

## PROGRAMMATIC AGREEMENT

Among

The U.S. Department of the Interior, Bureau of Ocean Energy Management;  
the State Historic Preservation Officers of Delaware, Maryland, New Jersey, and Virginia;  
The Advisory Council on Historic Preservation;  
The Narragansett Indian Tribe; and the Shinnecock Indian Nation

Regarding

the “Smart from the Start” Atlantic Wind Energy Initiative:  
Leasing and Site Assessment Activities within the Wind Energy Areas  
offshore Delaware, Maryland, New Jersey, and Virginia

WHEREAS, the Bureau of Ocean Energy Management (BOEM) has embarked upon the “Smart from the Start” Atlantic Wind Energy Initiative for the responsible development of wind energy resources on the Atlantic Outer Continental Shelf (OCS), pursuant to Section 8(p)(1)(c) of the Outer Continental Shelf Lands Act (OCSLA), which was enacted in the Energy Policy Act of 2005, and the implementing regulations at 30 CFR part 585; and

WHEREAS, under the “Smart from the Start” Initiative BOEM has identified areas on the OCS offshore the States of Delaware (DE), Maryland (MD), New Jersey (NJ), and Virginia (VA) (Wind Energy Areas (WEAs)) that appear most suitable for future wind energy activities; BOEM may issue leases within these areas; and BOEM may approve site assessment plans (SAPs) on these leases; and

WHEREAS, BOEM has determined that both the issuance of a renewable energy lease and the subsequent approval of a SAP on a lease constitute undertakings subject to Section 106 of the National Historic Preservation Act (NHPA; 16 U.S.C. § 470f), and its implementing regulations (36 CFR 800); and

WHEREAS, BOEM is analyzing the environmental consequences of issuing leases and approving SAPs within these WEAs in accordance with the Department of the Interior’s regulations implementing the provisions of the National Environmental Policy Act of 1969, as amended (42 U.S.C. § 4321 *et seq.*); and

WHEREAS, under the renewable energy regulations, the process for issuing renewable energy leases on the OCS and approving plans for activities on those leases is a staged decision-making process; and

WHEREAS, under the current renewable energy regulations (30 CFR part 585), the decision to issue a lease or leases is distinct and separate from a decision to approve, approve with modification, or disapprove a SAP; and

WHEREAS, the issuance of a renewable energy lease grants the lessee the exclusive right to submit plans for BOEM approval pursuant to 30 CFR part 585; and

WHEREAS, pursuant to 30 CFR part 585, the approval of a SAP grants the lessee the right to install and operate one or more meteorological facilities (e.g. meteorological towers and/or buoys) in the lease area for the site assessment term of the lease; and

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WHEREAS, the proposed undertakings would be located in identified WEAs on the OCS offshore DE, MD, NJ, and VA; and

WHEREAS, BOEM proposes that the Areas of Potential Effects (APE) for the undertakings, as defined in 36 CFR § 800.16(d) of the Advisory Council on Historic Preservation’s (ACHP’s) regulations implementing Section 106 of the NHPA, are defined as (1) the depth and breadth of the seabed that could potentially be impacted by proposed seafloor/bottom-disturbing activities (e.g., core samples, anchorages and installation of meteorological towers and buoys); and (2) the viewshed from which lighted meteorological structures would be visible; and (3) any areas on land used for staging the offshore work; and

WHEREAS, the undertakings subject to this Programmatic Agreement (Agreement) are limited to site assessment activities only (placement of meteorological towers and buoys for the site assessment term of the lease) and the issuing of leases: (1) giving the lessee the exclusive right to submit a SAP; and (2) on which lessees are anticipated to conduct site characterization activities to meet the information requirements in the renewable energy regulations for submitting a SAP and construction and operations plan (COP); and

WHEREAS, there will be neither shore-based facilities nor cabling installed and any construction and operations activities that might include such cables or shore-based facilities would be considered under a separate Section 106 consultation; and

WHEREAS, under the current renewable energy regulations, BOEM may offer a number of leases within a WEA simultaneously under a competitive lease issuance process, or it may issue a single lease for a given area via the noncompetitive lease issuance process; and

WHEREAS, the issuance of leases among the various WEAs may not be issued simultaneously, and could occur over a number of years; and

WHEREAS, under the current regulations, a SAP for a particular lease must be submitted within six (6) months of competitive lease issuance and within sixty (60) calendar days of a determination of no competitive interest; and

WHEREAS, the ACHP’s implementing regulations for Section 106 (36 CFR § 800) prescribe a process that seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among parties with an interest in the effects of the undertakings, commencing at the early stages of the process; and

WHEREAS, BOEM has identified and consulted with the State Historic Preservation Offices (SHPOs) for DE, MD, NJ, and VA, (collectively, “the SHPOs”); and

WHEREAS, the Section 106 consultations described in this Agreement will be used to, *inter alia*, establish a process to determine and document the APEs for each undertaking; further identify historic properties located within each undertaking’s APE that are listed in, or eligible

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for listing in the National Register of Historic Places (National Register); and assess the potential adverse effects and avoid, reduce, or resolve any such effects through the process set forth in this Agreement; and

WHEREAS, according to 36 CFR § 800.16(l)(1) historic property means

*any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian Tribe or Native Hawaiian organization and that meet the National Register criteria; and*

WHEREAS, BOEM initiated consultation in 2011 through letters of invitation, telephone calls, emails, meetings, webinars, and the circulation and discussion of this agreement in draft; and this outreach and notification included contacting over 85 individuals and entities, including Tribes, local governments, SHPOs, state-recognized Tribes, and the public; and

WHEREAS, BOEM has initiated formal government-to-government consultation with the following Federally-recognized Indian Tribes (Tribes): the Narragansett Indian Tribe and the Shinnecock Indian Nation; and

WHEREAS, these Tribes have chosen to consult with BOEM and participate in the development of this Agreement, in which the term Tribe refers to them, consistent with the meaning of 36 CFR § 800.16(m); and

WHEREAS, BOEM shall continue to consult with these Tribes to identify properties of religious and cultural significance that may be eligible for listing in the National Register (Traditional Cultural Properties or TCPs) and that may be affected by these undertakings; and

WHEREAS, BOEM has identified and contacted 16 state-recognized Tribes, none of which have chosen to consult with BOEM and participate in the development of this Agreement; and

WHEREAS, in accordance with Section 106, Federal agencies are required to take into account the effects of their undertakings on historic properties; and

WHEREAS, BOEM, in consultation with the SHPOs and with their assistance, has begun implementing an outreach plan to involve the public and to identify other consulting parties through outreach, notifications, and request for comment; and

WHEREAS, through this outreach, TCPs eligible for inclusion in the National Register that are associated with the mid-Atlantic seafaring traditions may be identified; and

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WHEREAS, BOEM currently has limited information regarding the presence of historic properties located on the Atlantic OCS in the areas within the WEAs that may be subject to leasing; and

WHEREAS, one of the primary reasons BOEM requires lessees to submit the results of site characterization surveys in a SAP is so that potential historic properties within the lease area that could be affected by the installation and operation of meteorological facilities can be identified and adverse effects to them avoided, minimized, or as appropriate mitigated; and

WHEREAS, BOEM has determined that the identification and evaluation of possible historic properties shall be conducted in phases, so the consultation process provided for in this Agreement shall necessarily continue throughout both stages of the decision-making process: lease issuance and SAP consideration; and

WHEREAS, the ACHP’s regulations at 36 CFR § 800.14(b)(3) provide for developing Programmatic Agreements for complex or multiple undertakings; and

WHEREAS, future commercial-scale development that may or may not occur within the WEAs is a separate undertaking and would be considered under future, separate Section 106 consultation(s); and

WHEREAS, BOEM, the SHPOs, and the ACHP are signatories to this Agreement; and

WHEREAS, BOEM has asked the Narragansett Indian Tribe and the Shinnecock Indian Nation to sign this Agreement as invited signatories; and

WHEREAS, BOEM has a policy for post-review discoveries to ensure that the identification and evaluation of historic properties, assessment of effects, and development of treatment and mitigation plans for unforeseen effects to previously-identified historic properties and/or historic properties discovered during implementation of the projects are properly coordinated (*See Guidelines for Providing Geological and Geophysical, Hazards, and Archaeological Information Pursuant to 30 CFR Part 285*, Section IV.B, “Unanticipated Discoveries (Chance Finds)”, available online at [http://www.boem.gov/Renewable-Energy-Program/Regulatory-Information/Index.aspx#Notices\\_to\\_Lessees,\\_Operators\\_and\\_Applicants](http://www.boem.gov/Renewable-Energy-Program/Regulatory-Information/Index.aspx#Notices_to_Lessees,_Operators_and_Applicants)); and

WHEREAS, BOEM has guidelines for surveys that: (1) meet or exceed the Secretary of the Interior’s standards for identification surveys; (2) help ensure that all identification surveys be carried out by professionals meeting the Secretary of the Interior’s professional qualifications; and (3) recommend that analysis for viewshed impacts follow applicable, established guidelines (*Guidelines for Providing Geological and Geophysical, Hazards, and Archaeological Information Pursuant to 30 CFR Part 285*, available online at: [http://www.boem.gov/Renewable-Energy-Program/Regulatory-Information/Index.aspx#Notices\\_to\\_Lessees,\\_Operators\\_and\\_Applicants](http://www.boem.gov/Renewable-Energy-Program/Regulatory-Information/Index.aspx#Notices_to_Lessees,_Operators_and_Applicants)); and

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WHEREAS, both the post-review discoveries policy and guidelines for survey activities will be subject to future alteration as consultations progress, technology improves, and scientific studies take place;

NOW, THEREFORE, BOEM, the ACHP, the SHPOs, Tribes, and the other concurring parties (the Parties), agree that the undertakings shall be implemented in accordance with the stipulations below in order to: (1) take into account foreseen and unforeseen future effects to historic properties; and (2) give consulting parties continued opportunity to consult on the scope of identification efforts, identification of historic properties, evaluation of historic significance, assessment of adverse effects, and avoidance and mitigation of any identified, potentially affected historic properties.

#### STIPULATIONS

BOEM shall ensure that the following measures are carried out:

- I. Within 30 calendar days of execution of the Agreement, BOEM shall hold a consultation meeting or webinar with all Parties to ensure that the consulting parties have a common understanding of how BOEM shall administer the offshore wind leasing and plan approval process in the mid-Atlantic WEAs. BOEM shall:
  - A. Explain its legal obligations and limitations under OCSLA, the renewable energy regulations at 30 CFR part 585, and other laws and regulations pertaining to these undertakings.
  - B. Explain the leasing and plan approval process as provided in the renewable energy regulations.
  - C. Review those Section 106 compliance activities that have already occurred with respect to the undertakings, which are the subject of consultation pursuant to this Agreement.
  - D. Consult with the Parties on how APEs shall be defined for leases and SAPs within the WEAs, including those submerged areas that may have once been dry land since the last glacial maximum and could contain archaeological sites eligible for listing in the National Register.
  - E. Confirm each Party’s geographic interests to determine the portions of the WEAs on which that Party wishes to be consulted.
  - F. Solicit information on known historic properties within the APE that are located within the WEAs and/or may be outside of the WEAs but may potentially be indirectly affected by the undertaking.

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- G. Invite the Tribes and local interest groups to consult on TCPs that are located within the WEAs and/or may be outside of the WEAs but may potentially be indirectly affected by the undertaking.
  - H. Discuss strategies BOEM shall use to identify other historic properties that may be affected.
  - I. Discuss BOEM’s existing policy for post-review discoveries and solicit suggestions for its improvement.
  - J. Propose a plan for how future consultation shall proceed throughout the term of this agreement.
- II. Prior to issuing a lease, BOEM shall:
- A. Share with the Appropriate Parties (the appropriate SHPO and other signatories to this Agreement who have confirmed interest in the APE that may be affected by the undertaking, and other consulting parties) existing, non-proprietary information regarding the area BOEM proposes to lease, including BOEM’s APE for each lease.
  - B. Solicit additional information on historic properties from the Appropriate Parties, and the public within the APE.
  - C. For competitive lease issuance, BOEM shall utilize the Proposed Sale Notices to solicit additional information on historic properties from the public in the area(s) BOEM proposes to lease.
  - D. Invite the Tribes to consult on TCPs that are located within the WEAs and/or potentially affected by the undertaking.
  - E. Discuss with the Appropriate Parties other identification methods BOEM should consider to meet its “reasonable and good faith” identification standard (as described in BOEM’s *Guidelines for Providing Geological and Geophysical, Hazards, and Archaeological Information Pursuant to 30 CFR Part 285*).
  - F. Consult with the Appropriate Parties to develop a process for addressing any post-review discoveries that may be made.
  - G. Place a stipulation in the lease addressing post-review discoveries.
  - H. Consider whether additional lease stipulations regarding the presence of, or effects to cultural or historic properties are appropriate.

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- I. Treat all potential historic properties as eligible for inclusion on the National Register unless it is determined in consultation with the appropriate SHPO and relevant signatories that a property lacks integrity or does not meet the National Register criteria, consistent with 36 CFR 800.4(c).
  - J. In consultation with the Appropriate Parties, make determinations of effect consistent with 36 CFR 800.4(d).
  - K. Resolve adverse effects, where practicable, by avoiding historic properties and recording a finding of *No historic properties affected*, or *No adverse effect*, consistent with 36 CFR 800.4(d) and 800.5(b).
  - L. If adverse effects to historic properties cannot be avoided, BOEM shall:
    - 1. Consult with the Appropriate Parties and provide the public an opportunity to comment on the eligibility of the properties;
    - 2. Seek to resolve the adverse effects through minimizing and mitigating those effects in consultation with the Appropriate Parties and the public, as described in 36 CFR § 800.6.
- III. If a lease is issued, BOEM shall invite the lessee to participate in the consultation process pursuant to 36 CFR § 2(c)(4) insofar as its lease is concerned. This may include an offer to facilitate a Memorandum of Agreement (MOA) between the lessee, those Parties interested in the lease area, and BOEM.
- IV. Prior to approving, approving with modification, or disapproving a SAP, BOEM shall:
- A. Share with Appropriate Parties existing, non-proprietary information regarding the lease area, including the results of the lessee’s or BOEM’s surveys, available information on the size, nature, and location of the proposed temporary meteorological buoys or towers, and whether these can be seen from the shoreline.
  - B. Request from the Appropriate Parties information on historic properties within the APE that could be affected by the installation of meteorological facilities on a lease issued within the WEAs.
  - C. Request that the Tribes consult on TCPs that are located within the relevant lease area and/or potentially affected by the installation of meteorological facilities on the lease.
  - D. Consider scheduling a consultation meeting with the Appropriate Parties to (1) review the results of the identification steps, (2) discuss what additional steps to take and/or methods to be used for further identification of historic properties that may be

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- deemed necessary by BOEM, (3) and solicit their opinions on which identified resources may meet the National Register criteria.
- E. Treat all identified potential historic properties as eligible for inclusion in the National Register unless it is determined in consultation with the Appropriate Parties that a property lacks integrity or does not meet the National Register criteria, consistent with 36 CFR 800.4(c).
  - F. Before making determinations of effect and adverse effect, consult with the Appropriate Parties consistent with 36 CFR 800.4 and 800.5.
  - G. Resolve adverse effects, where practicable, by avoiding historic properties and recording a finding of *No historic properties affected*, or *No adverse effect* consistent with 36 CFR 800.4(d) and 800.5(b).
  - H. If adverse effects to historic properties cannot be avoided, BOEM shall, in consultation with the Parties, seek to resolve the adverse effects through minimizing and mitigating those effects and provide the public an opportunity to comment on the proposed mitigation, as described in 36 CFR 800.6.
- V. CONSULTATION WITH TRIBES
- A. In addition to consultation as described in Part I of this Agreement, BOEM shall continue to consult with the Tribes throughout the implementation of this Agreement in a government-to-government manner consistent with Executive Order 13175, Presidential memoranda, and any Department of the Interior policies, on subjects related to the undertakings.
- VI. PUBLIC PARTICIPATION
- A. Because BOEM and the Parties recognize the importance of public participation in the Section 106 process, BOEM shall provide opportunities for continuing public participation in Section 106-related activities, and shall consult with the Parties on possible approaches for keeping the public involved and informed throughout the term of the Agreement.
  - B. BOEM shall keep the public informed and may produce reports on historic properties and on the Section 106 process that may be made available to the public at BOEM’s headquarters, on the BOEM website, and through other reasonable means insofar as the information shared conforms to the confidentiality clause of this Agreement (Stipulation VII).



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VII. CONFIDENTIALITY

- A. Because BOEM and the Parties agree that it is important to withhold from disclosure sensitive information such as that which is protected by NHPA Section 304 (16 U.S.C. § 470w-3) (*e.g.*, the location, character and ownership of an historic resource, if disclosure would cause a significant invasion of privacy, risk harm to the historic resources, or impede the use of a traditional religious site by practitioners), BOEM shall:
1. Request that, by the second consultation meeting, each Party inform the other Parties if, by law or policy, it is unable to withhold sensitive data from public release.
  2. Arrange for the Parties to consult as needed on how to protect such information collected or generated under this Agreement.
  3. Follow, as appropriate, 36 CFR 800.11(c) for authorization to withhold information pursuant to NHPA Section 304, and otherwise withhold sensitive information to the extent allowable by laws including the Freedom of Information Act, 5 U.S.C. § 552, through the Department of the Interior regulations at 43 CFR Part 2.
  4. Request that the Parties agree that materials generated during consultation be treated by the Parties as internal and pre-decisional until they are formally released, although the Parties understand that they may need to be released by one of the Parties if required by law.

VIII. ADMINISTRATIVE STIPULATIONS

- A. In coordinating reviews, BOEM shall follow this process:
1. Standard Review: The Parties shall have a standard review period of thirty (30) calendar days for commenting on all documents, resource evaluations of significance, treatment plans, and specifications which are developed under the terms of this Agreement, from the date they are sent by BOEM via electronic media (email or secure website).
  2. Expedited Request for Review: The Parties recognize the time-sensitive nature of this work and shall attempt to expedite comments or concurrence when BOEM so requests. The expedited comment period shall not be less than fifteen (15) calendar days from the date BOEM sends such a request via electronic media.

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3. If a Party cannot meet BOEM’s expedited review period request, it shall so notify BOEM in writing within the fifteen (15) calendar day period. If a Party fails to provide comments or respond within the time frame requested by BOEM (either standard or expedited), then BOEM may proceed as though it has received concurrence from that Party. BOEM shall consider all comments received within the review period.
  4. All Parties will send correspondence and materials for review and via electronic media unless a Party requests, in writing, that BOEM transmit the materials by an alternate method specified by that Party. BOEM will attempt to accommodate these requests. However, the time and expense involved in transmitting review materials by an alternate method may preclude BOEM from accommodating these requests, in which case BOEM will send the review materials to that Party via electronic media. In any case, should BOEM transmit the review materials by the alternate method identified by the Party, the review period will begin on the date they are or would have otherwise been sent via electronic media.
  5. Each Party shall designate a point of contact for carrying out this Agreement and provide this contact’s information to the other Parties, updating it as necessary while this Agreement is in force. Updating a point of contact alone shall not necessitate an amendment to this Agreement.
- B. Dispute Resolution. Should any Signatory or Invited Signatory object in writing to BOEM regarding an action carried out in accordance with this Agreement, or lack of compliance with the terms of this Agreement, the Signatories and Invited Signatories shall consult to resolve the objection. Should the Signatories and Invited Signatories be unable to resolve the disagreement, BOEM shall forward its background information on the dispute as well as its proposed resolution of the dispute to the ACHP. Within 45 calendar days after receipt of all pertinent documentation, the ACHP shall either: (1) provide BOEM with written recommendations, which BOEM shall take into account in reaching a final decision regarding the dispute; or (2) notify BOEM that it shall comment pursuant to 36 CFR 800.7(c), and proceed to comment. BOEM shall take this ACHP comment into account, in accordance with 36 CFR 800.7(c)(4). Any ACHP recommendation or comment shall be understood to pertain only to the subject matter of the dispute; BOEM’s responsibility to carry out all actions under this Agreement that are not subjects of dispute shall remain unchanged.
- C. Amendments. Any Signatory or Invited Signatory may propose to BOEM in writing that the Agreement be amended, whereupon BOEM shall consult with the Parties to consider such amendment. This Agreement may then be amended when agreed to in writing by all Signatories and Invited Signatories, becoming effective on the date that the amendment is executed by the ACHP as the last Signatory.

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- D. Adding Federal Agencies. In the event that another Federal agency believes it has Section 106 responsibilities related to the undertakings which are the subject of this Agreement, that agency may attempt to satisfy its Section 106 responsibilities by agreeing in writing to the terms of this Agreement and notifying and consulting with the SHPOs and the ACHP. Any modifications to this agreement that may be necessary for meeting that agency’s Section 106 obligations shall be considered in accordance with Stipulation VIII.C of this Agreement.
- E. Term of Agreement. The Agreement shall remain in full force until BOEM makes a final decision on the last SAP submitted under a lease issued under this portion of the “Smart from the Start” initiative, or for ten (10) years from the date the agreement is executed, defined as the date the last signatory signs, whichever is earlier, unless otherwise extended by amendment in accordance with Stipulation VIII.C of this Agreement.
- F. Termination.
1. If any Signatory or Invited Signatory determines that the terms of the Agreement cannot or are not being carried out, that Party shall notify the other Signatories and Invited Signatories in writing and consult with them to seek amendment of the Agreement. If within sixty (60) calendar days, an amendment cannot be made, any Signatory or Invited Signatory may terminate the Agreement upon written notice to the other Signatories and Invited Signatories.
  2. If termination is occasioned by BOEM’s final decision on the last SAP contemplated under this portion of the “Smart from the Start” Initiative, BOEM shall notify the Parties and the public, in writing.
- G. Anti-Deficiency Act. Pursuant to 31 U.S.C. § 1341(a)(1), nothing in this Agreement shall be construed as binding the United States to expend in any one fiscal year any sum in excess of appropriations made by Congress for this purpose, or to involve the United States in any contract or obligation for the further expenditure of money in excess of such appropriations.
- H. Existing Law and Rights. Nothing in this Agreement shall abrogate existing laws or the rights of any consulting party or agency party to this Agreement.
- I. Compliance with Section 106. Execution and implementation of this Agreement evidences that BOEM has satisfied its Section 106 responsibilities for all aspects of these proposed undertakings by taking into account the effects of these undertakings on historic properties and affording the ACHP a reasonable opportunity to comment with regard to the undertakings.

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By:



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Date: 12-21-11

Maureen A. Bornholdt  
Program Manager, Office of Renewable Energy Programs  
Bureau of Ocean Energy Management


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Date: 1/20/2012

Timothy A. Slavin  
Director  
and State Historic Preservation Officer

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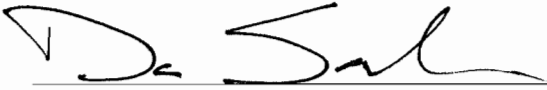


Date: 1-18-12

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J. Rodney Little  
Maryland State Historic Preservation Officer  
Maryland State Historic Preservation Office

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Date: JAN. 31, 2012

Daniel D. Saunders  
Deputy State Historic Preservation Officer  
New Jersey State Historic Preservation Office  
New Jersey Department of Environmental Protection

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Date: 4/18/12

Kathleen S. Kilpatrick, Director  
Department of Historic Resources and Virginia State Historic Preservation Officer  
Virginia State Historic Preservation Office



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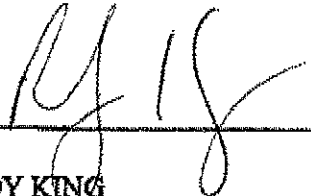
  
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Date: 01/11/2012

[NAME] John Brown  
[TITLE] Narragansett Indian Tribal Historic Preservation Officer  
Narragansett Indian Tribe

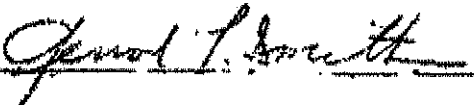
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TRUSTEES OF THE SHINNECOCK INDIAN NATION

  
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RANDY KING  
TRUSTEE, CHAIRMAN

Date: 1/20/2012

  
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GERROD SMITH  
TRUSTEE,

Date: 1/20/2012

  
\_\_\_\_\_

FRED BESS  
TRUSTEE,

Date: 01/20/2012

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Date: 1/31/12

John M. Fowler  
Executive Director  
Advisory Council on Historic Preservation