From: Ryan Lewelling
To: Mark Roberts
Subject: RE: Notice of Intent (NOI) - Danco Subdivision Project located at 2890 Old Highway 53
Date: Wednesday, November 29, 2023 10:14:52 AM
Attachments: image001.png
image002.png
image003.png

Mark,

The Assessor's Office has no additional comments than those provided on January 4, 2023.

Ryan Lewelling
Cadastral Mapping Specialist
Assessor-Recorder, County of Lake

From: Mark Roberts <mroberts@clearlake.ca.us>
Sent: Wednesday, November 1, 2023 10:11 AM
Subject: Notice of Intent (NOI) - Danco Subdivision Project located at 2890 Old Highway 53
Importance: High

Hello Fellow Agency,

Notice is hereby given that the City of Clearlake has tentatively determined that the project described below will not result in a significant adverse impact on the environment with the incorporated Mitigation Measures/Conditions of Approval and that, in accordance with the California Environmental Quality Act, the City is prepared to issue a "mitigated negative declaration" in accordance with the California Environmental Quality Act (CEQA). **Due to the size of the file, please utilize the links below to access/download the environmental documents for review/comment.**
The State Clearing House Document Number is 2023110007 (https://ceqasubmit.opr.ca.gov/Document/Index/291022/1). We look forward to receiving your comments.

Project Title: Danco Subdivision Development Project

Project Location: 2890 Old Highway 53; Clearlake, CA 95422. **Assessor Parcel Number (APN):** 010-048-08

Summary: The project consists of subdividing a 30-arce parcel into twenty-two (22) individual residential lots. The parcels would range in size from 1.25 to 2.75 acres in size. Access to the

proposed lots will be located off Old Highway 53 via two proposed roadways, indicated as Road A and B on the tentative map (formal road names are to be determined). The northern proposed roadway will be greater than 800 feet in length and the southern proposed roadway is approximately 686 feet in length. The width of each roadway will be a minimum of 50 feet and have a turnaround/cul-da-sac. Utilities: Each lot will be provided with power through Pacific Gas and Electric (PG&E); Highlands Water Company will provide water to each lot & each new lot will have its own Onsite Waste Management System (septic).

This tentative determination is based on an environmental study that assesses the project's potential environmental impacts and those potential impacts have been reduced to less than significant levels with the incorporated mitigation measures. Anyone can review this study at Clearlake City Hall, 14050 Olympic Drive, Clearlake, CA 95901, during normal business hours (recommend you make an appointment with the planner) or by downloading the documentation from the State Clearinghouse Website at: https://ceqanet.opr.ca.gov/ or from the City of Clearlake Website at: https://www.clearlake.ca.us/404/Public-Review-Documents

Final environmental determinations are made by the decision-making body, which, in this case would be the City of Clearlake, Planning Commission. The public review period for this notice will remain open for a period of at least 30 days from the publication of this **Notice of Intent on Saturday, November 4th, 2023, until Tuesday, December 5th, 2023.** For more information, please call (707) 994-8201 during normal business hours of City Hall (Monday through Thursday – 8am to 5pm).

During this period written comments on the project and the proposed mitigated negative declaration may be addressed. You may also submit comments via email at mroberts@clearlake.ca.us. **(All comments must be received no later than Tuesday, December 5th, 2023).**

Sincerely,

Mark Roberts

Mark Roberts
Senior Planner
mroberts@clearlake.ca.us
Phone: (707) 994-8201
Website: https://www.clearlake.ca.us/

City of Clearlake • 14050 Olympic Drvie, Clearlake CA 95422

Proposed Old Highway 53 subdivision development

Submitted by David Goolsbee, 15618 Brunetto Ln., Clearlake

Following are concerns that I believe need to be addressed when considering approval of this project.

Old 53: The bridge on old 53 at the north end of this site over the wet weather stream is already inadequate, has been the site of a number of accidents, and will need to be upgraded to handle the higher traffic created by this subdivision. The bridge need to be upgraded regardless. The site plan indicates that on street parking, curb and gutter and sidewalks will be added. This suggests that the power lines will need to be moved and/or placed underground. This stretch of road has become a place for cars and motorcycles to exceed safe speeds, noise, and reckless driving. (squealing tires, donuts, etc.) The road may not be adequate to handle the increased traffic as a primary access into Burns Valley. Measures need to be considered to discourage unsafe driving.

Site drainage: Roughly 4 acres of impermeable surface will be created if this property is fully developed. This will create faster runoff into the wet weather stream and ultimately increased potential for flooding in Burns Valley Creek and even in the tributary stream on this property unless mitigated with dry wells, swales, catchment ponds, or other technique to encourage this surface water to soak into the aquifer rather than runoff into the the stream.

Solar and energy efficiency:The site plan does not consider solar access unless most of the trees on the south end are removed. The layout should be reconsidered to account for this. In addition, passive and/ or active solar along with photovoltaics should be required. There is also the potential to create a micro grid that potentially could be coupled with the other solar systems in the neighborhood. Zero energy and energy efficient building systems should be encouraged.

Septic systems, package treatment: It may be more economical to install a small package treatment plant rather than 20+ septic systems. It may be prohibitive to install septic systems adjacent to the stream, particularly in those parcels on the northwest end of the property. Gray water potential should be encouraged.

Development assurances: Will there be any assurances that the developer will complete this project to some minimum level regarding the # of homes and infrastructure? It is questionable whether this project will attract the high end clientele proposed due to the proximity to highway noise and the egg ranch and other commercial/industrial and cannabis grow zoning close by.

Wet weather stream protection: Consider creating a green belt owned by an HOA jointly and thus allowing smaller lot sizes. The shared ownership could then be used to meet the 1 1/4 acre min. for this zone. No trees cut within 50 ft. each side of creek to avoid erosion and alteration of the stream bed as indicated in the BRA.

Tree protection: Given that Lake County has lost an incredible number of trees over the past decade or so due to fires, drought, insect/blight, and development, we should actively protect every live healthy tree possible along with planting to offset the carbon sequestration loss. And when removal is absolutely necessary, at least 10 new trees should be planted along with a minimum number required for landscaping. Three trees is not adequate to account for the time to reach maturity and the survival rate.

Night sky protection: Our neighborhood is a great place to observe the stars and we want to be assured that this development will not disrupt that community asset, even more than the Night Sky County Ordinance.

VIA E-MAIL AND U.S. MAIL

Mark Roberts, City Planner
City of Clearlake
14050 Olympic Drive
Clearlake, CA 95422
E-Mail: mroberts@clearlake.ca.us

December 5, 2023

Re: Danco Subdivision Project - State Clearing House No. 2023110007
(HP-20221227-01)

Dear Mr. Roberts:

The Koi Nation of Northern California ("Koi Nation") thanks the City of Clearlake ("City") for the opportunity to provide comments on the City's Notice of Intent ("NOI") to Adopt a Mitigated Negative Declaration ("MND") for the proposed Danco Subdivision Development Project ("Project"). The Project is within the aboriginal territory of the Koi Nation, and the Koi Nation has a cultural interest and authority in the proposed Project area. The City's Environmental Guidelines also acknowledge the Koi Nation's affiliation with the land now within the City. Similarly, the Koi Nation and the City entered into a Memorandum of Agreement in 2014 acknowledging, in part, "the City of Clearlake ("City") recognizes that the lands in and around the City are culturally significant to the [Koi Nation]." Thus, the City has repeatedly acknowledged the Koi Nation's ancestral ties to the subject lands.

The Koi Nation offers these comments for the City's consideration, and encourages the City to proceed with a more rigorous environmental review process than it has conducted to date rather than adopt the current draft MND. As explained in this letter, the proposed MND is inadequate and does not adequately consider and mitigate the adverse impacts of the Project on the environment. Substantial evidence referenced in this letter and provided to the City by tribal cultural resources expert Robert Geary, the Koi Nation's Tribal Historic Preservation Officer ("THPO"), during consultation between the City and Koi Nation demonstrates that a fair argument exists that the Project will have substantial impacts on the environment by impacting tribal cultural resources, and the mitigation measures proposed in the draft MND fail to mitigate these impacts. Therefore, the City should prepare an Environmental Impact Report (EIR) including a meaningful consideration of project alternatives and adoption of feasible mitigation measures to reduce the impacts of the Project on the environment. (*See Protect Niles v. City of Freemont* (2016) Cal.App.5th 1129 [holding that an EIR is required rather than a MND when substantial evidence supports a fair argument that there will be adverse environmental impacts from a project.].) At a minimum, the City must conduct further environmental analysis and continue tribal consultation

to develop a revised MND with additional analysis and significantly more robust mitigation measures to avoid, preserve in place, or mitigate impacts to tribal cultural resources.

APPLICABLE CEQA STANDARDS

Under the California Environmental Quality Act ("CEQA"), all lead agencies must prepare an EIR for projects "which may have a significant effect on the environment." (Pub. Resources Code § 21151(a).) In *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 392, the California Supreme Court explained the role an EIR plays in the CEQA process, and instructed that: "The [EIR] is the primary means of achieving the Legislature's considered declaration that it is the policy of this state to 'take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.' [Citation.] The EIR is therefore the 'heart of CEQA.' [Citation.]" (*See also Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 944 ["At the 'heart of CEQA' [citation] is the requirement that public agencies prepare an EIR for any 'project' that 'may have a significant effect on the environment.' [Citation.]"].) "When the informational requirements of CEQA are not complied with, an agency has failed to proceed in 'a manner required by law' and has therefore abused its discretion." (*Save our Peninsula Committee v. Monterey County Board of Supervisor* (2001) 87 Cal.App.4th 99, 118.)

CEQA "creates a low threshold requirement for preparation of an EIR and reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted." (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1316-1317.) Accordingly, "'if a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect.'" (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1111.) "The fair argument standard thus creates a low threshold for requiring an EIR, reflecting the legislative preference for resolving doubts in favor of environmental review. [Citations.]" (*Covina Residents for Responsible Development v. City of Covina* (2018) 21 Cal.App.5th 712, 723.) To the extent that there is a conflict in the evidence or a conflict amongst expert opinions, the City should not "weigh" the conflicting evidence to determine whether an EIR should be prepared. It should simply prepare an EIR. It is the function of an EIR, not an MND, to resolve conflicting claims as to the environmental effects of a project, and the City is not permitted to choose among differing expert analysis and opinion if it decides to proceed with an MND rather than an EIR. (*See Citizens for Responsible & Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1340.)

THE MND FAILS TO FULLY ANALYZE TRIBAL CULTURAL RESOURCES

Based on the proposed MND, it is apparent that the information developed by and relied upon by the City for purposes of analyzing tribal cultural resources does not satisfy the distinct and separate requirements applicable to tribal cultural resource analysis under CEQA. Archaeological information may inform a tribal cultural resources assessment, but it is no substitute for the expert input from the California Native American Tribal government which is traditionally and culturally affiliated with the area, in this case the Koi Nation.

The City's obligation to consider tribal expertise is specifically acknowledged by the Public Resources Code. According to Public Resources Code section 21080.3.1(a), "[t]he Legislature finds and declares that California Native American tribes traditionally and culturally affiliated with a geographic area may have expertise concerning their tribal cultural resources." The Legislature adopted this section as part of AB 52 in which it acknowledged: "tribal knowledge about the land and tribal cultural resources at issue should be included in environmental assessments for projects that may have a significant impact on those resources" and "a substantial adverse change to a tribal cultural resource has a significant effect on the environment." (AB 52, § 1(b)(4), (9) & 14).)

According to the Governor's Office of Planning and Research's Technical Advisory for AB 52 (2014 Stats, ch. 532), examples of types of substantial evidence of tribal cultural resources include:

> elder testimony, oral history, tribal government archival information, testimony of a qualified archaeologist certified by the relevant tribe, testimony of an expert certified by a tribal government, official tribal government declarations or resolutions, formal statements from a certified Tribal Historic Preservation Officer, or historical/anthropological records.

(Governor's Office of Planning and Research, Technical Advisory, AB 52 and Tribal Cultural Resources, AB 52, at 5, a copy of which is attached hereto at Exhibit A ("Technical Advisory").) The Technical Advisory also cites the federal Native American Grave Protection and Repatriation Act which recognizes relevant evidence including "geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion. (*Id*. at 5-6, citing 43 C.F.R. § 10.14(d).) Similarly, federal courts have referenced meeting minutes, anthropological reports, and tribal elder or tribal declarations as relevant evidence. (*See Pueblo of Sandia v. United States* (10th Cir. 1995) 50 F.3d 856.) Thus, traditionally and culturally associated tribes can submit expert information regarding the identity of and impact on tribal cultural resources through a wide range of sources for purposes of supporting the need for an EIR.

The Koi Nation has presented such information to the City, but it appears that the City relied solely on its archaeologist, Dr. Greg White, in determining the presence of tribal cultural resources, the extent of boundaries of tribal cultural resources and impacts thereto. However, Dr. White has previously admitted that he is not the expert when it comes to determining tribal cultural resource impacts. As Dr. White publicly acknowledged during his testimony at the City Council's June 7, 2023, special meeting on a related project:

> As an archeologist I am not in a position to change CEQA or its effect on my conclusions but I also don't speak to the issue of tribal cultural resources which is the province of the Tribe under AB 52. And so I wanted to make that distinction …that I as an archeologist I speak to the archeological issues and as THPO Robert [Geary] speaks to the Tribal issues…AB 52 gives the Tribe agency in defining the nature of tribal cultural resources and I am not in a position to define what those tribal cultural resources are …

Thus, Dr. White, the archaeologist the City relied upon in its MND, admits that tribal experts, like Koi Nation THPO Geary, have the necessary expertise to identify tribal cultural resources and

culturally appropriate mitigation measures for tribal cultural resources. Dr. White acknowledged THPO Geary as an expert in tribal cultural resources. Mr. Geary's professional qualifications are attached to his letter at Exhibit B for your reference.

Tribal expertise presented to the City by Mr. Geary and others confirms the area within and defined by the proposed subdivision both contains distinct tribal cultural resources and is a geographically defined tribal cultural landscape of which those tribal cultural resources are a contributing feature. Through AB 52, the Legislature expressly defined tribal cultural resources and a tribal cultural landscape. As defined in Public Resources Code section 21074:

> (a) "Tribal cultural resources" are either of the following:
>
> (1) Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either of the following: (A) Included or determined to be eligible for inclusion in the California Register of Historical Resources. (B) Included in a local register of historical resources as defined in subdivision (k) of Section 5020.1.
>
> (2) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1. In applying the criteria set forth in subdivision (c) of Section 5024.1 for the purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.
>
> (b) A cultural landscape that meets the criteria of subdivision (a) is a tribal cultural resource to the extent that the landscape is geographically defined in terms of the size and scope of the landscape.

Public Resources Code section 5024.1(c), as referenced by Section 21074, lists four distinct alternative criteria for listing historical resources as follows:

> (1) Is associated with events that have made a significant contribution to the broad patterns of California's history and cultural heritage.
>
> (2) Is associated with the lives of persons important in our past.
>
> (3) Embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of an important creative individual, or possesses high artistic values.
>
> (4) Has yielded, or may be likely to yield, information important in prehistory or history.

Tribal cultural resources and the type of tribal cultural resources called a tribal cultural landscape can include Native American human remains, grave associated artifacts, traditional cultural resources, cultural sites, village campsites, gathering areas for food, fiber, and materials to make regalia, baskets, ceremonial items, and other tribal cultural resources, tool manufacturing areas, burial grounds, and religious or spiritual sites. It is also noteworthy that a tribal cultural landscape

is not identical to archaeological resources or boundaries. Unfortunately, the City through its draft MND, failed to take into account the tribal knowledge and expertise that were provided to it during the consultation process in its determination of the extent of the tribal cultural resources and boundaries present on the Project site.

The Koi Nation's concerns with Dr. White's analysis and its identification of applicable tribal cultural resources and a tribal cultural landscape were explained in detail in Mr. Geary's June 27, 2023, letter to City Planner Mark Roberts. The Koi Nation's letter is incorporated herein by reference, and is part of the administrative record for this Project, but is not attached due to the confidential nature of material it contains within the letter itself and within the letter's attachments. The City should have the original letter within its files, and the Koi Nation can provide an additional confidential copy to the City Council and key staff working on this Project upon request. In summary, the Koi Nation explained to the City that:

1. The findings from two prior surveys dated February 4, 1992, and September 17, 1999, survey report # S-013515 and S-023490, by Jay Flaherty of Archaeological Services, Inc., must be more fully addressed.

2. The discovery of site BVS-CR-02 meets the criteria to be registered as a significant site on the California Register of Historical Resources, and its discovery evidences the likelihood that more tribal cultural resources will be discovered during ground disturbing activities. The MND fails as an informational CEQA document because it must note the significance of site BVS-CR-02 and examine and address the likelihood of additional impacts on tribal cultural resources during construction.

3. Substantial evidence submitted to the City during consultation shows that tribal cultural resources are not limited only to the areas on and immediately adjacent to BVS-CR-02, and that additional tribal cultural resources locations were found outside of the limited designation of the initial site's boundaries. Such information further indicates additional tribal cultural resources will likely be discovered with any ground disturbing activities throughout the Project site. The MND must examine and address this likelihood.

4. The redesign of the Project for protection and preservation of tribal cultural resources and additional mitigation measures that was agreed on in principle by the Koi Nation and Project developer Danco is evidence that Tribes, project applicants, and lead agencies can work together to complete a project and still protect tribal cultural resources when willing. The City should support this plan and incorporate the agreed upon applicable measures in the Project's environmental document. That plan fully addresses the Koi Nation's concerns. Adoption of that plan by the City Council would allow the Project to move forward without further delay.

5. Tribal cultural knowledge and expertise were shared in government-to-government consultation with the City on April 6, 2023. The tribal consultation notes must be incorporated into the Project record, and the issues raised by the Koi

Nation addressed during that consultation must be shared with the City Council and incorporated into the Project's governing environmental documents.

6. The Koi Nation submitted substantial evidence of a tribal cultural landscape, acorn tracts, Tribal history, traditional and on-going land use of the Project area as part of cultural practices, and the Project's presence within lineal Koi Nation lands including information within the Gifford 1923 archaeological report that explains the tribal cultural landscape acorn tracts and a map provided by the Koi Nation. This information must be incorporated into the Project record, and the issues raised by the Koi Nation addressed and incorporated into the Project's governing environmental documents.

7. An analysis of the importance of protection and preservation to the Koi Nation is missing. AB 52 requires that the City consider the significance of the tribal cultural resources to the Tribe. This is a statutory requirement. The City cannot skip it.

8. It is important to have a reburial area identified in advance of Project construction that will not entail future disturbances in that location, but the MND fails to include necessary protections for the reburial area including a cultural easement, and detailed capping instructions. Mr. Geary can provide examples of these requirements to the City upon request. The proposed tribal cultural resources treatment plan provided by the Koi Nation to the City includes important tribal cultural resources protection measures. It is incorporated herein by reference because it contains sensitive information. An additional copy can be provided to the City upon request.

9. The City must agree not to remove cultural soils from the Project site and then redeposit such culturally sensitive soils on another location since redepositing cultural soils from one project to another creates a legacy issue which is culturally harmful to the Koi Nation, creates an ongoing cumulative impact to tribal cultural resources and significant cultural harm, and which will be very expensive for the City to address. The less harmful and less expensive approach is for the City to agree not to remove cultural soils from any project site and to keep them on site.

The draft MND does not address these concerns about impacts to tribal cultural resources. These concerns were previously shared with the City during consultation. It is imperative that the City prepare a supplemental archaeological study for the entire Project site to address the sensitivity of the area for tribal cultural resources and the presence of culturally sensitive materials that may be impacted by construction of the Project. The supplemental study must also address eligibility for the California Historic Register under each specific criteria of Public Resources Code section 5024.1 since such analysis is entirely lacking from Dr. White's report. The supplement must also acknowledge tribal cultural landscape boundaries based upon tribal expertise and not simply archaeological based criteria. The supplemental report should be conducted with Mr. Geary and include his expertise. The Koi Nation recommends the City retain archeologists Sitha Redy or Lisa Westwood to complete the supplemental report.

The failure to analyze the Project's impacts on tribal cultural resources and the tribal cultural landscape violates CEQA's mandate to analyze all the Project's impacts. (See CEQA Guidelines §§ 15064(d), 15065(a); Pub. Resources Code § 21065; *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109.) Without a doubt, the Koi Nation has raised a fair argument that the Project site constitutes a tribal cultural resources landscape and contains specific tribal cultural resources that will be impacted by the Project. Such a fair argument necessitates preparation of an EIR or at a minimum, it necessitates substantial revisions to and supplemental studies in support of the draft MND. (*See Berkeley Hillside Preservation v. City of Berkeley*, *supra*, 60 Cal.4th at 1111.)

THE MND FAILS TO ANALYZE AND PROVIDE APPROPRIATE MITIGATION MEASURES

While identification of tribal cultural resources and establishing appropriate tribal landscape boundaries are crucial issues, a concurrent vital concern is analyzing and establishing culturally appropriate feasible mitigation measures to address the impacts to tribal cultural resources. According to Public Resources Code section 21082.3(b),

> 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:
>
> (1) Whether the proposed project has a significant impact on an identified tribal cultural resource.
>
> (2) Whether feasible alternatives or mitigation measures, including those measures that may be agreed to pursuant to subdivision (a), avoid or substantially lessen the impact on the identified tribal cultural resource.

Unfortunately, upon review, the proposed Project's mitigation measures do not fully address the concerns of the Koi Nation regarding adequate identification, avoidance, preservation in place and mitigation of impacts to tribal cultural resources. Because of terrible and traumatic past experiences with projects undertaken by the City, the Koi Nation now has to forcefully advocate for having tribal cultural resources treatment protocols and a tribal monitoring agreement in place for projects on sensitive sites such as this one, to avoid a repeat of the prior actions which caused, and continue to cause, significant negative impacts to tribal cultural resources and significant cultural harm and trauma to the members of the Koi Nation. Thus, the City needs to continue the AB 52 consultation process and include the Koi Nation's recommendations to fully address tribal cultural resources including: (1) inclusion of a Koi Nation Tribal Monitor for all ground disturbance activities based upon a signed monitoring agreement; and (2) incorporation of the Tribe's Treatment Protocols into Project Mitigation Measures.

Tribal monitoring as a mitigation measure is important since the construction personnel are not trained in how to identify or handle tribal cultural resources uncovered during ground disturbing activities. These construction workers are skilled at, and must focus upon, safely operating equipment and completing excavation based upon the necessary Project specifications. The Koi Nation does advocate for and appreciates provisions providing for on-site cultural sensitivity training of such workers as a necessary and appropriate part of the monitoring process. However,

such training is only for an hour, and is a part of the entire process. The brief hour long cultural sensitivity training on-site typically offered can only impart basic information regarding cultural sensitivity so that workers in this tribal cultural resources landscape will be respectful. The tribal monitors provided by the Koi Nation undergo extensive training in both identifying and handling of tribal cultural resources. The two roles are distinct, require different expertise, and are not interchangeable. Given the tribal cultural resources discovered during ground disturbing activities at the identified site within the Project, it is highly likely that additional tribal cultural resources will be discovered elsewhere on the site once locations not yet fully analyzed are disturbed. It is crucial to have fully trained tribal monitoring personnel on-site to identify and determine the proper handling of such items. Further, the cost of such monitoring to the City should be nominal since the developer had indicated it will cover such costs and in any event the Koi Nation has agreed to provide such monitoring at a discounted rate without administrative management fees based upon the importance to the Koi Nation of protecting its tribal cultural resources and in consideration of this Project's goal to provide more affordable housing to the community.

Any ground disturbing activity on site must also be subject to an executed tribal cultural resources protocol governing the handling of any tribal cultural resources. The Koi Nation has presented proposed protocol provisions to the City, and can provide other examples if needed during renewed consultation. For example, the treatment protocol would require that the City not remove cultural soils from the Project site, which is a standard practice throughout the state but which the City ignores in the proposed draft MND measures. It will also provide specificity as to reburial procedures and appropriate specified locations which are measures that the draft MND lacks. It will also specifically provide for the Koi Nation's involvement in decisions related to handling of its tribal cultural resources given that the Project site is within the cultural territory of the Koi Nation. It is imperative that such measures be addressed and agreed upon in advance given the likelihood of further tribal cultural resources once ground disturbing activities commence. Given the likelihood of discovery, these are not measures that can simply be deferred to another day under CEQA.

Any development in culturally sensitive areas, such as the Project site, must be done in a way that is respectful of tribal cultural resources and seeks to avoid, protect, preserve in place, or mitigate impacts to those resources as required by CEQA and AB 52. The Koi Nation is willing to consult and collaborate with the City to implement these legal requirements. The tribal cultural heritage of Lake County is rich and diverse. Impacting and damaging these important tribal cultural resources impacts the Koi Nation's cultural practices and its religious practices, and causing great and ongoing trauma, as well as the cultural, archaeological, and historic heritage of the Koi Nation and California. Such impacts and damages can and must be avoided and mitigated beyond the cursory treatment provided by the pending draft MND.

THE MND MUST ALSO ANALYZE CUMULATIVE IMPACTS ON TRIBAL CULTURAL RESOURCES

In enacting AB 52, the Legislature acknowledged that "a substantial adverse change to a tribal cultural resource has a significant effect on the environment," and consequently it sought to "[r]ecognize the unique history of California Native American tribes and uphold existing rights of all California Native American tribes to participate in, and contribute their knowledge to, the environmental review process pursuant to [CEQA]." (AB 52, § 1(b).) The substantial change to

tribal cultural resources and need for tribal participation in the environmental review process for projects involving artifacts, remains and ancestral lands is significant as to one project and this significance is amplified when numerous projects within the relatively small municipal boundaries of the City involve the same or similar tribal cultural resources impacts. As courts recognize, "[c]umulative impact analysis is necessary because the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact." (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 114, disapproved on other grounds.) Impacts are cumulatively considerable if the effects of a project are significant when viewed in connection with the effect of past projects, other current projects and probable future projects. (Pub. Resources Code § 21083(b).) An EIR is required if a Project will involve cumulatively significant impacts.

The City is located within the aboriginal territory of the Koi Nation, and it contains numerous documented and undocumented sites used and inhabited by Ancestors of Tribal members. Some of these sites are the oldest in California. Lake County in general, and the City of Clearlake area in particular, are incredibly archaeologically, historically, culturally, and tribal culturally significant. Many of these sites have been, are currently, or will be subject to City projects including the present Project. These projects have resulted in, and will likely continue to result in, the discovery of Native American human remains and a significant number of artifacts associated with the Tribe such as occurred at the recent Austin Park Splash Pad project and will occur at the Burns Valley Sports Complex and 18th Avenue Extension and Airport Hotel Projects. The City's pattern and practice of engaging in development projects without meaningful good faith tribal consultation, without adequate identification and analysis of tribal cultural resources, without acknowledgment and analysis of tribal expertise and without adoption of adequate mitigation measures is creating a cumulative impact to tribal cultural resources which violates CEQA, and which is unethical and disrespectful to the Ancestors of people who are part of the Clearlake community. Thus, the City must fully examine such cumulatively considerable cultural impacts within the context of an EIR for this Project including, but not limited to, impacts resulting from the Mullin Storm Drain Project involving the discovery and inappropriate relocation of Native American Human Remains, the 18th Avenue Extension and Airport Hotel Project involving potential impacts to tribal cultural resources, the Burns Valley Sports Complex Project involving unmitigated impacts to known Ancestral village sites, and the Austin Park Splash Pad and Skate Park Projects. The Austin Park Splash Pad Project involved the discovery of multiple tribal cultural resources during the first few days of construction, even though the City's archeologist, Dr. White, said that there would be no impacts to tribal cultural resources. The draft MND does not address any of these other projects when discussing cumulative impacts, and merely includes a brief summary conclusion that any such impacts of the subject project will not be significant. This fails to provide the meaningful analysis of cumulative impacts required by CEQA.

THE CITY MUST ENGAGE IN CONTINUED CONSULTATION WITH THE KOI NATION

In enacting AB 52, the Legislature acknowledged the importance of on-going consultation between a lead agency and impacted Tribe regarding the identification and preservation of tribal cultural

resources. CEQA and AB 52 require tribal consultation to identify tribal cultural resources, inform the choice of environmental document, and help develop culturally appropriate mitigation measures. (Pub. Resources Code § 21080.3.1(b).) For purposes of defining the required consultation, section 21080.3.1(b) references Government Code section 65352.4 which explains:

> "[C]onsultation" 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.

The leading statewide guidance on AB 52 instructs, "consultation can continue throughout the CEQA process." (*See* Technical Advisory, at 6, fn. 6.) The City appears to acknowledge the importance of consultation by citing to its Tribal Consultation Interim Standard Operating Procedures Manual within the MND. These, however, are interim guidelines, and the final status of such guidelines is unknown. The Koi Nation has continually expressed its willingness to work with the City to finalize these guidelines, but the City has failed to respond.

The Koi Nation acknowledges and appreciates the City's initial consultation efforts for the Project. Unfortunately, the City prematurely declared the consultation complete without adequately considering the Koi Nation's expertise and without working in good faith with the Koi Nation to develop appropriate mitigation measures. As noted, the Legislature intended consultation to be a process of seeking, discussing, and considering carefully the views of others, and such consultation should continue throughout the CEQA process. As also noted, much work remains to be done by the City in supplementing its analysis, defining appropriate tribal cultural landscape boundaries based upon tribal expertise and in developing appropriate mitigation measures. Continued good faith consultation with the Koi Nation which holds ancestral ties to the Project site and holds acknowledged expertise as to impacted tribal cultural resources and the surrounding tribal cultural landscape is key to a successful CEQA process. Thus, it is imperative that the City rescind its premature notice of cessation of consultation.

CONCLUSION

Although the present draft MND is woefully inadequate, the City can avoid the mistake that other public entities have made by taking these public comments from the Koi Nation seriously, reaching out to tribal governments, including the Koi Nation, again for information, and properly analyzing the cultural and archaeological sites as tribal cultural resources and developing necessary and feasible mitigation measure to address Project impacts to tribal cultural resources and the tribal cultural landscape. Such analysis must be based upon and consider tribal expertise and not simply rely upon an archaeological assessment. Fully utilizing the government-to-government consultation process with the Koi Nation which is traditionally and culturally affiliated with the area will be an important step in allowing the City to obtain relevant information about the impacts of the Project on tribal cultural resources and allow the City to determine culturally appropriate mitigation measures for those impacts. The proposed draft MND is inappropriate without further

analysis. (*See Save the Agoura Cornell Knoll v. City of Agoura Hills* (2020) 46 Cal.App.5th 665 ("*Agoura Hills*").

In *Agoura Hills*, the City of Agoura Hills failed to identify and analyze a prehistoric archaeological site as a tribal cultural resource, despite being notified by public comments that fairly apprised the Agoura Hills of the concern that it had failed to adequately address project alternatives or mitigation measures that could preserve tribal cultural resources. As a result, the City was sued, and it lost. After considerable expense and delay of the project, the City was required by the Court of Appeal to prepare an EIR. The City can and must avoid a similar outcome.

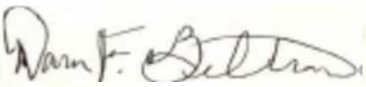
The Koi Nation looks forward to consulting and working with the City to address the draft MND's serious deficiencies as noted in this letter, in order to help make sure the Project is protective of the Koi Nation, its Ancestors and its tribal cultural resources and tribal cultural landscape. Please contact the Koi Nation's Tribal Historic Preservation Officer for further information or if you have questions:

Robert Geary, Tribal Historic Preservation Officer
Office: (707) 900-6931
Email: Rgeary@hpultribe-msn.gov.

Please refer to HP-20221227-01 in any correspondence concerning this Project. Please also provide Mr. Geary with notice of the circulation of any supplemental, revised or amended MND or EIR, and notice of any Planning Commission or City Council meetings or workshops concerning the Project and its environmental documents. Finally, please include this letter including its attachments and incorporated documents within the record for this Project.

Thank you for your consideration of these matters.

Respectfully,



Chairman Darin Beltran
Koi Nation of Northern California

Attachments

cc: Koi Nation Tribal Council
Robert Geary, Koi Nation THPO
Holly Roberson, Tribal Cultural Resources Counsel
City of Clearlake City Council (c/o Melisa Swanson, City Clerk)
City of Clearlake City Manager

EXHIBIT A

TECHNICAL ADVISORY

AB 52 AND TRIBAL CULTURAL RESOURCES IN CEQA

Table of Contents

I. Purpose

This technical advisory is part of a series of advisories provided by the Governor's Office of Planning and Research (OPR) as a service to professional planners, land use officials and California Environmental Quality Act (CEQA) practitioners. OPR creates and updates technical advisories as needed on current issues in environmental law and land use planning that broadly affect the practice of CEQA and land use planning in California.

The purpose of this technical advisory is to provide guidance to lead agencies regarding recent changes to CEQA requiring consultation with California Native American tribes and consideration of tribal cultural resources. It summarizes the reasons for the legislative changes and explains the substantive and procedural requirements that went into effect on July 1, 2015. Finally, it summarizes relevant case law and provides a list of additional resources related to tribal cultural resources and CEQA.

II. Legislative Intent

The legislature added the new requirements regarding tribal cultural resources in Assembly Bill 52 (Gatto, 2014). By requiring consideration of tribal cultural resources early in the CEQA process, the legislature intended to ensure that local and tribal governments, public agencies, and project proponents would have information available early in the project planning process to identify and address potential adverse impacts to tribal cultural resources. By taking this proactive approach, the legislature also intended to reduce the potential for delay and conflict in the environmental review process. AB 52 § 1 (b)(7).[1]

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[1] Assembly Bill 52 (Gatto, 2014). Section 1 of the bill states the legislature's intent as follows:

"In recognition of California Native American tribal sovereignty and the unique relationship of California local governments and public agencies with California Native American tribal governments, and respecting the interests and roles of project proponents, it is the intent of the Legislature, in enacting this act, to accomplish all of the following: (1) Recognize that California Native American prehistoric, historic, archaeological, cultural, and sacred places are essential elements in tribal cultural traditions, heritages, and identities. (2) Establish a new category of resources in the California Environmental Quality Act called "tribal cultural resources" that considers the tribal cultural values in addition to the scientific and archaeological values when determining impacts and mitigation. (3) Establish examples of mitigation measures for tribal cultural resources that uphold the existing mitigation preference for historical and archaeological resources of preservation in place, if feasible. (4) Recognize that California Native American tribes may have expertise with regard to their tribal history and practices, which concern the tribal cultural resources with which they are traditionally and culturally affiliated. Because the California Environmental Quality Act calls for a sufficient degree of analysis, tribal knowledge about the land and tribal cultural resources at issue should be included in environmental assessments for projects that may have a significant impact on those resources. (5) In recognition of their governmental status, establish a meaningful consultation process between California Native American tribal governments and lead agencies, respecting the interests and roles of all California Native American tribes and project proponents, and the level of required confidentiality concerning tribal cultural resources, at the earliest possible point in the California Environmental Quality Act environmental review process, so that tribal cultural resources can be identified, and culturally appropriate mitigation and mitigation monitoring programs can be considered by the decision making body of the lead agency. (6) Recognize the unique history of California Native American tribes and uphold existing rights of all California Native American tribes to participate in, and contribute their knowledge to, the environmental review process pursuant to the California Environmental Quality Act (Division 13 (commencing with § 21000) of the Public Resources Code). (7) Ensure that local and tribal governments, public agencies, and project proponents have

To accomplish those goals, the legislature added or amended the following sections in the Public Resources Code: 21073, 21074, 21080.3.1, 21080.3.2, 21082.3, 21083.09, 21084.2, and 5097.94. These changes are summarized in Section III.

III. Summary of New Requirements for Consultation and Tribal Cultural Resources

The Public Resources Code now states that "[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." Pub. Res. Code § 21084.2.

To determine whether a project may have such an effect, the Public Resources Code requires a lead agency to consult with any California Native American tribe that requests consultation and is traditionally and culturally affiliated with the geographic area of a proposed project. That consultation must take place prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report for a project. Pub. Res. Code § 21080.3.1.

If a lead agency determines that a project may cause a substantial adverse change to tribal cultural resources, the lead agency must consider measures to mitigate that impact. Pub. Res. Code § 20184.3 (b)(2) provides examples of mitigation measures that lead agencies may consider to avoid or minimize impacts to tribal cultural resources.

Specific provisions of the new law are described in more detail below.

A. Definition of Tribal Cultural Resources

Section 21074 of the Public Resources Code states that "tribal cultural resources" are:

(1) sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a tribe that are listed, or determined to be eligible for listing, in the national or state register of historical resources, or listed in a local register of historic resources; or

(2) resources that the lead agency determines, in its discretion, are tribal cultural resources.[2]

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information available, early in the California Environmental Quality Act environmental review process, for purposes of identifying and addressing potential adverse impacts to tribal cultural resources and to reduce the potential for delay and conflicts in the environmental review process. (8) Enable California Native American tribes to manage and accept conveyances of, and act as caretakers of, tribal cultural resources. (9) Establish that a substantial adverse change to a tribal cultural resource has a significant effect on the environment."

[2] Pub. Res. Code § 21074

(a) "Tribal cultural resources" are either of the following:

Any lead agency determination that a resource should be treated as a tribal cultural resource must be made using the criteria set forth in subdivision (c) of § 5024.1 of the historical register.[3] The agency must also consider the significance of the resource to a California Native America tribe. Pub. Res. Code §§ 5024.1, 21074. California Native American tribes traditionally and culturally affiliated with the geographic area of a project may have expertise concerning their tribal cultural resources. Pub. Res. Code § 21080.3.1. Courts will defer to a lead agency's factual determination that a resource is a tribal cultural resource if that decision is supported by substantial evidence in the record.[4]

Evidence that may support such a finding could include elder testimony, oral history, tribal government archival information, testimony of a qualified archaeologist certified by the relevant tribe, testimony of an expert certified by the tribal government, official tribal government declarations or resolutions, formal statements from a certified Tribal Historic Preservation Officer, or historical/anthropological records.

Federal law also provides examples of potential sources of tribal knowledge. The federal Native American Graves Repatriation Act recognizes the following types of evidence of cultural affiliation: geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other

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(1) Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either of the following:

(A) Included or determined to be eligible for inclusion in the California Register of Historical Resources.

(B) Included in a local register of historical resources as defined in subdivision (k) of §5020.1.

(2) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of §5024.1. In applying the criteria set forth in subdivision (c) of §5024.1 for the purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.

(b) A cultural landscape that meets the criteria of subdivision (a) is a tribal cultural resource to the extent that the landscape is geographically defined in terms of the size and scope of the landscape.

(c) A historical resource described in §21084.1, a unique archaeological resource as defined in subdivision (g) of §21083.2, or a "nonunique archaeological resource" as defined in subdivision (h) of §21083.2 may also be a tribal cultural resource if it conforms with the criteria of subdivision (a).

[3] Pub. Resources Code § 5024.1 (c): A resource may be listed as historical resources in the California Register if it meets any of the following National Register of Historic Places criteria:

(1) Is associated with events that have made a significant contribution to the broad patterns of California's history and cultural heritage.

(2) Is associated with the lives of persons important in our past.

(3) Embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work if an important creative individual or possesses high artistic values.

(4) Has yielded, or may be likely to yield, information important in prehistory or history.

[4] *Berkeley Hillside Preservation v. City of Berkeley*, 60 Cal. 4th 1086, 1117 (2015); *Valley Advocates v. City of Fresno*, 160 Cal.App.4th 1039, 1072 (2008).

relevant information or expert opinion. 43 C.F.R. § 10.14 (d). Similarly, in *Pueblo of Sandia v. United States*, the Tenth Circuit held that meeting minutes, anthropological reports, and tribal elder affidavits were all admissible evidence of a resource's tribal significance. *See Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995).

B. Consultation

Public Resources Code § 21080.3.1(b) states that a "consultation" with a California Native American tribe (as defined in Government Code § 65352.4) means:

[T]he 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.

OPR's SB 18 *Tribal Consultation Guidelines* provide further explanation of what counts as tribal consultation.[5] The guidelines state that consultation "is a process in which both the tribe and local government invest time and effort into seeking a mutually agreeable resolution for the purpose of preserving or mitigating impacts to a cultural place, where feasible." *Tribal Consultation Guidelines*, 15. The guidelines go on to say that:

Effective consultation is an ongoing process, not a single event. The process should focus on identifying issues of concern to tribes pertinent to the cultural place(s) at issue – including cultural values, religious beliefs, traditional practices, and laws protecting California Native American cultural sites – and on defining the full range of acceptable ways in which a local government can accommodate tribal concerns. *Id.* at 16.

The new provisions in the Public Resources Code suggest topics that may be addressed during consultation. If the California Native American tribe requests consultation regarding alternatives to the project, recommended mitigation measures, or significant effects, the consultation must include those topics. Pub. Res. Code § 21080.3.2 (a).

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[5] Since 2004, cities and counties have had to consult with California Native American Tribes before adoption or amendment of a general plan, specific plan or designation of open space. (Gov. Code § 65352.4, "Senate Bill 18" (Burton, Chapter 905, Statutes of 2004).) The Tribal Consultation Guidelines explain those requirements in detail. The new requirements in the Public Resources Code do not change those ongoing responsibilities. In instances in which the requirements of both the Government Code and the Public Resources Code apply to a project, while there may be substantial overlap, the lead agency must ensure that it complies with the requirements of both statutes.

C. Timing in the CEQA Process and Consultation Steps

The new provisions in the Public Resources Code set out specific steps and timelines for the notice and consultation process.

Those steps are summarized below as well as in the graphic entitled "Compliance Timeline and Consultation Process Flowchart" in Section V.

(1) The Native American Heritage Commission will provide each tribe with: (i) a list of all public agencies that may be lead agencies under CEQA within the geographic area with which the tribe is traditionally and culturally affiliated; (ii) the contact information of those public agencies; and (iii) information on how the Tribe may request consultation. This list must be provided on or before July 1, 2016. Pub. Res. Code § 5097.94 (m).

(2) If a tribe wishes to be notified of projects within its geographic area, the tribe must submit a written request to the relevant lead agency. Pub. Res. Code § 21080.3.1 (b). The Native American Heritage Commission website includes a sample template for an AB 52 notice list request letter from a California Native American tribe to a lead agency.

(3) Within 14 days of determining that a private project application is complete, the lead agency must provide written notification to the tribes as described in step 2. The 14-day notification must include a description of the project, its location, and must state that the tribe has 30 days to request consultation. OPR's AB 52 website includes a sample template for an AB 52 notice letter from a lead agency to a California Native American tribe.

(4) If the tribe wishes to engage in consultation on the project, it must respond to the lead agency within 30 days of receipt of the formal notification described in step 3. The tribe's response must designate a lead contact person. If the tribe does not designate a lead contact person, or designates multiple people, the lead agency shall defer to the individual listed on the contact list maintained by the Native American Heritage Commission. The NAHC website includes a sample template for an AB 52 response letter from a California Native American tribe to a lead agency.

(5) The lead agency must begin the consultation process within 30 days of receiving the request for consultation.

(6) Consultation concludes when either: 1) the parties agree to measures to mitigate or avoid significant effects on the tribal cultural resources; or 2) a party, acting in good faith and after reasonable effort, concludes that a mutual agreement cannot be reached. Pub. Res. Code § 21080.3.2 (b)(1) & (2).[6]

[6] Note that the consultation can continue throughout the CEQA process.

D. Confidentiality

Environmental documents must not include information about the location of an archeological site or sacred lands or any other information that is exempt from public disclosure pursuant to the Public Records Act. Cal. Code Regs. § 15120 (d); *see also Clover Valley Foundation v. City of Rocklin*, 197 Cal. App. 4th 200, 220 (2011).[7] Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects are also exempt from disclosure. Pub. Res. Code, §§ 5097.9, 5097.993. Confidential cultural resource inventories or reports generated for environmental documents should be maintained by the lead agency under separate cover and shall not be available to the public. *See Clover Valley Foundation*, 197 Cal. App. 4th at 221 (citing Governor's Office of Planning and Research, Cal. Tribal Consultation Guidelines (Nov. 14, 2005 supp. p. 27)).

The new provisions in the Public Resources Code include additional rules governing confidentiality during tribal consultation. Pub. Res. Code § 21082.3 (c).

First, information submitted by a California Native American tribe during the environmental review process may not be included in the environmental document or disclosed to the public without the prior written consent of the tribe. However, confidential information may be included in a confidential appendix or exchanged confidentially with other public agencies that have jurisdiction over the environmental review documents. Pub. Res. Code § 21082.3 (c)(1). This confidentiality protection extends to a tribe's comment letter on an environmental document. A lead agency can write general summaries of tribal comment letters without violating this confidentiality mandate. *See Clover Valley Foundation*, 197 Cal. App. 4th at 222.

Second, the lead agency and the tribe may agree to share confidential information regarding tribal cultural resources with the project applicant and its agents. If this occurs, the project applicant becomes responsible for keeping the information confidential (unless the tribe consents to disclosure in writing in order to prevent looting, vandalism, or damage to the cultural resource). The project applicant must use a reasonable degree of care to protect the information. Additionally, information that is already publically available, developed by the project applicant, or lawfully obtained from a third party that is not the tribe, lead agency, or another public agency may be disclosed during the environmental review process. Pub. Res. Code § 21082.3 (c)(2).

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[7] In *Clover Valley*, the trial court denied petitions for writ of mandate challenging a city's approval of a subdivision project. Revisions to the project included transferring prehistoric Native American artifacts for preservation. The city prepared a recirculated draft environmental impact report to analyze the revised project. The locations and specific characteristics of the cultural resources were not described. The city provided additional information briefly describing the characteristics of the cultural resources, the project's effects on them, and planned mitigation measures. The Court of Appeal affirmed the trial court's ruling, holding that the changes were not significant in light of disclosure restrictions pertaining to cultural resources. Gov. Code § 6254 (r); Pub. Res. Code §§ 5097.9, 5097.993; Cal. Code Regs., tit. 14, § 15120, subd. (d).

Third, the new law does not affect any existing cultural resource or confidentiality protections. Pub. Res. Code, § 21082.3 (c)(3).

Fourth, the lead agency or another public agency may describe the confidential information in general terms in the environmental document. This is done to ensure that confidentiality is maintained while the public is informed about the basis of the decision. Pub. Res. Code § 21082.3(c)(4). The decision in *Clover Valley* provides a useful description of how a lead agency may balance the need for confidentiality with disclosure obligations under CEQA.

E. Mitigation

Public agencies must, when feasible, avoid damaging effects to any tribal cultural resource. Pub. Res. Code § 21084.3 (a). Appropriate mitigation for a tribal cultural resource is different than mitigation for archeological resources. If the lead agency determines that a project may cause a substantial adverse change to a tribal cultural resource, mitigation measures should be identified through consultation with the tribal government. If measures are not otherwise identified in the consultation process, the Public Resources Code describes mitigation measures that may avoid or minimize the significant adverse impacts. Pub. Res. Code § 21084.3 (b). Examples include:

(1) Avoidance and preservation of the resources in place, including planning and construction to avoid the resources and protect the cultural and natural context, or planning greenspace, parks, or other open space, to incorporate the resources with culturally appropriate protection and management criteria.

(2) Treating the resource with culturally appropriate dignity, taking into account the tribal cultural values and meaning of the resource, including the following:
    (A) Protecting the cultural character and integrity of the resource;
    (B) Protecting the traditional use of the resource; or
    (C) Protecting the confidentiality of the resource.

(3) 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.

(4) Protecting the resource. *Id.*

IV. Updating Appendix G

The new provisions direct OPR to update the sample initial study checklist in Appendix G of the CEQA Guidelines to do the following: (1) separate the consideration of paleontological resources from tribal cultural resources and update the relevant sample questions; and (2) add consideration of tribal cultural resources with relevant sample questions.

As noted above, the substantive and procedural requirements added in AB 52 went into effect on July 1, 2015. Because the environmental checklist in Appendix G is a sample checklist and not mandatory, lead agencies do not need to wait for the Appendix G update before updating their own procedures.

In January 2016, OPR transmitted a draft update to Appendix G to the California Natural Resources Agency. On June 3, 2016 the agency released a revised proposal to include tribal cultural resources in Appendix G. Up to date information can be found here: http://resources.ca.gov/ceqa/.

On September 27, 2016 the Office of Administrative Law endorsed/approved the suggested changes. Appendix G now contains a statement in the Environmental Checklist Form at the beginning of Appendix G regarding notice and consultation between lead agencies and California Native American Tribes.

Appendix G also has a new section called Tribal Cultural Resources, which asks two questions related to the presence of tribal cultural resources. The first asks whether there is a potential adverse change in the significance of a listed tribal cultural resource. The second asks whether there is a substantial adverse change in the significance of a resource determined by a lead agency to be a tribal cultural resource. As noted in Section III.A, when answering the second question, a lead agency must use its discretion while supporting the decision with substantial evidence, applying the criteria of the historic register, and taking into account the significance of the resource to a California Native American Tribe. Consultation with California Native American Tribes is a key way to obtain the information necessary to understand the significance of the resource.

Appendix G contains the following prompt for lead agencies to consider whether the substantive and procedural requirements for consultation with tribal governments have been followed in accordance with the changes to CEQA made by AB 52:

Have California Native American tribes traditionally and culturally affiliated with the project area requested consultation pursuant to Public Resources Code section 21080.3.1? If so, has consultation begun?

Appendix G was also updated to contain the following questions:

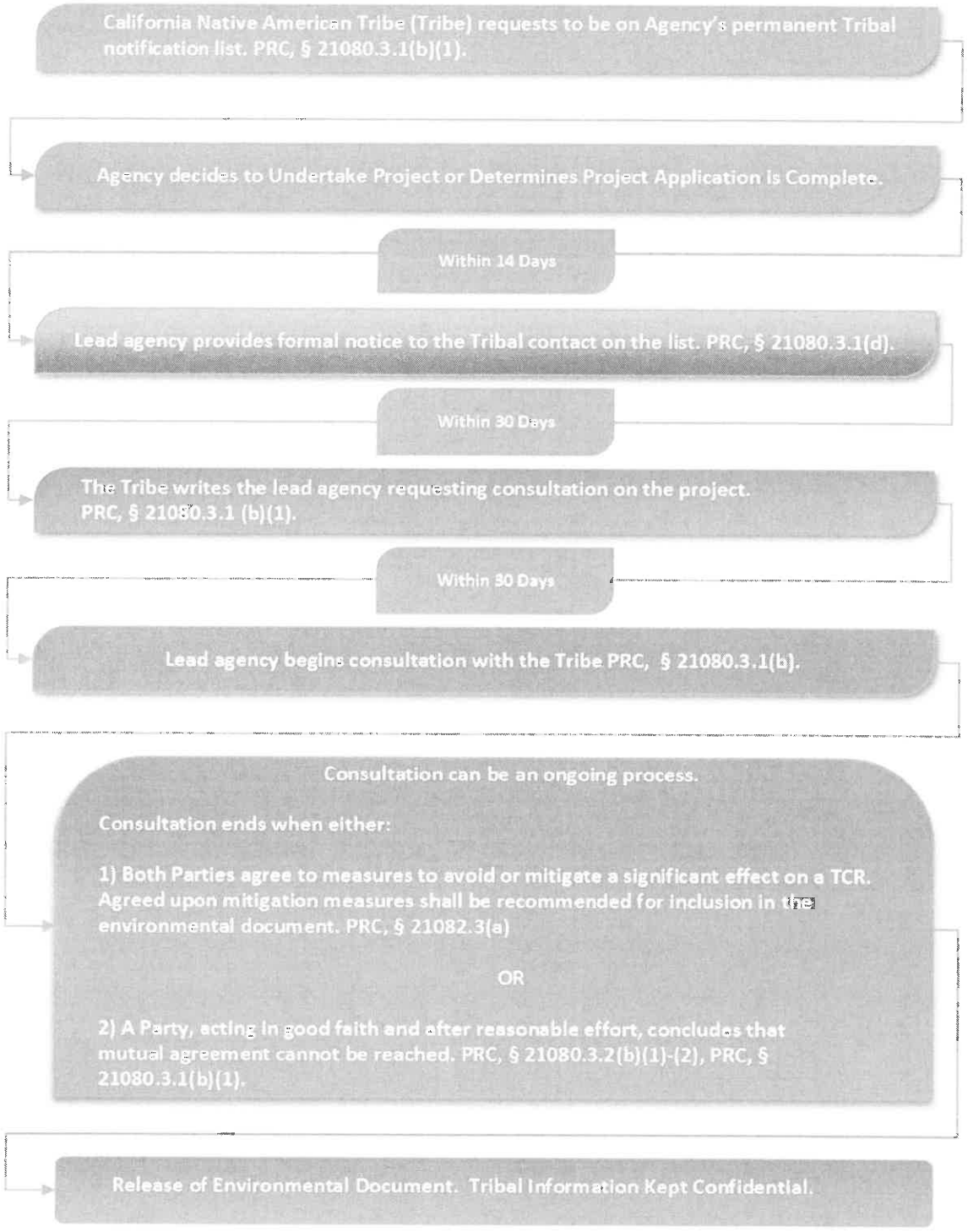
Would the project cause a substantial adverse change in the significance of a tribal cultural resource, defined in Public Resources Code section 21074 as either a site, feature, place, cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American tribe, and that is:

i) listed or eligible for listing in the California Register of Historical Resources, or in a local register of historical resources as defined in Public Resources Code section 5020.1(k); or

ii) a resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Public Resources

Code Section 5024.1. In applying the criteria set forth in subdivision (c) of Public Resource Code Section 5024.1, the lead agency shall consider the significance of the resource to a California Native American tribe.

V. Compliance Timeline and Consultation Process Flowchart



VI. Bibliography of Resources

A. California Government Resources

Assembly Bill No. 52 (2013- 2014 Reg. Sess.) <http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB52> (as of Feb. 17, 2015).

Senate Bill No. 18 (2003-2004 Reg. Sess.) <http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0001-0050/sb_18_bill_20040930_chaptered.html> (as of Feb. 17, 2015).

Governor's Exec. Order No. B-10-11 (Sept. 19, 2011) <http://gov.ca.gov/news.php?id=17223> (as of Feb. 17, 2015).

Governor's Office of Planning and Research, Tribal Consultation Guidelines: Supplement to General Plan Guidelines (Nov. 14, 2005) <http://www.opr.ca.gov/docs/011414_Updated_Guidelines_922.pdf> (as of Feb. 17, 2015).

Governor's Office of Planning and Research Tribal Cultural Resources and CEQA website and Implementation Resources (2016) < https://www.opr.ca.gov/s_ab52.php> (as of Jul. 14, 2016).

California Native American Heritage Commission Web Site and Implementation Resources (2015) <http://www.nahc.ca.gov> (as of Jul. 14, 2016).

California Energy Commission, Tribal Consultation Policy (Nov. 2014) <http://www.energy.ca.gov/Tribal/documents/2014-11-12_Draft_Tribal_Consultation_Policy.pdf> (as of Feb. 17, 2015).

California Office of Historic Preservation, California Office of Historic Preservation Web Site (2015) <www.ohp.parks.ca.gov> (as of Feb. 17, 2015).

California Office of Historic Preservation, California Historical Resources Information System (2015) <http://ohp.parks.ca.gov/?page_id=1068> (as of Feb. 17, 2015).

California Department of Transportation, Native American Liaison Web Site (2007) <http://dot.ca.gov/hq/tpp/offices/ocp/nalb/> (as of Feb. 17, 2015).

B. Federal Government Resources

Executive Order 13175, 65 Federal Register 67249 (Nov. 9, 2009) regarding Consultation and Coordination with Indian Tribal Governments <http://www.whitehouse.gov/the-press-office/memorandum-Tribal-consultation-signed-president> (as of Feb. 17, 2015).

Executive Order 13007, 61 Federal Register 26771 (May 24, 1996), regarding Tribal Sacred Sites <http://www.achp.gov/EO13007.html> (as of Feb. 17, 2015).

U.S. Department of the Interior, National Parks Service, Guidelines for Evaluating and Registering Archeological Properties (2000) ("Bulletin 36") <http://www.nps.gov/nr/publications/bulletins/pdfs/nrb36.pdf> (as of Feb. 17, 2015).

U.S. Department of the Interior, National Parks Service, Guidelines for Evaluating and Documenting Traditional Cultural Properties (1990, revised 1998) ("Bulletin 38") <http://www.nps.gov/nr/publications/bulletins/pdfs/nrb38.pdf> (as of Feb. 17, 2015).

Advisory Council on Historic Preservation, Working With §106 Web Site (Feb. 13, 2015) <http://www.achp.gov/work106.html> (as of Feb. 17, 2015).

C. Selected California Cases

Berkeley Hillside Preservation v. City of Berkeley, 60 Cal. App. 4th 1086 (2015) (holding that an agency's factual determination of whether unusual circumstances exist is reviewed under the substantial evidence standard, and favorably citing the holding in *Valley Advocates*).

Citizens for the Restoration of L Street v. City of Fresno, 229 Cal. App. 4th 340 (2014) (holding that the fair argument standard does not apply to a lead agency's discretionary determination of whether a non-listed building or district is an historical resource for purposes of CEQA).

Madera Oversight Coalition, Inc. v. County of Madera, 199 Cal. App. 4th 48 (2011) (holding that the phrase "preservation in place is the 'preferred manner' of mitigating impacts to archaeological sites" means that feasible preservation in place must be adopted to mitigate impacts to historical resources of an archaeological nature unless the lead agency determines that another form of mitigation is available and provides superior mitigation of impacts. Preservation in place maintains the relationship between artifacts and the archaeological context. Preservation may also avoid conflict with religious or cultural values of groups associated with the site.) (Overruled in part on other grounds).

Clover Valley Foundation v. City of Rocklin, 197 Cal. App. 4th 200 (2011) (holding that CEQA does not require a lead agency to disclose confidential information regarding the location and nature of cultural resources sites and that a lead agency need only provide a general description of those resources and mitigation measures in an EIR).

Valley Advocates v. City of Fresno, 160 Cal. App. 4th 1039 (2008) (holding that the substantial evidence standard of review applies to an agency's determination of whether a building that is not listed, or eligible for listing, in a historic register qualifies as an historical resource, and further holding that once a lead agency determines the resource to be an historical resource, the fair argument standard applies to the question of whether the proposed project may cause a substantial adverse change in the significance of that historical resource).

D. Selected Federal Cases

Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995) (federal case regarding traditional cultural properties under the National Historic Preservation Act and the National Environmental Policy Act, including an example of a reasonable and good faith effort at consultation between a lead agency and a tribe. This case includes a discussion on cumulative impact analysis and a reasonable range of alternatives analysis under NEPA and Section 106 of the NHPA. This case recognizes as evidence the affidavit of a tribal elder and religious leader.).

Muckleshoot Indian Tribe v. United States Forest Service, 177 F. 3d 800 (9th Cir. 1999) (Federal case regarding traditional cultural properties under the National Historic Preservation Act and the National Environmental Policy Act, including a discussion of how adequate mitigation for a tribally significant historic property may be different than mitigation for an historic resource. This case includes examples of tribal evidence).

EXHIBIT B

Robert J. Geary
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THPO Designee | Koi Nation of Northern California
635 E. Hwy 20, A | P.O. Box 516
Upper Lake, CA 95485
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Robert J. Geary (Elem Pomo) is the Director of Cultural Resources / Tribal Historic Preservation Officer (THPO) for Habematolel Pomo of Upper Lake and the THPO Designee for Koi Nation of Northern California, both federally-recognized sovereign nations.

For over 30 years, Robert has served as a tribal cultural leader and practitioner, well-recognized for his rich and deep traditional tribal knowledge and professional expertise in tribal cultural resources, including site protection, California Indian culture, and language revitalization.

Within his Pomo community, Robert is a ceremonial roundhouse leader, Southeastern Pomo language teacher (Xai-tsnoo), and regalia maker. He is the founder and president of the Clear Lake Pomo Cultural Preservation Foundation, and has worked extensively to preserve and revitalize his heritage language, including creating the first Southeastern Pomo dictionary in collaboration with UC Davis and UC Berkeley, and developing Xai-tsnoo language curriculum and classes for his community.

Robert has also served as a cultural curation advisor of Pomo-related art and cultural objects for the New York Metropolitan Museum of Art, de Young Museum, Grace Hudson Museum, and San Francisco Opera. Most recently, Robert served as an advisor and co-presenter for the *Jules Tavernier and the Elem Pomo* exhibition at the de Young, which included a documentary featuring Robert's traditional knowledge of tribal cultural landscape and ceremony and a display of historic ceremonial regalia made by his family.

As THPO, Robert regularly consults with Federal, State, and local agencies for the repatriation of cultural collections under NAGPRA and AB 275, performs surveys of tribal cultural landscapes and sacred sites, serves as liaison between tribal MLDs and project agencies, provides cultural sensitivity trainings, and supervises and trains tribal cultural monitors.

Prior to his role as THPO, Robert studied cultural anthropology and served as Manager of Language and History and Site Protection Supervisor for Cultural Resources for the Yocha Dehe Wintun Nation. In these roles, Robert worked to protect, preserve, and revitalize Patwin language, culture and sacred sites.

As a lineal descendant of culture keepers, Robert firmly believes in the importance of strengthening and preserving cultural knowledge and tribal history through direct transmission, and regularly lends his rich traditional knowledge and professional expertise in tribal cultural resources to a wide range of organizations through trainings, presentations, consultations, and interviews. Such organizations have included: the Ca. Depts. of Water Resources and Transportation; Lake County's Office of Education, Sheriff's Office, and Planning Commissioners and Planners; Clearlake Judge's Breakfast; Society for California Archeology (SCA); Stanford; UC Berkeley; UC Davis; Purdue; NBC; News for Native California; San Jose Mercury News; Los Angeles Times; Native News Online; and Capitol Public Radio.

In 2022, Robert and the California THPOs received the SCA Award for Excellence in Cultural Resource Management in recognition of their outstanding leadership in the field.

SIERRA CLUB
Lake Group

Attn: Mark Roberts, City of Clearlake Senior Planner
Re: Subdivision Map Application, SD 2022-01

Date: December 5, 2023

Dear Planning Department and Commission Members,

I am writing on behalf of the Sierra Club Lake Group today to express concerns about some of the aspects of the Danco Subdivision Development Project located at 2890 Old Highway 53 (APN 010-048-08). This project includes a waterway, a blue oak forest woodland and a meadow area that require special consideration as part of the natural beauty experienced by people entering and leaving the City of Clearlake and for the ecosystems they support. There are also a few species of plants and animals that are of special concern that may inhabit in the project area. There are also concerns about how many of the lots will actually be built out. Having another paper subdivision is highly undesirable especially along a scenic corridor.

The City's General Plan states that among many goals are those of maintaining its natural beauty. Putting a housing development in this location does not seem consistent with these goals as this is a scenic area that is seen by people entering and leaving the city. The following is just a sampling of what is in the document.

Goal OS-6: A city that preserves and celebrates its environmental resources.

Objective OS 6.1: Preserve and maintain forested areas, fields, stream corridors, wetlands, and other open spaces that are within and surround the City.

Policy OS 6.1.1: The City should establish and preserve buffers between developed areas and forested areas, fields, stream corridors, wetlands, and other open spaces.

Goal CO-4: A diverse landscape where plant and wildlife habitats, open space, and natural resources are preserved and protected.

Objective CO 4.1: Protect all state and federally listed endangered and threatened species.

Objective CO 4.2: Prevent conversion of wildlife habitat into other land uses.

This property is a buffer zone between the developed part of the city and the watershed ecosystem that lies to the east of Highway 53.

The City also has an Oak Tree Ordinance, Municipal Code 18-40, which states that any Blue, Valley, Interior Live, California Black, Canyon Live, and Oregon White Oak tree that is more than six inches in diameter at breast height cannot be cut down without a permit. There is almost 11.5 acres of blue oak woodland that have many trees fitting this description in this project boundary. Although this is provided for in the project plan, there are challenges to providing mitigation for the removal of native trees within the City. I discovered this when offered the opportunity to help figure out a way to utilize the fees collected from the low income housing

development that is nearing completion on Old Highway 53. Much of those fees have yet to be used for mitigation. Apparently, there are no city owned places where the planting of oak trees is desired.

There needs to be a plan in mind for mitigation of removal of the specified trees, which may include some planting of oak trees in other areas of the project. However, it will ultimately be up to the individuals who purchase the homes to maintain any of these trees. If trees are to be planted elsewhere or the fees used to improve the health and safety of other oak trees already in the city, a plan must be made and executed in a timely fashion and follow-up care provided.

Another section of the General Plan states the following goal:

Goal CO-1: Clean and safe lake conditions for wildlife, swimming, fishing, and boating.
Objective CO 1.1: Protect the quality of surface and groundwater resources.
Objective CO 1.2: Prevent sediment erosion and nutrient loading of Clear Lake.

The waterway in question is labelled as an intermittent drainage. This tributary to Burns Valley Creek sends water and its contents to Clear Lake. Although the BRA did not conduct a formal aquatic resource delineation, this waterway "is likely considered a water of the U.S. and water of the State subject to USACE and RWQCB jurisdiction under Sections 404 and 401 of the CWA. The intermittent drainage also falls under the jurisdiction of Section 1600 of the California Fish and GameCode". If these waters, in combination with others in the area, significantly affect the chemical, physical, or biological integrity of waters that have commercial value, such as Clear Lake, they should be protected in order to protect the resource.

Although the BRA requires setbacks from this waterway that should protect it during the development phase, there is no way for the City to monitor what happens once the property is sold to a homeowner. Soil disturbance could increase erosion and therefore sediment and use of chemicals as herbicides, pesticides, and fertilizers would likely increase the quantities of these substances entering Clear Lake and affecting the water quality, especially where Burns Valley Creek enters the lake at Austin Park. Because of this risk, altering the lot lines so that the waterway is not included in any of the lots is in the best interest of the public and is strongly urged by our group.

As we proceed into a future that is likely to have climate disruptions that put species that are already threatened by loss of habitat into even more peril, it behooves us to do what we can to preserve those habitats. Even small disruptions, when added together, can have significant impact on stressed species. Adhering to the recommendations of the Biologic Resource Assessment (BRA) by providing appropriate surveys and avoidance and mitigation will minimize the impact of the development.

The species of special concern are listed in the Biologic Assessment Report and include Bent-flower Fiddleneck, Western Bumble Bee, Monarch Butterfly, and Cooper's Hawk. The BRA states that a certified botanist should survey the area for plants during their flowering season. It

SIERRA CLUB
Lake Group

also states that the project manager should provide for marking and avoidance of identified plants, including milkweed that serves as the larval Monarch Butterfly feed source, or provide

mitigation for disturbance. The same is true for assessing whether birds and bats are nesting in the forested areas. The BRA's instructions suggest ground disturbance only occur from September 1st to January 31st without surveys being conducted 14 days before disturbance or any lapse in construction activity. The surveys are to extend 500 feet from the project perimeter to account for any impact on local raptor populations. If this project goes forward, it is important that the City assures that these surveys are completed and that the appropriate avoidance and/or mitigation measures are taken seriously to honor the existing General Plan goals and objectives. These surveys and actions should be made public in a timely manner.

Paper subdivisions are highly undesirable in general and unacceptable in this location. The City needs to require that Danco commits to building out at least 50% of the lots before approving this project and granting the building permits. Cutting down trees and laying asphalt in this area will make for an unsightly entrance to the city that will provide no benefits if the houses are not built and inhabited.

Management of runoff during heavy rain events could prove to be a problem in this area as standing water is common along the western side of the project area during such events. Drainage in the low areas and along Old Highway 53 will need to be improved substantially to deal with this issue.

There may be benefit to the community in providing an area of middle income housing in this location. However, it should not be at the expense of following our General Plan Goals and maintaining a healthy watershed. If you decide to approve this project, please assure that it has the minimum impact possible by changing the lot lines in the northern area to remove threat to the waterway, upholding the Oak Tree Ordinance, and by following the recommendations in the Biologic Resource Assessment (BRA).

Respectfully,
Deb Sally
Chair, Sierra Club Lake Group

From:	Lori Baca
To:	Mark Roberts
Subject:	RE: Notice of Intent (NOI) - Danco Subdivision Project located at 2890 Old Highway 53
Date:	Wednesday, November 1, 2023 10:38:36 AM
Attachments:	image005.png image006.png image007.png

Mark,

The parcel is outside of the 200 foot requirement to connect to public sewer, and since project description states the lots will be provided private septic systems there will be no impact to LACOSAN, no comment.

Have the best day!

Lori A. Baca
Customer Service Supervisor
Lori.Baca@lakecountyca.gov
Office Number (707) 263-0119
Fax (707) 263-3836

From: Mark Roberts [mailto:mroberts@clearlake.ca.us]
Sent: Wednesday, November 1, 2023 10:11 AM
Subject: Notice of Intent (NOI) - Danco Subdivision Project located at 2890 Old Highway 53
Importance: High

Hello Fellow Agency,

Notice is hereby given that the City of Clearlake has tentatively determined that the project described below will not result in a significant adverse impact on the environment with the incorporated Mitigation Measures/Conditions of Approval and that, in accordance with the California Environmental Quality Act, the City is prepared to issue a “mitigated negative declaration” in accordance with the California Environmental Quality Act (CEQA). **Due to the size of the file, please utilize the links below to access/download the environmental documents for review/comment.**

The State Clearing House Document Number is 2023110007 (https://ceqasubmit.opr.ca.gov/Document/Index/291022/1). We look forward to receiving your comments.

Project Title: Danco Subdivision Development Project

Project Location: 2890 Old Highway 53; Clearlake, CA 95422. **Assessor Parcel Number (APN):** 010-048-08

Summary: The project consists of subdividing a 30-arce parcel into twenty-two (22) individual residential lots. The parcels would range in size from 1.25 to 2.75 acres in size. Access to the proposed lots will be located off Old Highway 53 via two proposed roadways, indicated as Road A and B on the tentative map (formal road names are to be determined). The northern proposed roadway will be greater than 800 feet in length and the southern proposed roadway is approximately 686 feet in length. The width of each roadway will be a minimum of 50 feet and have a turnaround/cul-da-sac. Utilities: Each lot will be provided with power through Pacific Gas and Electric (PG&E); Highlands Water Company will provide water to each lot & each new lot will have its own Onsite Waste Management System (septic).

This tentative determination is based on an environmental study that assesses the project's potential environmental impacts and those potential impacts have been reduced to less than significant levels with the incorporated mitigation measures. Anyone can review this study at Clearlake City Hall, 14050 Olympic Drive, Clearlake, CA 95901, during normal business hours (recommend you make an appointment with the planner) or by downloading the documentation from the State Clearinghouse Website at: https://ceqanet.opr.ca.gov/ or from the City of Clearlake Website at: https://www.clearlake.ca.us/404/Public-Review-Documents

Final environmental determinations are made by the decision-making body, which, in this case would be the City of Clearlake, Planning Commission. The public review period for this notice will remain open for a period of at least 30 days from the publication of this **Notice of Intent on Saturday, November 4th, 2023, until Tuesday, December 5th, 2023.** For more information, please call (707) 994-8201 during normal business hours of City Hall (Monday through Thursday – 8am to 5pm).

During this period written comments on the project and the proposed mitigated negative declaration may be addressed. You may also submit comments via email at mroberts@clearlake.ca.us. **(All comments must be received no later than Tuesday, December 5th, 2023).**

Sincerely,

Mark Roberts

Mark Roberts
Senior Planner
mroberts@clearlake.ca.us
Phone: (707) 994-8201
Website: https://www.clearlake.ca.us/

City of Clearlake • 14050 Olympic Drvie, Clearlake CA 95422

6 December 2023

Mark Roberts
City of Clearlake
14050 Olympic Drive
Clearlake, CA 95422
mroberts@clearlake.ca.us

COMMENTS TO REQUEST FOR REVIEW FOR THE MITIGATED NEGATIVE DECLARATION, DANCO SUBDIVISION DEVELOPMENT PROJECT, SCH#2023110007, LAKE COUNTY

Pursuant to the State Clearinghouse's 1 November 2023 request, the Central Valley Regional Water Quality Control Board (Central Valley Water Board) has reviewed the *Request for Review for the Mitigated Negative Declaration* for the Danco Subdivision Development Project, located in Lake County.

Our agency is delegated with the responsibility of protecting the quality of surface and groundwaters of the state; therefore our comments will address concerns surrounding those issues.

I. Regulatory Setting

Basin Plan

The Central Valley Water Board is required to formulate and adopt Basin Plans for all areas within the Central Valley region under Section 13240 of the Porter-Cologne Water Quality Control Act. Each Basin Plan must contain water quality objectives to ensure the reasonable protection of beneficial uses, as well as a program of implementation for achieving water quality objectives with the Basin Plans. Federal regulations require each state to adopt water quality standards to protect the public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act. In California, the beneficial uses, water quality objectives, and the Antidegradation Policy are the State's water quality standards. Water quality standards are also contained in the National Toxics Rule, 40 CFR Section 131.36, and the California Toxics Rule, 40 CFR Section 131.38.

The Basin Plan is subject to modification as necessary, considering applicable laws, policies, technologies, water quality conditions and priorities. The original Basin Plans were adopted in 1975, and have been updated and revised periodically as required, using Basin Plan amendments. Once the Central Valley Water Board has adopted a Basin Plan amendment in noticed public hearings, it must be approved by

the State Water Resources Control Board (State Water Board), Office of Administrative Law (OAL) and in some cases, the United States Environmental Protection Agency (USEPA). Basin Plan amendments only become effective after they have been approved by the OAL and in some cases, the USEPA. Every three (3) years, a review of the Basin Plan is completed that assesses the appropriateness of existing standards and evaluates and prioritizes Basin Planning issues. For more information on the *Water Quality Control Plan for the Sacramento and San Joaquin River Basins*, please visit our website:
http://www.waterboards.ca.gov/centralvalley/water_issues/basin_plans/

Antidegradation Considerations

All wastewater discharges must comply with the Antidegradation Policy (State Water Board Resolution 68-16) and the Antidegradation Implementation Policy contained in the Basin Plan. The Antidegradation Implementation Policy is available on page 74 at:
https://www.waterboards.ca.gov/centralvalley/water_issues/basin_plans/sacsjr_201805.pdf

In part it states:

Any discharge of waste to high quality waters must apply best practicable treatment or control not only to prevent a condition of pollution or nuisance from occurring, but also to maintain the highest water quality possible consistent with the maximum benefit to the people of the State.

This information must be presented as an analysis of the impacts and potential impacts of the discharge on water quality, as measured by background concentrations and applicable water quality objectives.

The antidegradation analysis is a mandatory element in the National Pollutant Discharge Elimination System and land discharge Waste Discharge Requirements (WDRs) permitting processes. The environmental review document should evaluate potential impacts to both surface and groundwater quality.

II. Permitting Requirements

Construction Storm Water General Permit

Dischargers whose project disturb one or more acres of soil or where projects disturb less than one acre but are part of a larger common plan of development that in total disturbs one or more acres, are required to obtain coverage under the General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities (Construction General Permit), Construction General Permit Order No. 2009-0009-DWQ. Construction activity subject to this permit includes clearing, grading, grubbing, disturbances to the ground, such as stockpiling, or excavation, but does not include regular maintenance activities performed to restore the original line, grade, or capacity of the facility. The Construction General Permit requires the development and implementation of a Storm Water Pollution Prevention Plan (SWPPP). For more information on the Construction General Permit, visit the State Water Resources Control Board website at:

http://www.waterboards.ca.gov/water_issues/programs/stormwater/constpermits.shtml

Clean Water Act Section 404 Permit

If the project will involve the discharge of dredged or fill material in navigable waters or wetlands, a permit pursuant to Section 404 of the Clean Water Act may be needed from the United States Army Corps of Engineers (USACE). If a Section 404 permit is required by the USACE, the Central Valley Water Board will review the permit application to ensure that discharge will not violate water quality standards. If the project requires surface water drainage realignment, the applicant is advised to contact the Department of Fish and Game for information on Streambed Alteration Permit requirements. If you have any questions regarding the Clean Water Act Section 404 permits, please contact the Regulatory Division of the Sacramento District of USACE at (916) 557-5250.

Clean Water Act Section 401 Permit – Water Quality Certification

If an USACE permit (e.g., Non-Reporting Nationwide Permit, Nationwide Permit, Letter of Permission, Individual Permit, Regional General Permit, Programmatic General Permit), or any other federal permit (e.g., Section 10 of the Rivers and Harbors Act or Section 9 from the United States Coast Guard), is required for this project due to the disturbance of waters of the United States (such as streams and wetlands), then a Water Quality Certification must be obtained from the Central Valley Water Board prior to initiation of project activities. There are no waivers for 401 Water Quality Certifications. For more information on the Water Quality Certification, visit the Central Valley Water Board website at: https://www.waterboards.ca.gov/centralvalley/water_issues/water_quality_certification/

Waste Discharge Requirements – Discharges to Waters of the State

If USACE determines that only non-jurisdictional waters of the State (i.e., "non-federal" waters of the State) are present in the proposed project area, the proposed project may require a Waste Discharge Requirement (WDR) permit to be issued by Central Valley Water Board. Under the California Porter-Cologne Water Quality Control Act, discharges to all waters of the State, including all wetlands and other waters of the State including, but not limited to, isolated wetlands, are subject to State regulation. For more information on the Waste Discharges to Surface Water NPDES Program and WDR processes, visit the Central Valley Water Board website at:https://www.waterboards.ca.gov/centralvalley/water_issues/waste_to_surface_water/

Projects involving excavation or fill activities impacting less than 0.2 acre or 400 linear feet of non-jurisdictional waters of the state and projects involving dredging activities impacting less than 50 cubic yards of non-jurisdictional waters of the state may be eligible for coverage under the State Water Resources Control Board Water Quality Order No. 2004-0004-DWQ (General Order 2004-0004). For more information on the General Order 2004-0004, visit the State Water Resources Control Board website at:

https://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2004/wqo/wqo2004-0004.pdf

Dewatering Permit

If the proposed project includes construction or groundwater dewatering to be discharged to land, the proponent may apply for coverage under State Water Board General Water Quality Order (Low Threat General Order) 2003-0003 or the Central Valley Water Board's Waiver of Report of Waste Discharge and Waste Discharge Requirements (Low Threat Waiver) R5-2018-0085. Small temporary construction dewatering projects are projects that discharge groundwater to land from excavation activities or dewatering of underground utility vaults. Dischargers seeking coverage under the General Order or Waiver must file a Notice of Intent with the Central Valley Water Board prior to beginning discharge.

For more information regarding the Low Threat General Order and the application process, visit the Central Valley Water Board website at: http://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2003/wqo/wqo2003-0003.pdf

For more information regarding the Low Threat Waiver and the application process, visit the Central Valley Water Board website at: https://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/waivers/r5-2018-0085.pdf

Limited Threat General NPDES Permit

If the proposed project includes construction dewatering and it is necessary to discharge the groundwater to waters of the United States, the proposed project will require coverage under a National Pollutant Discharge Elimination System (NPDES) permit. Dewatering discharges are typically considered a low or limited threat to water quality and may be covered under the General Order for *Limited Threat Discharges to Surface Water* (Limited Threat General Order). A complete Notice of Intent must be submitted to the Central Valley Water Board to obtain coverage under the Limited Threat General Order. For more information regarding the Limited Threat General Order and the application process, visit the Central Valley Water Board website at: https://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/general_orders/r5-2016-0076-01.pdf

NPDES Permit

If the proposed project discharges waste that could affect the quality of surface waters of the State, other than into a community sewer system, the proposed project will require coverage under a National Pollutant Discharge Elimination System (NPDES) permit. A complete Report of Waste Discharge must be submitted with the Central Valley Water Board to obtain a NPDES Permit. For more information regarding the NPDES Permit and the application process, visit the Central Valley Water Board website at: https://www.waterboards.ca.gov/centralvalley/help/permit/

If you have questions regarding these comments, please contact me at (916) 464-4684 or Peter.Minkel2@waterboards.ca.gov.

Peter Minkel

Peter Minkel
Engineering Geologist

cc: State Clearinghouse unit, Governor's Office of Planning and Research, Sacramento