AB 52 and CEQA

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This presentation does not constitute legal advice. Recipients of this information are encouraged to seek legal counsel, as appropriate.
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- Represents clients addressing impacts of major public safety projects on cultural resources

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- Director of Cultural Resources at ECORP Consulting, Inc.
- Registered Professional Archaeologist, 22 years of experience
- Specialization in compliance strategy and public policy regarding cultural resources (Section 106 NHPA, CEQA, NEPA)
- Faculty at CSU-Chico and Butte College
Overview

- Integration of AB 52 into the CEQA Process
- Implementation and Compliance Challenges
- Questions?
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<th>Agency</th>
<th>Tribes</th>
<th>When Applies</th>
<th>Party Initiating Contact</th>
<th>Reaction</th>
<th>Timing</th>
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<tr>
<td>Section 106 NHPA</td>
<td>Federal</td>
<td>Federally-recognized</td>
<td>Prior to issuance of a permit, license, or funding</td>
<td>Federal Agency</td>
<td>Proactive</td>
<td>Tends to be later in the process, post-CEQA</td>
<td>No timeframes</td>
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<td>Senate Bill 18</td>
<td>Local (Cities/Counties)</td>
<td>California Native American Tribes</td>
<td>Prior to General Plan and Specific Plan adoptions or amendments</td>
<td>Local Agency</td>
<td>Proactive</td>
<td>Tends to be earlier in the process, in conjunction with CEQA</td>
<td>90 day window to initiate, followed by CC/BOS noticing (45 and 10 days)</td>
</tr>
<tr>
<td>Public Comment: CEQA</td>
<td>State/Local</td>
<td>Any member of the public</td>
<td>CEQA</td>
<td>Tribes</td>
<td>Reactive</td>
<td>Near the end of CEQA, after the draft environmental document has been released to the public</td>
<td>Initial Study: 30 calendar days, EIR: 45 calendar days</td>
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<tr>
<td>Public Comment: NEPA</td>
<td>Federal</td>
<td>Any member of the public</td>
<td>NEPA (note, this often occurs in conjunction with Section 106)</td>
<td>Tribes</td>
<td>Reactive</td>
<td>Near the end of NEPA, after the draft environmental document has been released to the public</td>
<td>EA: 30 calendar days, EIS: 45 calendar days</td>
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<tr>
<td>Assembly Bill 52</td>
<td>State/Local</td>
<td>California Native American Tribes</td>
<td>CEQA</td>
<td>Tribes</td>
<td>Proactive</td>
<td>Earliest point in the process, at the start of CEQA</td>
<td>14 days from start; 30 day response window; 30 day initiation window; then no time frames</td>
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1. Amended CEQA to mandate early tribal consultation *prior to and during* CEQA review

- Cannot *release* an environmental document until consultation, if requested, has been initiated [PRC 21080.3.1(b)]

- Cannot *certify* environmental document until consultation, if initiated, has concluded [PRC 21082.3(d)].

- With "California Native American tribes"
  - Not necessarily physically located near your project
  - Not necessarily the same groups as for Section 106 or SB 18, because:
    - Only with those tribes who have formally requested, in writing, notification on CEQA projects under AB 52 (= “general notification”)
    - How you identify tribes and initiate consultation is opposite of pre-AB 52
2. Introduced new resource to CEQA: Tribal Cultural Resources (TCRs)

- TCR is defined as sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either of the following:
  - Included or determined to be eligible for inclusion in the CRHR; or
  - Included in a local register of historical resources; or
  - A resource determined by the lead agency, in its discretion and supported by substantial evidence, and considering the stated importance to the tribe, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1 (=CRHR)
  - Some special considerations…
Special Considerations

- Tribes, not archaeologists, are the experts

- A cultural landscape must be geographically defined in terms of the size and scope of the landscape

- A TCR may also be considered a historical resource under CEQA

- Not necessarily visible or archaeological (e.g., viewsheds)
3. Significant impact on TCR = significant effect on environment

- This may dictate the type of CEQA document needed (EIR vs. MND)
  - Cannot release an environmental document until consultation, if requested, has been initiated [PRC 21080.3.1(b)]
  - If you are already doing an EIR for other reasons, technically, you CAN release an NOP before you know the impacts to TCRs
4. Requires formal *conclusion* to consultation

- The consultation shall be considered concluded when either of the following occurs:
  
  1. The parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists, on a tribal cultural resource; or
  
  2. A party, acting in *good faith and after reasonable effort*, concludes that mutual agreement cannot be reached.

✓ Cannot *certify* environmental document until consultation, if initiated, has concluded [21082.3(d)].
5. Effective July 1, 2015 for all projects subject to CEQA, except for projects where:

- Notices of Preparation for EIRs, or Notices of Intent to adopt NDs or MNDs were *published* before July 1
The Process
Procedures/ Timelines

Outside of the CEQA Process

NAHC* assembles master list of all agencies by 7/1/2016 (DONE)

Tribe contacts NAHC to request agency contact lists

NAHC responds to tribe with agency lists

*Native American Heritage Commission
### The Agency List:

http://nahc.ca.gov/codes/

<table>
<thead>
<tr>
<th>Location</th>
<th>Type</th>
<th>Description</th>
</tr>
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<tbody>
<tr>
<td>Sacramento</td>
<td>State Government</td>
<td>California Department of Transportation</td>
</tr>
<tr>
<td>Humboldt</td>
<td>State Government</td>
<td>California Department of Transportation, District 1</td>
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<td>San Joaquin</td>
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<td>Inyo</td>
<td>State Government</td>
<td>California Department of Transportation, District 9</td>
</tr>
<tr>
<td>Sacramento</td>
<td>State Government</td>
<td>California Department of Transportation, Headquarters</td>
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</table>

**Statewide**

State Government  Cal Fire

**Your listing is as follows:**

Yuba County  
915 8th Street, Suite 115  
Marysville, CA 95901

This means that all notices are going to the County Administrator’s Office. Be sure to ask them to forward them to Community Development, if they don’t already know to do so!

Regardless of where they are directed, letters would apply to the Planning Department and Public Works Department, and any other departments or divisions that would serve as a lead agency under CEQA.

Within counties and cities, there are often multiple autonomous divisions that serve as their own lead agencies that don’t typically interact with each other (e.g., public works, community development, airport, etc.).

**Potential scenario:** tribe sends letter to the main (general) office for all agency projects. By default, City Clerks tend to receive letters. Do those (non-planning) offices know to notify all department offices that a letter was received and that they are time-sensitive?
**Procedures/Timelines**

**Outside of the CEQA Process**

NAHC* assembles master list of all agencies by 7/1/2016 (DONE)

Tribe contacts NAHC to request agency contact lists

NAHC responds to tribe with agency lists

Tribe sends to agency, general notification request letters including contact person

*Native American Heritage Commission

*NAHC has been advising tribes that unless they request to be consulted by letter, there is no obligation for the agencies to consult under AB 52.

*Agencies: keep a file*
Procedures/Timelines

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Tribe contacts NAHC to request agency contact lists

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Agencies: keep a file

Inside the CEQA Process

CEQA lead agency reviews application and determines it complete; the CEQA process begins.

Within 14 days

Agency notifies tribe’s contact person (for tribes that requested consultation) of project in writing, with map and project description, and notification that tribe has 30 days to respond. *

Within 30 days

Tribe responds in writing to indicate desire to consult

Lead agency initiates Consultation within 30 days of receiving request to consult

Tribe DOES NOT respond to indicate desire to consult or does not wish to consult

Lead agency documents such in the administrative record / CEQA doc and moves on. This is the earliest point at which you could publish an NOP or NOI.

Applicant (internal or external) submits application to CEQA lead agency

Agencies have discretion about how they define the start date of CEQA

Be aware of permit streamlining act requirements
Procedures/ Timelines

Lead agency initiates consultation *within 30 days* of receiving request

- Tribe may consult with other members/elders/experts
- Initial meeting with tribe to present the project
- Agency/applicant may host project area tour

Does tribe express concern for TCRs in project area?

- Yes
- No

- Lead agency evaluates evidence for being eligible for CRHR, local registry, or NRHP based on “substantial evidence” and being geographically defined relative to the project area.

- Are there TCRs present in the project area for the purpose of CEQA?

- Document such in CEQA doc and move on

- You could publish an NOP or NOI

*No statutory limit on length of consultation*
Lead agency initiates consultation within 30 days of receiving request.

- Tribe may consult with other members/elders/experts
- Initial meeting with tribe to present the project
- Agency/applicant may host project area tour

Does tribe express concern for TCRs in project area?

- Yes: Document such in CEQA doc and move on
- No: You could publish an NOP or NOI

- Are there TCRs present in the project area for the purpose of CEQA?
  - Yes: Confidential information must be withheld from public distribution
  - No: Document such in CEQA doc and move on

No statutory limit on length of consultation.
Procedures/ Timelines

What are appropriate **mitigation** measures?

Consult on impacts to TCRs

What **alternatives** to avoid TCRs are feasible? *(this SHALL be included in consultation if the tribe specifically requested so) see NAHC template*

Will the project significantly impact TCRs?

What type of CEQA **document** is appropriate?

Will the project have a significant or less-than-significant **impact** on the TCR?

Agency will need to adopt thresholds
Consult on impacts to TCRs

Will the project significantly impact TCRs?

- No
  - Document such in CEQA doc and move on
  - This is the latest point at which you could publish an NOP or NOI

- Yes
  - Did the parties agree to mitigation measures?
    - Yes
    - No

This may be the latest point in the process when the type of CEQA document is determined because impacts to TCRs could be the only thing that kicks an IS/MND into an EIR. If an EIR is already being prepared for other issues, then selection may occur earlier in the consultation process.
Did the parties agree to mitigation measures?

- Yes
- No

15126.4 (a)(3): “Mitigation measures are not required for effects which are not found to be significant”

15126.4(a)(4)(B): “The mitigation measure must be “roughly proportional” to the impacts of the project.

AB 52 offers suggestions: e.g., preservation and avoidance; protecting cultural character, traditional use, and confidentiality; and use of conservation easements
**Example Mitigation**

- **Interpretive Panels**
  - Do not install at locations of sites, however
  - Typically about $5,000 per panel
Example Mitigation

- Reburial / Repatriation of Artifacts
  - Be aware of potential conflicts with Section 106 requirements
  - Make sure it is kept confidential
  - State law: reinternment record must be filed with county; also CHRI S
  - Could be preceded by artifact scanning and casting
Example Mitigation

♦ Scanning and Casting
  ♦ Reasonable and effective way to document; provide castings to tribe
Example Mitigation

- Laser Scanning / LIDAR
**Example Mitigation**

- **Capping of Sites**
  - Works well in situations where horizontal separation (buffers) is not feasible, but vertical separation would work.
  - Must be done in conjunction with a CE so that maintenance or utility work does not disturb the site.
Did the parties agree to mitigation measures?

Yes

Incorporate mitigation measures into selected CEQA doc and MMRP, as well as alternatives considered; become legally enforceable

No

Lead agency documents good faith and reasonable effort (documented by its administrative record) and uses its own best judgment on which mitigation measures to implement

Agency certifies the EIR or adopts the ND/MND
Implementation and Compliance Issues

- Categorical exemptions
- Issues with request letters and responses
- TCRs without consultation
- Notices of Preparation
- Substantial evidence and significant impacts
- Different types of EIRs
Exemptions

- Statutory Exemptions
  - CEQA does not apply, so neither does AB 52

- Categorical Exemptions
  - Exempt from preparing environmental documents or exempt from CEQA altogether?
    - May not be used for projects that may cause a substantial adverse change in the significance of a historical resource (14 CCR Section 15300.2(f))
    - Lead agencies must first determine if the project has the potential to impact historical resources and if those impacts could be adverse prior to determining if a categorical exemption may be utilized for any given project
    - High likelihood that TCRs are also historical resources under CEQA
  - Cat ex w/technical studies and AB 52 consultation record?
Requests to Consult

- Late arriving general request letters
  - Arrival of general request letters after 14-days into CEQA, but before NOP or NOI published or doc certified/adopted
  - Stop and restart?
    - Have you already released your environmental document?
    - Literal interpretation: yes.
      - 21080.3.1 (b): “Prior to the release of a ND, MND, or EIR for a project, the lead agency shall begin consultation...”
      - Cannot release environmental document until consultation, if requested, has been initiated.
      - Cannot certify your environmental document until consultation, if initiated, has been concluded.
Requests to Consult

- **When no tribes wish to consult**
  - No general request letters received yet. Proactive vs. reactive?
    - 21080.3.1(c): “to expedite the requirements of this section, the NAHC shall assist the lead agency in identifying the California NA tribes that are traditionally and culturally affiliated with the project area.”
    - NAHC has been sending out lists of tribal contacts to agencies for AB 52 consultation – however, *this is not part of the procedures in AB 52.*
    - *Current trend:* more agencies are being reactive, taking a literal interpretation of the bill
  - If no letters were received and you are ready to publish your NOP or NOI, document that in the TCR section!
    - -role of Sacred Lands File information in CEQA docs
  - NAHC: “failure to request notification does not preclude non-AB 52 tribal consultation”
Requests to Consult

♦ Unexpected general request letters from new tribes
  – California Native American tribes have moved around over time or have been relocated by the government
  – Not necessarily physically located near your project
    » See maps at http://calepa.ca.gov/Tribal/Resources.htm
    » Consider contacting NAHC
Late responses to offers to consult

- After the 30-day response window closes, an acceptance letter arrives
  - Pay attention to postmarks

- If lead agency complied with the noticing requirements and the tribe failed to request consultation within 30 days, then the agency may certify without consulting (PRC 21082.3(d)(2)).
  - However: PRC 21080.3.2(c) allows tribes or the public to submit information on TCRs, impacts, and MMs to the agency anyway; and
  - CEQA public comment periods and public meetings may elicit comments from tribes
  - These other mechanisms are not subject to AB 52 thresholds
**NOTICIONS OF PREPARATION**

**NOPS and Noticing Requirements**

- Legislative Counsel’s Digest appears to differ from actual text of the law with regard to timing of consultation relative to environmental documents and noticing. (OPR says to disregard LCD!)
  - LCD: requires a “lead agency to begin consultation... prior to determining whether a ND, MND, or EIR is required for a project.
  - 21080.3.1 (b): “Prior to the release of a ND, MND, or EIR for a project, the lead agency shall begin consultation...”
    - However, 21080.3.2(a): “The consultation may include discussion concerning the type of environmental review necessary” and
    - 21084.2: “A project with an effect that may cause a substantial adverse change in the significance of a TCR is a project that may have a significant effect on the environment.”
    - But to be clear....
Cannot **release** an environmental document until consultation, if requested, has been initiated [PRC 21080.3.1(b)]

Cannot **certify** environmental document until consultation, if initiated, has concluded [PRC 21082.3(d)].

However, AB 52 does not address release of NOPs.

- NOP is not an environmental document
- NOP is notice that an EIR *will be* prepared
- NOP is only pre-decisional if it is released before consultation and does not include TCRs as a potential significant impact
- TCRs aside, if IS/MND is a possibility, then must wait for consultation to be carried out before publishing NOP
Weighing substantial evidence and significance of impacts

TCRs must meet criteria or be supported by “substantial evidence”

- 21080: “fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.”

- 21080.3.1(a): CA tribes are experts

- Disagreement among experts = EIR should summarize the main points of disagreement among the experts.

  “The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure.”
Substantial Evidence

Weighing substantial evidence

- Agencies have discretion, but courts will decide
- When evaluating, look for:
  - geographic or physical manifestation of the TCR inside the project area
  - ethnographic evidence to support TCR
  - contact period vs. recent
  - oral history

Determining significance of impacts

- Impacts can’t be measured with science
- There are no overarching thresholds of significance for impacts to TCRs
- Significant impact might trigger an EIR
 Agencies: develop your own thresholds of significance for TCRs.

- General thresholds may need to be similar to what you are using for Historical Resources

- Consider that project-specific thresholds of significance may be more appropriate for TCRs

  - will project diminish the qualities that made it significant in the first place?
    - Location, design, setting, materials, workmanship, feeling, and association
Types of EIRs

- **Supplemental, Addendum, and Subsequent docs**
  - **Subsequent**
    - When there are substantial changes in project, or new information; *subject to public review and comment*
    - Could a case be made that TCRs trigger the need for this, if the original EIR didn’t address impacts to TCRs?
  - **Supplemental**
    - Relatively minor updates; *subject to public review and comment*
  - **Addendum**
    - Minor technical edits; *but no public review and comment*
  - **Is it new CEQA or continuation of existing CEQA review?**
    - If it will result in an IS/ND, IS/MND, or EIR, then AB 52 is required.
    - Addendum does not typically result in a stand-alone EIR or IS
Agencies: define criteria for the “start date” of CEQA

- Option 1: complete application and project description
  - For development projects: Notice of Complete Application?
- Option 2: all of the above plus funding in place
- Option 3: all of the above plus assigning a project manager/planner and/or retaining a CEQA consultant under contract
  - Define your start date in writing as a policy statement, and apply it consistently across all projects.
  - Memorialize that start date in writing in all project documentation.
    - For development projects, could use the Notice of Complete Application under the Permit Streamlining Act
    - Agencies have discretion as to how much documentation is needed
Suggestions

Appearance of being “pre-decisional”

- Concern among agencies over RFPs for IS/MNDs or EIRs

  - How do you know you are going to prepare an IS/MND before you determine whether or not there are TCRs present, and you need to do consultation to determine if there are?

- Solution: RFP for IS checklist only at first

- What if you already know you need an EIR for other reasons?
Suggestions

- Develop standard operating procedures.
  - Handling general consultation requests (POC)
    - Will you release copies of documentation?
  - Template letters to document consultation
  - Decision trees for assessing TCRs
  - Thresholds of significance
  - Sample mitigation measures (commensurate and tied to impact)
  - QC checklists to document and verify compliance
  - Restructure your CEQA docs to include TCRs
  - Dealing with postmarks and letter dates that conflict with each other
    - Maintain your detailed administrative record on consultation to help with legal defensibility
    - It will be just as important to document why you DIDN’T consult, if that is the case.
Questions?

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