

Madrone Parkway Carpenters Training
Center Project

File Numbers: UP2018-011 and SR2019-007

Initial Study/ Mitigated Negative Declaration

**RESPONSES TO PUBLIC COMMENTS AND TEXT
CHANGES**

August 30, 2019

CEQA Lead Agency:



**City of Morgan Hill
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In Consultation with:

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SECTION 1

SUMMARY OF COMMENTS

The Madrone Carpenters Training Center Initial Study/Mitigation Negative Declaration (Initial Study/MND) was circulated for public review for a 30-day review period, from July 22, 2019 to August 21, 2019. During the circulation period, the City of Morgan Hill received one comment letter as shown in the Table in Section 2.

In summary, the comments received on the draft Initial Study/MND did not raise any new issues about the project's environmental impacts, or provide information indicating the project would result in new environmental impacts or impacts substantially greater in severity than disclosed in the Initial Study/MND. CEQA does not require formal responses to comments on an Initial Study/MND, only that the lead agency consider the comments received [CEQA Guidelines §15074(b)]. Nevertheless, responses to the comments are included in this document to provide a complete environmental record.

The following pages contain a list of the agencies and persons that submitted comments on the Initial Study/MND and the City's responses to comments received on the Initial Study/MND. The specific comments have been excerpted from the letter and are presented as "Comment" with each response directly following ("Response"). Copies of the actual letter submitted to the City of Morgan Hill is attached to this document.

**SECTION 2 AGENCIES AND PERSONS COMMENTING ON
THE INITIAL STUDY/MND**

	Comment Received From	Date of Letter	Response on Page
	<i>Agency Comments</i>		
A.	CA Native American Heritage Commission	August 16, 2019	5-13

SECTION 3

RESPONSE TO COMMENTS

This memo responds to comments on the Initial Study/MND as they relate to the potential environmental impacts of the project under CEQA. Numbered responses correspond to comments in each comment letter. Copies of the comment letters are attached.

A. RESPONSE TO COMMENTS FROM NATIVE AMERICAN HERITAGE COMMISSION

Comment A1: The Native American Heritage Commission (NAHC) has reviewed the Mitigated Negative Declaration prepared for the above referenced project. The review included the Introduction, Project Information, and Project Description; and the Environmental Setting, Checklist, and Impacts Discussion, section 4.5, Cultural Resources and section 4.18 Tribal Cultural Resources prepared by David J. Powers & associates, Inc. for the City of Morgan Hill. We have the following concern(s):

1. Standard Condition CUL-1 names the Amah Mutsun Tribal Band as Most Likely Descendant (MLD) for the project. MLDs are not designated in advance of a find of Native American Human Remains on a specific project. Having been designated MLD for previous projects in the area does not mean that the named tribe will be designated for this project. Please see Public Resources Code section § 5097.98 for the process of designating a MLD when Native American Human remains are discovered.

Response A1: The commenter stated that the MLD is not designated in advance of a find of Native American Human Remains for a specific project. The reference to Amah Mutsun Tribal Band as the MLD has been removed from the Initial Study/MND text. See revisions to the Initial Study/MND text in Section 4 of this document.

Comment A2:

2. The NAHC policy referenced in Standard Condition CUL-1 is a DRAFT document and is not in force at this time. There is no prohibition of the same tribe being monitors and a designated MLD for the project.

Response A2: Comment A2 has been noted. The comment does not require any changes to the Initial Study/MND analysis. No further response is required.

Comment A3:

3. The Most Likely Descendant (MLD) timeline in the Mitigation Measure CUL-4 is incorrect. Public Resources Code § 5097.98 specifies that an MLD has 48 hours after being allowed access to the site to make recommendations for disposition of the remains and associated grave goods.

Response A3: The commenter stated that the MLD has 48 hours after being allowed access to the site to make recommendations for disposition of remains and associated grave goods. This revision to has been made to the Initial Study/MND text. See section 4.0 of this document.

Comment A4:

4. Cultural Resources and/or Tribal Cultural Resources assessments are not documented. This document appears to rely solely on the 2016 General Plan Cultural Resources Sensitivity Map. Assessments (Literature searches, site surveys, and contact with culturally affiliated tribes) should adequately assess the existence and significance of cultural resources and plan for avoidance, preservation in place, or barring both, mitigation of project-related impacts to tribal cultural resources. The lack of documented resources does not preclude inadvertent finds, which should be addressed in the mitigation measures.

Response A4: The City’s Archaeological Sensitivity Map is based on a previous citywide prehistoric and historic site record and literature search completed by Basin Research Associates, on behalf of the City. As stated in the Initial Study/MND, based on this sensitivity map, the project site is not located within an archaeological sensitive area; therefore under City policy, the project would not warrant an archaeological literature search or site surveys. As stated in the Initial Study/MND, implementation of Standard Condition CUL-1 would avoid impacts to archaeological materials or human remains in the event of the inadvertent finds of these materials during excavation/construction.

Comment A5: While consultation requirements under AB-52 have technically been met, the NAHC recommends that consultation outreach to the tribes on the NAHC list is consistent with Best Practices. Please refer to: http://nahc.ca.gov/wp-content/uploads/2015/04/AB52TribalConsultationRequirementsAndBestPractices_Revised_3_9_16.pdf

Response A5: Assembly Bill 52 (AB 52) requires lead agencies to provide notice of non-exempt projects to tribes that are traditionally and culturally affiliated with the geographic area if they have requested to be notified. The City of Morgan Hill has not been contacted for notification and consultation by a tribe and, therefore, tribal consultation is not required for the project under AB 52. Given that no tribes have identified tribal cultural resources at the project site and the site is in an area of the City deemed low sensitivity for cultural resources as determined by the professional archaeologist, there would be no expectation of impacts to these resources and no mitigation required to reduce impacts to these resources.

Comment A6: Agencies should be aware that AB 52 does not preclude them from initiating tribal consultation with tribes that are traditionally and culturally affiliated with their jurisdictions before the timeframes provided in AB 52. For that reason, we urge you to continue to request Native American Tribal Consultation Lists and Sacred Lands File searches from the NAHC. The request forms can be found online at: <http://nahc.ca.gov/resources/forms/>. Additional information regarding AB 52 can be found online at http://nahc.ca.gov/wp-content/uploads/2015/10/AB52TribalConsultation_CalEPAPDF.pdf, entitled “Tribal Consultation Under AB 52: Requirements and Best Practices.”

Response A6: As stated in Response A5, AB 52 requires lead agencies to provide notice of projects to tribes that are traditionally and culturally affiliated with the geographic area if they have

requested to be notified. The City of Morgan Hill has not been contacted for notification and consultation by a tribe and, therefore, tribal consultation and a Sacred Lands File search is not required for the project under AB 52. Therefore, no tribal consultation or Sacred Lands file search will be conducted as a part of this project. The information provided regarding tribal consultation and Sacred Lands File searches has been noted. The site is located in an area of low sensitivity for cultural resources, indicating low likelihood of inadvertently discovering tribal cultural resources during construction.

Comment A7: The NAHC recommends lead agencies consult with all California Native American tribes that are traditionally and culturally affiliated with the geographic area of your proposed project as early as possible in order to avoid inadvertent discoveries of Native American human remains and best protect tribal cultural resources.

Response A7: As stated in Responses A4 – A6, the City of Morgan Hill has not been contacted for notification and consultation by a tribe and, therefore, tribal consultation is not required for the project under AB 52. Given that no tribes have identified tribal cultural resources at the project site, there would be no impacts to these resources or mitigation required to reduce impacts. Implementation of Standard Condition CUL-1 would avoid significant impacts to Native American human remains in the event of inadvertent discoveries. The site is located in an area of low sensitivity for cultural resources, indicating low likelihood of inadvertently discovering tribal cultural resources during construction.

Comment A8: A brief summary of portions of AB 52 and SB 18 as well as the NAHC’s recommendations for conducting cultural resources assessments is also attached.

Response A8: Comment A8 has been noted. SB 18 applies to projects that involve a General Plan or Specific Plan Amendment, which the subject project does not. No further response is required.

Comment A9: The California Environmental Quality Act (CEQA), specifically Public Resources Code §21084.1, states that a project that may cause a substantial adverse change in the significance of a historical resource is a project that may have a significant effect on the environment. If there is substantial evidence, in light of the whole record before a lead agency, that a project may have a significant effect on the environment, an environmental impact report (EIR) shall be prepared. In order to determine whether a project will cause a substantial adverse change in the significance of a historical resource, a lead agency will need to determine whether there are historical resources within the area of project effect (APE).

Response A9: Comment A9 has been noted. CEQA Guidelines Section 15064.5(a) defines historic resources as those listed in, or determined eligible by the State Historical Resources Commission, for listing in the California Register, or included in a local register or historical resources. No such structures or objects are present on the site or surrounding properties. As stated in Section 4.5, Cultural Resources of the Initial Study/MND, there are no historical resources located within the project APE. The project would have no impact on historical resources and, therefore, would not cause a substantial adverse change in the significance of a historical resource.

Comment A10: CEQA was amended in 2014 by Assembly Bill 52. (AB 52).⁴ AB 52 applies to any project for which a notice of preparation or a notice of negative declaration or mitigated negative declaration is filed on or after July 1, 2015. AB 52 created a separate category for “tribal cultural resources,” that now includes “a project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment. Public agencies shall, when feasible, avoid damaging effects to any tribal cultural resource. Your project may also be subject to Senate Bill 18 (SB 18) (Burton, Chapter 905, Statutes of 2004), Government Code §65352.3, if it also involves the adoption of or amendment to a general plan or a specific plan, or the designation or proposed designation of open space. Both SB 18 and AB 52 have tribal consultation requirements. Additionally, if your project is also subject to the federal National Environmental Policy Act (42 U.S.C. § 4321 et seq.) (NEPA), the tribal consultation requirements of Section 106 of the National Historic Preservation Act of 19668 may also apply.

Consult your legal counsel about compliance with AB 52 and SB 18 as well as compliance with any other applicable laws.

Response A10: As stated in the Responses to A5 – A7, no tribes that are traditionally and culturally affiliated with the geographic area if they have requested to be notified of projects in the area and no tribal cultural resources have been identified at the site. The City has, therefore, complied with AB 52. The project would, therefore, not have a significant impact on a tribal cultural resource and would not cause a substantial adverse change in the significance of a tribal cultural resource. The proposed project would not require an amendment to a General Plan or Specific Plan and, therefore, the project is not subject to SB 18 requirements. The project is not subject to NEPA; for this reason, the project would not be subject to Section 106 of the National Historic Preservation Act tribal consultation requirements.

Comment A11:

Under AB 52:

AB 52 has added to CEQA the additional requirements listed below, along with many other requirements:

Within fourteen (14) days of determining that an application for a project is complete or of a decision by a public agency to undertake a project, a lead agency shall provide formal notification to a designated contact of, or tribal representative of, traditionally and culturally affiliated California Native American tribes that have requested notice.

A lead agency shall begin the consultation process within 30 days of receiving a request for consultation from a California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed project and prior to the release of a negative declaration, mitigated negative declaration or environmental impact report. For purposes of AB 52, “consultation shall have the same meaning as provided in Gov. Code §65352.4 (SB 18).

The following topics of consultation, if a tribe requests to discuss them, are mandatory topics of consultation:

- a. Alternatives to the project.
- b. Recommended mitigation measures.
- c. Significant effects.

1. The following topics are discretionary topics of consultation:

- a. Type of environmental review necessary.
- b. Significance of the tribal cultural resources.
- c. Significance of the project's impacts on tribal cultural resources.

If necessary, project alternatives or appropriate measures for preservation or mitigation that the tribe may recommend to the lead agency.

With some exceptions, any information, including but not limited to, the location, description, and use of tribal cultural resources submitted by a California Native American tribe during the environmental review process shall not be included in the environmental document or otherwise disclosed by the lead agency or any other public agency to the public, consistent with Government Code §6254 (r) and §6254.10. Any information submitted by a California Native American tribe during the consultation or environmental review process shall be published in a confidential appendix to the environmental document unless the tribe that provided the information consents, in writing, to the disclosure of some or all of the information to the public.

If a project may have a significant impact on a tribal cultural resource, the lead agency's environmental document shall discuss both of the following:

- a. Whether the proposed project has a significant impact on an identified tribal cultural resource.
- b. Whether feasible alternatives or mitigation measures, including those measures that may be agreed to pursuant to Public Resources Code §21082.3, subdivision (a), avoid or substantially lessen the impact on the identified tribal cultural resource.

Consultation with a tribe shall be considered concluded when either of the following occurs:

- a. The parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists, on a tribal cultural resource; or
- b. A party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached.

Any mitigation measures agreed upon in the consultation conducted pursuant to Public Resources Code §21080.3.2 shall be recommended for inclusion in the environmental document and in an adopted mitigation monitoring and reporting program, if determined to avoid or lessen the impact pursuant to Public Resources Code §21082.3, subdivision (b), paragraph 2, and shall be fully enforceable.

If mitigation measures recommended by the staff of the lead agency as a result of the consultation process are not included in the environmental document or if there are no agreed upon mitigation measures at the conclusion of consultation, or if consultation does not occur, and if substantial evidence demonstrates that a project will cause a significant effect to a tribal cultural resource, the lead agency

shall consider feasible mitigation pursuant to Public Resources Code §21084.3 (b).

An environmental impact report may not be certified, nor may a mitigated negative declaration or a negative declaration be adopted unless one of the following occurs:

- a. The consultation process between the tribes and the lead agency has occurred as provided in Public Resources Code §21080.3.1 and §21080.3.2 and concluded pursuant to Public Resources Code §21080.3.2.
- b. The tribe that requested consultation failed to provide comments to the lead agency or otherwise failed to engage in the consultation process.
- c. The lead agency provided notice of the project to the tribe in compliance with Public Resources Code §21080.3.1 (d) and the tribe failed to request consultation within 30 days.

This process should be documented in the Tribal Cultural Resources section of your environmental document.

Response A11: The AB 52 requirements listed under Comment A11 have been noted. As stated in Responses A5 and A6, the City of Morgan Hill has not been contacted for notification and consultation by a tribe and, therefore, tribal consultation is not required for the project under AB 52. For this reason, the project would not be subject to the consultation requirements listed under Comment A11. The project would have no impact on tribal cultural resources. An abbreviated discussion of AB 52 requirements is included in Section 4.18, Tribal Cultural Resources of the Initial Study/MND. The City, therefore, has complied with AB 52.

Comment A12:

Under SB 18:

Government Code §65352.3 (a) (1) requires consultation with Native Americans on general plan proposals for the purposes of “preserving or mitigating impacts to places, features, and objects described §5097.9 and §5091.993 of the Public Resources Code that are located within the city or county’s jurisdiction. Government Code §65560 (a), (b), and (c) provides for consultation with Native American tribes on the open-space element of a county or city general plan for the purposes of protecting places, features, and objects described in Public Resources Code §5097.9 and §5097.993.

- SB 18 applies to local governments and requires them to contact, provide notice to, refer plans to, and consult with tribes prior to the adoption or amendment of a general plan or a specific plan, or the designation of open space. Local governments should consult the Governor’s Office of Planning and Research’s “Tribal Consultation Guidelines,” which can be found online at: https://www.opr.ca.gov/docs/09_14_05_Updated_Guidelines_922.pdf
- **Tribal Consultation:** If a local government considers a proposal to adopt or amend a general plan or a specific plan, or to designate open space it is required to contact the appropriate tribes identified by the NAHC by requesting a “Tribal Consultation List.” If a tribe, once contacted, requests consultation the local government must consult with the tribe on the plan proposal. A tribe has 90 days from the date of receipt of notification to request consultation unless a shorter timeframe has been agreed to by the tribe.

- There is no Statutory Time Limit on Tribal Consultation under the law.
- Confidentiality: Consistent with the guidelines developed and adopted by the Office of Planning and Research, the city or county shall protect the confidentiality of the information concerning the specific identity, location, character, and use of places, features and objects described in Public Resources Code §5097.9 and §5097.993 that are within the city's or county's jurisdiction.
- Conclusion Tribal Consultation: Consultation should be concluded at the point in which:
 - The parties to the consultation come to a mutual agreement concerning the appropriate measures for preservation or mitigation; or
 - Either the local government or the tribe, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached concerning the appropriate measures of preservation or mitigation.

Response A12: The project would not require a General Plan or Specific Plan Amendment. Therefore, the project is not subject to SB 18 requirements listed under Comment 12.

Comment A13:

NAHC Recommendations for Cultural Resources Assessments:

- Contact the NAHC for:
 - A Sacred Lands File search. Remember that tribes do not always record their sacred sites in the Sacred Lands File, nor are they required to do so. A Sacred Lands File search is not a substitute for consultation with tribes that are traditionally and culturally affiliated with the geographic area of the project's APE.
 - A Native American Tribal Contact List of appropriate tribes for consultation concerning the project site and to assist in planning for avoidance, preservation in place, or, failing both, mitigation measures.
 - The request form can be found at <http://nahc.ca.gov/resources/forms/>.
- Contact the appropriate regional California Historical Research Information System (CHRIS) Center (http://ohp.parks.ca.gov/?page_id=1068) for an archaeological records search. The records search will determine:
 - If part or the entire APE has been previously surveyed for cultural resources.
 - If any known cultural resources have been already been recorded on or adjacent to the APE.
 - If the probability is low, moderate, or high that cultural resources are located in the APE.
 - If a survey is required to determine whether previously unrecorded cultural resources are present.
- If an archaeological inventory survey is required, the final stage is the preparation of a professional report detailing the findings and recommendations of the records search and field survey.
 - The final report containing site forms, site significance, and mitigation measures should be submitted immediately to the planning department. All information regarding site locations, Native American human remains, and associated funerary objects should be in a separate confidential addendum and not be made available for

- public disclosure.
- The final written report should be submitted within 3 months after work has been completed to the appropriate regional CHRIS center.

Response A13: As stated in Responses A4 – A6, the City of Morgan Hill has not been contacted for notification and consultation by a tribe and, therefore, tribal consultation is not required for the project under AB 52. Based on the City’s Archaeological Sensitivity Map (based on a previous archaeological records search for the City at the CHRIS center), the project is not located within an archaeologically sensitive area. Therefore, the City would not be required to contact the NAHC for a Sacred Lands File search or Native American Tribal Contact List. Further, the City (or an archaeological resource consultant) would not be required to contact the CHRIS center to complete an archaeological literature search or archaeological inventory survey for the project site or surrounding area, given prior research indicates there is no need.

Comment A14:

Examples of Mitigation Measures That May Be Considered to Avoid or Minimize Significant Adverse Impacts to Tribal Cultural Resources:

- Avoidance and preservation of the resources in place, including, but not limited to:
 - Planning and construction to avoid the resources and protect the cultural and natural context.
 - Planning greenspace, parks, or other open space, to incorporate the resources with culturally appropriate protection and management criteria.
- Treating the resource with culturally appropriate dignity, taking into account the tribal cultural values and meaning of the resource, including, but not limited to, the following:
 - Protecting the cultural character and integrity of the resource.
 - Protecting the traditional use of the resource.
 - Protecting the confidentiality of the resource.
- Permanent conservation easements or other interests in real property, with culturally appropriate management criteria for the purposes of preserving or utilizing the resources or places.
- Please note that a federally recognized California Native American tribe or a non-federally recognized California Native American tribe that is on the contact list maintained by the NAHC to protect a California prehistoric, archaeological, cultural, spiritual, or ceremonial place may acquire and hold conservation easements if the conservation easement is voluntarily conveyed.
- Please note that it is the policy of the state that Native American remains and associated grave artifacts shall be repatriated.

Response A14: As stated in Responses A4 – A6 and the Initial Study/MND, there are no tribal cultural resources present at the site and, therefore, no mitigation measures would be required to reduce or avoid impacts to tribal cultural resources. With the implementation of Standard Condition CUL-1 (consistent with state policies) in the Initial Study/MND, the project would avoid impacts to Native American remains and associated grave artifacts.

Comment A15: The lack of surface evidence of archaeological resources (including tribal cultural resources) does not preclude their subsurface existence.

- Lead agencies should include in their mitigation and monitoring reporting program plan provisions for the identification and evaluation of inadvertently discovered archaeological resources. In areas of identified archaeological sensitivity, a certified archaeologist and a culturally affiliated Native American with knowledge of cultural resources should monitor all ground-disturbing activities.
- Lead agencies should include in their mitigation and monitoring reporting program plans provisions for the disposition of recovered cultural items that are not burial associated in consultation with culturally affiliated Native Americans.
- Lead agencies should include in their mitigation and monitoring reporting program plans provisions for the treatment and disposition of inadvertently discovered Native American human remains. Health and Safety Code section 7050.5, Public Resources Code §5097.98, and Cal. Code Regs., tit. 14, §15064.5, subdivisions (d) and (e) (CEQA Guidelines §15064.5, subds. (d) and (e)) address the processes to be followed in the event of an inadvertent discovery of any Native American human remains and associated grave goods in a location other than a dedicated cemetery.

Response A15: As stated in the Initial Study/MND, the project applicant would implement Standard Condition CUL-1 in the Initial Study/MND to avoid significant impacts to archaeological resources. The project is not in an archaeologically sensitive area and, therefore, a certified archaeologist and/or a culturally affiliated Native American would not be required to monitor ground-disturbing activities.

Implementation of Standard Condition CUL-1 would also avoid significant impacts to subsurface cultural resources that are not associated with human burials. Consistent with Standard Condition CUL-1, in the event significant archaeological resources are encountered, ground-disturbing activities would be immediately stopped and an authorized representative would contact NAHC, the City, and Amah Mutsun Tribal Band to report the find and initiate the consultation process for treatment and disposition. In the event of inadvertent discovery of any Native American human remains and associated grave goods in a location other than a dedicated cemetery, the above standard condition (for treatment and disposition of these resources) would also be implemented in accordance with the state codes listed in the Comment A15.

SECTION 4**TEXT CHANGES TO THE INITIAL STUDY/MND**

This section contains revisions to the text of the Madrone Parkway Carpenters Training Center Initial Study dated July 2019. Revised or new language is underlined. All deletions are show with a ~~line-through~~ the text.

Page Number	Description of Change
48	<ul style="list-style-type: none"><li data-bbox="513 537 1422 800">• The Coroner will have two working days to examine the human remains after being notified of the discovery. If the remains are Native American, the Coroner has 24 hours to notify the NAHC. The NAHC is responsible for identifying and immediately notifying the Most Likely Descendant (MLD) from the Amah Mutsun Tribal Band. (Note: NAHC policy holds that the Native American Monitor will not be designated the MLD.)<li data-bbox="513 846 1403 919">• Within 24 hours of their notification by the NAHC, the MLD will be granted permission to inspect the discovery site if they so choose.<li data-bbox="513 961 1414 1297">• Within <u>48</u> 24 hours of their notification by the NAHC, the MLD may recommend to the City’s Community Development Director the recommended means for treating or disposing, with appropriate dignity, the human remains and any associated grave goods. The recommendation may include the scientific removal and non-destructive or destructive analysis of human remains and items associated with Native American burials. Only those osteological analyses or DNA analyses recommended by the Amah Mutsun Tribal Band may be considered and carried out.

SECTION 5 PUBLIC COMMENTS AND ATTACHMENTS

Please see copies of the original comments attached to this section.

NATIVE AMERICAN HERITAGE COMMISSION
Cultural and Environmental Department
1550 Harbor Blvd., Suite 100
West Sacramento, CA 95691
Phone (916) 373-3710
Email: nahc@nahc.ca.gov
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August 16, 2019

Jim Rowe
City of Morgan Hill
17575 Peak Avenue
Morgan Hill, CA 95037

Also sent via e-mail: jim.rowe@morganhill.ca.gov

RE: **SCH# 2019079075, Madrone Parkway Carpenters Training Center Project**, City of Morgan Hill; Santa Clara County, California

Dear Mr. Rowe:

The Native American Heritage Commission (NAHC) has reviewed the Mitigated Negative Declaration prepared for the above referenced project. The review included the Introduction, Project Information, and Project Description; and the Environmental Setting, Checklist, and Impacts Discussion, section 4.5, Cultural Resources and section 4.18 Tribal Cultural Resources prepared by David J. Powers & associates, Inc. for the City of Morgan Hill. We have the following concern(s):

1. Standard Condition CUL-1 names the Amah Mutsun Tribal Band as Most Likely Descendant (MLD) for the project. MLDs are not designated in advance of a find of Native American Human Remains on a specific project. Having been designated MLD for previous projects in the area does not mean that the named tribe will be designated for this project. Please see Public Resources Code section § 5097.98 for the process of designating a MLD when Native American Human remains are discovered.
2. The NAHC policy referenced in Standard Condition CUL-1 is a DRAFT document and is not in force at this time. There is no prohibition of the same tribe being monitors and a designated MLD for the project.
3. The Most Likely Descendant (MLD) timeline in the Mitigation Measure CUL-4 is incorrect. Public Resources Code § 5097.98 specifies that an MLD has **48 hours after being allowed access to the site** to make recommendations for disposition of the remains and associated grave goods.
4. Cultural Resources and/or Tribal Cultural Resources assessments are not documented. This document appears to rely solely on the 2016 General Plan Cultural Resources Sensitivity Map. Assessments (Literature searches, site surveys, and contact with culturally affiliated tribes) should adequately assess the existence and significance of cultural resources and plan for avoidance, preservation in place, or barring both, mitigation of project-related impacts to tribal cultural resources. **The lack of documented resources does not preclude inadvertent finds**, which should be addressed in the mitigation measures.
5. While consultation requirements under AB-52 have technically been met, the NAHC recommends that consultation outreach to the tribes on the NAHC list is consistent with Best Practices. Please refer to: http://nahc.ca.gov/wp-content/uploads/2015/04/AB52TribalConsultationRequirementsAndBestPractices_Revised_3_9_16.pdf

Agencies should be aware that AB 52 does not preclude them from initiating tribal consultation with tribes that are traditionally and culturally affiliated with their jurisdictions before the timeframes provided in AB 52. For that reason, we urge you to continue to request Native American Tribal Consultation Lists and Sacred Lands File searches from the NAHC. The request forms can be found online at: <http://nahc.ca.gov/resources/forms/>. Additional information regarding AB 52 can be found online at http://nahc.ca.gov/wp-content/uploads/2015/10/AB52TribalConsultation_CalEPAPDF.pdf, entitled "Tribal Consultation Under AB 52: Requirements and Best Practices".

The NAHC recommends lead agencies consult with all California Native American tribes that are traditionally and culturally affiliated with the geographic area of your proposed project as early as possible in order to avoid inadvertent discoveries of Native American human remains and best protect tribal cultural resources.

A brief summary of portions of AB 52 and SB 18 as well as the NAHC's recommendations for conducting cultural resources assessments is also attached.

If you have any questions, please contact me at my email address: gayle.totton@nahc.ca.gov.

Sincerely,

Handwritten signature of Gayle Totton in cursive.

Gayle Totton, B.S., M.A., Ph. D.
Associate Governmental Program Analyst

Attachment
cc: State Clearinghouse

The California Environmental Quality Act (CEQA)¹, specifically Public Resources Code §21084.1, states that a project that may cause a substantial adverse change in the significance of a historical resource is a project that may have a significant effect on the environment.² If there is substantial evidence, in light of the whole record before a lead agency, that a project may have a significant effect on the environment, an environmental impact report (EIR) shall be prepared.³ In order to determine whether a project will cause a substantial adverse change in the significance of a historical resource, a lead agency will need to determine whether there are historical resources with the area of project effect (APE).

CEQA was amended in 2014 by Assembly Bill 52. (AB 52).⁴ **AB 52 applies to any project for which a notice of preparation or a notice of negative declaration or mitigated negative declaration is filed on or after July 1, 2015.** AB 52 created a separate category for “tribal cultural resources”⁵, that now includes “a project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment.”⁶ Public agencies shall, when feasible, avoid damaging effects to any tribal cultural resource.⁷ Your project may also be subject to **Senate Bill 18 (SB 18)** (Burton, Chapter 905, Statutes of 2004), Government Code §65352.3, if it also involves the adoption of or amendment to a general plan or a specific plan, or the designation or proposed designation of open space. **Both SB 18 and AB 52 have tribal consultation requirements.** Additionally, if your project is also subject to the federal National Environmental Policy Act (42 U.S.C. § 4321 et seq.) (NEPA), the tribal consultation requirements of Section 106 of the National Historic Preservation Act of 1966⁸ may also apply.

Consult your legal counsel about compliance with AB 52 and SB 18 as well as compliance with any other applicable laws.

Pertinent Statutory Information:

Under AB 52:

AB 52 has added to CEQA the additional requirements listed below, along with many other requirements:

Within fourteen (14) days of determining that an application for a project is complete or of a decision by a public agency to undertake a project, a **lead agency** shall provide formal notification to a designated contact of, or tribal representative of, traditionally and culturally affiliated California Native American tribes that have requested notice.

A **lead agency** shall begin the consultation process within 30 days of receiving a request for consultation from a California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed project.⁹ and **prior to the release of a negative declaration, mitigated negative declaration or environmental impact report.** For purposes of AB 52, “consultation shall have the same meaning as provided in Gov. Code §65352.4 (SB 18).¹⁰

The following topics of consultation, if a tribe requests to discuss them, are mandatory topics of consultation:

- a. Alternatives to the project.
- b. Recommended mitigation measures.
- c. Significant effects.¹¹

1. The following topics are discretionary topics of consultation:

- a. Type of environmental review necessary.
- b. Significance of the tribal cultural resources.
- c. Significance of the project’s impacts on tribal cultural resources.

If necessary, project alternatives or appropriate measures for preservation or mitigation that the tribe may recommend to the lead agency.¹²

With some exceptions, any information, including but not limited to, the location, description, and use of tribal cultural resources submitted by a California Native American tribe during the environmental review process **shall not be included in the environmental document or otherwise disclosed by the lead agency or any other public agency to the public, consistent with Government Code §6254 (r) and §6254.10.** Any information submitted by a California Native American tribe during the consultation or environmental review process shall be published in a confidential appendix to the environmental document unless the tribe that provided the information consents, in writing, to the disclosure of some or all of the information to the public.¹³

If a project may have a significant impact on a tribal cultural resource, **the lead agency’s environmental document shall discuss** both of the following:

- a. Whether the proposed project has a significant impact on an identified tribal cultural resource.

¹ Pub. Resources Code § 21000 et seq.

² Pub. Resources Code § 21084.1; Cal. Code Regs., tit.14, § 15064.5 (b); CEQA Guidelines Section 15064.5 (b)

³ Pub. Resources Code § 21080 (d); Cal. Code Regs., tit. 14, § 15064 subd.(a)(1); CEQA Guidelines § 15064 (a)(1)

⁴ Government Code 65352.3

⁵ Pub. Resources Code § 21074

⁶ Pub. Resources Code § 21084.2

⁷ Pub. Resources Code § 21084.3 (a)

⁸ 154 U.S.C. 300101, 36 C.F.R. § 800 et seq.

⁹ Pub. Resources Code § 21080.3.1, subds. (d) and (e)

¹⁰ Pub. Resources Code § 21080.3.1 (b)

¹¹ Pub. Resources Code § 21080.3.2 (a)

¹² Pub. Resources Code § 21080.3.2 (a)

¹³ Pub. Resources Code § 21082.3 (c)(1)

- b. Whether feasible alternatives or mitigation measures, including those measures that may be agreed to pursuant to Public Resources Code §21082.3, subdivision (a), avoid or substantially lessen the impact on the identified tribal cultural resource.¹⁴

Consultation with a tribe shall be considered concluded when either of the following occurs:

- a. The parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists, on a tribal cultural resource; or
- b. A party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached.¹⁵

Any mitigation measures agreed upon in the consultation conducted pursuant to Public Resources Code §21080.3.2 **shall be recommended for inclusion in the environmental document and in an adopted mitigation monitoring and reporting program**, if determined to avoid or lessen the impact pursuant to Public Resources Code §21082.3, subdivision (b), paragraph 2, and shall be fully enforceable.¹⁶

If mitigation measures recommended by the staff of the lead agency as a result of the consultation process are not included in the environmental document or if there are no agreed upon mitigation measures at the conclusion of consultation, or if consultation does not occur, and if substantial evidence demonstrates that a project will cause a significant effect to a tribal cultural resource, **the lead agency shall consider feasible mitigation** pursuant to Public Resources Code §21084.3 (b).¹⁷

An environmental impact report **may not be certified**, nor may a mitigated negative declaration or a negative declaration be adopted unless one of the following occurs:

- a. The consultation process between the tribes and the lead agency has occurred as provided in Public Resources Code §21080.3.1 and §21080.3.2 and concluded pursuant to Public Resources Code §21080.3.2.
- b. The tribe that requested consultation failed to provide comments to the lead agency or otherwise failed to engage in the consultation process.
- c. The lead agency provided notice of the project to the tribe in compliance with Public Resources Code §21080.3.1 (d) and the tribe failed to request consultation within 30 days.¹⁸

This process should be documented in the Tribal Cultural Resources section of your environmental document.

Under SB 18:

Government Code §65352.3 (a) (1) requires consultation with Native Americans on general plan proposals for the purposes of “preserving or mitigating impacts to places, features, and objects described §5097.9 and §5091.993 of the Public Resources Code that are located within the city or county’s jurisdiction. Government Code §65560 (a), (b), and (c) provides for consultation with Native American tribes on the open-space element of a county or city general plan for the purposes of protecting places, features, and objects described in Public Resources Code §5097.9 and §5097.993.

- SB 18 applies to **local governments** and requires them to contact, provide notice to, refer plans to, and consult with tribes prior to the adoption or amendment of a general plan or a specific plan, or the designation of open space. Local governments should consult the Governor’s Office of Planning and Research’s “Tribal Consultation Guidelines,” which can be found online at: https://www.opr.ca.gov/docs/09_14_05_Updated_Guidelines_922.pdf
- **Tribal Consultation:** If a local government considers a proposal to adopt or amend a general plan or a specific plan, or to designate open space it is required to contact the appropriate tribes identified by the NAHC by requesting a “Tribal Consultation List.” If a tribe, once contacted, requests consultation the local government must consult with the tribe on the plan proposal. **A tribe has 90 days from the date of receipt of notification to request consultation unless a shorter timeframe has been agreed to by the tribe.**¹⁹
- **There is no Statutory Time Limit on Tribal Consultation under the law.**
- **Confidentiality:** Consistent with the guidelines developed and adopted by the Office of Planning and Research,²⁰ the city or county shall protect the confidentiality of the information concerning the specific identity, location, character, and use of places, features and objects described in Public Resources Code §5097.9 and §5097.993 that are within the city’s or county’s jurisdiction.²¹
- **Conclusion Tribal Consultation:** Consultation should be concluded at the point in which:
 - The parties to the consultation come to a mutual agreement concerning the appropriate measures for preservation or mitigation; or
 - Either the local government or the tribe, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached concerning the appropriate measures of preservation or mitigation.²²

NAHC Recommendations for Cultural Resources Assessments:

- Contact the NAHC for:

¹⁴ Pub. Resources Code § 21082.3 (b)

¹⁵ Pub. Resources Code § 21080.3.2 (b)

¹⁶ Pub. Resources Code § 21082.3 (a)

¹⁷ Pub. Resources Code § 21082.3 (e)

¹⁸ Pub. Resources Code § 21082.3 (d)

¹⁹ (Gov. Code § 65352.3 (a)(2)).

²⁰ pursuant to Gov. Code section 65040.2,

²¹ (Gov. Code § 65352.3 (b)).

²² (Tribal Consultation Guidelines, Governor’s Office of Planning and Research (2005) at p. 18).

- A Sacred Lands File search. Remember that tribes do not always record their sacred sites in the Sacred Lands File, nor are they required to do so. A Sacred Lands File search is not a substitute for consultation with tribes that are traditionally and culturally affiliated with the geographic area of the project's APE.
- A Native American Tribal Contact List of appropriate tribes for consultation concerning the project site and to assist in planning for avoidance, preservation in place, or, failing both, mitigation measures.
 - The request form can be found at <http://nahc.ca.gov/resources/forms/>.
- Contact the appropriate regional California Historical Research Information System (CHRIS) Center (http://ohp.parks.ca.gov/?page_id=1068) for an archaeological records search. The records search will determine:
 - If part or the entire APE has been previously surveyed for cultural resources.
 - If any known cultural resources have been already been recorded on or adjacent to the APE.
 - If the probability is low, moderate, or high that cultural resources are located in the APE.
 - If a survey is required to determine whether previously unrecorded cultural resources are present.
- If an archaeological inventory survey is required, the final stage is the preparation of a professional report detailing the findings and recommendations of the records search and field survey.
 - The final report containing site forms, site significance, and mitigation measures should be submitted immediately to the planning department. All information regarding site locations, Native American human remains, and associated funerary objects should be in a separate confidential addendum and not be made available for public disclosure.
 - The final written report should be submitted within 3 months after work has been completed to the appropriate regional CHRIS center.

Examples of Mitigation Measures That May Be Considered to Avoid or Minimize Significant Adverse Impacts to Tribal Cultural Resources:

- Avoidance and preservation of the resources in place, including, but not limited to:
 - Planning and construction to avoid the resources and protect the cultural and natural context.
 - Planning greenspace, parks, or other open space, to incorporate the resources with culturally appropriate protection and management criteria.
- Treating the resource with culturally appropriate dignity, taking into account the tribal cultural values and meaning of the resource, including, but not limited to, the following:
 - Protecting the cultural character and integrity of the resource.
 - Protecting the traditional use of the resource.
 - Protecting the confidentiality of the resource.
- Permanent conservation easements or other interests in real property, with culturally appropriate management criteria for the purposes of preserving or utilizing the resources or places.
- Please note that a federally recognized California Native American tribe or a non-federally recognized California Native American tribe that is on the contact list maintained by the NAHC to protect a California prehistoric, archaeological, cultural, spiritual, or ceremonial place may acquire and hold conservation easements if the conservation easement is voluntarily conveyed.²³
- Please note that it is the policy of the state that Native American remains and associated grave artifacts shall be repatriated.²⁴

The lack of surface evidence of archaeological resources (including tribal cultural resources) does not preclude their subsurface existence.

- Lead agencies should include in their mitigation and monitoring reporting program plan provisions for the identification and evaluation of inadvertently discovered archaeological resources.²⁵ In areas of identified archaeological sensitivity, a certified archaeologist and a culturally affiliated Native American with knowledge of cultural resources should monitor all ground-disturbing activities.
- Lead agencies should include in their mitigation and monitoring reporting program plans provisions for the disposition of recovered cultural items that are not burial associated in consultation with culturally affiliated Native Americans.
- Lead agencies should include in their mitigation and monitoring reporting program plans provisions for the treatment and disposition of inadvertently discovered Native American human remains. Health and Safety Code section 7050.5, Public Resources Code §5097.98, and Cal. Code Regs., tit. 14, §15064.5, subdivisions (d) and (e) (CEQA Guidelines §15064.5, subds. (d) and (e)) address the processes to be followed in the event of an inadvertent discovery of any Native American human remains and associated grave goods in a location other than a dedicated cemetery.

²³ (Civ. Code § 815.3 (c)).

²⁴ (Pub. Resources Code § 5097.991).

²⁵ per Cal. Code Regs., tit. 14, section 15064.5(f) (CEQA Guidelines section 15064.5(f)).