



PECHANGA INDIAN RESERVATION
Temecula Band of Luiseño Mission Indians

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October 14, 2015

Christopher Calfee, Senior Counsel
Governor's Office of Planning and Research
1400 Tenth Street
Sacramento, California 95814

**Re: Comments on the 8/11/15 Proposed CEQA Guidelines submitted by the
Pechanga Band of Luiseño Indians**

Dear Mr. Calfee:

These comments are submitted on behalf of the Pechanga Band of Luiseño Indians ("Pechanga Tribe" or "Tribe"), a federally recognized and sovereign Indian Nation. Although we are submitting these comments after the published October 12, 2015 deadline, it is our understanding through email correspondence with you that our comments submitted on this date will be considered timely and will be reviewed and considered by your office. We thank you for the opportunity and look forward to continuing to work with your office on these issues of importance to the Tribe.

The Tribe has a specific role and identified level of participation in the CEQA, not only because of its status as a sovereign political nation within the State of California, but because of our unique relationship and expertise concerning Tribal Cultural Resources and the environmental impacts to these resources. It is our contention that tribal perspectives, interest, and input is key to arriving at legally adequate CEQA Guidelines, not just to comply with the CEQA Amendments implanted through Assembly Bill 52 ("AB 52"), but also in order to ensure that the policy and legislative intent of AB 52 is not inadvertently undermined by conflicting, unclear, or absent guidance in the CEQA Guidelines. The Pechanga Tribe has a uniquely important perspective as we were directly involved in the AB legislative process and have been working to protect our irreplaceable traditional cultural resources for decades.

Our investment in ensuring that the CEQA Guidelines are revised to assist with the proper implementation of AB 52, cultural resources protection and tribal interests, and as such, we are requesting individual consultation concerning these amended Guidelines pursuant to the Governor's Executive Order B-10-12. Even if E.O. B-10-12 does not apply to the Office of Planning and Research, in the interest of federal and state policy for government agencies, departments and offices which consult with tribes when they enact policy and legislation that impacts their interests and sovereignty, we ask for individual consultation on the Guidelines.

We offer these comments as our initial input on the recently posted draft amendments to the CEQA Guidelines. Please note these are not our exhaustive comments and we reserve the right to further comment on the Guidelines as OPR continues to move through the OPR drafting stage and administrative review process, in addition to comments we might offer during our individual consultation and any working groups assembled on these topics.

CEQA GUIDELINES MUST NOT CONTRAVENE AB 52

The Guidelines implementing CEQA cannot contravene the new CEQA provisions developed and enacted under AB 52. See Cal. Govt. Code § 11342.2 (“no regulation adopted is valid or effective unless *consistent and not in conflict with the statute*”) (emphasis added). Indeed, as OPR is aware, at least one California Court has invalidated provisions of the guidelines as inconsistent with and contrary to CEQA. See Communities for a Better Environment v. California Resources Agency, 103 Cal. App. 4th 98 (2002). While AB 52, via Public Resources Code § 21083.09, specifically requires OPR to revise the Guidelines to update Appendix G, other relevant portions of the Guidelines must be revised to incorporate and implement the mandates of newly enacted law, such as AB 52, otherwise the Guidelines will be in conflict with the governing law and would potentially be subject to invalidation.

Furthermore, having accurate and robust CEQA Guidelines that address the provisions enacted by AB 52 is of paramount importance to the proper implementation of CEQA. Not only for the reasons discussed above, but also because administrative guidelines are given “great weight” by courts when reviewing agency compliance with CEQA. See Communities for a Better Environment, 103 Cal. App. 4th 98. Thus, to ensure proper judicial review of actions taken under CEQA, the guidelines must be amended to incorporate the mandates and considerations raised by AB 52. Because courts look to the Guidelines as authority, ensuring adequate CEQA Guidelines are of paramount importance. To not have them address AB 52, which is a significant change to the law, will frustrate the implementation of the law, the fundamental intent and purposes of the law, and the tribes’ ability to invoke the CEQA statute as it was intended. Since the AB 52 amendments to CEQA are brand new, the first impressions to all courts will be of vital importance in the proper execution of the law. Including relevant language in the Guidelines will help courts address these cases in a manner consistent with both the letter and intent of the law.

In addition to adding appropriate language concerning the implementation of AB 52 throughout the Guidelines, we believe there is some initial areas that are reasonable to focus on at first. For example, in the Appendix G (checklist), we suggest adding specific questions for Tribal Cultural Resources (“TCRs”), which are a new category of resource under AB 52. We also suggest adding in questions about tribal consultation, which is now mandated under AB 52, a significant change from the prior statute and Guidelines that had no such mandate. We further suggest that the Existing Landscape Section should include questions regarding TCRs, as landscapes are expressly included in the definition under the amended statute. We have additional, more specific comments on Appendix G, below.

Another area where AB 52 could be woven in is having a separate section in the Guidelines discussing California Tribes and their role in the CEQA process. This section could include the following topics:

1. Guidance on Sacred Places (referencing existing State Law and other pertinent legal guidance)
2. Guidance on Cultural Landscapes (National Park Service Bulletin 38 and National Park Service Preservation Brief 36)
3. Guidance on Determining the presence of a TCR (NPS Bulletin 38 concerning the role and importance of tribal and community values and resource expertise, including consultation with the tribes and communities that assign value to the resource)
 - a. Emphasizing tribal expertise and consultation is key here
4. Guidance on understanding and following the Definition of TCRs (see above, including early consultation)
5. Guidance on complying with tribal consultation
 - a. Procedural requirements
 - i. Determining when an Application is Deemed Complete so as not to frustrate the intent of early tribal consultation on presence of resources, significant impacts, tribal consultation on alternatives and the type of environmental review
 - ii. Tribal Consultation regarding level of environmental review and why this is important on the front end of the CEQA process
 - iii. Tribal expertise and evidence for TCRs
 - iv. Confidentiality
 1. Existing law concerning tribal resources and sacred places
 2. Applicant and lead agency role and responsibilities
 - v. Avoidance and Mitigation Measures
 - vi. What to do with information generated through consultation
 - vii. Conclusion of Consultation
 - b. Substantive definition
 - i. Meaning, purpose, how to execute
 - ii. Role of applicant, agency, consultant
6. Culturally appropriate mitigation under CEQA

We suggest initially focusing on these areas in order to ensure the Guidelines are legally adequate and because we are concerned that without accompanying regulations, there is a high probability the statutory language of AB 52 will not be carried out as intended. We also suggest that to give solid guidance that lead agencies can rely on in complying with AB 52 and cultural resources protection, that OPR should cite to common practices being employed by lead agencies that work to save and protect these invaluable Tribal Cultural Resources.

We are also concerned because one of the key purposes behind AB 52 was to give a solid statewide structure to an already existing process in order to diminish the probability of litigation. Without proper and adequate guidance, litigation is much more likely to be utilized in order to provide

standards with which agencies can comply. We urge OPR to consider this costly and inefficient adversarial method of ensuring compliance that is unnecessary with practitioners, both tribal and non-tribal, throughout the state that have been and can continue to assist OPR with proper guidance on AB 52.

BASELINE

The proposed revision to section 15125(a) states that 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.

In many cases, tribes encounter an argument that a project location is, in whole or in part, "previously disturbed," thus minimizing the potential to impact cultural resources. This view does not reflect the reality that despite surface disturbance, properties of cultural significance to tribes may still have ancestral burials and intact cultural resources buried deeper below the disturbed surface or along with the disturbed areas. In our experience, some resources have been found as deep as 20 feet, thus demonstrating that surface disturbances do not always destroy the resources. We often argue that the lack of surface indicators of resources should not dictate a determination of whether resources are present. The sensitivity of the area and recorded resources in the vicinity should always be considered. We have also had finds below the plow line or under properties that were developed and utilized decades ago without significant landform alteration (i.e., houses without basements, business buildings without below ground parking, etc.). In addition, we have examples where human remains have been found in agricultural areas, long assumed by agencies to be too disturbed to contain cultural resources. An additional difficulty is the prevalence of pot hunting which has disturbed, to some degree, many cultural resources, yet they retain significant cultural value to tribes.

In addition, the entire idea of disturbance as defined by many archaeologists does not apply to places and sites of cultural value. Tribal values are not contingent upon a scientific view of provenience, intact resources or other archaeological and western development terminology. TCRs should not be subject to these standards and baselines when assessing presence, significance or significant environmental impacts.

Based on our examples, we disagree with the notion that baselines should not consider conditions that were illegal or unpermitted – particularly when applied to burial grounds, sacred places and tribal cultural resources. Additionally, 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. Even if resources are destroyed, the tribal value of the resources or landscape may still be of value to the tribe and should be considered. Overall, the source of the disturbance should be considered just like any other factor in determining the baselines for a project.

Considering the "disturbance" is 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. Tribes would welcome the

opportunity for repair, rehabilitation and restoration of culturally-sensitive resources and areas as appropriate mitigation, rather than the standard approach of once disturbed its destroyed. Given AB 52's mandates to consider impacts to TCRs and requiring appropriate mitigation, the option of restoration and rehabilitation of "disturbed" areas with resources should be more strongly advocated as it is consistent not only with tribal values, but with CEQA's preference for avoidance and preservation.

DEFERRAL OF MITIGATION DETAILS/JOINT NEPA/CEQA DOCUMENTS

In our experience, the issues of deferred mitigation and the failure to produce joint CEQA/NEPA documents often overlap in ways that negatively impact cultural resources.

Deferred mitigation is a particular concern to tribes because of the nature of many tribal cultural resources being under the ground and not always visible during surveys done as part of environmental review, particularly when those surveys are not completed with a tribal representative. In our experience, it is a best practice to have all cultural resource reports, including archaeological surveys, ethnographic reports, and tribal consultation on those reports completed prior to the draft environmental document being circulated. We often work with lead agencies in reviewing these documents prior to their release for public review to ensure the accuracy of the information, protect against disclosure of confidential information and lessen the burden for the agency in reviewing lengthy tribal comments. However, this practice occurs infrequently and often significance conclusions and mitigation are already improperly deferred to after publication of the DEIR or even project approval, when methods of avoidance, redesign and alternatives analysis are severely limited due to irreversible project momentum and applicant costs.

In our experience, the state CEQA process is completed before the NEPA and NHPA processes are completed. In some cases, a lead agency will improperly defer tribal consultation on resources, impacts and mitigation to the federal process that frequently comes later, after CEQA approval. By that time, the applicant has an approved project, with approved mitigation measures which severely hamstrings the federal agency's ability to fulfill its obligations and leads to both the destruction of resources and many cultural resources of tribal concern, including TCPs and Cultural Landscapes being left out of the CEQA evaluation process.

Further, in our experience, contrary to existing section 15222 regarding the preparation of joint environmental documents, many lead agencies do not coordinate with their federal counterparts and do not prepare joint documents. The existing and proposed Guideline language does little to strengthen the coordination process and reference no consequences for noncompliance. Given the issues we've identified above, we ask that OPR strengthen the language in this section to ensure that lead agencies actually do prepare joint documents, which will help lessen the 11th hour pleas of tribes and the unnecessary destruction of cultural resources.

Given this history in California, we are very concerned with 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. It is highly possible that this revision would be used to further disadvantage tribes and tribal cultural resource consideration in the CEQA process, leaving tribes

with the only remedy being to file a CEQA lawsuit. If OPR fails to provide specific guidance from OPR in this complex area, we fear it will be misused and raise an increased potential for additional conflict – some of the very things that AB 52 sought to remedy.

INITIAL STUDY PREPARATION

We strongly object to applicants and/or their consultants preparing the Initial Study as proposed by the new section 15063(a)(4). In our many years of experience, applicants and their consultants have an inherent bias in favor of minimizing many issues that lead to the destruction of cultural resources, including the level of environmental review, the impacts to resources and the mitigation associated with their projects. The Initial Study is the critical first look at how a project will be reviewed and progress under the CEQA process. 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, which we have witnessed to become impaired if they are not themselves preparing the Initial Study.

In addition, under AB 52, lead agencies have a duty to consult with tribes on the environmental impacts and level of environmental review necessary. This is another example where the lack of inclusion of AB 52 in the Guidelines will be used against tribes. Consultants, first of all, are not the party with the affirmative obligation to consult with tribes and deferring such consultation violates not only AB 52, but would also violate SB 18, if applicable. Second, consultants are usually given the responsibility to identify, characterize, define, explain and analyze the environmental impacts of a project. When it comes to cultural resources they are often put in the position of explaining the significance and value of the resources, including the cultural values. Unfortunately, many of the consultants do not have the California cultural resources and cultural sensitivity training to perform these functions correctly under CEQA and with due respect to stakeholder communities. Time and time again, we experience that it is our tribal representatives, when allowed access to project properties early in the review process, that locate and define significant resources rather than the consultants, who miss them or are unable to determine the nature of the resources. Rather than outsourcing this function, local lead agencies must develop their own relationships directly with tribes under AB 52, not only because of the law, but also because of best practices. In our experience, the better relationship tribes have with a lead agency, the more efficient and effortless the CEQA process leading to results to which all interested parties can agree.

Additionally, the Guidelines lack any justification for this significant change that would allow individual applicants to exercise an unprecedented level of influence and control over how the environmental process proceeds. Rather than “increasing consistency,” this revision would expand a current bias in the EIR preparation process to other environmental documents and the very decision of whether an EIR should be prepared. Again, this is a CEQA mandate that lead agencies can only fulfill by consulting with Tribes. In the jurisdictions we work with, the 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 legally defensible environmental documents which better reflect tribal issues and points of view. This outcome not only complies with AB 52, but also ensures a more adequate environmental assessment and impact analysis.

APPENDIX G ENVIRONMENTAL CHECKLIST FORM

With regard to updating Appendix G to conform to the new CEQA amendments, there are some specific directives for OPR set forth in AB 52. The language states that OPR shall prepare and develop, and the Secretary of Natural Resources Agency "shall certify and adopt, revisions to the Guidelines that update 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 sample questions."

Initially, while we understand that there is a desire to consolidate or otherwise remove or revise redundant and/or outdated questions, in many of these instances there is no specified reasoning for the proposed change to demonstrate how the current organization is unworkable or problematic. If the consolidation and/or reorganization is not done with proper detail, we are concerned there may be fewer investigations and even less attention paid to certain resource categories, including those of importance to tribes.

Besides the specific directive to update Appendix G, the Tribe asserts that it is also appropriate to insert additional language to ensure compliance and direction for agencies responsible for following AB 52. As we have discussed in the AB 52 working group sessions, planners and consultants rely heavily on the Appendix G when making their decisions and environmental documents. In addition, as a key player with the AB 52 legislation sponsored by Assembly member Gatto, the Pechanga Tribe had numerous discussions with OPR and State Resources concerning the need for guidance on the definition of TCRs, guidance to assist agencies in identifying TCRs and whether to include such guidance in the statutory language or the CEQA Guidelines. For example, we desired to provide clear guidance on cultural landscapes and were assured this would be given in the CEQA Guidelines. From our standpoint and experience on the AB 52 legislation, as well as countless other state bills on tribal resources, it is crucial that the Guidelines provide helpful and clear guidance that mirrors both the intent and language of the pertinent legislation. Ensuring that Appendix G includes all relevant decision points is key to ensuring compliance with AB 52. Below are some of our specific comments on the relevant questions that can be added to help lead agencies comply with the law. These suggestions are based upon our previous discussions during the legislative process for AB 52 as well as our decades of experience in working with CEQA, lead agencies, applicants and consultants.

First, we note that there is no requirement to notify the Native American Heritage Commission of projects, and many inaccurately believe that the Office of Historic Preservation plays no role in CEQA. We suggest adding a question on page 46 that requires the agency to indicate whether tribal consultation or responsible agency input is required under SB 18 or AB 52 or some other law or applicable policy.

Additionally, on page 47 we offer that a checkbox be inserted that states this or something similar:

Tribal Consultation Initiated

Since one of the cornerstones of AB 52 is early consultation, noted in both the legislative intent and the statutory language itself, the Tribe requests specific language dedicated to ensuring agencies initiate the consultation at the point in time when the project application is “deemed complete” and prior to the lead agency making final determinations on the level and type of environmental review for a specific project (AB 52 Section 1(b)(7), Cal Pub Res Code 21080.3.1(b), 21080.3.2(a)). After having several months of interaction with lead agencies on compliance with AB 52, we find that many do not understand their mandate to consult with the tribes on the presence of TCRs, the significant environmental impacts of the project, and the level of environmental review required by a specific project. By incorporating this into Appendix G, we hope that this will help agencies clearly understand that the tribe is required (should they request consultation and engage, of course) to be part of the determination. This is a new concept for agencies, which have for decades determined what level of environmental review was necessary without any input from tribes or the public. Given its unfamiliarity, we believe that requiring a planner to read and check the box will help them comply with the mandate to properly consult with tribes.

On page 62 in Section XI. OPEN SPACE, MANAGED RESOURCES AND WORKING LANDSCAPES we request a note or question be inserted that includes TCR landscapes so that practitioners are reminded to include these tribal landscapes in the impact considerations. AB 52 specifically includes landscapes and so should be reflected in Appendix G. If more guidance is deemed necessary to help agencies understand the nature and evaluation of landscapes, a reference to National Park Service Bulletin 38 and the National Park Service Preservation Brief 36 would be appropriate.

For Section V. CULTURAL RESOURCES, we propose the questions below. In our many decades of experience, we have witnessed firsthand how the lack of specific wording in the questions about the nature and type of resources leads to omission and incorrect impact assessments on cultural resources. For example, as we discussed during the legislative process for AB 52, Historic Resources are comprised of more than one type of historic resources, not just historic buildings. However, consultants that may not know this and are unable or unwilling to research and review all the types of Historic Resources only answer the checklist questions for the type of resources with which they are familiar.

CULTURAL RESOURCES

Cultural Resources consist of Historic Resources, Archaeological Resources and Tribal Cultural Resources.

Would the project:

a) Cause a substantial adverse change in the significance of an historical building, structure, object, district or site, including Traditional Cultural Properties?

- b) Cause a substantial adverse change in the significance of an archaeological resource, including a unique archaeological resource, pursuant to section 15064.5?
- c) Cause a substantial adverse change in the significance of a tribal cultural resource as defined in Public Resources Code section 21074, including a sacred place or a landscape?
- d) Disturb any resource or place defined in Public Resources Code section 5097.91 et seq. ("Native American Historical, Cultural, and Sacred Sites") including human remains, including those interred outside of formal cemeteries?
- e) Cause a substantial adverse change in the significance of any cultural or historical resource identified in local, regional, state or federal plans, policies, or regulations?

We offer OPR the legal justification for referencing the NAHC statutes (letter (d) above) in CEQA Guidelines 21003(a), which directs local agencies to integrate the requirements of CEQA with planning and environmental review procedures otherwise required by law or local practice. In addition, Native American human remains are to be assessed during the CEQA process; however, questions concerning their presence or likelihood are often ignored because lead agencies mistake state law for an actual environmental assessment and federal agencies completely ignore state law on human remains. Common mitigation is solely a reference to the state law procedures on notification of a finding of human remains and "Most Likely Descendant" rather than adequately providing for avoidance measure for Native American human remains.

Letter (e) above is modeled after the existing Appendix G IV (b) BIOLOGICAL RESOURCES question and is consistent with AB 52 in terms of the consistency with local registers and plans. We believe that this is consistent with other parts of Appendix G and can serve as a "catch-all" question that may help lead agencies better understand the potential adverse change to a resource.

We understand that Appendix G may likely be part of an OPR working group discussion. As such, we offer this suggested framework, as an extension of our discussions during the legislative process, and while agreeing to continue to work through outstanding issues. One of our primary goals is to arrive at a set of questions and language that executes the AB 52 amendments, best practices, and the spirit and law of the CEQA.

LACK OF AB 52 GUIDANCE

As we have noted in our comments, the current draft Amendments to the Guidelines to not take into account the significant changes to CEQA by AB 52. From the Tribe's perspective, it is unfair and contrary to meaningful consultation for OPR to request comments on a set of Guidelines that essentially offer no guidance on the substantial new CEQA amendments added by AB 52. OPR is basically asking tribes to quickly become experts on the entirety of the CEQA Guidelines and identify where and how tribes fit into these Guidelines given AB 52 and their interests in protecting tribal cultural resources. It should not fall upon the tribes to do so in order to have competent and legally adequate guidelines. As such, it should not be surprising that many tribes will offer little or no specific comments on the Guidelines as they relate to AB 52.

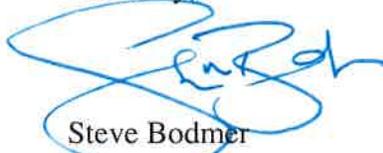
OPR has suggested that one way to provide effective input on these comments is to focus comments on the issues that are covered within the scope of the proposed changes. For AB 52 amendments and issues of tribal concern, there are really no proposed changes to which we can tailor our comments. Due to the absence of appropriate AB 52 language in the draft, it is our assertion that substantial changes should be made to the draft Guidelines in order to incorporate the statutory changes implemented by AB 52 and to appropriately reflect tribal interests. Those changes should be circulated for comment and additional tribal and public input.

The comments provided herein are being provided to the extent possible for the Tribe at this stage of the Guidelines revision process; however, we believe the lack of AB 52 language and the inability to target our comments very much frustrates any interested party, particularly tribes, from ensuring the Guidelines will be not only legally adequate, but purposeful and helpful to those who rely on them daily.

The Pechanga Tribe greatly appreciates the opportunity to be included in the CEQA/AB 52 Working Group with OPR and other stakeholders and we will continue to participate in that process for the purposes of achieving much needed guidance on AB 52 and legally sound CEQA Guidelines. We also believe that our comments demonstrate that OPR should take time to consult broadly with tribes across California 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. As we noted above, many tribes are not "experts" in the entirety of the CEQA Guidelines and not providing any specific language for them to comment on puts all tribes in the state at a great disadvantage. We hope our efforts with the Working Group can provide additional guidance to OPR on this most important issue.

On behalf of the Tribe, we thank OPR for considering our comments and taking the time to review our suggestions. We look forward to our individual consultant and continued dialogue on how we can work as partners to ensure the CEQA Guidelines are amended to reflect the entirety of the statute and protect all of California's unique resources, including those with irreplaceable tribal values.

Sincerely,



Steve Bodmer
General Counsel

cc: John Laird, Secretary of Natural Resources
Assembly member Mike Gatto
Cynthia Gomez, Executive Director, Native American Heritage Commission
Paula Treat, Pechanga Lobbyist
Laura Miranda, Attorney for the Pechanga Tribe