

**The Role of the Native American
Heritage Commission
in the
Implementation of
Assembly Bill (AB) 52**

January 2015

Outline of Presentation

- Overview of the California Environmental Quality Act (CEQA) Environmental Review Process
- Protection of Tribal Cultural Resources Before and After AB 52
- AB 52 Tribal Consultation Process
- NAHC Implementation of AB 52
- What Tribes Can Do To Prepare

CEQA Environmental Review

Whenever a public agency must approve a project, it has to first determine whether the project must undergo an environmental review under the California Environmental Quality Act (CEQA) (Public Resources Code section 21000 et seq.)

CEQA Environmental Review

The purpose of environmental review under CEQA is to:

- Determine the effects, if any, of a project on the environment; and
- Mitigate those effects, if necessary and possible.

CEQA Environmental Review

Step One: Application Filed

- Step One: An application for approval of a project is completed by the applicant and filed with the agency.
 - If an agency is undertaking the project, the agency must formally decide to undertake the project.
 - This first step is important because it triggers deadlines under AB 52.

CEQA Environmental Review

Step Two: Is Environmental Review Required?

- Step Two: The agency determines whether the project is subject to CEQA environmental review. How?
 - If the project is not legally exempt from environmental review; AND
 - the project might have a significant effect on the environment, then the project must undergo environmental review under CEQA.

CEQA Environmental Review Step Three: Lead Agency Designated

- Step Three: Designation of a Lead Agency. Where one or more public agencies must approve a project, one of them is designated the “lead agency” to oversee the CEQA environmental review process.

CEQA Environmental Review

Step Four: Initial Study

- Step Four: Initial Study. The lead agency prepares an initial study to determine the type of environmental review document is required.

CEQA Environmental Review

Step Five: Environmental Review Document

Step Five: Preparation of the environmental review document. The environmental review document shows how the lead agency has considered the impacts of a project on a variety of resources, such as historical or biological resources.

CEQA Environmental Review

Step Five: Environmental Review Document

Step Five (cont'd): One of three types of environmental review documents will be prepared, depending on the results of the initial study:

- A Negative Declaration (ND);
- A Mitigated Negative Declaration (MND); or
- An Environmental Impact Report (EIR).

CEQA Environmental Review

Step Five: Environmental Review Document

Initial Study Results: If the Initial Study shows that a project that may have a significant effect on the environment, a Mitigated Negative Declaration or an Environment Impact Report is required.

- A project is considered to have a significant effect on the environment if it may cause a substantial adverse change in the significance of a historical resource.

CEQA Environmental Review

Step Five: Environmental Review Document

- A Negative Declaration: A negative declaration is prepared when the agency determines that a project would not have a significant effect on the environment.
(Public Resources Code section 21080 (c))

CEQA Environmental Review

Step Five: Environmental Review Document

- A Mitigated Negative Declaration: A mitigated negative declaration is prepared when an initial study identifies potentially significant effects on the environment, but:
 - Revisions in the project plan would mitigate the effects to the point there would be no significant effect on the environment; and
 - There is no substantial evidence that the revised project may have a significant effect on the environment. (PRC 21080 (c) (1) & (2))

CEQA Environmental Review Step Five: Environmental Review Document

The Negative Declaration (ND) and
Mitigated Negative Declaration (MND)
Preparation Process:

- The lead agency gives the public notice of the availability of the Negative Declaration or Mitigated Negative Declaration.
- The public comments.

CEQA Environmental Review

Step Five: Environmental Review Document

The ND and MND Process (cont'd):

- The lead agency considers the Negative Declaration or Mitigated Negative Declaration.
- If approved, the lead agency files a Notice of Determination.

CEQA Environmental Review

Step Five: Environmental Review Document

- An Environmental Impact Report (EIR) – The most thorough environmental review document. An EIR is prepared when a project may have a significant effect on the environment. (Public Resources Code section 21080 (d))

CEQA Environmental Review

Step Five: Environmental Review Document

The Environmental Impact Report Process:

- The lead agency prepares a Notice of Preparation to let everyone know it will prepare an EIR.
- The lead agency prepares a draft EIR.
- The public comments on the draft EIR.
- The lead agency responds to the comments and prepares a final EIR.

CEQA Environmental Review Step Five: Environmental Review Document

The Environmental Impact Report Process (cont'd):

- ❑ The lead agency makes findings of feasibility of reducing or avoiding significant environmental impacts.
- ❑ The lead agency makes a decision on the project.
- ❑ If approved, the lead agency files a Notice of Determination.

Cultural Resources Protection Before AB 52

Why CEQA Didn't Always Protect Tribal
Cultural Resources Prior to AB 52:

- Not all tribal cultural resources met the criteria to be considered “historical resources.”
- If a cultural resource was not considered a “historical resource,” the effects of a project on that resource did not have to be considered.

Cultural Resources Protection Before AB 52

In order for a tribal cultural resource to be considered an “historical resource,” it had to meet one of the following criteria:

- Was it associated with events that made a significant contribution to California history and cultural heritage?

Cultural Resources Protection Before AB 52

- Was it associated with the lives of persons important in the past?
- Does it embody distinctive characteristics of a type, period, region or method of construction or represent the work of an important creative individual or possess high artistic values?

Cultural Resources Protection Before AB 52

- Has it yielded, or is it likely to yield, information important in prehistory or history?

(Public Resources Code section 5024.1)

Cultural Resources Protection Before AB 52

□ Problems:

- The criteria for what made a “cultural resource” an “historical resource” did not take into account the cultural or spiritual value of the resource to California Native American Tribes.
- If a “cultural resources” did not meet the criteria to be considered an “historical resource,” it could be destroyed.

Cultural Resources Protection Before AB 52

- Problems (cont'd):
 - Even if a tribal cultural resource met the requirements to be considered an historical resource, the mitigation measures to protect the tribal cultural resource often resulted in damage.

Cultural Resources Protection After AB 52

How AB 52 Protects Tribal Cultural Resources:

- Provides a category of cultural resources, “tribal cultural resource,” that is separate from the category of “historical resource” that considers the value of the resources to California Native American tribes

Cultural Resources Protection After AB 52

How AB 52 Protects Tribal Cultural Resources (cont'd):

- ▣ Requires consultation with “California Native American Tribes,” which means a Native American Tribe located in California and on the SB 18 list maintained by the NAHC, prior to the preparation of negative declaration, mitigated negative declaration or environmental impact report.

Cultural Resources Protection After AB 52

How AB 52 Protects Tribal Cultural Resources (cont'd):

- ▣ Increases confidentiality protections for information about tribal cultural resources that is exchanged during tribal consultation

Cultural Resources Protection After AB 52

Definition of “tribal cultural resource”:

- Includes “sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either of the following:

Cultural Resources Protection After AB 52

Definition of “tribal cultural resource” cont’d:

- Included or eligible for inclusion in the California Register of Historical Resources
- A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to Public Resources Code section 5024.1. In applying the criteria the lead agency shall consider the significance of the resources to a California Native American Tribe.

Cultural Resource Protection After AB 52

Definition of “tribal cultural resource”
cont’d:

- A cultural landscape that meets one of the above criteria and is geographically defined in terms of the size and the scope of the landscape
- A “nonunique archaeological resource” if it conforms with the above criteria.

Cultural Resource Protection After AB 52

The provisions of AB 52 come into effect for projects that have a notice of preparation (EIR) or a notice of negative declaration or mitigated negative declaration filed on or after July 1, 2015.

AB 52 Tribal Consultation Steps

- Step One: A tribe must request, in writing, to be notified by lead agencies through formal notification of proposed projects in the geographic area that is traditionally and culturally affiliated with the tribe.
- Without this request, there is no requirement that a lead agency consult with a tribe under AB 52.

AB 52 Tribal Consultation Process

- Step Two: Within 14 days of determining that an application for a project is complete or of a decision by a public agency to undertake a project, a lead agency must provide formal notification to the designated contract or tribal representative of traditionally and culturally affiliated California Native American tribes that have requested notice.

AB 52 Tribal Consultation Steps

- Step Two (cont'd): This notice shall be accomplished by at least one written notification that includes:
 - A brief description of the proposed project;
 - The project's location;
 - The lead agency contact information; and
 - A notification that the tribe HAS 30 DAYS TO REQUEST CONSULTATION.

AB 52 Tribal Consultation Steps

- Step Three: The tribe must respond, in writing, within 30 days of receipt of the formal notification and request consultation.

AB 52 Tribal Consultation Steps

- Step Three (cont'd): When responding to the lead agency, the tribe shall designate a lead contact person.
- If the tribe does not designate a lead contact person or designates multiple lead contact persons, the lead agency shall defer to the person listed on the contact list maintained by the NAHC for SB 18 consultation.

AB 52 Tribal Consultation Steps

Step Four:

- The lead agency shall begin the consultation process within 30 days of receiving a California Native American tribe's request for consultation and prior to the release of a negative declaration, mitigated negative declaration, or environmental impact statement.

AB 52 Tribal Consultation Steps

- For purposes of AB 52, “consultation” shall have the same meaning as provided in SB 18 (Section 65352.4 of the Government Code).

AB 52 Tribal Consultation Steps

- Step Five – What AB 52 Tribal Consultation Can Include:
 - The parties may propose mitigation measures, including but not limited to, those recommended in Public Resources Code section 21084.3 or alternatives that would avoid significant impacts to a tribal cultural resource.

AB 52 Tribal Consultation Steps

- Step Five (cont'd): If a tribe requests consultation regarding alternatives to the project, recommended mitigation measures, or significant effects, the consultation SHALL include those topics.

AB 52 Tribal Consultation Steps

- Step Five (cont'd): The consultation may include discussion concerning:
 - The type of environmental review necessary;
 - The significance of tribal cultural resources;
 - The significance of the project's impacts on the tribal cultural resources; and
 - If necessary, project alternatives or appropriate measures for preservation or mitigation that the tribe may recommend.

AB 52 Tribal Consultation Steps

- Step Five (cont'd): Any mitigation measures agreed upon in consultation conducted under AB 52 shall be recommended for inclusion in the environmental document and in an adopted mitigation monitoring program if determined to avoid or lessen the impact, and shall be fully enforceable.

AB 52 Tribal Consultation Steps

- Step Five (cont'd): If a project may have a significant impact on an identified tribal cultural resource, the lead agency's environmental documents shall discuss:
 - Whether the proposed project has a significant impact on an identified tribal cultural resource; and

AB 52 Tribal Consultation Steps

- Step Five (cont'd)
 - Whether feasible alternatives or mitigation measures, including measures that may be agreed upon as part of consultation, avoid or substantially lessen the impact on the identified tribal cultural resource.

AB 52 Tribal Consultation Steps

- Step Six: Conclusion of Consultation. Consultation is concluded when either of the following occurs:
 - The parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists, to a tribal cultural resource;
 - A party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached.

AB 52 Confidentiality Provisions

AB 52 provides that a project applicant or a project's legal advisers, using a reasonable degree of care, shall maintain the confidentiality of information exchanged during consultation or the environmental review process and shall not disclose to a third party confidential information regarding tribal cultural resources.

AB 52 Confidentiality Provisions

- Places an affirmative duty to keep confidential tribal cultural resource information confidential, as opposed to just excluding such information from disclosure under the Public Records Act or providing for its confidentiality in the CEQA Guidelines

AB 52 Confidentiality Provisions

- Does not apply to data or information that are or become publicly available, are already in the lawful possession of the project applicant before being provided by a California Native American Tribe, are independently developed by the project applicant, or lawfully obtained by the project applicant from a third party that is not a lead agency, tribe, or public agency.

AB 52 Implementation by the NAHC

What does the NAHC have to do to prepare
for AB 52?

➤ On or before July 1, 2016, the NAHC must provide:

- ✓ Each California Native American tribe a list of all public agencies that may be a lead agency under CEQA within a tribe's traditional tribal territory, including the contact information for these agencies
- ✓ Information on how the tribe may request the public agency to notify the tribe of projects within the jurisdiction of those public agencies for the purposes of requesting consultation.
- ✓ Assist the lead agencies in identifying California Native American tribes that are traditionally and culturally affiliated with their jurisdictions.

➤ The provisions of AB 52 that provide tribes the right to consultation are effective July 1, 2015, prior to the July 1, 2016 deadline for the NAHC to provide lists of lead agencies to tribes.

- That being the case, the NAHC proposes implementing the law in three phases:

- Phase I, F.Y. 2014 - 2015: Completion of a basic list of public agencies (state agencies, federal agencies, counties, cities, and districts) organized and searchable by county for tribes. The list will be on the NAHC website.
 - ✓ Governor's Office of Planning and Research (OPR) has provided an initial list of agencies in an Excel file and we are requesting assistance to create a searchable database. In addition we would like to create:
 - A link to CEQA.net on the NAHC website, whereby tribes can use a drag tool to search specific areas and projects, and State Clearinghouse (SCH) numbers will appear.

➤ Phase II, F.Y. 2015 - 2016

- ✓ Completion of an updated comprehensive list of lead agencies.
- ✓ Completion of a Native American Land Information System (NALIS), a database SOLELY for NAHC use that can be searched by location that includes a map overlay of traditional tribal territories.
 - Maps of traditional tribal territories were requested by letter from tribes on November 26, 2014.

➤ Phase II, continued:

- ✓ Tribal consultation, stake holder involvement, outreach, and training.
- ✓ NAHC will assist OPR in revising CEQA Guidelines to separate “consideration of paleontological resources from “tribal cultural resources” and adding “consideration of tribal cultural resources” (Public Resources Code section 21083.09 (a) and (b)).

Phase III, F.Y. 2016 – 2017:

On-going administration and maintenance of the NALIS program, which includes continued, tribal consultation, stakeholder involvement, outreach, and training.

- To make full compliance with AB 52 possible, the NAHC is requesting:
- ✓ Additional funds in F.Y. 2015-2016 to develop the NALIS, which will include updated lead agency contact information for tribes to request tribal consultation and geospatial information to be used by the NAHC in identifying tribes and tribal territories within public agency jurisdictions.
- ✓ Additional funds in F.Y. 2016 -2017 for an annual ongoing cost of maintaining the NALIS, and for continuing tribal consultation, stakeholder outreach, and training.

How Tribes Can Prepare for AB 52

- Provide a map of your area of traditional and cultural affiliation to the NAHC to help the NAHC determine the lead agencies that may have projects in that area.
- Prepare a form letter to lead agencies informing them that the tribe wants to be informed of projects in the tribe's area of traditional and cultural affiliation.

How Tribes Can Prepare for AB 52

- Prepare a form letter to send within 30 days of receiving notification from a lead agency in order to request consultation.
- The NAHC has form letters on its website.
- Be prepared to discuss the significance of your tribal resources, project alternatives, mitigation measures, and the type of environmental review necessary.

Questions?

- Contact Rob Wood, Analyst,
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