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April 27, 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 Supplemental Response to Comments,
Draft Tribal Consultation Policy**

Background

On April 11, 2018, the Commission held a public hearing (and opened a public comment period) on its Draft Tribal Consultation Policy (initially dated August 11, 2017). On April 20, 2018, the Commission staff posted an updated Second Draft Tribal Consultation Policy (dated April 20, 2018). In this memo the Commission staff is responding to comment letters received after March 29, 2018 (letters received before that date were responded to at the April 11, 2018, Commission meeting). These more recent letters were posted on the Commission's website on April 20, 2018, and are as follows:

Written Comments by Tribal Representatives identified on the Native American Heritage Commission's (NAHC's) "SB-18/AB-52" Consultation List (hereafter "NAHC List"):

1. Gabrieleno Band of Mission Indians-Kizh, Andrew Salas, Chairman, letter dated March 29, 2018.
2. Northern Chumash Tribal Council, Fred Collins, Chair, letter dated April 10, 2018.
3. Elk Valley Rancheria, Dale Miller, Chairman, letters dated April 9, 2018, and April 11, 2018.
4. Henry Pedregon, Member, Gabrieleno Band of Mission Indians-Kizh, letter dated April 10, 2018.

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5. Victoria Jones, Member, 9th Generation Juaneño Band of Mission Indians, Acjachemen Nation, email dated April 10, 2018.
6. Pete Conejo-Tochtli (Melendez), Tewa Nation member (a New Mexican Tribe), email dated April 9, 2018.
7. Rumsen Ohlone (Rumšen Am:a Tur:ataj Ohlone), Dee Dee Manzanares-Wyatt, letter dated April 10, 2018.
8. Anna Christensen, Protect the Long Beach/Los Cerritos Wetlands, email dated April 10, 2018.

Summary of Comments and Responses

A. Gabrieleno Band of Mission Indians-Kizh, Andrew Salas, Chairman, letter dated March 29, 2018.

Comment 1

A number of commenters, including Chairman Salas, requested that the Commission limit which Tribes and Tribal organizations would qualify for Consultation under the Tribal Consultation Policy. Several Tribes suggested that, for any particular consultation, the Commission limit its Consultation to the Tribe demonstrating ancestral lineage to the area in question, and not to Tribes that are either (1) not on the Tribal Consultation list compiled by the Native American Heritage Commission ("NAHC List"), or (2) if the Tribe were listed by the NAHC, Tribes that had not demonstrated ancestral lineage to the area.

Response 1

We agree that additional clarity over this question is warranted, and the Draft Tribal Consultation policy has been modified to specify that formal Consultation under the Policy would be limited to those Tribes identified on the NAHC's official Tribal Consultation List. The draft policy (page 9; Item VI.4.)) has been revised and would now read:

4. **Contacting Tribes For Commission Actions.** During its review of plans, development proposals, or other activity to be the subject of a Commission Action, 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 NAHC's California Tribal Consultation 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.

At the same time, the section also clarifies that the Commission will continue to coordinate with other interested parties; the sentence following the above language would add:

Time permitting, the Commission staff will also attempt to contact any other Native American or tribal organizations that Commission staff has reason to know may have an interest in the Action; however those contacts would be outside the scope of this formal Tribal Consultation Policy.

We do not agree with the portion of the comment which states that Tribes on the NAHC Tribal Consultation List need to establish ancestral lineage to a particular project or planning area in order to be consulted with, and we would defer to the NAHC on any questions of lineage or other qualifications it looks at to determine its listings and areas of cultural affiliation.

Comment 2

The Commenter requested that any references to the “NAHC Contact List” be changed to “NAHC Consultation List.”

Response 2

We agree and have made this clarification.

Comment 3

The Commenter requested that any references to the “Tribe” be changed to “relevant ancestral Tribe.”

Response 3

For the reasons discussed in Response 1 above, we disagree with this suggestion.

Comment 4

The Commenter requested changes to the definition of Tribal cultural resources, as follows:

5.Cultural Resources:

a. “Cultural resources” are either of the following:

(1) Sites, features, places, cultural landscapes, sacred places, and objects (artifacts and ecofacts) with cultural value to a California Native American tribe that are one either of the following:

(A) Included or determined (determined by the local Tribe) to be eligible for inclusion in the California Register of Historical Resources.

(B) Included in a local register of historical resources as defined in Public Resources Code Section 5020.1(k).

- (C) ~~Determined sacred or significant to the local Tribe which may or may not have been acknowledged at the state or federal levels. Oral history is considered of primary importance in determining sacred significance.~~
- (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(e). In applying these criteria, the lead agency shall consider the significance of the resource to a California Native American tribe.~~
- B. ~~A cultural landscape may need to be that meets the criteria of subdivision (a) is a tribal cultural resource to the extent that the landscape is geographically defined in terms of the size and scope of the landscape for purposes of registration.~~
- C. ~~A historical resource described in Public Resources Code Section 21084.1, a unique archaeological resource as defined in Public Resources Code Section 21083.2(e), or a "nonunique archaeological resource" as defined in Public Resources Code Section 21083.2(h) may also be a tribal cultural resource if it conforms to the criteria of subdivision (a).~~

Response 4

The definition in the Policy was taken directly from CEQA definitions. We recommend keeping the definition the same as that under CEQA.

Comment 5

The Commenter requested replacing the definition of "Indian Country or Tribal Lands" with the following:

- 7. 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 within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.~~

Tribal lands are defined by one of the following:

- a. A reservation
- b. Any traditional territory as defined by the Tribe and recognized by the State..
Oral history may be of significant primary importance.
- c. Tribal lands can include water bodies (e.g. lakes, oceanaries, etc) or lake waterways
- d. Tribal lands also include the atmosphere over tribal areas which include the air, air quality and astronomical associations

Response 5

As noted in the Second Draft Tribal Consultation, due to several concerns raised in previous comments, we have removed the definition of Indian Country or Tribal Lands. We do not believe the Tribal Consultation Policy needs a definition of either of these terms.

Comment 6

The Commenter requested replacing modifications to the definition of Tribal Interests, including noting that the "... Kizh consider the pine trees of San Gabriel mountains to be their living ancestors."

Response 6

We believe the changes recommended are unnecessary, and that any such considerations recommended can already be accommodated under the current definition.

Comment 7

The Commenter requested adding to the definition of sovereignty the following: "Non-federally recognized tribes also have sovereignty having the same rights and considerations, some of which have been delegated by the state of California. This comment was echoed in a slightly different manner by the Elk Valley Rancheria, which stated that the definition "should also recognize that the State of California recognizes tribal sovereignty and the exercise of Tribal jurisdiction and authority, e.g., environmental review for gaming projects pursuant to Tribal law."

Response 7

We do not believe the definition of Tribal Sovereignty needs to be modified. It is accurate to state that the State of California recognizes Tribal Sovereignty, and this Tribal Consultation Policy is in part a more formal recognition of this Sovereignty. Nevertheless, we do not believe that the State's adoption, over recent decades, of additional consultation requirements or provision for Tribes to exercise jurisdiction over environmental review or other matters creates a shift in the definition of what constitutes Tribal Sovereignty.

Comment 8

The Commenter requested several changes to the Guiding Principles, as shown below:

III. GUIDING PRINCIPLES

The Commission seeks to establish and maintain a respectful and effective means of communicating and consulting with Tribes and will seek in good faith to:

1. Communicate and consult with Tribes and seek tribal input regarding the identification of potential issues, possible means of addressing those issues, and appropriate actions, ~~if any~~, to be taken by the Commission.
2. Assess the potential impact of proposed Commission Actions on Tribal Interests and ensure, to the maximum extent feasible, that tribal concerns are considered before such Actions are taken, such that impacts are avoided, minimized, or properly mitigated in conformity with Coastal Act and other applicable legal requirements.
3. Provide timely and useful information relating to such proposed Actions that may affect Tribal Interests.

Define "timely"
4. Communicate with and engage with Tribes at the earliest possible stage in the review and decision-making processes ~~prior to any field work or construction~~.
5. Communicate with Tribes in a manner that is considerate and respectful.
6. Provide Tribes with meaningful opportunities to respond and participate in decision-making processes that affect Tribal Interests.
7. Acknowledge and respect Cultural Resources regardless of whether those resources are located on or off Tribal Lands. ~~This also includes resources that have been or happened to be present located at the site or curated.~~
8. Acknowledge and respect both the confidential nature of information concerning cultural practices, traditions, beliefs, tribal histories, and Tribal Lands, and legal protections of the confidentiality of certain tribal cultural information (e.g., Gov. Code §§ 6254(r), 6254.10, Pub. Res. Code § 21082.3(c)).³ The Commission will take all lawful and necessary steps to ensure confidential information provided by a Tribe is ~~considered confidential~~ and is not to be disclosed without the prior written permission of the Tribe.
9. Encourage collaborative and cooperative relationships with Tribes in matters affecting coastal resources.
10. Acknowledge and seek ways to accommodate the limited financial and staffing resources of Tribes and the Commission to ensure effective communication and consultation, including taking advantage of any joint consultation opportunities as discussed on page 14 below (Item 7. Joint Consultation).
11. ~~Identify and recommend means to remove procedural impediments to working directly and effectively with Tribes.~~

Response 8

We do not agree that any of these changes are needed; we believe the concepts presented can already be accommodated under the currently worded Guiding Principles.

Comment 9

The Commenter recommended several changes to Contacting Tribes for Commission Actions, as shown below:

a. For **planning matters** (Local Coastal Program (LCP), Public Works Plan (PWP), Long Range Development Plan (LRDP), Port Master Plan (PMP), or any amendment to such plan), the following procedures shall be used:

- (1) Upon receipt of such a plan for certification, and prior to determining whether the plan was “properly submitted” (pursuant to, e.g., 14 Cal. Code Regs. §§ 13520, 13553, 13354, 13365, and 13628), review the submittal to determine the degree to which the local government preparing the plan consulted with Tribes regarding Cultural Resource effects pursuant to AB 52 (applicable if local government is lead agency for CEQA review) and/or SB 18 (specifically applicable for general plan, including land use plan, submittals).³ Request that the local government submit additional information regarding tribal consultation, as appropriate, although failure to do so would not generally be grounds for determining the submittal incomplete. The “Tribe” shall determine if consultation was complete and adequate for each project. Written documentation of consultation will be provided by the Tribe to the commission.

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 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.~~ For any project (whether

procedural or physical), the “Tribe” will be contacted and thus have the right to respond. It will be up to the “Tribe” to determine and decide if consultation is warranted.

- (2) Regardless of whether the Commission engages in consultation as described above, provide written public notice to all ~~relevant, ancestral tribal of that area. interested Tribes~~ in accordance with standard Commission notice procedures for upcoming hearings. Where feasible, schedule the item for the hearing in a location convenient to the project site in order to facilitate maximum participation by affected Tribes.
- (3) ~~*This section needs to be written – difficult to understand Include in staff recommendations to the Commission a summary of the results of any local government and/or Commission staff consultations described in this Tribal Consultation Policy, with sensitivity to the Tribal confidentiality needs as described in this Policy, and with publicly available summaries of identified concerns included only if the affected tribes agree to such disclosure in writing.~~

Response 9

While we encourage Tribes to indicate whether they believe Consultation is complete and adequate, the Policy directs Commission and its staff's actions, and is not intended to mandate tribal responsibilities. In addition, if a Tribe does not believe Consultation is warranted, then no such Consultation would ensue. Concerning the purported lack of clarity of the last paragraph above, we are open to and will consider recommendations for clarifying it. The paragraph currently reads as follows:

(3) Include in staff recommendations to the Commission a summary of the results of any local government and/or Commission staff consultations described in this Tribal Consultation Policy, with sensitivity to the Tribal confidentiality needs as described in this Policy, and with publicly available summaries of identified concerns included only if the affected tribes agree to such disclosure in writing.

B. Northern Chumash Tribal Council, Fred Collins, Chair, letter dated April 10, 2018.

Comments

The commenter urged: (1) an appreciation of the care and effort needed to achieve successful consultation practices; (2) that early and timely consultation is warranted before momentum gathers for proposed developments; and (3) that coalitions of tribal organizations should only support local Tribal Voices.

Responses

These comments are understood and constitute some of the rationale for developing this Tribal Consultation Policy. Concerning input to the Commission by tribal or other organizations not on NAHC's Tribal Consultation List, see Response A.1 above.

C. Elk Valley Rancheria, Dale Miller, Chairman, letter dated April 11, 2018.

[Note: The Rancheria clarified that its April 11, 2018, letter was the letter intended for Commission review. It corrected a typographical omission of one word in the April 9, 2018, Rancheria letter.]

Comment 1

The commenter stated that the "Definition of 'consultation' should include a 'good faith' component and not simply feasibility."

Response 1

"Good faith" is assumed by the language in the definition of "Consultation." We will add that phrase to make it abundantly clear. The use of the term "where feasible" was not referring to the manner of consultation, but to whether consultation would reach mutual agreement. We believe the "where feasible" should remain as proposed.

Accordingly, the first sentence of the definition of Consultation will be clarified as follows:

4. Consultation: Means the meaningful and timely process of seeking, discussing, and considering carefully, and in good faith, the views of Tribes, 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.

Comment 2

The commenter recommended changing the reference of "federal recognition" to the Federally Recognized Indian Tribe List Act of 1994 ("List Act"), Section 104 of the Act of November 2, 1994 (Pub. L. 103-454; 108 Stat. 4791, 4792), rather than the federal regulations regarding recognition. The Commenter notes that some Tribes were not recognized through the cited regulations ((United States Code of Federal Regulations, Title 25, section 83.2), but are recognized under the "List Act."

Response 2

To avoid confusion we will remove the previously cited regulation as a reference, as follows:

6. 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 is eligible for the programs, services, and other relationships established for the United States for Indians, because of their status as Indians. (~~United States Code of Federal Regulations, Title 25, section 83.2~~)

Comment 3

The commenter recommended expanding the definition of "Tribal Interests" to include "governmental and jurisdictional interests."

Response 3

As the commenter noted, we added the term "governmental" here in response to the previous suggestion made by the Lytton Rancheria. We believe the definition is sufficiently broad to accommodate any "jurisdictional" interests.

Comment 4

The commenter requested that the definition of "Tribal Sovereignty" be expanded to include State recognition.

Response 4

See Response A.7 above.

Comment 5

The commenter recommended harmonizing Guiding Principles 9 and 11.

Response 5

We agree with the concept expressed, but do not believe modifications in the language for these Principles warrants modifications.

Comment 6

The commenter expressed concerns over potential delays in the discussion of federal agency Tribal Consultation that suggests additional coordination/consultation may be warranted in the event a federal agency limits its consultation to federally-recognized Tribes. The example cited by the commenter was a fee to trust action.

Response 6

We understand the concern and would want to avoid any delays by the process in the event the staff determines that Consultation with non-federally recognized Tribes has not, but should be (or should have been), undertaken. Hopefully, early input and coordination can resolve this concern such that delays would not be necessary. For example, for fee to trust actions, the Bureau of Indian Affairs (BIA) provides advance notices of its consideration of a trust application, and this would provide ample opportunity for the Commission staff to both independently contact any non-federally-recognized Tribes, as well as recommend the BIA initiate similar contacts. Also, as was the case recently with the Cher-Ae Heights Indian Community of the Trinidad Rancheria, which is contemplating a fee to Trust action in Trinidad, pre-submittal (i.e., prior to submittal to the BIA of an application for a Trust action) Consultation between the Tribe and the Commission staff occurred and represents the kind of “up-front” coordination which provide additional opportunities to identify concerns early in processing (thus avoiding creating any delays). Finally, it should be noted that BIA consistency determinations for Trust actions are subject to a very short time period for Commission review (60-75 days, unless extended by the BIA).

D. Henry Pedregon, Member, Gabrieleno Band of Mission Indians-Kizh, letter dated April 10, 2018.

Comment 1

The commenter stated that the definitions of Cultural Resources and Tribal Interests should mention and include “Oral Histories” of the Tribe, which the commenter states “is the primary component of AB 52.”

Response 1

We agree that oral histories are inherently extremely value and intended to be explored in consultation efforts. While AB 52 does not specifically mention oral histories, we believe it is similarly inherent in that law that consideration of tribal history and interests

include oral histories. We are therefore not recommending modifying the proposed definitions in the Policy.

Comment 2

The commenter asked what the status of non-federally-recognized Tribes under the Policy.

Response 2

As mentioned in Response A.1 above, the status of non-federally-recognized Tribes has been clarified.

Comment 3

The commenter asked whether “Tribal Lands” refers to both federally-recognized and non-federally-recognized Tribes.

Response 3

As mentioned in Response A.5 above, the definition of Tribal Lands has been removed.

Comment 4

The commenter asked who will determine Tribal Liaisons, and whether there will be “guarantees of neutrality.” The Commenter also asks whether the Tribe can “contest or reject the CCC candidate.”

Response 4

The Commission’s Executive Director will make these appointments. Any concerns over perceived neutrality can be reviewed by the Commission, the Executive Director, and/or the Headquarters office Liaison (if the concern is expressed over the District Liaison). If a Commission staff member consulting with a Tribe is not the Liaison, the Tribe can express concerns to the District Liaison.

Comment 5

The commenter asked whether the Commission’s Tribal Contact List will be the same as the NAHC’s List.

Response 5

Yes. See Response A.1 above, which clarifies this point.

Comment 6

The commenter asked whether the Commission’s Tribal Contact List will be the same as the NAHC’s List, and whether the Commission will “insure against individuals fraudulently representing themselves as ‘Native Americans’ as they already exist on the NAHC List”.

Response 6

The Commission's List will be the same as the NAHC's (see Response A.1 above which clarifies this point.) The Commission will not be making judgments independent of the NAHC concerning which Tribes to List for Tribal Consultation.

Comment 7

The commenter asked whether non-federally-recognized Tribes will be recognized under review of federal agency activities and permits.

Response 7

Yes, the language in the Policy for Commission reviews of federal agency activities and permits is intended to involve Consultation with non-federally-recognized Tribes on NAHC's List.

Comment 8

The commenter expresses the need to work with the NAHC to modify and/or verify contacts on its List.

Response 8

As noted above, the Commission will not be making judgments independent of the NAHC concerning which Tribes to List for Tribal Consultation.

Comment 9

The commenter asked whether a Tribe will have access to Consultation records.

Response 9

Yes, a Tribe being consulted with will have access to the records of the Consultation.

The remaining four letters reviewed for this memo (listed below) did not raise any additional issues warranting further responses:

Victoria Jones, Member, 9th Generation Juaneño Band of Mission Indians, Acjachemen Nation, email dated April 10, 2018.

Pete Conejo-Tochtli (Melendez), Tewa Nation member (a New Mexican Tribe), email dated April 9, 2018.

Rumsen Ohlone (Rumšen Am:a Tur:ataj Ohlone), Dee Dee Manzanares-Wyatt, letter dated April 10, 2018.

Anna Christensen, Protect the Long Beach/Los Cerritos Wetlands, email dated April 10, 2018.