

December 18, 2015

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

Sent electronically to: ceqa.guidelines@resources.ca.gov

**SUBJECT: DISCUSSION DRAFT OF PROPOSED CHANGES TO APPENDIX G OF THE
CEQA GUIDELINES INCORPORATING TRIBAL CULTURAL RESOURCES**

Dear Ms. Roberson:

The California Chamber of Commerce and the below-listed organizations ("Coalition") thank you for the opportunity to submit comments regarding the Office of Planning and Research's ("OPR") Discussion Draft of Proposed Changes to Appendix G of the CEQA Guidelines Incorporating Tribal Cultural Resources ("Discussion Draft"). The Discussion Draft proposes to implement the Legislature's directive in Public Resources Code section 21083.09, enacted as part of Assembly Bill 52 (Chapter 532, Statutes 2014), to add tribal cultural resources to the sample initial study form found in Appendix G of the CEQA Guidelines. More generally, AB 52 amended CEQA to require lead agencies to (1) consult with affected Native American Tribes on a project-by-project basis and (2) analyze whether a project with an environmental effect may cause a substantial adverse change in the significance of a new resource area called "tribal cultural resources."

The Discussion Draft proposes three alternative sets of draft Appendix G questions regarding tribal cultural resources. This letter provides the Coalition's feedback regarding each alternative. In sum, the Coalition supports and prefers Alternative 1, but has concerns with Alternatives 2 and 3. We now discuss each alternative in turn.

Alternative 1

Alternative 1 cites the definition of Tribal Cultural Resources in the Public Resources Code, and asks the preparer of the checklist to indicate what level of potential impact a proposed project might have to that resource. Specifically, Alternative 1 asks if a project would "cause a substantial adverse change in the significance of a Tribal Cultural Resource as defined in Public Resources Code § 21074."

Alternative 1 is preferable for two reasons. First, it is consistent with the statutory language in AB 52, which states that "[a] project with an effect that may cause a **substantial adverse change in the significance of a tribal cultural resource** is a project that may have a significant effect on the environment." (Public Resources Code, § 21084.2. [emphasis added].) Second, Alternative 1 contains a direct reference to the definition of "tribal cultural resources" in Public Resources Code section 21074, which will allow the preparer of the checklist to refer directly to the pertinent definitional portion of the statute and make the relevant inquiries in

accordance with the statutory text. As a whole, Alternative 1 is simple, concise, workable, and consistent with the statute. The Coalition prefers it for these reasons.

Alternative 2

Alternative 2 paraphrases the definition of tribal cultural resources from Public Resources Code section 21074 and asks the preparer of the checklist to determine if a project would “cause a substantial adverse change in the significance of a site, feature, place, cultural landscape, sacred place, or object with cultural value to a California Native American Tribe that is listed or determined eligible for listing on the California register of historical resources, listed on a local historical register, or otherwise determined by the lead agency to be a tribal cultural resource.”

As a threshold matter, the Coalition does not object to listing in Appendix G the various resources that may qualify as a tribal cultural resource under Public Resources Code section 21074. However, the Coalition is concerned that Alternative 2 casually paraphrases a definition that was perhaps the most highly debated and negotiated aspect of the bill. Virtually all of the language in Public Resources Code section 21074 was the result of intense stakeholder negotiations and, accordingly, should not be paraphrased. If OPR proceeds with the concept of listing each inquiry individually, it should include the statutory text to ensure that lead agencies utilize the Appendix G checklist consistent with the intent of the statute.¹

Additionally, Alternative 2 conflates the many definitional inquiries lead agencies are required to make by combining them together as one inquiry. Alternative 2 should present the several definitional inquiries under the statute as independent inquiries to avoid unnecessary confusion. For example, while the inquiries under Public Resources Code section 21074 (a)(1)(A)&(B) regarding listing determinations are a subset to the items contemplated under section 21074(1), the discretionary determination under section 21074(a)(2) is a separate and independent determination that is not a subset of section (a)(1).

Accordingly, in the event OPR proceeds with Alternative 2 or a concept similar thereto, we propose the following changes (OPR’s proposed language in regular font, Coalition’s proposed language in **bold** and underline):

- e) Cause a substantial adverse change in the significance of a site, feature, place, cultural landscape **that is geographically defined in terms of the size and scope of the landscape**, sacred place, or object with cultural value to a California Native American Tribe that is:
 - i. listed or determined eligible for listing on the California **R**egister of **H**istorical **R**esources or
 - ii. listed **in** a local historical register **as defined in subdivision (k) of Section 5020.1 of the Public Resources Code; or** ~~or otherwise determined by the lead agency to be a tribal cultural resource.”~~

¹ As noted above, the primary reason the Coalition prefers Alternative 1 is because, unlike Alternative 2, it directs the preparer of the Appendix G checklist to the statutory definition of “tribal cultural resources” in Public Resources Code section 21074, which in turn allows the preparer to conduct his or her analysis based on that negotiated language.

f) Cause a substantial adverse change in the significance of a resource that is 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.

Alternative 3

Alternative 3 provides introductory text stating that “[c]onsultation with a California Native American Tribe that has requested such consultation may assist a lead agency in determining whether the project may adversely affect tribal cultural resources and, if so, how such effects may be avoided or mitigated.” It then asks the preparer of the Appendix G checklist to ask whether the project would cause a substantial adverse change to a tribal cultural resource, and in doing so lists each definitional inquiry separately.

The introductory text in Alternative 3 is unnecessary and goes beyond what the statute requires. Specifically, Public Resources Code section 21083.09 states that on or before July 1, 2016, OPR shall update Appendix G that do both of the following: (1) separate the consideration of paleontological resources from tribal cultural resources and update the relevant sample questions and (2) add consideration of tribal cultural resources with relevant sample questions. The statute does not call for OPR to elaborate on the benefits of consultation, nor is such elaboration necessary. To wit, the fundamental purpose of AB 52 was to create a *mandatory* consultation on a project-level basis between lead agencies and Native American Tribes who request it. Indeed, section (5) of the findings and declarations in AB 52 contains language substantively similar to that which OPR proposes:

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

The introductory text in Alternative 3 may be appropriate had AB 52 merely created a permissive consultation process. In that case, perhaps some introductory language about the purpose and benefits of consultation may encourage otherwise hesitant lead agencies to engage in early consultation. However, because AB 52 creates a mandatory consultation process, the details and intent of which are already laid out in statute, the language is unnecessary. Accordingly, the Coalition respectfully requests OPR not to proceed with Alternative 3.²

² It should also be noted that Alternative 3, similar to Alternative 2, conflates the inquiries that lead agencies are required to make in determining whether something is a tribal cultural resource. Specifically, Alternative 3, while it appropriately parses out the inquiries, suggests that the discretionary determination under section 21074(a)(2) is a subset of the threshold determination in section 21074(a)(1). However, only sections 21074(a)(1)(A)&(B) are subsets of that provision.

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Thank you for considering our comments. We welcome the opportunity to discuss our comments further at your convenience.

Sincerely,



Anthony Samson, Policy Advocate
California Chamber of Commerce

On behalf of the following organizations:

American Council of Engineering Companies - California
Associated Builders and Contractors of California
Associated General Contractors
Association of California Water Agencies
Bay Area Council
California Association of Realtors
California Building Industry Association
California Business Properties Association
California Business Roundtable
California Cattlemen's Association
California Construction and Industrial Materials Association
California Farm Bureau Federation
California Manufacturers and Technology Association
California Retailers Association
California State Association of Counties
California Wind Energy Association
Building Owners and Managers Association of California
Independent Energy Producers
Institute of Real Estate Management
International Council of Shopping Centers
Large-scale Solar Association
Los Angeles Area Chamber of Commerce
National Association of Industrial and Office Properties of California
Orange County Business Council
Pacific Gas & Electric
Retail Industry Leaders Associations
Rural County Representatives of California
San Jose Silicon Valley Chamber
The California Rail Industry