

Exhibit 2.9: Finding of Adverse Effect Format and Content Guide

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Exhibit 2.9: Finding of Effect Format and Content Guide

Introduction

In accordance with Section 106 Programmatic Agreement (Section 106 PA¹) [Stipulation XVIII](#), Finding of Effect reports must be consistent with the documentation standards set forth in 36 CFR 800.11.

Finding of Adverse Effect

When Caltrans proposes that adverse effects cannot be avoided, Caltrans prepares the Finding of Adverse Effect (FAE) documentation and sends it to CSO for review. CSO will then consult with SHPO. The Caltrans district sends notification of the findings to the consulting parties and interested members of the public, as appropriate. The Caltrans district also assists CSO in resolving the adverse effects. (See Section 106 PA [Stipulation X.1](#) and [XI](#).)

FINDING OF ADVERSE EFFECT FORMAT

- Title page
- Introduction
- Description of Undertaking
- Public Participation
- Description of Historic Properties
- Application of the Criteria of Adverse Effect
- Alternatives Considered But Rejected
- Mitigation Measures
- Conclusions
- Attachments
 - Maps
 - Correspondence
 - Other Exhibits

Don't forget the transmittal letter for FAEs to SHPO or THPO.

Adverse Effects to Archaeological Properties Listed/Eligible under Criterion D *Only*

When Caltrans proposes that the adverse effects are to archaeological properties listed or determined eligible for inclusion in the National Register *exclusively* under Criterion D, the Caltrans district simultaneously notifies and sends the supporting documentation to CSO, SHPO and other consulting parties. (See [Section 106 PA Stipulations X.C.2](#) and [XI](#).)

¹ *First Amended Programmatic Agreement Among the Federal Highway Administration, the Advisory Council on Historic Preservation, the California State Historic Preservation Officer, 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*, effective January 1, 2014.

Adverse Effect Documentation

An Adverse Effect finding should be documented according to the following outline.

Title Page

The title page identifies the project by:

- Name of project in a brief descriptive title, such as “Finding of Adverse Effect for Route Realignment on Route 53 between Fern Creek and Matador Road”
- County, route and post-miles
- E-FIS project number (or Federal-Aid project number for Local Assistance projects)

The page also includes

- Name, title, location and signature of the Caltrans District Branch Chief (DEBC) for whom the report was prepared. The DEBC’s signature on the title page indicates approval and acceptance of the document
- Name, title and signature of the Caltrans Professionally Qualified Staff (PQS) or consultant PQS who prepared the document, along with the address for the PQS
- Name, title and signature of the Caltrans Professionally Qualified Staff (PQS) who reviews the document for approval, along with the address for the PQS
- Month and year FAE was prepared (appears at bottom of page) If a consultant PQS prepares the FAE, the project contract number should appear below the E-FIS project number (or Federal-Aid project number for Local Assistance projects)

Introduction

- Summarize the project Section 106 compliance activities to date. Include the date the HPSR was processed, and briefly describe the historic properties and their National Register status.
- Specify the properties for which there will be an Adverse Effect as a result of the project, and any for which a No Adverse Effect or No Historic Properties Affected finding is applicable.
- State that “Caltrans has determined that the undertaking as a whole will have an Adverse Effect on historic properties pursuant to [Section 106 PA Stipulation X.C](#) and is consulting SHPO regarding this finding (or seeking SHPO concurrent with this finding), pursuant to [Section 106 PA Stipulation XI](#), [36 CFR 800.6\(a\)](#), and [800.6\(b\)\(1\)](#).

Description of the Undertaking

- Identify the project by district, county, route, and postmile limits, and indicate distance to the nearest town or other landmark.
- Identify the APE, and refer to attached maps, photographs, and drawings, as necessary.
- Describe the project concisely but with sufficient detail to ensure that a reviewer unfamiliar with the project or project area has a clear understanding of the extent of potential effects.
- Discuss all pertinent project-related activities and alternatives.

Public Participation

- Summarize efforts to involve the public in the Section 106 process as well as any comments received to date.
- Identify any additional consulting parties, such as other federal and state agencies, Native Americans, or local governments. Summarize consultation efforts and results to date.
- Describe the ongoing NEPA environmental process, including environmental compliance events such as public hearings.
- Emphasize cultural resources issues discussed at public meetings, and if concerns have been raised, discuss steps taken to ensure public concerns are incorporated into the Section 106 process.

Description of Historic Properties

Provide a very brief description of the steps taken to identify historic properties.

Discuss any comments received from the public or consulting parties that aided in the identification process.

For each historic property, provide:

- Date the property was listed on the National Register
- Date the Keeper of the National Register determined the property eligible, if applicable, and state that it was a Keeper determination of eligibility
- Date that SHPO concurred with Caltrans' determination regarding National Register eligibility; or
- Statement that an eligibility consensus determination is pending, as applicable
- Concise description of each historic property with emphasis on the characteristics that qualify it for the National Register. See [Exhibit 7.1](#) for more information on essential physical features.

For each historic property, specify:

- National Register criteria for which each property is eligible
- Level and period of significance
- National Register boundaries
- Contributing and non-contributing elements

The summary statements of significance and property descriptions in the HPSR may be used (see [Exhibit 2.15](#) for textual information to include in the summary statements).

Application of the Criteria of Adverse Effect

- Discuss the applicable Criteria of Adverse Effect, and explain in detail why the effect is adverse.
- Describe the physical effects of the undertaking on each property, including any indirect effects such as increased noise or introduction of visual elements out of character with the property.
- For every alternative, describe the direct and/or indirect effect the alternative will have on each historic property. See [Exhibit 2.15](#) for additional guidance.

Alternatives Considered but Rejected

Describe alternatives that were considered but rejected, and the rationale for the rejection, particularly any “avoidance” alternatives (i.e., an alternative that would not adversely affect historic properties).

- Description and graphics may be derived from the “Alternatives” discussion in the environmental document.
- Discussion should focus on the effects of the various alternatives upon identified historic properties, however.

Mitigation Measures

This section is included in a finding of Adverse Effect document *only* when it is accompanied by a draft Memorandum of Agreement (MOA). If a draft MOA is not attached, this information is discussed in a consultation document that accompanies the MOA and is forwarded by CSO to SHPO under a separate cover.

Discuss any measures proposed to avoid, minimize, or mitigate the adverse effects to each historic property (e.g., implementation of a Data Recovery Plan or historic property marketing plan).

Conclusions

- Briefly summarize the contents of the document that resulted in the finding of Adverse Effect.
- State that Caltrans finds that there are historic properties affected pursuant to [Section 106 PA Stipulation IX.B.](#)
- State that Caltrans has determined that the undertaking as a whole will have an Adverse Effect on the following historic properties and is seeking SHPO concurrence with these findings pursuant to Section 106 PA [Stipulation XI.C](#) and 36 CFR 800.5. (*List historic properties.*) Caltrans will continue consultation regarding resolution of adverse effects pursuant to Section 106 PA Stipulation XI, and 36 CFR 800.6 through preparation of an MOA in consultation with consulting parties.
- If applicable, refer to the attached draft MOA, which stipulates the terms under which the undertaking will be implemented in order to take into account its effects on historic properties.
- If the draft MOA does not accompany the FAE document, state that this document serves only to obtain SHPO concurrence that the undertaking will have an Adverse Effect on historic properties and that mitigation measures will be discussed in a separate consultation document along with a draft MOA.

If warranted, include a table that summarizes effects and mitigation measures at each property for each alternative (see Table 1 below).

Table 1. Example Tables for Finding of Adverse Effect Document		
Property	Effect Finding (Alt. 1)	Mitigation
CA-ABC-1234	Not Adverse - indirect potential for destruction	ESA – see ESA Action Plan
Jones House	None – avoidance	N/A
City Park	Not Adverse – ROW take of non-contributing element	N/A
Property	Effect Finding (Alt. 2)	Mitigation
CA-ABC-1234	Adverse – destruction	Data Recovery Plan
CA-ABC-1235	Not Adverse – indirect potential for destruction	ESA – see ESA Action Plan
Jones House	None – avoidance	N/A
Jones Creek Bridge	Adverse – destruction	HAER
City Park	Not Adverse – ROW take of non-contributing element	N/A

Attachments

- Project Vicinity Map
- Project Location Map
- Project APE Map (detail location of the historic property, including the National Register boundaries, in relation to the project and depict project effects on the property)
- Correspondence with the SHPO, Native Americans, and any other consulting parties or the public (e.g., local governments)
- Exhibits pertaining to the historic properties discussed (e.g., photographs, construction drawings, photo simulations)
- ESA Action Plan, if applicable (for archaeological properties)
- Data Recovery Plan (for archaeological properties)
- Restrictions or conditions to ensure preservation, such as a local agency resolution or protective covenant (for buildings and structures)

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State-owned Historical Resources

For State-owned historical resources FAE reports must be consistent with the documentation standards set for in the PRC 5024 Memorandum of Understanding (5014 MOU²) [Stipulation XVII](#). The format and content of the FAE report follows what is described above in this exhibit.

² Memorandum of Understanding Between the California Department of Transportation and the California Historic Preservation Officer Regarding Compliance with Public Resources Code Section 5024 and Governor's Executive Order W-26-92, effective January 1, 2015.

The key differences between the Section 106 and the PRC 5024 processes are:

1. The term “Resolution of Adverse Effects” is not used. There is only “mitigation” of adverse effects under PRC 5024.
2. The FAE report and request for concurrence may be combined in the same Historical Resources Compliance Report (HRCR) as the identification and evaluation findings. For more information see [Chapter 2 Section 2.8.7.4](#) and [5024 MOU Stipulation X.D.](#)
3. For NRHP/California Historical Landmark eligible State-owned archaeological resources, *not* on the Master List of Historical Resources (Master List; see [5024 MOU Stipulation IV.E](#) for a definition of what is on and not on the Master List), a Finding of Adverse Effect with Standard Mitigation Measures (FNAE-SMM) may be used and is sent to CSO for a 30-day review. For more information see [Chapter 2 Section 2.8.7.1](#) [5024 MOU Stipulation X.C.1](#), and Exhibit 2.14.
4. FAEs for State-owned Historical Resources *not* on the Master List of Historical Resources (Master List; see [5024 MOU Stipulation IV.E](#) for a definition) are sent only to CSO for a 30-day review and are not forwarded to SHPO. For more information see [Chapter 2 Section 2.8.7.2](#), [5024 MOU Stipulation X.C.2.a](#), and Exhibit 2.14.
5. All FAEs for State-owned Historical Resources *on* the Master List are sent first to CSO for review then forwarded to SHPO with a request for concurrence. For more information see [Chapter 2 Section 2.8.7.2](#), [5024 MOU Stipulation X.C.2.b](#), and Exhibit 2.14.
6. When there is public interest or controversy, all FAEs—whether or not the State-owned historical resource is on the Master List—are first sent to CSO for review then forwarded to SHPO with a request for concurrence. For more information see Chapter 2 [Section 2.8.7.3](#) and [5024 MOU Stipulation X.E.](#)
7. If Caltrans and SHPO cannot agree on prudent and feasible mitigation measures, SHPO forwards the disagreement to the Office of Planning and Research (OPR) for arbitration and OPR’s decision is final and binding. For more information see [5024 MOU Stipulation X.F.](#)

Caltrans Peer Review and Approval

Under the Section 106 PA/5024 MOU the Caltrans PQS or a qualified consultant prepares the FAE. Only Caltrans PQS (certified at the Principal Investigator Prehistoric Archaeology or Historical Archaeology, or Principal Architectural Historian levels) may peer review FAEs and review FAEs for approval by the DEBC. The Caltrans PQS or consultant, who prepares the FAE signs, dates and includes his/her discipline, PQS level (as applicable) and District/Headquarters or affiliation. The Caltrans PQS reviewing the FAE for approval likewise signs, dates, and includes his/her PQS discipline, level and District. The DEBC signs and dates the FAE to signify approval.