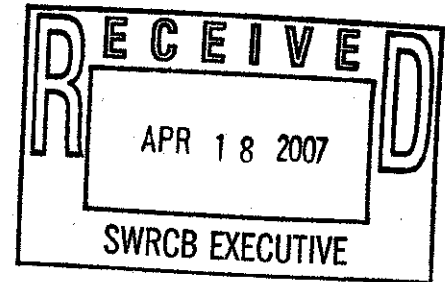


RANCHO MISSION VIEJO

April 18, 2007



State Water Resources Control Board
Ms. Song Her, Clerk to the Board
Executive Office
POB 100
Sacramento, CA 95812-0100

Reference: Wetland and Riparian Area Protection Policy

Subject: Rancho Mission Viejo Comment Letter

Dear Ms. Song:

Thank you for providing Rancho Mission Viejo (RMV) with the opportunity to comment on the CEQA scoping for the proposed Wetland and Riparian Area Protection Policy ("Policy").

RMV is located in Southern Orange County, California. The Ranch is bound by the existing communities of Rancho Santa Margarita, Mission Viejo, San Juan Capistrano and the undeveloped Cleveland National Forest and MCB Camp Pendleton. Various habitat types including but not limited to coastal sage scrub, chaparral, grassland, oak woodland and riparian are present on the Ranch.

Since 1882, the O'Neill family has been a responsible steward of the Ranch. We have, and continue to actively manage the Ranch to protect the resources on it. We intend to continue this tradition of stewardship into the future. To protect our land's resources, and address the needs of Orange County's growing population, RMV, in conjunction with the County of Orange, has undertaken a coordinated approach to the Endangered Species Act, Clean Water Act and Orange County's General Plan on approximately 22,815 acres of our 27,000 acre ownership.

In 2004 RMV and the County of Orange completed a General Plan Amendment/Zone Change (GPA/ZC) process to determine future land uses on RMV. In January of this year, the County of Orange, RMV and U.S. Fish and Wildlife Service (USFWS) successfully concluded the decades long planning process for the Southern Subregion Habitat Conservation Plan (HCP). In March of this year, the U.S. Army Corps of Engineers (USACE) and RMV also concluded the planning

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effort for the San Juan Creek Watershed/western San Mateo Creek Watershed Special Area Management Plan (SAMP). Both the HCP and the SAMP will result in the implementation of a watershed-wide management plan for the preservation, enhancement and restoration of aquatic resources on RMV lands.

RMV is fully supportive of the State's efforts to protect wetland and riparian habitats within both California as a whole, and specifically those resources within Orange County; however, we believe the proposed Policy raises significant questions regarding the relationship of the proposed Policy and the regulations (California Fish and Game Code, Section 1600) under which the California Department of Fish and Game protects these resources. We are not supportive of enacting new regulations that duplicate existing state regulations. In this regard, we offer the following comments for your consideration.

In the Introduction to the proposed Policy, the SWRCB sets forth the reasons why it believe a statewide Wetland and Riparian Area Protection Policy is needed. These reasons can be summarized as:

1. Lack of clarity in the existing regulatory framework for protecting non-federal wetlands and riparian;
2. Lack of statewide consistency in the definition of wetlands and riparian areas;
3. Lack of statewide consistency in definitions of beneficial uses for wetlands and riparian area functions; and
4. Lack of consistent statewide requirements for evaluating the condition of wetland and riparian area resources.

Reason 1: Lack of clarity in the existing regulatory framework for protecting non-federal wetlands and riparian

The SWRCB is correct in noting that whether a particular resource is regulated or not under the federal Clean Water Act has been complicated by recent federal court cases, including most notably: *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U. S. 159 (2001) (SWANCC) and *Rapanos et ux., et al. v. United States*, 126 S. Ct 2208 (2006) (Rapanos). However, while the picture for federal wetland regulations might be complicated, this is not the case at the State level. Contrary to the impression created by the proposed Policy Informational document, there are existing, well enforced regulations designed to protect California's wetland and riparian resources that are implemented by a sister State agency, the California Department of Fish and Game (CDFG). CDFG is responsible for implementation of Section 1600 et seq. of the Fish and Game Code. Section 1600 of the Fish and Game Code is unaffected by federal court rulings.

Section 1600 of the Fish and Game Code states “The Legislature finds and declares that the protection and conservation of the fish and wildlife resources of this state are of utmost public interest. Fish and wildlife are the property of the people and provide a major contribution to the economy of the state, as well as providing a significant part of the people's food supply; therefore their conservation is a proper responsibility of the state.”

To ensure that wetlands and riparian areas are protected and conserved, Fish and Game Code Section 1602 requires any person, state or local governmental agency, or public utility to notify the Department before beginning any activity that will do one or more of the following: 1) substantially obstruct or divert the natural flow of a river, stream, or lake; 2) substantially change or use any material from the bed, channel, or bank of a river, stream, or lake; or 3) deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it can pass into a river, stream, or lake. Fish and Game Code Section 1602 applies to all perennial, intermittent, and ephemeral rivers, streams, and lakes in the state.

RMV does not believe that this regulation exhibits a lack of clarity. Quite the contrary, the regulation is quite clear that it applies to *any person, state or local governmental agency, or public utility* and *to all perennial, intermittent, and ephemeral rivers, streams, and lakes in the state*. CDFG implements its authority under Section 1600 consistently and rigorously. In any subsequent policy or CEQA document on the protection of the state's wetlands and riparian areas, the SRWQCB should specifically consider the level of protection afforded by any existing regulation, including but not limited to Section 1600 of the Fish and Game Code, and explain in detail why further regulation is necessary, is not duplicative of an existing regulatory program and what benefits specifically will be gained through further regulation. Absent a clear benefit, RMV is not supportive of the enactment of new regulations that will duplicate the protections afforded by existing State regulations.

RMV notes that one of the three primary goals of the state's Wetlands Conservation Policy (Executive Order W-59-93) is to “reduce procedural complexity in the administration of State and Federal wetlands conservation programs.” In furtherance of this goal, one of the statewide policy initiatives is the “integration of wetlands policy and planning with other environmental and land use processes.”

For this reason, the Wetlands Conservation Policy designates the CDFG as one of the participating entities in any statewide initiative regarding wetlands. Pursuant to the Policy, relevant state agencies (including, among others, CDFG and the SWRCB) are to work together to develop consistent wetlands policies, standards and guidelines in order to avoid the confusion that would be associated with inconsistent application of these policies, standards and guidelines.

Furthermore, in formulating its proposals for improving the administration of wetlands regulatory programs in the state, the Wetlands Conservation Policy seeks to remove layers of review from the wetlands regulatory process. Consistent with this goal, the Policy declares that

. . . the State will work toward the adoption of a single definition of wetlands for regulatory purposes. The definition will, to the greatest extent possible, be consistent with the definition and wetlands delineation manual used by the Federal government.

Reason 2: Lack of statewide consistency in the definition of wetlands and riparian areas

CDFG defines the area subject to its jurisdiction as:

The term stream, which includes creeks and rivers, is defined in Title 14, California Code of Regulations (CCR), Section 1.72:

“A stream is a body of water that flows at least periodically or intermittently through a bed or channel having banks and supports fish or other aquatic life. This includes watercourses having a surface or subsurface flow that supports or has supported riparian vegetation.”

However, this definition is not complete with respect to Sections 1601 or 1603 because it does not define the terms bed, channel, or bank and does not define other stream-related features such as aquatic life, riparian vegetation, etc. It is therefore incumbent on Department personnel to develop a sense of what constitutes a stream for purposes of implementing and enforcing sections 1600 – 1607 and Lake/Streambed Alteration Agreements.

The following concepts have therefore been developed to assist Department employees in this endeavor.

- 1. The term stream can include intermittent and ephemeral streams, rivers, creeks, dry washes, sloughs, blue-line streams (United States Geological Survey Maps, USGS), and watercourses with subsurface flow. Canals, aqueducts, irrigation ditches, and other means of water conveyance can also be considered streams if they support aquatic life, riparian vegetation, or stream-dependent wildlife.*
- 2. Biologic components of a stream may include aquatic and riparian vegetation, all aquatic animals including fish, amphibians, reptiles, invertebrates, and terrestrial species, which derive benefits from the stream system.*
- 3. As a physical stream, a stream not only includes water (at least on an intermittent or ephemeral basis), but also a bed, bank, and/or levee, instream features such as logs or snags, and various flood plains depending on the return frequency of the flood event being considered (i.e., 10, 50, or 100 years, etc.).*
- 4. The lateral extent of a stream can be measured in ways depending on a particular situation and the type of fish or wildlife resources at risk. The*

following criteria are presented in order from the most inclusive to the least inclusive.

- A. The floodplain of a stream can be the broadest measurement of a stream's lateral extent depending on the return frequency of the flood event used. For most flood control purposes, the 100-year flood event is the standard measurement and maps of the 100-year flood plain exist for many streams. However, the 100-year flood plain may include significant amounts of upland or urban habitat and therefore may not be appropriate in many cases.*
- B. The outer edge of riparian vegetation is generally used as the line of demarcation between riparian and upland habitats and is therefore a reasonable and identifiable boundary for the lateral extent of a stream. In most cases, the use of this criterion should result in protecting the fish and wildlife resources at risk.*
- C. Most streams have a natural bank which confines flows to the bed or channel except during flooding. In some instances, particularly on smaller streams or dry washes with little or no riparian habitat, the bank should be used to mark the lateral extent of a stream.*
- D. A levee or other artificial stream bank could be used to mark the lateral extent of a stream. However, in many instances, there can be extensive areas of valuable riparian habitat located behind a levee.*

Any of the above criteria could be applicable in determining what constitutes a stream depending on the potential for the proposed activity to adversely affect fish and other stream-dependent wildlife resources.

Our experience to date is that the functional definition of "riparian areas" applied by CDFG results in much more substantial areas subject to CDFG jurisdiction than to Corps jurisdiction. For example, on the 401/WDR issued by the San Diego RWQCB for Planning Area 1 of the RMV Ranch Plan (see WDID No. 9 000001486 and 401 Cert No. 06C-047), USACE jurisdiction totaled 2.4 acres and CDFG jurisdiction totaled 4.5 acres. This difference in jurisdiction extends across RMV lands subject to the SAMP and HCP. For CEQA scoping purposes, it would seem incumbent upon the SWRCB to review the extent of CDFG jurisdiction under Fish & Game Code Section 1600 et seq. and to review the manner in which CDFG exercises its existing authority.

With regard to wetlands located within the broadly defined CDFG jurisdictional areas, CDFG and the California Coastal Commission both define wetlands according to a one parameter test, as follows:

WETLANDS are lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this classification wetlands must have one or more of the following three attributes: (1) at least periodically, the land supports

predominantly hydrophytes; (2) the substrate is predominantly undrained hydric soil; and (3) the substrate is nonsoil and is saturated with water or covered by shallow water at some time during the growing season of the year. (Cowadin et al)

Use of this definition in the field usually results in more area/resources that are defined as wetlands under the state regulations than under the three parameter federal regulations. The enclosed cross-section illustrates this concept.

RMV does not believe that there is a lack of consistency in the definition of wetlands and riparian areas. If anything, the use of the one parameter test may be functionally over-inclusive because it defines many areas as wetlands that do not exhibit functions generally attributed to wetlands by biologists.

Reason 3: Lack of statewide consistency in definitions of beneficial uses for wetlands and riparian area functions

During the delineation of CDFG jurisdiction for the HCP/Master Streambed Alteration Agreement, based on the regulatory framework described above, a number of factors were considered/evaluated in determining the limits of vegetation associations that would be regulated by CDFG as riparian habitat including beneficial uses for wetlands and riparian area functions. Specific resources used to aid in the identification and delineation of vegetation defined as “riparian” include the following: *National List of Plant Species that Occur in Wetlands* (Reed 1988)¹ and *A Manual of California Vegetation* (Sawyer and Keeler-Wolf 1996).² Use of the wetland indicator status provided in Reed (1988), as a useful tool for separating “riparian” from “upland” species is supported by an understanding of the origins of riparian systems in areas governed by a Mediterranean climatic regime. The dominant tree and shrub species that occur along perennial and intermittent streams are recognized remnants of the Arcto-Tertiary Geoflora of the Late Tertiary and Quaternary Periods that included wet climates, explaining their high demands for water (Holstein 1984).³ In areas now dominated by the drier Mediterranean climate, these species persist in areas where there is a permanent or seasonal surface or subsurface water supply. The dominant genera in southern California include: willow (*Salix*, spp.), cottonwood (*Populus* spp.), alder (*Alnus rhombifolia*), sycamore (*Platanus racemosa*), maple (*Acer* spp.), ash (*Fraxinus* spp.), and in some settings, oak (*Quercus* spp.).⁴ The hydrologic requirements for many of these genera differ and are generally well known. For example, well-aerated water that is close to the surface will favor alder whereas when the water table is relatively deep, sycamores will predominate as long as the intervening soil aeration is high. Direct measurements of water use by red willow documented water-use rates at 52.7 acre-

¹ Reed, J.B. Jr. 1988. National List of Plant Species that Occur in Wetlands. U.S. Fish and Wildlife Service Biological Report 88(26.10).

² Sawyer, John, O. and Todd Keeler-Wolf. 1995. *A Manual of California Vegetation*. California Native Plant Society, Sacramento.

³ Holstein, Glen. 1984. California Riparian Forests: Deciduous Islands in an Evergreen Sea. In: Warner and Hendrix (Eds.). *California Riparian Systems: Ecology Conservation and Productive Management*. University of California Press, Berkeley.

⁴ Holstein, Glen. 1984. California Riparian Forests: Deciduous Islands in an Evergreen Sea. In: Warner and Hendrix (Eds.). *California Riparian Systems: Ecology Conservation and Productive Management*. University of California Press, Berkeley.

inches per year with alder-dominated habitat using 47.0 acre-inches of water during the peak growing season July to October (California DPW 1942).⁵

The methods described here incorporated the wetland indicator status for each species as provided by Reed (1988), with the hydrologic requirements as noted above. The methods also follow Smith (2000) and are also consistent with the guidance provided by CDFG. The convention for application of these tools in the field for the project-level delineation was developed with direct input from CDFG biologists during the verification process. The methodology for defining the dimensions of riparian habitat in the field is summarized as follows:

- Designation of an area as “riparian habitat” was generally limited to stands of vegetation that included a predominance of species that exhibited an indicator status of FAC, FACW or OBL. (Coast live oaks were included as riparian habitat in specific instances as further described/discussed below.)
- Where all riparian habitat was included within the bank-full stream channel (*e.g.*, riparian herb), the outermost limits of either the bank or riparian habitat was mapped as the limits of CDFG riparian jurisdiction/habitat.
- Where riparian habitat extended beyond the bank-full channel to the active floodplain, and did not extend outside the active floodplain, the outermost limits of either the active floodplain or riparian habitat were mapped as the limits of CDFG riparian jurisdiction/habitat. By inclusion of the active flood plain and associated riparian habitat, the hydrologic, biogeochemical, and habitat functions not specifically associated with riparian vegetation, such as areas with localized ponding that support aquatic organisms (*e.g.*, invertebrates, amphibians, etc.), but providing such hydrologic, biogeochemical and habitat functions, were captured and included within the jurisdictional area(s).
- Where riparian habitat extended beyond the active flood plain to active terraces, the outermost limits of the riparian habitat on the terrace (*i.e.*, canopy edge or “drip line”) was mapped as the limits of CDFG riparian jurisdiction/habitat. Similar to inclusion of the flood plain described above, inclusion of the active terraces ensured that functions such as hydrologic exchange with the adjacent uplands, nutrient cycling, shading by overhanging vegetation, bank and channel stabilization by roots, as well as habitat functions, were included in the jurisdictional area(s).

Thus contrary to the statement in the information scoping document, CDFG specifically considers beneficial uses and riparian function in their jurisdictional determinations, leading one to, again, question the need for potentially duplicative state regulations.

Reason 4: Lack of consistent statewide requirements for evaluating the condition of wetland and riparian area resources

Regarding the lack of statewide requirements for evaluating the condition of wetland and riparian area resources, as part of the supporting technical documents for the SAMP, the USACE

⁵ State of California Department of Public Works. 1942. *Bulletin No. 50: Use of Water by Native Vegetation.*

performed an assessment of riparian ecosystem integrity for both the San Juan and San Mateo Creek Watersheds. The results of this assessment are documented in the report titled *Assessment of Riparian Ecosystem Integrity in the San Juan and San Mateo Creek Watersheds, Orange County, California* prepared by R. Daniel Smith. Hydrologic Integrity, Water Quality Integrity and Habitat Integrity were selected by the USACE as the assessment “endpoints” representing riparian ecosystem integrity. Several assessment indicators were selected to measure the endpoints, these included:

- Altered Hydraulic Conveyance – Riparian Reach and Drainage Basin
- Surface Water Retention
- Perennialized Stream Flow
- Import, Export, and Diversion of Surface Water
- Floodplain Interaction
- Sediment Regime
- Land Use/Land Cover – Nutrients, Pesticides, Hydrocarbons and Sediments
- Area of Native Riparian Vegetation
- Riparian Corridor Continuity – Riparian Reach and Drainage Basin
- Land Use/Land Cover – Riparian Ecosystem Boundary
- Land Use/Land Cover – Upland Buffer

A pre-project baseline was established for the San Juan/San Mateo Creek Watersheds; and each alternative selected for consideration in the SAMP EIS was modeled as a post-project condition. This type of assessment may work for larger scale projects such as a SAMP or similar effort but may be cost and time prohibitive for smaller scale projects. Alternative methods for assessing condition of wetlands such as the California Rapid Assessment Method (CRAM)⁶ which has been developed by a large team that includes CDFG, ACOE, USFWS and various RWQCBs. Thus, there are accepted methods for assessing wetlands functions that are regularly applied in the field by the Corps and by CDFG staff and which are employed in CEQA review of projects, as well as Corps 404 and CDFG 1600.

Alternatives

RMV is concerned that the “No Action” alternative in the public scoping document includes major omissions about what the Board has done to protect wetlands since 2004.

In 2004 the state Board adopted a General WDR for small wetlands areas disclaimed by the USACE. This General WDR covered those smaller wetlands. It also contained very stringent mitigation requirements. This is not mentioned in the scoping document.

⁶ Collins, J.N, E.D. Stein, M. Satula, R. Clark, A.E. Fetscher, L. Grenier, C. Grosso, and A. Wiskind. 2006. California Rapid Assessment Method (CRAM) for Wetlands and Riparian Areas. Version 4.2.3. 136 pp.

After the adoption, the Board issued guidance to all the regional Boards asking them to issue WDRs for areas that had been disclaimed by the Corps pursuant to SWANCC. This is also not mentioned in the scoping document. This guidance has been implemented by the San Diego RWQCB, and specifically on RMV. RMV received both a 401 certification and a WDR for impacts related to Planning Area 1 of the Ranch Plan (see WDID No. 9 000001486 and 401 Cert No. 06C-047).

Without mentioning any of this, the No Action alternative makes it appear that the SWRCB has done nothing to protect wetlands that have been disclaimed by the USACE since SWANCC. The description of the No Action alternative should be revised to include this information, a specific description of the number of projects issued a WDR, their mitigation requirements and an assessment of the benefits to wetlands and riparian areas of this approach.

Definition of Wetlands

Alternatives 3 and 4 call for using a broader definition than the federal wetlands definition. We want to point out to you that the Wetlands Workplan on Page 4 specifically states that the SWRCB should adopt the federal definition. RMV believes that adoption of another definition of wetlands in the state will cause considerable confusion for the regulated community when faced with two state issued definitions of wetlands, one used by CDFG and the Coastal Commission and one potentially used by the SWRCB. In order to maintain consistency between the 404 permit process and the 401 certification process, the federal definition should be used. Furthermore, jurisdictional delineations should follow U.S. Army Corps of Engineers Wetland Delineation Manual⁷ (Wetland Manual) and the 2006 Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Supplement (Arid West Supplement).⁸

Riparian Areas

Alternatives 3 and 4 call for the Board to begin regulating upland riparian areas never regulated by the USACE. We are concerned with this.

1. Alternative 3 states that the SWRCB should adopt the National Research Council definition of riparian areas. This definition would mean that the SWRCB would be regulating areas 100 meters away from the water courses. When the Board adopted the General WDR in 2004 it specifically excluded this definition from the General WDR. This was not mentioned in the scoping document.
2. As described above, CDFG implements Section 1600 of the Fish and Game Code which has a very broad application. Adoption by the SWRCB of a broad definition of riparian

⁷ Environmental Laboratory. 1987. Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1, U.S. Army Engineer Waterways Experimental Station, Vicksburg, Mississippi.

⁸ U.S. Army Corps of Engineers. 2006. Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Supplement. Ed. J.S. Wakeley, R.W. Lichevar, and C.V. Noble. ERDC/EL TR-06-16. Vicksburg, MS: U.S. Army Engineer Research and Development Center.

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areas would again cause considerable confusion for the regulated community when faced with two state-issued definitions of riparian areas, one used by CDFG and one potentially used by the SWRCB. An action by the SWRCB to adopt the CDFG definition would result in duplicative regulations that would not provide additional protections and would be contrary to the State's Wetlands Conservation Policy.

Exemptions

Farming Practices

The federal wetlands program has always exempted normal farming practices from the application of the program. As a working cattle ranch and citrus producer, RMV believes the SWRCB should consider a similar exemption for normal farming practices as part of its analysis of the proposed Policy.

Constructed Wetlands

We also believe that as a State, we should be encouraging the construction of wetlands for water quality or habitat purposes. We at Rancho Mission Viejo have constructed a wetland bioswale for water quality treatment purposes (called the Sienna Botanica) through the heart of our Ladera Ranch Project, as well as water quality wetlands to treat 1-2 year storms (also note the success of IRWD's San Joaquin Marsh water quality wetlands program). This effort was fully supported by the San Diego RWQCB. RMV believes the SRWCB should continue to encourage this type of innovative planning for water quality treatment and should therefore exempt these types of wetlands from regulation under the proposed Policy. This is consistent with the State's Wetlands Conservation Policy which encourages regulatory flexibility when wetlands are created incidental to other activities.

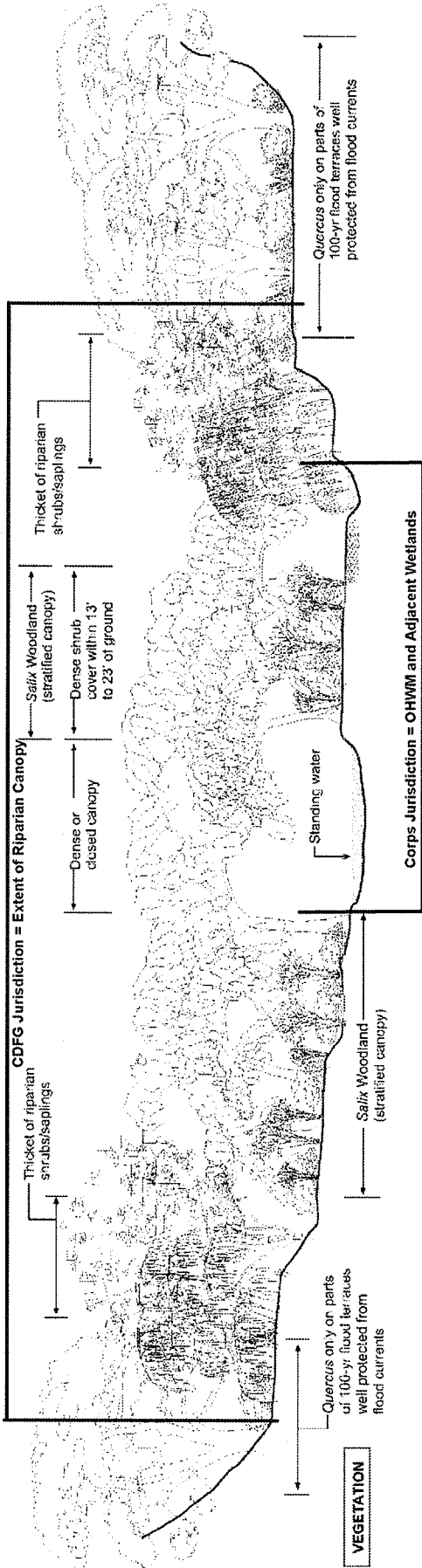
Again, thank you for the opportunity to comment on the proposed Policy. We look forward to continuing our participation in the CEQA process. If you have any questions regarding these comments, please contact me at (949) 240-3363.

Sincerely,



Laura Coley Eisenberg, Vice President
Open Space & Resource Management

Enclosure



CDFG Jurisdiction = Extent of Riparian Canopy

Corps Jurisdiction = OHWM and Adjacent Wetlands

VEGETATION

Thicket of riparian shrubs/saplings

Thicket of riparian shrubs/saplings

Salix Woodland (stratified canopy)

Dense shrub cover within 13' to 23' of ground

Dense or closed canopy

Quercus only on parts of 100-yr flood terraces well protected from flood currents

Quercus only on parts of 100-yr flood terraces well protected from flood currents

Standing water

Salix Woodland (stratified canopy)

