

Enclosure 4: Draft Memorandum of Agreement

DRAFT
MEMORANDUM OF AGREEMENT

BETWEEN the DEPARTMENT OF THE NAVY and
the MAINE STATE HISTORIC PRESERVATION OFFICER
PURSUANT to 36 CFR PART 800

REGARDING THE BRIDGE 1 STRUCTURAL REPAIRS PROJECT
AT PORTSMOUTH NAVAL SHIPYARD, KITTERY, MAINE

WHEREAS, the Department of Navy (Navy) has determined that the proposed project, Bridge 1 Structural Repairs at the Portsmouth Naval Shipyard, Kittery, Maine (Portsmouth), will have an adverse effect on resources that are listed or eligible for listing in the National Register of Historic Places; and

WHEREAS, the Undertaking includes the structural reinforcement of piers and abutments through the installation of micropiles, the cladding of piers with sheet piles, the capping of abutments with concrete; the removal of the bridge superstructure including the decking, girders, railroad, sidewalks and lighting; the construction of a new bridge superstructure including new stringers, concrete decking, vehicle rails, sidewalks, windscreens, increased anti-terrorism force protection measures including pop-up bollards and lighting; and

WHEREAS, the area of potential effect (APE) consists of the Portsmouth Naval Shipyard Historic District (Historic District) and more specifically, the construction site and the adjacent view shed which contains Bridge 1 as well as the views from the Town of Kittery's Foreside District; and

WHEREAS, Bridge 1 is a contributing resource to the Historic District and as such is eligible for inclusion in the National Register of Historic Places, and the Maine State Historic Preservation Office (ME SHPO) has concurred with that determination in a letter dated February 5, 2008; and

WHEREAS, the APE is located within an area of historic archaeological sensitivity; and

WHEREAS, the Navy has conducted a Phase "1" archaeological survey of the project area and identified that further archaeological survey is not necessary within the project area as excavation will be limited to areas of fill and previously excavated areas; as such, the Navy determined that the Undertaking will have no adverse effect on archaeological resources; and

WHEREAS, the Navy determined the Undertaking will have an adverse affect to Bridge 1 and the Historic District; and

WHEREAS, the ME SHPO has/has not concurred with the Navy's determination of effect finding listed above in a letter dated XXX XX, XXX; and

WHEREAS, the Navy solicited comments on the Undertaking from the interested public under 36 C.F.R § 800.2 (d), and contacted the Portsmouth Historical Society, Maine Preservation, New Hampshire Preservation Alliance, the Kittery Historical and Naval Society, the Town of Kittery, and the City of Portsmouth, of which XXXX elected to/elected not to comment on the project; and

WHEREAS, pursuant to 36 C.F.R § 800.2 (c)(2), the Navy contacted the Aroostook Band of Micmac Indians of Maine, Houlton Band of Maliseet Indians of Maine, Indian Township Reservation of the Passamaquoddy Tribe of Maine, Penobscot Tribe of Maine and the Pleasant Point Reservation of the Passamaquoddy Tribe of Maine, to determine if they might attach religious and cultural significance to the property subject to this agreement, of which the XXXXX has/has not elected to comment; and

WHEREAS, in accordance with 36 C.F.R. § 800.6(a)(1), the Navy has notified the Advisory Council on Historic Preservation (ACHP) of its adverse effect determination providing the specified documentation, and the ACHP has chosen/chosen not to participate in the consultation pursuant to 36 C.F.R § 800.6(a)(1)(iii) as indicated in their letter dated XXX XX, XXXX; and

WHEREAS, an executed copy of this Agreement will be filed with the ACHP pursuant to 36 C.F.R § 800.6(b)(1)(iv); and

NOW, THEREFORE, the Navy and the ME SHPO agree that this Undertaking shall be implemented in accordance with the following stipulations in order to take into account the effect of the Undertaking on historic properties.

STIPULATIONS:

I. Minimized impact to Historic Resources, Design Review

- A. The Navy is designing the repairs and modernizations to minimize impact to historic resources to the maximum extent practicable. The Navy shall incorporate comments from the 95% submission into the project however possible and shall submit the 100% design drawings to the ME SHPO for review and to confirm the design minimizes the impact to the Historic District to the extent feasible within the parameters of the project requirements. The ME SHPO shall have fifteen (15) calendar days from the date on which the design drawings are received to respond. No response from the ME SHPO at the end of the fifteen (15) calendar days following confirmed receipt of design drawings may be considered by the Navy as concurrence on the appropriateness of the design.

II. Documentation of Bridge 1

- A. The Navy shall prepare a Level II Maine Historic Engineering Record for Bridge 1 (MHER). The report shall contain information as outlined in the Schedule of Documentation provided by the ME SHPO on XXX XX, XXXX.
- i. The MHER shall include a site plan illustrating the Bridge as a connection between Kittery Foreside District and the Shipyard. Select historic drawings, where available, shall be digitally reproduced at a high quality or photographed with large-format negatives.
 - ii. Large format black and white photographs illustrating context, overall form, structural system and details including the manufacturers plate, riveted connections and rail track. All photographs shall be reviewed and accepted by the ME SHPO prior to beginning any demolition activities.
 - iii. The MHER shall include a written summary of the bridge's construction history including a discussion of changing transportation trends at the Shipyard; the function and use of Bridge 1 from the time of its construction to present; the Bridge's relationship with the larger Portsmouth Naval Shipyard Historic District and its role in Shipyard operations throughout the building's history; and a description of the railroad system on the Shipyard and how Bridge 1 fits within that context.
 - iv. The Navy shall submit a draft of the MHER to the ME SHPO for their review and comment. The submittal shall be made at a stage during the process when the ME SHPO comments may be incorporated into the final MHER.
 - v. The Navy shall provide the MHER documentation to the ME SHPO for retention and shall also archive the documentation at the Portsmouth Naval Shipyard in Kittery, Maine.

III. Archaeological Resources

A. Ground Disturbing Activities

- i. Ground disturbing activities shall occur in areas previously disturbed by utility installation or in areas identified as composed of fill and not requiring further archaeological investigation based on a Phase I archaeological survey of the project area. The ME

SHPO concurred/did not concur with the findings of that survey in a letter dated XX XXX, XXXX.

- ii. If significant archaeological resources or a site is inadvertently discovered during ground disturbing activities, the Navy shall proceed in accordance with the process outlined in Stipulation B, Post Review Discoveries of this agreement.

B. Post Review Discoveries

- i. In the event that a previously unidentified archaeological resource is discovered during ground disturbing activities, all construction work involving subsurface disturbance shall be halted in the area of the resource and in the surrounding area where further subsurface deposits may reasonably be expected to occur. Within two (2) working days the Navy shall have an archaeologist meeting the SOI *Professional Qualifications Standards* inspect the work site and determine the extent and nature of the affected archaeological property. The ME SHPO and other parties, as deemed appropriate by the archaeologist, shall be consulted in setting the boundaries of the archaeological resource. Construction work may then proceed in the project area outside of the site boundaries.
- ii. The Navy shall notify the ME SHPO and, if appropriate, the ACHP within two (2) working days of the discovery in accordance with 36 C.F.R § 800.13. If the archaeological resource is, or has the potential to be, of Native American origin, the Navy shall also notify any Federally recognized Indian tribes that might attach religious and cultural significance to the affected property. The notifications shall describe the Navy's assessment of National Register eligibility of the property and the proposed actions to resolve the adverse effects. In accordance with 36 C.F.R § 800.13 (b)(3), the ME SHPO, federally recognized tribes, as appropriate, and the ACHP shall respond within two (2) working days of the notification.
- iii. If the resource is determined by the Navy, in consultation with the ME SHPO, to meet the National Register Criteria (36 C.F.R § 60.4), the Navy shall ensure compliance with 36 C.F.R § 800.13. Work in the affected area may not proceed until the development and implementation of appropriate data recovery or other recommended mitigation procedures. The Navy shall provide the ME SHPO, and make available to consulting parties and the interested public, a report on the mitigation actions when they are completed.

- iv. If in consultation with the ME SHPO, a determination is made that the located resource is not eligible for inclusion on the National Register of Historic Places, work may resume in the affected area.

C. Human Remains

- i. Human remains and associated funerary objects of Native American origin (prehistoric or historic) encountered during the course of actions taken as a result of this Agreement shall be treated in a manner consistent with the provisions of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 et seq.) and its implementing regulations, 43 C.F.R. § 10. Treatment must include consultation with any Federally-recognized tribes with an interest in the project, project area, or region.
- ii. The Navy shall treat all burial sites, human remains and funerary objects with dignity and respect. The Navy will follow the applicable federal laws related to the treatment of buried human remains including the National Historic Preservation Act (16 U.S.C 470 et seq.), Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 et seq.), and the Archaeological Resources Protection Act (16 U.S.C. 470 et seq.), and other guidance including the Navy OPNAV Instruction 11170.2A *Navy Responsibilities Regarding Undocumented Human Burials* of January 2007, and the Advisory Council on Historic Preservation's *Policy Statement Regarding Treatment of Burial Sites, Human Remains and Funerary Objects* of February 2007.

ADMINISTRATIVE CLAUSES:

I. Dispute Resolution. Should the ME SHPO object in writing to any action carried out or proposed by the Navy with respect to the implementation of this Agreement within thirty (30) calendar days, the Navy shall consult with the ME SHPO to resolve the objection. If the Navy determines that the objection cannot be resolved, the Navy shall request comments of the Advisory Council on Historic Preservation pursuant to 36 C.F.R. Part 800.

II. Anti-Deficiency Act. The Anti-Deficiency Act, 31 U.S.C. sections 1341, 1342 and 1517(a), prohibits federal agencies from incurring an obligation of funds in advance or in excess of available appropriations. All requirements set forth in this Agreement requiring the expenditure of Federal Government funds are expressly subject to the availability of

appropriated funds. Nothing in this agreement shall be interpreted to require obligation or expenditure of funds in violation of the Anti-Deficiency Act.

III. Unavailability of Funds. If the Navy cannot perform any obligation set forth in this Agreement due to the unavailability of funds, the Navy and the ME SHPO intend the remainder of the Agreement to be executed. Any obligation under the Agreement which cannot be performed due to the unavailability of funds must be re-negotiated between the Navy and the ME SHPO.

IV. Amendments. Any party to this Agreement may request that it be amended, whereupon the parties will consult to consider such amendment in accordance with 36 C.F.R Part 800. The amendment shall be agreed to in writing by all signatories and will be effective on the date a copy signed by all of the signatories is filed with the ACHP.

V. Termination. Any signatory to the Programmatic Agreement may terminate it by providing thirty (30) calendar days notice to the other parties, explaining the reason for the termination. The parties shall consult during the 30-day period prior to termination to seek agreement on amendments or other actions that would avoid termination. In the event of termination, the Navy shall comply with 36 C.F.R. § 800.3 through 800.7 with regard to the Bridge 1 Structural Repairs Project.

VI. Duration. The effective date of this Agreement shall be the date of the last signature. This agreement shall expire if its terms are not carried out within ten (10) years from the date of its execution, unless the responsible parties agree in writing to an extension for carrying out its terms. Six months prior to the expiration date, the parties shall review the MOA for possible amendment and renewal.

EXECUTION of this Agreement by the Navy and the ME SHPO, and implementation of its terms, is evidence that the Navy has taken into account the effects of this Undertaking on historic properties and afforded ME SHPO and the ACHP opportunity to comment, satisfied the requirements of Section 106 of the National Historic Preservation Act, and may proceed with the project.

Nothing in this agreement serves to create any right or benefit, substantive or procedural, enforceable in law or equity by a party against the United States, its officers or any person.

Each of the undersigned certifies that he or she has full authority to bind the party that he or she represents for purposes of entering into this agreement.

PORTSMOUTH NAVAL SHIPYARD

BY: _____

Patricia H. Riordan, Base Support Officer

DATE

MAINE STATE HISTORIC PRESERVATION OFFICER

BY: _____ DATE _____
Earle G. Shettleworth, Jr.

