

The California Environmental Quality Act (CEQA)

Introduction and Purpose of CEQA

The California Environmental Quality Act (CEQA) and the CEQA Guidelines govern the environmental review process in California.¹ CEQA, enacted in 1970, is a so-called “mini NEPA,” the state version of the federal National Environmental Policy Act (NEPA) with some similarities, such as required drafting of an environment assessment, but also there are a number of significant distinctions.

CEQA holds public agencies, both state and local, to a duty of avoiding or minimizing any significant effects their discretionary actions—like carrying out a capital project or approving an applicant’s license to build a facility— may have on the environment, where feasible.²

CEQA seeks to accomplish this by setting out a mandatory process for carrying out environmental assessments and soliciting feedback from Tribes, other public agencies, and the general public.³ These assessments determine whether an activity could potentially have a significant effect on the environment, list feasible alternatives, and propose methods for minimizing or altogether avoiding those effects. Environmental assessments do not control final decisions on whether to approve an activity. But CEQA intends agencies to consider the environmental impacts treated in these documents to inform their decisions as well as hold them accountable to the wider public by justifying their ultimate action.⁴

Role of Governor’s Office of Planning and Research

The Office of Planning and Research (OPR) is billed as “the State’s Comprehensive Planning Agency.” OPR proposes state policy and drafts guidance for state and local agencies. OPRs role under CEQA extends to policy development, repository of documents, distribution of environmental documents, and education of state and local agencies. OPR administers the State Clearinghouse, a database of CEQA documents, and distributes environmental documents to state agencies, departments, boards, and commissions for review and comment.⁵ OPR drafts and promulgates the CEQA Guidelines, or regulations, and

¹ Cal. Pub. Res. Code §§ 21000-21189.57 [hereinafter CEQA]; Cal. Code Regs. Tit. 14, §§ 15000-15387. For a simplified overview of CEQA, see THE GOVERNOR’S OFFICE OF PLANNING AND RESEARCH, *CEQA 101*, https://opr.ca.gov/ceqa/docs/20210809-CEQA_101.pdf (last visited Dec. 7, 2021) [hereinafter Guidelines].

² Guidelines, §§ 15021, 15091, 15041.

³ CEQA, § 21102.

⁴ Guidelines, § 15121.

⁵ Guidelines, § 15023(c), (h).

recommends amendments to the Guidelines to the Natural Resources Secretary. OPR also evaluates proposals for adoption, amendment, or repeal of categorical exemptions, and makes recommendations to the Natural Resources Secretary.

Relevant CEQA Definitions

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, ambient noise, and objects of **historical** or aesthetic significance.”⁶

Project means a project, undertaken either by a public agency or a person supported through agency funding, or involving the issuance of public agency permission (e.g., permit, license), with a potential for resulting in either a direct physical change or a reasonably foreseeable indirect physical change in the environment.⁷

The CEQA Process

The Main Phases of CEQA Review

Determine whether CEQA applies to the proposed agency action.

Determine the level of scrutiny lead agencies must give a proposed activity, expressed through the type of environmental assessment document.

Draft the environmental document, including carrying out ***consultation*** with other relevant agencies with a stake in the project and conducting government-to-government with affected Tribes under AB 52.

Circulate the draft environmental document for public and other agency feedback.

Finalize and certify the draft environmental document, responding to comments received.

Amend and recirculate with a subsequent or supplemental document, if needed.

Respond to litigation, if applicable.

⁶ Guidelines, § 15360.

⁷ CEQA, § 21065; Guidelines, § 15378.

Determining whether CEQA applies

CEQA governs certain, environmentally relevant discretionary actions of both state and local agencies, with some procedural distinctions.⁸

Key Roles in CEQA

The **Lead Agency** plays the primary role in ensuring compliance with CEQA. This is the public agency principally responsible for carrying out or approving a project.⁹

A **Responsible Agency** is any other agency that plays a part in approving the project; for example, a city may be the Lead Agency for approving a land use project, such as a sports stadium or industrial complex, but the project may also require a permit from the Regional Water Quality Control Board or local Air District.¹⁰

A **Trustee Agency** possesses jurisdiction over natural resources that are held in trust for the people of the State of California. It is involved in CEQA review when a proposed project could affect one of those resources.¹¹

If the proposed activity is a private project, the project applicant submits its application package, including answers to an environmental questionnaire.¹²

The Lead Agency conducts a preliminary review to determine whether CEQA applies, identifies the needed environmental experts to carry out CEQA analysis and review, and prepares the appropriate environmental review document.¹³

The threshold inquiry is whether the proposed activity qualifies as a “project,” as defined in the statute and the CEQA Guidelines.¹⁴ A project may be proposed by the agency itself, such as a public works project or a zoning ordinance. A project may also be a private undertaking – such as a housing development—subject to the approval of one or more public agency, such as through issuing a license or permit, or one that receives public funding.

⁸ See generally CEQA, §§ 21100-21108, 21150-21154.

⁹ Guidelines, § 21067.

¹⁰ Guidelines, § 21069.

¹¹ Guidelines, § 15386.

¹² See Practical Law Real Estate, California Environmental Quality Act: Overview (2021).

¹³ Guidelines, §§ 15002(k), 15060.

¹⁴ Guidelines, § 15378.

CEQA applies only to *discretionary* and not *ministerial* agency decisions. Certain classes of projects are exempted from CEQA or subject to a streamlined or equivalent process.¹⁵ CEQA provides for both statutory exemptions and categorical exemptions (or exempt classes), the latter established by regulation.

Statutory exemptions include emergency projects, feasibility studies, and, relevant to Tribes, cooperative agreements for developing solid waste management facilities in Indian country.¹⁶

CEQA empowers the Secretary for Natural Resources to establish categorical exemptions, based on a finding that a particular class of projects will not have a significant effect on the environment.¹⁷ However, CEQA still applies to a project otherwise falling within an exempt class if there is risk of a significant impact, individually or cumulatively with similar successive projects, including those that could affect a particularly sensitive environment, and those that are located on a hazardous waste site or could damage resources affiliated with a designated scenic highway.¹⁸ Notably, CEQA and its Guidelines recognize an exception for projects that may “cause a substantial adverse change in the significance of a historical resource,” but they do not emphasize tribal cultural resources specifically.¹⁹ This includes agreements related to addressing Native American human remains.²⁰

Projects that are by-right; that is, comply with applicable zoning laws and building codes, and those that will result in no significant environmental effect (the “common sense” exemption) also are excluded from CEQA review.²¹

If a project is exempt from CEQA, the lead agency will file a Notice of Exemption (NOE).²²

¹⁵ Guidelines § 15061.

¹⁶ Guidelines §§ 15269, 15282(q). Statutory exemptions may either completely or only partially exempt a proposed project from CEQA. Partially exempt projects include those consistent with existing general or community plans and zoning laws, and certain infill projects. See Practical Law Real Estate, California Environmental Quality Act: Overview (2021).

¹⁷ Guidelines, Art. 19; § 15354.

¹⁸ Guidelines, § 15300.2.

¹⁹ CEQA, § 21084. SEE CALIFORNIA GOVERNOR’S OFFICE OF PLANNING AND RESEARCH, *Technical Advisory: CEQA Exemptions Outside of the CEQA Statute* (2018), https://opr.ca.gov/ceqa/docs/20180606Tech_Advisory_CEQA_Exemptions.pdf.

²⁰ Cal. Pub. Res. Code § 5097.98(g).

²¹ Practical Law Real Estate, California Environmental Quality Act: Overview (2021).

²² CEQA, § 21152-21152.1. The Lead Agency will also issue the NOE to any person who previously requested one in writing and to any legislature in whose district the project would have an environmental impact. CEQA, § 21092.2. If the Lead Agency is a local agency and a non-elected official or body issues the Notice of Exemption, that decision may be appealed to the elected decision-making body. Guidelines, § 15061.

The Secretary for Natural Resources may also certify certain regulatory programs as exempt from preparing the environmental documents CEQA requires if the program otherwise requires preparing environmental analysis documents containing similar information. However, these projects still must avoid significant adverse effects on the environment, where feasible.²³

Apart from these exemption categories, CEQA permits streamlined environmental review for certain projects the legislature has characterized as bringing particularly desirable economic or social benefits that could be stifled by strenuous CEQA review. This includes transit priority projects declared to be sustainable communities projects, and some low income, residential, and mixed-use housing projects. Of note is that CEQA still prohibits these projects from having significant impacts on certain resources, including historical resources, but the statute does not mention of tribal cultural resources specifically.²⁴ However, AB 168 added a Tribal scoping process for Tribal cultural resources for streamlined housing projects. *See AB 52 discussion.*

Initial Study: Determining the Environmental Document Required – EIR, MND, or ND

If the project does not qualify for an exemption, the Lead Agency carries out an Initial Study to determine whether it should prepare an Environmental Impact Report (EIR) or Negative Declaration (ND), or to rely on an EIR/ND prepared previously.²⁵ The Lead Agency carries out this environmental review, often using the checklist contained in Appendix G of the CEQA Guidelines, or the agency's own form. The timeframe is 30 days, with a possibility of extending 15 days more if both the Lead Agency and Project Applicant agree to the extension.²⁶ The Lead Agency consults with all Responsible and Trustee Agencies responsible for the resources affected by the project.

The key consideration is whether the proposed project may have a *significant effect on the environment*.²⁷

- ***Significant effect on the environment*** means “a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project, including land, air, water, minerals, flora, fauna, ambient noise, and *objects of historic or aesthetic significance*. An economic or social change by itself shall not be considered a significant effect on the environment. A social or

²³ Guidelines, §15250. Certified regulatory programs are listed at Guidelines §15251.

²⁴ CEQA, §§ 21155.1, 21159.21.

²⁵ Guidelines, § 15002(k), 15063.

²⁶ Guidelines, § 15101.

²⁷ CEQA, §21083; Guidelines, § 15002(k), 15063.

economic change related to a physical change may be considered in determining whether the physical change is significant.”²⁸

- **AB 52** adds “A project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment.”²⁹

The Lead Agency’s determination of significance is based on *substantial evidence*. The Lead Agency may rely upon expert opinion “supported by facts, technical studies or other substantial evidence” and upon “scientific and factual data.”³⁰ Appendix G does not specifically reference Indigenous Knowledge, but does reference the “significance of the resource to a California Native American Tribe” as one type of substantial evidence for which the agency must account.

- **Mandatory findings of significance** include projects with the potential to substantially degrade the quality of the environment, curtail the range of fish or wildlife habitat, substantially threaten plant and animal species, destroy critical examples of major periods of state history, or achieve short-term environmental goals to the disadvantage of long-term environmental goals, where potential effects could be cumulative considerable, or either directly or indirectly cause substantial adverse effects on human beings.³¹

Potential environment effects extend to all phases of a project, from planning all the way through completion and operation.³² Effects may be individual or cumulative. An incremental effect is *cumulatively considerable* if it contributes to a significant effect when aggregated with past, current, and probable future projects.³³ The Lead Agency may consider both *direct* and *reasonably foreseeable indirect* physical changes to the environment. Resulting economic and social changes are not considered to be significant effects to the environment, but they may be used in determining the significance of a physical change.³⁴

The Guidelines specifically note the significance of impacts to historical and archeological resources including Native American human remains. The Guidelines also recommend that a Lead Agency make provisions for “historical or unique archaeological resources”

²⁸ Guidelines § 15382 (*emphasis added*). Guidelines, § 15064.7 “A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect.”

²⁹ CEQA, § 21084.2.

³⁰ Guidelines, § 15063(a)(3), 15064(b)(1).

³¹ CEQA, § 15065.

³² Guidelines, § 15126.

³³ Guidelines, § 15064.

³⁴ Guidelines, § 15064.

inadvertently discovered during development, but does not mention Tribal cultural resources specifically.³⁵

The Initial Study concludes with the Lead Agency deciding to move forward with either an *Environmental Impact Report* (EIR), *Mitigated Negative Declaration* (MND),³⁶ or *Negative Declaration* (ND). The Lead Agency may also decide a prior environmental document already analyzed all potential impacts and appropriately avoided or mitigated them.³⁷

Types of Environmental Assessments

Environmental Impact Report (EIR) – substantial evidence the project may have a significant effect on the environment.

Mitigated Negative Declaration (MND) – the project as initially conceived could have significant effects on the environment, but revisions agreed to by the applicant would avoid or mitigate them to below the threshold of significance.

Negative Declaration (ND) – No substantial evidence the project may have a significant effect on the environment.

The rest of the discussion will focus primarily on the EIR, as the most comprehensive of the three.

Drafting the Environmental Document

The Lead Agency will then draft the environmental document.

Tiering

The Lead Agency may be able to take advantage of *tiering*, or streamlining environmental review under an earlier, broader environmental review document encompassing a larger region. The Lead Agency will determine which, if any environmental effects were not sufficiently addressed in the earlier EIR document and then conduct a more focused review of just those impacts. The later EIR, MND, or ND then focuses on the environmental impacts (and new or additional mitigation measures or alternatives), specific to the narrower project, that were not addressed in the earlier EIR.³⁸

³⁵ Guidelines, § 15064.5(f).

³⁶ Guidelines, § 15369.5.

³⁷ Practical Law Real Estate, California Environmental Quality Act: Overview (2021).

³⁸ CEQA, §§ 21093, 21157.1, 21158; Guidelines, §§ 15152, 15175, 15178.

Examples of the broader environmental document include a Master EIR, Staged EIR, and Program EIR.

A **Master EIR** (MEIR) covers all or a portion of a territory under a public agency's control. It evaluates and provides mitigation measures to address the significant environmental effects of projected projects, including cumulative impacts.³⁹ **For SB 18: MEIRs may be prepared for §21157 (1) A general plan, element, general plan amendment, or specific plan; and (7) A regional transportation plan.**

A **Staged EIR** encompasses a large capital project requiring multiple discretionary agency approvals.⁴⁰

A **Program EIR** will be prepared for a related series of actions that could be characterized as a single, large project.⁴¹

The Lead Agency prepares a Notice of Preparation, issued to OPR and both Responsible and Trustee agencies. The Notice is filed with any federal agency involved in approving or funding the project, as well as with each county where the project or one of its components will be located.⁴²

The Lead Agency will, in the case of an EIR, determine the *scope* of the document in consultation with agencies, the applicant, and the general public. The Lead Agency *consults* with other public agencies as relevant to the proposed project, including each Responsible and Trustee Agency.⁴³ Each Responsible and Trustee Agency then has 30 days in which to inform the Lead Agency what environmental information, falling within its statutory jurisdiction, should be included in the EIR.⁴⁴ The Lead Agency will convene a *Scoping meeting* for projects deemed of "statewide, regional, or areawide significance," notifying any public agency, organization, or individual who has filed a written request to receive such a notice.⁴⁵ Tribes are not specifically included.

³⁹ Guidelines, §§ 15169. Generally, tiering applies only if the MEIR was certified within the prior five years. CEQA, § 21157.6; Guidelines, § 15179.

⁴⁰ Guidelines, § 15167.

⁴¹ Guidelines, § 15168.

⁴² CEQA, § 21092; Guidelines, § 15082. CEQA, § 21092.2. Notice is additionally issued to any person who filed a request to receive such a notice, as well as to any legislator representing a district where the project could be environmentally impacted by the project.

⁴³ CEQA, §§ 21104, 21152.

⁴⁴ Guidelines, § 15103.

⁴⁵ Guidelines, §§ 15083, 15206. Such projects meet one of the following three criteria: (1) A proposed local general plan, element, or amendment of a general plan, for which an EIR was prepared [not an MND or ND]; (2) A project with the potential for causing significant effects on the environment

The Lead Agency will prepare the draft, directly or by a consultant under contract; or the applicant may contract with a consultant to prepare the draft if the Lead Agency approves. Any person may send to the Lead Agency any information or comments to assist it in preparing the document.⁴⁶

Content of the Environmental Document

The EIR discusses all significant effects the proposed project may have on the environment, albeit limited to substantial adverse changes in physical conditions. This includes treatment of cumulative impacts.⁴⁷

The EIR lays out *mitigation measures* as well as range of *reasonable alternatives* to the project or its location. Alternatives must achieve the project's basic objectives while either avoiding or reducing the significant effects. This must include discussion of the "no project" alternative.

A ND includes a brief description of the proposed project, its location, and the Lead Agency's official finding of no significant effect. An MND expands on an ND by including the mitigation measures which will address potentially significant effects.⁴⁸

Possible Mitigation Measures Under CEQA Guidelines

Avoiding or minimizing the environmental impact.

Remedying the impact, such as through repair, rehabilitation, or restoration.

Ongoing preservation and maintenance activities.

Replacing or substituting natural resources.

In-lieu fees.

Review of the Environmental Document

The Lead Agency makes the completed draft environmental document available for public and agency review, issuing a public notice of availability. It will also file a notice of completion with OPR and will submit the EIR, MND, or ND to the State Clearinghouse if

extending beyond the city or county in which the project would be located; and/or (3) A project which would substantially affect sensitive wildlife habitats.

⁴⁶ Guidelines, § 15084(c).

⁴⁷ CEQA, § 21100; Guidelines, §§ 15126.4, 15126.6, 15131.

⁴⁸ Guidelines, § 15070.

either the agency is a state agency or the project is of sufficient statewide, regional, or areawide significance.⁴⁹

In addition to soliciting public comments, the Lead Agency requests comments from Responsible and Trustee Agencies, as well as from any other federal, state, or local agencies possessing jurisdiction over any resources the proposed project could affect.⁵⁰ The minimum public review period for an EIR is 30 days, or 45 days if submitted to the State Clearinghouse; the period for an MND or ND is 20 or 30 days, respectively.⁵¹ The maximum period is 60 days, barring unusual circumstances.⁵² CEQA allows but does not require a public hearing on the document.⁵³

The Lead Agency provides written response to every public comment that raises significant environmental issues, as well as to comments supplied by any public agency.⁵⁴ It must explain any disagreement with a comment in a “good faith, reasoned analysis,” although the level of detail in a response need only correspond to the level of detail provide in the comment itself.⁵⁵ The response may be in the form of revisions to the body of the final environmental document itself, or compiled in a separate section.

An EIR may be recirculated if the Lead Agency is made aware of significant new information after the draft is publicly released but prior to the final document’s certification. New information is significant if the public would otherwise be deprived a meaningful opportunity to comment upon either a previously undisclosed substantial adverse environmental effect or a feasible way to mitigate or avoid such an effect which the project’s proponents declined to implement.⁵⁶

Finalizing and Certifying the EIR

CEQA requires a Final EIR be completed and certified within one year, and an ND be completed and certified within 180 days, after the Lead Agency designates the project

⁴⁹ Guidelines, §§ 15085, 15087. The State Clearinghouse distributes the environmental document within three days of receipt.

⁵⁰ Guidelines, § 15086. Responsible and Trustee agencies may suggest mitigation measures. Tribes are not explicitly included among these agencies.

⁵¹ CEQA, § 21091; Guidelines, §§ 15073, 15105.

⁵² Guidelines, § 15105.

⁵³ Guidelines, § 15202

⁵⁴ Guidelines, § 15088. The Lead Agency provides written responses at least 10 days prior to the environmental document’s certification. CEQA, § 21093.

⁵⁵ Guidelines, § 15088(c).

⁵⁶ Guidelines, § 15088.5.

application complete. There is a possible maximum extension of 90 days if both the agency and applicant consent.⁵⁷ The Lead Agency files a Notice of Completion with OPR.⁵⁸

The Final EIR incorporates the comments and recommendations received on the draft document, a list of all parties who commented on the draft, and the Lead Agency's responses to all significant points on environmental matters that were raised in the review and consultation process.⁵⁹

The environmental document must be certified by the decision-making body—either the Lead Agency itself or an elected body—prior to approval of the project itself.⁶⁰ The Lead Agency files a Notice of Determination within five working days after deciding to carry out or approve the proposed project.⁶¹

Both Lead and Responsible Agencies must consider the environmental document prior to granting approval, making a written finding for each significant environmental effect described,⁶² namely, that either the project has been altered so as to avoid or substantially reduce the effect; that such alterations fall under another agency's purview; or overriding concerns – “specific economic, legal, social, technological, or other considerations” – render such mitigation measures or alternatives infeasible.⁶³

Although agencies are obligated to avoid or minimize environmental damage, the Lead Agency may still approve a project that will have one or more significant effects on the environment when there is a competing public objective. The CEQA process ensures the Lead Agency's decision is fully informed and its reasoning transparent to the public.⁶⁴ The rationale is embodied in a *Statement of Overriding Consideration*.⁶⁵ The statement explains there is no feasible options for avoiding the undesirable impact and the risk to the environment is outweighed by the economic or social benefits that will accrue from carrying out the project.⁶⁶ Each finding must be supported by substantial evidence.

⁵⁷ CEQA, §§ 21100.2(a)(1)(A)-(B); 21151.5(a)(1)(A)-(B); Guidelines, §§ 15107, 15108. The time limit may be waived for projects subject to both NEPA and CEQA, where additional time is needed to prepare a combined EIR/EIS or ND/FONSI. Sometimes approvals may be required from federal, state, and local agencies, necessitating coordination.

⁵⁸ CEQA, § 21161. The Lead Agency also issues a notice to every person who previously filed a request to receive such notice, as well as to any legislator whose district would be environmentally impacted by the project. CEQA, § 21092.2.

⁵⁹ Guidelines, § 15132.

⁶⁰ CEQA, §§ 21100.2, 21151.5; Guidelines, § 15090.

⁶¹ CEQA, § 21152; Guidelines, § 15075. This initiates a 30-day statute of limitations period on court challenges to the approval.

⁶² Guidelines, § 15004.

⁶³ Guidelines, §§ 15091(a)(1)-(3), 15092.

⁶⁴ Guidelines, § 15043.

⁶⁵ Guidelines, § 15093.

⁶⁶ Guidelines, §§ 15043, 15091, 15093.

Mitigation measures must be fully enforceable, such as through writing conditions into a permit or license, and enforced through a reporting or monitoring program.⁶⁷ The Lead Agency may substitute other mitigation measures that are just as or are more effective, but only after holding a public hearing and adopting written findings in support of making the substitution.⁶⁸

The Lead Agency may later need to issue a Subsequent or Supplemental environmental document if substantial changes occur or are proposed for the project, or if new information becomes available. The document will undergo the same notice and public review process as the original environmental document.⁶⁹

Legal Challenges Under CEQA

Persons may challenge a public agency's decision on the grounds of noncompliance with CEQA. Generally, claimants seeking to challenge a public agency's decision on the grounds of noncompliance with CEQA must be "beneficially interested" in the result of the case, beyond the interest of the public at large, to have standing to seek a writ of mandate.⁷⁰ The claimants must be adversely and substantially affected by a government agency action.⁷¹ These are not citizen suits. However, there is a "public interest" exception to the requirement a claimant shows a special interest. This occurs when the claimant is seeking to enforce a public right or duty, as a citizen.⁷²

⁶⁷ Guidelines, §§ 15126.4, 15097.

⁶⁸ Guidelines, § 15074.1.

⁶⁹ CEQA, §§ 21092.2, 21166; Guidelines § 15162.

⁷⁰ A writ of mandate is a form of equitable relief directing a lower court or administrative agency to take, or refrain from taking, an action.

⁷¹ See California Code Civ. Proc., § 1086 – beneficial interest ("The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested."). *But see* California Government Code § 11350 regarding declaratory relief ("Any interested person may obtain a judicial declaration as to the validity of any regulation by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure.").

⁷² Two oft-cited cases are *Waste Management of Alameda County, Inc. v. County of Alameda*, 79 Cal. App. 4th 1223 (2000) (finding the petitioner, a waste disposal company, could not establish a "beneficial interest" needed for CEQA standing because its interests – competition with a rival landfill – fell outside CEQA's zone of interest) and *Save the Plastic Ban Coalition v. City of Manhattan Beach*, 52 Cal. 4th 155 (2011) (finding a corporate entity had citizen suit standing under the "public interest" exception. However, the claimant also had a beneficial interest in the matter). Note that Tribes impacted by agency certification of an environmental document or approval of a project impacting TCR, presumably would fall under the "beneficial interest" test.

California Public Resources Code Section 21167 governs the timeline for challenging in court a public agency's decision under CEQA.⁷³

Examples of Challenges Under CEQA

A public agency is carrying out or has approved a project that may have a significant effect on the environment without having determined it may have a significant effect on the environment.

A public agency improperly determined whether a project may have a significant effect on the environment.

An EIR does not comply with CEQA.

A public agency improperly determined a project is not subject to CEQA.

A public agency committed another act or omission that otherwise does not comply with CEQA.

Challengers must first exhaust their administrative remedies prior to contesting an agency action in court. This means they must have objected to project approval, alleging grounds for noncompliance, during the public comment period for the draft environmental document.⁷⁴ A court hearing a challenge to a public agency's determination, finding, or decision under CEQA will determine whether the agency's act or decision was supported by substantial evidence, taken in light of the whole record.⁷⁵ Other inquiries will extend only to whether the agency committed a prejudicial abuse of discretion.⁷⁶ Several remedies are available to a court finding a public agency's decision did not comply with CEQA.⁷⁷

⁷³ CEQA, § 21167. The statute lays out limited timeframes for different types of challenges.

⁷⁴ CEQA, § 21167.

⁷⁵ CEQA, § 21168.5.

⁷⁶ CEQA, § 21168.5.

⁷⁷ CEQA, § 21168.9; Guidelines, § 15234.

Remedies⁷⁸

Void determination, finding, or decision in whole or in part if a court finds project activity or activities will prejudice consideration of a particular mitigation measure or alternatives.

Suspend any/all that could result in an adverse change/alteration to the physical environment (until public agency brings determination/finding/decision into compliance).

Mandate specific action to bring determination/finding/decision into compliance.

Nexus with Local Land Use Planning and SB 18

CEQA applies to the preparation of a general or specific plan by a local government, because planning may have indirect impacts on the environment. Since CEQA applies, the Tribal consultation requirements of AB 52 are triggered. However, the California Code of Regulations, § 15166(a), states that EIR preparation requirements may be satisfied as part of a General Plan by using the general plan or element document, if (1) The general plan addresses all the points required to be in an EIR by Article 9 of these Guidelines, and (2) The document contains a special section or a cover sheet identifying where the general plan document addresses each of the points required.

Whether or not a separate EIR or the elements of an EIR within a general plan have been prepared, the EIR shall be forwarded to the State Clearinghouse for review. It is not clear as to whether when the EIR requirements are satisfied by the general plan, AB 52 is triggered. Regional *Transportation* Plans (RTPs) are subject to CEQA. Title 23 CFR part 450.316(c) requires MPOs to involve the federally recognized Native American Tribal Government in the development of the RTP and FTIP.

Treatment of Tribal Matters in CEQA – Outside of AB 52

Treatment of Native American Resources in California

CEQA

CEQA, § 21083.2. Archaeological resources

In determining payment [project applicant to pay ½ estimated cost of mitigation as guarantee to lead agency], the lead agency shall give due consideration to the in-kind value of project design or expenditures that are

⁷⁸ *Id.*

intended to permit any or all archaeological resources or California Native American culturally significant sites to be preserved in place or left in an undisturbed state.

CEQA, § 21167.6.2. Lead Agency Prepares and Certifies a Record of the Proceedings

When a project applicant requests (within 30 days after a lead agency makes a determination under 21080.1 (whether an EIR, ND, or MND required for any project), 21094.5 (determination re: application to CEQA to an infill project), or chapter 4.2 starting with 21155 (transit priority project, e.g., a cumulative effect addressed)), lead agency to prepare and certify a record of the proceedings, including making available to the public all documents submitted to/cited by/relied on by the lead agency in preparing the draft environmental document.

But does NOT require the disclosure or posting information about the location of any sacred lands.

Guidelines, § 15120(d). Contents of EIRs

Prohibits any publicly available document prepared under CEQA to include information on sacred lands.

Guidelines, § 15376. Person

“Person” includes any person, firm, association, organization, partnership, business, trust, corporation, limited liability company, company, district, city, county, city and county, town, the state, and any of the agencies and political subdivisions of such entities, and to the extent permitted by federal law, the United States, or any of its agencies or political subdivisions. **Public Records Act (PRA)**

Exempts from public disclosure certain documents pertaining to Native American cultural places.

Other state protections

Native American Historic Resource Protection Act

Public Resources Code § 5097.9