



CEQA Basics

Office of Historic Preservation

Redlands, CA
June 18, 2015

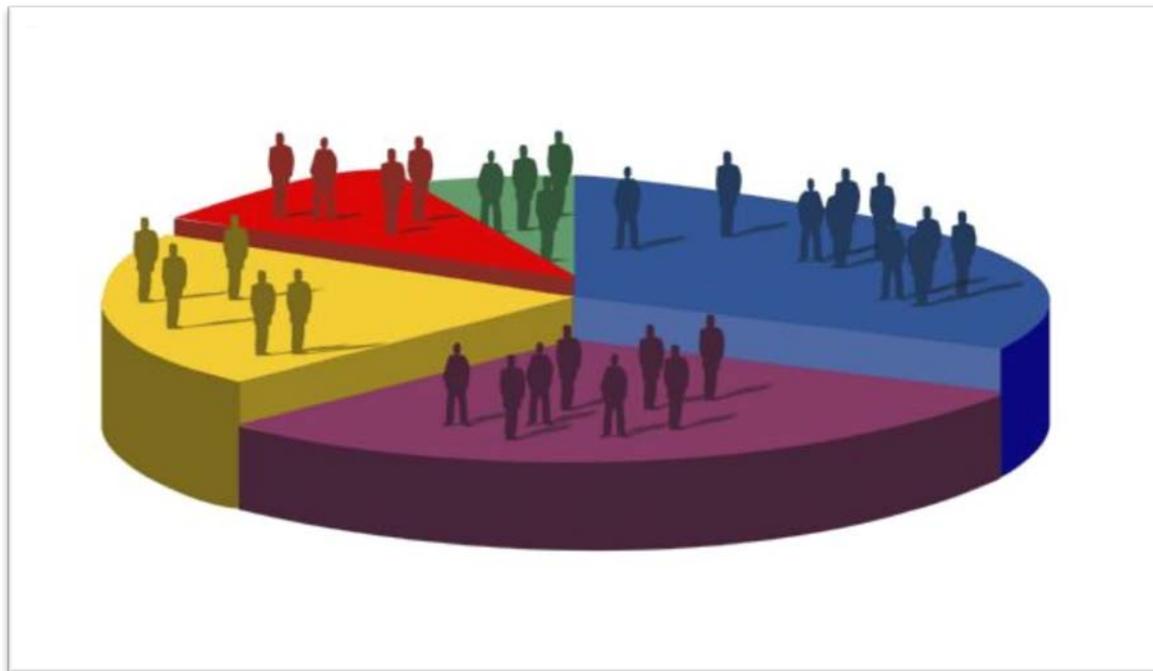
Terry Rivasplata, AICP
Technical Director
ICF International

Course Objectives

- Better understanding of:
 - The CEQA process, including what constitutes a “project,” CEQA’s exemptions, and how to keep abreast of a CEQA project
 - The level of effort required for identification of historical resources and assessment of effects
 - CEQA’s differences from the Section 106 process
 - The relationship between CEQA, NEPA, and Section 106
 - CEQA/NEPA “joint” documents
 - Commenting effectively

Introduction

The California Environmental Quality Act



First: What is CEQA?

- *California Environmental Quality Act*: Is a state law that applies to discretionary actions by California agencies (state, regional, local):
 - Thousands of projects each year
 - Not all require an Environmental Impact Report (EIR)
- CEQA requires disclosure of potential significant impacts of an action before approval
- CEQA requires mitigation of any significant impacts
- CEQA itself is not a permit – it neither approves nor denies a project

What Are CEQA's Objectives?

- Disclose to decision makers and public significant environmental effects of proposed activities
- Identify ways to avoid or reduce environmental damage
- Prevent environmental damage by requiring implementation of feasible alternatives or mitigation
- Disclose to public reasons for agency approval of projects with significant environmental effects
- Foster interagency coordination in project review
- Enhance public participation in the planning process

What Defines Adequate CEQA Compliance?

- CEQA is enforced by lawsuits – adequacy will be determined in court if the agency’s CEQA approach is challenged
- Considerations:
 - The Law (Public Resources Code 21000, et seq.)
 - State CEQA Guidelines (California Code of Regulations)
 - Case Law – published cases of the Supreme and Appellate Courts
- Court review:
 - Reviews “administrative record” before the public agency
 - Sanctions: invalidate CEQA document and project approval
 - Project can proceed when CEQA flaws repaired

Who's Responsible for CEQA Compliance?

- California public agencies:
 - Doesn't apply to federal agencies or Native American tribes
- The agency undertaking or initially approving the project is the "lead agency" under CEQA:
 - CEQA applies to "discretionary" actions by public agencies
 - Ministerial actions are not subject to CEQA
- Typical local projects:
 - Adopting a general plan, specific plan, or amendment
 - Zoning action
 - Subdivision of land
 - Conditional use permit or variance
 - Lead Agency's capital improvements

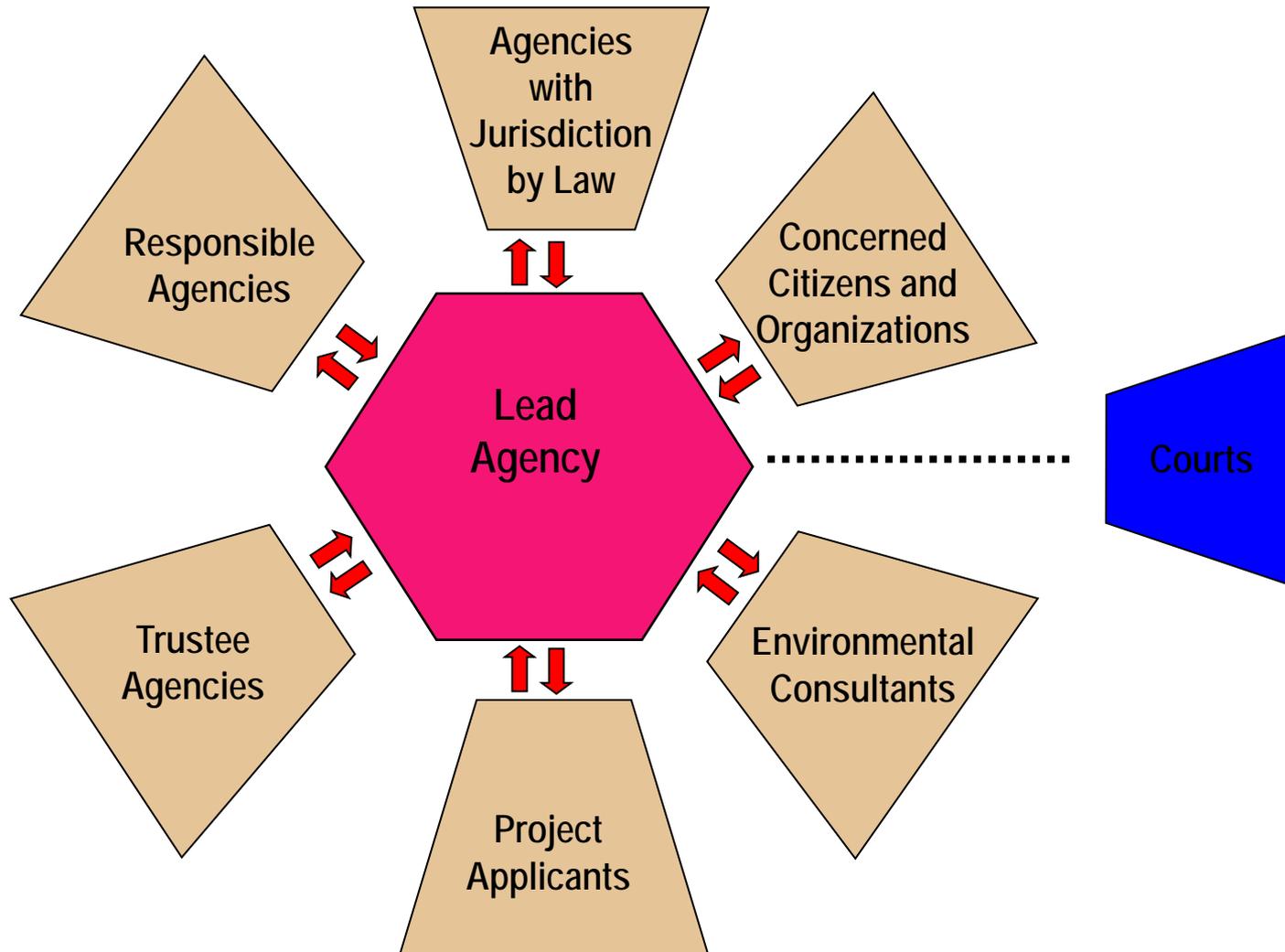
What Determines the Appropriate CEQA Approach?

- The lead agency determines the appropriate approach
- Considerations:
 - CEQA, the CEQA Guidelines, and judicial opinions
 - Project characteristics and level of design
 - Professional judgment
 - Industry Standards – methodology
 - Expert opinion based on fact (“fair argument”)
 - Input from other agencies
- Strategic Considerations:
 - Level of controversy
 - Likelihood of legal challenge

Limits on CEQA

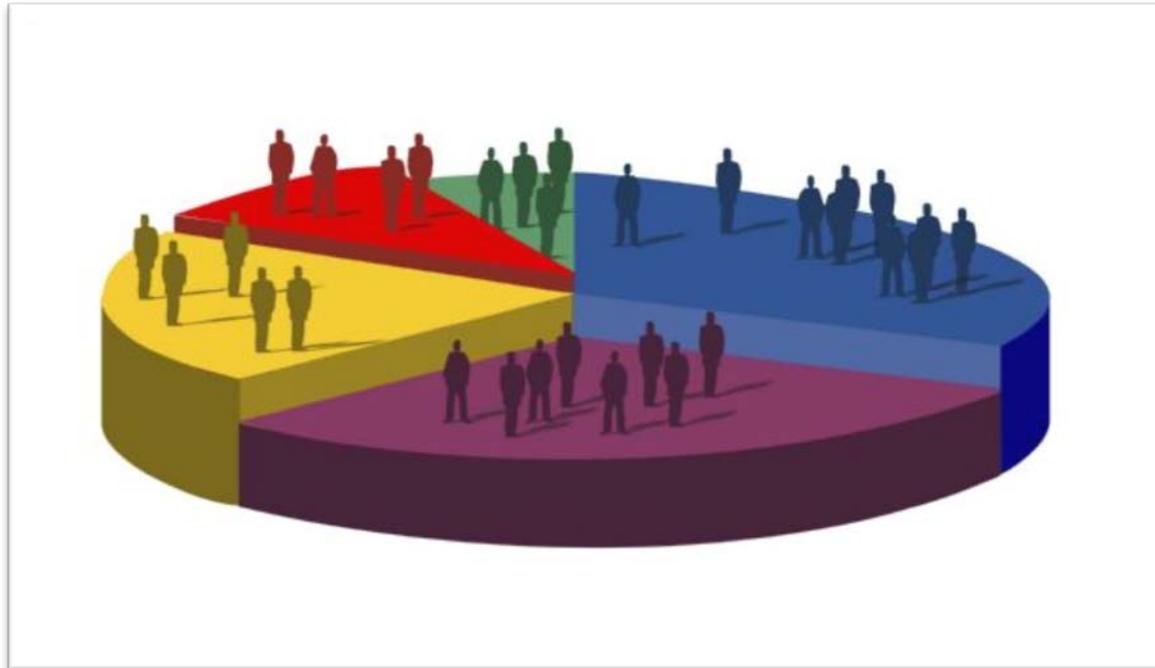
- CEQA requires identification and mitigation of potential significant effects, BUT it doesn't stop a project
 - With an EIR, a project may be approved even if it has significant, unavoidable impacts
- CEQA informs decision makers, BUT it doesn't require them to make good decisions
- CEQA requires mitigation when feasible, BUT it doesn't give the Lead Agency any new powers to do so
- CEQA doesn't establish any professional standards for cultural resources analyses

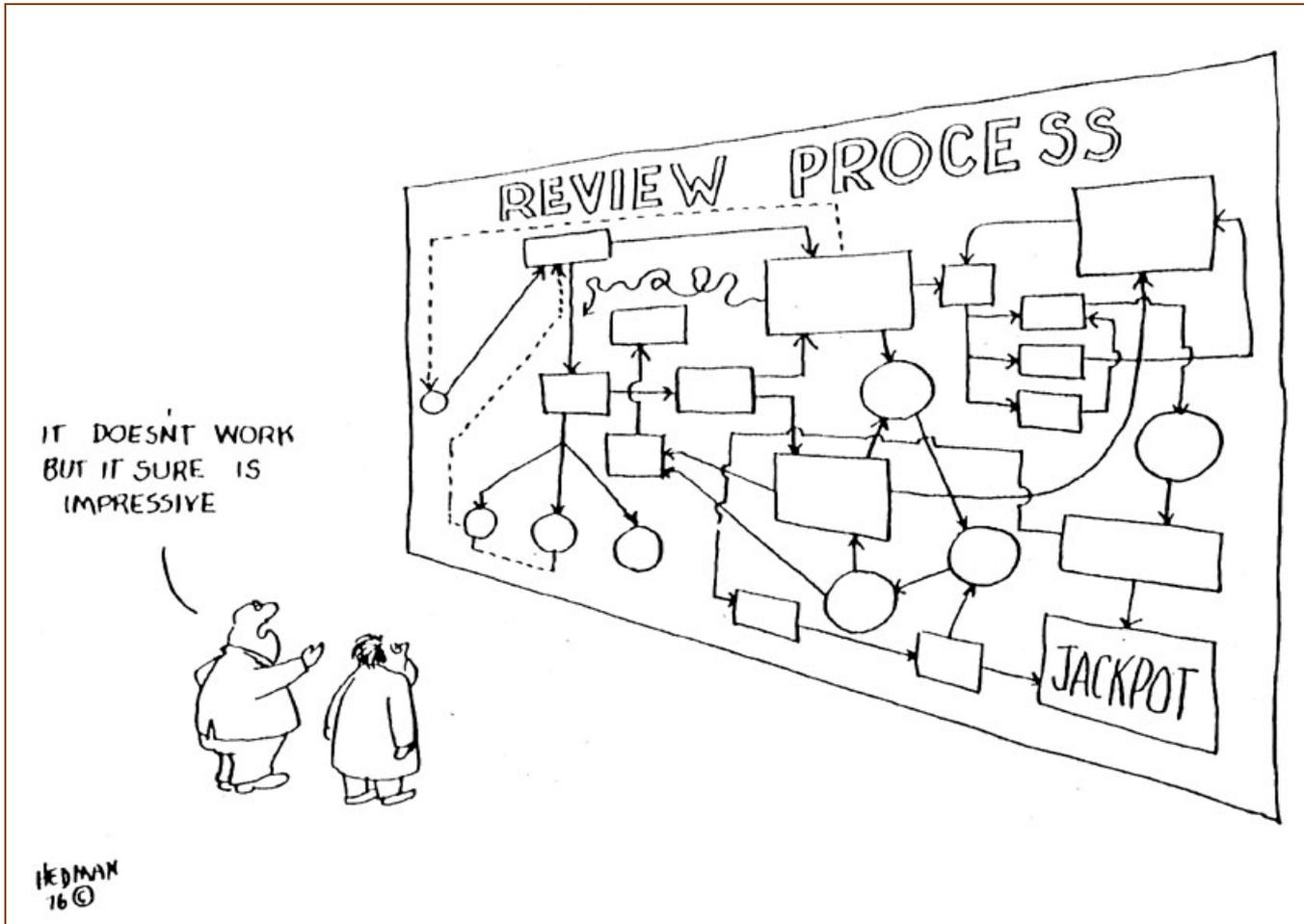
Key Participants in the CEQA Process

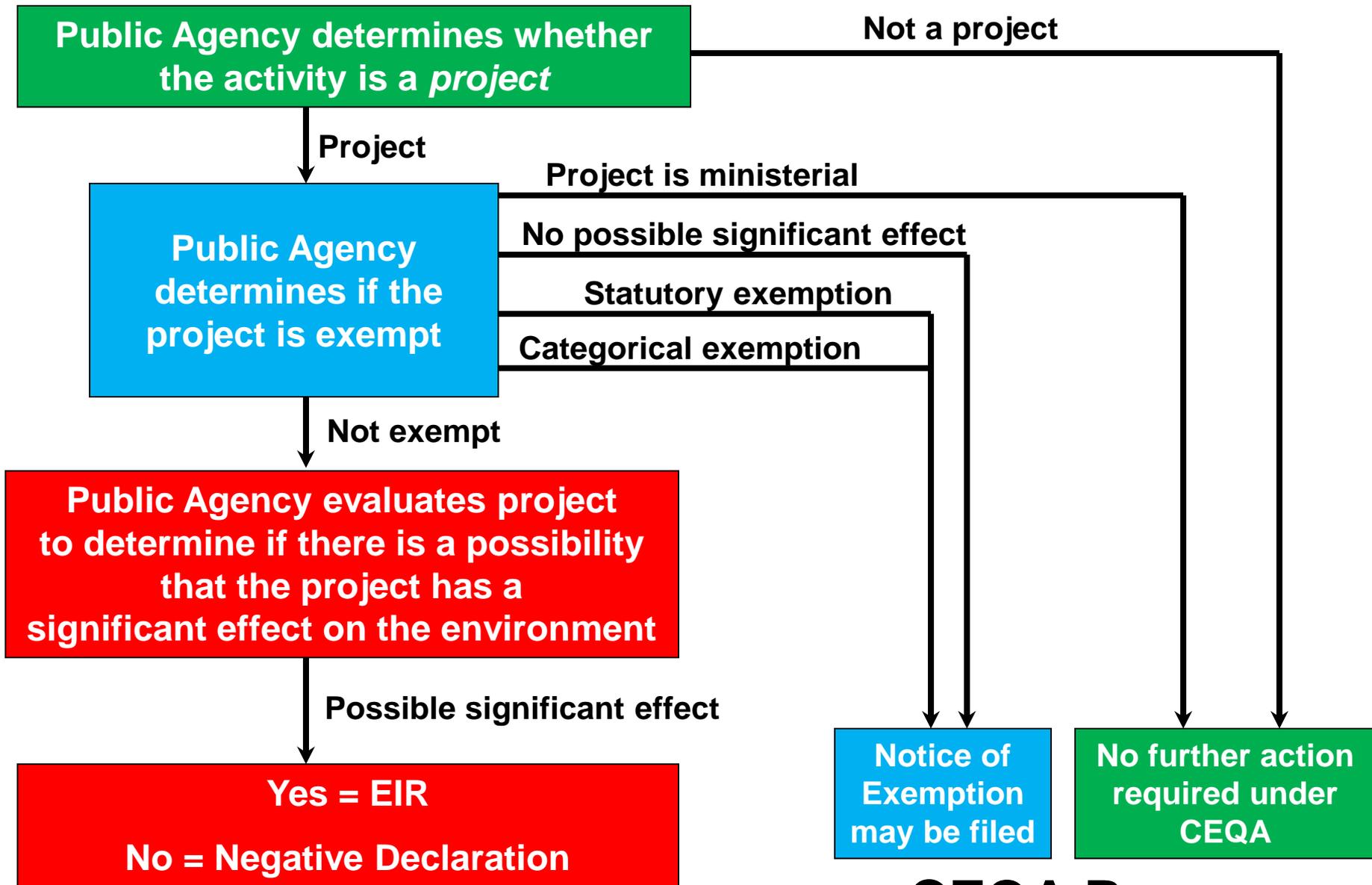


Part I

The CEQA Process







CEQA Process Flow Chart

Phase 1. Applicability Review

- Is there a Project?
 - “Projects” covered by CEQA include any activity carried out, approved, or funded by a California public agency that may result in an ***adverse physical change*** in the environment, either directly or indirectly.
- If there isn’t a “project,” then CEQA doesn’t apply
 - CEQA does not apply to “ministerial” projects

Ministerial v. Discretionary Projects

- Ministerial: Little personal judgment; use of fixed or objective standards
- Discretionary: Requires exercise of judgment or deliberation
- Mixed Projects: Considered discretionary

CEQA Guidelines secs. 15357 and 15369

Is the Project Exempt from CEQA?

- Common Statutory Exemptions:
 - Ministerial projects
 - Emergency projects
- Categorical Exemptions:
 - 33 “classes” established by the CEQA Guidelines
 - Section 15300.2 exceptions
 - When in doubt, document
 - There are no “mitigated” exemptions
 - Filing Notice of Exemption
 - Historical resource restoration or rehabilitation that is consistent with Secretary of Interior’s Guidelines is categorically exempt

Statutory Exemptions

- Created by law
- Vary widely in their application and the extent to which they actually exempt a project from CEQA review:
 - Ministerial projects – never subject to CEQA review
 - Emergency projects – must document the emergency, then can exempt actions
 - “Infill” project exemptions – numerous qualifiers must be met before one of these exemptions can be used

Categorical Exemptions

- Established by regulation
- Project must fit within one of the 33 classes of exemption
- A project consistent with the Secretary of Interior's Standards for the Treatment of Historic Properties is exempt
- A project subject to unusual circumstances that indicate it may result in a significant impact doesn't qualify
- Categorical exemptions are not subject to public review and comment:
 - However, like any other part of CEQA, they are subject to legal challenge

When Does a Categorical Exemption Not Apply?

When a project may cause a substantial adverse change in the significance of a historical resource, as determined by the lead agency

(Only one of several exceptions to categorical exemptions)

Determination must be based on substantial evidence.

CEQA Guidelines Section 15300.2(f)



CEQA has Special Provisions for Historical Resources

- Public Resources Code Section 21084.1 states that “[a] project that may cause a substantial adverse change in the significance of an historical resource is a project that may have a significant effect on the environment.”
- In plain language: “substantial adverse change” = EIR
- Disclosure, but not protection, is required:
 - Lead Agency must disclose and mitigate impacts
 - With an EIR, Lead Agency can approve destructive/damaging project

Phase 2: Initial Study

- If the project is not exempt, an Initial Study is prepared to determine whether to prepare ND, MND, or EIR:
 - It documents the determination
 - Includes pertinent technical studies: archaeo survey, historical buildings evaluation, biological surveys, etc.
- “Fair Argument” = factual evidence of a potential adverse impact:
 - Can be *fairly argued* based on substantial evidence that the proposed project may have a significant impact?
- A fair argument for significant impacts requires EIR to be prepared

Appendix G – The Model Checklist

- CEQA Guidelines Appendix G model checklist for initial studies:
 - A model, not a mandatory checklist
 - Lead agency may adapt it to meet its needs
 - Because an environmental issue is not on the checklist does not mean it is not an issue for a given project
- Appendix G consists of a set of questions:
 - Intended to guide lead agency toward a comprehensive analysis
- Most lead agencies use the model checklist for their Initial Studies

Appendix G – Cultural Resources

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
<u>V. CULTURAL RESOURCES.</u> Would the project:				
a) Cause a substantial adverse change in the significance of a historical resource as defined in § 15064.5?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b) Cause a substantial adverse change in the significance of an archaeological resource pursuant to § 15064.5?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c) Directly or indirectly destroy a unique paleontological resource or site or unique geologic feature?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d) Disturb any human remains, including those interred outside of formal cemeteries?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<u>VI. GEOLOGY AND SOILS.</u> Would the project:				
a) Expose people or structures to potential substantial adverse effects, including the risk of loss, injury, or death involving:	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
i) Rupture of a known earthquake fault, as delineated on the most recent Alquist-Priolo Earthquake Fault Zoning Map issued by the State Geologist for the area or based on other substantial evidence of a known fault? Refer to Division of Mines and Geology Special Publication 42.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
ii) Strong seismic ground shaking?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
iii) Seismic-related ground failure, including liquefaction?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
iv) Landslides?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b) Result in substantial soil erosion or the loss of topsoil?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c) Be located on a geologic unit or soil that is unstable, or that would become unstable as a result of the project, and potentially result in on- or off-site landslide, lateral spreading, subsidence, liquefaction or collapse?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

An Initial Study Checklist Should Consider

- Whether there any known historical resources in the study area
- Whether there are likely historical resources in the study area:
 - If the answers to 1 & 2 are no, then consider a Cat Ex or Negative Declaration
- Whether the project would directly or indirectly adversely affect historical resources:
 - If no, consider a Negative Declaration
 - If yes, prepare an EIR unless the affect can be mitigated to a less than adverse level

CEQA Guidelines and Historical Resources

- Resources considered significant:
 - Listed or eligible for listing on California or National register
- Presumed significant, unless a “preponderance of evidence demonstrates” otherwise:
 - Listed on a local register or identified in “an historical resource survey”
- Lead agency can consider a resource significant
 - Even if not listed or eligible for listing

Guidelines Section 15064.5

What Does Listing Do?

- Listing increases the resource's stature should there be a proposed project that may adversely affect it:
 - Remember that significant adverse effect = EIR
- It does not protect a resource if the proposal is not subject to CEQA
- Listing does not ensure that the resource will never be adversely affected:
 - With an EIR, the project may proceed even if the resource is destroyed
- Listing a resource does not itself trigger CEQA

Guidelines Section 15064.5

Negative Declarations and EIRs

- Neg Dec or Mitigated Neg Dec is the CEQA document prepared when the project is not exempt and:
 - There is no factual evidence that the project may have a significant effect or,
 - There is no factual evidence that the project, as modified or conditioned, may have a significant effect
- An EIR is required to be prepared when:
 - There is factual evidence that the project may have a significant effect
 - The EIR process is lengthier and has more requirements than does the Neg Dec or Mitigated Neg Dec process

Impacts under CEQA

- CEQA requires consideration of:
 - Direct impacts - Same time and place as project
 - Indirect impacts - May be different time and place
 - Cumulative impacts - Project's contribution to combined impact caused by effects of past, present, and reasonably foreseeable future projects
- *Impacts to cultural resources may fall into any of these categories*

Phase 3: Neg Dec or EIR

- Negative Declaration, Mitigated ND, or EIR process must be completed before decision makers may approve the project
- The decision makers must consider the comments received during the CEQA document's review period
- All feasible mitigation measures must be made a part of project approval

Negative Declaration

- Negative Declaration or Mitigated ND:
 - Allowed only when there is no *substantial evidence* to support the argument that the project has the potential to cause a significant effect (no *fair argument*)
 - “substantial evidence” doesn’t include argument alone, opinion not based in fact, clearly inaccurate information
 - Document’s conclusion is based on:
 - Initial Study,
 - Supporting studies, and other evidence in the record.
- Proposed ND/MND must be circulated for public review and comment for at least 30 days:
 - A project not involving any state agencies can be circulated for 20 days

Environmental Impact Report

- An EIR is prepared when there is the potential for a significant effect that can't be reduced to a less than significant level
- An EIR discloses:
 - Project description
 - Impacts and mitigations
 - A range of project alternatives, including No Project
 - Significant and unavoidable impacts, if any
- Notice of Preparation is circulated for comment for 30 days
- Draft EIR is circulated for comment for 45 days
- Final EIR incorporates DEIR comments and written responses to the comments

EIR - Alternatives

- EIR must analyze a reasonable range of alternatives
- Each alternative must:
 - Meet most or all project objectives,
 - Substantially avoid or reduce one or more significant impacts identified for the project, and
 - Be potentially feasible.
- Alternatives can include alternative locations or projects
- Alternatives can be analyzed at a lesser level of detail than the project
- Need not have an alternative for each project impact

What Is a Mitigation Measure under CEQA?

Avoid	Avoid the impact altogether by not taking certain action or parts of an action
Minimize	Minimize impacts by limiting the degree or magnitude of the action and its implementation
Rectify	Rectify the impact by repairing, rehabilitating, or restoring the affected environment
Reduce or Eliminate	Reduce or eliminate the impact over time by preservation and maintenance during the life of the action
Compensate	Compensate for the impact by replacing or providing substitute resources or environments

Project Approval

- Agency must adopt Negative Declaration or certify Final EIR *prior* to project approval:
 - Mitigation measures must be adopted as conditions of approval
 - With an EIR, must also adopt findings describing disposition of impacts
 - And, a statement of overriding considerations
 - A mitigation monitoring or reporting program is also required
- Final step: File a Notice of Determination:
 - Notice begins the 30-day statute of limitations for filing a lawsuit over the ND, MND, or EIR

Relevant Case Law

- Archaeological resources decisions
- Supreme Court omnhow to approach categorical exemptions

Why Talk About Litigation?

- Courts have interpreted how CEQA's applied
- Courts are empowered to invalidate the lead agency's CEQA determination and the resultant CEQA document
- Litigation costs time and money:
 - Litigation may take years to complete
 - Successful plaintiffs commonly collect attorney's fees from defendant
- Reviewing past published decisions highlights these interpretations and offers insight into how CEQA works
- *Note: While litigation may lead to a better CEQA document, the Lead Agency can eventually approve the project after it adopts the improved document*

Clover Valley Foundation v. City of Rocklin, Town of Loomis v. City of Rocklin

- City approved development of Clover Valley, a largely pristine landscape of oak woodlands, creek, historic rock walls and historical and prehistoric cultural resources
- EIR disclosed presence of archaeological resources and analyzed impacts:
 - Mitigation included Historic Properties Management Plan (HPMP) required for federal permits under Section 106
 - Locations of 8 resource sites were not disclosed
- Plaintiffs argued that the EIR must disclose more info on the sites
- Court held that statutory prohibition on disclosure of historic sites ruled. The EIR properly withheld specific locations.

(2011) 197 Cal.App.4th 200

Clover Valley Foundation v. City of Rocklin, Town of Loomis v. City of Rocklin (Cont.)

- Plaintiffs argued that the EIR must disclose more info on the sites
- Court held that statutory prohibition on disclosure of historic sites ruled. The EIR properly withheld specific locations.

Madera Oversight Committee v County of Madera

- County approved a 1,600-acre development project on rural site
- Adequacy of EIR challenged by Madera Oversight Coalition and others, including the Dumna Tribal Council
 - Multiple claims of inadequacy, including the cultural resource report and mitigation measures
- Court invalidated the EIR and project approval
 - Cultural resources mitigation measure was inadequate
 - EIR improperly allowed cultural resources significance determination to be changed, without public review

(2011) 199 Cal.App.4th 48

Madera Oversight

Cultural Resource Identification/Evaluation Studies

- Inventory/Evaluation document concluded that four prehistoric archaeological sites and a historic structure (the Madera Canal) were “historical resources” eligible for listing in the CRHR:
 - One site: A “large village site containing milling stations, stone artifacts, animal bones, mussel shells, and human bone.”
 - Second site: A large bedrock milling location
 - Third site: A sparse scatter of flaked and ground stone artifacts
 - Fourth site: A number of milling stations, a chert quarry, a rock shelter and intact midden, and a scatter of stone artifacts.
 - The Madera Canal is part of the CVP and eligible for that association

Madera Oversight

What Were the Impacts of the Project on Historic Properties?

- The EIR concluded that, unless mitigated, the project would result in a “substantial adverse change” to all five historical resources
- It concluded further that the impact would be reduced to a “less-than-significant level” through implementation of specified mitigation measures
 - Identified as MM 4.5-2(a) through (e)

Madera Oversight

What Did Mitigation Measure 4.5-2 Require?

- (a) The applicant shall “hire a qualified archaeologist to analyze the artifacts previously recovered in test excavations to verify the data potential of the site.”
- (a) Part 2. “If it is verified the site is a historical resource for the purposes of CEQA, the qualified archaeologist shall review all existing documentation and make recommendations as to the appropriate course of action. Appropriate actions could include a Data Recovery Plan or preservation in place.”
- (b) Pursue a data recovery plan if recommended
- (c) Preserve in place, if approved by the County
- (d) Protect the sites during construction
- (e) Protect the sites following construction

Madera Oversight

Why Did the Court Reject the EIR Cultural Resource Section?

- Significance must be determined before the EIR is certified:
 - Mitigation measure allowing reversal of finding of significance based on further analysis (thereby avoiding need to mitigate) was invalid
 - Verification” of significance level *after* the EIR was certified (and out of the public eye) violated CEQA by subverting its public disclosure provisions
- The mitigation measures did not give priority to preservation in place, as required under the CEQA Guidelines Section 15126.4

Madera Oversight

What Was Wrong With Other Mitigation Measures?

- CEQA Guidelines Section 15126.4 (b)(3) establishes a clear priority for preservation in place over data recovery or other mitigation measure:
 - Preservation in place “is the preferred manner of mitigating impacts to archaeological sites...”
- If data recovery is “the only feasible mitigation,” it should proceed according to a formal plan adopted before any excavation is undertaken

Berkeley Hillside Preservation v. City of Berkeley

- City approved 10,000 square foot home and garage based on categorical exemptions
- Opponents' claimed "fair argument" exception to exemption
 - Their geotechnical engineer claimed risk of landslide and mass grading
- Cal Supreme Court held in City's favor

March 2, 2015 __ Cal.4th __

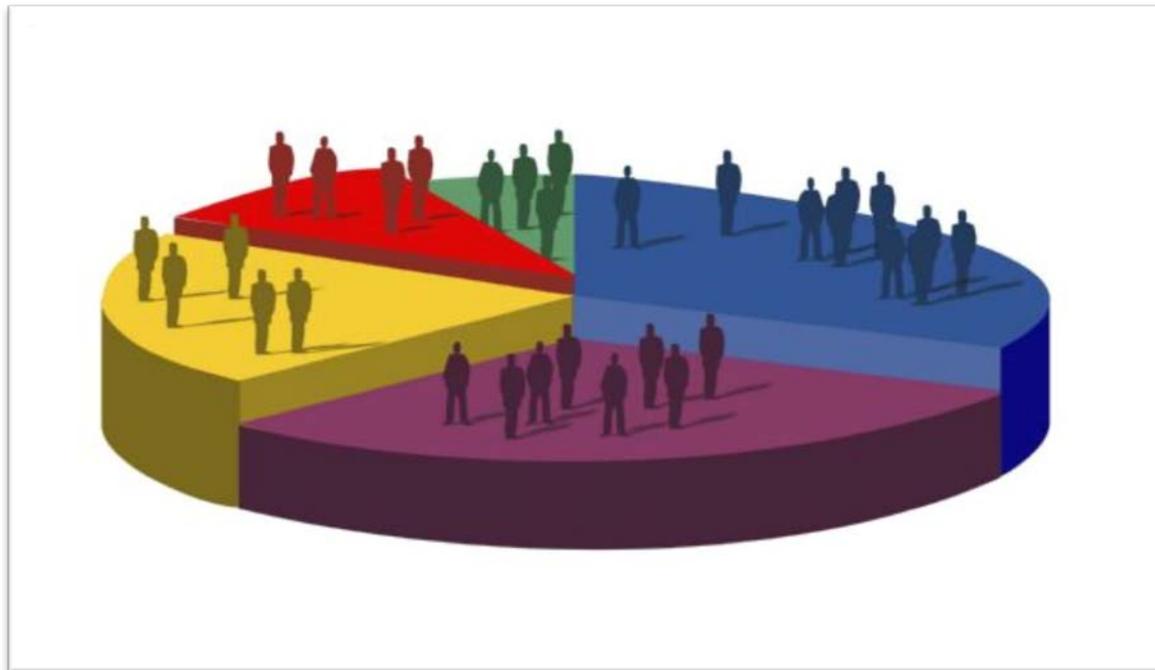
Berkeley Hillside Preservation v. City of Berkeley

Berkeley (cont'd)

- Categorical exemptions are subject to “exceptions” where “unusual circumstances” exist
- Court established two-step test:
 1. Do unusual circumstances exist?
 2. If so, is there a fair argument that the project may have a significant impact?
- First test is based on substantial evidence, not fair argument, standard

Part II

Level of Effort



You're an Agency Planner: What's a Good Faith Effort?

- CEQA requires a *good faith* effort at disclosure
- An EIR (or ND/MND) should be prepared with a sufficient degree of analysis to provide decision-makers with ample information to make an informed decision:
 - Analysis links data to conclusions
 - Simply searching the databases is not enough
- Disagreement among experts does not make an EIR inadequate provided the EIR summarizes the main points of disagreement:
 - Disagreement among experts is a fair argument that *would* make an MND inadequate

Is the Work “CEQA Adequate”?

- There is no CEQA guidance that answers this question
- Answer is based on determination of a good faith effort, adequacy of administrative record, and, if a MND is prepared, whether a fair argument has been made
- This is largely defined by the standard in the industry
- Work should always be documented in the administrative record:
 - The court is limited in its consideration to the administrative record
 - If it isn't in the record, it doesn't exist
 - Record may be reference works, surveys, etc. pertinent to the analysis

Is the Work “CEQA Adequate”?

- Public opinion and involvement can be a factor:
 - Potential for CEQA lawsuit may push an agency toward an EIR
 - Therefore, level of controversy may define appropriate level of effort

Note: Court challenges are the way that CEQA adequacy issues are determined and cultural resource analyses are one route for a successful suit due to the complexity of the topic

CEQA and Cultural Resources

- Public Resources Code (PRC) Section 21084.1:
 - A project with an effect that may cause a ***substantial adverse change*** in the significance of a historical resource is a project that may have a significant effect on the environment
- State CEQA Guidelines Section 15064.5:
 - Describes basic considerations for historical resources under CEQA
- PRC Section 21081.6:
 - Requires implementation of “fully enforceable” mitigation

Some Related California Preservation Laws and Regulations

- PRC Section 5020.1:
 - “Substantial adverse change’ means demolition, destruction, relocation, or alteration such that the significance of an historical resource would be impaired”
- PRC Section 5020, et seq.:
 - Establishes the State Historical Resources Commission, the State Historic Preservation Officer, and the California Register of Historical Resources
 - Establishes criteria for listing resources
- PRC Section 5024.5:
 - When a project would affect state-owned historical resources, state Lead Agency must consult with OHP

Related California Preservation Laws and Regulations (Cont.)

- PRC Section 5024.1:
 - The CRHR is “an authoritative guide in California to be used by state and local agencies . . . to identify the state’s historical resources and to indicate what properties are to be protected, to the extent prudent and feasible, from substantial adverse change”
- PRC Section 5097.5, et seq.:
 - Establishes Native American Heritage Commission,
 - Establishes process for dealing with the discovery of Native American human remains.

CEQA and Cultural Resources (Cont.)

- An EIR must be prepared whenever a “fair argument” is raised (Guidelines Section 15064):
 - As an expert agency, comments from OHP may provide a fair argument for an EIR



Is the Project's Impact Significant under CEQA?

- Four steps:
 - Identify cultural resources
 - Evaluate significance of resources
 - Assess severity of impacts on the resources
 - Develop feasible, fully enforceable mitigation measures
- *If any of these steps are absent, the analysis/evaluation may be inadequate and that warrants a comment*

Significant or Not? Who Decides?

- The Lead Agency makes the final call on significance, subject to a fair argument:
 - Evaluation should be completed by qualified personnel
 - Evaluation states how the property meets (or doesn't meet) the criteria through discussion of its significance and the integrity of its character-defining features (CDFs)
 - Evaluation must be supported with evidence (i.e., documentation)
- If an EIR is prepared, fair argument does not apply:
 - Adequacy of the Lead Agency's determination relies on whether it has supporting evidence to support its conclusions



Step 1: Identification

- CEQA guidance does not specify acceptable levels of research to achieve a good faith effort
- The good news is that the process for determining whether the project will affect a historical resource is well established in the industry; and
- Other useful guidance is available.



California Historic Resources Information System



- CHRIS – database of historical resources maintained at regional Information Centers
- Useful as a beginning step to identify known resources, but it's only a start:
 - Eligible but not listed resources are not included
 - Only recorded archaeological sites are included
 - Coverage is limited to areas that have been previously surveyed and resources recorded/reported
- *An analysis that relies solely on a database search to conclude that the project would have no impact may be inadequate*

Consultation with Tribe(s)

- Assembly Bill 52 establishes requirements for consultation with California Native American Tribes
- AB 52 will apply to all projects for which notice of the proposed ND or MND, or EIR Notice of Preparation, has been released after July 1, 2015
- We'll discuss this in detail this afternoon

Common Myths About Identification



“A records search will indicate whether there are known historical resources.”

Truth: most properties will not have been identified or evaluated so the CRHR criteria for significance will need to be applied.

Other Myths

- If it isn't on a local register, it isn't a historical resource
- If it's only on a local register, it isn't a historical resource
- If a previous study says it isn't eligible, it isn't a historical resource
- Just because it's eligible doesn't mean CEQA considers it significant
- It's less than 50 years old, so it isn't a historical resource

More Myths

- If it's an urban or previously disturbed setting, an archeological study isn't needed
- If there's been ground disturbance (e.g., plowing), there are no archeological resources
- If the property is located in a historic district, but does not contribute, then it isn't a historical resource

And Still More Myths

“It’s always clear if a resource is significant”



In fact, determining significance can be a negotiated process:

- Can be a consensus decision
- Interested parties’ opinions matter
- Lots of guidance but no one size fits all recipe

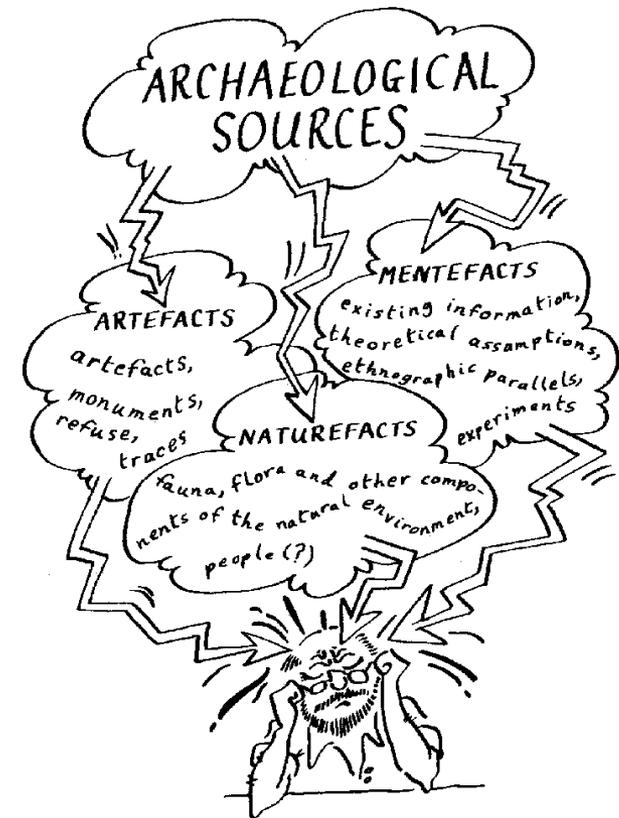
Establishing the Administrative Record (= Showing the Math for Good Faith Effort)

- Identify known significant resources - record search, consultation with interest groups, etc.
- Identify and assess previous studies - record search, thematic studies
- If previous studies are inconclusive or old, inventory project area
- Apply all applicable significance criteria to determine eligibility for listing in CRHR and if coordinating with other reviews, apply appropriate criteria
- Retain copies of all documentation, including reference books, for the administrative record

What Comprises the Administrative Record for Historical Resources?

- Cultural resources technical reports
- Also:
 - Project files
 - Evaluations
 - Site records/photographs
 - Historical research
 - Personal communications with interested parties

Archaeological info is part of the admin record, but not subject to public disclosure



Why Is the Administrative Record Important?

- In CEQA litigation, a court's review is limited to the "whole of the record" that was before the decision-makers
- The court relies on the record to reconstruct the activities and thought processes of the lead agency and to examine the evidence supporting the agency's decision
- "If it isn't in the record, it didn't happen."

Step 2: Evaluation of Significance

- CEQA Guidelines' Significant Historical Resource:
 - Already listed in or determined eligible for the CRHR
 - Includes National Register-listed or eligible properties
 - California Historical Landmarks (No. 770 and above)
 - Listed in a local register or found significant in a historical resource survey
 - Lead agency considers resource to be “historically significant”

CEQA Guidelines Section 15064.5

Significance - Mandatory

- Automatically listed in the California Register:
 - Listed in the National Register
 - Formally determined eligible for the National Register
 - California State Landmark No. 770 or above
 - Listed in the California Register by the State Historical Resources Commission

Example: Southern Pacific Depot, Sacramento, National Register-listed



Significance - Presumptive

- Listed in a local register of historical resources, as defined in PRC section 5020.1(k). [Note - does not say “eligible,” only “listed in”]
 - City landmarks, monuments, structures of merit:
 - *Ex: Old St. Mary’s, San Francisco, San Francisco Landmark No. 2, declared 1968. But NOT listed in the National Register.*



Significance - Discretionary

- CEQA lead agency determines to be historically significant
- Generally, “historically significant” if the resource meets the criteria for listing on the California Register of Historical Resources
- However, failure to meet these criteria is no limitation on lead agency’s discretion



Evaluation-Discretionary (Cont.)

- CRHR criteria is modeled after National Register.
- A resource must be significant at the national, state or local level and meet at least one of the following:
 - Criterion 1: Events
 - Criterion 2: Persons
 - Criterion 3: Design/Construction
 - Criterion 4: Potential to yield information
 - Integrity: Seven aspects are consistent with National Register, but threshold is lower (OHP regulations)

Step 3: Assess Impacts to Historical Resources

- The significance of a historical resource is materially impaired when a project demolishes or materially alters in an adverse manner *those physical characteristics* of a historical resource that:
 - Convey its historical significance and justify its inclusion in or eligibility to the California Register (or)
 - Account for its inclusion a local register (or)
 - Account for its identification in a historical resources survey (or)
 - Convey its historical significance and that justify its inclusion in or eligibility for the California Register as determined by a lead agency for purposes of CEQA.

CEQA Guidelines Section 15064.5

Assess Impacts: Demolition

- Demolition of a historical resource destroys the physical characteristics that convey its significance. The effect is unavoidable, and *cannot* be mitigated to less than significant



Example: Most of the Brown Derby Restaurant on Wilshire Boulevard was demolished. The “derby” was placed atop a retail mall as mitigation, but what is left no longer conveys its historic significance.

Assess Impacts: Alterations Meeting Secretary of Interior's Standards

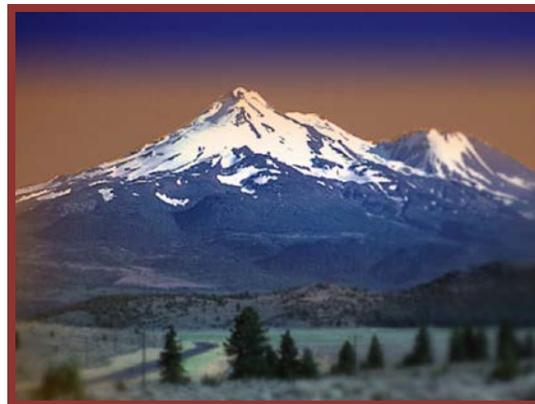
- Alterations meeting the Secretary's Standards are generally less than significant under CEQA

Example -- Sacramento Memorial Auditorium. After several generations of rehabilitation, the building retains eligibility because work was consistent with the Secretary of the Interior's Standards



Step 4: Mitigation

- What Does CEQA Say About Mitigation?
 - Guidance is focused on archaeology – silent about built environment
 - Specifically identifies project redesign, deed transfers, capping, and incorporating into open space as preferred impact avoidance strategies
 - Preservation in place is the preferred approach
 - When avoidance is infeasible, excavation is the recommended mitigation measure



Mitigation

- For archaeological resources:
 - Impacts should be avoided when feasible;
 - Preservation in place is preferred mitigation; and
 - Often data recovery through excavation is the only feasible mitigation, and a data recovery plan generally required.
- For historical resources:
 - Actions consistent with Secretary of the Interior's Standards for Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring, and Reconstructing Historic Buildings are generally accepted as mitigation under CEQA
 - Moving the historical resource to an appropriate receiver site may mitigate the effect to less than significant when moved resources can still be eligible for the California Register
 - Demolition cannot be mitigated below a level of significance

Mitigation

- “Deferred” mitigation is not allowed if the CEQA document is an MND:
 - Mitigation must be sufficiently detailed to reduce potential impacts
- Development of detailed mitigation can be deferred if the CEQA document is an EIR, however:
 - Agency must commit to mitigation by adopting the mitigation measure
 - The mitigation measure must include performance standards that describe how the mitigation will be refined and how it will be effective
 - Alternatively, the mitigation measure could include a menu of mitigations, with the specific mitigation to be selected from that menu in the future

Mitigation

- Moving the historical resource to an appropriate receiver site may mitigate the effect to less than significant, because moved resources can still be eligible for the CRHR



Example: Metal truss bridge in Folsom, built 1894, moved to Siskiyou County in the 1930s, and moved back to Folsom in late 1990s.

Effective Mitigation Measures

Five Questions to Ask	
WHY	State the objective of the mitigation measure and why it is recommended
WHAT	<ul style="list-style-type: none"> • Explain the specifics of the mitigation measure and how it will be designed and implemented • Identify measurable performance standards by which the success of the mitigation can be determined • Provide for contingent mitigation if monitoring reveals that the success standards are not satisfied
WHO	Identify the agency, organization, or individual responsible for implementing the measure
WHERE	Identify the specific location of the mitigation measure
WHEN	Develop a schedule for implementation

Mitigation Measures Must Be Feasible & Enforceable

<p>Adequate </p> <ul style="list-style-type: none"> • Avoid • Minimize • Rectify • Reduce over time • Compensate 	<p>Potentially Adequate </p> <ul style="list-style-type: none"> • Provide funding for • Hire staff • Monitor or report • Comply with existing regulations or ordinances • Obtain permit • Preserve already existing natural area 	<p>Inadequate </p> <ul style="list-style-type: none"> • Consult with • Submit for review • Coordinate with • Study further • Inform • Encourage/discourage • Facilitate • Strive to
---	--	---

Some measures adequate for an EIR will not support adoption of an MND because of the fair argument standard applied to MNDs.

Reviewer Considerations

- Is there feasible and enforceable mitigation identified?
- Is it clearly going to reduce, avoid, etc. the impact?
- Is the mitigation sufficient to avoid a significant, unavoidable impact?
 - If not, did the agency prepare an EIR?
- Is the mitigation improperly deferred?



Why Isn't Monitoring Alone Adequate Mitigation?

- Mitigation is to avoid, reduce, etc. impacts
- Simply monitoring impacts doesn't avoid or reduce them:
 - If monitoring is required, it must be part of a larger mitigation measure describing what will be done to reduce impacts if resources are encountered

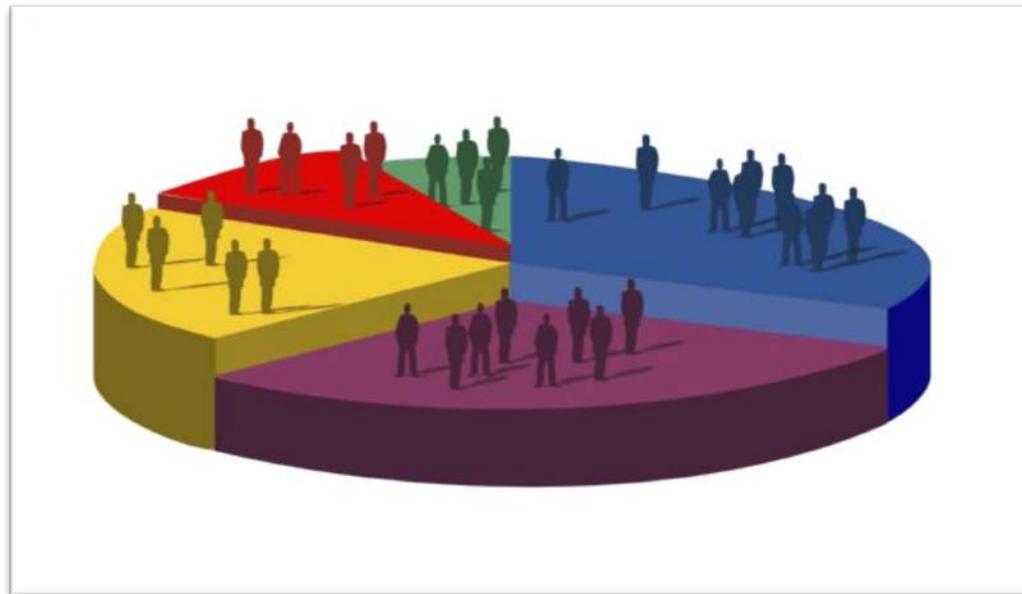


What about Native American Monitoring?

- CEQA is silent on the topic
- Can ensure that mitigation measures are carried out
- Can expedite compliance with PRC 5097 if human remains are found:
 - Remains will be treated sensitively and repatriated
- Can be component of a multi-part measure
- Still not adequate as the sole mitigation approach for the reasons discussed previously

Part III

Relationship Between CEQA, NEPA, and Section 106



CEQA, NEPA, and Section 106

- CEQA:
 - Applies only to California agency projects
 - Section 106 isn't applicable
- NEPA:
 - Applies only to federal agency actions
 - Must integrate Section 106 considerations
- Typically, if NEPA does not apply to a development project, then Section 106 is not invoked

Typical Relationships Triggering CEQA and NEPA

- California project receiving federal funds:
 - Road projects
 - HUD funding of residential/economic development projects
- California project requiring federal permits:
 - Section 404 permits from the USACE for placing dredge or fill in waters of the United States (wetlands)
 - Section 10 permits under the ESA for “incidental take” of federally listed threatened or endangered species
 - Others
- Large project co-sponsored by state and federal agencies:
 - E.g., BDCP, California High Speed Rail

CEQA and NEPA Are Separate Processes

- Typically, where both CEQA and NEPA will be triggered by a project:
 - The CEQA and NEPA processes are handled separately by the respective Lead Agencies
 - CEQA will be completed first, since California agency approval usually occurs first
 - NEPA will be completed later when federal agency permits are pursued
- Some Resulting Problems:
 - CEQA historical resources analysis that doesn't provide sufficient information for Section 106
 - Mitigation measures imposed by the respective agencies that are inconsistent

Integrating CEQA & NEPA for Efficiency

- Define project and project area
- Records search - Define Area of Potential Effects (APE) early, or overestimate
- Consultation - Extend invitation to all who may be interested parties
- Technical reports - Apply NRHP, CRHR, and local criteria in one report; clearly state character-defining features for each criteria
- Impacts analysis - Impacts/effects are based upon project's potential to reduce significance of historic resources

Integrating Regulatory Requirements

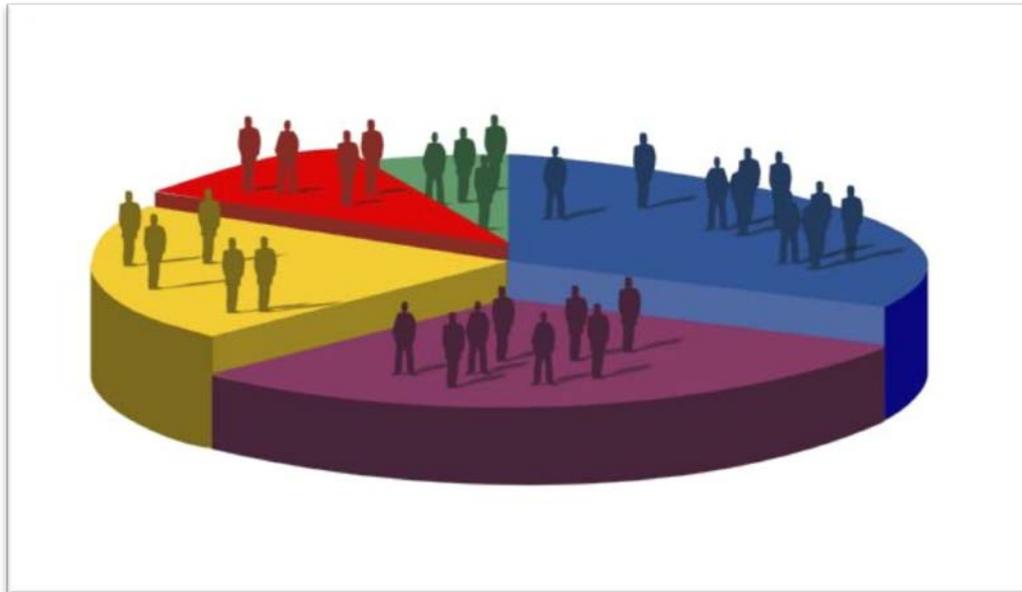
- Need to consider that different agencies have different:
 - Areas of potential effect
 - Areas of jurisdiction
 - Regulatory guidance
- Differences can result in different compliance requirements, especially in documentation

Integrating Regulatory Requirements

- Local requirements that are conflicting with each other and state and federal requirements, especially local lists, can be a problem:
 - The cultural resources listed locally are considered significant under CEQA, maybe not so under NEPA
- Be attentive to work conducted for another agency. Something that satisfies CEQA might not be adequate/appropriate for Section 106 and visa-versa

Part IV

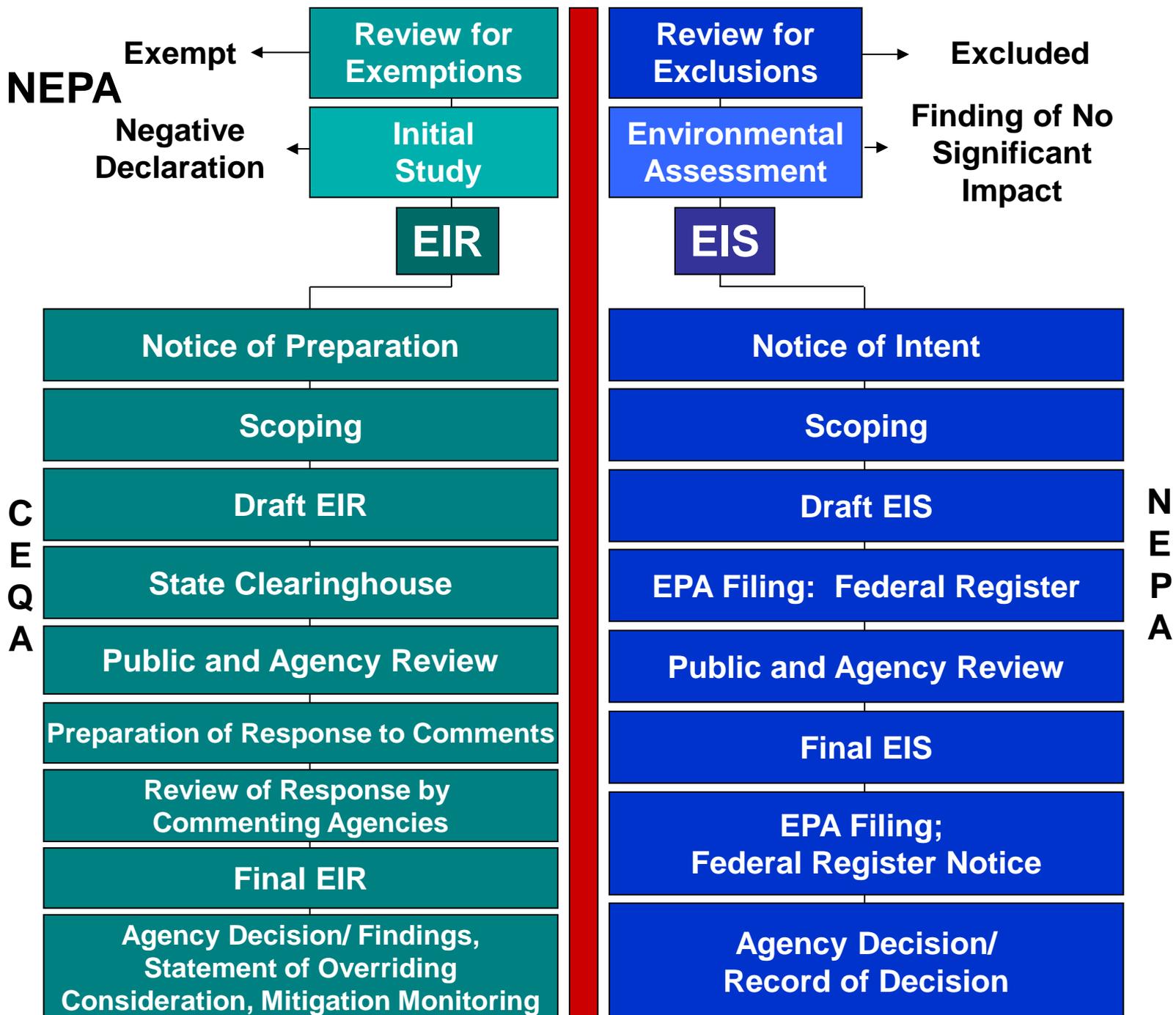
CEQA/NEPA Joint Documents



CEQA & NEPA in One Document

- Both CEQA and NEPA encourage preparation of “joint” documents when a project requires compliance with both laws
- Sometimes this is advantageous:
 - Large projects involving federal permitting
 - Projects with both state and federal funding
- Sometimes it is not:
 - Small projects with different CEQA and NEPA outcomes
 - Projects where federal and state agencies see no advantage to a joint document
 - Projects where state agency is concerned about schedule

CEQA and NEPA as Parallel Processes



Joint Documents

- Common joint documents:
 - EIR/EIS
 - EIR/EA-FONSI
 - IS-MND/EA-FONSI
- CEQA and NEPA have different approaches to “significance”
- NEPA has no “fair argument” provision:
 - NEPA EA-FONSI may be used where CEQA would require an EIR

Joint Documents

(Cont.)

- Common challenges:
 - More flexible use of Categorical Exclusions vs. Categorical Exemptions
 - EA and Initial Study and the fair argument standard
 - Contents (including alternatives)
 - Thresholds of significance
 - Baseline for determining significance
 - Coordination/integration of other agencies' reviews

The Translation Chapter

- Premise: The basic outlines of EIRs and EISs are similar:
 - Differences bear explanation
- EIR/EIS chapter can describe CEQA compliance vs. NEPA compliance:
 - Fills in any holes in the NEPA analysis to comply with CEQA
 - Location of mandated CEQA vs. NEPA discussions
 - Selected standards of significance
 - Significant impacts under CEQA standard
 - Mitigation measures under CEQA standard
 - CEQA alternatives, if necessary

Some Joint Document Challenges

- Consistent project objectives
- Sequencing of mitigation measures:
 - Mitigation measures providing for “adaptive management” must be sufficiently detailed to avoid being improperly deferred mitigation
- Consistent approach to “baseline”:
 - Must reflect “existing conditions” per CEQA
- Special study or survey protocols:
 - Must satisfy state and federal requirements

More Joint Document Challenges

- Each federal agency has its own NEPA regulations:
 - Experience with one agency may not translate to another
- Agreement on the scope of the project:
 - Some agencies apply a “small federal handle” approach and do not examine the “whole of the action” as is required under CEQA
- Differences in notice requirements:
 - Federal agency regulations vary with regard to length of the EA review period (less than the 30 days required for an IS-MND)
 - Federal agency NEPA regulations may require broader notification of interest groups (e.g., Environmental Justice communities) than CEQA

Is There a Problem if a Joint Document Uses “Phased Identification?”

- Federal law (36 CFR 800.4(b)) allows for phased identification when:
 - Alternatives under consideration consist of corridors or large land areas;
 - Where access is restricted;
 - Where deferred action is specifically provided for in an MOA under 36 CFR 800.6;
 - Where deferred action is specifically provided for in a PA under 36 CFR 800.14; and
 - Where deferred action is specifically provided for in a NEPA document under 36 CFR 800.8.
- But, that’s federal law – not CEQA:
 - It’s not an acceptable CEQA approach if it defers making a determination of significance, regardless of the question of full evaluation

Conflict Could Occur when Identification is Phased Through an MOA, PA, or in a NEPA Document



- This is a key concern when preparing a joint CEQA-NEPA document
- Under federal law:
 - A Programmatic Agreement can defer nearly all aspects of identification, evaluation, assessment of effects, and mitigation
 - Nearly anything can be, and often is, deferred if the consulting parties agree to it
- Under CEQA:
 - Not an acceptable approach because it defers making a determination of significance

Part V

Reviewing CEQA Documents



Tribe's Role in Reviewing CEQA Documents

- Formal consultation role early in the CEQA process *prior* to public release of draft CEQA documents
- Can provide a perspective that other entities do not
- Fact-based opinion can prompt EIR preparation
- Can choose to comment on public draft document too

Consultation Request –

- Once the lead agency sends out requests for consultation:
 - Tribe has 30 days to request consultation
- Can choose not to consult
 - Consider sending a courtesy response

Finding Out What's Going On with a Project

- Because consultation begins before the CEQA document is drafted...
 - Reliant upon lead agency to provide project information
 - Preliminary analysis may or may not be completed by the agency

A Few Words About Comments During the Public Review Period

- Be concise and be specific:
 - What specifically are your remaining concerns?
- Written comments are best:
 - Can be more comprehensive than verbal comments
 - Should include references, if applicable

Commenting on a CEQA Document

- **Remember:** CEQA is about the impacts on the environment, it doesn't decide whether to approve the project
- “Just the Facts, Ma'am:” focus on environmental issues
- Effective comments:
 - Are concise, focusing on the document at hand
 - Speak to the project's potential for impact and effectiveness of mitigation measures
 - Identify the specific part(s) of the document needing improvement
 - Include supporting evidence/facts