

Department of Toxic Substances Control

Official Policy

TRIBAL CONSULTATION POLICY**DTSC-XX-XXXX**

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All Staff

Environmental Justice and Tribal Affairs

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Issuing Unit

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Signature

Date Signed

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I. PREFACE

In 2011, Governor Edmund G. Brown Jr. issued Executive Order B-10-11 requiring all State of California agencies and departments to encourage communication and consultation with California Indian Tribes, as defined further below. Accordingly, the California Department of Toxic Substances Control (DTSC) or “Department” hereby adopts this Tribal Consultation Policy (“Consultation Policy” or “Policy”), which memorializes its commitment to strengthening and sustaining government-to-government relationships between California Indian Tribes and the State. On August 20, 2015, to further Executive Order B-10-11 the California Environmental Protection Agency (CalEPA) adopted its Tribal Consultation Policy to govern and ensure effective communication and government-to-government consultation between tribes and CalEPA and its constituent departments.

Currently, there are 109 federally recognized tribes in California. Federally recognized Tribes may enact tribal codes that affect natural resources, public health and environmental protection, and they may apply for treatment in the same manner as a state under certain federal environmental and cultural resource laws. There are also over 80 non-federally recognized Tribes in California many of whom are in the process of seeking federal recognition. Although they existed and lived across the state prior to the formation of the United States, or the state of California, these Tribes are not currently recognized as sovereign nations by the federal government.

All California Indian 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 unique lifestyles, cultural beliefs, traditions, and specific connections to areas of California that are their ancestral homelands.

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II. DEPARTMENT OF TOXIC SUBSTANCES CONTROL (DTSC)

Mission: To protect California's people and environment from harmful effects of toxic substances by restoring contaminated resources, enforcing hazardous waste laws, reducing hazardous waste generation, and encouraging the manufacture of chemically safer products.

Background: DTSC was established to protect California against threats to public health and degradation to the environment and to restore properties degraded by past environmental contamination. Through its statutory mandates, DTSC cleans up existing contamination, regulates management of hazardous wastes, and prevents pollution by working with businesses to reduce their hazardous waste and use of toxic materials.

DTSC consists of:

- Over 900 scientists, engineers, toxicologists, chemists, geologists, attorneys, criminal investigators, analysts and administrative staff;
- Nine offices – Sacramento (2 offices, headquarters and a field office), Berkeley, Clovis, Cypress, Chatsworth, Commerce, El Centro and San Diego;
- Two environmental chemistry laboratories - Berkeley and Pasadena

Management and staff of DTSC are committed to protecting Californians and their environment from exposure to hazardous wastes by enforcing hazardous waste laws and regulations. DTSC takes enforcement action against violators; oversees cleanup of hazardous wastes on contaminated properties; makes decisions on permit applications from companies that want to store, treat or dispose of hazardous waste; and protects consumers against toxic ingredients in everyday products. DTSC is committed to engaging the public in a way that allows those most affected by its decisions, to be given opportunities to voice their concerns and ask questions.

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IV. DTSC CONSULTATION POLICY

This Policy is intended to foster effective consultation and collaboration between DTSC and California Indian Tribes, and to provide meaningful input into the development of policies, rules, regulations, programs, projects, plans and activities that may affect Tribal communities. The goal underlying DTSC's development of the Policy is to engage in a timely and interactive process to respectfully seek, discuss and consider Tribes' views on matters within the purview of DTSC's activities. DTSC also intend to apply this Policy in its efforts to resolve concerns at the earliest opportunity, and in a manner that respects and furthers the interests of Tribes and the State of California. DTSC shall implement the principles described in this Policy in a manner that facilitates effective communication and consultation practices, and promotes cooperation and efficiencies in Tribal consultation. DTSC aims to engage in Tribal consultations consistent with the principles highlighted in this policy, and notes that AB 52 Tribal Consultations may deviate from DTSC's general consultation process to ensure compliance with AB 52 requirements. This Consultation Policy shall be considered and acknowledged by DTSC when drafting, updating, or implementing guidance, policies, and Department Procedure Memoranda (DPM). The DTSC Consultation Policy broadly defines provisions for enhancing DTSC's consultation efforts with tribes. This Consultation Policy shall complement, not supersede, any existing laws, rules, statutes or regulations that guide consultation processes with Tribes. This policy is not a regulation, and it does not create, expand, limit, waive, or interpret any legal rights or obligations. Nothing in this policy shall be construed to prevent DTSC from taking timely action to fulfill their legal obligations to protect public health and safety, or the environment; or to carry out federally-mandated duties under delegated federal programs and actions.

V. DEFINITIONS

For purposes of this policy, the following terms shall have the meanings defined below:

AB 52 Consultation: An AB 52 Consultation occurs when DTSC is the lead agency on a project, a Tribe has submitted a written request to DTSC to be informed of proposed projects in a geographic area traditionally and culturally affiliated with the Tribe, and the required timelines outlined in AB 52 are satisfied. (Public Resource Code section 21080.3)

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California Indian Tribe: A federally recognized California Tribal government listed on the most recent notice of the Federal Register or a non-federally recognized California Tribal government on the California Tribal Consultation List maintained by the California Native American Heritage Commission.

Communication: The dissemination, exchange and/or sharing of information between DTSC and California Indian Tribes.

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, where feasible, seeking agreement. Consultation between government agencies and Native American Tribes shall be conducted in a way that is mutually respectful. Consultation shall also recognize the Tribes' potential needs for confidentiality with respect to places that have traditional Tribal cultural significance. (Government Code section 65352.4.)

Federal Recognition: The acknowledgement by the federal government that a Tribal government and Tribal members constitute a Tribe with a government-to-government relationship with the United States, and eligibility for the programs, services, and other relationships established for the United States for Indians, because of their status as Indians. (Title 25 United States Code section 83.2)

Federally Recognized Tribe: A Tribal entity that is recognized as having a government to-government relationship with the United States; these entities are listed on the Federal Register and the current list is posted on the Governor's Office of the Tribal Advisor's website

Non-Federally Recognized Indian Tribe: Those Tribes that are not federally recognized and are on the list maintained by the Native American Heritage Commission.

Indian Country or Tribal Lands: The same meaning as the term "Indian country" in United States Code of Federal Regulations, title 18, section 1151, that states: (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

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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.

Tribe: Refers to a California Indian Tribe.

Tribal Leaders: Refers to elected officials of Indian Tribes.

Tribal Sovereignty: The unique political status of Federally Recognized Tribes. A Federally Recognized Tribe 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 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.

VI. GUIDING PRINCIPLES

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

- a. Acknowledge and respect tribal sovereignty.
- b. Understand that Federally Recognized Tribes have a unique trust relationship with the federal government.
- c. Recognize that all California Indian Tribes including individuals, communities, groups and organizations 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 Indian 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 Indian Tribes, whether or not the cultural resources are located on Tribal lands.

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- 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 activities or programs on Tribal lands and cultural resources.
- h. Encourage collaborative efforts between California Indian Tribes and federal, state, and local government entities to resolve issues of mutual concern.
- i. After adoption, the Department will conduct a two-year review of this Policy and revise the policy as needed to make it more effective.

VII. DTSC CONSULTATION PROCESS

Through this Consultation Policy, the intent of DTSC is to strengthen its ability to successfully resolve issues of mutual concern collectively with tribes. While the communication and collaboration encouraged by this Policy provides increased ability to solve problems, it may not result in a resolution of all issues. Therefore, inherent in this Consultation 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.

This Consultation Policy implements Executive Order B-10-11 and is intended to improve DTSCs' internal management and communication; it is not a regulation and does not supersede, create, expand, limit, waive or interpret any state or federal legal rights or obligations including, but not limited to, treaty rights, immunities or jurisdiction of any tribe or the State of California.

Collaboration: DTSC will work to identify and coordinate policy when there are issues that may pertain to or affect Tribes. DTSC also commits to disseminating public documents and notices, and to actively seeking opportunities for collaboration, and maintaining an ongoing dialogue, with tribes. DTSC is committed to the principle that interaction with Tribes shall be regarded as a "partnership" of mutual respect whereby the Department strives to ensure a sound and productive relationship with tribes through the development and maintenance of a meaningful dialogue.

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Communication: Open and respectful communication with Tribal representatives is essential. DTSC will engage in early, inclusive, and frequent communication with tribal leaders regarding issues 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 (see below) and documentation in a manner that provides an adequate review and response period for the parties involved; 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 representatives to address the sensitivity of such information and maintain its confidentiality to the fullest extent possible. All parties to any consultation should promote respect, shared responsibility, and an open and free exchange of information.

Tribal Liaison: The Director will designate a member of the Executive staff within the Department to act as a Tribal Liaison for the purpose of coordination between DTSC and tribes. The DTSC Tribal Liaison will be responsible for coordinating outreach, communication and other activities affiliated with DTSC and Tribal interests. DTSC will publish on its Departmental website, the names and contact information for the DTSC Tribal Liaison and appropriate Tribal Affairs staff, along with the final Department Consultation Policy.

Education: The DTSC Tribal Liaison will encourage Department 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 distinctions of 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.

Process: DTSC 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 that is timely and respectful, and which clearly identifies internal processes and timeline expectations for the parties involved. DTSC commits to making information available to Tribes, as early in the planning process as feasible. Either DTSC or any Tribe may initiate consultation.

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Timely Notice: This Consultation Policy recognizes that Tribes are located in diverse and sometimes remote regions throughout the state, thereby necessitating the need for clear and adequate notice/outreach prior to consultation or meetings that may require travel. DTSC should initiate contact with Tribes as early as possible, preferably within no less than 30 days prior to major decisions or activities, to provide adequate time for Tribes to respond, particularly on substantive matters, and most importantly, to respect Tribal protocol and cultural patterns that require consideration, deliberations, and consensus. DTSC will honor a Tribe's request for additional time to prepare for or attend a consultation session or in person meeting whenever possible.

Barbara A. Lee
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