

## Next Steps

We will evaluate the ITP application, associated documents, and public comments in reaching a final decision on whether the application meets the requirements of section 10(a) of the ESA (16 U.S.C. 1531 *et seq.*). The HCP and EA may change in response to public comments. After completion of the EA, we will determine whether the proposed action warrants a finding of no significant impact or whether an environmental impact statement should be prepared. We will also evaluate whether the proposed ITP action would comply with the requirements of section 7 of the ESA by conducting a formal consultation on the proposed ITP action. We will use the results of this consultation, in combination with the above findings, in our final analysis to determine whether or not to issue an ITP. If the requirements are met, we will issue the ITP to the applicant. We will not make our final decision until after the end of the 45-day public comment period, and we will fully consider all comments and information we receive during the public comment period.

## Authority

We provide this notice in accordance with the requirements of section 10(c) of the ESA and its implementing regulations (50 CFR 17.22 and 17.32) and NEPA and its implementing regulations (40 CFR 1506.6).

Dated: September 14, 2017.

**Theresa E. Rabot,**

*Deputy Regional Director, Pacific Region, U.S. Fish and Wildlife Service, Portland, Oregon.*

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

[FWS-R8-ES-2017-N107;  
FXES11140800000-178-FF08ECAR00]

### Endangered and Threatened Wildlife and Plants; Incidental Take Permit Application; Proposed Low-Effect Habitat Conservation Plan for the Coastal California Gnatcatcher and Associated Documents; Brea, California

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

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, have received an application from Orange County Waste & Recycling for a 5-year incidental take

permit for the threatened coastal California gnatcatcher pursuant to the Endangered Species Act. We are requesting comments on the permit application and on our preliminary determination that the applicant's accompanying proposed habitat conservation plan qualifies as low effect, eligible for a categorical exclusion under the National Environmental Policy Act. The basis for this determination is discussed in our environmental action statement and associated low-effect screening form, which are also available for public review.

**DATES:** Written comments should be received on or before January 2, 2018.

**ADDRESSES:** *Submitting Comments:* You may submit comments by one of the following methods:

- *U.S. Mail:* Field Supervisor, Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 2177 Salk Avenue, Suite 250, Carlsbad, CA 92008.
- *Fax:* Field Supervisor, 760-431-9624.
- *Email:* [fw8cfwocomments@fws.gov](mailto:fw8cfwocomments@fws.gov); please include "Olinda Alpha Landfill HCP" in the subject line.

*Obtaining Documents:* You may obtain copies of the proposed HCP and EAS on the Carlsbad Fish and Wildlife's HCP Web site at [https://www.fws.gov/carlsbad/HCPs/HCP\\_Docs.html](https://www.fws.gov/carlsbad/HCPs/HCP_Docs.html). To request copies of the application, proposed HCP, and EAS, contact the Service immediately, by telephone at 760-431-9440 or by letter to the Carlsbad Fish and Wildlife Office (see **ADDRESSES**). Copies of the proposed HCP and EAS also are available for public inspection during regular business hours at the Carlsbad Fish and Wildlife Office (see **ADDRESSES**).

**FOR FURTHER INFORMATION CONTACT:** Ms. Karen Goebel, Assistant Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES**); telephone: 760-431-9440. If you use a telecommunications device for the deaf (TDD), please call the Federal Relay Service (FRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:** We, the U.S. Fish and Wildlife Service (Service), have received an application from Orange County Waste & Recycling (applicant) for a 5-year incidental take permit for one covered species pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*; ESA). The application addresses the potential "take" of the threatened coastal California gnatcatcher (*Polioptila californica californica*; gnatcatcher) in the course of activities associated with the construction, operation, and

maintenance of the Olinda Alpha Landfill projects, in the City of Brea, Orange County, California. A conservation program to avoid, minimize, and mitigate for project activities would be implemented as described in the applicant's proposed habitat conservation plan (HCP).

We are requesting comments on the permit application and on our preliminary determination that the proposed HCP qualifies as a low-effect HCP, eligible for a categorical exclusion under the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*; NEPA). The basis for this determination is discussed in our environmental action statement (EAS) and associated low-effect screening form, which are also available for public review.

## Background

Section 9 of the ESA and its implementing Federal regulations prohibit the take of animal species listed as endangered or threatened. "Take" is defined under the ESA as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect listed animal species, or to attempt to engage in such conduct" (16 U.S.C. 1538). "Harm" includes significant habitat modification or degradation that actually kills or injures listed wildlife by significantly impairing essential behavioral patterns such as breeding, feeding, or sheltering (50 CFR 17.3). However, under section 10(a) of the ESA, the Service may issue permits to authorize incidental take of listed species. "Incidental taking" is defined by the ESA implementing regulations as taking that is incidental to, and not the purpose of, carrying out an otherwise lawful activity (50 CFR 17.3). Regulations governing incidental take permits for endangered and threatened species, respectively, are found in the Code of Federal Regulations at 50 CFR 17.22 and 50 CFR 17.32.

## Applicant's Proposed Project

The applicant requests a 5-year permit under section 10(a)(1)(B) of the ESA. If we approve the permit, the applicant anticipates taking gnatcatcher as a result of permanent impacts to 5.78 acres (ac) of coastal sage scrub habitat that the species uses for breeding, feeding, and sheltering, as well as 2.85 ac of nonnative grassland habitat that may support gnatcatcher foraging and/or dispersal. The take would be incidental to the applicant's activities associated with the construction of the Olinda Alpha Landfill projects in the City of Brea, California, and includes restoration and in-perpetuity

preservation and management of 11.56 ac of gnatcatcher habitat.

The Olinda Alpha Landfill projects propose to construct a desilting basin, perform a partial cap closure, install screening trees for the Brea Power Plant, and construct a winch concrete pad on 12.56 ac located on the 565-ac Olinda Alpha Landfill property in the City of Brea. The project will permanently impact 5.78 ac of coastal California gnatcatcher-occupied coastal sage scrub habitat as a result of clearing and grading activities.

To minimize take of coastal California gnatcatcher by the Olinda Alpha Landfill projects and to offset impacts to its habitat, the applicant proposes to mitigate for permanent impacts to 5.78 ac of occupied gnatcatcher coastal sage scrub habitat through the restoration, conservation, and in-perpetuity management of 11.56 ac of coastal sage scrub suitable for the gnatcatcher by a Service-approved restoration contractor and the Puente Hills Habitat Preservation Authority. The applicant's proposed HCP also contains the following proposed measures to minimize the effects of construction activities on the gnatcatcher:

- Prior to the initiation of work activities on the project sites, grading limits will be clearly delineated with flagging and/or temporary fencing and silt fencing, as necessary, to help guide work activities and avoid impacts to areas beyond the project boundaries.
- Prior to the initiation of work activities on the project sites, a Service-approved biologist will conduct a brief training session for all project personnel regarding the conservation measures and regulations described herein, as well as general information and methods that will help avoid and minimize disturbance to the gnatcatcher in the vicinity of project activities.
- A Service-approved biologist will monitor grading of the site daily (or as determined necessary by the monitoring biologist) and provide a letter summarizing compliance with this HCP and the construction limits of the proposed projects to the Service within 1 month of completion of grading.
- Vegetation clearing will take place outside of the bird nesting season (February 15 through August 31) to the fullest extent practicable. Clearing may only occur during this period once a Service-approved biologist has conducted at least three surveys of the impact areas for nesting birds, with each survey taking place 1 week apart, and the last survey conducted within 24 hours prior to clearing. The qualified biologist will document compliance with the Migratory Bird Treaty Act and

other applicable regulations that protect nesting birds. If an active bird nest is observed, a 300-foot buffer must be established, within which no project activities will occur until the nest is no longer active. A reduced buffer may be established by the monitoring biologist if it is deemed appropriate and will not result in the alteration of nesting behaviors. To fulfill this measure, all project activities that are deemed necessary to occur during the bird nesting season will be monitored by the qualified biologist, as well as any active nest detected in the vicinity of project activities.

- Project sites will be kept as clean as possible to avoid attracting predators. All food-related trash will be placed in sealed bins or removed from the site regularly.

- Staging areas for each project will be limited to developed or previously disturbed areas.

#### **Proposed Action and Alternatives**

The Proposed Action consists of the issuance of an incidental take permit and implementation of the proposed HCP, which includes measures to avoid, minimize, and mitigate impacts to the gnatcatcher. If we approve the permit, take of gnatcatcher would be authorized for the applicant's activities associated with the construction of the Olinda Alpha Landfill projects. In the proposed HCP, the applicant considers alternatives to the taking of gnatcatcher under the proposed action. Alternative development configurations for each project component were considered; however, because of site-specific regulatory requirements and the topography of the site, further avoidance of impacts to coastal California gnatcatcher habitat could not be achieved. The applicant also considered the No Action Alternative. Under the No Action Alternative, no incidental take of coastal California gnatcatcher resulting from habitat modification would occur, and no long-term protection and management would be afforded to the species.

#### **Our Preliminary Determination**

The Service has made a preliminary determination that approval of the HCP and issuance of an incidental take permit qualify for categorical exclusion under NEPA (42 U.S.C. 4321 *et seq.*), as provided by the Department of the Interior implementing regulations in part 46 of title 43 of the Code of Federal Regulations (43 CFR 46.205, 46.210, and 46.215), and that the HCP qualifies as a low-effect plan as defined by the Habitat Conservation Planning Handbook (December 2016).

We base our determination that a HCP qualifies as a low-effect plan on the following three criteria:

(1) Implementation of the HCP would result in minor or negligible effects on federally listed, proposed, and candidate species and their habitats;

(2) Implementation of the HCP would result in minor or negligible effects on other environmental values or resources; and

(3) Impacts of the HCP, considered together with the impacts of other past, present, and reasonably foreseeable similarly situated projects, would not result, over time, in cumulative effects to environmental values or resources that would be considered significant.

Based upon this preliminary determination, we do not intend to prepare further NEPA documentation. We will consider public comments in making the final determination on whether to prepare such additional documentation.

#### **Next Steps**

We will evaluate the proposed HCP and comments we receive to determine whether the permit application meets the requirements and issuance criteria under section 10(a) of the ESA (16 U.S.C. 1531 *et seq.*). We will also evaluate whether issuance of a section 10(a)(1)(B) incidental take permit would comply with section 7 of the ESA by conducting an intra-Service consultation. We will use the results of this consultation, in combination with the above findings, in our final analysis to determine whether or not to issue a permit. If the requirements and issuance criteria under section 10(a) are met, we will issue the permit to the applicant for incidental take of gnatcatcher.

#### **Public Comments**

If you wish to comment on the permit application, proposed HCP, and associated documents, you may submit comments by any of the methods noted in the **ADDRESSES** section.

#### **Public Availability of Comments**

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**Authority**

We provide this notice under section 10 of the ESA (16 U.S.C. 1531 *et seq.*) and NEPA regulations (40 CFR 1506.6).

**Scott A. Sobiech,**

*Acting Field Supervisor, Carlsbad Fish and Wildlife Office, Carlsbad, California.*

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**DEPARTMENT OF JUSTICE****Drug Enforcement Administration****Kofi E. Shaw-Taylor, M.D. Decision and Order**

On June 12, 2017, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause to Kofi E. Shaw-Taylor, M.D. (hereinafter, Respondent) of Baltimore, Maryland. GX 1. The Show Cause Order proposed the revocation of Respondent's Certificate of Registration on the ground that Respondent does "not have authority to handle controlled substances in the State of Maryland," the State in which he is registered. GX 1, at 1 (citing 21 U.S.C. 823(f) and § 824(a)(3)).

As to the Agency's jurisdiction, the Show Cause Order alleged that Respondent holds DEA Certificate of Registration No. AS2145476 which authorizes him to dispense controlled substances in schedules II through V as a practitioner at the registered address of 4419 Falls Road, Suite C, Baltimore, Maryland 21211. GX 1, at 1. *See also* GX 2 (Controlled Substance Registration Certificate) (including "Westside Medical Group"). The Show Cause Order alleged that this registration expires on February 29, 2020. GX 1, at 1. *See also* GX 2.

As the substantive ground for the proceeding, the Show Cause Order alleged that Respondent is "without authority to handle controlled substances in Maryland, the state in which . . . [he is] registered with the DEA." GX 1, at 1. It further alleged that, on May 9, 2017, Respondent's "authority to prescribe and administer controlled substances in the State of Maryland was suspended." GX 1, at 1. *See also* GX 3 (Maryland State Board of Physicians Order of Summary Suspension of License to Practice Medicine, hereinafter Order of Summary Suspension). The Show Cause Order alleged that "DEA must revoke . . . [his] DEA . . . [registration] based upon . . . [his] lack of authority to

handle controlled substances in the State of Maryland." GX 1, at 1 (citing 21 U.S.C. 802(21), 823(f)(1), and 824(a)(3)).

The Show Cause Order notified Respondent of his right to request a hearing on the allegations or to submit a written statement while waiving his right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. GX 1, at 2 (citing 21 CFR 1301.43). The Show Cause Order also notified Respondent of the opportunity to submit a corrective action plan. GX 1, at 2 (citing 21 U.S.C. 824(c)(2)(C)).

By letter dated July 17, 2017 addressed to the Office of the [DEA] Administrative Law Judges, Respondent, by his counsel, requested a hearing. GX 5, at 1. The letter admitted that the Maryland State Board of Physicians issued an Order of Summary Suspension of Respondent's license to practice medicine on May 9, 2017. *Id.* According to the letter, Respondent was challenging that Order "on grounds of abuse of and lack of due process." *Id.*

On July 24, 2017, the Chief Administrative Law Judge, John J. Mulrooney, II, ordered the Government to file proof of service and evidence in support of its allegation that Respondent lacked State authority to practice medicine. GX 6, at 1 (Order Directing the Filing of Proof of Service and Government Evidence of Lack of State Authority Allegation and Briefing Schedule). The Order also established a briefing schedule "if the Government files a motion based on timeliness of the hearing request and/or a motion for summary disposition based on its allegation that the Respondent lacks state authority to handle controlled substances." *Id.* at 1-2.

By submission dated July 28, 2017, Respondent, by his counsel, submitted an "Order to Show Cause Waiver of Hearing and Statement on the Matter." GX 7. According to that submission, Respondent's counsel stated that Respondent was served with the Show Cause Order on June 20, 2017. GX 7, at 1. He also stated that Respondent was waiving a hearing on the Show Cause Order. *Id.* Further, the submission admitted that the Maryland State Board of Physicians issued an Order of Summary Suspension of Respondent's license to practice medicine, characterizing the Order as being "based on alleged but unproven charges." *Id.* It expressed "our fervent belief that the Respondent shall prevail in this matter and his Medical license reinstated." *Id.* It asked that "the DEA suspend the revocation" of Respondent's registration "pending the restoration of the Medical license to save the Respondent the

inconvenience, trauma and the lengthy process of reapplication of this same license." *Id.*

By Order dated August 2, 2017, the Chief Administrative Law Judge terminated the proceedings based on Respondent's "Order to Show Cause Waiver of Hearing and Statement on the Matter." GX 8, at 1 (Order Terminating Proceedings).

On August 2, 2017, the Government submitted a Request for Final Agency Action and an evidentiary record to support the Show Cause Order's allegation.

I find that the Government's service of the Show Cause Order on Respondent was legally sufficient. I find that, by letter from his counsel dated July 17, 2017, Respondent requested a hearing. I find that, by submission of his counsel dated July 28, 2017, Respondent sought to file an "Order to Show Cause Waiver of Hearing and Statement on the Matter." Respondent was entitled to waive his right to a hearing and to fail to follow up on his request for a hearing. *See* 21 CFR 1301.43(d). DEA regulations, however, limit the time for Respondent to exercise his right to submit a written statement of position to "the period permitted for filing a request for a hearing or a notice of appearance," absent a showing of good cause. 21 CFR 1301.43(c). Respondent's "Statement on the Matter" was not filed within the period specified in the regulation, and Respondent did not make a showing of good cause to excuse the untimeliness. I decline, therefore, to consider any factual assertions or arguments that Respondent raised in the "Statement on the Matter."<sup>1</sup> I issue this Decision and Order based on the record submitted by the Government and on Respondent's request for a hearing. 21 CFR 1301.43(e).

**Findings of Fact***Respondent's DEA Registration*

Respondent currently holds DEA practitioner registration AS2145476 authorizing him to dispense controlled substances in schedules II through V at the address of Westside Medical Group, 4419 Falls Road, Suite C, Baltimore, Maryland 21211. GX 1, at 1; GX 2. This registration expires on February 29, 2020. *Id.*

<sup>1</sup> Respondent's "Statement on the Matter" did not claim that Respondent's medical license had been reinstated. To the contrary, it reiterated Respondent's admission that the Maryland State Board of Physicians issued an Order of Summary Suspension of Respondent's medical license.