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## STAFF REPORT: REGULAR CALENDAR

**Consistency Determination No.:** CD-0009-17

**Federal Agency:** U.S. Customs and Border Protection

**Location:** Tijuana River Floodway, east and west of Dairy Mart Rd. bridge, City and County of San Diego ([Exhibits 1 – 2](#))

**Project Description:** Expansion of vegetation control activities to include: (i) mechanical removal of 2.6 acres of native riparian vegetation; and (ii) application of herbicides.

**Staff Recommendation:** Objection

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## SUMMARY OF STAFF RECOMMENDATION

U.S. Customs and Border Protection (CBP) has submitted a consistency determination for an expanded program of vegetation control within the Tijuana River Floodway (TRF), a channelized portion of the Tijuana River in the San Ysidro district of the City of San Diego, near the United States – Mexico Border ([Exhibits 1, 2](#)). The TRF, which is owned by the federal International Border and Water Commission (IBWC), was constructed for flood control purposes and has been previously cleared of major vegetation in order to maintain flood control capacity. The CBP considers the TRF a “critical operations area.”

In recent years, CBP has conducted vegetation control within a 167-acre portion of the TRF in order to maintain clear lines of sight and allow effective surveillance of the area. Under prior agreements with the IBWC and the U.S. Fish and Wildlife Service, CBP's vegetation management efforts have been limited to the mechanical removal of non-native vegetation, thereby avoiding intact stands of native riparian vegetation that persist in the northwestern portion of the TRF, on either side of the Dairy Mart Road bridge ([Exhibits 2, 3, 6](#)). These native riparian habitats form a portion of the designated critical habitat for the endangered least Bell's vireo (LBV) in the Tijuana River Valley.

CBP proposes to expand its vegetation control efforts to include (a) the mechanical removal of approximately 2.56 acres (62%) of the native riparian vegetation within the LBV critical habitat portion of the project area, including on-going control of new growth; (b) continued mowing and disking of TRF areas outside the critical habitat area; and (c) new use of herbicides for more effective eradication of invasive species. CBP states that the expanded program is necessary in order to maintain lines of sight, reduce hiding opportunities in the TRF, and allow it to fulfill its mission.

The proposed project would include the removal of 2.56 acres of native riparian woodland and shrub habitat that support several rare and sensitive species, including the federal- and state-listed LBV. Due to the rarity, ecological importance, and vulnerability of these habitats and species, the staff recommends the Commission determine these areas to be environmentally sensitive habitat areas (ESHA) under the Coastal Act. Staff therefore recommends the Commission find that the proposed project, occurring within ESHA, would be **inconsistent** with the ESHA policies of the California Coastal Management Program (CCMP) (Coastal Act Section 30240), because it is not a resource-dependent use and would significantly disrupt the habitat values of the ESHA.

The native riparian habitats to be removed are also coastal wetlands. Therefore staff recommends the Commission find the proposed project **inconsistent** with the wetlands protection policy of the CCMP (Coastal Act Section 30231) because it would fail to maintain or restore the biological productivity and quality of these wetlands.

The removal of native vegetation also constitutes a major stream alteration, making Coastal Act Section 30236 applicable as well. However, in contrast to past vegetation removal efforts in the TRF, which were necessary flood control projects (one of the specified allowable uses under Section 30236), the proposed surveillance and border security project is not one of the three allowable uses that could justify major stream alterations. Thus, staff recommends that the Commission find the project **inconsistent** with the stream alteration policy of the CCMP (Coastal Act Section 30236).

The staff therefore recommends that the Commission **object** to CBP's consistency determination CD-0009-17. The motion and resolution are on Page 4 of this report. The standard of review for this consistency determination is the Chapter 3 policies of the Coastal Act.

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## I. FEDERAL AGENCY’S CONSISTENCY DETERMINATION

U.S. Customs and Border Protection (CBP) has determined the project consistent to the maximum extent practicable with the California Coastal Management Program.

## II. MOTION AND RESOLUTION

### Motion:

*I move that the Commission **concur** with consistency determination CD-0009-17.*

Staff recommends a **NO** vote on the motion. Following the staff recommendation will result in an objection to the determination and adoption of the following resolution and findings. An affirmative vote of the majority of the Commissioners present is required to pass the motion.

### Resolution:

*The Commission hereby **objects** to consistency determination CD-0009-17 by Customs and Border Protection on the grounds that the project is not consistent with the California Coastal Management Program to the maximum extent practicable.*

## III. APPLICABLE LEGAL AUTHORITIES

### Standard of Review

The federal Coastal Zone Management Act (“CZMA”), 16 U.S.C. § 1451-1464, requires that federal agency activities affecting coastal resources be “carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.” Id. at § 1456(c)(1)(A). The implementing regulations for the CZMA (“federal consistency regulations”), at 15 C.F.R. § 930.32(a)(1), define the phrase “consistent to the maximum extent practicable” to mean:

*... fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency.*

This standard allows a federal activity that is not fully consistent with California’s Coastal Management Program (“CCMP”) to proceed, if full compliance with the CCMP would be “prohibited by existing law.” In its consistency determination, Customs and Border Protection did not argue that full consistency is prohibited by existing law or provide any documentation to support a maximum extent practicable argument. Therefore, there is no basis to conclude that existing law applicable to the Federal agency prohibits full consistency. Since Customs and Border Protection has raised no issue of practicability, as so defined, the standard before the Commission is full consistency with the enforceable policies of the CCMP, which are the policies of Chapter 3 of the Coastal Act (Cal. Pub. Res. Code §§ 30200-30265.5).

### Procedure if the Commission finds the proposed activity inconsistent with the CCMP.

Section 930.43(a) of the federal consistency regulations (15 CFR § 930.43(a)) requires that, if the Commission’s objection is based on a finding that the proposed activity is inconsistent with the

CCMP, the Commission must identify measures, if they exist, that would bring the project into conformance with the CCMP. That section states that:

*(a) In the event the State agency objects to the Federal agency's consistency determination, the State agency shall accompany its response to the Federal agency with its reasons for the objection and supporting information. The State agency response shall describe: (1) How the proposed activity will be inconsistent with specific enforceable policies of the management program; and (2) The specific enforceable policies (including citations).(3) The State agency should also describe alternative measures (if they exist) which, if adopted by the Federal agency, would allow the activity to proceed in a manner consistent to the maximum extent practicable with the enforceable policies of the management program. Failure to describe alternatives does not affect the validity of the State agency's objection.*

As described in Sections IV. C. – F. of this report, the Commission finds that the proposed project is not consistent to the maximum extent practicable with the CCMP; and pursuant to Section 930.43 of the federal regulations implementing the CZMA, requiring the Commission to identify measures, if they exist, that would bring the project into compliance with the CCMP to the maximum extent practicable, it identifies the following as possible measures to bring this project into compliance with the CCMP to the maximum extent practicable:

1. **Avoidance of Native Riparian Vegetation and Least Bell's Vireo Habitat:** The proposed vegetation control activities in the TRF would need to be redesigned to avoid the removal of any existing areas of native riparian vegetation within the project area, and in particular within the 15.99-acre LBV critical habitat area surrounding Dairy Mart Road bridge.
2. **Inclusion of Measures to Protect Sensitive Species and Habitats During Non-Native Vegetation Removal:** The proposed removal of non-native vegetation within and adjacent to native riparian ESHA would need to include the preparation and implementation of resource protection measures, including (a) scheduling of project activities outside of the nesting season (Feb 15 – Aug 31) for LBV and other bird species; (b) provision of a qualified biological observer to monitor for LBV and other sensitive wildlife species during project activities (with the authority to halt project activities if needed to protect sensitive wildlife); and (c) use of temporary flagging or fencing to demarcate the limits of non-native vegetation control and prevent impacts to adjacent native vegetation.
3. **Inclusion of Best Management Practices to Control Spread of Invasive Plants:** The proposed vegetation control activities in areas dominated by non-native plant communities would have to include BMPs, to be approved by the USFWS and CDFW, necessary to minimize the potential for spread of non-native, invasive species, including giant reed (*Arundo donax*).
4. **Avoidance of Native Wetland Areas:** The proposed vegetation control activities in the TRF would need to be redesigned to avoid the cutting or removal of other wetland areas dominated by native plant species, in particular the native bulrush (*Schoenoplectus americanus*) wetland located in the north-central portion of the project area.

### **Federal Agency Response to Commission Objection**

Section C(a)(i) of Chapter 11 of the CCMP requires federal agencies to inform the Commission of their response to a Commission objection. This section provides:

*If the Coastal Commission finds that the Federal activity or development project ... is not consistent with the management program, and the federal agency disagrees and decides to go forward with the action, it will be expected to (a) advise the Coastal Commission in writing that the action is consistent, to the maximum extent practicable, with the coastal management program, and (b) set forth in detail the reasons for its decision. In the event the Coastal Commission seriously disagrees with the Federal agency's consistency determination, it may request that the Secretary of Commerce seek to mediate the serious disagreement as provided by Section 307(h) of the CZMA, or it may seek judicial review of the dispute.*

The federal consistency regulations reflect a similar obligation; 15 CFR §930.43 provides:

#### ***State agency objection. ...***

*(d) In the event of an objection, Federal and State agencies should use the remaining portion of the 90-day notice period (see §930.36(b)) to attempt to resolve their differences. If resolution has not been reached at the end of the 90-day period, Federal agencies should consider using the dispute resolution mechanisms of this part and postponing final federal action until the problems have been resolved. At the end of the 90-day period the Federal agency shall not proceed with the activity over a State agency's objection unless: (1) the Federal agency has concluded that under the "consistent to the maximum extent practicable" standard described in section 930.32 consistency with the enforceable policies of the management program is prohibited by existing law applicable to the Federal agency and the Federal agency has clearly described, in writing, to the State agency the legal impediments to full consistency (See §§930.32(a) and 930.39(a)), or (2) the Federal agency has concluded that its proposed action is fully consistent with the enforceable policies of the management program, though the State agency objects.*

*(e) If a Federal agency decides to proceed with a Federal agency activity that is objected to by a State agency, or to follow an alternative suggested by the State agency, the Federal agency shall notify the State agency of its decision to proceed before the project commences.*

## **IV. FINDINGS AND DECLARATIONS**

### **A. PROJECT DESCRIPTION**

U.S. Customs and Border Protection (CBP) has submitted a consistency determination for the proposed expansion of its current vegetation control activities within the Tijuana River Floodway (TRF), a channelized portion of the Tijuana River valley located in the San Ysidro district of the City of San Diego near the U.S. – Mexico border ([Exhibits 1, 2](#)). The TRF is owned by the International Boundary and Water Commission (IBWC) and is managed for flood control purposes. Due to its proximity to the international boundary, the TRF is also a critical area for CBP operations. The proposed project would extend mechanical vegetation removal efforts into

native riparian vegetation in the area surrounding the Dairy Mart Road bridge, and introduce the use of herbicides to improve the overall efficacy of vegetation removal.

### **Project Location and Background**

The Tijuana River is an ephemeral stream draining a watershed of 1,700 square miles, of which approximately 30% occurs in the United States. Due to historical flooding problems along the river on both sides of the international boundary, the U.S. and Mexico executed a 1944 Water Treaty and several related resolutions for joint flood control and channel maintenance activities on either side of the border. In 1978, the Tijuana River Flood Control Project was completed, including construction of a 2.7 mile concrete flood control channel in the city of Tijuana and a 0.5 mile concrete channel and two miles of river channelization within levees (i.e., the TRF) on the U.S. side of the border.

The proposed vegetation removal activities would occur within the levees that define the TRF ([Exhibit 2](#)). The levees extend downstream (into the U.S.) approximately two miles from the border to Tijuana River Valley Regional Park, where the river resumes its natural course. The south levee runs along the international boundary, while the north levee parallels the southern portion of the San Ysidro community, just south and west of Camino De La Plaza. The project area includes 167.5 acres of the TRF extending from the border to approximately 200 yards downstream of the Dairy Mart Road bridge, but excludes the sod farm area that comprises the northwestern portion of the TRF ([Exhibit 2](#)). The project area on either side of the bridge includes approximately 17 acres of designated critical habitat for endangered least Bell's vireo (LBV), an extension of a much larger (885 acre) critical habitat area occurring within the neighboring Tijuana River Valley Regional Park.

The vegetation and channel of the Tijuana River in the reach adjacent to the border have been extensively modified, both during the construction of the TRF in the late 1970s and during subsequent vegetation management activities carried out to maintain flood control capacity within the floodway. In 1996, the Coastal Commission concurred with a consistency determination for the removal of approximately 37.5 acres of native riparian vegetation within the TRF for flood control purposes (CD-138-96). Although the Commission found the removal of native riparian vegetation to be inconsistent with Coastal Act Sections 30231 (protection of riparian buffers) and 30240 (protection of environmentally sensitive habitat areas), with the inclusion of riparian habitat mitigation, the Commission determined the project to be "consistent to the maximum extent practicable" with the CCMP because full consistency was prohibited by the requirements of existing law – specifically, the treaty obligations between the U.S. and Mexico requiring the IBWC to maintain the TRF's flood control capacity and to remove obstructions that would diminish this capacity. CBP states that the currently proposed project would occur outside the area of previous vegetation removal projects and is not a part of the IBWC's flood control program.

Vegetation control within the TRF is currently managed by CBP in partnership with the IBWC, and consists of selective mechanical removal (i.e., disking and mowing) in accordance with a 1980 Memorandum of Understanding between the two agencies and a 2008 Programmatic Environmental Impact Statement for flood control improvements (IBWC 2008), and a 2010 Endangered Species Act consultation with the U.S. Fish and Wildlife Service (USFWS). The 2010 consultation was necessary to address potential impacts to the endangered least Bell's vireo (LBV) and its critical habitat, which is supported by native vegetation occurring in the western



portion of the TRF on either side of Dairy Mart Road ([Exhibits 2, 3](#)). Routine vegetation control starts at the border on the east end of the project area, and extends between the levees westward to the edge of the designated critical habitat for least Bell's vireo, approximately 200 yards west of the Dairy Mart Road bridge. The work is performed twice a year, typically when the vegetation reaches approximately two feet tall. In accordance with the requirements of the 2010 USFWS consultation, removal of native vegetation (e.g., willows, mulefat) within the LBV critical habitat area is restricted, and CBP removes only non-native species such as giant reed (*Arundo donax*).

### **Purpose and Need**

In its consistency determination, CBP states that effective control of both native and non-native vegetation in the TRF is necessary to allow continued USBP surveillance to curtail illegal activities in this controlled area adjacent to the U.S. – Mexico border. CBP describes the purpose of the project as follows:

*The purpose of the Proposed Action is to enable CBP to fulfill its mission of protecting the U.S. southern border and to enhance the safety of CBP personnel in carrying out their duties. For CBP to meet its mission to control illegal activities, it must maintain surveillance sight lines across the Project Area in perpetuity.*

*The need for the Proposed Action is that existing native and non-native plants obstruct the view of the USBP officers, which hinders their ability to detect people illegally crossing the border in the vicinity of the TRF. In addition to blocking visibility, many of the plants are robust enough to impede movement. Native black willows (*Salix gooddingii*) near the Dairy Mart Bridge also limit sight lines, preventing CBP from fulfilling its mission.*

In the area immediately east of Dairy Mart Rd. bridge, where the removal of native vegetation is currently restricted due to the presence of designated critical habitat for the federally-endangered least Bell's vireo (LBV), effective surveillance is particularly difficult:

*... in areas where native vegetation provides critical LBV habitat, vegetation removal is currently restricted. Native black willows (*Salix nigra*) and mulefat (*Baccharis salicifolia*) continue to grow larger, obscuring effective CBP surveillance and limiting direct views into the areas with native vegetation. The current mechanical removal only protocol restricts removal or trimming of native plants that support the LBV critical habitat, thereby preventing effective CBP surveillance and line of sight monitoring in those areas.*

### **Project Description**

CBP proposes to address these operational challenges by expanding its on-going vegetation control activities to include (a) mechanical removal of native vegetation within the 16-acre LBV critical habitat area surrounding Dairy Mart Road bridge; and (b) application of herbicides to increase the effectiveness and efficiency of the vegetation control efforts.

#### *Mechanical Removal*

Under the proposed project, removal of all non-native vegetation (e.g., giant reed ) within the project area, as shown in [Exhibit 2](#), would continue. However, CBP also proposes to expand its mechanical removal efforts to include the removal of 2.56 acres (62%) of the existing 4.1 acres of native riparian vegetation currently within the 15.99 acres LBV designated critical habitat



occurring at the west end of the project area, on either side of Dairy Mart Road bridge. As shown in [Exhibit 3](#), CBP proposes to remove all native vegetation on the east side of the bridge, while allowing existing native vegetation in the area west of the bridge to remain. However, any *new* native vegetation growth west of the bridge is proposed to be removed on an on-going basis. The most abundant tall-growing native species in the area of new removal are black willow (*Salix gooddingii*), arroyo willow (*S. lasiolepis*) and mulefat (*Baccharis salicifolia*).

Mechanical removal methods would include disking, mowing, cutting, and occasional use of heavy equipment to extract tree roots. Removal of native vegetation would be done in the designated areas between September 1 and February 15 in order to avoid the bird nesting season.

#### *Herbicide Application*

CBP proposes to supplement expanded mechanical removal with the application of herbicides, which have not previously been used by CBP to control vegetation in the project area. CBP describes the proposed herbicide program as follows:

*Herbicide application must comply with the U.S. Environmental Protection Agency (USEPA) label directions as well as California Environmental Protection Agency, Department of Pesticide Regulation label standards. In areas near the Tijuana River, specific herbicides that are compatible with wetlands and water bodies would be used, including, AquaMaster® and Rodeo®, or equivalents ... [O]ther herbicides that are readily dispersed into aquatic habitats and that can cause damage to aquatic species would not be used.*

*Herbicide application could occur up to four times a year. Staging areas would be sited in previously disturbed areas such as unimproved roads, shoulders, graded areas, or sites with compacted soil that do not support vegetation adjacent to the Tijuana River Floodway. Prior to the beginning of work, all crew members would be trained to differentiate between native and non-native plants that occur within the management area.*

*... Several herbicide application methods are available. The application method that would be used by CBP would be based upon the 1) treatment objective (removal or reduction), 2) accessibility, topography, and size of the treatment area, 3) characteristics of the target species and the desired vegetation cover, 4) location of sensitive areas and potential environmental impacts in the immediate vicinity, 5) anticipated costs and equipment limitations, 6) meteorological, vegetative, and soil conditions of the treatment area at the time of treatment, and 7) proximity of human habitation ... In general, herbicide would be applied when translocation of herbicide from the leaves through the stem down to the rhizomes is maximized.*

*Herbicide would be thoroughly applied at the highest concentration allowed on the label to each leaf. The manufacturer's recommended rate of application for each targeted species would be followed. All applicators would be licensed and certified and crews would only mix herbicide and refill sprayers within the staging areas to minimize impacts.*

*Application of chemical controls is most effective on new sprouts that typically emerge after removal of aboveground biomass by mechanical methods. CBP current mechanical practices would reduce the quantities of herbicide needed for subsequent control, due to*

*the reduction in unwanted vegetation masses needing treatment. Re-sprouting species, such as giant reed, require a series of follow up applications of herbicide to be fully eliminated. An Aquatic Pesticide Application Plan would be prepared ...*

### **Alternatives**

As a part of its environmental review under the National Environmental Policy Act (NEPA), CBP examined several alternatives to the proposed project (Alternative 2), summarized as follows:

- Alternative 1 – No Action: The current vegetation controls strategy, consisting of the mechanical removal of non-native vegetation, would continue. The removal of trimming of native plants that support the LBV critical habitat would continue to be restricted.
- Alternative 3 – Pruning and Herbicide Application: Mechanical removal of non-native vegetation would continue, but would be supplemented by the pruning/trimming of native willows to a height of 10 feet throughout the project area up to 200 yards downstream of Dairy Mart Road bridge. Herbicide application as described above would be introduced.
- Alternative 4 – Herbicide Application and Grazing Management: Mechanical removal of non-native species and herbicide application would be followed with grazing by domesticated animals as a means of controlling new plant growth. Sheep and goats have been found to graze on both giant reed and woody vegetation such as willows.

Each of these project alternatives would avoid the removal of mature native riparian vegetation within LBV critical habitat, and would thus result in lesser environmental impact than the proposed project. However, CBP determined that none of the alternatives would be effective in reducing the existing visual obstructions that prevent adequate surveillance within this portion of the project area, and thus would not fulfill the project purpose.

### **Habitat Mitigation**

CBP states in its consistency determination that “any removal of sensitive habitat would likely be mitigated at a ratio of 3:1 for permanent losses of habitat”, and in its *Draft Environmental Assessment* (Draft EA) outlines a mitigation program consisting of two basic measures:

- Acquisition of mitigation bank credits at an approved mitigation bank in the San Diego area sufficient to offset permanent impacts to native habitat at a 3:1 ratio;
- Funding to support Kuroshio shot hole borer (an invasive pest) research and eradication

However, CBP has not yet prepared a detailed description of the habitat mitigation that would occur as a part of the proposed project.

## **B. OTHER AGENCY APPROVALS**

### **U.S. Army Corps of Engineers**

The U.S. Army Corps of Engineers (ACOE) is responsible for reviewing and authorizing the discharge of dredged or fill material into waters of the U.S. under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act. CBP has indicated that ACOE staff is currently reviewing the proposed project to determine whether an ACOE permit is required.

### **U.S. Fish and Wildlife Service**

Section 7(a)(2) of the federal Endangered Species Act requires that any Federal agency that permits, licenses, funds, or otherwise authorizes activities must consult with USFWS and/or National Marine Fisheries Service (NMFS), as appropriate, if an action “may affect” a listed species or designated critical habitat. CBP has initiated Section 7 consultation with USFWS, and on August 21, 2017, submitted a draft Biological Assessment evaluating the potential effects of the proposed project on federally-listed species and designated critical habitat.

### **San Diego Regional Water Quality Control Board (RWQCB)**

If required, CBP will submit an application to the San Diego Regional Water Quality Control Board for Clean Water Act Section 401 Certification for potential discharges into waters of the U.S. in the project area.

### **State Water Resources Control Board (SWRCB)**

The Statewide General National Pollutant Discharge Elimination System (NPDES) Permit for Residual Aquatic Pesticide Discharges to Waters of the United States from Algae and Aquatic Weed Control Applications (Water Quality Order 2013-0002-DWQ, General Permit No. CAG990005) regulates discharges resulting from applications of a variety of pesticides, including those proposed for use in the current project. CBP will apply to the SWRCB for coverage under this General Permit and prepare a required Aquatic Pesticide Application Plan.

### **California State Historic Preservation Office (SHPO)**

Pursuant to a 2014 Programmatic Agreement (CBP 2014) between federal, state and tribal agencies, CBP must undertake National Historic Preservation Act Section 106 consultation with the SHPO for qualifying projects. In the Draft EA, CBP determined that the proposed project qualified as exempt under the Section IV of the Programmatic Agreement and requires no further consultation with the SHPO.

### **Native American Tribal Consultation**

CBP sent coordination letters to Native American tribal representatives and the Native American Heritage Commission regarding protection of cultural resources within the project area.

## **C. STREAM ALTERATION**

Section 30236 of the Coastal Act states:

*Channelizations, dams, or other substantial alterations of rivers and streams shall incorporate the best mitigation measures feasible, and be limited to (1) necessary water supply projects, (2) flood control projects where no other method for protecting existing structures in the floodplain is feasible and where such protection is necessary for public safety or to protect existing development, or (3) developments where the primary function is the improvement of fish and wildlife habitat.*

Proposed development involving substantial alteration of a river or stream must demonstrate that the development: (1) is for one of the three allowable uses specified in Section 30236; and (2) incorporates “the best mitigation measures feasible.” The Commission has determined, on numerous previous occasions, that major vegetation removal within the banks of a river or stream constitutes a “substantial alteration.” For example, a previous vegetation removal project conducted by the IBWC in the TRF was found by the Commission to be a substantial alteration

of a river or stream, but it was found to be consistent with Section 30236 because the project was being conducted for necessary flood control purposes and incorporated the best mitigation measures feasible (CD-138-96).

As described in Section IV.A, above, CBP proposes to remove 2.56 acres of native riparian vegetation from the Tijuana River channel in the vicinity of Dairy Mart Rd. bridge, in an area that was not subject to vegetation removal covered by the IBWC's previous consistency determination (CD-138-96). The purpose of the present project, as summarized above, is to create new lines of sight, reduce hiding opportunities, and increase the safety and effectiveness of the Border Patrol's enforcement activities within the TRF. In contrast to the prior project, the current project is not primarily intended as a water supply, flood control, or habitat improvement project, and thus does not represent an allowable use under Section 30236 that would justify the substantial alteration of the Tijuana River that would result from the proposed vegetation removal.

For this reason, the Commission finds that the proposed project would be inconsistent with the stream alteration policy of the CCMP (Coastal Act Section 30236). In order to be found consistent with Coastal Act Section 30236, the project would need to be modified as follows:

1. **Avoidance of Native Riparian Vegetation and Least Bell's Vireo Habitat:** The proposed vegetation control activities in the TRF would need to be redesigned to avoid the removal of all existing native riparian vegetation within the project area, and in particular within the 15.99-acre LBV critical habitat area surrounding Dairy Mart Road bridge.

#### **D. ENVIRONMENTALLY SENSITIVE HABITAT AREAS AND WETLANDS**

Section 30240 of the Coastal Act states:

*(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.*

*(b) Development in areas adjacent to environmentally sensitive habitat areas ... shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat ... areas.*

Section 30107.5 of the Coastal Act defines environmentally sensitive area:

*"Environmentally sensitive area" means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.*

As discussed below, the proposed project involves development within and affecting native riparian habitat meeting the definition of an environmentally sensitive habitat area (ESHA). The Coastal Act establishes a high standard for protection of areas that are identified as environmentally sensitive. Only resource-dependent uses, such as habitat restoration, are allowed

within ESHA, and all development within or adjacent to ESHAs must be sited and designed to prevent significant disruption or degradation of the ESHAs.

The following findings were developed in consultation with the Commission's staff ecologist, Dr. Laurie Koteen. Dr. Koteen has reviewed available biological information relevant to the proposed project and has concluded that the native riparian habitat within the project area constitutes ESHA under the Coastal Act (*see* [Appendix B – Staff Ecologist Memo](#)).

### **Riparian Habitats**

At present, the project area consists largely of ruderal vegetation communities dominated by non-native species ([Exhibit 4](#)). The construction of the TRF and subsequent flood control and vegetation removal projects have drastically altered this reach of the Tijuana River Valley, removing of much of the native riparian vegetation that previously occurred along the river and, for the most part, preventing its regrowth. For example, the IBWC's 1996 flood control project removed approximately 37.5 acres of native riparian vegetation that had regrown since the initial construction of the TRF in 1978 (CD-138-96).

Nonetheless, CBP reports that the current project area supports approximately 4.1 acres of intact native riparian vegetation. These remaining areas of riparian woodland, distributed in patches across the floodplain, are restricted to the northwestern end of the project area on either side of the Dairy Mart Road bridge, contiguous with a much larger area of riparian forest occurring within the Tijuana River Valley Regional Park ([Exhibits 2 - 4](#)). CBP's *Biological Survey Report* (WRA 2015b) identifies several gradations within these native riparian habitats based on the relative abundances of several dominant species, including arroyo willow (*Salix lasiolepis*), Goodding's black willow (*S. gooddingii*), and mulefat (*Baccharis salicifolia*) ([Exhibit 6](#)). Other, non-native species such as black mustard (*Brassica nigra*), giant reed (*Arundo donax*), Castor bean (*Ricinus communis*) and fennel (*Foeniculum vulgare*) are present amidst the native riparian vegetation, but in contrast to other portions of the TRF, are not dominant.

Riparian vegetation communities are among California's most sensitive habitats due to their high level of productivity, biodiversity, importance as migration corridors and bird nesting habitat, and limited geographic distribution. Riparian habitats statewide have experienced drastic reductions in extent over the past 150 years due to reservoir construction, levee and channelization projects, timber harvest, livestock grazing, water pollution, gold and gravel mining and clearing for agricultural and urban uses. At present, riparian vegetation covers an estimated 145,000 hectares statewide, representing just 2% to 15% of its historic range, depending on bioregion (RHJV 2004). Riparian habitats are particularly threatened in Southern California, where their area has been reduced by an estimated 95% to 97% (Faber et al 1989). The riparian vegetation communities present at the project site are considered by the California Department of Fish and Wildlife (CDFW) to be sensitive due to their scarcity and declining status in California (CDFG 2010; CDFW 2017). Remaining areas of Southern Arroyo Willow forest are ranked by CDFW as S2.1 ("imperiled" in the state due to very restricted range, very few populations, steep declines or other factors), while Black willow (*S. gooddingii*) forest is ranked S3 ("vulnerable"). The historical channelization of the Tijuana River Valley, both upstream and downstream of the international border, provides a local example of the ways in which native riparian habitats have been altered or eliminated.

In past actions, the Commission has routinely recognized native riparian habitats in San Diego County (particularly those supporting rare and sensitive species) as ESHA (e.g., CDPs. 6-01-149, 6-10-006, 6-13-0713, CD-043-07, CC-056-11) including within the Tijuana River Valley (e.g., CDP 6-02-005, CD-084-99) and the TRF itself (CD-127-96, CD-138-96). Additionally, the native riparian habitats within the project area are included within the “Multiple Species Conservation – Open Space” land use designation in the 1999 Tijuana River Valley Land Use Plan, a component of the City of San Diego’s certified Local Coastal Program. A primary goal of this land use designation is to “restore the Tijuana River Valley to a broad natural floodplain containing riparian and wetland habitats.” Approximately 140 acres of the project area are also included in the City of San Diego’s Multi-Species Conservation Plan Multi-Habitat Planning Area (MHPA), which delineates core biological resource areas and corridors targeted for conservation.

The riparian vegetation at the project site occurs within a larger, 15.99-acre area of designated critical habitat for the federally-listed endangered least Bell’s vireo, and is known to support this species. The project area may also provide habitat for several other rare and sensitive species.

#### Least Bell’s Vireo

Least Bell’s vireo (LBV) is a migratory bird that summers in California and northern Baja California and that is listed as endangered under both the federal and state Endangered Species Acts.<sup>1</sup> LBV was once common in lowland riparian habitats throughout California, but declined precipitously during the twentieth century primarily due to habitat loss and nest parasitism by brown-headed cowbird (*Molothrus ater*), a problem which has been exacerbated by the conversion of riparian habitats into croplands favored by cowbird for foraging (USFWS 1998; RHJV 2004). By the time of federal listing in 1986, the LBV population had declined to just 300 pairs that were restricted to southern California, primarily San Diego County (USFWS 1998). The population has increased since, with the number of nesting territories in the state in 2006 estimated to be approximately ten times greater than in 1986, though still limited almost entirely to southern California (USFWS 2006).

As detailed in the Draft EA and its supporting technical reports, the native riparian vegetation within the project area provides suitable habitat for LBV, and the species has been observed at the project site and other nearby areas during biological surveys:

*Recent surveys have confirmed the birds’ presence at the Naval Outlying Landing Field less than 2.5 miles away (Lynn 2015), and WRA biologists have heard the birds singing from within the Project Area. It is therefore likely that the least Bell’s vireo occurs within the Project Area, and nesting may occur where the riparian vegetation is dense and continuous.*

LBV breeding habitat consists of riparian vegetation (often in an early successional state) providing dense cover in the lower shrub layer for nest concealment, and a stratified canopy structure favorable to insect abundance and thus vireo foraging (USFWS 1998). LBV breeding and nesting extends from mid-March to late September. The willow- and mulefat-dominated

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<sup>1</sup> LBV was listed as a Federal Endangered species in 1986; critical habitat was designated in species was established in 1994.

vegetation at the project site provides suitable breeding habitat for LBV, although no nesting in this area has been documented by CBP.

Critical habitat for LBV consists of 38,000 acres in the riparian areas of ten Southern California watersheds, including 885 acres in the Tijuana River Valley and approximately 16 acres within the project area.

#### Other Sensitive Species

CBP's *Biological Survey Report* (WRA 2015b) and *Draft Biological Assessment* (WRA 2017) indicate that a number of other rare and sensitive wildlife species are either present or have the potential to occur in the project area due to the presence of suitable habitat. These species are listed in Table 1, below:

**Table 1: Special-Status Wildlife Species with Potential to Occur at Project Site**

Scientific Name	Common Name	Regulatory Status*	Comments
<i>Empidonax traillii extimus</i>	Southwestern willow flycatcher	FE, SE	Suitable riparian habitat present; thought to be extirpated from project area (WRA 2015b, 2017)
<i>Setophaga petechia</i>	Yellow warbler	SSC	<b>Observed in project area</b> ; suitable riparian breeding habitat present.
<i>Aimophila ruficeps canescens</i>	So. California rufous-crowned sparrow	WL	Some suitable habitat components (shrubs) present; moderate potential to occur (WRA 2015b)
<i>Elanus leucurus</i>	White-tailed kite	FP	<b>Observed in project area</b> ; suitable nesting habitat present (WRA 2015b, 2017)
<i>Accipiter cooperii</i>	Cooper's hawk	WL	<b>Observed in project area</b> ; suitable riparian nesting habitat present. (WRA 2015b, 2017)
<i>Circus cyaneus</i>	Northern harrier	SSC	<b>Observed in project area</b> ; suitable shrub/ grassland nesting habitat present. (WRA 2015b, 2017)
<i>Athene cunicularia</i>	Burrowing owl	SSC	Some suitable habitat components present (grassland/scrubland/mammal burrows); moderate potential to occur (WRA 2015b)
<i>Lepus californicus bennettii</i>	San Diego black-tailed jackrabbit	SSC	Suitable shrub habitat present; high potential to occur (WRA 2015b)
<i>Aspidoscelis hyperythra beldingi</i>	Belding's orange-throated whiptail	SSC	<b>Observed in project area</b> ; suitable habitat present (WRA 2015b, 2017).
<i>Crotalus ruber</i>	Red-diamond rattlesnake	SSC	Some suitable habitat components present moderate potential to occur (WRA 2015b)
<i>Phrynosoma blainvillii</i>	Coast horned lizard	SSC	Some suitable habitat components present moderate potential to occur (WRA 2015b)
<i>Anniella pulchra pulchra</i>	Silvery legless lizard	SSC	Some suitable habitat components present moderate potential to occur (WRA 2015b)

\* FE = federally-listed endangered; SE = state listed endangered; SSC = state species of special concern; FP = CDFW "fully protected" species; WL = CDFW "watch list" species.

Southwestern willow flycatcher (*Empidonax traillii extimus*) is a federal- and state-endangered species that breeds in riparian woodlands of the American southwest, including southern California. Although suitable riparian habitat occurs in the project area, this species is thought to have been extirpated from the Tijuana River Valley by 1997. Surveys conducted from 1997-2001 were unable to locate any nests, and flycatchers were not detected in the project area during CBP's recent surveys (WRA 2015b).



The Tijuana River Valley provides breeding and nesting habitat for an abundance of bird species. The *Biological Resources Survey* (WRA 2015b) reports that between 76 and 104 different species may breed in the project vicinity. Several sensitive species known to use riparian habitat for foraging and nesting, including yellow warbler, white-tailed kite, Cooper's hawk and northern harrier, are identified by CBP's biological consultant as being present in the project area (WRA 2015b, 2017). These species are listed by CDFW as "species of special concern" (due to small, isolated or declining populations or vulnerability to habitat loss or other disturbance factors), "fully protected" (rare, facing possible extinction) or on the CDFW "watch list" (CDFW 2017).

CBP's biological assessments also indicate that the project area supports suitable habitat for several state-listed sensitive mammal and reptile species, though only one (Belding's orange-throated whiptail) was observed during surveys (WRA 2015b, 2017).

#### ESHA Determination

Based on these considerations, in particular the relative scarcity of intact native riparian vegetation in Southern California, the presence of the endangered least Bell's vireo and other rare and sensitive species in the riparian habitats within the project area, and the fact that these resources could easily be disturbed or degraded by human activities or development, the riparian habitats within the 15.99-acre LBV critical habitat area meet the definition of ESHA under Coastal Act Section 30107.5.

#### Project Impacts to Riparian Habitats and Sensitive Species

As described in Section IV.A, above, the proposed project would remove approximately 2.56 acres of native riparian vegetation in order to facilitate Border Patrol operations within the project area. Native vegetation removal would be concentrated in the northwestern portion of the project area, immediately to the east of Dairy Mart Road bridge ([Exhibit 3](#)). The 2.56 acres of native vegetation to be removed represents 62% of the existing native riparian habitat in the project area. After the initial removal of vegetation, CBP would also periodically remove or treat with herbicides any new growth of native riparian plants to ensure that the area remains clear.

The proposed removal of the existing native vegetation cover also has the potential to directly harm or disrupt the behavior of rare and sensitive wildlife species, including the endangered LBV, which occur in the project area, and would degrade the riparian and wetland habitats on which they depend. The habitat values of the treated areas would be reduced or eliminated due to the altered vegetation structure (removal of tree canopy and shrub understory), resulting in loss of cover, feeding areas, nest sites, and other similar functions. Following the initial vegetation removal effort, CBP intends to maintain the cleared areas free of major woody vegetation, which would effectively render permanent these habitat alterations. Although the area of the LBV critical habitat that would be removed (2.56 acres) is small relative to the area that would remain nearby in Tijuana River Valley Regional Park (approximately 885 acres), the project would nonetheless encroach into an area that the USFWS has determined is essential for the continued survival and eventual recovery of this species.

#### Impact Avoidance, Minimization and Mitigation

CBP's project description includes several measures intended to reduce or mitigate the impacts of the proposed vegetation management activities on sensitive species and habitats. As described

in Section 5.3 of the Draft EA, CBP would implement the following best management practices (BMPs):

- *Coordinate with the appropriate federal agency for potential impacts on and appropriate minimization and avoidance measures for species.*
- *If clearing activities are scheduled during nesting season (February 15 through September 1), surveys would be performed to identify active nests. If an active nest is found, a buffer would be established and the nest avoided or CBP would consult with USFWS.*
- *CBP would not, for any length of time, permit any pets inside the Project Area or adjacent native habitats. This BMP does not pertain to law enforcement animals.*
- *Maintenance equipment would be cleaned prior to entering and departing Project Areas to minimize the spread and establishment of nonnative invasive species.*
- *Clearing of native vegetation would take place outside of the breeding season and under the guidance of a qualified biologist. Contractor to consult with CBP to ensure that adequate sight lines are created to ensure CBP is better able to fulfill its mission efficiently and safely.*

In addition, and as discussed in below in Section IV.E, CBP would include BMPs to minimize ground disturbance and impacts to water quality during project implementation.

CBP also proposes to carry out mitigation for the unavoidable impacts to native riparian vegetation and LBV habitat:

*The goals of mitigation are to replace the lost habitat so as to minimize impacts to LBV and to fund research and eradication of the Kuroshio shot hole borer which is causing broad scale impacts to LBV habitat in the area.*

*The following mitigation measures would also apply to Biological Resources.*

- *Mitigation bank credits would be acquired to offset permanent impacts to native habitat at a 3:1 ratio at an approved mitigation bank within the San Diego area, and/or*
- *Funding as determined in consultations with the USFWS would be provided for Kuroshio shot hole borer research and eradication.*

*Implementation of BMPs and mitigation measures described above would serve to expand LBV habitat at a protected mitigation bank where the scale of habitat preservation would triple that impacted by the project in order to support more reproducing populations of LBV, and where maintenance would be funded for long-term habitat protection. In addition, the existing remaining habitat would benefit from funding made available by the project to research methods to minimize the broad scale impacts currently caused by the Kuroshio shot hole borer affecting LBV habitat in the Tijuana River Basin and to develop/implement new techniques to limit impacts to riparian vegetation.*

Analysis

With a few limited exceptions, Section 30240(a) of the Coastal Act does not allow development within ESHAs, even with mitigation. The primary exception applies if the proposed development is “a use dependent on the resource.” This fundamental requirement of the Act was confirmed in the *Bolsa Chica* case, wherein the Court found the following:

*Importantly, while the obvious goal of section 30240 is to protect habitat values, the express terms of the statute do not provide that protection by treating those values as intangibles which can be moved from place to place to suit the needs of development. Rather, the terms of the statute protect habitat values by placing strict limits on the uses which may occur in an ESHA ...*<sup>2</sup>

The only other exceptions would be: (1) if strict application of the restrictions established by Section 30240 would result in a Constitutional “taking” of private property rights; (2) if the Commission were to find that (a) a project consisted of a specific, allowable use under another Coastal Act policy (for example, Section 30236 allows for alteration of coastal streams for flood control, etc.) and (b) that authorization takes precedence over the restrictions in section 30240; (3) if the Commission were to find that a project posed conflicts between one or more Coastal Act policies, in which case the Commission must invoke the conflict resolution policy and authorize an activity that it determined met the requirements of Section 30007.5 of the Coastal Act because the conflict was being “... resolved in a manner which on balance is the most protective of significant coastal resources” (Section 30007.5); or (4) if the “consistency to the maximum extent practicable” standard applicable to federal agencies (and described above in Section III) presented a situation where avoiding development within ESHA was prohibited based on existing law.<sup>3</sup>

In the present case, while the Commission is sensitive to the unique border security concerns present within the TRF, there is no basis to apply any of these exceptions. The project is a federal agency action occurring on federal land, so there is no potential for a taking of private property rights. Border security is not among the very limited number of allowable uses within a stream channel under Section 30236, and approval of the proposed vegetation removal is not required by any other policy so as to create a conflict among Chapter 3 policies. Moreover, CBP has not argued that full consistency with the CCMP is prohibited by existing law or provided any documentation to support a maximum extent practicable argument. Thus, the Commission is not aware of any circumstance that would supersede the requirements of the Coastal Act policies protecting ESHA and sensitive species.

The removal of 2.56 acres of native riparian habitat supporting LBV and other rare and sensitive species, which the Commission’s staff ecologist has determined constitutes ESHA, is clearly inconsistent with the resource protection requirements of Section 30240(a) of the Coastal Act,

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<sup>2</sup> *Bolsa Chica Land Trust v. Superior Court* (1999). 71 Cal.App.4th 493, 507.

<sup>3</sup> For example, in 1996 the Commission concurred with IBWC consistency determination CD-138-96 for vegetation control activities in the TRF, including the removal of native riparian vegetation, on the grounds that the project was (a) necessary for flood control purposes (an allowable use under Coastal Act 30236) and (b) required under existing law, specifically the federal government’s treaty obligations with Mexico. As such, the Commission found the vegetation removal to be “consistent to the maximum extent practicable” with the CCMP.

both because the proposed development is not a resource-dependent use, and because it does not protect against the significant disruption of habitat values.

### **Non-Native Vegetation Removal**

CBP's proposed vegetation control activities would also include the trimming, removal and herbicide treatment of non-native vegetation occurring throughout the project area, including in areas within and immediately adjacent to the riparian ESHA in the 16-acre LBV critical habitat area. Section 30240(b) requires that development occurring in adjacent (buffer) areas be "designed to prevent impacts which would significantly degrade those areas" and be "compatible with the continuance" of the ESHA.

As described in the CBP's consistency determination and Draft EA, much of the project area is dominated by non-native herbaceous vegetation. In the western portion of the project area, adjacent to the native riparian vegetation, the highly-invasive species giant reed (*Arundo donax*) is particularly abundant. CBP's *Biological Resource Survey* describes the species as follows:

*Giant reed is an aggressive, introduced perennial grass that readily outcompetes native plants. It is one of the fastest growing land plants in the world, forming large, very dense thickets up to 18 feet in height that crowd out any native plants. Areas infested with giant reed suffer dramatically decreased biodiversity, wildlife habitat, and structural diversity. The plant reproduces quickly in several different ways: through rhizomes and culms that detach from the plant to float down river or through its self-regenerating stalks ... The Cal-IPC ranking for the species of giant reed is High, meaning it has a severe impact on the ecosystems it invades.*

The mechanical removal of giant reed is a part of CBP's existing, on-going vegetation control program under its 1980 MOU with the IBWC, the 2008 IBWC Programmatic EIS and 2010 Endangered Species Act USFWS consultation. CBP states in the Draft EA and consistency determination that the continued removal of giant reed and other non-native, invasive species (e.g., fennel) within the full project area, including within and adjacent to native riparian vegetation, would have direct beneficial effects because it would limit the spread of these species, allow for the spread and regrowth of native vegetation within the portion of the project area west of Dairy Mart Road bridge, and improve the quality of vegetation throughout the TRF. CBP has also stated that removal of giant reed and other invasive species in the project area would benefit downstream habitats by limiting invasive plant infestations from upstream (12/19/17 J. Petrilla e-mail).

The Commission agrees, in principle, that CBP's program of non-native vegetation removal in the project area could benefit native habitats in the surrounding area (both within the project area and in areas downstream), if carried out in a manner that protects the existing riparian ESHA. The removal of non-native vegetation, even if for purposes of surveillance and law enforcement, has the potential to enhance and restore the riparian ESHA by controlling the spread of invasive species such as *Arundo* and affording native species new space to grow. The Commission has consistently determined that habitat restoration within ESHA is a "resource dependent" activity, and thus an allowable use of the ESHA under Section 30240. In its consistency determination and Draft EA, CBP has proposed to conduct all vegetation removal activities outside the bird nesting season (February 15 – August 31), in order to minimize the potential that such activities

would disrupt LBV and other sensitive avian species in the area. The USFWS and CDFW recommend the use of a slightly different avoidance period (March 15 – September 15) for LBV nesting. Other necessary avoidance mitigation measures to avoid affecting ESHA would include (a) the provision of a qualified biological observer to monitor for LBV and other sensitive species during vegetation removal activities; and (b) use of temporary flagging or fencing to mark the limits of vegetation control and protect adjacent native vegetation.

Additionally, the removal of non-native vegetation would also need to be carried out using methods that do not promote the spread of invasive pest species such as giant reed. As noted by CBP's biological consultants, giant reed is known to spread via "culms that detach from the plant to float down river" (WRA 2015b). In their joint September 5, 2017 comment letter on the Draft EA, USFWS and CDFW also caution that "[c]ontrol of arundo should be done according to the technique described in *Controlling Arundo on IBWC Property in the Tijuana River Valley* (Boland 2015)" to avoid further spreading this pest.

To date, CBP has not provided a comprehensive plan for the protection of ESHA and sensitive species during its proposed non-native vegetation removal activities, nor evidence that its vegetation removal techniques would prevent the spread of giant reed and other non-native pests. In the absence of this information, the Commission concludes that the proposed project would be inconsistent with Coastal Act Section 30240(a), because the proposed non-native vegetation removal, although an allowable, resource-dependent use, would not protect against the significant disruption of ESHA, and inconsistent with Coastal Act Section 30240(b), because the proposed development occurring in a buffer area would not be designed to prevent impacts that would significantly degrade an ESHA.

#### *Kuroshio Shot Hole Borer*

As noted by the USFWS and CDFW in their September 5, 2017 letter to CBP, vegetation within the Tijuana River Valley has been severely affected by the Kuroshio Shot Hole Borer (SHB), an invasive ambrosia beetle that tunnels galleries into the cambium and introduces fungi and other pathogens into many native riparian trees, often resulting in dieback. USFWS/CFDW further note that the improper disposal of cleared vegetation resulting from the proposed project could lead to further spread of SHB, and recommend several best management practices needed to minimize the spread of this pest:

- i. *education of on-site workers regarding SHB and its spread;*
- ii. *reporting sign of SHB infestation, including sugary exudate ("weeping") on trunks or branches and SHB entry/exit-holes (about the size of the tip of a ballpoint pen), to the Department and University of California- Riverside's (UCR) Eskalen Lab;*
- iii. *equipment disinfection;*
- iv. *avoidance and minimization of transport of potential host tree materials;*
- v. *chipping potential host materials to less than 1 inch and solarization, prior to delivering to a landfill;*
- vi. *chipping potential host materials to less than 1 inch and solarization, prior to composting on-site;*
- vii. *solarization of cut logs and/or burning of potential host tree materials; and*

*viii. reporting suspected infestations to the UCR Eskalen Lab at (eskalenlab.ucr.edu).*

In response to these comments, CBP has agreed to incorporate these BMPs into its project description, and further, to adhere to recommendations for managing SHB contained in recent guidelines developed by UC Riverside (Paine et al. 2017), and to continue on-going monitoring for SHB in the project area. With these measures in place, the Commission concludes that the proposed vegetation removal in areas adjacent to riparian ESHA would minimize the potential for spread of the SHB and further infestations that would significantly degrade the ESHA.

### **Conclusion**

For the reasons discussed above, the Commission finds that the proposed development is not consistent with the resource protection requirements of Section 30240 of the Coastal Act. In order to be found consistent with Coastal Act Section 30240, the project would need to be modified as follows:

1. **Avoidance of Native Riparian Vegetation and Least Bell's Vireo Habitat:** The proposed vegetation control activities in the TRF would need to be redesigned to avoid the removal of any existing areas of native riparian vegetation within the project area, and in particular within the 15.99-acre LBV critical habitat area surrounding Dairy Mart Road bridge.
2. **Inclusion of Measures to Protect Sensitive Species and Habitats During Non-Native Vegetation Removal:** The proposed removal of non-native vegetation within and adjacent to native riparian ESHA would need to include the implementation of resource protection measures, including (a) scheduling of project activities outside of the nesting season (Feb 15 – Sep 15) for LBV and other bird species; (b) provision of a qualified biological observer to monitor for LBV and other sensitive wildlife species during project activities (with the authority to halt project activities if needed to protect sensitive wildlife); and (c) use of temporary flagging or fencing to demarcate the limits of non-native vegetation control and prevent impacts to adjacent native vegetation.
3. **Inclusion of Best Management Practices to Control Spread of Invasive Plants:** The proposed vegetation control activities in areas dominated by non-native plant communities would have to include BMPs, to be approved by the USFWS and CDFW, necessary to minimize the potential for spread of non-native, invasive species, including giant reed (*Arundo donax*).

In the absence of these project modifications, the Commission concludes that the proposed project's permanent and/or temporary use of an ESHA, specifically the removal of 2.56 acres of native riparian woodland vegetation supporting least Bell's vireo, is not a use allowable within such habitat, and that use would not protect such habitat. Further, the proposed non-native vegetation removal in areas within and adjacent to the ESHA are not designed to prevent impacts that would significantly degrade those areas. For these reasons, the proposed project is inconsistent with the requirements of the ESHA policies of the CCMP (Coastal Act Section 30240). The Commission therefore objects to CBP's consistency determination based on its inconsistency with the ESHA policies of the CCMP.

## E. WETLANDS AND WATER QUALITY

Section 30231 of the Coastal Act states:

*The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.*

### Wetlands

CBP's wetland delineation (WRA 2015a) identifies approximately 68.4 acres of the project area as meeting the Coastal Commission's definition of a wetland, based on the presence of wetland hydrology, hydric soils and/or hydrophytic vegetation <sup>4</sup> ([Exhibit 5](#)). The large majority of the wetlands within the project area were classified as "seasonal floodplain wetland (managed/herbaceous)." These areas are dominated by non-native emergent vegetation, and for the most part have been subject to CBP's existing vegetation control program of mowing and disking, which effectively eliminates any shrub or tree growth in these areas.

Within the LBV critical habitat area in the northwestern portion of the TRF, CBP identified a second wetland type ("seasonal floodplain wetland (forested/shrub)") dominated by native riparian vegetation (willows and mulefat). These native riparian wetlands, corresponding to the riparian ESHA previously identified in Section IV.D, have been allowed to persist due to existing restrictions on the removal of native vegetation under CBP's 1980 MOU with the IBWC and the 2010 USFWS consultation.

The wetland delineation also identifies a small, separate area of forested/shrub wetland in the north-central portion of the project area ([Exhibit 5](#), near DP06). This area consists, at least in part, of a stand of Chairmaker's bulrush (*Schoenoplectus americanus*), a native, obligate wetland species that appears to be supported in this location by sprinkler runoff from a nearby sod farm (WRA 2015b) ([Exhibit 6](#)).

The proposed project involves vegetation control activities throughout most of the project area, including the removal of 2.56 acres of the existing native riparian wetland vegetation in the LBV

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<sup>4</sup> Coastal Act Section 30121 defines a wetland as follows:

*Wetland means lands within the Coastal Zone which may be covered periodically or permanently with shallow water and include saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, and fens.*

The Commission's administrative regulations further define a wetland based on the presence of three indicators:

*Wetlands are lands where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes, and shall also include those types of wetlands where vegetation is lacking and soil is poorly developed or absent as a result of frequent or drastic fluctuations of surface water levels, wave action, water flow, turbidity or high concentrations of salt or other substance in the substrate. Such wetlands can be recognized by the presence of surface water or saturated substrate at some time during each year and their location within, or adjacent to, vegetated wetlands or deepwater habitats.*



critical habitat area, and the continuance of current mowing and disking activities in wetlands dominated by non-native species (“managed/herbaceous” floodplain wetland areas). As discussed in detail in Section IV.D, above, the Commission has found that the proposed removal of the native riparian vegetation would represent a significant disruption of habitat values and is not an allowable use of this ESHA. For the same reasons, the Commission finds that the proposed removal of 2.56 acres of native riparian vegetation would degrade the biological productivity and quality of a coastal wetland and stream, and would, therefore, be inconsistent with the requirement of Section 30231 to maintain, and where feasible restore, wetlands and streams.

Similarly, the proposed mowing, disking or herbicide treatment of the small bulrush wetland occurring in the north-central portion of the project site would represent a significant degradation of the quality of this native wetland habitat.

In contrast, the proposed vegetation control within the larger portion of the project area dominated by non-native species, including approximately 63 acres of jurisdictional wetland, would not significantly degrade these areas in comparison to their existing state, which is in large part the end result of repeated disruption and clearance during past flood control and vegetation management activities. Moreover, the proposed removal and control of non-native, invasive species such as giant reed (*Arundo donax*), if carried out with appropriate precautions (see above), has the potential to benefit adjacent and downstream riparian and wetland areas by reducing source populations of this pest. The Commission has therefore determined that, as discussed above, if the project were modified to eliminate native vegetation removal, assure use of appropriate BMPs for control of invasives, and avoid adversely affecting the native bulrush area identified above, the project could be found consistent with Section 30231 of the Coastal Act.

### **Water Quality**

Due in part to discharges originating in Mexico, the Tijuana River system is listed as “impaired” under Section 303(d) of the Clean Water Act, and has been found to contain high concentrations of coliform bacteria, nutrients, pesticides and trace metals, high turbidity, and low dissolved oxygen. These water quality issues are being addressed by city, county and state agencies through the Tijuana River Water Quality Improvement Plan, approved by the San Diego RWQCB in February of 2016.

The proposed project has the potential to adversely affect surface and groundwater water quality in the Tijuana River basin through (i) ground disturbance, sediment mobilization and accidental spills of contaminants during mechanical vegetation removal activities; and (ii) the application of herbicides as a vegetation control technique.

The proposed vegetation control activities would not involve excavation, tree root removal or other techniques with the potential for major ground disturbance, and CBP would implement standing erosion control BMPs to minimize the potential for increased runoff and sedimentation in the Tijuana River. The Draft EA indicates that project staging areas would be located on roads, shoulders, graded areas, or other cleared areas with compacted soil outside the TRF in order to minimize the disturbance of vegetation and loose soils within the project area. Trash

and other solid waste materials would be removed from project sites and placed in waste receptacles to be located at the off-site staging areas.

In order to minimize the potential for water quality impacts from spills of fuel, oil or other hazardous materials, CBP would implement the following measures:

*To minimize potential impacts from hazardous and regulated materials, all fuels, waste oils, and solvents would be collected and stored in tanks or drums within a secondary containment system that consists of an impervious floor and bermed sidewalls capable of containing the volume of the largest container stored therein. The refueling of machinery would be completed in accordance with accepted industry and regulatory guidelines, and all vehicles would have drip pans during storage to contain minor spills and drips. Although it is unlikely that a major spill would occur, any spill of reportable quantities would be contained immediately within an earthen dike, and the application of an absorbent (e.g., granular, pillow, sock) would be used to absorb and contain the spill.*

...

*All waste oil and solvents would be recycled. All non-recyclable hazardous and regulated wastes would be collected, characterized, labeled, stored, transported, and disposed of in accordance with all applicable federal, state, and local regulations, including proper waste manifesting procedures.*

CBP also indicates that it would comply with all conditions of its Section 401 Water Quality Certification, ACOE permits, and Statewide General NPDES Permit for Residual Aquatic Pesticide Dischargers from Algae and Aquatic Weed Control Applications issued by the State Water Resources Control Board.

### *Herbicides*

Herbicides used in the proposed project would be approved and registered by the U.S. EPA, and would be applied in compliance with EPA and California Department of Pesticide Regulation (CDPR) label standards. Herbicides used in areas near the Tijuana River would be limited to specific chemicals (e.g., glyphosate) that CDPR recommends for use in or near wetlands and water bodies, avoiding chemicals that are easily dispersed in water.

CBP has indicated that much herbicide use would be focused on controlling *Arundo donax* (giant reed). Effective treatment of this species requires spot application of herbicide, at high concentration, directly to each leaf, often with several follow-up treatments. This relatively precise method of application would minimize the total volume of herbicide used and the potential for the herbicide to enter the aquatic environment. In its consistency determination, CBP outlined the general guidelines it would follow to minimize the release of herbicides into the aquatic environment:

*... Several herbicide application methods are available. The application method that would be used by CBP would be based upon the 1) treatment objective (removal or reduction), 2) accessibility, topography, and size of the treatment area, 3) characteristics of the target*

*species and the desired vegetation cover, 4) location of sensitive areas and potential environmental impacts in the immediate vicinity, 5) anticipated costs and equipment limitations, 6) meteorological, vegetative, and soil conditions of the treatment area at the time of treatment, and 7) proximity of human habitation ... In general, herbicide would be applied when translocation of herbicide from the leaves through the stem down to the rhizomes is maximized.*

As a part of its compliance with the Statewide NPDES Permit for aquatic pesticides, CBP would also be required to prepare and implement a more specific Aquatic Pesticide Application Plan designed to reduce impacts to surface water quality during project implementation.

Based on the above discussion, the Commission finds that the proposed project would protect against adverse impacts to water quality from vegetation removal activities and herbicide application.

### **Conclusion**

For the reasons discussed above, the Commission finds that the proposed development is not consistent with the wetland protection requirements of Section 30231 of the Coastal Act, because it would not maintain the biological productivity of native wetlands occurring in the project area. In order to be found consistent with Coastal Act Section 30231, the project would need to be modified as follows:

1. **Avoidance of Native Riparian Vegetation and Least Bell's Vireo Habitat:** The proposed vegetation control activities in the TRF would need to be redesigned to avoid the removal of any existing areas of native riparian vegetation within the project area, and in particular within the 15.99-acre LBV critical habitat area surrounding Dairy Mart Road bridge.
2. **Inclusion of Measures to Protect Sensitive Species and Habitats During Non-Native Vegetation Removal:** The proposed removal of non-native vegetation within and adjacent to native riparian ESHA would need to include the preparation and implementation of resource protection measures, including (a) scheduling of project activities outside of the nesting season (Feb 15 – Aug 31) for LBV and other bird species; (b) provision of a qualified biological observer to monitor for LBV and other sensitive wildlife species during project activities (with the authority to halt project activities if needed to protect sensitive wildlife); and (c) use of temporary flagging or fencing to demarcate the limits of non-native vegetation control and prevent impacts to adjacent native vegetation.
3. **Inclusion of Best Management Practices to Control Spread of Invasive Plants:** The proposed vegetation control activities in areas dominated by non-native plant communities would have to include BMPs, to be approved by the USFWS and CDFW, necessary to minimize the potential for spread of non-native, invasive species, including giant reed (*Arundo donax*).
4. **Avoidance of Native Wetland Areas:** The proposed vegetation control activities in the TRF would need to be redesigned to avoid the cutting or removal of other wetland areas

dominated by native plant species, in particular the native bulrush (*Schoenoplectus americanus*) wetland located in the north-central portion of the project area.

## **F. CULTURAL RESOURCES**

Coastal Act Section 30244 states:

*Where development would adversely impact archaeological or paleontological resources as identified by the State Historic Preservation Officer, reasonable mitigation measures shall be required.*

The Tijuana River Valley lies within the traditional territory of the Kumeyaay people, who used the river and floodplain for fishing, food gathering and the collection of clay for thousands of years prior to the arrival of Europeans (TRNERR 2010).

In preparing the Draft EA, CBP commissioned a cultural resources survey of the project area (Northland 2015), conducted documentary research and sent coordination letters to Native American tribes and the Native American Heritage Commission in an effort to identify archaeological and culture resources in the project area. No historic structures, archaeological deposits, or other cultural resources were identified. Periodic flooding, a shifting river channel and the continual reworking of floodplain sediments in the project area create a dynamic environment that is not conducive to the preservation of archaeological and paleontological remains; evidence of earlier occupations of the area has likely been scoured or dispersed. In addition, past flood control and vegetation clearing activities, including mechanical disking, have likely further reduced the likelihood of identifying any cultural resources that may have been within the project area.

For these reasons, CBP concluded that the propose project would not result in new impacts to cultural resources beyond those that have already occurred, as the extent of ground disturbing activities would not be significantly expanded. Based on the findings of the records review, site survey, and coordination, CBP has also determined that no historic properties are present or would be affected by the proposed project, and that the project is exempted from further review pursuant to a September 2014 agreement among federal, state and tribal agencies governing CBP undertakings along the international border.<sup>5</sup> CBP states that no further consultation with Native American tribes or the California State Historic Preservation Officer (SHPO) is required at this time.

Additionally, in the Draft EA, CBP describes several measures that would be implemented to protect any cultural resources encountered during project activities:

*Furthermore, if important previously unidentified cultural resources are encountered, the contractor would stop all ground disturbing activities in the vicinity of the discovery until officials from CBP, the IBWC, and the California Office of Historic Preservation (OHP) are notified and the nature and significance of the find can be evaluated. If human remains are encountered during construction activity, construction would stop and the OHP would*

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<sup>5</sup> U.S. Customs and Border Protection. 2014. *Programmatic Agreement Regarding CBP Undertakings in States Located Along the Southwest Border of the United States*. Federal, State and Tribal agreement signed September 2014.

*also be notified per the Native American Graves Protection and Repatriation Act, and the California Public Resources Code Section 5097.98., and appropriate tribal organizations would be consulted. Thus, no impacts to cultural resources in the Project Area are expected.*

Additionally, in response to an August 1, 2017 comment letter provided to CBP by the Viejas Band of Kumeyaay Indians, CBP has agreed to allow a Kumeyaay cultural monitor to be present during project activities to monitor for the discovery of cultural artifacts, cremations sites or human remains.

For these reasons, the Commission finds that the project is **consistent** with the cultural resources policy of the CCMP (Coastal Act Section 30244).

## **Appendix A: Substantive File Documents**

### ***Consistency Determination for Project:***

U.S. Customs and Border Protection (CBP). 2017. Coastal Consistency Determination for Tijuana River Vegetation Control (CD-0009-17) and associated file.

### ***NEPA Document for Project:***

U.S. Customs and Border Protection (CBP). 2017. *Draft Environmental Assessment and Finding of No Significant Impact – Tijuana River Vegetation Control*. U.S. Department of Homeland Security. July 2017.

### ***Previous Coastal Commission Actions:***

Coastal Development Permit No. 6-01-149 (California Department of Transportation), January 9, 2003.

Coastal Development Permit No. 6-02-055 (California Department of Parks and Recreation), March 4, 2003.

Coastal Development Permit No. 6-10-006 (California Department of Transportation), August 13, 2010.

Coastal Development Permit No. 6-13-0713 (City of Carlsbad), March 12, 2014.

Consistency Certification No. CC-056-11 (San Diego Association of Governments). October 10, 2012.

Consistency Determination No. CD-127-96 (International Boundary and Water Commission), November 15, 1996.

Consistency Determination No. CD-138-96 (International Boundary and Water Commission), December 11, 1996.

Consistency Determination No. CD-084-99 (U.S. Army Corps of Engineers), September 14, 1999.

Consistency Determination No. CD-043-07 (U.S. Army Corps of Engineers), February 6, 2008.

### ***Correspondence***

U.S. Fish and Wildlife Service (USFWS) and California Department of Fish and Wildlife (CDFW). 2017. Letter (“Comments on the Draft Environmental Assessment for U.S. Customs and Border Protection’s Tijuana River Vegetation Control Project, San Diego County) to John Petrilla, U.S. Customs and Border Protection. Dated September 5, 2017.

Viejas Band of Kumeyaay Indians. 2017. Letter (“Tijuana River Vegetation Control EA Project”) to John Petrilla, U.S. Customs and Border Protection. Dated August 1, 2017.

Petrilla, J. 2017. E-mail (“RE: Request for consistency determination review period extension – Tijuana River Vegetation Control (CD-0009-17)”) to Joseph Street, California Coastal Commission. Dated December 19, 2017.

### ***Other Reports and Resources:***

California Department of Fish and Game (CDFG). 2010. List of Vegetation Alliances and Associations. Vegetation Classification and Mapping Program, September 2010.

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Faber, P.A., E. Keller, A. Sands and B.M. Massey. 1989. The ecology of riparian habitats of the southern California coastal region: a community profile. U.S. Fish and Wildlife Service Biological Report 85(7.27), 152 pp.

Northland Research, Inc. (Northland). 2015. *Cultural Resource Survey, Vegetation Management Plan*. Tijuana River Vegetation Control Project. Prepared for U.S. Customs and Border Protection.

Paine, T., M.E. Jones, A. Eskalen, M. Dimson and J. Kabashima. 2017. *Invasive Shothole Borers + Fusarium Dieback -- Prioritizing Management Efforts*. University of California, Riverside and Orange County Parks. Revised April 2017.

Riparian Habitat Joint Venture (RHJV). 2004. *The riparian bird conservation plan: a strategy for reversing the decline of riparian associated birds in California*. Version 2.0. California Partners in Flight. Available at: <http://www.prbo.org/calpif/pdfs/riparian.v-2.pdf>. Accessed: January 2018.

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U.S. Fish and Wildlife Service (USFWS). 1998. *Draft Recovery Plan for the Least Bell's Vireo*. Portland, OR.

U.S. Fish and Wildlife Service (USFWS). 2006. *Least Bell's Vireo (Vireo bellii pusillus) 5-Year Review Summary and Evaluation*. Carlsbad, CA.

U.S. International Boundary and Water Commission (IBWC). 2008. *Final Programmatic Environmental Impact Statement – Improvements to the Tijuana River Flood Control Project*. Prepared in cooperation with the U.S. Army Corps of Engineers, May 2008.

WRA, Inc. 2015a. *Wetland Delineation Report/Vegetation Management Plan, Tijuana River, San Diego County, California*. WRA Project No. 24228. Prepared for U.S. Customs and Border Protection, March 2015.

WRA, Inc. 2015b. *Biological Survey Report, Tijuana River, San Diego County, California*. WRA Project No. 24228. Prepared for U.S. Customs and Border Protection, April 2015.

WRA, Inc. 2017. *Draft Biological Assessment – Tijuana River Vegetation Control*. WRA Project No. 24228. Prepared for U.S. Customs and Border Protection, August 2017.