

**PROGRAMMATIC AGREEMENT
AMONG THE
ENVIRONMENTAL PROTECTION AGENCY, REGION 1;
THE U.S. ARMY CORPS OF ENGINEERS, NEW ENGLAND DISTRICT; AND
THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH)
PERTAINING TO CULTURAL RESOURCES COMPLIANCE
FOR THE
NEW BEDFORD HARBOR SUPERFUND PROJECT,
NEW BEDFORD, MASSACHUSETTS AND VICINITY**

WHEREAS, The U.S. Army Corps of Engineers (Corps), New England District, is providing assistance and expertise to the Environmental Protection Agency (EPA), Region 1 for implementation of the New Bedford Harbor Superfund Project (Project) in Acushnet, Fairhaven, and New Bedford, Massachusetts; and

WHEREAS, in accordance with the Department of Defense American Indian and Alaska Native Policy, Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), Corps Engineer Regulations 1105-2-100 (Native American Considerations), and the National Historic Preservation Act of 1966 (NHPA), as amended, and implementing regulations 36 CFR 800, we have formally initiated consultation with the Wampanoag Tribe of Gay Head (Aquinnah) (hereinafter called the Tribe); and

WHEREAS, the Tribe is a Federally Recognized Tribe whose ancestral lands are located within the proposed project area and Section 106 of the NHPA and 36 CFR 800 require that Federal agencies consult with Native American tribes or entities that may attach cultural or religious significance to historic properties that may be affected by an undertaking; and

WHEREAS, the Project is within the Tribe's, and its non-federally recognized sister Tribe, the Mashpee Wampanoag Tribe's historical aboriginal home territory, which encompasses southeastern Massachusetts, eastern Massachusetts and Rhode Island, Cape Cod, and the islands of Martha's Vineyard and Nantucket; and

WHEREAS, Federal policy and law requires that the Tribe be given a timely, full and meaningful opportunity to take part in preserving aspects of the cultural environment that have the greatest importance to the Tribe;

NOW THEREFORE, EPA, the Corps, and the Tribe agree to abide by the following stipulations for the preservation of cultural resources for the duration of the Project, until the cleanup is completed:

STIPULATIONS

1. The parties acknowledge that the Project has begun, commencing with a cultural resources survey and subsurface testing; and that the Tribe has been and will continue to be given the opportunity to identify historic properties within the Project that may be of religious, sacred, or spiritual significance to the Tribe. Upon identification of Tribal historic properties, EPA and the Corps, recognizing that an Indian tribe may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites, will ensure that the confidentiality of this information is addressed and maintained pursuant to 36 CFR 800.11(c) and to the fullest extent provided by law.
2. In the event that historic properties are identified, and in accordance with 36 CFR 800.5, EPA, the Corps, and the Tribe will apply the Criteria of Adverse Effect to properties within the area of potential effects. An adverse effect is found when an undertaking may alter, directly or indirectly any of the characteristics of a historic property that qualify the property for inclusion in the National Register. If an adverse effect is found, further consultation will take place between EPA, the Corps, the Tribe, the Massachusetts State Historic Preservation Officer (MA SHPO), and other consulting parties to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects.
3. The Tribe will ensure that the identification of sacred, spiritual, or other ancestral properties or sites within the project impact area is conducted in a timely fashion prior to construction so that proper resource avoidance, impact minimization, or mitigation may be conducted.
4. The Tribe will have a Cultural Resource Monitor (CRM), who will observe the archeological work in accordance with the site-specific health and safety plan. The parties agree that the reporting protocol will be flexible, and if questions arise, the CRM will ensure that the Tribal Historic Preservation Officer (THPO) and Corps Tribal Coordinator (hereafter Tribal Coordinator) are contacted.
5. In the event of any inadvertent discovery of cultural resources, the Tribal Coordinator, the THPO, EPA and the Corps New Bedford Resident Engineer will be contacted and further consultation will take place per 36 CFR 800.13. EPA, the Corps, the MA SHPO, and other consulting parties will consult with the Tribe, and together they will determine necessary actions to resolve adverse effects prior to construction affecting such sacred, spiritual, or other ancestral properties or sites within the project impact area. The CRM and the Tribal Coordinator will be notified and the Tribe will be given an opportunity to respond. The Corps shall take into account the Tribe's recommendations and carry out appropriate actions as agreed upon by the parties.

6. The location of the discovery shall be reported solely to the CRM and the appropriate Corps, EPA and MA SHPO manager(s) having immediate administrative responsibility.
7. In the event that a cultural resource is encountered that qualifies as a historic property as that is defined in section 106, a site-specific mitigation plan will be developed and commented on by all consulting parties pursuant to the Section 106 process.
8. Any cultural artifacts found would be temporarily curated by the archaeological Contractor until such time as a permanent repository is identified.
9. In the event that human skeletal remains are uncovered, all work within the surrounding area of the find shall immediately cease and the Native American Graves Protection and Repatriation Act (25 U.S.C. § 3001 *et seq.*) and Massachusetts General Laws, including but not limited to Chapter 9 sections 26A and 27C, for human burials shall apply. EPA, the Corps, and the Tribe will be contacted immediately about the discovery and the location. The Massachusetts State Police and the Regional Medical Examiner will then be notified. If said remains are determined to be more than 100 years old, the State Archaeologist, Massachusetts Commissioner on Indian Affairs, and the THPO will then be contacted upon notification.
10. Upon identification of the human remains as Native American, the Tribe shall be consulted further to determine the proper course of action and disposition of the remains, including reinterment, if desired, by the Tribe. The Tribe shall provide input in designing emergency burial relocation, if necessary, and shall serve as the liaison with the Wampanoag Confederation and Tribal Councils. The Tribe shall be given an opportunity to carry out religious ceremonies and rituals attendant upon reinterment of the remains. The Tribe shall be responsible for the timely and expeditious treatment and disposition of the remains.
11. At any time during the implementation of the measures stipulated herein should any objection to any such measure or manner of implementation be raised, all parties shall take the objection into account and consult as needed to resolve the objection. If further consultation is not productive and the objection is not resolved, the comments of the Advisory Council on Historic Preservation (Council) will be sought as stipulated in 36 CFR 800.2(b)(2). The Council, as the Federal agency established to implement and oversee the Section 106 process, may decide to become involved or may be invited to consult by any of the consulting parties as a means of resolving conflicts and completing the Section 106 process.

12. Execution and implementation of this Programmatic Agreement evidences that EPA and the Corps have satisfied their Section 106 responsibilities with the Tribe for all individual undertakings of the project. Should any party to this Agreement determine that some portion of it cannot be met, is not being met or believes a change is necessary, that party shall immediately notify the other parties to the Agreement in writing and request the parties consult to consider an amendment or addendum to this agreement which would ensure full compliance. Such amendment or addendum shall be executed in the same manner as the original Agreement.

U.S. Army Corps of Engineers, New England District

By: _____ Date: _____
Colonel Brian E. Osterndorf, District Engineer

U.S. Environmental Protection Agency, Region 1

By: _____ Date: _____
EPA Regional Administrator, Region 1

Wampanoag Tribe of Gay Head (Aquinnah), Tribal Historic Preservation Officer

By: _____ Date: _____
Matthew Vanderhoop, Tribal Historic Preservation Officer

ACCEPTED for the Advisory Council on Historic Preservation

By: _____ Date: _____
John M. Fowler, Executive Director, Advisory Council on Historic Preservation