Christopher Calfee  
Deputy Secretary and General Counsel California Natural Resources Agency  
Via Email Only  
March 15, 2018

Re: United Auburn Indian Tribe Comments on Proposed Updates to the CEQA Guidelines  
(November 2017)

Dear Deputy Secretary Calfee:

These comments are timely submitted on behalf of the United Auburn Indian Tribe of the Auburn Rancheria (Tribe), a federally-recognized tribal nation with a federally-recognized Tribal Historic Preservation Office (THPO). We received a letter dated January 23, 2018, from the Deputy Secretary directed to our Tribal Chairperson, inviting our "early input" on the draft proposed changes to the CEQA Guidelines (guidelines). As the proposed guidelines amendments were already out for public review, we felt the letter arrived late in the regulatory process.

Our concern is that the amendments and additions to the guidelines appear to be largely a result of infill development, local government, water agency, and building agency input and advocacy. Very few, if any, of the proposed amendments and additions reflect tribal stakeholder views despite the efforts of tribes to participate early in the update process. For us, this calls into question the "balance" of the regulatory package.

While the guidelines update is certainly a large undertaking with many points of view to be considered and possibly harmonized, the views of California's tribal nations should also be heard and considered. It is important to acknowledge that tribal concerns regarding CEQA are not limited to the implementation of AB 52 and did not end with the prior amendments to the guidelines to address Tribal Cultural Resources (TCRs) or the development with OPR of the draft AB 52 Technical Advisory. There are proposed revisions here we are seeing for the first time that could undermine successful AB 52 implementation. We have tried where we could to
propose potential solutions for the concerns we have identified. We therefore ask that our comments be seriously considered.

In this vein, we respectfully request government-to-government consultation on the proposed rulemaking package, with a focus on the comments below. We also suggest that a group meeting with other interested tribes might be a good place to start. For convenience, our letter generally follows the order of how the issues were presented in the rulemaking package for efficiency and readability. These are complex issues that would benefit from additional stakeholder review and discussion.

1. Using Regulatory Standards and Thresholds for Significance in CEQA (proposed Amendments to Sections 15064 and 15064.7)

The OPR summary states the first criterion requires that a standard be adopted by some "formal mechanism". (See, text of proposed amendments to Section 15064.7(b)). Do these mechanisms include consultation with tribes? If not, they should, particularly for any standards related to archaeological, cultural resources, historic properties, TCRs, Traditional Cultural properties (TCPs), etc. Tribes are experts regarding their TCRs and their views should be solicited and considered in the development of any such thresholds. If this does not occur, standards or thresholds may be biased by archaeological input, and create the potential for litigation regarding TCRs, something the legislative intent of AB 52 sought to avoid. We have recently seen a state agency develop such an approach without true consultation with tribes, resulting in a flawed approach that will lead to conflict and project delay.

Moreover, OPR proposes to add a sentence to Section 15064.7 (b) "clarifying" that agencies may use significance thresholds on a case-by-case basis, which seems to undercut the first criterion above requiring adoption of a standard by a formal mechanism and the requirements of subdivision (d). The concerns about standards applies equally to thresholds. Further, the proposed language at new Section 15064(b)(2), that the lead agency should briefly explain how compliance with the thresholds means the project's impacts are less than significant. The use of permissive language may mean that the agency may not support its finding with substantial evidence in the record, potentially encouraging violations of CEQA. We therefore cannot support the revisions as proposed.

Solution: The guidelines should require consultation with tribes on the development of any standards and thresholds. Section 15064(b)(2) also should be revised to shall briefly explain how compliance with the thresholds means the project's impacts are less than significant to better reflect existing CEQA.
2. "Within the Scope" of a Program EIR and Clarifying Rules on Tiering (proposed Amendments to Section 15168 and 15152)

Making programmatic review easier, the OPR summary notes an objective is to use the resources "saved" from potentially unneeded environmental review being better applied toward the mitigation of actual significant effects on the environment. Also, that program EIRs can be particularly useful in addressing big picture alternatives and cumulative effects. These are noble goals, but not often being realized.

Tiering only works for cultural resources and TRCs when the base tiering document was sufficient, which unfortunately in our experience is very rarely is the case. Ability to potentially endlessly tier off of an AB 52 noncompliant document and sidestep consultation with tribes by simply not doing a notice of preparation (NOP) for the subsequent document is a significant problem already and would only worsen if not addressed with the proposed revisions which make tiering easier. This practice also constrains the practical ability to consider design alternatives in the field to reduce impacts to TCRs. What is the obligation of the agency to consider changes in law, such as the promulgation of AB 52, when assessing the appropriateness of tiering off a prior EIR?

Also, we have not seen mitigation funding increase for cultural resources and TCRs since AB 52 was enacted or become operational. Adequate funding to support a reasonable effort at early identification of TCRs and the use of Tribal Monitors to survey must be secured early on in project development and budgeting and should be incentivized. There are also pockets of resistance to looking at alternatives and addressing cumulative effects, notably with some branches of DWR and flood control agencies: Instead they repeatedly defer meaningful cultural resource identifications, avoidance, and mitigation to project level review, or even later, during construction. This results in impacts to historic properties by discovery and no consideration of those cumulative effects. (Please also see our related comments in section below on deferral of Mitigation Details).

We have also often seen agencies failing to address big picture alternatives and cumulative effects in programmatic documents, contrary to CEQA, instead trying to defer those to project level documents when we are then told it is too complex to set up at the project level. These include the failure to develop creative mitigation frameworks for TCRs, such as cultural funds, mitigation banks, and cultural conservation easements, which should be set up as early in the process as possible. This also has implications for the viability and effectiveness of the proposed Amendments to Section 15730 to recognize conservation easements within CEQA's definition of Mitigation.
The text of the proposed amendments at Section 15168(a)(c)(2) also lists "overall planned density and building intensity" as a factor that the agency can use in making their determination. However, overall density and intensities may not be relevant to impacts to cultural resources and TCRs: instead it may be true that the siting and location for that density, intensity, and project components are not necessarily fungible and can make a difference between a significant and less than significant impacts to these resources. We therefore cannot support the revisions as proposed.

**Solution:** Commit to working with tribes and agencies to develop guidance regarding AB 52 goals and tiering, securing adequate budgets for AB 52 implementation and TCR mitigation and tribal participation initiatives, and encouraging agencies to set up programs to support TCRs including cultural funds and conversation easements and banks.

3. Exemptions (*proposed Amendments to Sections 15182 and 15301*)

Certain exemptions from CEQA can cause significant adverse impacts/effects to tribes and resources of concern to them. Over a decade ago, a bill passed through legislature to preclude the use of exemptions in sacred areas. This concern still exists and would only worsen with the proposed amendments including those to expand the Emergency Exemption, discussed below.

Also, the proposals fail to note the section of the Public Resource Code relating to the Native American Heritage Commission's (NAHC) jurisdiction, is not part of CEQA, and remains applicable even if a project were determined to be exempt from CEQA. This includes, but is not limited to, compliance with California Ancestral burials, grave goods, ceremonial sites, and Most Likely Descendant (MLD) laws. We therefore cannot support the revisions as proposed.

**Solution:** We again request that CNRA and OPR consider adding questions regarding NAHC resources in the guidelines, possibly under the TCR section. (See comments in introduction above and in checklist discussion below).

The proposed guideline amendment for *Transit Oriented Development* states that certain projects that are consistent with certain adopted plans would be exempt from CEQA. This is proposed to include Master Pans, Downtown plans, etc. What if the plans did not include consultation with tribes pursuant to SB 18 (Burton) and AB 52 (Gato)? Tribes are experts regarding their TCRs and their views should be solicited and considered in the development of any such plans. If this does not occur, the plans, their standards, and thresholds, may not reflect tribal input, and create the potential for litigation regarding TCRs, something the legislative intent of AB 52 sought to avoid.

The guideline amendment for the *Existing Facilities Exemption* proposes to exempt projects that involve negligible or no expansion of existing or former uses. This can be an issue for tribes
where a facility, public structure, or topographic feature was vacant, abandoned, or unused at the time of the lead agency’s determination but is now being proposed for reuse and is located in or near a cultural site or TCR which may have not been previously considered. Tribes concern may be mostly in a suburban or rural environments, but not exclusively. We therefore cannot support the revisions as proposed.

Solution: Can the proposed exemption expansion be limited to urban environments to facilitate infill development but also allow for resources outside of those environments to be considered with more certainty?

4. Updating the Environmental Checklist (proposed Amendments to Appendix G)

Several aspects of the proposed revisions to the checklist warrant comment from a tribal perspective:

I. AESTHETICS:

Concern: It seems that the proposal here is to boil down aesthetic concerns to zoning and design review for urban areas. While this may work in some instances, it may not work for nonurban areas, historic properties and districts within urbanized areas, or for resources of tribal concern. There is also more to this subject than just considering public views. Relative to historic properties and districts within urbanized areas, the feeling, association, and context of the resources must be considered. Many zoning and design review regulations and boards do not have that expertise or consider these aspects. Moreover, visual quality, viewsheds, and aesthetics, often play a role in the significance and integrity for TCRs.

Solution: Any proposals to revise the guidelines must be sure to make allowance for the continuance of considerations relative to historic properties and TCRs. They should also be limited to urban environment, and be accompanied by requirements that zoning and design review boards have members qualified relative to historic preservation and TCRs.

VI. ENERGY:

Concern: This is a newly proposed section to the checklist. We are concerned that as it is written, section (b) is both redundant to and inconsistent with the approach taken in proposed revised XI. LAND USE AND PLANNING (b) which asks if the project would cause a significant environmental impact due to a conflict with any land use plan, policy, or regulation adopted for the purpose of avoiding or mitigating an environmental effect. We are also concerned the verbiage "conflict with or obstruct" could be used by some to try and challenge efforts to designate or manage open space, park lands, or other special designation lands including public lands within or near areas referenced in renewable energy plans.
Solution: Strike VI Energy (b) question or reword it to take an approach more consistent with proposed revisions to XI. LAND USE AND PLANNING (b).

VII. GEOLOGY AND SOILS:

Concern: AB 52 directed that paleontological questions be separated from TCR questions. However, there are several concerns about how this is reflected in the proposed guidelines. First, Paleontology should be in its own section; the resource and expertise about it is directly related neither to Geology nor Soils, except that many (but not all) paleontological resources may be in the ground. Second, the question about paleontological resources is overly brief and insufficient to prompt an adequate review for such resources. Third, the question does not reflect recent guidance from the American Society of Paleontologists that some paleontological resources may be cultural resources.

Solution: CNRA should outreach to California paleontologists and develop a standalone PALEONTOLOGICAL RESOURCES section with updated and meaningful questions. Also, the reference to whether there is a unique geologic feature, can remain as a question in the Geology and Soils section.

IX. HAZARDS AND HAZARDOUS MATERIALS:

Concern: Why is section (f) related to a project within the vicinity of a private airstrip proposed for deletion? If not here, where are such effects otherwise considered?

Solution: Retain section (f).

X. HYDROLOGY AND WATER QUALITY:

Concern: Why are sections (g) through (j) related to placing housing within a 100 year flood hazard area, exposure of people or structures including flooding resulting from a failure of a levee or dam, and inundation by seiche, tsunami, or mudflow proposed for deletion? If not here, where are such effects otherwise considered?

Solution: Retain sections (g) through (j).

XIII. NOISE:

Concern: Why are sections (e) and (f) related to projects located within airport land use plans or within two miles of a public airport and within the vicinity of a private air strip proposed for deletion? If not here, where are such effects otherwise considered?

Solution: Retain sections (e) and (f).
XIV: POPULATION AND HOUSING:

*Concern:* Why is section (e) related to projects that could displace substantial numbers of people proposed for deletion? If not here, where are such effects otherwise considered? Redevelopment often displaces lower income housing with more expensive housing, contributing to the affordable housing crisis, homelessness, and loss of historic buildings.

*Solution:* Retain section (e).

XVIII. TRIBAL CULTURAL RESOURCES:

Now that a few years of implementation experience has occurred relative to AB 52 (Gatto), we make the following comments:

*Concern:* The rulemaking package (page 31) states that the checklist questions should alert lead agencies to environmental issues that might otherwise be overlooked in the project planning and approval process. We still maintain that adding a question to the question to the Cultural Resources or TCR sections regarding the presence of public land would assist applicants, agencies, and tribes in better understanding the potential of the project to impact resources under the jurisdiction of the NAHC. Without such a prompt, many will continue to not understand that the NAHC jurisdiction is separate from consideration of resources under CEQA.

*Solution:* Add prompt to Cultural or TCR sections regarding whether the project is on public land and may contain properties under the jurisdiction of the Native American Heritage Commission.

*Concern:* Page 2 of the sample environmental checklist form, number 11 (page 37) focuses on whether the consultation has *begun*. While starting consultation with tribes prior to finalization of the initial study is important, that continues to not be the only measure for successful AB 52 compliance. Other simple prompts can help get the agency off to a stronger start that will help to reduce the potential for do-overs and project delays.

*Solution:* We believe that instead of potentially prompting a binary yes/no answer, the question should be poised to do more, such as also inquire whether consulting tribes were involved in determining the level of environmental review, whether the tribe's views were incorporated into the initial study, whether agreement has been reached on how to incorporate tribal perspectives into the environmental documents and project record, etc.

XVIX. UTILITIES AND SERVICE SYSTEMS:

*Concern:* We understand the addition to the question regarding a project having sufficient water supplies available during normal, dry, and multiple dry years. However, why was reference to existing entitlements and resources proposed for deletion? If not here, where are
such effects otherwise considered? Note that California tribes often hold primary rights to water and this has been underscored by recent federal caselaw.

Solution: Retain language regarding water entitlements.

XXI. MANDATORY FINDINGS OF SIGNIFICANCE:

Concern: The proposal adds the word "substantially" before the phrase degrade the quality of the environment, and before the phrase reduce the number or restrict the range of a rare or endangered plant or animal in section (a). What is the purpose of these changes? Do they add a higher bar to the significance threshold resulting in reduced environmental protection? This is of concern to tribes as rare and endangered plants may also be species of cultural use and concern to tribes. If not here, where are such effects otherwise considered?

Solution: Retain original wording in section (a).

5. Remedies and Remand (proposed New Section 15234)

This section lays out remedy and remand options for a court. It appears to be something that was largely sought by allies of the development community. There are both general and specific concerns with the new section. Generally, it will provide the parties with several more things to argue about in litigation which would likely extend both litigation costs and timeframes, and likely require additional court briefings and hearings. It would also likely increase misunderstandings among the parties and the courts about what parts of a project may/not proceed, which in turn could result in irreparable environmental harm, such as wetlands being mistakenly bulldozed, buildings accidentally razed, or burials removed from their resting places. More specifically, the proposal notes that Public Resources Code section 21168.9(a) states that CEQA does not limit the traditional equitable powers of the judicial branch. Yet, the way new section 15234 is worded might be read that the equitable powers of a court in a CEQA action are limited to the ones enumerated in the new section, i.e., "requires the agency to do one or more of the following . . ." We therefore cannot support the revisions as proposed.

Solution: If the amendments are retained, we suggest shortening the section and use wording that clearly preserves the court's equitable powers on a case by case basis such as by "including, but not limited to" language, etc.

6. Analysis of Energy Impacts (proposed Amendments to Section 15126.2)

This section appears confused about whether it is related to energy impacts or land use impacts (or both). Moreover, there is no reasoning provided for the proposal stating that the revisions "signal" that a full "lifecycle" analysis that would account for energy used in building materials and consumer products will generally not be required.
Solution: Explain the legal basis for the lack of evaluation of full lifecycle analyses directly in the proposal; if there is no legal basis, revise the proposed guidelines to provide for such analysis, subject to a rule of reason or other guidance.

7. Deferral of Mitigation Details (proposed Amendments to Section 15126.4)

The proposal is that details of mitigation, not mitigation itself, may be deferred until after project approval in certain circumstances. The issue here is what constitutes a "mitigation measure" versus a "detail": one parties' "specific detail" may be another parties' substantial measure. No workable definitions are provided in the proposal.

Tribes have already seen this issue arise in the context of certain programmatic and quasi-programmatic environmental documents and their approach towards resource identification efforts for cultural resources and TCRs. In these cases, some water agencies have attempted to defer reasonable efforts to identify such resources until a later time, well after project approval. Such efforts then increase the risk of sensitive resources being located too late in the project process or even during construction itself, the timing of which then makes project redesign and avoidance unlikely - outcomes that the legislature sought to avoid with the passage of SB 18 and AB 52.

Our further concern is that agencies may try and subvert the intent of the proposed guideline change by asserting that because it can be somewhat more difficult, costly, or time consuming, that identification of resources of tribal concern can almost always be viewed by an agency as "impractical" or "infeasible" prior to project approval. Moreover, these terms are undefined in the guideline. This is setting up a serious risk of litigation for agencies who want to assert deferral as far as they can. It also exacerbates the current problem where agencies assert at the time of project approval that consultation with tribes is "pending" or "incomplete" which again pushes tribal input further into the future and after a project has been approved. The tribal input at that later time is less effective, again subverting legislative intent and consultation best practices as outlined by the Advisory Council on Historic Preservation, Office of Native American Affairs <http://www.achp.gov/nap.html>.

Deferring the "specific detail" of resource identification also could render the alternatives analysis pointless as to these resources as the location of resources must be known at the time of environmental review so that they can be considered for preservation in place, as required by CEQA, during environmental review. We therefore cannot support the revisions as proposed.

Solution: Strike "impractical" or replace "impractical or infeasible" with words with potentially less wiggle room, such as "not possible". Also, commit to working with tribes, SHPO, ACHP, and other stakeholders to produce guidance regarding reasonable efforts to identify cultural
resources and the benefits of coming to conclusion regarding the substance of TCR mitigation measures before project approval.

8. Responses to Comments (proposed amendments to Sections 15067 and 15088)

Proposed amendments to section 15087(c)(2), public review of Draft EIR, require the public notice of availability of an EIR to state the manner in which the lead agency will receive comments from the public. The concern is that if only electronic submission is allowed, that the underserved public, including those without internet connection or with unreliable internet, will be left out of the environmental review process. This can be of special concern for rural communities and those lacking communication infrastructure, a very real issue for many California tribal communities.

Solution: Make clear that while agencies may receive electronic submissions, that they must also still receive mailed comments and to make that clear in the notice.

Regarding referenced material, this is not just an issue for lead agencies, it can also be a problem for tribes and the commenting public. For example, we have seen consultant reports supporting environmental documents reference other reports and materials, sometimes in a substantive way. These references are rarely attached to the report and sometimes are not readily available on the internet. Sometimes it takes a long time for such materials to be supplied upon request - if they are even provided before the close of the comment period - sometimes they are not provided at all. These reports and materials must be made available for reviewers to test whether these source materials have been accurately portrayed in the expert reports. This gets to the heart of verifying what is being portrayed as substantial evidence by consultants. The proposed guidelines update does not address this issue and in fact may worsen it.

Solution: Examine section 15087(c)(5) and provide clarity on an agency's and its consultants' obligation to make available referenced sources in consultant reports in a manner that addresses any potential concern regarding potential sensitive or confidential cultural information.

9. Pre-Approval Agreements (proposed Amendments to Section 15004)

This proposed revision creates some of the same issues as those enumerated above regarding Deferral of Mitigation Details. Namely, that irreversible momentum towards project approval has occurred, and that environmental review coming later in time will be less robust and mitigation measures more likely to be determined infeasible, leaving project impacts unmitigated and creating additional unmitigated cumulative effects.
Of specific concern, are certain revisions to Section 15004(b)(2)(A) allowing for land acquisition agreements when conditioning the agency's future use of the site on CEQA compliance. The practical effect of entering into acquisition agreements would be to predetermine the project location, rendering any off site alternatives analysis moot.

**Solution:** Strike "and may enter into land acquisition agreements when the agency has conditioned the agency's future use of the site in CEQA compliance."

Another issue is whether the proposed findings in Section 15004(b)(4) which would help set the expectations of the parties and specifically commits the agency to key steps in the CEQA process, applies to both public and private projects.

**Solution:** Add language to Section 15004(b)(4) clarifying that the findings apply to both private and public projects. Also, to allow for a full range of mitigation measures to be considered, strike the word "feasible." Feasibility of measures is a separate step that occurs after all mitigation is considered; collapsing those steps would result in public comment being meaningless.

10. **Preparing an Initial Study (proposed Amendments to Section 15063)**

This proposal desires to specify the arrangements a lead agency may use to prepare an initial study. In general, we prefer that the lead agency itself prepare the initial study, to help reduce the potential for conflicts-of-interest on the part of applicants or outside consultants with business conflicts.

**Solution:** If the proposed revision is retained, language should be added to Section 15063(a)(4) clearly stating that such arrangements are still subject to Section 15084(e), that the documents must reflect the agency’s independent judgment.

11. **Citations in Environmental Documents (opposed Amendments to Sections 15072 and 15087)**

This proposed revision creates some of the same issues as those enumerated above regarding Responses to Comments. Namely, that citations and references that are used in a consultant’s report should continue to be made available so that they can be assessed for sufficiency as substantial evidence. This is of particular concern relative to cultural resources and TCRs, as old reports are often cited or referenced, but not incorporated by reference, and often contain inaccuracies, errors, or outdated approaches. Such material therefore may not form the basis for substantial evidence as defined in CEQA once tested. Without having these reports available, these errors may remain uncorrected and environmental effects of a project may go unmitigated. This is of a particular concern relative to TCRs, as old reports using archaeological
methods are not appropriate for consideration of TCRs. The approach advocated in the proposed revisions also hampers transparency, another hallmark of CEQA.

Solution: Add language to the revisions at Sections 15072(g)(4) and 15087(c)(5) stating that referenced or cited material will be made available by the lead agency upon request, in a timely manner, and respecting confidentiality provisions of CEQA.

12. Project Benefits (proposed Amendments to Section 15124)

These proposed revisions would clarify that the general project description may also discuss the proposed project’s benefits to allow decision makers to balance a project’s benefits and costs. We do not believe this revision is necessary as project benefits are fully considered in the Statement of Overriding Considerations and are not precluded from being part of the environmental document by CEQA. Making it seem as though a consideration of a project’s benefits should be considered at the environmental document stage, may also shortcut a complete environmental analysis as it may go over the line and veer into project advocacy when the environmental document is supposed to reflect the independent judgment of the lead agency. We therefore cannot support the revisions as proposed.

Solution: If the proposal is retained, the proposal should be revised at Section 15124(b) to include that any statements about project benefits must clearly identify whether the project benefits being asserted are asserted by the applicant versus the lead agency.

13. Using the Emergency Exemption (proposed Amendments to Section 15269)

This proposal is to add language that emergency reports may require planning and that review of long-term projects may also be exempt if environmental review would create a risk to public health, safety, or welfare or if activities are proposed for existing facilities in response to an emergency at similar facility. If aggressively used, the proposal could greatly expand the use of emergency exemptions beyond bona fide emergency situations and result in unstudied and unmitigated environmental effects, including those to TCRs, as there would be no CEQA document or process. Almost any agency could try and argue its project protects public health, safety, or welfare - after all, these are the very purposes of municipal and state government. This also could be of particular concern for TCRs in and near rivers, coastlines, and forests - relating to water (levees, dams, etc.) and fire control. The proposal could also create a potential end run around AB 52 and tribal consultation contrary to the intent of the legislature. We therefore cannot support the revisions as proposed.

Solution: If the proposal is retained, findings must be developed so that the exemption does not swallow the rule. Also, OPR should commit to working with tribes, SHPO, ACHP, and other stakeholders to produce guidance regarding methods to consider TCRs and retain tribal
consultation during emergency projects, including supporting the use of negotiated Memoranda of Understanding between the agencies and interested tribes to protect TCRs and to act in accordance with NAHC jurisdiction over Ancestral burials, ceremonial sites, and sacred places which is a legal obligation separate from CEQA compliance.

Thank you for considering these comments. We hope they are useful to you. Please keep us on lists to receive future rulemaking notices for this action. We look forward to your written responses and productive consultation.

Very Truly Yours,

[Signature]

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