

CALIFORNIA CODE OF REGULATIONS, TITLE 14, NATURAL RESOURCES

Division 17, Native American Heritage Commission

CHAPTER 1. DISPUTE RESOLUTION/MEDIATION PROCEDURES

§ 29001 Purpose of the Dispute Resolution/Mediation Process

These dispute resolution/mediation regulations of the Native American Heritage Commission (Commission) implement the California Native American Graves Protection and Repatriation Act, Division 7, Part 2, Chapter 5 of the Health and Safety Code (Health and Safety Code section 8016).

Note: Authority cited: Health and Safety Code section 8016.

§ 29002 Construction of Regulations

- (a) As used in these regulations, words in the singular shall include the plural and words in the plural shall include the singular, unless the context otherwise requires.
- (b) In these regulations, whenever a time is stated within which an act is to be done, the time is computed by excluding the first day and including the last day. If the last day is any day the Commission is closed for business, that day is also excluded.
- (c) In these regulations, any time within which an act is to be done refers to calendar days, unless otherwise specified.
- (d) Time limits set forth in these regulations are not jurisdictional.

Note: Authority cited: Health and Safety Code section 8016.

§ 29003 Confidentiality

Confidentiality in any mediation/dispute resolution under these regulations shall be governed by Government Code section 11420.30, and Evidence Code sections 703.5, 1119-1126; and 1152. Accordingly, all communications and records made or used in the course of the mediation/dispute resolution proceedings described herein are protected as follows:

- (a) Anything said, any admission made, and any document prepared in the course of, or pursuant to, mediation/dispute resolution under these regulations is a confidential communication, and a party to the mediation/dispute resolution has a privilege to refuse to disclose and to prevent another from disclosing the communication, whether in an adjudicative proceeding, civil action, or other proceeding. This subdivision does not limit the admissibility of evidence if all parties to the mediation proceedings consent.
- (b) Except as provided for in section 29014, no reference to the mediation/dispute resolution proceedings, including the mediator's written decision, may be made in the context of (1) the Final Commission Determination provided for in section 29014, (2) any other administrative

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adjudicative proceeding or (3) any civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose.

(c) No mediator, Commissioner, or Commission employee is competent to testify at (1) the Final Commission Determination provided for in section 29014, (2) any other administrative adjudicative proceeding or (3) any civil action as to any statement, conduct, decision, or order occurring at, or in conjunction with, a mediation/dispute resolution.

(d) Evidence otherwise admissible outside of mediation/dispute resolution under these regulations is not inadmissible or protected from disclosure solely by reason of its introduction or use in mediation/dispute resolution under these regulations.

Note: Authority cited: Health and Safety Code section 8016; Government Code section 11420.30; Evidence Code sections 703.5, 1119-1126, and 1152.

§ 29004 Commission Notification to Parties to Dispute

(a) If the Commission receives multiple written requests for repatriation of the same item(s) or remains pursuant to section 8014 of the Health and Safety Code, written notification that there is a dispute between a requesting party and an agency or museum, written notification of a dispute as to the contents of an inventory or summary, or written notice of any other dispute in relation to the repatriation process described in section 8016 of the Health and Safety Code, within 14 days the Commission will provide the involved parties with notice of the dispute.

(b) Any affected party may contact the Commission in writing to notify it that a dispute has arisen in relation to the repatriation process. If an affected party notifies the Commission of such a dispute it shall include the information required under § 29005.

Note: Authority cited: Health and Safety Code section 8016.

§ 29005 Submission of Documentation by Disputing Parties

Upon receipt of notification from the Commission that a dispute exists in relation to the repatriation process, each party to the dispute shall within 30 days submit the following information to the Commission:

- (i) The names of all parties involved in the dispute and their attorney (if any);
- (ii) The physical addresses, electronic mail addresses, and telephone numbers of the parties or their representatives, including attorney;
- (iii) A brief statement of the nature of the dispute;
- (iv) Related documentation to the dispute, including records and arguments submitted to the state agency and/or museum and;
- (v) Relief requested by the parties.

Final Draft CalNAGPRA Dispute Resolution Mediation Regulations

Note: Authority cited: Health and Safety Code section 8016.

§ 29006 Federal Dispute Resolution

(a) If a state agency or state-funded museum is also subject to the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.), and it cannot determine the most appropriate requestor, then the parties must submit their dispute under this section, otherwise consistent with federal law. Parties that have requested the assistance of the federal Native American Graves Protection and Repatriation Review Committee in resolving the dispute shall inform the Commission of this fact concurrent with the submission of the above information, or immediately after requesting assistance from the Native American Graves Protection and Repatriation Review Committee if such request is made after the initial submission to the Commission.

(b) Any party may also request that the Commission suspend dispute resolution under these regulations pending the completion of the federal dispute resolution process. Suspension of dispute resolution under these regulations shall be at the Commission's discretion. If the parties are unable to resolve their dispute through the federal dispute resolution process, then they must inform the Commission of this fact, including providing any advisory findings and recommendations which may have resulted from the federal dispute resolution process. Upon such notification, any suspension of dispute resolution under these regulations shall be immediately lifted and the matter shall proceed in accordance with these regulations.

Note: Authority cited: Health and Safety Code section 8016. Reference: 43 C.F.R. section 10.10.

§ 29007 Required Meeting of the Parties

(a) Within 10 days of receiving from each party the submission described in §§ 29004 and 29005, the Commission shall serve upon all parties identified therein (1) a copy of each submission and (2) a notice informing the parties of the requirement that they must meet within 30 days of the date of the Commission's mailing of the documentation.

(b) The parties shall notify the Commission upon completion of this meeting, indicating whether the parties were able to settle all or any part of the dispute.

If the parties were unable to settle all or any part of the dispute, they may provide to the Commission (1) a statement identifying the issues and facts still in dispute; and (2) names of and contact information for any qualified mediators who are mutually agreeable to the parties.

Note: Authority cited: Health and Safety Code section 8016.

§ 29008 Mediation Defined

(a) Mediation refers to a process whereby a neutral third person, a designated mediator, acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal, non-binding, and non-adversarial process with the objective of helping the disputing parties reach a mutually acceptable written agreement. The role of the designated mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem

Final Draft CalNAGPRA Dispute Resolution Mediation Regulations

solving, exploring resolution alternatives, and issuing a decision to assist the parties in evaluating and assessing their claims and arguments.

(b) A mediator must conduct the mediation proceedings in a procedurally fair manner. “Procedural fairness” means a balanced process in which each party is given an opportunity to participate fully and without coercion. A mediator may adopt their own related processes, including incorporating restorative justice practices, holding joint mediation sessions, or separating the parties in different rooms during the process. A mediator is not obligated to ensure the substantive fairness of an agreement reached by the parties. A mediator may present possible settlement options and terms for discussion. A mediator may also assist the parties in preparing a written agreement consistent with the parties’ intent. Mediation sessions may be continued as determined necessary by the mediator. The process may be terminated by either party or by the mediator upon a determination that continuation of the process would no longer advance the aims of the mediation or that the parties may better resolve the matter without the mediator’s facilitation.

Note: Authority cited: Health and Safety Code section 8016.

§ 29009 Providing Copies of Papers for Mediation

All papers and documents submitted for mediation, other than for final Commission determinations as provided for under § 29014, should be provided to the mediator with copies to all parties as specified in the briefing schedule under § 29013 of these regulations. Parties should provide electronic copies whenever possible. The designated mediator may also exercise discretion in providing additional procedures for the service of papers and documents as appropriate and/or in consideration of restorative justice principles under § 29011, including allowing a party to submit records and other evidence to the mediator without providing copies to the other parties where the mediator determines the party has a reasonable justification for doing so.

Note: Authority cited: Health and Safety Code section 8016.

§ 29010 Designation of Mediator; Disqualification

(a) If the Commission receives notice that the parties were unable to settle all or parts of their dispute, the Commission shall, within 30 days, inform the parties of the need to designate a mediator.

(b) The Commission shall designate a certified mediator or Commission staff member, excluding Commissioners, with training and experience adequate to mediate the parties’ dispute, including, to the extent possible, experience working with California Native American tribes and repatriation. The Commission will bear the costs associated with any mediator under contract with the Commission. The Commission may, at its discretion, use the following options for the designation of a mediator:

(1) Designate a mediator from a list of mediators the Commission has contracted with for this purpose; or

Final Draft CalNAGPRA Dispute Resolution Mediation Regulations

(2) Provide the parties with the names of mediators with whom the Commission has contracted for this purpose to allow for the parties to select a mutually agreed to mediator; o

(3) Allow the parties to choose a mediator with training and experience adequate to mediate the parties' dispute who is mutually agreeable to the parties. The parties shall bear any and all costs associated with using a mediator not currently under contract with the Commission and shall enter into a cost-sharing arrangement prior to the mediation.

(c) Mediators are disqualified from serving on any of the grounds listed in this section:

- (1) The mediator has personal knowledge of disputed evidentiary facts involved in the dispute;
- (2) The mediator, or their spouse or minor children, is a person within the third degree of relationship to a party, or to a person who provided professional advice to a party. A third degree of relationship includes a great- grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, cousin, niece, step-siblings, or adopted relatives.
- (3) The mediator, or their spouse or minor children, is employed by, a member of, or otherwise affiliated with a party, including museum, agency, or Native American tribe which is a party to the dispute;
- (4) The mediator, or their spouse or minor children, has a financial interest in the dispute or with a party;
- (5) The mediator is in discussions, or has a current arrangement, concerning prospective or existing employment or other compensated service with a party or related to the specific matter in the dispute. "In discussions" means that the mediator solicited or otherwise indicated an interest in accepting or negotiating possible employment or providing services; or
- (6) The mediator or the Commission believes, for any other reason, that they are unable to fairly and impartially facilitate resolution of the parties' dispute.

(d) Prior to designation of a mediator, the Commission shall confirm with a prospective mediator that:

- (1) The mediator agrees to be bound by the confidentiality provisions described in § 29003; and
- (2) Upon having reviewed the names of the parties and the nature of the dispute, the mediator is not subject to disqualification.

(e) If any party believes that a mediator designated by the Commission should be disqualified, the party must notify the Commission of the grounds for disqualification within 10 days of being notified of the mediator's designation. Within 10 days of receiving the notification of the grounds for disqualification, the Commission shall either designate another mediator

Final Draft CalNAGPRA Dispute Resolution Mediation Regulations

consistent with this section or notify the parties that it has determined that the previously selected mediator is not disqualified.

Note: Authority cited: Health and Safety Code section 8016.

§ 29011 Restorative Justice Principles

(a) In conducting mediation sessions and issuing any written decision, the mediator shall consider and encourage the parties to consider restorative justice principles and values applicable to the dispute, including incorporating tribal customs and traditions regarding dispute and mediation processes.

- (1) With the written consent of the parties to the mediation, the procedures detailed in these regulations may be modified to accommodate restorative justice principles and values.
- (2) The mediator may incorporate restorative justice principles into their own related processes not detailed in these regulations.

(b) The mediator shall consider and encourage the parties to consider restorative justice principles as part of the mediation. The following is a non-exclusive list of examples of restorative justice principles:

- (1) The harm(s) caused to the affected tribes and communities by the discovery (unearthing) and/or removal of any ancestral remains and cultural items, as well as the benefits of their return;
- (2) The harm(s) to affected tribes if remains and cultural items are left un-repatriated and/or not reinterred with culturally appropriate treatment;
- (3) The tribal traditions, customs, and values necessitating the return of the remains and cultural items, including the significance of these to the tribe(s) and tribal community;
- (4) Deference to tribal knowledge concerning the remains or cultural items, and related history, including the significance of the location of their discovery;
- (5) Tribal customs regarding preservation in place, removal, handling and storage of remains and cultural items during a dispute, as well as for their repatriation or reinterment with culturally appropriate treatment;
- (6) The effort and costs incurred by the tribe(s) in seeking repatriation or the reinterment of remains and cultural items with culturally appropriate treatment;
- (7) Any assistance tribes will need in repatriation and/or reinterment with culturally appropriate treatment, including providing sites for reinterment and related ceremonies;

Final Draft CalNAGPRA Dispute Resolution Mediation Regulations

- (8) Direct and indirect costs associated with the meditation and repatriation process, including costs to tribes or others to prepare items for reburial or other treatment, assessing and cataloguing items, obtaining places to repatriate the items, and incidental expenses, such as travel expenses;
- (9) Restitution for lost, stolen, or damaged cultural items and ancestral remains;
- (10) Culturally appropriate corrective actions to reduce contamination of remains and cultural items, or restitution if such corrective actions are unavailable;
- (11) Other measures mitigating harms caused to the tribes, including contributions and improvements to Native American programs and studies or other measures to foster a greater understanding and appreciation of California Native American culture, including, but not limited to,
 - (i) museums working with tribes to find culturally appropriate exhibits;
 - (ii) universities partnering with tribes on tribally led research and programing;
 - (iii) acknowledgements of ancestral lands; and
 - (iv) apologies for wrongs commitment towards California Native Americans.

Note: Authority cited: Health and Safety Code section 8016.

§ 29012 Attendance by Parties and Representatives

Each party, or an officer or member of the party with authority to bind the party in a settlement or agreement, shall attend each mediation session. Parties are permitted to be accompanied by an attorney. Other non-parties may attend only with the permission of all parties and with the consent of the mediator.

Note: Authority cited: Health and Safety Code section 8016.

§ 29013 Briefing and Mediation Schedule

(a) *Opening Statement Briefs (Complaint)*: Within 20 days of the Commission's designation of a mediator, each party to the dispute shall submit an opening statement brief to the mediator and all other parties identifying each issue or item in dispute, the facts supporting their positions, and the legal bases supporting their positions. The brief should be accompanied by any evidence demonstrating the truth of the facts presented in the opening statement brief. Any evidence presented with a brief should be separately identified with an exhibit list, for instance Exhibit 1 (exhibit description), etc. with the exhibits attached. As appropriate, the mediator has discretion to implement reasonable policies and practices for mediation, including, without limitation, creating submission procedures, requesting exhibit indexes, imposing page limits, separating the parties during the process, and requesting additional evidence or briefing from the parties.

Final Draft CalNAGPRA Dispute Resolution Mediation Regulations

- (b) *Response Briefs:* Each party to the dispute is permitted, but not required, to submit a second brief and evidence responding to the opening statement briefs and evidence of the other party or parties. Any such responses shall be filed with the mediator and submitted to the opposing party or parties within 20 days of the date of the last-submitted opening statement. As appropriate, the mediator may request that accompanying evidence be lodged separately, with each exhibit marked as part of an index.
- (c) *Mediation Sessions:* Within 7 days of having received responses from all parties, or 27 days after having received opening statements, whichever is later, the mediator shall contact the parties to schedule an initial mediation session. The mediation session shall be scheduled to occur within 20 days of the submission of the last-submitted response brief, or 40 days from the submission of the last-submitted opening statement, whichever is earlier. If the parties are unable to agree upon a date, the designated mediator will provide the parties with a mediation date within this time frame. Mediation sessions may be continued as determined necessary by the mediator.
- (d) *Mediation Venue:* Mediation sessions shall occur at locations mutually agreeable to the parties and the mediator. If the parties are unable to agree upon a location, the location shall be chosen by the mediator. Mediation sessions shall be conducted in-person, unless the parties, with the mediator's consent, agree to hold virtual mediation sessions using video-conferencing technology.
- (e) *Agreements:* Any agreements reached by the parties resolving some or all of the disputes shall be written, signed, and dated by the parties or their authorized representatives. All agreements must allow for Commission enforcement. Within 30 days of reaching an agreement, a copy of the agreement must be provided to the Commission which shall have the power to enforce its provisions. This authority includes, but is not limited to, the ability to require the parties to participate in renewed mediation under these regulations concerning enforcement or potential breaches of the agreement.
- (f) *Mediator Decision:* If the parties are unable to reach an agreement to fully resolve their dispute through the mediation process, then, within 7 days of the last mediation session, the mediator shall render a written decision as to all issues that remain unresolved. The decision shall identify the issues and/or items in dispute, the parties' positions concerning each issue and/or item in dispute, the evidence supporting the parties' positions, and the applicable law, and it shall provide an assessment of the facts in dispute and the application of law to those facts, including the application of the restorative justice principles specified in § 29011. Before seeking a final Commission determination under § 29014, the parties must meet to discuss the written decision in an effort to resolve the matter. Provided, however that the written decision shall be advisory only to the interested parties.

Note: Authority cited: Health and Safety Code sections 8015 and 8016.

§ 29014 Final Commission Determination

- (a) Within 30 days of receiving the mediator's decision as to all issues that remain unresolved, the parties must notify the Commission they are unable to resolve their dispute

Final Draft CalNAGPRA Dispute Resolution Mediation Regulations

through mediation and confirm that they met to consider the mediator's written decision. The parties shall not transmit a copy of the mediator's decision, briefs, evidence, or other information shared during mediation to the Commission, nor shall information from the mediator's decision be referenced in the parties' briefs or arguments.

(b) Upon the parties' notification they are unable to resolve their dispute through mediation, the Commission will designate a hearing officer subject to the same disqualification provisions for mediators set out in § 29010. Alternately, the Commission may refer the matter to the California Office of Administrative Hearings for hearing and determination by an administrative law judge.

(c) Hearings will be conducted consistent with Chapter 5 of the California Administrative Procedure Act, sections 11500, et seq. of the Government Code. Assistance with this process may be found on the Office of Administrative Hearings' website or by contacting that agency. Such hearings will be closed to the public, and, to the extent permitted by law, evidence shall not otherwise be made public to protect records of Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects described in sections 5097.9 and 5097.993 of the Public Resources Code maintained by, or in the possession of, the Commission, and/or another state or local agency. Such evidence includes information related to the location, description, and use of tribal cultural resources as described under section 21082.3 of the Public Resources Code, as well as records that relate to archaeological site information and reports in the possession of the Commission or other state agencies obtained during a consultation process between a California Native American tribe and the state or local agency consistent with section 6254.10 of the Government Code.

(d) At the completion of the California Administrative Procedure Act hearings, the hearing officer or administrative law judge shall prepare a proposed decision that will consider the facts as presented by the parties; the applicable law; tribal traditional knowledge, oral histories, documentation, and testimonies relative to other relevant categories of evidence as provided in Health and Safety Code section 8016; restorative justice principles described in section 29011; and the proposed resolution and remedies. The hearing officer or administrative law judge will not consider the decision of the mediator; nor will any party share with the hearing officer or administrative law judge the decision of the mediator or any part of the record produced at mediation.

(e) Upon completion of the proposed decision, the hearing officer or administrative law judge shall submit the proposed decision to the parties and Commission.

(f) Upon receipt of the hearing officer's or administrative law judge's proposed decision, the Commission will calendar a closed session review at the next regularly scheduled Commission meeting, unless a special meeting is otherwise noticed for the matter, consistent with section 11517 of the Government Code. Commissioners and/or employees who have served as or assisted designated mediators in the matter under consideration or in another matter involving any of the same parties, or are disqualified from serving on any of the grounds listed in § 29010 (c) may not participate in such reviews.

Final Draft CalNAGPRA Dispute Resolution Mediation Regulations

(g) Within 15 calendar days after the Commission's receipt of the hearing officer's or administrative law judge's proposed decision, each party may submit a written brief served on all parties addressing the proposed decision. Parties may not submit any evidence and are limited to addressing the facts, law, and decision included in the proposed decision. Parties may not submit reply or response briefs. Briefs must be consistent with the following requirements:

(i) The briefs shall be no longer than 30 pages, excluding indexes and exhibits. Parties may seek leave to file briefs in excess of these page limits from the Commission, and such requests shall be granted upon a showing of good cause.

(ii) The lines of text must be unnumbered and at least one-and-a-half spaced. Headings and footnotes may be single spaced. Quotations may be block indented and single spaced. "Single spaced" means six lines to a vertical inch.

(iii) The font size, including footnotes, must not be smaller than 13-point.

(iv) The margins must be at least 1 1/2 inches on the left and right and 1 inch on the top and bottom.

(v) The pages must be consecutively numbered. The page numbering must begin with the cover page as page 1 and use only Arabic numerals (e.g., 1, 2, 3). The page number may be suppressed and need not appear on the cover page.

(vi) The Commission may take the following actions concerning the hearing officer's or administrative law judge's proposed decision:

(1) Adopt the proposed decision in its entirety.

(2) Reduce, increase, or otherwise modify the proposed remedy and adopt the balance of the proposed decision.

(3) Make technical or other minor changes in the proposed decision and adopt it as the decision.

(4) Reject the proposed decision and refer the matter back to the hearing officer, administrative law judge, or entity which conducted the hearing to take additional evidence. The hearing officer or administrative law judge should prepare a revised proposed decision based upon the additional evidence, the transcript, and other papers that are part of the record of the prior hearing. A copy of the revised proposed decision shall be provided to each party.

(5) Reject the proposed decision and decide the matter on the record, including the hearing transcript.

(vii) In the event that the Commission rejects a proposed decision and elects to decide the matter on the record, the following procedure shall be followed:

Final Draft CalNAGPRA Dispute Resolution Mediation Regulations

- (1) The Commission shall provide the parties with written notification that it has rejected the proposed decision and will decide the matter itself based upon the Commission's own record.
 - (2) The Commission will provide a copy of the record, including the hearing transcript, to the parties unless the parties stipulate that the Commission may hear the matter without the transcript.
 - (3) The parties shall confine their arguments to the record. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by the hearing officer, the final decision, a transcript of all proceedings, all exhibits whether admitted or rejected, the written evidence and any other papers in the matter, except as provided by law. No new evidence will be accepted by the Commission, unless the parties can demonstrate, through a separate motion to the Commission, new or different facts, circumstances or law that could not otherwise have reasonably been presented before the hearing officer. Such motion must be brought within ten-days after Commission notification to the parties that it will decide the matter on the record. If additional oral evidence is permitted and introduced at this hearing, no Commissioner may vote on the matter unless the Commissioner has heard the additional evidence.
 - (4) The complaining parties shall file their opening briefs within 20 days after the Commission has transmitted the record to the parties.
 - (5) The responding parties shall file their responding briefs within 20 days after service of any opening briefs.
 - (6) The complaining parties may file reply briefs within 15 days after service of any responding briefs.
 - (7) All briefs shall comply with the formatting in subdivision (g):
 - (8) Parties may request an oral hearing no later than two business days after completion of the written briefing. The Commission shall schedule a hearing within 15 days of such request. The hearings shall be scheduled within 65 to 90 days after the rejection of the final decision. Each party will be given 30 minutes to present their arguments.
 - (9) The Commission shall issue its final decision within 100 days after the rejection of the final decision. If the Commission has ordered a transcript of the hearing, the Commission shall issue its final decision within 100 days after receipt of the transcript. If the Commission finds that a further delay is required by special circumstances, it shall issue an order delaying the decision for up to 30 days.
- (h) The parties shall retain the option and are encouraged to come to an agreement resolving all or part of their dispute during any point of the dispute resolution/mediation process, including after notifying the Commission that they were unable to resolve their dispute through mediation. The parties must promptly provide the Commission with a written copy of any agreement

Final Draft CalNAGPRA Dispute Resolution Mediation Regulations

resolving any part of a dispute pending before the Commission. The Commission shall have the power to enforce any agreement consistent with § 29013.

Note: Authority cited: Health and Safety Code sections 8015 and 8016; Government Code sections 11500, et seq., Government Code section 11126.

§ 29015 Precedent Decisions

(a) The Commission may designate, as a precedent decision, any decision or part of any decision that contains a significant legal or policy determination of general application that is likely to recur. The Commission may also designate as a precedent decision any precedent decision issued by another California state government agency.

(b) Once the Commission designates a decision or part of a decision as precedent, the Commission may rely on it or that part of it as precedent and the parties may cite to such decision in their argument to the Commission and courts.

(c) The Commission may reverse in whole or in part the prior designation of a decision as a precedent decision.

(d) Notice of intent to designate or withdraw designation of a precedent decision shall be given with the notice of a Commission meeting. Interested persons may submit written comments for or against the proposed action. The Commission may decide the issue at that meeting or put the matter over to a subsequent meeting.

(e) All precedent decisions shall be posted on the Commission's website with the goal of transparency and ease of research. Precedent decisions may be redacted to protect confidential information including sensitive cultural resource information.

Note: Authority cited: Health and Safety Code sections 8015 and 8016; Government Code section 11425.60.