

LEARNING THE LANGUAGE OF CEQA: WHAT IS CEQA, WHAT DOES IT DO, AND WHAT TRIBES SHOULD UNDERSTAND ABOUT IT



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Questions?

- If you have questions during any of today's presentations or after today's public hearing, email:
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- We will try to answer questions received during today's public hearing in real time.
- This PowerPoint will be available on the NAHC's website.

Outline of Presentation

- What is the California Environmental Quality Act? (CEQA)
- What does CEQA do?
- What should tribes understand about CEQA?
- How does CEQA work?

Goals of this Presentation

- Prepare tribes, regardless of size or resources, to participate in the CEQA environmental review process.
- “Translate” CEQA terms into plain language – you will see important terms that have a legal meaning under CEQA in **bold** text.
- Highlight the points in the CEQA process where tribes should **PAY ATTENTION**.

CEQA Language Does Not Equal Plain Language

- Words that have one meaning in plain, everyday language may have a “legal” definition under CEQA. To understand CEQA, you have to understand some important CEQA “legal” definitions.
- This is a VERY BASIC, VERY SIMPLIFIED description of the CEQA environmental review process and not intended for those with experience with and expertise in CEQA.

Main Sources of Law on CEQA

- The laws on CEQA are found mainly in three places:
 - The CEQA statutes enacted by the Legislature (Pub. Resources Code §§ 21000 – 21189.3).
 - The CEQA Guidelines, which are regulations adopted by the State Natural Resources Agency (Cal. Code Regs., tit. 14, §§ 15000 - 15387).
 - Public agencies' ordinances, resolutions, rules, regulations, objectives, criteria, or procedures for the evaluation of **projects** and preparation of **environmental impact reports** and **negative declarations** under CEQA. (Pub. Resources Code § 21082; Cal. Code Regs., tit. 14, § 15022 (a)).
- Many exemptions from CEQA are not in the CEQA statutes.

Main Sources of Law on CEQA

- Tribes should get copies of:
 - The CEQA statutes.
 - The CEQA Guidelines.
 - Any ordinances, resolutions, rules, regulations, etc., that a public agency uses to implement CEQA, ESPECIALLY IF the public agency is one that approves projects in the tribes' areas of traditional and cultural affiliation.

What is the California Environmental Quality Act?

- The California Environmental Quality Act (CEQA) is a state law that makes state and local governments consider the effects that activities these governments are in charge of approving may have on the **environment** BEFORE they approve those activities. CEQA calls these activities “**projects**” if they meet the legal definition of “**project**” under CEQA. (Pub. Resources Code § 21065).
- CEQA only applies to **discretionary** “**projects.**” (Pub. Resources Code § 21080 (a)).

What is the California Environmental Quality Act?

- Typically, CEQA comes into play when a private party, such as a company, or a state or local government agency wants to engage in an activity that requires some type of government permit or approval, such as building a road or a bridge.

What Does CEQA Do?

- CEQA creates an environmental review process for state and local governments to use when approving projects.
- BUT: CEQA does not give an agency any more power than what it already has. The approval process for projects and the CEQA process are separate.
- AND: CEQA does not compel any particular outcome other than compliance with its process.

What Does CEQA Do?

- Described in (somewhat) plain language:
- Whenever someone, a company, or a state or local government wants to take engage in an activity that:
 - 1) might affect the **environment**; and
 - 2) requires some kind of government approval, like a permit, a **lead agency** needs to:

What Does CEQA Do?

- Identify **significant effects of the project on the environment**, if any.
- If there are significant effects, consider **feasible alternatives** or **feasible mitigation measures** to reduce those effects;
- If **feasible alternatives** or **feasible mitigation measures** aren't available or won't reduce effects, explain why the project should be approved anyway because of the benefit of the project.

Policy Behind CEQA

- The policy of the State is that public agencies should not approve projects that have a **significant effect on the environment** if there are **feasible** alternatives or **feasible** mitigation measures that would substantially reduce those effects. (Pub. Resources Code § 21002).

CEQA Definitions Break

- **Environment** means “the physical conditions which exist within the area which will be affected by a proposed **project**, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance.” (Pub. Resources Code § 21060.5)
- **Lead Agency** means the public agency that has the principal responsibility for carrying out or approving a project that may have a **significant effect upon the environment**. (Pub. Resources Code § 21067).
- **Significant Effect on the Environment** means a substantial, or potentially substantial, adverse change in the environment. (Pub. Resources Code § 21068).

CEQA Definitions Break

- **Feasible** means “capable of being accomplished within a reasonable amount of time, taking into account economic, environmental, social and technological factors. (Pub. Resources Code § 21061.1)
- **Mitigation Measures** means “changes the **lead agency** has either required in the project or made a condition of approval to **mitigate** or avoid **significant environmental effects**. (Pub. Resources Code §§21002, 21002.1(b); Cal. Code. Regs., tit. 14, § 15074 (d)).

What Should Tribes Understand About CEQA

- Public agencies shall, when **feasible**, avoid damaging effects to any **tribal cultural resource**. (Pub. Resources Code § 21084.3)
- **“Tribal cultural resource”** has a legal definition that we will discuss later. (Pub. Resources Code § 21074).
- **Not all cultural resources meet the legal definition of “tribal cultural resource.” More on this later.**

What Tribes Should Understand About CEQA: What CEQA Does Not Do

- CEQA's environmental review process DOES NOT:
 - Guarantee that what a tribe considers to be a cultural resource will be considered a **tribal cultural resource** so that significant effects on it must be considered;
 - Guarantee that a **tribal cultural resource** will be avoided – because avoidance must be **feasible**;
 - Guarantee that negative effects to a **tribal cultural resource** will be mitigated – because **mitigation measures** must be **feasible**.

The CEQA Environmental Review Process, In Plain Language

- The CEQA environmental review process has three parts that include seven major steps:
- Part One: Preliminary Review
- 1) Determine that the project application is complete (Cal. Code Regs, tit. 14, §15060) or the decision by a public agency to undertake an **project** is made. (Pub. Resources Code § 20165).
- 2) Determination whether the activity is subject to CEQA – does CEQA apply to it?

The CEQA Environmental Review Process, In Plain Language

- Part One: Preliminary Review
- 3) If CEQA applies to the activity, determine whether the project is exempt from CEQA. If the project is not subject to CEQA or exempt, the lead agency may file a **Notice of Exemption** after approving the project. (Cal. Code Regs., tit. 14, §15374).
- **PAY ATTENTION:** The lead agency does not have to file a Notice of Exemption before approving a project.

The CEQA Environmental Review Process, In Plain Language

- Part Two: The Initial Study and Other Evidence
- 4) If the project is not exempt from CEQA, determine whether the **project** may have a **significant effect on the environment** and what kind of environmental document must be written to identify significant effects, if any, as well as project alternatives and mitigation measures. The **initial study** and other evidence are considered to make these decisions.

The CEQA Environmental Review Process, In Plain Language

- **CEQA Definitions Break:**
- **Initial Study** means "a preliminary analysis prepared by the lead agency to determine whether an **environmental impact report (EIR)** or a **negative declaration** must be prepared or to identify the significant environmental effects to be analyzed in an **EIR**. (Cal. Code Regs., tit. 14, § 15365).
- **PAY ATTENTION:** The point of tribal consultation under **AB 52** is for tribes to have their tribal cultural resources considered in this preliminary analysis of determining significant environmental effects.

The CEQA Environmental Review Process, In Plain Language

- Part Three – The Environmental Document
 - 5) The agency decides what kind of environmental document it is required to write to evaluate the project – a **negative declaration**, **mitigated negative declaration**, or an **environmental impact report**. (Pub. Resources Code § 21080 (c) – (d)).
 - 6) Consideration and then adoption or certification of the final environmental document as being completed in compliance with CEQA before approving the project (Cal. Code Regs., tit. 14, §§ 15074, 15090).

The CEQA Environmental Review Process, In Plain Language

- Part Three: The Environmental Document
- 7) The filing of the **notice of determination** signaling that a project was approved and the CEQA environmental review was completed in compliance with CEQA. (Pub. Resources Code §§ 21108, 21152; Cal. Code Regs., tit. 14, §§ 15075, 15090).

Step One: Completed Project Application or Agency Decision to Undertake a Project

- The CEQA environmental review process does not start until:
 - An application for a proposed project or action is determined to be complete by the lead agency (Cal. Code Regs, tit. 14, § 15060), unless the project has a short time period for approval (Cal. Code Regs., tit. 14, § 15111); or
 - A public agency has decided to undertake a project or action. (Pub. Resources Code § 21065).
- A state or local agency has 30 days to determine whether an application is complete. (Cal. Code Regs., tit. 14, §§ 15060, 15101).

Step One: Completed Project Application or Agency Decision to Undertake a Project

- What the completed project application or agency decision to undertake a project triggers:
 - The approval process for the project by the state or local agency that received the application.
 - The CEQA environmental review process, which is separate from the project approval process.
 - The beginning of the notification period to tribes for AB 52 consultation. Lead agencies must notify tribes that have requested notice under AB 52 of projects in their areas of traditional and cultural affiliation of such a project within 14 days of determining that an application is complete or of deciding to undertake a project. (Pub. Resources Code § 21080.3.1 (d)).

Step Two: Does CEQA Apply To This Activity?

- CEQA applies to an activity undertaken, supported, or authorized by a public agency, BUT:
- CEQA does not apply to an activity if:
 - The activity does not involve the exercise of discretionary power by a public agency (meaning that the decision whether to approve the project is ministerial);
 - The activity will not result in a direct or reasonably foreseeable physical change in the environment; or
 - The activity is not a project as defined in Section 15378 of the CEQA guidelines. (Cal. Code Regs., tit. 14, § 15060 (c)).

Step Two: Does CEQA Apply to This Activity?

- **Discretionary or Ministerial project?:** A project is ministerial, and not discretionary, if it does not involve the exercise of discretionary power by a public agency. (Pub. Resources Code § 21080(b)(1); Cal. Code Reg. 15369).
- **Ministerial** describes a government decision involving little or no personal judgment by a public official as to the wisdom or manner of carrying out a project. (14 Cal. Code Regs., tit.14, §15369).
- This means, if a public agency has no choice but to approve a permit or activity if certain requirements are met, the activity is **ministerial and not subject to CEQA.**

Step Two: Does CEQA Apply to This Activity:

- Examples of **ministerial** activities include granting:
 - Automobile registrations
 - Dog licenses
 - Marriage licenses
- Examples of activities presumed ministerial include granting:
 - Building permits
 - Business licenses

Step Two: Does CEQA Apply To This Activity?

- CEQA does not apply to activities that will not result in a direct physical change or reasonably foreseeable physical change in the environment. (Pub. Resources Code § 21065; Cal. Code Regs., tit. 14, § 15060 (c)(2)).
- CEQA does not apply to activities that are defined as not being projects under Section 15378 of the CEQA Guidelines. Examples of such activities include:
 - Proposals for legislation to be enacted by the State Legislature.
 - Organizational or administrative activities of governments that will not result in direct or indirect physical changes in the environment.

Step Three: Is This Project Exempt From CEQA?

- CEQA provides that some projects that are discretionary projects are still exempt from CEQA.
- Types of CEQA exemptions:
 - Statutory exemptions
 - Categorical exemptions
 - Common sense exemption

Step Three: Is This Project Exempt from CEQA? Statutory Exemptions

- Statutory exemptions are exemptions from CEQA written into law by the State Legislature. (Pub. Resources Code § 21080.) Examples include:
 - Emergency repairs to public service facilities necessary to maintain service. (Pub. Resources Code section 21080(b)(2)).
 - Projects that a public agency rejects or disapproves. (Pub. Resources Code section 21080 (b)(5));

Step Three: Is This Project Exempt from CEQA? Statutory Exemptions

- Emergency projects, in general. (14 Cal. Code Reg. section 15269)
- BUT the Most Likely Descendants statute still applies – It is exempt from CEQA. (Pub. Resources Code § 5097.98)
- There are no exceptions to CEQA statutory exemptions.

Step Three: Is This Project Exempt from CEQA? Categorical Exemptions

- Categorical exemptions are exemptions enacted by regulation by the State Resources Agency for classes of projects. (Pub. Resources Code § 21084 (a)).
- Examples of categorical exemptions include:
 - Demolition and removal of a single-family home. (Cal. Code Regs., tit. 14, § 15301(I)(1)).
 - Minor repairs and alterations to existing dams and appurtenant structures under the supervision of the Department of Water Resources. (Cal. Code Regs., tit. 14, § 15301(m)). (But the MLD statute still applies).

Step Three: Is This Project Exempt from CEQA? Categorical Exemptions

- Historical Resources Exception to Categorical Exemptions:
- A categorical exemption SHALL NOT BE USED for a project which may cause a substantial adverse change in the significance of a **historical resource**.
- **PAY ATTENTION:** Because some **tribal cultural resources** may also be **historical resources**, tribes should pay attention when categorical exemptions are used.

Step Three: Is This Project Exempt from CEQA? Categorical Exemptions

- A “**historical resource**” is defined as “a resource listed in, or eligible for listing in, the California Register of Historical Resources.” (Pub. Resources Code § 21084.1).
- A **tribal cultural resource** includes “sites, features, places, cultural landscapes, and objects with cultural value to a California Native American tribe that are included or determined to be eligible for inclusion in the California Register of Historical Resources. (Pub. Resources Code § 21074(a)(1) (A).

Step Three: Is This Project Exempt from CEQA? Categorical Exemptions

- A **tribal cultural resource** is also a **historical resource** if it is listed or determined eligible for listing on the California Register of Historical Resources. (Pub. Resources Code § 21074 (c)).
- A **lead agency CANNOT APPLY A CATEGORICAL EXEMPTION** if a **project** may cause a substantial adverse change in a tribal cultural resource that is also a **historical resource**. (Pub. Resources Code § 21074(a)(1) (A); Cal. Code Regs., tit. 14, § 15300.2 (f)).

Step Three: Is This Project Exempt from CEQA? The Common Sense Exemption

- The Common Sense Exemption provides that CEQA only applies to projects that have the potential for causing a significant effect on the environment. If it is certain there is no possibility that an activity will have a significant effect on the environment, the activity is not subject to CEQA. (Cal. Code Regs., tit. 14, §15061(b)(3)).

Step Three: Is This Project Not Subject To or Exempt from CEQA? Notice of Exemption

- If a project is not subject to CEQA or exempt from CEQA, the lead agency may, but is not required to, file a **Notice of Exemption** with the county clerk or the Governor's Office of Planning and Research (OPR) after approval of the project. (Cal. Code Regs., tit. 14, § 15062 (a) – (c)).
- The time period to file a lawsuit challenging a Notice of Exemption starts 35 days after the Notice is filed and posted. (Cal. Code Regs., tit. 14, § 15062 (d)).

Step Three: Is This Project Subject to CEQA? Notice of Exemption

- If a lead agency approves a project that is not subject to CEQA or exempt from CEQA without filing a **Notice of Exemption**, the time period to file a lawsuit challenging the **Notice of Exemption** is 180 days from approval or commencement of the project. (Cal. Code Regs., tit. 14, § 15112(5).
- **PAY ATTENTION** when a Notice of Exemption is filed. **ASK** the basis for the exemption and whether it was properly applied.

Step Four: The Initial Study and Other Evidence

- If a project is subject to CEQA, the next step is to determine whether the **project** may have a **significant effect on the environment** and what kind of environmental document is required. The **Initial Study** is a document the **lead agency** drafts to help with that determination.
- **PAY ATTENTION.** Tribes should have the information about their **tribal cultural resources** and the impacts of a project on them considered in the **initial study**.

Step Four: The Initial Study and Other Evidence

- Tribes should initiate AB 52 tribal consultation BEFORE the initial study is complete.
- Mandatory topics of AB 52 tribal consultation, if requested by the tribe, include:
 - Alternatives to the project
 - Recommended mitigation measures
 - Significant effects

Step Four: The Initial Study and Other Evidence

- Discretionary topics of AB 52 tribal consultation, if requested by the tribe, include:
 - The type of environmental review necessary.
 - The significance of tribal cultural resources.
 - The significance of of the project's impacts on tribal cultural resources;
 - If necessary, project alternatives or appropriate measures for preservation or mitigation that the tribe might recommend. (Pub. Resources Code § 21080.3.2 (a)).

Step Four: The Initial Study and Other Evidence

- The NAHC has form letters on its website for tribes to use to do the following under AB 52:
- Request notification from public agencies of projects within a tribe's area of traditional and cultural affiliation under AB 52.
- Request tribal consultation on projects under AB 52.
- **PAY ATTENTION:** If a tribe does not request notification from public agencies about projects **FIRST**, it cannot later request AB 52 consultation.

Step Four: The Initial Study and Other Evidence

- The checklist used by public agencies to prepare an **initial study** is in **Appendix G** of the CEQA Guidelines.
- **Appendix G** has been updated to include consideration of impacts to tribal cultural resources and can be found on the Natural Resources Agency website at:
<http://resources.ca.gov/ceqa/docs/ab52/final-approved-appendix-G.pdf>

Step Five: Determination of Which Environmental Document to Write

- Based on the **initial study** and other evidence, the lead agency will write one of three environmental documents:
- **Negative Declaration:** A **negative declaration** means a written statement briefly describing the reasons that a proposed project will not have a significant effect on the environment and does not require the preparation of an **environmental impact report**. (Pub. Resources Code § 21064; Cal. Code Regs., tit. 14, § 15371).
- If there is no **substantial evidence** that a project may have a **significant effect on the environment**, the agency must adopt a **negative declaration**.

CEQA Definitions Break

- **Substantial evidence** includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact. (Pub. Resources Code § 21080 (e) (1)).
- **Substantial evidence** is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment. (Pub. Resources Code § 21080 (e)(2)).

Step Five: Determination of Which Environmental Document to Write

- **Negative Declaration** – if there is **substantial evidence** that a project may cause a substantial adverse change in the significance of a tribal cultural resource, then a negative declaration is not appropriate. (Pub. Resources Code §§ 21064, 21084.2; Cal. Code Regs., tit. 14, § 15064 (f)(3)).
- **PAY ATTENTION: A negative declaration, like other environmental documents, cannot be released until tribal consultation requested in compliance with AB 52 has been initiated.** (Pub. Resources Code § 21080.3.1 (b)).

Step Five: Determination of Which Environmental Document to Write

- **Mitigated Negative Declaration:** A mitigated negative declaration is prepared when an **initial study** has identified potentially **significant effects on the environment**, but:
 - (1) revisions to the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid or **mitigate** the effects to a point where clearly no significant effect on the environment would occur; and
 - (2) there is no **substantial evidence** in light of the whole record before the public agency that the project, as revised, may have a **significant effect on the environment**. (Pub. Resources Code § 2104.5; Cal Code Regs., tit. 14, § 15064(f)(2)).

Step Five: Determination of Which Environmental Document to Write

- **A mitigated negative declaration:**
 - Must include **mitigation measures**, and the mitigation measures must be discussed in the **initial study**. (Cal. Code Regs, tit. 14, §§15063(d)(4); 15071(e);
 - Must include a **mitigation monitoring or reporting program for the mitigation measures**. (Pub. Resources Code § 21081.6; Cal. Code Regs., tit. 14, § 15074(d)).

CEQA Definitions Break

- **Mitigation** means:
- Avoiding the impact altogether by not taking a certain action or parts of an action;
- Minimizing impacts by limiting the degree or magnitude of the action and its implementation;
- Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment.
- Reducing or eliminating the impact over time by preservation and maintenance operations during the lifetime of the action.
- Compensating for the impact by replacing or providing substitute resources or environments. (Cal. Code Regs., tit. 14, § 15370).

Step Five: Determination of Which Environmental Document to Write

- **Mitigated Negative Declaration**
- **PAY ATTENTION: A mitigated negative declaration** cannot be released until tribal consultation requested in compliance with AB 52 has been initiated. (Pub. Resources Code § § 21080.3.1 (b)).
- **PAY ATTENTION: If a project with a mitigated negative declaration** does not reduce significant effects to a **tribal cultural resource**, a **mitigated negative declaration is not the appropriate environmental document.**

Step Five: Determination of Which Environmental Document to Write

- An **environmental impact report (EIR)** must be prepared if the agency determines that the project may have a significant effect on the environment. (Pub. Resources Code § 21080 (d); Cal. Code Regs., tit. 14, § 15064 (f)(1)).

Step Five: Determination of Which Environmental Document to Write

- An **EIR** must discuss:
 - Significant environmental effects of the proposed project;
 - Significant environmental effects which cannot be avoided if the proposed project is implemented;
 - Significant irreversible environmental changes which would be involved in the proposed project should it be implemented;
 - Growth-inducing impact of the proposed project;
 - Mitigation measures proposed to minimize significant effects; and
 - Alternatives to the proposed project. (Cal. Code Regs., tit. 14, §15126).

Step Six: Consideration and Adoption or Certification of the Environmental Document

- Public agencies must provide the public an opportunity to review and comment on environmental documents before adopting them or certifying that they were completed in compliance with CEQA.
- Notice before preparation of the environmental document?
 - Before a draft EIR is prepared, the lead agency will file a **Notice of Preparation**. When the draft EIR is completed, the lead agency will file a **Notice of Completion**.
 - There is no required notice before the preparation of a negative declaration or mitigated negative declaration. When either is completed, the lead agency will file a **Notice of Availability**.

Step Six: Consideration and Adoption or Certification of the Environmental Document

- Comment Period for Environmental Documents:
- Public agencies have to provide a period for the public to comment on environmental documents and public notice of the comment period. Public agencies must respond to relevant comments.
 - Comment period for **negative declarations** and **mitigated negative declarations**: Not less than 20 days. (Cal. Code Regs., tit. 14, § 15105 (b)).
 - Comment period for a draft **EIR**: Not less than 30 days and no longer than 60 days except in unusual circumstances. (In general; exceptions apply). (Cal. Code Regs., tit. 14, § 15015 (a)).

Step Six: Consideration and Adoption or Certification of the Environmental Document

- **PAY ATTENTION:** If a tribe disagrees with an environmental document, it should provide written comments during the comment period.
- For a draft **EIR**, the **lead agency** must respond to comments in the final **EIR**, with some exceptions.

Step Six: Consideration and Adoption or Certification of the Environmental Document

- Hearing: A **lead agency** will typically hold a hearing to:
- 1) Adopt a **negative declaration** or **mitigated negative declaration**; or
- 2) Certify a final **EIR**; and
- 3) Approve the project.
- **PAY ATTENTION:** If a tribe still has concerns about whether the **lead agency** has complied with CEQA, this is the time to put those concerns on the record. Any testimony at a hearing should also be provided in writing and asked to be included in the **administrative record**.

Step Seven: Notice of Determination

- The **Notice of Determination** is the **lead agency's** notice to the public after it has approved or determined to carry out a project which is subject to CEQA. (Cal. Code Regs., tit. 14, § 15373).
- The **Notice of Determination** is filed with either the county where the project is located or with the Office of Planning and Research. It is filed **negative declarations, mitigated negative declarations, and final EIRs.**

Step Seven: Notice of Determination

- The filing and posting of the **Notice of Determination** starts the statute of limitations for a lawsuit to challenge how the lead agency conducted the CEQA process.
- The statute of limitations after a **notice of determination** has been filed for a **negative declaration** or **mitigated negative declaration** is **30 days**.
- **PAY ATTENTION:** It is extremely difficult to file a CEQA lawsuit because of the short statute of limitations.

Step Seven: Notice of Determination

- The **administrative record** is all of the evidence, documents, and testimony the **lead agency** considered during the CEQA process.
- In a CEQA lawsuit, the only evidence a court will consider is what is in the **administrative record**, with possibly some exceptions.
- **PAY ATTENTION:** If a tribe does not participate in AB 52 consultation, comment on environmental documents, or testify at public hearings to approve a project, the tribe will have nothing in the administrative record for a court to consider.

THE END!

- QUESTIONS?
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