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Holly Roberson, OPR, Land Use Counsel
By Email Only: Holly.Roberson@OPR.CA.GOV

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 <u>own</u> 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.

**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.

| | 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?~~ | | | | |

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 other than burials addressed immediately above should 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.