, or to remove the species from areas under Federal jurisdiction. In addition, for plants listed as endangered, the Act prohibits the malicious damage or destruction in areas under Federal jurisdiction and the removal, cutting, digging up, damaging, or destroying of such endangered plants in knowing violation of any State, Commonwealth, or Territory law or regulation, or in the course of any violation of State, Commonwealth, or Territory criminal trespass law. Certain exceptions to the prohibitions apply to any employee or agent of the Service, any other Federal land management agency, or a State conservation agency (50 CFR 17.61(c)(2)–(4)).

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, to enhance the propagation or survival of the species. We anticipate that the only permits that would be sought or issued would be in association with recovery efforts as these two species are not common in cultivation or the wild.

It is our policy, published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify, to the maximum extent practicable at the time a species is listed, those activities that are likely to constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effects of the listing on proposed and ongoing activities within a species' range.

We believe the following activities could potentially result in a violation of section 9; however, possible violations are not limited to these actions alone: collection (including scientific collection absent authorization by the Service), damage, or destruction of *Nesogenes rotensis* or *Osmoxylon mariannense* on non-Federal lands if conducted in knowing violation of CNMI law or regulations, including CNMI criminal trespass law. In addition, possible violations include importing or exporting these species,

and selling or shipping specimens in interstate or foreign commerce in the course of commercial activity.

We will review other activities not identified above on a case-by-case basis to determine whether they may be likely to result in a violation of section 9 of the Act. We do not consider these lists to be exhaustive and provide them as information to the public. You should direct questions regarding whether specific activities would constitute a violation of section 9 to the Field Supervisor of the Pacific Islands Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section).

You may request copies of the regulations regarding listed plants and address questions about prohibitions and permits to the U.S. Fish and Wildlife Service, Ecological Services, Permits Branch, 911 NE 11th Avenue, Portland OR 97232–4181 (telephone 503/231–2063; FAX 503/231–6243).

*National Environmental Policy Act*

We have determined that environmental assessments and environmental impact statements, as defined in 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).

*Civil Justice Reform*

In accordance with Executive Order 12988, the Department of the Interior's Office of the Solicitor has determined that this rule does not unduly burden the judicial system and does meet the requirements of sections 3(a) and 3(b)(2) of the Order. We have listed *Nesogenes rotensis* and *Osmoxylon mariannense* as endangered species in accordance with the provisions of the Endangered Species Act.

*Paperwork Reduction Act*

This rule does not contain any new collections of information that require approval by the Office of Management

and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This rule will not impose record keeping or reporting requirements on State or local governments, individuals, businesses, or organizations. 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 OMB control number. The existing OMB control number is 1018–0094 and expires July 31, 2004.

*References Cited*

A complete list of all references cited in this rulemaking is available upon request from the Pacific Islands Fish and Wildlife Office (See **FOR FURTHER INFORMATION CONTACT** section.)

*Author*

The primary authors of this final rule are the staff of the Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT** section).

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

Endangered and threatened species, Exports, Imports, Reporting and record-keeping 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. Section 17.12(h) is amended 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>Nesogenes rotensis</i> .....	* None .....	* Western Pacific Ocean—U.S.A. (Commonwealth of the Northern Mariana Islands).	* Verbenaceae—Verbena family.	E	* 742	* NA	* NA

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
* <i>Osmoxylon mariannense</i> .	* None .....	* Western Pacific Ocean—U.S.A. (Commonwealth of the Northern Mariana Islands).	* Araliaceae—Ginseng family.	E	* 742	NA	* NA
*	*	*	*	*	*	*	*

Dated: April 1, 2004.

**Marshall Jones,**

*Deputy Director, Fish and Wildlife Service.*

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