

FOR CONTRACT NO: 12-0H4404
PROJECT ID: 1200000217

INFORMATION HANDOUT

AGREEMENTS

UNITED STATES FISH AND WILDLIFE SERVICE

ROUTE: 12-Ora-73-10.0/24.5



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Ecological Services
Carlsbad Fish and Wildlife Office
6010 Hidden Valley Road, Suite 101
Carlsbad, California 92011



In Reply Refer To:
FWS-OR-12B0292-12I0532

AUG 29 2012

Mr. Chris Flynn
Senior Environmental Planner
California Department of Transportation
District 12
3347 Michelson Drive, Suite 100
Irvine, California 92612-1692

Attention: Ms. Shannon Crossen, Associate Environmental Planner

Subject: Informal Section 7 Consultation for the SR-73 Slope Erosion and Stability Project,
Orange County, California

Dear Mr. Flynn:

This is in response to your letter dated August 3, 2012, requesting our concurrence with your determination that the subject project is not likely to adversely affect the federally threatened coastal California gnatcatcher (*Poliptila californica californica*, gnatcatcher) in accordance with section 7 of the Endangered Species Act of 1973 (Act), as amended (16 U.S.C. 1531 *et seq.*). The California Department of Transportation (Caltrans) has assumed the Federal Highway Administration's (FHWA) responsibilities under the Act for this consultation in accordance with Sections 6004 and 6005 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) 2005, as described in the National Environmental Policy Act (NEPA) Delegation Pilot Program Memorandum of Understanding between FHWA and Caltrans (effective July 1, 2007) and codified in Renewed 23 U.S.C. 326 and 23 U.S.C. 327.

The purpose of the project is to reduce erosion and sediment flow into 39 flood control basins within the Caltrans right-of-way along State Route 73 (SR-73) by repairing erosion on the road slopes and bare areas within the median. This consultation addresses erosion repair work at Post Mile (PM) 20.793, off of the southbound side of SR-73, adjacent to Wildlife Undercrossing 2. At this location, project work includes grading, addition of concrete-lined drainage ditches, addition of pavement, brush-layering, temporary access roads, and placement of rip rap (Caltrans 2012).

The gnatcatcher is known to occur in the vicinity of the project. There are five gnatcatcher territories within the PM 20.793 site and the surrounding area (LSA Associates Inc. 2012). Erosion repair work is anticipated to result in direct effects to small portions of territories 1 and 2 including approximately 0.006 acre of permanent impacts resulting from a small amount of

paving and construction of concrete drainage ditches and 0.609 acre of temporary impacts from temporary access roads, grading, brush layering, placement of compost socks, and placement of a small amount of rip rap (0.06 acre) that will be filled with dirt and planted. No direct impacts are proposed or anticipated to territories 3, 4, or 5, although they may be subject to indirect impacts such as noise and vibration.

The following measures have been incorporated into the project design to avoid and minimize potential effects to the gnatcatcher:

1. All project work at the PM 20.793 site will be conducted between September 1 and February 14 to avoid the gnatcatcher breeding season.
2. The work on the southern slope, including grading and grubbing, was redesigned in coordination with the Carlsbad Fish and Wildlife Office (CFWO) to minimize impacts to the habitat within gnatcatcher territory 2.
3. The 0.609 acre temporary impact area will be revegetated with native species. In addition, Caltrans will initiate a habitat enhancement project in the vicinity of the erosion repair work that will remove invasive plant species and seed / plant native coastal sage scrub species on a minimum of 0.1 acre (for a total of at least 0.709 acre of restoration and enhancement) in the project vicinity. The proposed planting palette has been provided to the CFWO for review and approval. A 3-year plant establishment period is proposed that will include exotic species removal and reapplication of seed as necessary.
4. If maintenance of a coastal sage scrub restoration/enhancement area is necessary between February 15 and August 31, a biologist permitted by the CFWO will survey for gnatcatchers within the creation/restoration/enhancement area, access paths to it, and other areas susceptible to disturbances by site maintenance. Surveys will consist of three visits separated by 2 weeks starting March 1 of each maintenance/monitoring year. Work will be allowed to continue on the site during the survey period. However, if gnatcatchers are found during any of the visits, the applicant will notify and coordinate with the CFWO to identify measures to avoid and/or minimize effects to the gnatcatcher (e.g., nests and an appropriate buffer will be flagged by the biologist and avoided by the maintenance work).
5. A biologist ("Project Biologist") approved by the CFWO will be on site during: a) initial clearing and grubbing; and b) weekly during project construction within 200 feet of offsite gnatcatcher habitat to ensure compliance with all conservation measures. The Project Biologist¹ will be familiar with the habitats, plants, and wildlife in the project area to ensure that issues relating to biological resources are appropriately and lawfully managed. Caltrans will submit the biologist's name, address, telephone number, and work schedule on the project to the CFWO prior to initiating project impacts. The biologist will be provided with a copy of this consultation.

¹ The designated project biologist for this measure should be experienced in gnatcatcher biology and ecology.

6. Under the supervision of the Project Biologist, the limits of project impacts (including construction staging areas and access routes) will be clearly delineated with bright orange stakes, flags, or markers (fencing is not proposed due to the wildlife corridor in the project area) that will be installed in a manner that does not impact habitats to be avoided and such that they are clearly visible to personnel on foot and operating heavy equipment. If work occurs beyond the fenced or demarcated limits of impact, all work will cease until the problem has been remedied to the satisfaction of the CFWO. Temporary construction markers will be maintained in good repair until the completion of project construction and removed upon project completion.
7. The Project Biologist will submit a final report to the CFWO within 120 days of project completion including photographs of impact areas and adjacent habitat, documentation that authorized impacts were not exceeded, and documentation that general compliance with all conservation measures was achieved. The report will specify numbers, locations, and sex of gnatcatchers (if observed), observed gnatcatcher behavior (especially in relation to project activities), and remedial measures employed to avoid and minimize impacts to gnatcatchers. Raw field notes should be available upon request by the CFWO.
8. Wildlife fencing for Wildlife Undercrossing 2 may be temporarily relocated during construction but will be replaced upon project completion. Temporary construction fencing will be placed, to the greatest extent feasible, in a manner that will not impede wildlife movement through the undercrossing.
9. An employee education program will be developed and implemented by the Project Biologist. Each employee (including temporary, contractors, and subcontractors) will receive a training/awareness program prior to working on the proposed project. They will be advised of the potential impact to the listed species and the potential penalties for taking such species. At a minimum, the program will include the following topics: occurrence of the listed and sensitive species in the area (including photographs), their general ecology, sensitivity of the species to human activities, legal protection afforded these species, penalties for violations of Federal and State laws, reporting requirements, and project features designed to reduce the impacts to these species and promote continued successful occupation of the project area.
10. If invasive weed species are already growing within the project area, special care will be taken during transport, use, and disposal of soils containing invasive weed seeds to ensure that invasive weeds are not spread into new areas by the project. All heavy equipment will be washed and cleaned of debris prior to entering a new area to minimize the spread of invasive weeds. Eradication strategies will be implemented should an invasion of nonnative plant species be observed in the project work area by the Project Biologist.
11. No night work will occur at the PM 20.793 site; all work at the PM 20.793 site will be limited to the hours between dawn and dusk.

12. All equipment maintenance, staging, and dispensing of fuel, oil, coolant, or any other such activities will be restricted to designated disturbed/developed areas. They will be located such that runoff from the designated areas will not enter gnatcatcher habitat.
13. Erosion and sediment control devices used for the proposed project, including fiber rolls and bonded fiber matrix, will be made from biodegradable materials such as jute, with no plastic mesh, to avoid creating a wildlife entanglement hazard.
14. Cut and fill will be balanced within the project or the construction contractor will identify the source or disposal location. All spoils and material disposal will be disposed of properly.
15. To avoid attracting predators of the gnatcatcher, the project site will be kept as clean of debris as possible. Food-related trash items will be kept in enclosed containers and regularly removed from the site.
16. Project personnel will be prohibited from bringing domestic pets to the construction site to ensure that domestic pets do not disturb or depredate wildlife in the adjacent native habitat.

The proposed project will permanently impact 0.006 acre and temporarily impact 0.609 acre of coastal sage scrub habitat that is growing on the fill slope of SR-73. The erosion repair work will affect approximately 0.24 acre (8.45 percent) of coastal sage scrub within gnatcatcher territory 1, which was estimated to be approximately 2.84 acres, from placement of rip rap and soil, compost socks, brush layering, and an access road. The project will also affect approximately 0.375 acre (17.05 percent) of gnatcatcher territory 2, which was estimated to be approximately 2.2 acres, from grading, concrete ditch placement and paving, brush layering, and compost socks. No direct impacts are proposed or anticipated to territories 3, 4, or 5, though they may be subject to indirect impacts.

The percentages of impact to territories 1 and 2 are considered to be conservative estimates. Gnatcatcher territories in the project vicinity were roughly mapped during protocol surveys, and their sizes are likely underestimated, which would result in percentages of impact being overestimated. Gnatcatcher territories in coastal areas average 5.7 acres, with a minimum size of 2.5 acres (Atwood et al. 1998). The small and predominantly temporary impacts will occur in patches along the SR-73 fill slope. Because of the small size of the anticipated impacts and the fact that the impacts will be confined to small patches along the edges of the potential gnatcatcher territories, we have determined that sufficient habitat will remain to support essential breeding, feeding, and sheltering behaviors, and that the temporary loss of habitat will not significantly affect gnatcatcher survival or reproduction. For the purposes of section 7 consultation, an insignificant effect is one that is sufficiently small that a person would not be able to meaningfully measure, detect, or evaluate it.

To ensure that any effects of clearing activities on individual gnatcatchers are reduced to the level of insignificance, a Service-approved biologist will be present to ensure that gnatcatchers

are not directly killed or injured during vegetation removal activities. All work will be conducted during the non-breeding season, which will ensure that there is no potential for clearing activities to affect gnatcatcher breeding. Gnatcatchers may be passively flushed out of the work area in the direction of coastal sage scrub adjacent to the project site as vegetation is cleared for the erosion repair work. In the context of this project, this low-level flushing activity during the non-breeding season is considered an avoidance and minimization measure that has an insignificant effect on individual gnatcatchers and does not rise to the level of take as defined by the Act.

Temporary indirect impacts may occur to gnatcatchers as a result of noise, introduction of invasive species, erosion, sedimentation, and human encroachment resulting from the project. Noise and vibration associated with the use of mechanized equipment during construction of the proposed project has the potential to disrupt gnatcatcher foraging and sheltering behaviors in adjacent habitat by masking intraspecific communication and startling birds (e.g., see Dooling and Popper 2007 for a discussion of observed effects of highway noise on birds). Construction lighting has the potential to affect gnatcatchers. Light that alters natural light patterns in ecosystems can lead to increased predation, disorientation, and disruption of inter-specific interactions (Longcore and Rich 2004). Measures (listed above), such as conducting project work at PM 20.793 during daylight hours and during the non-breeding season, have been incorporated into the project to reduce potential noise and lighting impacts to gnatcatchers to the level of insignificance.

The project has also incorporated measures (listed above) to prevent the introduction and spread of invasive species, and to minimize construction erosion, sedimentation, and human encroachment into the adjacent habitat. SR-73 is an existing facility, so with the proposed measures, any increase in habitat degradation associated with these factors is likely to be insignificant.

Temporarily impacted coastal sage scrub will be restored in association with the project, and additional habitat enhancement will be conducted in the project vicinity as well. Restoration and enhancement activities may result in minor disturbance of gnatcatchers that are adjacent to or within the restoration sites, but only a relatively small amount of coastal sage scrub (0.709 acre) will be restored/enhanced, and measures (listed above) have been incorporated to ensure that gnatcatchers will not be significantly disrupted during breeding activities and that no nests will be destroyed as a result of restoration and enhancement activities. Therefore, effects to gnatcatcher associated with habitat restoration are anticipated to be insignificant. Further, the restoration and enhancement that will occur as a result of the project will improve the ability of the project area to support the gnatcatcher.

Because the above measures have been incorporated into the project, we concur with your determination that the proposed project is not likely to adversely affect the gnatcatcher. We base our concurrence on the following reasons: 1) all project work at PM 20.793 will be conducted during the non-breeding season; 2) native vegetation removal for the project will be conducted under the supervision of the Project Biologist; 3) the project impacts to approximately 0.615 acre of coastal sage scrub habitat are not anticipated to significantly interfere with essential

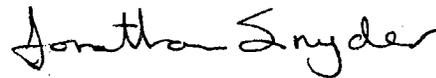
gnatcatcher feeding or sheltering behaviors; 4) construction activities will be modified to limit noise, lighting, introduction of invasive species, erosion, sedimentation, and human encroachment disturbance to gnatcatchers as described in the conservation measures above to ensure that gnatcatcher feeding and sheltering activities in the adjacent habitat are not substantially disrupted should they be present during construction. In addition, the project will protect nearby habitat by controlling erosion, and the project's temporary impact areas will be restored, and additional habitat enhancement will occur in the vicinity of the project, which will support the survival and recovery of the species.

Therefore, the interagency consultation requirements of section 7 of the Act have been satisfied. Although our concurrence ends informal consultation, obligations under section 7 of the Act will be reconsidered if new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not previously considered or this action is subsequently modified in a manner that was not considered in this assessment.

This document does not authorize take under the Migratory Bird Treaty Act (MBTA) of 1918, as amended (16 U.S.C. §§ 703-712). In order to avoid violation of the MBTA, all project work at PM 20.793 will be conducted between September 1 and February 14 to avoid the breeding season.

Thank you for your coordination on this project. If you have any questions regarding this letter, please contact Sally Brown of my staff at 760-431-9440 x278.

Sincerely,



for Karen A. Goebel
Assistant Field Supervisor

Literature Cited:

Atwood, J. L., S. H. Tsai, C. H. Reynolds, J. C. Luttrell, and M. R. Fugagli. 1998. Factors affecting estimates of California gnatcatcher territory size. *Western Birds* 29:269-279.

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Dooling, R. J. and A. N. Popper. 2007. The effects of highway noise on birds. Prepared by Environmental BioAcoustics LLC for the California Department of Transportation, Sacramento, California. 74 pp.

LSA Associates Inc. 2012. Protocol Coastal California Gnatcatcher Survey Results, State Route 73 (SR-73) Sedimentation Project, Cities of Irvine, Newport Beach, Orange County, California; Caltrans Project No. 1200000217; EA No. 0H440; SR-73 Sedimentation Project, Post Mile 20.88; LSA Project No. CDT1115. 3+pp.

Longcore, T. and C. Rich. 2004. Ecological light pollution. *Front Ecological Environment* 2(4):191-198.