Client Alert

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Assembly Bill 52 to Expand CEQA's Scope and Impose New Consultation Requirements

On September 25, 2014, Governor Jerry Brown signed Assembly Bill 52, which expands the reach of the California Environmental Quality Act (CEQA) by requiring the lead agency on a proposed project to consult with any California Native American tribes affiliated with the geographic area. Further, the legislation creates a broad new category of environmental resources, "tribal cultural resources," which must be considered under CEQA.

Prior to this legislation, tribal cultural resources were encompassed in CEQA's categories for "historical" and "archaeological" resources. AB 52 creates a distinct category for tribal cultural resources, requiring a lead agency to not only consider the resource's scientific and historical value, but also whether it is culturally important to a California Native American tribe. The bill defines tribal cultural resources as "sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe" that are included in or determined to be eligible for inclusion in the California Register of Historical Resources or the local register of historical resources. The definition also includes resources "determined by the lead agency, in its discretion and supported by substantial evidence, to be significant" pursuant to the criteria for listing in the state register. A "cultural landscape" may be a tribal cultural resource if it meets the above criteria and is "geographically defined in terms of the size and scope of the landscape."

AB 52 also sets up an expanded consultation process. Beginning July 1, 2015, lead agencies are required to provide notice of proposed projects to any tribe traditionally and culturally affiliated with the geographic area. If, within 30 days, a tribe requests consultation, the consultation process must begin before the lead agency can release a draft EIR, negative declaration or mitigated negative declaration. Consultation with the tribe may include discussion of the type of review necessary, the significance of tribal cultural resources, the significance of the project's impacts on the tribal cultural resources, and alternatives and mitigation measures recommended by the tribe. The consultation process will be deemed concluded when either (a) the parties agree to mitigation measures or (b) any party concludes, after a good faith effort, that an agreement cannot be reached. Any mitigation measures agreed to by the tribe and lead agency must be recommended for inclusion in the environmental document.

If a tribe does not request consultation, or otherwise assist in identifying mitigation measures during the consultation process, a lead agency may still consider mitigation measures if the agency determines that a project will cause a substantial adverse change to a tribal cultural resource.

This legislation has the potential to affect any party that may be subject to CEQA's requirements. Because all tribes affiliated with an area must be given an opportunity to consult, extended costly delays in the CEQA process are foreseeable. Further, the creation of a resource category that requires consideration of an object's or landscape's difficult-to-define "cultural" value complicates the evaluation of a project's impacts and will likely result in the increased adoption of burdensome mitigation measures.

Notably, AB 52 adopts an approach that is much stricter than the federal statute in a number of respects. For example, the National Historic Preservation Act is limited to federally recognized tribes, does not include the concept of a "cultural landscape" and requires that the lead agency must consider the tribe's

recommended mitigation measures but stops short of mandating a recommendation for inclusion of agreed-upon mitigation measures. Therefore, any projects that would require a federal permit, i.e., Section 404 permits from the US Army Corps of Engineers under the Clean Water Act, for example, would trigger procedures under the NHPA that would require a separate process with many but not all of the same tribes and with different standards and criteria. How the CEQA consultation will be coordinated with the federal process under the NHPA is to be determined.

Project applicants should begin to consider these changes, effective July 1, 2015, in project planning and timelines. Particularly, projects that will require both state and federal permits will want to begin discussions with the regulatory agencies regarding how these processes will be coordinated to avoid duplication and delay.

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