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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.*



Overview

- ◆ Tribal Consultation Overview
- ◆ Assembly Bill 52
 - Purpose and requirements
 - Procedures and timelines
 - 6 biggest procedural problems
 - 6 key things to do now
- ◆ Questions?



Consultation Mechanisms

Regulatory Context	Agency	Tribes	When Applies	Party Initiating Contact	Reaction	Timing	Schedule
Section 106 NHPA	Federal	Federally-recognized	Prior to issuance of a permit, license, or funding	Federal Agency	Proactive	Tends to be later in the process, post-CEQA	No timeframes
Senate Bill 18	Local (Cities/Counties)	California Native American Tribes	Prior to General Plan and Specific Plan adoptions or amendments	Local Agency	Proactive	Tends to be earlier in the process, in conjunction with CEQA	90 day window to initiate, followed by CC/BOS noticing
Public Comment: CEQA	State/Local	Any member of the public	CEQA	Tribes	Reactive	Near the end of CEQA, after the draft environmental document has been released to the public	Initial Study: 30 calendar days EIR: 45 calendar days
Public Comment: NEPA	Federal	Any member of the public	NEPA (note, this often occurs in conjunction with Section 106)	Tribes	Reactive	Near the end of NEPA, after the draft environmental document has been released to the public	EA: 30 calendar days EIS: 45 calendar days
Assembly Bill 52	State/Local	California Native American Tribes	CEQA	Tribes	Proactive	Earliest point in the process, at the start of CEQA	14 days from start; 30 day response window; 30 day initiation window; then no time frames



Purpose/Requirements

◆ 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



Purpose/Requirements

◆ 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



Purpose/Requirements

◆ 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.



Arranging your checklists

- ◆ 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”



Purpose/Requirements

◆ Effective July 1, 2015 for all projects subject to CEQA, except for projects where:

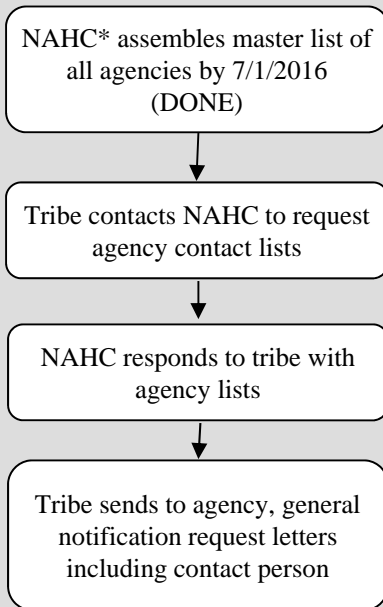
- Notices of Preparation for EIRs, or
- Notices of Intent to adopt NDs or MNDs

...were *published* before July 1



Procedures/Timelines

Outside of the CEQA Process

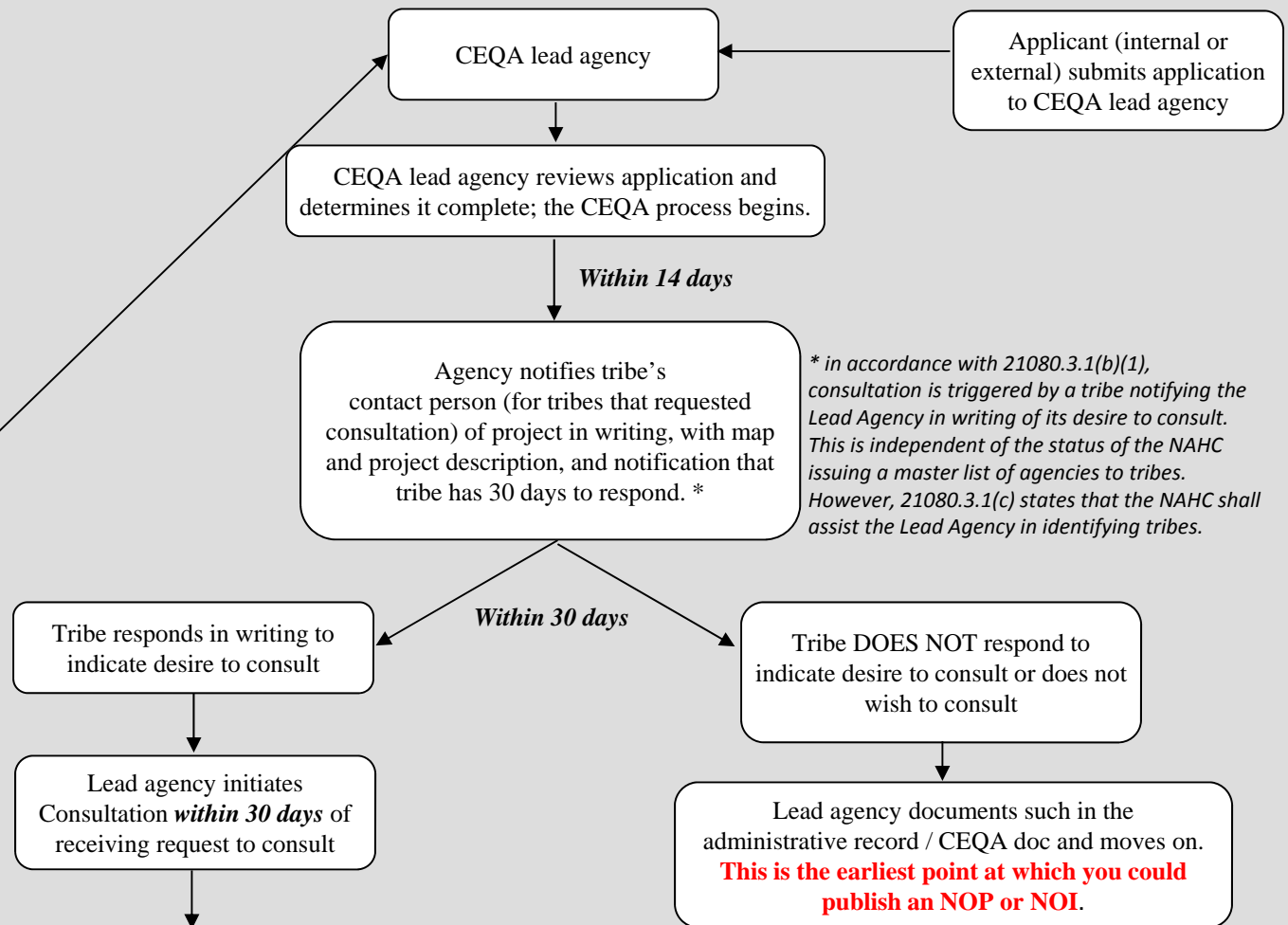


*Native American Heritage Commission

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

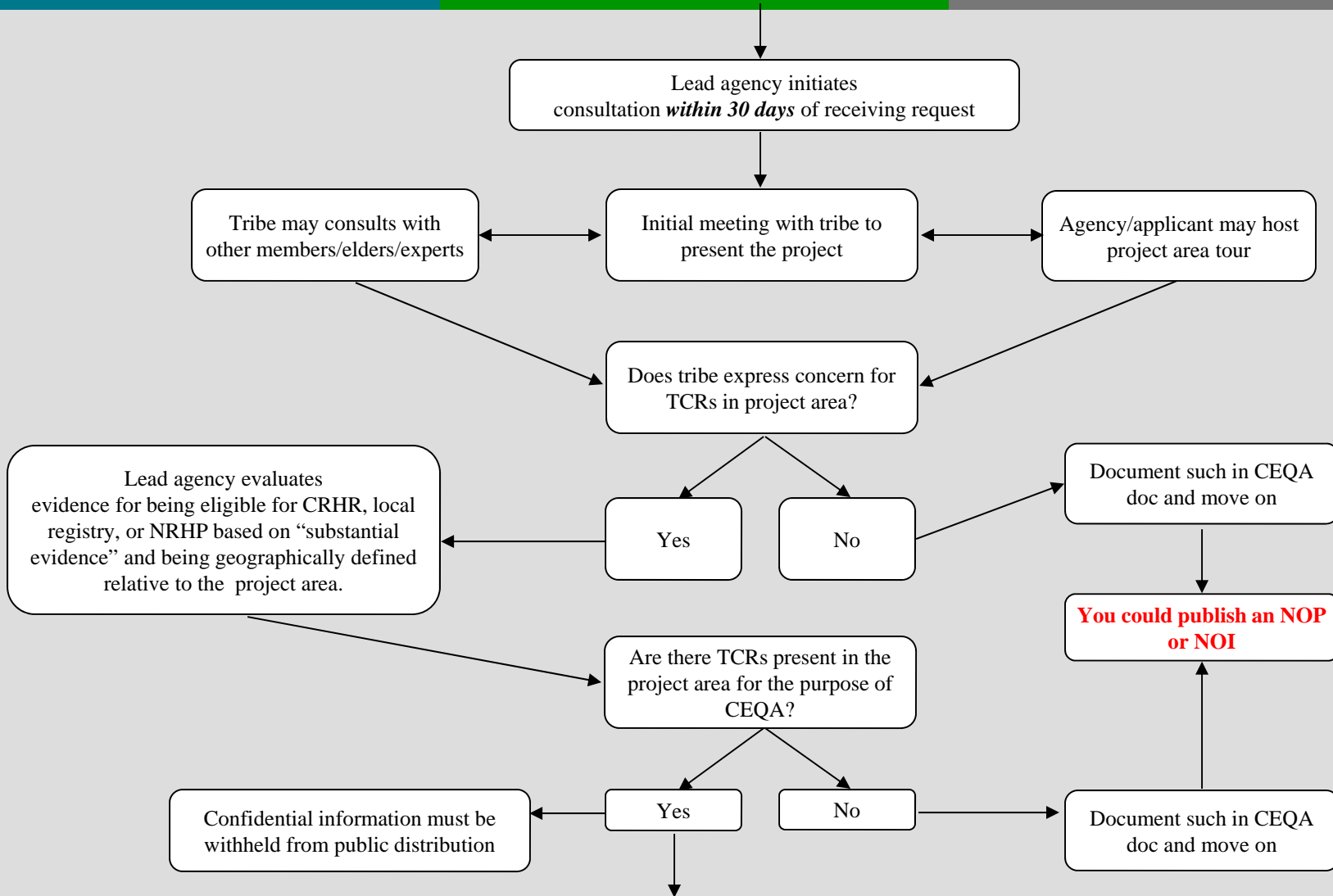
Inside the CEQA Process



** 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.*

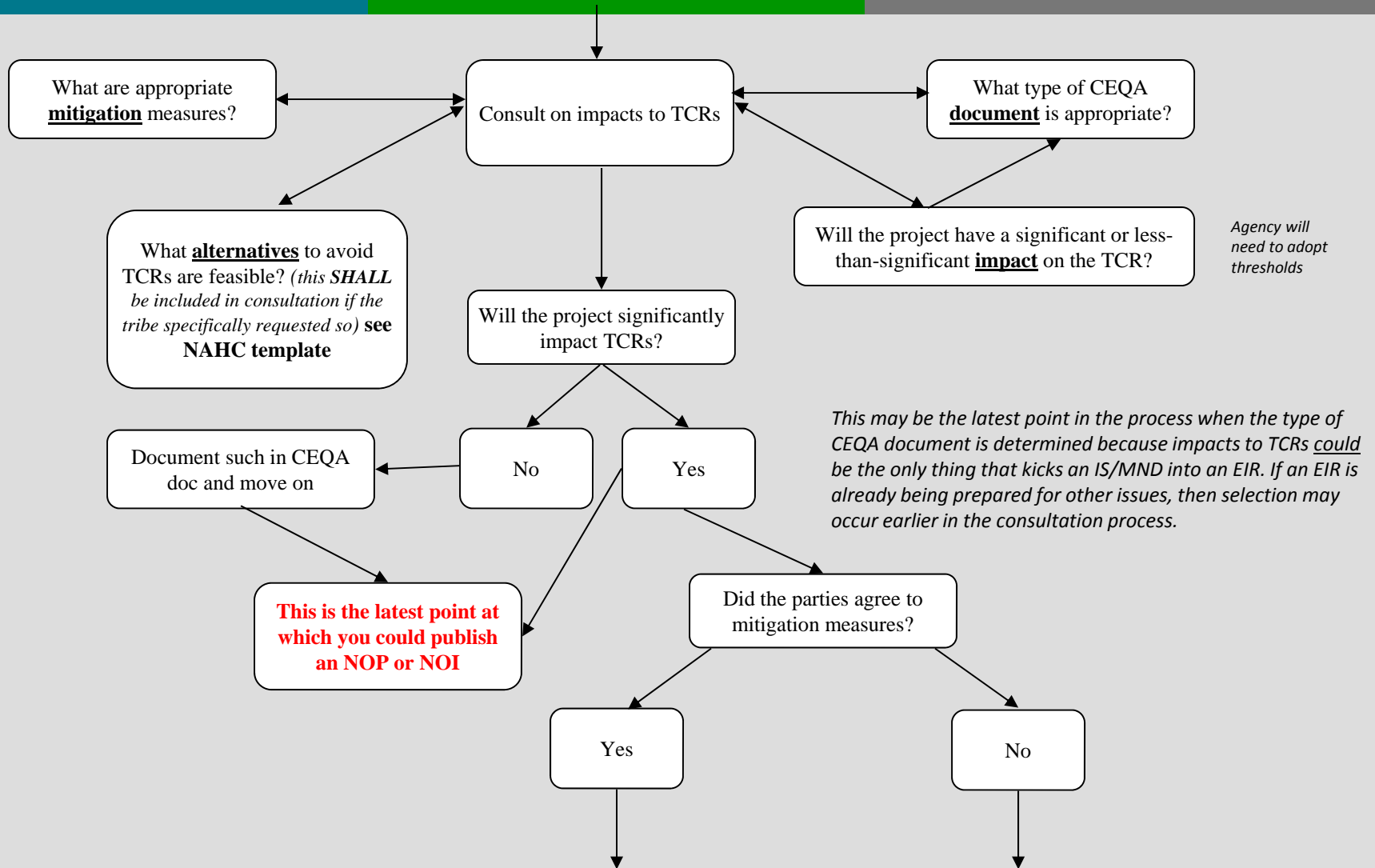


Procedures/Timelines



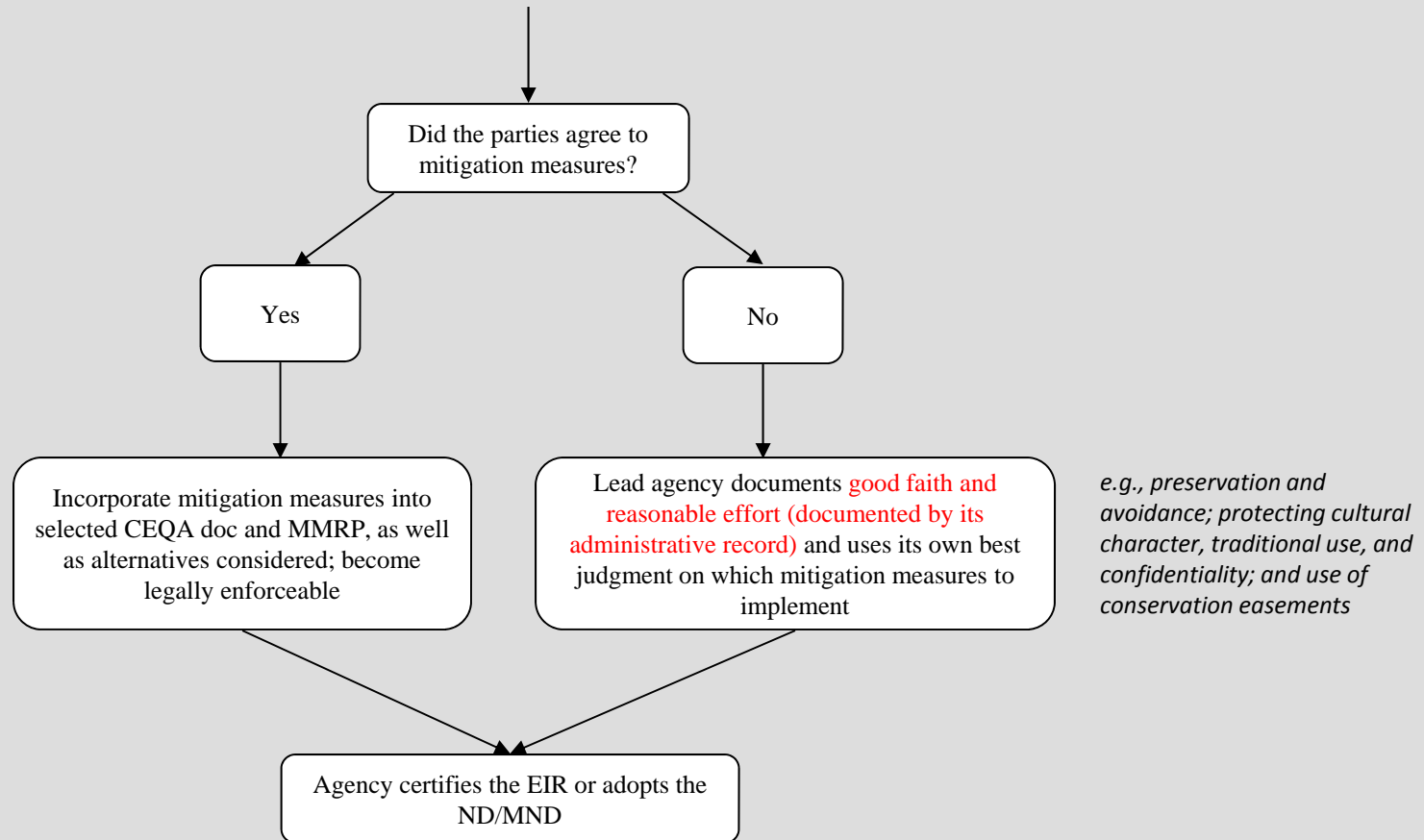


Procedures/Timelines





Procedures/Timelines





Procedural Problems

- ◆ 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."



Procedural Problems

- ◆ 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!



Procedural Problems

- ◆ 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...”



Procedural Problems

◆ 4. Supplemental, Addendums, and Subsequents

- Subsequent EIRs
 - 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.



Procedural Problems

◆ 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?



Procedural Problems

- ◆ 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.



What to Do Now

◆ 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.



What to Do Now

◆ 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?

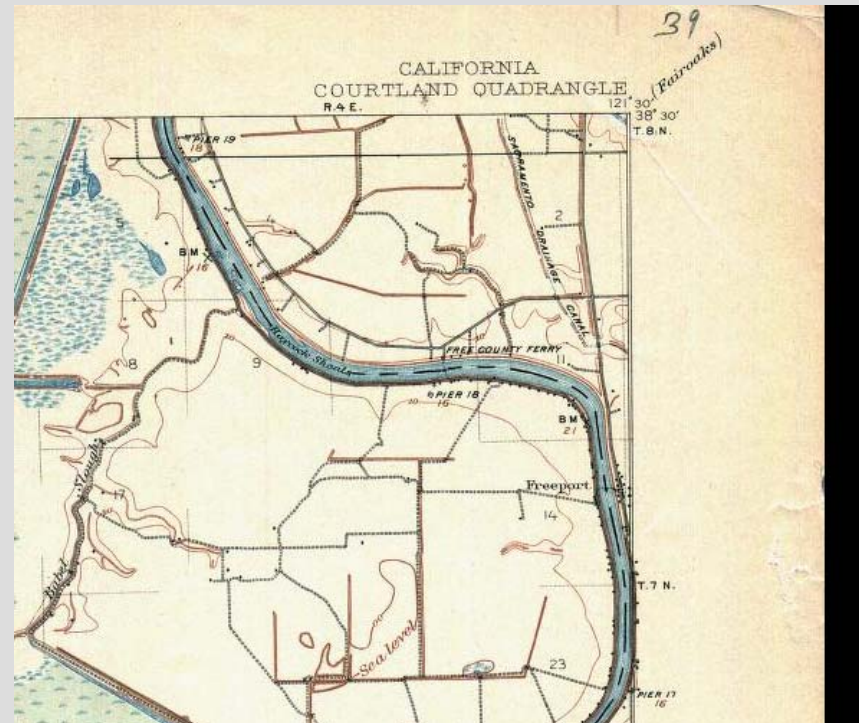




Is the impact significant?



1998 aerial



1908 topo



What to Do Now

- ◆ 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

Sacramento	State Government	California Department of Transportation	←
Humboldt	State Government	California Department of Transportation, District 1	
San Joaquin	State Government	California Department of Transportation, District 10	
San Diego	State Government	California Department of Transportation, District 11	
Orange	State Government	California Department of Transportation, District 12	
Shasta	State Government	California Department of Transportation, District 2	
Sacramento	State Government	California Department of Transportation, District 3	
Alameda	State Government	California Department of Transportation, District 4	
San Luis Obispo	State Government	California Department of Transportation, District 5	
Fresno	State Government	California Department of Transportation, District 6	
Los Angeles	State Government	California Department of Transportation, District 7	
San Bernardino	State Government	California Department of Transportation, District 8	
Inyo	State Government	California Department of Transportation, District 9	
Sacramento	State Government	California Department of Transportation, Headquarters	←

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

Contra Costa	County Government	Contra Costa County	←
Contra Costa	Flood Control District	Contra Costa County Flood Control District	
Contra Costa	County Government	Contra Costa County Local Agency Formation Commission (LAFCO)	
Contra Costa	Mosquito & Vector Control District	Contra Costa Mosquito and Vector Control District	
Contra Costa	Resource Conservation District	Contra Costa Resource Conservation District	
Contra Costa	Transportation Authority	Contra Costa Transportation Authority	
Contra Costa	Water District	Contra Costa Water District	

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.

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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