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
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PECHANGA INDIAN RESERVATION
Temecula Band of Luiseño Mission Indians

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April 8, 2015

VIA ELECTRONIC MAIL
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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

Tribal Consultation

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)?	☐	☐	☐	☐