May 29, 2015

Christopher Calfee, Senior Counsel
Holly Roberson, Land Use Counsel
Governor's Office of Planning and Research
1400 Tenth Street
Sacramento, CA 95814

Sent electronically to: CEQA.Guidelines@resources.ca.gov

Subject: Discussion Draft Technical Advisory – AB 52 and Tribal Cultural Resources in CEQA

Dear Mr. Calfee and Ms. Roberson:

The California Chamber of Commerce and the below-listed organizations thank you for the opportunity to submit comments regarding the Office of Planning and Research's ("OPR") May 2015 Discussion Draft Technical Advisory ("Technical Advisory"). Specifically, the Technical Advisory provides guidance to lead agencies regarding implementation of Assembly Bill 52 (Gatto, 2014). AB 52 amended the California Environmental Quality Act ("CEQA") to require lead agencies to (1) consult with affected Native American Tribes on a project-by-project basis and (2) analyze whether a project with an environmental effect may cause a substantial adverse change in the significance of a new resource area called "tribal cultural resources."

This comment letter focuses on two aspects of the Technical Advisory that we believe require further clarification. First, this letter proposes to clarify that a lead agency's threshold determination regarding whether a non-listed resource is a "tribal cultural resource" under Public Resources Code section 21074 is a separate and distinct determination from the secondary (and in some instances unnecessary) determination regarding whether an impact to a "tribal cultural resource" is significant. The former determination with respect to non-listed resources is a discretionary determination governed by the "substantial evidence" standard, while the standard of review governing the latter question may differ depending on what type of environmental document the lead agency prepares. Second, this letter proposes to clarify that AB 52's consultation provisions do not trigger when the lead agency determines that a project is exempt from review under CEQA.

1. Standard of Review

Section 21074 subdivision (a)(2) defines a "tribal cultural resource" as "[a] resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant . . . ." In summarizing this subsection, the Technical Advisory states that "because the statute gives lead agencies discretion regarding how to treat non-listed resources, evidence of a fair argument is insufficient by itself

to compel a lead agency to treat it as a tribal cultural resource if the lead agency determines otherwise." (Page 5.) We believe this portion of the Technical Advisory requires two clarifications.

First, the Technical Advisory should expressly distinguish the *threshold* determination a lead agency must make regarding whether a resource is a "tribal cultural resource" from the *secondary* determination a lead agency may need to make regarding whether potential impacts to the "tribal cultural resource" are significant. Indeed, a case to which the Technical Advisory cites, *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, which involved an exemption determination for a building demolition project, notes that in the context of determining historicity for purposes of CEQA, lead agencies must make these two determinations independently. The first determination, according to *Valley Advocates*, is whether an object or a building is an historical resource for purposes of CEQA's discretionary historical resources category. (*Id.* at 1069-1070.) Second, if and when the resource has been determined to be an historical resource, then the lead agency must determine "whether the proposed project 'may cause a substantial adverse change in the significance of an historical resource' and thereby have a significant effect on the environment." (*Id.* at 1072.)

Expressly distinguishing these determinations in the Technical Advisory is critical because a different standard of review may apply to each question, depending on the level of environmental review being conducted. If a lead agency conflated the two determinations, it would be impossible to conduct an adequate analysis regarding project's impacts to tribal cultural resources, thus opening up opportunities for legal challenge. To avoid this outcome, we believe the Technical Advisory should also provide a more straightforward and explicit explanation regarding the applicable standard of review to each determination.

According to the Technical Advisory, "because the statute gives lead agencies discretion regarding how to treat non-listed resources, evidence of a fair argument is insufficient by itself to compel a lead agency to treat it as a tribal cultural resource if the lead agency determines otherwise" in making its threshold determination under Section 21074 subdivision (a)(2). While we generally agree with this guidance, the Technical Advisory should be more explicit that a determination under Section 21074 subdivision (a)(2) is governed by the substantial evidence standard, regardless of the type of environmental document being prepared.

The Technical Advisory relies on the *Valley Advocates* case in noting that the fair argument standard does not govern a lead agency's determination of whether a building qualifies as a "historical resource" under CEQA. While the *Valley Advocates* case is informative for AB 52 implementation in affirming that the fair argument standard does not apply to a lead agency's interpretation under Section 21074 subdivision (a)(2), a subsequent case, *Citizens for the Restoration of L Street v. City of Fresno* (2014) 229 Cal.App.4th 340, more expressly stated that "the substantial evidence test, rather than the fair argument standard, applies to a lead agency's discretionary determination of whether a building or district is an historical resource for purposes of CEQA." (*Id.* at 347.) The *Valley Advocates* and *Citizens for the Restoration of L Street* holdings are significant because, together, they stand for the proposition that the substantial evidence standard applies to the lead agency's threshold determination, regardless of whether they proceed with an exemption (*Valley Advocates*) or a mitigated negative declaration (*Citizens for the Restoration of L Street*). (*Id.*)

The applicable standard of review for the second determination, *i.e.*, whether a project may cause a substantial adverse change in the significance of a tribal cultural resource, will differ depending on the level of environmental review being conducted. Specifically, if the lead agency prepares an environmental impact report (EIR), then the substantial evidence standard would apply to the lead agency's determination. (*North Coast Rivers Alliance v. Marin Mun. Water Dist.* (2013) 216 Cal.App.4th 614 [substantial evidence standard applies to the scope of an EIR's analysis, the methodology used to asses impacts, and the reliability or accuracy of the data supporting the EIR's conclusions].) If, however, the lead agency prepares a lower level of review, then the fair argument standard would apply to the lead agency's determination. (*Citizens for the Restoration of L Street*, 229 Cal.App.4th at 385 [in the context of a mitigated negative declaration, "the fair argument standard would be applied by the lead agency after it knew whether the building was an historical resource . . . .";Berkeley *Hillside Preservation v. City of*

Berkeley (2015) 60 Cal.4th 1086, 1117 [the fair argument standard is "intended to guide the determination of whether a project has a potentially significant effect . . . ."].)

Based on the above, we propose the following modifications to page 5 of the Technical Advisory:

> **Under the statute, a lead agency must first determine whether a resource is a "tribal cultural resource." If a resource meets the definition in Section 21074 (a)(1)(A) or (B) pertaining to listed and eligible to be listed resources, then the lead agency must treat the resource as a "tribal cultural resource."[1] Under Section 21074 subdivision (a)(2), a lead agency, in its discretion and supported by substantial evidence, may determine whether a non-listed resource is a tribal cultural resource.** Note that because the statute gives lead agencies discretion regarding how to treat non-listed resources, evidence of a fair argument is insufficient by itself to compel a lead agency to treat it as a tribal cultural resource if the lead agency determines otherwise. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1117 ("'the fair argument standard does not govern . . .' an agency's determination of whether a building qualifies as a 'historical resource'") (quoting *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, 1072).) **Instead, a lead agency's discretionary determination under Section 21074 subdivision (a)(2) is governed by the "substantial evidence" standard, regardless of the type of environmental document it elects to prepare. (*Citizens for the Restoration of L Street v. City of Fresno* (2014) 229 Cal.App.4th 340, 347 (in preparing a mitigated negative declaration, "the substantial evidence test, rather than the fair argument standard, applies to a lead agency's discretionary determination of whether a building or district is an historical resource for purposes of CEQA.").)**
>
> **If a lead agency determines that a resource is a tribal cultural resource under Section 21074 subdivision (a)(2), the lead agency must next determine whether "[a] project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource." (Public Resources Code, § 21084.2.) The applicable standard of review for this determination will vary depending on the type of environmental document the lead agency elects to prepare. Specifically, if the lead agency prepares an environmental impact report (EIR), then the substantial evidence standard would apply to the lead agency's determination. (*North Coast Rivers Alliance v. Marin Mun. Water Dist.* (2013) 216 Cal.App.4th 614 [substantial evidence standard applies to the scope of an EIR's analysis, the methodology used to asses impacts, and the reliability or accuracy of the data supporting the EIR's conclusions].) If, however, the lead agency prepares a lower level of review, then the fair argument standard would apply to the lead agency's determination. (*Citizens for the Restoration of L Street*, 229 Cal.App.4th at 385 (in the context of a mitigated negative declaration, "the fair argument standard would be applied by the lead agency after it knew whether the building was an historical resource . . . .");Berkeley *Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1117 [the fair argument standard is "intended to guide the determination of whether a project has a potentially significant effect . . . ."].)**

2. Exemption Determinations

The Technical Advisory should expressly state that AB 52's consultation requirements do not trigger for purposes of an exemption determination. The statutory language of AB 52 omitted reference to

[1] **If a resource is a "cultural landscape" that meets the requirements of Section 21074 subdivison (a), then the cultural landscape must also be geographically defined in terms of the size and scope of the cultural landscape in order to be deemed a "tribal cultural resource." (Public Resources Code, § 21074(c).)**

exemption determinations in its consultation provisions, and existing law does not require lead agencies to consult with responsible or trustee agencies prior to making an exemption determination.

The statutory language is clear that consultation only triggers when the lead agency elects to prepare a negative declaration, mitigated negative declaration, or environmental impact report. Specifically, Section 21080.3.1 subdivision (b) states that "[p]rior to the release of a *negative declaration*, *mitigated negative declaration*, or *environmental impact report* for a project, the lead agency shall begin consultation with a California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed project . . . ." (emphasis added.)

The tribal consultation language in Section 21080.3.1 is substantively similar to the consultation language in Section 21080.3 subdivision (a) regarding consultation with responsible and trustee agencies. Specifically, that language also omits reference to exemptions, noting that "[p]rior to determining whether a *negative declaration or environmental impact report* is required for a project, the lead agency shall consult with all responsible and trustee agencies." (emphasis added.) Because a lead agency is not required to consult with responsible or trustee agencies prior to making exemption determinations, it follows that a lead agency is not required to consult with Native American tribes prior to making exemption determinations.

Importantly, existing law further does not require a lead agency to follow any specific procedures in approving activities that are exempt, and AB 52 does nothing to change that. Specifically, CEQA does not require lead agencies to follow any specific procedure in approving activities that are exempt. An agency is not required to provide any notice to the public or other agencies that it is considering whether an activity it is going to carry out or approve is exempt. Further, the lead agency need not provide an opportunity to review or comment on the exemption, and it need not hold a hearing on its exemption determination. (*Robinson v. City & County of San Francisco* (2012) 208 Cal.App.4th 1356, 1385; *Cal-Lorenzo Valley Community Advocates for Responsible Educ. V. San Lorenzo Valley Unified Sch. Dist.* (2006) 139 Cal.App.4th 1356, 1385.) Had AB 52 intended to incorporate new procedures into the exemption determination process, then it would have expressly done so.

It should also be noted that if a lead agency determines that a project is categorically exempt from CEQA, an exception to the exemption may apply. (CEQA Guidelines, § 15300.2) If a lead agency determines during the administrative process that an exception indeed applies, it would be required to conduct a higher level of environmental review, which would, in turn, require the lead agency to consult with affected Native American tribes.

Based on the above, we propose the following addition to the Technical Advisory:

> **A lead agency is not required to consult with California Native American tribes prior to making a determination that a project is exempt from CEQA. The statutory language specifies that consultation only triggers when the lead agency elects to prepare a negative declaration, mitigated negative declaration, or environmental impact report. (Public Resources Code, § 21080.3.1(b).) This statutory langauge is substantively similar to the existing statutory provision related to lead agency consultation with responsible and trustee agencies, which specifies that a lead agency need only consult with responsible and trustee agencies for negative declarations or environmental impact reports. (Public Resources Code, § 21080.3(a).)**

Thank you for considering our recommendations. We welcome the opportunity to meet with you in person to discuss these recommendations in further detail.

Sincerely,

Anthony Samson, Policy Advocate

On behalf of the following organizations:

American Council of Engineering Companies
Associated Builders and Contractors of California
Associated General Contractors
Association of California Water Agencies
Bay Area Council
California Association of Realtors
California Building Industry Association
California Business Properties Association
California Cattlemen's Association
California Chamber of Commerce
California Construction and Industrial Materials Association
California Farm Bureau Federation
California Manufacturers and Technology Association
California Retailers Association
California Wind Energy Association
Building Owners and Managers Association of California
Independent Energy Producers
Institute of Real Estate Management
International Council of Shopping Centers
Large-scale Solar Association
Los Angeles Area Chamber of Commerce
National Association of Industrial and Office Properties of California
Orange County Business Council
Pacific Gas & Electric
Retail Industry Leaders Associations
Rural County Representatives of California
San Jose Silicon Valley Chamber
The California Rail Industry

AS:mm