



INTRODUCING
Sticks & Stones
NEWSLETTER

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EVERYTHING YOU REALLY DIDN'T WANT TO KNOW ABOUT BIOLOGICAL, CULTURAL, AND OTHER COMPLIANCE ISSUES.

Welcome

Welcome to Sticks & Stones, brought to you by Argonaut Ecological, Inc. and Peak & Associates. The purpose of this newsletter is to keep our clients abreast of regulatory issues associated with biological and cultural regulatory compliance, and other items of interest (CEQA, water quality, etc).

In the age of instant and never ending electronic communication, I thought a bit of "the good ol' days" approach to communication may be refreshing.... The brevity of this newsletter is intentional. Your time is valuable so we want to focus on those issues we think will be most important to you. Also, if you are like me, my mailbox is flooded with various newsletters, all of which seem helpful, but are long and become a chore to read on the computer. We may not capture all current issues, but we will strive to focus on those issues that we think you should know about.

So, with that, feel free to push back from your computer, grab a cup of coffee or tea, and spend a minute or two reading our humble, but hopefully, useful little newsletter.

Sincerely,

Kathy Kinsland CISEC, QSP, TOR-QISP
Senior Scientist/Regulatory Specialist

CONSTRUCTION STORMWATER – Did you know?

In 2014, the California State Water Resources Control Board (SWRCB) issued a statement that manual calculations of rainfall erosivity (R-value) for stormwater permitting purposes on construction stormwater projects are no longer allowed. Instead, the US EPA's online calculator must be used for determining low erosivity waivers and rainfall erosivity on construction stormwater projects. However, this raises several concerns, namely, why was the change made and what are the implications to licensed engineers? An evaluation done by Hans Kramer of Terraphase Engineering between the manual versus online method calculation found significant differences between manual calculations, the former US EPA erosivity calculator, and the new US EPA erosivity calculator. The differences between the three ranged from (-29% to 346%) for the projects identified, with some manual calculations being more conservative than the online calculations. For professional engineers (PE), they are certifying that the engineering calculations are accurate. Without being able to see the data that the online calculator is based upon and how the calculations are derived, what exactly is a PE certifying? The regulator's reasoning is that this is designed to "provide clarity" by specifying one method, but as usual, has raised new concerns.

PRIMER ON SECTION 106 CONSULTATION

ARTICLE PROVIDED BY:
Melinda Peak of Peak & Associates



You've been told that your project requires a Section 106 consultation. *What's that about?* A brief primer: Section 106 consultation is required any time a Federal (not State) agency is going to undertake a project or issue a permit/authorization that may affect a historic resource. The process involves three steps: identify the resource, consult with Native American or other groups, and assess the impacts. *What are historic resources?* Historic resources are a subset of "cultural resources" that are included in the National Register of Historic Places, or that meet the criteria of the National Register. The resources can be historic or prehistoric period resources.

The resource is first "identified" through record searches (and sometimes field work) to determine what information is known about the resource. Then consultation with Native American groups and others are needed to obtain information about their knowledge of resources present on the project site (and whether the site is considered a site of religious or cultural importance to them). Sometimes additional studies may be needed to determine if a resource meets National Register criteria and constitutes as a significant resource. The final step in the process requires the Federal agency to determine whether an action could adversely affect the resource. If an adverse effect is possible, then the agency may require avoidance or mitigation of to minimize the impact.

At various points in the process, consultation with Native American and other groups is emphasized. Sometimes the groups may request access to your property/site to see the resource (see the back page for advice if this happens). The consultation is advisory and the Federal agency may choose to approve or undertake a project in a reasonable manner that does not necessarily follow the methods proposed by a such group.

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Section 106 Consultation: "THE GOOD, THE BAD, AND THE UGLY."



ARTICLE PROVIDED BY:
Melinda Peak of Peak & Associates

What do you do when you've been told that as part of the Section 106 consultation process, interested groups want access to your site to look at/evaluate the historic resources? Don't panic, but be smart. Whether you are a land developer or a municipality, keep the following in mind;

- You do NOT need to allow any interested party to roam across your project site looking anywhere and everywhere, nor is it advisable. A better option is to arrange a guided field tour that is limited to viewing recorded historic resources, only.
- By all means, have your project archeologist present during the field tour to keep the attendees focused on only what they need to see. The archeologist can then point out features and record any comments made during the tour as part of the consultation record.
- To protect against liability, request that any parties that want site access - historical society members, Native American groups, and/or members of the public- provide you with insurance certificates. Not unreasonable given your consultants and contractors likewise have to carry insurance to protect your interests. No insurance? Sorry, no access. (Likely your insurance carrier or attorney would concur.)

CENTRAL VALLEY SPECIES UPDATE:



In December 2015, the U.S. Fish and Wildlife Service (USFWS) proposed listing the [tricolored blackbird](#) as an endangered species. Concurrently, in December 2015 the State (CDFW) accepted a petition to list the species as "endangered." Tricolored blackbirds nests in grain fields (heavily rely on dairy silage fields) and waterways (tule/cattail). The public comment period for the federal listing ended in November 2016. To date USFWS has not made a determination of whether the listing will be adopted. The State (CDFW) had one year to make a determination on the State listing, but in the December 2016 Fish and Game Commission meeting, staff requested a six month extension. Stay tuned, but it seems likely either way the species will be listed.

Recent CEQA News

Who's the lead agency in public/private partnerships?

The Center for Biological Diversity v. County of San Bernardino (G051058) 4th Dist., May 10, 2016. The court also provided guidance and a "means test" under CEQA for determining the appropriate choice as a lead agency, public agency, and a nongovernmental entity. It held that, in a public/private partnership, the lead agency may be either "(1) the public agency that is a part of the public/private partnership, or (2) the public agency with the greatest responsibility for supervising or approving the project as a whole."

Traffic Impacts under CEQA:

Governor Jerry Brown has been busy. He's proposed draft regulations that modify how traffic impacts are analyzed under CEQA in a way that may actually make sense ... excellent article by Fehr & Peers Transportation Consultants found at <http://www.fehrandpeers.com/opr-releases-updates-to-ceqa-guidelines/>

CEQA Exemptions:

The First District Court of Appeals has ruled that the accrual of a claim that a public agency exemption determination violated CEQA is not postponed by the plaintiff's failure to discover the violation. *Communities for a Better Environment et al. v. Bay Area Air Quality Management District*, No. A143634 (1st Dist., July 19, 2016; modified Aug. 10, 2016).

As a note, under CEQA, lead agencies are NOT required to file a notice of exemption with the State Clearinghouse. They can, and in doing so, shorten the challenge period. Otherwise, the exemption are be filed with the County Clerk, and in that case, the challenge period is 180 days.

Regulatory Update: **MIGRATORY BIRDS**

On August 2015, CDFW issued a "Notice of Proposed Rulemaking" that would grant further protection of migratory birds, especially as it applies to CEQA. The draft regulation would, among other things, apply a significance test for common bird population into CEQA reviews. According to CDFW the draft regulations were needed to "provide clarity" to the regulated community and would, "merely formalize the interpretations the agency has generally given the statutes to date." However, uncharacteristically in August 2016, CDFW did an about-face and issued a notice rescinding the proposed draft regulations.

Regulatory relief in California? What's up with that?

Three "take-aways":

1. More than likely whenever a regulatory agency says they need to provide "clarity" to a regulation for the public, what they really want to do is expand the regulation.
2. When an agency says they want to "merely formalize" the interpretation they have been using for years, it actually means they have been interpreting the statute broadly (likely too broadly) and now want to have their interpretation codified without having to go through that pesky rule making process.
3. This is not the last you'll see of this proposed draft regulation. The "why" behind why they elected not to proceed with the regulation is unknown, but rest assured, the wagons are being circled and readied for the next stand.