



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.

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 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.