

Sent: 6/11/2015 4:42:16 P.M. Pacific Daylight Time
Subj: AB 52 Draft Technical Advisory - Kwaaymii Laguna Comments

Dear Ms. Roberson,

These comments on the draft OPR AB 52 Technical Advisory are respectfully submitted on behalf of our client, Carmen Lucas, Kwaaymii Laguna Band of Indians, San Diego County. Thank you for agreeing to consider those comments submitted beyond the June 1 deadline.

Section Advisory Purpose: The Advisory would be stronger if it had a more robust statement of purpose. It should also be made clear whether this Advisory is merely interim, until the revisions to CEQA Guidelines Appendix G are promulgated, or whether it will live on in the adopted or perhaps an updated form consistent with the revised Appendix G. This practice area is complicated and unfamiliar to many, therefore there may be utility in having a more permanent Advisory. However, a more permanent Advisory would benefit from additional and more intensive consultation with tribes, as was done for example, with OPR's SB 18 Consultation Guidance. OPR should also consider convening a tribal working group to discuss revisions to the Guidelines pursuant to both the AB 52 and the general Guidelines update.

Section D. Confidentiality: AB 52 adds Section 21082.3(c)(2)(3) to the Public Resources Code which states that, "This subdivision does not affect or alter the application of subdivision (r) of Section 6254 of the Government Code, Section 6254.10 of the Government Code, or subdivision (d) of Section 15120 of Title 14 of the California Code of Regulations." AB 52 also adds Section 21082.3(g) to the Public Resources Code which states that, "This section is not intended, and may not be construed, to limit . . . existing confidentiality provisions . . ." Therefore, the Advisory should further emphasize that those sections of existing state law that require confidentiality of certain information are unaffected by the bill; a reference to Government Code section 6254.10 should also be added. To better assist practitioners, the Advisory should make clear that the Government Code references are to the California Public Records Act and reflect exemptions therefrom.

Section V. Compliance Timeline and Consultation Process Flowchart: Many of us are visual learners so the inclusion of a flowchart in the draft Advisory was appreciated. However, in accordance with the bill language, Advisory text and best practices, we suggest there be an arrow added facing downward, with the word "Consultation," at the very bottom of the flowchart, to indicate that consultation may continue after the release of the Environmental Document.

Section VI. B. Bibliography, Federal Government Resources: Federal guidance exists regarding Cultural Landscapes. NPS defines Cultural Landscapes as: ". . . a geographic area, including both cultural and natural resources and the wildlife or domestic animals therein, associated with an historic event, activity, or person, exhibiting other cultural or aesthetic values." This definition is relevant because Cultural Landscapes are specifically called out in AB 52's definition of tribal cultural resources; TCRs are:

"Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe . . ." (italics added).

Also, there are four kinds of Cultural Landscapes: Historic Designed Landscapes, Historic Vernacular Landscapes, Historic Sites and Ethnographic Landscapes. Ethnographic Landscapes are defined as "a landscape containing a variety of natural and cultural resources that associated people define as heritage resources. Examples are contemporary settlements, religious sacred sites and massive geological structures. Small plant communities, animals, subsistence and ceremonial grounds are often components." Thus, like TCPs, it is the associated people who define the resource and its significance. This is wholly consistent with the intent of AB 52 and the introduction of the category of TCRs to CEQA.

According to NPS Preservation Brief #36: Protecting Cultural Landscapes, the preservation planning process for Cultural Landscapes should involve: historical research; inventory and documentation of existing conditions; site analysis and evaluation of integrity and significance; development of a cultural landscape preservation approach and treatment plan; development of a cultural landscape management plan and management philosophy; development of a strategy for ongoing maintenance; and, preparation of a record of treatment and future research or recommendations. This may help inform treatment of Ethnographic Cultural Landscapes as well.

The Advisory therefore should include the definitions and context in its text and the following references (among others) in its Federal Government Resources section:

Advisory Council on Historic Preservation, Native American Traditional Cultural Landscapes and the Section 106 Review Process (July 2012)

<<http://www.achp.gov/natl-qa.pdf>>

Advisory Council on Historic Preservation, Native American Traditional Cultural Landscapes Action Plan (November 2011)

<http://www.achp.gov/na_culturallandscapes.html>

U.S. Department of the Interior, National Parks Service, Protecting Cultural Landscapes: Planning, Treatment and Management of Historic Landscapes, ("Preservation Brief 36")

<<http://www.nps.gov/tps/how-to-preserve/briefs/36-cultural-landscapes.htm>>

U.S. Department of the Interior, National Parks Service, Guidelines for the Treatment of Cultural Landscapes

<<http://www.nps.gov/tps/standards/four-treatments/landscape-guidelines/index.htm>>

Section VI. C. Bibliography, Cases Interpreting Provisions in the Public Resources Code Governing Analysis of Historic Resources: The list of cases in the draft Advisory is very short and as such could be misleading, especially to a practitioner new to this area. Our suggestion is to add more relevant cases and change the title to state that these are select cases.

For example, Citizens for the Restoration of L Street, referenced in the draft Advisory text and Reference sections, deals with historic structures and not archaeology - let alone tribal cultural resources -, thus may not be on point for the references as currently stated in the draft Advisory text. This should be revised accordingly.

Other cases are absent from the Advisory text and Reference sections, such as Madera Oversight Coalition v. County of Madera (2011) 199 Cal.App.4th 48 (feasible preservation in place must be adopted to mitigate impacts to historical resources of an archaeological nature unless the lead agency determines that another form of mitigation is available and provides superior mitigation of the impacts; CEQA documents must address the reasons why preservation in place was rejected in favor of other forms of mitigation; a determination of whether an archaeological site is an historic resource 1) is mandatory, 2) must be made before the EIR is certified and 3) cannot be undone after EIR certification). Also, while addressing historic structures, League for Protection of Oakland's Architectural and Historic Resources v. City of Oakland (1997) 52 Cal.App.4th 896, stands for the proposition that in developing mitigation measures, that demolition or destruction of an historical resource requires more than reporting or a commemorative plaque to offset the impact. The Native American Heritage Commission also may be able to assist OPR in identifying those cases that may better relate to resources of specific concern to tribes and AB 52.

Moreover, it might be helpful for the Advisory (and possibly the Guidelines) to discuss AB 52's potential intersection with California's Native American resource laws found at Public Resources Code section 5097.91 et seq ("Native American Historical, Cultural, and Sacred Sites"). The revisions to CEQA pursuant to AB 52 were not designed to reduce or limit existing considerations and protections for Native American burials or ceremonial sites. This should be made clear in the Advisory and references to relevant case law added such as People v. Van Horn (1990) 218 Cal.App.4d 1378 (in disagreement about whether burial related objects were to be treated as grave goods by Indians or scientific artifacts by archaeologists, the statute clearly gives the choice of preservation or reburial to Native Americans and the Legislature did not intend to give archaeologists any statutory powers with respect to Native American burials). It is my client's view that under no pretense should identified burial grounds, burials, rich midden soil or ceremonial places be impacted or effected during development pursuant to CEQA.

General Comment, Constitutional Perspective: AB 52 adds Section 21082.3(g) to the Public Resources Code which states that, "This section is not intended, and may not be construed, to limit . . . the protection of religious exercise to the fullest extent permitted under state and federal law." CEQA already deals with some Constitutional issues (i.e., CEQA Guidelines section 15140 regarding nexus and proportionality of impacts and mitigation) so Constitutionality is not a new concept to CEQA. Moreover, the PRC sections relating to the NAHC continue to offer protection to tribal ceremonial and sacred properties. Thus, tribal cultural resources may have religious access and accommodation components to them that could elevate their consideration under CEQA beyond that provided to more standard historical resources or other resource types. The Advisory must be clear that AB 52 implementation must not be in conflict with tribal religious exercise to the fullest extent permitted.

General Comment, Writing of Environmental Document: It may be helpful for early technical guidance to make clear that a business-as-usual approach to writing environmental reports will not be acceptable to properly analyze and consider TCRs. Just changing the title of a section or report cover from archaeological resources to tribal cultural resources will not meet the bill's intent. A tribal voice, perspective and pen should govern the surveys, assessments, reports and environmental documents regarding TCRs. This also applies during the development of proposed mitigation in those cases where avoidance is not possible, that mitigation for impacts for TCRs should reflect the views and priorities of tribes - not those of archaeologists, particularly those who are not authorized to speak on behalf of the affected tribe(s).

We hope these comments are helpful to OPR. Please put us on the list to receive all future notices regarding AB 52 implementation, the CEQA Guidelines revisions, and this Advisory.

We also are available to discuss these comments and other revisions to both the Advisory and the Guidelines.

Very truly yours,

Courtney Coyle