CALIFORNIA NATURAL RESOURCES AGENCY

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CERTIFICATION

The foregoing table of contents constitutes the California Natural Resources Agency's rulemaking file for the subject regulations. The rulemaking file as submitted is complete. The rulemaking record for the subject regulations was closed on July 30, 2016.
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Sacramento, California, on July 30, 2016.

Signed:

8-8-16
Date

Heather Baugh
Assistant General Counsel

Tab A

STATE OF CALIFORNIA--OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATIONS SUBMISSION

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-2013)

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z-2016-0209-02		

For use by Office of Administrative Law (OAL) only

NOTICE

REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY

AGENCY FILE NUMBER (If any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE
California Environmental Quality Act	14	Appendix G	Upon Filing with OAL

3. NOTICE TYPE	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
[X] Notice re Proposed Regulatory Action [ ] Other	Heather Baugh	916-653-8152	916-653-8102

OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	[ ] Approved as Submitted [ ] Approved as Modified [ ] Disapproved/ Withdrawn		

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S)	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
California Environmental Quality Act--Tribal Cultural Resources	n/a

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	
	ADOPT
	AMEND: Appendix G
TITLE(S): 14	REPEAL

3. TYPE OF FILING

- [ ] Regular Rulemaking (Gov. Code §11346)
- [ ] Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)
- [ ] Emergency (Gov. Code, §11346.1(b))
- [ ] Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.
- [ ] Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)
- [ ] Emergency Readopt (Gov. Code, §11346.1(h))
- [X] File & Print
- [ ] Other (Specify) _____
- [ ] Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
- [ ] Print Only

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

June 6, 2016 to June 21, 2016.

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

- [ ] Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a))
- [ ] Effective on filing with Secretary of State
- [ ] §100 Changes Without Regulatory Effect
- [X] Effective other (Specify) Upon filing with OAL (See justification)

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

- [ ] Department of Finance (Form STD. 399) (SAM §6660)
- [ ] Fair Political Practices Commission
- [ ] State Fire Marshal
- [ ] Other (Specify) N/A

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)
Heather Baugh	916-653-8152	916-653-8102	heather.baugh@resources.ca.gov

8. **I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.**

SIGNATURE OF AGENCY HEAD OR DESIGNEE: John Laird

DATE: 3/8/16

TYPED NAME AND TITLE OF SIGNATORY: John Laird, Secretary

For use by Office of Administrative Law (OAL) only

INSTRUCTIONS FOR PUBLICATION OF NOTICE AND SUBMISSION OF REGULATIONS

Use the form STD. 400 for submitting notices for publication and regulations for Office of Administrative Law (OAL) review.

ALL FILINGS

Enter the name of the agency with the rulemaking authority and agency's file number, if any.

NOTICES

Complete Part A when submitting a notice to OAL for publication in the California Regulatory Notice Register. Submit two (2) copies of the STD. 400 with four (4) copies of the notice and, if a notice of proposed regulatory action, one copy each of the complete text of the regulations and the statement of reasons. Upon receipt of the notice, OAL will place a number in the box marked "Notice File Number." If the notice is approved, OAL will return the STD. 400 with a copy of the notice and will check "Approved as Submitted" or "Approved as Modified." If the notice is disapproved or withdrawn, that will also be indicated in the space marked "Action on Proposed Notice." Please submit a new form STD. 400 when resubmitting the notice.

REGULATIONS

When submitting regulations to OAL for review, fill out STD. 400, Part B. Use the form that was previously submitted with the notice of proposed regulatory action which contains the "Notice File Number" assigned, or, if a new STD. 400 is used, please include the previously assigned number in the box marked "Notice File Number." In filling out Part B, be sure to complete the certification including the date signed, the title and typed name of the signatory. The following must be submitted when filing regulations: seven (7) copies of the regulations with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification) and the complete rulemaking file with index and sworn statement. (See Gov. Code § 11347.3 for rulemaking file contents.)

RESUBMITTAL OF DISAPPROVED OR WITHDRAWN REGULATIONS

When resubmitting previously disapproved or withdrawn regulations to OAL for review, use a new STD. 400 and fill out Part B, including the signed certification. Enter the OAL file number(s) of all previously disapproved or withdrawn filings in the box marked "All Previous Related OAL Regulatory Action Number(s)" (box lb. of Part B). Submit seven (7) copies of the regulation to OAL with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification). Be sure to include an index, sworn statement, and (if returned to the agency) the complete rulemaking file. (See Gov. Code §§ 11349.4 and l.1347.3 for more specific requirements.)

EMERGENCY REGULATIONS

Fill out only Part B, including the signed certification, and submit seven (7) copies of the regulations with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification). (See Gov. Code §11346.1 for other requirements.)

NOTICE FOLLOWING EMERGENCY ACTION

When submitting a notice of proposed regulatory action after an emergency filing, use a new STD. 400 and complete Part A and insert the OAL file number(s) for the original emergency filing(s) in the box marked "All Previous Related OAL Regulatory Action Number(s)" (box 1b. of Part B). OAL will return the STD. 400 with the notice upon approval or disapproval. If the notice is disapproved, please fill out a new form when resubmitting for publication.

CERTIFICATE OF COMPLIANCE

When filing the certificate of compliance for emergency regulations, fill out Part B, including the signed certification, on the form that was previously submitted with the notice. If a new STD. 400 is used, fill in Part B including the signed certification, and enter the previously assigned notice file number in the box marked "Notice File Number" at the top of the form. The materials indicated in these instructions for "REGULATIONS" must also be submitted.

EMERGENCY REGULATIONS - READOPTION

When submitting previously approved emergency regulations for readoption, use a new STD. 400 and fill out Part B, including the signed certification, and insert the OAL file number(s) related to the original emergency filing in the box marked "All Previous Related OAL Regulatory Action Number (s)" (box 1b. of Part B).

CHANGES WITHOUT REGULATORY EFFECT

When submitting changes without regulatory effect pursuant to California Code of Regulations, Title 1, section 100, complete Part B, including marking the appropriate box in both B.3. and B.5.

ABBREVIATIONS

Cal. Code Regs. - California Code of Regulations
Gov. Code - Government Code
SAM - State Administrative Manual

For questions regarding this form or the procedure for filing notices or submitting regulations to OAL for review, please contact the Office of Administrative Law Reference Attorney at (916) 323-6815.

Tab B

CALIFORNIA natural resources AGENCY

EDMUND G. BROWN JR., *Governor*
JOHN LAIRD, *Secretary for Natural Resources*

Title 14
CALIFORNIA NATURAL RESOURCES AGENCY
NOTICE OF PROPOSED RULEMAKING
AMENDING GUIDELINES IMPLEMENTING
THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

February 19, 2016

NOTICE IS HEARBY GIVEN pursuant to Government Code section 11346.6 that the California Natural Resources Agency ("Resources Agency") proposes to adopt and amend regulations implementing Title 14, Division 6, Chapter 3 of the California Code of Regulations, the Guidelines for Implementation of the California Environmental Quality Act (CEQA Guidelines), to include consideration of impacts to tribal cultural resources.

PROPOSED ACTION

Public Resources Code section 21083.09, added by Assembly Bill 52 (Gatto, 2014) requires the Resources Agency to update Appendix G of the CEQA Guidelines to address tribal cultural resources. Appendix G contains a sample environmental checklist that lead agencies may use to conduct an initial study, which assists lead agencies to determine whether to prepare a negative declaration or an environmental impact report.

The changes to the Guidelines proposed in this action are as follows:

Amend Appendix G section on Evaluation of Environmental Impacts, and amendments to existing Section V, Cultural Resources. More information about the proposed regulatory action can be found in the Initial Statement of Reasons.

PUBLIC HEARING AND WRITTEN COMMENT PERIOD AND AGENCY CONTACT

A public hearing will be held in accordance with the requirements set forth in Government Code section 11346.8. The hearing details are as followings:

Date: April 4, 2016
Time: 9:00 a.m.
Location: California Natural Resources Building
1416 Ninth Street, First Floor Auditorium
Sacramento, CA 95814

The hearing will be closed when all persons present have had an opportunity to comment on the proposed action. Time limits may be placed on oral comments to ensure that all persons wishing to comment have the opportunity within the available time for the hearing. The Agency requests but does not require that persons who make oral comments at the hearing also submit a written copy of their testimony at the hearing.

Written Comments:

Interested members of the public may present comments orally or in writing at the hearing and may provide comments by postal mail or by electronic submittal before the close of the public comment period. The public comment period for this regulatory action will begin on **February 19, 2016**. To be considered by the Resources Agency, written comments not physically submitted at the hearing, must be submitted by **April 4, 2016** and received no later than 5:00 pm. The Resources Agency will consider only comments submitted and received by that time. Following the consultation of the written comment period, the Resources Agency may adopt the proposal as set forth without further notice. Comments submitted electronically are preferred.

Submit comments to:

ceqa.guidelines@resources.ca.gov
or to:
Heather Baugh
The California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814
(916) 653-8152

Please note that under the California Public Records Act (Government Code. §6250 et seq.), written and oral comments, attachments, and associated contact information (e.g., address, phone, email, etc.) become part of the public record and can be released to the public upon request.

Pursuant to Government Code section 11346.9(a)(3), the Resources Agency shall in a final statement of reasons respond to comments submitted during the comment period containing objections and/or recommendations specifically directed at the Resources Agency's proposed action or to the procedures followed by the Resources Agency in proposing or adopting the proposed action.

AUTHORITY AND REFERENCE

Authority: Public Resources Code sections 21083 and 21083.09

Reference: Public Resources Code sections 21073, 21074, 21080.3.1, 21080.3.2, 21082.3, 21084.2 and 21084.3.

Tab C

Originally Proposed Language for Tribal cultural resources update to Appendix G

1. Add a statement regarding tribal consultation to the beginning of Appendix G under EVALUATION OF ENVIRONMENTAL IMPACTS, which provides guidance on completing the checklist and environmental analysis:

[...]
10. Tribal consultation, if requested as provided in Public Resources Code Section 21080.3.1, must begin prior to release of a negative declaration, mitigated negative declaration, or environmental impact report for a project. Information provided through tribal consultation may inform the lead agency's assessment as to whether tribal cultural resources are present, and the significance of any potential impacts to such resources. Prior to beginning consultation, lead agencies may request information from the Native American Heritage Commission regarding its Sacred Lands File, per Public Resources Code sections 5097.9 and 5097.94, as well as the California Historical Resources Information System administered by the California Office of Historic Preservation.

2. Changes to the language of Section V to include Tribal cultural resources, with proposed additions in Bold and Underline.

V. CULTURAL RESOURCES
Would the project:
a) Cause a substantial adverse change in the significance of a historical resource as defined in § 15064.5?
b) Cause a substantial adverse change in the significance of an archaeological resource pursuant to
§ 15064.5?
c) Directly or indirectly destroy a unique paleontological resource or site or unique geologic feature?
d) Disturb any human remains, including those interred outside of ~~formal~~ **dedicated** cemeteries?
e) Cause a substantial adverse change in the significance of a tribal cultural resource, defined in
Public Resources Code section 21074 as either:

1) a site, feature, place, cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American Tribe, that is listed or eligible for listing on the California Register of Historical Resources, or on a local register of historical resources as defined in Public Resources Code section 5020.1(k), or

2) a resource determined by a lead agency, in its discretion and supported by substantial evidence, to be significant according to the historical register criteria in Public Resources Code section 5024.1 (c), and considering the significance of the resource to a California Native American tribe.

Authority: Public Resources Code sections 21083 and 21083.09

Reference: Public Resources Code sections 21073, 21074, 21080.3.1,

21080.3.2, 21082.3, 21084.2 and 21084.3.

Tab D

INFORMATIVE DIGEST/ POLICY STATEMENT OVERVIEW

Background and Effect of the Proposed Rulemaking

On July 1, 2015 AB 52 (Gatto, 2014) went into effect. According to its author:

> [E]xisting laws lack a formal process for tribes to be involved in the CEQA process as tribal governments. CEQA projects that impact tribal resources have experienced uncertainty and delays as lead agencies attempt to work with tribes to address impacts on tribal resources. With this bill, it is the author's intent to "Set forth a process and scope that clarifies California tribal government involvement in the CEQA process, including specific requirements and timing for lead agencies to consult with tribes on avoiding or mitigating impacts to tribal cultural resources." (Assembly Floor Analysis, at p. 4, August 27, 2014.)

Among other things, AB 52 added a definition of "tribal cultural resources." (Public Resources Code § 21074.)

"Tribal cultural resources" are either of the following:
(1) Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either of the following:

> *(A) Included or determined to be eligible for inclusion in the California Register of Historical Resources.*
>
> *(B) Included in a local register of historical resources as defined in subdivision (k) of Section 5020.1.*

(2) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1. In applying the criteria set forth in subdivision (c) of Section 5024.1 for the purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.
(b) A cultural landscape that meets the criteria of subdivision (a) is a tribal cultural resource to the extent that the landscape is geographically defined in terms of the size and scope of the landscape.
(c) A historical resource described in Section 21084.1, a unique archaeological resource as defined in subdivision (g) of Section 21083.2, or a "nonunique archaeological resource" as defined in subdivision (h) of Section 21083.2 may also be a tribal cultural resource if it conforms with the criteria of subdivision (a).

AB 52 also created a formal requirement for consultation with California Native American Tribes in the CEQA process. Tribal Governments can request consultation with a lead agency and give input regarding potential impacts to tribal cultural resources before the agency decides what type of environmental review is necessary for a proposed project. (Pub. Resources Code § 21080.3.2.) The Public Resources Code further requires avoiding damage to tribal cultural resources, if feasible. If not, lead agencies must mitigate impacts to tribal cultural resources to the extent feasible.

By including tribal cultural resource assessment and Government to Government consultation early in the CEQA process, the Legislature intended to [e]nsure that local and tribal governments, public agencies, and project proponents have information available, early in the California Environmental Quality Act environmental review process, for purposes of identifying and addressing potential adverse impacts to tribal cultural resources and to reduce the potential for delay and conflicts in the environmental review process. (AB 52 § 1(b)(7).)

AB 52 directed an update to the CEQA Guidelines regarding tribal cultural resources, particularly to add questions to the environmental checklist form, found in Appendix G. (Public Resources Code § 21083.09.)

Summary of Existing Laws and Regulations Related Directly to the Proposed Rulemaking

The California Environmental Quality Act (Public Resources Code section 21000 et seq.) (CEQA) requires public agencies to identify potential adverse environmental effects of activities that they propose to carry out, fund, or approve, and to consider feasible alternatives and mitigation measures that would substantially reduce significant adverse environmental effects that are identified. CEQA compliance usually involves preparation by a public agency of either a negative declaration, mitigated negative declaration, or an environmental impact report. CEQA requires the Secretary for the Natural Resources Agency, in consultation with the Governor's Office of Planning and Research (OPR), to periodically adopt, amend and repeal the CEQA Guidelines. Public Resources Code section 21083.09 required a specific update to Appendix G of the CEQA Guidelines to address tribal cultural resources. Appendix G contains a sample environmental checklist that lead agencies may use to prepare an initial study, which may lead to preparation of either a negative declaration, mitigated negative declaration or environmental impact report.

In addition to adding Public Resources Code section 21083.09, AB 52 also added provisions to CEQA defining tribal cultural resources, requiring consultation with California Native American Tribes, and requiring mitigation of significant impacts to tribal cultural resources when feasible. (Pub. Resources Code §§ 21073, 21074, 21080.3.1, 21080.3.2, 21082.2, 21083.09, 21084.2, and 21084.3.) The consultation requirement is similar to a provision of the Government Code requiring consultation with tribes regarding adoption or amendment of various land use plans. (Gov. Code § 65352.4.)

Summary of the Effect of the Proposed Rulemaking

The effect of the proposed rulemaking will be to assist lead agencies with compliance with new requirements in CEQA regarding consultation with California Native American Tribes and the analysis of potential impacts to tribal cultural resources.

Policy Objectives and Specific Benefits Anticipated by the Proposed Regulation Including Non-monetary Benefits

In addition to the objectives explicitly stated in CEQA, the Resources Agency has several policy objectives that guided the development of this proposed action. First, the purpose of Appendix G is to

assist lead agencies in complying with CEQA's substantive requirements. Because many agency staff look to the CEQA Guidelines as the comprehensive source of information regarding CEQA's requirements, and because some agencies may not be familiar with the analysis of tribal cultural resources, some degree of detail in the questions related to tribal cultural resources is appropriate. Second, because Appendix G is intended as a tool to assist lead agencies, the Resources Agency has attempted to use simple, plain language. Third, because the CEQA Guidelines apply to all types of public agencies across the state, the Resources Agency has attempted to keep questions as broadly worded as possible. The proposed action balances each of these objectives.
By adding a statement related to consultation in the Evaluation of Environmental Impact section of Appendix G, the changes indicate that lead agencies can gain information needed to fill out the initial study and understand the full scope of potential impacts to tribal cultural resources, before proceeding with environmental review and project development. The benefits of this consultation process are three-fold. It helps lead agencies avoid a procedural error in CEQA by inadvertently neglecting consultation, it potentially protects tribal cultural resources, and it allows projects to move forward with more certainty and less potential delay from unanticipated discovery of tribal cultural resources during construction. As a matter of policy, these changes help lead agencies efficiently comply with CEQA, adequately consider impacts to tribal cultural resources, and promote streamlined development.

The objective of the changes to the Section V, Cultural Resources, are to clearly indicate to lead agencies that tribal cultural resources are a type of cultural resource that may be distinct from historical and archeological resources. The language of the proposed questions in Appendix G, which detail the two ways that a lead agency can find that a resource is a tribal cultural resource, are intended to provide a clear record of the basis for the determination that a project may or may not have a potentially significant impact on such resources.

The Proposed Regulation is Not Inconsistent with or Incompatible with Existing State Law or Regulations

The proposed regulations are not inconsistent or incompatible with existing state regulations. After performing an evaluation of relevant regulations applicable to this topic area, the Agency found that the requirements in the Public Resources Code relevant to Tribal Cultural Resources are unique, as they pertain to a new class of resources in CEQA called Tribal Cultural Resources. The proposed regulations to add Tribal Cultural Resources to the sample environmental checklist form in Appendix G of the CEQA Guidelines, therefore, are neither inconsistent nor incompatible with existing state regulations.

The Resources Agency has developed these regulations in alignment with existing state law and regulations. The amendments to the Guidelines reflect statutory requirements. These amendments update the Guidelines to be consistent with AB 52, which added Public Resources Code sections 5097.94, 21073, 21074, 21080.3.1, 21080.3.2, 21082.3, 21084.2, 21084.3. The proposed regulations do not impose new requirements, but rather add the consideration of the requirements in statute to the sample environmental checklist form for the sake of clarity and completeness. Therefore, these amendments will not result in any inconsistency and incompatibility with existing state regulations.

FORMS INCORPORATED BY REFERENCE

There are no forms incorporated by reference in the proposed regulations.

DISCLOSURES REGARDING THE PROPOSED ACTION

FISCAL IMPACT DETERMINATION REGARDING THE PROPOSED ACTION

Pursuant to Government Code sections 11346.5(a)(5) and (a)(6), the Secretary has made an initial determination that the proposed regulatory action would not create costs to covered State agencies. The proposed regulatory actions would not create costs or savings in federal funding to the State, costs or mandates to any local agency or school district, whether or not reimbursable by the State pursuant to Government Code, Title 2, Division 4, Part 7 (commencing with section 17500) or other nondiscretionary costs of savings to State or local agencies.

The regulation does not impose a mandate on any private individual, business or local government because use of the Appendix G sample environmental checklist form is optional and voluntary.

The determinations of the Secretary concerning the costs or savings necessarily incurred by public agencies and private persons and businesses in reasonable compliance with the proposed regulatory action are presented below:

- Cost to any Local Agency or School District Requiring Reimbursement Pursuant to Government Code section 17500 et seq.: None
- Cost or Savings for State Agencies: None
- Other Non-Discretionary Costs or Savings on Local Agencies: None
- Costs or Savings in Federal Funding to the State: None

There is No Significant Effect on Housing Costs

The Secretary of the Resources Agency has also made the initial determination that the proposed regulatory action will not have a significant effect on housing costs because the proposed regulation only changes a sample checklist in the CEQA Guidelines, it does not add new requirements under the law.

There is No Significant Adverse Economic Impact Directly Affecting Business, Including Ability to Compete and Declaration of Initial Determination of No Impact

The Secretary of the Resources Agency has made an initial determination that the proposed regulatory action would not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states, or on representative private persons. An initial determination has been made that there is no impact because

the proposed regulations simply make clear existing requirements in the law by adding to a sample checklist. There are no new requirements in the proposed regulations.

STATEMENT OF RESULTS OF THE ECONOMIC IMPACT ASSESSMENT

The Secretary of the Resources Agency has made an initial determination that the proposed regulatory action would not affect the creation or elimination of jobs within the State of California, the creation of new businesses or elimination of existing businesses within the State of California, or the expansion of businesses currently doing business within the State of California. A detailed assessment of the economic impacts of the proposed regulatory action can be found in the Economic and Fiscal Impact Analysis, which is an attachment to the Initial Statement of Reasons, ISOR.

If there are any non-economic benefits to the proposed regulation, such as an increase in the health and welfare of California residents who are also California Native Americans, or a benefit to the State's environment because this proposed regulation implements changes to the California Environmental Quality Act, those benefits are due to the requirements in the statute. As previously stated, the proposed regulations merely add content to an optional, sample environmental checklist form. They therefore have no benefit, either positive or negative, other than the potentially more effective implementation by lead agencies of the requirements in AB 52 and the changes it made to the Public Resources Code.

COST IMPACTS TO REPRESENTATIVE PERSONS OR BUSINESSES, INCLUDING SMALL BUSINESSES

In developing this regulatory proposal, Agency staff evaluated the potential economic impacts on representative private persons or businesses. The Agency staff is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

The Secretary of the Resources Agency has also made an initial determination that, pursuant to California Code of Regulations, Title 1, section 4, the proposed regulatory action would not affect small businesses because the regulations only interpret and make clear existing requirements in the Public Resources Code in an optional, sample checklist of existing requirements. No new regulations are added to small business as a result of the proposed regulations.

ALTERNATIVES CONSIDERED

In accordance with subsection 11346.5(a)(13) of the Government Code, the agency must determine that no reasonable alternative considered by the agency or that has otherwise been identified and brought to the attention of the agency would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons that the proposed action, and/or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

In this case, there are no alternatives to this initial proposal.

The Governor's Office of Planning and Research released three discussion draft alternatives on November 17, 2015 for 30 days of public comment. The discussion draft alternatives are included in the record in the document titled "Discussion Draft of Proposed Changes to Appendix G of the CEQA Guidelines Incorporating Tribal Cultural Resources", which is an attachment to the ISOR.

After reviewing public comments received both in writing and during a public hearing, and a meeting with Tribal Leadership, OPR created a new proposed regulatory package with a revised proposal for updates to Appendix G to include tribal cultural resources and separate paleontology. The Agency has reviewed this package and decided to submit the revised proposal for public comment and regulatory review.

CONTACT PERSONS

Inquiries concerning the proposed administrative action may be directed to:

ceqa.guidelines@resources.ca.gov

Heather Baugh
The California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814
(916) 653-8152

Please direct requests for copies of the proposed text ("the express terms") of the regulations, the initial statement of reasons, or other information upon which the proposed rulemaking is based to Ms. Baugh at the above address. The backup person to contact for access to documents is Lia Duncan, at Lia.Duncan@resources.ca.gov or (916) 653-5656.

AVAILABILITY OF RULEMAKING PACKAGE AND INTERNET ACCESS

The Resources Agency will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office at the above address. As of this date this notice is published in the Notice Register, the rulemaking file consists of this notice, the express terms of the proposed text of the regulations, the initial statement of reasons, and supporting information. Copies may be obtained by contacting either Heather Baugh or Lia Duncan at their address and/or phone numbers and email addresses listed above.

If there are substantial and related changes to the proposed regulation, the full text of the regulation, if changed after the forty-five day initial public comment period, will be available for at least 15 days prior to the date on which the Resources Agency adopts, amends, or repeals the proposed regulation.

Final Statement of Reasons

Upon its completion, the Final Statement of Reasons (FSOR) will be available and copies may be requested from the agency contact persons in this notice, or may be accessed on the Resources Agency's website www.resources.ca.gov.

Internet Availability

This notice, the ISOR and all subsequent regulatory documents, including the FSOR, when completed, will be available on the Resources Agency's website www.resources.ca.gov.

NON-DUPLICATION OF FEDERAL LAW AND RELATIONSHIP TO FEDERAL LAW

The proposed regulations do not duplicate federal law, nor are they mandated by federal law or regulations. Because AB 52 added a new requirement to the Public Resources Code in the California Environmental Quality Act, the Guidelines for the California Environmental Quality Act in Appendix G, the sample environmental checklist form also needs an update.

OTHER STATUTORY REQUIREMENTS

In accordance with Government Code section 11346.5(a)(4), there are no other requirements identified in this notice that are that are specific to the Resources Agency or any specific regulation or class of regulations.

REASONABLE ACCOMODATIONS

The hearing location is accessible to persons with disabilities. If any member of the public wishes to comment and requires other reasonable accommodations, please contact Lia Duncan at the Natural Resources Agency as listed above at least five days prior to the scheduled workshop.

Tab E

CALIFORNIA natural resources AGENCY

EDMUND G. BROWN JR., *Governor*
JOHN LAIRD, *Secretary for Natural Resources*

STATEMENT OF 45-DAY NOTICE OF AVAILABILITY OF PROPOSED TEXT (Section 44 of Title 1 of the California Code of Regulations)

On February 19, 2016, the California Natural Resources Agency mailed the proposed text of the regulations along with a notice of the public comment period to those persons specified in subsections (a)(1) through (4) of Section 44 of Title 1 of the California Code of Regulations. The public comment period for the modified text was from February 19, 2016 through April 4, 2016. The Agency also sent the notice to its statewide CEQA list serve, and to tribal list serves as requested.

Dated: July 26, 2016

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Tab F

CALIFORNIA NATURAL RESOURCES AGENCY

Initial Statement of Reasons for Regulatory Action

Amendments to the State CEQA Guidelines Implementing Assembly Bill 52 (Gatto, 2014) Regarding Tribal Cultural Resources

California Natural Resources Agency

2/9/2016

Proposed changes to the sample environmental checklist in Appendix G of the California Environmental Quality Act Guidelines to incorporate tribal cultural resources questions and separate paleontology.

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I. Introduction

The California Natural Resources Agency (the "Resources Agency") proposes certain amendments and additions to Appendix G of the Guidelines Implementing the California Environmental Quality Act (Public Resources Code section 21000 *et seq.*) ("CEQA"). Specifically, these amendments implement the Legislature's directive in Public Resources Code section 21083.09 (enacted as part of Assembly Bill 52 (Chapter 532, Statutes 2014)). That section directs the Resources Agency to:

> *[C]ertify and adopt, revisions to the guidelines that update Appendix G of Chapter 3 (commencing with Section 15000) of Division 6 of Title 4 of the California Code of Regulations to do both of the following:*
>
> *(a) Separate the consideration of paleontological resources from tribal cultural resources and update the relevant sample questions.*
>
> *(b) Add consideration of tribal cultural resources with relevant sample questions.*

CEQA generally requires public agencies to review the environmental impacts of proposed projects, and, if those impacts may be significant, to consider feasible alternatives and mitigation measures that would substantially reduce significant adverse environmental effects. Section 21083 of the Public Resources Code requires the adoption of guidelines to provide public agencies and members of the public with guidance about the procedures and criteria for implementing CEQA. The guidelines required by section 21083 of the Public Resources Code are promulgated in the California Code of Regulations, title 14, sections 15000-15387 (the "Guidelines" or "State CEQA Guidelines"). Public agencies, project proponents, and third parties, who wish to enforce the requirements of CEQA, rely on the Guidelines to provide a comprehensive guide on compliance with CEQA. Subdivision (f) of section 21083 requires the Resources Agency, in consultation with the Office of Planning and Research ("OPR"), to certify, adopt and amend the Guidelines at least once every two years.

Notably, OPR is currently considering wider changes to many other portions of the CEQA Guidelines pursuant to the directive in Public Resources Code section 21083(f). Section 21083.09, as noted above, requires the promulgation of changes to Appendix G of the Guidelines specifically addressing tribal cultural resources by July 1, 2016. This proposed regulatory action, therefore, proposes only limited changes to Appendix G specifically implementing AB 52.

The Resources Agency considered reasonable alternatives to the amendments. OPR developed three alternative sets of questions that could respond to the directive in AB 52, and sought public input on those alternatives. Based on that input, OPR developed a proposal for changes which it submitted to the Resources Agency on January 29, 2016. Having considered the alternatives originally developed by OPR, the public input it received, and OPR's final recommendation, the Resources Agency has determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the

proposed amendments. This conclusion is based on the Resources Agency's determination that the amendments are necessary to implement the Legislature's directive in AB 52. Thus, the amendments add no additional substantive requirements; rather, the Guidelines merely assist lead agencies in complying with CEQA's requirements, as updated in AB 52. The Resources Agency rejected the no action alternative because it would not respond to the Legislature's directive in AB 52.

There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts are due to statutory additions to CEQA and not these proposed amendments.

The Resources Agency also initially determined that the amendments would not have a significant adverse economic impact on business. The Resources Agency has determined that this action would have no impacts on project proponents. However, the Resources Agency is aware that certain of the statutory changes enacted by the Legislature and judicial decisions, described in greater detail below, that are reflected in the amendments could have an economic impact on project proponents, including businesses. Among other things, project proponents could incur additional costs in assisting lead agencies to comply with CEQA's requirement for analysis of tribal cultural resources. However, the amendments to the Guidelines merely reflect those legislative and judicial requirements, and the Resources Agency knows of no less costly alternative. These amendments update the Guidelines to be consistent with AB 52, but do not impose any new requirements. Therefore, these amendments will not have a significant, adverse economic impact on business.

The amendments do not duplicate or conflict with any federal statutes or regulations. CEQA is similar in some respects to the National Environmental Policy Act ("NEPA"), 42 U.S.C. sections 4321-4343. Federal agencies are subject to NEPA, which requires environmental review of federal actions. State and local agencies are subject to CEQA, which requires environmental review before state and local agencies may approve or decide to undertake discretionary actions and projects in California. Although both NEPA and CEQA require an analysis of environmental impacts, the substantive and procedural requirements of the two statutes differ. Most significantly, CEQA requirements for feasible mitigation of environmental impacts exceed NEPA's mitigation provisions. A state or local agency must complete a CEQA review even for those projects for which NEPA review is also applicable, although Guidelines sections 15220-15229 allow state, local, and federal agencies to coordinate review when projects are subject to both CEQA and NEPA. Because state and local agencies are subject to CEQA unless exemptions apply, and because CEQA and NEPA are not identical, guidelines for CEQA are necessary to interpret and make specific provisions of AB 52 and do not duplicate the Code of Federal Regulations.

II. Initial Statement of Reasons

The Administrative Procedure Act requires that an agency prepare an initial statement of reasons supporting its proposed regulation. (Gov. Code § 11346.2 (b).) Below is a brief background on AB 52, and Appendix G in the CEQA Guidelines. Following that background, OPR's public engagement process and the Natural Resources Agency's rulemaking process is briefly described. Next, this Initial Statement of Reasons explains the purpose and necessity of each proposed change to the Guidelines.

A. A. Background on AB 52 (Gatto, 2014)

On July 1, 2015 AB 52 (Gatto, 2014) went into effect. (A copy of AB 52 is contained in Attachment A.) According to its author:

> [E]xisting laws lack a formal process for tribes to be involved in the CEQA process as tribal governments. CEQA projects that impact tribal resources have experienced uncertainty and delays as lead agencies attempt to work with tribes to address impacts on tribal resources. With this bill, it is the author's intent to "Set forth a process and scope that clarifies California tribal government involvement in the CEQA process, including specific requirements and timing for lead agencies to consult with tribes on avoiding or mitigating impacts to tribal cultural resources."

(Assembly Floor Analysis, August 27, 2014.)

AB 52 established a new category of resources in CEQA called Tribal cultural resources. (Public Resources Code § 21074.)

"Tribal cultural resources" are either of the following:

(1) Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either of the following:

> *(A) Included or determined to be eligible for inclusion in the California Register of Historical Resources.*
>
> *(B) Included in a local register of historical resources as defined in subdivision (k) of Section 5020.1.*

(2) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1. In applying the criteria set forth in subdivision (c) of Section 5024.1 for the purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.

(b) A cultural landscape that meets the criteria of subdivision (a) is a tribal cultural resource to the extent that the landscape is geographically defined in terms of the size and scope of the landscape.

(c) A historical resource described in Section 21084.1, a unique archaeological resource as defined in subdivision (g) of Section 21083.2, or a "nonunique archaeological resource" as defined in subdivision (h) of Section 21083.2 may also be a tribal cultural resource if it conforms with the criteria of subdivision (a).

AB 52 also created a process for consultation with California Native American Tribes in the CEQA process. Tribal Governments can request consultation with a lead agency and give input into potential impacts to tribal cultural resources before the agency decides what kind of environmental assessment is appropriate for a proposed project. (Pub. Resources Code § 21080.3.2.) The Public Resources Code now requires avoiding damage to tribal cultural resources, if feasible. If not, lead agencies must mitigate impacts to Tribal Cultural Resources to the extent feasible.

By including tribal cultural resource assessment and Government to Government consultation early in the CEQA process, the Legislature intended to ensure that local and Tribal governments, public agencies, and project proponents would have information available early enough in the project planning process to identify and address potential substantial adverse impact to tribal cultural resources. By taking this proactive approach, the Legislature also intended to reduce the potential for delay and conflicts in the environmental review process. ((AB 52 § 1 (b)(7).)

AB 52 also directed OPR to prepare, and the Resources Agency to adopt, questions regarding tribal cultural resources in the CEQA Guidelines Environmental Checklist Form, found in Appendix G. (Public Resources Code § 21083.09.) The statute also directs OPR to separate the consideration of paleontological resources from tribal cultural resources.

Additional information on the new provisions added by AB 52 is provided in a discussion draft technical advisory that OPR released in May of 2015. (A copy of the discussion draft technical advisory is included in Attachment B.)

B. Background on Appendix G

The CEQA Guidelines are administrative regulations that implement the California Environmental Quality Act. As regulations, the CEQA Guidelines implement, interpret and make specific the terms in the Public Resources Code. The CEQA Guidelines cannot add new requirements, nor can they remove any requirements found in the statute.

Appendix G in the CEQA Guidelines contains a sample initial study form. The purpose of an initial study is to assist lead agencies in determining whether a project may cause a significant impact on the environment. (State CEQA Guidelines, § 15063.) To help guide that determination, Appendix G asks a series of questions regarding a range of environmental resources and potential impacts. Appendix G's questions are not an exhaustive list of all potential impacts. (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal. App. 4th 1099, 1109-1112 (seasonal reduction of surface flow in local streams may be an impact on the environment, even though that particular impact is not specifically listed in Appendix G).) Appendix G further advises that its environmental checklist is only a *sample* form that can be tailored to address local conditions and project characteristics.

Because CEQA now provides that a project that may cause a substantial adverse change in a Tribal Cultural Resource is a project that may have a significant effect on the environment, changes must be made to the sample environmental checklist form to include questions about tribal cultural resources. The provisions of the statute for avoidance and mitigation of potential effects on tribal cultural resources will not be affected by the CEQA Guidelines Appendix G update process.

C. Background on OPR's Development of Proposed Changes to Appendix G Incorporating Tribal Cultural Resources

As with other CEQA Guidelines updates, prior to the release of a draft, OPR conducted extensive public outreach and coordinated closely with the Native American Heritage Commission and California Office of Historic Preservation. OPR staff presented at over twenty different professional conferences, public workshops with the Native American Heritage Commission, and state and local agency meetings. The purpose of that outreach was to hear from tribes, public agencies, environmental organizations, business interests and others regarding potential changes to Appendix G to implement AB 52. In addition to outreach, in May of 2015, OPR released a discussion draft technical advisory on the procedural requirements of AB 52, and sought public input on that discussion draft. OPR invited public review of the discussion draft technical advisory, met with tribes and stakeholders, and received comment letters with suggestions for improvement.

1. Discussion Draft of Changes

In November of 2015, OPR released a Discussion Draft of Proposed Changes to Appendix G of the CEQA Guidelines Incorporating Tribal Cultural Resources for a thirty-day public review period. (A copy is contained in Attachment C.) That draft included three potential options for changes to Appendix G.

Alternative one in that draft would add one question to Section V (Cultural Resources) of Appendix G. That question would ask if a project would cause a substantial adverse change in the significance of a tribal cultural resource as defined in Public Resources Code section 21074. That option is similar to the format for the existing subdivisions in Section V on historical and archaeological resources.

Alternative two in OPR's draft would ask essentially the same question in the cultural resources section, but paraphrased the definition of tribal cultural resources in the Public Resources Code. It would also change the word formal to dedicated, in subdivision (d) regarding disturbance of human remains outside of cemeteries.

Alternative three in OPR's draft would create a new section, outside of Section V (Cultural Resources) containing questions only related to tribal cultural resources. Those questions spelled out the full definition of tribal cultural resources, mirroring the language in Public Resources Code section 21074. Those questions would also include detailed lead-in language referencing the procedural consultation requirements.

During the public comment period, OPR held two workshops, one for the public and one for Tribal Leadership, as well as a Tribal webinar for staff working for Tribal Governments. The comment period on OPR's draft closed on December 18, 2015. OPR received thirty-eight comments from Tribal Governments, cultural resource management practitioners, archaeologists, paleontologists, the business community, and lead agencies and local governments.

Comments on the proposal largely addressed the amount of detail that should appear in the Appendix G questions. On the one hand, some comments favored the minimalist approach in OPR's alternative one (simply cross-referencing the statutory definition of tribal cultural resources). Those comments suggested

that too much detail in the Appendix G questions might create confusion and complicate the CEQA process.

Other comments, however, suggested that lead agencies are not consistent in their approach to tribal cultural resources, and further that some lead agencies do not understand how tribal cultural resources may have value that is different from historic and archeological resources. Accordingly, those comments suggested that additional detail regarding tribal cultural resources was both appropriate and necessary.

Comments from Tribal Governments also expressed concern that if the new question regarding tribal cultural resources were a subset of the broader cultural resources section in the sample environmental checklist, lead agencies might rely solely on archaeologists and not properly take into account tribal expertise.

2. OPR's Recommended Changes

Having reviewed and considered the comments that it received on the discussion draft, OPR developed a final recommendation that it transmitted to the Resources Agency on January 29, 2016 (See copy in Attachment D.) The recommendation balances the competing interests expressed in the public comments while implementing the specific direction in AB 52 to ensure that the checklist is clear, concise, and complete. As described in greater detail below, the recommendation contains the following:

- Proposed additions to the introductory language in the section of Appendix G entitled, "Evaluation of Environmental Impacts." Those additions would refer to the procedural requirement for tribal consultation in Public Resources Code section 21080.3.1. It also refers to other sources of information regarding tribal cultural resources, including the California Historical Resources Information Systems as managed by the California Office of Historic Preservation, and the Sacred Lands File, as maintained by the California Native American Heritage Commission.
- Proposed revision to subdivision (d) of Section V (Cultural Resources) to replace the word "formal" with the word "dedicated" to conform to existing language regarding cemeteries elsewhere in the Public Resources Code and in the Health and Safety Code.
- Proposed addition of subdivision (e) to Section V (Cultural Resources) adding a question regarding tribal cultural resources. That question mirrors the statutory definition in Public Resources Code section 21074. It is broken into two subparts to assist lead agencies in determining whether there may be a potentially significant impact to such resources, as they are defined in CEQA (i.e., that they are either on or eligible for the state historical register or included in a local register of historic properties, or are resources that a lead agency chooses to treat as a tribal cultural resource).

3. Suggestions Not Incorporated

OPR's transmittal to the Resources Agency explained that certain suggestions were not chosen for inclusion in its recommendation.

First, some Tribal Governments recommended language asking whether a project would potentially disturb any resource or place defined in Public Resources Code section 5097.9 et seq. (Native American Historical, Cultural and Sacred Sites). That suggestion was not incorporated for two reasons. First, the suggestion would exceed the scope of analysis of tribal cultural resources required by the Public

Resources Code. The Sacred Lands File contains resources that may or may not be tribal cultural resources, as defined for CEQA purposes in Public Resources Code section 21074. Instead, OPR recommends that the addition to the section on "Evaluation of Environmental Impacts" include a reference to the Sacred Lands File as a source of information that may inform the lead agency's analysis of potential impacts.

Second, some comment letters, particularly from tribal governments, favored the approach in alternative three, which created a new section called Tribal Cultural Resources. Those letters suggested that if tribal cultural resources were in the same section as archeological or historical resources, that lead agencies might only consult with archeologists and historic resources experts, but not tribes. OPR disagrees.

The environmental checklist in Appendix G is separated into broad categorical headings. Tribal cultural resources are a type of cultural resource, separate from historical and archaeological resources. As stated above, each line on the checklist is a separate analysis of a separate resource. Keeping the category as a broad category with distinct subsets sets tribal cultural resources apart sufficiently to meet the direction of the statute. Moreover, as discussed below, in the proposed addition to the instructions entitled Evaluation of Environmental Impacts, indicate the value of tribal consultation in filling out the checklist appropriately.

Third, some comments from business interests suggested that the new question for tribal cultural resources should consist only of a cross-reference to the statutory definition. That suggestion was not incorporated because it does not provide sufficient guidance to lead agencies. The statutory definition of tribal cultural resources is complex, including two circumstances in which a resource is a tribal cultural resource. Public Resources Code section 21074 (a) lists resources that must be treated as tribal cultural resources, while Public Resources Code section 21074 (b) indicated when a lead agency may use its discretion to determine that a resource is a tribal cultural resource. This important distinction merits two sub-questions in the checklist.

Instead of the minimal approach, OPR recommends keeping tribal cultural resources in the Cultural Resources section and explaining it in detail. This approach is consistent with the recommendation made by the business community, but expands on the definition by quoting the statutory definition to show the two different paths to recognition of a resource as a tribal cultural resource for analysis of potential impacts to the resource. This is consistent with the tribal government preference for the more specific language found in alternative three.

Fourth, some paleontologists and Tribal Governments commented that paleontology should be in a completely separate section of Appendix G from tribal cultural resources. Specifically, they recommended removing it from Section V (Cultural Resources) because paleontology is the study of flora and fauna pre-human history, and therefore is not cultural. Many comments suggested moving paleontology to the Geology and Soils section. For example, "In San Francisco, we have moved this question to the Geology and Soils section. We find this placement suitable, given the relationship of a site's paleontological sensitivity to soil conditions." (Comment letter from the City and County of San Francisco. 12/22/2015) As noted above, however, OPR is currently considering larger updates to Appendix G as part of a comprehensive update to the CEQA Guidelines. Rather than risk confusing lead agencies and practitioners

with multiple updates to Appendix G, OPR proposes to defer further changes related to paleontology to the comprehensive update.

The environmental checklist is a sample document. It is a tool that lead agencies may use, but they can also create their own checklist. Several local governments, for example, the City and County of San Francisco, have already moved paleontology in their checklist. If paleontology moves out of the cultural resources section in the comprehensive update, that does not prohibit lead agencies from updating their own checklist at an earlier date. In proposing a question regarding tribal cultural resources in a subdivision of Section V that is separate from the subdivision related to paleontology, OPR has fulfilled the legislative direction of AB 52 to separate Tribal cultural resources and paleontological resources.

D. Economic Impact Analysis

Introduction

Per Gov. Code section 11346.3(b)(1), the Agency has prepared the following Economic Impact Analysis for the proposed changes to Appendix G of the CEQA Guidelines.

This package proposes limited changes to Appendix G of the CEQA Guidelines. Appendix G is a sample environmental checklist form, designed to assist lead agencies in carrying out an environmental analysis under CEQA (Public Resources Code § 21000 *et seq.*). Specifically, Appendix G poses questions about how a project may potentially affect a series of potential resource areas including, among others, air quality, biological resources, etc. Appendix G does not purport to include every possible environmental impact. Lead agencies may, moreover, tailor the checklist form as they see fit. (CEQA Guidelines § 15063(f).) Assembly Bill 52 (Chapter 532, Statutes 2014), hereafter AB 52, added new substantive and procedural requirements to CEQA regarding the analysis of tribal cultural resources. It also required the Natural Resources Agency to update Appendix G with appropriate sample questions addressing tribal cultural resources. This proposed rulemaking contains those updates to Appendix G. These changes do not add any new requirements. Therefore, the proposed regulatory changes have no economic impact.

Notably, the Governor's Office of Planning and Research, which developed these changes, conferred with the Department of Finance regarding potential economic impacts of the proposal. According to the Department of Finance, it "appears that there would not be fiscal or economic impacts from the proposed regulations. The statute (AB 52) that directs OPR to add items on Tribal Cultural resources seems to have enough details to be self-implementing, and the proposed regulations merely remind people going through the CEQA process to comply with those existing requirements. As there would be no additional work needed as a result of the checklist addition, there would be no cost or benefit associated with the proposal." (Email communication, Department of Finance Chief Economist to OPR Staff, November 20, 2015.)

Background and Existing Requirements

The Public Resources Code contains requirements regarding analysis of cultural resources. The California courts have previously determined that CEQA requires analysis and mitigation of impacts to historical and archeological resources, some of which may also be related to California Native American tribes, independent of the AB 52 amendments to the Public Resources Code. (See e.g. Pub. Resources Code, § 21004 ("a public agency may use discretionary powers ... for the purpose of mitigating or avoiding a significant effect on the environment"), *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 207 (approval of project conditioned on redesign to protect prehistoric Native American artifacts) (*Clover Valley*); *People v. Van Horn* (1990) 218 Cal.App.3d 1378, 1384 (conducting archaeological survey for Environmental Impact Report revealed ancient grave containing skeletons and artifacts dating from pre-colonial times).) The new law created a definition of tribal cultural resources and changed CEQA such that a project with an effect that may cause a substantial adverse change in the significance of tribal cultural resources is a project that may have a significant effect on the environment. (Pub. Resources Code § 21084.2.) AB 52 further added Public Resources Code section 21083.09 requiring OPR to develop and the Resources Agency to adopt additional questions in the CEQA Guidelines, Appendix G, to address tribal cultural resources. The detailed procedural requirements in the law are self-implementing.

Business Impact

The Resources Agency is aware that certain requirements that AB 52 added to the Public Resources Code, and that are related to but are not created by this proposed action, may potentially have an economic impact on business. Among other things, project proponents could incur costs in assisting lead agencies to comply with the requirement for analysis of tribal cultural resources and consultation if properly requested. On the other hand, by clarifying the scope and timing of tribal consultation in the CEQA process, the provisions added by AB 52 may reduce current uncertainty and delays experienced by project proponents and lead agencies. (See, Assembly Floor Analysis of AB 52, August 27, 2014.) The proposed amendments to the Guidelines do not add to those requirements

Cost savings to businesses

Additionally, this proposed action may reduce the costs of environmental review to lead agencies and project applicants by directing them to sources of information regarding potential tribal cultural resources, including consultation with Tribal Governments traditionally and culturally affiliated with the proposed project area. Moreover, the proposed changes may reduce compliance costs by clarifying which tribal cultural resources must be studied in a CEQA analysis and by standardizing the initial study checklist form. Early identification and appropriate mitigation of tribal cultural resources can save time and money during the project development process by avoiding inadvertent discoveries of gravesites or other tribal cultural resources, which could affect construction timelines.

The proposed action would add a new statement related to tribal consultation in the Evaluation of Environmental Impact section of Appendix G. Doing so creates three potential procedural and practical benefits. It may help lead agencies avoid a procedural error in CEQA by inadvertently neglecting consultation. The addition might also potentially protect tribal cultural resources, which have value to a California Native American tribe and which may help prevent costly litigation over project impacts.

Finally, the additions may allow projects to move forward with more certainty and less potential delay from unanticipated discovery of tribal cultural resources during construction.

The language of the proposed questions in Appendix G that detail the two ways that a lead agency can find that a resource is a tribal cultural resource, are intended to provide a clear record of the basis for the determination that a project may or may not have a potentially significant impact on a tribal cultural resource. This additional clarity will be beneficial because lead agencies, tribal governments, and project applicants will all know that tribal cultural resources are a new, distinct resource in CEQA with the same protections as any other type of resource and the two specific ways to find that a tribal cultural resource is potentially impacted by a project.

For these reasons, the Resources Agency has determined that the amendments included in this proposed action may reduce the costs of environmental review to lead agencies and project applicants.

Alternatives

The Resources Agency considered reasonable alternatives to the amendments. OPR developed three alternative sets of questions that could respond to the directive in AB 52, and sought public input on those alternatives. Based on that input, OPR developed a proposal for changes which it submitted to the Resources Agency on January 29, 2016. Having considered the alternatives originally developed by OPR, the public input it received, and OPR's final recommendation, the Resources Agency has determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed amendments. This conclusion is based on the Resources Agency's determination that the amendments are necessary to implement the Legislature's directive in AB 52. Thus, the amendments add no additional substantive requirements; rather, the Guidelines merely assist lead agencies in complying with CEQA's requirements, as updated in AB 52. The Resources Agency rejected the no action alternative because it would not respond to the Legislature's directive in AB 52. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts are due to statutory additions to CEQA and not these proposed amendments.

1. Analysis under Gov. Code section 11346.3(b)(1)(A): the creation or elimination of jobs within the state.

For the reasons stated in the introduction, there will be no creation or elimination of jobs within the state as a result of this regulation. The underlying statute is self-implementing. Any creation of new jobs or the elimination of jobs within the state will be the result of the statute and not these regulations.

2. Analysis under Gov. Code section 11346.3(b)(1)(B): the creation of new businesses or the elimination of existing businesses within the state.

For the reasons stated in the introduction, there are no businesses that will be created by this proposed regulation. The proposed changes are to an optional, sample checklist. The underlying statute is self-implementing. Any creation of new businesses or the elimination of existing businesses within the state will be the result of the statute and not these regulations.

3. Analysis under Gov. Code section 11346.3(b)(1)(C): the expansion of businesses currently doing business within the state.

For the reasons stated in the introduction, any expansion of existing businesses currently doing business within the state, such as cultural resource management firms, will be a result of the statute and not these regulations.

4. Analysis under Gov. Code section 11346.3(b)(1)(D): the benefits of the regulation to the health and welfare of California residents, worker safety, and the state's environment.

For the reasons stated in the introduction, the benefits from the additional checklist statement and questions stem from the form of the checklist, but the requirements to analyze whether there are potentially significant impacts to tribal cultural resources and for lead agencies to consult with Tribal Governments, if requested, come directly from the statute.

Therefore, the estimated benefits of the regulation to the health and welfare of California residents, worker safety, and the state's environment, if any, are not quantifiable, and are the result of the statute, not the proposed regulation. The proposed regulation merely clarifies the statute in the sample environmental checklist form.

III. Explanation and Necessity of the Proposed Amendments to Appendix G

The following sets forth the specific purposes, necessity and related information regarding each proposed change to Appendix G.

A. Proposed Addition to "Evaluation of Environmental Impacts"

1. Specific Purposes of the Amendment

The amendment to the beginning of Appendix G under Evaluation of Environmental Impacts would add a statement regarding the significance of tribal consultation, a citation to the procedural requirements for request of tribal consultation, and mention of available state resources to help inform a lead agency's awareness of potential tribal cultural resources in the project area.

The proposed text states:

10. Tribal consultation, if requested as provided in Public Resources Code Section 21080.3.1, must begin prior to release of a negative declaration, mitigated negative declaration, or environmental impact report for a project. Information provided through tribal consultation may inform the lead agency's assessment as to whether tribal cultural resources are present, and the significance of any potential impacts to such resources. Prior to beginning consultation, lead agencies may request information from the Native American Heritage Commission regarding its Sacred Lands File, per Public Resources Code sections 5097.9 and 5097.94, as well as the California Historical Resources Information System administered by the California Office of Historic Preservation.

The proposed addition to the section entitled "Evaluation of Environmental Impacts" in Appendix G implements AB 52 direction to update Appendix G to "[a]dd consideration of tribal cultural resources…." Specifically, the intent of this addition is to help lead agencies comply with the procedural requirements of AB 52 to consider information from tribal consultation in the impact analysis of the sample environmental checklist.

The first sentence in the proposed addition accomplishes two goals. First, it provides a reference to section 21080.3.1, which includes the detailed requirements on tribal consultation. Particularly because some planners tend to rely on the Appendix G checklist, rather than look to the Public Resources Code, this cross-reference will assist lead agencies in identifying new procedural requirements. Second, that sentence restates the requirement from section 21080.3.1 that consultation commence before the lead agency releases a mitigated negative declaration, negative declaration, or draft environmental impact report for public review. (Pub. Resources Code § 21080.3.1 (b).)The second sentence in the proposed addition states that tribal consultation may assist a lead agency in determining whether tribal cultural resources are present, and the significance of any potential impacts to such resources. The intent of this sentence is to indicate to lead agencies that not only is consultation a procedural requirement, but it may also provide information that will be helpful in filling out the environmental checklist.

The third sentence in the proposed addition refers to additional sources of information regarding tribal cultural resources. It also indicates that lead agencies may seek out that information prior to commencing consultation. This clarification is important because many tribes request that lead agencies provide any information they have from the Native American Heritage Commission regarding its Sacred Lands File, and the California Historical Resources Information System administered by the California Office of Historic Preservation. Obtaining that information early in the process may help minimize the time needed in actual consultation.

2. Necessity

The Legislature directed OPR and the Resources Agency to develop changes to Appendix G related to tribal cultural resources. (Pub. Resources Code, § 21083.09 ("Add consideration of tribal cultural resources with relevant sample questions").) Tribal consultation pursuant to Public Resources Code 21080.3.1, the Native American Heritage Commission's Sacred Lands File, and the California Historical Resources Information System administered by the California Office of Historic Preservation may all provide information that will assist the lead agency's consideration of tribal cultural resources.

According to the Legislature's intent for the new law, "Because the California Environmental Quality Act calls for a sufficient degree of analysis, tribal knowledge about the land and tribal cultural resources at issue should be included in environmental assessments for project that may have a significant impact on those resources." (AB 52 § 1(b)(7).) Government to government consultation, if requested, is an opportunity for lead agencies to receive that tribal knowledge in order to conduct an initial study of potentially significant impacts to this new type of resource under CEQA.

There are existing state laws and cases that protect information about sensitive sites. AB 52 built on that body of law. Under existing state law, environmental documents must not include information about the location of an archeological site or sacred lands or any other information that is exempt from public disclosure pursuant to the Public Records Act. (Cal. Code Regs. §15120(d).) Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects are also exempt from disclosure. (Pub. Resources Code §§ 5097.9, 5097.993).)

The changes in AB 52 provide additional specific requirements to protect the confidentiality of tribal cultural resources and information exchanged through consultation. (Pub. Resources Code section 21082.3(c).) Tools for maintaining the confidentiality of information exchanged during consultation include the use of a confidential appendix. (See: *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 220). This reflects California's policy in favor of protection of Native American artifacts. Confidential cultural resource inventories or reports generated for environmental documents should be maintained by the lead agency under separate cover and shall not be made available to the public. (*Clover Valley* at 221, citing Governor's Office of Planning and Research, Cal. Tribal Consultation Guidelines, (Nov. 14, 2005, sup. P. 27).)

3. Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the amendments and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is

proposed or would be as effective as, and less burdensome to affected private persons than, the proposed amendments. This conclusion is based on the Resources Agency's determination that the proposed amendments are necessary to implement the Legislature's directive in AB 52 in a manner consistent with existing statutes and case law, and that the proposed amendments add no new substantive requirements. Appendix G is a sample checklist that lead agencies are free to customize. (State CEQA Guidelines § 15063(f).) The Resources Agency rejected the no action alternative because it would not achieve the objectives of the amendments. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

4. Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The proposed amendments do not add any substantive requirements, and so will not result in an adverse impact on businesses in California. The Public Resources Code contains requirements regarding tribal consultation, as well as analysis and mitigation of impacts to tribal cultural resources. The intent of the proposed amendments to Appendix G is to reduce the costs of environmental review to lead agencies and project applicants by directing them to sources of information regarding potential tribal cultural resources, including consultation with Tribal Governments traditionally and culturally affiliated with the proposed project area.

B. Proposed Revision to Section V, Subdivision (d) (cemeteries)

The purpose of this revision is to conform section d) of the Cultural Resources category in the initial study checklist to language in section 7050.5 of the Health and Safety Code.

The proposed text change is as follows:

V. CULTURAL RESOURCES

Would the project:

[...]

d) Disturb any human remains, including those interred outside of ~~formal~~ **dedicated** cemeteries?

1. Specific Purposes of the Amendment

The purpose of this amendment is to conform the questions in Section V. Cultural Resources, to the language regarding cemeteries in other parts of the Health and Safety Code. The proposed change to section V, subdivision (d) deletes the word "formal" and inserts the word "dedicated" with reference to human remains found outside of cemeteries. Many Native American burials occurred outside of dedicated cemeteries. This change makes the wording consistent with the relevant provisions of law

2. Necessity

Section 21083.09 of the Public Resources Code directed OPR to develop, and the Resources Agency to adopt, changes to the environmental study sample checklist. The amendment is also necessary to ensure that the language of the checklist is consistent with relevant statutory definitions.

3. Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the amendments and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed amendments. This conclusion is based on the Resources Agency's determination that the proposed amendments are necessary to implement the Legislature's directive in AB 52 in a manner consistent with existing statutes and case law, and that the proposed amendments add no new substantive requirements. Appendix G is a sample checklist that lead agencies are free to customize. (State CEQA Guidelines § 15063(f).) The Resources Agency rejected the no action alternative because it would not achieve the objectives of the amendments. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

4. Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The proposed amendments do not add any substantive requirements, and so will not result in an adverse impact on businesses in California. The Public Resources Code contains requirements regarding tribal consultation, as well as analysis and mitigation of impacts to tribal cultural resources. The intent of the proposed amendments to Appendix G is to reduce the costs of environmental review to lead agencies and project applicants by directing them to sources of information regarding potential tribal cultural resources.

C. Proposed Addition to Section V, Subdivision (e) (tribal cultural resources)

1. Specific Purposes of the Amendment

The proposed addition of a new subdivision (e) to Section V (cultural resources) adds tribal cultural resources as a subcategory of cultural resources to the Appendix G initial study sample checklist. This proposed change implements the directive in AB 52 to "[a]dd consideration of tribal cultural resources with relevant sample questions." (Pub. Resources Code § 21083.09(b).) Proposed Subdivision (e) tracks the definition of tribal cultural resources in Public Resources Code section 21074, which indicates two circumstances in which something would be considered a tribal cultural resource. This detailed breakdown of the definition will create a better record of the basis of the agency's analysis with regard to tribal cultural resources.

This change also complies with the requirement in AB 52 to update Appendix G to separate paleontology from Tribal cultural resources because it creates separate questions about tribal cultural resources and paleontological resources on separate lines of the checklist. (Pub. Resources Code §21083.09(a).)

Proposed new subdivision (e) strikes a balance between the competing interests expressed in public input on OPR's discussion draft. For example, Tribal Governments commented on the importance of recognizing tribal expertise in the assessment of tribal cultural resources. Subdivision (e)(1) states that a resource must have cultural value to a California Native American Tribe. Subdivision (e)(2) states that in applying the historical register criteria, lead agencies must consider the significance of the resource to the tribe.

Business groups, on the other hand, raised concern about the complexity of any new additions. Because in practice many planners look only to the CEQA Guidelines, simply citing provisions in the Public Resources Code may not provide adequate guidance to lead agencies[1]. this proposal provides guidance to help lead agencies determine whether there is a potentially significant impact to a tribal cultural resource, and provides a citation to the statutory definition for additional detail. Yet, this proposal is far less detailed than some comments proposed.

2. Necessity

The Legislature directed OPR and the Resources Agency to develop changes to Appendix G related to tribal cultural resources. (Pub. Resources Code, § 21083.09 ("Add consideration of tribal cultural resources with relevant sample questions").) The proposed subdivision (e) (tribal cultural resources), therefore, implements the Legislature's directive to add sample questions regarding the consideration of tribal cultural resources.

3. Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the amendments and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed amendments. This conclusion is based on the Resources Agency's determination that the proposed amendments are necessary to implement the Legislature's directive in AB 52 in a manner consistent with existing statutes and case law, and that the proposed amendments add no new substantive requirements. Appendix G is a sample checklist that lead agencies are free to customize. (State CEQA Guidelines § 15063(f).) The Resources Agency rejected the no action alternative because it would not achieve the objectives of the amendments. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

[1] Business groups included a letter from the California Chamber of Commerce, signed by a coalition of organizations including twenty-nine businesses and associations of industry and local governments.

4. Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The proposed amendments do not add any substantive requirements, and so will not result in an adverse impact on businesses in California. The Public Resources Code contains requirements regarding tribal consultation, as well as analysis and mitigation of impacts to tribal cultural resources, where feasible. The intent of the proposed amendments to Appendix G is to reduce the costs of environmental review to lead agencies and project applicants by directing them to sources of information regarding potential tribal cultural resources.

IV. Bibliography

A. Template Letter: California Native American Tribe to Lead Agency requesting to be on AB 52 notice list

(Courtesy of the California Native American Heritage Commission).

[Tribal Government Letterhead]

<Date>

<Lead Agency Address>

RE: California Environmental Quality Act Public Resources Code section 21080.3, subd. (b) Request for Formal Notification of Proposed Projects Within the _____ Tribe's Geographic Area of Traditional and Cultural Affiliation

Dear < >:

As of the date of this letter, in accordance with Public Resources Code Section 21080.3.1, subd. (b), <Tribe Name>, which is traditionally and culturally affiliated with a geographic area within your agency's geographic area of jurisdiction, requests formal notice of and information on proposed projects for which your agency will serve as a lead agency under the California Environmental Quality Act (CEQA), Public Resources Code section 21000 et seq.

Pursuant to Public Resources Code section 21080.3.1, subd. (b), and until further notice, we hereby designate the following person as the tribe's lead contact person for purposes of receiving notices of proposed projects from your agency:

Name

Title

Address

Phone Number

Cell Phone Number

Fax Number

Email Address

We request that all notices be sent via certified U.S. Mail with return receipt. Following receipt and review

of the information your agency provides, within the 30-day period proscribed by Public Resources Code section 21080.3.1, subd. (d), the <Tribe Name> may request consultation, as defined by Public Resources Code section 21080.3.1, subd. (b), pursuant to Public Resources Code section 21080.3.2 to mitigate any project impacts a specific project may cause to tribal cultural resources.

If you have any questions or need additional information, please contact our lead contact person listed above.

Sincerely,

<Name>

<Title>

CC: Native American Heritage Commission

Available at: Available at: http://nahc.ca.gov/wp-content/uploads/2015/06/Request-for-Formal-Notification-of-Proposed-CEQA-Projects-.pdf

B. Template Letter: Lead Agency to California Native American Tribe providing notice and offering consultation

(Courtesy of OPR)

Sample Letter- Lead Agency Notification to California Native American Tribes re: project application and consultation under AB 52.

Instructions: Please remove all highlights after filling in the blanks. Please erase these instructions from your letter.

< Date >

[Lead Agency Letterhead]

FROM: <NAME OF LEAD AGENCY TRIBAL CONTACT/ PROJECT LEAD>

RE: Tribal Cultural Resources under the California Environmental Quality Act, AB 52 (Gatto, 2014). Formal Notification of determination that a Project Application is Complete or Decision to Undertake a Project, and Notification of Consultation Opportunity, pursuant to Public Resources Code § 21080.3.1 (hereafter PRC).

Dear < MAIL MERGE: TRIBAL CONTACT TITLE, TRIBAL CONTACT LAST NAME>:

The <Lead Agency > has determined that a project application is complete for the <Name of Project> OR The <Lead Agency > has decided to undertake the following project: <Name of Project>.

Below please find a description of the proposed project, a map showing the project location, and the name of our project point of contact, pursuant to PRC § 21080.3.1 (d).

< Description of the Proposed Project>

<Project Location>

<Lead Agency Point of Contact>

Pursuant to PRC § 21080.3.1 (b), you have 30 days from the receipt of this letter to request consultation, in writing, with the <Lead Agency>.

Very Respectfully,

<Name>

<Title>

Available at: https://www.opr.ca.gov/s_ab52.php

C. Template Letter: California Native American Tribe to Lead Agency requesting consultation

(Courtesy of the California Native American Heritage Commission).

Sample letter from a California Indian tribe, as defined in Chapter 905 of the Statutes of 2004, to a lead agency requesting consultation pursuant to Assembly Bill 52 (Gatto, 2014), Public Resources Code Section 21080.3.1, subds. (b), (d) and (e).

[Tribal Government Letterhead]

<Date>

<Lead Agency Address>

RE: Formal Request for Tribal Consultation Pursuant to the California Environmental Quality Act (CEQA), Public Resources Code section 21080.3.1, subds. (b), (d) and (e) for <Project Name>, <City and/or County>.

Dear < >:

This letter constitutes a formal request for tribal consultation under the provisions of the California Environmental Quality Act (CEQA) (Public Resources Code section 21080.3.1 subdivisions (b), (d) and (e)) for the mitigation of potential project impacts to tribal cultural resource for the above referenced project. <Tribe name> requested formal notice and information for all projects within your agency's geographical jurisdiction on <date of letter> and received notification on < date of lead agency response> regarding the above referenced project. Attached please find copies of those letters.

<Tribe name> requests consultation on the following topics checked below, which shall be included in consultation if requested (Public Resources Code section 21080.3.2, subd. (a)):

_____ Alternatives to the project

_____ Recommended mitigation measures

_____ Significant effects of the project

<Tribe name> also requests consultation on the following discretionary topics checked

below (Public Resources Code section 21080.3.2(, subd. (a):

_____ Type of environmental review necessary

_____ Significance of tribal cultural resources, including any regulations, policies or standards used by your agency to determine significance of tribal cultural resources

_____ Significance of the project's impacts on tribal cultural resources

_____ Project alternatives and/or appropriate measures for preservation or mitigation that we may recommend, including, but not limited to:

(1) Avoidance and preservation of the resources in place, pursuant to Public Resources Code section 21084.3, including, but not limited to, planning and construction to avoid the resources and protect the cultural and natural context, or planning greenspace, parks or other open space, to incorporate the resources with culturally appropriate protection and management criteria;

(2) Treating the resources with culturally appropriate dignity taking into account the tribal cultural values and meaning of the resources, including but not limited to the following:

a. Protecting the cultural character and integrity of the resource;

b. Protection the traditional use of the resource; and

c. Protecting the confidentiality of the resource.

(3) Permanent conservation easements or other interests in real property, with culturally appropriate management criteria for the purposes of preserving or utilizing the resources or places.

(4) Protecting the resource.

Additionally, <Tribe name> would like to receive any cultural resources assessments or other assessments that have been completed on all or part of the project's potential "area of project effect" (APE), including, but not limited to:

1. The results of any record search that may have been conducted at an

Information Center of the California Historical Resources Information System (CHRIS), including, but not limited to:

- ☐ A listing of any and all known cultural resources have already been recorded on or adjacent to the APE;
- ☐ Copies of any and all cultural resource records and study reports that may have been provided by the Information Center as part of the records search response;
- ☐ If the probability is low, moderate, or high that cultural resources are located in the APE.
- ☐ Whether the records search indicates a low, moderate or high probability that unrecorded cultural resources are located in the potential APE; and
- ☐ If a survey is recommended by the Information Center to determine whether previously unrecorded cultural resources are present.

2. The results of any archaeological inventory survey that was conducted, including:

- ☐ Any report that may contain site forms, site significance, and suggested mitigation measures.

  All information regarding site locations, Native American human remains, and associated funerary objects should be in a separate confidential addendum, and not be made available for pubic disclosure in accordance with Government Code Section 6254.10.

3. The results of any Sacred Lands File (SFL) check conducted through Native American Heritage Commission. The request form can be found at http://www.nahc.ca.gov/slf_request.html. USGS 7.5-minute quadrangle name, township, range, and section required for the search.
4. Any ethnographic studies conducted for any area including all or part of the potential APE; and
5. Any geotechnical reports regarding all or part of the potential APE.

We would like to remind your agency that CEQA Guidelines section 15126.4, subdivision (b)(3) states that preservation in place is the preferred manner of mitigating impacts to archaeological sites. Section 15126.4, subd. (b)(3) of the CEQA Guidelines has been interpreted by the California Court of Appeal to mean that "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 impacts." *Madera Oversight Coalition v. County of Madera* (2011) 199 Cal.App.4th 48, disapproved on other grounds, *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439.

<Tribe name> expects to begin consultation within 30 days of your receipt of this letter. Please contact <Tribe name> 's lead contact person identified in the attached request for notification.

<Name

<Title>

<Address>

<Telephone number>

<Email address>

Sincerely,

<Name>

<Title>

cc: Native American Heritage Commission

Available at: http://nahc.ca.gov/wp-content/uploads/2015/06/Request-for-Formal-Tribal-Consultation.pdf

D. Tribal Consultation Guidelines – Supplement to General Plan Guidelines

https://www.opr.ca.gov/docs/011414_Updated_Guidelines_922.pdf

E. Senate Bill 18 (Chapter 905, Statutes of 2004).

Legislative Counsel's Digest

SB 18, Burton. Traditional tribal cultural places.

(1) Existing law establishes the Native American Heritage Commission and authorizes the commission to bring an action to prevent severe and irreparable damage to, or assure appropriate access for Native Americans to, a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property.

Existing law authorizes only specified entities or organizations, including certain tax-exempt nonprofit organizations, and local government entities to acquire and hold conservation easements, if those entities and organizations meet certain conditions.

This bill would include a federally recognized California Native American tribe or a nonfederally recognized California Native American tribe that is on the contact list maintained by the Native American Heritage Commission, among those entities and organizations that may acquire and hold conservation easements, as specified.

(2) Existing law requires the Office of Planning and Research to implement various long range planning and research policies and goals that are intended to shape statewide development patterns and significantly influence the quality of the state's environment and, in connection with those responsibilities, to adopt guidelines for the preparation and content of the mandatory elements required in city and county general plans.

This bill would require that, by March 1, 2005, the guidelines contain advice, developed in consultation with the Native American Heritage Commission, for consulting with California Native American tribes for the preservation of, or the mitigation of impacts to, specified Native American places, features, and objects. The bill would also require those guidelines to address procedures for identifying the appropriate California Native American tribes, for continuing to protect the confidentiality of information concerning the specific identity, location, character, and use of those places, features, and objects, and for facilitating voluntary landowner participation to preserve and protect the specific identity, location, character, and use of those places, features, and objects. The bill would define a California Native American tribe that is on the contact list maintained by the Native American Heritage Commission as a "person" for purposes of provisions relating to public notice of hearings relating to local planning issues.

(3) Existing law requires a planning agency during the preparation or amendment of the general plan, to provide opportunities for the involvement of citizens, public agencies, public utility companies, and civic, education, and other community groups, through public hearings and any other means the city or county deems appropriate.

This bill would require the planning agency on and after March 1, 2005, to refer the proposed action to California Native American tribes, as specified, and also provide opportunities for involvement of California Native American tribes. The bill would require that, prior to the adoption or amendment of a

city or county's general plan, the city or county conduct consultations with California Native American tribes for the purpose of preserving specified places, features, and objects that are located within the city or county's jurisdiction. The bill would define the term "consultation" for purposes of those provisions. By imposing new duties on local governments with respect to consultations regarding the protection and preservation of California Native American historical, cultural, and sacred sites, the bill would impose a state-mandated local program.

On and after March 1, 2005, this bill would include open space for the protection of California Native American historical, cultural, and sacred sites within the definition of "local open-space plan" for purposes of provisions governing the preparation of the open-space element of a city and county general plan.

(4) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

The people of the State of California do enact as follows:

SECTION 1. (a) The Legislature finds and declares all of the following:

(1) Current state law provides a limited measure of protection for California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places.

(2) Existing law provides limited protection for Native American sanctified cemeteries, places of worship, religious, ceremonial sites, sacred shrines, historic or prehistoric ruins, burial grounds, archaeological or historic sites, inscriptions made by Native Americans at those sites, archaeological or historic Native American rock art, and archaeological or historic features of Native American historic, cultural, and sacred sites.

(3) Native American places of prehistoric, archaeological, cultural, spiritual, and ceremonial importance reflect the tribes' continuing cultural ties to the land and to their traditional heritages.

(4) Many of these historical, cultural, and religious sites are not located within the current boundaries of California Native American reservations and rancherias, and therefore are not covered by the protectionist policies of tribal governments.

(b) In recognition of California Native American tribal sovereignty and the unique relationship between California local governments and California tribal governments, it is the intent of the Legislature, in enacting this act, to accomplish all of the following:

(1) Recognize that California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places are essential elements in tribal cultural traditions, heritages, and identities.

(2) Establish meaningful consultations between California Native American tribal governments and California local governments at the earliest possible point in the local government land use planning process so that these places can be identified and considered.

(3) Establish government-to-government consultations regarding potential means to preserve those places, determine the level of necessary confidentiality of their specific location, and develop proper treatment and management plans.

(4) Ensure that local and tribal governments have information available early in the land use planning process to avoid potential conflicts over the preservation of California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places.

(5) Enable California Native American tribes to manage and act as caretakers of California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places.

(6) Encourage local governments to consider preservation of California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places in their land use planning processes by placing them in open space.

(7) Encourage local governments to consider the cultural aspects of California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places early in land use planning processes.

SECTION 2. Section 815.3 of the Civil Code is amended to read:

815.3. Only the following entities or organizations may acquire and hold conservation easements:

(a) A tax-exempt nonprofit organization qualified under Section 501(c)(3) of the Internal Revenue Code and qualified to do business in this state which has as its primary purpose the preservation, protection, or enhancement of land in its natural, scenic, historical, agricultural, forested, or open-space condition or use.

(b) The state or any city, county, city and county, district, or other state or local governmental entity, if otherwise authorized to acquire and hold title to real property and if the conservation easement is voluntarily conveyed. No local governmental entity may condition the issuance of an entitlement for use on the applicant's granting of a conservation easement pursuant to this chapter.

(c) A federally recognized California Native American tribe or a nonfederally recognized California Native American tribe that is on the contact list maintained by the Native American Heritage Commission to

protect a California Native American prehistoric, archaeological, cultural, spiritual, or ceremonial place, if the conservation easement is voluntarily conveyed.

SECTION. 3. Section 65040.2 of the Government Code is amended to read:

65040.2. (a) In connection with its responsibilities under subdivision (l) of Section 65040, the office shall develop and adopt guidelines for the preparation and content of the mandatory elements required in city and county general plans by Article 5 (commencing with Section 65300) of Chapter 3. For purposes of this section, the guidelines prepared pursuant to Section 50459 of the Health and Safety Code shall be the guidelines for the housing element required by Section 65302. In the event those additional elements are hereafter required in city and county general plans by Article 5 (commencing with Section 65300) of Chapter 3, the office shall adopt guidelines for those elements within six months of the effective date of the legislation requiring those additional elements.

(b) The office may request from each state department and agency, as it deems appropriate, and the department or agency shall provide, technical assistance in readopting, amending, or repealing the guidelines.

(c) The guidelines shall be advisory to each city and county in order to provide assistance in preparing and maintaining their respective general plans.

(d) The guidelines shall contain the guidelines for addressing environmental justice matters developed pursuant to Section 65040.12.

(e) The guidelines shall contain advice including recommendations for best practices to allow for collaborative land use planning of adjacent civilian and military lands and facilities. The guidelines shall encourage enhanced land use compatibility between civilian lands and any adjacent or nearby military facilities through the examination of potential impacts upon one another.

(f) The guidelines shall contain advice for addressing the effects of civilian development on military readiness activities carried out on all of the following:

(1) Military installations.

(2) Military operating areas.

(3) Military training areas.

(4) Military training routes.

(5) Military airspace.

(6) Other territory adjacent to those installations and areas.

(g) By March 1, 2005, the guidelines shall contain advice, developed in consultation with the Native American Heritage Commission, for consulting with California Native American tribes for all of the following:

(1) The preservation of, or the mitigation of impacts to, places, features, and objects described in Sections 5097.9 and 5097.995 of the Public Resources Code.

(2) Procedures for identifying through the Native American Heritage Commission the appropriate California Native American tribes.

(3) Procedures for continuing to protect the confidentiality of information concerning the specific identity, location, character, and use of those places, features, and objects.

(4) Procedures to facilitate voluntary landowner participation to preserve and protect the specific identity, location, character, and use of those places, features, and objects.

(h) The office shall provide for regular review and revision of the guidelines established pursuant to this section.

SECTION. 4. Section 65092 of the Government Code is amended to read:

65092. (a) When a provision of this title requires notice of a public hearing to be given pursuant to Section 65090 or 65091, the notice shall also be mailed or delivered at least 10 days prior to the hearing to any person who has filed a written request for notice with either the clerk of the governing body or with any other person designated by the governing body to receive these requests. The local agency may charge a fee which is reasonably related to the costs of providing this service and the local agency may require each request to be annually renewed.

(b) As used in this chapter, "person" includes a California Native American tribe that is on the contact list maintained by the Native American Heritage Commission.

SECTION. 5. Section 65351 of the Government Code is amended to read:

65351. During the preparation or amendment of the general plan, the planning agency shall provide opportunities for the involvement of citizens California Native American Indian tribes, public agencies, public utility companies, and civic, education, and other community groups, through public hearings and any other means the city or county deems appropriate.

SECTION. 6. Section 65352 of the Government Code is amended to read:

65352. (a) Prior to action by a legislative body to adopt or substantially amend a general plan, the planning agency shall refer the proposed action to all of the following entities:

(1) A city or county, within or abutting the area covered by the proposal, and a special district that may be significantly affected by the proposed action, as determined by the planning agency.

(2) An elementary, high school, or unified school district within the area covered by the proposed action.

(3) The local agency formation commission.

(4) An area-wide planning agency whose operations may be significantly affected by the proposed action, as determined by the planning agency.

(5) A federal agency if its operations or lands within its jurisdiction may be significantly affected by the proposed action, as determined by the planning agency.

(6) A public water system, as defined in Section 116275 of the Health and Safety Code, with 3,000 or more service connections, that serves water to customers within the area covered by the proposal. The public water system shall have at least 45 days to comment on the proposed plan, in accordance with subdivision (b), and to provide the planning agency with the information set forth in Section 65352.5.

(7) The Bay Area Air Quality Management District for a proposed action within the boundaries of the district.

(8) On and after March 1, 2005, a California Native American tribe, that is on the contact list maintained by the Native American Heritage Commission, with traditional lands located within the city or county's jurisdiction.

(b) Each entity receiving a proposed general plan or amendment of a general plan pursuant to this section shall have 45 days from the date the referring agency mails it or delivers it in which to comment unless a longer period is specified by the planning agency.

(c) (1) This section is directory, not mandatory, and the failure to refer a proposed action to the other entities specified in this section does not affect the validity of the action, if adopted.

(2) To the extent that the requirements of this section conflict with the requirements of Chapter 4.4 (commencing with Section 65919), the requirements of Chapter 4.4 shall prevail.

SECTION 7. Section 65352.3 is added to the Government Code, to read:

65352.3. (a) (1) Prior to the adoption or any amendment of a city or county's general plan, proposed on or after March 1, 2005, the city or county shall conduct consultations with California Native American tribes that are on the contact list maintained by the Native American Heritage Commission for the purpose of preserving or mitigating impacts to places, features, and objects described in Sections 5097.9 and 5097.995 of the Public Resources Code that are located within the city or county's jurisdiction.

(2) From the date on which a California Native American tribe is contacted by a city or county pursuant to this subdivision, the tribe has 90 days in which to request a consultation, unless a shorter timeframe has been agreed to by that tribe.

(b) Consistent with the guidelines developed and adopted by the Office of Planning and Research pursuant to Section 65040.2, the city or county shall protect the confidentiality of information concerning the specific identity, location, character, and use of those places, features, and objects.

SECTION. 8. Section 65352.4 is added to the Government Code, to read:

65352.4. For purposes of Section 65351, 65352.3, and 65562.5,"consultation" means the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party's sovereignty. Consultation shall also recognize the tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural significance.

SECTION 9. Section 65560 of the Government Code is amended to read:

65560. (a) "Local open-space plan" is the open-space element of a county or city general plan adopted by the board or council, either as the local open-space plan or as the interim local open-space plan adopted pursuant to Section 65563.

(b) "Open-space land" is any parcel or area of land or water that is essentially unimproved and devoted to an open-space use as defined in this section, and that is designated on a local, regional or state open-space plan as any of the following:

(1) Open space for the preservation of natural resources including, but not limited to, areas required for the preservation of plant and animal life, including habitat for fish and wildlife species; areas required for ecologic and other scientific study purposes; rivers, streams, bays and estuaries; areas adjacent to military installations, military training routes, and restricted airspace that can provide additional buffer zones to military activities and complement the resource values of the military lands; and coastal beaches, lakeshores, banks of rivers and streams, and watershed lands.

(2) Open space used for the managed production of resources, including but not limited to, forest lands, rangeland, agricultural lands and areas of economic importance for the production of food or fiber; areas required for recharge of ground water basins; bays, estuaries, marshes, rivers and streams which are important for the management of commercial fisheries; and areas containing major mineral deposits, including those in short supply.

(3) Open space for outdoor recreation, including, but not limited to, areas of outstanding scenic, historic and cultural value; areas particularly suited for park and recreation purposes, including access to lakeshores, beaches, and rivers and streams; and areas which serve as links between major recreation and open-space reservations, including utility easements, banks of rivers and streams, trails, and scenic highway corridors.

(4) Open space for public health and safety, including, but not limited to, areas which require special management or regulation because of hazardous or special conditions such as earthquake fault zones, unstable soil areas, flood plains, watersheds, areas presenting high fire risks, areas required for the protection of water quality and water reservoirs and areas required for the protection and enhancement of air quality.

(5) Open space for the protection of places, features, and objects described in Sections 5097.9 and 5097.995 of the Public Resources Code.

SECTION. 10. Section 65562.5 is added to the Government Code, to read:

65562.5. On and after March 1, 2005, if land designated, or proposed to be designated as open space, contains a place, feature, or object described in Sections 5097.9 and 5097.995 of the Public Resources Code, the city or county in which the place, feature, or object is located shall conduct consultations with the California Native American tribe, if any, that has given notice pursuant to Section 65092 for the purpose of determining the level of confidentiality required to protect the specific identity, location, character, or use of the place, feature, or object and for the purpose of developing treatment with appropriate dignity of the place, feature, or object in any corresponding management plan.

SECTION 11. No reimbursement is required by this act pursuant to

Section 6 of Article XIII B of the California Constitution for certain costs that may be incurred by a local agency or school district because in that regard this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

However, notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains other costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

V. Attachment A – Assembly Bill 52 (Gatto, 2014)

Legislative Counsel's Digest

AB 52, Gatto. Native Americans: California Environmental Quality Act.

Existing law, the Native American Historic Resource Protection Act, establishes a misdemeanor for unlawfully and maliciously excavating upon, removing, destroying, injuring, or defacing a Native American historic, cultural, or sacred site, that is listed or may be eligible for listing in the California Register of Historic Resources.

The California Environmental Quality Act, referred to as CEQA, requires a lead agency, as defined, to prepare, or cause to be prepared, and certify the completion of, an environmental impact report on a project that it proposes to carry out or approve that may have a significant effect on the environment or to adopt a negative declaration if it finds that the project will not have that effect. CEQA also requires a lead agency to prepare a mitigated negative declaration for a project that may have a significant effect on the environment if revisions in the project would avoid or mitigate that effect and there is no substantial evidence that the project, as revised, would have a significant effect on the environment. CEQA requires the lead agency to provide a responsible agency with specified notice and opportunities to comment on a proposed project. CEQA requires the Office of Planning and Research to prepare and develop, and the Secretary of the Natural Resources Agency to certify and adopt, guidelines for the implementation of CEQA that include, among other things, criteria for public agencies to following in determining whether or not a proposed project may have a significant effect on the environment.

This bill would specify that a project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource, as defined, is a project that may have a significant effect on the environment. The bill would require a lead agency to begin consultation with a California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed project, if the tribe requested to the lead agency, in writing, to be informed by the lead agency of proposed projects in that geographic area and the tribe requests consultation, prior to determining whether a negative declaration, mitigated negative declaration, or environmental impact report is required for a project. The bill would specify examples of mitigation measures that may be considered to avoid or minimize impacts on tribal cultural resources. The bill would make the above provisions applicable to projects that have a notice of preparation or a notice of negative declaration filed or mitigated negative declaration on or after July 1, 2015. The bill would require the Office of Planning and Research to revise on or before July 1, 2016, the guidelines to separate the consideration of tribal cultural resources from that for paleontological resources and add consideration of tribal cultural resources. By requiring the lead agency to consider these effects relative to tribal cultural resources and to conduct consultation with California Native American tribes, this bill would impose a state-mandated local program.

Existing law establishes the Native American Heritage Commission and vests the commission with specified powers and duties.

This bill would additionally require the commission to provide each California Native American tribe, as defined, on or before July 1, 2016, with a list of all public agencies that may be a lead agency within the geographic area in which the tribe is traditionally and culturally affiliated, the contact information of those

agencies, and information on how the tribe may request those public agencies to notify the tribe of projects within the jurisdiction of those public agencies for the purposes of requesting consultation.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

The People Of The State Of California Do Enact As Follows:

Section 1.

(a) The Legislature finds and declares all of the following:

(1) Current state law provides a limited measure of protection for sites, features, places, objects, and landscapes with cultural value to California Native American tribes.

(2) Existing law provides limited protection for Native American sacred places, including, but not limited to, places of worship, religious or ceremonial sites, and sacred shrines.

(3) The California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) does not readily or directly include California Native American tribes' knowledge and concerns. This has resulted in significant environmental impacts to tribal cultural resources and sacred places, including cumulative impacts, to the detriment of California Native American tribes and California's environment.

(4) As California Native Americans have used, and continue to use, natural settings in the conduct of religious observances, ceremonies, and cultural practices and beliefs, these resources reflect the tribes' continuing cultural ties to the land and their traditional heritages.

(5) Many of these archaeological, historical, cultural, and sacred sites are not located within the current boundaries of California Native American reservations and rancherias, and therefore are not covered by the protectionist policies of tribal governments.

(b) In recognition of California Native American tribal sovereignty and the unique relationship of California local governments and public agencies with California Native American tribal governments, and respecting the interests and roles of project proponents, it is the intent of the Legislature, in enacting this act, to accomplish all of the following:

(1) Recognize that California Native American prehistoric, historic, archaeological, cultural, and sacred places are essential elements in tribal cultural traditions, heritages, and identities.

(2) Establish a new category of resources in the California Environmental Quality Act called "tribal cultural resources" that considers the tribal cultural values in addition to the scientific and archaeological values when determining impacts and mitigation.

(3) Establish examples of mitigation measures for tribal cultural resources that uphold the existing mitigation preference for historical and archaeological resources of preservation in place, if feasible.

(4) Recognize that California Native American tribes may have expertise with regard to their tribal history and practices, which concern the tribal cultural resources with which they are traditionally and culturally affiliated. Because the California Environmental Quality Act calls for a sufficient degree of analysis, tribal knowledge about the land and tribal cultural resources at issue should be included in environmental assessments for projects that may have a significant impact on those resources.

(5) In recognition of their governmental status, establish a meaningful consultation process between California Native American tribal governments and lead agencies, respecting the interests and roles of all California Native American tribes and project proponents, and the level of required confidentiality concerning tribal cultural resources, at the earliest possible point in the California Environmental Quality Act environmental review process, so that tribal cultural resources can be identified, and culturally appropriate mitigation and mitigation monitoring programs can be considered by the decision making body of the lead agency.

(6) Recognize the unique history of California Native American tribes and uphold existing rights of all California Native American tribes to participate in, and contribute their knowledge to, the environmental review process pursuant to the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code).

(7) Ensure that local and tribal governments, public agencies, and project proponents have information available, early in the California Environmental Quality Act environmental review process, for purposes of identifying and addressing potential adverse impacts to tribal cultural resources and to reduce the potential for delay and conflicts in the environmental review process.

(8) Enable California Native American tribes to manage and accept conveyances of, and act as caretakers of, tribal cultural resources.

(9) Establish that a substantial adverse change to a tribal cultural resource has a significant effect on the environment.

Section 2

Section 5097.94 of the Public Resources Code is amended to read:

5097.94.

The commission shall have the following powers and duties:

(a) To identify and catalog places of special religious or social significance to Native Americans, and known graves and cemeteries of Native Americans on private lands. The identification and cataloguing of known graves and cemeteries shall be completed on or before January 1, 1984. The commission shall notify landowners on whose property such graves and cemeteries are determined to exist, and shall identify the Native American group most likely descended from those Native Americans who may be interred on the property.

(b) To make recommendations relative to Native American sacred places that are located on private lands, are inaccessible to Native Americans, and have cultural significance to Native Americans for acquisition by the state or other public agencies for the purpose of facilitating or assuring access thereto by Native Americans.

(c) To make recommendations to the Legislature relative to procedures which will voluntarily encourage private property owners to preserve and protect sacred places in a natural state and to allow appropriate access to Native American religionists for ceremonial or spiritual activities.

(d) To appoint necessary clerical staff.

(e) To accept grants or donations, real or in kind, to carry out the purposes of this chapter.

(f) To make recommendations to the Director of Parks and Recreation and the California Arts Council relative to the California State Indian Museum and other Indian matters touched upon by department programs.

(g) To bring an action to prevent severe and irreparable damage to, or assure appropriate access for Native Americans to, a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, pursuant to Section 5097.97. If the court finds that severe and irreparable damage will occur or that appropriate access will be denied, and appropriate mitigation measures are not available, it shall issue an injunction, unless it finds, on clear and convincing evidence, that the public interest and necessity require otherwise. The Attorney General shall represent the commission and the state in litigation concerning affairs of the commission, unless the Attorney General has determined to represent the agency against whom the commission' s action is directed, in which case the commission shall be authorized to employ other counsel. In any action to enforce the provisions of this subdivision the commission shall introduce evidence showing that such cemetery, place, site, or shrine has been historically regarded as a sacred or sanctified place by Native American people and represents a place of unique historical and cultural significance to an Indian tribe or community.

(h) To request and utilize the advice and service of all federal, state, local, and regional agencies.

(i) To assist Native Americans in obtaining appropriate access to sacred places that are located on public lands for ceremonial or spiritual activities.

(j) To assist state agencies in any negotiations with agencies of the federal government for the protection of Native American sacred places that are located on federal lands.

(k) To mediate, upon application of either of the parties, disputes arising between landowners and known descendants relating to the treatment and disposition of Native American human burials, skeletal remains, and items associated with Native American burials.

The agreements shall provide protection to Native American human burials and skeletal remains from vandalism and inadvertent destruction and provide for sensitive treatment and disposition of Native American burials, skeletal remains, and associated grave goods consistent with the planned use of, or the approved project on, the land.

(l) To assist interested landowners in developing agreements with appropriate Native American groups for treating or disposing, with appropriate dignity, of the human remains and any items associated with Native American burials.

(m) To provide each California Native American tribe, as defined in Section 21073, on or before July 1, 2016, with a list of all public agencies that may be a lead agency pursuant to Division 13 (commencing with Section 21000) within the geographic area with which the tribe is traditionally and culturally affiliated, the contact information of those public agencies, and information on how the tribe may request the public agency to notify the tribe of projects within the jurisdiction of those public agencies for the purposes of requesting consultation pursuant to Section 21080.3.1.

Section 3

Section 21073 is added to the Public Resources Code, to read:

21073.

"California Native American tribe" means a Native American tribe located in California that is on the contact list maintained by the Native American Heritage Commission for the purposes of Chapter 905 of the Statutes of 2004.

Section 4

Section 21074 is added to the Public Resources Code, to read:

21074.

(a) "Tribal cultural resources" are either of the following:

(1) Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either of the following:

(A) Included or determined to be eligible for inclusion in the California Register of Historical Resources.

(B) Included in a local register of historical resources as defined in subdivision (k) of Section 5020.1.

(2) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1. In applying the criteria set forth in subdivision (c) of Section 5024.1 for the purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.

(b) A cultural landscape that meets the criteria of subdivision (a) is a tribal cultural resource to the extent that the landscape is geographically defined in terms of the size and scope of the landscape.

(c) A historical resource described in Section 21084.1, a unique archaeological resource as defined in subdivision (g) of Section 21083.2, or a "nonunique archaeological resource" as defined in subdivision (h) of Section 21083.2 may also be a tribal cultural resource if it conforms with the criteria of subdivision (a).

Section 5

Section 21080.3.1 is added to the Public Resources Code, to read:

21080.3.1.

(a) The Legislature finds and declares that California Native American tribes traditionally and culturally affiliated with a geographic area may have expertise concerning their tribal cultural resources.

(b) Prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report for a project, the lead agency shall begin consultation with a California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed project if: (1) the California Native American tribe requested to the lead agency, in writing, to be informed by the lead agency through formal notification of proposed projects in the geographic area that is traditionally and culturally affiliated with the tribe, and (2) the California Native American tribe responds, in writing, within 30 days of receipt of the formal notification, and requests the consultation. When responding to the lead agency, the California Native American tribe shall designate a lead contact person. If the California Native American tribe does not designate a lead contact person, or designates multiple lead contact people, the lead agency shall defer to the individual listed on the contact list maintained by the Native American Heritage Commission for the purposes of Chapter 905 of the Statutes of 2004. For purposes of this section and Section 21080.3.2, "consultation" shall have the same meaning as provided in Section 65352.4 of the Government Code.

(c) To expedite the requirements of this section, the Native American Heritage Commission shall assist the lead agency in identifying the California Native American tribes that are traditionally and culturally affiliated with the project area.

(d) Within 14 days of determining that an application for a project is complete or a decision by a public agency to undertake a project, the lead agency shall provide formal notification to the designated contact of, or a tribal representative of, traditionally and culturally affiliated California Native American tribes that have requested notice, which shall be accomplished by means of at least one written notification that includes a brief description of the proposed project and its location, the lead agency contact information, and a notification that the California Native American tribe has 30 days to request consultation pursuant to this section.

(e) The lead agency shall begin the consultation process within 30 days of receiving a California Native American tribe's request for consultation.

Section 6

Section 21080.3.2 is added to the Public Resources Code, to read:

21080.3.2.

(a) As a part of the consultation pursuant to Section 21080.3.1, the parties may propose mitigation measures, including, but not limited to, those recommended in Section 21084.3, capable of avoiding or substantially lessening potential significant impacts to a tribal cultural resource or alternatives that would avoid significant impacts to a tribal cultural resource. If the California Native American tribe requests consultation regarding alternatives to the project, recommended mitigation measures, or significant effects, the consultation shall include those topics. The consultation may include discussion concerning the type of environmental review necessary, the significance of tribal cultural resources, the significance of the project's impacts on the tribal cultural resources, and, if necessary, project alternatives or the appropriate measures for preservation or mitigation that the California Native American tribe may recommended to the lead agency.

(b) The consultation shall be considered concluded when either of the following occurs:

(1) The parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists, on a tribal cultural resource.

(2) A party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached.

(c) (1) This section does not limit the ability of a California Native American tribe or the public to submit information to the lead agency regarding the significance of the tribal cultural resources, the significance of the project' s impact on tribal cultural resources, or any appropriate measures to mitigate the impact.

(2) This section does not limit the ability of the lead agency or project proponent to incorporate changes and additions to the project as a result of the consultation, even if not legally required.

(d) If the project proponent or its consultants participate in the consultation, those parties shall respect the principles set forth in this section.

Section 7

Section 21082.3 is added to the Public Resources Code, to read:

21082.3.

(a) Any mitigation measures agreed upon in the consultation conducted pursuant to Section 21080.3.2 shall be recommended for inclusion in the environmental document and in an adopted mitigation monitoring and reporting program, if determined to avoid or lessen the impact pursuant to paragraph (2) of subdivision (b), and shall be fully enforceable.

(b) If a project may have a significant impact on a tribal cultural resource, the lead agency' s environmental document shall discuss both of the following:

(1) Whether the proposed project has a significant impact on an identified tribal cultural resource.

(2) Whether feasible alternatives or mitigation measures, including those measures that may be agreed to pursuant to subdivision (a), avoid or substantially lessen the impact on the identified tribal cultural resource.

(c) (1) Any information, including, but not limited to, the location, description, and use of the tribal cultural resources, that is submitted by a California Native American tribe during the environmental review process shall not be included in the environmental document or otherwise disclosed by the lead agency or any other public agency to the public, consistent with subdivision (r) of Section 6254 of, and Section 6254.10 of, the Government Code, and subdivision (d) of Section 15120 of Title 14 of the California Code of Regulations, without the prior consent of the tribe that provided the information. If the lead agency publishes any information submitted by a California Native American tribe during the consultation or environmental review process, that information shall be published in a confidential appendix to the environmental document unless the tribe that provided the information consents, in writing, to the disclosure of some or all of the information to the public. This subdivision does not prohibit the confidential exchange of the submitted information between public agencies that have lawful jurisdiction over the preparation of the environmental document.

(2) (A) This subdivision does not prohibit the confidential exchange of information regarding tribal cultural resources submitted by a California Native American tribe during the consultation or environmental review process among the lead agency, the California Native American tribe, the project applicant, or the project applicant' s agent. Except as provided in subparagraph (B) or unless the California Native American tribe providing the information consents, in writing, to public disclosure, the project applicant or the project applicant' s legal advisers, using a reasonable degree of care, shall maintain the confidentiality of the information exchanged for the purposes of preventing looting, vandalism, or damage to a tribal cultural resources and shall not disclose to a third party confidential information regarding tribal cultural resources.

(B) This paragraph does not apply to data or information that are or become publicly available, are already in the lawful possession of the project applicant before the provision of the information by the California Native American tribe, are independently developed by the project applicant or the project applicant' s agents, or are lawfully obtained by the project applicant from a third party that is not the lead agency, a California Native American tribe, or another public agency.

(3) 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.

(4) This subdivision does not prevent a lead agency or other public agency from describing the information in general terms in the environmental document so as to inform the public of the basis of the lead agency ' s or other public agency' s decision without breaching the confidentiality required by this subdivision.

(d) In addition to other provisions of this division, the lead agency may certify an environmental impact report or adopt a mitigated negative declaration for a project with a significant impact on an identified tribal cultural resource only if one of the following occurs:

(1) The consultation process between the California Native American tribe and the lead agency has occurred as provided in Sections 21080.3.1 and 21080.3.2 and concluded pursuant to subdivision (b) of Section 21080.3.2.

(2) The California Native American tribe has requested consultation pursuant to Section 21080.3.1 and has failed to provide comments to the lead agency, or otherwise failed to engage, in the consultation process.

(3) The lead agency has complied with subdivision (d) of Section 21080.3.1 and the California Native American tribe has failed to request consultation within 30 days.

(e) If the mitigation measures recommended by the staff of the lead agency as a result of the consultation process are not included in the environmental document or if there are no agreed upon mitigation measures at the conclusion of the consultation or if consultation does not occur, and if substantial evidence demonstrates that a project will cause a significant effect to a tribal cultural resource, the lead agency shall consider feasible mitigation pursuant to subdivision (b) of Section 21084.3.

(f) Consistent with subdivision (c), the lead agency shall publish confidential information obtained from a California Native American tribe during the consultation process in a confidential appendix to the environmental document and shall include a general description of the information, as provided in paragraph (4) of subdivision (c) in the environmental document for public review during the public comment period provided pursuant to this division.

(g) This section is not intended, and may not be construed, to limit consultation between the state and tribal governments, existing confidentiality provisions, or the protection of religious exercise to the fullest extent permitted under state and federal law.

Section 8

Section 21083.09 is added to the Public Resources Code, to read:

21083.09.

On or before July 1, 2016, the Office of Planning and Research shall prepare and develop, and the Secretary of the Natural Resources Agency shall certify and adopt, revisions to the guidelines that update Appendix G of Chapter 3 (commencing with Section 15000) of Division 6 of Title 4 of the California Code of Regulations to do both of the following:

(a) Separate the consideration of paleontological resources from tribal cultural resources and update the relevant sample questions.

(b) Add consideration of tribal cultural resources with relevant sample questions.

Section9

Section 21084.2 is added to the Public Resources Code, to read:

21084.2.

A project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment.

Section 10

Section 21084.3 is added to the Public Resources Code, to read:

21084.3.

(a) Public agencies shall, when feasible, avoid damaging effects to any tribal cultural resource.

(b) If the lead agency determines that a project may cause a substantial adverse change to a tribal cultural resource, and measures are not otherwise identified in the consultation process provided in Section 21080.3.2, the following are examples of mitigation measures that, if feasible, may be considered to avoid or minimize the significant adverse impacts:

(1) Avoidance and preservation of the resources in place, including, but not limited to, planning and construction to avoid the resources and protect the cultural and natural context, or planning greenspace, parks, or other open space, to incorporate the resources with culturally appropriate protection and management criteria.

(2) Treating the resource with culturally appropriate dignity taking into account the tribal cultural values and meaning of the resource, including, but not limited to, the following:

(A) Protecting the cultural character and integrity of the resource.

(B) Protecting the traditional use of the resource.

(C) Protecting the confidentiality of the resource.

(3) Permanent conservation easements or other interests in real property, with culturally appropriate management criteria for the purposes of preserving or utilizing the resources or places.

(4) Protecting the resource.

Section 11

(a) This act does not alter or expand the applicability of the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) concerning projects occurring on Native American tribal reservations or rancherias.

(b) This act does not prohibit any California Native American tribe or individual from participating in the California Environmental Quality Act on any issue of concern as an interested California Native American tribe, person, citizen, or member of the public.

(c) This act shall apply only to a project that has a notice of preparation or a notice of negative declaration or mitigated negative declaration filed on or after July 1, 2015.

Section 12

No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because a local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act, within the meaning of Section 17556 of the Government Code.

VI. OPR Discussion Draft Technical Advisory: AB 52 and Tribal Cultural Resources in CEQA

https://www.opr.ca.gov/docs/DRAFT_AB_52_Technical_Advisory.pdf

VII. Attachment C – OPR Discussion Draft of Changes to Appendix G of the CEQA Guidelines

Introduction

The Governor's Office of Planning and Research is pleased to invite public input on this update to the Guidelines Implementing the California Environmental Quality Act (CEQA Guidelines) to address tribal cultural resources. This update implements the Legislature's directive in Public Resources Code section 21083.09 (enacted as part of Assembly Bill 52 (Chapter 532, Statutes 2014)) to add tribal cultural resources to the sample initial study form found in Appendix G of the Guidelines.

This document provides background on AB 52, Appendix G, and an explanation of the three alternatives put forth as draft questions about Tribal Cultural Resources for inclusion in the initial study form, as well as information about effective public comment.

Background on AB 52 (Gatto, 2014)

On July 1, 2015 AB 52 (Gatto, 2014) went into effect. According to its author:

> [E]xisting laws lack a formal process for tribes to be involved in the CEQA process as tribal governments. CEQA projects that impact tribal resources have experienced uncertainty and delays as lead agencies attempt to work with tribes to address impacts on tribal resources. With this bill, it is the author's intent to "Set forth a process and scope that clarifies California tribal government involvement in the CEQA process, including specific requirements and timing for lead agencies to consult with tribes on avoiding or mitigating impacts to tribal cultural resources."

(Assembly Floor Analysis, August 27, 2014.)

AB 52 established a new category of resources in the California Environmental Quality Act called Tribal Cultural Resources. (Public Resources Code § 21074.)

"Tribal cultural resources" are either of the following:

(1) Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either of the following:

> *(A) Included or determined to be eligible for inclusion in the California Register of Historical Resources.*
>
> *(B) Included in a local register of historical resources as defined in subdivision (k) of Section 5020.1.*

(2) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1. In applying the criteria set forth in subdivision (c) of Section 5024.1 for the purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.

AB 52 also created a process for consultation with California Native American Tribes in the CEQA process. Tribal Governments can request consultation with a lead agency and give input into potential impacts to tribal cultural resources before the agency decides what kind of environmental assessment is appropriate for a proposed project. The Public Resources Code now requires avoiding damage to tribal cultural resources, if feasible. If not, lead agencies must mitigate impacts to Tribal Cultural Resources to the extent feasible.

AB 52 also directed the Governor's Office of Planning and Research (OPR) to prepare, and the California Natural Resources Agency to adopt, questions regarding Tribal Cultural Resources in the CEQA Guidelines Environmental Checklist Form, found in Appendix G. (Public Resources Code § 21083.09.) The statute also directs OPR to separate the consideration of paleontological resources from Tribal Cultural Resources.

Additional information on the new provisions added by AB 52 is provided in a draft Technical Advisory that OPR released in May 2015.

Background on Appendix G

The CEQA Guidelines are administrative regulations that implement the California Environmental Quality Act. As regulations, the CEQA Guidelines implement, interpret and make specific the terms in the Public Resources Code. The CEQA Guidelines cannot add new requirements, nor can they remove any requirements found in the statute.

Appendix G in the CEQA Guidelines contains a sample initial study form. The purpose of an initial study is to assist lead agencies in determining whether a project may cause a significant impact on the environment. (State CEQA Guidelines, § 15063.) To help guide that determination, Appendix G asks a series of questions regarding a range of environmental resources and potential impacts. Appendix G's questions are not an exhaustive list of all potential impacts. (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal. App. 4th 1099, 1109-1112 (seasonal reduction of surface flow in local streams may be an impact on the environment, even though that particular impact is not specifically listed in Appendix G).) Appendix G further advises that its environmental checklist is only a *sample* form that can be tailored to address local conditions and project characteristics.

Because CEQA now provides that a project that may cause a substantial adverse change in a Tribal Cultural Resource is a project that may have a significant effect on the environment, changes must be made to the sample environmental checklist form to include questions about tribal cultural resources. The provisions of the statute for avoidance and mitigation of potential effects on tribal cultural resources will not be affected by the CEQA Guidelines Appendix G update process.

Explanation of the Alternatives

Since Governor Brown signed AB 52, OPR has engaged in intensive outreach to California Native American Tribes, local governments, CEQA practitioners and others. Through participation in workshops and conferences, OPR has solicited informal input into the possible content of this CEQA Guidelines update. That input suggested a range of approaches for new questions to Appendix G. Some suggested

only minimal changes, while others suggested that, because some lead agencies may not be familiar with the full breadth of tribal cultural resources, the new Appendix G questions should be very detailed.

To encourage a robust public process and thorough consideration of different interests, this document presents three alternative sets of draft Appendix G questions regarding tribal cultural resources. Each of these three options include tribal cultural resources and separate out paleontological resources, as required by statute, but they do so in increasingly detailed ways.

Alternative one is minimal; it merely cites the definition of Tribal Cultural Resources in the Public Resources Code, and asks the preparer of the checklist to indicate what level of potential impact a proposed project might have to that resource. Alternative one adds tribal cultural resources to the existing Cultural Resources section, which also includes historical, paleontological, and archaeological resources as separate and individual questions.

Alternative two paraphrases the definition of Tribal Cultural Resources, rather than simply providing a citation to the Public Resources Code. Doing so makes clear that a variety of objects and places may be tribal cultural resources. It also changes the description of cemeteries from formal to dedicated, in accordance with Public Resources Code, Ch. 1.75, § 5097.98, and Health and Safety Code § 7050.5(b). The checklist continues to ask a separate question regarding paleontology. These changes would also occur within the broader umbrella of the Cultural Resources section of Appendix G.

Alternative three contains the most detail. It includes introductory language for context, similar to the agricultural resources and air quality sections of Appendix G. The introductory text refers to procedural requirements related to consultation. It also provides the definition of Tribal Cultural Resources, separated to indicate sources of authority for such resource. Alternative three creates a new section of Appendix G, titled Tribal Cultural Resources.

These three alternatives present a range of possible options, though there are certainly others. If there are other options that OPR should consider, please feel free to submit your suggestions. Further, in reviewing the options presented, please let us know if terms are confusing, whether these questions will result in any unintended consequences, and whether there are additional resources that would be helpful in implementation.

How Can I Provide Input?

We hope that you will share your thoughts and expertise in this effort to update Appendix G.

Input may be submitted electronically to ceqa.guidelines@resources.ca.gov. While electronic submission is preferred, suggestions may also be mailed or hand delivered to:

Holly Roberson, Land Use Counsel
Governor's Office of Planning and Research
1400 Tenth Street
Sacramento, CA 95814

Please submit all suggestions before **December 18, 2014** at **5:00 p.m**. Once the comment period closes, OPR will review all written input and revise the proposal as appropriate. Once OPR finalizes the draft, it

will submit the draft to the Natural Resources Agency, which will then commence a formal rulemaking process. Once the Natural Resources Agency adopts the changes, they undergo review by the Office of Administrative Law.

Please note, the update to Appendix G to add consideration of tribal cultural resources is separate from two other pending updates to the CEQA Guidelines (a comprehensive update and an update regarding transportation analysis). We ask that you focus comments on these potential questions in Appendix G. Future activity on the other CEQA Guidelines updates will be announced through the CEQA Guidelines listserv and on OPR's website.

Tips for Providing Effective Input

OPR would like to encourage robust engagement in this update process. We expect that participants will bring a variety of perspectives. While opposing views may be strongly held, discourse can and should proceed in a civil and professional manner. To maximize the value of your input, please consider the following:

- In your comment(s), please clearly identify the specific issues on which you are commenting. If you are commenting on a particular word, phrase, or sentence, please provide the page number and paragraph citation.
- Explain why you agree or disagree with OPR's proposed changes. Where you disagree with a particular portion of the proposal, please suggest alternative language.
- Describe any assumptions and support assertions with legal authority and factual information, including any technical information and/or data. Where possible, provide specific examples to illustrate your concerns.
- When possible, consider trade-offs and potentially opposing views.
- Focus comments on the issues that are covered within the scope of the proposed changes. Avoid addressing rules or policies other than those contained in this proposal.
- Consider quality over quantity. One well-supported comment may be more influential than one hundred form letters.
- Please submit any comments within the timeframe provided.

Alternative 1 V. CULTURAL RESOURCES. Would the project:	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
a) Cause a substantial adverse change in the significance of a historical resource as defined in § 15064.5?	☐	☐	☐	☐
b) Cause a substantial adverse change in the significance of an archaeological resources pursuant to § 15064.5?	☐	☐	☐	☐
c) Directly or indirectly destroy a unique paleontological resource or site or unique geologic feature?	☐	☐	☐	☐
d) Disturb any human remains, including those interred outside of formal cemeteries?	☐	☐	☐	☐
e) Cause a substantial adverse change in the significance of a Tribal Cultural Resource as defined in Public Resources Code § 21074?	☐	☐	☐	☐

Alternative 2 V. CULTURAL RESOURCES. Would the project:	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
a) Cause a substantial adverse change in the significance of a historical resource as defined in § 15064.5?	☐	☐	☐	☐
b) Cause a substantial adverse change in the significance of an archaeological resources pursuant to § 15064.5?	☐	☐	☐	☐
c) Directly or indirectly destroy a unique paleontological resource or site or unique geologic feature?	☐	☐	☐	☐
d) Potentially disturb any human remains, including those interred outside of ~~formal~~ **dedicated** cemeteries **(see Public Resources Code, Ch. 1.75, § 5097.98, and Health and Safety Code § 7050.5(b)).**	☐	☐	☐	☐
e) Cause a substantial adverse change in the significance of a site, feature, place, cultural landscape, sacred place, or object with cultural value to a California Native American Tribe that is	☐	☐	☐	☐

listed or determined eligible for listing on the California register of historical resources, listed on a local historical register, or otherwise determined by the lead agency to be a tribal cultural resource.

Alternative 3

VI. TRIBAL CULTURAL RESOURCES.
Consultation with a California Native American Tribe that has requested such consultation may assist a lead agency in determining whether the project may adversely affect tribal cultural resources, and if so, how such effects may be avoided or mitigated. Whether or not consultation has been requested, would the project cause a substantial adverse change in a site, feature, place, cultural landscape, sacred place, or object, with cultural value to a California Native American Tribe, which is any of the following:

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
a) Included or determined to be eligible for inclusion in the California Register of Historical Resources?	☐	☐	☐	☐
b) Included in a local register of historical resources	☐	☐	☐	☐
c) Determined by the lead agency, in its discretion and supported by substantial evidence, to be a Tribal Cultural Resource, after applying the criteria in Public Resources Code § 5024.1(c), and considering the significance of the resource to a California Native American Tribe?	☐	☐	☐	☐

VIII. Attachment D – Proposed Changes to Appendix G of the CEQA Guidelines

Proposed Language for Tribal cultural resources Update to Appendix G

Having reviewed and considered the comments, we recommend the following changes to Appendix G.

1. Add a statement regarding tribal consultation to the beginning of Appendix G under EVALUATION OF ENVIRONMENTAL IMPACTS, which provides guidance on completing the checklist and environmental analysis:

[...]

10. Tribal consultation, if requested as provided in Public Resources Code Section 21080.3.1, must begin prior to release of a negative declaration, mitigated negative declaration, or environmental impact report for a project. Information provided through tribal consultation may inform the lead agency's assessment as to whether tribal cultural resources are present, and the significance of any potential impacts to such resources. Prior to beginning consultation, lead agencies may request information from the Native American Heritage Commission regarding its Sacred Lands File, per Public Resources Code sections 5097.9 and 5097.94, as well as the California Historical Resources Information System administered by the California Office of Historic Preservation.

2. Changes to the language of Section V to include Tribal cultural resources, with proposed additions in **Bold and Underline.**

V. CULTURAL RESOURCES

Would the project:

a) Cause a substantial adverse change in the significance of a historical resource as defined in § 15064.5?
b) Cause a substantial adverse change in the significance of an archaeological resource pursuant to § 15064.5~~?~~
c) Directly or indirectly destroy a unique paleontological resource or site or unique geologic feature?

d) Disturb any human remains, including those interred outside of ~~formal~~ **dedicated** cemeteries?

e) Cause a substantial adverse change in the significance of a tribal cultural resource, defined in Public Resources Code section 21074 as either:

1) a site, feature, place, cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American Tribe, that is listed or eligible for listing on the California Register of Historical Resources, or included in a local register of historical resources as defined in Public Resources Code section 5020.1(k), or

2) a resource determined by a lead agency, in its discretion and supported by substantial evidence, to be significant according to the historical register criteria in Public Resources Code section 5024.1 (c), and considering the significance of the resource to a California Native American tribe.

STATE OF CALIFORNIA

GOVERNOR'S OFFICE *of* PLANNING AND RESEARCH

EDMUND G. BROWN JR.
GOVERNOR

KEN ALEX
DIRECTOR

January 29, 2016
Secretary John Laird
California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

Re: Transmittal of the Governor's Office of Planning and Research's proposed Amendments to the CEQA Guidelines, Appendix G to include consideration of impacts to Tribal Cultural Resources

Dear Secretary Laird:

This package contains the Governor's Office of Planning and Research's (OPR) proposed changes to the sample environmental checklist form in Appendix G of the CEQA Guidelines to include consideration of impacts to tribal cultural resources.

OPR developed the proposed Amendments pursuant to Public Resources Code section 21083.09, enacted in Assembly Bill 52 (Gatto, 2014), which states in part:

> On or before July 1, 2016, the Office of Planning and Research shall prepare and develop, and the Secretary of the Natural Resources Agency shall certify and adopt, revisions to the guidelines that update Appendix G of Chapter 3 (commencing with Section 15000) of Division 6 of Title 4 of the California Code of Regulations to do both of the following:
>
> (a) Separate the consideration of paleontological resources from tribal cultural resources and update the relevant sample questions.
> (b) Add consideration of tribal cultural resources with relevant sample questions.

In developing the proposed Amendments, OPR actively sought the input, advice, and assistance of numerous interested parties and stakeholder groups. Since September 2014, OPR has met with representatives of numerous agencies and organizations to discuss the perspectives of the business community, the environmental community, local governments, non-governmental organizations, state agencies, California Native American Tribes, CEQA practitioners, and legal experts. In addition, OPR staff presented at numerous regional and statewide conferences to raise awareness about CEQA and AB 52 among diverse audiences and to seek their input.

In November of 2015, OPR released a Discussion Draft of Proposed Changes to Appendix G of the CEQA Guidelines Incorporating Tribal Cultural Resources for a thirty-day public review period. That draft included three potential alternatives for changes to Appendix G. OPR also continued to conduct extensive public outreach, including a workshop for Tribal leadership and a public workshop, in order to receive input on the proposed amendments. In addition to oral comments at its workshops, OPR also received over thirty written comment letters.

OPR has incorporated suggestions and clarifications from public comment to the extent possible and consistent with CEQA and cognizant of the usability of the checklist as a simple, sample form.

Summary of OPR's Proposed Changes to Appendix G

This package proposes limited but meaningful changes to Appendix G.

First, the proposal would add to the introductory language in the section of Appendix G entitled "Evaluation of Environmental Impacts." The addition would refer lead agencies to the procedural requirement for tribal consultation in Public Resources Code section 21080.3.1. It also refers to other sources of information regarding tribal cultural resources, including the California Historical Resources Information Systems managed by the California Office of Historic Preservation, and the Sacred Lands File, maintained by the California Native American Heritage Commission. These proposed changes should assist lead agencies by alerting them to the new procedural requirements added by AB 52, as well as by pointing them to relevant sources for information.

The second proposed change would add subdivision (e) to Section V (Cultural Resources) to specifically address tribal cultural resources. The proposed question mirrors the statutory definition in Public Resources Code section 21074. The question is further broken into two subparts, in order to assist lead agencies in determining whether there may be a potentially significant impact to tribal cultural resource as defined in statute.

The proposal also includes minor revisions intended to conform the language in Appendix G regarding cemeteries to relevant provisions of the Health and Safety Code.

While AB 52 also directed that paleontology be separated from consideration of tribal cultural resources in Appendix G. The additions described above achieve that purpose. Each question on a separate line of the checklist is an independent analysis. Some comments suggested removing paleontology from the Cultural Resources portion of Appendix G, and moving it to the Geology and Soils section. While that suggestion may merit future consideration, OPR is currently considering a broader set of updates to Appendix G as part of a comprehensive update to the CEQA Guidelines. Rather than risk confusing lead agencies and practitioners with multiple updates to Appendix G, OPR proposes to defer further consideration of future changes related to paleontology to the comprehensive update.

Next Steps

This submittal to the California Natural Resources Agency will be posted on the OPR website.

Please do not hesitate to contact Holly Roberson, Land Use Counsel, at (916) 322-0467 or holly.roberson@opr.ca.govif OPR can provide further assistance.

Sincerely,

Ken Alex

Ken Alex
Director
Governor's Office of Planning and Research

Tab G

Link to Webcast of Public Hearing April 4, 2016

The hearing was recorded via webcast, and all comments and objections can be understood from the recording. Location of the webcast is found at:

http://www.cal-span.org/cgi-bin/archive.php?owner=COPC&date=2016-04-04&player=jwplayer

Tab H

Public Comments

Round 1

Comment 1-1

City of San Diego comments on Proposed Amendments to the CEQA Guidelines, Appendix G

Herrmann, Myra [MHerrmann@sandiego.gov]

Sent: Saturday, April 02, 2016 5:25 PM
To: CEQA Guidelines@CNRA
Cc: Herrmann, Myra [MHerrmann@sandiego.gov]
Importance: High

To whom it may Concern:

The City of San Diego appreciates the opportunity to provide comments to your office on the proposed amendments to the CEQA Guidelines, Appendix G. We have reviewed the proposed amendments and have the following comments:

We concur with the proposal to add a 10th statement to the beginning of Appendix G under the heading "Evaluation of Environmental Impacts". We agree that adding a statement will provide further direction to planners of all levels when preparing the initial study checklist for their projects. However, by the time an environmental analyst is preparing their initial study one would assume they have already initiated the tribal consultation process in accordance with PRC Section 21080.3.1. We believe that the informational language should be providing direction to include the results of the tribal consultation process and could be revised to state that the information provided during the tribal consultation process should be included in the initial study discussion to support the significance determination box that would be checked. 1-1.1

We support the edits to question "d" and agree that the change will provide clarity to agency staff, applicants and consultants when completing the initial study checklist.

We support the addition of a new question in the Initial Study checklist within Section V. Cultural Resources. However, we do not believe that the new question "e" needs to be expanded as proposed. No other CEQA sections referenced in the Cultural Resources section are further described. For the sake of consistency, the City believes that the question can stand alone as follows: "Cause a substantial adverse change in the significance of a tribal cultural resource as further defined in Public Resources Code Section 21074?" The expanded language can already be easily found in the CEQA statutes for further reference, clarification or direction and does not necessarily require repeating herein. 1-1.2

Thank you for the opportunity to provide comments on this item. We look forward to seeing the final version. Please feel free to contact me if you have any questions in response to my comments.

Myra Herrmann
Senior Planner/Archaeologist/Tribal Liaison
City of San Diego
Planning Department
T (619) 446-5372
www.sandiego.gov

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Comment 1-2

Caitlin Gulley [cgulley@tataviam-nsn.us]
Sent: Tuesday, March 15, 2016 8:51 PM
To: CEQA Guidelines@CNRA
Cc: Duncan, Lia@CNRA

Ms. Baugh,

I'd like to request that you forward me (via email) the proposed text ("the express terms") of the regulations and the initial
statement of reasons for the proposed amendments to regulations implementing Title 14, Division 6, Chapter 3 of the California Code of Regulations, the Guidelines for Implementation of the California Environmental Quality Act (CEQA Guidelines). 1-2.1

If the files are to large even to be split, then a drop box would be sufficient. I'll be out of the country starting next week, so I'd appreciate receiving them by Thursday so I may review and comment before I leave. Thank you!

--
***Caitlin Gulley**, Director*
Tribal Historic and Cultural Preservation Department
Cell: (661) 433-0599
Office: (818) 837-0794
cgulley@tataviam-nsn.us

Fernandeño Tataviam Band of Mission Indians
1019 Second Street
San Fernando, California 91340
Phone: (818) 837-0794 Ext. 208
Website: http://www.tataviam-nsn.us

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Comment 1-3

Santa Barbara County Planning Department Director Comments on Draft Appendix G Checklist for AB52

Russell, Glenn [grussell@co.santa-barbara.ca.us]

Sent: Tuesday, March 22, 2016 3:13 PM
To: CEQA Guidelines@CNRA
Cc: Gerber, Joyce [jgerber@co.santa-barbara.ca.us]

I began my analysis of the draft checklist for Cultural Resources V (d) and (e) by printing out every code section listed in the draft checklist and every code section referenced in the listed sections. Of course, every code section relevant to the issue of the definition and determination of Tribal Cultural Resources (Section e) is listed or referenced, so you are not missing any code sections. Here are my comments:

Section d- (Disturb and human remains....)- I have no comments. It seems fine.

Section e- (1) and (2)- (tribal cultural resources)- I see the potential for some confusion between #1 and #2. In fact, we saw juts the type of confusion that I am thinking about at the recent SCA Annual Meeting session on AB 52. #1 focuses on listing or eligibility for listing in the California Register of Historical Resources. #2 focuses on PRC 5024.1 (c), which lists criteria for listing in the California Register of Historical Resources. Some practitioners will see this as redundant and wonder what the real difference is between #1 and #2, given that they are both about the California Register. Perhaps the real difference is that #1 refers to the formal process of listing or determining eligibility for listing and #2 refers to the less formal process of local agency discretion (i.e. judgment in the absence of a formal listing or eligibility determination).

A contributor to potential confusion is the lead in that states ".....a tribal cultural resource defined in Public Resources Code section 21074 as *either*:" This sets up the expectation of a binary definition and I am not so sure that 21074 defines tribal cultural resources as "either" in the way that the draft checklist does. 21074 defines 1-3.1
tribal cultural resources as a series of different things, including unique and non-unique archaeological resources, which I am not sure are adequately referenced in the current draft checklist. Should they be? Perhaps this "unique" vs. "non-unique" distinction is really out of date and should not be explicitly referenced. I know 1-3.2
that I basically ignore the distinction between "unique" and "non-unique" archaeological resources when making significance determinations. But they are explicitly referenced in the 21074 definitions.

I understand that this is very tricky given all the various relevant code sections that are referenced in 21074 that are al slightly different. I will now try my best to make a suggestion, which is based on what I think the real difference is between #1 and #2. I like simplicity, so I think there should not be a #1 and a #2. Try this out:

e) Cause a substantial adverse change in the significance of a tribal cultural resource as defined in Public Resources Code section 21074. A tribal cultural resource must be listed or eligible for listing in the California Register of Historical Resources, included in a local register of historical resources as defined in subdivision (k) of Public Resources Code Section 5020.1 or, based on the discretion of a lead agency and supported by substantial evidence, is (would be?) eligible for listing in the California Register of Historical Resources considering the significance of the resource to a California Native American tribe.

Here is a slightly different version:

e) Cause a substantial adverse change in the significance of a tribal cultural resource as defined in Public Resources Code section 21074. A tribal cultural resource must be listed or eligible for listing in the California 1-3.3
Register of Historical Resources, included in a local register of historical resources as defined in subdivision (k) of Public Resources Code Section 5020.1 or, based on the discretion of a lead agency supported by substantial evidence, and considering the significance of the resource to a California Native American tribe, is a tribal

cultural resource as defined in Public Resources Code section 21074.

I hope this helps. See you all soon!

Glenn

Glenn S. Russell, PhD., RPA
Director,Planning and Development
Past President California County Planning Directors Association CCPDA
http://www.ccpda.org/
County of Santa Barbara
123 Anapamu St.
Santa Barbara, CA 93101-2030
Phone (805) 568-2085
FAX (805) 568-2030

For more information about the Department go to:
http://www.sbcountyplanning.org/

Comment 1-4

Comments on the NOP Rulemaking Amending Guidelines Implementing the CEQA to Include Conserationof Impacts to Tribal Cultural Resources

De Leon,Rebecca A [rdeleon@mwdh2o.com]

Sent: Monday, April 04, 2016 11:41 AM
To: CEQA Guidelines@CNRA
Attachments: Final Letter_CA Natural Re~1.pdf (2 MB)

Attached is the comment letter for CA Natural Resources Agency-Tribal Cultural Resources

Rebecca De Leon
The Metropolitan Water District
Of Southern California
700 N. Alameda Street
Los Angeles, CA 90012
Office: (213) 217-6337
rdeleon@mwdh2o.com

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Comment 1-4

THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA

Submitted electronically

April 1, 2016

Heather Baugh
California Natural Resource Agency
1416 Ninth Street
Sacramento, CA 95814
CEQA.Guidelines@resources.ca.gov

Dear Ms. Baugh:

Comments on the Notice of Proposed
Rulemaking Amending Guidelines Implementing the California
Environmental Quality Act to Include Consideration of Impacts to Tribal Cultural Resources

The Metropolitan Water District of Southern California (Metropolitan) reviewed the proposed amendments in language for the tribal cultural resources update to Appendix G of the CEQA Guidelines. The passage of Assembly Bill 52 established a new category of resources under the California Environmental Quality Act (CEQA) called "tribal cultural resources" that considers tribal cultural values in addition to the scientific and archaeological values when determining impacts and mitigation. As such, the Office of Planning and Research (OPR) has transmitted proposed changes to Appendix G of the CEQA Guidelines to the California Natural Resource Agency for additional public comment on the proposed rulemaking.

Metropolitan is a public agency and regional water wholesaler. It is comprised of 26 member public agencies serving approximately 19 million people in portions of six counties in Southern California, including Los Angeles, Ventura, Orange, Riverside, San Bernardino, and San Diego Counties. Metropolitan's primary sources of imported water come from the California State Water Project (SWP) and from the Colorado River via the Colorado River Aqueduct (CRA). Metropolitan's mission is to provide its 5,200 square mile service area with adequate and reliable supplies of high-quality water to meet present and future needs in an environmentally and economically responsible way.

Metropolitan appreciates the opportunity to remain engaged in the updates to Appendix G of the CEQA Guidelines and offers the following comments in response to the February 19, 2016 solicitation for feedback:

Amendment of Appendix G section on Evaluation of Environmental Impacts

It is unnecessary and inappropriate to add a discussion of tribal consultation to the Evaluation of Environmental Impacts section of Appendix G. The addition of a statement regarding tribal consultation to the beginning of Appendix G under the Evaluation of Environmental Impacts heading provides an undue emphasis on tribal cultural resources when no other CEQA impact category is afforded any guidance or discussion in this section. For example, no guidance is provided in the Evaluation of Environmental Impacts section for information that may inform a lead agency on determining the significance of Biological Resources, Greenhouse Gas Emissions, Hazards and Hazardous Materials, or Transportation/Traffic, even though information or guidance on those topics is available. 1.4-1

The rationale provided in the Initial Statement of Reasons Section III(A) that the inclusion of the detailed requirements on tribal consultation is because some planners tend to rely on the Appendix G checklist, rather than look to the Public Resources Code is conclusory and speculative. The Office of Planning Research and the California Natural Resource Agency should not assume that professional planners are not capable of or do not already review and interpret both the Code and Guidelines, as well as multiple other source authorities.

For the reasons cited above, Metropolitan recommends that the Natural Resource Agency not add a statement regarding tribal consultation to the beginning of Appendix G under the Evaluation of Environmental Impacts section.

Proposed Amendments to Section V(d)

While Metropolitan supports the change in language to describe cemeteries as "dedicated" instead of "formal," this proposal is outside the scope of Assembly Bill 52, and therefore should not be amended as part of the incorporation of tribal cultural resources into Appendix G. It may be appropriate to include in a separate, general update of the guidelines. 1.4-2

Addition of Section V(e)

As proposed, Section V(e) inserts text from Section 21074 of the Public Resources Codes into the Appendix G checklist in a manner that is inconsistent with how other cultural resource categories are treated. For example, the definitions of archaeological and historical resources are not provided, only citations to the respective code sections. Additionally, the listing of examples of potential types of tribal cultural resources as described in Section V(e)(1) is not comprehensive. Providing examples gives weight to those listed at the expense of those that are undefined. Metropolitan recommends citing the relevant sections of code in keeping with the 1.4-3

format and style of the existing questions in the Cultural Resources section instead of providing examples.

Recommended Amendments to Section V

Metropolitan recommends the following amendments to Section V of Appendix G:

V. CULTURAL RESOURCES

Would the project:

a) Cause a substantial adverse change in the significance of a historical resource as defined in § 15064.5?
b) Cause a substantial adverse change in the significance of an archaeological resource pursuant to § 15064.5?
c) Directly or indirectly destroy a unique paleontological resource or site or unique geologic feature?
d) Disturb any human remains, including those interred outside of formal cemeteries?
e) Cause a substantial adverse change in the significance of a tribal cultural resource defined in Public Resources Code section 21074 ~~as either~~?

~~1) a site, feature, place, cultural landscape that is geographically defined in terms of the Size and scope of the landscape, sacred place, or object with cultural value to a California Native American Tribe, that is listed or eligible for listing on the California Register of Historical Resources, or on a local register of historical resources as defined in Public Resources Code section 5020.1(k), or~~

~~2) a resource determined by a lead agency, in its discretion and supported by substantial evidence, to be significant according to the historical register criteria in Public Resource Code section 5024.1(c), and considering the significance of the resource to the California Native American tribe.~~

For the foregoing reasons, Metropolitan recommends that no amendments to the Evaluation of Environmental Impacts section occur, the amendment from dedicated to formal cemeteries not take place as part of the incorporation of tribal cultural resources into Appendix G, and the incorporation of tribal cultural resources be consistent with the current format of Appendix G.

Metropolitan appreciates this opportunity to provide input to your process and welcomes further opportunity to continue to engage in this process. If you have any questions on the comments contained in this letter, please contact Ms. Michelle Morrison at (213) 217-7906.

Very truly yours,

Deirdre West
Manager, Environmental Planning Team

MM/mm
(J:\Environmental-Planning & Compliance\COMPLETED JOBS\February2016 \20160223EXT)

Comment 1-5

FEDERATED INDIANS OF
GRATON
RANCHERIA

Submitted electronically to ceqa.guidelines@resources.ca.gov

April 4, 2016

Heather Baugh
The California Natural Resources Agency
1416 Ninth St, Suite 1311
Sacramento, CA 95814

Dear Ms. Baugh,

This letter is submitted on behalf of Chairman, Greg Sarris of the Federated Indians of Graton Rancheria, a federally recognized tribal government in Rohnert Park, California. We provide this letter in response to the Notice of Proposed Rulemaking Amending Guidelines Implementing the California Environmental Quality Act, specifically modifications to Appendix G of the CEQA checklist.

The Tribe appreciates the opportunity to comment on the proposed changes to Appendix G, and submits the following for consideration:

- The proposed Appendix G includes significant changes from the proposed alternatives submitted to Tribes in the Office of Planning and Research consultation process. Such significant changes should have included further input/comment and dialogue with Tribal Cultural Leaders and Tribal Government Representatives. 1.5-1
- The Appendix G section needs to be cited as Tribal Cultural Resources with an accompanying review process specific to whether TCR's were property identified, evaluated and avoided or mitigated. Not to be coupled with meeting other aspects of the various laws, such as those of the Native American Heritage Commission (NAHC) or the California Historical Resources Information System (CHRIS). 1.5-2

The Tribe respectfully requests continuing consultation on these important change to the CEQA Appendix G with tribal governments by convening additional meetings throughout the State.

Respectfully,

Buffy McQuillen, Tribal Heritage Preservation Officer
Federated Indians of Graton Rancheria

6400 Redwood Drive, Suite 300 • Rohnert Park, CA • 94928 • Office: 707.566.2288 • Fax: 707.566.2291
www.gratonrancheria.com

Comment 1-6

FW: Blue Lake Tribe comments to Resources Agency re: AB 52 draft Appendix G

Holly Roberson [Holly.Roberson@OPR.CA.GOV]
Sent: Monday, April 04, 2016 4:12 PM
To: Baugh, Heather@CNRA; CEQA Guidelines@CNRA
Cc: Christopher Calfee [Christopher.Calfee@opr.ca.gov]
Attachments: AB 52 App G comments Blue ~1.pdf (611 KB)

Just making sure this gets in the file.

From: Janet Eidsness [mailto:JEidsness@bluelakerancheria-nsn.gov]
Sent: Tuesday, March 29, 2016 12:38 PM
To: heather.baugh@RESOURCES.CA.GOV; Holly Roberson
Cc: Adrian Praetzellis (adrian.praetzellis@sonoma.edu); shpo@parks.ca.gov; nahc@nahc.ca.gov; nwic@sonoma.edu; Allison, Eric@Parks (Eric.Allison@parks.ca.gov); Anmarie Medin (Anmarie.Medin@parks.ca.gov); katy.sanchez@nahc.ca.gov; Janet Eidsness (jpeidsness@yahoo.com)
Subject: Blue Lake Tribe comments to Resources Agency re: AB 52 draft Appendix G

All,

Please see attached comment letter sent in the spirit of government-to-government consultation. I will not be attending the tribal consultation meeting hosted by the Resources Agency in Sacramento on April 4th, which is the deadline for these comments.

Best regards,

Janet P. Eidsness, M.A.
Tribal Heritage Preservation Officer (THPO)
Blue Lake Rancheria
P.O. Box 428 (428 Chartin Road)
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Comment 1-6

March 29, 2016

Heather Baugh, Assistant General Counsel
California Natural Resources Agency
Via email to Heather.Baugh@resources.ca.gov

Re: Blue Lake Rancheria THPO comments on (AB 52) draft Appendix G, Natural Resources Agency

Dear Heather:

This letter follows up on my comments and discussion with you by telephone on 3/25/16.

The ancestral homeland and culturally affiliated area for the Blue Lake Rancheria (Tribe) has been mapped to include the Wiyot ethnographic territory (see map). It encompasses the greater Humboldt Bay area, cities of Eureka, Arcata, McKinleyville and Blue Lake, and is the largest population center in Humboldt County and north coastal California. Consequently, the Tribe consults on numerous CEQA projects with various local lead agencies to identify and protect the newly defined (Wiyot) Tribal Cultural Resources (TCR) pursuant to AB 52.

A CEQA Guidelines update of Appendix G (Chapter 3 of Div 6 of Ch 4 of the CCR) is among the requirements of AB 52 and must be in place by July 1, 2016. Presently, the California Natural Resources Agency (CNRA) requests tribal and stakeholder review and comment on the subject, due no later than April 4, 2016. The "Proposed Language for Tribal cultural resources update to Appendix G" (CNRA 2/9/16, online at http://resources.ca.gov/ceqa) builds on the work of the Governor's Office of Planning and Research (OPR) and takes into consideration comments received from tribes and others parties by OPR and CNRA to-date.

Notably, this "Proposed Language..." suggests adding a statement regarding tribal consultation to the beginning of Appendix G under EVALUATION OF ENVIRONMENTAL IMPACTS, "which provides guidance on completing the checklist and environmental analysis," which states in the last sentence:

> 10. Tribal consultation ... Prior to beginning consultation, lead agencies may request information from the Native American Heritage Commission [NAHC] regarding its Sacred Lands File [SLF] ... as well as the California Historical Resources Information System [CHRIS] administered by the California Office of Historic Preservation [COHP].

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My concerns focus on the CHRIS and NAHC response letters that a CEQA lead agency may request and obtain comments on, their confidentiality under law, how such information may be misinterpreted by a lead agency, and the need for tribal access to the confidential information provided by such responses. 1.6-1

My comments here are directed to provide insights to the CNRA and OPR legal staff as the parties responsible for meeting the statutory requirements of AB 52. Most importantly, these comments are a call to action to the NAHC (for SLF) and to the COHP (for CHRIS). While the COHP may not have statutory requirements under AB 52, my comments are important to its operational efficiency and best practices of CHRIS where AB 52 and the CHRIS intersect.

I have 40 years experience working at a deep level with the CHRIS and SLF, as a cultural resource consultant with emphasis on working with California Indian communities. I have a long view and considerable institutional knowledge of these databases, generally how they were compiled, and how lead agencies sometimes misinterpret the information received. I currently serve as the Tribal Historic Preservation Officer (THPO) for the Blue Lake Rancheria, and have been authorized by the Tribal Council to comment on their behalf.

1. I recommend the above cited introductory language be adopted in its entirety. I have some serious reservations, however, I will try to explain here how the seemingly simple suggestion (lead agencies request information about the SLF and the CHRIS) may be misinterpreted and misused.

CHRIS: NON-CONFIDENTIAL SUMMARY SEARCHES, AGREEMENTS WITH LEAD AGENCIES, TRIBAL ACCESS

2. CHRIS information may be obtained by CEQA lead agencies under a fairly standard "Memorandum of Agreement (MOA) for the jurisdiction's Project Review Program" (cf. Humboldt County and City of Arcata MOAs with NWIC; Bryan Much, NWIC Coordinator pers. Comm.. 3/24/16). Most CEQA lead agencies do not have staff that qualify for *access to confidential data* (archaeological site locations) as defined by the CHRIS (Information Center Rules of Operation, or ICROM, Section III A B, on OHP website). Consequently, lead agencies receive *non-confidential summary search responses* (per ICROM, Section III F) (Eric Allison, CHRIS Coordinator at OHP, pers. Comm. 3/25/16). 1.6-2

There are no set written standards for what is contained in the *non-confidential summary search responses* to lead agencies (Eric Allison, pers. Comm.. 3/25/16). They do NOT contain all the information that is cited in the NAHC's Template Letter "California Native American Tribe to Lead Agency requesting consultation" (see Section IV Bibliography, C, 1,

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pp. 22-23 of CNRA 2/9/16 statement of reasons...). They DO NOT contain copies of any confidential cultural resources records and study reports pertaining to archaeological sites or TCR. They do include file reference numbers (trinomials for recorded sites; report S-numbers for formal reports). The responses do generally include: (1) listing of cultural resources recorded on or adjacent to the Area of Potential Effects (APE); (2) listing of formal cultural resources reports for the APE (some survey reports dating back 10-20-30-40 years and not meeting today's standards for identification); (3) IC staff predictions of unrecorded archaeological cultural resources sensitivity of the APE; and (4) a statement either recommending or not recommending a cultural resources identification study be conducted. The response letters may comment on the nature of the known information – whether a survey that covered thousands of acres and was completed in one week's time (cf. Benson 1977), was "complete" or adequate for purposes of the current CEQA review; but this may and has often been missed by non-expert lead agency planners in my area.

The worst case scenario I've experienced first-hand is that lead agencies believe they've met the record search requirements by simply asking and receiving a response from an IC. Importantly, most lack staff with sufficient background to interpret what the responses really mean. Negative site findings for an APE may be assumed by lead agency staff to mean there are no resources present; whereas, it may in fact indicate no surveys have ever been conducted or located sites recorded. Also commonly misinterpreted by planners is that older surveys were adequate for the purposes of the identifying archaeological sites for the current CEQA project under review.

3. My suggestion is that AB 52 consulting tribes request from lead agencies the responses to the *non-confidential summary searches*, and then turn to the issuing IC to request the confidential information be sent to the tribal contact (e.g., THPO). This would provide an opportunity for checks and balances between individual tribal cultural resources databases (which vary greatly in scope, technology and being current or not) and the CHRIS system that is the mother of all cultural resources databases for the state (evolving and accruing data since the 1950s or earlier). 1.6-1

4. Further, this will head off any potential conflicts where a project applicant has hired a professional consultant, who conducts a confidential CHRIS records search on his/her client's dime, and is asked by the tribe for copies of said records and reports. Such a tribal request and handing over confidential documents by the consultant is a violation of the CHRIS access policy (ICROM Section III). Of course, entering into AB 52 government-to-government consultation about a TCR in a project area will likely disclose lots of confidential information shared among the tribe, the lead agency, the applicant and his/her consultant, for the tribe to make its case and lead agency to make an informed decision. This highlights the need to get confidentiality protocols 1.6-2

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in place among this group of key players to the CEQA review (clearly, these are NOT the public); and the extra care needed to not disclose confidential information to the general public, but give them enough to feel a fair decision can be reached. 1.6-3

5. For the above to be most effective, OHP's on-going effort to establish written standards for Tribal Access to the CHRIS (see http://www.ohp.parks.ca.gov/?page_id=28036) needs to take this circumstance into account. 1.6-4

6. As a possible model, I will file the confidential access agreement form with the NWIC (for Humboldt County), naming myself as the qualified person for the Tribe; standing MOAs between the City of Arcata and Humboldt County with NWIC will be attached; and the package copied to these two CEQA lead agencies. I will request in writing that these lead agencies provide me with a copy of the non-confidential summary searches, and after checking tribal database may then request the confidential information be provided by NWIC to me, at no cost (assume PDF files). With these data in hand, I can then double back and verify the tribal database and the IC records, and analyze for myself the potential or known TCR sensitivity and basis for requesting a cultural resources identification study be conducted for any particular CEQA review (taking into account the anticipated depth and area of ground disturbance, and record of prior disturbance). 1.6-5

7. Also, CHRIS is encouraged to standardize these non-confidential summary response letters, especially with an eye to educating and explaining what the information reveals and in really clear language non-technical planners can understand. Full report citations are requested. 1.6-6

NAHC RESPONSES TO SACRED LANDS FILE SEARCHES, UPDATING CONTACTS, TRIBAL ACCESS

8. The NAHC needs to dedicate staff and e-data systems to maintain, update and access the SLF, while maintaining the integrity and confidentiality of the database. With only ca. 2000 SLF listings to-date (Katie Sanchez, NAHC, pers. Comm. 3/25/16), this is a very incomplete database of the potential number of actual sacred sites in the state. Given the SLF maintained by the NAHC was established by legislation in _1976?, the SLF has not been well received or supported by the wider tribal community for a variety of reasons. From my 40 years working with tribes, I would say concern for maintaining confidentiality of computerized information is a top concern. I would anticipate that with AB 52, tribes may find it prudent to submit SLF forms to the NAHC to help facilitate protection through consultation (existing lists of potential TRC may be supportive). Since many of the NAHC SLF search 1.6-7

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responses are negative, and most sacred sites are not (yet?) listed there, it is imperative that the NAHC inform the requesters about what a 'negative' response means. As of 3/25/16, there is no reference to the SLF on the NAHC website, nor posting of forms for SLF submittals or a requested SLF search.

9. With AB 52 Appendix G coming on line soon, NAHC policies for maintaining and updating the SLF need to be vetted and put in place, especially with regard to contacts listed on individual SLF filings and tribal access to SLF records on file for their own ancestral lands. Of the hundreds of SLF search requests I've made throughout my career as a consultant, only two NAHC responses were positive "hits." For these, the NAHC recommended I contact the person listed on the SLF form; in both cases, the individuals were deceased. Further, as a THPO I was told that I could not request a search for the Blue Lake Rancheria mapped area of concern for TCR; I could only request copies of filings the Tribe had made in the past (Katie Sanchez, NAHC, pers. Comm.. 3/25/16). Currently, there is no NAHC policy about who can submit a SLF listing, and this needs to be addressed (tribes and individuals?); in the early years of the SLF, I understand most were submitted by individuals. 1-6.8

Sincerely,

Janet P. Eidsness

Janet P. Eidsness, THPO
Blue Lake Rancheria

Attachment: Blue Lake Rancheria's mapped area of concern

Cc: (by email)
Holly Roberson, Governor's Office of Planning & Research
Adrian Praetzellis, SHRC and Information Center Procedural Advisory Committee (ICPAC)
Cynthia Gomez, Executive Secretary NAHC
Julianne Polanco, California SHPO
Bryan Much, NWIC Coordinator
Eric Allison, CHRIS OHP Coordinator
THPO Advisory Committee on OHP CHRIS Tribal Access Policy, c/o E. Allison
Anmarie Medin, OHP Tribal Liaison
Katie Sanchez, NAHC staff
California THPOs

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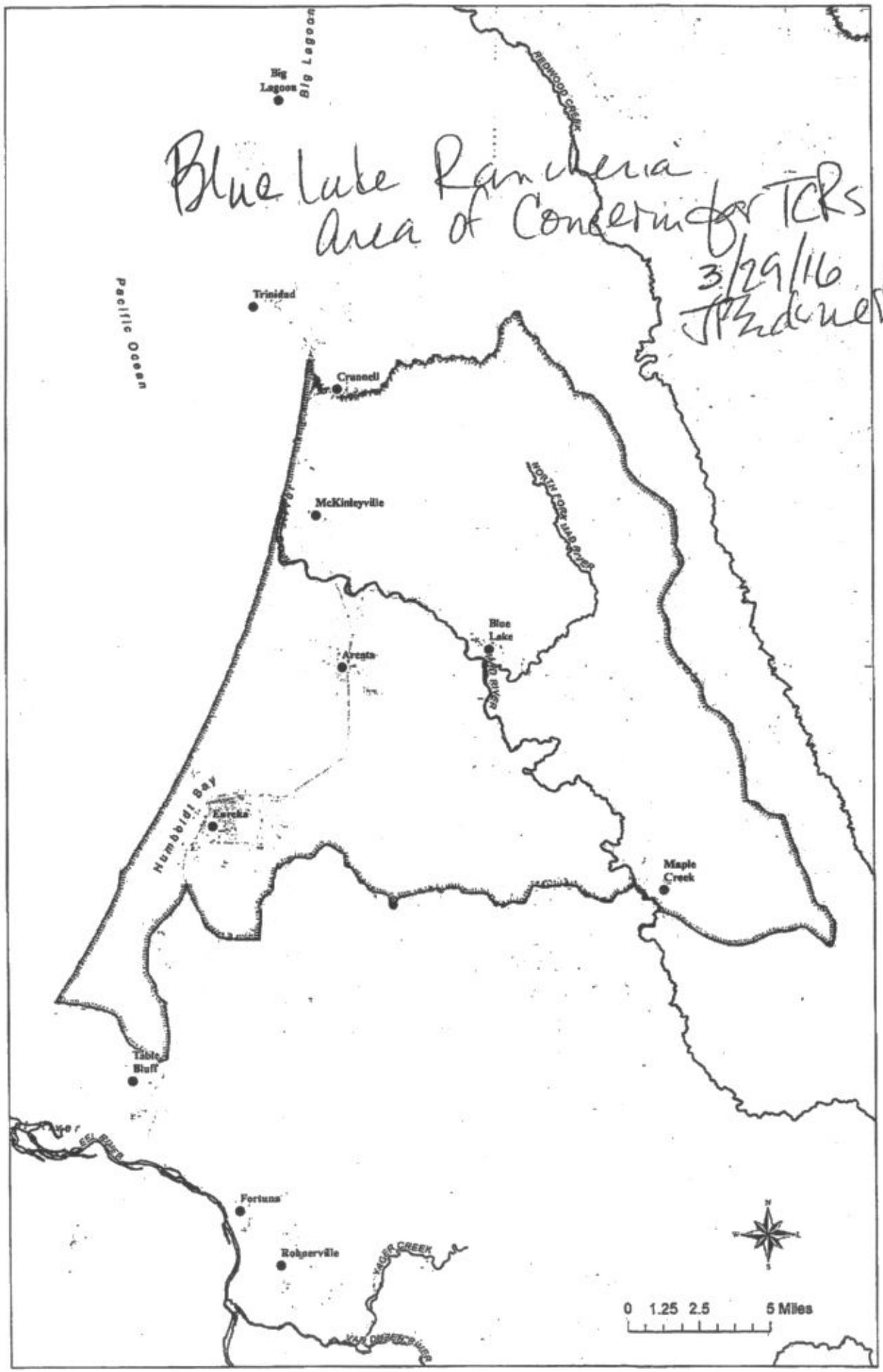
REFERENCES

California Natural Resources Agency (CNRA)
2016 Initial Statement of Reasons for Regulatory Action...Implementing AB 52 Regarding Tribal Cultural Resources. Dated 2/9/16



Blue Lake Rancheria
Area of Concern for TCRs
3/29/16
JTRadnell

Comment 1-7

Duncan, Lia@CNRA

From: Baugh, Heather@CNRA
Sent: Monday, April 18, 2016 1:28 PM
To: Duncan, Lia@CNRA
Subject: FW: Paleontological Resources
Attachments: T. Demere -SDNHM - paleontological resources.pdf

For print

Heather C. Baugh, Assistant General Counsel
California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814
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From: Tom Demere [mailto:tdemere@sdnhm.org]
Sent: Monday, April 04, 2016 5:17 PM
To: Baugh, Heather@CNRA
Subject: Paleontological Resources

Dear Ms. Baugh,

I am submitting the attached comment letter concerning the treatment of paleontological resources under the proposed AB 52 regulatory updates to CEQA.

Thomas A. Deméré, Ph.D.
Curator, Department of Paleontology
Director, Department of PaleoServices
San Diego Natural History Museum

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Comment 1-7

SAN DIEGO NATURAL HISTORY MUSEUM
BALBOA PARK - SAN DIEGO SOCIETY OF NATURAL HISTORY - ESTABLISHED 1874

April 4, 2016

Heather Baugh, Assistant General Counsel
The California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

Re: Proposed AB 52 Regulatory Updates to CEQA and Paleontological Resources

Dear Ms. Baugh:

I appreciate the opportunity to comment on the Proposed AB 52 Regulatory Update to CEQA. My area of concern involves proposed changes to Appendix G, specifically how potential adverse impacts to paleontological resources are addressed. Having followed the issues surrounding passage of AB 52, I am aware of the requirements to separate consideration of paleontological resources from consideration of cultural resources. However, it is not clear where paleontological resources will eventually land and placing them together with Open Space, Managed Resources and Working Landscapes or with Geology, Soils, and Seismicity fails to recognize the true significance of paleontological resources and their educational and scientific value to the citizens of California. Consolidating paleontological resources with these disparate resource issues does not seem logical given the buried nature of paleontological resources (i.e., fossils), their occurrence in stratified sedimentary rocks, and the fact that fossils serve as direct evidence of ancient biodiversity and the ecosystems that supported that biodiversity.

To my mind, the proposed changes to Appendix G regarding paleontological resources run the risk of drastically reducing the attention given to these important educational and scientific resources by lead agencies when reviewing project proposals and environmental documents. Rather than reducing the attention these resources are given, I would hope that the State of California would be more interested in increasing that attention. To underscore the significance of the educational and scientific value of paleontological resources as distinct from non-biological natural resources like geologic features and waterways, it is instructive to note that in 2009 the federal government passed the Paleontological Resources Protection Act. This legislation and its accompanying implementation guidelines has gone a long way in elevating the review of potential impacts to paleontological resources on lands managed by the Bureau of Land Management and U.S. Forest Service.

Based on the above discussion I would like to recommend an alternative solution to the requirements of AB52 from the one offered in the proposed document. My suggestion is to establish a new Issue in Appendix G for consideration of paleontological resources. An example checklist question for this new Issue might read as follows: 1.7-1

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[Type here]

Issue VI. PALEONTOLOGICAL RESOURCES -- Would the project:

a) Cause an adverse change to a significant or unique paleontological resource.

Establishment of a standalone Issue for paleontological resources will have the positive effect of satisfying the requirements of AB52, while recognizing the unique educational and scientific value of such resources.

Thank you again for the opportunity to comment on the proposed AB 52 regulatory updates to the California Environmental Quality Act. I would be happy to put together a more formal document addressing to this problem and, if possible, would like to arrange a meeting with you and your staff.

Sincerely,

Thomas A. Deméré

Thomas A. Deméré, Ph.D.
Curator, Department of Paleontology
Director, Department of PaleoServices

619-255-0232
tdemere@sdnhm.org

Comment 1-8

SLR Comments Regarding Proposed Language for TCRs Update to Appendix G

Merri Lopez-Keifer [lopezkeifer@gmail.com]

Sent: Monday, April 04, 2016 5:00 PM
To: CEQA Guidelines@CNRA
Cc: Carmen Mojado [cjmojado@slrmissionindians.org]
Attachments: SLR Comments on Appendix G~1.pdf (80 KB) ; SLR Comment Letter & Attac~1.pdf (127 KB)

Dear Ms. Baugh:

Attached please find a letter from the San Luis Rey Band of Mission Indians regarding the propsoed language for traditional cultural resources update to Appendix G.

Sincerely,

Merri Lopez-Keifer
Chief Legal Counsel
San Luis Rey Band of Mission Indians
(925) 457-3395
lopezkeifer@gmail.com

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Comment 1-8

SAN LUIS REY BAND OF MISSION INDIANS

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April 4, 2016

Heather Baugh
The California Natural Resources Agency
State of California
1416 Ninth Street, Ste. 1311
Sacramento, CA 95814

VIA ELECTRONIC MAIL
ceqa.guidelines@resources.ca.gov

RE: SAN LUIS REY BAND OF MISSION INDIANS COMMENTS ON PROPOSED LANGUAGE FOR TRIBAL CULTURAL RESOURCES UPDATE TO APPENDIX G OF THE CEQA CHECKLIST GUIDELINES PURSUANT TO AB 52 (GATTO)

Dear Ms. Baugh:

We, the San Luis Rey Band of Mission Indians ("SLR" or "Tribe"), a California Native American tribe that is traditionally and culturally affiliated with San Diego and Riverside counties, appreciate the opportunity to provide comments to the California Natural Resources Agency ("CNRA") on the proposed changes to Appendix G of the California Environmental Quality Act ("CEQA") Guidelines. The intent of the proposed changes is to incorporate the new resource known as "Tribal Cultural Resources" ("TCRs") into Appendix G ("Appendix G Checklist") pursuant to Assembly Bill 52 (Gatto) ("AB 52"). The Tribe is resolute in the preservation and protection of our tribal cultural resources. Our ancestors have inhabited our lands for thousands and thousands of years and our culture is a "living culture." Our native culture must be protected and preserved: past, present and future.

TCRs are not only a new resource under CEQA, but also a new term of art in the protection and preservation of California Native American resources. TCRs are non-renewable resources; once they are destroyed, they are erased from history forever. TCRs may be present on the surface, or may be buried below the surface. TCRs, wherever they are situated on this earth, are invaluable resources to California and to California Native American tribes. They represent tribal values: tangible and non-tangible alike. Therefore, the implementation of TCRs in CEQA and their introduction into the Appendix G Checklist, must be done in a very deliberate, sensitive, and most effective way possible to be successful in both an ideological and practical application. 1.8-1

Although not selected by the Governor's Office of Planning and Research as proposed language for Appendix G, SLR had preferred for TCRs to be placed within their own resource category (see SLR Letter to OPR dated12-18-15). By being placed inside its own resource category, the importance of the resource would be acknowledged and therefore would have been evaluated without the limitations that had been placed on it in the past. Yet, this proposed language was not selected by OPR.

If TCRs will not be given their own resource category, then SLR strongly recommends that the proposed language of CNRA be modified to reflect a change in the order of priority for a Lead Agency's review of a resource's significance and potential adverse impact by the CEQA project. This modification would result in TCRs being evaluated first, followed by archaeological resources and historical resources. In reversing the current proposed order of evaluation, the Checklist would support the legislature's intent in having TCRs evaluated early in the development process through tribal consultation. Prior to the enactment of AB 52, Lead Agencies relied solely upon archaeologist or other professional consultants on a California Native American resource's significance. However, through the enactment of AB 52, the State of California has acknowledged the importance of California's First People and that they are the experts of their resource's significance. Therefore, by placing TCRs first in the review, Lead Agencies will be directed to evaluate a Native American resource differently than it had in the past. The value of consulting with California Native American tribes may be more effectively realized, a goal of AB 52, and the actual resources will have an increase potential to be properly evaluated and considered by the Lead Agency, another goal of AB 52. 1.8-2

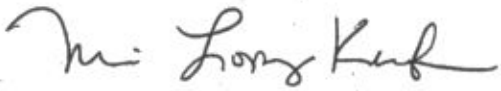
Lead Agencies must learn, through practical application, that information shared by California Native American tribal governments, should not be pitted against those of the archaeologist or other professional consultant, but that the information provided by the tribal governments to be superior resources of information and knowledge that may compliment that of the scientific information provided by the compensated consultant. There is no denying that an archaeologist may be able to provide information to the lead agency regarding known locations of TCRs; however, it is only through the tribal consultation that meaning, or significance, may be given to those resources. In placing the evaluation of a TCR as the first resource to be weighed and considered, a preference and priority is established. 1.8-3

Moreover, SLR recommends that paleontological resources should be completely removed from Section V, Cultural Resources. Instead, paleontological resources should be placed within Section VI, Geology and Soils. Such change has been incorporated by Lead Agencies throughout the state, including but not limited to, the City and County of San 1-8.4

Francisco and the City of Vista. Paleontology does not belong with Cultural Resources (TCRs, Archaeological and Historical Resources) and/or Tribal Cultural Resources and should be placed within the resource section most applicable to its review and protections, Geology and Soils.

The San Luis Rey Band of Mission Indians, above all else, wishes for the successful implementation of AB 52: through more effective and respectful government-to-government consultations to a more respectful analysis of a tribal cultural resource based on tribal values and knowledge. SLR appreciates the opportunity to provide our comments to the California Natural Resource Agency on its responsibility to update Appendix G. Thank you for protecting our invaluable California Native American tribal cultural resources.

Sincerely,



Merri Lopez-Keifer
Chief Legal Counsel
San Luis Rey Band of Mission Indians

cc: Mel Vernon, SLR Captain
Carmen Mojado, SLR Secretary of Government Relations

Enclosure: Attachment A

Comment 1-8

SAN LUIS REY BAND OF MISSION INDIANS

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December 18, 2015

Holly Roberson
Land Use Counsel
Governor's Office of Planning and Research
1400 Tenth Street
Sacramento, CA 95814

VIA ELECTRONIC MAIL
ceqa.guidelines@resources.ca.gov

RE: SAN LUIS REY BAND OF MISSION INDIANS COMMENTS ON DISCUSSION DRAFT OF PROPOSED CHANGES TO APPENDIX G OF THE CEQA CHECKLIST GUIDELINES INCORPORATING TRIBAL CULTURAL RESOURCES PURSUANT TO AB 52 (GATTO)

Dear Ms. Roberson:

We, the San Luis Rey Band of Mission Indians ("SLR" or "Tribe"), a California Native American tribe that is traditionally and culturally affiliated with San Diego and Riverside counties, appreciate the opportunity to provide comments to the Governor's Office of Planning and Research ("OPR") on the proposed changes to Appendix G of the California Environmental Quality Act ("CEQA") Guidelines. The intent of the proposed changes is to incorporate the new resource known as "Tribal Cultural Resources" ("TCRs") into Appendix G ("Appendix G Checklist") pursuant to Assembly Bill 52 (Gatto) ("AB 52"). The Tribe is resolute in the preservation and protection of our tribal cultural resources. Our ancestors have inhabited our lands for thousands and thousands of years and our culture is a "living culture." Our native culture must be protected and preserved: past, present and future.

TCRs are not only a new resource under CEQA, but also a new term of art in the protection and preservation of California Native American resources. TCRs are non-renewable resources; once they are destroyed, they are erased from history forever. TCRs may be present on the surface, or may be buried below the surface. TCRs, wherever they are situated on this earth, are invaluable resources to California and to California Native American tribes. They represent tribal values: tangible and non-tangible alike. Therefore, the implementation of TCRs in CEQA and their introduction into the Appendix G Checklist, must be done in a very deliberate, sensitive, and most effective way possible to be successful in both an ideological and practical application.

Three (3) alternatives were presented by OPR for suggested incorporation of TCRs in the Appendix G Checklist. SLR believes that the proposed language in Alternative 3 best meets the legislative intent and specific statutory language of AB 52. We find Alternative 1 to be ineffectual in meeting and incorporating the legislative intent of AB 52. We find Alternative 2, although more effective than Alternative 1, deficient in establishing the importance of the evaluation of TCRs and the expertise California Native American tribes have on their living culture. Therefore, SLR opines that Alternative 3 serves TCRs the best and provides all the necessary context for successful AB 52 implementation into the Appendix G Checklist. However, although SLR believes Alternative 3 best meets the legislative intent of AB 52, we firmly believe that additional modifications are necessary. These modifications are reflected in Attachment A.

Moreover, placing TCRs into their own resource category, as suggested in Alternative 3, best sets TCRs apart from archaeological and historical resources, and a purely archaeological and/or scientific based analysis as to whether California Native American resources will be negatively impacted by a proposed CEQA action. By being placed inside its own resource category, the importance of the resource is acknowledged and therefore must be evaluated without the limitations that had been placed on it in the past. For instance, if no known archaeological resources were to be impacted, or if those resources were to be defined and asserted by an archaeologist and/or consultant, to be "insignificant," then it often became an unsurmountable burden of proof for a California Native American tribe to persuade a Lead Agency that a TCR may be impacted by the proposed project. Lead Agencies often would assert that because no "known" arcaheologicl resourcses were within the confines of the CEQA project site, then a tribe's concern regarding "subsurface TCRs" would fall on deaf ears and not be fairly considered by the Lead Agency. In fact, creating a separate resource category, and not simply adding an additional subsection to the current Checklist in Section V, TCRs and tribal expertise, through Tribal Consultation, will be given a seat at the table in assisting a Lead Agency in determining whether a TCR will be adversely impacted by a CEQA project. Setting TCRs apart correctly places the "expertise" of and on the resource and a project's potential negative impact on those resources with the California Native American tribes, and not solely on a non-tribal value analysis.

Additionally, Alternative 3 is preferred by SLR because of its inclusion of an introductory paragraph stressing the legal necessity for tribal consultation to occur very early in project scoping and even before the agency has come to preliminary conclusions regarding the potentially significant effects of a project in the checklist questions. It is imperative that a Lead Agency weighs and considers the potential adverse impact a project may have on a TCR, whether it be on the surface or below the surface, before they determine the type of

environmental review will be necessary. It is imperative that a Lead Agency, if said agency is not fortunate to consult with a tribal government, know that they still have a statutory responsibility to evaluate the potential adverse impact to TCRs. SLR believes that Alternative 3, with the included modifications, will best achieve this goal.

If, however, OPR is not inclined to adopt a new section of resource review for TCRs, as is the preference of SLR, then in the alternative, SLR's secondary preference would be for a significant revision of Alternative 2. This secondary preference can be found in Attachment B. The most notable revision would be to reverse the order of priority for a Lead Agency's review of a resource's significance and potential adverse impact by the CEQA project. Prior to the enactment of AB 52, Lead Agencies relied solely upon archaeologist or other professional consultants on a California Native American resource's significance. However, through the enactment of AB 52, the State of California has acknowledged the importance of California's First People and that they are the experts of their resource's significance. Therefore, by placing TCRs first in the review, Lead Agencies will be directed to evaluate a Native American resource differently than it had in the past. The value of consulting with California Native American tribes may be more effectively realized, a goal of AB 52, and the actual resources will have an increase potential to be properly evaluated and considered by the Lead Agency, another goal of AB 52. Lead Agencies must learn, through practical application, that information shared by California Native American tribal governments, should not be pitted against those of the archaeologist or other professional consultant, but that the information provided by the tribal governments may instead compliment that of the scientific information provided by the compensated consultant. Archaeologist do contribute to much of the knowledge about where resources have been known to be located; however, it is only through the tribal consultation that meaning, or significance, may be given to those resources. In placing the evaluation of a TCR as the first resource to be weighed and considered, a preference and priority is established.

Furthermore, SLR respectfully requests that OPR further modify Appendix G by adding a check box for TCRs in the Checklist Form in the introductory section ENVIRONMENTAL FACTORS POTENTIALLY AFFECTED. SLR also supports, as suggested by the Santa Ynez Band of Chumash Indians and the Pechanga Band of Luiseno Indians, that adding a question at the end of the start of the Checklist Form would be incredibly useful in flagging a potential statutory requirement to consult with California Native American tribal governments. SLR suggests the following be added to the front page:

> 11. Tribal Consultation has begun pursuant to Public Resources Code § 21080.3.1. If not, do not check box, and briefly state why such consultation has not begun.

In order to best and most effectively implement AB 52 successfully, then this type of guidance

must be given on page one of the Checklist, not simply included in the resource category later in the Checklist. Providing this additional prompt will assist Lead Agencies greatly in complying with the new requirements of TCR evaluation and Tribal Consultation through the enactment of AB 52.

And last but not least, SLR believes that paleontological resources should be completely removed from Section V, Cultural Resources. Instead, paleontological resources should be placed within Section VI, Geology and Soils. Such change has been incorporated by Lead Agencies throughout the state, including but not limited to, the City and County of San Francisco and the City of Vista. Paleontology does not belong with Cultural Resources (TCRs, Archaeological and Historical Resources) and/or Tribal Cultural Resources and should be placed within the resource section most applicable to its review and protections, Geology and Soils.

The San Luis Rey Band of Mission Indians, above all else, wishes for the successful implementation of AB 52: through more effective and respectful government-to-government consultations to a more respectful analysis of a tribal cultural resource based on tribal values and knowledge. SLR appreciates the opportunity to provide our comments to OPR on its responsibility to update Appendix G. Thank you for protecting our invaluable California Native American tribal cultural resources.

Sincerely,

Merri Lopez-Keifer
Chief Legal Counsel
San Luis Rey Band of Mission Indians

cc: Mel Vernon, SLR Captain
Carmen Mojado, SLR Secretary of Government Relations

Enclosures: Attachment A & B

ATTACHMENT A

Alternative 3

TRIBAL CULTURAL RESOURCES.

Information submitted through consultation with a California Native American Tribe ~~that has requested such consultation may~~ is to be considered by ~~assist~~ a lead agency in determining what type of environmental document should be undertaken, identifying tribal cultural resources, determining whether the project may adversely affect tribal cultural resources, and ~~if so,~~ how such effects may be avoided or mitigated. ~~Whether or not consultation has been requested,~~ However, regardless of whether tribal consultation occurs or is completed, substantial adverse changes to a tribal cultural resource are to be identified, assessed and mitigated. Public agencies shall, when feasible, avoid damaging effects to any tribal cultural resource.

1) Would the project cause a substantial adverse change in a site, feature, place, cultural landscape, sacred place, or object, with cultural value to a California Native American Tribe, which is any of the following:

a) Included or determined to be eligible for inclusion in the California Register of Historical Resources?

b) Included in a local register of historical resources?

~~c) Determined by the lead agency, in its discretion and supported by substantial evidence, to be a tribal cultural resource, after applying the criteria in Public Resources Code §5024.1(c), and considering the Significance of the resource to a California Native American Tribe?~~

c) After considering the significance of the resource to a California Native American Tribe and applying the criteria in Public Resources Code §5024.1(c), a resource is determined by the lead agency, in its discretion and supported by substantial evidence, to be a tribal cultural resource?

2) Would the Project:

a) Potentially disturb any human remains, including those interred outside of dedicated cemeteries (see Cal. Public Resources Code, Ch. 1.75, §5097.98 and Health and Safety Code §7050.5(b))?

b) Potentially disturb any resource or place defined in Public Resources Code §5097.9 et seq (Native American Historical, Cultural and Sacred Sites)?

ATTACHMENT B

V. CULTURAL RESOURCES

Would the project:

a) Cause a substantial adverse change to Tribal Cultural Resources- a site, feature, place, cultural landscape, sacred place, or object with cultural value to a California Native American Tribe (Public Resources Code § 21074), including subsurface Tribal Cultural Resources, that is:
   (1) listed or determined eligible for listing on the California register of historical resources,
   (2) listed on a local historical register, or
   (3) after considering the significance of the resource to a California Native American Tribe and applying the criteria in Public Resources Code §5024.1(c), is deemed by the lead agency to be a Tribal Cultural Resource?
b) Cause a substantial adverse change in the significance of an archaeological resources pursuant to § 15064.5?
c) Cause a substantial adverse change in the significance of a historical resource as defined in § 15064.5?
d) Potentially disturb any human remains, including those interred outside of formal dedicated cemeteries (see Public Resources Code, Ch. 1.75, § 5097.98, and Health and Safety Code § 7050.5(b))?

Comment 1-9

Pechanga Tribes Comments on the Proposed Amendments to the CEQA Guidelines Appendix G

Andrea Fernandez [afernandez@pechanga-nsn.gov]

Sent: Friday, April 08, 2016 3:49 PM
To: CEQA Guidelines@CNRA; Gibson, Thomas@CNRA; Paula Treat [mslobby@earthlink.net]
Cc: Ebru Ozdil [eozdil@pechanga-nsn.gov]; Laura Miranda [lmiranda@pechanga-nsn.gov]
Attachments: Tribes Comments on the Pro~1.pdf (774 KB)

Good afternoon,

Electronically attached please find the Pechanga Tribe's comments on the above referenced matter. Should you have any questions or concerns please contact Steve Bodmer at sbodmer@pechanga-nsn.gov or Laura Miranda at lmiranda@pechanga-nsn.gov.

Thank You,

Andrea Fernandez
Legal Assistant
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Comment 1-9

PECHANGA INDIAN RESERVATION
Temecula Band of Luiseño Mission Indians

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April 8, 2015

VIA ELECTRONIC MAIL
ceqa.guidelines@resources.ca.gov

Heather Baugh
The California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

Re: Pechanga Tribe Comments on Title 14 California Natural Resources Agency Proposed Amendments to Guidelines Implementing the CEQA – Appendix G to Include Consideration of Tribal Cultural Resources

Dear Ms. Baugh:

These comments are submitted on behalf of the Pechanga Band of Luiseño Indians (the "Tribe"), a federally-recognized and sovereign Indian nation. We appreciate the opportunity to provide comments during this official rulemaking process on the proposed changes to Appendix G as the consideration and protection of tribal cultural resources is of paramount concern for the Tribe.

Additionally, we would like to thank you and Mr. Gibson for our in-person consultation on March 25, 2016. Pechanga found the face-to-face dialogue most helpful in working through our concerns, while discussing a path forward that would help all stakeholders properly implement AB 52. We request to continue this open dialogue throughout the remainder of the rulemaking process.

It is our understanding this letter, although submitted after the official deadline for comments, will be part of the official rulemaking record and will be considered in any re-drafts and included in the record of decision. The Tribe submitted written comments dated December 18, 2015 on the first Appendix G proposal vetted by the Governor's Office of Planning and Research ("OPR"). We request that those comments also be part of the official rulemaking record and the record of decision.

To frame our comments, we want to first take note of the legislative mandates of AB 52 as it relates to the update of Appendix G. Newly added section 21083.09 of the Public Resource Code requires OPR to prepare and develop (on or before July 1, 2016) revisions to Appendix G to do both of the following:

(a) Separate the consideration of paleontological resources from tribal cultural resources and update the relevant sample questions; and
(b) Add consideration of tribal cultural resources with relevant sample questions.

Pechanga considers the scope of (b) above to provide both the direction and latitude to agencies responsible for drafting and implementing the CEQA regulations for AB 52. Proper consideration of tribal

cultural resources consistent with the intentions and mandates in the bill consists of identification of the resources, assessment of project impacts as they relate to the resources, the avoidance preference mandated for the resource, and feasible culturally appropriate mitigation. Moreover, identification of tribal cultural resources is unlike the identification of other resources in CEQA. The very definition contains a core component of the *tribal value* of the resource. Because of this key element in the definition of tribal cultural resources, tribal consultation plays a crucial, if not necessary role in the identification and proper legal consideration of tribal cultural resources. As such, you will see in our suggested approach for Appendix G that we are advocating for the clear inclusion of all of the pieces necessary for a legally proper "consideration of tribal cultural resources" under CEQA.

While the current proposal offered for this rulemaking process does incorporate some new language that addresses concerns tribes raised with the initial proposal, Pechanga does have continued comments and concerns on issues we don't believe were adequately addressed after the comment period on the first draft vetted by OPR. In the November 17, 2015 proposal provided by OPR, there were three options provided for review and comment. After receiving comments from tribes and other interested parties, OPR opted to draft an entirely new proposal that was distinct from any of the three previous alternatives and proceeded to pass that new draft onto the Natural Resources Agency for the rulemaking process. We appreciate that OPR circulated and received comments on the first draft with the three options; however, additional discussions did not occur after the Tribe submitted their comments and before the rulemaking package was sent to Resources. We believe that additional discussions between OPR and the Tribes could have been beneficial, as we did not get the opportunity to discuss the rationale behind our original comments on the first draft (our December 18, 2015 letter). We hope our consultation on March 25th has begun to remedy this oversight of fully completing the consultation on the initial draft. We look forward to the opportunity to fully discuss our reasoning and purpose behind these comments.

Pechanga approaches these proposed changes with an eye toward helping all parties that will be required to implement AB 52. Of particular concern is how planners and consultants use the Appendix G checklist practically on a daily basis. Pechanga does not offer our comments solely for the benefit of tribal interests. We are especially interested in how we can all work together to formulate a document that guides planners in their obligations to ensure compliance with the law's mandates. Since AB 52 and the accompanying CEQA regulations affect tribal sovereignty and self-determination, it is not improper or biased to engage tribes on a government-to-government basis, including attempting to reach agreement on language for these regulations and ensuring the language does not negatively impact tribal governments. These regulations are not simply of substantial interest to Pechanga, but they impact core sovereign rights and identity for all California tribes. The regulations should improve tribal participation and the consideration of tribal cultural resources in the CEQA, not detract from it, make it more complicated, contradict AB 52, or take us back to the problems that existed pre-AB 52.

The specific edits we suggest to the publically noticed language are in Attachment A to this letter and are explained herein. The Attachment to this letter contains proposed language we offer to the Natural Resources Agency and OPR in lieu of the previous attachment submitted with our December 18, 2015 comment letter.

<u>Cultural Resources</u>

We continue to take the position that AB 52 intended that tribal cultural resources be a separate category

and should not be a sub-category of cultural resources. When tribal resources were evaluated in the CEQA, pre-AB 52, it was under the categories of archaeological and historical resources. The problems with this structure and process were that the resources were assessed primarily in terms of scientific or historical significance criteria ONLY. The tribal value of the resource was not folded in the tribal identification, significance or mitigation analysis. In addition, archaeological and historic preservation methodologies for determining impacts and mitigation were utilized inappropriately for tribal cultural resources. As evidenced by the language in AB 52, a main intention was to create a new category of resources separate and apart from other cultural resources along with a new list of potential mitigation for these resources. In addition, a clear process of tribal consultation was included, with topics and purposes specifically designed to combat the problem of the tribal values not being included in the analysis. Although there may be hesitation on dividing out tribal cultural resources from the general category of cultural resources by consultants – they claim it could raise questions about the relationship between tribal cultural resources and other resources – we believe the problem of tribal cultural resources continuing to be identified, treated and mitigated like other cultural resources will continue if tribal cultural resources are not separated out. AB 52 clearly states that tribal cultural resources can also be historic resources and archaeological resources so there should not be an issue with overlapping resource types. This also occurs with biological resources, geological resources, etc. If not separated, the danger is losing the main elements in AB 52, which are the tribal value of the resource in terms of its identification, project impacts to that resource from a tribal value perspective and culturally appropriate mitigation. 1-9.1

Since tribal value is at the forefront of what makes up a tribal cultural resource, we believe the questions offered for identification of a tribal cultural resource in the proposed Section V mischaracterize the AB 52 intended definition. The language as drafted will direct planners and consultants to mistakenly focus on the listing or eligibility aspect of the resource as the only type of determination they need to make, and ignore obtaining and incorporating the tribal values element into the environmental assessment. In the proposed Section V, there are actually three separate questions combined under question number one. As drafted, the planner or consultant will not properly focus on the tribal value element that is intended to be achieved through consultation, but instead will focus on whether a resource at issue is listed on or eligible for the California Register a local register. In determining whether there is a TCR, there are two components to this question: 1) Is there a site, feature, place or cultural landscape, sacred place or object with cultural value to a California Native American tribe?; and 2) Does that resource have any of the qualifying elements such as eligibility or listing on the California Register, listing on a local register or a determination of eligibility by a lead agency? This is the approach that should be reflected in the checklist. Of course, associated with question one is tribal consultation. But even if tribal consultation is not completed or does not occur, the planner or consultant, as part of their CEQA responsibilities will still need to figure out whether there is a tribal cultural resource. So, the planner or consultant will have to go through that initial determination of whether or not they have one of those types of resources that has tribal value. They then will be responsible for documenting their answer with the information they receive or don't receive.

In addition to these suggested edits, we offered two additional questions for the cultural resources section. Would the Project:

a) Potentially disturb any human remains, including those interred outside of dedicated cemeteries (see Cal. Public Resources Code, Ch. 1.75, §5097.98 and Health and Safety Code §7050.5(b))? 1-9.2

b) Potentially disturb any resource or place defined in Public Resources Code §5097.9 et seq. (Native American Historical, Cultural and Sacred Sites)?

The purpose of including these questions in Appendix G is to address specific confidential information that tribes may have regarding the location of human remains and/or sacred sites or other resources that could be covered under a) and b) above. Unfortunately, many applicants do not address them during the CEQA assessment process and often wait until either very late in the approval process or after the project receives approval. The result is that when these resources do present themselves, projects often are delayed and/or halted because these sites are identified after development plans and mitigation measures have received approval. These resources are considered tribal cultural resources by tribes and may be tribal cultural resources under the law depending upon the specific factual situation at hand. Adding these questions to the Appendix G checklist is not beyond the scope of the law or AB 52 mandates. The questions do not change or deter from the mandates in the statutory sections were they currently live. The purpose of including them here is primarily for streamlining and efficiency in project processing. But it is also to ensure proper and thorough CEQA compliance. Adding them in the checklist fosters an early understanding of whether these resources may possibly exist and thoroughly assessing all impacts related to tribal cultural resources and of interest to tribes during consultation. We offer this language as a tool to further assist planners and consultants in identifying whether TCRs may be present. While the agency would still need to follow the mandates in each of those statutory sections, it makes sense from an efficiency standpoint and a legal standpoint to fold the mitigation measures and protocol for these resources into the tribal cultural resources CEQA analysis as well. Our suggestions will serve to make the process more effective for agencies as well as applicants by dealing with all the potential tribal cultural resources issues at the beginning of the process and in one place.

One final note regarding the revised Section V. Cultural Resources in the draft proposal. Pechanga continues to argue that including TCRs under the rubric of Cultural Resources is not likely to assist lead agencies in understanding the differing nature of these resources. In the original draft proposal issued by OPR, the third option created a new section in the checklist titled, Tribal Cultural Resources. Pechanga supported the third option, with modifications, in part because this was the only alternative to actually create both a TCR and Cultural Resources category. We still maintain that in order to provide proper consideration of TCRs and the procedural requirements of AB 52, TCRs should have a stand-alone category. For example, we have already experienced agency confusion with respect to compliance with AB 52, in large part because for decades environmental assessments have been completed with information from hired consultants only with tribal information excluded. Further, we have also heard that some agencies are asking archaeologists to assess the presence of TCRs, something they are simply unable to do because they cannot describe the inherent tribal values to the resource. Creating a new category, with its own section will call out the different approach required for assessing TCRs, allowing agencies to more clearly comprehend their mandates. Also, this will serve to fill Natural Resources' purpose, as identified in page 16 of the Initial Statement of Reasons for Regulatory Action, of providing guidance to help agencies determine whether there is a potentially significant impact to a tribal cultural resource, and provide a citation to the statutory definition for additional details. 1-9.3

<u>Tribal Consultation</u>

We are in agreement with the inclusion of the reference to the tribal consultation process in Appendix G. In fact, in our prior comments we suggested adding a checkbox regarding tribal consultation as a trigger for the agency in compliance with the procedural requirements at the applicable juncture in the processing of a development application. Building in consultation language and triggers in Appendix G is essential to ensuring that the individual filling out the form considers the consultation obligation before the type of 1-9.4

environmental document is decided, during all phases of preparation for the technical studies to ensure tribal cultural resources and their tribal values are identified and considered, and during the environmental review process to discuss appropriate avoidance and mitigation measures. Failing to follow the law's requirements when a tribe has requested consultation could result not only in delays for approvals, but in subsequent legal challenges to flawed documents. It is our sincere desire to avoid both outcomes and we urge Natural Resources to develop a checklist that is user-friendly, relevant for its practical use and accessible to all who may use it. We are aware that other industries, such as business groups have advocated for brevity in the checklist. We understand this concern; however, brevity should not outweigh an effective, useful tool for a complex new area of law even if so doing results in a longer checklist.

The first practical issue with the wording and placement of the offered consultation language is that planners are not likely to read it. Pechanga's cultural resource team includes a certified planner who has worked for both the public and private sectors before joining us. She also testified at the hearing hosted by the Natural Resources Agency on these matters. The practical effect of this language is that a planner may read it once and then never look at it again. That is because it is buried in the Evaluation of Environmental Impacts and because it has no call to action associated with it or any requirement or questions that the planner must complete and/or answer. Planners process hundreds of projects under time constraints with few resources and the inability to get up to speed on every nuance of the law. This means that they look for exactly what needs to have action or specific deliverables to complete and the rest gets skipped over. We don't want to see the checklist end up with nicely worded language with good intentions that will simply be ignored. It will end up having little force or effect in terms of achieving notice to planners and applicants that tribal consultation is required under AB 52 and is required in order to answer the questions concerning tribal cultural resources. 1-9.5

We suggest that the consultation element include a "call to action" so that it captures the mandate of initiating consultation at the point in time required by AB 52 (prior to decisions being made about the type of environmental document that should be prepared). This consultation element can be in the form of a question that the planner has to complete and answer. We suggest that this be located in the initial section of the Appendix G Checklist as #11. If a planner is required to not only read a question, but to write in an answer or check a box, they are more likely to pay attention to the procedural requirements. We believe these action items will provide the framework needed to guide planners and consultants through this new process. In addition, by having a call to action in the consultation element, it will establish Natural Resources Agency's goal of avoiding a lead agency's procedural error in CEQA by inadvertently neglecting consultation, which may help prevent costly litigation over project impacts, and delay in construction (Pages 9 and 10 of "Initial Statement of Reasons for Regulatory Action" report). Since we do understand, however, the purpose of originally locating the language in the Evaluation of Environmental Impacts section, we suggest leaving the bulk of the language in that section as #10, but with edits. 1-9.6

One edit is to include the tribal expertise language into this paragraph as well. Without it the phrase "tribal consultation may inform the lead agency's assessment as to whether tribal cultural resources are present" reads with a tone that tribal information is still viewed as something akin to the information from a general member of the public or a consultant. It also adds to the confusion of the role tribal information plays as a basis for meeting the substantial evidence standard in CEQA. Another purpose of AB 52 was to give tribal government information its due place in the CEQA process. The legislature was clear and they acknowledged that tribes were no longer going to be treated like members of the public or like consultants or other stakeholders. Tribal government status is acknowledged, the meaning of the resources to the tribes is acknowledged and tribal expertise and information about the resources is specifically called out as a reason for lead agencies to obtain this information and factor it into their environmental assessments. 1-9.7

Another reason to include the tribal expertise language is because planners are not resource preservation specialists, historians, archaeologists or tribal governments. Planners simply gather their sources of information and use that information to fill out the checklist. Planners rely on the information and technical reports provided during the process. With regard to figuring out whether a tribal cultural resource is present, the major element is the tribal information. Without the reference to tribal expertise there may be a misunderstanding by the planner that tribal information is supplemental or does not have to be the primary place to look. Again, the intention of AB 52 was to change the habitual manner of looking to consultants to make determinations of significance for resources that were valuable to the tribes. The checklist must do everything to reflect this intention the accompanying statutory mandates.

The last two sentences in our paragraph #10 are edits we offer is to aid in understanding what to do when tribal consultation fails to result in agreed upon mitigation measures or does not occur. Pursuant to section 21082.3(e), if there are tribal cultural resources present that have been identified and proven with substantial evidence, but that a California tribal government is not consulting on or where mitigation cannot be agreed upon, the agency is still responsible for identifying and mitigating the resources pursuant to the mitigation sections 21084.3. We would not want agencies or consultants to think they could ignore the resources just because a tribe was not present or that the consultation failed to yield any mitigation. Also, in some circumstances there are some geographic areas in the State where tribes have been driven out and there are no federally recognized tribes or tribes meeting the California Indian tribe definition, but there are published records about the resources and individual tribal people present. The resources in those areas were not intended to be excluded from CEQA. Lastly, an important piece of the AB 52 requirements that we do not want to get lost is if consultation does not result in agreed upon mitigation measures, public agencies shall, when feasible, avoid damaging effects to any tribal cultural resource. So we urge this be added as well. 1-9.8

With respect to the last sentence in Natural Resources' paragraph, we feel that it is misleading in that it suggests these sources of information are optional for a lead agency. In fact, lead agencies and consultants are *required* to request searches of the Sacred Lands File and the California Historical Resources Information System as part of the initial due diligence process. In addition, it is also misleading because the records search process, although related to the consultation process, is not the same, and cannot be substituted for consultation. Moreover, many times a records search does not yield information on tribal cultural resources. When this happens there is often a misunderstanding by consultants and agencies that when there is a negative finding on a records search that one can conclude that no tribal cultural resources exist. However a negative finding does not necessarily mean tribal cultural resources are not present. Not every resource is listed and there are other ways to find out whether resources are present – namely consulting with the tribes, foot surveys, soils reports and other physical studies and tests. If the language were to remain, there would need to be additional language added addressing the inconclusiveness of relying solely on records searches. However, since the language is part of a separate due diligence process of gathering information, we are taking the position that it is not necessary in a paragraph about tribal consultation. We'd like to avoid a lengthy paragraph that is likely to cause more confusion so we are requesting that it be stricken.

<u>New Checkbox under Environmental Factors Potentially Affected</u>

As currently drafted, the factors that are potentially affected by a project do not include tribal cultural resources. AB 52 created a new category of resources that are distinct from cultural resources as currently understood in the world of CEQA. Adding in Tribal Cultural Resources is also another "action item" which

a planner or consultant must consider in preparing the checklist. Not only would a separate checkbox fulfill the mandate of AB 52 by separating out Tribal Cultural Resources, it would also help assist the preparer in the proper consideration of TCRs.

We understand that this could cause confusion if the new proposal is adopted as it relates to the questions under the new proposed Section V. Cultural Resources since TCRs are not separated out from that category, but rather are included under the same category as new question (e). However, we continue to advocate that the category of Tribal Cultural Resources should be a stand-alone category from other resources listed under Cultural Resources because their nature and identification is so vastly different than historic buildings or archaeological sites. We expound on the unique considerations regarding TCRs in our prior comment letter (for example, they are not easily discernable to the naked eye of someone outside of the affiliated community) and refer you to those comments for additional information so as to not repeat them here.

In closing, in virtually every single environmental document the Tribe has reviewed over the past several decades the exact checklist that is offered by the State is utilized and relied upon for the analysis, findings and conclusions in the CEQA documents. To ensure compliance with AB 52, the Appendix G checklist must incorporate all the components of AB 52, including direction on how to ascertain whether there is a tribal cultural resource and ensuring that the tribal consultation component is carried out pursuant to the statute and for the purposes of informing the environmental review and the analysis of impacts to tribal cultural resources. We hope that our comments herein and those discussed in our consultation, including those in the future, will help your agency create a document that provides necessary and appropriate guidance for all stakeholders.

The Tribe would like to thank Natural Resources for offering an opportunity to provide comments on these proposed revisions to Appendix G. We look forward to working with you on future drafts of Appendix G. Thank you for taking the time to review our comments and for meeting with Pechanga. Should you have any questions, please contact Michele Hannah, Deputy General Counsel at (951) 770-6179 or mhannah@pechanga-nsn.gov or Laura Miranda at lmiranda@pechanga-nsn.gov.

Sincerely,

Steve Bodmer
General Counsel

Laura Miranda, Esq.
Attorney for the Pechanga Tribe

cc: Assemblyman Mike Gatto
Thomas Gibson, Deputy Secretary for Natural Resources Agency
Pechanga Tribal Council
Pechanga Cultural Resources Department
Paula Treat, Lobbyist for the Pechanga Tribe

Attachment A
Pechanga Band of Luiseño Indians Comment
4/8/2016

CEQA
Appendix G
Environmental Checklist Form

1. Project title:

_____

2. Lead agency name and address:

_____

_____

……And so forth……

11. Tribal Consultation: Prior to determining what type of environmental document should be undertaken for the Project has tribal consultation been initiated? Yes ☐ OR No ☐
If no, explain why: _____

_____

EVALUATION OF ENVIORNMENTAL IMPACTS:

1) A brief explanation is required for all answers except "No Impact" answers that are adequately supported by the information sources a lead agency cites…..

2) All answers must take account of the whole action involved,….

……And so forth….

10) Since California Native American tribes traditionally and culturally affiliated with a geographic area may have expertise concerning their tribal cultural resources, information submitted through consultation with a California Native American Tribe is to be considered by a lead agency in determining what type of environmental document should be undertaken, identifying tribal cultural resources, determining whether the project may adversely affect tribal cultural resources, and how such effects may be avoided or mitigated. However, regardless of whether tribal consultation is completed or occurs, substantial adverse changes to a tribal cultural resource are to be identified, assessed and mitigated pursuant to Public Resources Code §21084.3. Public agencies shall, when feasible, avoid damaging effects to any tribal cultural resource.

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ENVIRONMENTAL FACTORS POTENTIALLY AFFECTED:

The environmental factors checked below would be potentially affected by this project, involving at least one impact that is a Potentially Significant Impact as indicated by the checklist on the following pages.

☐ Aesthetics	☐ Agricultural Resources	☐ Air Quality
☐ Biological Resources	☐ Cultural Resources	☐ Geology/Soils

....And so on....

☐ Paleontological Resources

☐ Tribal Cultural Resources	☐ Utilities/Service Systems	☐ Mandatory Findings of Significance

SAMPLE QUESTION
Issues:

I. AESTHETICS – Would the project:

...And so on.....

XV. TRANSPORTATION/TRAFFIC – Would the project:.....

XVI. TRIBAL CULTURAL RESOURCES

(**IMPORTANT**: In applying the criteria set forth in subdivision (c) of Section 5024.1 the lead agency **shall** consider the significance of the resource to a California Native American tribe.)

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
1) Would the Project cause a substantial adverse change:				
a) In a site, feature, place, cultural landscape, sacred place, or object, with cultural value to a California Native American Tribe that is included or determined to be eligible for inclusion in the California Register of Historical Resources?	☐	☐	☐	☐

b) In a site, feature, place, cultural landscape, sacred place, or object, with cultural value to a California Native American Tribe that is included in a local register of historical resources?	☐	☐	☐	☐
c) In a resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1?	☐	☐	☐	☐

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
2) Would the Project:				
a) Potentially disturb any human remains, including those interred outside of dedicated cemeteries (see Cal. Public Resources Code, Ch. 1.75, §5097.98 and Health and Safety Code §7050.5(b))?	☐	☐	☐	☐
b) Potentially disturb any resource or place defined in Public Resources Code §5097.9 et seq (Native American Historical, Cultural and Sacred Sites)?	☐	☐	☐	☐

Comment 1-10

Duncan, Lia@CNRA

From: Baugh, Heather@CNRA
Sent: Monday, April 18, 2016 1:17 PM
To: Duncan, Lia@CNRA
Subject: FW: Karuk comments on CEQA guidelines changes pursuant to AB52
Attachments: 16-04-04CalNRAcomm.doc; 16-04-04Karuk-CalNRAsgn.pdf

For print

Heather C. Baugh, Assistant General Counsel
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From: Alex Watts-Tobin [mailto:atobin@karuk.us]
Sent: Monday, April 04, 2016 6:15 PM
To: Baugh, Heather@CNRA
Cc: Gibson, Thomas@CNRA
Subject: Karuk comments on CEQA guidelines changes pursuant to AB52

Dear Heather Baugh,
I was not able to make the meeting about AB52 in Sacramento today, but would very much appreciate it if the Karuk THPO comments would be put into consideration. I have attached a word version and a signed version of the letter. Many thanks for requesting input from Tribes on this important matter. I would like to acknowledge input from Holly Roberson of OPR on this topic.

Sincerely,
Alex Watts-Tobin

ALEX R. WATTS-TOBIN, Ph.D.
THPO-Archaeologist
The Karuk Tribe's Department of Natural Resources

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Vúra yêeshiip kúma súpaah - Have a lovely day

Comment 1-10

Heather Baugh, Office of the General Counsel
California Natural Resources Agency
1416 9th Street 1311
Sacramento, CA 95814

April 4, 2016

Re: CEQA Guidelines updates pursuant to directives in AB52.

Dear Heather Baugh,

The Karuk Tribe THPO has already submitted comments to OPR December 17th, 2015, regarding the changes to CEQA Guidelines Appendix G, specifically concerning the wording for the proposed sheet on Tribal Cultural Resources. These comments were submitted during the OPR process, and the THPO recommended a modified version of option three, based on the wording choices presented. The Karuk THPO is now making a further recommendation. It has emerged from discussions about the legal background that there is a much more important issue at stake. That is, that the CEQA updates project needs to cover more than updates to Appendix G. Currently, OPR has no instructions beyond updating Appendix G and producing an updated lead agency list; the deadline for both of these initiatives is July 1st, 2016. By that time, the law will have been in effect for a year. There is a real danger that once these two projects have been completed, the implementation phase for AB52 would be considered complete.

The THPO would draw attention to comments given in March 2015 to the NAHC, and published on the OPR web site, which pointed out the lack of guidelines, and the resultant dangers to Tribal values. In 1-10.1
the absence of guidelines, lead agencies will develop their own process for complying with AB52, which may or may not be compatible with the spirit and intent of the law. It is likely that conflicting interpretations will be settled in the courtroom. What is needed, is a more practical definition of what counts as a Tribal cultural resource, and an outline of the process for determining the significance of 1-10.2
impacts to them. That is where the rubber meets the road in CEQA projects. It is worth noting that California PRC sec. 15064.5 outlines such a process for historical and archaeological resources. The "historical resources" section appears to refer to the built environment, a limitation which AB52 was designed to address. Tribal cultural resources need their own section in the Public Resources Code.

Accordingly, The Tribe is requesting a directive for a CEQA update that includes guidelines in PRC for practical definitions of Tribal cultural resources and for a process for determining impacts to them.

Sincerely,

Alex R. Watts-Tobin, Ph.D.
THPO / Archaeologist
Karuk Tribe

Comment 1-10

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Karuk Tribe

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Heather Baugh, Office of the General Counsel
California Natural Resources Agency
1416 9th Street 1311
Sacramento, CA 95814

April 4, 2016

Re: CEQA Guidelines updates pursuant to directives in AB52.

Dear Heather Baugh,

The Karuk Tribe THPO has already submitted comments to OPR December 17th, 2015, regarding the changes to CEQA Guidelines Appendix G, specifically concerning the wording for the proposed sheet on Tribal Cultural Resources. These comments were submitted during the OPR process, and the THPO recommended a modified version of option three, based on the wording choices presented. The Karuk THPO is now making a further recommendation. It has emerged from discussions about the legal background that there is a much more important issue at stake. That is, that the CEQA updates project needs to cover more than updates to Appendix G. Currently, OPR has no instructions beyond updating Appendix G and producing an updated lead agency list; the deadline for both of these initiatives is July 1st, 2016. By that time, the law will have been in effect for a year. There is a real danger that once these two projects have been completed, the implementation phase for AB52 would be considered complete.

The THPO would draw attention to comments given in March 2015 to the NAHC, and published on the OPR web site, which pointed out the lack of guidelines, and the resultant dangers to Tribal values. In the absence of guidelines, lead agencies will develop their own process for complying with AB52, which may or may not be compatible with the spirit and intent of the law. It is likely that conflicting interpretations will be settled in the courtroom. What is needed, is a more practical definition of what counts as a Tribal cultural resource, and an outline of the process for determining the significance of impacts to them. That is where the rubber meets the road in CEQA projects. It is worth noting that California PRC sec. 15064.5 outlines such a process for historical and archaeological resources. The "historical resources" section appears to refer to the built environment, a limitation which AB52 was designed to address. Tribal cultural resources need their own section in the Public Resources Code.

Accordingly, The Tribe is requesting a directive for a CEQA update that includes guidelines in PRC for practical definitions of Tribal cultural resources and for a process for determining impacts to them.

Sincerely,

A. Watts Tobin

Alex R. Watts-Tobin, Ph.D.
THPO / Archaeologist
Karuk Tribe

Comment 1-11

Duncan, Lia@CNRA

From:	Baugh, Heather@CNRA
Sent:	Monday, April 18, 2016 1:18 PM
To:	Duncan, Lia@CNRA
Subject:	FW: Santa Ynez Comments on Proposed Appendix G revisions pursuant to AB 52
Attachments:	Santa Ynez AB52 App G comment letter April 2016 w atchs.pdf

For Print

Heather C. Baugh, Assistant General Counsel
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From: CourtCoyle@aol.com [mailto:CourtCoyle@aol.com]
Sent: Monday, April 04, 2016 4:01 PM
To: Baugh, Heather@CNRA
Cc: Roberson, Holly@OPR; john.ferrera@asm.ca.gov; Robinson, Terrie@NAHC; Cynthia.Gomez@GOV.CA.GOV; scohen@santaynezchumash.org; Saunders, Jenan@Parks
Subject: Santa Ynez Comments on Proposed Appendix G revisions pursuant to AB 52

Dear Heather,

Attached please find comments and suggested language on the proposed rulemaking relative to the CEQA Appendix G AB 52 revisions. Please let me know if you have any questions or need clarification. We also look forward to working with your office to set up a date for consultation.

Best regards,
Courtney Coyle
as Attorney for
Santa Ynez Band of Chumash Indians

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Heather Baugh, Assistant General Counsel
The California Natural Resources Agency
Heather.Baugh@RESOURCES.CA.GOV

By EMAIL Only
April 4, 2016

Re: Santa Ynez Band of Chumash Indians Comments on Governor's Office of Planning and Research's proposed Amendments to the CEQA Guidelines, Appendix G, to include consideration of impacts to Tribal Cultural Resources

Dear Ms. Baugh,

The following comments on the Governor's Office of Planning and Research's (OPR's) proposed amendments to the CEQA Guidelines are timely submitted on behalf of the Santa Ynez Band of Chumash Indians (Santa Ynez), a federally-recognized tribe with a reservation in Santa Barbara County. Santa Ynez worked on the passage of AB 52, commented on the draft AB 52 Technical Advisory and has been in consultation with OPR regarding that Advisory, and participated in the OPR-convened tribal workshop and commented on the general update to the CEQA Guidelines (see attached letter dated October 12, 2015) and the proposed AB 52 revisions to Appendix G (see attached letter dated December 18, 2015).

As you know, OPR proposed the Amendments pursuant to the requirements of Assembly Bill 52 (Gatto, 2014), which states in part:

> On or before July 1, 2016, the Office of Planning and Research shall prepare and develop, and the Secretary of the Natural Resources Agency shall certify and adopt, revisions to the guidelines that update Appendix G of Chapter 3 (commencing with Section 15000) of Division 6 of Title 4 of the California Code of regulations to do both of the following:

(a) Separate the consideration of paleontological resources from tribal cultural resources and update the relevant sample questions.

(b) Add consideration of tribal cultural resources with relevant sample questions.

Santa Ynez appreciates the efforts made by OPR in developing the draft revisions, including having one workshop-style meeting and a webinar with tribes. However, the discussions occurred late in the process and additional discussions did not occur after the tribes submitted their comments and before the rulemaking package was sent to Resources. We believe that additional discussions between OPR and the Tribes could have been beneficial as we have not had the opportunity to discuss the rationale behind our prior comments or the proposed language in the package sent by OPR to the Resources Agency. This underscores the desirability of the Resources Agency checking back with tribes after comments are reviewed but before the rulemaking package is finalized. This approach would better meet tribal expectations of meaningful consultation on implementing a bill in which there are substantial tribal interests at stake which are significantly different from the interests of any other government or stakeholder group.

While we understand that Appendix G is to serve as a sample, in practice, it serves as the template for lead agency CEQA checklists statewide. It is also critical to the successful implementation of AB 52 for the checklist to be as accurate and helpful out of the gate as is possible. The rulemaking itself acknowledges that its effect will be to assist lead agencies with compliance with the new requirements in CEQA regarding consultation with tribes and the analysis of potential impacts to Tribal Cultural Resources (TCRs). For these reasons, we respectfully request the following revisions to the proposed language for both a Consultation Narrative and the Checklist Questions.

I. Consultation Narrative

The proposal adds a statement regarding tribal consultation to the beginning of Appendix G under EVALUATION OF ENVIRONMENTAL IMPACTS which provides guidance on completing the checklist and environmental analysis. While we appreciate this approach, we have concerns about both the proposed location for this statement as well as its specific wording.

First, regarding location, the EVALUATION OF ENVIRONMENTAL IMPACTS section is often not included in a lead agency's checklist or considered relative to a specific project as it mainly relates to preparation of an Initial Study or environmental document *in general* and not for the 1-11.1

substantive information or questions that are addressed in the Checklist for *a specific project*. This important information then could easily be overlooked by lead agencies and their EIR preparers thereby subverting the intent of its inclusion. For this reason, a narrative may more properly belong at the start of the Environmental Checklist Form after Project Title, Lead Agency name and address, other public agencies whose approval is required, etc., as shown below. **Santa Ynez stands by our comments in our letter dated December 18, 2015, that this new section or one or more consultation prompts should be added as number 11 at the bottom of the first page of the Checklist.** This would better meet the intent of AB 52.

Second, we respectfully request that the Resources Agency consider the attachment to our December 15, 2015, letter which included approaches for the consultation narrative or prompts. We suggested adding one or more prompts on the first page of the Checklist Form such as "Tribal Consultation is required pursuant to SB 18, AB 52 or other law or policy;" "Tribal Consultation or responsible and trustee agency input is required"; and "Tribal Consultation has begun pursuant to Public Resources Code section 21080.3.1. If not, do not check box, and briefly state why such consultation has not begun." Such prompts would be similar in form to existing prompts on other relevant issues in the Checklist. Also, adding a specific reference to SB 18 consultation with tribes would be wholly appropriate as no specific revisions to Appendix G have been made to reflect the requirements of SB 18 (Burton) which interfaces with the CEQA process whenever General or Specific Plans are adopted or amended. 1-11.2

If the Resources Agency wants to retain the OPR-proposed consultation narrative approach in some fashion, it could do so in conjunction with the prompts immediately above. We also would respectfully request the following specific wording revisions, or something similar:

> **Add a statement regarding tribal consultation at the end of page 1, CEQA APPENDIX G; ENVIRONMENTAL CHECKLIST FORM:**
>
> **11. Tribal consultation, if requested as provided in Public Resources Code Section 21080.3.1, must begin prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report for a project. Information provided through tribal consultation may inform the lead agency's assessment as to the type of environmental review necessary, whether tribal cultural resources are present, whether those tribal cultural resources are significant, the significance of any potential impacts to such resources, alternatives to the project or the appropriate measures for preservation or mitigation.**

As part of its resource identification efforts, lead agencies must seek the input of tribes and request information from the Native American Heritage Commission regarding its Sacred Lands File, per Public Resources Code sections 5097. and 5097.94, the California Historical Information System administered by the California Office of Historic Preservation and local registries while understanding that many resources have not been placed on any register further highlighting the need to consult with affiliated tribes during identification efforts. 1-11.3

The rationale for the revisions in the paragraph above includes the following:

1) The bill was very clear in listing some of the expected topics for consultation and that they be reflected Public Resources Code section 21080.3.2. To help successfully roll out AB 52, particularly in light of the fact that there is no other guidance document from the state, Appendix G should clearly reference those topics. For example, AB 52 states that tribes are to be consulted on the type of environmental document to be prepared. Yet, this critical step is absent from the currently proposed language. In the field, we are already seeing that lead agencies are skipping this step and only coming to tribes *after* they have already decided the kind of environmental document to use. Without specific reference to this requirement, tribes will continue to not be engaged early in the CEQA process or provide input at the earliest point of project design and alternatives, which was a major impetus behind the bill.

Similarly, that tribes be actively involved in the development of culturally-appropriate mitigation measures was a major reason for the bill: for too long the only approach taken to cultural resources were archaeological, scientific and academic. This resulted in mitigation that was often of little or no benefit to tribes even though it was resources of concern to tribes that were being impacted. Adding reference in Appendix G for the need for tribes to inform mitigation measures for impacts to TCRs is very important to tribes and can be easily integrated into both Appendix G and the existing CEQA process framework as demonstrated above.

2) We suggest referring to the register checks of the Native American Heritage Commission (NAHC), California Historical Resources Information System (CHRIS) and local registries as *one part* of the lead agencies TCR identification efforts. The *other major part* of that effort being consultation with culturally-affiliated tribes on both the tribal knowledge about the resource *and* the completeness and accuracy of the information on the registers. For a variety of reasons, resources of concern to tribes are currently underrepresented in the CHRIS system and local registries and those that are listed may only have been assessed in the past by archaeologists relative to archaeological values. Moreover, we have seen that some lead agencies do not have qualified staff to make or interpret registry inquiries. Thus, we also added 1-11.4

language at the end of the narrative regarding the potential limitations of registry searches to identify resources of concern to tribes. The revised language is necessary to set the table for productive consultation.

Moreover, we have revised the proposed language from "lead agencies *may* request information" to "lead agencies *must seek the input of tribes and* request information" because the word *may* in the proposal could be read by some as indicating it is an *optional* step when in reality doing register checks is a *necessary* step, as is consultation with affiliated tribes, for resource identification efforts and to support that effort with substantial evidence in the record as was described by the planner for Pechanga at the April 4, 2016, public hearing. Please also know the critical issue of what constitutes substantial evidence and a fair argument for TCRs has arisen relative to the draft AB 52 Technical Advisory. 1-11.5

3) The Resources Agency may also consider breaking the Consultation Narrative into two paragraphs as shown above: one relating to potential consultation topics and the second expanding on TCR identification methods to promote clarity. Alternatively, if a separate TCR section approach is taken in the Checklist Questions, it may be appropriate to add the Consultation Narrative pieces to that new section. However, we would need to see how that approach would work. 1-11.6

II. Checklist Questions

OPR has also proposed changes to the language of section V, the Appendix G Checklist Questions, to include TCRs. **Santa Ynez stands by the proposed Modified Alternative 3 language for the Checklist questions as attached to our letter dated December 15, 2015. This approach would better meet the intent of AB 52.**

Our concerns about the revised OPR-proposed language for the Checklist Questions includes the following:

1) TCRs should be fully separated out from historical and archaeological resources for several reasons. 1-11.7

First, full separation meets the intent of the bill which was to recognize TCRs as their own category. Second, TCRs are different from historical and archaeological resources as they pivot on the affiliated community to help identify them and express the cultural value of these places to those communities. Third, they presently occupy a much smaller number within the CHRIS and local registry systems which underscores the need for consulting with tribes. Fourth,

separation will help avoid confusion regarding whether legal precedent and standards for historic buildings necessarily applies to TCRs, an issue that has been identified in the review of OPR's draft AB 52 Technical Advisory. Finally, the rulemaking package itself acknowledged that an objective is to "clearly indicate to lead agencies that tribal cultural resources are a type of cultural resource that may be distinct from historical and archaeological resources." (Notice of Proposed Rulemaking, page 5). We believe the format in our prior proposal better meets all five of these aspects.

2) Separating Paleontological Resources should not be wholly deferred to the larger Appendix G update process

1-11.8

We appreciate that the proposal acknowledges that Paleontological Resource questions should be moved from the Cultural Resources section. However, we disagree that this can only be achieved via the larger, general CEQA update. We believe that the potentially extended timeframe for the general CEQA update would leave Paleontological Resources with Cultural Resources for too long, thereby creating its own confusion and not meeting the intent of the bill.

We respectfully suggest that an interim step could be to move Paleontology to its own section in Appendix G and possibly use some of the questions that OPR has already received from the paleontological community. Then, any necessary further and final adjustments to Paleontology could be done as part of the general CEQA update in collaboration with the professional paleontological community. Lead agencies will be updating their Checklists anyway to accommodate the AB 52 revisions and could also do the interim revisions for Paleontology at the same time. This step-wise process would also better meet the intent of AB 52.

3) Mandatory Resource section overly passive reference to tribes and tribal values 1-11.9

In the proposed mandatory determination section (proposed CULTURAL RESOURCES V.(e)(1)), tribes and tribal value appear passive. As worded, it's about cultural value to the tribe but there is no reference to *the evidence supporting that to come from tribes themselves* wherever possible. The notion of tribes using their own voice to identify and interpret the resources of cultural value to them is a critical aspect of AB 52's definition of TCRs as well as tribal self-determination and sovereignty. Without acknowledging such direct tribal input in some fashion in Appendix G, it is likely that the current untenable situation where consultants and EIR preparers essentially speak on behalf of tribes without tribal authorization or apply the more familiar archaeological or historical resource approaches to TCRs will continue in contravention of AB 52.

4) Discretionary Resource section needs restructuring 1-11.10

The proposed discretionary determination section places tribal input *at the end* of the section, whereas we strongly believe that tribal input should be located *at the start* of this section to cue agencies into the fact that talking to the tribes should be at the start, not the end, of that exercise so that the tribal values inform the whole determination as well as the contours of substantial evidence to support that determination. If this section is not restructured, it is likely that Lead Agencies will approach their task in a similar linear fashion, and that tribes will continue to be brought into the process late - after determinations are made - which will continue suboptimal practices that result in misunderstanding, project delay and litigation.

5) Lack of Reference to NAHC sections of Public Resources Code 1-11.11

The proposal does make a correction to the characterization of tribal cemeteries as dedicated, not formal, which we appreciate. However, the proposal does not fold in references to other relevant NAHC sections of the Public Resources Code, thus lead agencies and their consultants may remain under the misimpression they can "CEQA their way out of" those requirements, which is not the case. This includes references to Public Resources Code section 5097.9 (Native American Historical, Cultural and Sacred Sites Act, actions proposed on public lands) and Public Resources Code 5097.98 ("Human remains of a Native American may be an inhumation or cremation, and in any state of decomposition or skeletal completeness" and "Any items associated with the human remains that are placed or buried with the Native American human remains are to be treated in the same manner as the remains"). We respectfully request these prompts be folded into the questions as the issue of culturally-appropriate treatment of ancestral human remains and grave goods continues to often be unaddressed in environmental documents or handled inappropriately in mitigation measures (i.e., consultants and lead agencies focus only on archaeological, scientific or academic value of the remains and grave goods) resulting in delay and controversy during project construction when a tribe or Most Likely Descendent objects to the treatment of their ancestors.

A concise reference to those requirements, as outlined in our December 18, 2015, letter, could help promote the timely consideration of such resources relative to projects. The failure to do so in recent years regarding several high-profile projects (Padre Dam, UCSD Chancellor's House, Feather River West Levee Project, etc.) has become the subject of litigation as well as administrative actions before the NAHC and perhaps could have been avoided if these relevant statutes had been flagged and considered during the CEQA process.

For each of these reasons, we respectfully request the Resources Agency consider the specific format and wording suggestions as proposed here and in the attachment to our December letter (which we have again attached here for your convenience) and would respectfully request that language improvements consistent with these be a subject of government-to-government consultation. We have found that especially in very complex and technical discussions relative to tribal interests such as those at issue here, face-to-face meetings can result in enhanced understanding and more satisfying results for both the state and tribes.

III. Process Moving Forward

We appreciate the efforts the Resources Agency is making to integrate AB 52 into CEQA and offer our comments in a constructive manner and in the spirit of cooperation. Santa Ynez respectfully requests government-to-government consultation with the Resources Agency on the Appendix G revisions and a commitment that any revised draft language will be circulated after tribal comments are received and tribal consultations have occurred. While it may not be standard rulemaking practice within the agency, we believe such consultative efforts would bring forward the best final package.

Please know that successfully integrating tribes and tribal values into CEQA is a prime objective for Santa Ynez. Accordingly, we renew our prior comment that the draft AB 52 Technical Advisory be revised as indicated in our prior correspondences and communications with OPR and respectfully request that the draft Technical Advisory also be a subject of the government-to-government consultation requested above as the Appendix G revisions and Technical Advisory go hand-in-hand. Finally, we believe that the state should seriously consider development of a stand-alone practical guidance handbook on AB 52 to aid all practitioners.

We stand ready, willing and able to assist the state in seeing that the implementation of AB 52 gets off on the right foot for all stakeholders. Thank you in advance for your courtesy and cooperation.

Very truly yours,

Courtney Ann Coyle
Attorney at Law

Attachments: 2
cc:

Sam Cohen, Santa Ynez, Government Affairs and Legal Officer
John Ferrera, Assemblyman Gatto, Chief of Staff
Cynthia Gomez, Governor's Tribal Advisor
Terrie Robinson, NAHC, General Counsel
Jenan Saunders, OHP, Deputy SHPO
Holly Roberson, OPR, Land Use Counsel

Attachment 1

COURTNEY ANN COYLE
ATTORNEY AT LAW

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Christopher Calfee, Senior Counsel, OPR
CEQA.Guidelines@resources.ca.gov
By email only

October 12, 2015

Re: Santa Ynez Band of Chumash Indians Comments on the Proposed Updates to the CEQA Guidelines (Preliminary Discussion Draft), dated August 11, 2015

Dear Mr. Calfee:

These comments on the Proposed Updates to the CEQA Guidelines (Preliminary Discussion Draft), dated August 11, 2015 (Update), are timely submitted by this office on behalf of the Santa Ynez Band of Chumash Indians (Tribe), a federally-recognized Tribe with a reservation in Santa Barbara County.

Introduction

While the entire proposed Update is of interest, for the purposes of this comment letter, we will focus on those revisions that may be of particular concern to the Tribe, and possibly, other tribes in the state. Our comments generally will follow the format of the Table of Contents for the Update. Further, given the apparent lack of tribal involvement in the proposed updates, it may be appropriate for OPR, possibly with the support of the Native American Heritage Commission (NAHC) and the State Office of Historic Preservation (OHP), to outreach and consult with tribes in this important effort, the first since the late 1990s which was before most tribes were even actively involved in policy discussions on CEQA.

At the outset, we must note that many of the proposed revisions reflect items unsuccessfully sought by self-proclaimed "CEQA reformers," such as business and renewable energy sectors, over the last several legislative sessions. This includes proposed revisions relative to: standards, the Checklist, aesthetics, remedies/remand, baseline, deferred mitigation, Initial Study, project benefits and emergency exemptions.

On the other hand, items that other constituent groups, such and environmental, planning and tribal entities, sought to revise, such as those relative to bias and inclusion in the environmental process and tribal cultural resources are unaddressed. (See prior comments at <http://opr.ca.gov/docs/2014_CEQA_Guidelines_INDEX.pdf> including those from Santa Ynez and my office). Thus, the overall package does not appear to reflect the needs of all stakeholder groups or be a truly balanced approach to the Update.

Finally, the Update must be careful not to go beyond the current statute and existing law and into activist territory. Similarly, the Update does not sufficiently acknowledge that some of the cases it cites as authority for certain proposed revisions are highly fact dependent and that it may not be possible, or wise, to extrapolate from the specific facts in one matter to a rule of general applicability that might create inconsistencies elsewhere with CEQA.

Efficiency Improvements

The Update refers to updates to the Sample Environmental Checklist in Appendix G as an "Efficiency Improvement." (Update page 7). In some cases that statement may be true; but in others it may not be accurate. For example, the updates to Appendix G that will be made pursuant to AB 52 are mandated by statute and are procedural and substantive changes as discussed below in detail.

Using Regulatory Standards in CEQA

The first criterion of the proposed language regarding regulatory standards appears to require that a standard be adopted by some formal mechanism. Yet, the Update does not demonstrate how this proposal is consistent with project specific standards, which are permitted under CEQA. Compare Update pages 14 and 19 with CEQA Guidelines section 15064(d); *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059; and Appendix G reference (Update page 45) that the Environmental Checklist Form may be tailored to meet individual agencies' needs *and project circumstances*.

This can be of particular concern to tribes as impacts to tribal cultural resources and resources of other tribal concern often have not been adequately considered in the past through adopted standards that factored in tribal perspectives and needs. One example, is a County noise standard regarding worship that addresses worship that occurs within a building, such as a church; yet many tribal religious practices (worship) occur outdoors and not in a building with its noise attenuating qualities of a roof, walls, etc. Consideration of those tribal sensitive receptors would benefit from project specific standards that would more fully consider noise impacts to all receptors. Yet, the Guidelines revisions do not adequately address project specific standards.

Also, we would suggest the new language on page 15 be revised from "the lead agency **should** explain" to "the lead agency **shall** explain" so that an interested public can be provided the agency's analytical route and for it to be consistent with the language at Update page 18, section 15064.7(d), "a public agency **shall** explain how the particular requirements of the environmental standard will avoid or reduce project impacts . . ."

Updating the Environmental Checklist (Proposed Amendments to Appendix G)

Format Concerns

In general, while we understand the desire to consolidate and remove or revise redundant or outdated questions, in many cases no specific rationale for the proposed changes is provided to substantiate how the current organization is unworkable. (Update, page 39). In fact, we are concerned that the reorganization and consolidation in some instances may result in *fewer* investigations and *less* attention being paid to certain resource categories, some of which are of particular significance to tribes.

Aesthetics

Just because an issue may be difficult does not mean it should be ignored or discarded. For the following reasons, we believe the proposed revisions to this section go too far, beyond CEQA caselaw and existing Guidelines, and need significant narrowing and reworking.

First, aesthetics is not simply an urban issue, as implied by the proposed revisions and the case law cited therein for support (Update page 40), but can also be a suburban and rural issue that may require different solutions: management of an urban infill development may trigger very different analysis than a utility scale renewable project within a Traditional Cultural Property (TCP) or Cultural Landscape. Also, most unincorporated areas do not have Design Review Boards. The Update does not make these distinctions. These proposed revisions appear to be an unwarranted expansion of the facts in one case (*Bowman* - regarding whether a senior residential and mixed-use project in an urban area was "too big")[1] giving rise to a general rule that will lead to implementation problems.

Second, aesthetics issues form an important part of historic resource analysis under both federal and state guidance. See, for example, the National Historic Preservation Act (NHPA) references to National Register of Historic Places criteria regarding setting, feeling and association. Yet, the proposed revisions do not address the intersection of aesthetics/visual analysis with cultural/historic resource analysis. For many California tribes, views and viewsheds are significant aspects of important cultural sites, sacred places and ceremonial or religious practices. Also, views can be important aspects for historical structures and landscapes. For clarity, it may be appropriate to add a question to the aesthetics section related to historic and cultural resources or an aesthetics question to the cultural resources section.[2]

Third, the proposal does not appear consistent with CEQA itself. See, for example, Appendix G reference (Update page 46) which asks to describe in general terms the setting and project surroundings; Public Resources Code section 21001(b) (CEQA's purposes include taking all

[1] Note however, that *Bowman* itself recognized that, " . . . there may be situations where it is unclear whether an aesthetic impact like the one alleged here arises in a "particularly sensitive" context (Guidelines section 15300.2) where it could be considered environmentally significant . . . "

[2] The *Bowman* court also observed that, "In contrast, the project here is not located in an environmentally sensitive area and it does not implicate any historical or scenic resources."

action necessary to provide Californians with enjoyment of aesthetic, natural, scenic and historic environmental qualities and freedom from excessive noise); and Guidelines section 15064(b) which states that the significance of an activity may vary with the setting: an activity which may not be significant in an urban area may be significant in a rural area.[3]

Finally, we concur with retaining light and glare references in the Appendix G questions at Update page 51. However, we would also suggest adding a reference to shading as a potential effect at a new Appendix G Aesthetics I(d): "**Create a new source of shading that could adversely affect the area.**" Apart from impacts to communities in general, shading can be a particularly significant issue for tribal cultural resources: shade can affect the cultural integrity of many kinds of tribal resources such as equinox or calendar locations or other cultural features that require direct sunlight to activate them such as medicine rocks.

Air Quality

We support the addition of dust and haze to this category: sometimes such effects can damage tribal cultural use of certain areas and culturally-significant views. However, please explain how the proposed revision regarding removing the term "objectionable odors" and adding "frequent and substantial emissions for a substantial duration" is consistent with California law regarding nuisances. Also, does this revision adequately address sensitive receptors, such as schools, hospitals, the elderly or infirm, parkland, etc., or environmental justice considerations including for tribal reservation communities?

Cultural Resources

Appendix G Environmental Checklist Form (Update page 46) should add a Number 11 narrative question "Tribal consultation or responsible and trustee agencies input is required pursuant to SB 18 or AB 52 or other law or policy." This is a necessary addition as we have observed that many agencies fail to even notify the NAHC of projects and even more agencies do not believe that OHP plays any role in CEQA. Integrating the input of these agencies and of tribes into the CEQA process also will be a critical issue for successful implementation of AB 52.

As you know, AB 52 directed the development of new questions for Tribal Cultural Resources. To avoid confusion, we propose a revised structure for considering the many different kinds of cultural resources: separating the resources into type may assist planners and others in applying the correct criteria, guidance and precedent for each kind of cultural resource, their significance and mitigation. It may be necessary in addition to (or in lieu of) cross referencing authority, to concisely list the *kinds* of resources, sites, places at issue for *each category* to stimulate the most comprehensive investigation possible.

Further, the Update notes that current Appendix F relating to Energy Efficiency has often gone neglected during environmental review as it was seen as separate from the Checklist and may

[3] In fact, the *Bowman* court itself observed that, "To conclude that replacement of a virgin hillside with a housing project constitutes a significant visual impact says little about the environmental significance of the appearance of a building in an area that is already highly developed."

have been forgotten or ignored by environmental reviewers. (Update pages 42, 76-77). To remedy this, the proposed revision to Guidelines section 15126.2(b) makes specific reference to Appendix F. We are concerned that tribal cultural resource consideration and the proposed AB 52 Technical Advisory could suffer a similar fate as Appendix F if the Checklist Questions insufficiently cross reference and trigger consideration of other standards, statutes and guidance.

Hydrology and Water Quality

OPR proposes to change the question to whether a project would substantially *decrease* groundwater supplies (Update page 59). While the revision from "deplete" to "decrease" appears appropriate, no definition of "substantially" or examples are provided. As noted under the Water Supply Guideline discussion below, groundwater is an important resource to many tribes for support of tribal community and economic water needs (many tribes are not on municipal water), as a cultural resource (springs and other water sources can be sacred places), and to otherwise support native flora and fauna and environmental setting.

Moreover, the Update does not appear to factor in project-related water quantity and quality issues that may be exacerbated by climate change or draught. Finally, the Update discusses conservation efforts for energy: a similar question related to water conservation should be added to the Hydrology and Water Quality section. The Update does not indicate that such additions would be inconsistent with the "new regime" governing groundwater.

Open Space, Managed Resources and Working Landscapes

This proposed new resource category is of particular concern to tribes because many tribal cultural resources may be found in these areas, either on or below the surface of these lands (Update pages 62-65). It is well documented that areas of biological sensitivity are often also culturally significant to tribes. See for example, *The Desert Smells Like Rain: A Naturalist in Papago Indian Country,* (1987) Gary Paul Nabhan. Accordingly, we recommend that: Open Space, Managed Resources and Working Landscapes XI(a) be amended to "Adversely impact open space for the preservation of natural **and cultural** resources, including, but not limited to: . . . **(iv) areas of cultural resource sensitivity, cultural conservation easements or cultural landscapes."** For similar reasons, XI(c) should be amended to: "Adversely affect **natural or developed** open spaces used for outdoor recreation . . . to a degree that substantial physical deterioration **of the use or the environment** would occur?" There are differences in the methods to manage these kinds of places and uses. This could be coordinated with the comments below in the Conservation Easements as Mitigation section.

The Update also needs to recognize that Geology, Soils and Recreation are not just suburban or rural issues, as may be implied by the proposed revisions, but may also be urban issues requiring specific attention to soil stability, acres of parkland per number of residents or canyon preservation, etc. Yet, lumping these three areas exclusively into the Open Space, Managed Resources and Working Landscapes category may cause such issues to be neglected and not be analyzed by appropriate, professional staff. Further, it is also worth noting that some geologic formations and soils are of cultural significance to tribes for clay, ochre and tool/personal items

material sourcing. Retaining the Geology/Soils as a standalone section may also be a reasonable place to fold in the new and relocated paleontology questions. It would also make sense to retain specific references to earthquake mapping, liquefaction, landslides and soil erosion either in a retained Geology and Soils section or add them to the revised Hazards and Hazardous Materials section VII(h).

Regarding paleontology, the Update does not indicate what if any outreach has been made to paleontology professionals to develop new and relocated paleontology questions pursuant to AB 52's direction. We recommend working with the state's major natural history museums (including the San Diego Natural History Museum, the California Academy of Sciences, etc.) and colleges/universities with strong paleontology departments (such as University of California, Berkeley, etc.). As motioned above, it may make more sense also to place the paleontology questions in a Geology and Soils section rather than in this section.

Wildfire

Section XVII Wildfire is a proposed new section (Update pages 69-70). Many tribes and sensitive tribal cultural resources are located in somewhat to very remote areas that are prone to wildfire so this new section is of interest to us. Please explain how a classification of "very high" fire hazard severity zones was selected for the question and how this categorization relates to California's reservations. Also, please consider amending WILDFIRE XVIII(d) to "Expose people, **structures or sensitive natural and cultural resources** to significant risks . . ."

Remedies and Remand

The Update's discussion of proposed revisions to CEQA Guidelines section 15234 (Update, page 72) does not fully reference Public Resources Code section 21005(a) which also lists "noncompliance with substantive requirements of this division" as a prejudicial abuse of discretion by a lead agency. Further, Public Resources Code section 21168.5 goes on to state that abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.

The Update also does not explain how existing Public Resources Code section 21168.9 (Public Agency Actions; Noncompliance with Division; Court Order; Content; Restrictions) is insufficient to address the issue of remedies and remand which courts already routinely do. The case law cited in the Update in many instances is very fact specific, i.e., the *Poet, LLC* court allowing the continued operation of a regulation aimed at achieving a higher level of environmental protection even though it found the agency had failed to fully comply with CEQA - a rather uncommon fact pattern - and may not be appropriate to expand to a general rule of broad applicability as proposed by the new Guidelines section.

We also believe that the text of proposed Section 15234 may inadvertently shift the burden of justifying the order on petitioners (which would be unfair including that petitioners are not often privy to all aspects of a project) and the courts to fashion exceedingly detailed and complex orders (which could put further demands on already overburdened state courts).

As to specific language revisions, if OPR continues to move forward with this unnecessary addition to the Guidelines, we would recommend the word "could" be inserted into Section 15234(a)(2) "suspend any project activities that **could** preclude consideration and implementation of mitigation measures and alternatives analysis . . ."

We also find the proposed language for *res judicata* and scope of analysis relative to other portions of the environmental document to be inappropriate: until the new analysis is performed it often cannot be said with any degree of certainty that the mitigation measures and alternatives analysis will not need to be revisited or revised in some fashion.

This new Guideline would not improve CEQA litigation practice and in fact appears to be a recipe for increased disagreements and litigation including over the contents of orders. It should be struck or significantly revised.

Water Supply

The update proposes amendments to CEQA Guideline 15144. (Update pages 81-88). While additional guidance in this increasingly important issue area is warranted, the revisions make it difficult for a nonexpert in this area to understand what kinds of water supply analysis apply to what kinds of projects.

Also, Subdivision (f)(1) should include reference to analyzing the impacts of extraction for all supply locations for the proposed water supply. We have found that groundwater extraction outside the project area can cause impacts to local groundwater source supplies and resources far from the project area. Also, there can be impacts from trucking that water supply many tens of miles or piping the water to a project, or having to treat that water, that should be analyzed.

Finally, there are some who believe that reclaimed water - and not pristine groundwater - should be used wherever possible, particularly for construction purposes outside of culturally-significant areas or landscapes.

Baseline

We support the proposed revision to section 15125(a) stating the purpose of the environmental setting requirement is to give the public and decision makers the most accurate and understandable picture practically possible of the project's likely near-term and long-term impacts (Update page 94).

However, tribes often encounter arguments that a project location was selected in whole or in part because the area was "previously disturbed or degraded." This view does not reflect the reality that despite surface disturbance, often properties of cultural significance to tribes may still have ancestral burials, including intact resources, deeper below the disturbed surface or may otherwise still be used by tribes either physically or metaphysically despite the intrusions or disturbances. This can be an issue, for example, below the plowline or under properties that were developed decades ago without significant landform alteration (i.e., houses without basements, business buildings without below ground parking, etc.) Moreover, given California's history against tribes combined with the prevalence of pothunting, many cultural resources

have endured some level of disturbance, yet retain significant cultural value to tribes. These properties and resources should not be so readily dismissed.

For these reasons, we disagree with the notion that baselines should not consider conditions that were illegal or unpermitted - particularly for burial grounds, sacred places and tribal cultural resources. Moreover, an applicant should not receive the benefit of any advance disturbance or demolition work that might be done directly by it or indirectly sanctioned by it by turning a blind eye, to "clear" the property of sensitive biological or cultural resources. The source of the disturbance should be considered just like any other factor in determining the baseline(s) for a project. Any caselaw to the contrary should be carefully reviewed and considered on its specific facts and not necessarily be expanded to rules of general applicability.

This approach would be more consistent with the stated purpose of the revision and the existing Guidelines section 15370(c) which states that mitigation can include rectifying an impact by repairing, rehabilitating, or restoring the impacted environment. This also has implications for cumulative impacts analysis and mitigation, an area of CEQA that is often underanalyzed in environmental documents. In many cases, tribes would like to see the opportunity for repair, rehabilitation and restoration of culturally-sensitive resources and areas truly given a chance, instead of disturbance being deemed acceptable or irreversible in all situations.

Deferral of Mitigation Details/Joint NEPA/CEQA Documents

We are taking these two issues together since they overlap in meaningful ways.

First, we note that most of the cases cited in the Update relate to deferred mitigation of biological resources. Deferred mitigation is of particular concern to tribes because of the unique nature of some tribal cultural resources being under the ground and not always visible during surveys done as part of environmental review - either before or after project approval. One person's "detail" can be another's "deal point."

A best practice is to have all cultural resource reports, including archaeological surveys, ethnographic reports, tribal consultation on them, etc., completed prior to the draft environmental document being circulated. This best practice happens infrequently, however, and often significance conclusions and mitigation are already improperly deferred to after publication of the DEIR or even after project approval, at a time when methods of avoidance, redesign and alternatives analysis can be severely limited due to irreversible project momentum.

Second, the interface between how CEQA and federal NEPA and NHPA processes are often coordinated has left a lot to be desired from a tribal point of view. Often times, a lead agency will improperly defer tribal consultation on resources, impacts and mitigation to the federal process which frequently comes later, after CEQA approval. This sequencing problem has lead to many cultural resources of tribal concern, including TCPs and Cultural Landscapes being left out of the CEQA process.

Further, we observe that existing section 15222 regarding preparation of joint environmental documents is mostly observed in the breach: many lead agencies do not coordinate with their federal counterparts and do not prepare joint documents if the federal process is to occur later in time. The existing and proposed Guideline language (Update page 138-139) do little to strengthen the coordination process, continue the use of "should" instead of "shall" language and reference no consequences for noncompliance. Moreover, this kind of deferral does not appreciate significant differences between state and federal law, including that California has more detailed and tribally-focused treatments for ancestral burials and grave goods. The recently drafted Memorandum of Understanding between OPR and the White House referenced at Update page 138 (*NEPA and CEQA: Integrating Federal and State Environmental Reviews*, February 2014), while welcome, does not address these specific concerns.

Given this history in California, we are highly suspect of the proposed revisions to section 15126.4 allowing deferral of "details" when it may be "impractical" or "infeasible" to fashion them at the time of project approval (Update page 98). We believe that the revised Guideline would be exploited and stretched to further disadvantage tribes and tribal cultural resource consideration in the CEQA process and leave the only remedy being the filing of a CEQA lawsuit by the tribes. Without specific guidance from OPR in this complex area, we envision significant misuse and increased potential for additional conflict - things that AB 52 sought to fix.

Accordingly, OPR should also consider revising Section 15126.4(a)(B)(1) to: " . . . or where a regulatory agency other than the lead agency will issue a permit for a project that will impose mitigation requirement **consistent with, and at least as stringent as, state law** provided that the lead agency has: fully evaluated the significance of the environmental impact and explained why, **supported by substantial evidence,** it is not feasible or practical to formulate specific mitigation at the time of project approval." OPR should also consider adding language or discussion from *Communities for a Better Environment* and other cases regarding what might constitute *improper deferral* such as reliance on **nonexclusive, undefined or untested mitigation or mitigation of unknown efficacy**.

It may also be worth noting that section 15126.4(b) concerns Mitigation Measures Related to Impacts on Historical Resources. Currently, 15126.4(b)(3) addresses archaeological resources. It may be beneficial to introduce some guidance for Tribal Cultural Resources in a new subdivision to avoid confusion with mitigation for archaeological resources. Such guidance should be developed in consultation with tribes, NAHC and OHP. Also, please add the following citations for further clarity in the discussion: as to built historic resources, *League for Protection of Oakland's Architectural and Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896 (in developing mitigation measures, demolition or destruction of an historical resource requires more than reporting or a commemorative plaque to offset the impact); as to archaeological resources, *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), as to certain tribal cultural resources, *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).

Responses to Comments/Citations in Environmental Documents

We are taking these two issues together since they overlap in meaningful ways.

First, the citation to lengthy or obscure reports is a two-way street (Update pages 104 and 126). Oftentimes in cultural resource reports, preparers will list in the References or Bibliography section reports or information that is not included or that is difficult for the tribes to obtain. Many times the EIR preparers will not even make the reports available to tribes even upon request. Moreover, references to such reports are often general, lacking pinpoint cites, making it difficult to find the source of the alleged information used as support in the report. The proposed revisions do not clearly recognize this side of the issue.

Second, we support putting more of CEQA on the web. However, many tribes remain off the grid. Some do not have electric power, computers or reliable internet. To the extent that the revisions to section 15087 (Public Review of Draft EIR) and 15088 (Evaluation of and Response to Comments) could be read that documents will only be available electronically, only those comments submitted electronically will count and responses will only be issued electronically creates a major participation obstacle to many tribes - in contravention of AB 52's purpose - and an environmental justice concern that OPR would be wise to address.

Pre-Approval Agreements

Because of the nature of tribal cultural resources detailed above in the deferred mitigation section, pre-approval agreements can also pose particular problems for tribes. If an agency cannot obtain access to a property (such as private property with a potentially unwilling seller) prior to approval of a project under CEQA, they may approve a project design without first having performed necessary surveys, which may prove to be incompatible with cultural resources present but unknown or unverified prior to project approval. Once a project is approved and a property surveyed only after acquisition, it can make alternative and design considerations to avoid "late" discovered cultural resources more challenging. This particular issue would benefit from guidance, particularly where state agency funding for design is contingent upon approval (or conceptual approval) of a project at the local level. This also has implications for the implementation of Governor's Executive Order B-10-11 (strengthening state agency communication and collaboration with California tribes).

Initial Study

We would strongly object to applicants and/or their consultants preparing the Initial Study as proposed by the new section 15063(a)(4). This is because applicants and their consultants have

an inherent bias in favor of minimizing the level of environmental review, impacts and the mitigation associated with their projects. See, for example, *Citizens for CERES v. Superior Court* (2013) 217 Cal.App.4th 889 (interests between developer and agency not aligned before project approval). An Initial Study is the critical first look at how a project will be reviewed and progress under CEQA and lead agencies have an obligation to exercise their direct independent judgment on the level of environmental review required for a project, including the determination of whether a Fair Argument exists.

Moreover, in implementing AB 52, lead agencies will need to consult with tribes in their service area on the kind of environmental document to be used. Instead of outsourcing this function to the applicant or its consultants, lead agencies must develop their own relationships with tribes under AB 52.

Further, no new authority is cited in the Update (pages 116-119) to justify this significant change to allow applicants to exercise that level of influence and control over how the environmental process would proceed. Far from being "a technical improvement" or "increasing consistency", this revision would expand a current bias in EIR preparation to other environmental documents and unfairly influence the very decision of whether an EIR should be prepared. Accordingly, we find that agencies that control the preparation of all environmental documents and contract directly with EIR preparers, in general, have less applicant bias in their reports, more defensible environmental documents and better reflect tribal issues and points of view.

Time Limits for Negative Declarations

We recommend that the proposed language (Update page 135) be modified to read that, "lead agency procedures may provide that the 180-day time limit may be extended once for a period of not more than 90 days upon consent of the lead agency and the applicant **who shall not unreasonably withhold consent.**" Such language could help provide the necessary time for agencies to complete consultation with tribes pursuant to AB 52.

Project Benefits

We believe that CEQA already sufficiently allows for project benefits to be described such that the proposed revision is not necessary. However, if OPR continues to proceed with a revision (Update page 136), it must require that any statement of project benefit must clearly indicate whether the alleged benefits are those deemed by the lead agency or the applicant as those two entities may have different perspectives on the project's benefits. See, for example, *Citizens for CERES* discussion above.

Using the Emergency Exemption

It is our experience that the Emergency Exemption is already overly and improperly used for situations that are not an emergency as defined in by CEQA, situations in which there is no immediate endangerment of the public. In some circumstances, this has resulted in impacts to tribal cultural resources that could have otherwise been avoided through more robust

environmental review and consultation with tribes and has produced at least one lawsuit against a state lead agency by a tribe. See, for example, *Fort Mojave Indian Tribe v. Department of Toxic Substances Control et al* (2005), Sacramento Superior Court, 05CS00437. It also lead to the introduction and passage through the legislature of SB 1395 (Ducheny) in 2006 (requiring notification and consultation with tribes on CEQA-exempt projects that might affect a native sacred place).

If the proposed revision were to take effect (Update pages 140-141), we predict applicants and lead agencies will be further emboldened to stretch the exemption and take what look like "shortcuts", that will result in more environmental harm to resources of concern to tribes. According to the court, the *CalBeach* facts involved "rapid erosion" and a bluff that could collapse "within a few weeks." On the other hand, by their nature, longer-term or planned projects undertaken for the purpose of preventing or mitigating an emergency, usually have time built in for robust environmental review and at least consultation with tribes and should remain outside of emergency exemptions. Again, this is an area of CEQA where caselaw should not be expanded from its facts.

If OPR continues over objections to revise the Guideline, we suggest there be more clarity about what is meant by "a reasonable amount of planning." Also, section 15269(c)(i) should be revised to, "if the anticipated period of time to conduct and environmental review of such a long-term project would create a **substantial** risk to public health, safety or welfare . . ." Without such changes, and that the use of this exemption must be supported by substantial evidence, we will likely see more tribal-agency conflicts regarding treatment of tribal cultural resources which can be often found along the coast, rivers, lagoons and other waterways, places that are often the subject of "emergency" exemptions.

Conservation Easements as Mitigation

Generally, given the provisions of SB 18 which clarify that tribes can hold conservation easements and AB 52 which states that conservation easements may be an acceptable treatment for tribal cultural resources, it may make sense for any explanatory language or discussion relative to this Guideline to include these references.

Specific to the proposed revisions (Update 144-145), it may also be appropriate to include more detailed discussion regarding no net loss. Meaning, such off-site mitigation would not *avoid* the significant impact resulting from the permanent loss of prime agricultural lands on a project, but, but because such acquisition of the offsite conservation easement would *minimize* and *substantially lessen* that impact it should be required. Also, the discussion should emphasize that the *Masonite* case dealt specifically with agricultural easements: it may be that tribal cultural sites may be less fungible than many agricultural lands.

Interface with the draft OPR AB 52 Technical Advisory, Tribal Consultation and Confidentiality

Santa Ynez appreciates being included in the CEQA/AB 52 Focus Group and will continue to participate in that process. The Tribe also believes that our comments demonstrate that OPR should take the time to consult broadly with tribes to determine *what other additions and*

revisions to the CEQA Guidelines and Update process might be warranted in light of the enactment of both SB 18 and AB 52. Simply issuing an AB 52 Technical Advisory alone may be insufficient to ensure that the Guidelines as a whole are in conformance with the law and best practices. Accordingly, we reserve the right to comment on those additional revisions.

One additional issue area for clarification in the Update is confidentiality. We suggest adding to the discussion of existing Guideline section 15120(d) reference to Public Resources Code section 21082.3(c)(2)(3) which states that this subdivision does not affect or alter the application of Government Code Section 6254(r) (confidentiality of records of Native American graves, cemeteries and sacred places and records of places, features and objects maintained by or in the possession of state or local agencies); Government Code Section 6254.10 (confidentiality of records relating to archaeological site information and reports in the possession of staff or local agencies including those obtained through a consultation process); or CEQA Guidelines section 15120(d)(confidentiality of locations of archaeological sites and sacred lands in an EIR). 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 . . . " A reference to *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200 (OPR counsels local agencies to avoid including specific cultural place location information within CEQA documents or staff reports available at public hearings) should also be considered.

Conclusion

We hope these comments are helpful to OPR and look forward to working with OPR on improving the CEQA process for both tribes and tribal cultural resources. Santa Ynez is available to discuss any aspect of these comments with you or other OPR staff. Finally, please put my office and that of Sam Cohen, Governmental Affairs & Legal Officer at Santa Ynez, on the list to receive all future notices regarding the CEQA Guidelines Update, AB 52 implementation, and the AB 52 Technical Advisory.

Thank you for your courtesy and consideration.

Very truly yours,

Courtney Ann Coyle
Attorney at Law

cc:
John Ferrero, Chief of Staff, Assemblyman Gatto
Terrie Robinson, General Counsel, Native American Heritage Commission
Jenan Saunders, Deputy State Historic Preservation Officer, Office of Historic Preservation
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Attachment 2

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December 18, 2015

Re: Santa Ynez Band of Chumash Indians, Comments on Discussion Draft of Proposed Changes to Appendix G of the CEQA Guidelines Incorporating Tribal Cultural Resources pursuant to Assembly Bill 52 (Gatto)(November 17, 2015)

Dear Ms. Roberson,

These comments on the OPR-proposed CEQA Guidelines Appendix G, Tribal Cultural Resources (TCRs), are timely submitted by this office on behalf of the Santa Ynez Band of Chumash Indians, a federally-recognized tribe.

Introduction

We believe a modified Alterative 3 that incorporates the NAHC-recommended question on human remains best meets the legislative intent and specific statutory language of AB 52. It also serves to provide necessary context for successful bill implementation that will hopefully overcome some of the deficiencies regarding AB 52 we have seen in the field. We also briefly explain our view on why OPR-proposed Alternatives 1 and 2 don't work as well and should not be pursued further.

Alternative 3 - Support with Modifications

Alternative 3, as modified, best meets the directives of the bill to adopt revisions to Appendix G of the CEQA Guidelines to: a) separate the consideration of paleontological resources from TCRs, b) update the relevant sample questions for paleontological resources, and c) add consideration of TCRs to Appendix G with relevant sample questions. We discuss our views on directives a) and b) below in the section on Paleontology and Geology. We offer the modified Alternative 3 as an attachment with marginal notes to help explain aspects of the redline.

We believe that the bill instructed OPR to put TCRs into their own resource category and not to subsume it within the current Cultural Resources category. Introducing a stand-alone TCR category correctly distances TCR analysis from archaeology and archaeologists which all too

often has not occurred, resulting in only scientific perspectives being applied to resources of tribal concern and, in many cases, leading to their loss of cultural integrity or destruction. Separating the categories clearly signals that *other than* an archaeological approach will be required for TCR avoidance, identification, assessment and mitigation while leaving nontribal and scientific archaeology, many historical buildings and other nontribal cultural properties within the existing Cultural Resource categories and expertise. This is a critical issue for Santa Ynez: that tribes must be looked to to provide the information considered by lead agencies regarding historic properties of concern to tribes.

We also support having some form of an introductory section to the new TCR category and appreciate OPR's proposing this structure. We believe appropriate modification to the introduction will further set a useful frame and provide necessary context for successful bill implementation which should focus on the information and substantial evidence that tribes can uniquely provide regarding TCRs. For these reasons, we also support the inclusion of a prompt on consultation at the start of the Checklist Form as outlined below to underscore that consultation must occur very early in project scoping and even before the agency has come to preliminary conclusions regarding the potentially significant effects of a project in the checklist questions.

We also support adding more than one TCR question for several reasons, including that the legislation referenced questions - plural - thereby indicating the understanding that this complex area warrants being broken into more than one question. We also believe that bringing in questions from the Native American Historical, Cultural and Sacred Sites Act (Sacred Sites Act), which also must be informed by tribal input, helps to group relevant issues that must be informed by tribal views into one area in Appendix G. Taken together, this approach remains streamlined but also would provide more meaningful guidance to those who use Appendix G and must address this new resource category.

Finally, we respectfully ask that OPR consider adding two more questions to the attached, modified Alternative 3 Appendix G TCR section:

First addition, "Would the Project: . . . (2)(c) Potentially interfere with the free expression or exercise of Native American religion as proscribed in Public Resources Code §5097.9 et seq (Native American Historical, Cultural and Sacred Sites)?" This addition would be consistent with the citation above to the Sacred Sites Act and provide an important prompt for an aspect of access to sensitive cultural sites that may otherwise be overlooked by users of Appendix G.

Second addition, "Would the Project: . . . (2)(d) potentially effect any site, location or object included in the Native American Heritage Commission's Sacred Lands File?" This addition would prompt an inquiry that should already be done by qualified professionals as part of project scoping and to help document the potential for impact and the agency's analytical route.

Alternative 1 - Do not support

We believe that the approach taken by Alternative 1, though having the benefit of being concise, does not follow the directives of the bill or provide the necessary context for successful implementation of the statute.

First, this alternative does not put TCRs into their own resource category and therefore does not meet the direction of AB 52 to separate the questions, as discussed in more detail below.

Second, AB 52 introduces both new procedural and substantive aspects into CEQA, neither of which are called out in this alternative. Looking at this question, as written, will do little to guide a planner, tribe, applicant or consultant on what is expected during the CEQA process. The question's cross-referenced legal citation is a particular concern relative to those practitioners who may not have legal training. A very real danger of this approach is that issues related to TCRs will not get scoped early in the CEQA process - if ever - and therefore may not appear in the environmental documents which can then result in the very lack of inclusion, potential conflict and project delay that AB 52 sought to prevent.

We also respectfully disagree with the representative from PG&E who testified at the December 11, 2015, public workshop that the CEQA checklist should not serve an educational role. PG&E's view is flatly inapposite to the basic purposes of CEQA to promote public involvement, transparency and disclosure. (See, for example, Public Resources Code section 21000 and CEQA Guidelines section 15002(a)).

Moreover, Appendix G, while only a template, is certainly looked to by many as the standard for CEQA compliance - the notion of "if it's important or we have to do it, it will be in the checklist". The location of the TCR inquiry bundled with Cultural Resources and the brevity of the sole question provided by this alternative could be perceived as sending the message that a business-as-usual approach will satisfy AB 52 - which will not be the case.

Finally, many tribes have historically not engaged in the CEQA process for a variety of reasons, one of which is feeling that there was no place for them to get engaged. Alternative 1 fails to provide a visible place where tribes can clearly see how they and their unique concerns can now be integrated into the CEQA process - therefore this alternative does not meet a key objective of the bill - increased tribal involvement in CEQA.

Alternative 2 - Do not support

For many of the same reasons cited immediately above, we do not support this alternative. However, we do support the NAHC-recommended question on human remains found currently only in this alternative, believe it should be included in whatever option(s) OPR may send to the Resources Agency and have folded it into a modified Alternative 3 which we support as described above.

Paleontology and Geology

AB 52 also directs that Paleontology be separated from Tribal Cultural Resources and that the paleontological questions be updated. We have always interpreted that to mean that Paleontology should be provided its own resource section, separate from both Tribal Cultural Resources and Cultural Resources. This is supported by the fact that paleontological resources by definition are generally not cultural resources and as such require their own qualified reviewers. We would also support moving the question regarding unique geological features into the Geological Resource Section of the Checklist for the same reasons. Those paleontological or geologic resources that are also TCRs can have their cultural values, if any, analyzed in the new TRC section as features, sites or cultural landscapes, as well as having their scientific values considered by qualified scientific reviewers under a new Paleontological Resources and revised Geologic Resources section.

In our view, retaining the same paleontological question, keeping it under Cultural Resources and just putting a different letter in front of it does meet the requirements of AB 52 outlined above. Thus, it appears advisable for OPR to promptly outreach to both the paleontological and geological communities in California regarding the appropriate placement in Appendix G for these two resource types and the specific and appropriate new wording for those particular questions.

Need for Tribal Consultation Prompt and Checkbox

Another key issue for Santa Ynez unaddressed by the OPR-proposed alternatives is the need to highlight the timing for and procedural requirement for consultation between lead agencies and tribes. What we find with some frequency working in cultural preservation is that the NAHC and tribes often are not noticed of projects, or treated as trustee or governmental agencies, respectively, within the environmental documents. Having a specific prompt that calls out this procedural step would be beneficial to all parties.

In addition to adding a box for TCRs in the Checklist Form in the introductory section ENVIRONMENTAL FACTORS POTENTIALLY AFFECTED, we would also support adding a question at the end of the start of the Checklist Form to flag tribal (and possibly trustee agency) consultation for lead agencies, planners, consultants and tribes. Our view is that the information from consultation should flow from the earliest point in the CEQA scoping process to ensure timely identification and consideration of these resources - even before the Initial Study checklist is completed.

We therefore respectfully suggest in the section before the actual checklist questions at the end of the first page of the form and before the ENVIRONMENTAL FACTORS POTENTIALLY AFFECTED section to have a prompt such as "Tribal consultation is required pursuant to SB 18 or AB 52 or other law or policy," "Tribal consultation or responsible and trustee agencies input is required", or "Tribal Consultation has begun pursuant to Public Resources Code § 21080.3.1. If

not, do not check box, and briefly state why such consultation has not begun". Such a flag would be consistent with the comments Santa Ynez submitted on OPR's Proposed Updates to the CEQA Guidelines (Preliminary Discussion Draft) in its comment letter dated October 12, 2015, which we incorporate by reference here in its entirety. It would also be consistent with the Checklist format in general and serve to highlight this key aspect of AB 52 (the government-to-government relationship) in a more effective manner than any of the three OPR alternatives.

Conclusion

We appreciate OPR's efforts to try and engage tribes in the Appendix G revision process required by AB 52 and look forward to continuing consultation regarding this important effort. Please know that the attached is our best effort given the time constraints of the review period and the timing of the tribal leaders' meeting just two days before the comment deadline.

Also, know that there are other crucial aspects of AB 52 implementation that are outside of the Appendix G revision effort but are of vital importance to tribes. Santa Ynez sincerely hopes that OPR's recent tribal engagement is just the beginning of a constructive dialogue between OPR and tribes on successful implementation of AB 52 which should also include meaningful revisions to the draft AB 52 Technical Advisory and perhaps the development of a stand-alone practical guidance handbook on AB 52 and reach beyond into the ongoing general CEQA Guidelines update.

Should OPR have any questions regarding this submission, please do not hesitate to contact me.

Sincerely yours,

Courtney Ann Coyle
Attorney at Law

Attachment

cc:

Sam Cohen, Santa Ynez, Government Affairs and Legal Officer
John Ferrera, Assemblyman Gatto, Chief of Staff
Terrie Robinson, NAHC, General Counsel
Heather Baugh, Resources Agency, Assistant General Counsel

Modified Alternative 3
(To be considered in conjunction with Santa Ynez's December 18, 2015, comment letter)

TRIBAL CULTURAL RESOURCES.

Information submitted through consultation with a California Native American Tribe ~~that has requested such consultation may~~ is to be considered by ~~assist~~ a lead agency in determining what type of environmental document should be undertaken, identifying tribal cultural resources, determining whether the project may adversely affect tribal cultural resources, and ~~if so,~~ how such effects may be avoided or mitigated. ~~Whether or not consultation has been requested,~~ However, regardless of whether tribal consultation occurs or is completed, substantial adverse changes to a tribal cultural resource are to be identified, assessed and mitigated. Public agencies shall, when feasible, avoid damaging effects to any tribal cultural resource.

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
1) Would the project cause a substantial adverse change in a site, feature, place, cultural landscape, sacred place, or object, with cultural value to a California Native American Tribe, which is any of the following:				
a) Included or determined to be eligible for inclusion in the California Register of Historical Resources?				
b) Included in a local register of historical resources?				
~~c) Determined by the lead agency, in its discretion and supported by substantial evidence, to be a tribal cultural resource, after applying the criteria in Public Resources Code §5024.1(c), and considering the Significance of the resource to a California Native American Tribe?~~				

Comment [CAC1]: Language parallels that in AB 52's confidentiality section.

Comment [CAC2]: Struck because lead agencies may proactively initiate consultation: Overall focus should be on the information obtained not the process point.

Comment [CAC3]: Struck "may assist" as in our experience it could be misread as meaning that lead agencies may therefore in their discretion ignore the input.

Comment [CAC4]: These steps are necessary prerequisites BEFORE getting to adverse affect and must also benefit from tribal consultation.

Comment [CAC5]: See comment above regarding proactive consultation not being prohibited by AB 52.

Comment [CAC6]: Avoidance first reflects bill language and is a critical touchstone for bill implementation.

c) After considering the significance of the resource to a California Native American Tribe and applying the criteria in Public Resources Code §5024.1(c), a resource is determined by the lead agency, in its discretion and supported by substantial evidence, to be a tribal cultural resource?

2) Would the Project:

a) Potentially disturb any human remains, including those interred outside of dedicated cemeteries (see Cal. Public Resources Code, Ch. 1.75, §5097.98 and Health and Safety Code §7050.5(b))?

b) Potentially disturb any resource or place defined in Public Resources Code §5097.9 et seq (Native American Historical, Cultural and Sacred Sites)?

Comment [CAC7]: Reorganized this question to move up significance to tribe as the lead agency needs to consider tribal values PRIOR TO applying the criteria. If it remains in the order in the OPR-proposed draft, could be misinterpreted by some users approaching the question in an overly linear fashion that puts criteria determination ahead of soliciting and considering tribal values. Note that this is an existing concern under current CEQA practice that should be remedied.

Comment [CAC8]: This should be last step in the lead agencies thought process so it is moved to end of question.

Comment [CAC9]: Needed second question prompt due to wording of first question prompt above.

Comment [CAC10]: ADD: NAHC's recommendation imported from Alternative 2.

Comment [CAC11]: ADD: Places c han burials addressed immediately abov d be considered. Relates to NAHC statutes regarding prohibition on severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property.

Tab I

CALIFORNIA natural resources AGENCY

EDMUND G. BROWN JR., *Governor*
JOHN LAIRD, *Secretary for Natural Resources*

June 6, 2016

NOTICE OF MODIFICATIONS TO TEXT OF PROPOSED REGULATIONS

Pursuant to the requirements of Government Code section 11346.8 (c), and section 44 of Title 1 of the California Code of Regulations, the California Natural Resources Agency (Agency) is providing notice of changes made to proposed Appendix G of the California Environmental Quality Act Guidelines, which was the subject of a regulatory hearing on April 4, 2016. These changes are in response to comments received regarding the proposed regulation. Specifically, the Agency is focused on making the consideration of tribal consultation obligations more "action" based. Planners and others who use the checklist will have to describe what steps have been taken, consistent with Assembly Bill 52 (Gatto, 2014), to engage in tribal consultation, and document their compliance for their various administrative records. Further, a Tribal Cultural Resources section has been added as a stand-alone section to the checklist.

The Agency will continue clean-up language in the Cultural Resources section dealing with dedicated cemeteries, as the public largely appreciated this revision. However, it will not be moving that subsection of the Cultural Resources section to the new Tribal Cultural Resources Section because it may apply more broadly to other types of cultural cemeteries.

If you have any comments regarding the proposed changes, the Agency will accept written comments between **June 6, 2016 and June 21, 2016**. All written comments must be submitted no later than 5:00 p.m. on June 21, 2016, at ceqa.guidelines@resources.ca.gov.

Though email is preferred, comments will also be accepted by regular mail if submitted to:

Heather Baugh
The California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

All written comments received by June 21, 2016, which pertain to the indicated changes will be reviewed and responded to by the Agency's staff as part of the compilation of the rulemaking file. **Please limit your comments to the modifications to the text.**

Tab J

Modified Proposed Language for Tribal cultural resources update to Appendix G

1. Add a statement ~~regarding tribal consultation~~ to the ~~beginning of Appendix G under EVALUATION OF ENVIRONMENTAL IMPACTS~~Environmental Checklist Form at the beginning of Appendix G, which ~~provides guidance on completing the checklist and environmental analysis~~provides analysis general description and cover sheet for a proposed project:

[...]

11. Have California Native American Tribes traditionally and culturally affiliated with the project area requested consultation pursuant to Public Resources Code section 21080.3.1? If so, has consultation begun?

Note: Conducting consultation early in the CEQA process allows tribal governments, public lead agencies, and project proponents to discuss the level of environmental review, identify and address potential adverse impacts to tribal cultural resources, and to reduce the potential for delay and conflict in the environmental review process. Information is also available from the Native American Heritage Commission's Sacred Lands File per Public Resources Code sections 5097.9 and 5097.94 and the California Historical Resources Information System administered by the California Office of Historic Preservation. Please also note that Public Resources Code section 21082.3(c) contains provisions specific to confidentiality.

~~**10. Tribal consultation, if requested as provided in Public Resources Code Section 21080.3.1, must begin prior to release of a negative declaration, mitigated negative declaration, or environmental impact report for a project. Information provided through tribal consultation may inform the lead agency's assessment as to whether tribal cultural resources are present, and the significance of any potential impacts to such resources. Prior to beginning consultation, lead agencies may request information from the Native American Heritage Commission regarding its Sacred Lands File, per Public Resources Code sections 5097.9 and 5097.94, as well as the California Historical Resources Information System administered by the California Office of Historic Preservation**~~.

V. CULTURAL RESOURCES

Would the project:

a) Cause a substantial adverse change in the significance of a historical resource as defined in § 15064.5?
b) Cause a substantial adverse change in the significance of an archaeological resource pursuant to § ~~1~~5064.5?
c) Directly or indirectly destroy a unique paleontological resource or site or unique geologic feature?
d) Disturb any human remains, including those interred outside of ~~formal~~ **dedicated** cemeteries?

~~**e)Cause a substantial adverse change in the significance of a tribal cultural resource, defined in Public Resources Code section 21074 as either:**~~

~~**1)a site, feature, place, cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American Tribe, that is listed or eligible for listing on the California Register of Historical Resources, or on a local register of historical resources as defined in Public Resources Code section 5020.1(k), or**~~

~~2)1) a resource determined by a lead agency, in its discretion and supported by substantial evidence, to be significant according to the historical register criteria in Public Resources Code section 5024.1 (c), and considering the significance of the resource to a California Native American tribe~~

XVII. ~~UTILITIES AND SERVICE SYSTEMS~~ TRIBAL CULTURAL RESOURCES

	Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
a) Would the project cause a substantial adverse change in the significance of a Tribal Cultural Resource, defined in Public Resources Code section 21074 as either a site, feature, place, cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American Tribe, and that is:	☐	☐	☐	☐

- ☐ Listed or eligible for listing in the California Register of Historical Resources, or in a local register of historical resources as defined in Public Resources Code section 5020.1(k), or

- ☐ A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Public Resources Code Section 5024.1. In applying the criteria set forth in subdivision (c) of Public Resource Code Section 5024.1 for the purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.

XVIII. ~~MANDATORY FINDINGS OF SIGNIFICANCE~~ UTILITIES AND SERVICE SYSTEMS

XIX MANDATORY FINDINGS OF SIGNICIANCE

Authority: Public Resources Code sections 21083 and 21083.09

Reference: Public Resources Code sections 21073, 21074, 21080.3.1, 21080.3.2,

21082.3, 21084.2 and 21084.3.

Tab K

CALIFORNIA natural resources AGENCY

EDMUND G. BROWN JR., Governor
JOHN LAIRD, Secretary for Natural Resources

STATEMENT OF 15-DAY NOTICE OF AVAILABILITY OF MODIFIED TEXT (Section 44 of Title 1 of the California Code of Regulations)

On June 1, 2016, the California Natural Resources Agency mailed the modified proposed text of the regulations along with a notice of the public comment period to those persons specified in subsections (a)(1) through (4) of Section 44 of Title 1 of the California Code of Regulations. The public comment period for the modified text was from June 6, 2016 through June 21, 2016.

Dated: July 26, 2016

Heather Baugh
Assistant General Counsel

1416 Ninth Street, Suite 1311, Sacramento, CA 95814 Ph. 916.653.5656 Fax 916.653.8102 http://resources.ca.gov

Baldwin Hills Conservancy • California Coastal Commission • California Coastal Conservancy • California Conservation Corps • California Tahoe Conservancy
Coachella Valley Mountains Conservancy • Colorado River Board of California • Delta Protection Commission • Delta Stewardship Council • Department of Boating & Waterways • Department of Conservation
Department of Fish & Game • Department of Forestry & Fire Protection • Department of Parks & Recreation • Department of Resources Recycling and Recovery • Department of Water Resources
Energy Resources, Conservation & Development Commission • Native American Heritage Commission • Sacramento-San Joaquin Delta Conservancy • San Diego River Conservancy
San Francisco Bay Conservation & Development Commission • San Gabriel & Lower Los Angeles Rivers & Mountains Conservancy • San Joaquin River Conservancy
Santa Monica Mountains Conservancy • Sierra Nevada Conservancy • State Lands Commission • Wildlife Conservation Board

Tab L

STATE OF CALIFORNIA — DEPARTMENT OF FINANCE

ECONOMIC AND FISCAL IMPACT STATEMENT (REGULATIONS AND ORDERS)

STD. 399 (REV. 12/2013)

Instructions and Code Citations: SAM Section 6601-6616

ECONOMIC IMPACT STATEMENT

DEPARTMENT NAME	CONTACT PERSON	EMAIL ADDRESS	TELEPHONE NUMBER
California Natural Resources Agency	Heather Baugh	heather.baugh@resour	916-653-8152

DESCRIPTIVE TITLE FROM NOTICE REGISTER OR FORM 400	NOTICE FILE NUMBER
14 California Code of Regulation Appendix G	Z

A. ESTIMATED PRIVATE SECTOR COST IMPACTS *Include calculations and assumptions in the rulemaking record.*

1. Check the appropriate box(es) below to indicate whether this regulation:

- ☐ a. Impacts business and/or employees
- ☐ b. Impacts small businesses
- ☐ c. Impacts jobs or occupations
- ☐ d. Impacts California competitiveness
- ☐ e. Imposes reporting requirements
- ☐ f. Imposes prescriptive instead of performance
- ☐ g. Impacts individuals
- ☒ h. None of the above (Explain below): The proposed changes are to an optional sample checklist. Please see attached.

If any box in Items 1 a through g is checked, complete this Economic Impact Statement.
If box in Item 1.h. is checked, complete the Fiscal Impact Statement as appropriate.

2. The California Natural Resources Agency (Agency/Department) estimates that the economic impact of this regulation (which includes the fiscal impact) is:

- ☒ Below $10 million
- ☐ Between $10 and $25 million
- ☐ Between $25 and $50 million
- ☐ Over $50 million *[If the economic impact is over $50 million, agencies are required to submit a Standardized Regulatory Impact Assessment as specified in Government Code Section 11346.3(c)]*

3. Enter the total number of businesses impacted: 0

Describe the types of businesses (Include nonprofits): N/A

Enter the number or percentage of total businesses impacted that are small businesses: N/A

4. Enter the number of businesses that will be created: N/A eliminated: N/A

Explain: The proposed changes are to a sample checklist that is optional.

5. Indicate the geographic extent of impacts: ☒ Statewide ☐ Local or regional (List areas):

6. Enter the number of jobs created: N/A and eliminated: N/A

Describe the types of jobs or occupations impacted: N/A

7. Will the regulation affect the ability of California businesses to compete with other states by making it more costly to produce goods or services here? ☐ YES ☒ NO

If YES, explain briefly:

Instructions and Code Citations:
SAM Section 6601-6616

ECONOMIC IMPACT STATEMENT (CONTINUED)

B. ESTIMATED COSTS *Include calculations and assumptions in the rulemaking record.*

1. What are the total statewide dollar costs that businesses and individuals may incur to comply with this regulation over its lifetime? $ 0

   a. Initial costs for a small business: $ 0 Annual ongoing costs: $ 0 Years: 0

   b. Initial costs for a typical business: $ 0 Annual ongoing costs: $ 0 Years: 0

   c. Initial costs for an individual: $ 0 Annual ongoing costs: $ 0 Years: 0

   d. Describe other economic costs that may occur: 0

   The proposed changes are to a sample checklist that is optional. There are no required costs not otherwise created by statute.

2. If multiple industries are impacted, enter the share of total costs for each industry: n/a

   n/a

3. If the regulation imposes reporting requirements, enter the annual costs a typical business may incur to comply with these requirements. *Include the dollar costs to do programming, record keeping, reporting, and other paperwork, whether or not the paperwork must be submitted.* $ 0

4. Will this regulation directly impact housing costs? ☐ YES ☒ NO

   If YES, enter the annual dollar cost per housing unit: $ 0

   Number of units:

5. Are there comparable Federal regulations? ☐ YES ☒ NO

   Explain the need for State regulation given the existence or absence of Federal regulations: Please see attachment.

   Enter any additional costs to businesses and/or individuals that may be due to State - Federal differences: $ 0

C. ESTIMATED BENEFITS *Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.*

1. Briefly summarize the benefits of the regulation, which may include among others, the health and welfare of California residents, worker safety and the State's environment: n/a

2. Are the benefits the result of: ☐ specific statutory requirements, or ☐ goals developed by the agency based on broad statutory authority?

   Explain: Please see attachment.

3. What are the total statewide benefits from this regulation over its lifetime? $ 0

4. Briefly describe any expansion of businesses currently doing business within the State of California that would result from this regulation:

   n/a

D. ALTERNATIVES TO THE REGULATION *Include calculations and assumptions in the rulemaking record. Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.*

1. List alternatives considered and describe them below. If no alternatives were considered, explain why not: Please see attachment.

Instructions and Code Citations:
SAM Section 6601-6616

ECONOMIC IMPACT STATEMENT (CONTINUED)

2. Summarize the total statewide costs and benefits from this regulation and each alternative considered:

Regulation: Benefit: $ 0 Cost: $ 0

Alternative 1: Benefit: $ 0 Cost: $ 0

Alternative 2: Benefit: $ 0 Cost: $ 0

3. Briefly discuss any quantification issues that are relevant to a comparison of estimated costs and benefits for this regulation or alternatives:

4. Rulemaking law requires agencies to consider performance standards as an alternative, if a regulation mandates the use of specific technologies or equipment, or prescribes specific actions or procedures. Were performance standards considered to lower compliance costs? ☐ YES ☒ NO

Explain: Please see attachment.

E. MAJOR REGULATIONS *Include calculations and assumptions in the rulemaking record.*

California Environmental Protection Agency (Cal/EPA) boards, offices and departments are required to submit the following (per Health and Safety Code section 57005). Otherwise, skip to E4.

1. Will the estimated costs of this regulation to California business enterprises **exceed $10 million?** ☐ YES ☒ NO

If YES, complete E2. and E3
If NO, skip to E4

2. Briefly describe each alternative, or combination of alternatives, for which a cost-effectiveness analysis was performed:

Alternative 1:

Alternative 2:

(Attach additional pages for other alternatives)

3. For the regulation, and each alternative just described, enter the estimated total cost and overall cost-effectiveness ratio:

Regulation: Total Cost $ Cost-effectiveness ratio: $

Alternative 1: Total Cost $ Cost-effectiveness ratio: $

Alternative 2: Total Cost $ Cost-effectiveness ratio: $

4. Will the regulation subject to OAL review have an estimated economic impact to business enterprises and individuals located in or doing business in California exceeding $50 million in any 12-month period between the date the major regulation is estimated to be filed with the Secretary of State through12 months after the major regulation is estimated to be fully implemented?

☐ YES ☒ NO

If YES, agencies are required to submit a Standardized Regulatory Impact Assessment (SRIA) as specified in Government Code Section 11346.3(c) and to include the SRIA in the Initial Statement of Reasons.

5. Briefly describe the following:

The increase or decrease of investment in the State: n/a

The incentive for innovation in products, materials or processes: n/a

The benefits of the regulations, including, but not limited to, benefits to the health, safety, and welfare of California residents, worker safety, and the state's environment and quality of life, among any other benefits identified by the agency: n/a

STATE OF CALIFORNIA — DEPARTMENT OF FINANCE

ECONOMIC AND FISCAL IMPACT STATEMENT
(REGULATIONS AND ORDERS)

STD. 399 (REV. 12/2013)

Instructions and Code Citations:
SAM Section 6601-6616

FISCAL IMPACT STATEMENT

A. FISCAL EFFECT ON LOCAL GOVERNMENT *Indicate appropriate boxes 1 through 6 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.*

☐ 1. Additional expenditures in the current State Fiscal Year which are reimbursable by the State. (Approximate) (Pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code).

$ _____

☐ a. Funding provided in _____

Budget Act of _____ or Chapter _____, Statutes of _____

☐ b. Funding will be requested in the Governor's Budget Act of _____

Fiscal Year: _____

☐ 2. Additional expenditures in the current State Fiscal Year which are NOT reimbursable by the State. (Approximate) (Pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code).

$ _____

Check reason(s) this regulation is not reimbursable and provide the appropriate information:

☐ a. Implements the Federal mandate contained in _____

☐ b. Implements the court mandate set forth by the _____ Court.

Case of: _____ vs. _____

☐ c. Implements a mandate of the people of this State expressed in their approval of Proposition No. _____

Date of Election: _____

☐ d. Issued only in response to a specific request from affected local entity(s).

Local entity(s) affected: _____

☐ e. Will be fully financed from the fees, revenue, etc. from: _____

Authorized by Section: _____ of the _____ Code;

☐ f. Provides for savings to each affected unit of local government which will, at a minimum, offset any additional costs to each;

☐ g. Creates, eliminates, or changes the penalty for a new crime or infraction contained in _____

☐ 3. Annual Savings. (approximate)

$ _____

☒ 4. No additional costs or savings. This regulation makes only technical, non-substantive or clarifying changes to current law regulations.

☒ 5. No fiscal impact exists. This regulation does not affect any local entity or program.

☒ 6. Other. Explain Please see attachment.

Instructions and Code Citations:
SAM Section 6601-6616

FISCAL IMPACT STATEMENT (CONTINUED)

B. FISCAL EFFECT ON STATE GOVERNMENT *Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.*

☐ 1. Additional expenditures in the current State Fiscal Year. (Approximate)

$ _____

It is anticipated that State agencies will:

☐ a. Absorb these additional costs within their existing budgets and resources.

☐ b. Increase the currently authorized budget level for the _____ Fiscal Year

☐ 2. Savings in the current State Fiscal Year. (Approximate)

$ _____

☒ 3. No fiscal impact exists. This regulation does not affect any State agency or program.

☒ 4. Other. Explain Please see attachment.

C. FISCAL EFFECT ON FEDERAL FUNDING OF STATE PROGRAMS *Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.*

☐ 1. Additional expenditures in the current State Fiscal Year. (Approximate)

$ _____

☐ 2. Savings in the current State Fiscal Year. (Approximate)

$ _____

☒ 3. No fiscal impact exists. This regulation does not affect any federally funded State agency or program.

☒ 4. Other. Explain Please see attachment.

FISCAL OFFICER SIGNATURE	DATE
	2/1/16

The signature attests that the agency has completed the STD. 399 according to the instructions in SAM sections 6601-6616, and understands the impacts of the proposed rulemaking. State boards, offices, or departments not under an Agency Secretary must have the form signed by the highest ranking official in the organization.

AGENCY SECRETARY	DATE
	2/1/16

Finance approval and signature is required when SAM sections 6601-6616 require completion of Fiscal Impact Statement in the STD. 399.

DEPARTMENT OF FINANCE PROGRAM BUDGET MANAGER	DATE

Tab M

Round 2

Reply Reply All Forward Chat

Comment 2-1

Proposed Language for Tribal resources update to Appendex G.

Martz, Patricia [pmartz@calstatela.edu]

To: CEQA Guidelines@CNRA

Cc: tattnlaw@gmail.com

Saturday, June 04, 2016 1:05 PM

Dear Heather Baugh,

I have reviewed the above mentioned update and am concerned that the proposed language does not meet the intent and letter of AB 52 in that the guidance does not include tribal cultural resources, sacred places, and Native American traditions that have been overlooked or marginalized under CEQA. The language should not delete language mentioning and defining tribal cultural resources as a site, feature, place, cultural landscape with cultural value to a California Native American Tribe. An archaeological site that does not meet scientific criteria for significance may still hold spiritual value for Native Americans and this should be taken into consideration.

Sincerely,

Patricia Martz, Ph.D.
Professor Emerita
Dept of Anthropology
California State University, Los Angeles

Reply Reply All Forward Chat

Proposed Languate for Tribal cultural Resources Update to Appendix G

Martz, Patricia [pmartz@calstatela.edu]

To: CEQA Guidelines@CNRA

Cc: tattnlaw@gmail.com

Saturday, June 04, 2016 2:09 PM

Dear Heather,

I wish to clarify my previous comment. My concern is the requirement that the site be listed in the California Register of historic Resources, or in a local register as defined in Public Resources Code section 5020.1, which refers to a local register by a local government. It should also include the Sacred Lands Inventory kept by the Native American Heritage Commission and sites that are considered by a reliable tribal representative as a Traditional Cultural Property or Landscape. 2-1.1

Sincerely,

Patricia Martz, Ph.D.

Reply Reply All Forward Chat

Comment 2-2

Notice of Modifications to Text

Bryan Araki [BryanA@ci.clovis.ca.us]

To: CEQA Guidelines@CNRA

Monday, June 06, 2016 7:23 AM

Hi Heather:

I received your letter which was addressed to the Director, John Wright regarding text changes to Appendix G per AB52. The City of Clovis would like to thank you for the opportunity to review. We do not have any comments. Could you also please change the contact person as John Wright is no longer with the City? Dwight Kroll is the Director and his information is as follows:

Dwight Kroll, AICP
Director of Planning and Development Services
1033 Fifth Street
Clovis, CA 93612
(559)324-2343
dwightk@cityofclovis.com

Sincerely,

Bryan Araki
City Planner

City of Clovis Planning Division
1033 Fifth Street
Clovis, California 93612
Ph. (559) 324-2346
bryana@cityofclovis.com

Reply Reply All Forward Chat

Proposed changes to AB52

Comment 2-3

John Helmer [jhelmer@escondido.org]

To: CEQA Guidelines@CNRA

Cc: 'John Helmer' [jwhelmer4@gmail.com]

Monday, June 06, 2016 10:57 AM

I would suggest adding the word draft as a clarification as below to avoid confusion as to which version of the environmental document triggers the beginning of consultations: 2-3.1

10. Tribal consultation, if requested as provided in Public Resources Code Section 21080.3.1, must
begin prior to release of a draft negative declaration, mitigated negative declaration, or environmental
impact report for a project.

John Helmer
Consultant
(760) 839-4543
Planning Division
201 North Broadway
Escondido, CA 92025
www.escondido.org

Comment 2-4

Reply Reply All Forward Chat

Proposed changes to appendix G of the CEQA guide lines

Rollie Fillmore SR [rfillmore@JacksonCasino.com]

To: CEQA Guidelines@CNRA

Friday, June 10, 2016 9:45 AM

Good morning

I'd like to get more information if i could please. I don't see any environmental protection for medicine plants that might be affected 2-4.1

Rollie Fillmore
Cultural preservation department representative
Jackson rancheria band of miwuk Indians

Sent from my iPhone

Comment 2-5

Reply Reply All Forward Chat

Notice of Modifications to Text of Proposed Regulations - CSAC Comments

Chris Lee [clee@counties.org]

To: CEQA Guidelines@CNRA

Cc: Kiana Valentine [kvalentine@counties.org]

Attachments: CSAC Comments on Revised A~1.pdf (141 KB) [Open as Web Page]

Thursday, June 16, 2016 3:40 PM

You forwarded this message on 6/21/2016 2:56 PM.

Please see attached comments from the California State Association of Counties.

Christopher A. Lee
Legislative Analyst – Housing, Land Use & Transportation
California State Association of Counties®
(916) 650-8180 desk | (916) 956-1856 cell
clee@counties.org | www.csac.counties.org

1100 K Street
Suite 101
Sacramento
California
95814

Telephone
916.327.7500

Facsimile
916.441.5507

June 16, 2016

Comment 2-5

Ms. Heather Baugh
The California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

By Electronic Mail

Re: Notification of Modifications to Text of Proposed Regulations

Dear Ms. Baugh:

The California State Association of Counties (CSAC) appreciates the opportunity to comment on the proposed changes to the text of the regulation to implement Assembly Bill 52 (Chapter 532, Statute of 2014). CSAC has concerns with the proposed changes to the Appendix G checklist included under "XVII. Tribal Cultural Resources." Specifically, the formatting of the two questions misstates the law, as paragraph (a) contains language ("site, feature, place, cultural landscape ...") that applies to the first bullet point below it, but not to the second. 2-5.1

Accordingly, the text of the proposed language should be modified as follows:

a) Would the project cause a substantial adverse change in the significance of a Tribal cultural resource, defined in Public Resources Code section 21074 as either:

- A site, feature, place, cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American Tribe, and that is listed or eligible for listing in the California Register of Historical Resources, or in a local register of historical resources as defined in Public Resources Code section 5020.1(k), or

- A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Public Resources Code Section 5024.1. In applying the criteria set forth in subdivision (c) of Public Resource Code Section 5024.1 for the purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.

Thank you for your consideration of our comments. Should you have any questions, please do not hesitate to contact me at 916-327-7500, ext. 566, or kvalentine@counties.org.

Sincerely,

Kiana L. Valentine

Kiana Valentine
Legislative Representative

Comment 2-6

Reply Reply All Forward Chat

Comments from the Agua Caliente Band of Cahuilla Indians

Barragan, Leslie (TRBL) [lbarragan@aguacaliente.n...

To: CEQA Guidelines@CNRA

Attachments: ACBCI's Comments re Propos~1.pdf (1 MB) [Open as Web Page]

Monday, June 20, 2016 5:03 PM

You forwarded this message on 6/21/2016 2:56 PM.

To Whom It May Concern:

Attached please find comments from the Agua Caliente Band of Cahuilla Indians regarding the proposed revisions to Appendix G of CEQA Guidelines.

Thank you,

Leslie Barragan-Scott
Legal Secretary
Agua Caliente Band of Cahuilla Indians
5401 Dinah Shore Drive
Palm Springs, CA 92264
T: (760) 699-6952
F: (760) 699-6865

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Comment 2-6

AGUA CALIENTE BAND OF CAHUILLA INDIANS

LEGAL DEPARTMENT

Please respond to: ***John T. Plata***
General Counsel
(760) 699-6837

June 20, 2016

Ms. Heather Baugh
The California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, California 95814

RE: Proposed Revisions to Appendix G of the CEQA Guidelines

Dear Ms. Baugh:

The Agua Caliente Band of Cahuilla Indians ("Tribe") greatly appreciates the opportunity to participate in the current rulemaking process to amend Appendix G of the California Environmental Quality Act ("CEQA") Guidelines ("Appendix G"). Prior to certification and adoption of revisions to Appendix G, the Tribe hopes to provide final input on the three revisions that the Office of Planning and Research originally proposed and that the Natural Resources Agency has subsequently amended.

I. Evaluation of Environmental Impacts

The Natural Resources Agency ("Agency") has proposed adding to the Evaluation of Environmental Impacts section of Appendix G: (i) two questions regarding tribal consultation; and (ii) an explanatory paragraph to describe why early tribal consultation is necessary.

The Tribe supports the two questions regarding tribal consultation with minor non-substantive revision. The first question the Agency has proposed requires that a lead agency indicate whether a California Native American tribe has requested consultation. The second question the Agency has proposed requires that a lead agency explain whether consultation has begun if the lead agency has answered the first question in the affirmative. The Tribe fully supports the Agency's effort to request that lead agencies affirmatively indicate whether a California Native American tribe has requested consultation and whether consultation has begun. This is consistent with the intent of AB 52 (Gatto) to "establish a meaningful consultation process between California Native American tribal governments and lead agencies, respecting the interests and roles of all California Native American tribes and project proponents..." Consultation can only be meaningful if it occurs early in the environmental review process. For this reason, the Tribe believes a series of questions within Appendix G, which ascertain whether tribal consultation has occurred or commenced is the best approach since lead agencies rely on Appendix G (or some form thereof) to meet the requirements of an initial study during the preliminary environmental review phase.

5401 DINAH SHORE DRIVE, PALM SPRINGS, CA 92264
WWW.AGUACALIENTE-NSN.GOV

The Agency has also proposed adding an explanatory paragraph to describe why early tribal consultation is necessary. The Tribe greatly appreciates this approach, but believes California Native American tribes, lead agencies and project proponents would be better served if the Agency included additional language that clearly describes when tribal consultation is required. The Tribe supports this alternative approach because it provides clear direction to lead agencies on the new tribal consultation requirement under CEQA and, for this reason, better assists lead agencies in their CEQA compliance. The text the Tribe wishes to propose mirrors the text of Public Resources Code section 21080.3.1. 2-6.1

Finally, the Tribe proposes to add text that would "strongly encourage" lead agencies to retain written documentation of their compliance with CEQA's new tribal consultation requirement. The Tribe believes the proposed text fosters a more adequate administrative record while at the same time promoting a mechanism that ensures that the intent of AB 52 is carried out. 2-6.2

For the reasons set forth above, the Tribe proposes the following revision to the Evaluation of Environmental Impacts section of Appendix G:

EVALUATION OF ENVIRONMENTAL IMPACTS:

10~~1~~. Prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report for a project, lead agencies are required to consult with a ~~Have~~ California Native American ~~T~~tribes that is traditionally and culturally affiliated with the geographic area of the proposed project if: (1) the California Native American tribe requested to the lead agency, in writing, to be informed by the lead agency through formal notification of proposed projects in the geographic area that is traditionally and culturally affiliated with the tribe, and (2) the California Native American tribe responds, in writing, within 30 days of receipt of the formal notification, and requests the consultation. When consultation is required, lead agencies are strongly encouraged to include written documentation of their consultation with a California Native American tribe. ~~the project area requested consultation pursuant to Public Resources Code section 21080.3.1? If so, has consultation begun?~~ 2-6.1

Yes	No	
☐	☐	Has a California Native American tribe traditionally and culturally affiliated with the geographic area of the proposed project requested consultation pursuant to Public Resources Code section 21080.3.1?
☐	☐	If the answer to the previous question is "Yes," has consultation begun?

Note: Conducting consultation early in the CEQA process allows ~~tribal governments~~ California Native American tribes, ~~public~~ lead agencies, and project proponents to discuss the level of environmental review, identify and address potential adverse impacts to tribal cultural resources, and to reduce the potential for delay and conflict in the environmental review process. Information is also available from the Native American Heritage Commission's Sacred Lands File ~~per~~ pursuant to Public Resources Code sections ~~and~~ 5097.94 and the California Historical Resources Information System administered by the California Office of Historic Preservation. Please also note that Public Resources Code section 21080.3(c) contains provisions specific to confidentiality.

II. Cultural Resources

The Tribe supports the current proposal to delete the word "formal" and insert the word "dedicated" in subdivision (d) of section V of Appendix G since many Tribal burials have occurred outside of dedicated cemeteries. For this reason, the Tribe is not proposing any additional revision to subdivision (d) of section V of Appendix G.

III. Tribal Cultural Resources

The Tribe supports the current proposal to add new section XVII to Appendix G since this is a requirement of Public Resources Code section 21083.09. However, the Tribe proposes the following minor non-substantive revision to new section XVII of Appendix G:

XVII. TRIBAL CULTURAL RESOURCES.	Potentially Significant Impact	Less Than Significant Impact with Mitigation Incorporated	Less Than Significant Impact	No Impact	2-6.3
Would the project:					
a) ~~Would the project c~~ Cause a substantial adverse change in the significance of a Tribal cultural resource, defined in Public Resources Code section 21074 as either a site, feature, place, cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American Tribe, and that is:	☐	☐	☐	☐	

[ ] Listed or eligible for listing in the California Register of Historical Resources, or in a local register of historical resources as defined in Public Resources Code section 5020.1(k), or

[ ] A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Public Resources Code ~~S~~section 5024.1. In applying the criteria set forth in subdivision (c) of Public Resources Code ~~S~~section 5024.1 for purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.

The Tribe would like to thank the Agency for providing an opportunity to comment on the proposed revisions to Appendix G. The Tribe hopes to work with the Agency on future updates to Appendix G that may impact tribal interests. Should you have any questions or concerns, please do not hesitate to contact me at the number listed above.

Sincerely,

John T. Plata
General Counsel
AGUA CALIENTE BAND OF CAHUILLA INDIANS

Reply Reply All Forward Chat

Comment 2-7

San Joaquin County Comments for the Notice of Modifications to Text of Proposed Regulations

McGinnis, Ashlen [atmcginnis@sjgov.org]

To: CEQA Guidelines@CNRA

Cc: Spitzer, Amy [aspitzer@sjgov.org]; Vohra, Firoz [fvohra@sjgov.org]

Attachments: SJCDPW Comments to CNRA fo~1.PDF (187 KB) [Open as Web Page]

Tuesday, June 21, 2016 12:20 PM

You forwarded this message on 6/21/2016 2:57 PM.

Dear Ms. Heather Baugh,

Please see the attachment for the County's comments for the Notice of Modifications to Text of Proposed Regulations and let me know if you have any questions.

Thank you,

Ashlen McGinnis

Environmental Coordinator

San Joaquin County Public Works – Transportation Engineering Division
PO Box 1810, Stockton CA 95201
Tel: (209) 468-3085; Fax: (209) 468-2999
atmcginnis@sjgov.org

Comment 2-7

KRIS BALAJI
DIRECTOR

MICHAEL SELLING
DEPUTY DIRECTOR

FRITZ BUCHMAN
DEPUTY DIRECTOR

JIM STONE
DEPUTY DIRECTOR

ROGER JANES
BUSINESS ADMINISTRATOR

Public Works
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P. O. BOX 1810 - 1810 E. HAZELTON AVENUE
STOCKTON, CALIFORNIA 95201
(209) 468-3000 FAX (209) 468-2999
www.sjgov.org/pubworks

June 21, 2016

Ms. Heather Baugh
The California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

SUBJECT: NOTICE OF MODIFICATIONS TO TEXT OF PROPOSED REGULATIONS

Dear Ms. Baugh:

The San Joaquin County Department of Public Works has reviewed the Notice of Modifications for the above referenced project and has no comments at this time. However, the County does request to be included on the circulation list for any additional project documents.

Thank you for the opportunity to review and comment. Should you have questions please contact me at atmcginnis@sjgov.org or (209) 468-3085.

Sincerely,

Ashlen McGinnis

ASHLEN MCGINNIS
Environmental Coordinator

AM:as

c: Firoz Vohra, Senior Engineer

Reply Reply All Forward Chat

Comment 2-8

Comments on proposed modifications to the Environmental Checklist relative to Tribal Cultural Resources

Barbara Radlein [bradlein@aqmd.gov]

To: CEQA Guidelines@CNRA

Cc: Ian MacMillan [imacmillan@aqmd.gov]; Barbara Baird [BBaird@aqmd.gov]; Ryan Stromar [rstromar@aqmd.gov]

Attachments: SCAQMDAB52CommentLetter-Ju~1.pdf (294 KB) [Open as Web Page]

Tuesday, June 21, 2016 4:19 PM

Hi Heather,
Attached are SCAQMD's comments regarding OPR's latest proposed modifications to the Environmental Checklist relative to Tribal Cultural Resources.
Thank you.
Regards,
Barbara

Barbara Radlein
Program Supervisor, CEQA Special Projects
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, CA 91765
(t) 909.396.2716
(f) 909.396.3324
(e) bradlein@aqmd.gov

South Coast
Air Quality Management District
21865 Copley Drive, Diamond Bar, CA 91765-4178
(909) 396-2000 • www.aqmd.gov

June 21, 2016

Heather Baugh
The California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814
Transmitted via email to: ceqa.guidelines@resources.ca.gov

Re: Modifications to Text of Proposed Regulations Relative to Tribal Cultural Resources

Dear Ms. Baugh,

The South Coast Air Quality Management District (SCAQMD) appreciates the opportunity to comment on the latest proposed changes to the Environmental Checklist in Appendix G of the CEQA Guidelines to address Assembly Bill (AB) 52 and Tribal Cultural Resources in accordance with Public Resources Code §§ 21074 and 21080.3.1 (d).

When AB 52 went into effect on July 1, 2015, the Office of Planning and Rules (OPR) had not finalized the implementation guidance for implementing these requirements in CEQA evaluations. Nonetheless, agencies were required to comply with AB 52 in the interim. As such, the SCAQMD revised its own Environmental Checklist and significance criteria to address Tribal Cultural Resources, as shown in underlined text:

		Potentially Significant Impact	Less Than Significant With Mitigation	Less Than Significant Impact	No Impact
V.	**CULTURAL RESOURCES.** Would the project:				
a)	Cause a substantial adverse change in the significance of a historical resource as defined in §15064.5?	☐	☐	☐	☐
b)	Cause a substantial adverse change in the significance of an archaeological resource as defined in §15064.5?	☐	☐	☐	☐
c)	Directly or indirectly destroy a unique paleontological resource, site, or feature?	☐	☐	☐	☐

d)	Disturb any human remains, including those interred outside formal cemeteries?	☐	☐	☐	☐
e)	Cause a substantial adverse change in the significance of a tribal cultural resource as defined in Public Resources Code §21074?	☐	☐	☐	☐

Significance Criteria

Impacts to cultural resources will be considered significant if:

- The project results in the disturbance of a significant prehistoric or historic archaeological site or a property of historic or cultural significance, or tribal cultural significance to a community or ethnic or social group or a California Native American tribe.
- Unique paleontological resources or objects with cultural value to a California Native American tribe are present that could be disturbed by construction of the proposed project.
- The project would disturb human remains.

In addition, as part of releasing a CEQA document for public review and comment, the SCAQMD also provides a formal notice of all proposed projects to all California Native American Tribes (Tribes) that requested to be on the Native American Heritage Commission's (NAHC) notification list per Public Resources Code §21080.3.1 (b)(1).

After reviewing OPR's latest proposed changes to the Environmental Checklist contained within Appendix G of the CEQA Guidelines, the SCAQMD staff is unsure that it will be able to satisfactorily answer the proposed Environmental Checklist questions under #17a for many of our projects. The proposed questions in #17a are posed in a way that seems only applicable to land use projects and require the lead agency to check individual addresses in order to establish whether the project could have an impact on Tribal Cultural Resources. While this makes sense for projects that will occur at one location, many of the CEQA documents the SCAQMD prepares as lead agency are for regulatory actions (e.g., the adoption, amendment or the occasional repeal of a rule or regulation) that are implemented at a program level and typically cover the entire SCAQMD jurisdiction. SCAQMD has jurisdiction over much or all of the counties of Los Angeles, Orange, Riverside, and San Bernardino, which includes about one half of the state's population. Thus, having to check every address within SCAQMD's jurisdiction against the addresses in the California Register of Historical Resources, or in a local register of historical resources as defined in Public Resources Code section 5020.1(k) is an impractical exercise that does not make sense for regulatory actions regularly considered by our agency. Further, even if we were able to check all addresses on the lists for each

rule, it would often be speculative as to whether the rule might affect any particular property.

As such, the SCAQMD is seeking guidance from OPR as to how lead agencies preparing CEQA documents for regulatory projects that are not tied to an individual address should answer Environmental Checklist question #17a should the proposed revisions become finalized. We would like to schedule a call to discuss this in more detail with you at your convenience. You may contact either myself at (909) 396-3244, or Barbara Radlein at (909) 396-2716.

Sincerely,

Ian V. MacMillan

Ian MacMillan
Planning and Rules Manager

IM:BR

Reply Reply All Forward Chat Comment 2-9

Final Pechanga Comments Modifications to Appendix G CEQA

Andrea Fernandez [afernandez@pechanga-nsn.g...

To: CEQA Guidelines@CNRA; Baugh, Heather@CNRA; Gibson, Thomas@CNRA; Laura Miranda [lmiranda@pechanga-nsn.gov]; Paula Treat [mslobby@earthlink.net]

Cc: Anna Hoover [ahoover@pechanga-nsn.gov]; Ebru Ozdil [eozdil@pechanga-nsn.gov]

Attachments: Final Pechanga Comments Mo~1.pdf (308 KB) [Open as Web Page]

Tuesday, June 21, 2016 2:05 PM

You forwarded this message on 6/21/2016 2:58 PM.

Dear Ms. Baugh:

Electronically attached please find the Pechanga Tribe's comments pertaining to the above referenced matter.

Should you have any questions or concerns, please contact Steve Bodmer at (951) 770-6171 or at sbodmer@pechanga-nsn.gov or Laura Miranda at lmiranda@pechanga-nsn.gov

Thank You,

Andrea Fernandez
Legal Assistant
Pechanga Office of the General Counsel
P.O. Box 1477
Temecula, CA 92592
Main: (951) 770-6000
Direct Dial: (951) 770-6173
Fax: (951) 587-2248

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Comment 2-9

PECHANGA INDIAN RESERVATION
Temecula Band of Luiseño Mission Indians

OFFICE OF THE GENERAL COUNSEL
Post Office Box 1477 • Temecula, CA 92593
Telephone (951) 770-6000 Fax (951) 695-7445

General Counsel
Steve Bodmer

Deputy General Counsel
Michele Hannah

Associate General Counsel
Breann Nu'uhiwa
Lindsey Fletcher

Of Counsel
Frank Lawrence

June 21, 2016

VIA ELECTRONIC MAIL
Ceqa.guidelines@resources.ca.gov
Heather.baugh@resources.ca.gov
Thomas.gibson@resources.ca.gov

Ms. Heather Baugh
California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

Re: Pechanga Tribe Comments on Modifications to Text of Proposed CEQA Regulations Appendix G pursuant to CNRA Notice dated June 6, 2016

Dear Ms. Baugh:

These comments are submitted on behalf of the Pechanga Band of Luiseño Indians (the "Tribe"), a federally-recognized and sovereign Indian nation. We appreciate the opportunity to provide comments during this official rulemaking process on the proposed modifications to the originally noticed language for the CEQA Appendix G Checklist.

The Tribe thanks you and Mr. Gibson for receiving our comments submitted through our written correspondence dated April 8, 2016, the consultation meeting between your office and Pechanga representatives, and through our testimony at the April 4, 2016 hearing on the Regulations. We would like to further thank you for the time and effort your office put into considering our concerns with the original noticed language. The Modified language is greatly improved from the original draft.

There are, however, a few issues with the currently proposed language the Tribe would like to identify for the record. We request that Natural Resources give meaningful consideration to our requested edits below and we are available to consult further on these comments.

I. SEPARATION OF TCRS FROM CULTURAL RESOURCES

The Tribe thanks your office for separating out Tribal Cultural Resources from the Cultural Resources category, giving it a stand-alone section. We believe this not only mirrors the intent and language of AB 52, but will provide assistance to document preparers in understanding the necessity of conducting a resource analysis specifically tailored to TCRs that includes tribal information and expertise, rather than relying predominately on archaeological standards and assessments. We are not sure if this was an oversight, but we suggest adding a line item and checkbox for "Tribal Cultural Resources" in the ENVIRONMENTAL FACTORS POTENTIALLY AFFECTED section of the checklist, so planners and consultants clearly identify that this category of resources requires specific and different attention from other resources assessed under the Cultural Resources category. This change is also consistent with the rest of the checklist as each category of resources has a line item and checkbox associated with it in this Section of the Checklist. 2-9.1

II. INITIATION OF TRIBAL CONSULTATION

The Tribe thanks the Agency for including a specific question about initiating tribal consultation to the cover sheet of Appendix G that must be completed at the outset of project processing. We believe this will greatly assist document preparers concerning the timing and obligations of consultation and clarify the role of tribal consultation early in the CEQA process. Also, the addition of the paragraph below the question on consultation is helpful. However, we are not sure it upholds the language and intent of AB 52. In particular the language, "Conducting consultation early in the CEQA process allows...." seems to suggest that these parties are permitted to engage in the actions if they so choose. Actually AB 52 *requires* the parties to do the following: 2-9.2

1) "Prior to the release of a negative declaration, mitigation negative declaration, or environmental impact report for a project, the lead agency *shall begin* consultation with a California Native American tribe...." (Public Resources Code section 21080.3.1(b))

2) If the California Native American tribe requests consultation regarding alternatives to the project, recommended mitigation measures, or significant effects the consultation shall include those topics." (Public Resources Code section 21080.3.2(a)).

In addition, we continue to believe it is crucial to include actual language or a citation to the statute to clarify that consultation is to be initiated prior to the preparation and release of environmental documents. Early consultation was such an integral piece of AB 52 because prior to its implementation, tribal information was largely sought out at the end of the environmental review process, if at all, and well after major project decisions concerning impacts, alternatives and project designs were already invested in and finalized. In addition, parties involved in these processes have varying ideas of what constitutes "early consultation." This is why AB 52 specifically states when the consultation is to begin – prior to the release of the environmental documents. If this is not clear in either the checklist question on consultation or in the paragraph below, the fulfillment of "early consultation" will continue to be problematic. We see no reason not to define this as clearly as the statute does. This will help alleviate misunderstandings and assist planners in completing the myriad of regulatory obligations, in defined timelines, with which they must comply.

We reiterate our request that language be incorporated into the checklist to underscore one of the main intentions of AB 52 – that tribal expertise about their resources be acknowledged, incorporated and given the weight and consideration it is due in the environmental assessment process. For all the reasons stated in our April 8, 2016 letter, this is crucial to a document preparer's understanding of the role tribal information plays in determining whether there is a TCR, assessment of impacts thereto and determination of culturally appropriate mitigation. This would also help with the substantial evidence determination in terms of ensuring the level of importance the tribal information would play in meeting substantial evidence. 2-9.2

Lastly, as we have communicated previously, one object of AB 52 was to NOT require a listing of tribal sacred places on a register, the NAHC Sacred Lands File or any list under the administration of a public agency. As AB 52 is implemented, we do not want to mislead agencies into thinking that all the information they need in order to comply will be found in a State public agency listing or a register. When agencies or applicants submit a request for places listed on the NAHC's SLF, they may get a list of sites and they may not. If there are no sites listed or registered this does not mean that sacred sites do not exist on the project property. Culturally affiliated tribes should be consulted for the best information, which is exactly why 2-9.3

tribal consultation is a requirement of AB 52. The NAHC has had to insert language to this effect in their response letters to requests for SLF searches. Therefore, to state that information is available from the NAHC SLF is a bit misleading because there may not be any information through that mechanism. We have made edits below to reflect this reality and to help ensure tribal consultation is not circumvented in lieu of records searches.

Based on our comments and concerns identified above, we suggest the following edits to the modified language:

II. Have California Native American Tribes traditionally and culturally affiliated with the project area requested consultation pursuant to Public Resources Code section 21080.3.1? If so, has consultation begun pursuant to Public Resources Code section 21080.3.1(b)? 2-9.2

Note: Since California Native American tribes traditionally and culturally affiliated with a geographic area may have expertise concerning their tribal cultural resources, ~~Conducting~~ beginning consultation ~~early in the CEQA process~~ prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report for a project is required pursuant to Public Resources Code section 21080.3.1(b). This provides tribal governments, public lead agencies, and project proponents the opportunity early in the CEQA process to ~~discuss in~~ consult regarding the level of environmental review, identify and address potential adverse impacts to tribal cultural resources, and to reduce the potential for delay and conflict in the environmental review process. Information ~~is~~ may also be available from the Native American Heritage Commission's Sacred Lands File per Public Resources Code sections 5097.9 and 5097.94 and the California Historical Resources Information System administered by the California Office of Historic Preservation. Please also note that Public Resources Code section 21082.3(c) contains provisions specific to confidentiality. 2-9.3

III. PUBLIC RESOURCES CODE SECTION 5097.9

We continue to advocate for the addition of a question under the TCR category that asks whether the project potentially disturbs any resources or places defined in Public Resources Code section 5097.9. Our suggestion language is below.

b) Would the project potentially disturb any resource or place defined in Public Resources Code 5097.9 et seq? 2-9.4

The human remains question, which you have included in the Cultural Resources section, and the above question are directly related to and overlap with the questions concerning TCRs. These resources are essentially the very same resources that would be considered by a tribe to be TCRs. The difference being they are on public lands. Since these resources must be considered in a CEQA process, and are the same resources that are targeted by AB 52, we contend that adding this question will make the CEQA process more effective for all involved when it comes to the early identification and addressing of sacred sites. Since this was a main objective of AB 52, we believe this falls squarely within the scope of the AB 52 mandates. In the alternative, it does not deter or counter the mandates and is consistent with the Public Resources Code.

If the Agency does not choose to include the above question concerning resources defined at 5097.9, we suggest that your agency work with tribes on preparing practice tips or another type of guidance document (such as the SB 18 Guidelines) that could be posted on your website and associated agency websites concerning the execution of AB 52, in conjunction with SB 18, related Public Resources Code requirements

and other interrelated legal requirements. As a Tribe that is extremely active in assisting agencies, document preparers and applicants in understanding AB 52 through trainings, workshops and other formal meetings, we have heard time and time again that more guidance and practical tips, including best practices, is not only welcomed but enthusiastically requested. Through these conversations, we have concluded that individuals responsible for compliance with these new CEQA requirements, including tribal consultation, would greatly benefit from such guidance. We welcome further discussion concerning our experiences with lead agencies, consultants and project proponents and our ideas on how to approach a practical, useful guidance document.

In closing, the Tribe thanks the Natural Resource Agency for offering us an opportunity to provide further comments on these Modifications to Appendix G. Should you have any questions, please contact Michele Hannah, Deputy General Counsel at (951) 770-6179 or mhannah@pechanga-nsn.gov or Laura Miranda, Esq. at lmiranda@pechanga-nsn.gov.

Sincerely,

Steve Bodmer
General Counsel

Laura Miranda
Attorney for the Pechanga Tribe

cc: Assemblyman Mike Gatto
Cynthia Gomez, Executive Director, Native American Heritage Commission
Pechanga Tribal Council
Pechanga Cultural Resources Department
Paula Treat, Lobbyist for the Pechanga Tribe

Comment 2-10

Reply Reply All Forward Chat

UAIC Comments re Modifications to Appendix G

Brian Guth [bguth@auburnrancheria.com]

To: CEQA Guidelines@CNRA

Cc: Roberson, Holly@OPR; 'cynthia.gomez@gov.ca.gov'

Attachments: 2016-06-21 Whitehouse to C~1.PDF (54 KB) [Open as Web Page]

Tuesday, June 21, 2016 4:45 PM

Dear Ms. Baugh:

Attached is a letter from Chairman Whitehouse on behalf of UAIC, commenting on the revisions to Appendix G.

Sincerely,

Brian Guth

Brian R. Guth
Interim Tribal Administrator
United Auburn Indian Community
10720 Indian Hill Road | Auburn, CA 95603
Direct: (530) 883-2375 | Fax: (530) 883-2380
bguth@auburnrancheria.com

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MIWOK
MAIDU

United Auburn Indian Community
of the Auburn Rancheria

Gene Whitehouse
Chairman

John L. Williams
Vice Chairman

Danny Rey
Secretary

Jason Camp
Treasurer

Calvin Moman
Council Member

June 21, 2016

Comment 2-10

Heather Baugh
The California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

Dear Ms. Baugh:

On behalf of the United Auburn Indian Community, I would like to thank you and your colleagues for taking Tribal comments and AB 52's intent into account in developing the proposed revisions to Appendix G of the California Environmental Quality Act Guidelines. We believe the revised regulation better reflects Tribal concerns and captures the essence of AB 52. 2-10.1

Moving forward, we urge you to consider developing a guidance document similar to OPR's SB 18 consultation guidance to help all responsible parties successfully implement AB 52 and to reflect aspects of Tribal comments that were not incorporated into the Appendix G guidelines language such as those related to the Native American Heritage Commission sections of the Public Resources Code. We believe such a document would be extremely helpful to those responsible for implementing AB 52. 2-10.2

We also wish to thank OPR and the Office of the Tribal Advisor for facilitating the intertribal consultation meeting. We strongly encourage similar consultations in the future to promote further understanding between the affected parties.

Sincerely,

Gene Whitehouse
Chairman

cc: Holly Roberson, Office of Planning and Research
Cynthia Gomez, Office of the Tribal Advisor

Tribal Office 10720 Indian Hill Road Auburn, CA 95603 (530) 883-2390 FAX (530) 883-2380

Reply Reply All Forward Chat

Comment 2-11

Comments, Appendix G

Robinson, Terrie@NAHC [terrie.robinson@nahc.c...

To: CEQA Guidelines@CNRA

Tuesday, June 21, 2016 5:01 PM

You forwarded this message on 6/22/2016 10:37 AM.

On behalf of the Native American Heritage Commission, I provide the following comments:

XVII Tribal Cultural Resources -- checklist should also include:

A cultural landscape that meets the criteria of subdivision (a) to the extent that the landscape is geographically defined in terms of the size and scope of the landscape;

A "nonunique" archaeological resource as defined in subdivision (h) of Section 21083.2.

Terrie L. Robinson
General Counsel
Native American Heritage Commission
1550 Harbor Blvd, Suite 100
West Sacramento, CA 95691
(916) 373-3716 (voice)
(916) 373-5471 (fax)
terrie.robinson@nahc.ca.gov

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Comment 2-12

Reply Reply All Forward Chat

CCEEEB Comment Letter RE: Proposed Language for Tribal Cultural Resources Update to Appendix G

Tomas Garza [Tomas_Garza@gualcogroup.com]

To: CEQA Guidelines@CNRA

Cc: Kendra Daijogo [Kendra_Daijogo@gualcogroup.com]

Attachments: CCEEB AB 52 Comments June ~1.pdf (152 KB) [Open as Web Page]

Tuesday, June 21, 2016 5:03 PM

Good Afternoon,

Attached you will find a comment letter from our client, California Council for Environmental and Economic Balance ("CCEEB"), regarding Proposed Language for Tribal Cultural Resources Update to Appendix G.

Do not hesitate to contact us if you have any questions or need further information.

Thank you,

Tomas Garza
The Gualco Group, Inc.
500 Capitol Mall, Suite 2600
Sacramento, CA 95814-4752
916/441-1392
@gualcogroup
http://www.gualcogroup.com

Comment 2-12

California Council for Environmental and Economic Balance
101 Mission Street, Suite 1440, San Francisco, California 94105
415-512-7890 phone, 415-512-7897 fax, www.cceeb.org

Transmitted Via E-mail to: ceqa.guidelines@resources.ca.gov

June 21, 2016

Ms. Heather Baugh
The California Natural Resources Agency
1416 9th Street, Suite 1311
Sacramento, CA 95814

Re: Comment on the Proposed Language for Tribal Cultural Resources Update to Appendix G

Dear Ms. Baugh:

The California Council for Environmental and Economic Balance ("CCEEB") appreciates the opportunity to provide comments on the proposed changes to the proposed language for Tribal cultural resources update to Appendix G of the California Environmental Quality Act Guidelines.

CCEEB is a coalition of California business, labor and public leaders that works to advance strategies to achieve a sound economy and a healthy environment. Founded in 1973, CCEEB is a non-profit and non-partisan organization.

CCEEB has reviewed the new draft and supports the change to what is now proposed checklist XVII(a), second bullet. This change clarifies that, when the lead agency is "considering the significance of the resource to a California Native American tribe", it must do so by applying the established criteria of Public Resources Code Section 5024.1(c).

We believe this proposed change is an improvement to the draft document and encourage the agency to retain this change in the final document.

Sincerely,

Gerald D. Secundy

GERALD D. SECUNDY
President

Cc: Honorable Edmund G. Brown, Jr.
Honorable John Laird
Honorable Ken Alex
Ms. Heather C. Baugh
Ms. Holly Roberson

Duncan, Lia@CNRA Comment 2-13

From:	Herrmann, Myra <MHerrmann@sandiego.gov>
Sent:	Tuesday, June 21, 2016 6:33 PM
To:	CEQA Guidelines@CNRA
Cc:	Herrmann, Myra
Subject:	City of San Diego comments on Proposed Amendments to the CEQA Guidelines, Appendix G
Attachments:	City of San Diego comments on Proposed Amendments to the CEQA Guidelines, Appendix G
Importance:	High

To whom it may concern:

The City of San Diego appreciates the opportunity to provide additional comments to your office on the proposed amendments to the CEQA Guidelines, Appendix G. We have reviewed the additional proposed amendments and have the following comments:

We concur with the proposal to add question #11 regarding the tribal consultation process to the beginning of Appendix G under the heading "Evaluation of Environmental Impacts". We agree that adding the question will ensure that planners of all levels have complied with the provisions of CEQA at the earliest point in the process for their respective projects and that the results of the tribal consultation process then be included in the initial study discussion to support the significance determination box that would be checked. 2-13.1

There appears to be an error in Section V.b) which shows a deletion of the "1" in CEQA section 15064.5. This should be corrected before approval of the amendments to the checklist. 2-13.2

We support the edit to question "d" replacing the word "formal" with "dedicated" and agree that the change will provide clarity to agency staff, applicants and consultants when completing the initial study checklist. 2-13.3

While we support the addition of a new Section in the Initial Study checklist specific to Tribal Cultural Resources, we are unclear as to why this new section is being moved to the back of the Initial Study Checklist. Having the new section either directly before or after the Cultural Resources section would provide flow of discussion since some of the information would be sourced from a cultural report or other source materials and would be supported in both section discussions. We also do not believe that the new question "a" needs to be expanded as proposed. No other CEQA sections are further described as shown in the Cultural Resources section. For the sake of consistency, the City believes that the question can stand alone as follows: "Would the project cause a substantial adverse change in the significance of a tribal cultural resource as further defined in Public Resources Code Section 21074?" The expanded language can already be easily found in the CEQA statutes for further reference, clarification or direction and does not necessarily require repeating herein. 2-13.4

Thank you for the opportunity to provide additional comments on this item. I have included our previous comments for reference. We look forward to seeing the final version.

Please feel free to contact me if you have any questions in response to my comments.

Myra Herrmann
Senior Planner/Archaeologist/Tribal Liaison
City of San Diego

Planning Department
T (619) 446-5372
www.sandiego.gov

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Comment 2-14

Proposed Language for Tribal cultural resources update to Appendix G

1. Add a statement ~~regarding tribal consultation~~ to the ~~beginning of Appendix G under EVALUATION OF ENVIRONMENTAL IMPACTS~~Environmental Checklist Form at the beginning of Appendix G, which ~~provides guidance on completing the checklist and environmental analysis~~provides a general description and cover sheet for a proposed project:

[...]

11. Have California Native American Tribes traditionally and culturally affiliated with the project area requested consultation pursuant to Public Resources Code section 21080.3.1? If so, has consultation begun?

Note: Conducting consultation early in the CEQA process allows tribal governments, public lead agencies, and project proponents to discuss the level of environmental review, identify and address potential adverse impacts to tribal cultural resources, and to reduce the potential for delay and conflict in the environmental review process. Information is also available from the Native American Heritage Commission's Sacred Lands File per Public Resources Code sections and 5097.94 and the California Historical Resources Information System administered by the California Office of Historic Preservation. Please also note that Public Resources Code section 21082.3(c) contains provisions specific to confidentiality. 2-14.1

~~10. Tribal consultation, if requested as provided in Public Resources Code Section 21080.3.1, must begin prior to release of a negative declaration, mitigated negative declaration, or environmental impact report for a project. Information provided through tribal consultation may inform the lead agency's assessment as to whether tribal cultural resources are present, and the significance of any potential impacts to such resources. Prior to beginning consultation, lead agencies may request information from the Native American Heritage Commission regarding its Sacred Lands File, per Public Resources Code sections 5097.9 and 5097.94, as well as the California Historical Resources Information System administered by the California Office of Historic Preservation.~~

~~2. Changes to the language of Section V to include Tribal cultural resources, with proposed additions in Bold and Underline.~~

V. CULTURAL RESOURCES

Would the project:

a) Cause a substantial adverse change in the significance of a historical resource as defined in § 15064.5?
b) Cause a substantial adverse change in the significance of an archaeological resource pursuant to § ~~1~~5064.5?
c) Directly or indirectly destroy a unique paleontological resource or site or unique geologic feature?
d) Disturb any human remains, including those interred outside of ~~formal~~ **dedicated** cemeteries?

~~e) Cause a substantial adverse change in the significance of a tribal cultural resource, defined in Public Resources Code section 21074 as either:~~

~~1)a site, feature, place, cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American Tribe, that is listed or eligible for listing on the California Register of Historical Resources, or on a local register of historical resources as defined in Public Resources Code section 5020.1(k), or~~

~~2)1) a resource determined by a lead agency, in its discretion and supported by substantial evidence, to be significant according to the historical register criteria in Public Resources Code section 5024.1 (c), and considering the significance of the resource to a California Native American tribe~~

XVII. ~~UTILITIES AND SERVICE SYSTEMS~~ TRIBAL CULTURAL RESOURCES

	Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact	
a) Would the project cause a substantial adverse change in the significance of a Tribal cultural resource, defined in Public Resources Code section 21074 ~~as either a site, feature, place, cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American Tribe,~~ and that is:	☐	☐	☐	☐	2-14.2
☐ Listed or eligible for listing in the California Register of Historical Resources, or in a local register of historical resources as defined in Public Resources Code section 5020.1(k), or					
☐ A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Public Resources Code Section 5024.1. ~~In applying the criteria set forth in subdivision (c) of Public Resource Code Section 5024.1 for the purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.~~					2-14.3

XVIII. ~~MANDATORY FINDINGS OF SIGNIFICANCE~~ UTILITIES AND SERVICE SYSTEMS

XIX MANDATORY FINDINGS OF SIGNICIANCE

Tab N

Other Availability Statements

The entirety of this rulemaking package, including all documents required to be filed with the Office of Administrative Law, and a complete copy of the final regulatory text will be made available at the California Natural Resources Agency, 1416 9th Street, Suite 1311, Sacramento CA 95814. The package includes: (1) the express terms of the regulation, (2) the Initial Statement of Reasons, (3) All information and documents upon which the rulemaking is based, and (4) all notices and other statements of text availability. (See Government Code section 11346.5(a)(16).) A copy may be viewed at any time during regular business hours and is a public document. Further, the entire package, as well as a complete copy of the final regulatory text will be available for no less than six months online at the Agency's website, which is found at: www.resources.ca.gov. For further information please contact the Office of the General Counsel at (916) 653-5656.

8/8/16

Date

Heather C. Baugh
Assistant General Counsel
The California Natural Resources Agency

Tab O

CALIFORNIA NATURAL RESOURCES AGENCY

UPDATED INFORMATIVE DIGEST

There have been no changes in applicable laws or to the effect of the proposed regulation from the laws and effects described in the Notice of Proposed Action.

Tab P

CALIFORNIA NATURAL RESOURCES AGENCY

FINAL STATEMENT OF REASONS FOR REGULATORY ACTION

Proposed Amendments to the State CEQA Guidelines Addressing Tribal Cultural Resources (AB 52, Gatto 2014)

August 16, 2016

Purpose of this Document

The Administrative Procedure Act requires that the California Natural Resources Agency (Agency) prepare a final statement of reasons supporting its proposed regulation. The final statement of reasons updates the information contained in the initial statement of reasons, contains final determinations as to the economic impact of the regulations, and provides summaries and responses to comments received regarding the proposed action. (See Government Code section 11346.9)

Update to the Initial Statement of Reasons

The initial statement of reasons (ISOR) is incorporated by reference into this document. The Final Statement of Reasons (FSOR) is an update to the ISOR. The Notice of Proposed Regulations was published on February 19, 2016 in register 2016, NO. 8–Z, 2014. The Notice of Regulations was mailed the same day, in addition to being posted on the Agency website, and emailed to a list serve of interested persons. The public hearing was held on April 4, 2016. During the initial 45-day comment period, eleven written comments were received. Based on a review of these comments, the Agency made substantial changes that it deemed sufficiently related to the original notice. Therefore, a fifteen-day comment period was noticed by mail, and ran from June 6, 2016 to June 21, 2016.The Agency also offered California Native American Tribes (Tribes) government to government consultation in December of 2015, prior to the proposed release of the rulemaking package, and again on March 28, 2016, prior to the April hearing for the first round of comments. After the 15-day comment period, the Agency followed up with all Tribes that issued new comments, and again offered government-to-government consultation regarding the revised language. Fourteen comments were received during the 15-day comment period. A summary of the comments made, and the Agency's responses are below.

Local Mandate

The proposed regulations do not impose any mandate on local agencies or school districts.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Natural Resources Agency's Reasons for Rejecting Those Alternatives

The Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Natural Resources Agency's determination that the proposed action is necessary to implement the Legislature's directive in Assembly Bill 52 in a manner consistent with

existing statutes and case law, and that the proposed action adds no new substantive requirements. The Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions or the directive of the statue. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law, not from amendment of the sample checklist.

Evidence Supporting a Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The Agency seeks only to update Appendix G of the California Environmental Quality Act Guidelines (Appendix G), which lists the resource areas and questions to lead agencies in an effort to assist them in evaluating potentially significant impacts to the environment from work they are undertaking or approving. The checklist is a sample, and its use is not required. Further, the questions the Agency proposes to include in the checklist incorporate the new law's requirements. The questions in Appendix G do not expand or otherwise interpret the law. As a result, there are no economic impacts associated with these changes.

The Proposed and Amended Text

The Agency was directed by the Legislature in Public Resources Code section 21083.09 (enacted as part of Assembly Bill 52 (Chapter 532, Statutes 2014) to: certify and adopt revisions to the guidelines that update Appendix G of Chapter 3 (commencing with Section 15000) of Division 6 of Title 14 of the California Code of Regulations to do both of the following:

(a) Separate the consideration of paleontological resources from tribal cultural resources and update the relevant sample questions.

(b) Add consideration of tribal cultural resources with relevant sample questions.

The originally proposed changes to Appendix G were as follows:

Add a section 10 to the introductory language in the section of Appendix G entitled, "Evaluation of Environmental Impacts." The proposed language was:

> Tribal consultation, if requested as provided in Public Resources Code Section 21080.3.1, must begin prior to release of a negative declaration, mitigated negative declaration, or environmental impact report for a project. Information provided through tribal consultation may inform the lead agency's assessment as to whether tribal cultural resources are present, and the significance of any potential impacts to such resources. Prior to beginning consultation, lead agencies may request information from the Native

> American Heritage Commission regarding its Sacred Lands File, per Public Resources Code sections 5097.9 and 5097.94, as well as the California Historical Resources Information System administered by the California Office of Historic Preservation.

A proposed revision to subdivision (d) of Section V (Cultural Resources) to replace the word "formal" with the word "dedicated" to conform to existing language regarding cemeteries elsewhere in the Public Resources Code and in the Health and Safety Code.

•A proposed addition of subdivision (e) to Section V (Cultural Resources) adding a question regarding tribal cultural resources. That question was:

> Would the project:
>
> (e) Cause a substantial adverse change in the significance of a tribal cultural resource, defined in Public Resources Code section 21074 as either:
>
> (1) a site, feature, place, cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American Tribe, that is listed or eligible for listing on the California Register of Historical Resources, or on a local register of historical resources as defined in Public Resources Code section 5020.1(k), or
>
> (2) a resource determined by a lead agency, in its discretion and supported by substantial evidence, to be significant according to the historical register criteria in Public Resources Code section 5024.1(c), and considering the significance of the resource to a California Native American tribe.

Based on comments received, the Agency amended the original proposal and opened a 15-day comment period for substantial changes that were sufficiently related to the original notice. In its amended proposal, the Agency removed the proposed section 10 in the introductory language to the Checklist, and added question 11 to the Environmental Checklist Form at the beginning of Appendix G. In question 11 it asked:

> Have California Native American Tribes traditionally and culturally affiliated with the project area requested consultation pursuant to Public Resources Code section 21080.3.1? If so, has consultation begun?

> Note: Conducting consultation early in the CEQA process allows tribal governments, public lead agencies, and project proponents to discuss the level of environmental review, identify and address potential adverse impacts to tribal cultural resources, and to reduce the potential for delay and conflict in the environmental review process. Information is also available from the Native American Heritage Commission's Sacred Lands File per Public Resources Code section 5097.94 and the California Historical Resources Information System administered by the California Office of Historic Preservation. Please also note that Public Resources Code section 21082.3(c) contains provisions specific to confidentiality.

The Agency also moved the tribal cultural resources questions from the Cultural Resources section, and to a new Tribal Cultural Resources section. The questions in the new Tribal Cultural Resources were amended as follows:

> a) Would the project cause a substantial adverse change in the significance of a Tribal cultural resource, defined in Public Resources Code section 21074 as either a site, feature, place, cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American Tribe, and that is:
>
> - Listed or eligible for listing in the California Register of Historical Resources, or in a local register of historical resources as defined in Public Resources Code section 5020.1(k), or
>
> - A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Public Resources Code Section 5024.1. In applying the criteria set forth in subdivision (c) of Public Resource Code Section 5024.1 for the purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.

Boxes with degrees of significance were provided consistent with the rest of the checklist.

Summary and Response to Comments for Original Proposal

Thematic Responses to Comments Received on the Original Proposal (Round 1)

T1-1) A Separate Tribal Cultural Resources Section

Multiple commenters asked the Agency to consider a separate section in the Checklist for Tribal Cultural Resources, rather than combine Tribal Cultural Resources with other Cultural Resources. The Agency originally proposed to include questions related to tribal cultural resources within the existing section of Appendix G related to cultural resources. However, in response to these comments, the Agency created a new Tribal Cultural Resources section, and included it in alphabetical order with the other resource sections of the list. The Agency believes this properly implements the intent of the Legislature by creating a section with questions related to tribal cultural resources. It also makes clear that such resources are separate and apart from paleontological resources. Some analysis may overlap between the cultural and tribal cultural resources sections. For example, human remains found at proposed project sites could be subject to analysis under both sections. The Agency also retained the change from "formal cemetery" to "dedicated cemetery," in the Cultural Resources section, as this could implicate a cultural resource belonging to a group in California other than California Native American Tribes. . As a result, practitioners should be aware that both sections provide value in assessing potentially significant impacts.

T1-2) Consultation Narrative

Originally, the Agency proposed adding a discussion of consultation requirements in the portion of Appendix G titled "Evaluation of Environmental Impacts". That section includes recommendations for practitioners on how to use the initial study checklist. The proposed addition to that section would have suggested several sources of information to assist lead agencies in evaluating tribal cultural resources, including consultation where required. Several commenters stated the consultation narrative in the environmental evaluation section of the originally proposed text was located in a place on the checklist where it would not often be referred to, and lacked any action requirement by practitioners using the checklist. This drove concerns that the narrative would eventually be ignored. As a result of these comments, as well as comments that suggested providing a concise and discrete action item to help practitioners determine if all procedural statutory requirements had been met would be more useful, the Agency replaced the proposed narrative regarding consultation with a question about initiating consultation at the beginning of the Environmental Checklist Form. That portion of the form acts as a cover sheet for projects, and asked practitioners using the cover sheet to affirmatively check whether consultation has been sought and initiated.

The note following the added question regarding consultation modified the originally proposed consultation narrative by providing more direct information to practitioners about the value of early consultation, and the statutory directive to solicit tribal input

prior to release of certain documents. It also indicates other resources at the state where additional relevant information may be available.

Some commenters stated the original narrative was too permissive, and suggested that practitioners wait to engage in consultation until after the development of all draft documents. AB 52 contains a directive for lead agencies and tribes to discuss the appropriate type of environmental document to prepare during consultation and prior to release of the environmental document.

The Agency recognizes that Tribes will not choose to engage in consultation in all instances. Where Tribes have accepted an invitation for consultation, however, the added note expresses the Agency's view that early and meaningful consultation is required, and may lead to less conflict and greater efficiency in the environmental review process.

Finally, some comments stated that the proposed addition to the Evaluation section gave undue deference to the California Historical Resources Information System (CHRIS), and the California Native American Heritage Commission's sacred lands file. Comment letters opined that the CHRIS system and the sacred lands file are inaccurate, unmaintained, and that in some instances tribes have decided not to share information about sacred sites with the State. The comment letters further interpreted the Agency's proposed language giving the CHRIS system and the sacred lands file priority over information that may result from consultation. The Agency does not intend to suggest that those resources have any greater priority. The CHRIS system and the sacred lands file do provide information that may be useful, particularly where there is no tribal consultation. However, in response to those comments, the Agency modified the consultation narrative to emphasize the importance of tribal consultation issue, and retained references to the CHRIS system and the as resources to help lead agencies avoid impacts to tribal cultural resources.

T1-3) Separation of Paleontological Resources from Tribal Cultural Resources

Many Tribes expressed concern that the originally proposed text did not fully meet the statutory objective to separate Tribal Cultural Resources from paleontological ones. Changing the checklist to separate Tribal Cultural Resources from other cultural resources will explicitly separate tribal cultural resources from paleontological resources.

T1-4) Restructuring How the Questions are Asked

Several commenters suggested that the Tribal Cultural Resource questions should ask first whether a proposed project site includes a resource as defined by Public Resources Code 21074, and then consider whether the resource is either listed in the State's, or a local historic registry, or alternatively, is determined by the lead agency in its discretion to be a Tribal Cultural Resource because it could be so listed. The Agency agreed that this structure was consistent with the statute. Given the broad list of items

covered by Public Resources Code section 21074, asking whether any of these resources are listed, or whether the lead agency has determined they could be, is consistent with how CEQA treats this sort of analysis, and makes greater sense.

T1-5) Clarifying the Definition of Tribal Cultural Resources

Some commenters sought to have the agency clarify the definition of Tribal Cultural Resources. Specifically, some tribes wanted the Agency to clarify that biological resources, such as plants, could be considered Tribal Cultural Resources. The definition in Public Resources Code section 21074 was carefully developed, and extensive in nature. There is no basis for the Agency to further interpret the existing definition at this time. Rather, lead agencies in their discretion, may work with Tribes during consultation to consider impacts to tribal cultural resources as described by the statute.

T1-6) Defining Tribal Information as Substantial Evidence

Several Tribes have urged the Agency to develop sections within the CEQA Guidelines themselves that would declare tribal oral testimony as a type of substantial evidence. Further, some Tribes have expressed that they must compete with other experts, such as archeologists, about what is culturally relevant to indigenous peoples in instances where a resource is not listed. Such clarification is not necessary to effectuate the direction issued by the Legislature. The Legislature directed the Agency update the checklist, so substantive clarifications are not proposed at this time.

T1-7) Substantive Amendments to the CEQA Guidelines Beyond an Update of the Checklist

Some Tribes requested that the Agency go beyond the checklist and provide procedural and substantive analytical guidance on how to conduct consultation appropriately, and on how to evaluate potentially significant impacts to Tribal Cultural Resources. One commenter, for example, sought performance standards regarding the disturbance of tribal remains included in the rulemaking. These commenters suggested the Agency cross-reference existing laws implemented by the Native American Heritage Commission as a way to expand the scope and breadth of the definition in Public Resources section 21074, or provide related performance standards. The Agency chose to remain concise in its update to the checklist, which is used as a tool by practitioners on the ground, rather than expand the questions in the Tribal Cultural Resources section, or create additional regulatory sections within the Guidelines themselves. Further, lead agencies have an independent obligation to follow all applicable laws related to development of a proposed project site. Other laws, such as the California Native American Graves Repatriation Act exist outside of CEQA and have additional requirements relevant to the treatment of any human remains or associated grave goods. Such remains are likely to be a Tribal Cultural Resource if they are the remains of a Native American person. Practitioners must consider related laws as they apply the Tribal Cultural Resources definition. Additional questions that cross-reference

other laws could create unnecessary confusion given the breadth and scope of AB 52, and thus are not proposed at this time.

T1-8) The Agency Has Exceeded the Minimum Requirements Necessary to Fulfill its Mandate

Some commenters stated that the Agency need only provide a citation as a cross reference in the Tribal Cultural Resource definition, and ask lead agencies to consider the potential for significant impact to the resource in order to meet the Legislative directive of AB 52. Others stated that cleaning up the word "formal," to "dedicated," was not relevant and beyond the rulemaking's scope. Still others stated that any discussion of consultation was unnecessary in the checklist. The Agency disagrees.

First, the Agency believes that providing the language as proposed will help practitioners comply with the procedural requirements of the statute, including an obligation to consult.

Second, by changing the word "formal" to "dedicated," the Agency recognizes that some indigenous people, as well as early settlers to the State, may have buried their deceased in areas not formally recognized by the State, and that there is relevance in making this change when changes regarding Tribal Cultural Resources are made.

Finally, consultation will be required in some instances where Tribes have sought it, and the Agency believes its proposal will assist lead agencies in developing complete and clear administrative records.

T1-9) The Governor's Office of Planning and Research's Technical Advisory is Incomplete

Several comment letters encouraged the Governor's Office of Planning and Research to finalize a technical advisory on AB 52. OPR's technical advisory is not a part of this rulemaking, nor was it incorporated by reference. Therefore, the Agency sees no basis to make changes to Appendix G based on this comment.

Specific Response to Comments

Comment Letter 1-1

1-1.1
Commenter stated it believed the informational section on consultation should have an action item that ensures practitioners provide the results of consultation on the checklist to support any determination reached. The Agency agreed with this, and made changes. See Thematic Comment T1-2.

1-1.2

Commenter believes a cross reference to the definition of tribal cultural resources in Public Resources Code 21074 would be sufficient, rather than articulating some of its provisions. The Agency considered, but ultimately rejected this comment. The Agency determined providing some of the definition's language would prove helpful to practitioners using the list, and therefore, chose to retain it.

Comment Letter 1-2

1-2.1
Commenter sought and was provided with a copy of the proposed text and the package of rulemaking materials. The comment did not suggest any changes to the proposed text.

Comment Letter 1-3

1-3.1
Commenter stated the original wording of the checklist restructured the definition of TCRs in a manner that was inconsistent with the statute. The Agency made changes in response to this comment to include more of the text of the definition in section 21074.

1-3.2
Commenter suggested that subparts of the definition found in section 21074 be included in the checklist, including unique and non-unique archaeological resources. The Agency considered but rejected making these suggested changes. These subparts will apply in only certain situations, and thus they need not be included for practitioners to consider whether a TCR is present and potentially impacted by a project.

1-3.3
Commenter sought a broader approach to describing tribal cultural resources in the checklist. The Agency rejected this requested change because the statute is clear about what constitutes a TCR, and thus there was no basis to alter or otherwise manipulate the language.

Comment Letter 1-4

1-4.1
Commenter believes a cross reference to the definition of tribal cultural resources in Public Resources Code 21074 would be sufficient, rather than articulating the statute's express provisions. The Agency considered, but ultimately rejected this comment. The Agency chose to retain the statutory definition in order to provide the language to practitioners for clarity and consistency. .

1-4.2
Commenter supports the change to "dedicated cemetery," from "formal cemetery," but believes it to be outside the scope of the rulemaking. The Agency considered and rejected this comment. Tribes may have resources within dedicated cemeteries. Other

Californians may also have dedicated cemeteries. Further, the notice for this rulemaking relied not only on the authority vested in AB 52, but also on the Agency's general regulatory authority relative to CEQA and its regulations, commonly called the CEQA Guidelines. Finally, the original notice of rulemaking expressly noted the Agency would be amending section V of the checklist. Therefore, revising this statement to be more precise is within the scope of this rulemaking.

1-4.3
Commenter does not believe it is consistent to include some of the statutory definition of TCRs in the checklist. The Agency considered, and rejected this comment. The checklist is a tool intended to help practitioners evaluate potentially significant impacts from a proposed project. The Agency believes there is value in providing the definition, rather than merely cross-referencing sections.

Comment Letter 1-5

1-5.1
Commenter believes further consultation should have been offered by the Office of Planning and Research relative to the proposed text AB 52 directed the Governor's Office of Planning and Research to draft, and Resources to adopt, an update to Appendix G of the CEQA Guidelines. After the law was signed, the Governor's Office of Planning and Research conducted nearly two years of outreach efforts, which is fully detailed in its transfer letter to the Agency.

The Agency would further note, the Governor's Office of Planning and Research process to update the CEQA Guidelines occurs prior to the beginning of the rulemaking process at the Resources Agency. Therefore, this comment is outside the scope of this rulemaking, and the Agency declines to comment further upon its merit.

1-5.2
Commenter believes there needs to be a separate TCR section in the checklist. The Agency created a separate TCR section in the checklist. See Thematic comment T-1.

Comment Letter 1-6

1-6.1
Commenter believes that the references to the California Historical Resources Information System and the Native American Heritage Commissions' Sacred Lands File will create undue reliance, and that specifically, those data bases are outdated, difficult to use, and often incomplete or inaccurate. Therefore, Commenter feels lead agencies may misinterpret or misunderstand the data they receive. This Agency understands this commenter's concerns, but declines to adopt any changes. These state databases provide alternative resources for lead agencies and practitioners, and were referenced as a way to establish additional sources of information relative to TCRs in the hopes that lead agencies will successfully be able to determine their presence and avoid

impacts to them. References to these systems do not relieve lead agencies from complying with consultation obligations under AB 52, nor do they imply a value judgment relative to the data available.

1-6.2
Commenter again notes that the CHRIS database is not always consistent and the information is not always accessible. See answer to1-6.1

1-6.3
Commenter would like the Agency and State Historic Preservation Officer to "get confidentiality protocols in place." To the extent this comment is about another entity, and not the proposed text it is outside the scope of the rulemaking and the Agency declines to make changes. To the extent commenter is suggesting the Agency adopt protocols relative to confidentiality in the CEQA guidelines, it rejects this change. Each lead agency and tribe will have a different interaction, relationship, and level of exchange. Therefore, it is more appropriate for lead agencies to determine when and how to maintain confidentiality in compliance with the legal requirements of AB 52.

1-6.4
Commenter wants the State Historic Preservation Officer to work on consistent standards. This comment is outside the scope of this rulemaking, and the Agency declines to make changes based on it.

1-6.5
Commenter proposed a model for memorandums of understanding with the CHRIS system. This comment is outside the scope of this rulemaking, and the Agency declines to make changes based on it.

1-6.6
Commenter recommends standardized non-confidential summaries from CHRIS. This comment is outside the scope of this rulemaking, and the Agency declines to make changes based on it.

1-6.7 and 1-6.8
Commenter believes the Native American Heritage Commission needs to improve its sacred lands database and its staffing and policies for the ongoing management of that database. This comment is outside the scope of this rulemaking, and the Agency declines to make changes based on it.

Comment Letter 1-7

1-7.1
Commenter would like a discreet question about paleontological resources added to the checklist. The Agency considered, but rejected this change. While AB 52 directed that TCRs be separated from such resources, it did not specifically address altering the checklist as it currently relates to paleontological resources. Section V already seeks

consideration of the destruction of unique paleontological resources. Therefore, the Agency rejects this comment, as it believes the checklist is adequate in this regard.

Comment Letter 1-8

1-8.1 and 1-8.2
Commenter seeks to have TCRs placed in their own section of the checklist, or alternatively to have them listed first within cultural resources to establish their "priority." The Agency agrees that a separate section is warranted; see Thematic Comment T-1. The Agency disagrees that such resources are prioritized over others in CEQA. Making this change reflects the fact that AB 52 created a new resources category in statute, not but does not reflect a legal position by the Agency that TCRs should be elevated in value above all other resources. Therefore, the agency declines to make changes based on this comment.

1-8.3
Commenter suggests that the Agency include language that makes it clear tribal evidence is superior to other evidence and not to be "pitted" against, or subordinate to, archeological or other expert information. The Agency understands the concern, but lacks authority to create a hierarchical valuation of potential evidence. The lead agency retains discretion under AB 52, and CEQA more broadly, to consider whether and what substantial evidence is before it when making a determination. Such evidence may include archeological or other data. While it is true that tribes will be able to provide the lead agency with information about what is culturally significant to them if they choose to consult, the lead agency still retains the discretion to consider all the evidence before it. Therefore, the agency declines to make changes based on this comment. Part of the legislative intent of AB 52 is to "Recognize that California Native American tribes may have expertise with regard to their tribal history and practices, which concern the tribal cultural resources with which they are traditionally and culturally affiliated. Because the California Environmental Quality Act calls for a sufficient degree of analysis, tribal knowledge about the land and tribal cultural resources at issue should be included in environmental assessments for projects that may have a significant impact on those resources." (AB 52 (Gatto, 2014) Legislative Intent §1(a)(4).)

1-8.4
Commenter believes that paleontological resources should be separated out from the analysis relative to TCRs. The Agency agrees. See Thematic Comment T-3.

Comment Letter 1-9

1-9.1
Commenter believes TCRs should be listed in their own category in the checklist. The Agency agreed and made changes. See Thematic Comment T-1.

1-9.2

Commenter suggests two substantive CEQA questions. The first seeks analysis on the disturbance of human remains. The second seeks analysis on public lands and resources adjudicated by the Native American Heritage Commission pursuant to Public Resources Code section 5097.9. The Agency considered and rejected these questions. Lead agencies will need to consider whether a TCR, as defined is, present. The lead agency will then need to determine whether there is a potentially significant impact to an identified TCR. The analysis should also consider a cultural resource analysis that focuses on the potential to disturb dedicated cemeteries. As such, this change is not necessary to implement the mandate in AB 52. See Thematic Comment T1-7.

1-9.3
Commenter seeks a separate TCR section. The Agency has determined a separate section is warranted as TCRs are a new type of resource; see Thematic Comment T-1.

1-9.4, 1-9.5, 1-9.6, 1-9.7 and 1-9.8
Commenter seeks a clearer section on consultation and a "call to action," so that those using the checklist identify whether and what consultation has occurred. The Agency has made changes based on this comment. See Thematic Comment T-2.

Comment Letter 1-10

1-10.1 and 1-10.2
Commenter would like more substantive questions developed to define a TCR and to dictate how a TCR should be analyzed. The Agency considered and rejected changes based on this comment. The definition of TCR is in statute and is clear. See Thematic Comment T1-7.

Comment Letter 1-11

1-11.1, 1-11.2, 11-11.3, 1-11.4, and 1-11.5

Commenter believes the consultation narrative was located in the wrong section of the list and lacked specific direction to take action, and thereby could be overlooked. Commenter also believes the language provided was too vague and could lead to misunderstanding regarding the requirement to consult in certain instances. The Agency agrees and made changes. See Thematic Comment T-2.

1-11.7
Commenter believes that TCRs should be listed in their own category of the Checklist. Agency agrees and made changes based on this comment. See Thematic Comment T1-1.

1-11.8
Commenter believes that paleontological resources should be separated out from the analysis relative to TCRs. The Agency agrees. See Thematic Comment T-3.

1-11.9
Commenter asserts that the question regarding tribal cultural resources is too passive because it does not emphasize or prioritize the value of tribal input and evidence over other forms of evidence. While the Agency did reformulate and move this question to a separate section of the checklist, it rejects providing any valuation or prioritization of evidence as that is outside the scope of its authority. CEQA vests lead agencies with the discretion to determine whether and what evidence is before it on a project-by-project scale, and does not authorize the Agency to supplant its views or position for that of lead agency via the Appendix G sample checklist.

1-11.10
Commenter feels the question regarding the potential impacts to TCRs should be restructured so that tribal input is prioritized. The Agency did restructure and relocate this question to be more in line with the statute. However, that statute does not prioritize or authorize the Agency to prioritize or otherwise create a hierarchical value relative to types of evidence that may be before lead agencies. As such, the Agency declines to make changes based on this comment.

1-11.11
Commenter would like more substantive questions developed to define a TCR and to dictate how a TCR should be analyzed. Specifically, commenter seeks to have existing laws implemented by the Native American Heritage Commission relative to sacred sites and human remains considered as possible performance standards or "prompts" for lead agencies considering impacts. The Agency considered and rejected changes based on this comment. The definition of TCR is in statute and is clear; therefore, there is no reason to broaden it via other laws that are designed to fulfill purposes beyond environmental review. See Thematic Comment T1-7.

Summary and Comments Received on the Amendments to the Originally Proposed Text (Round 2)

Thematic Responses to Comments Received on the Amended Proposal

T2-1) Expanding the Definition of Tribal Cultural Resources

One commenter again stated the definition should include sacred sites listed in the Native American Heritage Commission's sacred lands file per Public Resources Code section 5097.94. As was the case with the originally proposed text, CEQA provides a broad definition meant to govern what is considered a tribal cultural resource for purpose of CEQA compliance in Public Resources Code section 20174. The Agency lacks the authority to clarify that definition beyond the scope of the statute.

One commenter suggested the Agency use the entire definition in Section 21074, including sub-parts (2)(b)-(c). The Agency's goal is to find a balance between efficiency

and clarity. These sub-sections limit and further expand upon the scope of the definition in 21074, and apply to CEQA projects regardless of whether they are expressly stated in the checklist. Specifically, they deal with how lead agencies should consider geographic landscapes, and the overlap between historic, archeological, and cultural resources, which must be consistent within the framework of listing of historic resources. The Agency does not need to include these sub-parts in the broader question in order for them to apply, nor will they apply in all instances. Rather, practitioners and others faced with these specific issues will need to review these sections and consider whether the resources at issue are within the broader definition.

Finally, one commenter wanted medicinal plants expressly referenced. The Agency declined to make such a change. The checklist is a general tool intended to provide a broad analytical framework for all potentially affected resources. Whether and how plants will be evaluated will be up to the lead agency in its discretion, within the scope of section 21074's definition of tribal cultural resources.

T2-2) Cross-Referencing the Statute for Efficiency

Conversely, one commenter again suggested merely cross-referencing the definition. Again, the Agency considered this, but decided that providing some of the definition's language would prove helpful to practitioners using the list, and therefore chose to retain it.

T2-3) Consultation Narrative

One commenter stated the "note" within the Environmental Checklist Form Cover Sheet implies consultation should be done prior to the release of a final, rather than draft, environmental document. The Agency disagrees. First, checklists are used, and therefore developed, in the *initial* study of a proposed project to help practitioners and others determine the appropriate level of environmental review. Thus, to answer the question, practitioners will have already had to engage relevant tribes. Further, Public Resources Code section 21080.3.2 (a) expressly states that consultation may include discussions about the type of environmental review. Thus, while the Agency acknowledges there is an outer limit relative to the timeline for commencing consultation in section 21080.3(d), which requires consultation to be initiated within 14 days of determining a project application is complete, or a lead agency has determined to *undertake* a project, the Agency believes the language used is consistent with AB 52. , The proposed language should result in meaningful consultation prior to commitment of lead agencies to any one course of action, or to the approval of a proposed project.

Similarly, several commenters wanted to see the consultation note expanded to include all of the procedural steps required under AB 52 relative to consultation. The Agency has declined to make this change. The Agency acknowledges that the checklist is a sample, and is seeking to strike a balance between a user-friendly document that will continue to serve lead agencies, while including enough information to ensure that practitioners and others comply with AB 52. Agency believes it has struck this balance

by cross-referencing relevant portions of the Public Resources Code regarding the consultation process, while asking pointed questions that seek to ensure practitioners consciously determine whether their obligations have been met.

Another comment again stated the Agency's narrative note on consultation was permissive in tone, rather than mandatory. The Agency has cross-referenced relevant portions of the law for easy access, and asked whether consultation has begun, when it is required. It has further recommended early consultation for meaningful and efficient results, and cited to other available state resources, in an effort to remind practitioners and others that such resources are available.

Finally, one commenter suggested that the reference to the sacred lands file at the Native American Heritage Commission and the CHRIS system was again going to create an undue reliance on those systems. While the Agency is sympathetic with to this concern, these resources exist and may add value to a planning agency's efforts. As such, it seeks to note them in this section. The Sacred Lands File and the CHRIS system may be particularly useful when tribes choose not to consult on a project.

Finally, one commenter stated the note was "out of place." The Agency disagrees. Given the unique nature of Tribal Cultural Resources, it is useful to add information that helps practitioners comply with the law where they will answer questions about such compliance.

T2-4) Location of the Tribal Cultural Resources Section on the List

One commenter stated the Tribal Cultural Resources Section should proceed directly after the Cultural Resources section for ease of use. The Agency acknowledges this would be one possible way to develop the checklist. Given that all other sections are in alphabetical order, however, it chose to follow the existing structure. Since this is a sample checklist, lead agencies could decide to make this change of their own accord.

T2-5) The Governor's Office of Planning and Research Technical Advisory is Incomplete

One commenter again sought to have the Agency finalize and clarify the technical advisory being developed by the Governor's Office of Planning and Research, and specifically asked that OPR provide a handbook similar to Senate Bill 18's (2004 (Burton)) consultation guidance. Again, such a request is outside the scope of this rulemaking, and the Agency's purview generally, and the Agency will not make changes based on this comment.

Similarly, one commenter noted it had already adopted a version of the originally proposed text through its own regulatory local process. It indicated that the description of tribal cultural resources in AB 52 were not useful for its work and were inhibiting its regulatory activity because they were scaled for development-type projects with discreet addresses. Again, this is outside the purview of this rulemaking. The Agency recognizes

its list is a sample, and encourages lead agencies to use it as they find appropriate. However, should they choose to develop their own lists, they will need to consult their own counsel.

Specific Response to Comments for Round 2
Comment Letter 2-1

2-1.1 Commenter wants the definition of Tribal Cultural Resources to be expanded to include resources listed on the Native American Heritage Commission's Sacred Lands File. Specifically, commenter seeks to have existing laws implemented by the Native American Heritage Commission relative to sacred sites and human remains considered as possible performance standards or "prompts" for lead agencies considering impacts. The Agency considered and rejected changes based on this comment. The definition of TCR is in statute and is clear; therefore, there is no reason to broaden it via other laws, which are designed to fulfill purposes beyond environmental review. See Thematic Comment T1-7.

Comment Letter 2-2
Commenter appreciated the changes and had no substantive or other edits to offer.

Comment Letter 2-3
Commenter believes the word "draft" should be inserted in the consultation narrative to ensure people are clear consultation is likely to be more effective prior to the impending release of a final document. The Agency declines to make this change. See thematic responses T2-3.

Comment Letter 2-4
Commenter is concerned about the lack of information on medicinal plants. The Agency assumes commenter is seeking to expand the definition of a TCR to include such plants. Therefore, the Agency declines to make changes based on this comment. The definition of a TCR is clear and in statute. Therefore, such changes would be beyond the Agency's authority. See thematic comment T2-1.

Comment Letter 2-5
Commenter believes the proposed formatting of the questions in the TCR section misstates the law. The Agency disagrees and declines to make changes based on this comment. See thematic comment T2-1.

Comment Letter 2-6

2-6.1
Commenter would like to see more language that directs lead agencies on when consultation should or must occur, with specific questions commenter believes would elicit clear responses and a developed administrative record. The Agency declines to make changes based on this comment. See thematic response T2-3.

2-6.2
Commenter has provided an alternative format, and suggested that the consultation narrative be developed into an actual checklist question that would elicit information about whether tribes have sought consultation notices, and whether if this is the case, if they were offered consultation. Commenter believes alternative language would foster closer statutory compliance and better administrative record development. The Agency declines to make changes based on this comment. See thematic response T2-3.

2-6.3
Commenter suggests making non-substantive formatting changes to the TCR checklist question. The Agency feels the change does not alter meaning or otherwise assist users, and therefore declines to adopt this change.

Comment Letter 2-7
Commenter had no comments.

Comment Letter 2-8
Commenter appears to be concerned because it adopted its own regulatory changes to a local checklist based on draft versions of the checklist that were initially circulated by the Governor's Office of Planning and Research (OPR). Commenter is further concerned because it also adopted regulatory thresholds recommended by OPR, which it finds are not sufficient for its jurisdictional needs. The comment does not pertain to the scope of this rulemaking, and the Agency declines to make changes based on it.

Comment Letter 2-9

2-9.1
Commenter notes the table of contents, referred to as "Environmental Factors Potentially Affected," for the checklist inadvertently failed to include the new TCR category. The Agency will make this change.

2-9.2 and 2-9.3
Commenter suggests rewording the narrative on consultation because it believes it improperly suggests consultation is permissive. The Agency declines to make changes based on this comment. In some instances, consultation will not be required, and lead agencies are given the discretion under AB 52 to determine when consultation is and is not a legal obligation. The consultation narrative crafted by the Agency asks whether consultation has begun in those instances when it has been properly requested by geographically affiliated tribes. It further denotes the State's view on why early consultation will lead to better results. See thematic comment T2-3.

2-9.4
Comment has sought additional substantive questions be asked in the new TCR section, particularly as they relate to resources protected by the Native American Heritage Commission. For the same reasons it declined to make such changes during a

15-day circulation, the Agency continues to reject changes in this regard. See thematic comment T1-7.

Comment Letter 2-10
2-10.1 and 2-10.2

Commenter thanks the Agency, and then seeks a future guidance document from OPR. The Agency declines to make changes based on this request, as it is outside the scope of this rulemaking.

Comment Letter 2-11
Commenter seeks to have the entire definition of TCR, including its subparts, expressly called out on the checklist. The Agency declines to make these changes. See thematic comment T2-1.

Comment Letter 2-12
Commenter supports the rulemaking. No changes are requested.

Comment Letter 2-13
2-13.1
Commenter supports the new section 11. No changes are sought.

2-13.2
Commenter has noted a non-substantive typo. The Agency did not intend to strike out part of the existing citation, and will make that change.

2-13.3
Commenter supports the rulemaking. No changes are requested.

2-14.4
Commenter would like a cross reference to the definition of TCR in Public Resources Code section 21074 rather than the proposed text. The Agency declines to make changes based on this comment. See thematic comment T2-1.

Comment Letter 2-14

2-14.1
Commenter believes the note is out of place and should be in its own section XVII. The Agency declines to make this change. The note is intended to help practitioners when they begin their initial study of a project and prior to proceeding to analyze potential impacts to TCRs. The Agency believes consultation can and will assist with the analysis of TCRs. Public agencies can certainly tailor this list, however, to any format that suits their needs as it is a sample. See thematic comment T2-3.

2-14.2

Commenter notes a typo to a citation. Specifically, the Agency noted the availability of the State's sacred lands file, which is memorialized in Public Resources Code section 5097.96, but has inadvertently referenced 5097.94. The Agency will make this non-substantive change.

2-14.3
Commenter would like a cross reference to the definition of TCR in Public Resources Code section 21074, only. The Agency declines to make changes based on this comment. See thematic comment T2-1.

Non-Substantial Changes

During the 15 day comment period two commenters noted typos in the proposed language. First, an unintended strikeout was made to Section V(b) of the Cultural Resources section relative to an existing cross-reference. This reference is correct and will not be altered.

Second, a commenter noted that the sacred lands file had been mis-cited to. The file is directed by Public Resources Code 5097.94, and this section will replace section 5097.96, which is broader and includes concepts beyond that file.

Finally, the Agency failed to update the table of contents for the checklist, referred to as "Environmental Factors Potentially Affected" with the phrase: "Tribal Cultural Resources." It will add a space for this new category in this section.

CEQA Compliance

The proposed regulations are not a "legal project" under section Guidelines section 15378, and therefore do not trigger CEQA because they make no foreseeable change to the environment either directly or indirectly, but rather inform lead agencies about how to consider evaluating proposed future projects.

Availability of the Final Statement of Reasons

The Agency will make copies of the Final Statement of Reasons (FSR) for the proposed regulations available. Copies of the rulemaking file for this regulatory action, which contains all information on which the proposal is based, are also available to the public, upon request directed to:

Lia Duncan
Legal Secretary
1416 9th Street, Suite 1311
Sacramento CA, 95814

Rulemaking documents are also available on the Agency website at http://resources.ca.gov/ceqa/

Tab Q

Final Text for tribal cultural resources update to Appendix G: Environmental Checklist Form

1. Add a box for Tribal Cultural Resources in the table of contents entitled "Environmental Factors Potentially Affected" between the "Transportation/Traffic" box and the "Utilities/ Service Systems" box.

☐ Tribal Cultural Resources

2. Add a statement to the Environmental Checklist Form at the beginning of Appendix G, which provides a general description and cover sheet for a proposed project:

[...]

11. Have California Native American tribes traditionally and culturally affiliated with the project area requested consultation pursuant to Public Resources Code section 21080.3.1? If so, has consultation begun?

Note: Conducting consultation early in the CEQA process allows tribal governments, lead agencies, and project proponents to discuss the level of environmental review, identify and address potential adverse impacts to tribal cultural resources, and reduce the potential for delay and conflict in the environmental review process. (See Public Resources Code section 21083.3.2.) Information may also be available from the California Native American Heritage Commission's Sacred Lands File per Public Resources Code section 5097.96 and the California Historical Resources Information System administered by the California Office of Historic Preservation. Please also note that Public Resources Code section 21082.3(c) contains provisions specific to confidentiality.

V. CULTURAL RESOURCES

Would the project:

a) Cause a substantial adverse change in the significance of an historical resource as defined in § 15064.5?
b) Cause a substantial adverse change in the significance of an archaeological resource pursuant to § 15064.5?
c) Directly or indirectly destroy a unique paleontological resource or site or unique geologic feature?
d) Disturb any human remains, including those interred outside of ~~formal~~ dedicated cemeteries?

XVII. TRIBAL CULTURAL RESOURCES

a) Would the project cause a substantial adverse change in the significance of a tribal cultural resource, defined in Public Resources Code section 21074 as either a site, feature, place, cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American tribe, and that is:	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
a) Listed or eligible for listing in the California Register of Historical Resources, or in a local register of historical resources as defined in Public Resources Code section 5020.1(k), or	☐	☐	☐	☐
b) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Public Resources Code Section 5024.1. In applying the criteria set forth in subdivision (c) of Public Resource Code Section 5024.1, the lead agency shall consider the significance of the resource to a California Native American tribe.	☐	☐	☐	☐

XVIII. UTILITIES AND SERVICE SYSTEMS

Authority: Public Resources Code sections 21083 and 21083.09

Reference: Public Resources Code sections 21073, 21074, 21080.3.1, 21080.3.2, 21082.3, 21084.2 and 21084.3.

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Note: Conducting consultation early in the CEQA process allows tribal governments, lead agencies, and project proponents to discuss the level of environmental review, identify and address potential adverse impacts to tribal cultural resources, and reduce the potential for delay and conflict in the environmental review process. (See Public Resources Code section 21083.3.2.) Information may also be available from the California Native American Heritage Commission's Sacred Lands File per Public Resources Code section 5097.96 and the California Historical Resources Information System administered by the California Office of Historic Preservation. Please also note that Public Resources Code section 21082.3(c) contains provisions specific to confidentiality.

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2. Add a statement to the Environmental Checklist Form at the beginning of Appendix G, which provides a general description and cover sheet for a proposed project:

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V. CULTURAL RESOURCES

Would the project:

a) Cause a substantial adverse change in the significance of an historical resource as defined in § 15064.5?
b) Cause a substantial adverse change in the significance of an archaeological resource pursuant to § 15064.5?
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d) Disturb any human remains, including those interred outside of ~~formal~~ dedicated cemeteries?

XVII. TRIBAL CULTURAL RESOURCES

a) Would the project cause a substantial adverse change in the significance of a tribal cultural resource, defined in Public Resources Code section 21074 as either a site, feature, place, cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American tribe, and that is:	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
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Authority: Public Resources Code sections 21083 and 21083.09

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Tab R

STATE OF CALIFORNIA
NATURAL RESOURCES AGENCY

In the Matter of: Proposed Adoption and Amendment Of Regulations Implementing the California Environmental Quality Act	))))	CERTIFICATION AND ADOPTION ORDER August 8, 2016

I. INTRODUCTION

By this Order, the Secretary for the California Natural Resources Agency ("Natural Resources Agency") certifies and adopts the attached amendments to the Natural Resources Agency's existing regulations implementing the California Environmental Quality Act ("CEQA"). (Cal. Code Regs., tit. 14, § 15000 et seq. ("State CEQA Guidelines").) This Order fulfills the Natural Resources Agency's obligations under sections 21083 and 21083.09 of the Public Resources Code to certify and adopt new regulations relative to Tribal Cultural Resources (commonly referred to as AB 52, Gatto 2014).

II. RULEMAKING HISTORY

The Governor's Office of Planning and Research ("OPR") developed the preliminary recommendations. In developing its recommendations, OPR actively sought the input, advice, and assistance of numerous interested parties and stakeholder groups, as well as California Native American Tribes. It then developed three alternatives, which were circulated for public comment before they were further revised to reflect that public participation. (See attached transmittal documents received by the Resources Agency from OPR on January 29, 2016.)

Upon receipt of OPR's recommendations, the Natural Resources Agency commenced its rulemaking process on February 19, 2016, by publishing its Notice of Proposed Action in the California Regulatory Notice Register. (Z-2016-8-Z) In addition, the Notice of Proposed Action was mailed and emailed to parties interested in direct notice, as well as emailed to its CEQA list serve. The Natural Resources Agency also posted the Notice, Proposed Text and Initial Statement of Reasons and links to all supporting material on its web site. Finally, it invited public comments on the proposed amendments between February 19, 2016 and April 4, 2016. A public hearing was held on April 4, 2016 in Sacramento.

Following review of all comments received during the public review period, the Natural Resources Agency determined that further revisions to the proposed text were appropriate. A 15-day Notice of Proposed Changes was mailed to all persons that requested notice. Electronic notices were e-mailed to those requesting such notification. Additionally, the Notice of Proposed Changes and the Revised Text of the proposed

amendments were posted on Natural Resources Agency's web site. Since all revisions to the proposed amendments were sufficiently related to the originally noticed text, public comment was invited between June 6, 2016, and June 21, 2016.

Following the close of the second public comment period, the Natural Resources Agency reviewed and considered all written comments. Concluding that no additional changes were necessary, other than the nonsubstantive changes described in the Final Statement of Reasons, the Natural Resources Agency developed detailed responses to all comments that it received, and finalized the regulations.

III. FINDINGS

A. This Rulemaking is not Subject to CEQA

The development of these regulations is not a project pursuant to Public Resources Code section 21065 because they will not result in any foreseeable change to the physical environment, nor do they commit any public entity to a definite course of action. Because the amendments will not cause any direct or indirect change in the environment, this activity does not fall within the definition of a project. (See, Cal. Code Regs. § 15378(b)(2) which expressly excludes administrative activities such as policy and procedure making from CEQA).

B. There is No Mandate on Local Agencies or School Districts

Government Code section 11346.9 requires the Natural Resources Agency to submit to the Office of Administrative Law a Final Statement of Reasons that includes two determinations. The first determination, identified in subdivision (a)(2), is whether adoption, amendment or repeal of the regulation imposes a mandate on local agencies or school district, and if so, whether the mandate is reimbursable pursuant to Part 7 of Division 4. If the agency finds that any such mandate is not reimbursable, it shall state the reasons for that finding. As discussed in the Notice of Proposed Action for this rulemaking, the Natural Resources Agency has determined that this rulemaking will not impose a mandate on local agencies or schools. Proposed amendments to the State CEQA Guidelines do not impose a state-mandated local program. The State CEQA Guidelines reflect existing statutory obligations that would generally apply to any discretionary action by any state agency, board or commission, or local or regional agency. None of the amendments to the State CEQA Guidelines require any new reports, filings or activities, or compel either directly or practically any particular action, but are merely triggered once an entity determines it must take a discretionary action. (See, *Clovis Unified School District In Re Test Claim*, the California Environmental Quality Act (2010) 03-TC-17.) Additionally, these regulations provide a streamlined alternative process for eligible infill projects, and so will not create a new mandate.

C. No Alternative Considered Would be More Effective in Implementing AB 52

The second determination the Natural Resources Agency must make, found in

subdivision (a)(4) of Government Code section 11346.9, is that no alternative considered by the Natural Resources Agency would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the adopted regulation. Similarly, Government Code section 11346.5(a)(13) requires the Notice of Proposed Action to contain a statement that the Natural Resources Agency must, before adopting the proposed amendments to the State CEQA Guidelines, determine that no reasonable alternative considered by it, or that has otherwise been identified and brought to the attention of it, would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons that the proposed action.

The Natural Resources Agency is not aware of any cost impacts or other burdens that a representative private person or business would necessarily incur in reasonable compliance with the amendments to the State CEQA Guidelines because those amendments do not impose any new requirements.

The Natural Resources Agency considered reasonable alternatives to the amendments in this rulemaking activity. The Natural Resources Agency has determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the amendments. This conclusion is based on the Natural Resources Agency's determination that the amendments are necessary to implement the Legislature's directive in AB 52. The Natural Resources Agency rejected the no action alternative because it would not respond to the Legislature's directive in AB 52. Since there are no impacts on business, including small business, there are no alternatives available that would lessen any adverse impacts to these entities.

D. There are No Adverse Economic Effects as a Result of This Rulemaking

Government Code section 11346.3 requires the Natural Resources Agency to assess the potential for adverse economic impacts on California business enterprises and individuals avoiding the imposition of unnecessary or unreasonable regulations or reporting, recordkeeping, or compliance requirements. That section establishes a series of requirements that the Natural Resources Agency must adhere to in amending the State CEQA Guidelines. The Natural Resources Agency has adhered to these requirements and finds all of the following:

1. That the amendments are based on adequate information concerning the need for, and the consequences of, the proposed action. The amendments fulfill the Natural Resources Agency's obligations under section 21083.09 of the Public Resources Code to certify and adopt by July 1, 2016. The Natural Resources Agency is also acting pursuant to its more general authority in section 21083(f) to adopt regular updates to the State CEQA Guidelines.

2. That the Natural Resources Agency has considered the impact on business in the rulemaking with consideration of industries affected. The Natural Resources Agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the amendments to the State CEQA Guideline. Further, the changes that were made were made to a sample, non-mandatory checklist intended to assist the Public in understanding its statutory obligation. Therefore, the amendments do not have a significant, adverse economic impact directly affecting business.

3. That the Natural Resources Agency has assessed the potential for the amendments to the State CEQA Guidelines to adversely affect California business enterprises and individuals, including whether it will affect the creation or elimination of jobs or the creation, elimination or expansion of businesses, as required by subdivision (b) of Government Code section 11346.3. The Natural Resources Agency does not believe the changes do anything more than provide the public with advisory direction on what has been enacted statutorily. Therefore, the amendments to the State CEQA Guidelines will not adversely affect California business enterprises and individuals or require any business to prepare a report.

8/8/16
Date

John Laird,
Secretary for the California Natural Resources Agency

Tab S

REQUEST AND JUSTIFICATION FOR AN EFFECTIVE DATE UPON FILING WITH SECRETARY OF STATE PURSUANT TO GOVERNMENT CODE 11343.4

Consistent with Government Code section 11343.4 and with the Office of Administrative Law's (OAL) proposed regulations adding Section 30 to Title 1 of the California Code of Regulations, good cause exists to permit enactment of the adopted regulations upon filing with the Secretary of State. The adopted regulations amend Appendix G of Title 14 of the California Code of Regulations pursuant to the authority delegated by Public Resources Code sections 21083, 21083.09, 21073, 21074, 21080.3.1, 21080.3.2, 21082.3, 21084.2 and 21084.3.

The California Natural Resources Agency believes that it is appropriate to enact these adopted regulations once OAL has completed its review because AB 52, Gatto 2014 directed that they be so adopted by July 1, 2016. AB 52 sought to expedite the rulemaking for this issue because Tribal Cultural Resources are unique resources that, once destroyed, may be lost forever. Further, in most instances they cannot be recreated or repaired if damage is done to them. It is important lead agencies preparing environmental documents consider the unique nature of Tribal Cultural Resources prior to making decisions that could irreparably harm them.

Tab T

AFFIDAVIT OF RULEMAKING RECORD
COMPLETENESS AND CLOSURE

California Natural Resources Agency

I, Heather Baugh, Assistant General Counsel for the Natural Resources Agency declare:

1. I am informed and believe the attached copy of the rulemaking file is complete
2. The rulemaking record was closed on August 8, 2016.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed at Sacramento, California on August 8, 2016.

Heather C. Baugh
Assistant General Counsel
California Natural Resources Agency