

**FIRST AMENDED
MEMORANDUM OF UNDERSTANDING AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
THE MASHPEE WAMPANOAG TRIBE,
AND THE MASSACHUSETTS DEPARTMENT OF TRANSPORTATION
REGARDING THE INITIATION OF CONSULTATION UNDER
SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT OF 1966, AS AMENDED**

WHEREAS, the Federal Highway Administration (FHWA) administers its Federal-Aid Highway Program in Massachusetts through the Massachusetts Department of Transportation, Highway Division (MassDOT), as authorized by 23 U. S. C. 101 et seq.; and

WHEREAS, the Mashpee Wampanoag Tribe is a federally recognized Indian tribe with ancestral lands in Massachusetts; and

WHEREAS, since time immemorial, indigenous Wampanoag people, aka Northeastern Woodland Indians, have traversed, encamped, hunted and gathered, fished, cultivated crops, held ceremonies, and interred their own, throughout Southeastern Massachusetts and Eastern Rhode Island; and

WHEREAS, the Wampanoag People have passed down their cultural worldview, traditions, spiritual practices, and cosmology through their oral history, and the specific utilization of this information is not common knowledge outside the Wampanoag community, nor is it typically shared outside Indian communities or with the non-Indian public; and

WHEREAS, the Mashpee Wampanoag Tribe possesses specialized expertise in determining sites, objects, and landscapes to which the tribe attaches cultural, traditional, and/or religious significance, and this expertise

WHEREAS, the regulations implementing Section 106 of the National Historic Preservation Act of 1966, as amended (Section 106) require the federal agency official with jurisdiction over an undertaking to consult with Indian tribes regarding federal undertakings occurring on or affecting historic properties on tribal lands [36 CFR 800.2(c)(2)(i)(A)] and to consult with any Indian tribe that attaches religious and cultural significance to prehistoric and historic properties that may be affected by an undertaking regardless of the location of the property [36 CFR 800.2(c)(2)(ii)]; and

WHEREAS, the Mashpee Wampanoag Tribe has appointed a tribal historic preservation officer (THPO) as the tribe's official representative for the purposes of Section 106 [36 CFR 800.2(c)(2)(i)(A)]; and

WHEREAS, FHWA has authorized MassDOT to initiate Section 106 consultations with federally recognized Indian tribes in Massachusetts for all Federal-Aid Highway Program undertakings; and

WHEREAS, MassDOT employs a staff of cultural resources specialists and consultants who meet the U. S. Secretary of the Interior's Professional Qualification Standards in the fields of archaeology, architectural history, and history to carry out its cultural resource programs and responsibilities; and

WHEREAS, the MassDOT Archaeological Resources Supervisor reviews every Federal-Aid Highway Program undertaking proposed by MassDOT; determines the extent of previous ground disturbance within the undertaking's Area of Potential Effect (APE), as defined in 36 CFR 800.16(d); consults with the

Mashpee Wampanoag THPO to identify the proximity of recorded archaeological sites to the APE; evaluates and documents the level of archaeological sensitivity that might exist within the APE; and recommends archaeological surveys as necessary to identify any properties within the APE that might be eligible for listing in the National Register of Historic Places; and

WHEREAS, the Mashpee Wampanoag Tribe employs Cultural Resource Monitors (CRMs) who may be dispatched by the THPO to observe and record archaeological activity within the APE whenever archaeological surveys are deemed necessary; and

WHEREAS, MassDOT participated in consultation and has been invited to sign this MOU; and

NOW, THEREFORE, FHWA, the Mashpee Wampanoag Tribe, and the Council agree that MassDOT will initiate Section 106 consultation for Federal-Aid Highway Program undertakings in Massachusetts according to the following stipulations.

STIPULATIONS

FHWA will ensure that the following measures are carried out.

I. Purpose and Applicability

This MOU sets forth the process by which FHWA, with MassDOT assistance, will meet its responsibilities under 36 CFR 800.2(c)(2)(ii)(A) to initiate Section 106 consultation with the Mashpee Wampanoag Tribe "early in the planning process" of Federal-Aid Highway Program undertakings in Massachusetts "to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties." This MOU identifies specific categories of undertakings for which MassDOT will initiate Section 106 consultation with the Mashpee Wampanoag Tribal Historic Preservation Officer (THPO) and specifies how MassDOT will carry out that initial consultation. This MOU also identifies specific construction activities and conditions for which no further consultation with the THPO shall be required. The MassDOT Archaeological Resources Supervisor shall determine if an undertaking meets the criteria for initial consultation.

II. Professional Qualifications

- A. MassDOT shall continue to employ, at a minimum, an archaeologist, an architectural historian, and a historic bridge specialist, to conduct Section 106 reviews and to direct consultants who conduct work in support of MassDOT's Section 106 reviews. MassDOT staff members who direct Section 106 work must meet the *U. S. Secretary of the Interior's Professional Qualifications Standards*, which were previously published in the Federal Register as 36 CFR Part 61--Appendix A, and which are included in this MOU as Appendix 3.
- B. The Mashpee Wampanoag THPO affirms that the CRMs possess the experience, knowledge, and character necessary to qualify them individually for the particular duties required by the Tribal Historic Preservation Department (Appendix 4).

III. Activities Requiring No Tribal Consultation

Appendix 1 “Construction Activities Exempt from Tribal Consultation” includes a list of construction activities that require no further Section 106 consultation with the THPO under this MOU, if those activities are located entirely within the footprint of an existing transportation facility. Such construction activities, by their nature, are unlikely to affect historic properties of religious and cultural significance to the Mashpee Wampanoag Tribe. MassDOT shall not be required to submit documentation to the THPO to initiate Section 106 consultation for such construction activities exempted under Appendix 1.

IV. Undertakings Subject to Initial Consultation with THPO

A. Statewide

MassDOT shall initiate Section 106 consultation with the THPO regarding any Federal-Aid Highway Program undertaking in Massachusetts that is included in one of the following categories:

1. Any undertaking that requires an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) under the National Environmental Policy Act. MassDOT shall initiate consultation with the THPO as early as feasible during the development of such an undertaking but prior to the submittal of the EA or EIS for public comment. FHWA shall ensure that the THPO receives a copy of any EA or EIS when making the document available for public comment, pursuant to 36 CFR 800.8(b)(2).
2. Any undertaking for which the MassDOT Archaeological Resources Supervisor, the Massachusetts State Archaeologist, or the Director of the Massachusetts Board of Underwater Archaeological Resources has determined that an archaeological survey is required.

B. Area of Interest

1. The THPO has determined that the Mashpee Wampanoag Tribe has a geographical Area of Interest comprised of the following locations in eastern and central Massachusetts for undertakings that are not included in Stipulation IV(A):

Barnstable County
Bristol County
Dukes County (Martha’s Vineyard)
Essex County, south of the Merrimack River
Kings County (Nantucket)
Middlesex County, south of I-495
Norfolk County
Plymouth County
Suffolk County
Worcester County, east of I-395 and I-190

2. MassDOT shall initiate Section 106 consultation with the THPO regarding any Federal-Aid Highway Program undertaking located within the Mashpee Wampanoag Tribe's Area of Interest if that undertaking involves excavation or new construction beyond the footprint of an existing transportation facility, as defined in Appendix 1, regardless of whether or not an archaeological survey is required as determined by MassDOT's Archaeological Resources Supervisor.

V. MassDOT Notification Procedures

- A. MassDOT shall initiate Section 106 consultation with the THPO as early as feasible during the development of an undertaking. If MassDOT initiates Section 106 consultation during a later design phase, it is with the understanding that the THPO's comments must be addressed fully before an undertaking may be advertised for construction.
- B. MassDOT will submit the following documentation by e-mail to the THPO to initiate Section 106 consultation for an undertaking that is included in any of the categories listed in Stipulation IV.
 1. A transmittal form that identifies the lead federal agency for the project and solicits written comments from the THPO. The form shall state that any written comments from the THPO must be received by MassDOT or FHWA not later than 30 days after the THPO's receipt of the documentation package. For an undertaking that requires an archaeological survey, MassDOT shall invite the THPO to participate in the survey.
 2. Project Notification Form that provides a clear and concise written description of the undertaking's scope of work, identifies any recorded archaeological sites in the vicinity of the project impact area, and describes historic land use in the vicinity.
 3. A locus map indicating the geographical limits of the undertaking.
 4. An aerial photograph or photographs depicting the area of the undertaking.
 5. A sufficient selection of construction plans to illustrate the undertaking's scope of work.
- C. MassDOT shall respond in a timely manner if the THPO should have questions regarding the documentation submitted by MassDOT to initiate Section 106 consultation, or if the THPO should request additional information or documentation.
- D. MassDOT shall notify the THPO of any substantial change to the scope of work for any undertaking for which Section 106 consultation has been completed or if new information should become available regarding historic properties of religious and cultural significance to the Mashpee Wampanoag Tribe that could be affected by an undertaking.

VI. THPO Response

- A. The THPO may respond directly to MassDOT (by letter, email, or telephone) if the THPO has questions or requires clarification regarding documentation submitted by MassDOT under Stipulation V(B), or if the THPO should require additional plans or other documentation.
- B. The THPO shall respond in writing directly to FHWA if the Mashpee Wampanoag Tribe should have concerns about a Federal-Aid Highway Program undertaking in Massachusetts or if the tribe has an interest in continuing to consult on a Federal-Aid Highway Program undertaking. FHWA shall honor the request of the THPO to enter into direct government-to-government consultation under Section 106 with the Mashpee Wampanoag Tribe and shall follow procedures established under 36 CFR 800. FHWA shall retain ultimate responsibility for all federal requirements pertaining to further direct government-to-government consultation with the Mashpee Wampanoag Tribe.
- C. FHWA and MassDOT shall have no further responsibility to continue Section 106 consultation with the Mashpee Wampanoag Tribe for an undertaking if the THPO should fail to respond to FHWA or MassDOT within 30 days after the THPO's receipt of the documentation package submitted by MassDOT under Stipulation V(B). The THPO, however, may initiate or resume Section 106 consultation with FHWA at any time during an undertaking's design or construction.

VII. Tribal Compensation

The Mashpee Wampanoag Tribe shall be entitled to compensation for certain activities performed under this MOU, as specified in Appendix 5.

VIII. Emergency Situations

MassDOT, on behalf of FHWA, may determine and implement appropriate measures for the identification and treatment of historic properties during emergencies declared by the President of the United States or the Governor of the Commonwealth of Massachusetts. MassDOT will notify FHWA and the THPO as soon as feasible regarding any such measures that may affect historic properties of religious and cultural significance to the Mashpee Wampanoag Tribe and afford the THPO an opportunity to comment on the treatment plan needed to move forward under these emergency circumstances. The THPO shall respond to FHWA or MassDOT, either by telephone, email, or in writing within seven days following receipt of notification or in the time available, as provided in 36 CFR 800.12(b)(2).

IX. Unanticipated Discoveries

For post-review discoveries of historic properties, or for unanticipated impacts to historic properties, FHWA and MassDOT shall follow provisions established pursuant to 36 CFR 800.13(b). MassDOT shall implement the terms of its Standard Special Provision that is included in every MassDOT construction contract regarding the discovery of unanticipated archaeological and skeletal remains during construction activities. The Standard Special Provision is attached to this MOU as Appendix 2.

X. Periodic Review

FHWA, the THPO, and MassDOT should meet as necessary to review the implementation and effectiveness of the MOU.

XI. Amendment

Any signatory to this MOU may request that it be amended, whereupon the parties will consult to consider such an amendment. Once agreed upon, amendments shall be executed in the same manner as the original MOU.

XII. Dispute Resolution

FHWA will become actively involved in the resolution of any disputes or objections under this MOU. FHWA or the THPO may request that the Council become involved in any dispute that cannot be resolved between the FHWA and the THPO pursuant to 36 CFR 800.

XIII. Termination


Any signatory to this MOU may terminate it by providing 30 calendar days written notice to the other parties explaining the reason for termination, provided that the parties will consult during the period prior to termination to seek agreement on amendments and other actions that would avoid termination. In the event of termination, FHWA will comply with CFR 800.2(C)(2) with regard to initiating and completing Section 106 consultation with the Mashpee Wampanoag Tribe.

Execution and implementation of this Memorandum of Understanding evidence that FHWA has satisfied its responsibilities for initiating Section 106 consultation with the Mashpee Wampanoag Tribe for all individual Federal-Aid Highway Program undertakings in Massachusetts.

SIGNATORIES ON PAGE 7.

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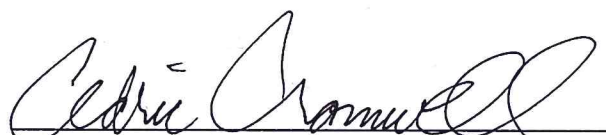
FEDERAL HIGHWAY ADMINISTRATION, MASSACHUSETTS DIVISION



Jeffrey H. McEwen, P.E., Division Administrator

5.12.17
Date

MASHPEE WAMPANOAG TRIBE



Cedric Cromwell, Chairman, Mashpee Wampanoag Tribal Council

7/14/17
Date



Ramona Peters, Tribal Historic Preservation Officer

5.30.17
Date

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION



Stephanie Pollack, Secretary & CEO

4-24-17
Date