

Comment Letter A

STATE OF CALIFORNIA  
 Edmund G. Brown, Jr., Governor

**NATIVE AMERICAN HERITAGE COMMISSION**  
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December 1, 2011

Mr. Matthew Schneider, Environmental Planner  
**County of San Diego Department of Planning & Land Use**  
 5201 Ruffin Road, Suite B  
 San Diego, CA 92123-1666

Re: SCH#2010091030 CEQA Notice of Completion; draft Environmental Impact Report (DEIR) for the "County of San Diego Wind Energy Zoning Ordinance and General Plan Amendment Project" located COUNTY-WIDE; San Diego County, California

Dear Mr. Schneider:

The Native American Heritage Commission (NAHC), the State of California 'Trustee Agency' for the protection and preservation of Native American cultural resources pursuant to California Public Resources Code §21070 and affirmed by the Third Appellate Court in the case of EPIC v. Johnson (1985: 170 Cal App. 3<sup>rd</sup> 604). The court held that the NAHC has jurisdiction and special expertise, as a state agency, over affected Native American resources, impacted by proposed projects including archaeological, places of religious significance to Native Americans and burial sites. The NAHC wishes to comment on the proposed project.

NOTE: This project is also subject to tribal government consultation pursuant to California Government Code §§65352.3, 65352.4 et seq.

This letter includes state and federal statutes relating to Native American historic properties of religious and cultural significance to American Indian tribes and interested Native American individuals as 'consulting parties' under both state and federal law. State law also addresses the freedom of Native American Religious Expression in Public Resources Code §5097.9.

The California Environmental Quality Act (CEQA – CA Public Resources Code 21000-21177, amendments effective 3/18/2010) requires that any project that causes a substantial adverse change in the significance of an historical resource, that includes archaeological resources, is a 'significant effect' requiring the preparation of an Environmental Impact Report (EIR) per the CEQA Guidelines defines a significant impact on the environment as 'a substantial, or potentially substantial, adverse change in any of physical conditions within an area affected by the proposed project, including ... objects of historic or aesthetic significance.' In order to comply with this provision, the lead agency is required to assess whether the project will have an adverse impact on these resources within the 'area of potential effect (APE), and if so, to mitigate that effect.

The NAHC Sacred Lands File (SLF) search resulted as follows: **Native American cultural resources were identified** within the County of San Diego, in numerous locations, as identified (e.g. 'area of potential effect' or APE). Also, the absence of archaeological resources does not preclude their existence. California Public Resources Code §§5097.94 (a) and 5097.96 authorize the NAHC to establish a Sacred Land Inventory to record Native American sacred sites and burial sites. These records are exempt from the provisions of the California



Response to Comment Letter A

Native American Heritage Commission

Dave Singleton

December 1, 2011

- A-1 The County concurs with this comment and addresses the specific comments on the proposed project below.
- A-2 The County agrees with this comment. Tribal consultation letters were mailed out on November 8, 2011 for a 90-day consultation period ending February 6, 2012. The County received one request for consultation with the Viejas Band of Kumeyaay Indians ("Viejas"). Subsequently, the County began consultation with Viejas on March 5, 2012 and concluded the consultation on May 29, 2012.
- A-3 The County concurs with this comment.
- A-4 The County concurs with this comment. The DEIR for the proposed project closely follows CEQA Guidelines.
- A-5 The issues raised in this comment are not inconsistent with the existing content of the DEIR. The presence of cultural resources in San Diego County and the regulatory requirements are discussed throughout Section 2.5.

## Reponses to Comments

<p>Public Records Act pursuant to California Government Code §6254 (r). The purpose of this code is to protect such sites from vandalism, theft and destruction. The NAHC "Sacred Sites," as defined by the Native American Heritage Commission and the California Legislature in California Public Resources Code §§5097.94(a) and 5097.96. Items in the NAHC Sacred Lands Inventory are confidential and exempt from the Public Records Act pursuant to California Government Code §6254 (r).</p>	<p>↑ A-5 Cont.</p>	<p><b>A-6</b> The County agrees with this comment. Please see response to comment A2.</p>
<p>Early consultation with Native American tribes in your area is the best way to avoid unanticipated discoveries of cultural resources or burial sites once a project is underway. Culturally affiliated tribes and individuals may have knowledge of the religious and cultural significance of the historic properties in the project area (e.g. APE). We strongly urge that you make contact with the list of Native American Contacts on the <u>list of Native American contacts</u>, to see if your proposed project might impact Native American cultural resources and to obtain their recommendations concerning the proposed project. Special reference is made to the <i>Tribal Consultation</i> requirements of the California 2006 Senate Bill 1059: enabling legislation to the federal Energy Policy Act of 2005 (P.L. 109-58), mandates consultation with Native American tribes (both federally recognized and non federally recognized) where electrically transmission lines are proposed. This is codified in the California Public Resources Code, Chapter 4.3 and §25330 to Division 15.</p>	<p>A-6</p>	<p><b>A-7</b> It appears that the commenter meant to cite Section 21083.2 of the CEQA Guidelines in this comment regarding the definition of mitigation. While the County appreciates this recommendation and agrees to take all feasible measures to avoid cultural resources, significant and unavoidable impacts are still anticipated through implementation of the Zoning Ordinance provisions for small turbines and MET facilities. Currently, one small turbine per legal lot is allowed by right. Under the proposed project, up to three free-standing small turbines and/or one MET tower would be allowed per legal lot. As fully analyzed in the DEIR, this component of the project may result in adverse effects to cultural resources.</p>
<p>Furthermore, pursuant to CA Public Resources Code § 5097.95, the NAHC requests that the Native American consulting parties be provided pertinent project information. Consultation with Native American communities is also a matter of environmental justice as defined by California Government Code §65040.12(e). Pursuant to CA Public Resources Code §5097.95, the NAHC requests that pertinent project information be provided consulting tribal parties. The NAHC recommends <i>avoidance</i> as defined by CEQA Guidelines §15370(a) to pursuing a project that would damage or destroy Native American cultural resources and Section 2183.2 that requires documentation, data recovery of cultural resources.</p>	<p>A-7</p>	<p>It should also be noted that the County provided pertinent project information to Viejas as part of the tribal consultation (see response to comment A2), including all information requested by Viejas in correspondence and during meetings.</p>
<p>Consultation with tribes and interested Native American consulting parties, on the NAHC list, should be conducted in compliance with the requirements of federal NEPA and Section 106 and 4(f) of federal NHPA (16 U.S.C. 470 <i>et seq.</i>), 36 CFR Part 800.3 (f) (2) &amp; .5, the President's Council on Environmental Quality (CSQ, 42 U.S.C 4371 <i>et seq.</i> and NAGPRA (25 U.S.C. 3001-3013) as appropriate. The 1992 <i>Secretary of the Interiors Standards for the Treatment of Historic Properties</i> were revised so that they could be applied to all historic resource types included in the National Register of Historic Places and including cultural landscapes. Also, federal Executive Orders Nos. 11593 (preservation of cultural environment), 13175 (coordination &amp; consultation) and 13007 (Sacred Sites) are helpful, supportive guides for Section 106 consultation. The aforementioned Secretary of the Interior's <i>Standards</i> include recommendations for all 'lead agencies' to consider the <u>historic context</u> of proposed projects and to "research" the <u>cultural landscape</u> that might include the 'area of potential effect.'</p>	<p>A-8</p>	
<p>Confidentiality of "historic properties of religious and cultural significance" should also be considered as protected by California Government Code §6254(r) and may also be protected under Section 304 of the NHPA or at the Secretary of the Interior discretion if not eligible for listing on the National Register of Historic Places. The Secretary may also be advised by the federal Indian Religious Freedom Act (cf. 42 U.S.C., 1996) in issuing a decision on whether or not to disclose items of religious and/or cultural significance identified in or near the APEs and possibility threatened by proposed project activity.</p>	<p>A-9</p>	
<p>Furthermore, Public Resources Code Section 5097.98, California Government Code §27491 and Health &amp; Safety Code Section 7050.5 provide for provisions for accidentally</p>	<p>A-10 ↓</p>	

## Reponses to Comments

discovered archeological resources during construction and mandate the processes to be followed in the event of an accidental discovery of any human remains in a project location other than a 'dedicated cemetery'.

A-10  
Cont.

To be effective, consultation on specific projects must be the result of an ongoing relationship between Native American tribes and lead agencies, project proponents and their contractors, in the opinion of the NAHC. Regarding tribal consultation, a relationship built around regular meetings and informal involvement with local tribes will lead to more qualitative consultation tribal input on specific projects.

A-11

If you have any questions about this response to your request, please do not hesitate to contact me at (916) 653-6251.

Sincerely,



Dave Singleton  
Program Analyst

Cc: State Clearinghouse

Attachment: Native American Contact List

**A-8**

Because there are no federal actions associated with the Proposed Project, the requirements of NEPA, Section 106 of the National Historic Preservation Act, Section 4(f) of the Department of Transportation Act and the Native American Graves Protection Act (NAGPRA) do not apply.

Through consultation with Viejas, additional changes were made to DEIR Section 2.5, Cultural Resources, to discuss historic context and cultural landscape. The underlined text below was added on Page 2.5-5 of the DEIR:

National Register of Historic Places, 1981

The National Register is an authoritative guide to be used by federal, state, and local governments; private groups; and citizens to identify the nation's cultural resources and to indicate what properties should be considered for protection from destruction or impairment. A traditional cultural property (TCP) can be defined generally as one that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community. TCPs may include sacred viewsheds, cultural landscapes, ceremonial sites, or other tangible cultural resources. Listing of private property on the National Register

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	<p>does not prohibit under federal law or regulation any actions that may otherwise be taken by the property owner with respect to the property.</p> <p>In addition, TCPs were added to the resources analyzed on Page 2.5-14 of the DEIR.</p> <p><b>A-9</b> The County concurs with this comment.</p> <p><b>A-10</b> The issues raised in this comment are not inconsistent with the existing content of the DEIR. The regulatory requirements for discovery of human remains are discussed in DEIR Section 2.5.2, 2.5.3.3 and 2.5.4.3.</p> <p><b>A-11</b> The County agrees with this comment. See also responses to comments A2, A7 and A8 above.</p>
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