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on Emergency Rulemaking for Assembly Bill 205 Opt-In Certification Provisions

Additional submitted attachment is included below.

FEDERATED INDIANS OF
GRATON
RANCHERIA

September 30, 2022

California Energy Commission
Docket Unit, MS-4
Docket No. 22-OIR-01
715 P Street
Sacramento, CA 95814-6400
docket@energy.ca.gov

Re: **Emergency Rulemaking for Assembly Bill 205 Opt-In Certification Provisions**

Dear Commissioners:

On behalf of the Federated Indians of Graton Rancheria (the Tribe), I submit the following comments on the California Energy Commission's (CEC) emergency rulemaking for Assembly Bill 205 (AB 205) Opt-in Certification. Our comments primarily concern the tribal consultation process as established by the California Environmental Quality Act (CEQA) and further delineated in Assembly Bill 209 (AB 209).

As you know, AB 205, as amended by AB 209 (collectively referred to herein as AB 205), creates a streamlined certification process for eligible non-fossil-fueled power plants and clean energy manufacturing facilities. The Tribe generally supports the State's effort to move away from traditional, carbon-producing energy sources. We urge, however, that this effort not occur at the expense of comprehensive environmental review and the protection of sacred, irreplaceable tribal cultural resources. As a federally recognized tribe with ancestral territory in Sonoma and Marin Counties in California, and a reservation in Sonoma County, our current landholdings are only a tiny fraction of our ancestral territory. Most of our cultural resources and sacred sites are located off the reservation and are vulnerable to destruction or inaccessibility due to development, climate change, and other threats. To combat this and preserve our culture, we have become a leader in working with federal, state and regional governments on cultural resource issues. The Tribe has a long history of consulting with local governments and agencies on projects and general plan amendments that potentially impact off-reservation cultural resources. The Tribe has also played a role in managing such resources through co-management arrangements with the National Park Service at Point Reyes National Seashore, Golden Gate

National Recreation Area, and Sonoma County at Tolay Lake Regional Park. In addition, the Tribe has been actively consulting with State officials on the Pathways to 30x30 initiative, the State Climate Adaptation Strategy, and other related objectives.

1. The Importance of Robust AB 52 Consultation & Other Process Issues

As a threshold matter, I wish to note that most of the following concepts and recommendations apply broadly to all CEC actions involving AB 52, not just the Opt-In Certification process pursuant to AB 205. Accordingly, we recommend that CEC incorporate these recommendations not only in the emergency regulations but also in all policies and guidance documents concerning tribal consultation.

During our consultation with CEC staff on September 27, we discussed the importance of properly initiating AB 52 consultation with tribes. A critical piece of this early stage is engagement with the Native American Heritage Commission (NAHC). Given the short statutory timeframes imposed by AB 205, the CEC should begin engagement with the NAHC now—before the Opt-In Certification process goes into effect—to explain those timeframes and the need for NAHC to quickly respond to CEC requests for lists of the tribes that are traditionally and culturally affiliated with proposed project sites. This will better enable the NAHC to anticipate such requests and designate appropriate staffing and processes. Otherwise, if CEC moves forward with finalizing the regulations and receiving applications, it risks not receiving tribal contact lists from the NAHC in sufficient time to initiate tribal outreach within five days of a completed application, as required by AB 205.

In such a situation, if the CEC initiates tribal outreach prior to receiving the appropriate contact list from the NAHC, the CEC may inadvertently extend consultation rights to tribes lacking traditional and cultural affiliation with the project site. The importance of traditional and cultural affiliation cannot be overstated and is a legal requirement of tribal consultation under AB 52 and AB 205.[1] Traditional and cultural affiliation means there is a relationship of shared group identity that can be reasonably traced historically or prehistorically between members of a present-day Indian tribe and an identifiable earlier group in that geographic area. A tribe with prehistoric ties to an area has the strongest traditional and cultural affiliation, followed next by those tribes with historic ties. Contemporary ties, however, are not evidence of traditional and cultural affiliation. Affiliation can be demonstrated through geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, tribal traditional knowledge, or other relevant information or expert opinion. Only tribes that are traditionally and culturally affiliated with a site carry the knowledge and experience to identify the cultural resources and sacred sites thereon and, importantly, to determine when avoidance is paramount or whether there are appropriate forms of mitigation available.

[1] *See* Ca. Pub. Res. Code §§ 21080.3.1, 25545.7.4(a).

Once the CEC, in coordination with the NAHC, has notified the traditionally and culturally affiliated tribes to a proposed project area, the CEC should plan for a meaningful, robust initial meeting with each tribe seeking to consult. The initial meeting is an important opportunity for CEC to explain the application review process and CEC's role and requirements. It is also an opportunity for the parties to develop a consultation agreement, if desired, to set forth the timelines and expectations for consultation. Information sharing is critical and various aspects should be addressed early. In order for the Tribe to meaningfully consult, it must receive the whole application packet and all related studies. CEC staff have indicated that these materials will be provided via the online docket. Whether through the docket or by direct sharing with the tribe, it is critical that all application materials and associated reports are shared; not just cultural reports but also biological reports, geo-technical reports, etc.

In turn, it is essential that CEC have frank discussions with tribes about confidentiality and the legal limitations of protecting tribally provided cultural information. CEC should be transparent that it lacks a records management system, vetted by tribes, to house and protect sensitive tribal knowledge. CEC should explain which types of information it can legally protect and withhold from public disclosure, and which types of information it is obligated to disclose. The CEC should implement procedures to ensure that CEC first requests permission from a tribe which has submitted confidential information before the CEC shares such information with other tribes, the applicant, or the public at large. If permission is not granted, CEC should take all steps authorized under California law to protect such information from disclosure.[2] CEC should also address the contingency procedures for when protected information is inadvertently disclosed to the public or to other tribes. In general, CEC should make all attempts to protect cultural information that has been designated as confidential by the submitting tribe. This includes reducing to writing only the bare minimum necessary to support the decision-making record. We also recommend specific regulatory language regarding confidentiality in the next section of our comments.

Additionally, the CEC should identify any federal nexus as early as possible in the permitting process. This will improve efficiencies in conducting cultural resource review and tribal consultation. If a federal nexus exists and Section 106 of the National Historic Preservation Act applies, this will inform how and when cultural resource surveys are conducted and the appropriate types of treatment plans. Regardless of whether there is a federal nexus, CEC should work with applicants to ensure that tribes are involved early enough in the permitting process to

[2] *See, e.g.*, Ca. Pub. Resources Code § 21082.3(c) (providing, among other things, that any information regarding the location, description, and use of tribal cultural resources that is submitted by a tribe during the environmental review process shall not be included in the environmental document or otherwise disclosed by the agency without the tribe's prior consent); Ca. Gov't Code § 6254(r) (exempting records related to Native American graves, cemeteries, sacred places, features, and objects from disclosure under the Public Records Act).

opine on which technical consultants (like archaeologists) the applicant should hire and to participate in site surveys and help develop treatment plans.

A central component of AB 52, as incorporated into the AB 205 Opt-In Certification Process, is mitigation. AB 205 expressly acknowledges that "[t]reatment of tribal cultural resources shall comply with Section 21084.3." In turn, Public Resources Section 21084.3 requires agencies, to the extent feasible, to "avoid damaging effects to any tribal cultural resources." This section further provides a non-exhaustive list of mitigation measures to avoid or minimize significant adverse impacts to tribal cultural resources, such as: avoidance and preservation in place; protecting the integrity, traditional use, and confidentiality of the resource; permanent conservation easements subject to culturally appropriate management criteria; and other measures that protect the cultural resource. AB 205 also explicitly requires the CEC to include license requirements for tribal monitors to monitor any archaeological, earthwork, or ground disturbing activities when tribal cultural resources would be adversely affected by the work. This is one of many mitigation measures available to tribes and the CEC under CEQA.

Another critical issue concerns the completion of AB 52 consultation vis a vis the timeframes set forth in AB 205. We ask CEC to consider and address in its regulations how it will reconcile the process for completing AB 52 consultation—which the legislators purposefully left unhindered by rigid deadlines for completion—with AB 205's 270-day window for CEC to certify the environmental impact report and issue a certificate for the site. If, towards the end of that 270-day window, tribal consultation is ongoing and there are no agreed upon mitigation measures, will CEC deny certification via the AB 205 Opt-In process and instead require the applicant to complete AB 52 consultation and CEQA while going through the normal permitting processes with all applicable local and state agencies? Or will the CEC conclude that mutual agreement cannot be reached and/or issue a CEQA statement of overriding considerations? To help avoid this scenario, we recommend CEC initiate informal "tribal engagement," as referred to in proposed regulatory Section 1878.5(b), before an application is formally determined to be complete and the AB 205 statutory requirement to initiate formal tribal consultation within five days is triggered. Such informal tribal engagement is not the same as formal tribal consultation, but could consist of notifying affiliated tribes that an application for a project is pending and sharing whatever information is known by the CEC at that point. This will allow tribes to begin evaluating the project and allocating limited tribal resources to engage in formal tribal consultation before the 270-day clock is triggered. The regulations must be clear, however, that formal tribal consultation pursuant to AB 52 occurs only once CEC has deemed an application complete and formally noticed the affiliated tribe(s) within five days pursuant to Public Resources Code Sec. 25545.7.4.

We also wish to emphasize that CEC should incorporate tribal analysis and feedback into the CEQA evaluation of a project's cumulative impacts. Only tribes can speak to the cumulative

impact that large energy projects have on tribal sacred sites and resources, such as by conducting a viewshed analysis. This is particularly true when projects are concentrated in certain geographic areas within a tribe's ancestral territory.

As a final point, and more generally to the AB 205 Opt-In Certification process, CEC should clarify how bundling will be handled. For example, if an energy storage facility project in isolation does not reach the $250 million investment threshold, could the project proponent bundle additional related projects to reach that dollar threshold? If so, what will be the parameters for bundling? And when will an application for bundled projects be deemed "complete" for purposes of triggering the 270-day review window? Additional guidance from CEC through the regulations or associate guidance documents is needed on this point.

2. Recommended Language in the Proposed Regulations

a. Confidentiality

The proposed regulations default to public disclosure of all supporting documentation for the opt-in application. *See* Proposed Sec. 1877(c). It is important, however, that the public and CEC staff understand the confidential tribal cultural resource information submitted as part of the AB 52 process is protected from public disclosure. Additionally, tribes may have their own confidentiality standards that govern the disclosure and use of confidential cultural information. Accordingly, we recommend that the regulations borrow from the confidentiality requirements in AB 168 (concerning tribal consultation on fast-tracked affordable housing projects).[3] Specifically, we recommend a new subpart (c) to Proposed Sec. 1878.5:

> (c) The parties to tribal consultation pursuant to this section shall comply with all of the following confidentiality requirements:
>
> (1) Subdivision (r) of Government Code section 6254.
>
> (2) Government Code section 6254.10.
>
> (3) Subdivision (c) of Public Resources Code section 21082.3.
>
> (4) Subdivision (d) of section 15120 of Title 14 of the California Code of Regulations.
>
> (5) Any additional confidentiality standards adopted by the tribe participating in consultation.

b. Mitigation

We appreciate that CEC intends the regulations to be gap filling. However, for the purpose of clarity for CEC staff, applicants, and tribes, we recommend adding a new subpart (d)

[3] Codified at CA. Gov't Code § 65913.4(b)(1)(D).

to Proposed Sec. 1878.5. The purpose of subpart (d) would be to emphasize that all forms of mitigation are available for Opt-In projects, not just tribal monitoring (as specifically identified in AB 205). We recommend the following language:

> (d) In addition to requiring tribal monitors as part of any license granted, as set forth in Public Resources Code section 25545.7.4(d), all forms of mitigation measures may be considered by the parties in order to avoid or minimize significant adverse impacts to any tribal cultural resource.

c. Concluding Tribal Consultation

As already explained, we believe the regulations need an additional provision addressing how CEC will complete AB 52 consultation when the AB 205 270-day window is nearly closed. While we do not offer specific language, we urge CEC to consider this issue and provide regulatory parameters to guide CEC staff, tribes, and applicants.

Thank you for your time and consideration of our comments. We look forward to ongoing communication and consultation on this issue.

Sincerely,

Buffy McQuillen

Buffy McQuillen
FIGR Tribal Heritage Preservation Officer