

Exhibit 5.12: Post-Review Discovery Without Plan and Unanticipated Effects

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Introduction

It is possible to conduct a reasonable and good faith effort to identify historic properties during the planning phase of a project and still encounter previously unrecorded archaeological resources during the project's implementation.

The regulatory context for post review discoveries and unanticipated effects is found in Stipulation XV.B of the Section 106 Programmatic Agreement (106 PA¹) and the PRC 5024 Memorandum of Understanding (5024 MOU²), or 36 CFR 800.13(b) for federal undertakings when the 106 PA does not apply. If there is a Memorandum of Agreement (MOA) or other agreement document in place for the project, follow protocols stipulated in that project's agreement document. For all other projects and situations, the protocols and sequence followed regarding post-review discoveries and unanticipated effects must meet the requirements as laid out in the 106 PA and/or the 5024 MOU.

If a plan for subsequent discovery is not in place and an undertaking affects a previously unidentified property or affects a known historic property in an unanticipated manner, Caltrans must promptly stop construction activity in the vicinity of the property and implement all reasonable measures to avoid, minimize, or mitigate further harm to the property. If buried cultural materials are encountered during construction, it is Caltrans policy that work stop in that area until a qualified archaeologist can evaluate the nature and significance of the resources.

The 106 PA and 5024 MOU distinguish steps for the notification process based on whether a previously unidentified property is found (Stipulation XV.B.2) or a known historic property is affected in an unanticipated manner (Stipulation XV.B.3). Pursuant to 106 PA/5024 MOU

¹ Programmatic Agreement Among the Federal Highway Administration, the Advisory Council on Historic Preservation, the California State Historic Preservation Officer, the United States Army Corps of Engineers' Sacramento District, San Francisco District, and Los Angeles District, and the California Department of Transportation Regarding Compliance with Section 106 of the National Historic Preservation Act as it Pertains to the Administration of the Federal-Aid Highway Program in California (2024).

² Memorandum of Understanding between the California Department of Transportation and the California State Historic Preservation Officer Regarding Compliance with Public Resources Code Section 5024 and Governor's Executive Order W-26-92 (2024).

Stipulation XV.B.2, Caltrans may consider any potentially affected previously unidentified resource eligible for the NRHP.

If human remains (or remains reasonably suspected of being human) are encountered on non-federal land, Health and Safety Code 7050.5 *requires that construction or excavation be stopped in the vicinity of the discovery and the county coroner be notified*. The coroner will determine if the remains are Native American. If so, in compliance with Public Resources Code 5097, the coroner notifies the Native American Heritage Commission (NAHC). The NAHC then notifies the person designated by them to be the Most Likely Descendent (MLD). The Caltrans District Native American Coordinator (DNAC) also directly notifies the NAHC and contacts the designated MLD in order to ensure that lines of communication are quickly established.

Initial Response and Notifications

The following sequences are intended as guidance. They do not replace good judgment in the field, which may be necessary to appropriately respond to a particular situation.

1. Construction personnel, or the person making the discovery, *immediately stops work in the vicinity of the resource* and coordinates with the Resident Engineer to ensure the resource is protected from further harm. If monitors such as tribal or archaeological monitors are involved, collaborate with them.
2. The Project Professionally Qualified Staff (PQS) or a designated qualified specialist immediately conducts a field inspection to determine the nature of the resource.
3. Upon determination that the resource is a previously unidentified potential historic property or a historic property that has been affected in an unanticipated way (including an ESA breach), the PQS immediately notifies the following parties, as follows:
 - Caltrans PQS and/or District Environmental Branch Chief (DEBC)
 - DNAC, as appropriate

County coroner when human remains (or remains reasonably suspected of being human) are encountered

4. Within 48 hours of the initial discovery, the PQS assesses the resource and, if determined to be *potentially* eligible, the DEBC notifies the following parties, as appropriate:
 - Caltrans Cultural Studies Office (CSO)

- State Historic Preservation Officer (SHPO)
- Native American consulting parties or other groups that may attach religious or cultural significance to the affected property
- Federal agencies, if federal lands are involved and the federal agency has delegated Caltrans lead pursuant to 36 CFR 800.2(a)(2)
- The United States Army Corps of Engineers District if within a DA Permit area
- Secretary of the Interior and the Advisory Council on Historic Preservation if an affected property is a National Historic Landmark
- Other consulting parties

The DEBC may delegate notification responsibility to the Caltrans Project PQS archaeologist, District Heritage Resources Coordinator (HRC), or DNAC as appropriate. The notification must include, to the extent such information is available:

- Which Stipulation the notification is occurring under:
 - Stipulation XV.B.2: previously unidentified post-review discovery
 - Stipulation XV.B.3: discovery of an unanticipated effect or ESA Breach
- A description of the nature and extent of the property or properties
- A preliminary assessment of potential National Register of Historic Places (National Register) eligibility of any resources (for Caltrans-owned resources also provide assessment of California Historical Landmark eligibility) (Stipulation XV.B.2 only)
 - Consideration of eligibility under Stipulation XV.B.2, if applicable
- The type and extent of any damage to the property
- The proposed actions necessary to complete evaluation and assessment of effects
- Any prudent and feasible treatment measures that would take any effects into account
- A request for comments within 72 hours

At its discretion, Caltrans may provide the notification through correspondence, hard copy, electronic media, telephone, or meetings, taking into account the capabilities of the consulting parties. Every effort should be made to ensure that the notification is received. For example, follow up an email with phone calls or additional emails. The notification process must be documented for the administrative record and inclusion in the 106 PA and 5024 MOU annual reporting.

The notified parties have 72 hours to respond to the notification. Response may include recommendations for further action and treatment or requests for more information, such as maps, photos, more detailed descriptions of the resources, and requests for field visits or inspections by additional parties.

Subsequent Actions and Reporting

To minimize construction delays and facilitate appropriate consultation regarding treatment of the affected resource(s), it is critical to promptly respond to any requests for additional information. If not already provided as part of the notification, initial documentation should be completed, including maps, photos, GPS data, and field drawings, as appropriate, and provided to the consulting parties. Subsequent actions, such as protective measures and data recovery efforts, must take into account any comments provided by the consulting parties.

It's important to maintain communication with consulting parties and follow through on commitments. Check in with regular progress updates and provide additional documentation as work is completed.

Required Reporting

- Complete a Department of Parks and Recreation (DPR form 523) form(s) and submit them to the appropriate regional [Information Center](#) to obtain a Primary Number. The Consulting parties may want to see the DPR 523 form(s) in order to give meaningful comments and input towards resolution of effects.
- Complete any agreed-upon reports that are part of the consultation to resolve adverse effects, if any occurred.
- Provide a Report of Construction Impacts to the Headquarters Division of Construction and to the CSO Chief, as outlined in Exhibit 5.13.
- Coordinate with the CSO Section 106 Branch Chief and/or the PRC 5024 Branch Chief to include information on the post review discovery and actions taken in the 106 PA and 5024 MOU annual reports.

CEQA

When there is a post-review discovery or unanticipated effect on a state-only project, follow the guidance outlined above. SHPO does not need to be notified unless the discovery or unanticipated effect involves Caltrans-owned resources, in which case Caltrans would comply with the 5024 MOU. Use the Historical Resources Compliance Report (HRCR) to document the steps taken. See Chapter 2 Section 2.7.12.1 Late Discoveries for more information.

Peer Review and Approval

As with all actions carried out under the 106 PA, the 5024 MOU and other state-only projects, including responses and reporting of actions taken in regard to post review

discoveries, all work is carried out by or under the direct supervision of a person or persons who meet the Secretary of the Interior’s Professional Qualifications Standards as set forth in Appendix 1 of both the 106 PA and 5024 MOU.

Caltrans PQS certified at the Principal Investigator level in Prehistoric Archaeology and/or Historical Archaeology, or Principal Architectural Historian, as appropriate, peer review the draft Post-Review Discovery documentation following the guidelines in Exhibit 2.16: Guidelines for Peer Review of Cultural Resources Reports. Peer reviewers’ names should be kept on record and comments retained in the project files.

Only Caltrans PQS at the Principal Investigator or Principal Architectural Historian levels (as appropriate) may review the final Discovery Plan for approval, which the DEBC approves. The Caltrans PQS, or consultant, who prepares the plan signs, dates and includes their discipline, PQS level (as applicable) and District/Headquarters or affiliation. The Caltrans PQS reviewing the plan for approval likewise signs, dates, and includes their PQS discipline, level and District. Finally, the DEBC approves the Discovery Plan by signing and dating the document.

See Chapter 2 Section 2.12 and Exhibit 2.17 Table C for additional guidance on peer reviews and reviews for approvals.