



State of California – Natural Resources Agency  
DEPARTMENT OF FISH AND WILDLIFE  
Deputy Director  
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GAVIN NEWSOM, Governor  
CHARLTON H. BONHAM, Director



February 14, 2019

Mr. Wade Caffrey  
VCS Environmental  
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San Juan Capistrano, CA 92675  
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Dear Mr. Caffrey:

**Subject: Request for Consistency Determination for the Cielo Vista Residential Development Project (2080-2019-001-05)**

On January 17, 2018, the Department of Fish and Wildlife (CDFW) received your notification on behalf of North County BRS Project, LLC that on December 21, 2018, the United States Fish & Wildlife Service (Service) issued a Biological Opinion (BO) (Service file No. FWS-OR-12B0346-18F0405) for the proposed Cielo Vista Residential Development Project (Project) referenced above. (See Cal. Reg. Notice Register 2019, No. 5-Z, p. 199.) The BO describes the Project and sets forth a series of measures to minimize and mitigate the incidental take of least Bell's vireo (*Vireo bellii pusillus*), a species designated as endangered pursuant to the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 et seq.). (See Cal. Code Regs., tit. 14, § 670.5, subd. (a)(5)(I).)

Your notification includes a request pursuant to Fish and Game Code Section 2080.1 that CDFW determine that the BO, including its Incidental Take Statement (ITS), is consistent with CESA as to the Project.

CDFW has determined that for purposes of least Bell's vireo and the Project as described in the BO, the BO and its associated ITS are consistent with CESA. A copy of the CDFW determination is enclosed for your records. (See also Fish & G. Code, § 2080.1, subd. (d).)

If you have questions regarding CDFW's consistency determination, please contact Jennifer Turner, Environmental Scientist, at (858) 467-2717.

Sincerely,

Chad Dibble, Deputy Director  
Ecosystem Conservation Division  
California Department of Fish and Wildlife

Enclosure

cc: **California Department of Fish and Wildlife**

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CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE  
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**CALIFORNIA ENDANGERED SPECIES ACT  
CONSISTENCY DETERMINATION NO. 2080-2019-001-05**

**Project:** Cielo Vista Residential Development Project  
**Location:** County of Orange  
**Applicant:** North County BRS Project LLC  
**Notifier:** VCS Environmental, as represented by Wade Caffrey

**Background**

North County BRS Project LLC (Applicant) proposes to develop 80 single family homes and associated infrastructure on 34.36 acres of an 84.78-acre property, in unincorporated Orange County, within the City of Yorba Linda Sphere of Influence. The Cielo Vista Residential Project (Project) includes upland and riparian vegetation clearing, grading, and 0.15 acres of stream infill within the 34.36-acre development footprint, and the creation and ongoing maintenance of an 8.04-acre fuel modification zone and water quality basin. Total construction is anticipated to last three years: grading and site preparation will occur over a period of approximately 12 months, and phased construction will occur over the following 24 months. An open space area of 33.59 acres, of which 3.06 acres are subject to a utility easement, will be restored, preserved, and managed north of the residential development (referenced as the "Preserve"). (See Figures 1-3 of the BO.)

The Project activities described above are expected to incidentally take<sup>1</sup> one pair (two individuals) of least Bell's vireo (*Vireo bellii pusillus*) where those activities take place within 0.86 acres of riparian vegetation that will be cleared. Least Bell's vireo could be incidentally taken as a result of the activities associated with vegetation clearing, such as nest abandonment due to noise disturbance, injury or death associated with felled vegetation, crushing of nests from heavy equipment, et cetera. Least Bell's vireo is designated as an endangered species pursuant to the federal Endangered Species Act (ESA) (16 U.S.C. § 1531 et seq.) and an endangered species pursuant to the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 et seq.). (See Cal. Code Regs., tit. 14, § 670.5, subd. (a)(5)(I).)

<sup>1</sup> Pursuant to Fish and Game Code section 86, "'Take' means hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill." See also *Environmental Protection Information Center v. California Department of Forestry and Fire Protection* (2008) 44 Cal.4th 459,507 (for purposes of incidental take permitting under Fish and Game Code section 2081, subdivision (b), "'take'...means to catch, capture or kill").



Least Bell's vireo are documented at the Project site and occupied least Bell's vireo habitat occurs within and adjacent to the Project site. Based on the proximity of documented least Bell's vireo, dispersal patterns of least Bell's vireo, and the presence of suitable least Bell's vireo habitat within the Project site, the United States Fish & Wildlife Service (Service) determined that least Bell's vireo is reasonably certain to occur within the Project site and that Project activities are expected to result in the incidental take of least Bell's vireo.

According to the Service, construction of the Project will result in the permanent loss of 0.86 acre of occupied least Bell's vireo habitat.

Because the Project is expected to result in take of a species designated as endangered under the federal ESA, the United States Army Corps of Engineers (USACOE) consulted with the Service as required by the ESA. On December 21, 2018, the Service issued a biological opinion (Service file No. FWS-OR-12B0346-18F0405) (BO) to the USACOE. The BO describes the Project, requires the Applicant to comply with terms of the BO and its incidental take statement (ITS), and incorporates additional measures.

The BO also requires the Applicant to implement and adhere to measures contained within the Project Environmental Impact Report (EIR; SCH# 2012071013) and Streambed Alteration Agreement (SAA; 1600-2017-0170-R5; see Fish and Game Code §1600 et seq.).

On January 17, 2018, the Director of the Department of Fish and Wildlife (CDFW) received a notice from the Applicant requesting a determination pursuant to Fish and Game Code section 2080.1 that the BO and its related ITS are consistent with CESA for purposes of the Project and least Bell's vireo. (Cal. Reg. Notice Register 2019, No. 5-Z, p. 199.)

## **Determination**

CDFW has determined that the BO, including the ITS, is consistent with CESA as to the Project and least Bell's vireo because the mitigation measures contained in the BO, ITS, and EIR meet the conditions set forth in Fish and Game Code section 2081, subdivisions (b) and (c), for authorizing incidental take of CESA-listed species. Specifically, CDFW finds that: (1) take of least Bell's vireo will be incidental to an otherwise lawful activity; (2) the mitigation measures identified in the BO, ITS, and EIR, will minimize and fully mitigate the impacts of the authorized take; (3) adequate funding is ensured to implement the required avoidance minimization and mitigation measures and to monitor compliance with, and effectiveness of, those measures; and (4) the Project will not jeopardize the continued existence of least Bell's vireo. The mitigation measures in the BO, ITS, and EIR include, but are not limited to, the following:

### **Avoidance, Minimization, and Mitigation Measures**

- By December 21, 2019, or prior to the termination of an extension, if such an extension is requested by the Applicant and granted by the Service and CDFW, Applicant will place a conservation easement (CE) over the 33.59-acre open-space Preserve.

The draft of the CE will be made available to the Service and CDFW by May 21, 2019. Any entity designated as Grantee must be approved by the Service and CDFW and be on the list of entities that are qualified by the State of California to hold and manage mitigation lands.

- Applicant will provide mitigation for permanent impacts to 0.86 acre of occupied vireo habitat through the enhancement of 7.5 acres of existing southern willow scrub and elderberry woodlands within the Preserve. Maintenance of this area will continue until the CE is recorded and the site is observed to have less than 5 percent cover of invasive woody species.
- Applicant will provide a long-term management plan (LTMP) for the Preserve, which will be reviewed for approval by the Service and CDFW. This document will describe in detail the CE, endowment funding, responsibilities, ongoing programs, and other features as outlined in the BO.
- As part of the LTMP, Applicant will contract a Service- and CDFW-approved entity for a long-term cowbird trapping program within the Preserve. Trapping will occur between March 15 and September 15, during least Bell's vireo nesting season.
- Applicant will submit to the Service in writing the names, recovery permit numbers, and resumes of all proposed biologists for approval, and proposed activities will not begin until biologist(s) have been approved by the Service. Although not a condition of the BO, CDFW requests to review and approve biologists. The approved biologists will have the authority to stop work or activities that do not comply with the BO.
- Applicant will only clear and remove vegetation between September 1 and February 14, outside the least Bell's vireo nesting season.
- If vegetation clearing is to occur within 500 feet of least Bell's vireo habitat from February 15 through August 31 (vireo nesting season), approved biologists will conduct weekly surveys to determine if impacts to least Bell's vireo will occur. Approved biologists will establish appropriate buffers if any active nests are detected, until the nest is no longer active.
- Applicant will conduct a contractor education program for all personnel prior to the beginning of project activities that will include a description of least Bell's vireo, construction limits, and avoidance and minimization measures that will be implemented.
- Approved biologists will delineate the limits of areas to be graded such that they are clearly visible to personnel. This includes the limits of the fuel modification zones, which will undergo vegetation thinning.



- Applicant will follow general construction best management practices, as outlined in the BO, which include: the use of erosion control equipment, limiting the staging and maintenance of equipment to within fenced grading limits, the presence of fire suppression equipment during all construction activities, limiting smoking to designated smoking areas with sand boxes, and the proper storage and removal of trash and debris.
- Applicant will minimize the ongoing impact of residences proximate to the Preserve by directing light away from conserved areas, avoiding the use of invasive species in landscaping, educating home buyers regarding the Preserve, and documenting Preserve and fuel-modification zone best management practices into HOA CC&Rs, as outlined in the BO.

#### Monitoring and Reporting Measures

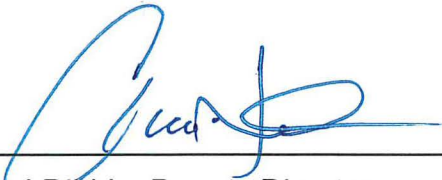
- Applicant will provide monthly summary reports to the Service of project activities throughout construction. Although not a condition of the BO, CDFW also requests a copy of the summary reports.
- Applicant will provide a final report within 60 days of completed construction, which shall include: as-built construction drawings with an overlay of habitat that was impacted and avoided, photographs of habitat areas that were to be avoided before and after construction, and a summary which documents that impacts were not exceeded and that compliance with the BO was achieved.
- Approved biologists will conduct twice-weekly inspections of areas which have been cleared of vegetation to monitor for any unauthorized impacts to least Bell's vireo; any such impacts will be reported to the Service immediately. Although not a condition of the BO, CDFW also requests to be notified of these impacts.

#### Financial Assurances

- Applicant will transfer a non-wasting endowment for the purposes of implementing the LTMP to the San Diego Foundation in the amount of \$382,040, prior to the commencement construction activities. Applicant will be responsible for maintaining the Preserve in accordance with the LTMP in the interim until management of the Preserve is transferred to a Service- and CDFW-approved land manager.
- Applicant will secure funding for the implementation of the LTMP, including interim management and long-term management, through a Letter of Credit (LOC) for a total of \$450,700. This LOC will be secured prior to initiation of vegetation clearing and will be released when the CE is recorded, the non-wasting endowment is funded, and management responsibilities are transferred to the approved land manager.

Pursuant to Fish and Game Code section 2080.1, take authorization under CESA is not required for the Project for incidental take of least Bell's vireo, provided the Applicant implements the Project as described in the BO, including adherence to all measures contained therein, and complies with the mitigation measures and other conditions described in the BO, ITS, and EIR. If there are any substantive changes to the Project, including changes to the EIR, or if the Service amends or replaces the BO or ITS, the Applicant shall be required to obtain a new consistency determination or a CESA incidental take permit for the Project from CDFW. (See generally Fish & G. Code, §§ 2080.1, 2081, subds. (b) and (c)).

CDFW acknowledges that the BO addresses coastal California gnatcatcher (*Polioptila californica californica*), a species designated as threatened under the ESA, and not listed under CESA. This species is known to occur within the Project site. The Service determined in the BO and ITS that, for purposes of the ESA, mortality or injury to individual coastal California gnatcatcher could occur. The Service authorized such take under the ESA, requiring the Applicant to implement various avoidance and minimization measures for the species. The Applicant is aware that, for the purposes of CESA, take of coastal California gnatcatcher as defined by state law is not prohibited, except as defined by the Fish and Game Code (see Fish and Game Code §§ 3503, 3503.5, 3511 and 3513). CDFW's determination that the Service BO and ITS are consistent with CESA is limited to least Bell's vireo.

By:   
Chad Dibble, Deputy Director  
Ecosystem Conservation Division  
California Department of Fish and Wildlife

Date: 2/14/19

