



Department of Toxic Substances Control Policy



<i>POLICY TITLE</i> Tribal Consultation Policy	<i>SUPERCEDES</i> None	<i>POLICY NUMBER</i> DTSC-20-038
<i>POLICY OWNER</i> Office of Environmental Equity, Tribal Affairs Program	<i>EFFECTIVE DATE</i> March 6, 2020	<i>PAGE</i> 1 OF 11
<i>DISTRIBUTE TO</i> All Staff	<i>APPROVED BY</i> (Original signed by Francesca Negri, Chief Deputy Director)	
<i>ISSUE DATE</i> March 6, 2020	Meredith Williams, Director	

POLICY STATEMENT

The Department of Toxic Substances Control (DTSC) seeks to foster effective communication and consultation between DTSC and California Native American Tribes. This policy memorializes DTSC’s commitment to strengthening and sustaining government-to-government relationships between the State and California Native American Tribes.

PURPOSE

This policy establishes guiding principles to consult with California Native American Tribes in a government-to-government relationship. DTSC will continually seek meaningful engagement and consultation with tribes through recognizing each tribe’s individual cultural beliefs, traditions, stewardship, sovereign status, and significant connections to ancestral lands throughout California.

The fundamental goal of this policy is to engage tribes in a timely and interactive process by respectfully seeking, discussing, and considering tribal perspectives and expertise on matters within the purview of DTSC’s activities.

Through this process, DTSC hopes to meaningfully incorporate tribes in the development of policies, rules,

regulations, programs, projects, plans, and activities that may affect their communities or ancestral territories.¹

AUTHORITY

The following is a list of key federal and state laws, regulations, and guidance documents related to this policy:

- a. Title 18 United States Code section 1151
- b. Title 25 United States Code section 3001, et seq.
- c. Executive Order B-10-11
- d. Executive Order N-15-19
- e. CalEPA Tribal Consultation Policy (2015)
- f. Government Code section 11019.8
- g. Government Code section 65352.4
- h. Health & Safety Code section 8012, et seq.
- i. Health & Safety Code section 7050.5
- j. Public Resources Code section 5024.1
- k. Public Resources Code section 5097.9, et seq.
- l. Public Resources Code section 21073-74, 21080.31 et seq. (Also referred to as Assembly Bill [AB 52])
- m. Public Resources Code section 71110

BACKGROUND

All California Native American Tribes, individuals, communities, groups, and organizations, whether officially recognized by the federal government or not, may have environmental, economic, and public health concerns that are different from the concerns of other tribes or the general public. These differences may exist due to lifestyles, traditional ecological knowledge and stewardship, cultural beliefs, traditions, and special cultural connections to areas of California that are their ancestral homelands. Currently, there are 109 tribes that are federally recognized in California, and there are over 80 tribes in California not holding federal recognition. Establishing trust and understanding is an essential part of working effectively and authentically with each unique tribal government and tribal community.

DEFINITIONS

For purposes of this policy, the definitions of the terms outlined below apply:

1. **AB 52 Consultation**: An AB 52 Consultation occurs when 1) DTSC is the lead agency undertaking a project; 2) a California Native American Tribe has submitted a written request to DTSC to be informed of proposed projects within a geographic area that the

¹ This policy and any internal procedures adopted for its implementation are intended solely as guidance. This policy does not constitute a rulemaking.

tribe has identified as being traditionally and culturally affiliated with; and 3) the required timelines outlined in AB 52 are satisfied. (Public Resource Code section 21080.3)

2. California Native American Tribe: For purposes of this Policy, refers to all tribes, regardless of federal recognition, that are culturally, regionally, or traditionally affiliated with lands or resources of California, including those listed on the California Tribal Consultation List maintained by the California Native American Heritage Commission.
3. Communication or Engagement (used interchangeably in this policy): The dissemination, exchange and sharing of information between DTSC and tribes. This can include in-person meetings, letters, e-mails, phone calls, or other means of sharing information.
4. Consultation: 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, wherever feasible, seeking agreement. Consultation between government agencies and California Native American Tribes shall be conducted in a way that is mutually respectful. Consultation shall also recognize tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural significance. (Government Code section 65352.4.)
5. Federal Recognition: A process established by the federal government that an American Indian group indigenous to the continental United States and members constitute a tribe with a government-to-government relationship with the United States. This process involves eligibility for the programs, services, and other relationships established by the United States for Native Americans (Title 25 United States Code section 83.2). Tribes that hold federal recognition are listed on the most recent notice of the Federal Register.
6. Government-to-Government Relationship: Exists between governments. Implicit in the relationship is a mutual recognition of the governmental nature of the respective parties, and the authority with which they represent a people. A government-to-government

relationship can be established regardless of whether a tribe is federally recognized or not.

7. Indian Country or Tribal Lands: Tribal lands, also known as Indian Country as a collective, can be defined through the US Code of Federal Regulations, title 18, section 1151, as: (a) all land within the limits of any Native American 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 Native American 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 Native American allotments, the Native American titles which have not been extinguished, including rights-of-way running through the same.
8. Tribal Representative: A person who is designated by the tribal government to represent the tribe in matters related to policy, regulation, or projects. They may be granted, at the request of tribal leadership, government-to-government relationship with State of California representatives.
9. Tribal Liaison: For purposes of this Policy, refers to a person on DTSC's executive leadership team who is designated to coordinate between DTSC and tribes. The DTSC Tribal Liaison will be responsible for coordinating outreach, engagement and other activities affiliated with DTSC and tribal interests, and will designate additional staff to carry out activities. The Department will publish on its Departmental website, the names and contact information for the DTSC Tribal Liaison and appropriate staff along with the Department Tribal Consultation Policy.
10. Tribal Sovereignty: For purposes of this Policy, refers to the inherent sovereignty of all California Native American Tribes, regardless of federal recognition. Tribes rely on their own inherent sovereignty to define boundaries, to make their own laws and be governed by them, and to promote and practice their history and cultural traditions. A tribe that is federally recognized has a unique legal and political status, and 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 State of California or 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.

GUIDING PRINCIPLES

This Tribal Consultation Policy is intended to foster effective communication and consultation between DTSC and California Native American Tribes, and to obtain meaningful input from tribes for the development of policies, rules, regulations, programs, projects, plans, and activities that may affect their communities.

DTSC will be guided by the following principles and best practices to improve and maintain effective government-to-government relationships and consultation with California Native American Tribes. DTSC shall:

- a. Acknowledge and respect tribal sovereignty.
- b. Understand tribes that are federally recognized have a unique legal and trust relationship with the federal government.
- c. Recognize that all California Native American Tribes including individuals, communities, groups and organizations may represent distinct and independent governmental entities with specific beliefs, traditions, and unique connections to areas of California that are their ancestral homelands.
- d. Communicate and consult with California Native American Tribes during the initial phases of decision-making processes that may affect tribal lands, people or cultural resources.
- e. Recognize and respect the cultural resources of California Native American Tribes, whether or not the cultural resources are located on designated tribal lands.
- f. Acknowledge the need for confidentiality regarding places, land, people, and cultural resources with traditional tribal cultural significance.
- g. Consider the potential impact of the Department's programs and regulated actions and decisions on tribal lands and cultural resources.

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- h. Consider and review a tribe's own consultation policy, if provided, before initiating consultation with that tribe.
 - i. Inquire which method of communication the tribe(s) prefer during the consultation process including, but not limited to phone, e-mail, fax or certified mail.
 - j. Encourage collaborative efforts between California Native American Tribes and federal, state, and local government entities to resolve issues of mutual concern.

IMPLEMENTATION

Through implementing this Policy, DTSC hopes to strengthen its ability to proactively and successfully resolve issues of mutual concern with tribes collaboratively. While the process of communication and consultation mandated by this Policy may increase the Department's ability to avert and solve problems, it may not result in a resolution of all issues. Therefore, inherent in this Policy is the right of DTSC and tribes to elevate an issue of importance to any decision-making authority of another entity, including, where appropriate, the highest levels of state and tribal government.

DTSC aims to engage in tribal consultations consistent with the principles highlighted in this Policy, and notes that AB 52 Consultations may deviate from DTSC's general consultation process to ensure compliance with AB 52 requirements.

- a. **Communication:** Open and respectful communication with tribal representatives is essential. The Department will engage in early, inclusive, and frequent communication with tribal leaders regarding policies and activities related to DTSC policy, permitting, remediation, or other actions pertaining to or affecting tribes. Such communication shall occur on a regular basis; continue throughout changes in leadership; be inclusive and transparent; provide timely notice and documentation in a manner that provides an adequate review and response period for the parties involved; be accessible to people with a diverse range of language, hearing, movement, sight, and cognitive ability; and be conducted in a manner that is consistently executed with the utmost level of respect, decorum and diplomacy. When a matter involves confidential or culturally sensitive information, DTSC will work with tribal leaders and their representatives to protect the sensitivity of such information and maintain its confidentiality as fully possible. All parties to any

consultation should promote respect, shared responsibility and an open and free exchange of information.

- b. **Collaboration:** The Department will work proactively to identify, coordinate, and revise policies and procedures when there are issues that may pertain to or affect tribes. The Department also commits to disseminating public documents and notices, actively seeking opportunities for collaboration, and maintaining an ongoing dialogue with tribes. The Department is committed to the principle that interaction with tribes shall be regarded as a partnership of mutual respect and intergovernmental relations whereby DTSC strives to ensure a sound and productive relationship with tribes through the development and maintenance of a meaningful dialogue.
- c. **Education:** The DTSC Tribal Liaison will encourage Department management and staff to seek ongoing training designed to improve the Department's capacity for promoting collaboration with tribes. Education and training should emphasize communication, tribal sovereignty, the unique histories and distinctions between tribes, and the skills and tools necessary for collaborative engagement. Departmental leadership shall endeavor to instill an awareness of tribal culture and respect within all programs.
- d. **Process:** The Department is responsible for implementing a wide range of services that are subject to federal and state laws, regulations, guidelines and restrictions. Within such mandates, every attempt will be made to interrelate with tribes in a manner, which is timely, respectful, and clearly identifies internal processes and timeline expectations for the parties involved. The Department commits to making information available to tribes, as early in the planning process as feasible. Either DTSC or any tribe may initiate consultation. Procedures for consultation shall be outlined and routinely reviewed and updated in staff guidance documents, such as DTSC's Departmental Procedures Memoranda (DPMs).

REFERENCES

Federal

Title 18 United States Code section 1151: The United States Code defines “Indian Country” as “(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.”

Title 25 United States Code section 3001, et seq.: The Native American Graves Protection and Repatriation Act (NAGPRA) requires consultation regarding the treatment and disposition of specific cultural items (human remains, funerary objects, sacred objects, and cultural patrimony) prior to intentional excavation or removal of Native American human remains, during the inventory of human remains, and to determine place and manner of delivery.

State

Executive Order B-10-11: “Recognizes and reaffirms the inherent right of Native American Tribes to exercise sovereign authority over their members and territories,” establishes the Governor’s Tribal Advisor position within the Governor’s Office, reaffirms the state’s commitment to working with Tribes, and encourages communication and consultation with Tribes.

Executive Order N-15-19: Issues an apology through executive order on behalf of California to California Native American peoples for the many instances of violence, mistreatment and neglect inflicted upon California Native Americans throughout the state’s history. Reaffirms and incorporates by reference the principles outlined in Executive Order B-10-11 and establishes a Truth and Healing Council.

Government Code section 11019.8: “All state agencies, as defined in [Government Code] section 11000, are encouraged and authorized to cooperate with federally recognized California Indian tribes on matters of economic development and improvement for the tribes.” This may include, but is not limited to, “providing information on programs available to

assist Indian tribes, providing technical assistance on preparation of grants and applications for public or private funds, conducting meetings and workshops, any other reasonable steps that could assist tribes in becoming economically self-sufficient, or consulting on a government-to-government basis, in a respectful and meaningful manner, with respect to a fee-to-trust land acquisition application that is for the purpose of housing, environmental protection, or cultural preservation.”

Government Code section 65352.4: “ ‘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 Native American 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.”

Health & Safety Code section 8012, et seq.: The California Native American Graves Protection and Repatriation Act requires any agency or museum that has possession or control over California Native American human remains and associated funerary objects to inventory, attempt to identify the geographic location, and consult with the tribe believed to be affiliated with the items.

Health & Safety Code section 7050.5: “In the event of discovery or recognition of any human remains in any location other than a dedicated cemetery, there shall be no further excavation or disturbance of the site or any nearby area reasonably suspected to overlie adjacent remains until the coroner of the county in which the human remains are discovered has determined... If the coroner recognizes the human remains to be those of a Native American or has reason to believe that they are those of a Native American, he or she shall contact, by telephone within 24 hours, the Native American Heritage Commission.”

Public Resources Code section 5024.1: Establishes a California Register of Historical Resources as an authoritative guide in California to be used by state and local agencies, private groups, and citizens to identify the state’s historical resources and to indicate what properties are to be protected, to the extent prudent and feasible, from substantial adverse change.

Public Resources Code section 5097.9, et seq.: “Prohibits a public agency, or private party using or occupying public property, or operating on public property, under a public license, permit, grant, lease, or contract made on or after July 1, 1977, from interfering with the free expression or exercise of Native American religion as provided in the United States Constitution and the California Constitution; or cause severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, except on a clear and convincing showing that the public interest and necessity so require.” This chapter establishes the Native American Heritage Commission and specifies its powers and duties.

Public Resources Code section 21073-74, 21080.3.1-3.2, 21082.3, 21083.09, 21084.2, and 21084.3.: (Also referred to as Assembly Bill (AB 52)): Prior to the release of a negative declaration, a mitigated negative declaration, or an environmental impact report for a project, the CEQA lead agency is required to consult with California Native American tribes that are traditionally and culturally affiliated with the geographic area of the proposed project if the tribe requested notification and requested consultation for the project. The California Environmental Quality Act (CEQA) requires public agencies to evaluate the effects of the projects on tribal cultural resources, historic resources, and archaeological resources as environmental impacts.

Public Resources Code section 71110: “The California Environmental Protection Agency, in designing its mission for programs, policies, and standards, shall do all of the following: (a) Conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations of the state. (b) Promote enforcement of all health and environmental statutes within its jurisdiction in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations in the state. (c) Ensure greater public participation in the agency's development, adoption, and implementation of environmental regulations and policies. (d) Improve research and data collection for programs within the agency relating to the health of, and environment of, people of all races, cultures, and income levels, including minority populations and low-income populations of the state. (e) Coordinate its efforts and share

information with the United States Environmental Protection Agency. (f) Identify differential patterns of consumption of natural resources among people of different socioeconomic classifications for programs within the agency.”

INQUIRIES

For questions regarding this policy, please contact DTSC’s Office of Environmental Equity, Tribal Affairs Program, by toll free telephone at (833) 350-2020, or by email at TribalAffairs@DTSC.CA.GOV.
