

[Proposed] Tribal Consultation Policy

Introduction:

The CA Public Utilities Commission (PUC or “Commission”) adopts this Tribal Consultation Policy, consistent with Executive Order B-10-11 issued by Governor Edmund G. Brown, Jr. on September 19, 2011). Executive Order B-10-11 declares that “the State is committed to strengthening and sustaining effective government-to-government relationships between the State and the Tribes by identifying areas of mutual concern and working to develop partnerships and consensus.” The Executive Order directs state executive agencies and departments to “encourage communication and consultation with California Indian Tribes.” It further directs state agencies and departments “to permit elected officials and other representatives of tribal governments to provide meaningful input into the development of legislation, regulations, rules, and policies on matters that may affect tribal communities.”

California is home to over 170 California Native American tribes.¹ Executive Order B-10-11 applies to federally-recognized Tribes and other California Native Americans. For purposes of this policy, the terms “tribes” and “tribal governments” refer to elected officials and other representatives of federally-recognized Tribes and other California Native Americans.

This policy is not intended to replace or supplant obligations mandated by federal law. It sets forth provisions for consultation, communication and collaboration with tribes to the extent that a conflict does not exist with applicable laws or regulations. This policy is not a regulation and it does not create, expand, limit, waive, or interpret any legal rights or obligations.

Tribal Liaison:

The Commission will appoint a tribal liaison to help implement this policy. The tribal liaison will act as a point of contact for tribal governments to seek advice on participation in Commission proceedings and Commission-approved programs; locating information; filing documents; contacting Commissioners, advisors, or staff; and other matters. Alternatively, tribal governments may contact the Commission’s Public Advisor for this assistance (Email: Public.Advisor@cpuc.ca.gov or phone: (866) 849-8390). The tribal liaison and/or Public Advisor are additional resources, and tribal governments may continue to directly contact relevant Commission staff regarding ongoing issues.

¹ “California Native American tribe” means 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. See Public Resources Code § 21073. California Native American tribes include both federally recognized and non-federally recognized tribes. Nothing in this policy prevents tribal consultation with other Native American groups demonstrating an ongoing connection to a specific place or cultural resource, or issue falling under the jurisdiction of the PUC.

Policy Goals: The goals of this policy are as follows:

- Recognize and respect tribal sovereignty
- Encourage and facilitate tribal government participation in PUC proceedings
- Give meaningful consideration to tribal interests in PUC decisions
- Encourage and facilitate tribal government participation in PUC-approved utility programs
- Protect tribal cultural resources
- Encourage investments by tribal governments and tribal members in onsite renewable energy generation, energy efficiency; low carbon transportation and energy storage.

Background Regarding PUC Authority:

The range of PUC activities is extensive and includes:

- Setting rates for privately-owned utilities, including gas, electric and water utilities and oil and gas pipeline companies; regulating telecommunication companies and certain transportation services.
- Requiring planning and procurement by utilities to ensure that they provide safe and reliable service; requiring utilities to procure renewable electricity to reduce greenhouse gas emissions.
- Establishing safety, training, inspection, record-keeping and reporting requirements for utilities.
- Approving construction of new utility infrastructure and acting as lead or responsible agency for California Environmental Quality Act (CEQA) review of these projects.
- Requiring reduced rates for low income utility customers (i.e., the California Alternative Rate for Energy and Family Electric Rate Assistance programs for gas and/or electricity customers; “Lifeline” for telephone service).
- Requiring utilities to provide no-cost energy efficiency upgrades to qualified low income customers (the Energy Savings Assistance Program).]
- Administering programs that provide subsidies for the provision of broadband services to difficult to reach and underserved communities in the State.
- Requiring incentive and rebate programs for customers who invest in energy efficiency, energy storage, electric vehicle charging, or participate in demand response programs that reduce “peak load” on the electricity grid.
- Regulating the safety of utilities, railroads, common carriers, charter party carriers and other transportation providers.
- Requiring gas utilities to reduce methane emissions from the gas delivery system.
- Taking enforcement actions to obtain compliance and/or impose penalties in response to violations of laws, regulations, rules and orders.

The PUC's activities may affect tribal governments in several ways, including but not limited to: 1) impacts on a tribe that is a utility customer at buildings and/or businesses owned or operated by the tribe or tribal members; 2) impacts on the affordability, availability and reliability of services provided to tribal members by utilities; and 3) potential impacts from proposed construction of utility infrastructure on or near tribal property or property containing tribal cultural resources.

Facilitating Tribal Government Participation:

The PUC will encourage and facilitate tribal government participation in its proceedings.

- The PUC will give special consideration to tribal governments' requests to participate in Commission proceedings. Administrative law judges and Commissioners are encouraged to grant a tribal government's request to become a party in a proceeding, even if a request is untimely, if the proceeding can continue under the existing schedule, or if it is reasonable to modify the schedule and consistent with principles of due process.
- Commission staff will assist tribal governments in locating relevant information and documents that will help them participate in Commission proceedings and/or Commission-approved programs. If necessary, Commission staff will send the relevant information or documents to a tribal government electronically or by regular mail.
- Commissioners and their advisors will make every effort to grant tribal governments' requests for in person meetings at a Commission office, when it complies with the applicable law regarding ex parte communications, or is not infeasible due to equal time requirements.² Other Commission staff will also accommodate tribal governments' request for in person meetings, whenever possible.
- Commission staff and Administrative Law Judges shall make efforts to ensure that relevant information the Commission receives from a tribal government is submitted into the record of a proceeding, consistent with the confidentiality provisions of this policy set forth below.
- The Commission will make efforts to ensure that tribal governments are aware of Commission-managed grant programs (such as the CA Advanced Services Fund), and various Commission-approved utility incentive and subsidy programs offered by the utilities, especially those that target disadvantaged and/or remote communities.
- Where feasible, Commission staff will provide assistance so that tribal governments and tribal members may seek to participate in (or benefit from) grant programs implemented by the Commission and various Commission-approved incentive and subsidy programs offered by the utilities.

² Public Utilities Code § 1701.3(h)(3).

Confidentiality:

- The Commission recognizes that confidentiality of information regarding tribal cultural resources, traditions, and religious activities and sites is important to tribal governments and tribal members.
- The Commission will follow existing laws that protect confidentiality of tribal cultural resources (including Pub. Res. Code §§ 5097.9, 5097.933 and 21082.3(c); Government Code § 6254(r) and Cal.Code Regs., tit. 14, § 15120(d)).
- The PUC will not include any information in environmental documents, or documents it files in proceedings, about the location of an archeological site, sacred lands, Native American graves, cemeteries, or sacred places, if the information is exempt from public disclosure under the above laws and regulations. The tribal government shall notify the PUC if any information it provides is confidential, and mark any such documents as confidential.
- If appropriate, the PUC will work with tribes to enter into a non-disclosure agreement for documents transmitted to the PUC that contain confidential information.
- If confidential information regarding the presence of tribal cultural resources is relevant to a Commission decision, the Commission will work with the tribal government to reach agreement on how to proceed, in an effort to allow the decision-makers to consider the information, while also protecting its confidentiality.

Tribal Consultation Under CEQA:

For projects where the PUC is the lead agency under CEQA, the PUC will comply with the statutory requirements regarding tribal consultation enacted by AB 52 (Gatto, 2014) (Pub. Res. Code §§ 21080.3 *et seq.*). The PUC will also follow the Governor's Office of Planning and Research guidance in the *Technical Advisory: AB 52 and Tribal Cultural Resources in CEQA* (June 2017), including its recommended process for consultation.

Summary of CEQA Consultation Process:

- A tribal government may request CEQA consultation if it is traditionally and culturally affiliated with the geographic area of a proposed project.
- The consultation must take place prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report. (Pub. Res. Code § 21080.3.1(a)). Since the initial consultation occurs early in the agency's CEQA review process (see below under Timing of Consultation), the consultation will occur before the PUC's release of a *draft or proposed* negative declaration, mitigated declaration, or environmental impact report.
- The consultation must address alternatives to the project, recommended mitigation measures, or significant effects, if requested by the tribe. (Pub. Res. Code § 21080.3.2(a)).
- If the agency determines that a project may cause a substantial adverse change to tribal cultural resources, the agency must consider mitigation measures. The agency must "when feasible, avoid damaging effects to any Tribal cultural resource." (Pub. Res. Code 21084.3(a)). The statute

describes mitigation measures that the agency may adopt, if feasible, to avoid or minimize the impacts. (Pub. Res. § 21084.3(b)).

- The consultation concludes when either 1) the parties agree on measures to recommend to mitigate or avoid a significant effect, if one exists, on a tribal cultural resource (Pub. Res. Code § 21082.3(a)), or 2) a party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached. (Pub. Res. Code § 21080.2.2(b)).

In 2016, Appendix G of the CEQA Guidelines was amended to implement AB 52. The Environmental Checklist in Appendix G of the CEQA Guidelines now directs lead agencies to address tribal cultural resources in Question #11: “Have California Native American tribes traditionally and culturally affiliated with the project area requested consultation pursuant to Public Resources Code section 20180.3? If so, has consultation begun?” Appendix G of the Guidelines also directs the lead agency to identify whether the project would cause a substantial adverse change in the significance of a tribal cultural resource that is: listed or eligible for listing in the California Register of Historical Resources; is listed in a local register of historical resources; or that is significant pursuant to the criteria in Public Resources Code § 5024.1(c) (CEQA Guidelines, Section XVII).

Advance Request for Notice of Projects:

- Pursuant to AB 52, a tribe may inform agencies in advance that it would like notice of projects subject to CEQA that are seeking the agency’s approval and that are within the tribe’s traditionally and culturally affiliated area. About a dozen tribes have requested this notice from the PUC to date.
- The PUC will send a letter encouraging other tribal governments (using a Native American Heritage Commission contact list) to submit an advance request to the PUC for notice of CEQA projects in its area. The Native American Heritage Commission has created a template for a letter requesting AB 52 notice (attached as Exhibit A). Tribal governments may use this template to request notice from the PUC.

Timing of Consultation: The PUC will follow the statutory deadlines for tribal consultation under CEQA, which generally require the following:

- When a tribe has requested notice of CEQA projects, the PUC must provide written notice to that tribe of a project in its area, within 14 days of determining that the project application is complete.
- A tribe may request to engage in consultation within 30 days of receipt of the notice, and designate a lead contact person.
- The PUC will begin the consultation process within 30 days of receipt of the request for consultation.
 - The PUC will hold a consultation meeting at one of the PUC offices within 30 days.

- If a meeting at a Commission office is not feasible for the tribal government, the consultation may occur at a mutually agreeable alternative location or by telephone.
- If the tribe requests that the consultation be scheduled for a time after the 30 day period, the PUC will accommodate the request.
- The PUC will participate in additional consultation meetings as necessary to address the issues and work in good faith to reach an agreement with the tribal government on recommendations for project modifications or mitigation measures.
- The PUC will honor a tribe's request for CEQA consultation that is made more than 30 days after the tribe's receipt of notice, as long as there is still time for meaningful consultation to occur.

Other Situations:

When a tribe has not requested advance notice of all CEQA projects from the PUC, if the Commission is the lead agency, a request will be made to the Native American Heritage Commission to identify tribal entities interested in the project area. Commission staff will ensure that the identified tribal entities receive written notice of a proposed project in their area at the beginning of the environmental review process. The Commission will carefully consider all tribal government comments regarding potential impacts on tribal cultural resources and suggested mitigation measures.