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March 29, 2018

To: Coastal Commissioners and Interested Parties

From: John Ainsworth, Executive Director
Alison Dettmer, Deputy Director
Mark Delaplaine, Manager, Energy, Ocean Resources, and Federal Consistency Division

Subject: **Coastal Commission Staff's Initial Response to Comments, California Coastal Commission Draft Tribal Consultation Policy, August 11, 2017**

Background

On August 11, 2017, the Commission staff circulated a Draft Tribal Consultation Policy (dated August 11, 2017) to Tribal Representatives on a list provided by the California Native American Heritage Commission (NAHC). That Draft Tribal Consultation Policy is now being circulated for general public comment, and the Commission staff is continuing to receive and consider comments. The purpose of this memo is to provide initial Commission staff responses to the comments received to date. The use of the terms "we" and "our" in the responses below refer to the views of the Commission staff. Where the staff's responses indicate modifications to the Draft Tribal Consultation Policy are warranted, such modifications are shown below the response, with the relevant passage from the Policy shown in "tracked changes" mode (i.e., with new language underlined, and deleted language shown in ~~strikeout~~ text).

The Commission staff received comments from the following Tribes and interested persons:

The comment letters received are attached, with links to the each letter on page 1 of the attachment (electronic version).

Prior to the upcoming May 2018, second Commission public hearing the Commission will be holding in northern California for consideration of comments, the Commission staff will publish a revised Draft Tribal Consultation Policy which reflects proposed changes shows in this memo, and any other changes warranted based on future comments received.

Summary of Comments and Responses

A. La Posta Band of Mission Indians, letter dated August 4, 2017.

Comment 1
The La Posta Band of Mission Indians requested certified mail (with return receipt) notification for matters where the Commission is the lead CEQA agency.

> **Response 1**
> This letter was received just before the Draft policy was circulated; therefore it may not have been intended as a comment letter. It is being included for the record. We note that it is very infrequent that the Commission is a lead CEQA agency, but our intent is to work with the La Posta Band of Mission Indians to determine which other types and locations of activities the Commission reviews it is interested in being notified about. Moreover, in the event the Commission is a lead CEQA agency, we intend to notify the Tribe by certified mail as requested.

B. Tongva Ancestral Territorial Tribal Nation, letter/emails dated September 17, 2017.

Comment 1
Page 1, background, paragraph 2 (and footnote 1, same page), concerning AB 52 and the list of non-federally recognized tribes by the NAHC, the Tongva Ancestral Territorial Tribal Nation objects to the "illegal" list created by the Native American Heritage Commission, which it states "does not have the authority under its legislative intent or directives to exclude lineal descendants or SB 18 required consultation. NAHC has recently illegally created illegal determinations on contact list persons and have excluded them."

> **Response 1**
> AB 52 vests the NAHC with specified powers, and defines a California Native American Tribe to mean: "a Native American tribe located in California that is on the contact list maintained by the Native American Heritage Commission for the purposes of Chapter 905 of the Statutes of 2004." [PRC 21073]. The Commission does not have the legal authority or expertise to question the NAHC on these matters. However, the Commission is not bound to "only" consult with tribes on the NAHC list, and the staff intends to continue to coordinate with the Tongva Ancestral Territorial Tribal Nation.

Comment 2
Page 2, paragraph 2, concerning the Commission's mission - the "CCC past history on protecting tribal resources is poor – only recently has the CCC attempted to be respectful but still short of true legal compliance including implementing "ajr 42 as chaptered = UNDRIP." When further questioned, the commenter explained these were references to Assembly Joint Resolution (AJR) 42, and the United Nations Declaration on the Rights of Indigenous Peoples. AJR 42 states:

> *This measure would express the Legislature's endorsement of the principles of the United Nations Declaration on the Rights of Indigenous Peoples. The measure would, among other things, also call for increased awareness, sensitivity, and respect for issues of sovereignty related to the heritage of Native Americans and indigenous peoples.*
>
> …
>
> *WHEREAS, The United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples on September 13, 2007, establishing a new systemic standard of recognition, respect, and protection for the rights of indigenous peoples of the world; and*
>
> …
>
> *WHEREAS, This resolution is not intended to create, and does not create, any rights or benefits, whether substantive or procedural, or enforceable at law or in equity, against the State of California or its agencies, departments, entities, officers, employees, or any other person; now, therefore, be it*
>
> *Resolved by the Assembly and the Senate of the State of California, jointly, That the Legislature of California expresses its endorsement of the principles of the United Nations Declaration on the Rights of Indigenous Peoples adopted by the United Nations General Assembly, and recognizes the call for increased awareness, sensitivity, and respect for issues of sovereignty, sacred and historic sites and traditions, and other vital aspects of the heritage of Native Americans and indigenous peoples implicit in those principles, notwithstanding the nonbinding nature of the declaration; …*

Response 2
We view the Commission's Draft Tribal Consultation Policy as being in alignment with the Assembly Joint Resolution and United Nations Declarations cited by the commenter.

Comment 3
Page 2, paragraph 3, add "tribal resources" after archaeological and paleontological resources as among the resources protected by the Commission.

Response 3
To the extent tribal resources fall within the Coastal Act's resource protection policies (Public Resources Code Section 30200 – 30265.5), the intent of the policy is to include them. However, it must be understood that although archaeological and paleontological resources are specifically protected under the Coastal Act (Public Resources Code Section 30244), not all tribal resources are necessarily coastal resources that are protected under the Coastal Act.

Comment 4
Page 2, Definitions of Commission "Actions." Add "tribal resources and rights" after Tribal Interests.

Response 4
The intent of the Policy was to cover a broad range of interests as tribal interests, so it would be in keeping with the Policy to clarify that "Tribal Interests" should include Tribal Resources and Rights. We will add language this clarification as follows.

Proposed Modification to Policy, Page 2 (near bottom of page**):**
1. Action (or "Commission Action"): Means a discretionary action taken by the Commission that may have a significant impact on Tribal Interests, Resources, or Rights. These actions include, but are not limited to:

Comment 5
Page 3: Definition of "California Native American Tribe**."** The commenter reiterates that the NAHC process is "illegal" and "recently fabricated," and notes further that it doesn't comply with the "mandatory CZMA federal compliance under SEC 106 NHPA [National Historic Preservation Act]/ACHP [Advisory Council on Historic Preservation]."

Response 5
See Response 1 above concerning the NAHC list. For information about coordinating for activities covered by the CZMA (Coastal Zone Management Act), see the language on pages 11-12 of the Policy, which discusses coordination for federal consistency determinations and certifications. Concerning compliance with ACHP guidance, we will quote relevant language from the ACHP Handbook's advice to federal agencies, which discusses consultation with Tribes that are not federally-recognized[1]:

4) If there are no federally recognized Indian tribes in the state where the project is located, does the agency still have to consult with any tribes?

[1] http://www.achp.gov/regs-tribes2008.pdf

Even when there are no federally recognized Indian tribes with tribal lands in the state where the project is located, the agency must still make a reasonable and good faith[2] effort to identify and consult with any Indian tribes that attach religious and cultural significance to historic properties that may be affected by the undertaking. The circumstances of history may have resulted in an Indian tribe now being located a great distance from its ancestral homelands and places of importance. Therefore, agencies are required to identify Indian tribes that may attach religious and cultural significance to historic properties in the area of the undertaking, even if there are no tribes near the area of the undertaking or within the state.

5) What is the federal agency's responsibility to consult with state recognized Indian tribes or tribes who have neither federal nor state recognition?

Under the Section 106 regulations at 36 CFR Section 800.2(c)(5), a federal agency may invite such groups to participate in consultation as "additional consulting parties" based on a "demonstrated interest" (discussed below) in the undertaking's effects on historic properties. However, the term "Indian tribe" as it appears in the NHPA refers only to federally recognized Indian tribes, which includes Alaska Native Villages and Village and Regional Corporations. In other words, only federally recognized Indian tribes that attach religious and cultural significance to historic properties that may be affected by the proposed undertaking have a statutory right to be consulting parties in the Section 106 process.

The question of inviting non-federally recognized tribes to participate in consultation can be both complicated and sensitive and thus deserves careful consideration. For example, some tribes may not be federally recognized but may have ancestral ties to an area. Other non-federally recognized tribes may have lost their recognition as a result of federal government actions in the 1950s to terminate relationships with certain tribes.[3] In other cases, such as in California,[4] the situation is complicated because there are more than 100 federally recognized tribes and more than 100 non-federally recognized tribes; again, the result of historical circumstances.

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[2] *Tips for fulfilling this requirement are provided under the heading "How do I identify tribes that must be invited to consult," at Section V(A)(3) of this [ACHP] handbook.*

[3] *During the "Termination Period" of the 1950s, Congress ended the federal government's relationship with more than 100 tribes in an attempt to assimilate members of Indian tribes into the broader society. Many, but not all, tribes regained their recognition. Some Indian tribes, however, are still seeking restoration of their federal recognition.*

[4] *For more information on this topic, visit www.epa.gov/indian 16 For more information about Indian tribes in California, their history, and a list of federally and state recognized tribes, visit the California Native American Heritage Commission website at http://ceres.ca.gov/nanc*

While non-federally recognized tribes do not have a statutory right to be consulting parties in the Section 106 process, the agency may invite them to consult as an "additional consulting party" as provided under the ACHP's regulations at 36 CFR Section 800.2(c)(5), if they have a "demonstrated interest." The agency should consider whether the non-federally recognized tribe can meet the threshold of a "demonstrated interest"—for example, whether the tribe can demonstrate it has ancestral ties to the area of the undertaking, or that it is concerned with the effects of the undertaking on historic properties for other reasons. In some cases, members of a non-federally recognized tribe may be direct descendants of indigenous peoples who once occupied a particular Native American site to be affected by the undertaking, or they might be able to provide the federal agency with additional information regarding historic properties that should be considered in the review process.

The inclusion of non-federally recognized groups in consultation may raise objections from some federally recognized tribes. Yet, there are other tribes who routinely support the invitation of nonrecognized tribes into consultation, recognizing their interests as well.

The ultimate decision on whether to consult with non-federally recognized tribes, however, rests with the federal agency. The decision should be given careful consideration and made in consultation with the SHPO (or if on or affecting tribal lands, with the THPO or designated tribal official). In addition, the federal agency may elicit input on the question from any federally recognized Indian tribes that are consulting parties. If the agency decides that it is inappropriate to invite non-federally recognized tribes to consult as "additional consulting parties," those tribes can still provide their views to the agency as members of the public under 36 CFR Section 800.2(d).

Comment 6
Page 3: Definition of "Communication**."** The commenter requests that tribal communications remain confidential unless and until the tribe has agreed to disclosure.

Response 6
This request is satisfied by the language contained later (i.e., after the definition section) in the Policy that does assure that information revealed in tribal communications will be kept confidential unless and until the tribe has agreed to disclosure (see Draft Policy, page 15, Section 9.b.).

Comment 7
Page 4, Definition of Cultural Resources, part c.: "Tribal resources should not be limited to cultural or arch[aeological] resources, but also all our tribal rights and interests that might or could be affected by any …[Commission] determinations on those without our prior consultation on each project."

Response 7
The definition of Cultural Resources was not created by the Commission, but comes from Public Resources Code Section 21074. The intent of this policy is to improve consultation practices and, to the degree possible, assure consultation with affected tribes prior to Commission actions affecting such tribes. Also, it was the intent of the statutes cited in this paragraph to broaden the definitions of matters to be considered and included as part of Tribal interests.

Comment 8
"We also have federal acknowledgment – 'CCC has those documents from TATTN.'"

Response 8
See Responses 1 and 5 above discussing Commission federal consistency reviews and ACHP guidance for consulting with Tribes that are not federally-recognized. We have coordinated and requested that federal agencies coordinate with Tongva Ancestral Territorial Tribal Nation (e.g., during Commission review of federal consistency determinations CD-0006-16, Navy FOCUS cable, and CD-0006-17, Army Corps, removal of Rindge Dam).

Comment 9
Tribal boundaries of historic usage and territories maps may vary – so all possible overlaps should be respected of neighbor tribes.

Response 9
We agree with the commenter, and we intend to be respectful of maps, boundaries, and territories where different tribes may have different understandings of these areas, boundaries, and overlaps.

Comment 10
Consultations should include compliance with "SEC 106 NHPA/ACHP consultations for federal consistency.

Response 10
See Response 5 above.

Comment 11
The Commission is in violation of the Governor's Executive Order B-10-11, "which has been a long-standing non-compliance violation" of 6 years, which order requires appointment of Tribal liaisons for "every state agency and department subject to my [i.e., the Governor's] executive control...."

Response 11
We do not agree that the Commission is in violation of EO-10-11. Nevertheless, this draft Policy will provide for Tribal Liaisons at the Commission staff, and will more generally provide for improved Tribal consultation, as called for in the Executive Order EO-10-11 and the Natural Resources Agency's Tribal Consultation Policy (dated November 20, 2012).

Comment 12
If the Commission adopts the "illegally defective" NAHC list, CCC will be in violation of numerous state and federal laws – which cannot exclude SB18 and AJR.[5]

Response 12
See Response 5 above.

Comment 13
The Commission "has to accept any tribal entity or tribal person as a culturally affiliated contact and should accept that request and use for all tribal claims and territory that can be established by historical genealogy and DNA reports results."

Response 13
Upon further discussion with the commenter, the comment appears to be focused on a request that the Commission not only consider NAHC determinations, but also any other available scientific genealogy and DNA evidence. Where appropriate for Commission Actions, the Commission will consult with any appropriate Tribal representative, and as noted in Response 1 above, we would not limit consultation to "only" Tribes identified by the NAHC.

C. <u>Cher-Ae Heights Indian Community of the Trinidad Rancheria</u>, letter dated September 21, 2017.

Comment 1
Add, page 2, to the Commission's mission statement: "and Traditional Ecological Knowledge" after the phrase "rigorous use of science."

Response 1
Because the Commission's mission statement is an agency-wide adoption of the mission statement, it would take considerable effort and discussion to modify it. As an alternative, we would suggest adding a clarifying sentence to the paragraph in the Policy

[5] "SB 18", as noted in the Policy, requires local governments adopting and amending general plans to notify, consult with, and consider the comments of Tribes concerning the need to protect traditional tribal cultural places.

"AJR," as noted in Response 2 above, refers to the Assembly Joint Resolution supporting the UN Declaration discussed in that response.

which quotes the mission statement, indicating that is inherent within the mission statement that expressions of traditional ecological knowledge are valued and to be encouraged. We also note that updating the Commission's Strategic Plan includes reviewing and possibly revising the Commission's mission statement. This review would provide a possible avenue for actually amending the mission statement.

Proposed Modification to Policy, Page 2 (paragraph 2)**:**
The Commission's mission is to protect, maintain, and, where feasible, enhance and restore, the resources of California's coast and ocean for present and future generations, through careful planning and regulation of environmentally-sustainable development, rigorous use of science, strong public participation, education, and effective intergovernmental coordination. Consistent with this mission, the Commission values and encourages expressions of traditional ecological knowledge.

Comment 2
Add, page 2, to the Commission's partnership with coastal cities and counties ", and in collaboration with Tribes."

Response 2
The intent of the language in the Background of the Policy concerning its partnership with local governments was to describe the shared planning and regulatory roles inherently set up in the Coastal Act. This language was not intended to imply that any other partnership the Commission may have with other entities was not valuable or necessary. The Commission intends this Policy as a first step (or an improvement to current efforts) for involving Tribal governments in those processes. In light of the Comment, it does appear warranted to clarify and expand the Policy's Background statement to cover situations where lands are being placed in Trust (or are held in Trust). We will add the following language to the Background.

Proposed Modification to Policy, Page 2 (paragraph 3)**:**
In partnership with coastal cities and counties, the Commission plans and regulates the use of land and water in the coastal zone, in a manner protecting public access and recreation, lower cost visitor accommodations, archaeological and paleontological resources, terrestrial and marine habitat protection, visual resources, landform alteration, agricultural lands, commercial fisheries, and coastal water quality. Where land is being placed in Trust (or subsequent activities on those lands trigger CZMA review), the Tribe (and not the area's local government) would be the primary partner with the Commission for planning and resource protection purposes. Central to the Commission's mission is the goal of maximizing public participation in the Commission's decision-making processes. The Commission believes establishing this Tribal Consultation Policy (Consultation Policy) will improve government-to-government dialogue with the Tribes, improve public participation, and provide a more specific process than

currently exists for the Commission to work cooperatively, communicate effectively, and consult with Tribes for the mutual benefit of protecting coastal resources.

Comment 3
Add, page 3, to the definition of cultural resources, the language underlined:

A resource determined by the CEQA lead agency or the Commission, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in Public Resources Code Section 5024.1(c). In applying these criteria, the lead agency shall consider the significance of the resource to a California Native American tribe in consultation with the affected tribe(s).

Response 3
We agree with the statement that significance should be based on consultation with the affected Tribe. A footnote will be added to clarify this intent.

Proposed Modification to Policy, Page 4 (3rd indented paragraph):
(2) A resource determined by the CEQA lead agency or the Commission, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in Public Resources Code Section 5024.1(c). In applying these criteria, the lead agency shall consider the significance of the resource to a California Native American tribe.[3]
[The added footnote would read: This definition should be interpreted to mean that the lead agency will consider this significance in consultation with the affected tribe(s).]

D. Jamul Indian Village, letter dated September 25, 2017.

Comment 1
The Jamul Indian Village states that the policy neglects to mention that "the entirety of the State's coastal zone is in former indigenous lands that likely have Tribal Cultural Resources at some level," that "This key concept cannot be overstated," that just because coastal areas have been developed over previously does not mean that those resources are no longer there," that "The Commission must be educated to recognize that the State's historic treatment toward Native American communities is one of suppression and aggression, … [etc]. "… Tribal Cultural Resources were often hidden from public records and governmental knowledge for their own preservation." "For a meaningful and thoughtful consultation policy, we ask that these thoughts and perspectives be incorporated into the Commission's consultations with Tribes. Understanding and embracing these perspectives will lead to improved relationships with Tribal communities, and a more effective protection of this part of the State's public trust resources."

Response 1
We agree with the spirit and intent of these comments, and the development of this Tribal Consultation Policy is intended to improve the Commission's understanding and embrace these perspectives in a more meaningful way. The following language will be added to the Background section of this Policy to reflect the historic mistreatment of Native American communities. A similar concern was expressed by Professor Gilio-Whitaker below (pages 20-21)).

> **Proposed Modification to Policy, Page 1** (after the first paragraph):
> It is important to recognize that the entirety of the State's Coastal Zone was originally indigenous territory that likely has cultural significance at some level or another. Long before the coastal areas were colonized by white settlers, each coastal area had significance to the local indigenous communities. This significance is part of the State's history, which is full of centuries of land theft, suppression, and aggression, pushing indigenous people from coastal (and other) regions early in the colonization and settlement of the State. For decades, even after native people were already excluded from coastal areas by settlers and state and federal officials, expressions of indigenous culture, religion and values led to aggression and persecution, including periods of genocide. Tribes were forced to abandon many coastal areas.
>
> Once genocidal policies were finally tempered, tribes were still not safe to use traditional areas along the coast, and Tribal communities had to endure Tribal children being taken from families and forced to attend boarding schools. These are some factors that have led to over a century of suppression of knowledge about Tribal cultural areas.

Comment 2
The statement that the Commission is "rarely a lead agency" under CEQA reflects bias and lack of knowledge, "Unless the Commission is stating that it does not conduct environmental review as a lead agency." Even if the Commission is not a lead agency, "We recommend that the Policy acknowledge the … statement [that] '… AB52 requires that "a project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resources, as defined, is a project that may have a significant effect on the environment' as a condition of past Commission compliance with AB 52, and direct staff to rectify this oversight through implementation of a meaningful and active consultation process in all actions."

Response 2
This statement in the Policy was simply reflecting that the Commission is, in fact, rarely a lead CEQA agency. Regardless of this fact, the Policy does, in fact, help implement "… a meaningful and active consultation process in all actions."

Comment 3
Page 2 of the Policy, which describes the Commission's relationship and partnership with local governments, should be expanded to describe a similar partnership with Tribal governments, and that "Such consideration should extend beyond consultation to a partnership in planning efforts so that the Commission properly values he present nature and use of tribal Cultural Resources."

Response 3
See Response C2 (to the Cher-Ae Heights/Trinidad Rancheria comment) above.

Comment 4
The definition of "Consultation" should reflect the time needed to educate Commission staff, any needed research, and assessment if impacts. It should also not be seen as a "one-time, one-meeting activity," but rather an iterative process. The Commission should conduct an independent review and not rely on other agencies' conclusions.

Response 4
The intent of the policy is to become more proactive and more independent in consulting with Tribal governments, to not rely on other agencies' conclusions and to conduct independent investigations, and that the process will not be "one-time" but, as suggested, "iterative." The following language will be added to clarify this intent.

Proposed Modification to Policy, Page 3 (4. Consultation):
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 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.)[3]

[The added footnote would read: Consultation should not be viewed as a "one-time, one-meeting activity," but rather an iterative process. Moreover, the Commission should conduct an independent review and not rely on other agencies' conclusions.

Comment 5
The definition of "Cultural Resources" is overly limited, "wholly excludes the present value of TCRs," and contains "gross errors" which "should be rectified before the policy is circulated. This limitation also places an increased emphasis on the second half of the definition that includes in the definition a 'resource determined by the CEQA lead agency or the Commission, in its discretion and supported by substantial evidence.' With this latter requirement, the

Commission must create a program, and the time necessary to implement it, that is open to developing the substantial evidence necessary to responsibly exercise this discretion through the consultation process."

Response 5
The definition of Cultural Resources was not created by the Commission, but is taken from Public Resources Code Section 21074, which is part of the CEQA statute. The definition is therefore appropriate for the purpose of this Policy. We agree that the Commission's decisions regarding Cultural Resources are and will continue to be based on the "substantial evidence" test, and that it will take effort and consultation to determine the significance of Tribal Cultural Resources in particular circumstances.

Comment 6
The definition of Tribal Sovereignty should be revised to state "Refers to the governmental status of federally recognized Tribes, which dictates that State and local governments interact with Tribes on a government-to-government basis. Federally recognized Tribes exercise jurisdiction and governmental authority over Tribal lands and have the inherent authority to govern themselves."

Response 6
The definition will be modified as suggested.

Proposed Modification to Policy, Page 5 (9. 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.~~ Refers to the governmental status of federally recognized Tribes, which dictates that State and local governments interact with Tribes on a government-to-government basis. Federally recognized Tribes exercise jurisdiction and governmental authority over Tribal lands and have the inherent authority to govern themselves.

Comment 7
"The guiding principles of the policy lack a key element – the development of a perspective that acknowledges the values of TCRs to the Native American communities. Many of the principles direct one sided actions by staff…. The principles should emphasize that the consultation … should begin at the earliest possible time to ensure adequate time for review…."

Response 7
The Draft Policy is directed at developing the perspective sought by the commenter, and it is meant to encourage consultation at the earliest time possible. If the commenter has specific suggestions for other language to make this intention more clear, we would be happy to consider such suggestions.

Comment 8
Tribal Liaison positions are often staffed by persons unfamiliar with indigenous past and current cultures and lacking sufficient empathy. "Significant education is required for staff throughout the state to understand the tribal resources that they are seeking to consider. The Tribal Liaison position should emphasize this education element for the Commission and all regional Tribal Liaisons."

Response 8
The intent of the Policy is to help develop the education sought by the commenter, through the consultation process. We agree that educating the Commission staff should be a high priority for the Tribal Liaison.

Comment 9
The training of Commission staff lacks "… emphasis on cultural understanding, education or perspective. … Please expand the training program to provide staff the tools and understanding necessary to implement the consultation policy."

Response 9
The intent of the Policy is to identify, develop, and continually expand the tools, understanding, and perspectives sought by the commenter.

Comment 10
The Commission should not assume it only needs to contact the "nearest" Tribe to an activity; multiple Tribes may have historically used an area; different Tribes may have different values about TCRs. "A robust training program for staff could provide tools to more completely understand potentially impacted tribal communities through understanding those communities, their history and use areas, and their locations today."

Response 10
We agree and understand that multiple Tribes may have historically used an area, and that different Tribes may have different cultural values. We expect this understanding to improve with the consultation and coordination efforts outlined in the Policy.

Comment 11
The Consultation process should be considered a "works in progress." Before consultation begins, adequate information needs to be provided to the interested Tribes. Tribal representatives may need to visit a site to determine the existence or value of a TCR. This "level

of vetting of a project … should occur early in the process, so that, if warranted, impact avoidance of impacts can be imposed through project modifications."

Response 11
The Consultation Policy is intended to be adaptive and not fixed, and the intent is to consult with Tribes early enough in the process to yield meaningful results (and if warranted, lead to project modifications to avoid, minimize or mitigate impacts). Encouraging site visits by interested Tribes should be folded into the process where feasible.

Comment 12
The commenter warns against "joint consultations" with groups of Tribes." This "may work in limited circumstances, but should be approached with caution." "Using joint consultations with multiple tribes assumes that the interests of the Tribes are the same, or that they are not conflicting. This is a false assumption [which] … may inhibit the viewpoints of one tribe when another is more vocal." The commenter recommends "Unless joint consultation is proposed by the tribes, individual consultations will provide more useful information for the commission and should be the standard course."

Response 12
We agree with the concern expressed here. The Policy would limit joint consultations to situations where "all parties agree" and where "there are sufficient issues in common to warrant a joint consultation."

Comment 13
The commenter expresses disappointment that the Commission seeks an " 'out' to meaningful consultation where statutory deadlines limit the manner or timeframe of consultation." The commenter recommends that the Commission "should move the consultation process early enough in the project consideration process that the statutory deadlines do not become a factor in the consultation process." The commenter further recommends that when statutory deadlines exist, the Commission "… should be required to exhaust its capabilities to gain deadline extensions before abbreviating the consultation process."

Response 13
We agree that consultation should commence early enough in the process to attempt to avoid statutory deadline problems, and that where flexibility exists, deadlines should be extended before abbreviating the consultation policy. However, experience informs us that statutory deadlines can sometimes make this difficult to achieve in practice. The goal of the Policy is to improve meaningful consultation, but with the understanding that there will be times when statutory deadlines prevail. The goal is to minimize these occurrences, to the degree legally permissible. We are not seeking to be relieved of the responsibility of due diligence, but simply acknowledging that there can be legal constraints on the Commission's timeframes for decisionmaking.

E. Lytton Rancheria of California, letter dated September 26, 2017.

Comment 1
The commenter recommends adding to the definitions (Section 1 page 3), a definition for Traditional Cultural Property, as follows:

> *A Traditional Cultural Property (TCP) is a property that is eligible for inclusion in the National Register of Historic Places (NRHP) based on its associations with the cultural practices, traditions, beliefs, lifeways, arts, crafts, or social institutions of a living community. TCPs are rooted in a traditional community's history and are important in maintaining the continuing cultural identity of the community.*
>
> *The cultural practices or beliefs that give a TCP its significance are, in many cases, still observed at the time a TCP is considered for inclusion in the NRHP. Because of this, it is sometimes perceived that the practices or beliefs themselves, not the property, make up the TCP. While the beliefs or practices associated with a TCP are of central importance, the NRHP does not include intangible resources. The TCP must be a physical property or place--that is, a district, site, building, structure, or object.*

Response 1
The State Historic Preservation Office defines Traditional Cultural Properties (TCPs) as follows:

> *Traditional Cultural Properties are eligible for inclusion to the National Register of Historic Preservation because of their association with cultural practices and beliefs that are: (1) rooted in the history of the community; and, (2) are important to maintaining the continuity of that community's traditional beliefs and practices. National Register Bulletin 38 (TCPs), can be used to define a property as a location associated with the traditional beliefs of a Native American group about its origins, its cultural history, or the natural world. Although not exclusively used in the Native American community, TCPs have been used to protect the beliefs, customs, and practices of California Indian Communities.*

We agree that the definition recommended by the commenter would be consistent with this definition, and that it would be useful to include the recommended definition in the Policy, to assist any Commission determination of what properties may constitute a cultural resource.

> **Proposed Modification to Policy, Page 5 (**after 1st paragraph**):**
> **10. Traditional Cultural Resource.** A Traditional Cultural Property (TCP) is a property that is eligible for inclusion in the National Register of Historic Places (NRHP) based on its associations with the cultural practices, traditions, beliefs,

lifeways, arts, crafts, or social institutions of a living community. TCPs are rooted in a traditional community's history and are important in maintaining the continuing cultural identity of the community.

The cultural practices or beliefs that give a TCP its significance are, in many cases, still observed at the time a TCP is considered for inclusion in the NRHP. Because of this, it is sometimes perceived that the practices or beliefs themselves, not the property, make up the TCP. While the beliefs or practices associated with a TCP are of central importance, the NRHP does not include intangible resources. The TCP must be a physical property or place--that is, a district, site, building, structure, or object.

Comment 2

1. Section II, Page 8. The commenter recommends expanding "Tribal interests" to include "… other governmental interests besides cultural and natural resources."

Response 2

The definition was intended to be broad enough to include this. We will add this language to the definition of Tribal Interests:

Proposed Modification to Policy, Page 4 (near bottom of page**):**
8. Tribal Interests: Include, but are not limited to: (a) Cultural Resources; or (b) fish, wildlife, plant, water, or similar natural resources. These interests may include other governmental interests besides cultural and natural resources.

Comment 3

Section IV, Pp. 8-12. The commenter recommends reiterating for each Commission process what is stated later in the document - that Tribes should be notified "as early as possible in the process." The commenter also recommends on page 9, first paragraph, adding the following underlined language to subpart c), which would read:

c) any Tribe(s) expressed significant, unresolved concerns about the Action's impacts on Tribal Interests during a local review process or requests consultation with the Commission for the Action;

In addition, the commenter requests clarification that such consultation will occur for all types of Commission actions.

Response 3

These changes will be made, as follows.

Proposed Modification to Policy, Page 8 (bottom of page/top of page 9**):**
4. Contacting Tribes For Commission Actions. During its review of plans, development proposals, or other activity to be the subject of a Commission

Action,[6] Commission staff in the District office or Commission unit proposing or reviewing the proposed Action will use the procedures below to determine whether and when to contact the Tribes identified on the Tribal Contact List that have expressed written interest, either to the Commission directly or to the NAHC, in being consulted on Commission Actions on particular matters or in specific geographic areas. Commission staff will also attempt to contact any other Tribes that Commission staff has reason to know may have an interest in the Action. If warranted, Commission staff will notify the NAHC of the Proposed Action and request a list of interested Tribes, and where also warranted, obtain the results of an NAHC Sacred Lands Files check. Notice to the NAHC will include a brief description of the nature and location of the proposed Action and a map or description of the area, if available. For all types of Commission actions, notification of interested Tribes and initiate of consultation, if requested, shall occur as early as possible in the review process. The timing and process for consultation concerning the various types of Actions by the Commission shall be as follows:

Proposed Modification to Policy, Page 9 (bottom of page**):**
Promptly notify affected Tribes in the manner they have requested and initiate consultation if any of the following circumstances apply: a) consultation is appropriate given the nature of the proposed plan and its potential for impacts on Tribal Interests; b) Commission staff has reason to know that particular Tribes may have an interest in the Action (e.g., Commission staff has previously worked with a Tribe on concerns in the geographic area); c) any Tribe(s) expressed significant, unresolved concerns about the Action's impacts on Tribal Interests during a local review process or requests consultation with the Commission for the Action; or d) a Tribe has specifically requested that the Commission notify it of this type of Action—e.g., all Actions in this location or of this type.

Comment 4
Section IV, Page 11. There's a reference to a section "4.c.(a) which is not clear.

[6] Unless consultation is legally required (e.g., in unusual circumstances where AB 52 applies because the Commission is a lead agency preparing an environmental impact report pursuant to CEQA), Actions with no or de minimis potential for cultural resource impacts are exempt from these consultation procedures. Examples of such circumstances could include exemption determinations, de minimis waivers, or CDPs for improvements to or redevelopment of structures within existing developed footprints where little or no grading is involved. *[For clarification – this footnote is not a proposed change, but is contained in the Draft Policy (footnote 4).]*

Response 4
The commenter is correct. The paragraphs were misnumbered in the draft policy, and will be renumbered. The reference was meant to be to the first paragraph under the federal consistency process.

> **Proposed Modification to Policy, Page 12 (**top of page**):**
> (B) If no CEQA documents were prepared, but NEPA documents were prepared (or are in the process of being prepared) by the permitting or funding agencies, follow the consultation steps outlined in Section 4.c.(1)(A) above.
>
> In addition, the numbering "c." will be added on page 11, near top of page, as follows:
>
> c. For **federal consistency** reviews (under the Coastal Zone Management Act), the following procedures shall be used:

Comment 5
Section V, Page 13. Suggests that "It is helpful for as much documentation about the Action as possible to be provided to the Tribes prior to any meetings."

Response 5
We understand the suggestion, but we note that the extent of documentation will likely vary depending on the specific situation, tribal interests, proposed activity and action, and possibly other factors. We will add the following language.

> **Proposed Modification to Policy, Page 14 (**top of page**):**
> **2. Time, Place, and Manner of Consultations**. Whenever feasible and consistent with applicable legal deadlines, the Commission will seek to commence consultations within 30 days after receipt of a written request for consultation from the Tribe. The Commission staff will pursue in-person consultations when feasible given the timing, funding, and travel constraints of the Tribes and the Commission staff. When feasible, the Commission staff will seek to arrange in-person consultations at the Tribe's offices, or Commission District offices. The Commission staff will work with Tribes, on a case-by-case basis, to determine the appropriate form and manner of consultation. Prior to any consultation, the Commission staff will provide the Tribes with documentation about the proposed Action. In addition, the Commission staff shall make a good faith effort to inform the Tribe in writing of the names and positions of those who will represent the Commission staff during the consultation.

F. Northern Chumash Tribal Council, email dated September 19, 2017.

Comment 1
The Northern Chumash Tribal Council supports the Draft Policy and does not recommend changes.

Response 1
No response necessary.

G. Xolon Salinan Tribe, letter dated October 20, 2017.

Comment 1
The Xolon Salinan Tribe agrees with the draft policy and does not recommend any changes.

Response 1
No response needed.

H. Dina Gilio-Whitaker, M.A., Policy Director and Senior Researcher, Center for World Indigenous Studies, Adjunct Professor of American Indian Studies, California State University San Marcos, letters and emails received October 29, 2017.

Comment 1
Professor Gilio-Whitaker's comments contained a fairly lengthy discussion of past mistreatments of Native Americans, ending with a recommendation that the Policy include a recitation of some of this history. Rather than attempt to summarize these comments, we will provide a few quotes directly as follows:

> *It is my contention as a scholar of Native American and Indigenous studies that the reason the federal government failed to create a satisfactory and responsive EJ policy framework for Native nations is that the entire structure of the federal relationship with tribal nations was not designed to impart any great measure of justice. It was in fact designed to constrain their rights and subject them to a hegemonic relationship with the State (the U.S.). Anybody with expertise in federal Indian law or knowledgeable about history knows this. It is a history that resulted in the structure most Native studies scholars now refer to as settler colonialism, in which the project of the settler State is to eliminate the Native population (and this it does physically, culturally, and discursively) to acquire their lands. At no time, however, has the U.S. ever admitted to this historically-created structure. Nowhere has it ever used the language of colonialism to describe its current relationship. Instead, it routinely whitewashes a profoundly violent and unjust history by publicly proclaiming a government-to-government relationship with tribes. Yet, it is not a relationship built on equity or shared power. Native nations don't even have the right to own the title of their own lands. It is a paternalistic relationship dictated by the U.S., and always in violation of the spirit of the hundreds of treaties the U.S. made with Native nations.*

The relationship of the State of California to tribes descends from this model of hegemony, and is designed to conform to it. In some ways, however, California (the "state"), has an even more egregious history with tribal people. Contrary to most popular and romanticized historical narratives, historians have documented a history of premeditated genocide and forced labor carried out by the state (Lindsay, 2012; Madley, 2016; Resendez, 2016), and was funded by state and federal dollars. It orchestrated a system of land theft so thorough that only a miniscule percentage is still in Indian hands. Land laws were so corrupt in California's early days that they were designed to transfer ownership from Mexican landowners (lands stolen from Indians to begin with); my research shows that this is how, for example, coastal lands in Southern California came to be owned predominantly by whites within just a few decades after statehood.

…

I have reviewed the draft Tribal Consultation Policy of August 18, 2017. The proposed policy is an example (as I've noted in my draft chapter on the limitations of EJ for tribal nations) of the constraint of any model of meaningful justice by its deferral to federal law. In my opinion, it provides only the smallest measure--a façade, really--of rights to tribes already robbed through the processes of history. As bleak as it sounds, this is a brutally honest assessment of the history that has created the political and legal structure we have today.

…

This is an opportunity for the state of California to acknowledge its dark history toward California Indians, and its complicity with the federal government in the land theft that now makes it necessary to even have a policy of environmental justice. The Coastal Commission is now in a position to help change the paradigm and accord a more just relationship toward tribal people. It can move toward this paradigm shift through the way its policy documents characterize the long arc of these relationships. Even if the legal experts see themselves as constrained by law in its current efforts to create an EJ policy framework, it can begin to acknowledge the structure that constrains it.

My suggestion is to include language at the beginning of the draft that goes beyond acknowledging tribal sovereignty (because this is, after all, a delegated, i.e. hegemonic form of sovereignty in federal law, and many California Indians do not even possess this much). Acknowledge the reality of the 18 treaties the federal government made in bad faith with California Indians. Acknowledge the land theft that makes tribal consultation with the goal of environmental justice necessary. Acknowledge the history by using the terms "colonialism" and "genocide." End the whitewashing of history.

Response 1
We agree with the comment and, as noted above on page 11, we will add language to the Background section of the Policy to summarize historic information about past atrocities committed against Native Americans by state and federal governments.

Proposed Modification to Policy, Page 1 (after the first paragraph):
[See page 11 above, additional text added to the Background, in response to the Jamul Tribe and Professor Gilio-Whitaker's Comments.]

Comment 2
Page 3, No. 4. Consultation. Replace "others" with "Tribes."

Response 2
That was the intent. We will make this change.

Proposed Modification to Policy, Page 3 (**Consultation**):
Consultation: Means the meaningful and timely process of seeking, discussing, and considering carefully the views of ~~others~~Tribes, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement.

Comment 3
Page 4, No. 7. Indian Country or Tribal Lands. The use of the phrase "dependent Indian communities" in the federal definition of "indian country," and in fact the "entire structure of federal Indian law, with its language of "dependency" was mythological from the beginning (Johnson v. M'Intosh, 1823), and scholars have shown over and over again how it is a colonial system that maintains a non-consensual system of domination."

Response 3
The definition is a direct quote from federal law, which the Commission does not have the authority to modify. We will add a footnote noting that the Commission does not condone the use of this term.

Proposed Modification to Policy, Page 4 (**Indian Country or Tribal Land**):
3. 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, which 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[8] 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.

[The added footnote would read: This phrase is in the regulation. In quoting it, the Commission does not in any way condone the use of this term.]

Comment 4
Page 5, same paragraph as previous comment. The comment is: "Why can't the state acknowledge that the federal government made 18 treaties with tribes in bad faith, (because they were never ratified), resulting in massive land theft? It might not change anything, but why not at least acknowledge this colonial history? All of the language in this paragraph simply functions to erase this history."

Response 4
See Response 1 above, as well as the response to Comment D.1 (Jamul Tribe) (page 11 above).

Comment 5
Page 6, Tribal Liaison**.** The Commission's Tribal Liaison should be a member of a California Indian Tribe, and if possible, the Commission's District office liaisons, should be members of tribes from each region.

Response 5
Given the constraints and limitations inherent in the State Personnel requirements for state employment, it may not be possible to incorporate this recommendation, although there is no reason it could not be stated as a goal. We note that a State law was recently adopted that required the California Governor to appoint at least one Commissioner to an upcoming vacancy on the Commission to be a member who would:

> *"… reside in, and work directly with, communities in the state that are disproportionately burdened by, and vulnerable to, high levels of pollution and issues of environmental justice, as defined. The bill would require that the Governor appoint a member who meets these qualifications to a vacant position from the appointments available no later than the fourth appointment available after January 1, 2017."*

Unlike Commissioner appointments, Commission staff positions are subject to strict State Personnel Board requirements, which may not be flexible enough to enable the Commission to commit to such a policy.

I. Esselen Tribe of Monterey County, letter dated November 12, 2017.

Comment 1
The Esselen Tribe did not recommend changes to the Draft policy, but requests future consultation on matters pertaining to coastal areas of California, and looks forward to meeting the Commission's tribal liaison when appointed.

Response 1
We will meet the request for future consultation with the Esselen Tribe.

Attachment - Comment Letters Received to date (also listed on page 1 above)

[Note: Comment letters are attached to the electronic version. Paper copies do not have the comment letters attached. Paper copies were mailed to Commissioners in the first mailing for the April 2018 CCC meeting, and were posted at https://www.coastal.ca.gov/meetings/agenda/#/2018/4 See Item W6d, Correspondence folder]