

Joint OCAEP/APA Lunch Program

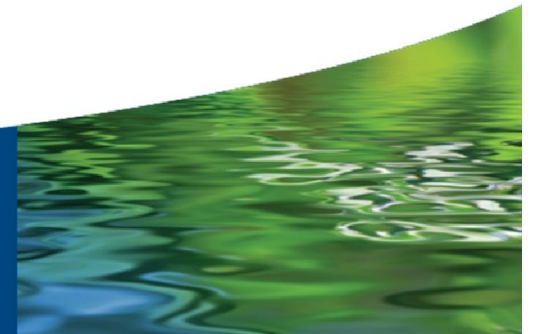
The New Tribal Consultation Requirement: AB 52

March 29, 2017

11:30 am – 1:00 pm

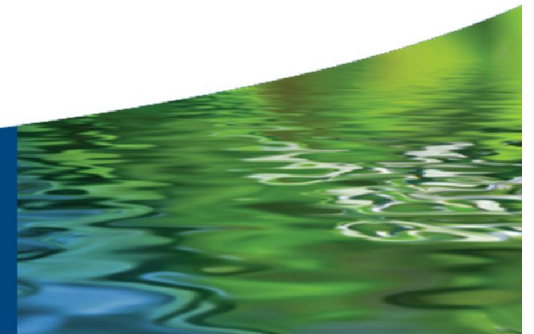
Irvine City Hall

Conference & Training Center



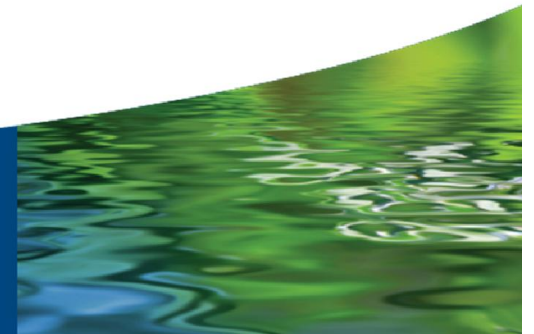
AB 52 – Why

- Why was AB 52 proposed?
 - There was concern that the implementation of CEQA was failing to recognize the potential *heritage value* of Native American cultural resources and, instead, only addressed the *scientific value* of Native American cultural resources for eligibility on the California Register of Historical Resources.



AB 52 – What Is It

- **CEQA Analysis:**
 - Requires consideration of a project's potential to significantly impact a Tribal Cultural Resource
- **Notice/Consultation:**
 - Requires early notice of projects and, if requested by a Tribe, consultation with requesting Tribes to inform the CEQA process



Who Must Comply With AB 52

- **Every** lead CEQA agency in California
 - Cities, counties, water districts, school districts, state agencies, etc.
 - Thus, in turn, every CEQA project applicant or proponent in CA



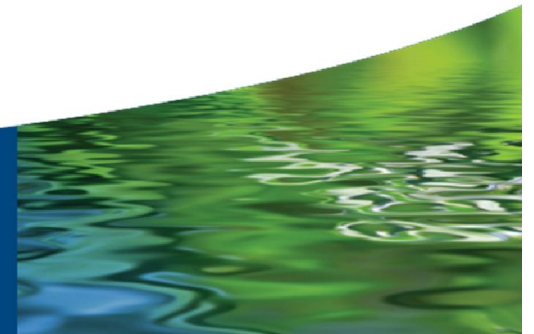
What Is a Tribal Cultural Resource

- Tribal Cultural Resources (TCRs):
 - A site, feature, place, cultural landscape, sacred place or object with cultural value to a “California Native American tribe,” that is either on, or eligible for inclusion in, the California Historic Register or a local historic register, or is a resource that the lead agency, at its discretion and supported by substantial evidence, determines should be treated as a Tribal Cultural Resource. PRC § 21074(a)(1-2)
- Tribes: In the Native American Heritage Commission (NAHC) “contact list.” PRC § 21073



What Is a Tribal Cultural Resource

- TCRs expressly include “non-unique archeological resources” PRC § § 21074(c); 21083.2(h)
 - Non-unique archeological resources: Do not contain “information needed to answer important scientific research questions” for which there is “demonstrable public interest;” nor “special and particular quality such as being the oldest of its type or the best available example of its type;” nor “directly associated with a scientifically recognized important prehistoric or historic event or person.”
- Instead of treating an archeological resource as significant under CEQA only if it is a good candidate for “scientific” research, or only if it is associated with a “scientifically” important event, public agencies must now view significance in a broader light – one keyed not just to the “scientific” value of a resource, but also to the sacred and/or cultural tribal value of the resource.



AB 52 – Much more than consultation

- Whether or not a Tribe has requested consultation, a CEQA document must disclose and analyze whether the proposed project would cause a substantial adverse change to the TCR and, therefore, have a significant impact on the TCR. PRC §21082.3(b)(1)-(2)
 - A CEQA document must consider feasible alternatives and/or mitigation measures to avoid or minimize an impact on the identified TCR.



Notices Inviting Consultation

- Lead Agency must provide requesting Tribe(s) with a notice of a proposed project 14 days after:
 - A project application is deemed complete, or
 - Deciding to undertake the project when it is the agency's own project.
- Notice must include:
 - Brief description of the project
 - Project Location
 - Lead agency contact



Notices Inviting Consultation

- Tips For Addressing Notices
 - Address notices to Tribal leadership with appropriate titles
 - Be sure to copy the Tribal Administrator and Tribal Environmental Director on the notice
 - Send letters via certified mail
 - Make follow-up calls to contacts who have not responded
 - Track all communications, including making records of phone conversations
- Optional:
 - Ask NAHC for list of tribes to consult with and notice those Tribes. This is NOT required.



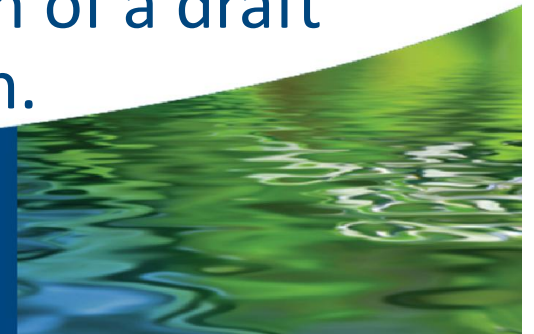
Requesting Consultation

- Tribe(s) must request consultation within 30 days of receipt of the notice, and must designate a lead contact person. If no lead is designated or if multiple persons are designated, the public agency is only required to coordinate with the person listed for the Tribe on the NAHC contact list.
 - Failure of a Tribe(s) to respond to the public agency's notice concludes the process, and no consultation is required.
- Note: Whether or not consultation is requested, nothing in AB 52 precludes a Tribe(s) from participating in the CEQA process in the same manner as a member of the public or public agency: via public comment.



Consultation Tips

- If consultation is requested it is advisable not to release a Draft ND/MND or Draft EIR for public review until consultation is completed and information, including any mitigation measures acceptable to the Tribe(s) are incorporated in the CEQA document.
 - Failure to wait until consultation is concluded or well-advanced may result in a lead agency receiving information after publication of a draft that triggers the need for recirculation.



Engaging in Consultation

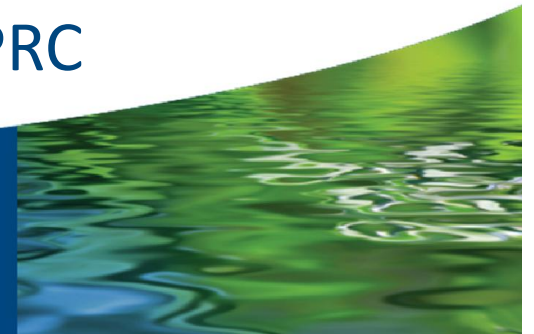
- If a Tribe requests consultation, the public agency must initiate consultation within 30 days of receiving that request. PRC §21080.3.1(e)



- All parties must undertake consultation in good faith, a process that may include, upon request, the participation of a project applicant and/or the applicant's consultants. PRC § 21080.3.2(d)

Engaging in Consultation

Consultation – “The meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties’ cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party’s sovereignty. Consultation shall also recognize the tribes’ potential needs for confidentiality with respect to places that have traditional tribal cultural significance.” PRC §21080.3.1(b) citing Gov’t Code § 65352.4



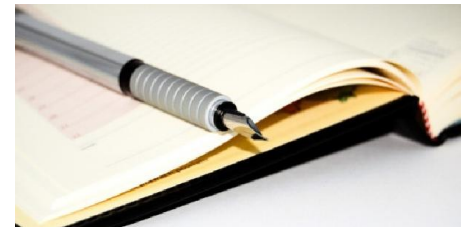
Consultation Tips

- Agree on a venue (don't assume consultation will be at agency's offices)
- Develop agenda with Tribe in advance
- To the extent possible, research any issues of concern prior to meeting including any topics identified by CEQA consultants and by Tribe
 - Share materials in advance of first consultation meeting



Consultation Tips

- Consultation Process
 - Respect Tribal sovereignty and confidentiality
 - Introductions at beginning of meeting – recognize leaders in the room.
 - Protocol for requesting input should be formal:
 - First - Tribal leaders; Second - Tribal designees; Third – open forum
- Note takers are important
 - Document all areas where agreement was and was not reached
- Solidify agreements for action and deadlines
- Identify follow the appropriate persons to continue dialog
- Schedule follow up meeting(s) if necessary



Consultation Tips

- When more than one Tribe requests consultation, the lead agency will be undertaking concurrent consultations. Consultations should be conducted individually.
- Provide time in the schedule for the 30-day period for Tribe(s) who have requested notice to respond to the lead agency's Solicitation and for any consultation between the Tribe(s) and the lead agency.



Concluding Consultation

- Consultation concludes when either:
 - Agreement is reached regarding recommendations to avoid and/or mitigate any significant effect on a TCR or,
 - A party concludes in good faith, after “reasonable effort,” that agreement cannot be reached.

PRC § 21080.3.2(b)

- After Consultation:
 - Follow up with all parties to see what went right and what could be improved in the process
 - Continue dialogue through Project implementation



Results of Consultation

- If, during consultation, a lead agency determines that a Tribe has provided substantial evidence that a project may have a significant effect on a TCR, this raises a “fair argument” requiring preparation of an EIR.
 - An MND can then only be adopted if it includes mitigation that the agency (and hopefully the Tribe) concludes will reduce any project impact on the TCR to a less than significant level.
- The lead agency is required to include those mitigation measures agreed-upon via consultation in the MND or EIR for consideration by decision-makers.



Confidentiality

- Whether or not a Tribe requests consultation, a public agency has the duty to keep certain information it may discover during the CEQA process confidential, unless it receives the prior written consent of the Tribe that provided the information. PRC § 21082.3(2)
- If a project applicant participates in a consultation, neither the applicant nor the applicant's legal advisers may, without prior written tribal consent, share information from the consultation with the public. PRC § 21082.3(c)(2)(A)



CONFIDENTIAL

Confidentiality

- AB 52 does not prohibit the “confidential exchange of information” between a tribe and a public agency, or between a tribe and a project applicant/ project applicant’s agent participating in the consultation. PRC § 21082.3(c)(2)(A)
- A public agency may describe information regarding TCRs “in general terms in the environmental document so as to inform the public of the basis of” a decision” without breaching confidentiality requirements PRC § 21082.3(c)(4)



CONFIDENTIAL

Confidentiality and Consultation

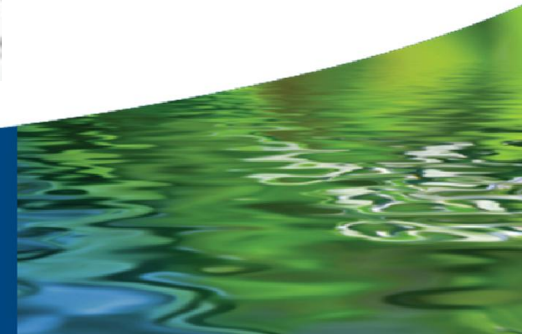
- AB 52 also allows for “confidential exchange” of information “between public agencies that have lawful jurisdiction over the preparation of the environmental document.” PRC § 21082.3(c)(1)
- **Practice Tip**: This appears to mean that a lead agency could share such information with responsible agencies, as they would both have lawful jurisdiction over the same CEQA document.



CONFIDENTIAL

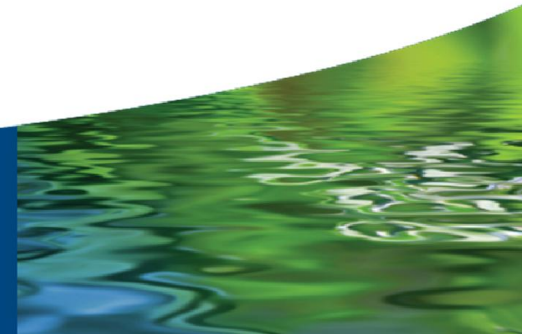
Confidentiality Tips

- Consider including in contracts with CEQA consultants and other contractors working on a project provisions for maintaining the confidentiality of information provided by consulting Tribe(s)



What Isn't Confidential?

- The confidentiality requirement does not apply to “publicly available” information, or information “already in the lawful possession of the project applicant,” “project applicant’s agents,” or a third party that is not the public agency conducting the CEQA review, prior to consultation. PRC § 21082.3(c)(2)(B).



TCR Mitigation

- Mitigation measures that could avoid or minimize adverse effects to TCRs must be considered, (unless determined to be infeasible):
 - Avoidance and preservation in place;
 - Treating the TCR with culturally appropriate dignity, which can include protecting the cultural character and integrity of the resource, protecting the traditional use of the resource, and protecting the confidentiality of the resource;
 - 3) Permanent conservation easements or other real property interests;
 - 4) “Protecting the resource” (a phrase which is undefined in the statute)

PRC §21084.3.



Mitigation Practice Tip

- Anecdotally, the most common request received by agencies conducting AB 52 outreach/consultation is for Tribal monitoring of ground disturbance activities.
 - Be sure to define the scope of the monitoring: Where on site? All disturbance or only below a certain depth? What happens if a resource is identified?



Approving Projects With TCR Impacts

- Staff must recommend to decision-makers that they include in a CEQA document the mitigation measures agreed upon in a consultation. PRC § 21082.3(e)
- The public agency may only certify an EIR or to adopt a mitigated negative declaration for a project that will have a significant impact on a TCR if:



Approving Projects With TCR Impacts

- Consultation has occurred and has concluded, either by agreement, or good faith determination that agreement cannot be reached;
 - Consultation was requested but the requesting Tribe failed to provide comments or otherwise failed to engage in consultation process; or
 - No consultation was requested after the public agency sent out notice of the project to those Tribes who had formally requested notification.
- PRC § 21082.3(d)

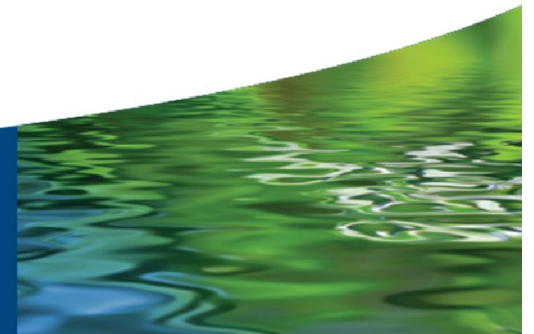


Approving Projects With TCR Impacts

- If substantial evidence demonstrates that a project will cause a significant effect to a TCR but (1) the decision-makers do not include the mitigation measures recommended by the staff in the environmental document; or (2) there are no agreed upon mitigation measures at the conclusion of the consultation; or (3) no consultation has occurred, the public agency must still consider the adoption of “feasible mitigation.” PRC §21082.3(e)
- Thus, even if the decision-maker does not accept the results of consultation, the agency must still adopt feasible mitigation to reduce significant impacts.



Questions?



Thank you for attending.

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