

# PROTECTING RARE PLANT COMMUNITIES USING THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

by Keith G. Wagner

The California Native Plant Society, through its Vegetation Program, has been working to identify the diversity of vegetation in the state. As described in *Fremontia* earlier this year (Vol 34, No 1), one of the original goals of the Program was to identify and define plant communities that are rare and deserving of recognition and conservation. Unfortunately, state and federal laws narrowly targeted at prohibiting the “take” of specified lists of rare and endangered plants, such as the state and federal endangered species acts (ESA), operate primarily at the species level, and therefore do not adequately consider or protect rare plant communities, except as an incident of protecting individually listed species. In the absence of more specific legal protections, several provisions of the California Environmental Quality Act (CEQA) (see Sidebar 1) discussed in this article can be used by CNPS members to help protect rare plant communities.

In enacting CEQA, the Legislature declared it is the policy of the



Vegetation team conducting a rapid assessment of spinescale scrub (characterized by *Atriplex spinifera*) adjacent to Soda Lake in the Carrizo Plain National Monument, San Luis Obispo County. Photograph by D. Hillyard.

state “to preserve for future generations representations of all plant and animal communities.” [Pub. Resources Code, §21001, subd. (c). CEQA is codified at Public Resources Code section 21000 et seq. CEQA’s statutory provisions, and the regulations promulgated by the California Resources Agency to guide the implementation of CEQA (com-

monly referred to as the “CEQA Guidelines”), are on the web at <http://ceres.ca.gov/ceqa/>].

CEQA requires that public agencies at all levels of state government must publicly examine, and mitigate or avoid to the extent it is feasible, the adverse environmental consequences of any discretionary project that such agencies propose to carry out, fund or otherwise permit or approve. [Pub. Resources Code, § 21002, 21080, 21081.] Many activities that have the potential to disrupt or eliminate rare plant communities in a given location – such as the conversion of open space or agricultural land to urbanized subdivisions, transfers of water from one watershed or region of the state to another, and the issuance of permits for a wide range of extractive industries across the state, just to name a few – require governmental approvals that trigger the need for CEQA review.

Participation by CNPS and its

## WHAT IS CEQA?

The California Environmental Quality Act, (CEQA) is a complex and comprehensive environmental protection law that includes the Act itself (codified at Pub. Resources Code, §21000 et seq.), the CEQA Guidelines (Cal. Code Regs., title 14, chapter 3, §15000 et seq.) and an extensive body of CEQA case law that has been developed, and which is constantly being refined, by California’s courts. Excellent resources for understanding and applying this law for resource protection include the Planning and Conservation League’s “Community Guide to the California Environmental Quality Act” by J. William Yeates (see [www.pcl.org](http://www.pcl.org)), and “How to Comment on a CEQA Document” by T. Peterson in *Fremontia* 29(3-4):27-37 (available as PDF at [www.cnps.org/fremontia/authors/Fremontia29-3-4p27-37hi.pdf](http://www.cnps.org/fremontia/authors/Fremontia29-3-4p27-37hi.pdf))





Pickleweed wetlands in San Luis Obispo County are mostly under protected ownership, like this marsh at Morro Bay Wildlife Area. Morro Bay is one of the few California estuaries where the wetlands have not been largely filled or converted to salt ponds. Photograph by D. Hillyard.

members in public agencies' CEQA processes is important, since the agency, consultants, and project proponents may not be aware of the existence or rarity of plant communities at any given project site, or within the environment that may otherwise be adversely affected by a proposed project. By participating in the CEQA process and providing important information about a project's potentially significant adverse effects to rare plant communities, CNPS and its members may be able to convince agency decision makers and project proponents to make changes that will allow the project to move forward, while at the same time substantially reducing, or entirely avoiding, adverse impacts to rare plant communities. In addition, participation by CNPS members is required to establish CNPS's legal standing in the event an agency fails to fully and fairly comply with CEQA's requirements before approving a project that may adversely impact rare plant communities. Optimally, comments by CNPS and its members should be made as early as possible, and CNPS members should consistently participate in each phase of CEQA's public process. Such participation would include, but is not limited to, scoping comments, comments on draft environmental documents that

are released for public review, and commenting at any public hearings for the project.

In providing comments, CNPS and its members should focus on identifying and presenting the agency with "substantial evidence" supporting any assertions regarding the existence of a potentially affected rare plant community, or a project's potentially significant, adverse effects on such resources. CEQA defines "substantial evidence" to include "fact, reasonable assumptions predicated upon fact, and expert opinion supported by fact." [Pub. Resources Code, § 21080, subd. (e)(1).] Substantial evidence is not "argument, speculation, unsubstantiated opinion or narrative . . ." [Pub. Resources Code, § 21080, subd. (e)(2).]

The following provisions of the CEQA Guidelines can be used to address a project's potential significant, adverse impacts to rare plant communities, to the extent that CNPS or others are able to submit substantial evidence 1) identifying the potential existence of the rare plant community, and 2) explaining how the project, if approved, may have significant, adverse effects on that community. Where such impacts are identified, they must be addressed during CEQA review, either through the incorporation of

mitigation measures and alternatives that will *clearly* avoid or mitigate the impacts to less-than-significant levels (in which case a mitigated negative declaration may be prepared), or through the analysis of such measures in an Environmental Impact Report (EIR), in situations where it appears that the project may have remaining, unavoidable impacts.

## PLANT COMMUNITIES THAT SUPPORT RARE, THREATENED OR ENDANGERED SPECIES

Section 15065 of the Guidelines requires preparation of an EIR when a proposed project has the potential to "substantially reduce the number or restrict the range of an endangered, rare or threatened species." [CEQA Guidelines, § 15065, subd. (a)(1).] The lead agency on a given project will play a significant role in determining whether substantial evidence in the record indicates that a project's impacts on given species' "number" or "range" is sufficiently "substantial" to trigger this section's protections. However, this provision is very useful to expand on protections offered by the state or federal endangered species acts, because CEQA expressly defines "endangered, rare or threatened" plants to include not only formally listed species under the state and federal ESAs, but also, to include any species that qualifies for such listing, *whether it is actually listed or not.* [CEQA Guidelines, § 15380.] This distinction is especially important, given the fact that the CNPS Inventory of Rare and Endangered Plants of California, *itself*, constitutes "substantial evidence" that a plant should be considered as rare, threatened or endangered, even if it is not formally listed under either the state or the federal ESA.

In cases where 1) a project may have significant, adverse effects on plants that are *listed* as rare, threat-



ened or endangered, or to plants that otherwise qualify for such listing based on substantial evidence, such as the CNPS Inventory; and 2) a determination is made by the lead agency that the project may "substantially" reduce such plants' number or restrict their range, then CNPS and its members can request that impacts to the functioning of the *entire* community on which such plant(s) depend, and not just direct impacts to the individual species, should be addressed in the agency's CEQA documents, and mitigated or avoided to the extent feasible.

### PLANT COMMUNITIES THREATENED WITH ELIMINATION

Section 15065 of the Guidelines also requires the preparation of an EIR where substantial evidence indicates that "the project has the potential to . . . threaten to eliminate a plant or animal community." [CEQA Guidelines, § 15065, subd. (a)(1).] This is admittedly a perilously low standard, similar to the "jeopardy" standard of the state and federal endangered species acts. However, there may be instances in which a large development would threaten to completely eliminate a plant community, either through direct or indirect impacts. If there is a fair argument that this would be the case, an EIR must be prepared.

### PLANT COMMUNITIES ASSOCIATED WITH RIPARIAN HABITATS

CEQA independently recognizes the substantial ecological role that riparian habitat plays and its significant historical loss. The list of sample questions that the California Resources Agency has approved as its Environmental Checklist (which is found at Appendix G of the CEQA Guidelines) specifically asks public agencies to consider, as part of their CEQA review, whether a proposed project would have "a substantial adverse effect on any riparian habitat." [CEQA Guidelines, Appendix G Environmental Checklist, sample question IV(c).] Although a series of recent U.S. Supreme Court decisions (which are far beyond the space available for this article) have recently raised questions about the scope of what "wetlands" are *actually* protected by the federal Clean Water Act, significant, adverse impacts to the state's wetlands should still be considered and mitigated or avoided under state laws, including CEQA.

Put another way, the question that CEQA asks is *not* whether a federal agency has jurisdiction over a particular wetland, but rather whether the *environment* (including any identified wetland) may be significantly, adversely affected by a proposed project. In light of the State of California's and the Fish and Game Commission's independent recognition of the value of the state's wetlands with a "no net loss of wetlands" policy, CNPS and its members should continue to insist that impacts to rare plant communities caused by the dredging or filling of wetlands be considered in CEQA documents that are prepared for such projects, *regardless* of the U.S. Supreme Court's ongoing efforts to curtail *federal* agencies' jurisdiction over such resources.

### PLANT COMMUNITIES ASSOCIATED WITH WETLANDS

A similar provision of the CEQA Guidelines' Appendix G Environmental Checklist asks if the project would have "a substantial adverse effect on federally protected wet-

lands as defined by Section 404 of the Clean Water Act (including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means." [CEQA Guidelines, Appendix G Environmental Checklist, sample question IV(c).] Although a series of recent U.S. Supreme Court decisions (which are far beyond the space available for this article) have recently raised questions about the scope of what "wetlands" are *actually* protected by the federal Clean Water Act, significant, adverse impacts to the state's wetlands should still be considered and mitigated or avoided under state laws, including CEQA.

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### PREVIOUSLY IDENTIFIED SENSITIVE NATURAL COMMUNITIES

The Appendix G Environmental Checklist also specifically asks if the project would have "a substantial adverse effect on any . . . sensitive natural community identified in local or regional plans, policies, regulations . . ." or whether the project will "conflict with any local policies

A mosaic of grassland and emergent marsh vegetation, partially created by different management practices, in the Southeastern portion of Suisun Marsh, DFG Grizzly Island Wildlife Area in Solano County. Photograph by T. Keeler-Wolf.





or ordinances protecting biological resources...." [CEQA Guidelines, Appendix G Environmental Checklist, sample question IV(b) & (e).] If sensitive natural communities are identified in, and protected by an overlying General Plan or any other local or regional plans, policies or ordinances, substantial adverse impacts to such communities caused by a specific project should be viewed as significant in the public agency's CEQA analysis for the project.

As just one example, the Land Use and Circulation Element of the Solano County General Plan states that the "County shall protect its... lowland grasslands which are critical habitats for marsh-related wildlife." Therefore, a project that would propose to destroy or have other substantial, adverse effects on lowland grassland near Suisun Marsh should be considered a significant impact for purposes of CEQA's analysis, and mitigation or avoidance, requirements.

### SENSITIVE NATURAL COMMUNITIES IDENTIFIED BY RESOURCES AGENCIES

The Appendix G Environmental Checklist also asks if the project will have a substantial adverse impact on a "sensitive natural community identified... by the California Department of Fish and Game or US Fish and Wildlife Service." [CEQA Guidelines, Appendix G Environmental Checklist, sample question IV(b).] The state's vegetation classification, which is based on CNPS' *A Manual of California Vegetation* (Sawyer and Keeler-Wolf 1995) and the state's Vegetation MOU Group, is a work in progress and requires thorough classification and mapping of vegetation statewide before a full understanding of community sensitivity is gained. However, the California Natural Diversity Database ("CNDDB") maintains a list of all

vegetation communities that have been identified so far ([www.dfg.ca.gov/whdab/pdfs/natcomlist.pdf](http://www.dfg.ca.gov/whdab/pdfs/natcomlist.pdf)). Communities that are indicated by an asterisk on this list are considered "sensitive" in that they have 100 or fewer viable occurrences in the state, based on the Department's best information about distribution and the likelihood of the community being found in currently unmapped areas.

Again, relying on "substantial evidence" contained in the Manual of California Vegetation, information generated by the Vegetation MOU Group, and the CNDDB, or similar sources, CNPS and its members can request that any CEQA analysis for a project included consideration, and mitigation or avoidance of, adverse impacts to these sensitive plant communities.

### OTHER RARE COMMUNITIES NOT PREVIOUSLY IDENTIFIED

Finally, even if the CEQA Guidelines discussed above do not *specifically* address a potential rare plant community that may exist on a project site, impacts to such communities should still be considered by the lead agency, so long as substantial evidence provided to the agency (i.e., scientific studies, or other fact-based submittals) establishes the community's nature and

existence. Many plant communities still need better definition with scientific data collection.

In this regard, if a project will clearly result in the destruction or degradation of a potential rare plant community, CNPS and its members can try to document and present to the lead agency evidence that the community is, in fact, a distinct and rare community. "Substantial evidence" that a community is distinct or rare might be established, for example, through vegetation sampling, classification, and mapping.

This, of course, may mean that a study has to be done quickly, which can be difficult without access to the site or where the project proponent does not agree to have a study done. However, CNPS and its members might be able to provide substantial evidence that a study *should* be done, based on a reasonable inference founded on expert opinion or facts that *are* available, that a rare community exists onsite.

For example, if the soils, geology, topography, and aerial photographic signature are similar to a nearby site that is both sampled and mapped as a rare community, one might reasonably infer that the plant community on the project site could be the same. Current vegetation mapping techniques use this type of inference all of the time, since some areas are accessible and sampled in a mapping effort while other areas are not accessible. The accuracy as-

Maritime chaparral dominated by Morro manzanita (*Arctostaphylos morroensis*) is limited to less than 1,000 acres and is threatened by residential development in the community of Los Osos and by expanding *Eucalyptus* stands in Montaña de Oro State Park, San Luis Obispo County. Photograph by D. Hillyard.





assessment of the mapping (which we hope was conducted) would test the assertions of the mapping of the nearby area and provide a measuring stick of the likelihood of any particular mapped vegetation stand actually being that type. Thus, if an unvisited area of a given signature is 80%-90% likely to be correctly identified according to the accuracy assessment, one might be able to make a "reasonable inference" based on this scientific fact (i.e., "substantial evidence") that the area is really that community type. In fact, this is one of the reasons that accurate and well-tested vegetation mapping will do a great deal for conservation advocacy.

Finally, if no map and accuracy assessment of an adjacent area are available, one might provide "substantial evidence" that a rare vegetation type is likely to occur on the site by collecting data from one or more stands in an adjacent or nearby area with similar environmental characteristics and photographic signature (or similar appearance through binoculars) to the community on the project site.

The key to effectively using the CEQA process to protect rare plant communities is to relentlessly focus on gathering and submitting "substantial evidence" in the form of *facts, expert opinion, and reasonable inferences* based on those sources. If you are providing previously undocumented evidence that a community on the project site is likely rare and should be addressed under CEQA, you must *clearly* establish 1) the facts that support your assertions and 2) the credibility of the methodology used in identifying or describing the rare plant community. Provide your credentials, if you are a botanist or biologist. After consulting with your local CNPS chapter or the state organization, affirm that you are representing the California Native Plant Society and demonstrate that you have used the accepted methodology in describing the rare community.

## GOING COASTAL TO PROTECT RARE PLANT COMMUNITIES

Sections of the California Coastal Act of 1976 can be utilized hand-in-hand with various provisions of CEQA to bolster the case for protection of rare plant communities. Specific provisions of the California Coastal Act of 1976 define sensitive resources and establish policies for development in and adjacent to sensitive areas within the Coastal Zone. California's Coastal Zone extends inland anywhere from 1,000 yards to as much as five miles from mean high tide.

While CEQA broadly provides for investigation and public disclosure of a project's environmental impacts, and strives to avoid or mitigate such impacts to the extent "feasible," the Coastal Act provides even greater protections, by directing that "environmentally sensitive areas" shall be protected against any significant disruption of habitat values; and that adjacent development shall be sited and designed to prevent impacts which would significantly degrade those areas (see, e.g., Pub. Resources Code, § 30240, subds. (a) & (b)).

The Coastal Act defines "environmentally sensitive areas" as "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." (Pub. Resources Code, § 3107.5) This provides dual utility, by 1) designating the area as "environmentally sensitive," and, thus, affording it *direct* protections under the express terms of the Coastal Act, while, at the same time, 2) providing "substantial evidence" that CEQA review is required for any impacts that a project may have on such resources under CEQA Guideline section 15065.

The Coastal Act also protects wetlands within the coastal zone. The Coastal Act defines "wetlands" as lands "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" (Pub. Resources Code, § 30121). The Coastal Act then goes on to generally preclude siting of development in areas that meet the Act's definition of "wetlands." (Pub. Resources Code, § 30255).

(The California Coastal Act is codified at Public Resources Code, section 30000 et seq. The Coastal Act is available on the internet at <http://www.coastal.ca.gov/ccatc.html>.)

## REFERENCES

- Sawyer, J. O., and T. Keeler-Wolf. 1995. A manual of California vegetation. California Native Plant Society. Sacramento, California.
- CNPS. 2001. Inventory of Rare and Endangered Plants of California (6th ed.). California Native Plant Society. Sacramento, California.
- California Resources Agency Land Use Planning Information Network (LUPIN): <http://ceres.ca.gov/planning/>

This site has links to a variety of land use planning tools and information, including the laws and regulations which we have cited above: <http://ceres.ca.gov/planning/state.html>.

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