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Christopher Calfee, Senior Counsel, OPR
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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 as 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 led 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 led 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,



Courtney Ann Coyle
Attorney at Law

cc:

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