

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AB56

Endangered and Threatened Wildlife and Plants; Special Rule Concerning Take of the Threatened Coastal California Gnatcatcher

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The implementing regulations for threatened wildlife under the Endangered Species Act of 1973, as amended (Act), generally incorporate the section 9 prohibitions for endangered wildlife, except when a special rule promulgated pursuant to section 4(d) applies. At the time the coastal California gnatcatcher (*Polioptila californica californica*) was listed as threatened, the Fish and Wildlife Service (Service) did not promulgate a section 4(d) special rule and, therefore, all of the section 9 prohibitions, including the "take" prohibition, became applicable to the species. However, in recognition of a State program that will provide for conservation and management of the gnatcatcher's habitat in a manner consistent with the purposes of the Act, the Service hereby defines, pursuant to section 4(d), the conditions under which take of the coastal California gnatcatcher would not be a violation of section 9.

EFFECTIVE DATE: December 10, 1993.

ADDRESSES: The complete file for this rule is available for public inspection, by appointment, during normal business hours, at the Carlsbad Field Office, U.S. Fish and Wildlife Service, 2730 Loker Avenue West, Carlsbad, California 92008.

FOR FURTHER INFORMATION CONTACT: Peter A. Stine, Acting Field Supervisor, at the address listed above (telephone 619/431-9440).

SUPPLEMENTARY INFORMATION:**Background**

The final rule listing the coastal California gnatcatcher (*Polioptila californica californica*) as a threatened species under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), was published in the *Federal Register* on March 30, 1993 (58 FR 16742), and contains a discussion of its status, 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 was not designated, and the conservation measures available to federally listed species. The Service considers the coastal California gnatcatcher, hereinafter referred to as gnatcatcher, likely to become endangered in the foreseeable throughout its historic range in southwestern California and northwestern Baja California, Mexico, due to widespread habitat destruction, degradation, and fragmentation, and the inadequacy of existing regulatory mechanisms to provide for its conservation.

Conservation measures available to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain activities. Section 4(d) of the Act provides that whenever a species is listed as a threatened species, the Service shall issue regulations deemed necessary and advisable to provide for the conservation of the species. Section 4(d) also provides that the Service may by regulation prohibit any act prohibited for endangered species under section 9(a) of the Act. 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)). At the time the gnatcatcher was listed as threatened, the Service did not promulgate a special rule for the species. However, pursuant to section 4(d) of the Act and 50 CFR 17.31(c), the Service proposed to define the conditions under which incidental take of the gnatcatcher resulting from certain land-use activities regulated by State and local government would not violate section 9 of the Act. This was done in recognition of the significant conservation planning efforts undertaken by the State of California

and several city and county governments pursuant to the Natural Community Conservation Planning Act of 1991 (NCCP) (California Fish and Game Code sec. 2800 *et seq.*). The NCCP program intends to provide for the conservation of listed and other sensitive species at a regional or ecosystem scale. The Service finds that implementation of the NCCP program and the special rule will provide for conservation and management of the gnatcatcher's habitat in a manner consistent with the purposes of the Act.

Under the special rule, incidental take of the gnatcatcher by land-use activities addressed in an approved NCCP plan will not be considered a violation of section 9 of the Act, provided the Service determines that such a plan meets the issuance criteria for an "incidental take" permit pursuant to section 10(a)(2)(B) of the Act and 50 CFR 17.32(b)(2). Under the special rule, a limited amount of incidental take of the gnatcatcher within subregions actively engaged in preparing a NCCP plan will also not be considered a violation of section 9 of the Act, provided the activities resulting in such take are conducted in accordance with the NCCP Conservation Guidelines and Process Guidelines, which were finalized by the California Department of Fish and Game (CDFG) in November 1993. The final rule has been modified to withdraw the requirement that the guidelines specifically adhere to the standards set forth under 50 CFR 17.32(b)(2). This was done in part because the NCCP Conservation Guidelines and Process Guidelines contain the essence of the standards delineated in 50 CFR 17.32(b)(2). The Service, as a partner in the NCCP program, also is encouraging long-term NCCP efforts leading to the completion and implementation of regional conservation plans. The Service deems the level of habitat loss contemplated under the interim procedures of the guidelines insignificant in view of the proposed long-term conservation efforts and short-term mitigation components of the NCCP program. In addition, this strategy was envisioned by the State's Scientific Review Panel (SRP) and is consistent with the SRP's recommended interim strategy in the guidelines. The modification of the special rule affects only the interim planning period. The requirement of the special rule that final NCCP plans meet the standards set forth under 50 CFR 17.32(b)(2) has not been changed.

Summary of Comments and Recommendations

In the March 30, 1993, proposed special rule (58 FR 16758) and associated notifications, all interested parties were requested to submit factual reports or information that might contribute to the development of a final rule. Appropriate elected officials (including 28 congressional representatives), 3 State agencies, 4 county and 50 city governments, 7 Federal agencies, and 50 landowners and other potentially affected or interested parties were contacted and requested to comment. A legal notice announcing this proposed action and inviting general public comment on the proposal was published in the Orange County Register, Riverside Press-Enterprise, and the San Diego Union-Tribune on April 5, 1993.

The Service held three public hearings on the proposed special rule. A notification of the hearings, reopening of the public comment period, and availability of a draft Environmental Assessment (EA), draft NCCP Conservation Guidelines, and draft NCCP Process Guidelines was published in the Federal Register on July 20, 1993 (58 FR 38736). A legal notice announcing the hearings and inviting general public comment on the proposal and the draft documents cited above was published in the Orange County Register on July 12, 1993; the Riverside Press-Enterprise on July 13, 1993; and the San Diego Union-Tribune on July 14, 1993. The draft EA, NCCP Conservation Guidelines, and NCCP Process Guidelines were distributed on August 2, 1993, to 256 parties, including the Governor's Office, 2 State Senators, 3 Federal and 3 State agencies, 15 city governments, and other interested parties. Public hearings were conducted in San Diego, California, on August 9, 1993; in Irvine, California, on August 11, 1993; and in Riverside, California, on August 13, 1993. About 300 people attended these hearings.

A total of 198 comments was received during two comment periods that encompassed almost 4 months. Multiple comments, whether written or oral from the same party on the same date, are regarded as one comment. Of these, 43 (22 percent) supported the special rule, 64 (32 percent) opposed the special rule, and 91 (46 percent) neither supported nor opposed the special rule.

Several conservation groups and many individuals expressed support for the special rule. A variety of public agencies, private organizations and groups, and individuals opposed the special rule. The majority of

commenters neither supported nor opposed the special rule; many of these respondents expressed various concerns and recommendations for modifying the rule and associated documents prior to their finalization.

The Service has reviewed all of the written and oral comments discussed above. Based on this review, 24 relevant issues have been identified and are discussed below. These issues are representative of the comments questioning or opposing the proposed special rule.

Issue 1: The special rule should be more explicit with respect to the criteria the Service will use to evaluate the adequacy of a NCCP plan.

Service Response: As discussed under the "Proposed Regulations Promulgation" section of the proposed special rule, the evaluation standards to be used by the Service are those set forth in 50 CFR 17.32(b)(2), which defines the issuance criteria for obtaining a permit to incidentally take listed wildlife species under section 10(a)(1)(B) of the Act. These criteria are sixfold.

1. The taking will be incidental to otherwise lawful activities and not the purpose of such activities. In other words, any taking allowed under the plan would have to occur inadvertently during normal development activities; it could not be deliberate and purposeful. In order to define what taking would be allowed under the program, the plan must carefully describe and delineate the following parameters: the conservation plan boundaries; currently proposed activities and all future actions reasonably certain to occur in the planning area that may result in incidental take; all extant biological information regarding the distribution, abundance, and ecology of the gnatcatcher, any other federally listed species, and possibly other species of concern (proposed, candidate, State-listed species) occurring within the planning area; and what impacts the taking would have on the gnatcatcher and other affected species, as appropriate. The plan must also include an analysis of alternatives that would not result in take and an explanation of why these are not being utilized. If existing biological data are nonexistent, vague, or of poor quality, additional studies (such as those recommended by the SRP under the NCCP Conservation Guidelines) may be needed to support the conservation and other land-use decisions proposed under the plan. During the plan preparation phase, the Service will provide technical assistance for determining the adequacy of the biological database, as well as

provide recommendations on additional studies that may be needed to provide an adequate data baseline from which to develop a plan. In general, biological data made available must be adequate to evaluate fully the likely impacts of proposed activities on all affected species being addressed within the plan. Typically, biological data need to be commensurate with the magnitude of proposed activities.

2. The plan will, to the maximum extent practicable, minimize and mitigate the impacts of the proposed incidental take. Compliance with this standard involves a planning strategy that emphasizes avoidance of impacts to the gnatcatcher (and potentially other sensitive species that may become listed), provides measures to minimize potential impacts by modifying proposed activities (e.g., clustering urban development or siting such activities in low quality habitat), and details compensation measures needed to offset unavoidable impacts. In general, mitigation measures will be commensurate with the magnitude of proposed impacts under the plan.

3. The plan must be adequately funded and contain provisions to deal with unforeseen circumstances. Compliance with this standard requires, first, a detailed description of the funding that will be made available over the life of the plan to implement the proposed mitigation program and other conservation measures. If full funding is not provided at the time the plan is approved but is intended to be generated on a continuing basis, the plan must establish programs and legally-binding mechanisms to generate sufficient funds for its implementation. The plan should detail the collection, management, and auditing of all funds, including penalties for failure to meet funding obligations by signatory members. Second, because circumstances and information may change over time and may result in unforeseen circumstances, the plan must detail the procedures to deal with such circumstances and, if necessary, to modify the plan. Consequently, the plan should provide for an amendment procedure and any other necessary measures or assurances to deal with such circumstances (e.g., if funding is not generated at the predicted rate).

4. The taking allowed under the plan will not appreciably reduce the likelihood of survival and recovery of the gnatcatcher in the wild. This criterion is equivalent to the regulatory definition of "jeopardy" under section 7(a)(2) of the Act and means to engage in an action that reasonably would be expected, directly or indirectly, to

reduce appreciably the likelihood of both the survival and recovery of the gnatcatcher (or any other listed species) in the wild by reducing its reproduction, numbers, or distribution. In effect, this criterion requires a "non-jeopardy" finding as a condition for issuance of any incidental take permit.

5. The plan will ensure that other measures that the Director of the Service may require as being necessary or appropriate will be provided. Such measures, as needed, should become apparent during plan development through coordination between the Service, the State, and plan participants and signatories and will likely include terms and conditions for monitoring implementation of the plan to ensure that its requirements and the requirements of the Act are met.

6. The Director of the Service is assured that the plan will be implemented. The Service anticipates that this requirement will be satisfied through execution of an Implementing Agreement (as discussed in detail in the NCCP Process Guidelines), which legally binds all participants and signatories to implement the plan as approved. The Service recognizes, however, that the Implementing Agreement cannot alter or usurp the existing authority of local government agencies. Rather, the agreement will, among other things, detail the manner in which the local agencies will exercise their existing authorities to effect land-use in the manner set forth in the plan. Consequently, local government agencies will continue to exercise their duly constituted planning, zoning, and permitting powers under the plan. However, any actions that violate the Implementing Agreement could invoke remedies for such violations provided under the agreement itself, and could also be a basis for revocation of the Service's concurrence under subparagraph (b)(2)(ii) of the special rule.

Issue 2: Mitigation requirements under the NCCP Conservation and Process Guidelines may not meet a "constitutionally required nexus."

Service Response: The mitigation guidelines established by each subregional planning body will include a range of potential mitigation measures appropriate for the subregion. The appropriate level and nature of mitigation that may be required for a particular activity will be determined by the authorizing jurisdiction on a project-by-project basis in conformance with the mitigation guidelines. The Service expects and intends that mitigation requirements will be reasonably related to the effects of the particular activity on

coastal sage scrub habitat and the gnatcatcher.

Issue 3: The special rule and the NCCP Conservation and Process Guidelines will effect a taking of private property.

Service Response: Issuance of the special rule by the Secretary, and CDFG's finalization of the NCCP Conservation and Process Guidelines, will not constitute a taking of private property. Neither the rule nor the NCCP Conservation or Process Guidelines make a determination about the uses that can be made of private property. Under the special rule, procedures are available by which property owners can obtain case-by-case determinations of application of the rule and the NCCP Conservation and Process Guidelines to their individual properties. Further, participation under the special rule is voluntary. A private entity seeking to develop private property in a manner that may result in the incidental take of the gnatcatcher in the course of an otherwise legal activity may proceed under section 7 of the Act if there is Federal agency action involved, apply for an incidental take permit under section 10(a)(1)(B) of the Act, or, if the private property involved is within a jurisdiction enrolled and actively engaged in the preparation of a NCCP plan, utilize the special rule.

Issue 4: The NCCP maps and coastal sage scrub habitat acreages presented in the NCCP Conservation Guidelines and the draft EA are inaccurate and are vaguely represented to the public and participating organizations.

Service Response: The NCCP planning area encompasses portions of five counties and about 3.8 million acres. As described in the draft EA, the data used to estimate existing habitat conditions in the NCCP planning area were provided by various local government entities. Data for San Diego County were developed by several different local government agencies and provided to the Service by the San Diego Association of Governments. Data for Riverside County were developed for the county in the course of previous conservation planning efforts. The data developed for Orange County are still being refined and compiled. However, a preliminary acreage estimate of extant coastal sage scrub habitat for Orange County has been provided to the Service by the county. Relatively little coastal sage scrub habitat remains in San Bernardino and Los Angeles Counties. Currently, there are no large-scale data on the distribution and abundance of this habitat type in these counties.

These data represent the best available information on current habitat

conditions. Nevertheless, it should be recognized that, because of the large area covered by this mapping effort, the resulting maps have a relatively large minimum mapping unit (approximately 2 to 5 acres) and the source data (primarily aerial photography) are fairly small in scale (1:24,000). The NCCP maps depicting the distribution of coastal sage scrub vegetation are meant to provide an overview and a biogeographic perspective of large regions for planning purposes. Comparisons with other mapping efforts of a similar nature are likely to show some differences due to mapping techniques and the experience and ability of those doing the work. The Service finds that the data used in these analyses represent the best information available from local entities currently engaged in conservation planning and are adequate to serve the regional planning purposes of the NCCP program.

Issue 5: The relationship between sections 4(d), 7, and 10 of the Endangered Species Act should be discussed with respect to the loss of coastal sage scrub habitat during the NCCP planning period.

Service Response: Under the special rule, incidental take of the gnatcatcher within subregions actively engaged in preparing a NCCP plan will not be considered a violation of section 9 of the Act, provided that activities resulting in such take are conducted in accordance with the NCCP Conservation and Process Guidelines. These guidelines provide for a maximum 5 percent loss of primarily "low quality" coastal sage scrub in the interim period during which subregional NCCP plans are being prepared, provided long-term conservation planning options are not foreclosed and certain other conditions are met as set forth in the guidelines. The baseline against which this loss is measured is the digital (i.e., computerized) vegetation data provided by the local jurisdictions, updated as appropriate to the date of the listing of the coastal California gnatcatcher on March 25, 1993.

As coastal sage scrub habitat is lost within a NCCP subregion during the planning period by any means, including activities subject to section 7 or section 10(a) of the Act, it will be tallied in relation to the 5 percent limit. Once the 5 percent limit is reached in any subregion, the provisions of the special rule concerning take of the gnatcatcher would cease to apply for that subregion until a NCCP plan has been adopted for the subregion and accepted by the Service under the special rule. Additional losses of coastal

sage scrub habitat that result from activities that may affect or result in the take of the gnatcatcher would be evaluated on a case-by-case basis through normal regulatory procedures under section 7 or section 10(a) of the Act as appropriate. Habitat losses greater than 5 percent could potentially occur through section 7 or section 10(a) processes, depending on the results of the normal regulatory review process, provided the activity meets the standards set forth in section 7 or section 10(a). The NCCP Conservation Guidelines and supporting documentation represent the best available information on the biology of the gnatcatcher. The Service intends to rely on the NCCP Conservation Guidelines and the supporting documentation to the maximum extent permitted by law in reviewing activities under section 7 and section 10(a) of the Act to ensure consistency with completed or ongoing subregional NCCP planning efforts and to prevent the foreclosure of long-term planning options.

Issue 6: More clearly explain the relationship of the special rule to the section 10(a) and section 7 processes under the Endangered Species Act for obtaining authorization to incidentally take the gnatcatcher.

Service Response: As a full cooperater in the NCCP program, the Service is committed to accomplishing the objectives of the program. All activities that the Service evaluates under its existing authorities will be analyzed to determine how they interact with and affect the NCCP program. The Service will support activities contributing to the completion of subregional NCCP plans prepared in accordance with the NCCP Conservation and Process Guidelines in so far as is legally allowable under the Service's mandates under the Endangered Species Act.

Section 7 and section 10(a) of the Act provide regulatory mechanisms for obtaining authorization to incidentally take listed species. The provisions of these sections of the Act, and their implementing regulations, apply to the gnatcatcher. With the promulgation of the special rule, another regulatory mechanism is provided to allow take of the gnatcatcher incidental to otherwise lawful activity. Under the special rule, incidental take of the gnatcatcher within enrolled jurisdictions actively engaged in the preparation of a NCCP plan will not be considered a violation of section 9 of the Act, provided such take occurs in accordance with the NCCP Conservation and Process Guidelines, until the 5 percent coastal sage scrub habitat loss limit is reached. At that

point, and until a NCCP plan is approved by the State and enrolled jurisdictions and accepted by the Service, the incidental take of gnatcatchers would be subject to the prohibitions under section 9 of the Act. Section 7 and section 10(a) remain in place as options for reconciling actions involving take of the gnatcatcher with the prohibitions against take contained in section 9 of the Act. As stated in the response to Issue 5, the Service considers the NCCP Conservation Guidelines and supporting documentation to represent the best available information concerning the biological needs of the gnatcatcher and intends to rely on the NCCP Conservation Guidelines and supporting documentation to the maximum extent permitted by law in reviewing activities under section 10(a) and section 7 of the Act.

Issue 7: Identify/elaborate on what constitutes adequate mitigation during the NCCP subregional planning period.

Service Response: The NCCP Process Guidelines, prepared by CDFG to describe how the NCCP planning process will be implemented, have incorporated specific guidance for securing interim habitat loss approval. These guidelines include the following elements that address the issue of what constitutes adequate mitigation.

Each NCCP subregional lead or coordinating agency is required to establish interim habitat loss mitigation guidelines appropriate for the subregion in order to authorize any loss of coastal sage scrub habitat. These guidelines must meet the minimum standards identified in the NCCP Process Guidelines and must be concurred with by CDFG and the Service prior to implementation. The mitigation standards include minimizing project impacts and mitigating those impacts with off-site acquisition of habitat, dedication of land on-site, restoration and enhancement of coastal sage scrub habitat, management agreements, transfer of development rights, or other mitigation approved by the Service and CDFG. Mitigation may be concurred with on a case-by-case basis prior to adoption of the subregional guidelines. As stated in the NCCP Conservation Guidelines, full mitigation of interim habitat losses may be incorporated, in part, through completion and implementation of the subregional NCCP plans. The subregional NCCP plans are intended to (1) promote the conservation of biodiversity; (2) provide for high likelihood of persistence of target species, including the gnatcatcher; and (3) provide for no net

loss of habitat value from present conditions.

Issue 8: There is insufficient information contained in the EA and the potential impacts are too great to justify interim take of the gnatcatcher. Therefore, an Environmental Impact Statement (EIS) is required.

Service Response: The Service finds that the EA contains sufficient information to evaluate the potential impacts to the gnatcatcher from the proposed special rule. The Service also finds that those impacts will not be significant for the reasons outlined below.

Estimates of the acreage and location of potentially affected coastal sage scrub habitat and gnatcatcher pairs, based on existing vegetation data provided by local jurisdictions and known locations of gnatcatchers, are described in detail in the EA. Under the provisions of the NCCP Conservation Guidelines, up to 5 percent of existing coastal sage scrub habitat could be lost, and an estimated 66 to 116 pairs of gnatcatchers could be incidentally taken under the provisions of the special rule during the planning period. The 5 percent loss of existing coastal sage scrub habitat represents about 20,000 acres of slightly more than 400,000 acres of coastal sage scrub found within the entire NCCP planning area. Under the NCCP Conservation Guidelines, loss of coastal sage scrub habitat will occur largely in areas of lower potential conservation value within a subregion. These areas are largely small fragments of habitat that occur on the fringes of existing urban or agricultural development. The NCCP Conservation Guidelines conservatively estimate that enhancement and restoration of existing coastal sage scrub habitat can compensate for a loss of up to 5 percent of coastal sage scrub habitat during this period without compromising the conservation of the gnatcatcher or other coastal sage scrub species. No loss of habitat would occur during the planning period that would foreclose options for long-term conservation planning and implementation, and mitigation for these losses must be provided in accordance with the NCCP Conservation and Process Guidelines.

The estimated maximum of 66 to 116 pairs of gnatcatchers potentially affected by activities during the interim planning period represent about 3 to 5 percent of the United States population. These pairs will be from areas of relatively low conservation value, as defined by the NCCP Conservation Guidelines, and the impacts to these pairs will be mitigated in accordance with the NCCP Conservation and Process Guidelines.

The Service has conducted an internal consultation under section 7 of the Act to evaluate the effects of the proposed special rule on the gnatcatcher during the interim planning period and has concluded that the rule is not likely to jeopardize the continued existence of this species.

Additional loss of coastal sage scrub habitat and incidental take of the gnatcatcher could occur under an approved subregional NCCP plan, but only if the Service concurs that the plan meets the issuance criteria under 50 CFR 17.32(b)(2). Impacts to the gnatcatcher resulting from the approval of a NCCP plan will be addressed under separate National Environmental Policy Act review and section 7 consultation procedures.

Based on its independent review of the NCCP Conservation and Process Guidelines and the analysis presented in the EA, the Service finds that the environmental impacts of the proposed special rule will not be significant and, therefore, preparation of an EIS is not required. The Service additionally finds that the rule is not likely to jeopardize the continued existence of the gnatcatcher. Long-term conservation opportunities will not be compromised by losses of coastal sage scrub during the NCCP subregional planning period; they should in fact be enhanced.

Issue 9: Certain activities, such as public works projects, agricultural activities, or loss of coastal sage scrub on parcels less than 5 acres in size, should be exempt from the take prohibitions under section 9 of the Act, as well as from the requirements of the NCCP program.

Service Response: These suggested changes were not made because such exemptions are inconsistent with the objectives of the Act and its implementing regulations, and are inconsistent with the NCCP Conservation and Process Guidelines.

Issue 10: Public utility-related activities often occur in linear project areas that should be treated separately in the special rule and under a separate regional plan that is consistent with the NCCP program.

Service Response: The Service recognizes the unique circumstances associated with utility and other types of linear projects. The Service also recognizes that circumstances may occur in which a proposed public utility project may cross a jurisdiction that has declined to enroll within the NCCP program. Therefore, in these unique cases, the Service recognizes the flexibility in the section 4(d) and NCCP processes to allow utilities to be treated as subregions for planning purposes.

The Service recognizes also that every linear project proponent cannot be treated as a subregion and will allow this planning method on a case-by-case basis for regional entities such as electrical, gas, and water utilities. Linear projects that are located within a subregion or cross into adjacent subregions must be included within the plans for those subregions. Any habitat destroyed within a subregion or subarea during the interim planning phase will be tallied against that subregion's or subarea's 5 percent interim habitat loss allocation.

Issue 11: Some of the identified mitigation options listed in the NCCP Conservation Guidelines are either untried or unavailable. One commenter stated that all parties need to acknowledge the highly experimental nature of restoration efforts in coastal sage scrub habitat and that successful restoration criteria should be established and successfully demonstrated before any further significant losses of habitat occur. Because of the speculative nature of enhancement/restoration, it should not be regarded at this time as an adequate means for compensating the loss of moderate or high value coastal sage scrub habitat.

Service Response: The enhancement/restoration of coastal sage scrub habitat is experimental. However, in spite of the uncertainty of success of enhancement/restoration, its use as a mitigation measure in the interim process is appropriate based on the limited habitat impact that may occur during the interim process (5 percent) and the potential application value of these restoration/enhancement efforts in preparing and implementing NCCP plans. Based on the results of initial restoration efforts, the Service (in cooperation with CDFG and restoration specialists) will establish specific restoration success criteria that will be incorporated into NCCP plans.

Issue 12: The research agenda outlined by the SRP in the NCCP Conservation Guidelines should be mandatory and should be prioritized.

Service Response: Additional scientific information is needed to guide regional conservation planning efforts such as the NCCP program. However, the degree to which these data will be needed during the planning period will generally be commensurate with the magnitude of impacts proposed under a NCCP plan.

Of the six research tasks recommended by the SRP, as discussed in the NCCP Conservation Guidelines, one (biogeography and inventory of coastal sage scrub) will be required to

support any subregional plan, and two others (trends in biodiversity and genetic studies) will be necessary to evaluate the success of NCCP plans. Some of the research recommended by the SRP is already under way: the Marine Corps is funding an ecological study of the gnatcatcher and cactus wren (*Campylorhynchus brunneicapillus couesi*) at Camp Pendleton in northern San Diego County; Southern California Edison is funding a similar type of research project in the San Joaquin Hills of Orange County and at the Palos Verdes Peninsula in Los Angeles County; and the Metropolitan Water District of Southern California is funding long-term research on the gnatcatcher in western Riverside County. In addition, both the Service and CDFG are seeking additional funding to implement, in part, the SRP's research agenda. Additional research funds should be provided by subregional and subarea planning efforts.

The Service and CDFG will also be establishing a committee (as recommended by the SRP) to develop more explicit research protocols for the general research tasks outlined in the NCCP Conservation Guidelines. In general, these protocols will vary from subregion to subregion, and will be determined by the size and types of data gaps, scale of the planning effort, and a combination of priority and funding considerations. Actual research schedules will be tailored to the scope and timing of subregional planning activities.

Issue 13: Existing local land-use regulations must be modified to implement the NCCP program.

Service Response: The Service agrees. As discussed previously under the response to Issue 1, local regulatory agencies are expected to commit formally to NCCP plan implementation through the execution of an Implementing Agreement (as discussed in detail in the NCCP Process Guidelines), which legally binds all participants and signatories to implement the plan as approved. The Service recognizes, however, that the Implementing Agreement must be consistent with State law governing local agency authority and must be legally enforceable. The Implementing Agreement should detail the manner in which the local agencies will exercise their existing authorities to effect land-use in the manner set forth in the plan.

Issue 14: The SRP or an equivalent advisory committee should be established to further guide the regional conservation planning efforts under the NCCP program.

Service Response: The Service agrees. CDFG and the Service are discussing various options, including reconstituting the SRP, establishing a coastal sage scrub "recovery" team, and organizing technical teams to focus on various aspects of coastal sage scrub conservation.

Issue 15: The affects of the NCCP program on non-participating landowners within enrolled jurisdictions should be explained.

Service Response: Landowners are subject to local land-use regulations whether or not they are actively participating in the NCCP program. If property lies within a NCCP-enrolled jurisdiction and is subject to a discretionary action by that jurisdiction, the landowner will be subject to any NCCP-related requirements established by the local agency under its existing authorities to effect land-use and will also have the benefits of the special rule during the planning period. Once a NCCP plan has been approved, all property within the plan boundaries will be subject to the terms and conditions of the approved plan.

Issue 16: Both the NCCP program and the special rule need to adequately address the economic impacts of these actions on potentially affected parties.

Service Response: The Service agrees that the economic impacts of the NCCP program and special rule must be addressed. The NCCP program will be implemented through preparation of subregional NCCP plans, prepared pursuant to and consistent with the NCCP Conservation and Process Guidelines. Each NCCP plan is intended to identify and provide for protection of habitat and wildlife diversity, while allowing compatible and appropriate land development in the subregion. Each NCCP plan will identify permanent habitat preserve areas and sites with low conservation value that would be more appropriate for land development purposes. An analysis of the economic impacts of such designations within a NCCP plan will be required in the joint Federal/State environmental document that will be prepared for each plan, as discussed in the "National Environmental Policy Act" section of this rule.

The socio-economic effects that would be expected to occur in the interim planning period (while a NCCP plan is being prepared) were addressed by the Service in the EA for the proposed special rule. In the EA, the Service found that the population growth forecasted for the five-county NCCP planning area would place increasing demands for residential and other associated development on local

communities. The prohibitions, pursuant to section 9 of the Act, on take of the gnatcatcher could result in adverse socio-economic impacts, due to constraints on development in areas that are occupied or used by gnatcatchers. Under the provisions of the special rule, a limited amount of incidental take of the gnatcatcher within subregions actively engaged in preparing a NCCP plan would not be considered a violation of section 9 of the Act, provided the activities resulting in such take are conducted in accordance with the NCCP Process and Conservation Guidelines. For this reason, the Service found that the interim provisions of the special rule could result in alleviating some of the existing Endangered Species Act-related constraints on development, while encouraging communities to proceed with the NCCP planning process. The EA found that significant socio-economic impacts would not be expected to result from the special rule.

The Service has also reviewed the special rule within the context of Executive Order 12866. The Service has determined that the special rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act.

Issue 17: The technical documentation used by the SRP in preparing the NCCP Conservation Guidelines was not available for public review during the comment period.

Service Response: The SRP used scientific and technical information that was available as of March 1993 in developing its recommended conservation strategy, which was incorporated into CDFG's NCCP Conservation Guidelines. The information used by the SRP was generally available in the published scientific literature and is described in "Scientific Review Panel Conservation Guidelines and Documentation," which is available from CDFG. This document includes unpublished analyses developed by SRP members and CDFG staff during the preparation of the NCCP Conservation Guidelines, and a summary and review of published and unpublished data regarding the biology of the coastal sage scrub community. Although the technical documentation used by the SRP was not fully compiled into the single document referenced above until October 1993, most of the information had been previously released by CDFG to the public during 1992 as NCCP documents (e.g., "The Coastal Sage Scrub Community Conservation Planning Region," "Sensitive Species Associated with Coastal Sage Scrub," and "Subregionalization for Natural

Communities Conservation Planning"), and the scientific publications cited therein are available in technical libraries.

Issue 18: Adequate NCCP plans for conserving the coastal sage scrub community cannot be based solely on three "target" species.

Service Response: The SRP determined that conservation efforts that plan for these three "target" species would form the basis for maintaining the viability of the remaining coastal sage scrub ecosystem because of their broad distribution throughout much of the coastal sage scrub community within the NCCP planning area. Target species are only part of the conservation strategy under the NCCP program, which emphasizes a habitat and community-based approach. The target species are only one measure of community conservation. The Service anticipates that information on other species will be gathered in conjunction with NCCP-related research activities.

For purposes of subregional planning, the target species may need to be supplemented by other species of concern. The inclusion of other species will be determined by consideration of the planning needs for the subregion, the degree to which unusual habitat requirements for the species make habitat-based or target species-based planning unreliable as conservation tools, and the anticipated regulatory status of the species.

Other species are addressed in the NCCP Process Guidelines. As discussed in the NCCP Process Guidelines, a subregional NCCP must meet Federal Endangered Species Act section 10(a) criteria for it to be accepted as equivalent to a Habitat Conservation Plan for incidental take of federally listed species. A NCCP plan may also cover additional species provided section 10(a) criteria are met. If such species are subsequently listed as threatened or endangered under the Act, the plan would support the issuance of a section 10(a) incidental take permit for those species barring significant new information or unforeseen circumstances.

Issue 19: The scientific basis for the 5 percent interim habitat loss limit under the NCCP program should be provided.

Service Response: The 5 percent interim coastal sage scrub loss figure represents a conservative estimate of the amount of habitat that could be lost in each subregion without foreclosing conservation planning options. In the opinion of the SRP, the 5 percent limit would result in a level of habitat loss that can be compensated for by long-

term management of coastal sage scrub habitat. As explained in the NCCP Conservation Guidelines and EA, loss of 5 percent of coastal sage scrub habitat can be sustained with no net loss of habitat value based on reasonable projections of long-term habitat enhancement and restoration opportunities provided for by the NCCP program.

The 5 percent figure is not intended to be a NCCP standard for conservation of the coastal sage scrub community. In some subregions, more than a 5 percent interim habitat loss may be possible without significantly foreclosing planning options. However, the acceptability of greater than a 5 percent interim loss must be demonstrated by the results of additional research, restoration, and management activities.

Issue 20: The Service should explain why it is allowing for a 20 percent loss of habitat for the Federal endangered Stephens' kangaroo rat (*Dipodomys stephensi*) and only a 5 percent loss of coastal sage scrub under the NCCP program and the special rule.

Service Response: In the case of the Stephens' kangaroo rat, the 20 percent loss of habitat (authorized under an incidental take permit pursuant to section 10(a)(1)(B) of the Act for certain portions of its range in western Riverside County) reflects an analysis of the best available scientific information on the status and ecology of this species. This determination was made more than 2 years after the listing of this species and after the preparation of an interim Habitat Conservation Plan. On the basis of this analysis, the Service found that the Stephens' kangaroo rat can sustain a 20 percent habitat loss in these areas and still remain viable, provided that the Habitat Conservation Plan approved with the issuance of the "take" permit is fully implemented.

In a similar manner, an analysis of the best available scientific information on the status and ecology of the coastal sage scrub community was recently completed by the SRP for the NCCP program.

On the basis of this analysis, the SRP concluded that a 5 percent loss of relatively low value coastal sage scrub habitat would not foreclose long-term conservation planning options under the NCCP program. Additional losses of coastal sage scrub habitat may occur under approved NCCP plans provided they are consistent with the NCCP Conservation Guidelines prepared by CDFG and provided they meet the issuance criteria under 50 CFR 17.32(b)(2).

Issue 21: Clearly define agency procedures for suspending or

withdrawing the provisions of the special rule, and provide for public participation in this process.

Service Response: Procedures for suspending or withdrawing the provisions of the special rule must be included in the Implementing Agreement prepared for each NCCP plan, as required by the NCCP Process Guidelines. The Implementing Agreement prepared by the plan proponent must be approved by the Service and CDFG and must be signed by the NCCP plan participants and the Service prior to incidental take of listed species.

To ensure that activities that occur during the interim planning period are consistent with the NCCP Conservation and Process Guidelines, the final rule has been modified to include Service review and monitoring of the implementation of the guidelines. Every 6 months during the interim planning period, the Service will review the NCCP Conservation Guidelines and Process Guidelines and their application to ensure that activities are being carried out in accordance with the guidelines and that regional and subregional conservation objectives are being met. If the Service determines that implementation efforts are not conforming to the guidelines, the Service will consult with CDFG to seek appropriate modification of the guidelines or their application as defined therein. If appropriate modification of the guidelines or their application, as defined therein, during the interim planning period does not occur, the Service may revoke the interim take provisions of this special rule on a subregional or subarea basis. The Service will publish the revocation findings in the Federal Register and provide for a 30-day public comment period prior to the effective date for revoking the provisions of the special rule in a particular area.

The Service emphasizes that the local governments under the NCCP program have the primary responsibility for ensuring compliance with the guidelines during this interim period. The Service intends that its semiannual evaluation of compliance with the guidelines and the regional and subregional conservation objectives will not duplicate local enforcement on a parcel-by-parcel basis.

Issue 22: Funding requirements and sources must be identified for NCCP research, program implementation, and preserve acquisition.

Service Response: Each NCCP plan presented to the Service will require an appropriate funding mechanism that ensures the plan will be fully

implemented. The sources and extent of funding provided for in a particular plan will depend on the specific provisions of the plan. The responsibility to identify and ensure funding commensurate with the conservation measures provided in the plan rests with the plan proponent. The Service will carefully review each plan to ensure that the funding provided is adequate to cover all aspects of plan implementation. Potential components of a plan that will require funding include preserve acquisition, preserve management, and habitat and species monitoring. Funding for research may also be provided. The Service and CDFG intend to support some research efforts as well, particularly those kinds of research that are regional in scope.

The Service does not propose to dictate the types of funding mechanisms plan proponents may choose or direct how the funds must be used to implement the plan. The Service is interested in maintaining maximum flexibility in the process and will address the adequacy of funding mechanisms in the context of the particular plan presented to the Service. Regional plans will ultimately have to comply with 50 CFR 17.32(b)(2), which includes a demonstration of adequate funding mechanisms for the program.

Issue 23: The special rule inappropriately extends legal protection to coastal sage scrub habitats that are not used by the gnatcatcher.

Service Response: The special rule defines the conditions under which activities involving take of the gnatcatcher will not be considered a violation of section 9 of the Act; that is the extent of its legal authority. The intent of the special rule is to assist local jurisdictions in conserving coastal sage scrub and the variety of species that inhabit this community through their participation in the NCCP program. While participation in the NCCP program is voluntary, the special rule provides incentives for participation by eliminating the necessity and costs of procuring incidental take permits under section 10(a) of the Act on an individual project basis and facilitating comprehensive planning for the conservation of the gnatcatcher and other coastal sage scrub species on a regionwide basis. Such regional planning is expected to afford significant protection for the gnatcatcher and the entire coastal sage scrub ecosystem, thus reducing threats to other coastal sage scrub species and providing a significant measure of certainty for future development in the region.

Issue 24: The planning timelines and phases for NCCP plans should be clarified, including what is expected at the subregional and subarea levels.

Service Response: The Service anticipates that the planning timelines for subregional NCCP plans will vary according to the specific conditions within the local jurisdiction or subregion. As stated in the NCCP Process Guidelines, the NCCP program is intended to give flexibility to each subregional effort to reflect local conditions, while still maintaining a regional conservation perspective. Planning may proceed on a subarea basis prior to the development of a subregional NCCP plan, provided the subarea NCCP plan contains a section that describes in detail how the subarea plan integrates its preserve areas and management across subarea and subregional boundaries. The subregional lead or coordinating agency must confirm that any subarea plan either is consistent with the subregional plan or does not preclude long-term conservation planning options within the subregion.

The NCCP Process Guidelines intend for local jurisdictions to adapt the NCCP process to their existing administrative processes relating to plan preparation, public review, and environmental review. Each NCCP plan must undergo environmental review, pursuant to the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA). As noted in the Process Guidelines and in the NEPA section of this special rule, a joint State/Federal environmental document will be prepared. In terms of a planning timeline, the Service anticipates that most NCCP plans will be prepared concurrent with the environmental documentation. In general, this process, including draft NCCP plan preparation, environmental documentation, and public review, is estimated to take at least 1 year to complete.

Once a final draft NCCP plan and the accompanying joint Environmental Impact Report (EIR)/EA or Environmental Impact Statement (EIS), whichever is applicable, are prepared and submitted to the Service for final review and approval, the Service will allow for a maximum 120-day period to review draft NCCP plans. This timeline assumes that the Service is involved early in the NCCP planning process, as recommended in the NCCP Conservation and Process Guidelines. Problems should be identified and resolved early in the process, resulting in a final NCCP plan that is acceptable to all parties and is approved within the above timeframe. Once the NCCP plan

and joint environmental document are approved, the Service will publish a Finding of No Significant Impact (FONSI) or Record of Decision (ROD), as applicable, in the Federal Register, which signifies the completion of the NEPA process. The FONSI or ROD will be published as close to the close of the 120-day review period as possible. An internal section 7 consultation must be conducted by the Service for each NCCP plan. The results of the internal section 7 consultation are usually included in the final joint EIR/EA or EIR/EIS and are always noted in the FONSI or ROD. The 120-day review period assumes that the internal section 7 consultation will be performed within this timeframe.

The draft NCCP plan and environmental documentation submitted to the Service should also be accompanied by a draft Implementing Agreement. An Implementing Agreement is a legally binding document that outlines the responsibilities of all parties in implementing the conservation measures outlined in the NCCP plan. The signature of the Service indicates the Service's final approval of the NCCP plan. Only after the Implementing Agreement is signed by all parties, including the Service, can take of the gnatcatcher occur in accordance with the provisions of the NCCP plan. The Service will attempt to review and resolve any problems with the Implementing Agreement within the 120-day review period. However, given the legal, often extremely detailed nature of Implementing Agreements, the Service cannot guarantee that it can review and finalize the Implementing Agreement within this timeframe. The Service will make every attempt to resolve Implementing Agreement issues as quickly as possible.

As provided by 5 U.S.C. 553(d)(3), the Service has determined that good cause exists to make this rule effective on the date of publication. Delay in implementation of the effective date would hinder conservation efforts for the gnatcatcher and its habitat.

National Environmental Policy Act

The Service has completed an EA pursuant to the National Environmental Policy Act of 1969. The EA analyzes the environmental effects of activities conducted under the provisions of the special rule that involve the incidental take of the gnatcatcher during the NCCP planning period. The Service has determined that the special rule will not result in a significant impact to the environment and therefore does not require the preparation of an EIS.

The Service will continue to comply with NEPA in implementing the provisions of the special rule. Pursuant to the NCCP Process Guidelines, a joint State/Federal environmental document that satisfies the requirements of NEPA and CEQA will be prepared for each NCCP plan.

Regulatory Flexibility Act and Executive Order 12866

This special rule has been reviewed under Executive Order 12866. The Department of the Interior has determined that the special rule 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 upon information discussed in this rule and in the EA, it is not expected that significant economic impacts will result from implementing the provisions of the special rule. Also, no direct costs, enforcement costs, or information collection or recordkeeping requirements are imposed on small entities by this rule. This action does not impose any recordkeeping requirements as defined by the Paperwork Reduction Act of 1980.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and 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. 1531-1543; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500, unless otherwise noted.

§ 17.11(h) [Amended]

2. Amend § 17.11(h), in the entry in the table under BIRDS for "Gnatcatcher, coastal California", in the last column "Special rules", by revising "NA" to read "17.41(b)".

3. 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 will not be considered a violation of section 9 of the Endangered Species Act of 1973, as amended (Act), if it results from activities conducted pursuant to the State of California's Natural Community Conservation Planning Act of 1991 (NCCP), and in accordance with a NCCP plan for the protection of coastal sage scrub habitat, prepared consistent with the State's NCCP Conservation and Process Guidelines, *provided that*:

(i) The NCCP plan has been prepared, approved, and implemented pursuant to California Fish and Game Code sections 2800-2840; and

(ii) The Fish and Wildlife Service (Service) has issued written concurrence that the NCCP 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 (MOU), 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 State's NCCP Conservation and Process Guidelines and the MOU are available from the U.S. Fish and

Wildlife Service, Carlsbad Field Office, 2730 Loker Avenue West, Carlsbad, CA 92008.) The Service shall monitor the implementation of the NCCP plan and may revoke its concurrence under this paragraph (b)(2)(ii) if the NCCP plan, as implemented, fails to adhere to the standards set forth in 50 CFR 17.32(b)(2).

(3) During the period that a NCCP plan referred to in paragraph (b)(2) of this section is being prepared, incidental take of the coastal California gnatcatcher will not be a violation of section 9 of the Act if such take occurs within an area under the jurisdiction of a local government agency that is enrolled and actively engaged in the preparation of such a plan and such take results from activities conducted in accordance with the NCCP Conservation Guidelines and Process Guidelines.

(4) The Service will monitor the implementation of the NCCP Conservation and Process Guidelines as a whole, and will conduct a review every 6 months to determine whether the guidelines, as implemented, are effective in progressing toward or meeting regional and subregional conservation objectives during the interim planning period. If the Service

determines that the guidelines are not effecting adequate progress toward or meeting regional and subregional conservation objectives, the Service will consult with the California Department of Fish and Game pursuant to the MOU to seek appropriate modification of the guidelines or their application as defined therein. If appropriate modification of the guidelines or their application as defined therein does not occur, the Service may revoke the interim take provisions of this special rule on a subregional or subarea basis. The Service will publish the findings for revocation in the *Federal Register* and provide for a 30-day public comment period prior to the effective date for revoking the provisions of the special rule in a particular area. Revocation would result in the reinstatement of the take prohibitions set forth under 50 CFR 17.31(a) and (b) in the affected NCCP area.

Dated: November 23, 1993.

George T. Frampton Jr.,

Assistant Secretary for Fish and Wildlife and Parks.

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