



# Tribal Consultation Policy

October 2018





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## MESSAGE FROM THE CALIFORNIA AIR RESOURCES BOARD

Community involvement provides an essential foundation to the work we do at the California Air Resources Board (CARB). Honest, open, two-way communication based on knowledge, trust, relationships, basic courtesy, and adequate resources is the most effective way to help us make decisions balancing environmental impacts and economic opportunities to create shared success.

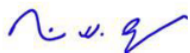
It is well known that government interactions with Native American tribes have been troubling and tragic historically, resulting in multigenerational distrust and a lack of communication and participation in important environmental decisions. Thanks to the leadership of Governor Brown and others, California is establishing a new era – one where state-tribal relations are not just important but vital to achieving mutual goals.

For millennia, tribes have been sustainably managing their lands and are in a unique position to offer insight to state agencies on ways to protect the environment – they are unique stewards of the earth. But air pollution and climate change know no boundaries. Impacts from climate change are felt by all – increased wildfires, droughts, and increased temperatures impact us all equally – but tribes perhaps more than others since their lands are often dependent on healthy habitats and natural systems.

For this reason, my personal engagement and experiences with the Native American community during my time at CARB has impressed upon me the vital importance for more deliberate communication and collaboration with tribes to protect air quality and combat climate change. We recognize that variations in the State's unique geography, climate, transportation, communications, and access to technology present both challenges and opportunities for better working relationships between state agencies and tribes. Despite cultural and physical obstacles, CARB is committed to good faith collaboration with tribes to make sound decisions to reduce climate change and air pollution while also positioning local economies to take advantage of the emerging low-carbon future.

This consultation policy puts us on this path and serves as a hands-on guide for how we will engage with tribes in our efforts moving forward. The collaborative approach detailed in this document involves sensible processes, practical tools, and helpful background information that is designed to set the foundation for continued collaboration and coordination with tribes to reach common future goals to clean the air and the environment.

Sincerely,



Richard W. Corey  
Executive Officer

## **DISCLAIMER**

This policy is intended solely for the guidance of CARB employees regarding tribal consultation and does not extend or impose requirements on any other person, governmental entity, or tribe. It does not alter or modify the terms of any law and does not constitute legal advice. This policy is not intended, and should not be construed, to define the legal relationship between CARB and tribes. This policy is not a regulation, and it does not create, expand, limit, waive, or interpret any legal rights or obligations. It does not affect or diminish any rights or protections afforded to any person or entity under any law. It waives no tribal governmental rights, including treaty rights, sovereign immunities, or jurisdiction. Nothing in this policy will be construed to prevent CARB from taking timely action to fulfill legal obligations to protect the public health and safety, or the environment; or to carry out federally-mandated duties under delegated federal programs.

CARB reserves the right to revise this policy at any point in the future and such changes will be retroactively applicable to matters initiated prior to any revision of this policy. When CARB revises the consultation policy, the “last updated” date at the bottom of the consultation policy’s cover page will reflect the date of the last change.

# **CALIFORNIA AIR RESOURCES BOARD TRIBAL CONSULTATION POLICY**

## **I. STATEMENT OF PURPOSE**

Governor Brown signed Executive Order B-10-11 on September 19, 2011, directing State agencies and departments, including CARB, to engage in effective government-to-government cooperation, collaboration, communication, and consultation with both federally recognized and non-federally recognized tribes when developing legislation, regulations, rules, and policies on matters that may affect tribal entities. This consultation policy is intended to assist CARB in carrying out the Governor's Executive Order, as well as the California Environmental Protection Agency's (CalEPA's) policy to ensure, improve, and maintain effective government-to-government relationships with tribes on environmental matters that may affect tribes.

This consultation policy is intended to be used in conjunction with other documents that may be instructive. For example, some tribes have their own consultation policies, which should be used in conjunction with this consultation policy. Also, CalEPA has a consultation protocol, which will also provide guidance to CARB staff in carrying out the step-by-step process of the consultations.

## **II. INTRODUCTION**

California is home to the largest Native American population in the United States. There are currently 109 federally recognized tribes and 57 non-federally recognized tribes within California.<sup>1</sup> Tribes have historically managed environmental resources effectively and have unique knowledge on resource management. All tribes, whether officially recognized by the federal government or not, may have environmental, economic, and public health concerns different from the concerns of other tribes or the general public. These differences may exist due to unique lifestyles, cultural beliefs and values, traditions, tribal knowledge (i.e., ecological, ethnography, meaning of place), tribal uses (i.e., land, water, natural resources), historical events, and specific connections to areas that are tribal ancestral homelands. Tribes might have an ancestral tie to an area even though they no longer reside in that area because many tribes were removed from their homelands and others were nomadic.

Legally, the difference between federally and non-federally recognized tribes is that federally recognized tribes are listed in the Federal Register and have a government-to-government relationship with the United States government as a

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<sup>1</sup> These numbers are subject to change depending on determinations made by the Bureau of Indian Affairs (BIA) and the Native American Heritage Commission (NAHC). Please consult the most current Federal Register for a list of federally recognized tribes and the NAHC for a list of non-federally recognized tribes in California.

distinct legal-political entity – a sovereign entity. These tribes possess certain kinds of rights that differ from the rights of other members of the public. Some of these rights are based on treaties, acts of Congress, Executive Orders, and court rulings. While non-federally recognized tribes may have an established governing body, they do not have this unique legal relationship with the federal government. Regardless of federal recognition, each tribe has its own government or leadership, unique history, demographics, and economic development opportunities.

Consistent with Executive Order B-10-11, CARB engages with both federally recognized and non-federally recognized tribes for purposes of consultation. While the distinction does not affect CARB's approach to consulting with tribes, the distinction between federally recognized and non-federally recognized tribes may have legal implications that may influence the matters discussed through the consultation process. CARB staff should consult with CARB's tribal liaison and Legal Office to determine if the distinction has legal implications for specific issues.

### **III. CARB MISSION AND OBJECTIVES**

As one of CalEPA's Boards, Departments, and Offices (BDOs), CARB aims to ensure all Californians have the same level of environmental protection. CARB's mission is "to promote and protect public health, welfare and ecological resources through the effective and efficient reduction of air pollutants while recognizing and considering the effects on the economy of the state."<sup>2</sup> CARB protects the public from exposure to toxic air contaminants; reduces California's emission of criteria pollutants, greenhouse gases, and short-lived climate pollutants; provides leadership in implementing and enforcing air pollution control rules and regulations; and provides innovative approaches for complying with air pollution rules and regulations.

CARB's mission and objectives are implemented through multiple divisions within CARB, based on the best possible scientific, environmental, and economic information. CARB decisions are made with respect for all of the communities and interests that will be affected by the decisions. Most of CARB's regulations are statewide and do not have ground-disturbing impacts that would affect tribes or their cultural resources. Still, CARB may have cause to consult with tribes on matters of interest to tribes or on CARB programs in which tribes voluntarily choose to participate.

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<sup>2</sup> Cal. Air Resources Bd., CARB Mission and Goals, <https://www.arb.ca.gov/html/mission.htm> (last visited Oct. 25, 2018).

#### IV. DEFINITIONS

For this policy, these terms will have the meanings defined below:

**Authorized Designee** is an individual that Consultation Officials have designated as being authorized to represent the agency during consultation and who has authority to make decisions.

**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, including those listed on the California Tribal Consultation List maintained by the California Native American Heritage Commission (NAHC).

**Collaboration** means communicating and working together through mutual respect and cooperation toward a common purpose. This exchange is conducted by respecting the protocols each respective tribe has established for contacting its governing body or its delegated official. It can be conducted through the Governor's appointed Agency Secretary, BDO Chairperson, Executive Director, or their delegated representatives.

**Communication** refers to the dissemination, exchange, or sharing of information between CalEPA, its BDOs, and tribes. This can include in-person meetings, telephone calls, webinars, emails, and other means to share information.

**Consultation** is a 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 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. (Gov. Code § 65352.4)

**Consultation Official** is the individual who engages in consultation with the tribe on a government-to-government basis who has authority to make decisions, such as CARB's Chair, Executive Officer, or individual designated as a consultation official as outlined in CalEPA's Tribal Consultation Protocol.

**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. Federally recognized tribes have the power to make and enforce laws on their lands and create governmental entities such as tribal courts. (25 U.S.C. § 83.2)

**Government-to-Government Relationship** is a relationship that exists between state, federal, local, and tribal governments. Implicit in the relationship is a bilateral recognition of the sovereignty of the respective parties.

**Indian Country or Tribal Lands** 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. (18 USC. § 1151)

**Native American** broadly describes the people considered indigenous to North America who lived here prior to European colonization. This term includes American Indians, Indians, Alaska Natives, Eskimos, Aleuts, and Native Hawaiians.

**Reservations** are lands reserved by a tribe during treaty negotiations with the federal government for tribal use, which are held in trust for the tribe by the federal government.

**Tribal Sovereignty** refers to the unique legal and 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.

## V. CONSULTATION

### A. Meaning of Consultation

The term “consultation” has a range of meanings. It is defined in the Government Code as 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.”<sup>3</sup> Federal

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<sup>3</sup> Gov. Code § 65352.4.



statutes and regulations contain similar definitions.<sup>4</sup> “Consultation” also has a plain meaning of a dialogue between two or more parties.<sup>5</sup>

Notably, consultation is distinct from public participation. Public participation legal requirements, including those in the California Administrative Procedure Act (APA), provide all citizens, governments, stakeholders, and organizations with notice of proposed agency action and an opportunity to comment on the proposed action before a decision is made. The APA public participation process is intended to inform and strengthen administrative agency decision-making, and CARB encourages tribes and their members to use CARB’s public participation processes in addition to consultation.

While tribal citizens may comment on CARB’s proposed actions as individuals, a tribal citizen’s public comments on a particular matter does not satisfy the consultation requirement. Consultation differs from public participation in that it entails engagement that is different from providing notice of a proposed action and an opportunity for members of the public to comment on it. Consultation is based on the unique legal status of tribes; that unique status provides an opportunity to consult with tribes in a government-to-government capacity about proposed actions that may affect tribal lands, resources, members, and welfare.

Different tribes may attach different meanings to the term “consultation” and have different interpretations of what makes a consultation “meaningful.” Consultation should happen early and often and can take time depending on the complexity of the matter.

Staff should communicate with individual tribes to understand expectations on what meaningful consultation means to a particular tribe. Staff should consult with CARB’s tribal liaison and Legal Office to help identify ways to make the consultation meaningful. Staff should also consult CalEPA’s Tribal Consultation Protocol to clarify who is tasked with what activity and for a complete step-by-step consultation process.

#### B. Determining if Consultation is Required or Appropriate

Consultation with tribes may be required by statute.<sup>6</sup> However, even in the absence of a legal consultation requirement, it still can be appropriate to consult

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<sup>4</sup> 25 U.S.C. § 2011 (“a process involving the open discussion and joint deliberation of all options with respect to potential issues or changes between the Bureau and all interested parties.”); 36 CFR 800.16(f) (“the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the 106 process.”)

<sup>5</sup> Blacks Law Dict., “Consultation,” pg. 335, cl. 1 (8th ed. 2004) (The act of asking the advice or opinion of someone (such as a lawyer); [a] meeting in which parties consult or confer; [t]he interactive methods by which states seek to prevent or resolve disputes.”)

with tribes out of respect for their status as sovereign governments or based on the unique tribal interests that may be affected by a proposed action, policy, or set of activities. These types of consultations fall under Executive Order B-10-11.

For example, most of CARB's regulations, programs, and policies do not have tribal implications as the regulations are statewide and not enforced on tribal lands absent a tribe's voluntary participation in one of CARB's programs. CARB does not issue permits and rarely engages in actions that direct or authorize ground disturbing activities.

Yet, even where not mandated by law, CARB should determine whether any of its actions, including but not limited to its development of regulations, policies, or plans, or other ongoing activities have tribal implications and whether consultation is therefore, appropriate. A tribal implication occurs when the action has a substantial direct effect on: (1) one or more tribes; (2) the relationship between CARB and tribes; or (3) the distribution of responsibilities between CARB and tribes. The term "substantial direct effect" refers to an effect or impact, either beneficial or adverse, that is directly caused by CARB action and that is significant in size or amount when compared to the effect or impact on non-tribal stakeholders.

The following is a list of actions that *may* have a direct tribal implication, which could make consultation appropriate:

1. Development and implementation of regulations, rules, policies, or guidelines that directly impact tribes traditionally and culturally affiliated with a geographic area.
2. Development and implementation of programs that directly impact tribes.
3. Development and implementation of local, regional or statewide plans that directly impact tribes.
4. Environmental review of regulations that directly impact tribes traditionally and culturally affiliated with a geographic area.
5. There is a direct nexus between funding and projects that could be implemented throughout the state where tribes are eligible to receive funds.

CARB staff should contact CARB's tribal liaison and Legal Office to help make this determination.

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<sup>6</sup> As an example, CEQA contains specific consultation tribal requirements. (Pub. Resources Code § 21080.3.1)

### C. When to Engage in Consultation

Consultation may arise because CARB has notified a tribe of proposed agency action that could result in tribal implications or because the tribe has requested consultation. Regardless of how the initial consultation request arises, the consultation should occur early enough in the decision-making process to allow tribes to provide meaningful input on the proposed action and to give CARB the opportunity to consider the tribe's input.

Each consultation will be unique so CARB employees should work in coordination with CARB's tribal liaison and Legal Office to determine the best time to begin consultation.

### D. Scope of Consultation

Each tribe has its own view of what it means to be a sovereign, including how the tribe prefers to communicate. A continuum of different interactions could qualify as a consultation depending on the individual tribe's interpretation of its sovereignty and other factors. CARB employees should use discretion when talking to tribes about consultation as the speaker and the listener may have different expectations about what is meant and how consultation should be conducted. It is important to let the tribe provide guidance on how the tribe defines consultation.

Some tribes only recognize consultation as a formal meeting that takes place between high ranking government officials and tribal leaders. This process is conducted between the agency and tribe on a government-to-government basis. After this relationship has been established, agreements may be reached that recognize and sanction communications between the designated representatives of the high-ranking officials and tribal leaders.

Other tribes may recognize meetings and communications between lower-ranking state-tribal representatives as consultation. This process can be conducted through written communications, telephone contact, workshops, webinars, face-to-face meetings, or listening sessions. This proves as an important conduit for sharing information and developing relationships and mutual trust. Receipt of written or oral comments, views, and concerns in the planning phase is a key objective.

The scope of consultation may be shaped by different factors, including but not limited to:

1. Tribal political structure
2. Tribal preference

3. Subject matter
4. Underlying statutory, regulatory, or policy requirements
5. Nature and complexity of the issues
6. Number of tribes affected
7. Scale of tribal implication
8. Agency time and resource constraints
9. Degree to which the agency-tribal relationship has developed
10. Whether a protocol has been established

The type and extent of engagement should reflect the scope and impact of the proposed agency action. A large-scale action with substantial direct effect on several tribes might require a more coordinated approach with ongoing engagement and a series of meetings with high-ranking officials. A less formal process such as webinars, phone calls, or face-to-face interactions with staff may be sufficient for more routine operational matters, matters that do not have substantial direct effect on tribes, or where preferred by the tribe.

Staff should communicate with the tribe and consult with CARB's tribal liaison and Legal Office to understand the full scope of the consultation and if there are any legal requirements.

#### E. Whom to Consult

CARB engages in consultation with federally-recognized tribes and non-federally-recognized tribes on the NAHC list. CARB will work with known tribes in the area, the Bureau of Indian Affairs (BIA) for federally recognized tribes and the NAHC for non-federally recognized tribes to identify the tribes within certain geographic locations if a project will include ground-disturbing activities. CARB will also consult other outside resources, such as CalEPA's tribal list, the Governor's Tribal Advisor, the tribes themselves, and other resources to ensure it has covered all potential tribes.

CARB will also work with these agencies and the tribes themselves to identify the appropriate tribal officials with whom CARB should consult. Determining who should represent a tribe is a matter that rests primarily with the tribal leaders, but representation could include a combination of tribal leaders, tribal environmental directors, tribal historic preservation officers, cultural resources officers, subject matter experts, and other officials. Having contact with more than one tribal official may ensure timely receipt and consideration of the invitation to consult.

Some tribes have fewer staff and may need more time to identify the appropriate individuals to be present at the consultation.

If multiple tribes have requested consultation on the same matter, staff may consider holding a joint consultation in a location mutually agreed upon by everyone, but only after all involved tribes have consented to a joint consultation.

#### F. Conclusion of Consultation

The consultation may continue until the project or review process is complete.

Consultation is considered concluded when:

1. The parties to the consultation come to a mutual resolution; or
2. Either CARB or the tribe, acting in good faith and after reasonable effort, concludes that a resolution cannot be reached.

If the parties to a consultation reach a mutual resolution, the consultation officials or their authorized designees will confirm the mutual resolution in writing and proceed to implement the measures agreed upon. A non-exhaustive list of potential mitigation measures that could be included are avoidance, monitoring, post project site visits, or other alternatives.

If the parties declare an impasse, written documentation of all efforts and alternatives will be forwarded to the tribal liaison, Legal Office, and applicable CARB Division Chief for review. The Division Chief, attorney, or tribal liaison may recommend mitigation, which could include no action, alternatives, or proceeding with the project as planned and will forward recommendations, with an underlying rationale, to the Executive Officer for a final decision regarding the project.

CARB will notify the tribe in writing to provide notice of its final decision(s), including what mitigation measures, if any, were taken.

#### G. Timeframe

Consultation should happen early, before decisions are made. The timeframe for completing a meaningful consultation will vary depending on the tribe(s) and other parties involved, the complexity of the issues, project timeline, and statutory deadlines, if any. The legal constraints of the project should be communicated to the tribe so as to set realistic expectations.

Staff should keep in mind that some tribes have fewer resources and staffing, which may impact the timeline. Tribes need to become informed on the subject matter, identify individuals who should be involved, and effectively communicate



their interest back to the state. A Tribal Council may need to vote on the action, which may only occur once a month or quarterly. It varies from tribe to tribe.

When the consultation involves highly sensitive and complex issues, the consultation process may be extended to allow sufficient opportunity to reach a mutual agreement as long as it is within the confines of legal deadlines, if any.

CARB staff will work with the tribe to determine tribal constraints and also work with CARB's tribal liaison and Legal Office to determine and communicate the agency's constraints and timeframe. Where statutory or other deadlines are not implicated, CARB staff will work to accommodate tribal time constraints where feasible in light of project timelines.

#### H. AB 52 Consultation

On September 25, 2014, the legislature enacted Assembly Bill 52 (AB 52), which amended the California Environmental Quality Act (CEQA). Under AB 52, CEQA analyses must consider the potential for impacts to tribal cultural resources, and under certain circumstances lead agencies<sup>7</sup> must consult with tribes that are traditionally and culturally affiliated with the geographic area of the proposed project.

AB 52 consultations differ from other general consultations described in this policy because AB 52 consultations relate only to the CEQA environmental analysis conducted for a project; apply only to agencies that are lead agencies for a project; specific timelines apply both to the agency and the tribe; and there are specific requirements the lead agency must follow.

CARB will work with tribes to implement the AB 52 consultation procedures, including taking the following specific steps:

1. Within 14 days of determining to undertake a project subject to CEQA, CARB will provide formal notification, in writing, with a description of the project and its location as follows:
  - a. Where CARB is the lead agency approving a project that involves ground disturbing activities, prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report, CARB will identify tribes traditionally and culturally affiliated with a geographic area by contacting NAHC and provide notice of the proposed activity to these tribes.

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<sup>7</sup> Under CEQA, a lead agency is "the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment. (Pub. Resources Code § 21067)

- b. For quasi-legislative CARB actions that affect the state as a whole and do not directly involve ground disturbing activities in a particular geographical area (e.g. proposed rulemakings or plans), CARB will notify those tribes that have requested notification under AB 52.
2. When a tribe receives a notification from CARB and wishes to engage in consultation, the tribe must submit a consultation request letter from the tribal government signed by the tribal chief, chair, or designated tribal representative within 30 days after receiving the CARB notification.
3. Within 30 days of receipt of a tribal request for consultation, CARB will begin the consultation process by sending a consultation initiation letter confirming the receipt of the request and requesting the tribe to designate the contact person and items to be discussed during the consultation.
4. Tribes should respond to CARB's consultation initiation letter to designate the contact person and items to discuss during the consultation. If CARB does not receive this information, CARB will send a follow-up letter to the tribe informing the tribe that CARB will consider the matter closed unless the tribe contacts CARB within a certain timeframe after receipt of the follow-up letter.
5. After the tribe has designated the contact person and items to discuss, CARB will schedule the consultation meeting as expeditiously as possible. Scheduling will depend on the level of management that must attend, what issues must be discussed, how many meetings are involved, and the legal requirements surrounding the consultation.
6. The consultation process concludes when an agreement is reached regarding measures to mitigate or avoid a significant effect to tribal cultural resources, if such an effect exists; or when either party, acting in good faith and after reasonable effort concludes that mutual agreement cannot be reached.

The deadlines indicated above are statutory deadlines that may change if the legislature amends CEQA. This policy is intended to provide an overview of some of the AB 52 requirements and to assist CARB staff, but is not a substitute for reading the law or consulting CARB's Legal Office. Determinations on the requirements and statutory deadlines must be made by reviewing the statute and the guidelines implemented thereunder. CARB staff should consult CARB's Legal Office to determine whether AB 52 applies, the appropriate deadlines, and how to fulfill the requirements of AB 52.

## I. Cultural Resources

Lack of sensitivity to cultural resources has resulted in cultural resources being destroyed or substantially altered or impacted. The term “cultural resource” can have multiple meanings depending on its use. Under the Public Resources Code, it is defined as “sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either (a) included or determined to be eligible for inclusion in the California Register of Historical Resources, or (b) included in a local register of historical resources.” (Public Res. Code § 21074) Cultural resources are also resources determined by CARB, in its discretion and supported by substantial evidence, to be significant pursuant to section 5024.1 of the Public Resources Code. (*Id.*)

Some tribes maintain a broad application of the definition of cultural resources. In this sense, it goes beyond objects and sites to landscapes, water, plants, animals, the sky, stories, etc. Some tribes maintain their own historical registers and have expertise concerning their tribal history and practices involving tribal cultural resources with which they are traditionally and culturally affiliated. Tribal input is most important to help identify cultural resources that are important to the individual tribe.

CARB staff will be mindful of the differences between the statutory definitions and how tribes apply these definitions and remain committed to working closely with tribes to identify and protect cultural resources to the extent provided by law. Staff should communicate with the tribe and consult with CARB’s tribal liaison and Legal Office to understand the full scope of the definition and if there are any legal requirements.

## VI. **GUIDING PRINCIPLES**

CARB will be guided by these principles and best practices to improve and maintain effective government-to-government relationships and consultation with tribes to the extent legal and practicable:

1. Acknowledge, recognize, reaffirm, and respect tribal sovereignty.
2. Commit to building, strengthening, and sustaining effective government-to-government relationships between the State and the tribes.
3. Understand that federally-recognized tribes have a unique trust relationship with the federal government.
4. Recognize that all tribes possess distinct cultural, spiritual, environmental, economic, and public health interests; traditional cultural knowledge about California resources; and specific beliefs, traditions, and unique connections to areas of California that are their ancestral homelands.

5. Understand the tribe's political structure, including titles for addressing tribal leaders and know that tribes are culturally and administratively different from one another.
6. Encourage communication and consult with tribes during the initial phase of decision-making processes that may affect tribal lands or cultural resources.
7. Establish a mechanism to obtain relevant and available information, studies, and data from tribes when conducting research or environmental studies that relate to or could affect tribal lands or cultural resources.
8. Permit tribes to provide meaningful input into developing legislation, regulations, rules, and policies on matters that may affect tribal lands or cultural resources.
9. Consider the potential impact of the agency's activities or programs on tribal lands and cultural resources.
10. Identify areas of mutual concern and work to develop partnerships and consensus.
11. Communicate with mutual respect, be open to, and consider new information to understand how CARB actions may affect tribes and possible alternatives.
12. Be mindful of tribal preferences and sensitive to cultural diversity.
13. Consider geographic distances and other unique circumstances such as critical subsistence, cultural or community-wide activities when scheduling consultations or other opportunities for tribal involvement in CARB decisions.
14. Recognize and respect the cultural resources of tribes, whether or not the cultural resources are on tribal lands.
15. Acknowledge and uphold the need for confidentiality regarding places, land, people, and cultural resources with traditional tribal cultural significance.
16. Ensure appropriate level officials are present at meetings with tribal governmental officials.
17. Contact the tribes, NAHC, and/or BIA to identify the appropriate tribal representative.

18. Notification letters and other written communications should be clear, concise, and written in plain language with definitions for any acronyms that are used.
19. Ask the tribe what method of communication is preferred, including telephone, webinar, email, facsimile, or mail. Considering challenges with specific communication methods, differing technology capabilities of different tribes, and the necessity at times to communicate time sensitive information, employ multiple methods of communication where feasible.
20. Be mindful and inclusive of a tribe's own consultation policies and procedures.
21. Consider tribal environmental justice concerns.
22. Follow-through on communication until the conclusion of the consultation.

## **VII. ACTION PLAN**

CARB will work with tribes to implement the following action plan, to the extent legal and practicable:

1. Maintain and solicit input from the CalEPA Tribal Advisory Committee (TAC)<sup>8</sup> regarding environmental issues and projects involving tribes. TAC 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 CARB as a central point of contact for tribes.
3. Implement CalEPA's separate Tribal Consultation Protocol.
4. Promote efforts of 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 CARB's ability to carry out meaningful consultation and communication with tribes, including training on cultural resources and cultural sensitivity.

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<sup>8</sup> The TAC was established in 2010 to discuss environmental issues and projects involving tribes. It consists of representatives from federally-recognized and non-federally recognized tribes who meet with the Secretary of CalEPA and/or designee, the heads of each BDO, or their designees, and the BDO Tribal Liaisons quarterly each calendar year.



6. Work with NAHC to provide notice to tribes that may be affected by projects that disturb specific geographic areas.
7. Work with the Governor's Tribal Advisor to facilitate communication and implementation of effective government-to-government consultations between the tribes, the Office of the Governor, state agencies, and agency tribal liaisons.
8. Request relevant and available information, studies and data from tribes when conducting research or environmental studies that relate to, or could affect, tribal lands or cultural resources.
9. Assess eligibility of tribes for financial assistance programs such as grants, loans, and other financial opportunities.
10. Provide an annual report on implementing this Action Plan to CalEPA's Assistant Secretary for Tribal Affairs.

Tribal engagement and consultations will vary based on the unique action that the agency is undertaking and the tribal concerns or preferences. CARB staff should coordinate with its tribal liaison before any outreach, engagement, or consultation takes place to determine what action items should be completed, by whom, and to establish a timeline for completion of the action items.

## APPENDIX A: LEGAL REFERENCES

### I. Federal Statutes, Regulations, and Executive Orders

1 U.S.C. § 450 et seq.: The Indian Self-Determination Act (ISDA) directs the Interior and Health and Human Services to enter into self-determination contracts with Indian tribes for “planning, conducting or administering programs and services” that are funded by the federal government. The implementing regulation, 25 C.F.R. Part 900 establishes consultation requirements for development of programs, relating to the budgeting process and spending, and with regard to contracts.

4 U.S.C. §§ 458aa to 458hh: The Tribal Self-Governance Act of 1994 expands the ISDA with regard to programming and services. The implementing regulation, 25 C.F.R. Part 1000 establishes consultation requirements for program eligibility determinations and annual funding agreements.

16 U.S.C. § 470, et seq.: The National Historic Preservation Act (NHPA) creates a framework for preservation of cultural resources and requires consultation when carrying out preservation and compliance responsibilities.

16 U.S.C. §§ 470aa to 470mm: The Archaeological Resources Protection Act (ARPA) protects archeological resources located on public and Indian lands. The implementing regulation, 43 C.F.R. Part 7.7(a) discusses notification and meeting requirements.

18 U.S.C. § 1151: The United States Criminal Code defines “Indian Country” as “(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.”

25 U.S.C. § 3001: The Native American Graves Protection and Repatriation Act (NAGPRA) requires federal agencies to consult regarding the treatment and disposition of specific cultural items (human remains, funerary objects, sacred objects, and cultural patrimony, etc.) prior to intentional excavation or removal of Native American human remains, during the inventory of human remains, and to determine place and manner of delivery.

42 U.S.C. § 1996: The American Indian Religious Freedom Act (AIRFA) is a Congressional policy statement that recognizes the right to practice traditional religions, access to sacred sites located on public lands, and use and possess

sacred objects. While it does not confer religious rights to Indians, procedural requirements have been upheld by specific courts.

Executive Order 13175: Establishes meaningful consultation with tribes on development of federal policies, strengthens the government-to-government relationship, and reduces imposition of unfunded mandates on tribes.

## **II. State Statutes, Regulations, and Executive Orders**

Government Code § 11019.8: “All state agencies, as defined in Government Code section 11000, are encouraged and authorized to cooperate with federally recognized California Indian [t]ribes on matters of economic development and improvement for the [t]ribes.” This may include providing information on programs available, providing technical assistance on preparation of grants and applications for public or private funds, conducting meetings and workshops, or any other reasonable steps that could assist tribes in becoming economically self-sufficient.

Government Code § 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.

Health & Safety Code § 8012, et seq.: The California Native American Graves Protection and Repatriation Act requires any agency or museum that has possession or control over California Native American human remains and associated funerary objects to inventory, attempt to identify the geographic location, and consult with the tribe believed to be affiliated with the items.

Public Resources Code § 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 § 5097.9 et seq.: Prohibits a public agency or private party from 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, in any manner whatsoever that would interfere with the free expression or exercise of Native American religion as provided in the United States Constitution and the California Constitution; or 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 § 21000 et seq.: Under CEQA, 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 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 § 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.”

Executive Order B-10-11: Reaffirms the inherent right of both federally recognized tribes and California Native Americans with sovereign authority over their members and territories, establishes the Governor’s Tribal Advisor position within the Governor’s Office, reaffirms the state’s commitment to working with tribes, and encourages communication and consultation with tribes.