

Appendix 5.10-G

Draft Programmatic Agreement

**PROGRAMMATIC AGREEMENT
AMONG
THE UNITED STATES ARMY CORPS OF ENGINEERS, THE
MASSACHUSETTS STATE HISTORIC PRESERVATION OFFICER, THE
ADVISORY COUNCIL ON HISTORIC PRESERVATION, THE WAMPANOAG
TRIBE OF GAY HEAD (AQUINNAH), THE MASSACHUSETTS BOARD OF
UNDERWATER ARCHAEOLOGICAL RESOURCES, AND CAPE WIND
ASSOCIATES, L.L.C.
REGARDING THE PROPOSED
CAPE WIND ENERGY PROJECT**

WHEREAS, the project proponent, Cape Wind Associates, L.L.C., (“Proponent”), has proposed to construct a wind park, consisting in part of 130 wind turbine generators, on Horseshoe Shoal in Nantucket Sound, Massachusetts (“Undertaking”); and

WHEREAS, pursuant to Section 10 of the Rivers and Harbors Act (33 USC 403), the United States Army Corps of Engineers (“USACE”) has been requested to issue a permit for construction of the Cape Wind Energy Project (“Undertaking”); and

WHEREAS, the USACE has consulted with the State Historic Preservation Officer (“SHPO”), the Advisory Council on Historic Preservation (“ACHP”), and the Wampanoag Tribe of Gay Head (Aquinnah) (“Tribe”) in accordance with Section 106 of the National Historic Preservation Act (“NHPA”) (16 USC 470f), and its implementing regulations, *Protection of Historic and Cultural Properties* (36 CFR Part 800), and USACE regulations at 33 CFR Part 325, Appendix C; and

WHEREAS, the USACE has coordinated its compliance with Section 106 and NEPA, pursuant to 36 CFR 800.8 through its preparation of an Environmental Impact Statement (“EIS”) for the Undertaking; and

WHEREAS, pursuant to Section 106 of NHPA, USACE in consultation with SHPO, identified the Undertaking’s Areas of Potential Effect (“APEs”) for Historic Properties and determined that the APEs are the areas where potential effects on Historic Properties caused by the Undertaking may occur; and

WHEREAS, the identification and evaluation of Historic Properties within the Undertaking’s APEs was conducted by the USACE in consultation with SHPO, as documented in the EIS; and

WHEREAS, generally Historic Properties can be categorized as archaeological or built [36 CFR 800.16(1)], and this Programmatic Agreement specifies the appropriate approaches for Archaeological and Built Properties in the APEs separately, due to

different issues presented by each category; and

WHEREAS, as documented in the EIS, USACE, in consultation with SHPO, identified the following Built Properties in the APEs: three National Historic Landmarks, five Historic Districts, and 12 individual Historic Properties; and

WHEREAS, as documented in the EIS, USACE, in consultation with SHPO, identified areas with the potential to contain submerged Archaeological Properties (“archaeologically sensitive areas”) in the APEs; and

WHEREAS, pursuant to Section 106 of NHPA, the USACE has determined that the Undertaking will have an effect on Built Properties listed in or eligible for listing in the National Register of Historic Places (“NRHP”) including two National Historic Landmarks, four Historic Districts, and ten individual Historic Properties; and

WHEREAS, the USACE has given special consideration to protecting National Historic Landmarks by requesting the participation of the ACHP and notifying the Secretary of the Interior, pursuant to Section 110(f) and CFR 800.10; and

WHEREAS, the USACE has determined that in regards to archaeologically sensitive areas, the Undertaking may have an effect on Archaeological Properties that may be eligible for listing in the NRHP; and

WHEREAS, this Programmatic Agreement sets forth measures that will be implemented for all Built and Archaeological Properties or archaeologically sensitive areas within the Undertaking’s current or future APEs;

NOW, THEREFORE, the USACE, the SHPO, the Tribe, and the Council have consulted and agree that implementation of the Undertaking covered by this Agreement shall take into account effects on Historic Properties and shall be administered in accordance with the following Stipulations to avoid, minimize, or mitigate adverse effects to Historic Properties and to satisfy the USACE’s Section 106 responsibilities. The USACE will condition any Section 10 permit it may issue regarding the Undertaking to ensure that the following stipulations are met.

STIPULATIONS

The USACE will ensure that the following measures are carried out by the Proponent:

I. BUILT PROPERTIES

A. Documentation

Prior to initiation of construction, the Proponent will consult with the SHPO, and the National Park Service if applicable, to determine what level and kind of State-level, and Historic American Buildings Survey/Historic American Engineering Record (HABS/HAER) if any, photographic and narrative recordation is required to document the existing conditions, settings, and view sheds of affected Historic Properties (Attachment A). Unless otherwise agreed to by the SHPO, the Proponent shall ensure that all documentation is completed and accepted by the SHPO, and the Library of Congress if applicable, prior to beginning construction of the wind park. The Proponent shall ensure that copies of the documentation are made available to local repositories identified by the USACE.

B. Project Design

The Proponent shall ensure that the final design of the Cape Wind Energy Project minimizes visual impacts to Built Historic Properties through the number, height, and color of the wind turbine generators, and other considerations, and shall consult with the SHPO regarding any future plan developments that would change these conditions or introduce potential new adverse effects to Built Properties.

C. Review of Submitted Materials

Within 30 days of receipt of material requiring review, comment, and/or approval by the SHPO, the SHPO shall notify the USACE and the Proponent in writing of its approval of said material or, if the material is not approved, of the specific deficiencies of the material. Failure by the SHPO to respond within 30 days of the receipt of any material or document from the USACE or Proponent shall be deemed to constitute full approval of such documents under the stipulations of this agreement.

D. Public Information Programs

The Proponent shall ensure that the documentation prepared under Stipulation I.A is made available to the widest possible public audience, not limited to preparing electronic copies of any images and text prepared as State-level and HABS/HAER Documentation and providing the documentation to local repositories, as designated by the USACE.

II. ARCHAEOLOGICALLY SENSITIVE AREAS

A. For those below-ground areas which will be impacted by the Undertaking which have not been included in previous archaeological investigations and reports including, but not limited to, areas where modifications to project plans and specifications may occur during the completion of design or during construction **and** those areas identified as having the potential to contain submerged cultural resources on or below the surface of the sea floor (Attachment B), the Proponent shall:

1. Submit information on the location of new project areas to the USACE, who shall, in consultation with the SHPO and State Archaeologist, determine the need for an archaeological identification survey.

2. For those areas that have the potential to contain submerged cultural resources on or below the sea floor and where impacts cannot be avoided an identification survey in a manner consistent with the Secretary of the Interior's *Standards and Guidelines for Identification* (48 FR 44720-23) shall be performed.

3. USACE shall evaluate any resources identified through identification survey in accordance with 36 CFR 800.4(c). If the resources are determined to be Historic Properties eligible for listing in the National Register, the USACE shall consult with SHPO to determine whether effects from the Undertaking can be prudently and feasibly avoided.

4. If avoidance is not prudent or feasible, a Data Recovery Plan (DRP) to minimize or mitigate the effects of the Undertaking shall be developed. The DRP shall be consistent with the *Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation* (48 FR 44716-42), and the Advisory Council on Historic Preservation's publication, *Treatment of Archaeological Properties: A Handbook*.

III. UNANTICIPATED DISCOVERIES

While the USACE and the Proponent have made a good faith effort to identify Historic Properties during the Undertaking's planning process, additional previously unidentified historic and archaeological resources may be discovered, which may be affected by the Undertaking. In the event that any unanticipated archaeological resources or human remains are encountered in areas previously cleared for construction, the requirements set forth in the *Procedures Guiding the Unanticipated Discovery of Cultural Resources and Human Remains* (Attachment C) shall be followed.

IV. DISPUTE RESOLUTION

A. In the event that any party to this Programmatic Agreement objects to any plan or report pursuant to this Programmatic Agreement within 30 calendar days of its receipt or requests a formal dispute resolution with respect to any other material issue of noncompliance, the USACE shall meet and consult in good faith with the objecting party to attempt to resolve the matter prior to undertaking formal dispute resolution.

B. Following such consultation, the USACE shall determine whether such issue has been resolved. If not the USACE shall forward within fifteen (15) calendar days of determination all documentation relevant to the dispute to the ACHP, including the USACE's proposed resolution of the dispute.

C. The ACHP will respond to USACE's request for recommendations and comments within thirty (30) calendar days of receiving all documentation. The USACE will take such recommendations or comments into account in resolving the dispute, per 36 CFR 800.6.

D. In the event that the ACHP fails to respond to USACE's request for comments within thirty (30) calendar days of receiving all pertinent documentation, USACE may proceed with resolving the dispute.

V. AMENDMENT

A. Any signatory party to this Programmatic Agreement may request that it be amended by providing notice of such request in writing to the other signatories. In such event, the USACE shall consult with the other signatories to consider such amendment. No such amendment shall be effective unless it is executed by all signatories.

VI. REPORTING AND OVERSIGHT

A. Commencing one year from the date this Agreement is fully executed and every year thereafter until the Undertaking is completed or terminated, annual reports will be submitted by the Proponent to all signatories, providing information concerning implementation of this Agreement and the effect of the Undertaking on Historic Properties.

B. The signatories to this Agreement will review the annual report and implementation of the Agreement and determine whether revisions to the Agreement are needed within thirty (30) days of the submission of the annual reports.

C. If all signatories to this Agreement agree that revisions to the Agreement are needed, such revisions will be implemented pursuant to Stipulation V.

VII. TERM OF AGREEMENT

A. This Agreement shall remain in force during the design and construction of the Undertaking. If, at the end of that period, any signatory to this Agreement requests that the term be extended, notification of the request in writing shall be made to the USACE.

B. Upon receipt of a request to extend the term of the Agreement, the USACE shall consult with all signatories, and the term shall be extended for such additional period as may be concurred on by the signatories.

C. In the event that the signatories do not concur on a requested extension, the matter shall be treated as a dispute resolution per Stipulation IV.B.

EXECUTION of this Programmatic Agreement and implementation of it's terms evidences that the USACE has engaged in consultation required under Section 106 of NHPA and Appendix C, that the ACHP has been afforded an opportunity to comment on the Undertaking and its effects on Historic Properties, and that the USACE has taken into account the effects of the Undertaking on Historic Properties in connection with the issuance of its Section 10 Permit for the Cape Wind Energy Project, in accordance with Sections 106 and 110(f) of the NHPA.

Signatories:

UNITED STATES DEPARTMENT OF THE ARMY CORPS OF ENGINEERS

Thomas L. Konig
Colonel, Corps of Engineers
District Engineer

Date

MASSACHUSETTS STATE HISTORIC PRESERVATION OFFICER

Cara Metz
State Historic Preservation Officer

Date

ADVISORY COUNCIL ON HISTORIC PRESERVATION

John Fowler
Executive Director

Date

Concurring Parties:

CAPE WIND LLC

Mitchell Jacobs
Treasurer

Date

WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH)

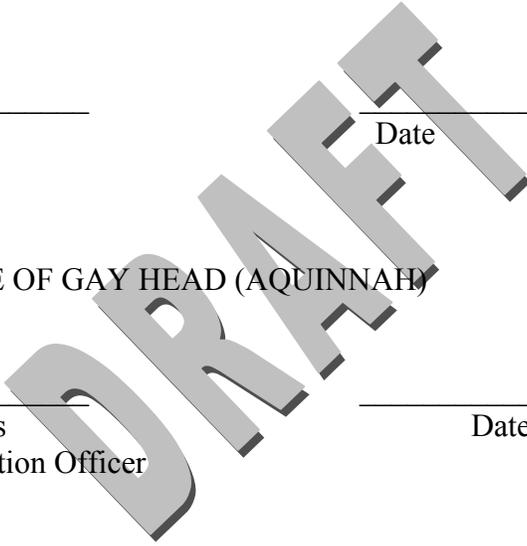
Cheryl Andrews-Maltais
Tribal Historic Preservation Officer

Date

MASSACHUSETTS BOARD OF UNDERWATER ARCHAEOLOGICAL
RESOURCES

Victor T. Mastone
Director

Date



ATTACHMENTS

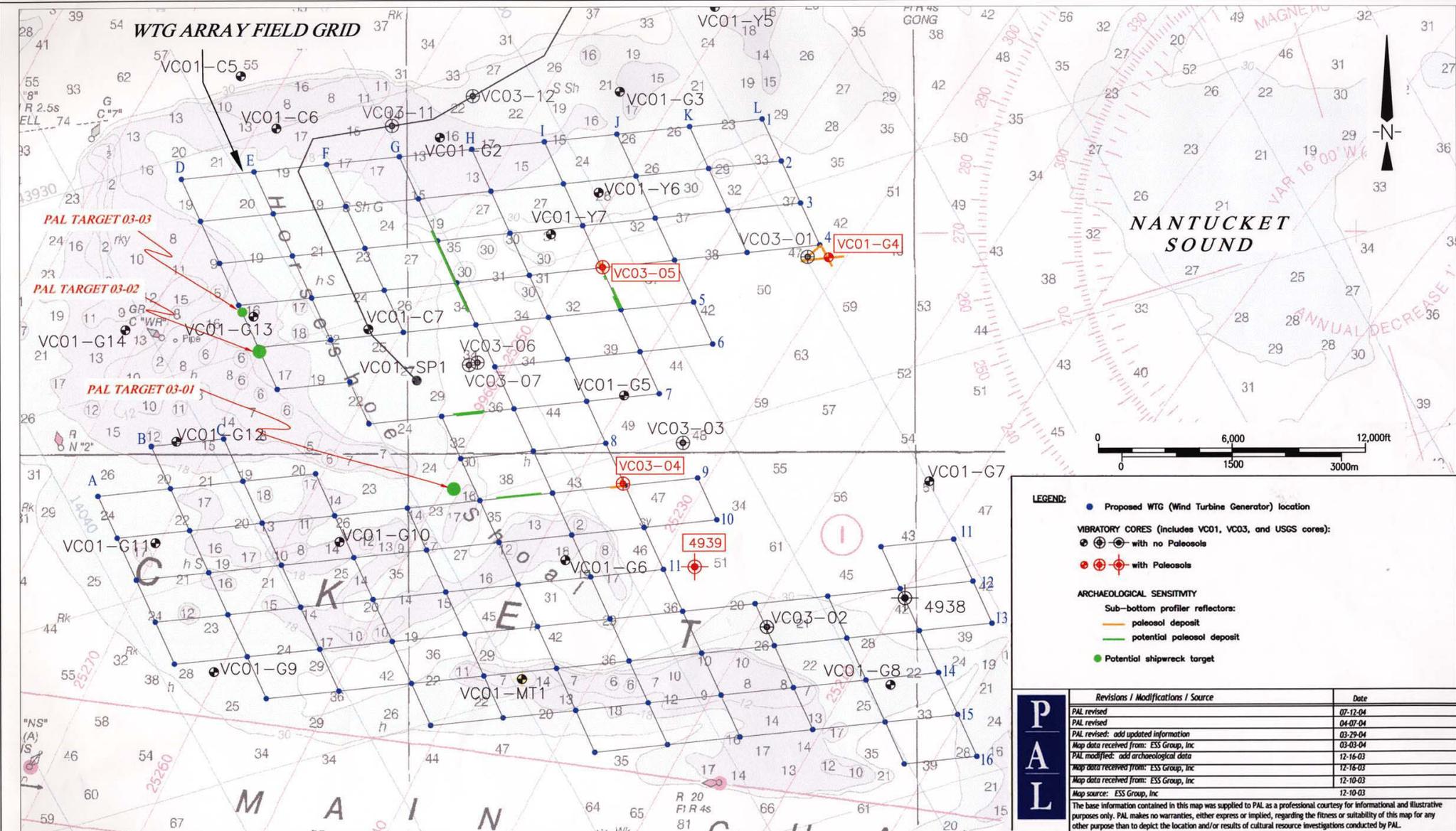
A. List of Affected Historic Properties

B. Map of Archaeologically Sensitive Targets and Areas

C. Procedures Guiding the Unanticipated Discovery of Cultural Resources and Human Remains

Attachment A. List of Affected Historic Properties.

Town	Name	Property Type	Distance/Direction to Wind Park	Section 106 Effect
Cape Cod				
Falmouth	Nobska Point Light Station	Individual Property	14.1 miles ESE	Adverse Effect
Barnstable	Cotuit Historic District	Historic District	6.1 miles SE	Adverse Effect
	Col. Charles Codman Estate	Individual Property	6.3 miles SE	Adverse Effect
	Wianno Historic District	Historic District	5.7 miles SSE	Adverse Effect
	Wianno Club	Individual Property	5.7 miles SSE	Adverse Effect
	Hyannis Port Historic District	Historic District	6.2 miles S	Adverse Effect
	Kennedy Compound	Historic Landmark	6.2 miles S	Adverse Effect
Chatham	Monomoy Point Lighthouse	Individual Property	14.9 miles WSW	Adverse Effect
Martha's Vineyard				
Tisbury	West Chop Light Station	Individual Property	11.0 miles ENE	Adverse Effect
Oak Bluffs	East Chop Light	Individual Property	9.4 miles ENE	Adverse Effect
	Dr. Harrison A. Tucker Cottage	Individual Property	9.4 miles ENE	Adverse Effect
Edgartown	Edgartown Village Historic District	Historic District	8.8 miles NE	Adverse Effect
	Edgartown Harbor Lighthouse	Individual Property	8.8 miles NE	Adverse Effect
	Cape Poge Light	Individual Property	5.4 miles NE	Adverse Effect
Nantucket				
Nantucket	Nantucket Historic District: Nantucket Cliffs	Historic Landmark	13.6 miles NNW	Adverse Effect
	Nantucket (Great Point) Light	Individual Property	11.2 miles NW	Adverse Effect



Attachment B. Archaeologically sensitive areas identified within the WTG array field, Cape Wind Energy Project offshore study area.

**CAPE WIND ENERGY PROJECT
HORSESHOE SHOAL, NANTUCKET SOUND, MASSACHUSETTS**

**PROCEDURES GUIDING THE UNANTICIPATED DISCOVERY OF
CULTURAL RESOURCES AND HUMAN REMAINS**

July 2004

Introduction

Archaeological investigations for the Cape Wind Energy Project (“Project”) are conducted under Section 106 of the National Historic Preservation Act of 1966 (16 USC 470f), as amended (1976, 1980, 1992, 1999), and implementing regulations of the Advisory Council on Historic Preservation (36 CFR 800). All work is undertaken pursuant to the *Secretary of the Interior Standards for Archaeology and Historic Preservation* (48 Federal Regulations 44716-42 (1983)) and the applicable laws and regulations pertaining to the cultural resources of Massachusetts.

This plan presents the approach that Cape Wind Associates, L.L.C. (“Cape Wind”) will use to address emergency discoveries of archaeological cultural resources during construction activities within the Project area of potential effect.

Notification Procedures

During Construction

Cape Wind is committed to the protection and preservation of cultural resources, in accordance with federal and state legislation. Cape Wind recognizes that despite intensive cultural resource survey investigations that are typically performed prior to Project construction, or the determination that a particular area exhibits low archaeological sensitivity, it is nonetheless possible that cultural resource deposits could be discovered during Project construction, particularly during excavation. Cape Wind recognizes the requirement for strict compliance with federal and state regulations and guidelines regarding the treatment of human remains, if any are discovered. The following details the procedures to be followed in the event that new cultural resource sites or human remains are discovered during the construction process.

Artifact Discoveries

The following procedures will be adhered to in the event of a potential discovery of an archaeological site(s) during construction.

1. In the event that suspected artifacts or features, such as elements of a shipwreck, are uncovered during a construction activity, that activity shall immediately be halted until it can be determined whether that materials are cultural and, if so, whether they represent a potentially significant site.

If artifacts are identified by the contractor's construction personnel, the contractor's construction foreman will be notified immediately. The foreman, in turn, will notify Cape Wind's project manager. Notification will include specific details regarding the discovery, such as the precise location and time of discovery.

If Cape Wind personnel identify such a discovery, they will direct the contractor to stop work on activities that could affect the integrity of the resource, and will inform Cape Wind's project manager.

2. Upon notification of the discovery of a possible site, Cape Wind will contact its cultural resource management consultants to review the discovery. Based on the information provided, the archaeologist will determine if additional investigation is required.

If on-site archaeological investigations are required, Cape Wind will inform the construction contractor. Construction activities that could affect the integrity of the resource will not be performed or resumed until the results of the additional investigations are reviewed and commented on in writing by the Army Corps of Engineers ("USACE") and the Massachusetts State Historic Preservation Office ("SHPO") or the Massachusetts Board of Underwater Archaeological Resources ("MBUAR").

3. The archaeologists will conduct additional investigation and analysis. Since the area will have already been partially disturbed by construction activities, the objective of any cultural resource investigations will be to recover data quickly so that construction at the site can continue in a timely manner.
4. The archaeologists will determine, based on the artifacts found and on the cultural sensitivity of the area in general, whether the site is potentially significant and whether the State Archaeologist or SHPO requires immediate notification by telephone. If not, data regarding the site will be faxed or sent by express mail to the ACOE and SHPO/MBUAR in order to ensure a quick agency response.

Human Remains Discoveries

Though the likelihood of encountering human remains during the construction of the Project is low, they will likely be discovered in excavations.

The treatment of any human remains encountered during the Project will be guided by the policy statement adopted by the Advisory Council on Historic Preservation ("Advisory Council"); see *Consulting About Archaeology Under Section 106*, Advisory Council 1990), and by Massachusetts state laws and guidelines. The Advisory Council policy statement recommends that, to the extent allowed by law, treatment of human remains should adhere to the following principles:

- Human remains and grave goods should not be disinterred unless required in advance of some kind of disturbance, such as construction

- Disinterment, when necessary, should be done carefully, respectfully, and completely, in accordance with proper archaeological methods
- In general, human remains and grave goods should be reburied in consultation with the descendants of the dead
- Prior to reburial, scientific studies should be performed as necessary to address justified research topics
- Scientific studies and reburial should occur according to a definite, agreed-upon schedule
- Where scientific study is offensive to the descendants of the dead, and the need for such a study does not outweigh the need to respect the concerns of such descendants, reburial should occur without prior study. Conversely, where the scientific research value of human remains or grave goods outweighs any objections that descendants may have to their study, they should not be reburied but should be retained in perpetuity for study

The procedures that will be followed in the event that human remains are discovered during construction of the Project are as follows:

1. If human remains are identified by any personnel on the construction site, all construction work in the immediate vicinity of the site that could affect the integrity of the remains will cease immediately.
2. Cape Wind's project manager will be informed immediately and notified of the exact location of the remains, as well as of the time of discovery, and in turn will be responsible for contacting immediately Cape Wind's cultural resources consultant.
3. Cape Wind's project manager will be responsible for immediately notifying appropriate ACOE personnel as well as the SHPO/MBUAR, the Chief Medical Examiner and the State Police.
4. The Medical Examiner will determine whether the remains are recent or archaeological. If the remains are determined to be of recent deposition, a criminal investigation may be warranted. If they are determined to be archaeological, i.e., older than 100 years, the State Archaeologist will take over the analysis to determine whether the remains are Native American.
5. If the remains are determined to be Native American, the State Archaeologist will consult the appropriate Native American group(s) and the Project proponent to discuss whether there are prudent and feasible alternatives to protect the remains. The results of this consultation will be made in writing. If it is not possible to protect the remains, they may be excavated only under a memorandum of agreement with all interested parties including Cape Wind, the USACE, the SHPO, recognized Native American groups, and landowners, if applicable. This memorandum will outline an adequate data recovery plan that specifies a qualified research team and an appropriate research design (including a proposal for disposition of the remains). Analyses to be performed on Native American remains are discussed in consultation with the appropriate Native American representatives. After analyses, Native American remains are returned to the appropriate Native American group for

disposition.

6. In all cases, due care will be taken in the excavation and subsequent transport and storage of the remains to ensure that the sacred meaning of the remains for Native Americans are respected and protected, as required.

List of Contacts

Federal

Army Corps of Engineers, New England Division
Regulatory Division
US Army Corps of Engineers
696 Virginia Road
Concord, Massachusetts 01742-2751
Contact: Kate Atwood
(978) 318-8537; FAX (978) 318-8560

Massachusetts

State Historic Preservation Office
Massachusetts Historical Commission
220 Morrissey Boulevard
Boston, Massachusetts 02125
Contact: Brona Simon, State Archaeologist, Deputy State Historic Preservation Officer
(617) 727-8470; FAX: (617) 727-5128

Massachusetts Board of Underwater Archaeological Resources
Department of Environmental Quality
251 Causeway Street, Suite 900
Boston, Massachusetts 02114
Contact: Victor Mastone
(617) 626-1141 x212; FAX (617) 626-1181

Massachusetts Commission on Indian Affairs
100 Cambridge Street, Suite 300
Boston, MA 02114
Contact: John Peters, Executive Director
(617) 573-1291; FAX (617) 573-1515

Tribal Historic Preservation Officer
Wampanoag Tribe of Gay Head (Aquinnah)
20 Black Brook Road
Aquinnah, MA 02535
Contact: Cheryl Andrews-Maltais, Tribal Historic Preservation Officer
(508) 645-9265 x 112; FAX (508) 645-3790