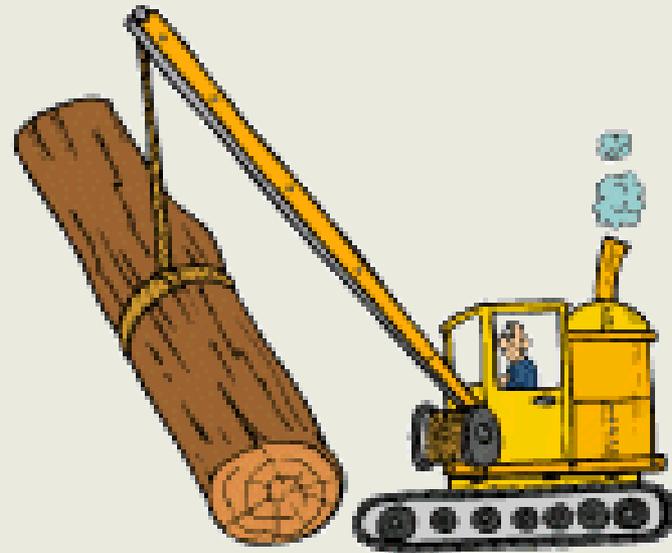


# TRIBAL PARTICIPATION IN THE CEQA PROCESS

# OBJECTIVES

- AB 52 Overview
- Participation in CEQA Process Beyond Consultation
  - No agreement reached in consultation
  - Categorical exemption “loophole”
  - Impacts to resources other than TCRs
- Defining TCRs

# PURPOSE OF CEQA



Address adverse physical changes  
to the existing environment

# CEQA PROCESS

- Disclosure
- Identification
- Prevention of Impacts
- Public Participation

# AB 52 OVERVIEW

- Requires CEQA Consultation with Tribes
- Establishes New Class of Resources: Tribal Cultural Resources
- Protects Confidentiality

## AB 52 RECOGNIZES:

- Tribal sovereignty and unique relationship between tribal governments and public agencies; while respecting interests and roles of project proponents
- Tribes may have expertise with regard to tribal history and practices
- Importance of incorporating tribal knowledge about land and TCRs into environmental analysis

# REQUEST FOR NOTICE

- Tribe submits written request for formal notification
  - To the lead agency
  - Projects in geographic area that is traditionally and culturally affiliated with tribe

# INITIATION OF CONSULTATION

- Within 14 days of completed project application or lead agency decision to undertake project— provide written notice to Tribes that requested
- Notice should include brief project description, location, lead agency contact info., and statement that Tribe has 30 days to request consultation
- Consultation begins within 30 days of lead agency receiving Tribe's request for 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 .
- Conducted in a way that is mutually respectful of each party's sovereignty.
- Shall recognize the tribes' potential needs for confidentiality.

Gov. Code, § 65352.4

# CONSULTATION PROCESS

- Before preparation of environmental review document
- Identify impacts to TCRs
- Propose mitigation measures to avoid or substantially lessen impacts to TCRs.
- Comment on project alternatives

# MITIGATION MEASURES

- Public agencies shall, when feasible, avoid damaging effects to any TCR.
  
- Public Resources Code 21084.3 examples of mitigation:
  - (1) Avoidance and preservation of the resources in place,
  - (2) Treating the resource with culturally appropriate dignity by:
    - (A) Protecting the cultural character and integrity of the resource.
    - (B) Protecting the traditional use of the resource.
    - (C) Protecting the confidentiality of the resource.
  - (3) Permanent conservation easements or other interests in real property
  - (4) Protecting the resource.

# CONCLUSION OF CONSULTATION

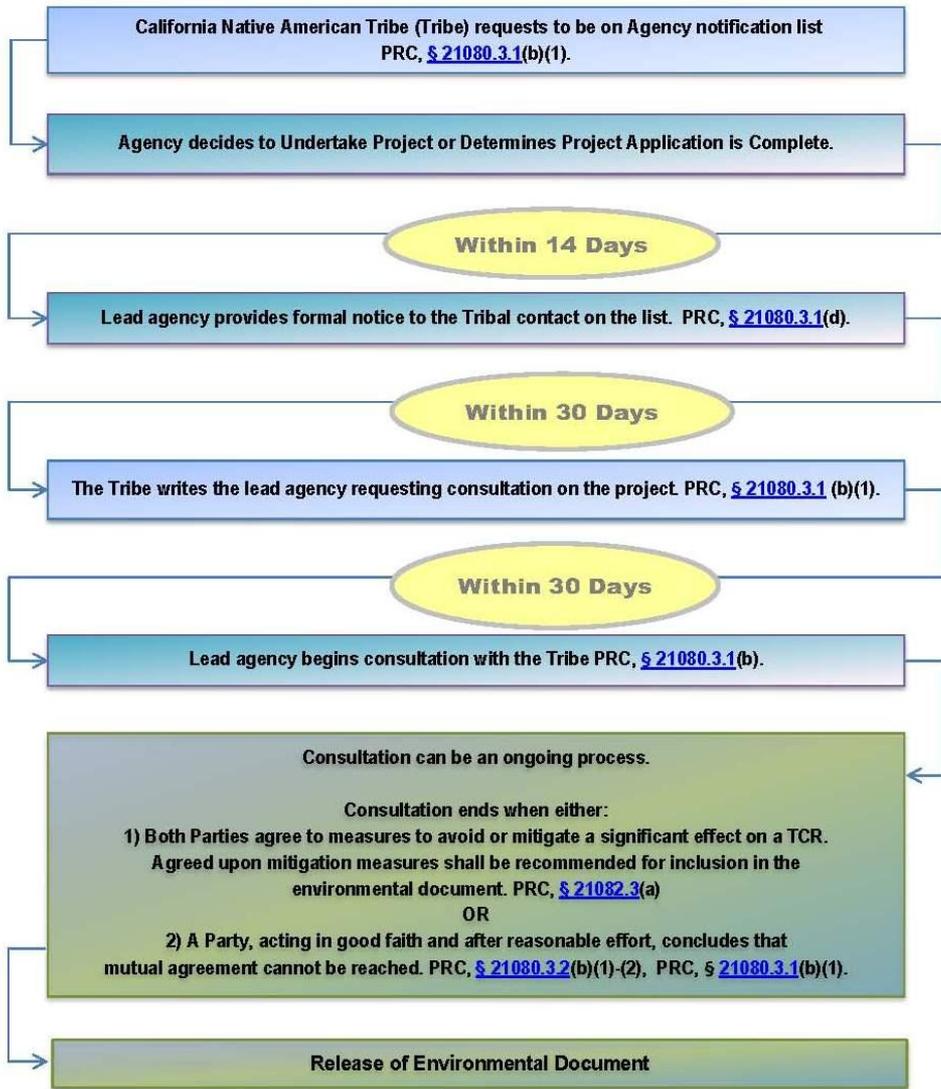
- Either:

- 1) the parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists, on a TCR, or

- 2) a party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached.

(Pub. Resources Code, § 21080.3.2 (b)(1) & (2).)

### Compliance Timeline and Consultation Process Flowchart



## CATEGORICAL EXEMPTION “LOOPHOLE”

- AB 52 requires consultation “prior to release of a negative declaration, mitigated negative declaration or environmental impact report.”
- If the agency plans to adopt a categorical exemption for a project, consultation is not required.

# CATEGORICAL EXEMPTIONS

- Resources Agency authorized to adopt list of projects where it is assumed there will be no significant impact
- Check list of exemptions at CEQA Guidelines section 15300



# A CATEGORICAL EXEMPTION DOES NOT APPLY IF...

- The project site is environmentally sensitive
- Cumulative impacts would be significant
- Environmental impacts due to unusual circumstances

- damage to scenic resources within an officially designated scenic highway
- located on a designated site affected by hazardous wastes or clean-up problems
- Impacts to an historic resources



# NOTICE OF EXEMPTION (“NOE”)

- State agency files with OPR
- Local agency files with the county clerk in the county(ies) where project is located
- Filing of NOE starts 35 day statute of limitations

Print Form

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**Notice of Exemption** **Appendix E**

**To:** Office of Planning and Research  
P.O. Box 3044, Room 113  
Sacramento, CA 95812-3044  
County Clerk  
County of: \_\_\_\_\_  
\_\_\_\_\_

**From:** (Public Agency): \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ (Address)

Project Title: \_\_\_\_\_  
Project Applicant: \_\_\_\_\_  
Project Location - Specific: \_\_\_\_\_

Project Location - City: \_\_\_\_\_ Project Location - County: \_\_\_\_\_  
Description of Nature, Purpose and Beneficiaries of Project: \_\_\_\_\_

Name of Public Agency Approving Project: \_\_\_\_\_  
Name of Person or Agency Carrying Out Project: \_\_\_\_\_

Exempt Status: **(check one)**:  
 Ministerial (Sec. 21080(b)(1); 15268);  
 Declared Emergency (Sec. 21080(b)(3); 15269(a));  
 Emergency Project (Sec. 21080(b)(4); 15269(b)(c));  
 Categorical Exemption. State type and section number: \_\_\_\_\_  
 Statutory Exemptions. State code number: \_\_\_\_\_

Reasons why project is exempt: \_\_\_\_\_

Lead Agency  
Contact Person: \_\_\_\_\_ Area Code/Telephone/Extension: \_\_\_\_\_

**If filed by applicant:**  
1. Attach certified document of exemption finding.  
2. Has a Notice of Exemption been filed by the public agency approving the project?  Yes  No

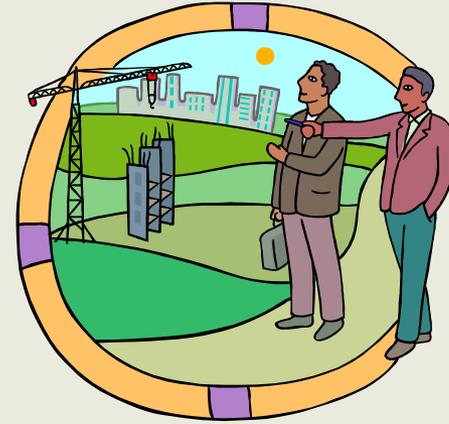
Signature: \_\_\_\_\_ Date: \_\_\_\_\_ Title: \_\_\_\_\_

Signed by Lead Agency  Signed by Applicant

Authority cited: Sections 21083 and 21110, Public Resources Code. Date Received for filing at OPR: \_\_\_\_\_  
Reference: Sections 21108, 21152, and 21152.1, Public Resources Code.

Revised 2011

# SCOPE OF PROJECTS



- Must consider the “whole of an action”
- No “piecemealing” or segmenting parts of the project to avoid review, or defer review

# TRIBAL CULTURAL RESOURCES

- A site feature, place, cultural landscape, sacred place or object, which is of cultural value to a Tribe— AND is either:
  - On or eligible for the CA Register
  - Listed on local historic register as defined in subdivision (k) of Section 5020.1.
  - A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1

# DISCRETIONARY CATEGORY OF TCRs

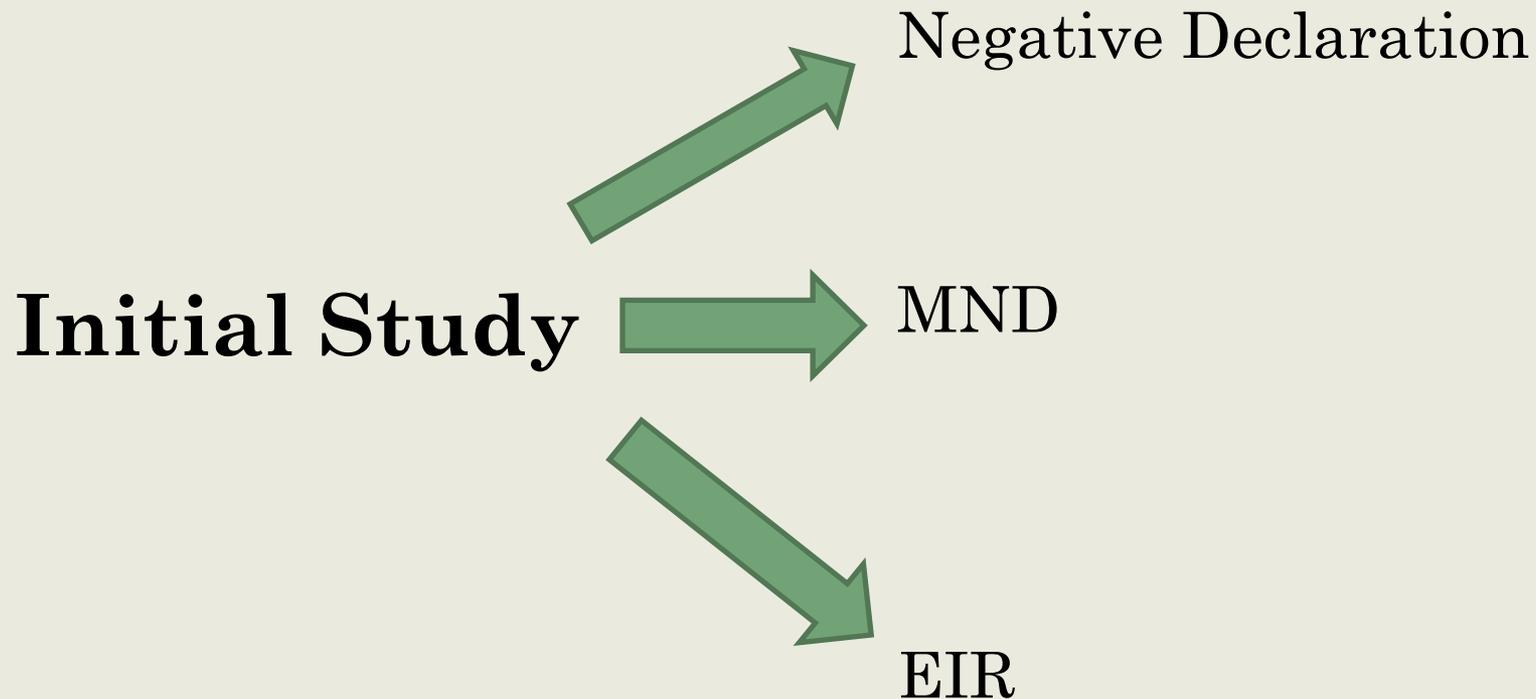
- Supported by substantial evidence
  
- Criteria under 5024.1
  - (1) associated with significant events
  - (2) associated with persons important in our past.
  - (3) distinctive design characteristics
  - (4) Has yielded, or may be likely to yield, information important in prehistory or history.

# COMPARE WITH TREATMENT OF DISCRETIONARY HISTORIC RESOURCES

3 categories of historic resources:

- Mandatory: listed on California Register
- Presumptive: listed on local register or survey, “unless the preponderance of the evidence demonstrates that the resource is not historically or culturally significant”
- Discretionary: The fact that a resource is not listed ... shall not preclude a lead agency from determining whether the resource may be an historical resource for purposes of this section

# CEQA DOCUMENTS



**CEQA APPENDIX G:  
ENVIRONMENTAL CHECKLIST FORM**

1. Project title: \_\_\_\_\_

2. Lead agency name and address:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

3. Contact person and phone number: \_\_\_\_\_

4. Project location: \_\_\_\_\_

5. Project sponsor's name and address:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

6. General plan designation: \_\_\_\_\_ 7. Zoning: \_\_\_\_\_

8. Description of project: (Describe the whole action involved, including but not limited to later phases of the project, and any secondary, support, or off-site features necessary for its implementation. Attach additional sheets if necessary.)  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

9. Surrounding land uses and setting: Briefly describe the project's surroundings:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

10. Other public agencies whose approval is required (e.g., permits, financing approval, or participation agreement):  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**ENVIRONMENTAL FACTORS POTENTIALLY AFFECTED:**

The environmental factors checked below would be potentially affected by this project, involving at least one impact that is a "Potentially Significant Impact" as indicated by the checklist on the following pages.

- |  |  |  |
|--|--|--|
| <input type="checkbox"/> Aesthetics                    | <input type="checkbox"/> Agriculture Resources     | <input type="checkbox"/> Air Quality         |
| <input type="checkbox"/> Biological Resources          | <input type="checkbox"/> Cultural Resources        | <input type="checkbox"/> Geology /Soils      |
| <input type="checkbox"/> Hazards & Hazardous Materials | <input type="checkbox"/> Hydrology / Water Quality | <input type="checkbox"/> Land Use / Planning |

Potentially Significant Impact	Less Than Significant With Mitigation Incorporation	Less Than Significant Impact	No Impact
--------------------------------------	---	------------------------------------	--------------

**I. AESTHETICS** -- Would the project:

- |  |                          |                          |                          |                          |
|--|--------------------------|--------------------------|--------------------------|--------------------------|
| a) Have a substantial adverse effect on a scenic vista?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| b) Substantially damage scenic resources, including, but not limited to, trees, rock outcroppings, and historic buildings within a state scenic highway? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| c) Substantially degrade the existing visual character or quality of the site and its surroundings?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| d) Create a new source of substantial light or glare which would adversely affect day or nighttime views in the area?                                    | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

**II. AGRICULTURE RESOURCES:** In determining whether impacts to agricultural resources are significant environmental effects, lead agencies may refer to the California Agricultural Land Evaluation and Site Assessment Model (1997) prepared by the California Dept. of Conservation as an optional model to use in assessing impacts on agriculture and farmland. Would the project:

- |  |                          |                          |                          |                          |
|--|--------------------------|--------------------------|--------------------------|--------------------------|
| a) Convert Prime Farmland, Unique Farmland, or Farmland of Statewide Importance (Farmland), as shown on the maps prepared pursuant to the Farmland Mapping and Monitoring Program of the California Resources Agency, to non-agricultural use? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| b) Conflict with existing zoning for agricultural use, or a Williamson Act contract?   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| c) Involve other changes in the existing environment which, due to their location or nature, could result in conversion of Farmland, to non-agricultural use?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

**III. AIR QUALITY** -- Where available, the significance criteria established by the applicable air quality management or air pollution control district may be relied upon to make the following determinations. Would the project:

# AN EIR MUST BE PREPARED WHEN:

- Fairly argued
- Based on substantial evidence
- In light of the whole record
- That a project *may* have a significant adverse environmental effect

# WHAT IS SUBSTANTIAL EVIDENCE?

- Facts
- Fact-related reasonable assumptions
- Expert opinion
- Sometimes lay opinion



# BASELINE FOR DETERMINING EFFECT

- Existing physical conditions at time environmental analysis commences
- The impacts of the project must be measured against the real conditions on the ground.

# SIGNIFICANT EFFECT ON THE ENVIRONMENT

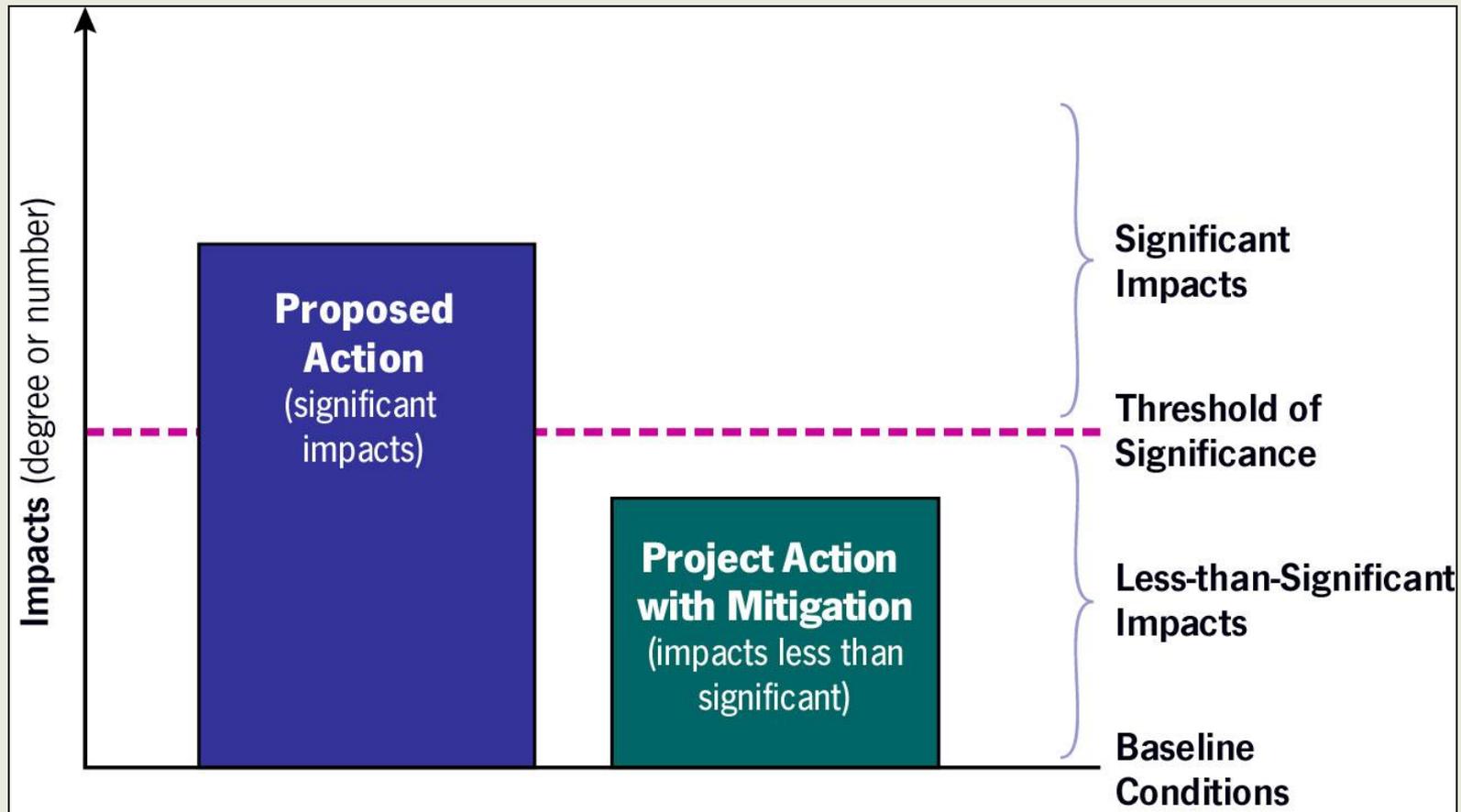
Significant changes to the existing physical environment includes foreseeable **indirect** and **cumulative** physical changes.

CEQA does not consider the environments impact on project



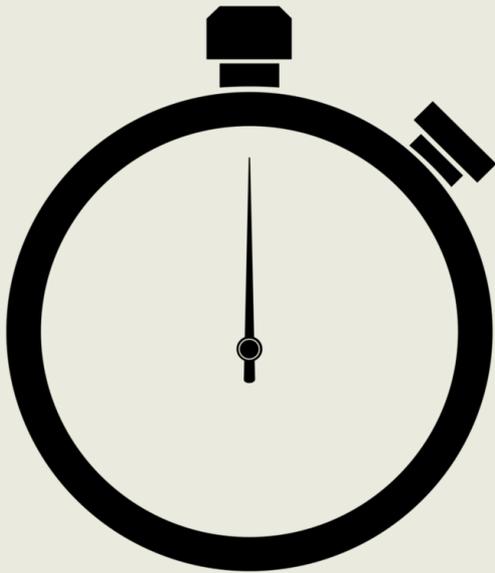
*"Nice, but we'll need an environmental-impact study, a warranty, recall bulletins, recycling facilities, and twenty-four-hour customer support."*

# MITIGATED NEGATIVE DECLARATION



# NOTICE OF DETERMINATION

- After approval of project a NOD is filed within 5 days
  - Local agency, file NOD with county clerk
  - State agency, file NOD with Office of Planning and Research



This starts statute of limitations

# PREPARATION OF DRAFT EIR

## Determining Scope of Draft EIR

- Notice of Preparation (“NOP”)
  - 30 day comment period
- Public agency consultation and responses to Notice of Preparation
- Public Scoping Meetings



# TYPES OF EIRS

<b>Activity</b>	<b>Type of EIR</b>
<b>Specific Project</b>	<ul style="list-style-type: none"><li>• <b>Project EIR</b></li><li>• <b>Joint EIR/EIS (federal agency involvement)</b></li><li>• <b>Focused EIR (when tiered off Master EIR)</b></li><li>• <b>Staged EIR</b></li></ul>
<b>Plan, Policy, or Program</b>	<ul style="list-style-type: none"><li>• <b>Tiered EIR</b></li><li>• <b>Program EIR</b></li><li>• <b>Master EIR</b></li><li>• <b>General Plan EIR</b></li></ul>
<b>EIR Already Certified</b>	<ul style="list-style-type: none"><li>• <b>Supplemental EIR</b></li><li>• <b>Subsequent EIR</b></li><li>• <b>Addendum to EIR</b></li></ul>

# COMPLETION OF DRAFT EIR

- Notice of Completion
  - Where to find Draft EIR
- Public Review
  - 30-45 days, possibly more



# CONTENTS OF A DRAFT EIR

- Table of contents
- Executive summary
- Project description
- Environmental setting
- Discussion of significant impacts
- Organizations/persons consulted
- Effects not found significant
- Mitigation measures
- Alternatives
- Growth-inducing impacts
- Significant irreversible changes

# PROJECT DESCRIPTION

- Statement of project's objectives
- Project location
- Project characteristics
  - Construction and operations
  - Reasonably foreseeable future phases
  - Related other activities
- Required approvals

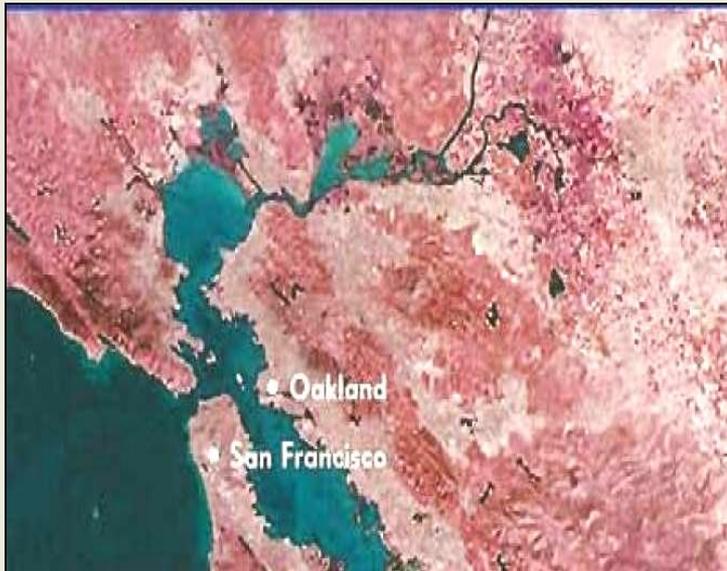
# ENVIRONMENTAL SETTING

- The existing environment when NOP's released
- Will *normally* constitute the baseline for significance analysis

# DISCUSSION OF SIGNIFICANT ENVIRONMENTAL IMPACTS:

- Comparing project impacts to baseline conditions
- Direct and Indirect Effects
- Feasible mitigation measures
- Unavoidable significant environmental effects

# CLIMATE CHANGE



# WATER SUPPLY

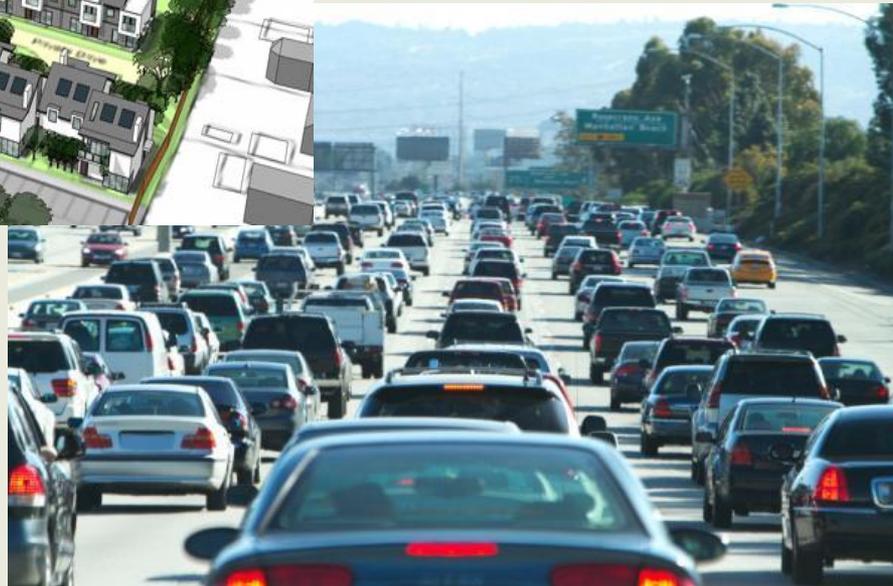
## An EIR:

- cannot assume a solution
- cannot limit analysis to first stage of development
- analyze impacts of future water sources

But, do not have to assure future water supply

# INDIRECT IMPACTS

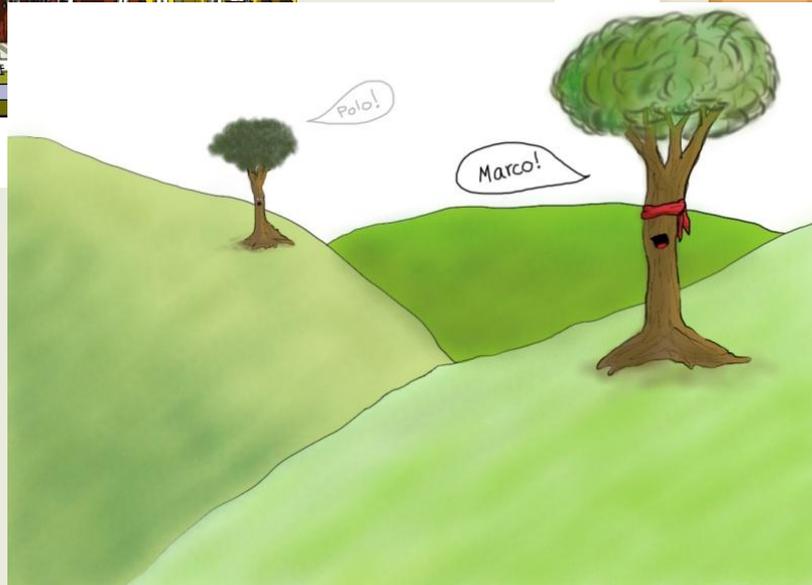
Later in time or removed in distance, but still reasonably foreseeable



# GROWTH INDUCING IMPACTS

- Foster economic or population growth or additional housing, or
- Remove obstacles to growth, or
- Encourage or facilitate other activities that cause significant environmental effects

# ALTERNATIVES



# ALTERNATIVES

- Evaluate “no project” alternative
- Evaluate alternative project locations, if necessary
- Identify environmentally superior alternative
- Explain why other alternatives have been eliminated from evaluation

# PUBLIC REVIEW OF THE DRAFT EIR



# FINAL EIR

- Response to comments
- Revisions to EIR
- Identify significant and unavoidable impacts

# CERTIFICATION OF EIR

- EIR completed in compliance with CEQA;
- Represents the lead agency's independent judgment; and,
- Decision-making body has reviewed and considered the information



"OK, all those in favour of delegating decision-making, shrug your shoulders"

# POST-EIR PROCESS

- Certification of final EIR
- Findings for each significant impact on feasible mitigation and alternatives
- Statement of overriding consideration for significant unavoidable impacts
- Mitigation monitoring or reporting
- Notice of Determination within 5 working days of project approval



# THREE POSSIBLE FINDINGS

- Project has been changed to avoid or substantially reduce impact magnitude

**OR**

- Changes to project are within another agency's jurisdiction and such changes have been or should be adopted

**OR**

- Specific economic, social, legal, technical, or other considerations make mitigation measure or alternative infeasible



# STATEMENT OF OVERRIDING CONSIDERATIONS

- Used when approving a project with unavoidable significant impacts
- Includes specific, written statement of reasons supporting approval – economic, legal, social, technological, or other benefits
- Must be supported by substantial evidence in the record

# MITIGATION MONITORING AND REPORTING PROGRAM

- Mitigation measures must be legally enforceable
- To change mitigation measures in the future, agency should substitute measures as effective as those originally adopted

# LITIGATION



# CHALLENGING AN AGENCY'S DECISION UNDER CEQA

- Who can sue?
  - Individuals, organizations, even corporations can bring an action under CEQA, but must:
    - Be affected by project's environmental impacts and
      - “Exhaust administrative remedies”



- Who do you sue?

- Respondent: agency, the agency's decision-making body, or individual decision-makers

- Real Party In Interest: any recipient of the objected to approval



# LITIGATION

## SHORT STATUTE OF LIMITATIONS

- **CEQA LITIGATION MUST BE COMMENCED WITHIN:**
- **35 days** after an agency has filed and posted Notice of Exemption
- **30 days** after an agency has filed and posted Notice of Determination (for either ND or EIR)
- **180 days** after an agency decides to carry out or approve a project, or from commencement of a project without formal decision

# CONSIDERING LITIGATION?

- Determine early in the administrative process what your goal is, and if you may be prepared to litigate
- Identify others who may want to join you
- Consider forming a group
- Consider retaining counsel to assist you in the administrative process if possible

# TIMING

- CEQA litigation moves quickly, compared to most civil litigation– is often completed at trial level in 9 months to a year
- There are mandatory time frames for filings and hearing



## ○ Litigation Expenses

- Court filing fees
  - Preparation of Administrative Record
  - Attorneys' fees
- 
- If you prevail, could recover these from respondent and real party
  - If you do not prevail, liable for successful parties costs



# THE END