

refer to Appendix A of the DEA of the proposed critical habitat designation for a more detailed discussion of potential economic impacts.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. Information for this analysis was gathered from the Small Business Administration, stakeholders, and the Service. For the above reasons and based on currently available information, we certify that if promulgated, the proposed designation would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

#### Authors

The primary authors of this notice are the staff members of the Idaho Fish and Wildlife Office, Pacific Region, U.S. Fish and Wildlife Service.

#### Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: October 17, 2011.

Eileen Sobeck,

Acting Assistant Secretary for Fish and Wildlife and Parks.

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[Docket No. FWS-R8-ES-2011-0066; 92220-1113-0000; ABC Code: C5]

#### Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition to Delist the Coastal California Gnatcatcher as Threatened

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

**ACTION:** Notice of 90-day petition finding.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to remove the coastal California gnatcatcher (*Polioptila californica californica*) as a threatened species under the Endangered Species Act of 1973, as amended (Act). Based on our review, we find that the petition does not present substantial scientific or commercial information to indicate that delisting the coastal California gnatcatcher may be

warranted. Therefore, we are not initiating a status review in response to this petition. We also conclude that the coastal California gnatcatcher constitutes a valid subspecies and are no longer considering whether to propose its reclassification to a distinct population segment (DPS) under the Act. We ask the public to submit to us any new information that becomes available concerning the status of, or threats to, the coastal California gnatcatcher or its habitat at any time.

**DATES:** The finding announced in this document was made on October 26, 2011.

**ADDRESSES:** This finding is available on the Internet at <http://www.regulations.gov> at Docket Number FWS-R8-ES-2011-0066. Supporting documentation we used in preparing this finding is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011. Please submit any new information, materials, comments, or questions concerning this finding to the above address.

**FOR FURTHER INFORMATION CONTACT:** Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, U.S. Fish and Wildlife Service, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011, by telephone at 760-431-9440, or by facsimile to 760-431-9624. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

#### SUPPLEMENTARY INFORMATION:

##### Background

Section 4(b)(3)(A) of the Act (16 U.S.C. 1531 *et seq.*) requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition, and publish our notice of the finding promptly in the **Federal Register**.

Our standard for substantial scientific or commercial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is “that amount of information that would lead a reasonable person to believe that

the measure proposed in the petition may be warranted” (50 CFR 424.14(b)(1)). If we find that substantial scientific or commercial information was presented, we are required to promptly conduct a species status review, which we subsequently summarize in our 12-month finding.

#### Petition History

We received a petition, dated April 9, 2010, from the Pacific Legal Foundation (PLF), representing the Coalition of Labor Agriculture, and Business (COLAB), Property Owners Association of Riverside County, and M. Lou Marsh, M.D., on April 12, 2010, to remove the coastal California gnatcatcher from the Federal List of Endangered and Threatened Wildlife (List) under the Act (PLF 2010, pp. 1-9). The petition clearly identifies itself as such and included the requisite identification information for the petitioner(s), as required in 50 CFR 424.14(a). This finding addresses the petition.

#### Previous Federal Actions

The coastal California gnatcatcher has been the subject of numerous **Federal Register** publications since its inclusion as a category two candidate species in 1982 (47 FR 58454, December 30, 1982; Service 2010, p. 3) (see <http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=B08X>). On March 22, 1991, the Service published a 90-day finding addressing seven petitions to list five species as threatened or endangered, including three petitions pertaining to the coastal California gnatcatcher (56 FR 12146), and concluded that substantial information was presented to indicate that listing might be warranted. This finding led to the September 17, 1991, publication of a proposed rule to list the coastal California gnatcatcher as endangered; the public comment period for this proposed rule lasted 6 months, until March 16, 1992 (56 FR 47053). The proposed rule also constituted our 12-month finding, which the proposed rule referred to as the “final finding”, on the petition.

On September 22, 1992, the Service reopened the public comment period on the proposed rule to list the coastal California gnatcatcher as endangered for an additional 30 days, from September 22, 1992, until October 22, 1992, and notified the public that we needed extra time to obtain and review the information regarding the taxonomy of the coastal California gnatcatcher (57 FR 43686). On March 30, 1993, the Service published a final rule to list the coastal California gnatcatcher as a threatened species (58 FR 16742). In that rule, we

did not designate critical habitat, because we had determined that designating critical habitat for the gnatcatcher was not prudent.

On March 30, 1993, the same day that the final listing rule published in the **Federal Register**, we also published a proposed rule to adopt a special rule under section 4(d) of the Act (16 U.S.C. 1531 *et seq.*) to allow for the take of the coastal California gnatcatcher (58 FR 65088). On December 10, 1993, the Service published in the **Federal Register** a final rule adopting the special rule concerning take of the coastal California gnatcatcher (58 FR 65088). The special rule is codified in the Code of Federal Regulations (CFR) at 50 CFR 17.41(b).

In a Memorandum Opinion and Order filed in the U.S. District Court for the District of Columbia on May 2, 1994 (*Building Industry Association of Southern California et al. v. Babbitt*), the Court vacated the listing determination for the coastal California gnatcatcher, stating the Secretary of the Interior should have made available the raw data that formed the basis of Dr. Jonathan Atwood's report (Atwood 1991) that concluded subspecies recognition for the coastal California gnatcatcher. We subsequently made these data available to the public for review and comment on June 2, 1994, for a period of 60 days, until August 1, 1994 (59 FR 28508). On June 16, 1994, the Court reinstated the threatened status for the coastal California gnatcatcher until the public could review and comment on the raw data analyzed by Atwood.

Before the comment period for the June 2, 1994, **Federal Register** publication ended, we extended that public comment period (59 FR 38426, July 28, 1994), and we subsequently extended it two more times, on August 26, 1994 (59 FR 44125), and October 25, 1994 (59 FR 53628). Therefore, the public comment period on data pertaining to the subspecific taxonomy of the coastal California gnatcatcher lasted from June 2, 1994, until December 1, 1994. Further, on December 27, 1994, we reopened the public comment period on those data for an additional 30 days, until January 26, 1995 (59 FR 66509).

On March 27, 1995, the Service published in the **Federal Register** (60 FR 15693) an extensive review of the Atwood data (including independent scientific analyses of the Atwood data) received during the public comment periods concerning the subspecies classification of the coastal California gnatcatcher. We affirmed our earlier determination that the coastal California

gnatcatcher is a valid subspecies (58 FR 16742, March 30, 1993; 58 FR 65088, December 10, 1993) and affirmed the coastal California gnatcatcher's threatened status under the Act.

On February 8, 1999, the Service published in the **Federal Register** (64 FR 5957) a notice of determination that it was prudent to designate critical habitat for the coastal California gnatcatcher. We subsequently published a proposed rule to designate critical habitat for the coastal California gnatcatcher (65 FR 5945; February 7, 2000); announced a reopening of comment period and availability of a draft economic analysis for the February 7, 2000, proposed rule (65 FR 40073; June 29, 2000); and published a final rule designating critical habitat for the coastal California gnatcatcher (65 FR 63679; October 24, 2000).

In response to a June 11, 2002, court ruling from the U.S. District Court for the Central District of California (*Building Industry Association of Southern California et al. v. Norton*), the Service published a proposed rule to revise designated critical habitat for the coastal California gnatcatcher on April 24, 2003 (68 FR 20228). In this proposed rule, the Service reconsidered the economic impacts associated with designating any particular area as critical habitat, announced that we were considering whether the listing of the coastal California gnatcatcher should be amended as a DPS in light of a study by Zink *et al.* (2000) questioning the genetic distinctiveness of the coastal California gnatcatcher, and opened a 60-day period for public comments (68 FR 20228). On April 8, 2004, the Service published two documents related to the coastal California gnatcatcher: The first reopened the public comment period on the proposed determination of a DPS of the coastal California gnatcatcher (69 FR 18515), and the second was a notice of availability of draft economic analysis and a public hearing on the proposed April 24, 2003, designation of critical habitat (69 FR 18516). The Service published its final rule concerning the revised designation of critical habitat on December 19, 2007 (72 FR 72009), for the coastal California gnatcatcher. In that **Federal Register** publication, we announced that we were continuing to evaluate whether the current listing of the coastal California gnatcatcher as a subspecies under the Act should be retained or changed.

In 2010, we completed a 5-year status review of the coastal California gnatcatcher (Service 2010, pp. 1–51). After analyzing all available information, including Zink *et al.* (2000), we recommended no change in

its threatened status and indicated that we would not pursue delineation of a DPS for the coastal California gnatcatcher (Service 2010, p. 36; [http://ecos.fws.gov/docs/five\\_year\\_review/doc3571.pdf](http://ecos.fws.gov/docs/five_year_review/doc3571.pdf)). With a recommendation of no change in threatened status, the coastal California gnatcatcher maintains its recovery priority number of 9C, based on the taxon's status as a subspecies facing a high degree of threat with a low recovery potential.

#### *Species Information*

For information on the biology and life history of the coastal California gnatcatcher, see the 2010 coastal California gnatcatcher 5-year review (Service 2010, pp. 6–11).

#### **Evaluation of Information for This Finding**

Under section 3(16) of the Act, we may consider for listing any species, including subspecies, of fish, wildlife, or plants, or any DPS of vertebrate fish or wildlife that interbreeds when mature (16 U.S.C. 1532(16)). Such entities are considered eligible for listing under the Act (and, therefore, are referred to as listable entities), should we determine that they meet the definition of an endangered or threatened species.

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations at 50 CFR 424 set forth the procedures for adding a species to, or removing a species from the List. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act:

- (A) The present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) Overutilization for commercial, recreational, scientific, or educational purposes;
- (C) Disease or predation;
- (D) The inadequacy of existing regulatory mechanisms; or
- (E) Other natural or manmade factors affecting its continued existence.

We must consider these same five factors in delisting a species. We may delist a species according to 50 CFR 424.11(d) if the best available scientific and commercial data indicate that the species is neither endangered nor threatened for the following reasons:

- (1) The species is extinct;
- (2) The species has recovered and is no longer endangered or threatened; or
- (3) The original scientific data used at the time the species was classified were in error.

In making this 90-day finding, we evaluated whether information

regarding the coastal California gnatcatcher, as presented in the petition and other information available in our files, is substantial, thereby indicating that the petitioned action may be warranted. The petition did not assert that the coastal California gnatcatcher is extinct, nor do we have information in our files indicating that the coastal California gnatcatcher is extinct. The petition did not assert that the coastal California gnatcatcher has recovered and is no longer endangered or threatened, nor do we have information in our files indicating the coastal California gnatcatcher has recovered. The petition also did not contain any information regarding threats to the coastal California gnatcatcher. We recently completed a 5-year status review in which we determined that the threats found at the time of listing remain, and we recommended that the coastal California gnatcatcher retain its threatened status (Service 2010, pp. 11–35). The petition asserts that the original scientific data used at the time the coastal California gnatcatcher was listed as Threatened under the Act were in error. Our evaluation of the information included with the petition is presented below.

The petitioners claim the coastal California gnatcatcher is not a valid subspecies and request we remove the coastal California gnatcatcher from the List. The petitioners present an unpublished literature review prepared for the Pacific Legal Foundation by Dr. Matthew A. Cronin (2009, *in litt.* pp. 1–18), which reviewed “\* \* \* post-listing studies to explain why the subspecies classification for the California gnatcatcher is no longer tenable” (PLF 2010, p. 4). The petition presented two published journal articles, Zink *et al.* (2000, pp. 1394–1405) and Skalski *et al.* (2008, pp. 199–220), supporting three issues of concern raised by Cronin (2009, *in litt.* pp. 1–18). The issues of concern raised by Cronin and stated in the petition are:

(1) “Zink *et al.* (2000, pp. 1394–1405) determined that Atwood’s observed morphological characteristic changes are not representative of genetic differentiation, which differentiation could support a subspecies classification. The Zink study’s conclusion is all the more significant given that Atwood was a co-author. In their paper, Zink and Atwood expressly state that *P. californica* should have no subspecies.

(2) Skalski *et al.* (2008, pp. 199–220) determined that Atwood’s statistical analyses were seriously flawed because Atwood’s supposed diagnostic characters support a geographic cline,

not a distinct break in character distribution markers, which could support a subspecies classification.

(3) Skalski *et al.* (2008, pp. 199–220) determined that Atwood’s data sets were confounded: many of Atwood’s specimens may not have been representative of wild gnatcatchers.”

The first issue presented by the petitioners refers to Zink *et al.* (2000, pp. 1394–1405), which asserts that the morphological differences (*i.e.*, plumage coloration, body size) identified by Atwood (1988, pp. iii–vii, 1–74; 1991, pp. 118–133) do not represent genetic differentiation that supports subspecies classification. Zink *et al.* (2000, p. 1399) examined variation within the mitochondrial (mt) mtDNA control region and three mtDNA genes of the coastal California gnatcatcher and concluded the genetic information does not support recognition of the coastal California gnatcatcher as a subspecies. Zink *et al.* (2000) does not state that *Poliophtila californica* should have no subspecies, but instead suggests that currently recognized subspecies may not be equivalent to ecologically significant units.

As a result of uncertainty in the subspecies status of the coastal California gnatcatcher raised by Zink *et al.* (2000, pp. 1394–1405), in 2003 and 2004 the Service solicited public comments on a proposed determination of a DPS for the coastal California gnatcatcher (68 FR 20228; 69 FR 18515). Public comments received in 2004 on this issue were highly polarized, though most expressed concern with the validity or usefulness of redefining the coastal California gnatcatcher as a DPS. Some commenters advocated delisting the coastal California gnatcatcher and asserted that the application of the DPS policy was inappropriate. They argued that the information presented by Zink *et al.* (2000, pp. 1394–1405) challenging the subspecies classification for the coastal California gnatcatcher superseded over 100 years of previously published taxonomic treatments recognizing morphological distinctiveness to varying degrees within the greater California gnatcatcher taxon, including (Brewster 1881, p. 103; Brewster 1902, p. 210; Thayer and Bangs 1907, p. 138; Grinnell 1926, p. 496; Grinnell 1928, p. 227; van Rossem 1931, p. 35; Hellmayr 1934, p. 508; AOU 1957, p. 451; Miller *et al.* 1957, pp. 204–205; Mayr and Paynter 1964, pp. 449–450; Atwood 1988, p. 61; Atwood 1991, p. 127; Phillips 1991, p. 25; Mellink and Rea 1994, p. 53; Howell and Webb 1995, p. 578). However, many public commenters advocated the retention of the coastal California gnatcatcher as a

listed subspecies and questioned if information from one scientific publication was sufficient to overrule information from multiple, previously published, scientific papers that acknowledge the distinctiveness of the coastal California gnatcatcher and lend support to its retention as a listed subspecies. The Service also received comments from peer-reviewers, the majority of which cautioned against putting too much weight on Zink *et al.*’s (2000) conclusions and questioned whether the analysis by Zink *et al.* (2000, pp. 1394–1405) supported a change of the coastal California gnatcatcher’s subspecific status (2000, pp. 1394–1405).

In 2004, the Service also convened a panel of seven Federal scientists (five Service biologists not associated with the listing of the coastal California gnatcatcher, one Smithsonian Institute biologist, and one National Park Service biologist) to discuss and evaluate how well scientific evidence supports the following statements:

(1) The coastal California gnatcatcher (*Poliophtila californica californica*) is a valid subspecies.

(2) The coastal California gnatcatcher is discrete (substantially divergent in physical, physiological, ecological, genetic, or behavioral characters) from other portions of the species.

(3) Loss of the coastal California gnatcatcher would represent a significant diminution of the species as a whole (in terms of evolutionary legacy or range of biological characteristics represented within the species).

(4) The coastal California gnatcatcher is neither a valid subspecies nor a discrete and significant portion of the species.

(5) The mtDNA evidence presented by Zink *et al.* (2000) alone constitutes sufficient information to overturn the existing taxonomy.

Overall, panelists supported retaining the coastal California gnatcatcher as a subspecies under the Act for reasons including (but not limited to):

(1) “There is evidence showing the coastal California gnatcatcher differs in several morphological characters from gnatcatcher populations farther south (body plumage color, tail length, amount of white in tail, and brownish plumage in females). All authorities have recognized it as a distinct taxon based on its physical appearance since it was first described. While some doubt has been cast on recent analyses of morphological data by Atwood (1991), problems with that analysis do not invalidate previous and subsequent morphological work (Grinnell 1926, van

Rossem 1931, Mellink and Rea 1994.” (VanderWerf, *in litt.* 2004, p. 1).

(2) Although Zink *et al.* (2000) concluded that mitochondrial DNA does not support the existence of a subspecies of *Polioptila californica*, “mtDNA represents only a single genetic marker among many potential markers that could provide an indication of population subdivision, subspecies, or local adaptation. Other molecular markers with higher mutation rates may reveal more recent patterns of divergence and would be more likely to show population differentiation, such as nuclear genetic markers, which might be linked to selected traits and would be expected to evolve more rapidly than mtDNA. None of these other markers have been investigated” (VanderWerf, *in litt.* 2004, pp. 1–2).

(3) “Phylogenetic reconstructions and taxonomic determinations should be, and usually are, based on a variety of morphological, genetic (including nuclear and mtDNA), and behavioral evidence.” (VanderWerf, *in litt.* 2004, p. 2).

(4) “Patterns in mtDNA variations can be extremely variable and may or may not have anything to do with the patterns seen in nuclear markers, or with morphological, ecological, physiological, or behavioral data, and therefore are often not reflective of important differences between species, subspecies or populations. Patterns of genetic variation can be totally different from, and uninformative about, important adaptive differences between taxa (Crandall *et al.* 2000). Besides the California gnatcatcher, there are many examples in which mtDNA evidence failed to detect documented differences in morphology, nuclear DNA and ecological adaptation, including the Common raven (Omland *et al.* 2000), Orchard oriole (Baker *et al.* 2003), Florida grasshopper sparrow (Bulgin *et al.* 2003), and Swamp sparrows (Greenberg *et al.* 1998).” (VanderWerf, *in litt.* 2004, p. 2).

(5) “The most comprehensive review of available mtDNA data was conducted by Funk and Omland (2003), who found that 23 percent of 2,319 species showed evidence of paraphyly or polyphyly based on mtDNA (sharing of mtDNA haplotypes among species), and they concluded that the causes of this must be understood to avoid erroneous phylogenetic interpretations.” (VanderWerf, *in litt.* 2004, p. 2).

(6) “Loss of the coastal California gnatcatcher would substantially decrease the species’ range and, since it occurs in a somewhat different habitat type from other populations, would diminish the ecological range of

characteristics present in the species. Although the adaptive significance of the morphological differences has not been investigated, it is possible they represent important adaptations to the local environment, and that their loss would diminish the species evolutionary legacy.” (VanderWerf, *in litt.* 2004, pp. 1–2).

(7) “Zink *et al.* (2000) provide some interesting information on the evolutionary history of [gnatcatcher] populations, but the argument that the California gnatcatcher is not distinct from other populations is based on a single genetic character, mtDNA, and this is a far too narrow and limited technique for making determinations of taxonomic validity. Most features of an organism are determined by multiple (nuclear) genes, not by mtDNA. Taxonomists and other biologists interested in evolutionary units cannot ignore available data on other aspects of the genome and physical and ecological characters (Crandall *et al.* 2000). Under the very narrow criterion of Zink *et al.* (2000) few subspecies would be valid, and many full species would not be recognized, despite abundant and definitive data that they are no longer capable of interbreeding with other species (Avice 2004).” (VanderWerf, *in litt.* 2004, pp. 2–3).

The panel concluded that the scientific evidence: (1) Substantially supports that the coastal California gnatcatcher is a valid subspecies; (2) substantially supports that the coastal California gnatcatcher is discrete from other portions of the species; (3) substantially supports that the loss of the coastal California gnatcatcher would represent a significant diminution of the species as a whole; (4) offers little support for the assertion that the coastal California gnatcatcher is neither a valid subspecies nor a discrete and significant portion of the species; and (5) displays little support that the mtDNA evidence presented by Zink *et al.* (2000, pp. 1394–1405) alone constitutes sufficient information to overturn the existing taxonomy. The panel also noted that further decision on the status of the taxon should wait for analyses of a variety of morphological, genetic (including nuclear and mtDNA), and behavioral evidence.

In 2005, Edwards *et al.* (p. 6552) asserted that nuclear genes, not mtDNA, should have priority in determining avian species delimitation. Additionally, Haig and Winker (2010, pp. 172, 174) asserted the best approach for subspecies recognition is to include multiple characters (mtDNA, nuclear DNA, morphology) and that reliance on a single locus with unique properties,

such as mtDNA, may not accurately reflect the genetic differences among populations due to random genetic effects (Funk *et al.* 2007, pp. 1287–1288).

We acknowledge that the taxonomic classification of the coastal California gnatcatcher has been the subject of considerable scientific debate. The Service also addresses the information presented by Zink *et al.* (2000) in a recent 5-year review for the coastal California gnatcatcher (Service 2010, pp. 4–5). Species experts have recognized the coastal California gnatcatcher as a distinct taxon based on its physical appearance since it was first described, and the taxon is recognized as a distinct subspecies by the American Ornithologists Union (AOU 1957, p. 451). Some doubt has been cast on analyses of morphological data by Atwood (1991, pp. 118–133) (*e.g.*, Cronin 1997, p. 663), but problems with those analyses do not invalidate previous and subsequent morphological work (Grinnell 1926, pp. 493–500; van Rossem 1931, pp. 36–37; Phillips 1991, pp. 25–26; Mellink and Rea 1994, pp. 50–62). Analysis by Zink *et al.* (2000, p. 1402) suggested that the northern population of California gnatcatchers does not appear to be unique, and that not all recognized subspecies equate to evolutionary significant units, although they were unable to expressly state that *P. californica* should have no subspecies, as claimed in the petition. We concluded in our 5-year review (Service 2010, pp. 4–5), that Zink *et al.* (2000, pp. 1394–1405) was insufficient to disregard the existing taxonomic status of the coastal California gnatcatcher and the information from multiple scientific papers that support subspecies classification of *P.c. californica*. We affirm that conclusion here. We conclude that the information and analysis in Zink *et al.* 2000 does not present substantial information that the current subspecies taxonomic classification of the coastal California gnatcatcher may be in error.

The second issue presented by the petitioners refers to Skalski *et al.* (2008, pp. 199–220) and the assertion that the statistical analyses applied to the morphological data (collected by Atwood in determining the subspecies status of the coastal California gnatcatcher) were not appropriate statistical techniques for determining subspecific species classification. The issue Skalski *et al.* (2008, pp. 199–220) raises concerns the use of numerous tests of equality of sample means, cluster analysis, and discriminant analysis (Atwood 1991; Atwood, *in litt.* 1994; Link and Pendleton, *in litt.* 1994;

McDonald *et al.*, *in litt.* 1994; Messer, *in litt.* 1994, Newton, *in litt.* 1994), which supported the subspecies classification. Skalski *et al.* (2008, pp. 199–220) assert these analyses are subject to high rates of false positives (Type I error) and therefore determination of classification as a subspecies should be based on analyses designed to detect specific alternative hypotheses, such as step and spline regression, while being insensitive to the sample location distributions (Skalski *et al.* 2008, p. 217).

We examined this paper and determined the statistical analysis conducted by Skalski *et al.* (2008, pp. 210–212), a spline regression model using the log-length of the white spot on the sixth rectrix (tail feather) of the California gnatcatcher, was a new interpretation of old data and examined only one character, as an example of the statistical analysis of the 31 that Atwood (1988, pp. iii–vii, 1–74; 1991, 118–133) analyzed in his research. Skalski's analysis of this character, in contrast to Atwood's analysis, did not detect variation in the character consistent with subspecific designations within the California gnatcatcher. However, the Service concludes the results of this restrictive analysis do not present substantial evidence supporting potential revision of the subspecific taxonomic classification of the coastal California gnatcatcher. While the issue of concern raised by Skalski *et al.* (2008, pp. 199–220) and the petitioners relates to the validity of the statistical technique used, and we acknowledge that application of different statistical methods may yield different conclusions, the study's application of alternative methods of data analyses is limited. Without further analysis of additional characters, few conclusions can be made as to the appropriate taxonomic classification of the coastal California gnatcatcher. The current information does not provide substantial information that the current subspecies taxonomic classification of the coastal California gnatcatcher may be in error.

We previously analyzed the statistical technique utilized to determine subspecific classification of the coastal California gnatcatcher and addressed this topic in a publication in the **Federal Register** that determined that the conclusions reached by Atwood (1991) were reasonable and were largely consistent with five other independent and alternative scientific analyses (Link and Pendleton, *in litt.* 1994; Atwood, *in litt.* 1994; McDonald *et al.*, *in litt.* 1994; Messer, *in litt.* 1994, Newton, *in litt.* 1994) that were received at that time

and support 30° north latitude as the southern subspecific boundary of *P.c. californica* (60 FR 15698; March 27, 1995). We continue to agree that Atwood's conclusions are reasonable because they are based on scientifically sound methodology that represents the best available scientific and commercial data available (60 FR 15699; March 27, 1995), as required in 50 CFR 424.11(d).

The final issue presented by the petitioners also refers to Skalski *et al.* (2008, pp. 199–220) and their assertion that “foxing” (the change in feather color associated with time after preparation of the specimen) of museum specimens might have biased Atwood's original and subsequent analysis of phenotypic characters, including plumage brightness (Atwood 1988, pp. iii–vii, 1–74; 1991, 118–133), by confounding the specimen's year of collection with measures of brightness of plumage. Significantly, Skalski *et al.* (2008) did not reexamine the specimens evaluated by Atwood, but instead constructed scatterplot diagrams that compared the area of specimen collection (latitude) with time (year) collected.

Mellink and Rea (1994, pp. 50–62), in their analyses of coastal California gnatcatcher taxonomy, collected samples from the field and specimens from museums for comparison of genetic differences. The petition argues that the study skins analyzed by Mellink and Rea (1994) were also subject to foxing. However, Mellink and Rea (1994, pp. 52–53) excluded samples that were worn, damaged, or soiled to eliminate discrepancies among samples and concluded that within this species, foxing is “\* \* \* slight and seems restricted largely to the gray underparts, with little or no apparent change in brown areas.”

Additionally, as mentioned under the second issue presented by the petitioners, five independent statistical analyses were conducted and submitted to the Service, in response to a request for public comment (59 FR 28508, 59 FR 38426, 59 FR 44125, 59 FR 53628, 59 FR 66509). These analyses (Link and Pendleton, *in litt.* 1994; Atwood, *in litt.* 1994; McDonald *et al.*, *in litt.* 1994; Messer, *in litt.* 1994; Newton, *in litt.* 1994) as well as Mellink and Rea (1994) were addressed in the March 27, 1995, **Federal Register** publication (60 FR 15693) announcing our determination that the coastal California gnatcatcher is a valid subspecies and affirming the coastal California gnatcatcher's threatened status under the Act (60 FR 15695). In that document, we concluded that there was no justification to support a claim that Atwood's 1991 data were

incomplete, censored, or otherwise inadequate. Furthermore, we concluded that the analysts of the five independent reviews of Atwood's 1991 data took adequate care to remove potential effects of confounding of specimen age and collection area (60 FR 15695; March 27, 1995).

We conclude that the petitioner did not present substantial new information regarding the subspecific status of the coastal California gnatcatcher. The genetic information provided in the petition (Zink *et al.* 2000) and assertions of improper statistical analyses (Skalski *et al.* 2008) have been the focus of several Service (Service 2010) and independent scientific reviews (Link and Pendleton, *in litt.* 1994; Atwood, *in litt.* 1994; McDonald *et al.*, *in litt.* 1994; Messer, *in litt.* 1994; Newton, *in litt.* 1994; Mellink and Rea 1994; VanderWerf, *in litt.* 2004) and the Service has concluded that the information is insufficient to support reclassification (see Service 2010, pp. 1–51). Issues regarding morphological analyses and specimen quality have also been considered by the Service and by numerous other taxonomic examinations, all of which support the subspecific status of the coastal California gnatcatcher (Grinnell 1926, pp. 493–500; van Rossem 1931, pp. 36–37; Phillips 1991, pp. 25–26; Mellink and Rea 1994, pp. 50–62). We hereby reaffirm our determination and recognition of the coastal California gnatcatcher as a distinct taxon, at the rank of subspecies as *Polioptila californica californica*.

### Finding

In summary, the petition does not present substantial information to support a finding that the removal of the coastal California gnatcatcher from the List of Endangered and Threatened Wildlife may be warranted on the ground that the coastal California gnatcatcher is not a valid subspecies.

The petition presents an unpublished review by Cronin (2009, pp. 1–18) contending that subspecies classification for the coastal California gnatcatcher is not reasonable. The review discusses articles by Skalski *et al.* (2008, pp. 1394–1405) and Zink *et al.* (2000), that provide analyses of Atwood's (1991) data. We previously reviewed Atwood's data (1988 and 1991) and concluded that Atwood's conclusion that the coastal California gnatcatcher is a valid subspecies is adequately supported (60 FR 15693, March 27, 1995). We also convened a panel of experts in 2004 to consider the Zink *et al.* (2000) study. The panel concluded that Zink *et al.* (2000) offers

little and insufficient support for reconsidering the coastal California gnatcatcher's subspecies classification. Our recent status review also concluded that the coastal California gnatcatcher represents a valid subspecies (Service 2010, pp. 1–51).

The petitioners also assert that the Service should overturn the classification of the coastal California gnatcatcher as a subspecies due to inappropriate techniques used in Atwood's (1991) statistical analysis of morphological data and present a review and interpretation of two journal articles in support of their claim. The Service reviewed the articles and determined that they do not present new information; instead they consist of an incomplete interpretation of old data. Moreover, the concerns raised by petitioners regarding "foxing" and the statistical technique utilized to analyze the data, were previously considered and rejected in our March 27, 1995, **Federal Register** publication affirming that the coastal California gnatcatcher meets the definition of a "species" under the Act (60 FR 15693), a Service status review (Service 2010, pp. 1–51), and a peer-reviewed journal (Mellink and Rea 1994, pp. 50–62).

Morphological variation within the California gnatcatcher species has been recognized as an indicator of the distinctiveness of populations and subspecific groups by numerous biologists, publications, and the AOU before and after Atwood's conclusion that the coastal California gnatcatcher is a valid subspecies (Brewster 1881, p. 103; Brewster 1902, p. 210; Thayer and Bangs 1907, p. 138; Grinnell 1926, p. 496; Grinnell 1928, p. 227; van Rossem 1931, p. 35; Hellmayer 1934, p. 508; AOU 1957, p. 451; Miller *et al.* 1957, pp. 204–205; Paynter 1964, pp. 449–450; Atwood 1988, p. 61; Atwood 1991, p. 127; Phillips 1991, p. 25; Mellink and Rea 1994, p. 53; Howell and Webb 1995, p. 578). Thus, we conclude that the best information available indicates that the coastal California gnatcatcher is a valid subspecies and that the original scientific data evaluated and methods of analysis used at the time of listing were not in error as suggested by the petitioners.

The sole focus of the petition is the contention that the coastal California gnatcatcher is not a valid subspecies and therefore should be delisted. Petitioners do not provide any information related to the other relevant factors that the Service considers when reviewing proposals to list or delist a species, including the factors provided under subsection 4(a)(1) of the Act. The information in Service files, including

our recent 5-year review of the species (Service 2010, pp. 1–51), confirms that threats to the coastal California gnatcatcher remain.

We have reviewed the petition, as well as the literature cited in the petition, and we have evaluated that information and information in our files. Based on this review and evaluation, we find that the petition does not present substantial scientific or commercial information to indicate that removal of the coastal California gnatcatcher from the List may be warranted. Although we will not commence a status review in response to this petition, we will continue to monitor the population status and trends of the coastal California gnatcatcher, potential threats to the coastal California gnatcatcher, and ongoing management actions that might be important with regard to the conservation of the coastal California gnatcatcher across its range.

Because we conclude that the coastal California gnatcatcher is a valid subspecies under the Act, we are no longer considering whether to propose its reclassification to a DPS under the Act. This document reaffirms our recognition of the coastal California gnatcatcher as a subspecies. We encourage interested parties to continue to gather data that will assist with the conservation of the subspecies. If you wish to provide information regarding the coastal California gnatcatcher, you may submit your information or materials to the Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES**), at any time.

#### References Cited

A complete list of references cited is available on the Internet at <http://www.regulations.gov> and upon request from the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

#### Author

The primary authors of this notice are the staff members of the Carlsbad Fish and Wildlife Office.

#### Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: October 14, 2011.

**Gregory E. Siekaniec**,  
*Acting Director, U.S. Fish and Wildlife Service.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 110707371–1617–01]

RIN 0648–BB28

#### Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; Specifications and Management Measures

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule, request for comments.

**SUMMARY:** NMFS proposes 2012 specifications and management measures for Atlantic mackerel and butterfish, and 2012–2014 specifications for *Illex* and longfin squid. This is the first year that the specifications are being recommended for Atlantic mackerel and butterfish under the provisions of the Mid-Atlantic Fishery Management Council's (Council) Annual Catch Limit and Accountability Measure Omnibus Amendment (Omnibus Amendment). The two squid species are exempt from these requirements because they have a life cycle of less than 1 year. This action also proposes to adjust the closure threshold for the commercial mackerel fishery to 95 percent (from 90 percent), to allow the use of jigging gear to target longfin squid if the longfin squid fishery is closed due to the butterfish mortality cap, and to require a 3-inch (76-mm) minimum codend mesh size in order to possess more than 2,000 lb (0.9 mt) of butterfish (up from 1,000 lb (0.45mt)). Finally, this rule proposes minor corrections in existing regulatory text intended to clarify the intent of the regulations. These proposed specifications and management measures promote the utilization and conservation of the Atlantic Mackerel, Squid, and Butterfish (MSB) resource.

**DATES:** Public comments must be received no later than 5 p.m., eastern standard time, on November 25, 2011.

**ADDRESSES:** Copies of supporting documents used by the Mid-Atlantic Fishery Management Council (Council), including the Environmental Assessment (EA) and Regulatory Impact Review (RIR)/Initial Regulatory Flexibility Analysis (IRFA), are available from: Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201,