

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AB56

Endangered and Threatened Wildlife and Plants; Proposed Special Rule To Allow Take of the Threatened Coastal California Gnatcatcher

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed special rule.

SUMMARY: The implementing regulations for threatened wildlife generally incorporate the section 9 prohibitions for endangered wildlife, except when a special rule applies. In the case of the coastal California gnatcatcher (*Poliioptila californica californica*), the Fish and Wildlife Service (Service) found that the prohibitions for endangered species were generally necessary and advisable for conservation of the species. This finding is published in this same **Federal Register** separate part.

However, pursuant to section 4(d) of the Endangered Species Act of 1973, as amended (Act), and the implementing regulations, the Service proposes to define the conditions associated with certain land-use activities under which take of the coastal California gnatcatcher would not be a violation of section 9. The Service seeks comments from the public on this proposed special rule.

DATES: Comments from all interested parties must be received by June 1, 1993.

ADDRESSES: Comments and materials concerning this proposal should be sent to the Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Field Office, 2730 Loker Avenue West, Carlsbad, California 92008. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Mr. Jeffrey D. Opdycke, Field Supervisor, at the address listed above (telephone 619/431-9440).

SUPPLEMENTARY INFORMATION:**Background**

The final rule to list the coastal California gnatcatcher (*Poliioptila californica californica*) as threatened, published in this same **Federal Register** part, presents discussions describing the current range and status of the gnatcatcher, previous Federal actions on this species, a summary of the comments and recommendations

received in response to the Service's proposal to list the gnatcatcher, detailed descriptions of the factors affecting its continued existence, the reasons why critical habitat is not being proposed, and the conservation measures available to federally listed species.

Section 4(d) of the Act provides that whenever a species is listed as a threatened species, such regulations deemed necessary and advisable to provide for the conservation of the species may be issued. These regulations may prohibit any act prohibited for endangered species under section 9(a). These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, or collect; or to attempt any of these), import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed wildlife species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies. The implementing regulations for threatened wildlife (50 CFR 17.31) incorporate, for the most part, the prohibitions for endangered wildlife (50 CFR 17.21), except when a special rule applies (50 CFR 17.31(c)). In the case of the coastal California gnatcatcher, the Service found that the prohibitions for endangered species were generally necessary and advisable for conservation of the species. However, pursuant to section 4(d) of the Act, as amended, and 50 CFR 17.31(c), the Service proposes to define the conditions under which take of the coastal California gnatcatcher resulting from specified land-use activities regulated by state and local government would not violate section 9 of the Act.

The Service recognizes the significant efforts undertaken by the State of California through the Natural Community Conservation Planning Act of 1991 (NCCP), as well as such programs as the Multiple Species Conservation Program of San Diego County and the Multispecies Habitat Conservation Planning effort by Riverside County, to approach systematic evaluation and restoration of habitat for the benefit of healthy ecosystems, rather than a species-by-species approach. Such efforts encourage holistic management of listed species, like the coastal California gnatcatcher, and other sensitive species. As a result, the Service is proposing a special rule that would define the conditions under which take associated

with certain land-use activities would be authorized. Under this special rule the Service would permit take of the coastal California gnatcatcher associated with land-use activities covered by an approved plan prepared under the NCCP, provided the Service determines that the approved plan meets the issuance criteria of an incidental take permit pursuant to 50 CFR 17.32(b)(2). Moreover, while the NCCP plans are being developed, the special rule would permit take of the gnatcatcher resulting from activities conducted in accordance with conservation guidelines developed by the Scientific Review Panel established under the NCCP process, provided the Service determines the guidelines meet the 50 CFR 17.32(b)(2) standards. The Service believes that this special rule will provide for habitat conservation and management essential to the recovery of the gnatcatcher in a manner consistent with the purposes of the Act.

Finalization of this special rule is contingent upon adoption of the Scientific Review Panel's planning guidelines for the Coastal Sage Scrub NCCP program by the California Department of Fish and Game and the Service.

National Environmental Policy Act

The Fish and Wildlife Service will comply with the National Environmental Policy Act of 1969 (NEPA) in implementing the provisions of the proposed special rule. Pursuant to the NCCP Process Guidelines adopted by the California Resources Agency and the California Department of Fish and Game, a joint State/Federal environmental document will be prepared for each NCCP plan. At the start of a NCCP planning effort, a planning agreement will establish the extent of Federal involvement and Service obligations under NEPA. As appropriate, the NCCP lead agency will provide documentation to assist the Service in NEPA compliance. Both State and Federal law provide for preparation of a joint State/Federal environmental document.

List of Subjects in 50 CFR Part 17

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

Proposed 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:

PART 17—[AMENDED]

(h) * * *

§ 17.11 Endangered and threatened wildlife.

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Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
BIRDS							
Gnatcatcher, coastal California.	<i>Polioptila californica californica</i> .	U.S.A. (CA), Mexico	Entire	T	496	NA	17.41(b)

3. It is proposed to amend § 17.41 by adding paragraph (b) to read as follows:

§ 17.41 Special rules—birds.

* * * * *

(b) Coastal California gnatcatcher (*Polioptila californica californica*).

(1) Except as noted in paragraphs (b)(2) and (3) of this section, all prohibitions of § 17.31 (a) and (b) shall apply to the coastal California gnatcatcher.

(2) Incidental take of the coastal California gnatcatcher is permitted if the take results from activities conducted in accordance with a Natural Community Conservation Plan for the protection of coastal sage scrub habitat, *provided that*:

(i) The Natural Community Conservation Plan has been prepared, approved, and implemented pursuant to California Fish and Game Code sections 2800–2840; and

(ii) The Fish and Wildlife Service has issued written concurrence that the Natural Community Conservation Plan meets the standards set forth in 50 CFR 17.32(b)(2). The Service shall issue its concurrence pursuant to the provisions of the Memorandum of Understanding dated December 4, 1991, between the California Department of Fish and Game and the Service regarding coastal sage scrub natural community conservation

planning in southern California. (Copies of the Memorandum are available from U.S. Fish and Wildlife Service, 2730 Loker Avenue West, Carlsbad, CA 92008.)

(3) During the period that a Natural Community Conservation Plan referred to in paragraph (b)(2) of this section is being prepared, incidental take of the coastal California gnatcatcher is permitted if the take results from activities conducted pursuant to guidelines prepared by the Scientific Review Panel for this program and adopted by the California Department of Fish and Game pursuant to California Fish and Game Code section 2825, *provided that*:

(i) The take occurs in an area within a local governmental jurisdiction that is enrolled in the natural community conservation planning process;

(ii) The Fish and Wildlife Service has issued written concurrence that the guidelines meet the standards set forth in 50 CFR 17.32(b)(2). The Service shall issue its concurrence pursuant to the provisions of the Memorandum of Understanding dated December 4, 1991, between the California Department of Fish and Game and the Service regarding coastal sage scrub natural community conservation planning in southern California; and

(iii) The total loss of coastal sage scrub habitat resulting from activities covered by this paragraph does not exceed the restrictions defined by the Scientific Review Panel/California Department of Fish and Game guidelines.

(4) If the Fish and Wildlife Service has concurred in the guidelines referred to in paragraph (b)(3) of this section, the Service shall review the guidelines every six months to determine whether they continue to meet the standards set forth in 50 CFR 17.32(b)(2). If the Service determines the guidelines no longer meet these standards, the Service shall consult with the California Department of Fish and Game pursuant to the Memorandum of Understanding dated December 4, 1991, to seek appropriate modification of the guidelines, and shall revoke its concurrence under paragraph (b)(3) of this section if appropriate modification of the guidelines does not occur.

Dated: March 19, 1993.

John F. Turner,
Director, U.S. Fish and Wildlife Service.
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