

TITLE 14, NATURAL RESOURCES

Division 18, Native American Heritage Commission

Chapter 2. CalNAGPRA Enforcement Regulations

PROPOSED REGULATION

The language proposed during the 45-day comment period is shown in single underline. Proposed changes for the 15-day notice are shown in double-underline for additions and double strike-through for deletions.

31020. Purpose

These regulations carry out the enforcement provisions of the California Native American Graves Protection and Repatriation Act, Division 7, Part 2, Chapter 5 of the Health and Safety Code (Health and Safety Code, § 8010, et seq.), consistent with the provisions of the federal Native American Graves Protection and Repatriation Act (25 U.S.C. § 3001 et seq.).

Note: Authority cited: Section 8029, Health and Safety Code; and Section 5097.94, Public Resources Code. Reference: Section 8029, Health and Safety Code.

31021. Applicability

These regulations apply to any Agency or Museum within the State of California that are in Possession or Control of California Native American human remains, associated funerary objects, unassociated funerary objects, sacred objects, or objects of cultural patrimony.

Note: Authority cited: Section 8029, Health and Safety Code; and Section 5097.94, Public Resources Code. Reference: Section 8013, Health and Safety Code.

31022. Definitions

Terms used in these Regulations have the same meaning as defined in section 8012 of the California Native American Graves Protection and Repatriation Act. The below terms have the following meaning:

- (a) “Act” means the California Native American Graves Protection and Repatriation Act, Division 7, Part 2, Chapter 5 of the Health and Safety Code (Health and Safety Code, § 8010 et seq.).
- (b) “Complaining Party” means any person who files a complaint under these regulations alleging that an Institution failed to comply with the Act.
- (c) “Institution” means an Agency or Museum.
- (d) “Preponderance” means more likely to be true than not true.

Note: Authority cited: Section 8029, Health and Safety Code; and Section 5097.94, Public Resources Code. Reference: Section 8012, Health and Safety Code.

31023. Violations of the Act

- (a) Any Institution that fails to comply with the requirements of the Act may be assessed a civil penalty by the Commission, not to exceed twenty thousand dollars (\$20,000) for each instance of failure to comply with the Act ~~violation~~. A penalty assessed under this section shall be determined after notice and the opportunity for a hearing before the Commission. The Commission shall collect all civil penalties which shall be paid within the timeframe established in Health and Safety Code section 8029 and made payable to the State of California in the form of a check. As provided for in Health and Safety Code 8029, the Attorney General shall act on behalf of the Commission to institute a civil action in an appropriate court to collect any unpaid penalty.
- (b) An Institution shall not be subject to civil penalties for actions taken in good faith to comply with the federal Native American Graves Protection and Repatriation Act. Whether an Institution is in compliance with the federal Native American Graves Protection and Repatriation Act will be determined after consultation with federal NAGPRA program staff as provided in Section 31024 of these regulations.

Note: Authority cited: Section 8029, Health and Safety Code; and Section 5097.94, Public Resources Code. Reference: Section 8029, Health and Safety Code.

31024. Penalties and Enforcement Procedures

- (a) Any person, including a member of the Commission or its staff, may file a written complaint with an allegation of failure to comply with the Act either via electronic mail at nahc@nahc.ca.gov or USPS regular mail at Native American Heritage Commission, 1550 Harbor Boulevard, Suite 100, West Sacramento, CA 95691. The ~~written~~ complaint ~~Allegations must be submitted in writing to Commission staff via USPS regular mail and~~ shall identify:
- (1) The Institution alleged to have failed to comply with the Act.
 - (2) Each provision of the Act that the Institution has allegedly failed to comply with.
 - (3) Facts and any evidence, showing that the Institution has Possession or Control of Native American Cultural items.

To the extent permitted by law, information provided to the Commission or its staff that includes records of Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects described in sections 5097.9 and 5097.993 of the Public Resources Code, shall not be made public. This includes information related to the location, description, and use of tribal cultural resources as described under section 21082.3 of the Public Resources Code, as well as records that relate to archaeological site information and reports in the possession of the Commission or other state agencies obtained during a consultation process between a California

Native American tribe and the state or local agency consistent with section 7927.005 of the Government Code.

(b) No later than 15 days after receiving a written complaint Commission staff shall evaluate the claim to determine if it meets the requirements of subsection (a) (1) – (3). If any required information is missing, Commission staff will contact the submitting party via USPS regular mail or, if provided, electronic mail, for additional information. If no further information is provided within 30 days of mailing the request, Commission staff shall close the matter.

(~~b~~c) Upon receipt of an allegation that an Institution has failed to comply with the Act, Commission staff will review it to determine whether the Institution is subject to NAGPRA by identifying whether the Institution receives federal funds and is in Possession or Control of Native American Cultural items. If the Institution is subject to NAGPRA, Commission staff will then consult with the federal NAGPRA program as to whether the Institution is in compliance with NAGPRA. If the federal NAGPRA program indicates that the Institution is in compliance with NAGPRA, then Commission staff will review the complaint and determine whether the allegations are related solely to violations of NAGPRA. If the allegations are related solely to violations of NAGPRA, Commission staff will inform the Complaining Party via USPS regular mail and, if provided, electronic mail, that the Institution is in compliance with NAGPRA and take no further action.

(~~e~~d) If the federal NAGPRA program informs Commission staff that the Institution is not in compliance with NAGPRA or if the allegations arise solely under CalNAGPRA, Commission staff will review the allegations, accompanying documentation, and applicable law and prepare an evaluation. If necessary to complete the evaluation, Commission staff shall request additional information from the Complaining Party and the Institution.

(1) If Commission staff determines that the allegations are unfounded, notice of this finding shall be sent via USPS regular mail and, if provided, electronic mail, to the Institution and the Complaining Party.

(2) If Commission staff determines that the Institution is not in compliance with the Act, notice of this finding shall be sent via USPS regular mail and, if provided, electronic mail, to the Institution and the Complaining Party along with a copy of the evaluation. Upon receipt of notification that it has failed to comply with the Act, an Institution may:

(A) Request informal discussions with Commission staff to attempt to reach an informal resolution of the complaint. Such requests must be in writing and received within 45 days of mailing of the written notice. Informal resolutions arrived at by the Institution and Commission staff constitute a final disposition of the matter. Notice of the final disposition shall be sent via USPS regular mail and, if provided, electronic mail, to the Institution and the Complaining Party.

(B) Take no action and await the notice of assessment of a civil penalty.

(~~e~~) If an Institution either fails to respond within 45 days of mailing of the written notice or informal discussions do not result in a resolution, Commission staff shall then prepare an evaluation and make recommendations as to the penalty for each instance of failure to comply with ~~violation(s)~~ of the Act. In preparing the evaluation and recommendation, Commission staff shall consult with the tribe(s) that are identified as culturally affiliated with the items that are the subject of the complaint to gather information related to the four factors listed below in (1) – (4) used to determine the amount of a civil penalty. The evaluation and recommendation shall include the evidence relied upon in making this decision. In reaching its recommendation on a penalty, Commission staff may consider the nature, scope, and gravity of the violation and its recommendation must include consideration of the following factors:

(1) The archaeological, historical, or commercial value of the item involved.

(2) The cultural and spiritual significance of the item involved.

(3) The damages suffered, both economic and noneconomic, by the aggrieved party as determined by the Commission.

(4) The number of violations that have occurred.

(~~e~~) Commission staff shall mail and, if available, email a copy of the evaluation and recommendation to the Institution with a copy sent to the Complaining Party. Within 60 days from the mailing of the evaluation and recommended assessment the Institution may:

(1) Accept the proposed penalty and pay the penalty as assessed.

(2) Request informal discussions with Commission staff to attempt to reach an informal resolution of the complaint. Informal resolutions arrived at by the Institution and Commission staff that concern the amount of civil penalty are subject to approval from the Commission as a final disposition of the matter. Notice of the final disposition shall be sent via USPS regular mail and, if provided, electronic mail, to the Institution and the Complaining Party.

(3) Request a public hearing.

Note: Authority cited: Section 8029, Health and Safety Code; and Section 5097.94, Public Resources Code. Reference: Section 8029, Health and Safety Code.

31025. Public Hearing Procedures

(a) Upon receipt of a request for a public hearing, Chief Counsel of the Commission will designate a Commission attorney or, if a Commission attorney is unavailable, an attorney from the California Department of Justice to serve as a hearing officer who shall rule on the admission and exclusion of evidence and advise the Commission on matters of law.

(b) Hearings will be before a majority of Commissioners and conducted consistent with Chapter 4.5 of the California Administrative Procedure Act, sections 11400, et seq. of the Government Code. If a Commissioner is the Complaining Party, they shall be excluded from participating in the hearing other than as the Complaining Party. To the extent permitted by law, evidence shall not be made public to protect records of Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects described in sections 5097.9 and 5097.993 of the Public Resources Code maintained by, or in the possession of, the Commission, and/or another state or local agency. Such evidence includes information related to the location, description, and use of tribal cultural resources as described under section 21082.3 of the Public Resources Code, as well as records that relate to archaeological site information and reports in the possession of the Commission or other state agencies obtained during a consultation process between a California Native American tribe and the state or local agency consistent with section 7927.005 of the Government Code.

(c) Prior to any public hearing, Commission staff shall:

- (1) Provide the Institution and the Complaining Party with at least 30 days' written notice via USPS regular mail and if provided, electronic mail.
- (2) Provide the Institution and the Complaining Party with a copy of the public hearing procedures.
- (3) Provide members of the public with the opportunity to provide comment, consistent with the requirements set forth in the Bagley-Keene Open Meeting Act.

(d) During the public hearing, the Commission will consider the following:

- (1) The Commission staff's evaluation and recommendation(s).
- (2) Any timely filed written responses by the Institution or the Complaining Party to the Commission staff's evaluation and recommendation(s).
- (3) Testimony by the Institution.
- (4) Testimony by the Complaining Party.
- (5) Comments from members of the public, ~~that are received by the Commission pursuant to the requirements in the Bagley-Keene Open Meeting Act.~~
- (6) Any additional evidence provided by the Institution or the Complaining Party that could not have been previously submitted.
- (7) Any other evidence that was not reasonably available at the time the Commission staff made their recommendation.

- (e) The Commission may request additional information from Commission staff, the Complainant Party or the Institution, or their designee. The Commission, at its discretion, may continue a public hearing to consider any additional evidence or arguments.
- (f) When determining whether the Institution failed to comply with the Act, the Commission will consider the evidence presented at the public hearing to reach a decision and must find by a Preponderance of the evidence that the Institution violated the Act.
- (g) When determining the appropriate monetary penalty for each instance of violation of the Act, the Commission shall rely upon the factors listed in 31024 (d).
- (h) After completion of the hearing, the hearing officer shall assist the Commission to prepare a written decision explaining the basis for its decision that shall consider the facts as presented by the parties; the applicable law; tribal traditional knowledge, oral histories, documentation, and testimonies. The Commission shall issue its decision via USPS regular mail and, if provided, electronic mail, to the Institution and the Complainant Party within 90 days of the hearing.

Note: Authority cited: Section 8029, Health and Safety Code; and Section 5097.94, Public Resources Code. Reference: Sections 11400, et seq., Government Code; and Section 8029, Health and Safety Code.

31026. Precedent Decisions

- (a) The Commission may designate, as a precedent decision, any decision or part of any decision that contains a significant legal or policy determination of general application that is likely to recur.
- (b) Once the Commission designates a decision or part of a decision as precedent, the Commission may rely on it or that part of it as precedent and the parties may cite such decision in their argument to the Commission and courts.
- (c) The Commission may reverse in whole or in part the prior designation of a decision as a precedent decision.
- (d) Notice of intent to designate or withdraw designation of a precedent decision shall be given with the notice of a Commission meeting. Before or during the scheduled Commission meeting, members of the public may submit written or oral comments for or against the proposed action, following the Commission's standard public comment policies and procedures. The Commission may decide the issue at that meeting or put the matter over to a subsequent meeting.
- (e) If a final judgment of a court of competent jurisdiction reverses or declares invalid a precedent decision, the Commission shall promptly modify the precedent decision to conform in all respects to the judgment of the court. The modified precedent decision shall supersede the prior precedent decision for all purposes.

- (f) All precedent decisions shall be posted on the Commission's website with the goal of transparency and ease of research. Precedent decisions may be redacted to protect confidential information including sensitive cultural resource information.

Note: Authority cited: Section 11425.60, Government Code; and Section 8029, Health and Safety Code; and Section 5097.94, Public Resources Code. Reference: Section 8029, Health and Safety Code.

31027. Quarterly Reporting

- (a) Beginning in April of the year in which these regulations become effective, the Commission shall, on a quarterly basis, publish on its website a summary of all complaints received and disposition which shall include the following information.

(1) Name of Institution and Complaining Party.

(2) Whether the Institution was in compliance with NAGPRA.

(3) If the complaint is determined to be founded, the outcome, including the amount of any civil penalty imposed and whether the penalty has been paid.

Note: Authority cited: Section 8029, Health and Safety Code; and Section 5097.94, Public Resources Code. Reference: Section 8029, Health and Safety Code.