THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) AND HISTORICAL (ARCHAEOLOGICAL) RESOURCES

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WHAT PROJECTS REQUIRE CEQA REVIEW?

All discretionary projects require CEQA review. A "discretionary" project is one where the permitting agency has the discretion to approve, disapprove, or require changes to a project before granting a permit (CEQA Sec. 21080).

HOW DOES CEQA ADDRESS HISTORICAL RESOURCES

What is a Historical Resource[1]

Historical Resources are one of the resources that require a "mandatory finding of significance" under CEQA law (Sec. 15065a). But CEQA does not apply to all resources that a layperson might consider to be historic. CEQA only applies to "historical resources" as defined in CEQA and cross-referenced in the Public Resources Code. There are 4 categories of "historical resources" that must be considered during CEQA project review (CEQA sec. 21084.1):

1. A resource listed in or determined eligible for listing in the California Register of Historic Resources (such resources "must in all cases be granted status as historical resource" CEQA sec. 15064.5)[2],

2. A resource included in a local register is presumed to be historically significant,

3. A resource deemed significant based on Public Resources Code Sec. 5024.1

4. A resource that may not qualify under the previous three categories, but that a local agency chooses to consider "historical".

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[1] In this review, the terms "Historical Resource", "Cultural Resource", and "Archaeological Resource" are used interchangeably.

[2] In the absence of formal listing or determination of eligibility, a lead agency shall consider a resource to be "historically significant" if it meets any of the criteria for listing in the State Register (see page 3) Remy et. al. 1999:182).

What is Required of the Lead Agency[3]

CEQA states that a lead agency must make two determinations regarding historical or archaeological resources:

1. "Whether a project will impact a resource that falls within the definition of "historical resource", and

2. "Whether any such impact will cause a substantial adverse change to the significance of the resource[4]." (Remy et. al. 1999:181) (CEQA Sec. 21084.1)

In order for the Item #1 determination to be completed, it is necessary to find out if there are any "historical resources"[5] at a proposed project location. This information cannot be obtained by simply reviewing the existing records of historical resources housed at a state or local agency[6]. An archaeological field inspection must be conducted on all discretionary projects in order to discover if any historical resources are present.[7] Such inspections are often called "**Phase I archaeological inspections**".

Why is a "Phase I" inspection required on <u>all</u> discretionary projects? It was required as a result of the passage of Assembly Bill 952 in 1982 (Calif. Statutes Chap. 1623). This law also prompted the addition of Sec. 21083.2 to CEQA guidelines indicating that only impacts to "unique" archaeological resources need be addressed during the environmental review and project planning process. Therefore, before the decision is made to issue a Negative Declaration, Categorical Exemption, or require an EIR, archaeological and historical resources on the property must have already been identified and evaluated for significance.

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[3] City or County planning department, public works department, special district, public utility, etc.

[4] In CEQA "adverse change to the significance of an historical resource means physical demolition, destruction, relocation, or alteration of the resource or its surroundings such that its significance is materially impaired." (sec. 15064.5 b)

[5] Archaeological resources are considered a subset of "historical resources" under CEQA Sec. 15064.5

[6] It is estimated that less than 5% of California has been inspected to record historical resources.

[7] The 1982 passage of Assembly Bill 952 (Calif. Statutes Chap. 1623) required archaeological inspections on <u>all</u> discretionary projects. However, some lead agencies in "development oriented" communities hedge the law by only requiring inspections on projects in moderate to highly sensitive areas. However, such hedging exposes the lead agency to legal action should an unidentified resource be damaged through the issuance of a permit without the required archaeological inspection.

The land use planner can't make the determination to require an EIR, issue a Negative Declaration, or issue a Categorical Exemption unless they have identified and evaluated the significance of any archaeological resources within the project area.

This addition to CEQA occurred in the 1980's as the result of a compromise between the development lobby and the environmental lobby. Prior to that time, a Phase I archaeological inspection was often an afterthought, tacked on as a stipulation when the permit was issued. This caused nothing but problems as historic sites were being discovered after the permits had already been issued. By then it was impossible to redesign projects around sites, or mitigate damage to sites prior to construction. The 1980's change required that Phase I inspections be conducted on <u>all</u> projects "up-front" in the planning process, so projects could be designed to avoid or mitigate impacts to resources before permits were issued. Those design changes could then be added as permit stipulations allowing for the issuance of a Mitigated Negative Declaration for the project.

What is a "Unique" or "Significant" Historical Resource?

CEQA relies on the California Register of Historic Resources to determine what is a "Unique" or "Significant" historical resource (CEQA Sec. 15064.5 a).

According to the Register, a resource is determined "significant" if it meets one of the following:

A. Is associated with events that have made a significant contribution to the broad patterns of California's history and cultural heritage;

B. Is associated with the lives of persons important in our past;

C. Embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of an important creative individual, or possesses high artistic value; or

D. Has yielded, or may be likely to yield, information important in history or prehistory. (Pub. Res. Code Sec. 5024.1, Title 14 CCR, Sec. 4852)

Most archaeological sites will be determined "significant" under item "D" above as long as they have maintained their integrity over the years. As long as an archaeological site can be avoided during construction, no further cultural resource work need take place following the Phase I field inspection listed above. If disturbance to an archaeological site can't be avoided during a construction project, it becomes necessary to determine whether the resource is "significant". It is possible that the surface observations made during the Phase I inspection can be used to determine if the site is intact. If this is not possible, then this determination will need to be made by an archaeologist doing a small scientific excavation and analysis of a sample from the proposed

area of impact. These test excavations are often called "**Phase II subsurface tests**".

A Phase II test is used to determine if the site is intact (undisturbed), what the contents are, its size and depth. All of these pieces of information are then used to determine its "significance" based on the California Register criteria listed above. If necessary, information from the Phase II test can also be used to properly design a data recovery mitigation plan as outlined below.

When a "Significant" Archaeological Resource is Involved

For archaeological sites, the CEQA laws are designed to preserve the information contained in the sites. This can be done by leaving the site alone (preserving the cultural soils intact), or by conducting archaeological excavation and analysis of the site area before it is disturbed by construction.

When a significant resource is involved, CEQA requires that the permitting agency first consider project alternatives, which will allow the "resources to be preserved in place and left in an undisturbed state" (CEQA sec. 21083.2 [b]). The following alternatives are listed in CEQA to accomplish this goal:

1. The project shall be designed to "avoid archaeological sites."(CEQA sec. 21083.2 (b1)

2. The project shall protect the resource by "deeding archaeological sites into a permanent conservation easement."(Sec. 21083.2 (b2)

3. The project shall protect the resource by "Capping or covering the archaeological sites with a layer of soil before building on the sites." (Sec. 21083.2 (b3) This should be followed by the filing of a deed restriction preventing any future owners from excavating beneath the fill soil.

4. The project shall protect the resource by "Planning parks, greenspace, or other open space to incorporate archaeological sites."(Sec. 21083.2 (b4)

CEQA goes on to say that, <u>as a last resort</u>, archaeological sites that cannot be preserved in place shall be mitigated through the excavation and analysis of the "scientifically consequential information from or about the resource" (CEQA sec. 15126.4c). The archaeological community is able to recover the scientifically consequential information by retrieving and studying a "Statistically Valid Sample" of the proposed area of impact.

The size of this sample is directly related to the content of the archaeological site. A site that contains materials from only a single cultural activity (such as stone tool making) may be adequately mitigated by the hand excavation and analysis of a sample as small as 1% of the proposed area of impact. A site which contains materials representing several activities such as stone tool

making, ceremonial activity, food processing, house construction, etc. may require a 10% or larger sample to adequately characterize all the various activities.

Mitigation of impacts to an archaeological site through the scientific excavation of a portion of the impact area is often called a "**Phase III data recovery program**."

Archaeological Monitoring of Construction Excavation

It should be noted that CEQA makes no mention of archaeological monitoring of construction excavation, yet most of us are aware of the term and most archaeologists have conducted "archaeological monitoring".

Archaeological monitoring of construction excavation does not constitute adequate mitigation of impacts to archaeological resources as specified in CEQA (sec. 15126.4b). Archaeological monitoring of construction excavation as a way of preserving historic site information makes as much sense as requiring an Audubon Society member to accompany duck hunters as a way of preserving the duck population. It cannot be used in the place of scientific data recovery, as it is impossible to retrieve volume controlled soil samples needed for statistical analysis[8] or to carefully hand excavate and retrieve fragile artifacts and features.

Although archaeological monitoring of construction is not suitable for retrieving the information required by CEQA for impact mitigation, it is appropriate and used in two basic situations:

1. When there is no observable cultural material within the project area, but background information suggests the presence of a site near-by. In this case the "monitoring" of initial construction grading or trenching is done as a precaution, just in case cultural soils from the nearby site underlay a portion of the project area.

   or

2. On a project where a known site exists, monitoring is usually recommended <u>after the data recovery or site capping mitigation program has been completed</u>. Under these circumstances, it is a way of recording large cultural features (fire hearths, house floors, privy pits, historical footings, etc.) that weren't encountered during the small hand excavation sample.

   In cases where site capping is the form of mitigation taking place, monitoring is usually recommended as a way of making sure that

[8] A major component of all archaeological research.

construction trenching and grading does not extend below the depth of the fill soil.

Developers often cringe when they learn that archaeological monitoring will take place during construction. They have usually set a budget and factored in the proposed costs of all phases of a project. Suddenly they are faced with the possibility that the discovery of a significant feature or buried soil layer could bring one of the most costly parts of a project to a halt for an undetermined period of time. This does occasionally happen, but only when the proper CEQA required steps have not been followed. If the required data recovery or site avoidance has taken place prior to construction, then the monitoring will only need to temporarily stop work in isolated areas for the recording and recovery of specific features and important artifacts.

Archaeological Monitoring V.S. Native American Monitoring

The term archaeological monitoring is also frequently confused with Native American monitoring. Archaeological monitoring is the careful observation of soils during construction excavation. These observations are looking for changes in soil color and consistency, artifacts, and other indications of the presence of cultural features for the purpose of discovering, recording, and recovering cultural information.

Native American monitoring occurs when a representative of a Native American community observes an archaeologist conducting archaeological work. Native American monitoring is not archaeology, or archaeological mitigation as required by CEQA[9]. Native American monitoring is done to make sure that cultural materials are handled properly and with respect by the archaeologist doing the data recovery. This can occur during the Phase II archaeological test excavation, Phase III data recovery mitigation program, or, following mitigation, during the construction monitoring phase. Frequently, the archaeological firm will hire a Native American representative as part of the field crew. As part of the crew, the cultural monitor is directly involved in the data recovery process and sees the cultural materials first-hand as they are discovered. This person not only provides for the monitoring of the archaeologist's work, but also benefits by being directly involved with discovering and learning about his or her cultural past.

CEQA does not require Native American monitoring[10], however it is often made part of a permit stipulation by the lead agency out of respect for the concerns of the local community. If a historic Chinese site or Italian site were being

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[9] Unless the Native American is also a Registered Professional Archaeologist.

[10] CEQA does however indicate that, in areas where human remains are likely, the lead agency shall work with the appropriate Native Americans as identified by the Native American Heritage Commission as provided in the Public Resources Code 5097.98 (sec. 15064.5 d).

impacted, it would be equally proper to request that Chinese American or Italian American monitors be provided the opportunity to monitor the work of the archaeologist.

Native American Monitoring with no archaeologist: The only time that a Native American (or other cultural) monitor might be involved in watching a project without a qualified archaeologist is if a sacred or religious site (such as a tree or rock outcrop) existed in the absence of any archaeological or historic deposit. This occurrence would be rare since wherever people congregate (whether for religious or other purposes) they seem to always leave items on the ground (i.e. archaeological deposits).

Curation

Archaeological specimens and field notes are part of the documentary record of an archaeological site. They must be curated for future use in research, interpretation, preservation, and resource management activities. Although CEQA is silent on the curation of cultural materials recovered from archaeological sites, State and Federal regulations as well as the "Codes of Conduct" and "Standards of Research Performance" of most archaeological societies and professional organizations require that their members provide for the proper curation of materials recovered from sites.

Curation should be provided for in any archaeological test or mitigation plan. Curation facilities should have adequate space, facilities, and professional personnel. They should maintain collections in a professional archival method to insure against loss and deterioration. The curation facility should be secure, but make collections available to qualified researchers, members of the cultural community they represent, and for use in interpretive displays and programs (Advisory Council on Historic Preservation 1980).

For the Lake County area, both Sonoma State University and the Elem Indian Colony maintain curation facilities for archaeological collections.

Accidental Discovery of Historical Resources

CEQA indicates that:

> "a lead agency should make provisions for historical or unique archaeological resources accidentally discovered during construction. These provisions should include an immediate evaluation of the find by a qualified archaeologist. If the find is determined to be an historic or unique archaeological resource, contingency funding and a time allotment sufficient to allow for implementing avoidance measures or appropriate mitigation should be available. Work could continue on other parts of the building site while historical or unique archaeological resource mitigation takes place."(CEQA sec. 21082 and CEQA guidelines

sec. 15064.5 f)

Human Remains Accidentally Discovered

There is no way of predicting when and where human remains will be encountered. When dealing with 20,000 years of cultural change in California, there were periods when people buried their dead under the house floor, periods when the dead were placed in dedicated cemeteries, and periods when the dead were buried outside the village area. Human remains can literally turn up anywhere within a prehistoric site.

CEQA Guidelines (Sec. 15064.5 e) state that:

"If human remains are discovered in any location other than a dedicated cemetery, the following steps should be taken:

There shall be no further excavation or disturbance of the site or any nearby area reasonably suspected to overlie adjacent human remains until:

A) The coroner of the county has determined that no investigation of the cause of death is required, and

B) If the coroner determines the remains to be Native American:

1. The coroner shall contact the Native American Heritage Commission (NAHC) within 24 hours.

2. The NAHC shall identify the person or persons it believes to be the most likely descended from the deceased Native American.

3. The most likely descendent may make recommendations to the landowner or person responsible for the excavation work, for means of treating or disposing of, with appropriate dignity, the human remains and any associated grave goods as provided in Public Resources Code Sec. 5097.98.

Exemptions

CEQA lists Categorical Exemptions that include classes of projects that generally are considered not to have potential impacts on the environment. Categorical exemptions are identified by the State Resources Agency and are defined in the CEQA Guidelines (14 CCR § 15300-15331).

Categorical exemptions are not allowed to be used for projects that may cause a substantial adverse change in the significance of an historical resource (14 CCR § 15300.2(f)). Therefore, lead agencies must first determine if the project has the potential to impact historical resources and if those impacts could be adverse prior to determining if a categorical exemption may be utilized for any given project.

ON-LINE RESOURCES

National Advisory Council on Historic Preservation http://www.achp.gov

State Office of Historic Preservation http://ohp.parks.ca.gov

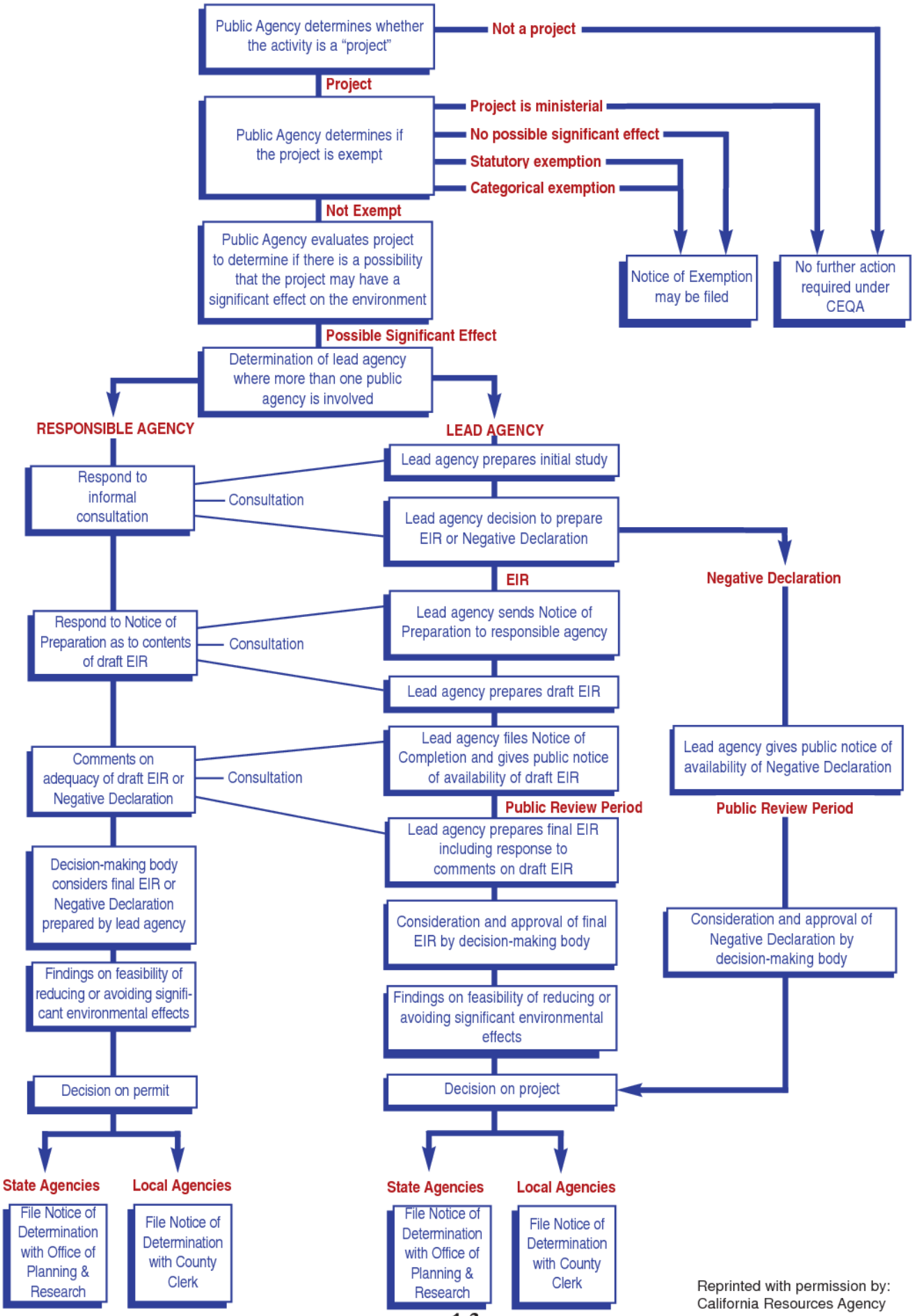
Register of Professional Archaeologists http://www.rpanet.org

Society for American Archaeology http://www.saa.org

Society for California Archaeology http://www.scahome.org

Lake County Archaeology http://www.wolfcreekarcheology.com/CEQALaw.htm

CEQA PROCESS FLOW CHART



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