AB 52 and CEQA - the New Tribal Consultation Requirement

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This presentation does not constitute legal advice. Recipients of this information are encouraged to seek legal counsel, as appropriate.
Tribal Consultation Overview

Assembly Bill 52
- Purpose and requirements
- Procedures and timelines
- 6 biggest procedural problems
- 6 key things to do now

Questions?
<table>
<thead>
<tr>
<th>Regulatory Context</th>
<th>Agency</th>
<th>Tribes</th>
<th>When Applies</th>
<th>Party Initiating Contact</th>
<th>Reaction</th>
<th>Timing</th>
<th>Schedule</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 106</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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<tr>
<td>NHPA</td>
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<tr>
<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</td>
</tr>
<tr>
<td>Public Comment:</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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<td>CEQA</td>
<td></td>
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<tr>
<td>Public Comment:</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>NEPA</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>
</tr>
</tbody>
</table>
Amended CEQA:

- Mandate early tribal consultation *prior to and during* CEQA review with a requirement to formally conclude consultation
  - With a different pool of “California Native American tribes”
    - Only those who have formally requested, in writing, notification on CEQA projects under AB 52
    - Not necessarily federally recognized; must demonstrate cultural affiliation to NAHC
    - Not necessarily physically located near your project
    - Not the same lists as for Section 106 or SB 18
Amended CEQA:

- Establishes new category of tribal cultural resources (TCRs), for which only tribes are experts
  - Not necessarily visible
  - Not necessarily archaeological
  - Often religious or spiritual in nature
  - Three criteria plus geographically defined
    - CRHR, local register, or substantial evidence
Amended CEQA:

- Significant impact on TCR = significant effect on environment
  - This may trigger an EIR

- Requires CEQA docs to incorporate findings, not just in terms of mitigation measures, but also in terms of which type of CEQA document is appropriate (e.g., EIR vs. IS/MND)

- Requires revision to CEQA checklist, separate from other cultural resources
  - Each agency differs in how to officially adopt revisions to checklist
  - OPR: “Appendix G is just an example,” not intended to be used verbatim.
August 2015 Prelim Discussion Draft Updates to CEQA Guidelines:

- Cultural and TCR in one section with 3 questions
  - a) historical resources/archaeological resources
  - b) TCRs
  - c) human remains

- Paleo moved into “Open Space, Managed Resources, and Working Landscapes”
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
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 is currently 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

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.

* in accordance with 21080.3.1(b)(1), consultation is triggered by a tribe notifying the Lead Agency in writing of its desire to consult. This is independent of the status of the NAHC issuing a master list of agencies to tribes. However, 21080.3.1(c) states that the NAHC shall assist the Lead Agency in identifying tribes.

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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
  - 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?
    - Yes
      - Confidential information must be withheld from public distribution
    - No
      - Document such in CEQA doc and move on
      - You could publish an NOP or NOI

- No
  - Document such in CEQA doc and move on
Procedures/ Timelines

Consult on impacts to TCRs

Did the parties agree to mitigation measures?

Yes

No

What are appropriate mitigation measures?

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

Consult on impacts to TCRs

Will the project significantly impact TCRs?

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

What type of CEQA document is appropriate?

Agency will need to adopt thresholds

No

Yes

Document such in CEQA doc and move on

This is the latest point at which you could publish an NOP or NOI

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.

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Procedures/ Timelines

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

e.g., preservation and avoidance; protecting cultural character, traditional use, and confidentiality; and use of conservation easements

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1. Legislative Counsel’s Digest differs from actual text of the law

- Timing of consultation relative to environmental documents and noticing

  - LCD: requires a “lead agency to begin consultation... prior to determining whether a ND, MND, or EIR is required for a project.

  - PRC 21080.3.1 (b): “Prior to the release of a ND, MND, or EIR for a project, the lead agency shall begin consultation...”

    - However, PRC 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.”
2. 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!
3. Arrival of general request letters after 14-days into CEQA, but before NOP or NOI published or doc certified/adopted

- Stop and restart?

  - Literal interpretation: yes.
    - PRC 21080.3.1 (b): “Prior to the release of a ND, MND, or EIR for a project, the lead agency shall begin consultation...”
4. Supplemental, Addendums, and Subsequents

- Subsequent EI Rs
  - Could a case be made that TCRs trigger the need for this, if the original EIR didn’t address impacts to TCRs?

→ Is it new CEQA or continuation of existing CEQA review?
  - If it will require publishing of an NOP or an NOI, then AB 52 is required.
5. Exemptions

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

- **Categorical Exemptions**
  - Exempt from preparing environmental documents or exempt from CEQA altogether?
    - not allowed to 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
  - Catex w/technical studies and AB 52 consultation record?
6. Appearance of being “pre-decisional”

- Concern among agencies over flying 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: fly RFP for IS checklist only at first

- What if you already know you need an EIR for other reasons?
What to Do Now

1. Agencies: define your criteria for the “start date of CEQA”
   - Option 1: complete application and project description
   - 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.
2. Agencies: determine how you will deal with Cat Ex’s

- Talk to your legal counsel, get them to provide clear guidance in writing
- *Trends:* currently, agencies are divided about 50/50 about whether or not AB 52 applies to Cat Ex’s.
3. Agencies: develop thresholds for “substantial evidence”

- TCRs must meet criteria or be supported by “substantial evidence”
  - PRC 21080: “fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.”
  - PRC 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.”

- 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
What to Do Now

4. Agencies: develop your 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
Is the impact significant?
Is the impact significant?

1998 aerial

1908 topo
5. Write some standard operating procedures.

- Processes for handling general consultation requests (POC)
- Template letters to document consultation
- Decision trees for assessing TCRs
- Thresholds of significance
- Sample mitigation measures (must be commensurate and tied to impact)
- QC checklists to document and verify compliance
- Restructure your CEQA docs to include TCRs

- 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.
What to Do Now

6. Contact NAHC directly to let them know how to list your agency in their database.

- go to http://nahc.ca.gov/codes/ to verify addresses. No points of contact are listed; some addresses are missing.

- Lists do not differentiate departments or divisions that serve as lead agencies

- Assign a POC so all departments know when a general letter arrives
### NAHC’s list of agencies

<table>
<thead>
<tr>
<th>Location</th>
<th>Government Type</th>
<th>Agency Name</th>
</tr>
</thead>
<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>
</tr>
<tr>
<td>San Joaquin</td>
<td>State Government</td>
<td>California Department of Transportation, District 10</td>
</tr>
<tr>
<td>San Diego</td>
<td>State Government</td>
<td>California Department of Transportation, District 11</td>
</tr>
<tr>
<td>Orange</td>
<td>State Government</td>
<td>California Department of Transportation, District 12</td>
</tr>
<tr>
<td>Shasta</td>
<td>State Government</td>
<td>California Department of Transportation, District 2</td>
</tr>
<tr>
<td>Sacramento</td>
<td>State Government</td>
<td>California Department of Transportation, District 3</td>
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<td>Alameda</td>
<td>State Government</td>
<td>California Department of Transportation, District 4</td>
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<tr>
<td>San Luis Obispo</td>
<td>State Government</td>
<td>California Department of Transportation, District 5</td>
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<td>Fresno</td>
<td>State Government</td>
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<td>Los Angeles</td>
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<td>California Department of Transportation, District 7</td>
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<td>San Bernardino</td>
<td>State Government</td>
<td>California Department of Transportation, District 8</td>
</tr>
<tr>
<td>Inyo</td>
<td>State Government</td>
<td>California Department of Transportation, District 9</td>
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</tbody>
</table>

Note that the two Sac offices (non-district) have different addresses.

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</tr>
</thead>
<tbody>
<tr>
<td>Contra Costa</td>
<td>County Government</td>
<td>Contra Costa County</td>
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<td>Contra Costa</td>
<td>Flood Control District</td>
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<tr>
<td>Contra Costa</td>
<td>County Government</td>
<td>Contra Costa County Local Agency Formation Commission (LAFCO)</td>
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<tr>
<td>Contra Costa</td>
<td>Mosquito &amp; Vector Control District</td>
<td>Contra Costa Mosquito and Vector Control District</td>
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<td>Contra Costa</td>
<td>Resource Conservation District</td>
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<td>Contra Costa</td>
<td>Transportation Authority</td>
<td>Contra Costa Transportation Authority</td>
</tr>
<tr>
<td>Contra Costa</td>
<td>Water District</td>
<td>Contra Costa Water District</td>
</tr>
</tbody>
</table>

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.

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**Potential scenario:** tribe sends letter to the main (general) office for all agency projects. Does HQ know to notify all district and department offices that a letter was received?
Final Tips

- Applicants, consultants, even admin staff at the agency can help maintain administrative record
  - This is one of the greatest legal exposures

- If you know or suspect there may be TCRs in your project area, try to plan to avoid them and/or use conservation easements
  - This may be cheaper than re-engineering or redesigning later
  - May help reduce mitigation costs
  - NAHC: “data recovery as mitigation should not continue to be the first choice, over preservation”
Questions?

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