Santa Clara Valley Habitat Plan
MINOR MODIFICATION

Subject	**Condition 16. Least Bell's Vireo survey requirements**
Clarification Number	**HPM2017-02**
Approved	
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Category

Conditions on Covered Activities

Topic

Condition 16 – Least Bell's vireo survey requirements.

Issue

- Condition 16 requires pre-construction surveys to be completed for covered activities occurring in least Bell's vireo habitat. As written, the condition is contradictory, as it references standard survey protocols for the species that conflict with other language in the condition.
- Condition 16 requires land cover verification of all potential breeding habitat within 250 feet of project activities. However, where potential breeding habitat is present on adjacent parcels that are privately owned, it is not clear how the biologist will determine whether nesting habitat is present because access to the potential habitat may not be feasible.

Plan Guidance

The following text is comprised of direct excerpts from Habitat Plan Chapter 6, taken from Condition 16 (beginning on page 6-68).

Condition 16. Least Bell's Vireo

Habitat Survey

Least Bell's vireo surveys will only be required for projects occurring within potential breeding habitat. The Implementing Entity will provide maps showing the geographic regions where surveys may be required. These maps will be updated during the permit term to incorporate best available science on where this species may be found. At the time of Plan adoption, the area of required surveys is limited to the Pajaro watershed, including Uvas, Llagas, and Pacheco sub-watersheds.

Projects occurring within the mapped area require surveys if the project-specific verified land cover map (see Section 6.8.3 *Item 3: Land Cover Types on Site*) shows that the project area is within 250 feet of riparian land cover types. If a project meets this criterion, a qualified biologist will conduct a field investigation to identify and map early successional riparian vegetation (typically dominated by willow shrubs and other thick understory vegetation) which may be used for nesting. If early successional riparian vegetation is found, the project proponent may revise the proposed project to avoid all areas within a 250-foot buffer around the potential nesting habitat and surveys will be concluded.

Preconstruction Survey

If the project proponent chooses not to avoid the potential nesting site and the 250-foot buffer, additional nesting surveys are required. Prior to any ground disturbance related to covered activities, a qualified biologist will:

1. Make his/her best effort to determine if there has been nesting at the site in the past 3 years. This includes checking the CNDDB, contacting local experts, and looking for evidence of historical nesting (i.e., old nests).
2. If no nesting in the past 3 years is evident, conduct a preconstruction survey in areas identified in the habitat survey as supporting potential least Bell's vireo nesting habitat. Surveys will be made at the appropriate times of year when nesting use is expected to occur. The surveys will document the presence or absence of nesting pairs of least Bell's vireo. Protocol-level surveys will be used (USFWS's 2001 least Bell's vireo survey guidelines or latest protocol). Surveys will conclude no more than two calendar days prior to construction.

To avoid last minute changes in schedule or contracting that may occur if an active nest is found, the project proponent may also conduct a preliminary survey up to 14 days before construction. If one or more least Bell's vireo nests are found present (through step 1 or 2 above), the nest site(s) plus a 250-foot buffer will be avoided (see below for additional avoidance and minimization details). The Wildlife Agencies will be notified immediately of nest locations.

Avoidance and Minimization

Covered activities must avoid active least Bell's vireo nests during the breeding season (March 15–July 31) by maintaining at least a 250-foot no-activity buffer around all active nests. As long as the nest remains active, no activity will occur within the established buffer. Disturbance to previous nesting sites (for up to 3 years) will also be avoided during the breeding season unless the disturbance is required for the conservation strategy or to maintain public safety. Least Bell's vireos use previous nesting sites, and disturbance during the breeding season may preclude birds from using existing nests.

The required buffer may be reduced in areas where there are sufficient barriers or topographic relief to protect the nest from excessive noise or other disturbance. Implementing Entity technical staff will coordinate with the Wildlife Agencies and evaluate exceptions to the minimum no-activity buffer distance on a case-by-case basis.

Analysis

The following discussion provides an analysis of the internal inconsistency of Condition 16, the challenges related to surveying on lands where access is not granted, and approaches to resolving these issues.

USFWS Protocol Consistency

In 2001, the U.S. Fish and Wildlife Service (USFWS) published suggested guidelines to facilitate accurate assessments of the presence/absence of least Bell's vireos. While Condition 16 in the Habitat Plan references the 2001 protocol, there are some inconsistencies between the USFWS protocol and the survey protocol in Condition 16. The main differences between the two are outlined below.

1. The 2001 USFWS protocol requires up to eight surveys that are spaced 10 days apart. Condition 16 in the Habitat Plan requires only two surveys, one 14 days in advance of the work and a second survey no more than two days before the construction begins.

2. The 2001 USFWS protocol defines breeding season as April 10–July 31. Condition 16 in the Habitat Plan defines breeding season as March 15–July 31.

In addition to the inconsistences between the 2001 USFWS protocol and Condition 16 in the Habitat Plan, there are additional elements within the USFWS protocol that are absent or not explicit in Condition 16. These elements, listed below under *Determination*, will be required for surveyors under Condition 16.

Site Access

If a parcel adjacent to the project site cannot be accessed by the biologist and that parcel has riparian habitat on it, as established through air photo review, it is not clear how the biologist will determine whether nesting habitat is present.

Determination

According to Section 15.2 of the Implementing Agreement, the Wildlife Agencies can approve minor modifications if those modifications do not result in adverse effects on Covered Species or natural communities that are significantly different from those analyzed in the Habitat Plan. The following text will revise and clarify Condition 16 in the Habitat Plan as a minor modification. The following text represents all the deletions in strikethrough, and addition in underscore.

Revisions to Condition 16. Least Bell's Vireo

To avoid and minimize direct impacts of covered activities on least Bell's vireos, the following procedures will be implemented. These survey requirements provide compliance with the Plan and the MBTA (least Bell's vireo is a listed species, so the HCP permit also serves as a Special Purpose Permit under MBTA; see Chapter 1 for details).

Habitat Survey

Least Bell's vireo surveys will only be required for projects occurring within 250 feet of potential breeding habitat and within the geographic regions where this species may occur. The Implementing Entity will provide maps showing the geographic regions where surveys may be required. These maps will be updated during the permit term to incorporate best available science on where this species may be found. At the time of Plan adoption, the area of required surveys is limited to the Pajaro watershed, including Uvas, Llagas, and Pacheco sub-watersheds.

~~Projects occurring within the mapped area require surveys i~~If the project-specific verified land cover map (see Section 6.8.3 *Item 3: Land Cover Types on Site*) shows that the project area is within 250 feet of riparian land cover types, a qualified biologist will first make his/her best effort to determine if there has been nesting at the site in the past 3 years. This includes checking the CNDDB, contacting local experts, and accessing any other available data. If nesting in the past 3 years is identified, the project is required to avoid the nesting site as described below under subheading *Avoidance and Minimization*. If no nesting in the past 3 years is evident~~If a project meets this criterion~~, a qualified biologist will conduct a field investigation to identify and map early successional riparian vegetation (typically dominated by willow shrubs and other thick understory vegetation) which may be used for nesting. If early successional riparian vegetation is found, the project proponent may revise the proposed project to avoid all areas within a 250-foot buffer around the potential nesting habitat and surveys will be concluded.

If potential breeding habitat is located on a parcel adjacent to the project site and cannot be accessed or observed from a distance by the biologist, it will be assumed that some early successional riparian vegetation is present and either a 250 foot no-activity buffer will be maintained, or preconstruction surveys are required as described below.

Preconstruction Survey

If the habitat survey identifies that no nesting has occurred in the past 3 years, but early successional riparian vegetation is present on or within 250 feet of the site, and the project proponent chooses not to avoid the potential nesting site and the 250-foot buffer, additional nesting surveys are required. ~~Prior to any ground disturbance related to covered activities, a qualified biologist will:~~

~~Look for evidence of historical nesting (i.e., old nests).~~

If evidence of ~~historical~~ nesting in the past 3 years is lacking, a qualified biologist will conduct a preconstruction survey in areas identified in the habitat survey as supporting potential least Bell's vireo nesting habitat. Surveys will be made at the appropriate times of year when nesting use is expected to occur (March 15–July 31). The surveys will document the presence or absence of nesting pairs of least Bell's vireo. The following elements of protocol-level surveys will be used (USFWS's 2001 least Bell's vireo survey guidelines or latest protocol).

- Surveys will be conducted by a qualified biologist familiar with the songs, whisper songs, calls, scolds, and plumage characteristics of adult and juvenile vireos. These skills are essential to maximize the probability of detecting vireos and to avoid potentially harassing the species in occupied habitats.
- Surveys will be conducted between dawn and 11:00 am. Surveys should not be conducted during periods of excessive or abnormal cold, heat, wind, rain, or other inclement weather that individual or collectively may reduce the likelihood of detection.
- Surveyors should not survey more than 3 linear kilometers or more than 50 hectares of habitat on any given survey day. Although surveyors should generally station themselves in the best possible locations to hear or see vireos, care should be taken not to disturb potential or actual vireo habitats and nests or the habitat of any sensitive or listed riparian species.
- The numbers and locations of all brown-headed cowbirds detected within vireo territories will be recorded during each survey and reported.

In instances where an adjacent parcel is not accessible because the biologist was not granted permission to enter, the following additional survey technique will be applied to increase the chance that any least Bell's vireos nesting on that adjacent parcel will be discovered. The Wildlife Agencies will be notified of any covered activity where lack of access requires modification to the standard survey protocol, and they may approve a modified protocol to assess whether least Bell's vireos are nesting on the adjacent parcel. In considering the request, the Wildlife Agency will evaluate the feasibility of delaying the work until after the breeding season. Unless a different solution is reached, the following alternate protocol will be used when site access is not granted.

- The biologist will locate his/herself as close to the riparian vegetation on the adjacent site as possible, without trespassing, and conduct two 30-minute observational bouts, listening and looking for signs of least Bell's vireo. The two listening bouts will occur at least one hour apart and will adhere to all of the other requirements listed above.

If project construction will start during breeding season (March 15–July 31), surveys will conclude no more than two calendar days prior to construction. To avoid last minute changes in schedule or contracting that may occur if an active nest (i.e., a nest that is under construction or contains eggs or young) is found, the project proponent may also conduct a preliminary survey ~~up to 14 days~~more than two calendar days before construction. If one or more least Bell's vireo nests are found present ~~(through step 1 or 2 above)~~, the nest site(s) plus a 250-foot buffer will be avoided (see below for additional avoidance and minimization details). The Wildlife Agencies, Habitat Agency, and CNDDB will be notified immediately of nest locations.

If project construction will start after the breeding season, surveys should occur during the prior breeding season. If project planning has not allowed sufficient time to allow for surveys during the prior season, the applicant may submit a request to the Habitat Agency to conduct two surveys during the following breeding season. This request is subject to approval by the Wildlife Agencies. The two surveys in the following season will occur on or immediately adjacent to the project site if the suitable habitat (successional riparian vegetation) remains after the project. If the suitable habitat is no longer present due to implementation of the project, the two surveys will occur at alternative locations (for the purpose of providing information on least Bell's vireo occurrence) as determined by the Habitat Agency.

Avoidance and Minimization

Covered activities must avoid active least Bell's vireo nests during the breeding season (March 15–July 31) by maintaining at least a 250-foot no-activity buffer around all active nests. As long as the nest remains active, no activity will occur within the established buffer. Disturbance to previous nesting sites (for up to 3 years) will also be avoided during the breeding season unless the disturbance is required for the conservation strategy or to maintain public safety. Least Bell's vireos use previous nesting sites, and disturbance during the breeding season may preclude birds from using existing nests.

The required buffer may be reduced in areas where there are sufficient barriers or topographic relief to protect the nest from excessive noise or other disturbance. Implementing Entity technical staff will coordinate with the Wildlife Agencies and evaluate exceptions to the minimum no-activity buffer distance for both active and previous nesting sites on a case-by-case basis.

Construction Monitoring

If ~~occupied~~ active nests (i.e., nests that are under construction or contain eggs or young) are identified, a qualified biologist will monitor construction to ensure that the 250-foot no-activity buffer around all active least Bell's vireo nests is maintained to ensure that covered activities do not affect nest success. If monitoring indicates that construction outside of the buffer is affecting breeding, the buffer will be increased if space allows (e.g., move staging areas farther away). If

space does not allow, construction will cease until the young have fledged from the nest or until the end of the breeding season, whichever occurs first. The biological monitor will also conduct training of construction personnel on the avoidance procedures, buffer zones, and protocols in the event that a least Bell's vireo flies into an active construction zone (i.e., outside the buffer zone).