**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

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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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*"Protecting, Preserving and Restoring Tribal, Cultural, Biological and Park Resource Landscapes"*

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Heather Baugh, Assistant General Counsel
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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

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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.

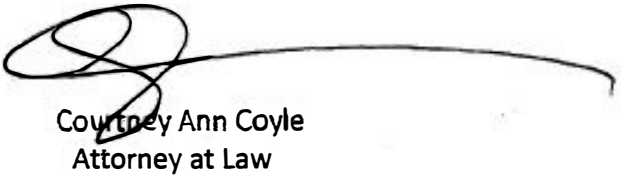
One additional issue area for clarification in the Update is confidentiality. We suggest adding to the discussion of existing Guideline section 15120(d) reference to Public Resources Code section 21082.3(c)(2)(3) which states that this subdivision does not affect or alter the application of Government 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,



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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.