

CALEPA POLICY MEMORANDUM

SUBJECT: CALEPA POLICY ON CONSULTATION WITH CALIFORNIA NATIVE AMERICAN TRIBES	NUMBER: CIT-15-01
	DATE ISSUED: AUGUST 20, 2015
REFERENCES:	EXPIRES: UNTIL RESCINDED
	CATEGORY: CALIFORNIA NATIVE AMERICAN TRIBES

STATEMENT OF PURPOSE

The mission of the California Environmental Protection Agency (CalEPA or Agency) is to restore, protect and enhance the environment, to ensure public health, environmental quality and economic vitality.

This policy provides a framework for CalEPA and its Boards, Departments and Offices (BDOs) to improve and maintain effective government-to-government relationships and engage in meaningful consultation with California Native American Tribes.

This policy demonstrates the Agency's commitment to obtaining information about the culture and history of California Native Americans and their environmental concerns and issues to enhance CalEPA's activities, policies, and decision-making processes.

DEFINITIONS

For purposes of this policy, the following terms shall have the meanings defined below:

California Native American Tribe: Means either a federally-recognized California Tribal government listed on the most recent notice of the Federal Register or a non-federally recognized California Tribal government on the California Tribal Consultation List maintained by the California Native American Heritage Commission.

Communication: Refers to the dissemination, exchange or sharing of information between CalEPA and its BDOs and California Native American Tribes.

Consultation: Means the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American Tribes shall be conducted in a way that is mutually respectful of each party's sovereignty. Consultation shall also recognize the Tribes' potential needs for

confidentiality with respect to places that have traditional Tribal cultural significance. (Government Code section 65352.4.)ⁱ

Federal Recognition: Refers to acknowledgement by the federal government that a Tribal government and Tribal members constitute a Tribe with a government-to-government relationship with the United States, and eligibility for the programs, services, and other relationships established for the United States for Indians, because of their status as Indians. (Title 25 United States Code section 83.2)

Indian Country or Tribal Lands: Has the same meaning as the term “Indian country” in United States Code of Federal Regulations, title 18, section 1151, that states: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Tribal Sovereignty: Refers to the unique political status of federally-recognized Tribes. A federally-recognized Tribe exercises certain jurisdiction and governmental powers over activities and Tribal members within its territory. Some of these powers are inherent, some have been delegated by the United States, and all are subject to limitations by the United States. Existing limitations are defined through acts of Congress, treaties, and federal court decisions.

BACKGROUND

California’s environmental regulatory system is a complex framework, with training, compliance assistance, inspection, permitting and enforcement activities carried out by a number of federal, state and local government agencies. As an officer of the Governor’s Cabinet, the Secretary for Environmental Protection coordinates the overall performance of the following six boards, departments, and office: the Air Resources Board, the Department of Resources Recycling and Recovery, the Department of Pesticide Regulation; the Department of Toxic Substances Control; the Office of Environmental Health Hazard Assessment; and the State Water Resources Control Board.

California has the second largest number of federally-recognized Tribes and, according to the 2010 U.S. Census, the largest Native American population in the United States. In California, there are currently 109 Tribes that are recognized by the federal government. Federally-

ⁱ For review under the California Environmental Quality Act, a specific consultation process is required for certain proposed projects that have a notice of preparation or a notice of negative declaration or mitigated negative declaration filed on or after July 1, 2015. Public Resources Code sections 21080.3.1, 21080.3.2, 21082.3, and 21084.2. For purposes of this consultation, Public Resources Code section 21083.09 further requires the Office of Planning and Research, by July 1, 2016, to prepare and develop revisions to California Environmental Quality Act guidelines that separate the consideration of paleontological resources from Tribal cultural resources and add consideration of Tribal cultural resources with relevant sample questions.

recognized Tribes may enact Tribal codes that affect natural resources, public health and environmental protection, and they may apply for treatment in the same manner as a state under certain federal environmental laws such as the Clean Water Act and the Clean Air Act.

There are also indigenous communities which, although they existed prior to the formation of the United States, are not currently recognized as sovereigns by the federal government. At this time, there are 81 non-federally recognized California Native American Tribes that are engaged in seeking federal recognition.

All California Native American Tribes, whether officially recognized by the federal government or not, may have environmental, economic, and public health concerns that are different from the concerns of other Tribes or the general public. These differences may exist due to unique lifestyles, cultural beliefs, traditions, and specific connections to areas of California that are their ancestral homelands.

GUIDING PRINCIPLES

CalEPA and its BDOs will be guided by the following principles and best practices to improve and maintain effective government-to-government relationships and consultation with California Native American Tribes. CalEPA and its BDOs shall:

1. Acknowledge and respect Tribal sovereignty.
2. Understand that federally-recognized Tribes have a unique trust relationship with the federal government.
3. Recognize that all California Native American Tribes represent distinct and independent governmental entities with specific beliefs, traditions and unique connections to areas of California that are their ancestral homelands.
4. Communicate and consult with California Native American Tribes during the initial phase of decision-making processes that may affect Tribal lands, people, or cultural resources.
5. Recognize and respect the cultural resources of California Native American Tribes, whether or not the cultural resources are located on Tribal lands.
6. Acknowledge the need for confidentiality regarding places, land, people and cultural resources with traditional Tribal cultural significance.
7. Consider the potential impact of the Agency's activities or programs on Tribal lands and cultural resources.
8. Encourage collaborative efforts between California Native American Tribes and federal, state, and local government entities to resolve issues of mutual concern.

ACTION PLAN

CalEPA and its BDOs will work together to implement the following actions to achieve these guiding principles, to the extent legal and practicable:

1. Maintain and solicit input from the CalEPA Tribal Advisory Committee regarding environmental issues and projects involving California Native American Tribes. The Tribal Advisory Committee will meet with the Secretary of CalEPA and the heads of each BDO, or their designees, at least once each calendar year.
2. Designate a Tribal liaison within CalEPA and within each BDO as a central point of contact for California Native American Tribes.
3. Develop and implement CalEPA's Tribal consultation protocol.
4. Promote efforts of California Native American Tribes to develop and expand environmental programs through training, outreach, and technical assistance.
5. Provide training to appropriate executive staff, managers, supervisors, and employees to improve CalEPA's ability to carry out meaningful consultation and communication efforts with California Native American Tribes.
6. Request relevant and available information, studies and data from California Native American Tribes when conducting research or environmental studies that relate to, or could impact, Tribal lands or cultural resources.
7. Assess eligibility of California Native American Tribes for CalEPA financial assistance programs such as grants, loans and scholarships.
8. Upon request by a California Native American Tribe, provide training and technical assistance, and share data, as resources allow.
9. Develop Memorandums of Understanding (MOUs), Memorandums of Agreement (MOAs), or other cooperative agreements with California Native American Tribes on specific projects or subject matters, as appropriate.
10. Provide a biennial report on implementing this Action Plan to the Secretary for Environmental Protection and the CalEPA Tribal Advisory Committee.

DISCLAIMER

This policy is intended solely for the guidance of employees of CalEPA and its BDOs and does not extend to other governmental entities. This policy is not intended, and should not be construed, to define the legal relationship between CalEPA or its BDOs and California Native American Tribes. This policy is not a regulation, and it does not create, expand, limit, waive, or interpret any legal rights or obligations. Nothing in this policy shall be construed to prevent CalEPA or its BDOs from taking timely action to fulfill their legal obligations to protect the public health and safety, or the environment; or to carry out federally-mandated duties under delegated federal programs.

STATUTORY REFERENCES

Federal

Title 18 United States Code section 1151: “Except as otherwise provided in sections 1154 and 1156 of this title, the term ‘Indian country’, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”

Title 25 United States Code section 83.2: “[A]cknowledging that certain American Indian groups exist as Tribes. Acknowledgment of Tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian Tribes by virtue of their status as Tribes. Acknowledgment shall also mean that the Tribe is entitled to the immunities and privileges available to other federally acknowledged Indian Tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such Tribes. Acknowledgment shall subject the Indian Tribe to the same authority of Congress and the United States to which other federally acknowledged Tribes are subjected.”

State

Government Code section 11019.8: “All state agencies, as defined in Government Code section 11000, are encouraged and authorized to cooperate with federally recognized California Indian Tribes on matters of economic development and improvement for the Tribes.”

Government Code section 65040.12(e): Provides a definition of environmental justice with regard to the Office of Planning and Research as the coordinating agency for environmental justice as: “the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies.”

Government Code section 65352.4: "Consultation" means the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American Tribes shall be conducted in a way that is mutually respectful of each party's sovereignty. Consultation shall also recognize the Tribes' potential needs for confidentiality with respect to places that have traditional Tribal cultural significance.

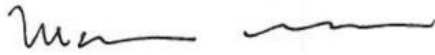
Public Resources Code section 5024.1: Establishes a California Register of Historical Resources as an authoritative guide in California to be used by state and local agencies, private groups, and citizens to identify the state's historical resources and to indicate what properties are to be protected, to the extent prudent and feasible, from substantial adverse change.

Public Resources Code section 5097.9 et seq.: "No public agency, and no private party using or occupying public property, or operating on public property, under a public license, permit, grant, lease, or contract made on or after July 1, 1977, shall in any manner whatsoever interfere with the free expression or exercise of Native American religion as provided in the United States Constitution and the California Constitution; nor shall any such agency or party cause severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, except on a clear and convincing showing that the public interest and necessity so require." This chapter establishes the Native American Heritage Commission, and specifies its powers and duties.

Public Resources Code section 21000 et seq.: California Environmental Quality Act of 1970 (CEQA) declares that it is state policy to: "Take all action necessary to provide the people of this state with . . . historic environmental qualities. . . ." It further states that public or private projects financed or approved by the state are subject to environmental review by the state. All such projects, unless entitled to an exemption, may proceed only after this requirement has been satisfied. CEQA requires detailed studies that analyze the environmental effects of a proposed project. Prior to the release of a negative declaration, a mitigated negative declaration, or an environmental impact report for a project, the lead agency is required to consult with California Native American Tribes that are traditionally and culturally affiliated with the geographic area of the proposed project if the Tribe requested notification and consultation. In the event that a project is determined to have a potential significant environmental effect, the act requires that alternative plans and mitigation measures be considered. CEQA includes Tribal cultural resources, historic, and archaeological resources as integral features of the environment.

Public Resources Code section 71110: "The California Environmental Protection Agency, in designing its mission for programs, policies, and standards, shall do all of the following:
(a) Conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations of the state.
(b) Promote enforcement of all health and environmental statutes within its jurisdiction in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations in the state. (c) Ensure greater

public participation in the agency's development, adoption, and implementation of environmental regulations and policies. (d) Improve research and data collection for programs within the agency relating to the health of, and environment of, people of all races, cultures, and income levels, including minority populations and low-income populations of the state. (e) Coordinate its efforts and share information with the United States Environmental Protection Agency. (f) Identify differential patterns of consumption of natural resources among people of different socioeconomic classifications for programs within the agency.”



MATTHEW RODRIQUEZ
Secretary for Environmental Protection