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**From:** Courtney Ann Coyle
**To:** Energy - Docket Optical System
**Cc:** Fishman, Corrine@Energy
**Subject:** Docket Number 21-OIR-04
**Date:** Monday, August 29, 2022 2:41:12 PM



Dear CEC,

The following comments on the express terms of the Rulemaking to Amend Regulations for Small Power Plant Exemptions, are submitted on behalf of Carmen Lucas, Kwaaymii Laguna Band of Indians. We found out about this rulemaking during last week's public meeting of the Lithium Valley Commission during an abbreviated summary by staff legal counsel.

An overarching concern is the proposal's, and its express terms, compliance with AB 52 and the Governor's Executive Orders. What consultation has been done with California Tribes on this proposed rulemaking? No evidence of consultation was provided, even though the new rules have significant tribal implications. (For example, the Initial Statement of Reasons (page 11) does not list any tribes or tribal communities in its list of "various stakeholders"). Moreover, there is no indication that the proposal was vetted through the Native American Heritage Commission (NAHC), the Office of Planning and Research (OPR), or the Office of Historic Preservation (OHP) even though they make changes regarding tribal cultural resources, historic properties, and CEQA. Consultation should occur prior to finalization of the regulations.

Moreover, the substantive and procedural requirements of AB 52 are not reflected in the regulations. For example, the Initial Statement of Reasons (page 6) asserts that proposed amendments are to update the regulations due to AB 52 requiring lead agencies to consult. Yet, consultation is not addressed in the regulation's express terms. The regulations also leave important issues unaddressd or unclear: Would the CEC or local governments be conducting the consultation? If consultation occurs after the requirements in this regulation or the CEQA document is produced, won't there be an irresistible momentum towards project approval rending the timing of tribal consultative input "too late" to be effective? What are the touchpoint of CEC involvement with tribes or oversight of lead agency action in this regard?

Regarding local government review of proposed projects, we are concerned about the past, existing, as well as long-term capacity of many local agencies to effectively address required engagement and consultation with affected tribes. Qualified personnel need to be employed at the local government level for the proposed structure to work and through the expected life of the regulation. Reliance on contractors often has been ineffective. Existing staff appear to need training. How does the proposal achieve this necessary capacity?

Re Appendix B (b)(1)(C), revise to "vertical and horizontal" depth of excavations; this is critical information for addressing effects to TCRs.

Re Appendix B (b)(1)(D), (2)(D), and 3(C), variously use the phrase, "consideration given to" engineering constraints, site geology, environmental effects, etc. Are there standards, criteria, or guidance for what "consideration given to" means or looks like? Otherwise, this phrase appears vague.

Re Appendix B (e) Facility Closure, where and when is decommissioning addressed?

Re Appendix B (f) Alternatives, language should be added discussing project design alternatives and micro siting to avoid effects to TCRs.

Re Appendix B (g)(2), Cultural Resources and Tribal Cultural Resources. While the addition of the TRC category is appropriate (if not overdue), the regulation appears to improperly conflate TCRs with archaeology. Doing so risks the continued inappropriate treatment of TCRs as archaeological resources by archaeological professionals, leaving tribes out of resource identification, evaluation, treatment, and mitigation in violation of CEQA. These sections especially warrant review by NAHC, OPR, and OHP. The fact that the regulations have not been updated since the passage of AB 52 in 2015 draws into question the extent to which other CEC rules and regulations may also be outdated. Has a comprehensive review of CEC policies and regulations been done since AB 2015 was adopted?.

No basis is provided in Appendix B (g)(2)(A) for the 5-mile radius limitation for ethnology, prehistory, and history of the region. Precontact trails, cultural landscapes, and traditional cultural properties (TCPs) may reasonably extend beyond such boundaries and be necessary for assessing context of the tribal or historic property.

As written, Appendix B (g)(2)(B) similarly appears to privilege archaeological societies and archaeologists over tribes in identifying TCRs in violation of AB 52 and caselaw such as *People v. Van Horn*.

Appendix B (g)(2)(C) refers to requiring new cultural and TCR surveys only if surveys are older than 5 years and that such surveys must be done by Secretary of Interior qualified individuals. No mention is made of affiliated tribes. Affliated tribes should be deployed on the very first survey and new surveys should be required on any age survey if those surveys were not performed with qualified tribal input on the scope, protocols, and personnel for these resource identification efforts. The section on confidentiality should also be revised to reference relevant sections of the Government and Public Resources Code for TCRs and information provided by tribes during consultation. Also, this section overemphasizes surveys while not even mentioning consultation with affiliated tribes, which would lead to tribes being left out.

Appendix B (g)(2)(D) references the NAHC's Sacred Lands File. Revisions should be made to ensure that the SLF search and the results of that search be provided to affiliated tribes prior to any field work or surveys commencing or reports being drafted. Moreover, any outreach to initiate consultation should disclose whether the SLF search was positive or negative, as tribes may be more engaged when they know about a positive result.

Appendix B (g)(4) Noise, should reference that TCRs can be affected by noise impacts and that tribal ceremonial use can be involve sensitive receptors.

Appendix B (g)(6) Visual Resources, should reference that projects can adversely affect the visual quality, setting, and context for TCRs. Again, what is the rationale for the 5- and 1-mile radius limitations? (A)(i)(c) also appears to reflect a western bias on what man-made features are to be considered as "significant innovations" or "unique" referencing just "the California State Capitol, Golden Gate Bridge, or Hollywood Sign" - again - leaving tribal properties and achievements out.

Appendix B (g)(7) Socioeconomics, should add a subsection (xix) requiring "a discussion of affected and affiliated Tribes' and tribal communities' concerns, opportunities, and issues".

Appendix B (b) Project Description should conform with the section (g)(13)(E) Impacts discussion to reference "site preparation, construction activities, plant operation, maintenance, closure, and decommissioning" as these are all aspects of proposed projects. Otherwise, impact analysis may

be improperly segmented.

Finally, it would be helpful to know the approximate number of facilities and geographical areas this regulation is projected to concern. At this point, Ms. Lucas is particularly concerned with Imperial and San Diego Counties. Such data points also would help understand cumulative effect, something that has been notoriously understudied and mitigated in our southern California desert.

We hope these comments are helpful to you.

Please place my office on the list to receive future notices regarding the proposed action.

Thank you.

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