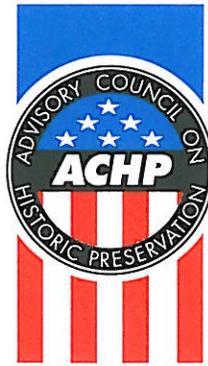


Appendix A

Advisory Council on Historic Preservation



Preserving America's Heritage

January 20, 2010

Poojan B. Tripathi
Project Manager
Alternative Energy Programs
U.S. Dept. of the Interior
Minerals Management Service
381 Elden Street, MS 4090
Herndon, VA 20170

Ref: Proposed Cape Wind Energy Project, Nantucket Sound, Massachusetts.

Dear Mr. Tripathi:

We are writing to follow up on the consultation meeting hosted by Secretary of the Interior Ken Salazar on January 13, 2010 for the Cape Wind project. That meeting was held as a part of the Minerals Management Service's (MMS) compliance with Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations, "Protection of Historic Properties" (36 CFR Part 800). In light of that meeting ACHP would like to share its views on the status of the Section 106 consultation and steps that can bring the Section 106 process to closure.

In our letters of April 1, 2009 and June 23, 2009, we raised several questions that we believed MMS needed to resolve in order to move the consultation process forward. We are pleased to note that MMS has now addressed those questions.

- MMS conducted site visits on Cape Cod and Martha's Vineyard with the Mashpee Wampanoag Tribe and the Wampanoag Tribe of Gayhead (Aquinnah) in August 2009. On November 17, 2009 MMS sent findings to the Massachusetts State Historic Preservation Officer (SHPO) regarding the eligibility of and effects to additional properties identified by the tribes during those site visits. Subsequent to MMS' revisions of its finding on January 13, 2010, MMS has found that two additional properties on Cape Cod and two additional properties on Martha's Vineyard are eligible and will be adversely affected by this undertaking. It also concluded that ten properties identified on Martha's Vineyard are located outside the Area of Potential Effects (APE). As a result the ACHP does not anticipate further consultation regarding the identification and eligibility of additional properties of interest to the tribes.
- MMS also requested that the National Park Service (NPS) comment on the nature of the effect of the undertaking on the Nantucket Historic District and the Kennedy Compound, both National Historic Landmark (NHL) properties. The NPS provided its views on October 16, 2009.

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- On November 18, 2009 MMS requested a formal determination of eligibility (DOE) for Nantucket Sound from the Keeper of the National Register of Historic Places. The Keeper issued her determination on January 4, 2010, finding the Sound eligible.
- Subsequently, on January 13, 2010 MMS amended its finding of effect for the undertaking.

These efforts have produced new information essential to the Section 106 consultation process as it moves forward. We note that the draft Memorandum of Agreement (MOA) currently before the consulting parties predates the steps MMS has taken to gather this new information and needs to be reconsidered in light of the findings. In order to move forward expeditiously, MMS and the consulting parties need to consider the comments provided by the NPS regarding the nature of effects to the NHLs, the Keeper's DOE for Nantucket Sound, and MMS' revised assessment of effects in the effort to reach consensus on possible ways to resolve the adverse effects. As part of this process, we feel it is critical that MMS clearly ascertain the tribes' assessment of the revised finding of effect and their opinion whether there are acceptable mitigation measures that could be included in a final MOA.

If further consultation leads to agreement among MMS, the SHPO, and the ACHP on how to resolve adverse effects, we can execute an MOA to conclude the Section 106 process. However, if no agreement can be reached, termination of the consultation process would ensue and MMS would request the formal comments of the ACHP. The ACHP would issue formal comments to the head of the agency. Once the head of the agency has considered the ACHP comments and responded to them, in accordance with the ACHP's regulations and Section 110(l) of the NHPA, MMS can make a final decision on the project.

The ACHP looks forward to working with MMS and the consulting parties to move the Section 106 process toward an appropriate conclusion. We believe that the schedule proposed by Secretary Salazar for bringing the Section 106 review to conclusion is reasonable and workable. He has requested that consulting parties and the public submit written comments regarding the effects of the project and suggestions for resolution of adverse effects to MMS by February 12, 2010. He has also urged that the MMS, ACHP, and SHPO determine by March 1, 2010 if it will be possible to reach an agreement on resolution of adverse effects. We can assure you that the ACHP will make every effort to achieve this goal.

Should you have any questions or wish to discuss these matters further, please contact Dr. John T. Eddins at 202-606-8553 or by e-mail at jeddins@achp.gov.

Sincerely,


for Reid J. Nelson
Director
Office of Federal Agency Programs



Preserving America's Heritage

December 11, 2009

Ms. Bettina Washington
Tribal Historic Preservation Officer
Wampanoag Tribe of Gay Head (Aquinnah)
20 Black Brook Road
Aquinnah, MA 02535

Ref: Request for ACHP comment on proposed expansion of APE for Cape Wind Energy Project

Dear Ms. Washington:

The Advisory Council on Historic Preservation (ACHP) received your letter of November 16, 2009 to John L. Nau III, Chairman. In that letter you requested that we make “a formal determination on the boundaries” of the Area of Potential Effects (APE) established by the Minerals Management Service (MMS) pursuant to Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations, “Protection of Historic Properties” (36 CFR 800). You have specifically asked whether the APE should be expanded to include the staging area for storage and shipment of the turbines and oil to be used as a lubricant for the turbines, extending from Quonset Point in Rhode Island to the location of the turbine array in Nantucket Sound, Massachusetts.

During the Section 106 consultation that has occurred to date, the tribes have expressed concerns about the economic and cultural repercussions of potential oil spills that might affect tribal shellfish and aquaculture grounds and other sites of religious and cultural significance to Indian tribes. The MMS, as federal agency of record, has determined, in its letter of June 26, 2009, that an expansion of the APE is not warranted. The conclusion was based on studies referenced in the Environmental Impact Statement (EIS) documents that indicate the potential for an oil spill from activities associated with the development and operation of the Cape Wind project is ‘extremely low.’

Section 106 requires that the federal agency determine the APE in consultation with the State Historic Preservation Officer (SHPO) and with appropriate THPOs if the undertaking has the potential to affect historic properties on tribal land. The ACHP does not have a formal role in this determination, other than the ability to provide advisory comments under 36 CFR 800.2 or 800.9. According to the definition provided at 36 CFR 800.16(a), the APE establishes the boundaries of “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist.” The definition assumes that effects to historic properties, whether direct or indirect, immediate or farther removed in time, at a distance, or cumulative over time, are reasonably foreseeable, based on consultations with stakeholders. This presumes that supporting documentation has been made available to the federal agency verifying the likelihood of effects on historic properties. According to information available in the FEIS (Sections 5.2.1.1, 5.2.2.1, and 5.2.3.1)

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and reports referenced therein (Report No. 4.1.3-1 “Simulation of oil Spills from the Cape Wind Energy Project Electric Service Platform in Nantucket Sound”, Report No. 3.3.5-1 “Oil Spill Probability Analysis for the Cape Wind Energy Project in Nantucket Sound”, and Report No. 5.2.1-1 “Vessel Allision and Collision Oil Spill Risk Analysis”), the MMS has considered the possibility of oil and fuel spills from work boats, delivery boats, and also from the Electric Service Platform (ESP), and the Wind Turbine Generators (WTGs) themselves. The modeling provides estimates that there would be one spill of oil or fuel in 16,677 years from work-boats and one spill in 500,000 years from oil delivery boats. The analysis provides estimates that if a spill event from transiting vessels occurs, it has a 90 percent probability of being one gallon or less, and only a 1 percent probability of being as much as 2,106 gallons. A spill event from the operation and maintenance of the WTGs and ESP, in Nantucket Sound itself, might occur 1.862 times over 30 years and has a 90 percent probability of being 50 gallons or less and a 1 percent probability of being as much as 10,198 gallons.

Thus, it appears based on these studies that the potential for oil spills of a magnitude that might affect historic properties from activities associated with this undertaking cannot be considered to be reasonably foreseeable in a project with a projected life span of 30 years or less. Further, in undertakings carried out on land, materials used in construction or operation are usually manufactured and stored at other locations and transported to the site of the project. In Section 106 consultations for such undertakings, the APE does not include the manufacture and storage sites or transport routes for materials. Nevertheless, the proposed staging areas on and near the project site should be included in the APE.

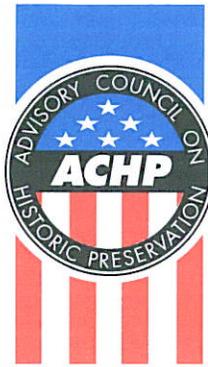
Finally, we note that in the FEIS, MMS references plans (Draft Oil Spill Response Plan and Emergency Response Plan) that have been developed to deal with oil and fuel spills that might occur during construction, operation, and deconstruction of the project. These emphasize controlling the spread and expediting the cleanup of spills, with primary focus on reduction of impacts on biota. The procedures set forth in these plans, when finalized, will serve to reduce or prevent impacts from any oil/fuel spills to historic properties that might be affected. As part of consultation, additional stipulations can be developed for inclusion in an agreement to address the role of other stakeholders in emergencies, and we would welcome the tribes’ recommendations in this regard.

The ACHP appreciates the tribes’ concerns about the possible impacts of oil spills related to this undertaking to cultural and economic interests of the tribe. In this case, the ACHP does not feel there is compelling evidence to recommend to MMS that it expand the APE, to include the transit route for materials and supplies from Quonset Point, Rhode Island, to Nantucket Sound. Should you have any questions or wish to discuss this matter further, please contact John T. Eddins, PhD at 202-606-8553, or by e-mail at jeddins@achp.gov.

Sincerely,



Reid J. Nelson
Director
Office of Federal Agency Programs



Preserving America's Heritage

June 23, 2009

Andrew D. Krueger, Ph.D.
Alternative Energy Programs
U.S. Department of the Interior
Minerals Management Service
381 Elden Street, MS 4090
Herndon, VA 20170

Ref: *Proposed Cape Wind Energy Project
Nantucket Sound, Massachusetts*

Dear Dr. Krueger:

The ACHP wanted to follow up with MMS regarding the June 16, 2009 consultation meeting held in Hyannis, Massachusetts concerning the Cape Wind project. While this meeting was productive in assessing the historic preservation issues we believe that there are certain actions that MMS should now take to make the next meeting, currently scheduled for July 21st, most effective in moving the Section 106 process forward. If MMS can provide the consulting parties with the information requested below, we should be able to determine at this meeting whether further consultation is likely to lead to a memorandum of agreement or whether termination and formal ACHP comment would be the most prudent way to conclude the Section 106 process.

First, the question of the National Register eligibility of Nantucket Sound as a traditional cultural place needs to be resolved. The earlier statements of the National Park Service appeared to be limited to a more general approach to the eligibility of bodies of water, without regard to their traditional religious or cultural significance. Formal clarification of this issue is needed so that the property can be given appropriate consideration in the consultation.

Similarly, MMS needs to obtain the formal views of the National Park Service on the project's visual impacts on the setting and views of the Nantucket Island and Kennedy Compound National Historic Landmark Districts. The effects on these two properties of national significance are critical to the overall assessment of the project's effects and the consideration of alternatives to avoid, minimize, or mitigate them. The ACHP has refrained from seeking a formal Section 213 report from the NPS in the interests of procedural efficiency and time. At this juncture in consultation, however, we need to have the substantive opinion of the NPS on this issue as a matter of record for all consulting parties.

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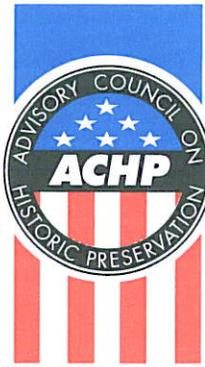
Finally, we understand that the Wampanoag Tribe of Gay Head (Aquinnah) and the Mashpee Wampanoag Tribe both raised the issue of additional historic properties of significance to them. We recommend that MMS elicit sufficient information from the Tribes regarding these properties so that their National Register eligibility can be resolved and so they can be given the appropriate consideration during the Section 106 review.

Should you have any questions or would like assistance from the ACHP in meeting these needs, please contact Dr. John Eddins at (202)606-8553 or via email at jeddins@achp.gov. We appreciate your continued cooperation in this matter.

Sincerely,



Reid Nelson
Director
Office of Federal Agency Programs



Preserving America's Heritage

April 1, 2009

Andrew D. Krueger, Ph.D.
Alternative Energy Programs
U.S. Dept. of the Interior
Minerals Management Service
381 Elden Street, MS 4090
Herndon, VA 20170

Ref: *Proposed Cape Wind Energy Project*
Nantucket Sound, Massachusetts

Dear Dr. Krueger:

As a follow-up to a March 20, 2009 meeting with representatives of the Minerals Management Service (MMS) and the Department of Interior (DOI), the Advisory Council on Historic Preservation (ACHP) is providing our assessment of the status of the consultation for the Cape Wind project. In addition, we would like to offer suggestions regarding the next steps to advance the process for complying with Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations, "Protection of Historic Properties" (36 CFR Part 800).

As a result of the issuance of a Finding of Adverse Effect on December 29, 2008, MMS is now formally consulting to resolve adverse effects that may result from the proposed Cape Wind project. Pursuant to Section 36 CFR§ 800.6 this consultation should address alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects. The ACHP has concluded that the information provided by MMS to date is sufficient for the consultation process to move forward.

Based on our review of the comments of consulting parties, it is apparent there are still several concerns about the adequacy of the Section 106 consultation, including the sufficiency of the effort to identify historic properties, the consideration of alternatives, and the use of documentation generated in the NEPA process to support determinations in the Section 106 process.

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Regarding the identification issue, we believe that the work that has been done so far meets the needs of moving the Section 106 process forward. It is appropriate for MMS to take additional steps to identify historic properties as consultation progresses or for the consulting parties to incorporate further identification efforts into a Memorandum of Agreement in order to more precisely define appropriate mitigation efforts to be carried out.

As to the latter two points, the Section 106 regulations promote the use of information, including the analysis of alternatives, developed for other reviews under other authorities, such as NEPA. Accordingly, MMS should clarify how the NEPA review addressed historic preservation issues that have been raised by other consulting parties.

It would be useful to clarify how historic preservation issues regarding the siting of the wind turbines, the design of the facility, the level of audible impacts, and the impact of long-term maintenance and operations were considered as part of analysis of alternatives included in the NEPA document. Since the location of the undertaking is a major point of contention among the consulting parties, clarification by MMS of the parameters established for the analysis of alternatives, along with the documentation of the analysis, would be helpful to move the consultation forward.

Tribal consultation is an important component of the Section 106 consultation process. MMS should consult further with the affected Indian tribes to determine what further evaluation is needed of properties of religious and cultural significance to them to address the effects on their use of the properties as well as long-term preservation issues. Taking into account Section 304 of the NHPA and Section §800.11(c) of the regulations, MMS should pursue discussions with the tribes to gather appropriate information for MMS to make an informed decision about the resolution of these effects.

In addition to addressing tribal issues, MMS should be prepared to discuss the following issues in the consultation process:

1. Mitigation of visual effects on two National Historic Landmarks caused by the wind turbines;
2. Long term cumulative effects to historic properties resulting from operation and maintenance of this facility;
3. Alternative sites that may be better suited for the Cape Wind Project.

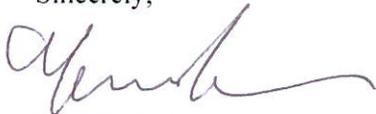
It is important that MMS not be irrevocably bound by conclusions reached in the NEPA process, but to be open to good faith consultation of mitigation measures during the Section 106 review process.

As we stated at the meeting, Section 106 does not preordain an outcome. Rather, through consultation, open communication, and flexibility, the consulting parties should negotiate mitigation measures to balance project needs with historic preservation concerns. We would encourage MMS and the consulting parties to work toward a consensus solution that can be embodied in a Memorandum of Agreement (MOA) or Programmatic Agreement (PA). Execution of an MOA or PA would be evidence that MMS has met its compliance responsibilities. Such an agreement would minimize the opportunities for a successful legal challenge under Section 106.

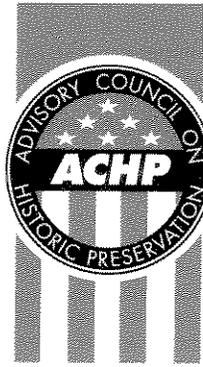
However, should MMS, the Massachusetts SHPO or the ACHP conclude that an agreement cannot be reached, then, pursuant to Section §800.7 of the regulations, any of the parties may terminate consultation, which would lead to formal comments from the ACHP. The regulations provide for a 45-day period for the submission of ACHP comments to the Federal agency; however, for this particular undertaking we have agreed to expedite our review and respond within 30 days of notice of a termination.

We stand ready to continue advising MMS about its Section 106 review for this undertaking. The ACHP will be available to attend future consultation meetings scheduled by MMS for this undertaking. Should you have any questions or wish to discuss this matter further, please contact Dr. John T. Eddins at 202-606-8553, or by e-mail at jeddins@achp.gov.

Sincerely,



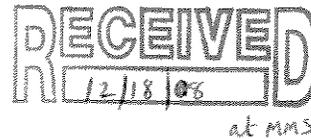
Reid J. Nelson
Director
Office of Federal Agency Programs



Preserving America's Heritage

December 17, 2008

Dr. Rodney E. Cluck
MMS Cape Wind Project Manager
Minerals Management Service
381 Elden Street
Herndon, VA 20164



Ref: *Proposed Cape Wind Energy Project
Nantucket Sound, Massachusetts*

Dear Dr. Cluck:

The Advisory Council on Historic Preservation (ACHP) would like to provide the following observations and advice to the Minerals Management Service (MMS) regarding its efforts to comply with Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations, "Protection of Historic Properties" (36 CFR Part 800), for the referenced undertaking. Pursuant to the Energy Policy Act of 2005, the MMS is charged with primary responsibility for environmental analysis and regulatory oversight for renewable energy projects on the Outer Continental Shelf (OCS), including the referenced undertaking. As a result, the MMS has assumed primary responsibility for compliance with Section 106 of the NHPA for this undertaking. The ACHP provides these observations pursuant to Section 36 CFR 800.9(a) of our regulations.

According to recent press reports, the MMS may be considering issuing the Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) for this undertaking prior to the end of December 2008. It is the opinion of the ACHP that the Section 106 process must be completed prior to or concurrent with the signing of a ROD. Section 106 of the NHPA instructs the Federal agency to take into account the effect of the undertaking on any property that is listed in or eligible for the National Register of Historic Places "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license." 16 U.S.C. § 470f (emphasis added). This statutory language makes it clear that a Federal agency must complete its Section 106 responsibilities before ("prior to") reaching its final decision ("approval," "issuance") on an undertaking.

According to the Council on Environmental Quality's (CEQ) regulations, a ROD "shall state . . . what the decision was . . . [and] . . . whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not." 40 C.F.R. § 1502.2 (emphasis added). When a ROD is released, the agency's final decision on an undertaking has been made and the ROD officially states what that agency's final decision "was." In order to fit into the Section 106 timeframe, the ROD should be issued concurrent with

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or after the completion of the Section 106 process. As you know, the execution of a Section 106 agreement, such as a Memorandum of Agreement or Programmatic Agreement, prior to the issuance of a ROD would give the agency this completion. For the reasons stated above, we encourage the MMS to consider the implications of the proposed timing of its issuance of a ROD and to complete the Section 106 process prior to signing the ROD. If the MMS proceeds with issuance of a ROD prior to the conclusion of the Section 106 process, the ACHP must then consider if this action has foreclosed the ACHP's opportunity to comment.

Prior to the enactment of the Energy Policy Act, the Corps of Engineers (Corps), New England District (NAE) was the lead federal agency for the Section 106 consultation related to this undertaking. The ACHP formally entered into the Section 106 consultation with the Corps for the undertaking in March of 2005 upon its determination that the project would adversely affect historic properties on or eligible for the National Register of Historic Places. Since assuming responsibility for renewable energy projects on the OCS, MMS has taken initial steps to take into account the effects of the referenced undertaking on historic properties by requiring a re-analysis of the findings of historic property identification studies conducted by the Corps, by the publication of a Draft Environmental Impact Statement (DEIS) for the Cape Wind project, and in the solicitation of public comments. In the DEIS, MMS recognized adverse effects to three historic properties. A number of consulting parties responded to the DEIS with concerns about how the MMS had been meeting its Section 106 responsibilities to date, specifically with several issues outlined below.

In July 2008, ACHP staff met with MMS staff to discuss the status of the Section 106 process for the undertaking. At that time, the ACHP reminded MMS that the agency needed to continue through the steps of the Section 106 process, in consultation with the Massachusetts State Historic Preservation Officer (SHPO), interested federally recognized Indian tribes (tribes), and other consulting parties to identify and evaluate historic properties, assess effects, and negotiate the resolution of adverse effects. We also reminded MMS that it must provide the public with substantive information about the undertaking and its effects on historic properties, and seek and consider public comment and input. At that meeting, ACHP noted the concerns expressed by consulting parties, about:

- 1) the consideration of alternatives that could remove or lessen potential for adverse effects to historic properties including several National Historic Landmarks (NHLs);
- 2) the definition of the Area of Potential Effects (APE) and the scope of the effort to identify historic properties that might be affected by the undertaking;
- 3) the need to consult with interested tribes on a government-to-government basis and consider concerns they have about effects on potential historic properties of religious and cultural importance; and
- 4) the need to resolve the discrepancies between the determinations made by the Corps, the conclusions of the current MMS DEIS about the number of identified historic properties and determination of effect, and additional concerns of stakeholders and the interested public.

Subsequent to our meeting in July, MMS held a Section 106 consultation meeting for interested tribes on September 8, 2008, and a consultation meeting for all consulting parties on September 9, 2008. ACHP did not attend these initial meetings, but it is our understanding that the purpose of the meetings was to outline the status of the Section 106 process at that point, outline the steps ahead, and request consulting party input on the identification of historic properties and the assessment of effects as presented in the DEIS. Follow-up consulting party meetings were tentatively scheduled for October, November, and December, but have been cancelled each time

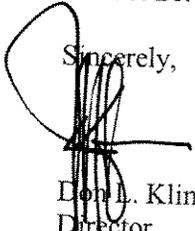
and now are planned sometime in early 2009. Based on recent information, it appears that MMS is considering accepting the effect determinations previously made by the Corps and is also considering additional recommendations about the identification of historic properties and effects made by consulting parties and other stakeholders. This is a positive development.

Following review of materials available to us, the Section 106 process for this undertaking appears to be still at the stage of identification of historic properties that might be affected by the undertaking as set forth in 36 CFR Section 800.4(b) and 800.4(c). According to our regulations, the federal agency must make a "reasonable and good faith effort" to carry out appropriate identification efforts. The agency determines the scope of this effort, in consultation with the appropriate SHPO/THPOs. Notwithstanding the information presented in the DEIS, MMS has yet to formally document its APE to the Massachusetts SHPO and other consulting parties, and identify historic properties within that APE that might be affected by the undertaking. By making formal determinations about the APE, historic properties identified, and effects, the agency sets in motion a series of steps, each with a specific time frame, that allow for formal response from SHPO/THPO and other consulting parties. These initial steps are necessary in order to move toward resolution of the Section 106 process.

We are well aware that MMS is breaking new ground in its effort to assess the effects on historic properties of construction and operation of wind turbine farms in open waters on the OCS. There is limited precedent to be relied on for making determinations about the nature and significance of effects to historic properties, over varying distances, in open seascapes, from temporary structures of this nature. There are also inherent difficulties in identifying and evaluating archaeological sites that might be located below the surface of the ocean floor. As you know, Section 106 of the NHPA does not require Federal agencies to preserve all historic properties, or even avoid adverse effects to such. Rather, it requires that Federal agencies take into account the effects of undertakings on historic properties and attempt to resolve adverse effects, by following the steps of the Section 106 process as set forth in 36 CFR part 800. Because of the unique nature of this type of undertaking, located in this type of setting, MMS may want to consider the utility of developing, in consultation with appropriate stakeholders, a program alternative, pursuant to 36 CFR 800.14, to govern the Section 106 process for future undertakings of this kind. Such an alternative could provide predictability, facilitate the delineation of an appropriate APE, streamline the scope of identification efforts, and provide guidelines for adequate assessment of effects to identified historic properties. The Section 106 consultation for the current undertaking will provide valuable lessons learned that could be applied to the development of a program alternative.

The ACHP looks forward to further assisting the MMS, Massachusetts SHPO, and other consulting parties during the Section 106 process for this undertaking. To facilitate our ongoing involvement, we request that we be copied on all documents and communications relating to the effects of this undertaking on historic properties and properties potentially eligible for inclusion on the NRHP. Should you have any questions or wish to discuss this matter further, please contact Dr. John T. Eddins at 202-606-8553, or by email at jeddins@achp.gov.

Sincerely,



Don L. Klima
Director

Office of Federal Agency Programs

Appendix B

Alliance to Protect Nantucket Sound

February 12, 2010

VIA ELECTRONIC SUBMISSION AND US MAIL

The Honorable Ken Salazar
c/o James F. Bennett
Chief, Branch of Environmental Assessment
Minerals Management Service
381 Elden Street
Mail Stop 4042
Herndon, Virginia 20170-4817

Re: Cape Wind Energy Project, Findings Document (Revised)

Dear Secretary Salazar:

I am responding on behalf of the Alliance to Protect Nantucket Sound (the "Alliance") to the comment letter dated today and addressed to you from Matthew F. Pawa, legal counsel to Clean Power Now, Inc. ("Pawa Letter.") In his letter, Mr. Pawa asserts, as he has so many other times in this matter, that the Cape Wind energy project will have no significant environmental or historic preservation effects of any kind to any historic resources, that the NEPA and section 106 review of this project have been appropriate, thorough and timely, and that the project should be approved without delay.

On the contrary, the section 106 review of the Cape Wind energy project as implemented by Minerals Management Service ("MMS") has been tardy, incomplete and legally insufficient. Moreover, any reasonable and clear-eyed assessment of the serious deficiencies of this review, and adverse effects of the project at the currently preferred Horseshoe Shoal location, will lead inevitably to the conclusion that this location should be rejected in favor of the viable and much less destructive alternative location considered in the Final Environmental Impact Statement ("FEIS") - South of Tuckernuck Island.

First, by way of background, it is useful to recall that Mr. Pawa has previously been challenged for his use of false and unwarranted statements in his enthusiastic and uncritical support of the Cape Wind energy project. In a letter to Andrew Krueger of MMS dated July 28, 2009 ("SHPO 7/28/09 letter"), Massachusetts State Historic Preservation Officer ("SHPO") Brona Simon felt compelled to "address certain

inaccurate statements” made by Mr. Pawa in a letter to MMS. Ms. Simon reported that Mr. Pawa’s letter contained “a number of inaccurate statements,” made “false and unwarranted statements” regarding the SHPO’s characterization of MMS’s good faith, and made statements contrary to the facts and the law of section 106 review. SHPO 7/28/09 letter at 1 and 2. In his characterization in his most recent letter of the complete adequacy of section 106 review in this matter, Mr. Pawa has likewise overstated his case.

Mr. Pawa states that MMS’s December 2008 Findings Document was the product of “MMS’s thorough evaluation of all onshore and offshore effects from the project, with special attention to tribal concerns.” Pawa Letter at 2. As the Alliance has noted in previous correspondence, however, MMS’s compliance under both the National Historic Preservation Act (“NHPA”) and the National Environmental Policy Act (NEPA) has been woefully inadequate. In particular, because MMS did not initiate the section 106 process during the project scoping phase under NEPA (as required by the regulations of the Council on Environmental Quality), but rather waited until just before issuance of the FEIS, the agency failed to learn of, incorporate information about, or analyze the effects of the project on either the traditional cultural properties (“TCPs”), or on the surrounding historic district recognized by the Massachusetts Historical Commission (MHC) and the Keeper of the National Register of Historic Places.

Indeed, in an investigation of the Cape Wind FEIS conducted by the Department of the Interior, Office of the Inspector General (“OIG”), OIG reported that the Federal agency responsible for performing the overall review of the EIS, the Environmental Protection Agency (“EPA”), expressed frustration that MMS’s rushed timeline for completing the EIS (finally releasing the FEIS on January 16, 2009, the last business day of the Bush administration) unnecessarily limited the amount of interagency coordination needed for such a large, complex project.” OIG Report, January 8, 2010, at 1.

These concerns are shared by others, including the Massachusetts SHPO. In a letter to MMS dated February 6, 2009 (“SHPO 2/06/09 letter”), SHPO Brona Simon stated her agency’s belief that the documentation provided in the [December 2008] Finding was “incomplete and insufficient,” in part because the “Final EIS was prepared without the benefit of this Finding, and the EIS includes inconsistent and insufficient information about cultural resources.” SHPO 2/06/09 letter at 1. SHPO Simon urged MMS to revise the Finding to address the comments of the Massachusetts SHPO and other consulting parties regarding the insufficiency of MMS’s methodology to characterize accurately the magnitude of the project’s effects on above-ground historic resources. SHPO 2/06/09 letter at 1 and 2. The SHPO stated that “[i]t is critically important to assess the adverse effects of the project in its entirety and to ensure that



the consideration of historic properties adversely affected is accurate in order for the remainder of the steps in the section 106 process to be meaningful and productive.” SHPO 2/06/09 letter at 1. The SHPO and the Alliance both demonstrated in 2009 how MMS had not adequately assessed adverse effects to the entirety of the historic properties in Nantucket Sound with the original Findings Document. Remarkably, in preparing the revised Findings Document in 2010, MMS failed to cure these deficiencies.

Mr. Pawa coolly asserts that MMS has proposed appropriate measures that will “largely mitigate the adverse effects’ from this project. Pawa letter at 5. Yet he fails to note that the only real mitigation measure offered in the Revised Finding Document is to paint the wind turbine generators off-white, and he ignores the most effective available avoidance measure, moving the project to an alternative location outside of Nantucket Sound. The Alliance has emphasized to MMS the availability of the South of Tuckernuck Island alternative as the most logical and most widely supported alternative location to allow MMS to support off-shore wind power while avoiding the worst of the adverse effects to unique and priceless historic properties and national historic landmarks (“NHLs”). SHPO Simon similarly noted that MMS had not made a sufficient alternatives analysis as part of the section 106 review, saying: “

Alternative locations and layouts, design, size, massing scale, materials, color, etc. outlined in the Final EIS for other environmental considerations, should now be explicitly applied to the historic and culturally important properties in the area of potential effect, with particular attention to the special requirements for protecting National Historic Landmarks.” . . .

SHPO 2/06/09 letter at 2.

SHPO Simon identified in 2009 the same point that the Alliance has made recently in pointing out the weak effort that MMS has made to evaluate alternatives that would avoid adverse effects to so many important historic properties and NHLs. She said:

A more explicit effort to consider feasible project alternatives will assist to clearly understand what effects to historic properties can be feasibly avoided or minimized. The alternatives analysis presented in the Finding and Final EIS does not convey a fully considered and convincing effort to examine ways to reduce or avoid effects to cultural resources.

Id.

Mr. Pawa asserts that there is no evidence in the record here that shows that archeologically sensitive areas will be disturbed. Pawa letter at 5. Yet the Keeper's determination of eligibility ("DOE") for Nantucket Sound noted a "high likelihood of submerged cultural resources and additional archeological materials in the Sound" and that the significant scientific finds of this have been made despite only "limited sampling." DOE at 7. The very limited number of vibracore drilling samples taken by MMS, prior to any tribal consultation or the Keeper's determination of eligibility, are not sufficient to discharge MMS's duty to make a reasonable and good faith effort to identify the underwater historic properties that may be destroyed by this project, or to address the project's impacts on the Sound as a TCP.

The FEIS and all of MMS's efforts to identify eligible cultural properties in consultation with the Wampanoag Indian Tribes occurred prior to the Keeper's DOE, at a time when MMS had denied that Nantucket Sound was eligible for the National Register. The DOE has thus interjected a new significant historic property into the reviews of Cape Wind under both NEPA and NHPA, at a time when these reviews were very nearly concluded. These consultations and the FEIS were therefore inadequate under the law because they failed to account for these significant historic resources, to analyze effects thereto, to consider alternatives to the proposed location, or to afford the public any opportunity to comment accordingly. MMS must now consider the effect of this DOE on the other parts of the Cape Wind NEPA and NHPA reviews that were previously conducted in ignorance, and indeed in denial, of the Keeper's DOE.

The DOE stated that the property that it determined to be eligible was the Sound itself, up to its shores and its boundary with Vineyard Sound, but not lands and properties on the shores. The DOE found that the Sound is also part of a larger district whose boundaries are not precisely defined (not "boundless" as Mr. Pawa asserts). Since MMS has opined that several properties on the near shores of Nantucket Sound will be adversely affected by Cape Wind, this larger district is obviously in the Cape Wind APE. The ACHP rules provide that MMS is required to take the steps necessary to identify historic properties in that APE. 36 C.F.R. § 800.4(b). In carrying out appropriate identification efforts, MMS is required to take into account, among other things, the magnitude and nature of the undertaking, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the APE. 36 C.F.R. § 800.4(b)(1).

Richard Moe, long-time president of the National Trust for Historic Preservation recently submitted a letter dated January 12, 2010 to Interior Secretary Salazar regarding the Cape Wind section 106 review ("Moe letter"). He pointed out to the Secretary, in stark contrast to Mr. Pawa's assertion of only minor impacts to historic properties and TCPs, that [e]ven though this process has already shown that siting the Cape Wind project as proposed would damage one of the country's most extraordinary

concentrations of historic and cultural assets, outstanding issues remain unresolved.” Moe letter at 1. In consideration of the important development of the Keeper’s DOE for Nantucket Sound, Mr. Moe urged the Department of the Interior and MMS to “give the fate of this significant historic and cultural resource the full consideration it is due.” *Id.*

Mr. Moe pointed out that the determination of eligibility only starts the further process required under the section 106 rules. He stated: “MMS now must take the time needed to fully consider and consult with the tribes on how Cape Wind could adversely affect the Sound’s significant cultural qualities and how these effects could be avoided, minimized or mitigated.” Moe letter at 2. The Alliance would add that since Cape Wind will cause multiple direct and visual effects to various parts of the Sound as well as to other historic properties and sacred sites on the shore, under the rules, such consultation must involve the full process of assessment of effects to every element of the Sound and its on-shore district, including: full public participation; consultation with the SHPO, Indian tribes and consulting parties; submission of full proposed findings of all effects to each historic property and TCP; the standard 30-day period of SHPO and public review for these findings; and a final finding and concurrence by the SHPO and the ACHP. *See* 36 C.F.R. §§ 800.4 and 800.5.

The National Trust for Historic Preservation’s opposition to the current proposal is strong enough that it has submitted another letter to MMS repeating the grave concerns expressed just one month ago by President Richard Moe. In a letter to Secretary Salazar care of James F. Bennett, dated today, Roberta Lane of the Trust’s Northeast Office, urges the Secretary not to issue the permit requested by Cape Wind, saying that the damage the project would cause to a rich concentration of nationally significant historic and cultural resources at the proposed Horseshoe Shoal location is too great to justify issuing that permit. Lane letter at 1 and 2.

Significantly, the National Trust joins with the Alliance and a growing group of stakeholders in urging MMS to invite Cape Wind to apply for a permit at the South of Tuckernuck location. *Id.* at 1. The National Trust states:

We feel strongly that the South of Tuckernuck is a highly preferable and feasible alternative location that serves the purpose and need of this renewable energy project while causing substantially less harm to the area’s most irreplaceable natural treasures.

Id. at 1.

It is clear, therefore, that notwithstanding the desire of Mr. Pawa and other interested parties for a hasty conclusion to the section 106 review of the Cape Wind

project, the significance and vast scope of the historic properties and NHLs in harm's way and the high stakes of the preservation values and resources that could be damaged by an improvident decision, MMS must take the time necessary to exercise its full public responsibilities, and to complete the most exacting review of the implications of the significant new information added to this matter by the determination of eligibility of Nantucket Sound as a TCP of religious and cultural significance to both Wampanoag Indian Tribes.

The Alliance is confident that MMS will recognize and discharge its complete duty with regard to these important and irreplaceable resources.

Respectfully submitted,



John F. Clark
Of Counsel
of Holland & Hart ^{LLP}

JFC:jfc

cc: Section 106 Consulting parties



February 11, 2010

Minerals Management Service
Attention: James F. Bennett
381 Elden Street
Mail Stop 4042
Herndon, VA 20170-4817

Dear Mr. Bennett:

RE: Cape Wind Energy Project, Findings Document MMS-2010-OMM-0002

The Alliance to Protect Nantucket Sound very much appreciates the recent interest expressed by Secretary Salazar and other Department of the Interior officials. Although this interest has been activated by section 106 and the recent determination that Nantucket Sound itself is eligible for listing on the National Register of Historic Places, we are grateful that consideration also is being given to the many other problems and conflicts created by this poorly-sited proposed energy plant. Clear alternatives exist, as demonstrated by our proposal of January 19, 2010, and adherence to the President's ocean policy and marine spatial planning initiatives now can ensure protection of Nantucket Sound and the prompt development of properly sited offshore renewable energy. Issuance of a lease to Cape Wind at the Horseshoe Shoal location will, to the contrary, perpetuate the conflict through extended litigation and the likely defeat of the project. Unfortunately, the federal government has failed thus far to accept a leadership role to promote renewable energy AND protection of historic, cultural and environmentally significant resources like the Sound. We support the Secretary's personal interest in seeking to resolve the longstanding dispute over this project and pledge our support toward that end at a location outside Nantucket Sound.

This comment letter is limited to section 106 issues. As the record reflects, there are multiple other problems with the MMS review to date, and none of the recent actions have cured those underlying defects.

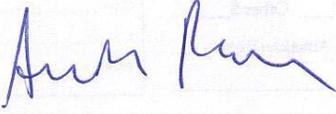
With regard to section 106, while the Secretary's personal interest and his recent visit to the Sound are greatly appreciated, it must be clearly understood that these actions do not constitute consultation under section 106 nor do they cure the failure of MMS to take the necessary actions in the past. Since the determination of eligibility, there has been no consultation that meets the standards of section 106. MMS has failed to conduct the new research necessary based on the major new determination and its sweeping effects. Until that research is completed, a sufficient consultation process cannot occur. In addition, the NEPA compliance is inadequate and is the result of the rushed political agenda of the Bush Administration, as confirmed by the recent Inspector General's report which is attached to this letter and incorporated into the record. Once a proper section 106 process is complete, a supplemental EIS will be needed. Most importantly,

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after a proper section 106 process, MMS has no choice other than to elect to avoid the direct and serious adverse effects of the proposed action under section 106 by selecting an alternative location or simply denying the Cape Wind application.

Set forth below are the comments of the Alliance on the purported MMS effects analysis issued on February 11, 2010. Considering the Secretary's recent statements and commitments, MMS should not have issued such a seriously deficient report that simply falls back into the rushed and inadequate approach revealed by the Inspector General's report. As discussed below, the MMS report cannot serve as the basis for any action other than serving as the next step in consultation and starting over or denying the Cape Wind application. The Alliance is prepared to work with MMS to correct this deficient record.

Respectfully,



Audra Parker
President & CEO
Alliance to Protect Nantucket Sound

Enc

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Detailed Comments of the Alliance to Protect Nantucket Sound to Minerals Management Service on Documentation of Section 106 Finding of Adverse Effect (Revised)

1.0 Introduction

From the outset, MMS uses the *Introduction* of the Adverse Effects Analysis to inappropriately downplay the serious and direct adverse effects of the proposed wind energy project at the Horseshoe Shoal location on the Traditional Cultural Properties (TCP) that have been newly recognized by MMS, and officially identified by the SHPO and Keeper of the National Register as being eligible for listing on the National Register of Historic Places. The Introduction mistakenly fails to mention that the Massachusetts State Historic Preservation Officer first made the Determination of Eligibility for the TCP, which was subsequently affirmed by the Keeper of the National Register.

Except for the meeting of consulting parties with Secretary Salazar on January 13, at which the Adverse Effects Documentation was first publicly released, there has been no further consultation with the consulting parties as required by Section 106 in the ensuing month, and no such meetings are scheduled at present. This blatant lack of regard for the serious nature of the identified adverse effects provides ample illustration of MMS' unwillingness to meet the spirit, much less the letter, of the laws that govern the present process. Full ongoing consultation is required, beginning now, precisely because of the newly recognized significance of the cultural features of Nantucket Sound, and the acknowledged adverse effects.

Although the Introduction identifies the newly recognized cultural properties, MMS continues to disregard the significance of the adverse effects by continuing to refuse to admit that the effects of the project will be "direct" as well as adverse. Given that the wind energy turbines will be physically constructed within and on top of a recognized TCP, and the base construction will require drilling directly into the TCP, and possible drilling into archeological resources, MMS must admit to the direct and adverse effects of the project, and then address these direct adverse effect through avoidance and consultation.

Although the entire Adverse Effects Documentation must be extensively revised to address the direct adverse effects of the proposal, new archeological exploration of the Sound will be needed before the full effects can be known, given the MA SHPO ruling and documentation that the findings revealed by the limited marine archeology done to date on the Shoal constitutes a "major scientific discovery."

2.1 Definition of the Area of Potential Effect (APE)

MMS must expand the APE to include not only the onshore and offshore areas where physical disturbance will occur, as described in the Documentation, but also the **visual airspace across the open waters of the Sound** that are critical elements of the Wampanoag cultural and religious practices, and which are also critical to the high quality of the cultural heritage and recreational tourism economy of the entire Lower Cape and Islands towns and villages. It is the unobstructed views across the open

water of the Sound that are the principle element of the TCP eligibility determination, and MMS must acknowledge this fact and base the consultation going forward on it.

3.0 Efforts to Identify Historic Properties

Overall, the MMS effort to identify historic properties are grossly deficient, especially given the pre-determination that Horseshoe Shoal would be the preferred site (only because that is the only site applied for by the applicant, Cape Wind, Inc.). Through many months of the NEPA process, MMS was unwilling to acknowledge that historic properties that have been determined to be eligible for listing on the National Register, but not yet actually listed, are under the NHPA, regarded as having equal protection, and must be treated by each federal agency as though they were already listed.

As a consequence, MMS should have, but did not, initiate the required NHPA Section 106 consultation process much earlier in the NEPA process (as recommended by CEQ NEPA regulations). In fact, had MMS initiated the 106 process during the Scoping Phase of the project, the agency should have realized then that the Horseshoe Shoal site is the most culturally sensitive and historically significant of any location in Nantucket Sound, and thus to be avoided for the wind energy facility or any other major industrial installation.

It was only when MMS had gotten deeply into the NEPA process and essentially completed all of the basic investigative analysis that they thought necessary at the preferred site, that the agency began 106 consultation and came to realize that there are many more historic and cultural properties than the agency had previously acknowledged.

Lack of knowledge is, forgivable under the NEPA process, but failure to take new knowledge into account is not. MMS failure to properly sequence the historic and cultural information gained through research and consultation into the NEPA analysis of impacts and consequences, much less into consideration of mitigation, has rendered the MMS full NEPA process for the Cape Wind Project as inadequate and incomplete. Minimally, a Supplemental EIS is needed in order to complete the process that is legally required before a Record of Decision may be signed.

3.1.2 Above-Ground Historic Resources

In this section of the Analysis, MMS perpetuates its erroneous conclusion that all impacts to above-ground cultural resources are *indirect*. “Direct” and “physical” effects are not synonymous terms under NHPA. Thus, many of the key negative visual effects of the Cape Wind project located on Horseshoe Shoal, while not physical, are direct, because Cape Wind in this location will unalterably change the visual setting of hundreds of historic properties and, thus will adversely impact the public’s understanding and appreciation of their significance.

Of even greater significance, in light of the finding of the SHPO and Keeper of the National Register that all of Nantucket Sound is eligible for listing on the National Register as a Traditional Cultural Property, is the fact that the adverse effects of the Cape Wind project on Horseshoe Shoal would be adverse both directly and physically. MMS has failed to acknowledge these direct adverse effects in its Findings. The open waters of the Sound are physical space, as is the airspace above these waters. Given that the Wampanoag are the “People of the First Light” whose culture and religious traditions are founded on practices at dawn, observing the rising sun over the open, unaltered, unobstructed waters of Nantucket Sound, the installation of 130 wind turbines, 440 feet into this physical airspace, and spread over 25 square miles of their sacred viewshed would be fundamentally destructive of their culture and to be avoided by actions of federal agencies under the law.

3.1.2.2 Visual Simulation Locations

As we have previously commented, the visual simulations performed by MMS to date have been inadequate to reveal the full extent of the adverse visual effects of the Cape Wind project on Horseshoe Shoal, as to number, location and type. Too few simulations have been done; simulations have not been done from the right locations; and all simulations done to date have been done from atop or immediately near an historic property, viewing the Cape Wind project site directly from the chosen historic property. What has not been done are simulations from sites that visitors to the Cape and Islands occupy from which both the historic property and the Cape Wind turbine complex would be simultaneously visible. These viewshed setting sites are just as integral to the historic setting as are views from atop the property itself; in fact, many of these nearby sites afford the most dramatic and powerful experiences for cultural heritage tourists and should be evaluated and protected from visual intrusions of the sort that Cape Wind would impose.

Thus, the PAL analysis of methodology cited on page 21 of the *Finding* Documentation for its consideration of this “third vantage point” viewshed is seriously flawed, should be rejected by MMS, and redone with a greater sensitivity to the perspective of a cultural heritage tourist, as well as that of the Wampanoag people, for whom this “third vantage point” is the essence of their practice and experience of place on the Cape.

Given that the Sound itself is a cultural property of significance, the visual simulations must be redone.

3.1.3 Traditional Cultural Properties (TCPs) Identified by MMS through Section 106 Consultation

MMS continues to downplay the significance of the historicity of the Cape and Islands and Nantucket Sound even in this section of the *Finding* that is focused on the Native American cultural significance of the area. While it is commendable that the MMS cultural specialists have acknowledged that five on-shore sites have traditional cultural significance, MMS minimizes their significance by defining them as “*potentially*” eligible for listing on the National Register. In fact, the work by MMS technical cultural specialists is sufficient to determine these sites to **be** eligible. Many historic properties are determined to be eligible that are never listed on the National Register; to be eligible is sufficient to be afforded all of the procedural protections offered by the NHPA.

3.2 Offshore Cultural Resources

Given the fact that the MA SHPO has determined the results of the MMS 2006 marine archeology reconnaissance survey to have provided a “major scientific discovery” of the important Native American cultural remains on Horseshoe Shoal, it is imperative that MMS shift its project focus away from the Shoal to another site for the Cape Wind facility. Minimally, a far more extensive and detailed archeological research investigation is essential for MMS to have performed if it persists in continuing with Horseshoe Shoal as the preferred location for the Cape Wind project. The magnitude of the SHPO determination of the archeological significance of the finds on the Shoal is sufficient to confirm that the MMS proposal to impose a “chance finds” requirement on the project’s developer would be totally inadequate as a mechanism for appropriate treatment of the archeological resources located there.

New archeological research and complete analysis of the results must be finalized, and appropriate preservation treatment measures imposed, before any permit could possibly be issued for legal construction on Horseshoe Shoal. The limited number of vibrocore drillings conducted to date for MMS on and around the Horseshoe Shoal are clearly an insufficient basis upon which MMS can make any decisions with regard to issuance of a permit for construction on the Shoal.

3.2.3 Offshore Traditional Cultural Resources

The *Finding* correctly notes that “*The Sound is eligible as an integral, contributing feature of a larger district, whose boundaries have not been precisely defined, under all four criteria of eligibility.*”

Unfortunately, MMS has failed in its analysis to date to draw the proper conclusion from this finding and move the Cape Wind project to another location.

In fact, this “larger district” depends not only on the TCPs both onshore and offshore for its historicity, but also on the myriad of eligible and listed historic properties that surround the Sound, and whose settings are integral components of this historic significance. Indeed, this is a clear case where this large, albeit undefined, historic district landscape and seashore is greater than the sum of its individual parts.

Much more research, analysis and consultation on this large historic district is required of MMS before any permit can be issued for a project on Horseshoe Shoal.

4.0 Description of Affected Historic Properties

The *Finding* continues to downplay the overall significance of its adverse effects on the totality of historic properties on the Cape, Islands and Nantucket Sound in this section of the Documentation. For example, the description of Nantucket Island refers to its designation as a “National Historic District” rather than its proper legal identification as a “National Historic Landmark District” - a designation that is significant because it denotes the professional determination that the place is nationally significant, and affords such places extra legal protections and procedural considerations when the site is threatened by adverse impacts, such as the Cape Wind project.

4.2 Five Onshore Traditional Cultural Properties

Here again, MMS has failed to properly consider the magnitude of adverse effects that Cape Wind construction on the Shoal would cause. Specifically, given the inextricable cultural linkage that exists between the five onshore TCP and the offshore TCP on the Sound, it is inappropriate for MMS to determine that the adverse effects of the Cape Wind project on these onshore TCP are only “indirect” adverse visual effects. Again, “direct” is not synonymous with “physical,” and it is abundantly clear that the visual intrusion of Cape Wind on Horseshoe Shoal to all of the most critical cultural practices of the Native Americans there, which even MMS acknowledges, for the offshore TCP, “will forevermore undermine the undefiled nature of this TCP of the Wampanoag Tribes in a direct and physical manner.” The adverse effects on the onshore TCP are just as much “direct” as for those offshore.

5.1.3 Onshore Individual Traditional Cultural Properties

MMS misjudges the adverse effects of the Cape Wind project, concluding that the adverse effects are indirect. Destroying the cultural practices and identity of the Wampanoag Tribes that have been carried out from these locations for centuries can hardly be “indirect.” Visual effects can be and are certainly in this instance “direct” adverse effects.

5.2.1 Effects to Historic Archeological Resources

While MMS requires “avoidance” as the appropriate mitigation in the case of shipwrecks around the Shoal, it does not consider “avoidance” as the most logical, appropriate and legally defensible mitigation for the adverse effects on historic and traditional cultural properties on and around the Sound. Avoidance is the best and most appropriate mitigation for the combined adverse effects of the Cape

Wind project on Horseshoe Shoal, especially when there is a clearly viable, and already analyzed alternative location, South of Tuckernuck Island.

5.2.2 Effects to Prehistoric Archeological Resources

MMS dependence on a very limited number of vibrocore drillings and a reconnaissance survey as the basis for conclusions that the effects to archeological resources on the Shoal would be minimal are not supportable by this limited research and analysis. The fact that little archeological remains been identified is attributable solely to the inadequate research completed by MMS, not to the fact that such archeological resources do not exist there. The traditional knowledge of the Wampanoag people as to the occupation and burials on the Shoal when it was dry land is a sufficient basis for requiring vastly greater research and analysis and is also sufficient basis upon which MMS should decide to avoid the Shoal entirely.

6.3.3 Project Mitigation of Effects to TCPs

MMS' concluding statement that "*MMS has taken every possible action to avoid and minimize adverse effects to historic resources through detailed planning carried out as part of the NEPA process*" is a woefully inaccurate statement of the facts, and highlights the disregard exhibited by MMS in both its understanding of the need for total integration of the NEPA and NHPA 1106 processes, and its insensitivity to and disregard of the legal protections offered by federal law for preserving the traditional cultural and religious practices of Native Americans.

MMS has not taken "*every possible action to avoid...*" in fact, it has not, to date, even seriously considered avoidance by choosing another location for the Cape Wind project.

Further, MMS has not done "*detailed planning*" under the NEPA process, or it would have begun the NHPA 106 process during the Scoping Phase of NEPA and engaged actively in the required Section 106 consultation throughout the NEPA process and especially during development of the project alternatives, rather than waiting until after its NEPA analysis was completed before actively seeking involvement of the consulting parties.

The NEPA and Section 106 processes conducted by MMS for the past five years since it was given responsibility for offshore alternative energy permitting have been seriously flawed and need to be fully corrected before issuing a final Record of Decision.



**Investigative Report of
Cape Wind Associates, LLC
Redacted**



Investigative Report

Cape Wind Associates, LLC

Report Date: January 8, 2010

This report contains information that has been redacted pursuant to 5 U.S.C. §§ 552(b)(2), (b)(5), (b)(6), and (b)(7)(C) of the Freedom of Information Act. Supporting documentation for this report may be obtained by sending a written request to the OIG Freedom of Information Office.

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RESULTS IN BRIEF

In the fall of 2008, the Department of the Interior's Office of Inspector General (OIG) received multiple complaints regarding a Minerals Management Service (MMS) National Environmental Protection Act (NEPA) review of an offshore wind farm proposed by Cape Wind Associates, LLC (CWA) to be located in Nantucket Sound, off the coast of Massachusetts. MMS published a final Environmental Impact Statement (EIS) for the project on January 16, 2009, the final business day of the Bush Administration.

Our investigation determined that several of the Federal agencies that worked with MMS in preparing the final EIS were concerned that its completion was unnecessarily rushed by MMS's desire to publish the report prior to the end of the Bush Administration. None of the agencies believed, however, that the expedited timeline affected their overall conclusions. In order to complete the NEPA review, MMS worked closely with cooperating Federal agencies, among them the U.S. Fish and Wildlife Service and the U.S. Coast Guard. Both agencies indicated that the timeline imposed by MMS pressed them into acting atypically, restricting their ability to be as thorough as they would have liked in conducting such a review. Moreover, the Federal agency responsible for performing the overall review of the EIS, the Environmental Protection Agency, expressed frustration that MMS's timeline unnecessarily limited the amount of interagency coordination needed for such a large, complex project.

MMS also consulted with the Federal Aviation Administration (FAA) outside of the NEPA process. In prior years, the FAA had issued statements that the CWA project would not adversely impact air navigation in the Nantucket Sound area, and these statements were documented in MMS's draft EIS. Days before the final EIS was published, however, MMS learned that the FAA had concluded a study that determined that the project would result in a "Presumed Hazard" to aircraft, yet MMS published the final EIS without acknowledging this new FAA finding, and instead allowed the final EIS to be published with FAA's outdated finding of "no adverse effect."

BACKGROUND

In November 2001, Cape Wind Associates, LLC (CWA) applied for a permit with the U.S. Army Corps of Engineers (COE) to construct an offshore wind farm (Cape Wind Project) in Nantucket Sound, the body of water located between Cape Cod, MA, and the islands of Martha's Vineyard and Nantucket. If constructed, the Cape Wind Project would be the first offshore wind farm in the United States. In November 2004, under the National Environmental Protection Act (NEPA), COE completed a draft Environmental Impact Statement (EIS) concerning the project.

On August 8, 2005, after COE had issued its draft EIA, the Energy Policy Act of 2005 (EPA) became law (Public Law No: 109-58). The EPA provided for the Minerals Management Service (MMS) to develop a program and regulations for leasing offshore areas for renewable energy projects, and as a result MMS became the lead Federal agency responsible for the environmental review of the Cape Wind Project proposal.

In January 2008, MMS released its own draft EIS for the Cape Wind Project. In a separate action several months later in June 2008, MMS released draft regulations for alternate energy facilities on

the Outer Continental Shelf (OCS). According to MMS, it submitted the final regulations to the Office of Management and Budget (OMB) in November 2008. Then on January 16, 2009, the final business day of the Bush Administration, MMS released a final EIS for the Cape Wind Project. Meanwhile, the regulations for OCS alternate energy facilities were not promulgated by the end of the Bush Administration – the regulations were ultimately promulgated and published in the Federal Register on April 29, 2009.

As of the date of this report, MMS has not yet issued a Record of Decision (ROD) for the Cape Wind Project, which is required prior to issuance of a lease.

DETAILS OF INVESTIGATION

Complaints

On July 24, 2008, Peter Kenney, a freelance writer and television producer from Cape Cod, MA, sent an email to the Department of the Interior (DOI) concerning MMS's review of the Cape Wind Project. The Department forwarded the email to the Office of Inspector General (OIG). Kenney claimed that CWA proposed in its lease application to MMS to use a specific wind turbine (3.6 Megawatt wind turbine) manufactured by General Electric Company (GE) as "the primary component" in the Cape Wind Project. Kenney claimed, however, that GE no longer commercially produces a 3.6 Megawatt (3.6MW) wind turbine for offshore use and that CWA knew this fact "long before the MMS draft EIS was completed and published" in January 2008.

On September 25, 2008, Sandy Taylor of Yarmouth Port, MA, submitted a letter of complaint to OIG regarding the Cape Wind Project that was signed by 34 individuals requesting that OIG "initiate an immediate investigation into improper actions by MMS in reviewing the Cape Wind energy project proposed for Nantucket Sound." The complaint was signed by several business persons, private citizens, realtors, and a Massachusetts State senator.

Summarized, the complaint alleged:

- That concerned parties, in response to the draft EIS, had determined that the project would do irreparable harm to the economic, environmental, and public safety interests of Cape Cod, Martha's Vineyard, and Nantucket.
- That the project was neither financially nor technologically feasible.
- MMS was cutting legal and regulatory corners in an effort to expedite the Cape Wind Project's review process and approve the project before the Bush Administration left office on January 20, 2009.
- MMS was prepared to make a decision on the Cape Wind Project before regulations were in place for offshore renewable energy projects.
- MMS was giving CWA a "sweetheart financial arrangement."
- MMS was moving the proposal toward approval even though the technology required to build the project is not available.
- MMS was ignoring the advice of the U.S. Fish and Wildlife Service (FWS), and that an FWS employee who submitted critical comments has been reassigned.
- MMS was prepared to move forward with approval prior to completing Historic Preservation consultation.
- MMS was prepared to proceed to approval prior to completing tribal consultation.

- MMS was prepared to move the project to approval prior to receiving final U.S. Coast Guard (USCG) terms and conditions for safe marine navigation.
- MMS was proceeding toward a final decision despite a Federal Aviation Administration (FAA) “presumed hazard determination.”
- Because of MMS’s overly narrow Purpose and Need Statement for the Cape Wind Project, it has not considered reasonable alternatives, as required under NEPA.
- MMS did not properly address the Cape Wind Project’s lack of economic viability.
- MMS failed to follow proper procedures for hiring a consultant to work on the Cape Wind Project EIS, selecting a firm favorable to wind development.
- MMS failed to properly evaluate the presence and handling of hazardous materials used on the project during energy generation.

On December 12, 2008, U.S. Senator Edward M. Kennedy, now deceased, submitted a letter to OIG stating that he is “concerned about how MMS is proceeding” in its review of the Cape Wind Project, and that MMS’s “questionable actions deserve thorough investigation, and I urge you to make it a high priority.”

In summary, Senator Kennedy’s letter expressed his concern that:

- MMS was failing to fulfill its responsibilities with respect to protecting the public interest in its actions on the Cape Wind Project, and that MMS may be in violation of several relevant statutes, including NEPA.
- FWS had undergone a dramatic reversal in its concern about the negative effects of the Cape Wind Project on endangered species.
- A FWS biologist had been reassigned who had insisted that the Cape Wind Project had not completed the requisite studies.
- FWS had made “subsequent changes” in its biological opinion apparently at the request of MMS.
- MMS failed to conduct the required nation-to-nation consultations with the Wampanoag Tribes (Aquinnah and Mashpee), which should have been completed before the release of the draft EIS.
- MMS failed to complete a full review of the project under the National Historic Preservation Act.
- MMS had exerted pressure on other cooperating agencies, such as the FAA and USCG, which were reviewing the project’s possible negative impacts on navigational radar systems.
- The FWS regional office in Concord, NH had deep concerns that MMS was not requiring the applicant to conduct all the necessary ecological impact studies.
- The comment letter by FWS also expressed disappointment that MMS was not following appropriate policies.
- MMS did not give FWS a preliminary draft of the EIS, so that FWS could provide comments.
- The draft biological opinion issued by FWS’s New England Field Office would have required that the project shut down during the migration season, but this provision was removed during FWS Headquarters’ office review.

- MMS pressed forward with the review of the project before promulgating the regulations required to guide such decisions.
- MMS set unrealistic deadlines for FAA and USCG to complete their studies regarding the possible impact of wind turbine interference on maritime and aeronautical radar operation.

OIG Investigation

As of the date of this report, MMS has stated that it has not completed the consultation required under Section 106 of the National Historic Preservation Act (NHPA). Accordingly, due to the lack of ripeness, this report does not address the complaints related to the NHPA Section 106 consultation process.

Based on multiple issues raised regarding the Cape Wind Project, this report is organized into 14 sections in order to address independently all of the issues identified in the initial complaints by Kenney, Taylor and Sen. Kennedy, along with discussing additional issues that were raised during the course of the investigation.

I. In their complaints, Kenney and Taylor both alleged that MMS was moving the proposal toward approval even though the technology required to build the project is not available.

In his interview with OIG, Kenney said that the main allegation of his complaint was that CWA submitted fraudulent/false information to MMS in their application for a permit to construct the wind farm by stating it planned to use a 3.6MW wind turbine manufactured by GE. According to Kenney, this was an intentional misrepresentation because CWA has known since late 2005/early 2006 that GE no longer plans to manufacture a 3.6MW wind turbine for commercial use.

According to Kenney, CWA's misrepresentation is material because only one other company in the world, Siemens Energy (Siemens), manufactures a 3.6MW wind turbine and has never sold such a turbine to any company/project in the United States, and has indicated it does not intend to do so. According to Kenney, due to the fact that CWA will not be able to use/purchase 3.6MW wind turbines, as outlined in their application to MMS, the EIS is essentially worthless and will have to be redone. The reason, Kenney stated, is that any other size turbine that CWA may try to substitute (e.g. 5.0MW wind turbines) would dramatically affect the analysis performed by MMS in completing the EIS due to major differences in the environmental analysis, along with the financial analysis concerning the feasibility of the project.

Kenney stated that he learned about GE's plans not to produce the 3.6MW wind turbines in late 2005/early 2006 – and that CWA also knew this fact – from a former GE executive. In response to the Taylor complaint noted above, OIG interviewed jointly Sandy Taylor, Glenn Wattley and Clifford Carroll. *Agent's Note: Taylor asked that Wattley and Carroll be present during her interview. At the time of his interview, Wattley was the President of the Alliance to Protect Nantucket Sound and Carroll was a private citizen.* According to Taylor's complaint, MMS' draft EIS specifies that the Cape Wind Project will employ 130 GE 3.6MW wind turbines and identifies that the critical calculations for project configuration impacts, such as electricity output, cost, emission abatement, are based on the manufacturer's guarantees. According to Wattley, however,

GE has publicly stated that the 3.6MW wind turbine is only experimental at this time and is not being produced for commercial purposes. Wattlely stated that a GE sales representative told him that GE does not have any immediate plans to commercially produce the 3.6MW wind turbines because it is not profitable to do so at this time. Wattlely produced a PowerPoint presentation from a conference held in Wilmington, DE, on September 8 and 9, 2008 prepared by Benjamin Bell of Garrad Hassan Group Limited, which indicates that the GE 3.6MW wind turbine is “commercially inactive.”

OIG interviewed a former GE executive to inquire about the complaints regarding GE’s production of 3.6MW wind turbines. The former GE executive stated that he was not willing to say what GE’s intentions are regarding their potential production of the 3.6MW wind turbines outlined in the Cape Wind Project. He stated that he is no longer employed by GE and it would be disingenuous of him to make such a statement on behalf of a company of which he is no longer an employee/representative. He did state, however, that GE’s decision to produce such turbines would never be set in stone because ultimately such a decision would depend on market factors at the time of potential production.

The former GE executive also stated that even if GE did not produce the 3.6MW wind turbines for the Cape Wind Project, Siemens does produce such a turbine and he is unaware of any reason why Siemens would not sell 3.6MW wind turbines to CWA for the project.

OIG also interviewed Rodney Cluck, MMS project manager for the Cape Wind Project, on the issue of turbine availability. Cluck stated that MMS was informed about this issue, and as a result MMS made an inquiry with CWA. According to Cluck, CWA responded in a letter to MMS on September 5, 2008 stating that CWA has not changed its intention to use 3.6MW+/- wind turbines in the Cape Wind Project. Cluck provided the letter from CWA, which stated:

Cape Wind has been aware of this fluid market structure and applied it to the MMS accordingly. It is our belief at this time that a 3.6MW+/- WTG [wind turbine generator] would best serve our project. The market today is currently served by suppliers with commercially available WTGs in this range including Siemens and Vestas. Cape Wind will select a specific supplier and unit in the normal course as the project development and timelines are more clearly defined.

Agent’s Note: In its proposal to MMS, CWA actually stated that it intended to use a “3.6MW +/- wind turbine,” which CWA believes allows for flexibility as to the size and manufacturer of the turbine actually used in the project (See page 45 below).

Cluck further stated that if CWA decided to change the size of the turbines for the project to either larger or smaller turbines, MMS would need to reevaluate that change. Cluck stated that this reevaluation may trigger a new NEPA analysis, which may result in the need to perform a new Environmental Analysis or an EIS. According to Cluck, MMS would need to conduct an assessment at that time, under NEPA, as to the type of analysis needed, depending on the magnitude of the change.

Robert LaBelle, MMS deputy associate director for the Offshore Energy and Minerals Management division, was also interviewed on the wind turbine availability issue. LaBelle confirmed Cluck’s statements, saying that even if the applicant decided to change the technology it plans for the project

at the time of construction, the final EIS would still be applicable unless the change was truly significant. LaBelle then stated that if the change in equipment was a “big change” – such as utilizing 5.0MW wind turbines – MMS would need to conduct a supplemental EIS in order to assess the change.

To address turbine availability directly with GE, OIG interviewed a manager for GE’s Alternate Energy Division (wind, solar, etc.), who is responsible for all GE sales of wind turbines nationwide. The manager stated that GE still produces the 3.6MW wind turbine and it is “in their portfolio.” He stated unequivocally that notwithstanding GE’s recent focus on onshore wind farm projects due to the recent boon in such wind farms, GE’s 3.6MW wind turbine would be made available for the Cape Wind Project if the developer, CWA, chooses to contract with GE to purchase them.

OIG also interviewed a director for GE. According to the GE director, the Cape Wind Project has been “his account” since 2005 and he has been the GE contact with CWA from 2005 to the present. According to him, GE has not entered into a contract with CWA to provide the 3.6MW wind turbines because discussions have not yet reached that stage. He said, however, that GE is fully prepared to produce the 3.6MW wind turbines for the Cape Wind Project if CWA chooses to contract with GE to do so.

In addition to contacting GE directly regarding the availability of 3.6MW wind turbines for the Cape Wind Project, OIG also interviewed a sales manager of Siemens. The sales manager reports directly to Siemens’ sales manager for the America Division. He confirmed that Siemens does commercially produce a 3.6MW wind turbine for offshore production, and that Siemens is the world’s top producer of offshore wind turbines. He stated, however, that Siemens’ 3.6MW offshore turbines are predominantly being used in wind farms off the coast of Europe and that to date none have been produced for offshore use in the United States.

When asked whether Siemens would or could produce 3.6MW wind turbines for the Cape Wind Project if requested to do so, the sales manager stated that Siemens could support such a project. He said that if a developer approached Siemens with an urgent request to provide such turbines, Siemens would certainly “sit down and talk to them about their needs.” Siemens would be capable of entering into a business arrangement to provide the turbines, he said, if Siemens deemed it to be economically feasible from a business strategy standpoint.

II. In their complaints, Senator Kennedy and Taylor both alleged that MMS was prepared to make a decision on the Cape Wind Project before regulations were in place for offshore renewable energy projects.

During his joint interview with Taylor and Carroll, Wattlely stated that the EPA Act directed MMS to promulgate final regulations governing alternate energy projects located on the OCS within 270 days of passage (May 2006) – well over 1,000 days prior to his interview. MMS finally released draft regulations in July 2008, after MMS issued the draft EIS on Cape Wind in January 2008. According to Wattlely, MMS’s failure to promulgate regulations prior to issuing the draft EIS made it impossible for the public to comment adequately on the draft EISs compliance with such regulations.

In an interview, Maureen Bornholdt, MMS program manager for the Office of Alternative Energy

Programs, stated that the office was created in August 2005 in response to passage of the EAct and that she was appointed to her position at the program's inception. According to Bornholdt, the EAct granted MMS the authority to regulate alternative energy on the OCS, including potential wind, solar, ocean wave, and any other alternative energy resources. Additionally, she stated that the EAct identified two ongoing wind farm projects at the time the EAct was passed: the Cape Wind Project and the Long Island Project. As a result, Bornholdt stated, MMS was essentially given three tasks:

- Develop a regulatory framework for the overall alternative energy program.
- Review the Cape Wind Project proposal.
- Review the Long Island Project proposal.

Bornholdt noted that the EAct provided no funding to MMS to complete these tasks.

According to Bornholdt, MMS began the tasks by comparing the findings of the draft EIS that had already been completed on the Cape Wind Project by COE to the regulatory framework MMS had in place under the Outer Continental Shelf Lands Act for administration of oil and gas leasing. She stated that MMS gathered a team of its own experts that identified potential alternative energy technologies while working in conjunction with the National Renewable Energy Laboratory (NREL) in Golden, CO.

Bornholdt stated that MMS issued an Advanced Notice of Proposed Rulemaking (ANPR) in December 2005, which essentially asked the public, states, agencies, and others this question: What elements should be in a regulatory program? She stated that the ANPR broke the question down into five components: leasing/access, payments, environmental compliance, inspections, and operations. According to Bornholdt, MMS was familiar with regulating and evaluating energy development on the OCS, but alternative energy technologies were "different stuff."

Bornholdt stated that after MMS reviewed the comments to the ANPR, MMS decided to complete a Programmatic EIS (PEIS) covering all alternative energy technologies on the OCS, such as wind, solar, and ocean wave. According to Bornholdt, while MMS was working on the PEIS the agency was simultaneously developing the framework for the alternative energy regulations addressing the same five components: leasing/access, payments, environmental compliance, inspections, and operations.

Bornholdt stated that the PEIS conducted a "high level study" of the potential alternative energy technologies, which needed to be completed before attempting to identify the necessary processes and regulatory framework. Bornholdt said that MMS completed the PEIS and in January 2008 issued a ROD for the PEIS that contained "Best Management Practices" that developers need to consider when proposing any alternative energy project on the OCS. She said MMS essentially treats these best practices as "guidelines" for the agency to use when considering potential projects.

On the question of whether the Cape Wind Project followed the process outlined in the draft regulations, Bornholdt explained that the project and the drafting of the regulations were being pursued "concurrently" and were on parallel tracks. She stated that as MMS began drafting the regulations – which mainly define the required processes involved in alternative energy projects– the Cape Wind Project was being handled with the same mind set. She explained that, in a way, each process – the Cape Wind Project and the regulation drafting – supported each other and ultimately resulted in a project that helped define what the process regulations would contain.

Cluck stated that MMS sent the final OCS alternative energy regulations to OMB on November 3, 2008. He stated that based on the PEIS that MMS issued, the final regulations do not need to be promulgated prior to MMS issuing the final EIS on the Cape Wind project. Cluck stated that the regulations do not contain engineering standards related to potential projects, but rather “a big chunk” of the regulations generally concerns the process of obtaining a lease. Since the process is essentially completed regarding the Cape Wind Project, Cluck stated that he does not believe the final alternative energy regulations in place would assist in analyzing the final Cape Wind EIS. Cluck did acknowledge that parts of the regulations do concern construction, operation and decommissioning of such projects. The regulations, however, simply require that plans for such activities are in place prior to their occurrence.

The issue of whether MMS can complete both a draft and a final EIS, issue a ROD, or issue a lease prior to issuing final regulations implementing MMS authority over such alternative energy projects was reviewed by OIG’s Office of General Counsel. The Office of General Counsel opined: “MMS is proceeding under statutory authority and an interim alternative energy program that do not appear to require MMS to issue regulations before approving Cape Wind.”

Agent’s Note: MMS’s final alternative energy regulations were publicly released on Earth Day, April 22, 2009. They are entitled “Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf – 30 CFR Parts 250, 285, and 290,” and were published in the Federal Register (FR) on April 29, 2009 at 74 FR 19638.

III. In their complaints, Senator Kennedy and Taylor both alleged that MMS was ignoring the advice of FWS, and a FWS employee who had submitted critical comments had been reassigned.

As noted above, Senator Kennedy’s letter to OIG stated the following:

It is clear that the regional office of the Fish and Wildlife Service in Concord, New Hampshire had deep concerns that MMS was not requiring the applicant to conduct all the necessary ecological impact studies. The comment letter by the Service also expressed disappointment that MMS was not following appropriate policies. In particular, MMS did not give the Service a preliminary draft of the Environmental Impact Statement, so that the Service could provide comments. The favorable biological opinion on Cape Wind released by the Service on November 24, 2008 is inexplicable, given the Service’s April comments.

It also has been reported that the draft biological opinion issued by the New England Field Office of Fish and Wildlife Service would have required that the project shut down during the migration season, but this provision was removed during D.C. office review.

Agent’s Note: In the course of investigating the allegations related to FWS’ overall role in the preparation of the EIS for the Cape Wind Project, we determined that the complainants were confused about the various obligations and multiple, distinct roles of FWS in the NEPA review process. The following explanation describes the two roles the FWS played in its dealings with MMS

on the Cape Wind Project.

As FWS is a cooperating agency in the EIS process, MMS was obligated to consult with FWS regarding the impact on all avian species that may result from the Cape Wind Project. In addition to this obligation, MMS was also obligated under the Endangered Species Act (ESA) to conduct "Section 7 Consultation" with FWS regarding the two species on the endangered species list: the piping plover and the roseate tern. FWS's role regarding the ESA consultation for these two species was distinct from its role as a cooperating agency regarding all avian species. Although these two roles naturally intertwine, they are guided by separate and distinct legal obligations.

- The April 21, 2008 comment letter that FWS issued in response to the draft EIS was in its role as a cooperating agency to MMS for all avian species.
- The draft and final Biological Opinions (BOs) issued by FWS were completed as a result of Section 7 Consultation MMS was required to conduct with FWS under the ESA.

Agent's Note: In order to assist the reader in keeping the distinction between FWS's dual roles and obligations, our findings related to these topics are presented in separate sections, with an additional section comparing FWS's findings in both processes. Our findings related to the circumstances surrounding the reassignment of the FWS biologist is presented in its own section. A final section contains our findings related to the Memorandum of Understanding (MOU) between MMS and FWS, which applies to all future projects and is not specific to the Cape Wind Project.

▪ **FWS's April 21, 2008 Comment Letter to the draft EIS**

A biologist for FWS' New England Field Office (NEFO) said that his federal civilian service began when he was hired in by COE specifically to develop EISs for COE. He moved to FWS as a biologist assigned to review NEPA documents, including EISs.

The biologist described the chronology of FWS's involvement with the preparation of the EIS related to the Cape Wind Project, saying that FWS began its agency coordination/consultation on the project with COE in early 2000. According to him, FWS was provided a far greater opportunity to consult with COE as a cooperating agency (via meetings, teleconference calls, document review, etc.) than with MMS after MMS took over the project. He stated he does not know why MMS limited these opportunities for consultation far more than COE. As an example of the comparison of cooperating agency consultation, the biologist stated that COE provided FWS the opportunity to comment on the draft EIS prior to public release, whereas MMS did not.

According to the biologist, he drafted the initial FWS comment letter after MMS released its draft EIS. He said he studied the 2,000-page draft EIS closely and took extensive notes about the issues that affected FWS. After performing this review, he drafted the letter and then worked closely with his supervisor at that time, in editing the letter. The biologist said that after NEFO was satisfied with the content, the letter was forwarded to the FWS regional office where it was reviewed by an Office of the Solicitor (SOL) Attorney Advisor. The biologist stated that after the region signed off on the letter, it was signed by the supervisor and officially released on April 21, 2008.

According to the biologist, the prevailing theme of the comment letter was the criticism that MMS

made many conclusions in the draft EIS regarding the impacts on migratory birds and other aquatic species without adequate baseline data. Specifically, he stated that the draft EIS concluded there were no, or minimal, impacts on these species, yet MMS did not have sufficient data to make such conclusions. According to the biologist, this was “the mantra of the entire document.” In fact, according to the biologist, Appendix C of the draft EIS contains several statements by MMS acknowledging that they did not have sufficient data to make conclusions regarding the potential impact on certain species, yet the main body of the draft EIS concluded that there is “no impact” or “minimal impact.” He said this resulted in the draft EIS containing blatant contradictions.

In the General Comments section of the letter, FWS stated the following:

[T]he DEIS [draft EIS] repeatedly and inappropriately draws conclusions regarding anticipated environmental impacts, or lack thereof, in the absence of important site-specific information on natural resources in, on, or in the airspace above Nantucket Sound that would be affected by the project. Chief among these are migratory birds and the benthic and pelagic resources they depend on. We noted the paucity of site-specific information from the inception of project review. Yet despite our continued recommendation that an adequate baseline be established from which to assess impacts and design minimization and mitigation measures, little information has actually been gathered.

The biologist said that general comments made by FWS in the letter pointed out that FWS had attempted to assist MMS in the NEPA review (preparation of the draft EIS), in accordance with DOI policy, by “identifying relevant issues, collecting and assembling necessary information, analyzing data, developing alternatives, evaluating alternatives, and estimating the effects of implementing each alternative.” The letter then stated that, “We [FWS] offer these comments for the same purpose. They are appropriately critical given the ‘draft’ nature of the document reviewed and the numerous unresolved issues and data gaps.”

Following the general comments section, the letter made several specific comments regarding the FWS review of the draft EIS. The letter concluded with the following statement:

In our view, if this project is to move forward through the various regulatory processes facing the application to a defensible decision point, the information needs identified in our scoping letters and EIS comments need to be addressed in a supplemental DEIS. As stated in the closing comments on our July 11, 2006 scoping letter: “We collectively have an opportunity before us now to ‘do this right’.” Unfortunately, we have failed to do so.

The former (retired) Supervisor for FWS’ NEFO has a degree in biology and worked for FWS for 37 years. He stated that he worked extensively on regulatory issues, including wetlands and ESA matters and had extensive experience reviewing EISs that were prepared under NEPA.

The former Supervisor stated that FWS began recommending to CWA in the early stages of the project that CWA start collecting certain types of data in order to assist FWS in assessing the impacts of the project on migratory birds. In fact, he stated that when CWA constructed a metrological tower

in Nantucket Sound in 2001, FWS recommended that CWA install radar on the tower in order to collect migratory bird data. CWA refused, however, claiming the expense was too high, and COE also refused to require CWA to follow FWS's recommendation. The former Supervisor stated that if CWA had followed FWS's recommendation in 2001 to install the radar and collect migratory bird data 24 hours a day, 7 days a week (24/7), the data required to adequately assess the impacts on migratory birds would have been greatly enhanced. According to him, FWS needed three years of 24/7 data in order to "cover the variances" among the typical seasonal differences that occur in between years.

He acknowledged that after MMS issued the draft EIS in January 2008 he signed the April 21, 2008 FWS comment letter in response to their draft EIS. The letter to MMS essentially stated that MMS did not have any of the data necessary to reach a conclusion on the project's impact on migratory birds. He said the comment letter reflected his personal opinion.

We interviewed a biologist in the Endangered Species Division for FWS' NEFO who has worked for FWS for 24 years and has been in NEFO's endangered species division for the past 20 years. The NEFO biologist stated that he did not believe the FWS comment letter on the draft EIS was "unprofessional." According to the NEFO biologist, MMS knew FWS was intending to issue a critical letter and therefore should not have been a surprised when they received the FWS correspondence. With respect to the Cape Wind Project, The NEFO biologist stated that he "never understood" why CWA did not conduct the three-year, 24/7 radar study that FWS recommended in 2001 at the inception of the project. He said CWA knew the project would be controversial and the study could have been completed well within the project's timeline. The NEFO biologist stated that the data that could have been collected from a radar study would have been very helpful to FWS in its analysis of the project.

Michael Thabault is the Assistant Regional Director for Ecological Services for the FWS northeast regional office. Thabault stated that when he arrived at his current position, FWS was working with COE on the draft EIS regarding the Cape Wind Project. Thabault stated the FWS position was that COE had overstated its conclusions based on the data COE collected over the preceding six years and, therefore, FWS recommended that COE collect additional data relative to avian resources in Nantucket Sound.

According to Thabault, when the EPA transferred obligations involving offshore wind power to MMS, FWS began to work very closely with MMS on their draft EIS. Thabault stated that the FWS stance in its comment letter on MMS's draft EIS was similar to its stance on COE's draft EIS. MMS, he said, overstated its conclusions relative to the impact on avian resources based on the data collected to date. Furthermore, he confirmed that FWS recommended suspending the NEPA process pending more data collection.

Thabault noted that under NEPA, FWS was a cooperating agency and that MMS, as the action agency, was the decision-making entity. In this structure, MMS had no obligation to embark upon the most environmentally protective alternative, but must disclose the impacts of the data analyzed by FWS. Thabault stated the FWS comment letter on MMS's draft EIS suggested ways to gather data that would make the assertions in the draft EIS more supportable. Thabault stated he has not read the final EIS, whereas, he stated that he read, commented on and approved the April 21, 2008 letter

containing FWS's comments on the draft EIS.

Thabault stated that FWS will wait until the ROD is issued to see whether FWS's concerns were addressed. Thabault noted that under NEPA's 30-day "cooling off" period once the ROD had been issued, FWS would have that amount of time to write a letter to MMS expressing FWS's concerns. Thabault expressed his belief that MMS had "plenty of time to do better" in terms of gathering data.

An Attorney Advisor for SOL in the FWS northeast regional office provides legal counsel to FWS on various issues, including the FWS role as a cooperating agency to MMS in the preparation of the final EIS for the Cape Wind Project.

The Attorney Advisor stated that after taking the lead on the project, MMS performed a higher quality analysis of the project than COE. He said MMS still failed, however, to have the draft EIS reviewed by the cooperating agencies, including FWS, prior to its public release. The Attorney Advisor stated that he believes cooperating agencies should have been afforded the opportunity to review the draft EIS and provide input to MMS prior to public release, but he does not know why MMS decided not to do so. The Attorney Advisor qualified his statement by acknowledging there are no "hard rules" on how an action agency interacts with a cooperating agency, but said he simply believes such coordination between MMS and FWS would have resulted in a stronger overall product.

The Attorney Advisor stated that NEFO typically sends any correspondence to SOL (him) for legal review to ensure FWS' stance on a particular subject is coordinated and formalized. He said that he received the comment letter from NEFO on April 8, 2008, and attempted to "sculpt it" by providing a framework to the scientific observations included in its content. The Attorney Advisor explained that he also edited in consideration of the letter's multiple audiences and its potential legal implications. According to him, the crux of the letter was to inform MMS that FWS did not believe enough data had been collected for MMS to arrive at the conclusions in the draft EIS -- data which FWS had specifically requested MMS and CWA to collect in order to make such conclusions.

According to the Attorney Advisor, MMS did not issue a specific response to FWS's comment letter. He pointed out that MMS is not obligated to issue a specific response to comments offered by a cooperating agency, but said MMS should, at the very least, attempt to respond to the comments in the final EIS. He said that MMS did attempt in the final EIS to respond to some of the points in the FWS comment letter, but added that it is not his decision as a SOL attorney whether MMS's response in the final EIS was entirely satisfactory to FWS.

An avian biologist for MMS stated that he reviewed the FWS comment letter to the draft EIS. He pointed out that he started working for MMS after the letter was issued, nonetheless he was asked by MMS to review the letter. The avian biologist said he was told by his MMS supervisors that the signatory of the FWS comment letter had made a big show in the letter of "falling on his sword" because he was preparing to retire shortly after its release, and that the letter had not been properly vetted through the FWS regional office.

We then provided the avian biologist with an email he authored on June 20, 2008, with the subject line reading: "**Houston, We Have a Problem!**" (emphasis included in email). In the email, he

stated:

I am new to MMS, and undoubtedly ignorant or misinformed about the processes for conducting NEPA and how final decisions are made, but I think it is extremely unlikely that the Cape Wind Project will go forward and be approved by January 2009. It is far more likely, in my opinion, that this proposed project will generate lawsuits and that a judge will issue an injunction preventing the project from going forward until much of the environmental information requested by USFWS [FWS] is obtained. That could delay the project for at least 3 years of monitoring (longer if the lawsuit drags on) and/or cause the applicant to cancel the proposed project.

It appears to me that the Corps of Engineers really botched this project almost from the beginning, and then handed MMS a burning torch flaming end first.

For example, it appears that

- The applicant selected the site and submitted to the Corps an unsolicited proposal for the project.
- The USFWS informed the applicant and the Corps as early as May 2002 of the need for 3 years of monitoring bird use of Nantucket Sound and the Horseshoe Shoals area to provide the information required to adequately inform the NEPA process. That was SIX (6) years ago, and the data were never collected. If the applicant had responded to the USFWS's comments, the project could well have been approved by January 2009, but they did NOT respond, and that is why a judge is likely to stop the project from proceeding and require the 3 years of monitoring. (emphasis included in email)
- Even those conservation organizations that recognize the need to move beyond just fossil fuel energy and who support development of wind energy recognize that each site is unique in its characteristics, must be evaluated on its own merits, and emphasize the need for using good science to acquire adequate information to make those site-specific evaluations and minimize wildlife impacts.

The avian biologist acknowledged that he authored the email containing the above statements, which essentially agreed with FWS's comment letter that not enough data to adequately assess the project's potential impacts on birds had been obtained by the applicant, notwithstanding the early FWS requests to the applicant to obtain such data. He stated that subsequent to his email he learned there is only "one type of radar" that could cover the five mile distance between the project and shoreline, and that particular radar (S band, C radar) is incapable of detecting smaller objects such as birds. He also stated he learned that the "only type of radar" capable of detecting birds has a maximum range of only two miles.

The avian biologist further stated that he personally researched the economics of setting up the needed radar on the meteorological tower in Nantucket Sound and determined it was not economically practical. He supported this statement by explaining that the radars needed are "directional" and, therefore, multiple radars would need to be placed on the tower at a rental cost of

\$250,000 apiece, which does not include operation and maintenance costs to run the radar 24/7 over three years.

When Cluck of MMS was asked how his agency responded to FWS's April 2008 comment letter, he stated that MMS held a meeting with FWS to review the letter "line by line." According to Cluck, FWS "stuck to their comments to a certain extent," although FWS Northeast Regional Director Marvin Moriarty said he believed the comment letter had "gone overboard on things" and was "unprofessional." Cluck stated that based on Moriarty's comments Cluck believed that the FWS comment letter was not reviewed beyond FWS's NEFO.

Moriarty is the Regional Director for the FWS northeast regional office. He said he has been the regional director for FWS Region 5 for the past five years and before that was a FWS deputy regional director in Minnesota for 16 years. He stated that he also worked at FWS headquarters in Washington, DC for 10 years, totaling 38 years of service with FWS. Moriarty said that the Cape Wind Project has been a significant issue within FWS since its inception in 2001, and that early on FWS biologists had identified that there was a lack of data for such an offshore wind farm project in Nantucket Sound. He added that he has physically visited the site for the project and noted that it is a "very active migratory bird area."

According to Moriarty, FWS's relationship with the original action agency handling the Cape Wind Project, COE, was "not very good." He stated that FWS was very critical of COE's draft EIS due to the lack of data that COE required the developer to obtain. He stated that FWS was encouraged when MMS became the action agency after passage of the EPAct because MMS is a part of DOI, and he believes MMS is "more scientifically oriented" than COE. He cited examples of projects in the past involving MMS where he observed they used "good science." Moriarty acknowledged, however, that the FWS comment letter on MMS's draft EIS was similar to the critical comment letter FWS issued on COE's draft EIS -- specifically, that MMS did not require the developer to provide the data needed to adequately address the potential impact of the Cape Wind Project on avian species.

Moriarty was asked if he ever stated to Cluck that he believed FWS's April 2008 comment letter was "unprofessional" or had "gone overboard on things." Moriarty responded that he does not remember ever making such statements to Cluck, or in fact ever speaking to MMS whatsoever about the comment letter. Moriarty stated that FWS stands by the content of the April 21, 2008 comment letter to the draft EIS.

▪ **Biological Opinion (BO) issued under the Endangered Species Act (ESA)**

In his joint interview with complainant Taylor and Wattley, Carroll stated that FWS recently issued their BO finding that the Cape Wind Project will not jeopardize the existence of the endangered species identified to be potentially impacted by the project: the piping plover and the roseate tern. Carroll stated that he believes the original BO drafted by staff biologists is most likely "quite different" from the final BO issued by FWS because the BO was altered by upper management in order to support a favorable finding for the final EIS. Carroll requested that OIG review the iterations of the BO as it was forwarded from staff biologists to SOL and FWS upper management in order to assess whether changes were made to the document for non-biological, political purposes.

Michael Amaral is the Endangered Species Division Supervisor for FWS's NEFO. According to Amaral, he has worked for FWS for 31 years and has been the supervisor of NEFO's endangered species division for the past 20 years. Amaral said he has been heavily involved in evaluating the Cape Wind Project on behalf of FWS since the project's inception and was one of the authors of the BO that evaluated the project's potential impact on the endangered species identified in the area. According to Amaral, unlike the April 21, 2008 comment letter, the BO focused exclusively on the piping plover and the roseate tern.

Amaral explained that the purpose of a BO is to make a finding whether a potential project will place an endangered species in "jeopardy" of extinction or not, resulting in a finding of "non-jeopardy." Amaral stated that a finding of jeopardy does not mean the potential project is "dead," but rather that FWS would then consult with the developer to "salvage parts of the project" by agreeing on "reasonable and prudent alternatives." If the BO makes a finding of non-jeopardy, FWS then proposes several "reasonable and prudent measures (RPM)" to the developer in order to "limit the take (killing)" of the endangered species. He confirmed that the BO for the Cape Wind Project made a finding of non-jeopardy.

Amaral stated that he and the NEFO biologist drafted the BO in NEFO, which was forwarded to the FWS regional office. Following consultation with the regional office, a draft BO was sent to MMS on October 31, 2008. According to Amaral, the draft BO contained several RPMs, including one to halt operation of the wind farm during specific high-migratory periods and certain weather conditions in order to limit the killing of the plover and tern. Amaral stated that MMS properly forwarded the draft BO to the developer of the Cape Wind Project, CWA. After reviewing the BO, CWA formally responded that the RPM to restrict operation of the project was "not reasonable because it does not meet the legal standard for imposing project restrictions, i.e., measures may involve only *minor* changes."

According to Amaral, CWA conducted an independent study of how the RPM would detrimentally affect the economics of the project and concluded that the RPM would "significantly impact the project," as opposed to being a minor change to the project. Amaral provided to the OIG a formal response from CWA's legal advisors which argued that the RPM to restrict operations would result in significant changes to the project, and therefore is not an allowable RPM to impose on the project. Amaral stated that based on both CWA's response and its consultation with MMS, MMS decided to remove the RPM restricting operation as a mandated condition under the BO because it does not meet the "minor change rule."

Agent's Note: *The final BO, without the RPM requiring operational shutdowns during certain specific times and conditions, was issued by FWS on November 21, 2008.*

According to Amaral, the typical process of preparing a BO was not followed for the Cape Wind Project. He said that the signatory authority for a non-jeopardy finding is typically held within the field office, but that the Cape Wind Project BO was reviewed and signed at the regional level. Amaral stated that he personally requested the region to assist in the preparation and review of the BO due to the high-profile nature of the project, and the input by the regional office was extremely valuable, in addition to the input from the SOL Attorney Advisor.

In his interview, Amaral disagreed with the allegations that the regional office modified the findings of NEFO in order to comply with departmental pressure to ensure a favorable finding for the Cape Wind Project, or that the process to reach a finding was rushed by directing NEFO to abbreviate the process. Amaral stated that the opposite occurred, and that the input from the regional office actually extended the time needed for completion because the regional office insisted that the scientific findings in the BO be thoroughly reviewed in order to produce a more “legally defensible” document.

Amaral addressed the point in the FWS April 2008 comment letter that FWS had requested CWA to conduct a three-year, 24/7 radar study, and CWA’s refusal to do so, saying that he agreed that the radar study would have significantly increased the amount of valuable data needed to analyze the project. Amaral pointed out, however, that the radar study would not have assisted FWS in preparing the BO and an analysis of the endangered species because the radar would not be able to distinguish between different species.

Amaral stated that MMS had made it clear that they were indeed trying to complete the final EIS and issue the ROD prior to the end of the Bush Administration. Amaral said he does not believe that the department was telling MMS *what* the final decision/conclusion regarding the project should be, but rather was trying to establish a timeline for completion.

Amaral said that as the deadline to complete the final EIS drew closer, he realized that FWS and MMS needed “much more time” to complete their work comprehensively on the BO. Amaral stated that he believes one area that was compromised due to the rushed timeline was the monitoring plan that MMS included in the final EIS. According to Amaral, there was no peer review of the monitoring plan and it appeared to him that MMS’ only ornithologist must have worked close to 24-hours-a-day for 3 weeks to prepare the monitoring plan. According to Amaral, the final product reflects this.

The NEFO biologist stated that he co-authored the Cape Wind Project BO with his supervisor, Amaral. The NEFO biologist said he believed that the timeline designated by MMS compromised the BO, but that the timeline pressure did not affect the ultimate determination in the BO of ‘non-jeopardy’. He said, however, that he feels that FWS was rushed in preparing the RPMs, and stated that the RPMs were essentially just “tacked on” at the end without much reflection because of FWS’s attempt to comply with the MMS timeline.

Thabault stated there was no pressure from FWS upper management or from MMS regarding the Cape Wind Project BO. He stated that FWS received a “lot of information from MMS,” and added that the role of FWS “was not to be obstinate, so we tried to facilitate agency timelines when we could.” Thabault noted that FWS requested a 60-day extension of the consultation period to December 3, 2008, and MMS responded with a different timeline. Thabault added that FWS did not meet MMS’s suggested timeline.

Commenting on the quality of the FWS BO dated November 21, 2008, Thabault stated that “you could always do better,” but given the quality of people involved, nothing was compromised. Thabault noted that the non-jeopardy decision was made long before the deadline. He said FWS would have voiced concerns to MMS if there were “any questions as to the biological impacts of this project.”

Thabault noted there were two issues that were outstanding at the end of the BO process: monitoring and temporary shutdowns of operations. Thabault stated FWS received feedback from MMS and the project CWA regarding the temporary shutdown of operations. Thabault stated FWS relied upon MMS to decide what was reasonable and prudent. Thabault said, "There was a decision made collectively by the FWS that we, given the amount of information that MMS was providing to us, saying it [temporary shutdown of operations] was not reasonable and prudent, we cannot as the FWS override their technical expertise around their own authorities, jurisdictions and expertise that they had in among themselves and for which they brought in from the applicant. So we did make a decision to take that out based on MMS's pushback because we don't have the capability, expertise, or the credibility to counter that at some point in time." Thabault stated that FWS "did a bang up job [on the BO] given the time constraints we had and the information we had."

The SOL Attorney Advisor stated that he believes the final BO that was issued on November 21, 2008, was a comprehensive document that was "robustly" supported by science. [Exemption 5]

In sum, the SOL Attorney Advisor explained that a change between a draft BO and a final BO that includes a controversial issue [Exemption 5] should always be adequately explained in supporting documentation, indicating an independent review of the issue by FWS. [Exemption 5]

The SOL Attorney Advisor concluded by observing that MMS ultimately postponed the timeline for completing their final EIS based on the need to give USCG more time to complete their analysis of the project. Accordingly, the FWS BO did not need to be completed in such a rushed manner, he said. [Exemption 5]

Martin Miller is the Chief for Endangered Species for the FWS northeast regional office. Miller stated that he agreed with Amaral that more time would have been helpful to allow FWS to work out the details of the monitoring plan included in the BO. That would reduce the risk of needing to adjust the plan at a later time. Miller explained, however, that FWS has the option of "re-initiating" the Section 7 Consultation process if it can be shown the monitoring plan is failing.

According to Miller, FWS regularly communicated to MMS its desire for more time to strengthen the BO, yet MMS held to its timeline, regardless of the fact that FWS was receiving necessary data from MMS up to the very day the BO was finalized. Miller stated there was a great deal of pressure on FWS to finalize and issue the BO within the MMS timeline. In fact, he stated that he was forced to skip a week-long policy meeting he was hosting as the regional chief of endangered species in order to review the BO prior to the date that MMS had set for it to be issued. Miller stated that the rush to complete the BO did not make much sense to him because it was in the best interest of both MMS and the developer to ensure that the BO was as legally defensible as possible.

In his interview, the avian biologist was provided an email he had authored after reviewing the draft BO. In the email he stated, "I did not find that the 'Reasonable and Prudent Measures [RPM]' section contained anything unreasonable." He was asked why he apparently changed his view on the RPM, which required an operational shutdown of the wind farm during certain seasonal time frames and foggy conditions. According to the avian biologist, after taking a closer look at the reasons cited by FWS to support the occasional operational shutdown, he determined that the reasons were not

biologically justified. Accordingly, he authored Attachment B to MMS's argument against the RPM explaining his views.

The avian biologist was provided an email he authored on October 20, 2008 to several potential external reviewers regarding the avian/bat monitoring plan he developed for the BO. In the email he stated, "Frankly, we just ran out of time for external review and needed to send our monitoring proposal to the Fish & Wildlife Service as part of Section 7 Consultation without external review in order to meet timelines." After reviewing the email, he was asked if he believes this failure to conduct external review of the avian/bat monitoring plan – due to the timeline created by MMS for its completion – may have compromised the plan. He stated that he does not believe the plan was compromised due to the lack of external review.

Agent's Note: The lack of peer review for the monitoring plan was one of the facets of the BO that Amaral believes was compromised due to MMS' unwillingness to extend the deadline for the BO.

- **Comparison of April 21, 2008 FWS Comment Letter to the draft EIS, and FWS' BO**

Moriarty was asked if the non-jeopardy finding in the BO effectively recanted FWS's stance in its April 2008 comment letter, which was highly critical of the MMS draft EIS due to the lack of avian migratory data. Moriarty stated that the BO did not in any way change the FWS position that there is a significant lack of data to make an adequate assessment of the impact on all avian species in the Nantucket Sound area. Rather, he said, the BO only pertains to the two species on the endangered species list: the piping plover and the roseate tern.

Additionally, Moriarty explained that FWS is required to make BO findings based only on the currently available data and FWS cannot mandate that the developer of a proposed project obtain more data. Accordingly, he added, the two positions of FWS related to the Cape Wind Project -- 1) a non-jeopardy finding in its BO for the two species on the endangered species list, and 2) FWS's comment letter criticizing MMS's draft EIS due to a significant lack of data -- do not contradict one another. Moriarty stated that FWS still believes it did not have the data necessary to make an adequate assessment of all avian species in that area. Based on the data FWS were provided, he said, the agency made the finding in the BO that the project would not jeopardize the existence of the two species on the endangered species list.

- **The Biologist's Reassignment from the Cape Wind Project**

The biologist was officially removed from working on the Cape Wind Project in June 2008 by his then-acting supervisor, Marjorie Snyder via an emailed "Project Reassignment Memo." According to this memo, Snyder stated that she was reassigning the biologist from the Cape Wind Project, along with other projects, due to his "combative and unprofessional behavior exhibited towards partners of [FWS]."

The former FWS supervisor of NEFO, stated that the biologist is opinionated in his writing and that he, often "massaged" the biologist's draft letters in order to tone them down. Considering this fact,

the former supervisor said he believes the biologist authored a letter critiquing a different wind farm project's assessment after his retirement that was not "massaged" and the regional office chastised the biologist for writing the letter.

Snyder is the Deputy Assistant Regional Director, Habitat Conservation Division, Ecological Services at the FWS northeast regional office. Snyder stated that she became the acting supervisor for NEFO on May 5, 2008, for a 60-day detail. According to Snyder, she reassigned the biologist in June 2008 and personally made the decision without any pressure from FWS management. Snyder stated she had never read the April 21, 2008 FWS comment letter to the draft EIS, and accordingly, her decision to reassign the biologist was in no way related to his involvement with the project.

Snyder stated that the biologist's behavior warranted his reassignment. Snyder stated that FWS received a letter from the office of Maine U.S. Sen. Olympia Snowe about the Wells Harvard Dredging Project, as well as a letter from the Vermont Agency of Natural Resources on the Sheffield Wind Project, both complaining about the biologist. Snyder described the biologist as a "problem child" who "does not play well with others." Snyder also described the biologist as a "combat biologist" who liked "throwing up road blocks" and was "uncooperative," which was inconsistent with the way FWS conducted business.

Snyder also cited an incident in the NEFO office in which the biologist used "totally inappropriate language and remarks that could not be ignored, and so all this stuff happening in a month was amazing to me." Snyder stated she could have easily ignored this as she was on a temporary detail. She thought the biologist's behavior was "inappropriate," however, and he "was not representing the FWS to the external partners in a way that he should have been." Snyder stated she coordinated her efforts to reassign the biologist with the FWS Human Resources Department, FWS Field Operations, and an SOL attorney.

Snyder provided a Counseling Memo dated June 24, 2008, addressed to the biologist, as well as the Project Reassignment Memo dated June 30, 2008. Snyder stated she requested that FWS Field Operations attend the meeting with the biologist in which Snyder gave him the counseling memo because she had "no trust in him at all and I would not want to be alone with him." Snyder noted that the biologist showed no remorse for the things he had done and that he did not think he had done anything wrong. Snyder stated that based upon his "controversial way of conducting himself, I decided that it would be appropriate to reassign him from these other projects, so it was not just Cape Wind, it was anything that had controversy, I didn't think he should be allowed to continue in because his representation of the Service and because of how he treated other peers in the Service."

According to a manager in Ecological Services, shortly into Snyder's term as acting supervisor for NEFO, the biologist had an altercation with a fellow FWS employee. The manager stated the biologist was using foul language and was acting in an intimidating manner. In addition to this altercation, the manager also cited the two letters received by FWS from Sen. Snowe's office and the Vermont Agency of Natural Resources regarding the biologist's job performance. Both letters were complaints about FWS representations at work groups. The manager stated all these issues came together in the same week and therefore something needed to be done to rectify the situation.

The Ecological Services manager discussed the matter with Snyder and a human resources specialist.

The manager stated Snyder worked directly with the Human Resource Specialist on drafting a counseling memo to the biologist. The manager recounted that he and Snyder met with the biologist regarding the counseling memo. In sum, the manager confirmed that the biologist's reassignment from the Cape Wind Project was a direct result of his behavior and was not a result of outside pressure or any political motivation related to the project.

Thabault stated that the biologist was reassigned from the Cape Wind Project, as well as other FWS projects, due to the "probable hostile work environment" he created, as well as several "strongly worded language" letters that were sent out to FWS project partners. Thabault characterized the letters written by the biologist as "harsh" and "overreaching our authority" in certain instances.

▪ **Memorandum of Understanding (MOU) between MMS and FWS**

Clint Riley is the FWS Deputy Division Chief for the Division of Migratory Bird Management. According to Riley, his division is responsible for overseeing national policies related to MOUs between FWS and other federal agencies, as required under Executive Order 13186. Riley stated that since the Executive Order was signed, FWS has been working with 10-12 different agencies in creating MOUs, which are in various stages of drafting.

Riley explained that the MOUs are agreements between FWS and other agencies establishing that the agencies will take all conservation measures practical in order to reduce the impacts of various projects on migratory birds. Riley pointed out that the MOUs are not entered into in order to ensure compliance with various laws, such as the Migratory Bird Treaty Act (MBTA).

Riley stated that the MOU between MMS and FWS would apply to all future projects within the scope of the MOU, not just the Cape Wind Project, and the process of developing the MOU has been off-and-on for a period of approximately three-to-five years. He pointed out, however, that the Cape Wind Project has been a driving factor in a recent effort to finally complete the MOU because of the project's potential negative impacts on migratory birds. He stated that the project has apparently resulted in a "heightened awareness" by MMS for the need to complete the MOU.

Riley stated again that the MOUs are not intended to specifically address MBTA compliance, but rather are intended to seek agreement between FWS and federal agencies on conservation measures. He stated that the MOUs are related to the MBTA, but they are "not a direct fit," and therefore an MOU will not provide "protection from the MBTA."

Riley was then asked if, pursuant to an MOU with a federal agency, FWS will "look the other way" if an incidental killing of a migratory bird does occur. Riley said that an MOU will not serve as a "get out of jail free card" for an agency that has signed an MOU with FWS. Indeed, he pointed out that FWS could not legally provide such a release of liability to an agency because there is currently no regulatory framework in place that would allow FWS to "exempt" an agency from provisions of the MBTA.

Riley further explained, however, that the existence of a completed MOU provides FWS with a starting point in ensuring that the agency is taking all available conservation measures necessary to avoid the incidental killing of migratory birds. Therefore when FWS law enforcement reviews a

potential incident prosecutorial discretion can be applied more readily because it may be easier to assess whether the agency has done all it could to avoid the incidental killing. Riley explained that MBTA enforcement actions by FWS try to focus on situations where an entity either intentionally “disregarded the MBTA” in its actions, or there were clear conservation measures available to avoid the killing, yet the entity intentionally chose to ignore such measures.

Agent’s Note: Following Riley’s interview, MMS and FWS finalized an MOU “Regarding Implementation of Executive Order 13186” on June 4, 2009.

IV. In their complaints, Senator Kennedy and Taylor alleged that MMS was prepared to move the project to approval prior to receiving final USCG terms and conditions for safe marine navigation:

In his joint interview with complainant Taylor and Wattley, Carroll stated that wind turbines, whether on land or offshore, cause significant radar interference. Over the past four years, Carroll has sent MMS substantial documentation from both Britain’s Arm’s Warfare Center (military agency) and Coastal Maritime (USCG equivalent) establishing that offshore wind farms have significantly “degraded their navigation systems.”

Carroll said that at a September 2008 hearing in Falmouth, MA, the developer, CWA, presented a report on radar interference it had been asked to produce by USCG. According to Carroll, CWA’s presenter and expert, Captain Dennis Barber, a consulting partner at Marico Marine in Southampton, U.K., told the audience that the report was not based on a “scientific report.” Wattley stated that he asked Captain Barber for the data supporting the report and Barber admitted that the report was not based on any particular data set.

According to Carroll and Wattley, among those present at the hearing were the head of USCG for the Cape Cod area, the Woods Hole, Martha’s Vineyard and Nantucket Steamship Authority (WMNSA), the Passenger Vessel Association, and Hy-Line Cruiselines (Hy-Line). Wattley and Carroll said that because the report was clearly inadequate, the USCG Captain stated he would commission an independent \$100,000 study to analyze the potential impact on radar and navigational from the Cape Wind Project.

Carroll said that besides stating he planned to commission an independent report addressing radar interference, the USCG Captain also stated that USCG would hold another workshop/stakeholder meeting with Cape Cod citizens to discuss the report’s findings as well as Search and Rescue (SAR) and other issues not discussed in the first workshop. Since that time, however, Wattley said that the USCG Captain has “pulled back” on this promise and stated in a November 4, 2008 letter that there would not be a second workshop.

Carroll also produced letters from U.S. Congressman James Oberstar, the Chairman of the House Committee on Transportation and Infrastructure, to Admiral Thad Allen, Commandant of USCG and then-DOI Secretary Dirk Kempthorne. In his September 12, 2008 letter to Allen, Oberstar stated, “I am deeply concerned that the Coast Guard and the Department of the Interior have not jointly developed clear and binding nationwide navigation safety standards for the Department’s new offshore renewable energy development program.”

Cluck stated that USCG's independent radar study was completed and MMS had received draft mitigation measures from USCG regarding the Cape Wind Project which are "broad and general." Cluck said the USCG Captain informed him that USCG was not prepared to issue "specific" mitigation measures at that time.

According to Cluck, the draft mitigation measures have identified that there will be "moderate impacts" to vessel traffic inside the array of turbines, whereas MMS initially believed the impact would only be "minor." Cluck explained that this finding of a greater impact does not necessarily put the mitigation measures "outside of the scope" of the final EIS, but rather USCG will need to recommend an appropriate level of mitigation to overcome the impact. According to Cluck, USCG is required to provide "terms and conditions" for the project under Section 414 of the Coast Guard Authorization Act so that the language of the terms and conditions may be included before issuing a lease, not necessarily before MMS issues the ROD.

The USCG Captain had been the USCG Sector Commander for Southeastern New England for approximately one year when interviewed and had been involved in reviewing the Cape Wind Project on behalf of USCG during that timeframe. According to him, MMS has been "very accommodating" with the timeline for producing the draft and final EIS for the Cape Wind Project. He stated that USCG was meeting the timeline requested by MMS until the developer of the project, CWA, presented their radar study, along with project opponents presenting a radar study; the two studies reached opposite conclusions.

The USCG Captain stated that before the release of the two opposing reports USCG was considering commissioning its own study, yet he concluded that an independent report was necessary following the concerns voiced by the local operators (ferries, fisherman, etc.). According to the USCG Captain, the decision to commission the third radar report was the circumstance that created the "time crunch" in meeting MMS's preferred timeline for issuing the final EIS.

The USCG Captain said that the contractor hired to perform the radar study was asked to answer only one question: "What will marine operators see on the radar when operating in/around the turbine array?" The contractor was not asked to make recommendations about risk, hazards, or impact. Accordingly, he said, the contractor looked at the projected design of the turbine array and plugged that information into a simulator to produce a report that would tell USCG what the radars would show when presented with different scenarios regarding number of vessels, direction, and other information.

Under section 414 of the Coast Guard Authorization Act of 2006, the USCG Captain stated, the general terms and conditions USCG provided to MMS that were included in the draft EIS are still valid and "meet the statutory requirements" of USCG. He explained that the terms and conditions are the "overall project framework," which can be modified through specific mitigation measures as the project moves forward and the measures become more readily definable. He purposely did not recommend the creation of "buffers of navigation" around the turbine array because he believes that would have caused a change in the "footprint of the project" that could unnecessarily "kill the project."

The USCG Captain said he was satisfied overall with the independently commissioned radar study. He acknowledged there still are many unknowns, yet he believes that with the information provided in the three radar studies USCG will be able to reduce the risks to a level that would ensure navigation safety. He stated that USCG has submitted SAR operation requirements to MMS and he believes that USCG can meet its SAR standards (two-hour response time) in and around the project's turbine array.

According to the USCG Captain, USCG has operated somewhat differently in its review of the Cape Wind Project than when normally scoping out potential projects that could affect navigation safety. He stated that USCG typically reaches out to all affected operators and stakeholders and regularly interacts with them in order to create transparency and determine the best course of action. He said that under the Cape Wind Project, however, USCG is "only a cooperating agency" and, therefore, he believes USCG needs to "stay in their box" and not "get ahead of MMS." Accordingly, the USCG Captain explained that USCG would attend MMS-sponsored events and only respond to questions submitted to MMS. As a result, he stated, USCG has been forced to change its approach from interacting freely with operators and stakeholders to "see what we can do" and only taking actions that USCG is "legally required to do."

The USCG Captain explained that the independently commissioned radar study report was completed after the public comment period was closed, and therefore USCG was not technically allowed to release the report for public comment. The report was only "presented" to stakeholders and operators and not put out for public comment or for questions and answers. He reiterated that the report was used only as a source for data and it did not make any conclusions or assessments on navigational safety. Rather, he said, USCG would make such assessments based in part on the data from the report and from other data and information sources.

The USCG Captain said that he has spoken directly to representatives from the WMNSA and the Massachusetts Fishermen's Partnership, Inc. about their concerns of the hazards of navigation and loss of commercial fishing grounds. He said he has spoken off-the-record with a few persons from these groups and has been able to partly assuage their fears. He reiterated that USCG is not operating in its typical manner – having direct, open communication with these groups – and he believes this has caused the groups to feel anxious and nervous about the Cape Wind Project.

Notwithstanding USGS's inability to meet directly with operators and stakeholders due to its role as a cooperating agency with MMS, the USCG Captain said he does not believe that the MMS timeline compromised USCG's ability to ensure public safety on the sea. He emphasized that USCG is not simply a "regulatory agency" on this project, but is itself a user of the affected area. USCG personnel operate in Nantucket Sound, Perry emphasized, and he would neither send his personnel into an area he believed to be a navigational hazard, nor would he ever state that an area "is safe" when he knew it was not.

When asked if MMS's timeline amounted to "political pressure" on USCG that resulted in compromising navigational safety, the USCG Captain said it was explained to USCG that the timeline was indeed tied to the end of the Bush Administration. He said he believes that based on the timeline USCG probably got "shortchanged a bit" regarding its involvement in the process but not to a degree that jeopardized safety. He acknowledged, however, that this "shortchange" has left USCG

“vulnerable” to claims that it has not adequately reviewed all public comments and listened thoroughly to stakeholders and operators. He concluded by stating that he has never been told by anyone to grant undue deference to the Cape Wind Project regarding safety issues.

A Captain and a manager of WMNSA were interviewed regarding several comment letters WMNSA has submitted to DOI, MMS, and USCG on the Cape Wind Project.

The Captain stated that he has several years of experience on the sea with all types of vessels and has been a Captain for WMNSA for the past six years. According to the Captain and the manager, WMNSA is a “quasi-state entity” that differs from a private company in that WMNSA is “legislatively mandated” to operate regardless of weather or other hazardous conditions. The Captain and the manager said that WMNSA is mandated to operate by law because the residents of Nantucket and Martha’s Vineyard rely solely on WMNSA ferry services to transport heating oil and liquefied petroleum gas to the islands; there is no other method of transportation available to deliver these vital products.

According to the Captain and the manager, the ferry regularly “tacks” its course based on the severe weather conditions prevalent in Nantucket Sound. The Captain stated that the tacking is necessary due to the combination of weather and the tides, and this tacking can cause major deviations from the projected ideal ferry routes. He explained that the tacking could even result in a ferry entering the Horseshoe Shoals footprint of the proposed Cape Wind Project. Regardless of whether the ferry would need to enter the wind farm, any potential tacking will be affected by the presence of the wind farm. WMNSA has estimated that the existence of the Cape Wind Project would require its vessels to burn approximately 300,000 gallons of additional fuel per year at an annual cost of more than one million dollars.

In addition to WMNSA’s concern with the tacking issue, the Captain and the manager stated that both the draft EIS and the final EIS essentially ignored the frequency and severity of ice events in Nantucket Sound; an array of 130 wind turbines over a proposed area of 25 square miles in the middle of Nantucket Sound will restrict the natural ice flow needed to dissipate the ice.

According to the Captain and the manager, every time WMNSA raised navigation safety issues to MMS, MMS deferred to USCG. Several times WMNSA tried to express its concerns about the Cape Wind Project to USCG, both in person and in letters. The Captain and the manager said, however, that USCG has acted atypically from its usual conduct in such matters, and they have been told that USCG has not answered WMNSA’s concerns and questions “based on advice from their [USCG] legal counsel.”

The Captain stated that the radar report commissioned by USCG was completely inadequate in addressing the radar interference that will occur as a result of the wind farm. He stated that he believes the study was so inadequate and was no better than a “high school project” because it only addressed a few scenarios with only a couple of vessels at a time. He stated that the public was not allowed to ask questions about the radar study at the one hearing USCG convened to present the study.

The Captain stated that USCG’s handling of navigational safety concerns for the Cape Wind Project

has been “past the point of embarrassment.” According to the Captain and the manager, the current Captain for USCG in Woods Hole has done a “poor job” dealing with the vessel operators in the area. He stated that the USCG Captain is not a “ship driver” who is familiar with the use of radar usage on a large commercial vessel, whereas he may have “used radar on a small boat.” The Captain does not believe, however, that the USCG Captain is capable of assessing the effects of the wind farm on navigational safety and potential radar interference based on the radar study commissioned by USCG.

In sum, the Captain and the manager stated that they feel WMNSA has been completely ignored in the MMS review of the Cape Wind Project. They said that they believe WMNSA’s comments on navigation safety should have received at least a modicum of recognition due to the group’s legislatively mandated role, adding, however, that this clearly has not occurred.

WMNSA submitted several comment letters to DOI, USCG and MMS explaining their significant concerns about the potential impact on navigational safety from the Cape Wind Project, as well as a map of Nantucket Sound identifying WMNSA and Hy-Line (private ferry operator) ferry routes as they relate to the proposed footprint of the Cape Wind Project.

Hy-Line, which in addition to WMNSA has submitted several comment letters to DOI, MMS, and USCG regarding the Cape Wind Project. An executive for Hy-Line stated that Hy-Line operates high speed ferry services between Hyannis, MA (Cape Cod – mainland), and the islands of Martha’s Vineyard and Nantucket. Hy-Line vessels travel routes within navigable channels in Nantucket Sound, he said, and create a triangle around the proposed footprint of the Cape Wind Project. According to the Hy-Line executive, due to the close proximity Hy-Line routes to the project – often within one-half mile of the wind farm – his company is very concerned about the safety risks associated with traveling so close to the potential wind farm.

The Hy-Line executive reiterated many of the same concerns related to sea navigation raised by WMNSA including radar interference, restricted ice flow, and the potential for collisions. Overall, he stated that Hy-Line is very uncomfortable with how USCG has addressed the many sea navigation safety issues raised by the ferry operators. The Hy-Line executive said USCG has done an inadequate job of conducting the review of the project and that “none” of his company’s concerns/comments have been properly addressed by the government. He said that Hy-Line has developed the impression that the project is a “bag job” – in that a decision to approve the project had been made “from day one” – and therefore the public’s comments and concerns were rendered meaningless.

The Hy-line executive stated that even if USCG eventually issues specific terms and conditions for the wind farm that affect navigational routes – in an attempt to promote safety – the mitigation measures will require the ferry operators to alter their current routes and expend far more fuel, resulting in cancellations and a negative economic impact on the companies. He said that he questioned how the government could approve a new private venture in federal waters that will clearly affect the safety of the current users of those federal waters, along with detrimentally affecting other private operators that have been using the area for years. He concluded that he believes the potential wind farm could not have been placed in a worse spot, inasmuch as “millions of people” transit Nantucket Sound annually by air and sea.

Edmund B. Welch is the Legislative Director for the Passenger Vessel Association (PVA), which submitted comment letters on both the draft and final EIS. Welch stated that PVA is a trade association representing U.S. flagged commercial passenger vessels throughout the United States. He said PVA represents most ferry companies and agencies in the country, among them WMNSA and Hy-Line, and that PVA's representation of the two ferry operators is why PVA became involved in reviewing the EIS process on the Cape Wind Project.

Welch said that he is an attorney and an active member of the North Carolina State Bar. Before working for the PVA, he was the Chief Counsel for the U.S. House Committee on Merchant Marine and Fisheries from 1981 through 1993. Although that committee no longer exists, during his time as the lead attorney, Welch said, the committee regularly held congressional oversight hearings on marine issues, including oversight of USCG.

Welch said that it was his impression that MMS "handed off" the issue of marine navigational safety to USCG, which should have been done because USCG is the agency responsible for such safety matters. Indeed, Welch stated that he believes that USCG needs to take a "central role" in regulating navigation safety for these types of projects because the PVA foresees many similar offshore projects in the future that will affect marine navigation routes.

According to Welch, in 2007 USCG produced a Navigational Vessel and Inspection Circular No. 02-07 (NVIC), entitled *Guidance on the Coast Guard's Roles and Responsibilities for Offshore Renewable Energy Installments (OREI)*. Welch believes, however, that USCG failed to follow its own NVIC in completing the review of the Cape Wind Project.

Welch stated that he believes that MMS addressed PVA's comments to the draft EIS by referring them to USCG. In turn, Welch stated that USCG "rushed" through its review and reached conclusions regarding navigational safety that PVA found quite surprising and does not agree with. According to Welch, Section 414 of the Coast Guard and Maritime Transportation Act of 2006 (CGMTAct) requires that USCG specify "the reasonable terms and conditions the Commandant determines to be necessary to be provided for navigational safety with respect to" the Cape Wind Project. He said that he believes that USCG met this obligation at the most minimum level and that USCG could legally argue that it fulfilled the obligation under Section 414 by establishing the general terms and conditions that were published in the draft EIS. Welch does not believe that USCG adhered to the spirit and intent of the law.

Welch explained that in several meetings held by USCG on the Cape Wind Project, the USCG Captain made it clear that he believed it was USCG's role solely to review the project *as proposed* and that USCG was not conducting a review from the standpoint of determining how the project may potentially be modified or altered to make it as safe as possible. According to Welch, by approaching the review in this manner USCG was not exercising its full authority to make suggested adjustments to the project in order to enhance safety. As an example, Welch stated that USCG has an entire program that regularly requires private owners of bridges to modify their bridges for safety purposes, whereas USCG's approach to the Cape Wind Project, for some unknown reason, was more "restrained" in that USCG apparently did not consider suggesting or demanding modifications to ensure navigational safety.

Welch further stated that the CGMTAct was intended to provide USCG the authority to impose terms and conditions on the *developer* of a project, as opposed to imposing terms and conditions on the current maritime users of the affected area. He said that is exactly what USCG is doing with respect to the Cape Wind Project – informing the users of the area what *they* must do in order to be safe. Welch explained that this creates a situation where the original maritime users are being told by USCG to adjust how they do business based on the specifications of a project proposed by a private developer, rather than USCG informing the new developer how it needs to adjust the project so that the use of the area by the current ferry operators, fisherman, and recreationists is not detrimentally affected. According to Welch, this situation is contrary to the legislative history of the CGMTAct, which clearly establishes that the terms and conditions developed by USCG were to be imposed on the developer, not the current maritime users.

Welch offered his observations of how USCG has proceeded in reviewing the Cape Wind Project, saying that he is “astounded” that USCG has apparently acquiesced to the developer’s project specifications. He said that he believes that if a catastrophic sea accident were to occur after construction of the project USCG would be held liable. Welch reiterated that he has worked closely with USCG over the past 30 years and has observed other agencies attempting to “rush” USCG into approving a project. He said USCG had always “pushed back” in order to ensure navigational safety, although this has not occurred with USCG’s review of the Cape Wind Project.

Welch stated that during his 20 years working on Capitol Hill he had never observed USCG, or any other federal agency, deliberately restrict comment periods and meetings with the public regarding a public project. In fact, he stated that an agency typically allows the public to comment “ad nauseam.” Accordingly, he believes that USCG’s actions tacitly display that a decision on the Cape Wind Project had already been reached prior to the “review.” He reiterated that this is very much “out of character” for USCG; he stated that one cannot help but wonder “what is going on behind the scenes?” Welch added that PVA and the ferry operators have not restricted their comments and observations regarding navigational safety to the USCG Captain’s level but have sent comment letters directly to USCG Commandant Allen in Washington, D.C.

In summary, Welch stated that he is not critical of how MMS handled the navigational safety issue because the agency properly deferred the issue to USCG. He stated, however, that he believes the unilateral timeline the MMS imposed on USCG to complete the review – so that MMS could issue the final EIS on the Cape Wind Project before the end of the Bush Administration – “absolutely” resulted in USCG inappropriately rushing through the review process. In fact, Welch said that USCG publicly stated several times that it was not the lead agency reviewing the project and therefore needed to comport to the schedule set by the lead agency, MMS. Welch stated that he believes this situation clearly compromised USCG’s review of navigational safety related to the Cape Wind Project.

V. In her complaint, Taylor stated MMS was proceeding toward a final decision despite an FAA “presumed hazard determination.”

During the joint interview with complainant Taylor and Wattley, Carroll stated that shortly after the Cape Wind Project’s inception, the FAA issued a “Determination of No Hazard” without consulting local airports. He stated that after the finding was issued all of the local airports and air traffic

controller organizations sent letters outlining their concerns with the project to the FAA and COE. Carroll provided an October 18, 2004 letter from the National Air Traffic Controllers Association to COE voicing their concerns about the project's impact on Visual Flight Rules (VFRs) for the area.

According to Carroll, the determination by FAA was valid for two years, after which a new determination would be issued. As a result, Carroll stated, the FAA ignored the concerns of the local airports and air traffic controller organizations and reissued the "Determination of No Hazard." After an additional two years, however, the FAA was required to make a new determination. This time, based on all of the documentation submitted to the FAA, the agency issued a "Presumed Hazard Determination."

Agent's Note: According to the FAA, the Public Notice that was issued at the time of the second determination merely created a "default finding" that there is a "presumed hazard" until the FAA's review is complete. A default finding is different than an actual Presumed Hazard Determination, which is only made after the FAA determines there is a "physical or electromagnetic interference with an air navigational system" (See next page for full discussion).

According to Carroll, this "Presumed Hazard Determination" was issued approximately six months before MMS issued the draft EIS. When the draft EIS was issued, however, it cited the FAA's previous "Determination of No Hazard." According to Carroll, since the FAA issued the "Presumed Hazard Determination," an FAA Obstacle Evaluation Team met with all three affected commercial airport managers at FAA headquarters in Washington, DC and the FAA ordered an independent radar study, which has not yet been completed.

Agent's Note: Following Carroll's interview, the FAA completed its initial review of the Cape Wind Project's potential impact on the radar systems of the three local airports and issued an actual Presumed Hazard Determination on February 13, 2009.

In addition to citing the FAA review of the Cape Wind Project, Carroll stated that the Department of Defense (DOD) believes the project could interfere with the national air defense system. Carroll also provided a July 8, 2008 letter to the FAA from Barnstable Airport manager, Nantucket Memorial Airport manager, and Martha's Vineyard Airport manager, which concluded with the following statement:

While we all believe strongly in the need for renewable energy, the placement of a 25 square mile wind plant in the middle of three of the busiest airports in the state, in some of the most unpredictable weather conditions on the East coast, poses an unacceptable risk to both our aircraft operators and passengers.

Cluck stated that a "presumed hazard determination" is a default position of the FAA rather than an actual finding that the project poses a hazard to aerial navigation. Cluck then stated that the FAA told MMS that they believe their determinations are excluded from the considerations of NEPA, thus the FAA will not necessarily complete their analysis of the project prior to MMS' issuance of the final EIS or ROD, but rather before the construction phase. Cluck provided a letter to MMS from the FAA dated November 12, 2008, which supported Cluck's statement that the FAA believed their review of the project was outside of the NEPA process.

When we asked for the MMS response to the July 8, 2008 letter to the FAA in which the regional airport managers said they believed the project “poses an unacceptable risk to both our aircraft operators and passengers,” Cluck responded that MMS is not an expert in air navigation and thus needs to rely on agencies such as the FAA to assess these issues.

The complainants stated in their interview that the DOD had concerns with how the project could affect their radar systems in the area. Cluck stated that a past DOD study determined that the project will not detrimentally affect defensive radar systems. In fact, Cluck provided a memorandum issued by the U.S. Air Force on March 21, 2004, that stated: “Our experts have reviewed the proposed locations for the Wind Power Plant near Cape Cod AFS [Air Force Station] and have determined it poses no threat to the operation of the PAVE PAWS radar at Cape Cod AFS.”

U.S. Air Force (USAF) Lieutenant Colonel Philip McNairy is with the Ground Based Missile Warning Defense and Surveillance division with the Headquarters Air Force Space Command at Peterson Air Force Base, Colorado. Lt. Col. McNairy was contacted by OIG in order to confirm the continued accuracy of the USAF’s March 21, 2004 memorandum regarding potential impacts, if any, to the PAVE PAWS radar system at Cape Cod AFS by the Cape Wind Project. Lt. Col. McNairy stated that he can unequivocally confirm that the project will not have any impact on the PAVE PAWS radar system at Cape Cod AFS.

Kevin Haggerty, the Manager of the Obstruction Evaluation Service for the FAA, was interviewed by OIG on January 7, 2009. According to Haggerty, the FAA became involved in reviewing the Cape Wind Project in 2003 after being asked to review the project’s effects on air travel in the area. Haggerty stated that the FAA performed a study at that time and subsequently issued a No Hazard Determination. According to Haggerty, the effects on radar from wind turbines were not well known at that time and there was no objection to the Determination.

Haggerty stated that the FAA typically grants one extension to a Determination, and on October 5, 2004, the FAA reviewed the data of its original report and granted an extension of its 2003 No Hazard Determination. He stated that after the extension was granted, a petition was filed claiming that the Determination was in error and the petitions supported its claim by providing to the FAA several British studies regarding an offshore wind farm’s effects on air navigational radar systems.

Haggerty stated that after conducting a discretionary review, on February 2, 2007, the FAA re-affirmed its No Hazard Determination. However, after learning that turbines were being proposed to be placed within three miles of the coast, the FAA issued a Public Notice on April 25, 2007, stating:

The structure above [wind farm] exceeds obstruction standards. To determine its effect upon the safe and efficient use of navigable airspace by aircraft and on the operation of air navigation facilities, the FAA is conducting an aeronautical study under the provisions of 49 U.S.C., Section 44718 and, if applicable, Title 14 of the Code of Federal Regulations, part 77.

According to Haggerty, such a Public Notice creates a “default finding” that there is a “presumed hazard” until their review is complete. He explained that such a default finding is different than an

actual Presumed Hazard Determination, which is only made after the FAA determines there is a “physical or electromagnetic interference with an air navigational system” (e.g. local airport). Haggerty said that based on the default finding that there is a presumed hazard, the FAA issued a January 11, 2008 letter to Congressman William Delahunt, which stated, “After the FAA issued a presumed hazard determination for the Cape Wind Project, the case was published for public comment.” Haggerty stated that this letter’s wording was poor because it created the impression that the FAA had made an actual Presumed Hazard Determination, rather than simply a presumed hazard default finding.

Following their April 25, 2007 Public Notice, Haggerty stated that the FAA commenced studying the project more in depth and in furtherance of the study, the FAA met with all concerned airports and dispatched a group of FAA specialists to the regional airports. The FAA specialists included experts in radar and air traffic control and based on the specialists’ findings, the FAA recently concluded that the project will indeed create a “physical or electromagnetic interference with an air navigational system,” and therefore the FAA would be issuing an actual Presumed Hazard Determination within the next one-to-two weeks of his interview date (January 7, 2009). According to Haggerty, in conjunction with the Presumed Hazard Determination, the FAA will also be issuing a new Public Notice stating that the project exceeds obstruction standards under Title 14 of the Code of Federal Regulations, part 77 (14 CFR 77), and the public notice will provide the opportunity for the public to comment on its findings. *Agent’s Note: Following Haggerty’s interview, the Presumed Hazard Determination was issued by the FAA on February 13, 2009.*

According to Haggerty, after the new Public Notice is issued, the FAA will then conduct a full aeronautical study of the project, including consideration of the public comments received. Haggerty stated that after concluding its study, the FAA will make determinations whether the project’s “interference with an air navigational system” could be mitigated or not. If the FAA determines that the interference can be mitigated, the FAA would then conduct negotiations with the developer of the project in an attempt to agree on appropriate mitigation measures. If the FAA and the developer agree on mitigation measures, the FAA will then issue a final Determination of No Hazard to Air Navigation that includes the conditions of mitigation. If the FAA determines that the interference cannot be mitigated, however, the agency will issue a Determination of Hazard to Air Navigation.

Haggerty reiterated the statements he made in his December 2008 letter to Cluck: “It is the FAA’s position that Part 77 determinations are excluded from the consideration of the National Environmental Policy Act of 1969 (NEPA).” In other words, he explained that the FAA believes that an FAA determination is not required for MMS to complete its final EIS.

Based on Haggerty’s statement on January 7, 2009 that the FAA had concluded that they will be issuing a Presumed Hazard Determination, OIG contacted Cluck on January 12, 2009, in order to determine if Cluck knew of the FAA’s intention to issue the hazard determination. After being informed of Haggerty’s statement that the FAA intended to issue the hazard determination, Cluck stated that he had not received any such information from the FAA.

In addition to stating that he had not received any information from the FAA about their recent study/finding of an interference hazard, Cluck stated that if he had received such information prior to the final EIS being delivered to the Environmental Protection Agency (EPA) on January 9, 2009, he

would have "recommended" that such a finding be included in the final EIS in order to be as "transparent" as possible. However, he stated that since MMS did not receive such information from the FAA prior to January 9, 2009, the final EIS cannot be stopped/modified once it has been delivered to the EPA.

The same day, January 12, 2009, OIG informed MMS Deputy Director Walter Cruickshank about the FAA's intention to issue a Presumed Hazard Determination in relation to the Cape Wind Project. In response, Cruickshank stated that he was completely unaware of the FAA's intention to issue a Presumed Hazard Determination for the Cape Wind Project. Cruickshank also stated that he believes that MMS Director Randall Luthi had also not been told about the finding, speculating that if Luthi had learned of the FAA finding, Luthi would have informed him.

According to Cruickshank, notwithstanding the fact that the final EIS had already been delivered to the EPA, if MMS deemed it necessary to do so, the final EIS could be held back from being published in the Federal Register on January 16, 2009, as scheduled. Cruickshank stated that he was not certain whether the FAA's recent finding of a hazard would warrant such an action, but rather that would be a decision made by MMS Director Luthi and the department. Cruickshank also added that, after release of the final EIS, MMS could issue a "supplemental" EIS that contained the FAA's finding if MMS deemed it necessary.

Sheri Edgett-Baron is the National Program Manager for FAA's Air Traffic System Operations Obstruction Evaluation Service, who has been working with Haggerty regarding their review of the Cape Wind Project. Edgett-Baron stated that she had spoke with Cluck on Wednesday, January 14, 2009, and informed him that the FAA will be issuing a Presumed Hazard Determination regarding the Cape Wind Project. On January 15, 2009, via email, Edgett-Baron forwarded to OIG a copy of the draft statement the FAA intended to issue regarding their hazard determination, which she stated was also sent to Cluck (MMS).

Agent's Note: At the time Edgett-Baron informed Cluck about FAA's intention to issue a Presumed Hazard Determination for the Cape Wind Project (January 14, 2009), MMS planned on having their final EIS published in the Federal Register two days later, on January 16, 2009. The final EIS was indeed published on January 16, 2009 without any indication that the FAA would be issuing a Presumed Hazard Determination for the project.

Moreover, although both MMS and FAA have stated that FAA's review is outside of the NEPA process, and therefore FAA's most up-to-date finding is not required to be included in the final EIS, it should be noted that MMS did include FAA's previous finding that the project would: "have no substantial adverse effect on the safe and efficient utilization of the navigable airspace by aircraft or on the operation of air navigation facilities," in the final EIS that was published on January 16, 2009, along with the statement that FAA's "subsequent determination is pending." See Page 5-253 of final EIS.)

The airport manager for the Barnstable Municipal Airport stated that he was a helicopter and seaplane pilot for USCG for 31 years and was the Chief for SAR operations for USCG for the entire Boston region for four years. Additionally, he also served as the USCG Group Commander at Woods Hole, Massachusetts in charge of SAR operations for the entire southeastern New England region for three years, which includes Nantucket Sound. According to the airport manager, he retired from

USCG in 1995.

The airport manager stated that he believes the potential placement of the wind farm in the center of Nantucket Sound is “foolish, crazy, and unsafe.” He explained that the location of the wind farm would be directly in the middle of the current visual flight rules (VFR) routes between Barnstable Airport, Martha’s Vineyard Airport, and Nantucket Memorial Airport.

Based on his extensive SAR experience, he believes the location of the proposed wind farm would greatly hinder SAR operations in that area. He stated that the typical low visibility for that area (due to low clouds) and the “incredible” amount of boating and shipping traffic in that area will result in significantly compromised SAR responses, either by air or sea. When informed that USCG stated that they feel comfortable that they will be able to meet the regulatory required “response time” for SAR operations with the wind farm present, the airport manager stated that the “response time” required under regulations is defined as how quick USCG can deploy in response to a emergency call, rather than how quickly and safely they can actually reach a victim. Accordingly, the fact that the wind farm is present would, understandably, not affect “response time,” although he believes it will definitely affect how long it takes to reach a victim, and more importantly, how safely USCG can reach and assist a victim. According to the airport manager, the Barnstable Airport Commission submitted comments to the final EIS completed by MMS regarding the Cape Wind Project to both the FAA and MMS that voiced the airport’s concerns regarding the Cape Wind Project.

The airport manager for the Nantucket Memorial Airport was a signatory to the July 8, 2008 joint letter submitted to MMS by the three airport managers in the Nantucket Sound area that voiced their concerns about the impact of the Cape Wind Project to their respective airports.

According to the airport manager for the Nantucket Memorial Airport, his major concerns regarding the Cape Wind Project involve safety. He stated that he believes the potential wind farm will greatly impact VFR air traffic over Nantucket Sound, which will in turn greatly increase the already congested air traffic in the area because pilots flying VFR will be forced to avoid the footprint of the wind farm on days with low visibility – which he stated occurs quite regularly and often happens with very little warning. He added that he also is concerned that many pilots will end up not adhering to the regulatory height restrictions in order to avoid steering around the wind farm and this will result in a constant safety issue for the area.

In addition to his concerns regarding VFR air traffic over Nantucket Sound, similar to the airport manager of the Barnstable Municipal Airport, he stated that he was also very concerned about the wind farm’s potential impact to SAR operations in and around the wind farm. Additionally, Peterson stated that he is not convinced that the radar issues that were documented by the FAA can be mitigated. In sum, he stated that he and other airport managers have continuously raised their safety concerns as they relate to VFR flights, radar issues, and SAR issues, yet MMS and the FAA have not “given these issues the weight” of consideration they deserve. He stated that it appeared to him that MMS came into reviewing the Cape Wind Project with “their minds already made up.”

He submitted a comment letter to MMS on January 9, 2009, that expressed his views on how MMS has failed to adequately consider input from the local airports regarding air safety in furtherance of completing the final EIS for the Cape Wind Project.

The airport manager for the Martha's Vineyard Airport stated that he reviewed, but did not submit comments to the draft EIS for the Cape Wind Project. According to the airport manager, he has concerns about how the project will affect air navigational safety in the Nantucket Sound area, including his airport, and he has communicated these concerns directly to the FAA rather than to MMS. He signed a joint July 8, 2008 letter jointly with the airport managers of the Barnstable Airport and the Nantucket Memorial Airport, which expressed several concerns to the FAA about the Cape Wind Project. In addition, he stated that he recently submitted a letter on April 29, 2009, to the FAA with specific concerns of his airport regarding FAA's ongoing review of the project's impact to air navigational safety.

According to the airport manager for Martha's Vineyard Airport, neither MMS nor the FAA has adequately analyzed the impact to local communities that will result from project's resultant displacement of aviation concerning VFR flights. He stated that the project will definitely result in VFR flight traffic being displaced from their normal routes in inclement weather in order to avoid the wind farm, and that displacement will result in a far greater concentration of air traffic over local communities on Cape Cod and both the Islands, thus increasing noise and carbon emissions over those communities.

The airport manager for Martha's Vineyard Airport stated that project will clearly have an impact on the SAR operations in the area of the wind farm. He stated that there is no question that any SAR operation being conducted via air (e.g. by helicopter) will be impeded by the presence of the project, and in his mind, this is unacceptable.

He stated that another area of definite impact the wind farm will have on air navigation operations is related to the medical evacuation flights from the Islands to the hospitals in both Hyannis and Boston, Massachusetts. His airport supports at least one medical evacuation per day in the off-season and many more in the summer time, due to the aging population of retirees and vacationers to the Island; and the wind farm will have a definite impact on both instrument flight rules (IFR) and VFR medical evacuation flights.

The airport manager for Martha's Vineyard Airport explained that if an evacuation flight is attempting to leave in inclement weather and the wind farm has a detrimental impact on the radar capabilities of the airports, obviously the flight will be impeded. Additionally, if a VFR flight is being attempted in low clouds, additional time will be required to "fly around" the wind farm, thus resulting in extra time needed to have the patient arrive at a hospital. According to him, both of these scenarios result in added time to medical evacuation flights where time is clearly of the essence, which he says is unacceptable.

VI. In her complaint, Taylor stated that because of MMS' overly narrow Purpose and Need Statement for the Cape Wind Project, it has not considered reasonable alternatives, as required under NEPA.

During his interview with complainant Taylor and Carroll, Wattlely stated that the Purpose and Need Statement issued by MMS in the draft EIS was too narrow to adequately assess alternatives, but rather it is fashioned in a way that results in the predetermined outcome that the Cape Wind Project is

the only feasible project.

Wattley stated that there are other alternatives that were not adequately analyzed by MMS in the draft EIS, such as deep water sites. According to Wattley, the draft EIS stated that deep water technology – versus shallow water technology (Cape Wind Project) – is 10-to-15 years away. Wattley said that this statement is untrue. According to Wattley, a European company called Blue H USA, LLC (Blue H) is currently pursuing a deep water wind farm project. Additionally, Wattley produced a June 26, 2008 letter signed by the entire Massachusetts Delegation (U.S. Senators and U.S. House Representatives) to MMS encouraging MMS to “evaluate the application submitted by Blue H USA, LLC, for a limited-term lease authorizing data collection and technology testing in support of alternative energy production on the OCS.”

According to Wattley, however, MMS has apparently put Blue H’s application into the “not now basket.” Wattley stated that Blue H representatives have approached MMS, and MMS has told them that they need to wait until the OCS alternative energy regulations are finalized. According to Wattley, by telling other companies, such as Blue H, that they must wait until the regulations are finalized, MMS is essentially stonewalling all other companies except for CWA. Wattley stated that this is another example of how CWA is apparently being “given the inside track” on producing alternate energy on the OCS at the expense of the public.

MMS Alternative Energy Program Manager Bornholdt stated that on November 6, 2007, MMS announced in the Federal Register an interim policy for authorization of the installation of offshore data collection and technology testing facilities in Federal waters. *Agent’s Note: The Cape Wind Project did not fall under this interim policy because it had been proposed six years prior (see below discussion in Section IX).* According to Bornholdt, MMS accepted comments and nominations until January 7, 2008, regarding the authorization of OCS activities involving the installation of meteorological or marine data collection facilities to assess alternative energy resources (e.g., wind, wave, and ocean current) or to test alternative energy technology and the interim policy is in effect until the MMS promulgates final rules.

Agent’s Note: Bornholdt’s interview occurred prior to release of the final alternative energy regulations in April 2009.

Bornholdt stated that Blue H submitted its nomination under the interim policy in March 2008, after the first group of nominations was accepted prior to the January 7, 2008 deadline. Bornholdt explained that MMS accepted Blue H’s nomination after the January deadline, although it was not included in the first group of nominations that MMS began to review and process. Accordingly, MMS did not begin reviewing Blue H’s nomination at that time, and as of this date of Bornholdt’s interview (April 8, 2009), MMS has not yet reviewed Blue H’s nomination.

Bornholdt explained that interim policy provided for the opportunity for various interested parties to “install meteorological or marine data collection facilities to assess alternative energy resources or to test alternative energy technology.” Under the interim policy, however, a company could not “operate” an alternative energy facility. In other words, if MMS approved their nominations, the companies could test and collect data, but their interest in the potential sites could never become a lease for actual operations. Bornholdt explained that only after the final alternative energy

regulations are promulgated, could an interested company actually submit an application for a lease that would allow the operation of a facility.

Agent's Note: CWA's application for commercial lease did not fall under this interim policy because it was submitted to the government seven years prior in 2001.

Regarding Blue H's nomination for testing and data collection under the interim policy, Bornholdt stated that MMS has not yet reviewed the nomination at the current time (due to the fact that Blue H's nomination was not submitted by the January 2008 deadline and was not in the first group of nominations MMS began reviewing first). Also, the Secretary of the Interior stated that he was committed to having the final alternative energy regulations promulgated in early 2009 and that it would not make sense to begin reviewing the Blue H nomination now under the interim policy. According to Bornholdt, this situation has been articulated to Blue H representatives by MMS.

A manager for Blue H provided background related to Blue H's achievements with developing deep-water floating wind turbines. The manager stated that Blue H installed the world's first floating wind turbine prototype in the Southern Adriatic Sea off the coast of Italy in the summer of 2008. Additionally, the company is currently building the first operational 2.0MW unit, which it expects to deploy at the same site in 2009 as the first unit in a planned 90MW offshore wind farm.

The manager for Blue H explained that deep-water floating wind turbines would be far more economic and energy efficient than shallow water wind farms, such as the one envisioned in the Cape Wind Project. He stated that the deep-water floating turbines would be constructed on land at a cheaper cost, and could be towed into land for needed maintenance at a far cheaper cost than constructing and maintaining fixed wind turbines in the ocean. Additionally, the winds are far greater in deep water versus shallow water, and therefore the energy generated by a deep-water wind turbine would be greater than that generated by a shallow water wind turbine.

He stated that Blue H wanted MMS to recognize that deep-water floating wind turbine technology is currently a viable technology and not "10-15 years away," as had been stated by MMS. Additionally, he stated that Blue H wanted the Commonwealth of Massachusetts to recognize the technology's viability.

According to the manager for Blue H, he met with Bornholdt and Cluck on April 7, 2008, to discuss Blue H's nomination. During this meeting, the manager said that Bornholdt informed Blue H that their nomination will be reviewed with the "second round" of nominations because their nomination was not received prior to the original nomination deadline; such review would occur in June or July of 2008. The manager said that when he met Bornholdt at a conference in Delaware in mid-September 2008, Bornholdt told him that MMS would not be reviewing Blue H's nomination until after MMS finalizes their alternative energy regulations.

The Blue H manager was asked how long it would take Blue H to construct a commercially operational wind farm in comparable size to the Cape Wind Project in Nantucket Sound if Blue H were able to secure all the necessary permits, leases, and financial support. In response, he stated that he believes that Blue H could produce such a wind farm within three years; yet he stressed that prior to being able to submit an application for a commercial lease, Blue H needs to first deploy a

demonstration unit to establish the viability of the technology to potential investors and operational contractors.

When informed that MMS has stated that they received advice from the National Renewable Energy Laboratory (NREL) that such technology was 10-to-15 years in the future, the manager from Blue H stated that NREL is a private group that works closely with private interest groups that are competitors of Blue H, and therefore he questions their objectivity. In fact, he stated that NREL's lead scientist for wind technology, has misrepresented Blue H's deep-water technology's viability in some of his presentations. The Blue H manager concluded by stating that he speculates that certain scientists and researchers are trying to delay deep-water floating wind turbine technology because of their interest in developing shallow water technology.

An Engineer at the National Wind Technology Center, which is a division within NREL, was interviewed. The engineer stated that NREL is operated by the Alliance for Sustainable Energy, LLC, and is under contract with DOE to research renewable energy, including wind. He stated that he is responsible for leading research for offshore wind technology, along with other offshore renewable energy resources.

The engineer stated that he understood why the site of Nantucket Sound was chosen for the proposed wind farm. He explained that there are high winds in the sound, while there are typically not heavy tides/waves that would "generate an extreme load" on the monopiles supporting the turbines. Additionally, the engineer stated that maintenance-wise, the developer would have "good access" to the wind farm in Nantucket Sound. According to him, NREL has learned from European experiences that maintenance and "unanticipated costs" are the biggest costs related to offshore wind farms.

The engineer stated that MMS had informed NREL that they were only considering projects that could be commercially developed within five to seven years, and NREL does not consider deep-water floating wind turbine technology to be commercially feasible within that timeframe. When asked specifically about the claims made by Blue H that their company is poised to produce a commercially operative wind farm, he stated that he did not believe that would be possible. According to him, Blue H does not have the technology needed to construct and operate a commercial wind farm in deep water. He acknowledged that Blue H placed a prototype tension leg platform with a "small antiquated" wind turbine off the coast of Italy as a demonstration project. The engineer stated, however, that the platform was placed in a location that does not experience any noticeable waves and the wind turbine was far smaller than would be necessary for a deep-water wind farm. He explained that these two components are the two most important factors in attempting to develop deep-water wind technology because it is a combination of these two factors, the waves and wind torque on a large wind turbine, which creates the "loads" on the structure. Accordingly, the engineer stated that Blue H's prototype did not really test deep-water wind turbine technology because neither of these two factors was present during their demonstration project.

The engineer stated that he agrees with Blue H's approach in trying to deploy prototype demonstration units in order to acquire the necessary information to advance floating wind turbine technology. When the engineer was informed, however, that the Blue H manager claimed that if Blue H was capable of securing the necessary financial support and permitting (leasing), Blue H could construct a commercial floating turbine wind farm comparable in size to the Cape Wind Project

within three years. He stated that he believes such a timeline is “not remotely realistic.”

The engineer stated that he believes the Cape Wind Project itself is probably three years away, technology-wise, and the necessary technology needed to construct a commercial floating wind turbine farm is 10-to-15 years away – if they were to secure the necessary financing. According to him, even if NREL itself was capable of acquiring the necessary funding, partner with a turbine manufacturer, and receive all of the necessary technological support from the oil and gas industry related to tension leg platforms, NREL would not be able to construct a commercially operable floating turbine wind farm within a three-year timeframe.

The engineer stated that he believes deep-water wind farms will be the future of the industry and he applauds Blue H’s desire to advance the technology. Based on his experience over the past 20 years developing wind turbine technology, however, he believes that the current state of floating wind technology today is similar to the state of onshore wind technology in the early 1980s. He stated that he wishes Blue H and other entrepreneurial companies the best of luck on their pursuits of deep-water floating wind turbine technology and stated that NREL would support their endeavors, however, He believes it would be damaging to the entire wind energy industry for a company to rush the development of a commercial wind farm in deep-water and have the farm fail due to the lack of technological acumen. He stated that he observed this scenario in the 1980s with development of onshore wind farms and the consequences set the industry back years due to the subsequent lack of confidence in the financial and political sectors that resulted.

Notwithstanding the specific issue surrounding Blue H’s application, the issue of whether MMS too narrowly stated the project’s purpose and need in the EIS’s Purpose and Need Statement was reviewed by OIG’s Office of General Counsel. OIG’s Office of General Counsel opined: “Despite the unique circumstances surrounding Cape Wind as one of MMS’s first alternative energy projects, the purpose and need statement for the Cape Wind EIS was narrowly drafted and, as a result, precludes MMS consideration of alternatives outside of its jurisdiction and concentrates on the objectives of the Cape Wind applicant. Nonetheless, the purpose and need statement is probably within the bounds of MMS discretion.”

VII. In her complaint, Taylor alleged that MMS did not properly address the Cape Wind Project’s lack of economic viability.

During his joint interview with Taylor and Carroll, Wattley stated that beyond the unanswered question of whether CWA can adequately finance the project, the draft EIS states that the project will not be economically profitable, but rather the cost of energy production is twice the current market rate. Wattley pointed out that Appendix F of the draft EIS contains an economic model established to assess the economics of the Cape Wind Project and other alternative sites identified by the draft EIS. On page 17 of Appendix F, MMS provides a table comparing the cost of energy for each of the different sites and states the following:

The proposed site at Horseshoe Shoal has the lowest estimated cost of energy, equal to \$0.122/KWhr, or \$122/MWhr, while none of the sites appear to be profitable at today’s electricity prices. The average locational marginal price for southeast Massachusetts, reported by ISO New England, Inc. for the real-time market, was

\$65.97/MWhr over the 2 year period from February 2005 through January 2007. For January 2007, the average price was \$58.77/MWhr.

According to Wattley, this gap between the cost of electricity for the Cape Wind Project and today's electricity prices (double the cost) cannot be overcome by subsidies alone because the gap is too large. Wattley then produced an April 10, 2007 email authored by Cluck which stated:

It is important to note that European experts are in a different boat. European wind farms are heavily subsidized by the government. In the U.S. a company must make a profit with limited government intervention (i.e. renewable energy credits) to succeed.

Based on Cluck's April 2007 statement in the above email that a "company must make a profit with limited government intervention [subsidies] to succeed," and the January 2008 draft EIS statement that "none of the sites (including the Cape Wind Project) appear to be profitable at today's electricity prices," Wattley concluded that these statements are clearly contradictory, yet MMS has never explained why they have changed their stance on the profitability issue.

Cluck stated that a draft EIS is not required to consider the economics of a proposed project under NEPA. He noted, however, that MMS did actually consider certain aspects of the economics involved in the project because it is the first proposed offshore wind farm in the country. He stated that under Appendix F of the draft EIS, MMS performed a type of economic "feasibility study" of the project to be used only for NEPA purposes; the study was not completed in an effort to assess "profitability" of the project.

Cluck explained that MMS is not obligated under NEPA or the draft regulations to verify CWA's ability to finance the project. He explained that MMS did not review "bank agreements" between CWA and banks to determine how they were receiving their financing for the project, but rather the feasibility study was an effort to assess whether the project was feasible based on current technology.

Wattley complained that the draft EIS shows that the project is not economically viable because it estimates that the cost of energy will be approximately twice that of current market rates. Cluck responded that it "is not MMS' job" to determine if CWA will make money or lose money on the project, but rather MMS is only responsible to assess whether the project is a financial possibility. Cluck pointed out that such offshore wind farms are operating off the coast of Europe successfully; thus it is clear that such projects are financially possible. In contrast, he stated that if a project being proposed had never been constructed anywhere in the world, a higher level of scrutiny would be warranted.

VIII. In her complaint, Taylor asserted that MMS failed to properly evaluate the presence and handling of hazardous materials used on the project during energy generation.

Carroll stated that the Electric Service Platform (ESP) that will be utilized in the Cape Wind Project will contain 40,000 gallons of coolant oil and MMS's draft EIS acknowledged that if a spill of the coolant oil were to occur, it has an over 90 percent probability of impacting the shoreline of Cape Cod, Martha's Vineyard, or Nantucket. He referred to the Executive Summary of an Applied Science Associates, Inc. Final Report 05-128, which is contained in the draft EIS.

Carroll stated that he has been asking CWA to identify the exact type of oil that will be used in the ESP (chemical composition) so that its impact resulting from a spill could be adequately assessed. To date, however, CWA still has not identified the exact oil they intend to use in the ESP. According to Carroll, the draft EIS identified the name of oil manufactured by Exxon that would be "similar" to the oil used in the ESP, but not the exact oil. As a result, Carroll stated that he has attempted to locate a Data Safety Sheet for the "similar" oil, yet he has not been able to do so. He stated that he even contacted Exxon directly, but could not locate a Data Safety Sheet. He further stated that he has requested MMS to produce a Data Safety Sheet for the proposed product "over 20 times," yet MMS has never responded to his requests.

Carroll then stated that the draft EIS contains no discussion regarding the resultant damage to the fishing grounds/industry, the tourism based economy, the beaches and inland salt marshes if an oil spill were to occur. Also, it contains no discussion of the potential clean-up efforts. Carroll stated that the draft regulations discuss "bonding of oil spills," yet the draft EIS makes no mention of this scenario. Carroll said that Cluck promised the draft EIS would contain a discussion regarding these potential impacts and clean-up efforts if a spill were to occur. According to Carroll, the lack of this discussion is a major failure of the draft EIS inasmuch as almost the entire economy of Cape Cod and the Islands is tourist and fishing industry based, which is dependent on its prime fishing grounds and beaches. Accordingly, any oil spill would destroy these areas and would shut down the economy for the entire affected area.

Cluck stated that he is certain that the general type of oil CWA plans on using is "not very hazardous." He further stated that he believes the oil will have similar qualities as mineral oil, which one could drink. However, when asked if he personally would drink the oil, Cluck said he would not.

Cluck then explained that the chances of a serious spill occurring is "incredibly low" since the oil will be contained in four separate containers that are "heavily insulated by rubber and steel." According to Cluck, the only way a serious spill could occur would be if the containers "were struck by a bolt of lightning or a real big ship." Cluck stated that in comparison to a spill of crude oil, the impact to the surrounding area of any potential spill of the oil to be used in the Cape Wind Project would be negligible.

MMS Deputy Director Cruickshank stated that he is certain that any oil storage component of the project will be required to have an oil spill response plan prior to its placement. Cruickshank stated that, under law, the operator/lessee would be responsible for all costs associated with a potential spill clean-up. Specifically, he stated that this is one of the areas that would be covered by the surety/bond that MMS would require of any lessee prior to allowing the construction and operation of any project. He stated that he believes that the oil response plan would not need to be in place until just prior to the project "breaking ground," and is not required by NEPA to be included in a final EIS.

IX. In her complaint, Taylor alleged that MMS was giving CWA a "sweetheart financial arrangement."

In his joint interview with Taylor and Wattley, Carroll said CWA was exempted under Section 388 of EPAct from having to competitively bid on the project. Carroll acknowledged that this exemption

was granted by Congress. He stated that the Senate inserted the language into the Act after it was passed by the House of Representatives, and by virtue of its deceptive wording, it was not identified by those disagreeing with the exemption until after the Act became law.

Cruickshank stated that Congress, not MMS, placed the exemption from competitive bidding for the Cape Wind Project in EAct. Cruickshank stated that MMS learned of the exemption from competitive bidding for the Cape Wind Project, along with one other project, after the language was inserted in the legislation, but prior to EAct being passed. He stated that MMS did not draft the language and was not consulted about its content, nor does he know who inserted the exemption language.

Bornholdt was asked if MMS had any discretion related to exempting the Cape Wind Project from a competitive bidding process that will be required for future alternative energy projects. She responded that an exemption was granted in EAct specifically for ongoing projects by Congress and MMS had no say in granting the exemption because it was a "Congressional Act." According to Bornholdt, if a law directs MMS to take a certain action, MMS follows the law. Bornholdt then stated the "Congress is always the wisest" and "we [MMS] don't second guess Congress."

X. In her complaint, Taylor alleged that MMS failed to follow proper procedures for hiring a consultant to work on the Cape Wind Project EIS, selecting a firm favorable to wind development.

During their joint interview with Taylor, Carroll and Wattle stated that MMS hired TRC to prepare the EIS, yet TRC is a strong advocate for wind development and the company has a financial interest in the Cape Wind Project being approved. Accordingly, Carroll and Wattle concluded that the company has a direct conflict of interest and should not have been selected by MMS to produce an "objective" EIS.

Cluck stated that prior to MMS's review of the project, COE had hired a different contractor to assist in completing the draft EIS, yet they were found to "be in the pocket of CWA." Accordingly, COE released that firm and then granted the consulting contract to TRC after conducting a competitive bidding process. As a result, when MMS took over the responsibility of completing the draft EIS, Cluck stated that MMS believed it to be wise to retain TRC inasmuch as they were "up to speed" with the project, and according to Cluck, he has found TRC to be professional and objective.

XI. Environmental Protection Agency

Under section 309 of the Clean Air Act, the EPA has been appointed the overseer of all EISs, and the EPA provides technical and procedural advice to the various agencies completing EISs. EPA utilizes a rating system in reviewing EISs and ultimately has the authority to direct an agency to conduct further analysis in relation to a final EIS.

An environmental scientist and Betsy Higgins, Director of Environmental Review from EPA stated that EPA became involved in reviewing the Cape Wind Project in early 2002 when the project's EIS was being completed by COE, prior to the responsibility for the EIS being transferred to MMS after passage of EAct. Higgins stated that EPA determined the draft EIS issued by COE was

“inadequate.”

Higgins stated that EPA plays an advisory role under NEPA, wherein EPA reviews and comments on all EISs completed by federal agencies. According to Higgins, if EPA determines that a final EIS is “unsatisfactory,” EPA would refer the matter to the Council on Environmental Quality for their attention. Higgins also stated that the NEPA process can be challenged in court by any citizen and EPA’s comment letters can be used as evidence for the judicial proceeding because they are a part of the administrative record for the concerned project. According to Higgins, the court has the prerogative as to how the court assesses EPA’s comment letters; she stated that deference is sometimes provided to the lead action agency, and other times deference is given to EPA’s comment letters if they express serious concern with the final EIS findings of the lead action agency.

EPA issued a comment letter regarding the Cape Wind Project on April 21, 2008, to the draft EIS completed by MMS, which raised several concerns. On February 17, 2009, following MMS’s issuance of the final EIS, EPA issued a comment letter to the final EIS.

In the cover sheet to EPA’s draft EIS comment letter, EPA stated, “While the DEIS improves upon the Corps’ DEIS, we believe additional work is needed, in close coordination with the cooperating agencies, between now and issuance of the FEIS [final EIS].”

On April 2, 2009, the environmental scientist and Higgins conducted a teleconference call with MMS to discuss EPA’s comments to the final EIS. According to Higgins, MMS stated during the teleconference that, regarding the economic viability issue, MMS does not believe they should “second guess” a business decision of the applicant by determining whether or not a lease will be granted based on the business’ potential profit or loss related to the project. MMS did, however, indicate that they will consider placing a deadline for commencing construction in the lease in order to keep the public informed and avoid the final EIS becoming stale prior to construction.

In their comment letter to the draft EIS, EPA stated the following regarding Air Quality issues:

In general, EPA noted some areas where the DEIS [draft EIS] was incomplete with regard to the air issues. The following are general comments on additional analyses that MMS needs to undertake, and are followed by a series of specific comments and edits on a section by section basis. In general, MMS needs to:

- Work with EPA to clarify whether and when different phases of the project are OCS [Outer Continental Shelf] sources under the Clean Air Act.
- Clarify what emissions from which phases of the project would be addressed by permit under the Clean Air Act.
- Conduct a conformity determination under the Clean Air Act that EPA and MMS can agree on, and that EPA can use to determine which emissions must be offset by General Conformity.
- Clarify what emissions from which phases of the project would be addressed by General Conformity under the Clean Air Act.

After issuance of the final EIS, EPA stated in their final EIS comment letter the following:

In comments on the DEIS [draft EIS], EPA noted that MMS did not conduct a Conformity Determination for the project. In November 2008 MMS submitted a Draft Conformity Determination to EPA. EPA noted several issues with MMS' Draft Conformity Determination, and stated those concerns in a letter to MMS on December 30, 2008. The FEIS included the original Draft Conformity Determination in Appendix I which did not address any comments or concerns provided in EPA's December 30, 2008 letter. EPA recommends that MMS work with us to address those concerns. A Conformity Determination will be necessary to support any Record of Decision for this project in the NEPA process, as well as the necessary air permit for the project.

...
There were inconsistencies between the FEIS [final EIS] and air permit application as to what equipment would actually be housed on the Electrical Service Platform.

According to Higgins, MMS must submit a revised Conformity Determination to EPA in order for EPA to issue an air permit for the project and this absolute requirement was discussed with MMS on the April 2, 2008 teleconference between EPA and MMS. After the teleconference, Higgins stated MMS indicated that MMS would discuss the issue with CWA, and send EPA a revised Conformity Determination that would overcome the deficiencies in the Draft Conformity Determination.

In addition to the specific concerns/comments EPA expressed in their comment letters to the EIS, the environmental scientist and Higgins were asked for their overall impression on how MMS handled the completion of the final EIS. According to Higgins, MMS tried to be more responsive than COE was prior to MMS taking over the project. Higgins stated, however, that it was clear that MMS was "under huge pressure" to complete the final EIS by a designated date, and as a result, Higgins believes that MMS did not conduct enough interagency meetings; she stated that in comparison to other EIS projects of similar magnitude, there was a noticeable lack of interagency meetings regarding the Cape Wind Project. Additionally, Higgins stated that she "was very frustrated" about the final EIS being rushed to meet the timeline associated with the end of the Bush Administration. According to Higgins, she sent Cluck emails detailing her frustration that she believed MMS was rushing the process unnecessarily, to which Cluck did not respond. Overall, Higgins stated that it was EPA's biggest concern that MMS was "scrambling to get it [final EIS] out the door."

XII. National Academy of Sciences

During our investigation into the issues raised by Senator Kennedy, Taylor, and Kenney, a separate issue was raised by Congressman William Delahunt's Chief of Staff Mark Forest. Forest submitted an email to the OIG stating that Section 1833 of EPAct required MMS to contract with the National Academy of Sciences (NAS) in order to provide MMS with objective, expert scientific advice regarding MMS' creation of an alternative energy program; yet after NAS submitted proposals for completing such work, "Nothing ever happened. They [NAS] were blown off."

In furtherance of our investigation into this issue, we identified a letter authored by former DOI Assistant Secretary for Land and Minerals Management C. Stephen Allred to Senator Jeff Bingaman, Chairman for the Committee on Energy and Natural Resources for the United States Senate. The

February 9, 2007 letter articulates reasons justifying why the department decided to not contract with NAS, as mandated in Section 1833. The letter concluded by stating that a similar letter was sent to Senator Pete V. Domenici, Ranking Member, Committee on Energy and Natural Resources; Representative Nick J. Rahall, Chairman, Committee on Natural Resources; and Representative Don Young, Ranking Member, Committee on Natural Resources.

Agent's Note: We could not determine whether the department or MMS received a response to this letter from any of the Congressional recipients. Our investigation into this issue, however, identified the following considerations taken by MMS that led to Allred's February 2007 letter to Congress explaining the Department's decision to not contract with NAS.

Section 1833 of the EPAct states that the Secretary of the Interior "shall" enter into a contract with NAS under which NAS will study the potential for alternate energy sources, assess the current laws related to the development of those resources, and then "recommend statutory and regulatory mechanisms for developing those resources."

Bornholdt was provided Section 1833 of EPAct, and after her review of the language, was asked if MMS contracted with the NAS, as directed by Congress, to complete the work outlined in the section. Bornholdt stated not to her knowledge. She stated that she has no personal opinion whether MMS "followed the law" with respect to this section.

After being informed that NAS had sent a scope of work and proposal to MMS in January 2006, in which she was a recipient, Bornholdt was provided a letter signed by former MMS Director Johnnie Burton on June 6, 2006, to NAS stating that MMS would not contract with NAS to perform the work outlined in Section 1833.

Tom Readinger is the former MMS Associate Director for Offshore Minerals Management. Readinger was informed that OIG had identified a set of emails in which he as Associate Director for MMS, opined why he believed MMS should not contract with NAS to conduct the study outlined in Section 1833 of EPAct. After reviewing the emails with Readinger, Readinger confirmed that he expressed the following reasons for not contracting with NAS:

- 1) The Bureau of Land Management (BLM) had contracted with NAS prior for a separate issue and they were not happy with the NAS study report provided to them;
- 2) EPAct provided no funding for the NAS study;
- 3) OMB had "eliminated funding" for FY07, thus indicating a "signal of non-support for the NAS study";
- 4) The Department of Energy had completed comparable studies; therefore the NAS study "won't add anything";
- 5) The "NAS study could bring policy implications which will be hard to control" by "tying our [MMS]' hands with recommendations on statutory/regulatory mechanisms."

Readinger explained his comments about how the "NAS study could bring policy implications which will be hard to control" by "tying our [MMS]' hands with recommendations on statutory/regulatory mechanisms." According to Readinger, NAS reports that had been contracted in the past by MMS had always provided policy recommendations, in addition to their scientific findings. Readinger

explained that this resulted in situations where MMS had been handcuffed by NAS reports in creating its own policies because the studies, in effect, placed obligations on MMS to explain why they may not follow the policy recommendations made by NAS. Readinger stated that this situation impacts MMS's discretion to create energy policy and therefore is undesirable.

After reviewing Section 1833 of EPAct, Cruickshank stated that he was not the "point man" for MMS in deciding against a contract with NAS, as directed by Congress. He acknowledged, however, that he was in the chain of command and was aware of the discussions within MMS concerning the potential NAS study. According to Cruickshank, he never communicated directly with NAS concerning the study.

Cruickshank stated that, based on his "big-picture memory" of the issue, both BLM and MMS were directed to contract with NAS, yet BLM immediately "backed out" by stating that they were not interested in contracting with NAS. According to Cruickshank, BLM had recently completed a PEIS that had analyzed many of the same areas Section 1833 considered in the potential NAS study, and therefore BLM did not feel the NAS study would be helpful to them.

Cruickshank stated that EPAct did not authorize any funding for the Section 1833, study and the proposal submitted by NAS to MMS was "very broad in scope" and expensive (i.e. \$875,000). Accordingly, inasmuch as MMS would have been forced to tap its existing budget in order to fund the study, Cruickshank stated that MMS attempted to narrow the scope of the study in order to both make it affordable and useful to MMS. Cruickshank explained that MMS believed much of the information considered in the study proposed by NAS could be obtained from other sources; therefore he said that MMS felt it did not need to fund such a broad, duplicative study.

In turn, Cruickshank stated that the Department offered to fund a far smaller study but NAS declined because they have a certain scope/funding threshold that was not met by MMS' offer. According to Cruickshank, it was his understanding that the ultimate decision to make the small counteroffer to the NAS proposal was made through the Department's Energy Coordination Council that was created in order to oversee the implementation of EPAct on behalf of DOI.

Cruickshank acknowledged that the purpose of Section 1833 appears to have been an effort by Congress to direct DOI to obtain objective, expert advice from outside the Department in order to assist in developing an innovative, far reaching alternative energy program and concomitant regulatory framework. According to Cruickshank, however, regardless of MMS's failure to contract with NAS, the Department did seek extensive advice and data from scientists and laboratories outside the Department in furtherance of developing the program and regulations via workshops and conferences.

We interviewed two directors from NAS. One director explained that certain studies are mandated by Congress in different manners. Congress may include direction to a Federal agency to conduct a specific study in either an Authorization Bill or an Appropriations Bill. According to him, an Appropriations Bill will include funding for the specific study, and accordingly, the Federal agency is much more willing to contract for the study since they are not required to pay for it out of their own operating budget. If direction to contract for a specific study is included in an Authorization Bill, however, the study is not necessarily funded, and therefore unless Congress later appropriates funds

for the study, the Federal agency would need to pay for the study from their own budget. The EPAct was an Authorization Bill, not an Appropriations Bill.

According to this director, when a study is directed in an Authorization Bill, unless the agency already planned on conducting a similar study or believes the study could be very helpful, often the agencies being mandated to conduct the study “claim poverty” and accordingly are not so eager to contract with NAS for the study. He stated that NAS has observed this scenario many times.

According to him, when this scenario occurs, the onus of “pressuring” the agency to contract for the study then falls back onto Congress. He explained that the Congressional Committee or Congressperson responsible for the study language in the law often needs to pressure the agency to complete the study; yet if this does not occur, in a practical sense, the agency is allowed to simply ignore the mandate.

The second director stated that he remembered discussing the study mandated by Section 1833 with MMS after passage of EPAct, although MMS was very distracted at the time by Hurricane Katrina and its aftermath. As a result, he stated that NAS prepared their proposal for the study and delivered it to DOI and MMS for their consideration. He confirmed that NAS was eventually informed in the June 6, 2006 letter from DOI that the Department was not interested in contracting for the study outlined in the proposal proffered by NAS, but rather the Department could offer “about \$25,000 to \$30,000” for a review of the overlap of regulatory framework. According to him, he would be hard-pressed to think of any study NAS could complete for such a small sum of money.

XIII. Cape Wind Associates (Cape Wind Project developer)

Dennis Duffy is the Vice President of CWA. Duffy stated that Energy Management, Inc. (EMI) is the parent company of CWA and Duffy also serves as the Vice President of EMI. According to Duffy, EMI has been in the energy business in New England for the past 30 years and has always had a focus on conservation-related energy projects. He stated that approximately 10 years ago EMI decided that wind energy was a promising, conservation based industry that could potentially prosper in New England, and after researching the wind energy industry, EMI determined that the most financially feasible wind project in New England would be located offshore. Duffy stated that EMI then conducted studies on the New England coastline and determined that the Nantucket Sound was the most feasible, promising site for an offshore wind farm. Accordingly, EMI created CWA and submitted an application/proposal to COE in 2001 to construct the Cape Wind Project on Horseshoe Shoals in Nantucket Sound.

Duffy explained that the reasons CWA chose Nantucket Sound as the most feasible, promising location for the Cape Wind Project. He stated that the following factors contributed to CWA’s decision:

- Depth of Water (Nantucket Sound is shallower than locations outside of the Sound);
- Storm Waves (Nantucket Sound experiences far less extreme storm waves than areas outside of the Sound);
- Proximity to the Energy Grid (Nantucket Sound is closer to the energy grid than areas outside of the sound);
- Wind Resources (Nantucket Sound offers excellent wind resources);

- Substrata (Horseshoe Shoals' terrain is suitable for wind turbine monopiles).

Duffy stated that CWA was aware that the site would be controversial when they chose it inasmuch as it is triangulated within three of the wealthiest resort areas in the country (Nantucket, Martha's Vineyard, and Cape Cod); CWA did not want to select a location "within view of yacht clubs." Duffy explained that CWA deemed that any other location outside Nantucket Sound was not economically feasible or commercially viable.

In relation to CWA's selection of Nantucket Sound for the project, Duffy stated that CWA has legally defended itself in several different legal forums that the scope of the Purpose and Need Statement in the EIS was proper, and not "too narrow." Duffy explained that opponents to the Cape Wind Project have repeatedly argued that the Purpose and Need Statement in the EIS was too narrow because it did not consider every potential energy alternative imagined. According to Duffy, CWA has successfully argued in court that the Purpose and Need Statement in the EIS for the project meets the "reasonability standard" that needs to be applied when evaluating its scope.

Duffy stated that since CWA submitted their proposal to construct the Cape Wind Project, CWA has been mired in eight years of bureaucratic red-tape and lawsuits. During that time frame, however, the COE issued a favorable draft EIS for the Cape Wind Project and MMS has issued both a "very favorable" draft EIS and final EIS for the project. Additionally, Duffy stated that CWA "has won all 11 court decisions" throughout several jurisdictions after being sued in relation to several different aspects of the project's review.

Duffy stated that CWA has never refused a request from the lead action agency, initially COE and now MMS, for any informational studies, including avian studies. According to Duffy, there are 17 participating agencies reviewing the project, and often there is no consensus amongst the agencies on what studies they request of CWA. As a result, CWA has been responsive to the lead agency, as needed; CWA cannot satisfy all of the requests made by all the agencies involved in reviewing the project, among them FWS.

Duffy further stated that the Cape Wind Project has completed "more pre-construction avian studies that any other project in the world." He stated that CWA has, in many cases, gone well beyond what is required under NEPA and the ESA in conducting avian studies for the project. Moreover, Duffy stated that there is "limited utility" in some of the requested studies, and it needs to be "kept in mind" that pre-construction avian activity does not necessarily coincide with post-construction activity.

Duffy further stated that the "gold standard" for avian research and studies for the area is the Massachusetts Audubon Society (MAS), which initially opposed the Cape Wind Project. Based on the studies CWA undertook and CWA's willingness to adopt an "adaptive management" approach to the avian impacts of the project, however, MAS is now a supporter of the project. In addition, Duffy stated that most other national conservation organizations are supporters of the project, including the National Resource Defense Council.

Duffy stated that CWA has repeatedly been called upon to respond to the allegation that CWA has not conducted the necessary studies needed to adequately assess the potential avian impact of the Cape Wind Project, specifically including the claim that a three-year, 24/7 radar study needs to be

conducted. He provided a response letter submitted to FWS on March 28, 2005, wherein CWA argued their “opposition to non-voluntary or expanded application of FWS’ interim guidance on avoiding and minimizing wildlife impacts from wind turbines (the Guidance).”

Duffy stated that, at a very high cost, CWA paid for a “jack-up barge” to be brought to Nantucket Sound from the Gulf of Mexico and radar studies were conducted for several significant periods of time. According to Duffy, CWA was warned of the safety hazards related to conducting such radar studies during inclement winter weather, and therefore CWA did not attempt to conduct such studies. In fact, he stated that since that time, a person was killed attempting to conduct a similar avian radar study off the coast of Delaware during inclement winter weather. Moreover, Duffy stated that the radar data that would be collected during such inclement weather has limited value because the radar is not effective in such weather.

With respect to the FAA’s Presumed Hazard Determination issued in February 2009, Duffy stated that CWA is working with the FAA in reaching mitigating terms that would overcome the determination. He stated that similar to requests by the lead action agency for the EIS (MMS), CWA will comply with all requests made by the FAA related to air navigation issues. After being informed that all three airport managers from the surrounding airports on Cape Cod, Martha’s Vineyard, and Nantucket have expressed their concerns with the project’s impact to air safety for the area, Duffy stated that he believes the local airport boards “are heavily politicized,” and the “political pressure has been intense for anyone who can throw up a roadblock” to the Cape Wind Project.

Duffy commented on the concerns of the local ferry operators in the Nantucket Sound regarding the impact of the wind farm on safety and their businesses by stating that USCG has reviewed the issues related to sea navigation and they have determined that “all issues can be mitigated.” Accordingly, Duffy stated that CWA feels comfortable that the sea navigation issues have been considered by the correct agency responsible for such issues (USCG).

With respect to the turbine availability issue, Duffy stated that CWA’s proposal for the project does not state that they will be using GE’s 3.6MW wind turbine, but rather it stated that CWA intended to use a “3.6MW +/- wind turbine,” which allows for flexibility as to the size and manufacturer of the turbine actually used in the project. Duffy further stated that CWA will not attempt to use any wind turbine that would be deemed to be a “material change” from the size of the wind turbine considered in the final EIS, thus triggering the need for a supplemental EIS.

Duffy stated that CWA is legally comfortable with the amount of pre-construction studies they have conducted and provided to the several Federal and State agencies for their consideration, and CWA is confident they would prevail in a court of law on these grounds if challenged. He further stated that CWA has amply complied with all of the government processes required of CWA under the law. Duffy believes any legal challenges lodged against CWA if the project is approved will simply be based on the fact that the “some people just don’t like the result,” and CWA will be able to defend itself successfully in Federal court.

XIV. Timeline for release of final EIS

MMS’s Cape Wind Project Manager Cluck stated that MMS Director Luthi had established the goal

to have both the final EIS and ROD completed prior to the end of 2008. He stated that he believes such a timeline was first discussed shortly after receiving the comments to the draft EIS in April 2008. According to Cluck, he never heard directly from anyone that the timeline was tied to the January 20, 2009 change of presidential administrations. He stated, however, that it was clearly “implied” that the Bush Administration would prefer to complete this process prior to their departure, if possible.

Cluck denied that neither he nor MMS was being told to rush and “cut corners” in order to have the Cape Wind Project approved prior to the departure of the Bush Administration. He stated that MMS was asked to work hard on completing its assessment of the project, yet MMS was not asked to rush the project in lieu of being thorough or place pressure on any cooperating agencies to do the same.

SUBJECT(S)

Minerals Management Service

DISPOSITION

This Report of Investigation will be forwarded to the Department and Minerals Management Service.

ACRONYMS

AFB	Air Force Base
ANPR	Advance Notice of Proposed Rulemaking
BLM	Bureau of Land Management
BO	Biological Opinion
CGMTAct	Coast Guard and Maritime Transportation Act of 2006
COE	U.S. Army Corps of Engineers
CWA	Cape Wind Associates
DOD	U.S. Department of Defense
DOI	U.S. Department of the Interior
EIS	Environmental Impact Statement
EMI	Energy Management, Inc.
EPA	Environmental Protection Agency
EPAct	Energy Policy Act of 2005
ESA	Endangered Species Act
ESP	Electric Service Platform
FAA	Federal Aviation Administration
FR	Federal Register
FWS	U.S. Fish and Wildlife Service
GE	General Electric Company
IFR	Instrument Flight Rules
MAS	Massachusetts Audubon Society
MBTA	Migratory Bird Treaty Act

MFP	Massachusetts Fishermen's Partnership, Inc.
MMS	Minerals Management Service
MOU	Memorandum of Understanding
NAS	National Academy of Sciences
NEFO	U.S. Fish and Wildlife Service' New England Field Office
NEPA	National Environmental Protection Act
NHPA	National Historic Preservation Act
NREL	National Renewable Energy Laboratory
OCS	Outer Continental Shelf
OIG	Office of Inspector General
OMB	Office of Management and Budget
PEIS	Programmatic Environmental Impact Statement
PMI	MMS' Policy and Management Improvement Division
PVA	Passenger Vessel Association
ROD	Record of Decision
RPM	Reasonable and Prudent Measures (Biological Opinion)
SAR	Search and Rescue
SOL	Office of the Solicitor
TRC	TRC Environmental Corporation
USAF	U.S. Air Force
USCG	U.S. Coast Guard
VFR	Visual Flight Rules
WMNSA	Woods Hole, Martha's Vineyard and Nantucket Steamship Authority



September 23, 2009

Ms. Karen Adams
Energy Project Manager
United States Army Corps of Engineers, New England District
696 Virginia Road
Concord, MA 01742

Ms. Elizabeth Higgins, Director
US Environmental Protection Agency
1 Congress Street, Suite 1100
Boston, MA 02114-2023

Re: NPS Review of the Questions of “Direct and Adverse Effects” on two National Historic Landmarks by the MMS Preferred Alternative of the Horseshoe Shoal Site for the proposed Cape Wind project.

Dear Ms. Adams and Ms. Higgins:

Please find enclosed supplemental comments from the Alliance to Protect Nantucket Sound regarding the deficiencies in the alternatives analysis in the FEIS prepared by the Minerals Management Service for the proposed Cape Wind project. Because the FEIS will be relied on by the Corps of Engineers and EPA for separate actions, the Alliance hereby submits these comments for your consideration as well.

These comments further serve to inform EPA of FEIS defects for purposes of its EIS sufficiency review. The Alliance requests that EPA reinstate that review and issue an unsatisfactory rating based on the clear failure of the FEIS to account for all reasonable alternatives.

Please contact the Alliance if you have any questions. Thank you.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Audra Parker', is written over a faint, dotted grid background.

Audra Parker
Executive Director

Attachment

4 Barnstable Road, Hyannis, Massachusetts 02601
□ 508-775-9767 □ Fax: 508-775-9725

www.saveoursound.org

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Cc: Representative William D. Delahunt
Senator John F. Kerry
S. Elizabeth Birnbaum, Esq., Director, Minerals Management Service
Rodney E. Cluck, Ph. D., Project Manager, Minerals Management Service
Walter Cruickshank, Ph.D., Minerals Management Service
Andrew Krueger, Ph.D., Alternative Energy Programs, Minerals Management Service
Wyndy J. Rausenberger, Esq., Department of the Interior, Office of the Solicitor
Kate Atwood, U. S. Army Corps of Engineers, NED

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September 22, 2009

Mr. Daniel N. Wenk
Acting Director
National Park Service
U.S. Department of the Interior
1849 C ST, N.W.
Washington, D.C. 20240

RE: NPS Review of the Question of “Direct and Adverse Effects” on two National Historic Landmarks by the MMS Preferred Alternative of the Horseshoe Shoal Site for the proposed Cape Wind project

Dear Mr. Wenk:

The Alliance to Protect Nantucket Sound offers additional information to augment your deliberations concerning the adverse effects the proposed Cape Wind power plant would have on the two National Historic Landmark (NHL) sites on the shore of Nantucket Sound. The proposed action would include construction of 130 wind turbine generators (WTGs), each over 440 feet above the water line, to be erected squarely in sight of the NHLs. Our extensive research into both the national significance of these properties, and the basis on which they were each separately determined to be of national significance, clearly indicates that this significance is fully dependent on the waters of the Sound, and in fact extends fully into the waters of the Sound.

As you know, Minerals Management Service (MMS) has asked National Park Service (NPS) to render an official, professional opinion as to the direct and adverse effects the proposed Cape Wind project would have on the two NHLs, the Kennedy Compound NHL and the Nantucket Island NHL District, and to do so prior to the Section 106 consultation meeting that MMS has scheduled for September 30, 2009.

To date, MMS has (reluctantly, and only after much prodding) acknowledged that the Cape Wind Preferred Alternative site on Horseshoe Shoal will cause adverse effects, visually, to both of these NHL sites. However, MMS continues to reject the conclusion of our preservation specialists that the adverse effects are direct, apparently because they do not accept the fact that the Sound itself is an essential, primary element of the historicity of both NHLs.

The historical significance of both the Kennedy Compound and Nantucket Island is inextricably tied to the location of both properties on the waters of Nantucket Sound. It has been made clear that three generations of the historically significant Kennedy family members (e.g. an Ambassador, a US Congressman, Senator and President, a US Senator) chose this location for the family Compound precisely because it offered ready access to the waters of Nantucket Sound. Similarly, it is maritime culture, in all of its forms, whaling, fishing, shipping, boating, recreation,

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tourism, etc., that caused the historic properties to be built on Nantucket Island. The national significance of both NHLs would be greatly reduced if these various properties were located anywhere else but immediately on the waters of Nantucket Sound. Attached are copies of the Alliance's previous comments to both the Army Corps of Engineers and the Minerals Management Service on the Cape Wind Draft Environmental Impact Statements which provides more detailed information.

From the earliest days of implementation of the National Historic Preservation Act, the NPS has filed professional recommendations and conclusions on the question of whether visual effects can be direct and adverse. Two examples may be sufficient for the present to illuminate this important policy that has been in place for some four decades. The NHL Mount Vernon, home of George Washington, but not a unit of the national park system, has had its view-shed preserved well beyond the present or even historic boundary of the farm. The shoreline forests across the Potomac River from Mount Vernon have been preserved from development to avoid any visual impairment of the historic home, through actions taken both by the NPS and the State of Maryland.

Similarly, from 1966-1968 the NPS officially protested the location of a proposed nuclear power plant across the Hudson River from the Saratoga Battlefield. While the proposed power plant site was well beyond the battlefield, it would have been visible to park visitors. In comments to the Advisory Council, it was noted that *"to build any high structure on the location proposed would mar greatly the inspiring historical significance of the park..."* In May 1968 the ACHP concluded that *"the proposed installation would be a monumental intrusion upon the area in question and as such would seriously compromise the very nature and purpose of the park."* Further, the ACHP noted that, *"no possible landscaping program or exterior architectural treatment of the structure can minimize the impact of the size of the building."*

Given the critical historical linkage between Nantucket Sound and the two NHLs, NPS can come to no other conclusion than that the location of the **Cape Wind energy plant on Horseshoe Shoal will have a direct and adverse effect on the national significance of these important places.**

We request an opportunity to meet with you and key staff of the National Register office prior to submitting your recommendations and conclusions to the MMS currently scheduled to be provided before September 30, 2009. Thank you.

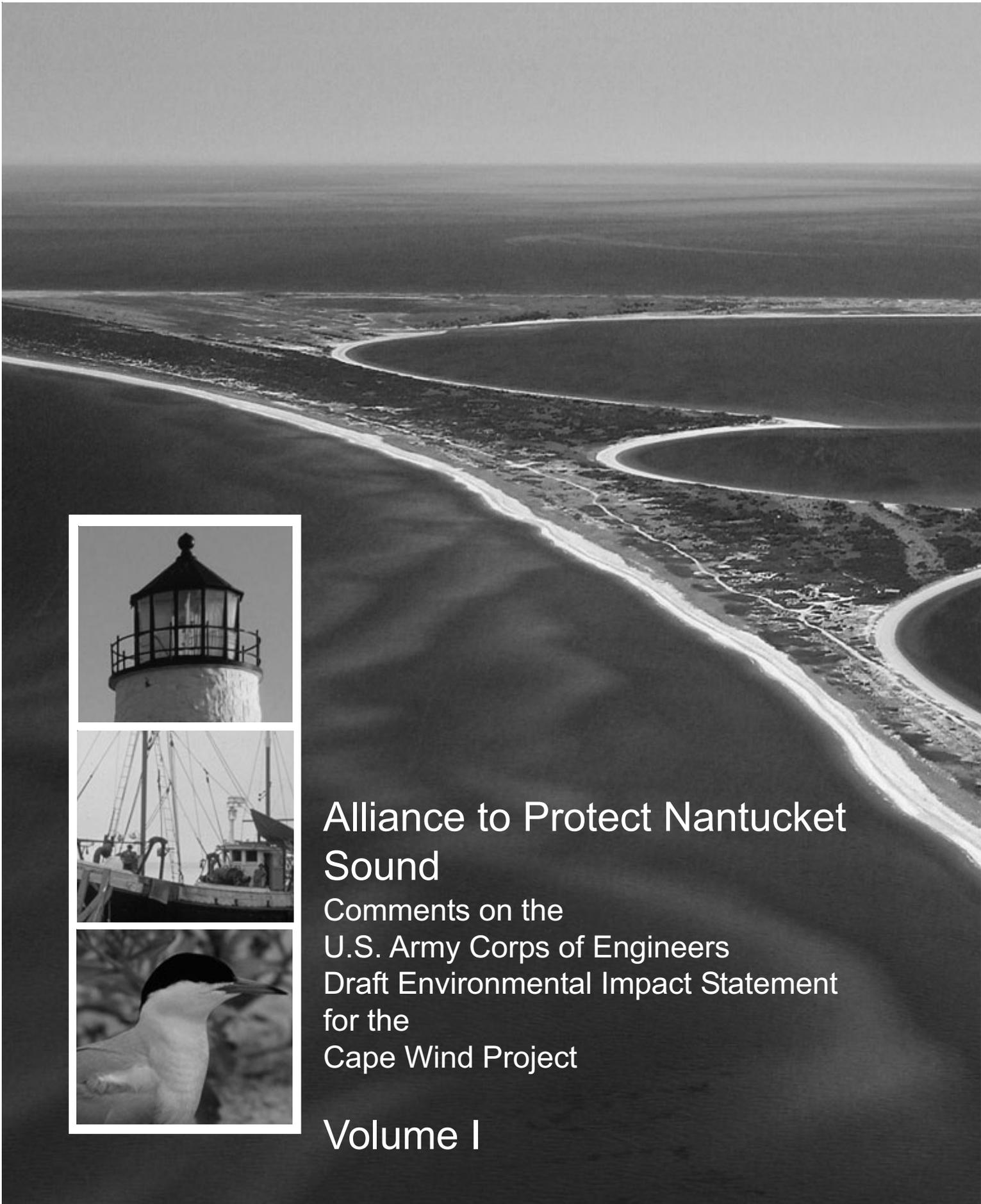
Sincerely,



Glenn G. Wattlely
President & CEO

Enclosures

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Alliance to Protect Nantucket Sound

Comments on the
U.S. Army Corps of Engineers
Draft Environmental Impact Statement
for the
Cape Wind Project

Volume I

February 24, 2005

the act." *See* S. Rep. No. 92-1159, at 5, *reprinted in* 1972 U.S.C.C.A.N. 4285, 4289. The evidence must show only that the offender was "conscious from his knowledge of surrounding circumstances and conditions that his conduct will naturally and probably result in injury [to protected birds.]" *Id.*; *see also Moon Lake*, 45 F. Supp. 2d at 1074. The BGEPA's civil penalties apply to any violation without regard to knowledge or intent. 16 U.S.C. § 668(b).

It is readily apparent that the energy plant could easily result in the taking or killing of bald eagles. If CWA is allowed to proceed with its plans, it will do so "knowingly" and will thus be liable under the BGEPA for any resulting eagle deaths. *See Moon Lake*, 45 F. Supp. at 1086 (finding that the plain language of the BGEPA, as well as the MBTA, applied to the defendant's failure to protect migratory birds from electrical lines). Thus, in addition to being subject to penalty and injunction under the MBTA, the proposed plant could also violate the BGEPA, subjecting it to penalties of far greater severity than those imposed under the MBTA. *See* 16 U.S.C. § 668(a),(b). Consequently, the unacceptable risk for eagle deaths and the consequent violation of the BGEPA argue strongly against the Corps issuing permits for the energy plant.

4. The Permit Application Must Be Denied Because the Energy Plant Will Adversely Affect Properties Protected Under the National Historic Preservation Act.

The National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470 *et seq.*, and the regulations of the Advisory Council on Historic Preservation ("ACHP"), 36 C.F.R. Part 800, require Federal agencies to consider the effects of their actions on historic properties and to take those effects into account during project planning and implementation. As a Federal agency, the Corps is bound by these obligations and has adopted implementing regulations. 33 C.F.R. Part 325 and Appendix C.

Although the Corps claims to have complied with all federal historic protection laws in its evaluation of the proposed project, the DEIS demonstrates that the project will violate the NHPA and weigh heavily against the public interest by causing adverse impacts to certain historic properties and failing to consider potential impacts to others. For these reasons, the permit application must be denied.

a. Background.

In furtherance of the Corps' review of the proposed project, CWA retained a cultural resource management firm, Public Archaeology Laboratory, Inc. ("PAL"), to conduct an assessment of the visual effects to nearby historic properties that would be caused by the proposed project if located at Horseshoe Shoals. (the "Visual Impacts

Assessment" or "VIA").³⁶ The VIA identified a number of historic properties on Cape Cod, Nantucket and Martha's Vineyard that fall within the area of potential effect for visual effects and assesses the effect on these historic properties.

Based on the PAL report, the Corps concluded that the project will have an adverse effect on 16 properties, including two National Historic Landmark ("NHL") properties – the Kennedy Compound and the Nantucket Historic District – four historic districts, and 10 individual historic properties. *See* DEIS at § 1.0. The Corps also concluded that the project will have no effect on one historic district and three individual properties. *See* DEIS, at § 1.0; PAL Visual Impact Assessment at 42.

On August 11, 2004, the Massachusetts State Historic Preservation Officer ("SHPO") concurred with the Corps' determination that the proposed project will have an adverse effect on the historic properties identified by PAL, including the Kennedy Compound NHL and the Nantucket Island NHL.³⁷ For both NHLs, the Massachusetts SHPO concluded as follows: "The adverse effect includes the introduction of visual elements that are out of character with the historic properties and alteration of the setting of the historic properties (36 C.F.R. 800.5(a)(2) (iv. and v.)."

b. The Corps is required by law to minimize to the full extent possible direct adverse effects from the proposed project to NHLs.

The preferred alternative for the construction of the proposed project will directly and adversely affect two historic properties of exceptional national significance to the United States that have been designated by the Secretary of the Interior as NHLs. These two properties are: (1) the Nantucket Historic District ("Nantucket Island NHL"); and (2) the Kennedy Compound ("Kennedy Compound NHL").

Under relevant federal law, including the provisions of Section 110f of the NHPA, 16 U.S.C. § 470h-2(f), Section 800.10 of the regulations of the ACHP, 36

³⁶ The PAL report is entitled "Technical Report – Visual Impact Assessment of Multiple Historic Properties Cape Wind Energy Project – Nantucket Sound, Cape Cod, Martha's Vineyard, and Nantucket, Massachusetts" and is found in the DEIS at Appendix 5.10-F.

³⁷ Letter from Brona Simon, State Archeologist, Deputy State Historic Preservation Officer, Massachusetts Historical Commission, to Christine A. Godfrey, Chief, Regulatory Division, US Army Corps of Engineers, "Cape Wind Energy Project, Barnstable and Yarmouth, MA" (dated Aug. 11, 2004).

C.F.R. Part 800, and Section 2.a. of the regulations of the Corps, 33 C.F.R. Pt. 325, App. C § 2.a, the Corps is required, to the maximum extent possible, to condition any permit issued to CWA as may be necessary to minimize harm to both the Nantucket Island NHL and the Kennedy Compound NHL.

Therefore, the Corps may not allow the proposed project to be constructed on Horseshoe Shoal in Nantucket Sound because of the resulting unavoidable adverse effects to the Nantucket Island NHL and Kennedy Compound NHL, and because the Corps has made it clear that it does not intend to condition the proposed permit, or undertake such planning and action, as necessary to minimize harm to these unique and irreplaceable national landmarks, even though the Corps is required by law to do so.

The only way to protect these two exceptionally significant landmarks as required by law is to mandate that the proposed project be constructed somewhere outside of Nantucket Sound.

(i) Section 110f of the NHPA.

Section 110f of the NHPA places special obligations on federal agencies when undertakings they license or permit may cause direct adverse effects to NHLs. The responsible federal agency is directed by law to minimize harm to such landmarks "to the maximum extent possible." Section 110f provides:

Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.

16 U.S.C. § 470h-2(f).

The Corps has promulgated its own regulations to implement Section 110(f), under which the Corps must take into account the effects of proposed Corps-permitted undertakings on historic properties "both within and beyond the waters of the U.S." 33 C.F.R. Pt. 325, App. C. § 2.a. The Corps is also required by its own regulations to place conditions on permits to minimize harm from such undertakings to NHLs. *Id.* The Corps' regulations provide:

Pursuant to Section 110(f) of the NHPA, the district engineer, where the undertaking that is the subject of a permit action may

directly and adversely affect any National Historic Landmark, shall, to the maximum extent possible, condition any issued permit as may be necessary to minimize harm to such landmark.

Id. Thus, in addition to the procedural requirements of the Corps' historic preservation regulations, this requirement imposes substantive limitations on the Corps' permitting decisions where NHLs may be directly and adversely affected. In contrast to the procedures in its regulations regarding other kinds of effects, which require only that the Corps "take into account" such effects, *id.*, where direct adverse effects to NHLs are possible, the Corps is required to minimize harm to any such landmark "to the maximum extent possible." *Id.*

(ii) The Corps has made a clear finding that the proposed project will directly and adversely affect both the Kennedy Compound and Nantucket Island NHLs.

In the DEIS the Corps acknowledges that the proposed project will cause adverse *visual* effects to the Kennedy Compound NHL and to Nantucket Island NHL. The Corps does not, however, acknowledge in the DEIS its duty to minimize harm to these NHLs "to the maximum extent possible." Since the DEIS treats visual effects separately from other kinds of effects, *see* DEIS, at §5.10.4, it may be that the Corps assumes that where adverse effects to an NHL are only *visual*, such effects will therefore not *directly* adversely affect the NHL. This assumption would be incorrect, unsupported in fact and directly contrary to applicable law.

The evidence that the Corps may be relying on this assumption, that visual effects are not direct effects, and the proof of this assumption's invalidity, are both contained in the conclusions in the Corps' own DEIS. The first evidence is found in the clever and disingenuous way that the DEIS treats the conclusions in PAL's VIA.

In its VIA, the Corps's historic preservation expert, PAL, described the specific nature of the adverse effect to the Kennedy Compound as follows:

The interruption of the natural horizon line by the [wind turbine generators] WTGs and related structures will significantly alter the historic Nantucket Sound setting of the Kennedy Compound, which served as the Summer White House for President John F. Kennedy. It will also impact water views from the Kennedy Compound. These changes constitute a [sic] alteration of the historic character, setting, and viewsheds of this historic property and features make it nationally significant and designated as an

NHL, as well as eligible for inclusion in the National Register. Therefore the Cape Wind Project will have an *Adverse Effect* on the Kennedy Compound.

DEIS, Appendix 5.10-F at p.38. (Emphasis in the original).

An obvious manipulation of these findings is found when we compare PAL's precise findings with the way they are reported in the DEIS, as follows:

The VIA [Visual Impact Assessment] found that the significant *visual* alteration to the historic Nantucket Sound setting caused by the WTGs and related structures will constitute an alteration of the historic character, setting and viewshed of the Kennedy Compound, and features that make it nationally significant and designated as an NHL, as well as eligible for inclusion on the National Register.

DEIS, § 5.10.4.3.2., at p. 5-206. (Emphasis supplied).

The characterization in the DEIS of the conclusions in the VIA is different from the actual conclusions in the VIA itself in a subtle but important way. The VIA states that the turbines will "significantly alter the historic Nantucket Sound setting." The DEIS says that the turbines will cause a "significant *visual* alteration." The statement in the DEIS is, however, incorrect. The alteration of setting described by the VIA is not merely visual, but is clearly a *physical* alteration of the setting that will have profound physical *and* visual effects on that element of the Kennedy Compound NHL. This is clear from the language in the PAL's report and the conclusions of a report from the expert consulting firm Gray and Pape, attached hereto. Ex. 11, at 2.

The physical effect described in the VIA from the addition of the Cape Wind project to the setting for the Kennedy Compound NHL is obvious. Moreover, the visual effect from this physical change is not limited to views *from* the Kennedy Compound (the "viewshed") as implied in the misleading characterization in the DEIS. This significant alteration of the Kennedy Compound's setting will have an effect on views looking toward the Compound from a variety of locations, both on and off shore. The addition to Nantucket Sound of 130 wind generators, each over 400 feet in height above the water, will cause a massive alteration and diminishment of the setting of the Kennedy Compound, and will severely diminish the ability of this landmark to convey its historic feeling and significance.

Similarly, regarding the adverse effect to Nantucket Island NHL, PAL said as follows:

The interruption of the natural horizon line by the [wind turbine generators] WTGs and related structures will alter the historic Nantucket Sound setting of the Nantucket Historic District NHL, a historic early settlement, maritime and premier whaling village, and summer resort. These changes constitute a [sic] alteration of the historic character, setting, and viewsheds that make Nantucket nationally significant and eligible for inclusion in the National Register and a NHL. Therefore the Cape Wind Project will have an *Adverse Effect* on the Nantucket Historic District.

DEIS, Appendix 5.10F, at p. 42. (Emphasis in the original).

This finding from PAL is consistent with the similar finding for the Kennedy Compound, cited above. And again, the DEIS changes the PAL finding ever so slightly in its characterization, as follows:

The VIA [Visual Impact Assessment] found that the *visual* alteration to the historic Nantucket Sound setting caused by the WTGs and related structures will constitute an alteration of the historic character, setting and viewshed of this historic early settlement, maritime and whaling village and summer resort that make Nantucket nationally significant and eligible for inclusion on the National Register and the NHL.

DEIS, Section 5.10.4.3.2., at p. 5-208. (Emphasis supplied.)

Once again, the clear PAL finding that the proposed project will "alter the historic Nantucket Sound setting of the Nantucket Historic District NHL" is changed in the DEIS to a finding of "visual alteration," which is inconsistent with the clear language of the VIA. Once again, the visual effect from this physical change is not limited to views *from* Nantucket Island but will adversely affect views of the island from many directions and approaches, thus diminishing the ability of visitors to appreciate the historic significance of the water approaches to Nantucket.

The alteration of setting described in the VIA is a physical alteration of the Nantucket Sound setting for both these NHLs, and therefore it constitutes a direct adverse effect. The incorrect and unsupported characterization in the DEIS that these effects are merely "visual" is a completely ineffective effort to obscure their true character.

(iii) The relevant facts and the applicable law both support the Corps' finding of direct adverse effect to the Kennedy Compound and Nantucket Island NHLs.

In addition to the findings in the PAL VIA, it is evident from a review of the relevant facts and federal law applicable to this issue, that the proposed project will directly and adversely affect both the Kennedy Compound NHL and the Nantucket Island NHL, as described in the following sections.

(a) The Corps' regulations expressly define as direct adverse effects the kind of effects that the proposed project will cause to the Kennedy Compound and Nantucket Island NHLs.

Under the definitions in the Corps' regulations, an effect to a historic property is defined as follows:

An "effect" on a "designated historic property" occurs when the undertaking may alter the characteristics of the property that qualified the property for inclusion in the National Register. Consideration of effects on "designated historic properties" includes indirect effects of the undertaking. For the purpose of determining effect, alteration to features of a property's location, setting, or use may be relevant, and depending on a property's important characteristics, should be considered.

33 C.F.R. Pt. 325, App. C. § 1.e.

Note that Corps regulations expressly provide that for the purpose of determining effect, consideration may be given to relevant alteration to features of a property's setting. It is clear that the alteration of a historic property's features would necessarily amount to a direct physical effect to that property. In using these terms, Corps regulations make clear that the cognizable effects to a historic property's setting are direct effects that result in a physical alteration of an important part, in fact a defining part, of both that property and that property's eligibility for the National Register.

The criteria for adverse effects in Corps regulations expressly define the alteration of a historic property's setting as an adverse effect to that property when that setting contributes to the property's qualification for the national Register.

The Corps' regulations provide as follows:

Adverse effects on designated historic properties include, but are not limited to: (1) Physical destruction, damage, or alteration of all or part of the property; (2) Isolation of the property from or alteration of the character of the property's setting when that character contributes to the property's qualification for the National Register; (3) Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting; (4) Neglect of a property resulting in its deterioration or destruction; and (5) Transfer, lease, or sale of the property.

33 C.F.R. Pt. 325, App. C. § 15.

Under this provision, of the proposed project will cause direct adverse effects to the Kennedy Compound NHL and the Nantucket Island NHL in two ways, under sections (3) and (4) above, by: (i) altering the character the setting for each of these NHL's, where the character of that setting contributes to each NHL's eligibility for the National Register; and (ii) introducing visual elements that are out of character with both NHLs and that will alter each of their settings.

(b) The proposed project will alter and diminish the setting of both the Kennedy Compound NHL and Nantucket Island NHL.

Historic Preservation experts at the consulting firm of Gray and Pape engaged by APNS to evaluate this matter agree with PAL that, "[t]he waters of Nantucket Sound represent a vital part of the setting of the Nantucket Historic District and the Kennedy Compound." Ex. 11, at 7. Similar to the conclusions of PAL and the Corps, Gray and Pape concludes that:

. . . [T]he Cape Wind energy project will directly and physically alter the shape and outline of the horizon and the water views of the sound from the Kennedy Compound NHL and Nantucket Island NHL. These effects will physically and directly alter, and diminish the integrity of, the character-defining element of the Nantucket Sound setting that is a physical part of these resources

and renders them eligible for the National Register and as National Historic Landmarks.

Id.

In addition to the grounds for this conclusion as described briefly in the VIA, Gray and Pape note that the waters in Nantucket Sound surrounding Nantucket Island would naturally and logically be considered part of the important historic setting of this NHL.³⁸ They point out:

The near shore waters surrounding Nantucket clearly constitute a natural resource exploited by the island's residents and were used for purposes related to the historical significance of the property. The waters immediately surrounding the island supplied sustenance to the island's residents in the form of fish, whales, seals, birds and shellfish. The waters served as the fields and pastures of many of the island's residents, in a nearly identical fashion to the fields and pastures of land-bound farmers. Island residents knew and exploited the near shore fishing and shell fish grounds in a sophisticated manner.

Id. at 5.

In addition, Gray and Pape describe the encompassing nature of the visual effects to Nantucket Island that will be caused by construction of the Cape Wind project because of the physical intrusion into, and alteration of, Nantucket Sound:

The sea passage to [Nantucket] island, by private vessel or ferry, remains a special event, permitting the traveler to prepare oneself for arrival at a special destination and, in the case of Nantucket, a historic property. In essence, Nantucket Sound serves as the foreground to the historic property. The island's setting in the ocean, and the leisurely, ritualized approach over the water, constitute important elements of the historic property's setting. Placing the proposed wind farm astride this approach will

³⁸ As noted above, the Corps' regulations state that it must take into account effects "both within and beyond the waters of the US." 33 C.F.R. Pt. 325, App. C. § 2(a).

significantly alter the setting of the historic property by altering the approach to the property.

Id.

From the admissions in the DEIS and the observations of both PAL and Gray and Pape, there is no doubt that the construction of the proposed project at the preferred alternative site in Horseshoe Shoal will alter and diminish the integrity of the setting for both the Kennedy Compound NHL and the Nantucket Island NHL

(c) The setting of Nantucket Sound is a qualifying characteristic of eligibility for both the Kennedy Compound NHL and Nantucket Island NHL.

The DEIS acknowledges and restates PAL's conclusion that the Nantucket Sound setting for both the Kennedy Compound NHL and the Nantucket Island NHL is one of the elements that make both landmarks nationally significant, as well as one of the elements of their eligibility for the National Register. This is true even though the Corps' regulations state that an "effect" occurs on a designated historic property only when the undertaking may alter a characteristic that qualified (past tense) the property for inclusion in the National Register. 33 C.F.R. Part 325, App. C, § 1(e) ("An 'effect' on a 'designated historic property' occurs when the undertaking may alter the characteristics of the property that *qualified* the property for inclusion in the National Register.") (Emphasis supplied). This provision thus implies that the Corps will consider only qualifying elements of the property that were considered in the written nomination of a property to the National Register or the list of National Historic Landmarks.

The ACHP rules expressly require that in determining the eligibility of properties, federal agencies must consider all relevant characteristics of a historic property that may qualify them for inclusion on the National Register, including those not listed on the original nomination form.³⁹ Thus the identification process must be a

³⁹ 36 C.F.R. §800.4(c)(1). Of course, in the case of the Kennedy Compound NHL as noted in the Gray and Pape report, the qualifying characteristic of setting is noted in the original nomination ("In the case of the Kennedy Compound NHL the property's significance is tied to its association with the Kennedy family. The NHL notes that the property commands sweeping views of Nantucket Sound and was the location where the Kennedy children learned to sail and engage in other important

"fluid and ongoing one." *Friends of Atglen-Susquehanna Trail v. Surface Transportation Bd.*, 252 F.3d 246, 263 (3rd Cir. 2001). Specifically, the ACHP rules state:

The passage of time, changing perceptions of significance, or incomplete prior evaluations *may require* the agency official to reevaluate properties previously determined eligible or ineligible.

36 C.F.R. § 800.4(c)(1) (Emphasis supplied).

Similarly, for purposes of assessing adverse effects, the ACHP regulations expressly require consideration of all qualifying characteristics whether or not identified in the original nomination. The ACHP regulations state:

Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register.

36 C.F.R. § 800.5(a)(1).

Where, as in this case, a conflict exists between the ACHP regulations and the regulations of the Corps, the regulations of the ACHP, to which Congress has given express authority to promulgate comprehensive regulations under the NHPA, control. *See Committee to Save Cleveland's Hulett's v. U.S. Army Corps of Engineers*, 163 F. Supp. 2d 776 (N.D. Ohio 2001) ("*Hulett's*") citing *Nat'l Ctr. For Preservation Law v. Landrieu*, 496 F. Supp. 716, 742 (D.S.C.) *aff'd per curiam*, 635 F.2d 324 (4th Cir. 1980) (holding that the ACHP has exclusive authority to determine the methods for compliance with NHPA); *Nat'l Trust for Historic Preservation v. U.S. Army Corps of Engineers*, 552 F. Supp. 784, 790-91 (S.D. Ohio 1982) (holding that the ACHP's regulations govern the implementation of § 106 for all federal agencies).

In particular, courts have held that the Corps may not rely on its own regulations to define or restrict the scope of its obligations under the NHPA where those regulations conflict or are inconsistent with the ACHP's regulations. *Hulett's*, 163 F. Supp. at 792. In addition, the Corps' interpretation of the correct requirements under the NHPA or the ACHP's rules is not authoritative and is entitled to no particular deference. *See National Trust for Historic Preservation v. Blanck*, 938 F.Supp 908, note 15 (D.D.C. 1996) ("While an agency is entitled to substantial

competitive activities. This clearly indicates that the waters of Nantucket Sound are part of the historically significant setting for the NHL.").

deference when it interprets statutes and regulations whose enforcement is committed to that particular agency, *Orengo Caraballo v. Reich*, 11 F.3d at 192-93, the NHPA delegates to the Army no particular interpretive or enforcement authority. Thus, the Army's interpretation of the NHPA is not entitled to the deference accorded to the Secretary of the Interior.").

In their report, Gray and Pape address the issue of the appropriate boundary of historic significance for Nantucket Island NHL and the Kennedy Compound NHL. They point out that although the area of the waters of Horseshoe Shoal are not included within the boundaries of these two NHLs as described in the nomination forms on file, this is not surprising, nor should it influence a more modern and up-to-date assessment of the extent of the area of historic significance for these properties that takes into account the changing perceptions of significance in the professional historic preservation community of historically important areas surrounding historic properties. The Gray and Pape report states:

The fact that the NHL boundaries contained in the descriptions in the nomination forms for the Kennedy Compound NHL and the Nantucket Island NHL do not encompass into the waters of Nantucket Sound is not surprising, since NRHP guidance regarding the establishment of boundaries is clearly focused on establishing boundaries for terrestrial resources and specifically calls for the use of natural features "such as a shoreline" in the selection of appropriate boundaries.

Ex. 11, at 6.

Nevertheless, given the close associations that these properties have with the sea and maritime industries, the non-inclusion of some portion of the surrounding waters is analogous to the former practice of listing farm buildings in the NRHP without including any of the farmland associated with the buildings. *Id.* at 4.

Gray and Pape conclude that the conclusions in the PAL report and the DEIS almost compel the conclusion that the boundaries of historic significance for both the Kennedy Compound NHL and Nantucket Island NHL extend into Nantucket Sound to include the Horseshoe Shoals area, and that under the ACHP's regulations, this should be acknowledged in the official records of these landmarks in the National Register. Gray and Pape state

The Corps and PAL have concluded, in the DEIS, that the proposed Cape Wind project on Horseshoe Shoals will have an adverse effect upon the setting of the two NHLs. This strongly

suggests that a reevaluation of the boundaries of these NHLs should include Horseshoe Shoals as an important component of the properties' historically significant setting. This conclusion is most consistent with the findings of the Corps and PAL that the proposed Cape Wind Project will have an adverse effect on both properties by altering the character of the properties' setting and by introducing a visual element that is out of character with the properties and their settings

Id. at 7.

Again, the DEIS, the PAL VIA and the expert opinion of Gray and Pape all agree on this key point - that the setting of Nantucket Sound is one qualifying element of eligibility, both for the National Register and as a NHL, for both the Kennedy Compound NHL and Nantucket Island NHL. Gray and Pape take this element into account in voicing their ultimate conclusion that the proposed Project will directly and adversely affect both of these landmarks. The Gray and Pape report concludes:

For the reasons discussed above, we conclude that the Cape Wind project will directly and physically alter the shape and outline of the horizon and the water views of the sound from the Kennedy Compound NHL and Nantucket Island NHL. These effects will physically and directly alter, and diminish the integrity of, the character-defining element of the Nantucket Sound setting that is a physical part of these resources and renders them eligible for the National Register and as National Historic Landmarks.

Id. at 7.

The DEIS admits that the preferred alternative for the proposed energy project will directly and adversely affect the Nantucket Island NHL and the Kennedy Compound NHL. This conclusion is amply supported by both the PAL Visual Impact Assessment and the professional opinion of historic preservation experts at Gray and Pape.

In an earlier draft of the EIS prepared in May 2003, the Corps committed to avoid adverse effects to historic properties where feasible, including by mitigation or alternatives. 5/29/03 Draft DEIS § 5.10.4. In the current DEIS, this language has been omitted and the Corps' regulations require only that it "take into account" effects to historic properties, without any obligation to avoid or mitigate those effects. 33 C.F.R. Pt. 325, App. C., § 2(a). As both PAL and the DEIS acknowledge, however,

the ACHP's rules require the Corps to consult with the SHPO, other consulting parties and identified Indian tribes "to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties." 36 C.F.R. § 800.6(a).

Under these circumstances, the Corps is required by their own regulations and the NHPA to condition any permit to CWA so that harm to these two exceptionally significant, invaluable and irreplaceable national resources is minimized to the maximum extent possible. There are no mitigation measures that will achieve the level of protection of the Kennedy Compound and Nantucket Island NHLs mandated by Federal law. The ACHP rules thus obligate the Corps to evaluate alternative locations for the proposed project somewhere outside of Nantucket Sound.

c. The Corps failed to consider numerous historic properties in its section 106 review.

In preparing the DEIS, the Corps failed to consider visual effects from the proposed project to numerous historic properties in violation of Section 106 of the NHPA. Pursuant to its regulations, the Corps assesses direct and indirect effects on "designated historic properties," which include historic properties listed in or determined eligible for listing in the National Register and historic properties that, in the opinion of the SHPO and the Corps, appear to meet the eligibility criteria. 33 C.F.R. Part 325, Appendix C, §§ 1(a), 15.

The NHPA makes no distinction between eligible properties and "determined eligible" properties, nor does it require the concurrence of the SHPO and the federal agency regarding the eligibility of a property. The NHPA requires federal agencies to assess effects to any property "included in or eligible for inclusion in the National Register." *See* 16 U.S.C. § 470f; 36 C.F.R. § 800.16(1)(1). Federal courts have held that "[t]he [NHPA] definition of 'eligible property' makes no distinction between determined eligible and property that may qualify" and struck down Corps regulations that maintained such a distinction. *See Colorado River Indian Tribes v. Marsh*, 605 F.Supp. 1425, 1437 (C.D. Cal. 1985).

According to the attached report prepared by an expert consultant in architectural history and historic preservation, Candace Jenkins, the Corps made no assessment of 2 properties listed on the National Register, 1 property that has been determined eligible and at least 20 properties that are eligible for inclusion on the

National Register. Ex. 12, at 2-5. In other words, the Corps has failed to assess at least 23 historic properties for visual effects as required under the NHPA.⁴⁰

Specifically, the consultant concluded that the William Street National Register Historic District, the Seaman's Reading Room and the Ritter House, all located in Tisbury, MA, were not assessed by the Corps despite the fact that each property expressly meets the definition of a "Designated historic property" under the Corps' rules. *Id.* at 2. In addition, 4 historic properties in Falmouth, MA, 7 properties in Yarmouth, MA, 1 historic property in Harwich, 5 historic properties in Chatham, MA, 2 historic properties in Oak Bluffs, MA and 1 historic property in Tisbury, MA are all "eligible for inclusion in the National Register," but were not assessed by the Corps. *Id.* at 2-5.

The Corps' failure to assess visual effects to these 23 historic properties violates Section 106 of the NHPA and the Corps' own regulations. Under these circumstances, grant of the permit application would be unlawful and not in the public's historic preservation interests.

5. The Permit Application Must be Denied Because the Energy Plant Will Result in the Unlawful Incidental Take of Marine Mammals in Violation of the Marine Mammal Protection Act.

It is virtually certain that the CWA wind energy plant will cause take of marine mammals. When an activity will result in the take of marine mammals, the courts have ruled that the underlying action is unlawful and subject to injunction. *Kokechik Fishermen's Ass'n*, 839 F.2d 795 (D.C. Cir 1988).⁴¹ In this case, despite the clear fact that unlawful incidental take will occur, CWA has failed to even apply for the required authorization, 16 U.S.C. § 1371(a)(5). As a result, the only possible conclusion is that the project is in violation of the MMPA and must be prohibited.

⁴⁰ The consultant's review was limited to properties that had been recommended for listing by professional consultants as the result of comprehensive surveys or had been evaluated by Massachusetts Historical Commission staff through their National Register Eligibility Opinion process. Exhibit 12, at 2. Many of the properties identified are turn-of-the-century summer resort communities that were planned and sited to take advantage of proximity to Nantucket Sound and the views thereof. *Id.*

⁴¹ The take associated with the CWA project will be significant. As noted in *Kokechik*, even *de minimus* incidental take of a few animals results in a prohibition of the underlying project if no authorization is granted. The ruling in *Kokechik* that a permit for known incidental take is necessary before an action can be approved has been affirmed in *Earth Island Institute v. Mosbacher*, 746 F.Supp 964, 974 (N.D.Cal. 1990).

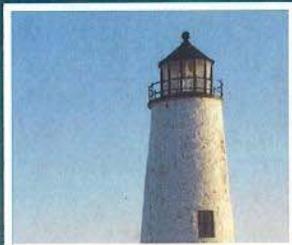
In May 2002, the Corps appears to have initiated informal ESA section 7 consultation with the Northeast Regional Office of NMFS concerning construction of the data tower in Nantucket Sound. The purpose of the tower was to collect data for use in assessing the pros and cons of constructing the full wind plant in Nantucket Sound. Construction of the tower required driving of three pilings, which was expected to take three days.

In a response letter dated June 27, 2002, the Regional Administrator identified ESA-listed species known to occur in the Sound. The letter noted that sound levels of approximately 125 dB were expected to be produced during the pile driving. It noted further that, during prior consultations, NMFS had identified 180 dB as the threshold level for preventing injury and harassment of marine mammals and sea turtles, and that the sound level expected to be generated by the pile driving was below this threshold. To confirm the expectation and ensure compliance with the 180 dB threshold, NMFS recommended that:

- the sound levels be monitored during the initial pile driving;
- an NMFS-approved observer be present during the pile driving to document the presence of listed species;
- work be suspended if a listed species is sighted in the vicinity of the pile driving; and
- all construction activities be immediately stopped, and further consultations be initiated, if a listed species is injured incidental to the construction.

The letter also noted that all marine mammals were afforded special protection under the MMPA and that the response was limited to the inquiry concerning ESA-listed species.

The DEIS for the proposed project indicates on page 1-10 and elsewhere that the Corps subsequently issued a permit to CWA for construction and operation of the data tower and that the permit contained a condition requiring that sound levels be monitored during pile driving at "an initial safety zone radius of 500 meters to determine compliance with the 180-dBL NMFS threshold." The DEIS also notes that "[a] similar safety radius was established by NMFS for pile installation at the San Francisco-Oakland Bay Bridge"



Alliance to Protect Nantucket Sound
Comments on the Draft Environmental
Impact Statement for the Proposed Cape
Wind Energy Plant (Project ID: PLN-GOM-0003)

Submitted To:
Minerals Management Service

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required by the MBTA.³⁵⁴ Accordingly, the proposed action could be enjoined unless and until such authorization is obtained.³⁵⁵ In the DEIS, MMS states that the proposed project may go forward without FWS authorization under the MBTA because no such permit currently exists. MMS has no authority for this statement, and case law confirms that the project cannot be authorized.

D. MMS Has Not Complied with the National Historic Preservation Act

In its DEIS sections dealing with “Cultural Resources” and Indian tribes, MMS has failed in significant ways to comply with the requirements of sections 106 and 110³⁵⁶ of the NHPA.³⁵⁷

The section 106 review for this project, as described in the DEIS, has been careless, incomplete, and legally insufficient. This is particularly the case in its failure to identify and consider effects to hundreds of above-ground historic properties, its failure to minimize harm to NHLs, and its failure to identify historic properties to which Indian tribes may attach religious and cultural significance. MMS has completely failed to comply with its obligations under the core requirements of federal preservation law: (1) to minimize harm to NHLs; (2) to identify properly affected historic properties; and (3) to take into account all effects to all such properties in its permitting decision.

In addition, despite repeated requests, MMS has failed to initiate required consultation with the Secretary of the Interior, the ACHP, the Massachusetts Historical Commission/State Historic Preservation Office (MHC/SHPO), and the Indian tribes with a significant historic connection to the lands of Nantucket Sound.

³⁵⁴ See, e.g., DEIS, at 1-8.

³⁵⁵ See, e.g., *Humane Soc’y v. Glickman*, 217 F.3d 882, 885-88 (D.C. Cir. 2000) (enjoining Dept. of Agriculture under the APA and the court’s “equitable injunction powers” from proceeding with plan to capture and kill Canadian geese in violation of the MBTA without FWS authorization); *Kokechik Fishermen’s Ass’n*, 839 F.2d 795 (D.C. Cir. 1988) (even de minimus incidental take of federally protected species results in a prohibition of the underlying project if no authorization is granted); *Center for Biological Diversity v. Pirie*, 201 F. Supp. 2d 113 (2002) (enjoining naval bombing exercises because of unauthorized incidental take of migratory birds), *vacated as moot* *Center for Biological Diversity v. Englund*, 2003 WL 179848 (D.C. Cir. 2003).

³⁵⁶ 16 U.S.C. §§ 470f and 470h-2(f).

³⁵⁷ *Id.* § 470 *et seq.*

1. Unexplained and Unjustified Rejection of Thirteen Adverse Effect Findings

In the DEIS, MMS categorically reversed, without explanation or justification, 13 of the 16 findings of Adverse Effect made for the proposed project only three years ago by the Corps, in which findings the MHC/SHPO concurred.

According to its description of its section 106 review of the proposed project, MMS relied on research, consultation, and findings for the project previously undertaken by the Corps, as well as additional research and visual simulations by the same consultants, undertaken after MMS became the lead agency for this review in 2005.³⁵⁸ Specifically, the DEIS cites and relies on the visual impacts assessments, reports, and visual simulations provided by PAL and Environmental Design and Research, P.C. (EDR), the consulting firms hired by CWA for the proposed project.³⁵⁹

In determining visual effects to historic properties as required by the ACHP's section 106 regulations, MMS expressly based its findings on "an analysis of visual effects undertaken in the visual impact assessment, which included both daytime and nighttime visual simulations." In this regard, there are only two versions of a professional "visual impact assessment" cited in the DEIS, both contained in reports prepared by PAL, a cultural resources firm based in Rhode Island. The most recent of these reports was prepared in 2006, and contained "new daytime and nighttime [visual]simulation."³⁶⁰ Also cited in the DEIS is the initial *Visual Impact Assessment* (VIA) prepared by PAL in 2004. In the initial VIA, PAL recommended findings of "adverse effect" for two NHLs (the Kennedy Compound NHL and the Nantucket Historic District NHL), four historic districts, and ten individual historic properties.³⁶¹

The MHC/SHPO concurred in all of those adverse effect findings in a letter dated August 11, 2004. The Corps expressly agreed with PAL and made those same adverse effect findings in a letter to the MHC/SHPO dated July 4, 2004. The Corps later confirmed its findings in both the Corps DEIS, and in the Draft and Final Environmental Impact Reports required under Massachusetts State law (DEIR - 11/2004, and FEIR - 2/2006).

In addition, in its "Certificate on the DEIR," the Massachusetts Secretary of Environmental Affairs (MSEA) reiterated the MHC/SHPO's findings of adverse effect to the

³⁵⁸ See DEIS, at 4.3.4, 4.3.5.1. and 5.3.3.4.

³⁵⁹ See *id.*, DEIS, at 4.3.4-1, 4.3.5-1, Figures 4.3.4-1-3, 5.3.3-1-6, and Tables 4.3.4-2, 5.3.3-5-8.

³⁶⁰ Report 4.3.4-1.

³⁶¹ DEIS Report 4.3.4-1 at i.

16 historic properties, and criticized the limited scope of the VIA, saying that the final report should contain an assessment of shore lands “lying between 14 and 18 miles from the outer perimeter of the project site (and therefore not encompassed by the 12 simulations presented by the Draft EIR).”³⁶² Further, in a July 21, 2005 letter to the MSEA, the MHC/SHPO noted that the project change proposed by CWA involving relocation of several of the turbines for the project “may have a greater visual impact on Nantucket [NHL]” as well as a greater visual impact on “the historic properties on Cape Cod and Martha’s Vineyard.”

In its DEIS, MMS ignored much of the evidence in the public record for the proposed project in making a finding of adverse effect for only the Kennedy Compound NHL, the Wianno Club, and the Cape Poge Lighthouse. Without referring to or explaining its deviation from the findings of PAL, the MHC/SHPO and the Corps, however, MMS made findings of “no adverse effect” for all of the remaining historic properties previously receiving adverse effect determinations, including one NHL (the Nantucket Historic District NHL), four historic districts (Cotuit HD, Wianno HD, Hyannis Port HD, and Edgartown HD), and seven individual historic properties (Col Charles Codman Estate, Monomoy Point Lighthouse, West Chop Light Station, East Chop Lighthouse, Tucker Cottage, Edgartown Harbor Lighthouse, and Nantucket/Great Point Lighthouse).

The findings of visual effects to historic properties in the MMS DEIS, relying on yet contradicting without explanation the Visual Impact Assessments from PAL, and flying in the face of the contrary findings of the Corps and MHC/SHPO, are arbitrary, capricious and not sustainable under federal law.

2. Insufficient Planning to Minimize Harm to NHLs

MMS has acknowledged that the proposed project will have an adverse effect on the Kennedy Compound NHL. The NHPA requires an agency official, to the maximum extent possible, to undertake such planning and actions as may be necessary to minimize harm to any NHL that may be directly and adversely affected by an undertaking.³⁶³

MMS has not acknowledged its responsibilities under this statute, notified the Secretary of the Interior and invited consultation with that officer, or described in the DEIS any actions that it has considered or taken to minimize harm to the Kennedy Compound NHL. As noted above, there is in addition a strong reason to believe that the proposed project will have adverse effects to more than one NHL, and MMS is required to invite the Secretary of the Interior to participate in consultation in connection with possible effects to

³⁶² Draft EIR Certificate, Mar. 3, 2005, at 20, 21.

³⁶³ 16 U.S.C. § 470h-2(f).

all NHLs.³⁶⁴ In this regard, it is worth noting the words of PAL's assessment of visual adverse effects from the proposed project to Nantucket Historic District NHL, as follows:

The interruptions of the natural horizon line by the WTGs and related structures will alter the historic Nantucket Sound setting of the Nantucket Historic district NHL, a historic early settlement, maritime and premier whaling village, and summer resort. These changes constitute a [sic] alteration of the historic character, setting and viewsheds that make Nantucket nationally significant and eligible for inclusion in the National Register and a NHL. Therefore the proposed project will have an *Adverse Effect* on the Nantucket Historic District.³⁶⁵

Other experts have noted the importance of the waters of Nantucket Sound to the historic integrity of both the Nantucket Historic District and the Kennedy Compound, and the adverse impact that the wind farm on Horseshoe Shoals will have on both NHLs. In a report submitted as part of the APNS comments on the Corps DEIS, historic landscape expert Patrick O'Bannon, Senior Historian for the cultural resources consulting firm Gray and Pape, said as follows:

One significant aspect of Nantucket's setting is the fact that it is an island, separated from the mainland and, until recently, only approachable by a vessel traversing the waters of Nantucket Sound The island's setting in the ocean, and the leisurely, ritualized approach over the water, constitute important elements of the historic property's setting. Placing the proposed wind farm astride this approach will significantly alter the setting of the historic property by altering the approach to the property . . . dramatically altering the feeling and association of the sea passage to this distinct and nationally significant historic property, the proposed project will adversely affect both the Nantucket Island NHL and the Kennedy Compound NHL.³⁶⁶

Therefore, there are strong reasons to question the validity of the reasoning behind MMS's reversal of adverse effect finding for the Nantucket Historic District NHL. Moreover, MMS has acknowledged that the proposed project will diminish the historic integrity of the Kennedy Compound NHL, and that the project would entail a "visual alteration of the setting" of that resource, including "relatively close, unobstructed views to the WTGs from nearly any vantage point within the [Kennedy Compound NHL]."³⁶⁷

³⁶⁴ 36 C.F.R. § 800.10.

³⁶⁵ PAL VIA, Corps DEIS, Appendix 5.10F, at 42 (emphasis in the original).

³⁶⁶ Ex 67.

³⁶⁷ DEIS at 5-199.

Further, the DEIS acknowledges that the project “would diminish the integrity of [the Kennedy Compound NHL’s] significant historic features.”³⁶⁸ Accordingly, it seems clear that these effects would qualify as “major” under the MMS guidelines (i.e., impacts are unavoidable, proper mitigation would reduce impacts only somewhat, and the affected community would experience unavoidable disruptions to a degree beyond what is normally acceptable.³⁶⁹

Notably, MMS recently released a Programmatic EIS (PEIS) on Alternative Energy Projects which proposed a policy that MMS will deny permits for projects on the OCS that will cause major adverse effects that cannot be adequately mitigated.³⁷⁰ Since the visual effects to many of the significant historic properties that will be caused by the proposed projects are concededly major, and since it appears clear that they cannot really be mitigated to any real degree, MMS’s own proposed standards for permitting alternative wind energy projects would seem to require rejection of the requested MMS permit for the proposed project at the Horseshoe Shoals site in Nantucket Sound.

3. Insufficient Identification of Historic Properties

Section 106 of the NHPA requires Federal agencies to take into account the effects of their undertakings on historic properties, and to afford the ACHP a reasonable opportunity to comment on such undertakings.³⁷¹ The Section 106 implementing regulations³⁷² promulgated by the ACHP require each Federal agency in their reviews of individual undertakings to “take the steps necessary to identify historic properties within the area of potential effects” and “make a reasonable and good faith effort to carry out appropriate identification efforts.”³⁷³

MMS acknowledges that their “initial inventory of historic resources within the [area of potential effects (APE)] followed the USACE guidance, and included only properties that

³⁶⁸ *Id.*

³⁶⁹ DEIS, at E-9, 10.

³⁷⁰ *Programmatic Environmental Impact Statement for Alternative Energy Development and Production and Alternate Use of Facilities on the Outer Continental Shelf*, Final Environmental Impact Statement, MMS 2007-046, Oct. 2007, at 2-21 (“Additional areas will be excluded on a site specific basis [from MMS leases, easements, or rights-of-way for alternative energy activities on the OCS] if resource impacts are identified that cannot be adequately mitigated.”).

³⁷¹ 16 U.S.C. § 470f.

³⁷² 36 C.F.R. Part 800.

³⁷³ *Id.* § 800.4(b).

were already listed on the [National Register].”³⁷⁴ This approach did not comply with the requirements of the section 106 regulations. MMS asserts that in response to comments received on the proposed action (presumably in response to the Corps DEIS), the inventory was expanded to include other properties. The total number of properties considered in the DEIS, however, is only 22.

Previous comments on this project from APNS and others identified a much larger universe of eligible properties missed by MMS and actually listed on the MHC records, including the Waquoit Historic District, which is in fact newly listed on the National Register, but not mentioned by MMS, and significant properties like the or the Falmouth Heights Historic District. Indeed, such comments have suggested that a reasonable identification effort as required would identify many more properties. For example, consultant Candace Jenkins confirmed as much in a report she prepared DEIS entitled “Identification of Potentially Eligible Properties, Cape Wind Energy Project” that was submitted as part of APNS’ comments to the Corps DEIS.³⁷⁵ Ms. Jenkins has updated that report for these comments and confirmed her previous findings. Appendix 22.

Without making site visits and only using MHC/SHPO records, Jenkins searched for easily identifiable properties that had been recommended for National Register listing by professional consultants as the result of comprehensive surveys funded and supervised by MHC, and/or that had been evaluated by MHC staff through their National Register Eligibility Opinion process. Even this limited effort produced a list of 23 above-ground historic resources, including 11 individual properties and 12 historic districts that encompass a remarkable total of approximately 1,562 individual components. Jenkins reports that some of these properties are very early examples of their type and might qualify for National Historic Landmark designation as well as listing in the National Register.

Nevertheless, the vast majority of these properties were not identified, and therefore effects from the proposed project were not considered, in the MMS DEIS.

Consultant Jenkins reports that a complete review of the MHC inventory forms for each town followed by fieldwork and research to identify additional properties as required by the ACHP’s regulations, would undoubtedly identify additional important historic properties. There is no doubt that MMS is required to undertake such an identification effort for this project to comply with section 106, and more importantly, to afford the significant historic properties of the shores of Nantucket Sound the minimum level of protection due under federal law.

³⁷⁴ DEIS, at 4-148.

³⁷⁵ Ex 68.

4. Insufficient Assessment of Effects

Since MMS has not identified at a minimum hundreds of National Register-eligible historic properties in the APE of the proposed undertaking, MMS has therefore not assessed the effects to those properties from that undertaking. The DEIS provides visual simulations from twelve locations at or near “designated properties,” but this overview assessment completely avoids considering effects to a huge number of historic properties and misrepresents the massive scope and scale of adverse effects to at least scores of historic districts and many hundreds of individually eligible historic properties all around Nantucket Sound.

MMS also applies the criteria of adverse effects in arbitrary and illogical ways. For example, the MMS DEIS reports that there is an adverse effect on the Wianno Club because “[t]his property is located directly on the shore with an unobstructed view to the WTGs. The visual impact of the WTGs would dominate the setting and diminish its integrity.”³⁷⁶

At the same time, the DEIS asserts that there is no adverse effect on the Wianno Historic District, of which the Wianno Club is a part, because only half of its properties are located on the shoreline. The DEIS does not say how many of the “other half,” most of which are located just across the street from the waterside properties, have views of the project. The conclusory and unsupported assessment of the DEIS is as follows: “The historic district includes 28 main buildings, only half of which have property on the shoreline. While the towers would be within view from the shoreline, it does not significantly change the overall setting of the historic district.”³⁷⁷

The assessment of effects to the Wianno Historic District improperly segments the district, implying that adverse effects to part of the district do not affect the district as a whole. Thus, the DEIS bases its reduction in the number of adverse effect findings from 16 to 3 on several faulty premises that are contradicted by information published by the National Register and the MHC/SHPO, as shown in this section from National Register Bulletin 15:

A district derives its importance from being a unified entity, even though it is often composed of a wide variety of resources. The identity of a district results from the interrelationship of its resources, which can convey a visual sense of the overall historic environment or be an arrangement of historically or functionally related properties.³⁷⁸

The assessment of effects from the proposed project in the DEIS is neither complete

³⁷⁶ DEIS, Table 5.3.3-1, at B-397.

³⁷⁷ *Id.*

³⁷⁸ NR Bulletin 15 – How to Apply the National Register Criteria for Evaluation, at 15.

nor proper, and overall, this flawed effort cannot legally sustain the findings of this Section 106 review.

5. Lack of Consultation with Indian Tribes Regarding Historic Properties Off Tribal lands

NHPA requires federal agencies in the course of exercising their responsibilities under Section 106, to consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking.³⁷⁹ The ACHP regulations make clear that this requirement applies to all historic properties wherever located, not just on tribal lands.³⁸⁰ In the DEIS, however, MMS admitted that it had consulted with only two Wampanoag Indian tribes, only with regard to “environmental justice” concerns, and only regarding visual impacts to locations on the lands of those two tribes, which MMS calculated had no possible views of the project.³⁸¹

The Wampanoag of Gay Head (Aquinnah), and their tribal organization, the United South and Eastern Tribes, have expressed a strong protest against MMS for not consulting with the Tribe regarding the horrible effects that the proposed project will cause to the sacred historic tribal lands of Nantucket Sound and the sites of religious and cultural significance to the tribe on those lands. Ex. 69. Other Indian tribes that MMS has not contacted, including the Mohegan, the Narragansett, and the Pequot, may well also have similar concerns that must be addressed.

In short, MMS has ignored and defaulted on its legal obligations to consult with all Indian tribes with a historic connection to the lands within the APE of this undertaking, and to identify impacts to historic properties to which any of those tribes may attach religious and cultural significance.

E. The Proposed Project Will Violate the MMPA

The proposed project will cause take of marine mammals. When an activity will result in the take of marine mammals, the courts have ruled that the underlying action is unlawful and subject to injunction.³⁸² In this case, despite the clear fact that unlawful

³⁷⁹ 16 U.S.C. § 470a(d)(6).

³⁸⁰ 36 C.F.R. § 800.2(c)(2)(B)(ii).

³⁸¹ See DEIS Section 4.3.3.3.1, and 5.3.3.3.2.

³⁸² *Kokechik Fishermen's Ass'n*, 839 F.2d 795 (D.C. Cir 1988). The take associated with the CWA project will be significant. As noted in *Kokechik*, even *de minimus* incidental take of a few animals results in a prohibition of the underlying project if no authorization is granted. The ruling in *Kokechik* that a permit for known incidental take is necessary before an action can be approved has been affirmed in *Earth Island Institute v. Mosbacher*, 746 F. Supp. 964, 974 (N.D. Cal. 1990).

SAVE OUR SOUND

alliance to protect nantucket sound

September 10, 2009

Dr. Melanie Stright, Federal Preservation Officer
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New Orleans, LA 70123

Re: Section 106 process for Cape Wind

Dear Dr. Stright, Dr. Krueger and Dr. Horrell:

I am writing this letter on behalf of the Alliance to Protect Nantucket Sound (Alliance) in response to the MMS letter of September 8, 2009, regarding "conclusion" of the Section 106 consultation process. Based on the current record compiled by MMS to date on the proposed Cape Wind project and its impacts on historic properties and tribal cultural practices, it would be significantly premature and illegal for MMS to conclude the Section 106 process without first addressing, completely, the serious issues that have been raised by the consulting parties.

In particular, and contrary to the statement in the MMS letter of September 8, 2009, it is MMS' responsibility, not that of the SHPO or the several adversely affected tribes, to prepare the necessary documentation that would enable the Massachusetts Historical Commission and the Keeper of the National Register to make a formal determination of eligibility of Nantucket Sound for listing on the National Register of Historic Places as a traditional cultural place (TCP).

This was discussed at the Cape Wind section 106 Historic Preservation consultation meeting on June 16, 2009, in Hyannis, Massachusetts, as well as in follow up letters to this meeting

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by the Advisory Council on Historic Preservation (ACHP), the Massachusetts Historical Commission (MHC), and the Alliance.

Likewise, in our last consultation meeting, the SHPO stated that "we're not at a point where we can talk about the Memorandum of Agreement (MOA) until those other issues are resolved," referring specifically to the eligibility determination and the adverse effects finding analysis.

It is the responsibility of MMS to address and resolve the National Register issue by preparing appropriate documentation to seek a formal determination of eligibility from the Keeper of the National Register and first submitting this documentation to the Massachusetts Historical Commission (MHC), so that MHC may issue a formal opinion to the Keeper. This is made clear in a July 28, 2009, letter from MHC to MMS which stated: "The ACHP informed MMS that the question of whether Nantucket Sound is eligible for listing in the National Register of Historic Places as a traditional cultural property must be resolved. The MHC was not aware that the MMS, in its separate government to government meetings with the THPOS, had agreed to seek a formal determination of eligibility from the Keeper of the National Register. In an effort to assist in moving the consultation process forward, I offered to streamline the determination of eligibility by suggesting that MMS submit their documentation to MHC as soon as it is ready so that a formal opinion as SHPO may be provided to MMS as required by the National Park Service regulation. See 36 CFR 63. It is premature to develop an MOA prior to the resolution of these issues."

Furthermore, in a June 23, 2009, letter from ACHP following the section 106 consultation meeting, Executive Director John Fowler reinforced MMS' duty to address and resolve the National register issue: "First, the question of the National Register eligibility of Nantucket Sound as a traditional cultural place needs to be resolved. The earlier statements of the National Park Service appeared to be limited to a more general approach to the eligibility of bodies of water, without regard to their traditional, religious or cultural significance. Formal clarification of this issue is needed so that the property can be given appropriate consideration in the consultation."

The Alliance is also aware that the Mashpee Wampanoag Tribe passed a tribal resolution on July 16, 2009, determining that Nantucket Sound is a TCP because of the Tribe's traditional, cultural, spiritual and religious connection to Nantucket Sound. This resolution also requested that the National Park Service agree with the Tribe's determination.

This responsibility for preparation of the documentation falls upon MMS because MMS has the primary responsibility for compliance under the National Historic Preservation Act for the effects of its actions on the historic and cultural resources of Nantucket Sound and the Cape Cod region.

Dr. Melanie Stright
Dr. Andrew D. Krueger
Dr. Christopher Horrell
Page 3 of 3

Clearly, as noted in the ACHP letter to MMS of June 23, 2009, the issue of whether Nantucket Sound is eligible for listing on the National Register must be resolved before the 106 process can be concluded. Since making that determination of eligibility is dependent on preparation of the necessary documentation, it would be in the best interest of all concerned, including MMS, for the agency to proceed immediately with development of that documentation.

The other major issue that has been part of the consultation from the outset, the adverse effects of the project on the two National Historic Landmarks (NHL), has also not been resolved. The statement in your letter of September 8, 2009, further complicates a satisfactory resolution of the conflict by once again attempting to minimize the issue: "The MMS has acknowledged the proposed project's *potential* to have adverse visual impacts..." (emphasis added). In fact MMS has previously stated its conclusion that these NHL properties will be visually adversely affected by the Cape Wind project, not that there is simply the potential for adverse effects. For MMS to backtrack now from the formal findings in the FEIS is further evidence of the agency's lack of good faith to date in these consultations.

Further, we would like to formally request that the September 30, 2009, Section 106 consultation meeting be held here on Cape Cod in order for all of the consulting parties to be adequately represented.

Thank you for your attention to this matter. Please feel free to call me with any comments or questions.

Sincerely,



Glenn G. Wattlely
President and CEO

Cc: Senator John F. Kerry
Congressmen William D. Delahunt
Director S. Elizabeth Birnbaum
Wyndy Rausenberger, Solicitor, Department of Interior
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August 3, 2009

VIA E-MAIL AND US MAIL

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Re: Section 106 Consultation Process for the Cape Wind Project

Dear Dr. Krueger:

On behalf of the Alliance to Protect Nantucket Sound (“Alliance”), I am writing to respond to and correct several statements in the letter to you of July 15, 2009 from attorney Matthew F. Pawa (“Pawa letter”) speaking for the pro-Cape Wind group Clean Power Now (“CPN”).

In that letter, CPN asserted that Minerals Management Service (“MMS”) should “terminate the Section 106 consultation process” currently underway reviewing the Cape Wind project for effects to historic properties. To support this suggestion, CPN asserts that because certain consulting parties, namely the Alliance, the Wampanoag Tribe of Gay Head (Aquinnah) and the Massachusetts Historical Commission/State Historic Preservation Officer (“MHC/SHPO”), have sent letters to MMS in recent months expressing positions with which CPN does not agree, CPN has therefore concluded that “further consultation will not be productive.” Pawa letter at 2. CPN also alleges that the MHC/SHPO is precluded by Massachusetts law from participating further in the section 106 review of the Cape Wind project, and that Nantucket Sound should not be considered eligible for the National Register of Historic Places.

In fact, none of CPN’s statements or suggestions are accurate or legally supportable. Indeed, in a letter to you dated July 28, 2009, the MHC/SHPO criticized the Pawa letter for its inaccurate statements. Further, both the Advisory Council on Historic Preservation (“ACHP”) and MHC/SHPO have expressed a willingness to continue productive consultation in this matter, and both have told MMS that additional



information is required before a decision can be made on moving forward on a memorandum of agreement for the Cape Wind project. At this stage of the section 106 review, therefore, there is no justification for terminating section 106 consultation, notwithstanding CPN's evident impatience to do so regardless of the requirements of the law.

Termination of Section 106 Consultation is Not Justified. The section 106 process is a process of project review based on the provisions of section 106 of the National Historic Preservation Act of 1966 ("NHPA") (16 U.S.C. §§ 470(f)), the most important federal law for the protection of historic properties. The section 106 process is based largely and importantly on consultation, which is to occur among the responsible agency official, the State Historic Preservation officer ("SHPO"), Indian tribes, interested parties and the public. Therefore, termination of consultation, though allowed in certain circumstances, is an extraordinary action that signifies a breakdown in the section 106 process. It is only reasonable that termination should be carefully considered and only invoked when necessary and when all required steps in the process through consultation to avoid adverse effects have been properly accomplished.

Termination of consultation is governed by the rules of the ACHP. These rules provide that: "after consulting to resolve adverse effects," either the responsible agency official, the responsible SHPO or the ACHP may "determine that further consultation will not be productive and terminate consultation." 36 C.F.R. § 800.7(a). Therefore, before considering termination, MMS must "conduct the section 106 process in accordance with the regulations." *See Friends of the Atglen Susquehanna Trail v. Surface Transportation Safety Board*, 252 F.3d 246, 267 (3rd Cir. 2001). Therefore, among other things, it must consider the comments of the key agencies and consulting parties as to such things as "the scope of the eligible historic properties and as to a proper mitigation plan." *Id.*

In this case, as previously stated by several parties, including the ACHP, MHC/SHPO, the National Trust for Historic Preservation, and the Alliance, MMS has not yet completed the necessary preliminary steps in the section 106 process, and therefore, termination at this stage would not be timely. In its letter to you of June 23, 2009, the ACHP identified three actions that MMS should take to allow this section 106 review to most effectively move forward. First, the question of National Register eligibility of Nantucket Sound as a traditional cultural property ("TCP") needs to be resolved. Second, MMS needs to obtain the formal views of the National Park Service on the Cape Wind project's visual impacts to the setting and views of the Nantucket Island and Kennedy Compound National Historic Landmark ("NHL") districts. Third, MMS should elicit further information from the consulting Indian tribes regarding historic properties of significance to them. The ACHP said that if MMS can provide this information to the consulting parties, "we should be able to determine at [the next]

meeting whether further consultation is likely to lead to a memorandum of agreement or whether termination and formal ACHP comment would be the most prudent way to conclude the Section 106 process.”

The Alliance would add that MMS has not yet explained how it intends to comply with its responsibility to minimize harm to the two adversely affected NHLs “to the maximum extent possible” as required by section 110(f) of the NHPA (16 U.S.C. § 470h-2(f)). Nor has MMS demonstrated and justified the reasonable and good faith effort necessary to identify all of those historic properties that will be affected by construction and operation of the Cape Wind project.

In recent consultation meetings and correspondence, MMS and the key consulting parties have all repeated their willingness and intention to continue the section 106 consultation process for the Cape Wind project. Consultation up until now has clearly been productive, even if not by CPN’s narrow and singularly goal-focused standards, and there is every evidence that consultation will continue to be productive, both for MMS and all those consulting parties willing to consult in good faith under the rules.

Section 106 Identification Efforts are Still Incomplete. MMS is certainly aware that under the ACHP’s rules MMS must “make a reasonable and good faith effort to carry out appropriate identification efforts,” and “to apply the National Register criteria [36 C.F.R. part 63] to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility.” 47 C.F.R. §§ 800.4(b)(1) and 800.4(c)(1). Nevertheless, for several years, until January 29, 2009, MMS relied on the flawed identification efforts used by the Army Corps of Engineers (“ACOE”), which were improperly limited by the ACOE rules to considering only effects to National-Register-listed and determined-eligible properties. It was that effort on which Cape Wind’s consultant PAL relied to prepare all of its photo simulations for this project from 2002 to 2008.

Then, at a January 29, 2009 consultation meeting, MMS requested that those attending submit in writing any additional historic properties that the parties believed were eligible for the National Register and potentially impacted by the Cape Wind project. Thirty properties were submitted in response to this request, and of that number, PAL “determined that an additional 16 of the 30 properties ” were eligible, and 12 were “found to be adversely affected.” (PAL Briefing Memorandum, Feb. 17, 2009, at 3). The MMS finding did not emphasize that the twelve additional properties were historic districts containing over 1,500 individual historic properties. But even so, this effort was not the effort required of MMS under the ACHP’s rules.



Eleven of the twelve additional historic properties considered by MMS as adversely affected were identified much earlier in this review by historic preservation consultant Candace Jenkins in her report dated February 16, 2005 and submitted to the ACOE DEIS as part of the Alliance comments (“Jenkins 2005 Report”). That report explained that Ms. Jenkins had identified all of these additional historic properties without doing any field work, but only by reviewing the records available at the offices of the MHC/SHPO. As such, she explained how her results were entirely dependent on the quality and thoroughness of the previous activity of the local historic districts to identify and add to the MHC records the historic properties in those towns. Therefore the records of the active towns, such as Barnstable, were much more complete than those of the inactive towns such as Harwich or Dennis. (*See Jenkins’ Report at 2.*)

In her summary, Jenkins expressly pointed out that “a full review of the inventory forms for each town followed by fieldwork to identify additional properties would undoubtedly identify additional properties.” (*Id.*) This “full review” and follow-up field work is the work, at a minimum, that would be required of MMS for any “reasonable and good faith” identification effort. MMS has not yet performed such a full review of local inventory forms, nor has MMS performed any independent investigatory field work of its own to identify those historic properties not yet included in the records. MMS has only asked PAL to review and confirm the properties identified by consulting parties such as the Alliance and Candace Jenkins.

The Alliance agrees with the Massachusetts SHPO that MMS’s documentation of how it has made a reasonable and good-faith effort to identify all those historic properties potentially affected by the Cape Wind project has been “incomplete and insufficient.” MHC/SHPO 2/06/09 letter to Rodney Cluck of MMS, at 1. The Alliance agrees with the Massachusetts SHPO that:

It is critically important to assess the adverse effects of the project in its entirety and to ensure that the consideration of historic properties adversely affected is accurate in order for the remainder of the steps in the Section 106 process to be meaningful and productive.

(*Id.*)

Only a small portion of the historic properties potentially affected by the Cape Wind project have been considered by MMS, however, and the incomplete inventory of adversely affected properties is the result of a failure to undertake for this review the reasonable and good faith identification efforts required by the section 106 rules. Drawing from the principle stated by the MHC/SHPO, above, the insufficient identification of properties and the resultant consideration of only a portion of the



historic properties that will be affected by the Cape Wind project, means that the remaining steps of the section 106 process cannot be meaningful or productive. This unfortunate state of affairs provides an insufficient basis on which to invoke termination of consultation.

The EFSB Certificate Did Not Preclude MHC/SHPO's Independent Participation in the Cape Wind Section 106 Review. As part of its argument that "further consultation would not be productive," CPN surprisingly argues that although MMS is required by federal law to consult with MHC/SHPO in the Cape Wind section 106 review, state law supposedly requires MHC/SHPO to support Cape Wind in that consultation. Pawa letter at 2, 3. CPN points out that because the Massachusetts Energy Facilities Siting Board ("EFSB") granted a Certificate of Public Interest and Environmental Impact ("Certificate") for the construction of two electric transmission lines related to the Cape Wind project (see Cape Wind Associates, LLC for a Certificate of Environmental Impact and Public Interest, EFSB 07-8, Final Decision, May 27, 2009), Massachusetts law supposedly prohibits MHC/SHPO from taking any action that would delay or prevent construction of the transmission lines as provided in the Certificate.

CPN goes further, however, arguing that because construction of the transmission lines is contingent on the federal permitting of the wind energy plant, MHC/SHPO is somehow prohibited from "taking any position in this consulting process that would delay" the Cape Wind project itself. Pawa letter at 3. Therefore, CPN concludes that MHC/SHPO may not act, or fail to act, "in any manner that would further delay or prolong the consultation process," not for the transmission lines, but for the wind energy plant. *Id.* The MHC/SHPO in her letter to you dated July 28, 2009 called this reasoning "unreasonable and misguided."

In truth, the MHC/SHPO is right, and CPN misreads the EFSB 2009 Final Decision and misstates its own position in this regard. Construction of the transmission lines is not only contingent on the construction of the wind energy plant, EFSB also conditioned its Certificate approval for the transmission lines on Cape Wind's obtaining all the federal permits necessary to begin building the wind energy plant. EFSB 2009 Final Decision at Exhibit A, p. 3. This approach was approved by the Supreme Judicial Court of Massachusetts, where the court also found that the wind energy plant was "beyond the board's jurisdiction." See Alliance to Protect Nantucket Sound v. Energy Facilities Siting Bd., 858 N.E. 2d. 294, 300 (Mass. 2006).

Before the EFSB, when the Alliance and others argued that the Board should consider not just the impacts from the transmission lines, but also those from the wind energy plant, both Cape Wind and CPN asserted that the scope of that proceeding was "appropriately limited to the transmission lines." EFSB 2009 Final Decision at 8.

Indeed, Cape Wind expressly disclaimed that EFSB had any authority over the actions of the MHC/SHPO with regard to the section 106 review of the wind energy plant, saying:

MHC's continuing role through the Section 106 process within the MMS review relates to the Wind Park, and not the transmission project, and thus, is outside the scope of this proceeding. . . . Accordingly, no relief from the Siting Board is needed or is being requested by Cape Wind with respect to MHC.

Reply Brief of Cape Wind Associates, LLC in EFSB Proceeding 07-8, at 59.

Far from having any preclusive effect on the actions of MHC/SHPO under federal law in the Cape Wind section 106 review, the Massachusetts Court held that the EFSB could not even forecast what the federal agencies might do in such a review. The court said:

[Here, the wind energy plant] is within the jurisdiction of the United States government, and Federal agencies will be making critical decisions about its permitting. An attempt by the board to predict the decisions of Federal agencies would constitute an exercise in administrative inefficiency and waste the time and effort of the board and the applicants.

Alliance v. EFSB, 858 N.E. 2d. at 300.

Thus, in this case where the EFSB has no jurisdiction over the wind energy plant, and no jurisdiction at all over the MHC/SHPO's actions with regard to the section 106 consultation with MMS regarding the plant, and further where the Certificate granted by EFSB for the transmission lines was expressly conditioned on obtaining all federal approvals for the wind energy plant, the Certificate can have no preclusive effect on the MHC/SHPO's freedom of independent action in the section 106 review of the Cape Wind project itself.

The Combined Land and Seascape of Nantucket Sound - A TCP Eligible for the National Register. CPN argues that Nantucket Sound is not a TCP eligible for the National Register of Historic Places ("National Register"). In contravention of this argument, MMS has acknowledged that the Cape Wind project will have an adverse effect on NHLs, historic districts and historic properties all around the shores overlooking Nantucket Sound of Cape Cod, Nantucket Island and Martha's Vineyard. Cape Wind Final Environmental Impact Statement ("FEIS") at 5-297, 5-298. Further, MMS has admitted that "the visual alteration that the WTGs would entail to the setting



of these properties . . . would diminish the integrity of these properties' significant historic features." *Id.* at 5-298.

Finally, MMS has admitted that when Indian tribes use areas beyond their tribal lands for religious or ceremonial purposes on the shores of Martha's Vineyard or Cape Cod, or on the waters of Nantucket Sound themselves, they would encounter visual impacts from the project, and that MMS has identified at least one such very sensitive eligible TCP that will be adversely affected by the wind energy plant. FEIS at 5-238 and 5-239, Letter to B. Simon of MHC/SHPO from M. Stright of MMS, June 12, 2009, at 5. These statements amount to a virtual acknowledgement that the entire area of Nantucket Sound exhibits the historic character of a National Register-eligible historic district, landscape or TCP.

Nevertheless, CPN quotes selected statements from National Register Bulletins 15 and 38 to support CPN's categorical assertions that "open waterways like Nantucket Sound are not eligible for listing on the [National] Register," and "Traditional Cultural properties cannot encompass vast landscapes or seascapes." Pawa letter at 3 and 4. Neither of these statements is supported by the quoted bulletins, and neither is an accurate statement of cultural resource policies.

Thomas King, a suitable authority on these matters, who is quoted by CPN and is a co-author of National Register Bulletin 38, has in another publication asserted that large landscapes and open water bodies can indeed be eligible for the National Register as TCPs. With regard to the vast landscapes excluded from consideration by CPN, Dr. King has said:

Landscapes, often quite expansive landscapes, can be TCPs and can be eligible as such for the National Register. . . . The Indian Pass/Trail of Dreams area in Imperial County, California is an example – a desert landscape comprising hundreds of square miles. . . . The even larger Badger Two-Medicine landscape – a complex of watercourses, mountains and wooded ridges in Montana is an area of spiritual power for the Blackfoot. . . . The Grand Canyon is another extensive TCP landscape, within which are smaller canyons, streams, springs, salt seeps and other places important to tribes of the region.

Thomas F. King, Places that Count, Traditional Cultural Properties in Cultural Resource Management, at 119, AltaMira Press, 2003

With regard to open waterways, Dr. King has said:

Whole rivers can be TCPs for a variety of reasons. . . . Lakes themselves . . . are not infrequently found eligible for the National Register. . . . I've argued elsewhere that Lake Superior can be regarded as eligible for the National Register for its association with the traditions of the Ojibwe and their Midewiwin religion, and with the lake's fish, game and wild rice.

Id. at 120

Clearly, if the 356-mile-long Lake Superior, more than 49,000 square miles in area, can be regarded as a TCP eligible for the National Register, surely the 750 square miles of Nantucket Sound should not render it too large to qualify.

Virtually all of the historic properties on the shores of Nantucket Sound derive a major part of their historic significance from their physical setting on the Sound, many with breathtaking views of the seascape, and their association and involvement with the remarkable maritime history of this unique area, spanning hundreds and thousands of years of sea-borne commerce, fishing, boating, recreation, religious worship and tourism. Views across the open waters of the Sound of and from these historic properties are a part of these properties, individually and together, and as such, necessary and integral to any understanding or appreciation of their historic significance.

This importance to the historic significance and National Register eligibility of virtually all of the historic properties on the shores of Nantucket Sound is clear and undeniable, and this is especially true for the Kennedy Compound NHL and the Nantucket Island NHL District. The history of the Kennedy family residence and its traditional uses include near constant and permanent awareness of the Sound and the magnetic attraction of the views and experiences of its waters. Similarly, the myriad users, residents, and visitors to Nantucket Island have all been steeped in the waters of the Sound. The visual qualities of the seascape vistas consistently offered and experienced from each of these historic properties are integral to the historic significance of both.

MMS has determined that 28 National-Register listed and eligible historic properties, including both NHLs, will be adversely affected by Cape Wind if it is constructed in its preferred site on Horseshoe Shoal. MMS, however, has failed to assess potential effects to the many historic properties that it has not yet identified, and therefore has failed in its section 106 responsibilities to assess the effects of the Cape

Wind project to all historic properties, including the historic integrated landscape and seascape that is Nantucket Sound itself. If MMS were to perform the required identification effort, it would surely come to agree that all the historic properties and districts of the Sound are interconnected historically with each other and with the waters of the Sound. Therefore, these properties and the waters of the Sound make up a traditional cultural landscape and seascape which should clearly be eligible for the National Register.

Indeed, as you know, two federally recognized Indian tribes, the Wampanoag Tribe of Gay Head (Aquinnah) and the Mashpee Wampanoag Tribe, consider the entire area of the shores and waters of Nantucket Sound to be a TCP that carries great religious and cultural significance for those tribes. Only a few weeks ago, on July 16, 2009, the Mashpee Wampanoag Tribe adopted a resolution asking that the National Park Service make a determination that Nantucket Sound is a TCP. The fact that the Aquinnah Wampanoag are studying the placement of wind turbine generators on tribal land in the center of Martha's Vineyard in no way vitiates their strong objections to the massive wind energy plant in the middle of the waters of Nantucket Sound that would so obviously disrupt the morning vistas so important to the sunrise religious ceremonies for the "People of the First Light."

Indeed, the Alliance recognizes that the issue of the National Register eligibility of Nantucket Sound as a TCP must be resolved in this consultation, as expressed by the ACHP in its letter of June 23, 2009. Moreover, the Alliance is pleased that MMS has agreed with the Indian tribes that MMS will submit this issue to the Keeper of the National Register for a formal determination of eligibility, as stated by the MHC/SHPO in her letter to you of July 28, 2009.

Section 106 and NEPA. As explained above, MMS has not properly completed the step of full identification of historic properties as provided in the rules for the section 106 process, and therefore MMS has not properly laid the foundation for appropriate compliance with the National Environmental Policy Act ("NEPA"). As the Alliance has said previously, an important aspect of compliance with both NHPA and NEPA is full consideration of all reasonable alternatives to the proposed project, but MMS has unreasonably and artificially restricted its consideration of alternative locations for the Cape Wind energy plant. MMS's unwillingness to consider and evaluate other reasonably usable locations for the project, away from Nantucket Sound, has rendered insufficient and incomplete its compliance with the requirements of both NEPA and NHPA. MMS should not terminate an incomplete 106 consultation process because doing so will further emphasize the deficiencies of its FEIS for the Cape Wind project. MMS should utilize the 106 consultation process to identify all affected historic properties and thoroughly take into account the adverse effects that will be caused, in order to properly complete a Record of Decision for this project.

Because MMS chose not to analyze any but an unreasonably narrow range of alternative locations for the Cape Wind project – asserting that because it did not have a permit application for any alternative sites it did not need to thoroughly analyze such possible alternative sites – and because it has used the 106 consultation process thus far to identify additional historic properties that would be adversely affected by Cape Wind in the proposed location, the agency should both continue the 106 consultation and complete the analysis of alternative locations for the project. MMS must properly complete the 106 consultation process and documentation in order to allow that process continue to provide important historic and cultural data necessary for MMS to be able to properly complete the NEPA process and documentation, prior to any final decision

In conclusion, I hope that this letter has provided to you additional information that will be helpful in your assessment of the letter from Mr. Pawa on behalf of CPN, and that the corrections and explanations provided herein will afford you a better understanding of the issues addressed.

Respectfully submitted,



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JFC:jfc

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Cape Wind section 106 consultation participant list, attached

Cape Wind Section 106 Consultation Participation List

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22	Elizabeth Merritt	National Trust for Historic Preservation	Elizabeth_Merritt@nthp.org	
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24	Michael J. Thomas	Mashantucket Pequot Tribe	lcicarone@mptn.org	860-396-6554
25	John Brown	Narragansett Indian Tribe	brwnjbb123@aol.com	
26	Craig Olmsted	Cape Wind Associates LLC	colmsted@capewind.org	
27	Glenn G. Wattlely	Alliance to Protect Nantucket Sound	ggwattlely@aol.com	
28	Richard White	Town of Dennis	rwhite@town.dennis.ma.us	
29	Barbara J. Hill	Clean Power Now	windfarm@cleanpowernow.org	508-775-7796

*Via facsimile.



June 23, 2009

Ms. Brona Simon
State Historic Preservation Officer
Massachusetts Historical Commission
The MA Archives Building
220 Morrissey Boulevard
Boston, MA 02125

Dear Ms. Simon:

By letter of June 12, 2009, the Minerals Management Service (MMS, or the Service) wrote to the Massachusetts Historical Commission (MHC) with requests for your concurrence in MMS's Finding of Adverse Effect (Finding) for the Cape Wind project, and for your agreement to the execution of a proposed Memorandum of Agreement (MOA) that MMS asserts would mitigate the allegedly unavoidable adverse effects from the proposed Cape Wind project to the many historic properties and National Historic Landmarks (NHLs) on the shores of Nantucket Sound.

For the reasons set forth below, the Alliance to Protect Nantucket Sound (APNS), the Mashpee Wampanoag Tribe and the Wampanoag Tribe of Gay Head Aquinnah agree with the conclusions and recommendations in your letter to MMS dated February 6, 2009, which we believe MMS has not yet properly addressed or resolved. Therefore, APNS requests that the MHC reject the course of action proposed by MMS and continue to work with MMS and the other stakeholders in this section 106 consultation under the National Historic Preservation Act (NHPA) in order to properly complete the review. This will require MMS *to identify completely and fully all of the affected properties, analyze the impacts of the project on those properties (including the NHLs), and to identify and fully consider all of the alternative locations* where the project could be developed without destroying the extraordinary historic values of the lands of Nantucket Sound.

Throughout the review of the Cape Wind proposal, MMS has treated NHPA compliance as a secondary issue. The Service failed to take any meaningful action to comply with the NHPA until well after the close of the comment period on the Draft Environmental Impact Statement (EIS), and, as MHC knows, it issued the Final EIS while the section 106 consultation process was in its early stages. Once MMS did turn its attention to the effects of this massive industrial project on one of the most historically significant locations in the United States, it improperly limited its identification of historic properties and refused without justification to consider the full range of alternatives necessary to achieve avoidance of harm to two NHLs and hundreds of historic properties. Throughout the section 106 process, as has now become clear, MMS is yet to consider the only course of action—relocation of the energy plant to another site—that would satisfy the requirements of the NHPA and protect the historic character of Nantucket Sound and its shores, as well as establish the basis upon which the longstanding dispute over this controversial project could be resolved on a consensus basis. As demonstrated by the June 12

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letter, MMS is prepared to adopt only minimal measures which would do virtually nothing to resolve the pervasive and significant adverse impacts from the project on so many historic, cultural, and tribal resources.

The inadequate response of MMS under the NHPA is the result of the fundamentally flawed assumptions that: 1) NHPA compliance is limited by the purpose and need statement and alternatives applied under the National Environmental Policy Act (NEPA); and 2) the purpose and need statement and alternatives in the EIS were properly established. Even if appropriate under NEPA, the constraints on the consideration of alternatives described in the June 12 letter are neither legally sufficient nor controlling of the NHPA compliance process. MMS is incorrect when it says that there are no reasonable alternative locations to which the project could be moved. Consequently, as MHC indicated at the June 16th meeting, the section 106 consultation process should continue until such sites are developed as the basis for a legally adequate Finding and MOA.

From the beginning of its consideration of the Cape Wind application in 2005, MMS has improperly limited its review based on the policy directive, established under the last Administration, that the decision on this project is confined to approval or denial of the site hand-picked by the applicant to advance its economic objectives. Hence, although a properly scoped and independently objective federal review of the Cape Wind project would have both quickly dismissed the applicant's desired site as untenable and broadened the analysis to a series of win-win alternatives, MMS has labored under the incorrect premise that it cannot issue a lease for a location other than the one selected by the applicant. MMS has also inappropriately dismissed the no action alternative. Limited by this inappropriate constraint on its discretion, MMS has committed a series of fundamental errors that have boxed the Cape Wind project review into far too narrow a scope of analysis. These errors have manifested themselves in many ways, but most significantly by dictating the evaluation of only large-scale offshore projects in, or in the immediate vicinity of, Nantucket Sound.

Following this exceedingly narrow scope of review, MMS improperly limited its NEPA alternatives analysis. Now, with its letter of June 12, 2009 MMS is also establishing limits on the section 106 process that would violate the NHPA. MMS cannot, however, limit the section 106 process on its own accord, and Cape Wind cannot force the other agencies with an independent role in protecting historic resources to short-circuit the review that is required by law and compelled by good-faith adherence to the principle of reaching a decision that is based upon public interest factors.

Section 106 and its implementing regulations establish a role for the MHC, the Aquinnah and Mashpee Wampanoag Tribes, the Advisory Council on Historic Preservation (ACHP), the U.S. Army Corps of Engineers (Corps), and other stakeholders. By fulfilling those roles, the parties responsible for NHPA implementation may yet bring the Cape Wind project review to a point where a balanced decision is made that protects Nantucket Sound and promotes properly-sited renewable energy development. APNS commends the MHC for the strong, independent, and constructive role it has played in the section 106 review and, as more fully detailed below, we ask that the MMS request of June 12 be rejected in favor of continued evaluation of impacts on historic properties and the required avoidance actions and alternatives review.

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Status of the Section 106 Review Process. MMS is yet to comply with its obligations under the core requirements of federal preservation law to: 1) to minimize harm to NHLs; 2) properly identify affected historic properties; and 3) take into account all effects to all such properties in its permitting decision. Indeed, the section 106 review of this project is far from complete, and before an MOA may be developed and presented to the consulting parties, further information, documentation, and consultation are necessary. We agree with you that “until a more complete alternatives analysis for cultural resources is undertaken, consideration of mitigation measures is premature.”¹ Moreover, although MMS has stated that the section 106 consultation continues, as indicated above the Final EIS was released in January, almost five months ago, and that document was completed without benefit of a full section 106 process and consensus resolution of adverse effects to historic properties and NHLs.

The Need to Evaluate Impacts on Additional Properties. Under the Advisory Council’s rules MMS is required to “make a reasonable and good faith effort to carry out appropriate identification efforts,” and “to apply the National Register criteria [36 C.F.R. Part 63] to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility.”² Until January 29, 2009, MMS relied on the flawed identification efforts supplied by the Corps, improperly limited to National Register-listed and determined-eligible properties. It was that effort on which Public Archaeological Lab (PAL) relied to prepare all of its photo simulations over the six years from 2002 to 2008.

At the January 29, 2009 consultation meeting, MMS requested that those attending submit in writing any additional historic properties that the parties believed were eligible for the National Register and potentially impacted by the project. Thirty properties were submitted from this request, and of that number, PAL “determined that an additional 16 of the 30 properties” were eligible, and twelve were found to be “adversely affected.”³ The MMS finding did not acknowledge that the twelve additional properties were historic districts containing over 1,500 individual sites

Eleven of the twelve additional historic properties considered by MMS as adversely affected were identified in this section 106 review by consultant Candace Jenkins in her report dated February 16, 2005 and submitted to the Corps as part of the APNS comments on the Draft EIS. The Jenkins report explained that it was prepared without any field work, employing only a review of the records of the MHC. As such, it was dependent on the previous activity of the local historic districts to identify and add to the MHC records the historic properties in those towns. Therefore, the records of the active towns, such as Barnstable, were much more complete than those of the inactive towns such as Harwich or Dennis.⁴

In her summary, Jenkins expressly pointed out that “a full review of the inventory forms for each town followed by fieldwork to identify additional properties would undoubtedly identify

¹ MHC letter to Rodney Cluck, Feb. 6, 2009 (SHPO 2/06/09 letter).

² 47 C.F.R. §§ 800.4(b)(1) and 800.4(c)(1).

³ PAL Briefing Memorandum, Feb. 17, 2009, at 3.

⁴ See Jenkins Report at 2.

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additional properties.”⁵ MMS has not performed such a review, and there is no evidence in the record that it has attempted any such field work on its own, aside from confirming the suggestions of properties identified by consulting parties such as APNS and Candace Jenkins.

MMS is required to make a reasonable and good-faith effort to identify all those historic properties potentially affected by the Cape Wind project. APNS and the Wampanoag Tribes agree with you that MMS’s documentation of having done so is “incomplete and insufficient.”⁶

APNS and the Wampanoag Tribes agree with you that:

It is critically important to assess the adverse effects of the project in its entirety and to ensure that the consideration of historic properties adversely affected is accurate in order for the remainder of the steps in the Section 106 process to be meaningful and productive.

Id. Until MMS fulfills this obligation, the section 106 process must continue.

The Duty to Protect National Historic Landmarks. MMS has acknowledged that the project will have an adverse effect on the Kennedy Compound NHL and the Nantucket Historic District NHL. This means that MMS is required, to the maximum extent possible, to undertake such planning and actions as may be necessary to minimize harm to those NHLs because they are directly and adversely affected by the undertaking.⁷ MMS is also required to invite the Secretary of the Interior to participate in consultation in connection with possible effects to all NHLs.⁸

MMS has not acknowledged this responsibility, notified the Secretary of the Interior and invited consultation with that official, or described in the Final EIS any actions it has considered or taken to minimize harm to these two exceptionally significant historic properties. MMS has a duty to evaluate the impact on NHLs under a higher standard, yet it continues to treat these nationally-significant resources like any other historic properties. Indeed, as the record of the consultation process confirms, the only way to minimize the harm to these NHLs is to move the project to another location. Unless MMS takes this action, the duty to protect the NHLs will be violated.

The Need to Evaluate Additional Tribal Properties and Impacts. The proposed project location will fundamentally alter key religious and cultural practices of Native American tribes in the vicinity. The Tribes’ practices include viewing the sun at dawn across an open and natural Sound while conducting religious ceremonies and prayers. Because of this, Nantucket Sound is eligible for the National Register of Historic Places as a Traditional Cultural Place (TCP). The National Park Service, in its agency guidelines for evaluating and documenting TCPs, defines a TCP as “[a] property that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that

⁵ *Id.*

⁶ SHPO 2/06/09 letter at 1.

⁷ 16 U.S.C. § 470h-2(f).

⁸ 36 C.F.R. § 800.10.

community's history, and (b) are important in maintaining the continuing cultural identity of the community.”⁹ Examples used to explain TCP include:

A location associated with the traditional beliefs of a Native American group about its origin, its cultural history, or the nature of the world.

An urban neighborhood or rural community that is the traditional home of a particular cultural group, and that reflects its beliefs and practices.

A location where a community has historically gone to perform economic, artistic, or ceremonial activities in accordance with traditional cultural practices important in maintaining its historic identity.¹⁰

The relationship of the local Tribes to Nantucket Sound fits within these examples, necessitating the evaluation of the Sound as a TCP.

The NHPA Duty to Evaluate Alternatives. NEPA and the NHPA are separate statutes, each of which must be complied with independently. This is an important issue discussed at the June 16th consultation meeting and, from the discussion, it is clear MMS does not have a clear understanding of the requirements of these important laws as applied to the Cape Wind project. While the consideration of alternatives has been described as the “heart” of every NEPA review, the consideration of alternatives to the proposed undertaking is most important in a section 106 review after the agency has identified that the undertaking will cause an adverse effect to one or more historic properties.

The ACHP's rules expressly provide that when an adverse effect is found, the agency must consult with the SHPO and other consulting parties (including the ACHP and Native American tribes) “to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize and mitigate adverse effects to historic properties.”¹¹ The rules further expressly provide that when an NHL may be directly and adversely affected by an undertaking, the Advisory Council shall use the process set forth in that section and “give special consideration to protecting [NHLs]”¹²

Therefore, as distinct from any process employed to achieve the goals of NEPA, MMS must employ the separate processes required in the section 106 rules to achieve the goals of that statute. Accordingly, when MMS concludes that one of its undertakings will cause an adverse effect to any historic property, it must develop and evaluate alternatives or modifications to the undertaking that could avoid those adverse effects. Moreover, when an undertaking will directly and adversely affect an NHL, or in this case two NHLs, MMS is required, to the maximum

⁹ National Park Service, *Guidelines for Evaluating and Documenting Traditional Cultural Places*, available at:

<http://www.nps.gov/nr/publications/bulletins/nrb38/nrb38%20introduction.htm>.

¹⁰ *Id.*

¹¹ 36 C.F.R. § 800.6(a).

¹² *Id.* § 800.10(a).

extent possible, to undertake such planning and actions as may be necessary to minimize harm to each of those NHLs. In considering the combined effect of the statute and its implementing rules, it is clear that MMS has a separate and higher duty than it has heretofore recognized under NEPA to evaluate alternatives that may be necessary to avoid adverse effects to hundreds of historic properties, and minimize harm to two NHLs.

MMS incorrectly maintains that its assessment of alternatives under section 106 must only be “reasonable,” citing for this proposition section 800.11 of the ACHP’s rules.¹³ This is incorrect. The only reference in that section to “reasonable alternatives” applies to the documentation that must be submitted to the ACHP when the ACHP is requested to comment because no MOA is agreed to.¹⁴

Under the constraints that it perceives under the rules implementing NEPA, and its supposed inability to consider certain alternatives, MMS has suggested that the direct and significant adverse effects from the proposed Cape Wind project to historic properties, TCPs, and NHLs may be “unavoidable.”¹⁵ Therefore, MMS proposes an MOA that essentially offers as mitigation only changes in design for the array, in essentially the identical location originally proposed, and painting the 130 wind turbines proposed for Horseshoe Shoal, each 440 feet tall, off-white instead of white. This proposed mitigation amounts to no mitigation, and is certainly inadequate to minimize harm to the maximum extent possible. The only way to reach adequate avoidance and mitigation in good-faith compliance with the requirements of federal preservation law is to seriously consider and implement an alternative that will relocate this project outside of Nantucket Sound. As the still evolving record on the Cape Wind project demonstrates, such alternatives exist, and they must be considered under the NHPA (as well as NEPA, in a new EIS).

The Flawed NEPA Purpose and Need Statement. Even if the NEPA purpose and need statement and alternatives control for NHPA purposes, it is by now so apparent that the Draft and Final EIS documents are deficient in this regard that the section 106 process should now be invoked to cure these deficiencies. The purpose and need for the proposed project identified in the EIS is impermissibly narrow and restrictive, causing MMS to limit and minimize the agency’s review of the project and viable alternatives. That practice violates NEPA and renders the Final EIS insufficient for federal decision-making purposes.

NEPA requires federal agencies to “rigorously explore and objectively evaluate all reasonable alternatives.”¹⁶ To do so, the action agency must first reasonably and fairly define the project’s purpose.¹⁷ The starting point for doing so is the agency mandate under the particular statute involved. The D.C. Circuit has stated the following test for drafting a purpose and need statement:

¹³ 36 C.F.R. § 800.11.

¹⁴ *See id.*, § 800.11(g)(2).

¹⁵ Finding, at sections 6.1 and 6.2.

¹⁶ 40 C.F.R. § 1502.14(a).

¹⁷ *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664, 666 (7th Cir. 1997) (*citing Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195-6 (D.C. Cir. 1991)).

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[A]n agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as other congressional directives.... Once an agency has considered the relevant factors, it must define goals for its actions that fall somewhere within the range of reasonable choices.¹⁸

An agency should therefore approach a purpose and need statement and review of alternatives by "tak[ing] responsibility for defining the objectives of an action and then provid[ing] legitimate consideration to alternatives that fall between the obvious extremes."¹⁹ Using this principle as a guide, court decisions regarding purpose and need are very consistent.

In the past, Cape Wind Associates (CWA) urged the Corps, and now MMS, to adopt a narrow view of purpose and need, relying on *Citizens Against Burlington* for the proposition that agencies "should take into account the needs and goals of the parties involved in the application."²⁰ By arguing that *Citizens* stands for the proposition that an applicant's economic objectives must control, CWA ignores an expansive body of case law clearly stating that purpose and need is dictated by the scope of an agency's mandate, not by the applicant's desires.

It is especially true that an applicant's goals should not be given controlling effect where the agency mandate is broad, such as MMS's authority under section 388 of the Energy Policy Act of 2005 to regulate offshore renewable energy development. Many courts, including those in the First Circuit, have concluded that an agency's "evaluation of alternatives mandated by NEPA is to be an evaluation of alternative means to accomplish the general goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals."²¹ In developing an appropriate purpose and need statement, MMS must abide by the following principles: 1) MMS's direction under section 388 broadly applies to oil, natural gas, and other energy-producing activities on the Outer Continental Shelf (OCS); 2) MMS's authority is limited by a program that must be carried out in a manner consistent with factors identified in section 388; and 3) the ostensible goal of the proposed project is to address climate change and air pollution problems through clean energy, which is a far-reaching goal not limited by geography or project size.

MMS must therefore construct a purpose and need statement that examines a wide range of technologies and uses as limiting criteria those issues that would prevent MMS from acting consistently with a program ensuring the section 388 factors. Unfortunately, the Cape Wind EIS purpose and need statement fails to meet these requirements. The 2008 Draft EIS and 2009 Final EIS describe the purpose and need of the proposed project as follows:

¹⁸ *Citizens Against Burlington, Inc.*, 938 F.2d at 196.

¹⁹ *Colorado Envtl. Coalition v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999).

²⁰ *Citizens Against Burlington, Inc.*, 938 F.2d at 196.

²¹ *Van Abbema v. Fornell*, 807 F.2d 633 (7th Cir. 1986); *see also Simmons*, 120 F.3d 664 (relying on *Van Abbema*); *Sierra Club v. Marsh*, 714 F. Supp. 539, 577 (D. Me. 1989), *aff'd*, 976 F.2d 763 (1st Cir. 1992) (same).

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The underlying purpose and need to which MMS is responding is to provide an alternate energy facility that uses the unique wind resources in waters off of New England using a technology that is currently available, technically feasible, and economically viable, that can interconnect and deliver electricity to the New England Power Pool (NEPOOL), and make a substantial contribution to enhancing the region's electrical reliability and achieving the renewable energy requirements under the Massachusetts and regional renewable portfolio standards (RPS).

In comments submitted on April 21, 2008, in response to the Draft EIS, APNS noted that MMS had crafted an inappropriately narrow purpose and need statement. MMS's statement establishes the following limitations: 1) the facility must be a wind energy facility; 2) it must be located to use the "unique" wind resources offshore of New England; 3) the facility must be technically feasible; 4) it must be economically viable; 5) it must be capable of interconnection with NEPOOL; 6) it must be capable of making a "substantial" energy contribution; 7) it must enhance the region's electrical reliability; and 8) it must help Massachusetts or other states in the region meet RPS. MMS has crafted a purpose and need statement in such a manner that few, if any, alternatives can satisfy the stated goal, in violation of the narrowest interpretation of NEPA.²² By using the same purpose and need statement in the Final EIS, MMS inappropriately dismissed APNS's comments and did nothing to correct this flaw.

Additionally, APNS commented that MMS cannot use a description of the proposed project as its purpose and need statement. "One fundamental problem is MMS's decision to draft the purpose and need statement by using a *description* of the actual project, rather than defining the general purpose for the proposed action. This approach so radically restricts the range of reasonable alternatives that all that is left is essentially the proposed project itself or some remarkably close variation thereof."²³

Likewise, the geographic limitation imposed by the purpose and need statement is inappropriate.²⁴ MMS has improperly constrained the purpose and need by an arbitrary limitation to the "unique" wind resources offshore of New England. There is nothing "unique" about the wind resources off of New England. It is also arbitrary to limit the geographic scope to the waters off of New England. Land-based sites clearly must be considered, as was done in the Corps Draft EIS. Moreover, to the extent that this project has been justified because of its purported RPS benefits, such regulatory control efforts are often regional in scope, at a greater scale than New England, and electricity generated outside of New England is readily delivered to NEPOOL.

Furthermore, MMS's treatment of technical feasibility is out of date, inconsistent, and inadequately explained.²⁵ MMS inappropriately dismissed deepwater project alternatives, the use of long-distance cables, and other technically viable offshore technologies such as

²² See Draft EIS Comments at 83-84.

²³ *Id.* at 84.

²⁴ *Id.* at 86.

²⁵ *Id.* at 87-90.

hydrokinetic technologies. While these technologies are already in commercial use in parts of Europe, MMS dismissed alternatives relying on them because of their higher economic cost. In fact, such facilities are likely to have lower costs.

Finally, APNS submitted comments to MMS noting that MMS cannot exclude alternatives for failing to be economically viable when it has concluded that the proposed project itself is not economically viable,²⁶ the project is not necessary to meet the Massachusetts RPS because the RPS is already satisfied,²⁷ and MMS has deliberately limited reasonable alternatives by improperly restricting alternatives to large-scale projects.

APNS suggested revised language for the purpose and need statement:

The underlying purpose and need to which MMS is responding is to provide an alternative energy facility using a technology that is technically feasible and economically viable that can interconnect with NEPOOL and make a substantial contribution (20 MW or more) to the region's energy reliability and achieving the renewable energy requirements under the Massachusetts and Regional RPS.²⁸

In its response, MMS acknowledged the comments and issued the following grossly inadequate response:

MMS has developed a purpose and need statement consistent with the requirements of NEPA, and allows for an analysis of reasonable alternatives to the proposed action, including no action. In describing the purpose and need statement, MMS fully explains why each of the elements of the purpose and need statement were important.²⁹

In other words, MMS responded to the APNS comment (which was also made by many other parties) by simply saying, in effect: "the purpose and need statement is right because we say so." MMS's continued use in the Final EIS of the inappropriate purpose and need statement that gave rise to APNS's comments on the Draft EIS results in a continuing violation of the requirements of NEPA and certainly disqualifies its use for section 106 purposes.

The Incorrect Application of the NEPA Purpose and Need Statement to the Cape Wind Proposal.

Even accepting the flawed purpose and need statement, the proposed project does not meet the parameters that MMS itself has established. APNS commented that "[t]here can be no more compelling explanation of why the project application must be denied than the fact that it fails the very test that MMS has established for its approval."³⁰ The reasons for the project's failure under the stated purpose and need are as follows.

²⁶ *Id.* at 90-91.

²⁷ *Id.* at 91.

²⁸ *Id.* at 96.

²⁹ Final EIS, Appendix L at 16.

³⁰ See Draft EIS Comments at 7.

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First, New England and Massachusetts are not facing a shortage of energy resources.³¹ MMS has failed to take into account high energy prices and a new market structure, both of which have radically affected the energy market.

Second, APNS commented that although the purpose and need statement does not explicitly state the point, MMS explains that based on an assessment by ISO-NE, the region is overly dependent on natural gas and needs to diversify its energy base, an effort which the proposed project will purportedly help. This analysis is no longer current, as there are numerous projects either in operation or slated for operation that diversify supply.³²

Third, the Massachusetts RPS requirement will still be met by the time the proposed project would come online, and regional renewable RPS programs have been met as well. The proposed project is clearly not needed for RPS purposes, and cannot be considered as potentially making a “substantial contribution” to achieving the RPS.³³ For example, CWA made repeated claims its project was needed to satisfy Massachusetts RPS requirements by 2008, yet the Massachusetts Division of Energy Resources reports that RPS was satisfied in 2008.

Fourth, the purpose and need is limited to projects that are economically viable. Because the estimated cost of producing electricity from the proposed project is nearly double the market rate for electricity in New England, the proposed project is not economically viable.³⁴

Finally, the proposed project itself is not technically feasible, because the wind turbine generator (WTG) contemplated in MMS’s NEPA analysis is no longer on the market. Much has been written about the fact that the General Electric 3.6 MW WTG is not available, including a New York Times interview of the General Electric Vice President. APNS has asked MMS to require CWA to specify a replacement WTG, but CWA has not done so. The burden is on CWA to prove it can procure a WTG at a reasonable cost as part of demonstrating technical feasibility: if an appropriate WTG cannot be secured, the project is not feasible. The requirement is to demonstrate feasibility prior to the Draft EIS and section 106 process, not after. Selection of a different size turbine, as appears necessary, would dramatically affect the size, scale and effects of the project.

As with the APNS comments on the purpose and need statement itself, MMS chose to deny the comments or state that they are somehow beyond the scope of the environmental review.³⁵ The end result, for purposes of section 106, is that the applicant’s proposal itself is not a viable option under the EIS criteria. MMS therefore has no valid basis for excluding from consideration other alternatives that would address section 106 problems on the grounds that they do not meet the purpose and need statement: No alternatives pass that test, so MMS is obligated to find a different site that minimizes the negative effects on historic resources, as the MHC has so appropriately maintained, or to adopt the no action alternative.

³¹ *Id.*

³² *Id.* at 8.

³³ *Id.*

³⁴ *Id.*

³⁵ See Final EIS Comments at 54-55.

The Failure to Consider Reasonable Alternatives Under NEPA. As noted above, the review of alternatives under the NHPA is distinct from NEPA. However, if MMS adheres to the EIS alternatives analysis for section 106 purposes, it will adopt an improperly limited and out-of-date analysis.

Once an action agency defines an appropriate purpose and need statement, the next step is to define the range of reasonable alternatives. NEPA requires federal agencies to take a “hard look” at the impacts of their actions. “The sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action.”³⁶ Special care and detailed analysis are particularly important when new technology is involved. “NEPA thus stands as landmark legislation, requiring federal agencies to consider the environmental effects of major federal actions, empowering the public to scrutinize this consideration, and revealing a special concern about the environmental effects of a new technology.”³⁷ Extra care is needed to “ensure that the bold words and vigorous spirit of NEPA are not similarly lost or misdirected in the brisk frontiers of science.”³⁸

At the “heart” of NEPA is the analysis of alternatives.³⁹ NEPA regulations require federal agencies to “[r]igorously explore and objectively evaluate all reasonable alternatives.”⁴⁰ Reasonable alternatives are “those that are *practical or feasible* from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.”⁴¹ In spite of comments submitted by APNS, MMS has violated these principles by selecting an unduly narrow range of alternatives for consideration in the Draft EIS and Final EIS.

Because of the improperly defined purpose and need statement, MMS has failed to evaluate reasonable alternatives as required by NEPA. APNS has submitted comments on multiple occasions, requesting that MMS broaden the scope of alternatives considered as a part of its NEPA analysis. In comments on the Draft EIS, APNS cited a report by consultant Helimax Energy Inc., which identified numerous locations for viable wind energy projects in New England and the Northeastern Seaboard with comparable or even better energy yields and fewer environmental and historic resource impacts and user group conflicts.⁴² In comments on the Draft EIS, APNS also asked that MMS recognize plans by Patriot Renewables, LLC to develop an offshore wind facility, called South Coast Wind, in Buzzards Bay, as well as the Blue H proposal for a floating deepwater commercial wind energy project located off of Martha’s Vineyard. The same APNS comments also noted that the State of Rhode Island was, at the time, seeking bids from private developers to construct, finance, and operate a proposed offshore wind farm in state waters, as well as the Winery Power proposal on Long Island.⁴³ Furthermore,

³⁶ *Calvert Cliffs’ Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1122 (D.C. Cir. 1971).

³⁷ *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 147 (D.C. Cir. 1985).

³⁸ *Id.* at 145.

³⁹ *Andrus v. Sierra Club*, 442 U.S. 347, 348 (1979).

⁴⁰ 40 C.F.R. § 1502.14(a).

⁴¹ Forty Most Frequently Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026 (Mar. 23, 1981) (emphasis added).

⁴² See Draft EIS Comments at 98-99.

⁴³ *Id.* at 99-103.

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APNS explained that the Federal Energy Regulatory Commission (FERC) has issued preliminary permits to over a dozen hydrokinetic projects, or tidal and wave energy projects, in the New England area, and that the Draft EIS failed to consider these offshore power generation technologies.⁴⁴ In addition, APNS commented that there are hundreds of onshore renewable and clean energy projects that are reasonable alternatives to the proposed project.⁴⁵

The Final EIS dismissed these comments using improper and faulty logic.⁴⁶

The issue of the improper limiting of the scope of considered alternatives continues to be a pressing one in light of continued developments. On June 6, 2009, BBC News reported that the first floating wind turbine was being towed out to sea off the coast of Norway.⁴⁷ As the technology becomes more widespread, it will lead to “offshore wind farms eventually being located many miles offshore” to the benefit of “military radar operations, the shipping industry, fisheries, bird life and tourism.”⁴⁸ This development highlights the technological feasibility *now* of deepwater wind alternatives that must be considered in MMS’s NEPA analysis rather than arbitrarily dismissed.

Other efforts within the United States to develop offshore wind are also moving forward. On June 11, 2009, lawmakers in Rhode Island voted to require the State’s dominant electricity distributor to purchase power from renewable energy producers.⁴⁹ This legislation, which is supported by National Grid, the electricity supplier in question, will remove a major financial obstacle to Deepwater Wind, LLC’s plan to develop a windfarm off the coast of Rhode Island. Potential changes to the bill could also require National Grid to buy electricity from a proposed, much larger plant that Deepwater Wind hopes to construct about two years later in deeper water. This project is better located and will further obviate the need for the proposed project to meet the RPS. Additionally, on June 11, 2009, the Massachusetts National Guard submitted plans to locate 17 wind turbines on the 22,000-acre Massachusetts Military Reservation.⁵⁰

At the June 16th consultation meeting, MMS provided a summary document of alternative sites that have been evaluated. One of the sites is Block Island, Rhode Island, which given the discussion above, must be reevaluated by MMS for several reasons:

1. The original Block Island evaluation considered the obsolete monopile WTG and must now be evaluated with the Deepwater Wind plan of the jacketed deepwater system
2. The original evaluation showed a comparable cost with Horseshoe Shoal, and Deepwater Wind now has a Power Purchase Agreement (PPA) for the Block Island project. CWA lacks such an agreement.

⁴⁴ *Id.* at 103-106.

⁴⁵ *Id.* at 106-110.

⁴⁶ See Final EIS Comments at 55-57.

⁴⁷ Jorn Madslie, *Floating wind turbine launched*, BBC News (June 6, 2009).

⁴⁸ *Id.*

⁴⁹ Associated Press, *RI Lawmakers Debate New Plan for Funding Wind Farm* (June 11, 2009).

⁵⁰ George Brennan, *Guard hopes to build 17 MMR wind turbines*, Cape Cod Times (June 11, 2009).

3. The Block Island site can be expanded to include multiples of WTGs while the Cape Wind Horseshoe Shoal site is limited, especially given CWA's decision to specify the high-cost monopile WTG (which GE is not selling for technology and economic reasons): This expansion capability is a significant advantage for satisfying Massachusetts and regional RPS requirements for years to come. It also means that there is the capacity to locate the Cape Wind project at this location, avoiding the many conflicts presented by the Horseshoe Shoal site.
4. The Block Island site can be integrated into the NEPOOL grid to support multiple PPAs.

The Block Island site, with a project applicant involved, presents Secretary Salazar with options that did not exist at the time of EIS issuance. As the Governor of Rhode Island, Donald Carcieri, testified at the Atlantic City public hearing Secretary Salazar held concerning energy policy for the OCS, the Deepwater Wind project is moving forward. The project is supported by a broad base of stakeholders and avoids the wasteful conflict over Horseshoe Shoal. The project developer also received a grant from the U.S. Department of Energy for bird and bat monitoring, which further validates that this is an acceptable alternative with an applicant for the Secretary's consideration.

The South of Tuckernuck site also has gained added support, and it would minimize many of the adverse impacts of the applicant's preferred site, including under section 106. Even under MMS's analysis, this site would be only marginally more expensive than the CWA proposal. Because none of these offshore sites can be developed without extensive federal and state subsidies, there is no basis upon which MMS can preclude one over the other based on economic feasibility. The public will need to pay the costs necessary to make any offshore wind project viable, and MMS therefore should make its choice, whether under NEPA or section 106, based on the alternative that achieves the greatest level of public consensus.

MMS Is Required to Fully Apply Its Offshore Renewable Energy Regulations. Although MMS has yet to provide a full and adequate explanation of how it is applying the recently promulgated regulations for renewable energy and alternate uses of existing facilities on the OCS (30 C.F.R. Parts 250, 285, and 290) to the Cape Wind application, agency officials have suggested that those requirements will be cherry-picked for the review of the project. In particular, without explanation, MMS officials have stated that the regulations would apply to the lease but not the decision itself. Such a position is clearly illegal, and it has strong negative implications for historic resources; the MHC should argue for full application of the federal rules.

As a legal matter, the regulations nowhere exempt Cape Wind. To the contrary, the regulations apply, on their face, to all projects. Nor is there any statutory exception that removes Cape Wind from the regulations. At most, 43 U.S.C. § 1337(p)(3) confers upon the Secretary the authority to make a leasing decision on the Cape Wind proposal without using competitive procedures (this provision leaves the Secretary with discretion to use a competitive process, however). Consequently, the most MMS could have done (but did not do) was *include in the regulations* an exclusion of Cape Wind from competitive leasing. All other provisions of the regulations continue to apply to Cape Wind, including those requirements that pertain to the protection of historic and cultural resources. For example, the recently released final regulations for the development of renewable energy on the OCS require that applicants demonstrate during the Site

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Assessment Plan and Construction and Operation Plan phases that the proposed activity will not cause undue harm or damage to sites, structures, or objects of historical or archeological significance. 43 C.F.R. §§ 285.606(a)(4), 285.621(d). Cape Wind has failed to do so, and MMS cannot ignore its obligation to enforce this requirement. APNS encourages the MHC to call upon MMS to comply with its own regulations for protecting the historic values of Nantucket Sound and to apply section 106, as appropriate, at each discrete decision-making stage required under those rules.

Designation of Nantucket Sound. Nantucket Sound qualifies for designation as a national marine sanctuary. While there are many values and features of the Sound that qualify it for Sanctuary status, its pervasive historic and cultural resources alone justify such action.

Currently, all state waters, defined as those within three miles of the coast, are Sanctuary waters under Massachusetts state law by designation in 1971. The Sanctuary purposes include protecting the scenery and view shed, which is, of course, one of the defining elements of the historic properties under the NHPA. Within the boundaries of the Massachusetts Cape and Islands Ocean Sanctuary (CIOS), defined by all waters out to three miles from Cape Cod, Martha's Vineyard, and Nantucket Island, a "hole in the doughnut" is created for federal lands and waters that do not have state Sanctuary protections. The MHC therefore should continue to seek federal action consistent with this protected value of the CIOS by insisting that MMS take the necessary actions under section 106 to find an alternative site for the Cape Wind project.⁵¹

In addition, for federal purposes, the time has come to take action to designate the Sound as a national marine sanctuary, and APNS encourages the MHC to advance that position to protect the historic values of the region. Under the National Marine Sanctuaries Act, the protection of historic and cultural values is a valid purpose for Sanctuary designation.⁵² The Sound qualifies on this basis alone, and when its other sanctuary-quality values are considered, the case for designation of the Sound is compelling.

In 1974, the state Congressional delegation introduced H.R. 1508 to create a Nantucket Sound Islands Trust, which would have required federal agencies to support Commonwealth and local efforts to protect the lands and waters of the region. Many parties recognized the risk that the unprotected federal zone presents to the values of the Sound. In 1980, the Commonwealth nominated the Sound for designation under the National Marine Sanctuaries Act. In 1983, the

⁵¹ Under Executive Order 13,158, MMS is required to avoid harm to the protected values of the Sound established under state law, including its scenic values. 65 Fed. Reg. 34,909 (May 26, 2000). The MHC should support formal designation of the Sound as a marine protected area under Executive Order 13,158 to protect its historic values.

⁵² Among the stated purposes of the National Marine Sanctuaries Act is "to enhance public awareness, understanding, appreciation, and wise and sustainable use of the marine environment, and the natural, historical, cultural, and archeological resources of the National Marine Sanctuary System." 16 U.S.C. § 1431(b)(4). Among the standards used to determine whether an area is suitable for Sanctuary designation is whether it possesses special significance due to "its conservation, recreational, ecological, historical, scientific, cultural, archeological, educational, or esthetic qualities." *Id.* § 1433(a)(2)(A).

Federal Resource Evaluation Committee, appointed by the National Oceanic and Atmospheric Administration's (NOAA) Sanctuary Program, determined that Nantucket Sound was worthy of designation and placed it on the Site Evaluation List (SEL) in the Federal Register as one of 28 areas from which NOAA could select sites to evaluate as candidates for Sanctuary designation.

While political opposition caused the SEL to be put on hold and declared inactive as a general matter, some federal designations have nonetheless been made. For example, the Monterey Bay National Marine Sanctuary was designated in September 1992 as a result of administrative agency action required by 1988 amendments to the National Marine Sanctuary Act. Stellwagen Bank National Marine Sanctuary was designated in November 1992 by Congressional action as part of the 1992 amendments to the Act.

A similar approach is more than justified for Nantucket Sound, and is essential to achieving balanced and fair decision-making on the Cape Wind project. The continued interest in, and qualification of, the Sound as a national marine sanctuary was confirmed as recently as 2003 in a study by the Center for Coastal Studies, prepared in response to a 2002 request from Representative Delahunt. The report, *Review of State and Federal Marine Protection of the Ecological Resources of Nantucket Sound*, found that the Sound "remains a pristine and tremendously productive ecosystem worthy of environmental conservation and protection." Noting NOAA's fundamental management philosophy for the sanctuary program of an ecosystem approach to marine environmental protection, the report noted that such an approach could greatly benefit the Sound.

The Obama Administration, through NOAA, also has placed renewed emphasis on the designation of marine protected areas and coordination of a national system of such areas. This interest, combined with Interior's new focus on comprehensive, ocean planning for offshore energy development, creates a favorable framework within which to pursue the long overdue determination of whether Nantucket Sound should be designated in protected status. Such a longstanding initiative should not be precluded by an irresponsible project that was improvidently rushed to near approval by the Bush Administration. The section 106 process should make note of the sanctuary-qualified status of the Sound and preclude any actions by MMS that interfere with the full consideration of such a designation in the future. APNS also requests that the MHC support a Sanctuary designation for purposes of protecting, among other values, the Sound's unique historic and cultural values.

Finally, in addition to supporting sanctuary status and formal designation of the Sound under Executive Order 13,158 as a culturally significant marine protected area, the MHC should evaluate proposing the Sound itself for inclusion on the National Register. The Sound is clearly eligible based on all four aspects of its cultural significance: the array of eligible and listed historic properties on its shore and the fact that the Sound is the character-defining element for all of them; the abundance of historic shipwrecks; the ancient Native village and burial site on Horseshoe Shoal; and the cultural and religious practices of the Tribes for whom a clear view across the Sound is essential. APNS would be pleased to work with the MHC to support inclusion of the Sound on the National Register on this basis.

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Compliance with Obama Administration Policy Directives on Public Participation. MMS response to comments submitted as part of the NEPA process has been cursory, if present at all. Public stakeholders have had to repeatedly request invitations to workshops and meetings on issues such as migratory bird protection, navigational safety, and historic preservation. The response to comments in the Final EIS is seriously deficient. This type of closed decision-making has resulted in a prolonged and divisive process.⁵³ While APNS appreciates the recent meetings held under section 106, the June 12 MMS letter now seeks to cut short the consultation process on historic resource protection, compounding the deficiencies of the NEPA review. The MHC should therefore support continued use of the section 106 process to compensate for the deficiencies in the MMS NEPA review.

On January 21, 2009, President Obama issued a Presidential Memorandum calling for a higher level of openness and public participation in federal decisions. The President directed that the Administration will “work together to ensure the public trust and establish a system of transparency, public participation, and collaboration.”⁵⁴ He stated further:

Public engagement enhances the Government’s effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer Americans increased opportunities to participate in policy-making and to provide their Government with the benefits of their collective expertise and information. Executive departments and agencies should also solicit public input on how we can increase and improve opportunities for public participation in Government.⁵⁵

⁵³ Additionally, MMS has violated its mandate under Department of the Interior NEPA regulations to engage in consensus-based management, despite frequent requests by many stakeholders that such a process be initiated. 43 C.F.R. § 46.110. The practice of consensus-based management incorporates direct community involvement into the decision-making process, from initial scoping to the implementation of the agency’s final decision. The regulations state: “Incorporating consensus-based management in the NEPA process, bureaus should consider any consensus-based alternative(s) put forth by those participating persons, organizations or communities who may be interested in or affected by the proposed action. While there is no guarantee that any particular consensus-based alternative will be considered to be a reasonable alternative or be identified as the bureau’s preferred alternative, bureaus must be able to show that the reasonable consensus-based alternative, if any, is reflected in the evaluation of the proposed action and discussed in the final decision.” *Id.* § 46.110(b). While APNS and other community stakeholders have identified numerous alternatives that qualify as consensus-based alternatives, MMS has failed to comply with its regulatory duty to consider and evaluate those alternatives as reasonable under NEPA.

⁵⁴ 74 Fed. Reg. 4,685 (Jan. 26, 2009).

⁵⁵ *Id.*

Certainly, the MMS NEPA process has failed to meet this test. Termination of the section 106 consultation over the objections of most of the stakeholders will conflict with the President's public participation and collaborative decision-making mandate. On this basis alone, MMS must continue to seek consensus through section 106, and the MHC is on solid ground for requesting continuation that the collaborative process under section 106.

Compliance with Obama Administration Comprehensive Ocean Planning and Management Directives. APNS has long pointed out—in Congressional testimony, letters to the Secretary of the Interior, and comments on the Cape Wind proposed project—that an ecosystem-based, or ocean zoning, approach must be applied to the management of ocean and coastal resources, including Nantucket Sound. Ocean conservation advocates, along with the U.S. Commission on Ocean Policy and the Pew Ocean Commission, have likewise recommended such an approach. Under such a framework, further action on the Cape Wind application should be withheld until the ocean zoning program has been developed and applied.

Last Friday, President Obama issued a proclamation directing the development of a unified federal program, based on a “comprehensive, integrated, ecosystem-based approach,” that establishes a framework for effective stewardship of marine resources.⁵⁶ This memorandum requires federal agencies to make decisions “within a unifying framework under a clear national policy, including a comprehensive ecosystem-based framework for the long-term conservation and use of our resources.” The framework is specifically directed to cover “the sustainability of ocean and coastal economies” to “preserve our maritime heritage.” These values are to be protected from, among other factors, “renewable energy, shipping, and aquaculture....” As a result, the President's June 12 mandate is directly applicable to the effect of the Cape Wind project on historic and cultural resources. The MHC's position on the need to explore alternatives to the proposed Cape Wind site is consistent with the President's new mandate to MMS and all other federal agencies.

In furtherance of these objectives, the President established a task force under the leadership of Council on Environmental Quality to develop, within 90 days, a national policy for protecting coastal and ocean resources and a framework for implementing that policy. Within 180 days, the task force should develop a framework for “marine spatial planning” that carries out a “comprehensive, integrated ecosystem-based approach that addresses the conservation, economic activity, user conflict, and sustainable use” of coastal and ocean areas. Clearly, the Cape Wind proposed project must be subject to review under the ocean zoning principles within this framework, once established. As a result, the section 106 process must be left open until these steps have been taken.

The Presidential proclamation is consistent with the actions and policies already taken by Secretary Salazar, including public meetings on offshore renewable energy. Thus, all of the

⁵⁶ Memorandum for the Heads of Executive Departments and Agencies, *National Policy for the Oceans, Our Coasts, and the Great Lakes* (June 12, 2009), available at: http://www.whitehouse.gov/the_press_office/Presidential-Proclamation-National-Oceans-Month-and-Memorandum-regarding-national-policy-for-the-oceans/ (last checked June 16, 2009).

central principles that have been advanced since the Presidential transition for federal energy development and ocean planning are readily applicable to Cape Wind. If the “ocean zoning” principles are properly applied to identify areas suitable for offshore energy development, then areas like Nantucket Sound, where multiple public use values are at stake and “marine heritage” resources are at risk, will be declared off-limits to energy development. Clearly, no further action should be taken on the Cape Wind application generally, or the section 106 process specifically, until the new spatial planning framework has been developed and applied. During this interim period, MMS should abide by the MHC’s recommendations to identify additional historic properties and evaluate additional alternatives. APNS commends the MHC for its foresight in continuing to press for a full alternatives analysis under section 106.

In conclusion, the MMS request to the MHC to concur in the Finding and enter into an MOA is premature and should be rejected. In the history of NHPA implementation anywhere in the country, it is hard to conceive of a proposed development with broader and more potentially harmful effects on historic resources than the Cape Wind project. The NHPA analysis of those impacts, and ways to avoid them, has not come even close to satisfying the letter and spirit of the law. Combined with environmental and economic considerations, and propelled forward by the long overdue and recently implemented federal initiatives to bring comprehensive planning to the use of ocean resources, the evaluation of the Cape Wind project under historic and cultural resource procedures and standards may yet bring about a decision that protects the extraordinary public interest values of Nantucket Sound while finding the proper location for renewable energy projects. APNS and the Wampanoag Tribes urge the MHC to continue to work with MMS and the other NHPA stakeholders to move the section 106 process in this direction and to forestall any further review of this controversial and conflict-inducing proposal until President Obama’s June 12 directive has been fully satisfied.

Thank you for considering these comments. Please let APNS know if it can be of further assistance.

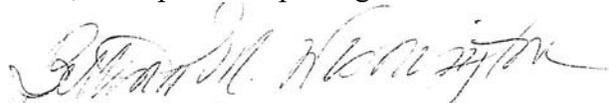
Sincerely,



Glenn G. Wattle
President & CEO



George “Chuckie” Green
THPO, Mashpee Wampanoag Tribe



Bettina Washington
THPO, Wampanoag Tribe of Gay Head Aquinnah

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cc: William Francis Galvin, Secretary of the Commonwealth of Massachusetts
Senator Edward M. Kennedy
Senator John F. Kerry
Representative William D. Delahunt
Wyndy J. Rausenberger, Department of the Interior, Office of the Solicitor
Dr. Rodney E. Cluck, Minerals Management Service
Dr. Melanie J. Stright, Minerals Management Service
John Eddins, Advisory Council on Historic Preservation (ACHP)
Anne Lattinville, MA Historical Commission
Cheryl Andrews-Maltais, Chairwoman, Aquinnah Wampanoag Tribe of Gay Head
Bill Bolger, National Park Service
Karen Adams, US Army Corps
Roberta Lane, National Trust for Historic Preservation
Elizabeth Merritt, National Trust for Historic Preservation
Sarah Korjeff, Cape Cod Commission
Jim Powell, Martha's Vineyard Commission
Andrew Vorce, Nantucket Planning and Economic Development Council
Mark Voigt, Nantucket Historic Commission
Charlie McLaughlin, Town of Barnstable
Patty Daley, Town of Barnstable
Suzanne McAuliffe, Town of Yarmouth
John Cahalane, Town of Mashpee
Sandra Fife, Town of Dennis
Peter Bettencourt, Town of Edgartown
Roger Wey, Town of Oak Bluffs
John R. Bugbee, Town of Tisbury
Libby Gibson, Town of Nantucket
James Merriam, Town of Harwich
Ronald Bergstrom, Town of Chatham
Carey Murphy, Town of Falmouth
John Brown, THPO, Narragansett Indian Tribe
Bruce Bozsum, Chairman, Mohegan Indian Tribe
Michael J. Thomas, Chairman, Mashantucket Pequot Tribe

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May 5, 2009

Dr. Melanie Stright, Federal Preservation Officer
Dr. Andrew D. Krueger, Alternative Energy Programs
Minerals Management Service
381 Elden Street
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John M. Fowler, Executive Director
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Ms. Brona Simon
State Historic Preservation Officer
Massachusetts Historical Commission
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220 Morrissey Blvd.
Boston, MA 02125

RE: Section 106 Consultation for Cape Wind Project

I am writing this letter on behalf of the Alliance to Protect Nantucket Sound (Alliance) to follow up on the Cape Wind Section 106 Historic Preservation consultation meeting held on April 28, 2009, in Hyannis, Massachusetts. While we appreciated the opportunity to discuss mitigation options for the adverse impacts to historic and Tribal properties from the proposed Cape Wind project, there are still many unresolved issues that need to be addressed in the Section 106 consultation. The applicant's apparent desire to terminate the Section 106 process, as demonstrated throughout the meeting, is of great concern. Termination of the consultation process at this time would be premature given the many unresolved issues and the requests from participants at the meeting for additional information, particularly in the area of additional alternatives analysis. Furthermore, the Section 106 Tribal process is just beginning, as stated by the Aquinnah/Gay Head and Mashpee Wampanoag Tribes present at the meeting. Thus, there is no need to rush the Historic Preservation process.

The following issues remain unresolved and should be discussed at the next Section 106 meeting set for June 16, 2009:

- Clarification about the geotechnical work to be conducted on Horseshoe Shoal by the Cape Wind project developer is needed. Specifically, insufficient vibrocore samples have been taken to adequately address the location of historic and cultural archaeological resources on Horseshoe Shoal. For example, the Final Environmental Impact Statement Figure 4.2.5-IA requires explanation.

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- A more comprehensive alternatives analysis must be undertaken and discussed. The following details should be considered:
 - The Minerals Management Services (MMS) determination that “mitigation on ceremonial practices and traditional cultural properties is ineffective, and the only avoidance of such impacts is relocation of the project.”
 - The strong opposition to locating the project on Horseshoe Shoal expressed by the Aquinnah/Gay Head and Mashpee Wampanoag Tribes and the 25 federally-recognized Tribes comprising the United South and Eastern Tribes (USET) because of unacceptable impacts to sacred Tribal land and cultural and religious practices.
 - Massachusetts State Historic Preservation Officer (SHPO) Brona Simon’s request that MMS conduct a study of alternative sites outside Nantucket Sound to consider relocating the project as the best mitigation strategy to avoid and/or minimize adverse impacts.
 - The current list of alternatives is not complete and inappropriately limited. Numerous alternative sites have been proposed recently for offshore wind projects in the northeast including Blue H (south of Martha’s Vineyard), Bluewater Wind (southwest of Martha’s Vineyard) and Deepwater Wind (south of Rhode Island).
 - Comments by National Trust for Historic Preservation (NTHP) that Section 110(f) applies to the affected National Historic Landmark properties and requires a higher level of scrutiny of alternatives, and MMS must afford the Advisory Council on Historic Preservation a reasonable opportunity to comment.
 - Secretary Salazar’s energy and marine spatial planning process is still underway and may yield alternative sites for consideration as well as areas where development would be prohibited.

The Alliance believes that any request the end the Section 106 process is premature with so many critical, outstanding issues to resolve. In addition, Section 106 cannot be terminated because mandatory consultation with the Tribes is still underway. We look forward to discussing these issues on June 16th.

Thank you for your attention to the above.

Sincerely,



Glenn G. Wattley
President and CEO

CC: Section 106 Consulting Parties
Secretary Kenneth L. Salazar
Senator Edward M. Kennedy
Senator John F. Kerry
Congressmen William D. Delahunt

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April 23, 2009

Dr. Rodney E. Cluck
Cape Wind Project Manager
Minerals Management Service
Environment Division
381 Elden Street
Herndon, Virginia 20170

RE: Cape Wind Section 106 Consultation Meeting; Deepwater Sites and Wind Turbine Generators

Dear Dr. Cluck:

I received your letter of April 17, 2009, and must immediately respond. With all due respect, your statement about the feasibility of deepwater sites is both inaccurate and misleading. On the matter of the GE 3.6 MW WTG and the need to specify another unit, we are in agreement on the need to confirm physical dimensions required for the Section 106 consultation process. However, I do not see how that can happen without Cape Wind confirming that it has executed an agreement to procure 130 wind turbine generators (WTGs). I will address the matter of deepwater WTGs, Cape Wind's need to specify a WTG for its project, and the need to evaluate an alternative deepwater site.

Deepwater Wind Energy: Secretary Salazar recently held four (4) hearings on energy policy for the Outer Continental Shelf (OCS). As I mentioned in my April 8, 2009, Memorandum to Minerals Management Service (MMS), Rhode Island Governor Donald L. Carcieri testified at the April 6, 2009, Atlantic City event about a deepwater project being developed off the Rhode Island coast. He discussed selection of a vendor to supply deepwater WTGs.

Furthermore, the letter from Blue H to Secretary Salazar confirms that a deepwater project is underway off the coast of Italy. The Tricase project is beyond "shovel ready," fully permitted and supported by a power purchase agreement (PPA). From a commercialization standpoint, this Blue H deepwater project is well ahead of the Cape Wind proposal. Blue H has announced its intention to develop a deepwater water project 23 miles south of Martha's Vineyard and has been ready for over a year to evaluate the site pending MMS approval.

The Bluewater Wind project off the coast of Delaware is another example of a deepwater project. Given the testimony of Governor Carcieri before Secretary Salazar and the examples of deepwater projects mentioned above, it is illogical to conclude that technology for deepwater sites is not available.

Cape Wind's Selection of WTGs: Yesterday, the new regulations for Alternative Energy Projects for the OCS were released. These regulations are consistent with the National

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Environmental Policy Act (NEPA) requirement that a project must have all the hardware specified. This is an important requirement because the physical aspects must be known in order to prepare a proper environmental impact assessment, a point on which we agree.

The point you made that there are many vendors of WTGs is not sufficient to satisfy the regulations (old and new). The critical information for the Section 106 process is the height of the WTG blade, which can vary by vendor. Furthermore, if Cape Wind were to select a WTG that is not a 3.6 MW WTG (larger or smaller), which is a possibility according to Cape Wind's Mark Rodgers of who was quoted in the March 27, 2009, *New York Times* article, then that would be a material change to the project requiring an entirely new environmental impact statement (EIS).

Our research identifies Siemens as the only vendor offering a 3.6 MW WTG, which is not currently being sold in the United States. If Cape Wind were to select the Siemens WTG, they would need to produce a contract showing commitment that Siemens will sell 130 3.6 MW WTGs. Moreover, Cape Wind would need to identify the blade tip height, which may not be 440 feet. Calculations of the Area Potential Effect (APE) are based on this dimension.

Deepwater Site Alternative: In the face of mounting evidence that deepwater sites are currently being evaluated and developed, I respectfully repeat my point that the Cape Wind EIS process is incomplete and requires MMS to evaluate a deepwater site. At the April 16, 2009, OCS energy policy hearing held in San Francisco, Senator Barbara Boxer, Chair of the Senate Environment and Public Works Committee, testified that California has beautiful beaches and vistas that must be protected from adverse impacts of energy projects. During the question and answer session, Secretary Salazar asked for feedback on offshore wind energy projects. Representative K. Jacqueline Speier of California responded that she would support offshore wind energy projects only if the projects are properly sited. The statements of Senator Boxer and Representative Speier are consistent with President Obama's policy that special regions can and must be conserved. As noted in the OCS presentation by Robert Labelle of MMS, the OCS is a vast resource. Therefore, we need not sacrifice a special place like Nantucket Sound.

MMS has identified over two dozen historical sites that would be adversely impacted by the Cape Wind project. The Aquinnah and Mashpee Wampanoag Tribes oppose the Cape Wind project because it adversely impacts cultural resources and religious practice. The Wampanoag opposition is supported by the United South and Eastern Tribes (USET), which is composed of 25 federally-recognized Native American Tribes. USET passed a resolution demanding the EIS evaluation be stopped. The Massachusetts State Historic Preservation Officer has written to MMS requesting an evaluation of an alternative deepwater site as the most obvious mitigation of adverse impacts. Many organizations oppose Cape Wind being sited on Horseshoe Shoal and support an evaluation of an alternative site.

The different size WTG must be specified by Cape Wind and the tip height identified and reviewed in the EIS for public comment by MMS. Until this is done, none of the analysis conducted by MMS, whether under NEPA, the Endangered Species Act, the National Historic Preservation Act, or other laws dependent on project size and design, will be legally sufficient and public review will have been thwarted.

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The fact is that Cape Wind management refuses to disclose its plans. MMS has allowed the applicant to "hide the ball" on this critical issue and now, well after the release of the FEIS, the mistake is becoming more and more difficult to rectify. MMS must immediately exercise its legal responsibilities to require Cape Wind to address the critical data gap on this question and, if the newly specified WTG will result in changes in project design or feasibility, withdraw the FEIS for revision and reissuance for additional public comment. The Section 106 process should be suspended until the project design uncertainty is resolved.

President Obama has promised his administration will bring change that includes decisions based on "science" not "politics." An evaluation of deepwater sites for the Cape Wind EIS is an excellent example of where science must prevail. I again respectfully request that MMS evaluate a deepwater site as an alternative to fully mitigate the adverse impacts on historic, cultural, and Tribal resources. Also, Cape Wind must specify a replacement WTG to identify the physical dimension as the regulations require.

Thank you for your attention to the above.

Sincerely,



Glenn G. Wattle
President and CEO

Cc: Consulting Parties to Section 106 Process
Senator Barbara L. Boxer
Senator Edward M. Kennedy
Senator John F. Kerry
Congresswoman K. Jacqueline Speier
Congressman William D. Delahunt

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MEMORANDUM

Date: April 8, 2009

Subject: Deepwater Site Alternative to Cape Wind

To: Section 106 Consulting Parties

From: Glenn G. Wattley, Alliance to Protect Nantucket Sound, President & CEO

I would like to provide you with some critical information in preparation for the Section 106 historic preservation consultation meeting that is scheduled to take place on April 28th, 2009. This information relates to deepwater wind technology and also to the fact that the GE 3.6 megawatt (MW) monopile wind turbine generators (WTGs) specified for the Cape Wind project are not available.

As has been well documented by the Minerals Management Service (MMS), Cape Wind would pose adverse impacts to numerous historic and tribal resources. The area of potential effect (APE) from the proposed project would be enormous given the fact that the specified WTGs have a tip height of 440 feet above sea level, and thus would be seen for roughly 25 miles. With such a large APE located in the center of three land masses, the only effective mitigation would be to relocate the project to an alternative site outside of Nantucket Sound. The Massachusetts State Historic Preservation Officer (SHPO) raised this option in her February 6, 2009 letter to MMS. The Alliance to Protect Nantucket Sound (Alliance) supports the SHPO's logical solution and offers the following information to demonstrate that MMS could clearly move the proposed project location and eliminate the conflict that has stalled and defined the Cape Wind proposal since 2001.

First, during the April 6, 2009, public hearing held by Interior Secretary Kenneth L. Salazar in Atlantic City on renewable energy policy for the Outer Continental Shelf (OCS), Rhode Island Governor Donald Carcieri, outlined his program to deploy a deepwater wind project off the coast of Rhode Island. His testimony confirmed the state's commitment to a deepwater site that is backed by strong stakeholder support.

Second, enclosed is a letter dated March 23, 2009 from Blue H USA to Secretary Salazar that provides an update on the state of its deepwater, floating-platform WTG that was tested last year off the coast of Italy. The letter also informs the Secretary that the first Blue H commercial unit, a 2.0 MW turbine, will be delivered this year to the Tricase site in Italy.

4 Barnstable Road, Hyannis, Massachusetts 02601
□ 508-775-9767 □ Fax: 508-775-9725

www.saveoursound.org

a 501 (c)(3) tax-exempt organization

MEMORANDUM

Page 2 of 2

Third, enclosed is a power point presentation that Blue H recently delivered at a federal offshore renewable energy meeting in Washington, D.C. The presentation explains that after the 2.0 MW WTG is installed this year, additional 3.5 MW turbines will be delivered starting next year, culminating in a 90 MW deepwater wind energy installation.

As Blue H has already submitted its application to MMS to conduct a test for a deepwater project 23 miles south of Martha's Vineyard, it should be evaluated and considered as a viable alternative to Cape Wind. The success of the Italian Tricase pilot, Blue H's announcement that it is building a commercial unit, and confirmation from Governor Carcieri that he is moving forward with Rhode Island's deepwater program represent clear examples of the direction the offshore wind industry should be moving to reach the goals that have been set for renewable energy development.

Finally, enclosed is a copy of a recent *New York Times* article, which confirms that GE will not sell 3.6 MW WTGs to Cape Wind. Given Cape Wind's need to find an alternative turbine with potentially different dimensions and an altered project footprint, the hard work that has been done to date regarding the APE of Cape Wind's currently proposed turbines will need to be updated. For example, if the developer selects the Vestas 3.0 MW WTG, the number of turbines and thus the project footprint would have to be expanded to generate the same amount of power.

I urge the Section 106 consulting parties to request a substantiated supplier decision and updated turbine and project specifications from Cape Wind and MMS. The developer should provide a contract with the chosen vendor demonstrating a firm agreement. As indicated in the *New York Times* article, the Cape Wind-GE "agreement" was a letter of intent and one that was not binding. Given the enormous investment of time and money by all parties in this Section 106 consultation process, the parties have a right to know the specific turbines being evaluated so as not to continue to waste resources and taxpayer money on a commercially unavailable technology.

In addition, given the fact that deepwater technology is available, the consulting parties should ask MMS to conduct an alternative site analysis of a deepwater location such as that being proposed by Blue H 23 miles south of Martha's Vineyard. A change of location to a deepwater site can offer significantly better wind resources while effectively mitigating the adverse impact on cultural and historic resources, and resolving the numerous other adverse impacts Cape Wind's current locations poses to marine and aircraft safety, commercial fishing, and the environment.

We look forward to the meeting on April 28th, 2009.

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Tricase Project - Blue H USA LLC

Offshore Wind Development Conference

Washington, D.C.

April 1, 2009

Raymond A. Dackerman
General Manager
Blue H USA LLC



Blue H

Primary Functions

- Deepwater Wind Energy Technology Development
- Site Development (Local Partners)
- Oversees Construction & Installation



Mission Statement

By owning and continually creating **innovative offshore technology**, Blue H intends to become the **world's leading developer of deepwater offshore wind farms** dependent on its technology



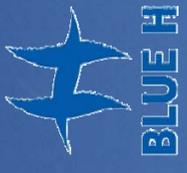
Management

Blue H's Key Executives & Advisors

- Neal Bastick** – Chief Executive Officer
- Senior Managing Director International Adaytum Inc
 - President Bionaire Internationale BV
- Martin Jakubowski** – Technology Architect
- Inventor of SDP technology and author of other Blue H patent applications
 - Significant experience in offshore wind farms and other energy projects
- Marc Zinnemers** – Chief Financial Officer
- Vice President Corporate Finance and Administration Gartner
 - EMEA Controller i2 Technologies
- Silvestro Caruso** – Director of Engineering
- Vice President Gamma Ventures Inc
 - Director of Engineering Ansaldo Energy
- Jaco Korbijn** – Commercial Director
- Managing Director Offshore Windpark Q7 BV
 - Manager Operations Eneco
- Giovanni Franzì** – Chairman
- Partner Cross Border (M & A specialists)
 - Head of Investment Banking at Merrill Lynch Europe
- Manfredi Lefebvre** – Board Member and Special Advisor
- Chairman of Silversea Cruises
 - Leading Italian industrialist & frequent international panelist (including the World Economic Forum)



World's First Floating Wind Energy Unit



Installed in deepwater – 371 feet

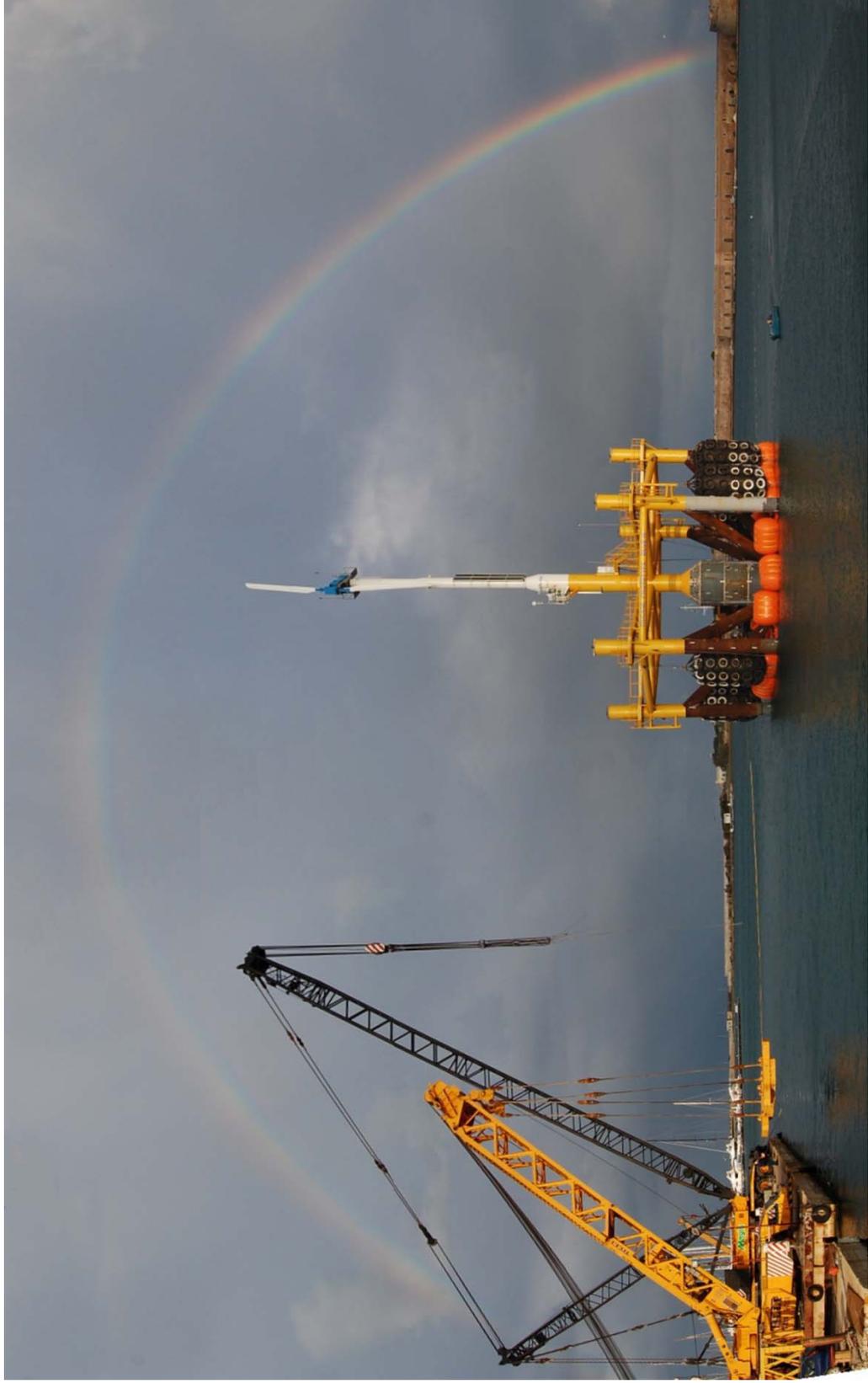


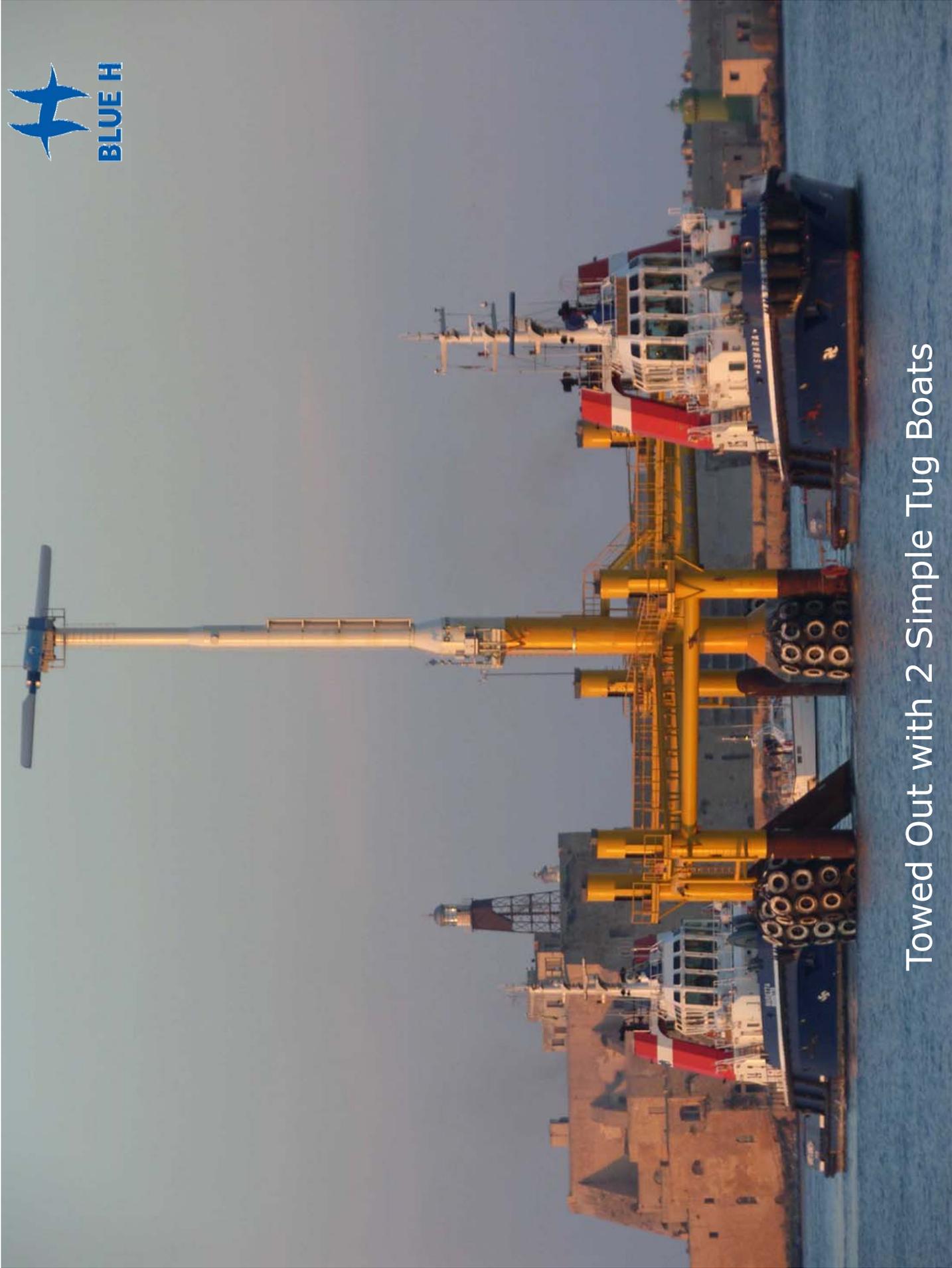
11.5 nautical miles from the coast



Prototype – Launching

The unit is in 4 meters of water

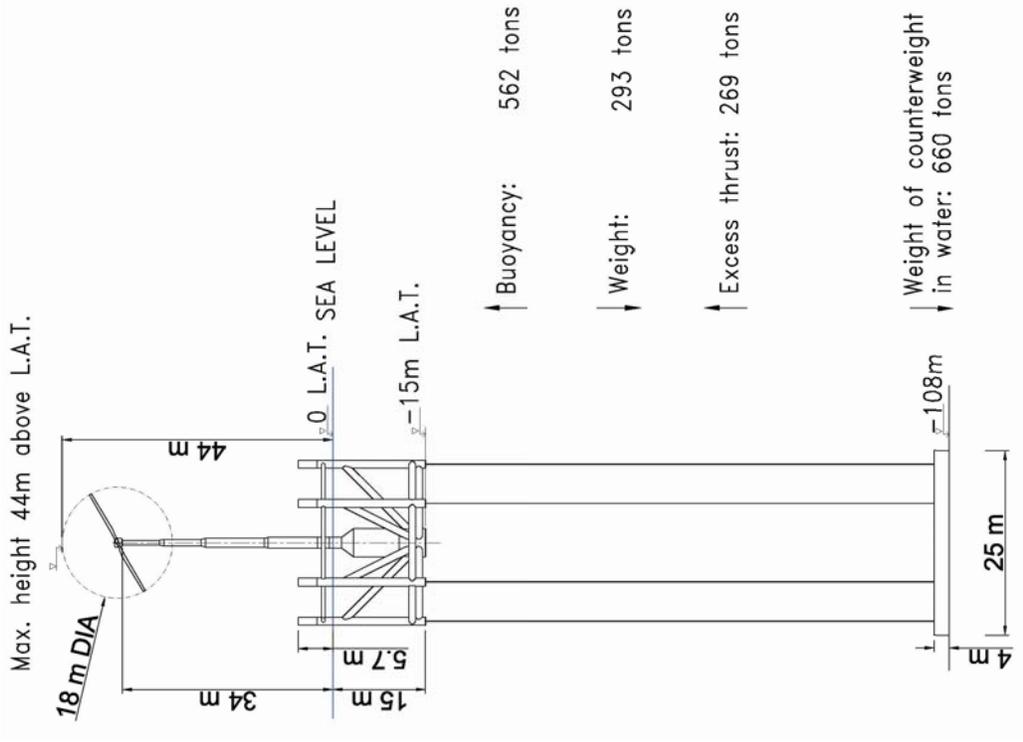




Towed Out with 2 Simple Tug Boats



2007 SDP Prototype



Primary Purpose:

Test concept, design, assembly, launch, float-over, installation, and decommissioning of the world's first floating wind turbine.

RINA Certified

Demonstration project is completed. Unit has been successfully decommissioned

Adapted from Proven Technology

Note: Prototype is not designed to be connected to the grid



“Offshore wind turbines should be ugly, noisy, and cheap!”

Mike Colechin
Leader Offshore Wind Working Group
Energy Technologies Institute
April 9 2008



Features of Gamma 2-bladed Technology

- Rotor with relatively high rated running speed > lighter drive train
- Broad range variable speed (from cut in to cut out) > higher efficiency
- Active Yaw control (in place of pitch control) > less complex/more reliable
- Yawing actuated by hydraulic system > more reliable
- Rotor with "state of art" Teetering Hinge > extended life time of drive train
- RINA Certified



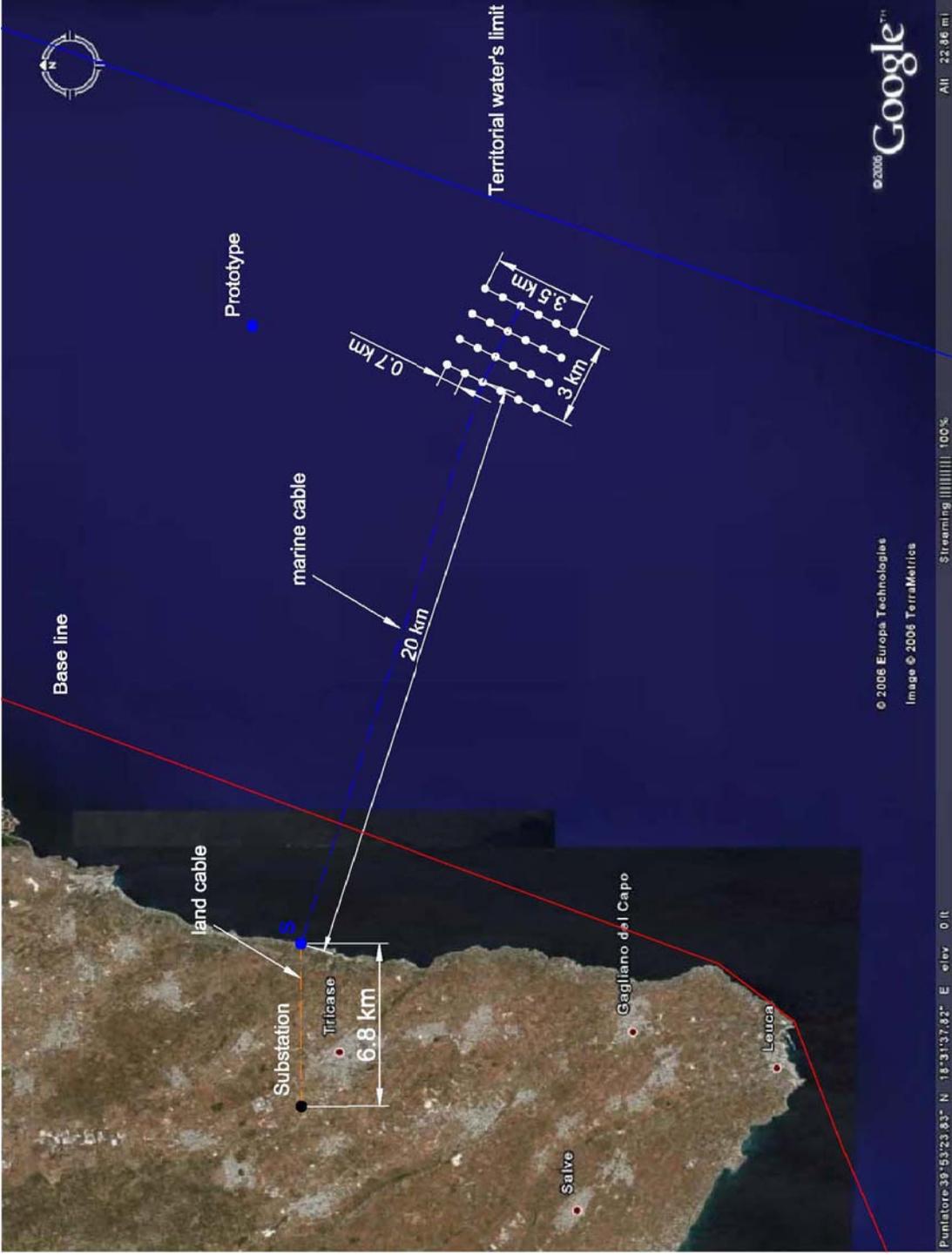


Planned Italian Sites – Prototype off Tricase





Blue H Skysaver Tricase 1 Wind Farm





Blue H Skysaver Tricase 1 Wind Farm

Proposed Build Out Schedule

- Year 1: 1 x 2.5 MW Unit
- Year 2: 1 x 3.5 MW Units
- Year 3: 6 x 3.5 MW Units
- Year 4: 12 x 3.5 MW Units
- Year 5: 4 x 3.5 MW Units

<u>Turbine Size</u>	<u>Rotor Diameter</u>	<u>Hub Height</u>
2.5 MW	60 Meters	43 Meters
3.5 MW	92 Meters	59 Meters



Italy's First Deep Water Offshore Wind Farm - DIWET Technology

Location:	Tricase, Southern Italy 10 miles from coastline Depth 110-120metres
Average wind speed:	7.75ms
Installed capacity:	88MW
Number of turbines:	26 units (2x2MW, 24x3.5MW)
CAPEX requirement:	€ 262million
Build out:	Five year build out, installed and running as of 2014 Phase 1: 6 units, 18MW completed by 2012 Phase 2: 20 units, 70MW completed by 2013/2014
Financing:	First three years 100% equity funded; 44m). Debt finance as of 2011, 2012 at 50% resp. 75% debt Refinanced in 2013
Electricity price:	0.08ct
Green certificates:	0.120ct green certificate (0.08ct green certificate, 1.5x for offshore)
Wind efficiency:	35% wind efficiency (10.731mill kWh per annum (Turbine 3.5MW))
Total Revenues:	€ 1,024million
IRR:	IRR: 23.85%
NPV:	€ 35m (@ 12% discount rate)



Energy Technologies Institute Announces First Projects to Benefit from £1.7 Billion Initiative

January 13, 2009

“The Energy Technologies Institute (ETI), a unique partnership between global industries and the UK Government, announced four innovative projects designed to support UK targets for the reduction in greenhouse gas emissions.

Private funding for the projects comes from the six current private sector partners – **BP, Caterpillar, EDF Energy, E.ON, Rolls-Royce** and **Shell**.





Blue H - ETI Project

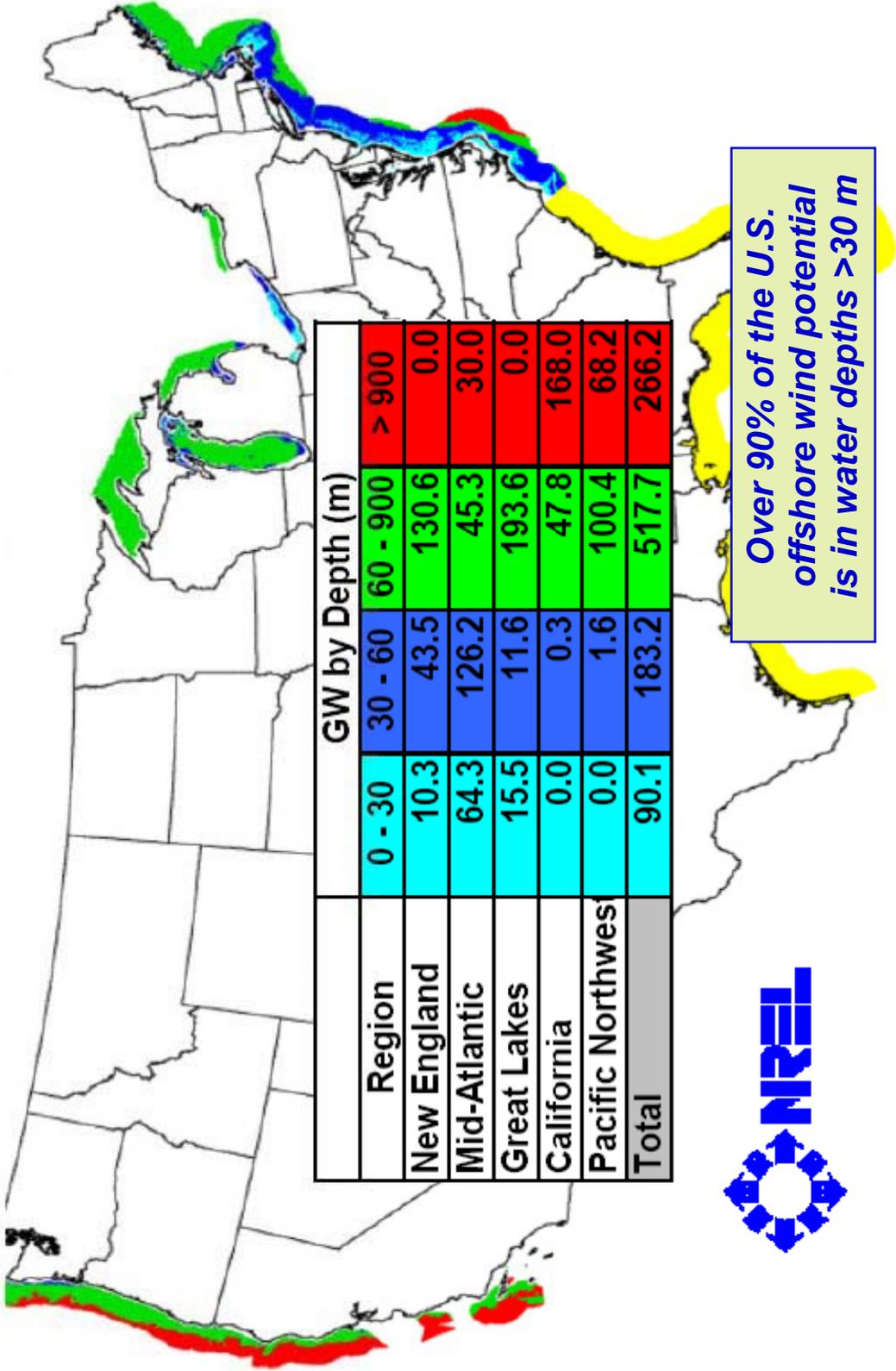
“**Project Deepwater Turbine:** A consortium led by **Blue H Technologies** with representatives from UK groups including **BAE Systems**, the **Centre for Environment, Fisheries, and Aquaculture (CEFAS)**, **EDF Energy**, **Romax**, and **SLP Energy** .

The project aims to design and determine the feasibility and potential of an integrated solution for a 5 MW floating offshore wind turbine for deepwater deployments between 30 & 300 metres.”





“Monopile-Based Turbines can be Utilized for Only 8.5% of U.S. Offshore Wind Energy Potential”



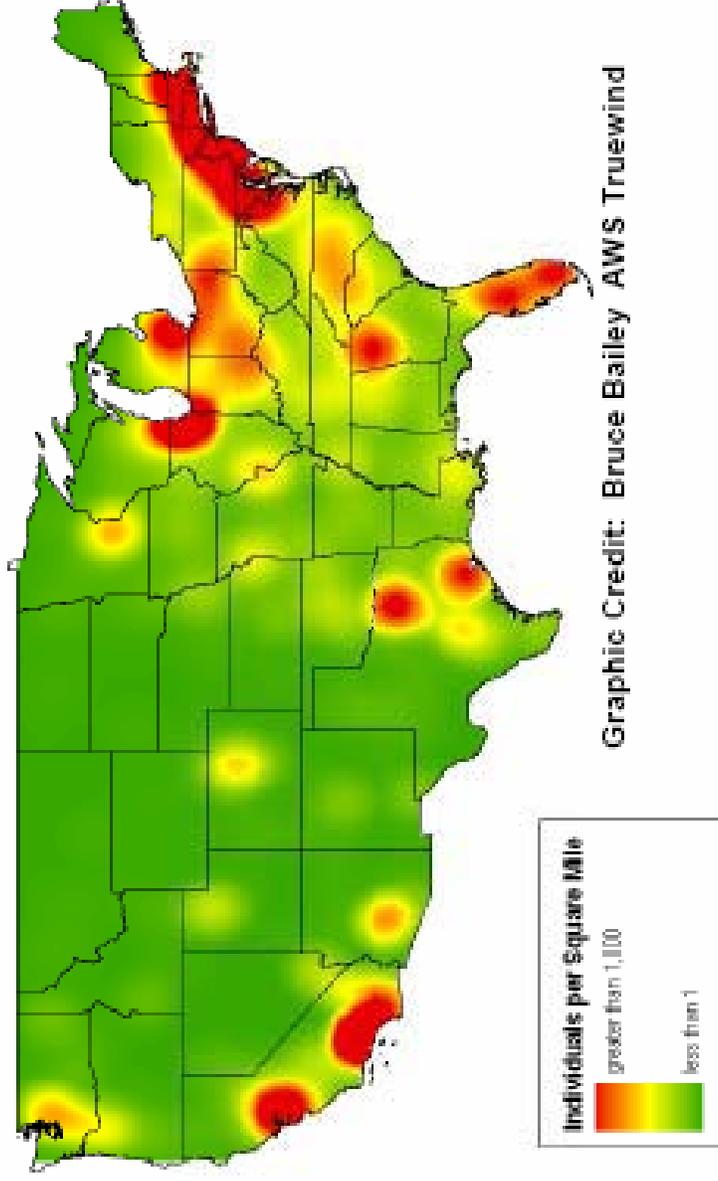
Over 90% of the U.S. offshore wind potential is in water depths >30 m





28 Coastal States Use 78% of the Electricity

US Population Concentration





Blue H USA LLC

- Massachusetts Office

Blue H USA, LLC
60 State Street, Suite 700
Boston, MA 02109

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info@bluehusa.com

- 9 US shareholders



Site Development – Some of Key Criteria for site identification & selection

- Speed and regularity of **wind**
- **Distance** from the coast (typically exceeding 10 nautical miles)
- **Water depths** (greater than 30 meters, preferably greater than 60 meters)
- No interference with **navigation lanes** (shipping & ferry lanes)
- No interference with military or civilian **aviation flight paths**
- No interference with **military zones** (including firing ranges, unexploded ordinance etc)
- Distance to **major urban zones** (i.e. large users of electricity)
- Distance to potential **substations on shore** to which the cables coming from the offshore wind farm can be connected
- **Capacity of grid** to absorb the large amounts of electricity produced by the wind farms
- Absence of significant ecological problems with marine **fauna** and **bird** flying patterns
- **Shortage of electricity onshore**, allowing the setting of an attractive price for the electricity produced by the wind farm
- **Favorable political climate** in the country or state where the connection to the grid takes place



Blue H USA LLC: Deep Water Wind Demonstration Project

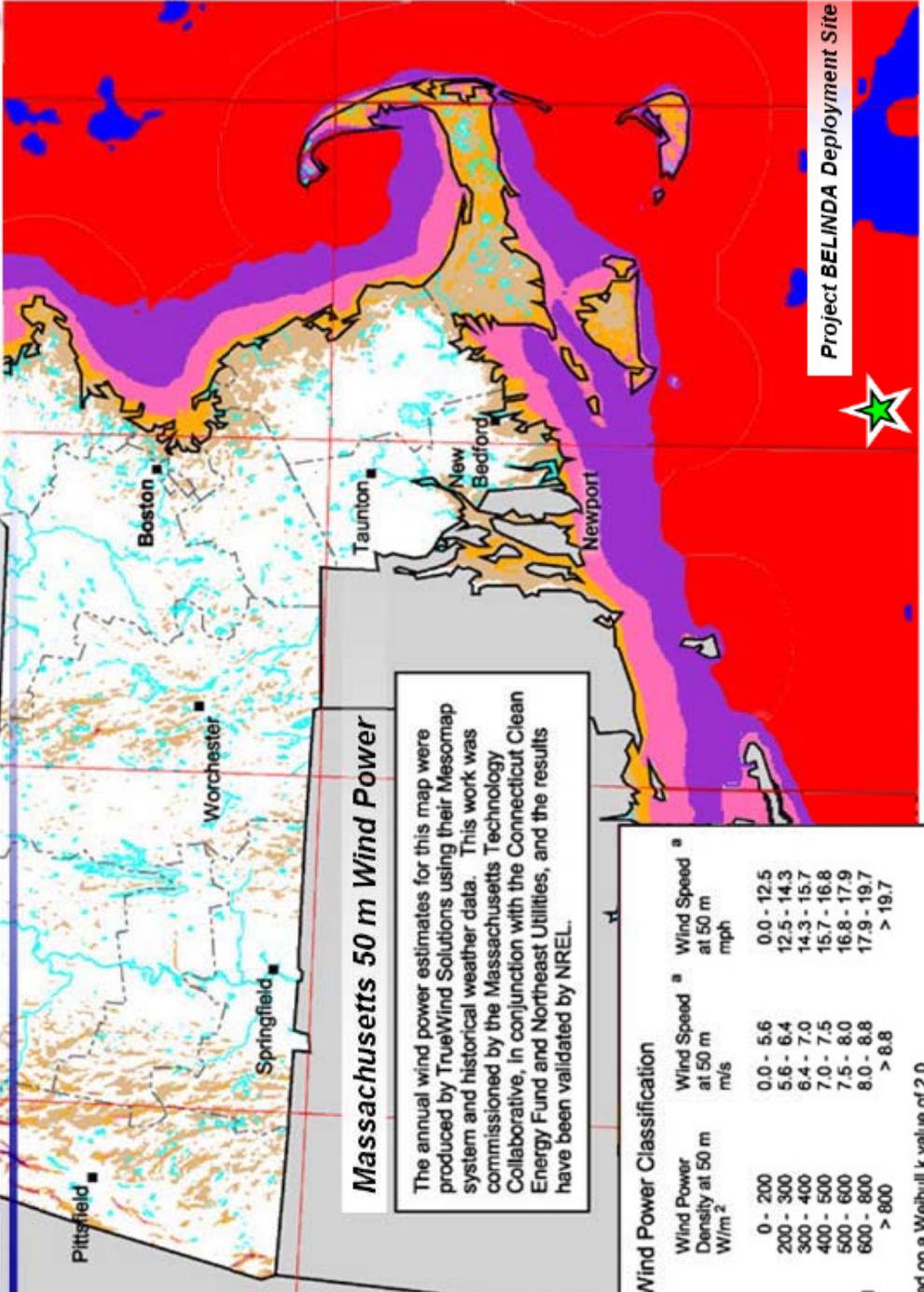




Massachusetts: Offshore Wind Map



U.S. Department of Energy
National Renewable Energy Laboratory



Massachusetts 50 m Wind Power

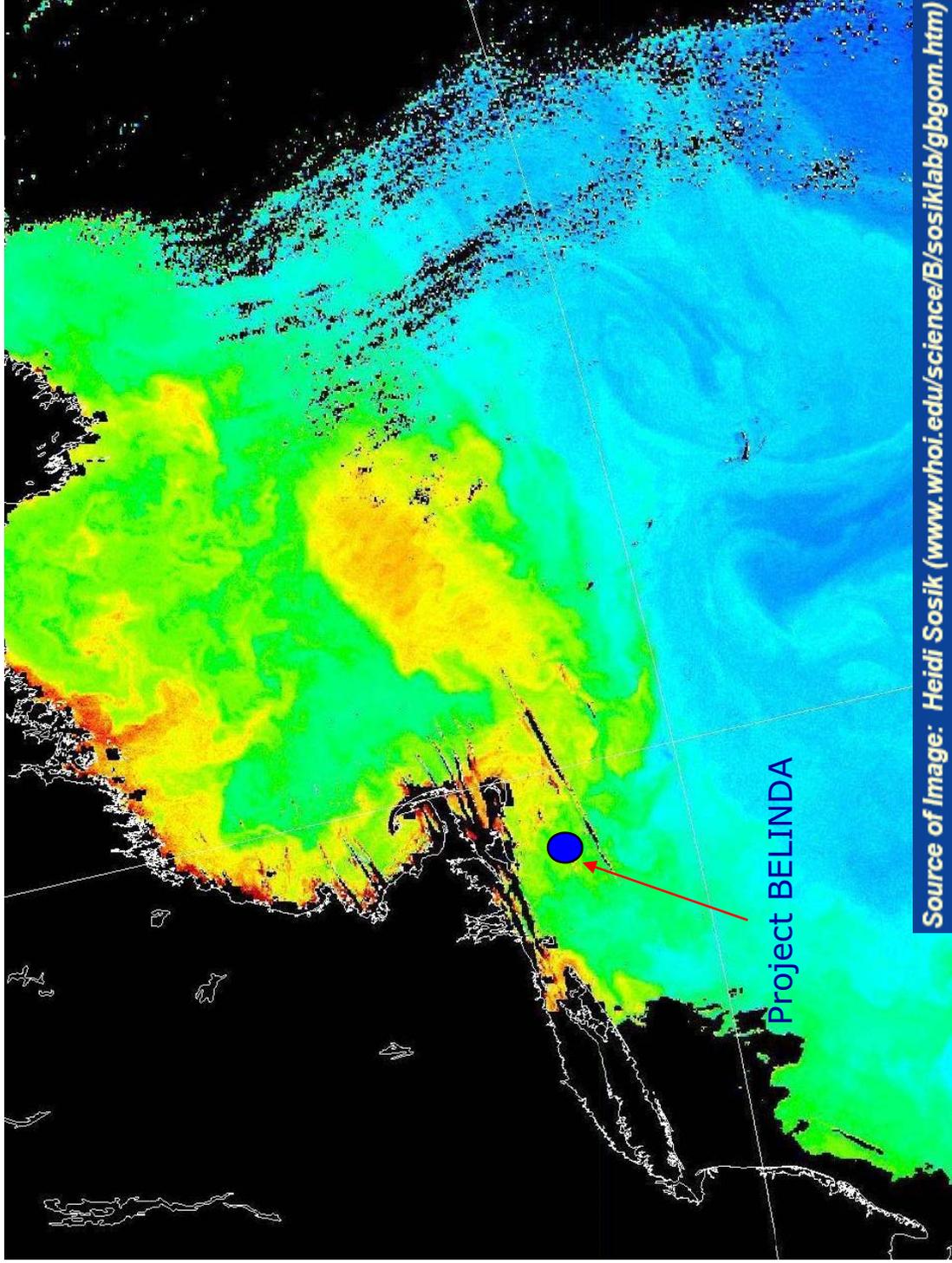
The annual wind power estimates for this map were produced by TrueWind Solutions using their Mesomap system and historical weather data. This work was commissioned by the Massachusetts Technology Collaborative, in conjunction with the Connecticut Clean Energy Fund and Northeast Utilities, and the results have been validated by NREL.

Wind Power Class	Resource Potential	Wind Power Density at 50 m W/m^2	Wind Speed at 50 m m/s	Wind Speed at 50 m mph
1	Poor	0 - 200	0.0 - 5.6	0.0 - 12.5
2	Marginal	200 - 300	5.6 - 6.4	12.5 - 14.3
3	Fair	300 - 400	6.4 - 7.0	14.3 - 15.7
4	Good	400 - 500	7.0 - 7.5	15.7 - 16.8
5	Excellent	500 - 600	7.5 - 8.0	16.8 - 17.9
6	Outstanding	600 - 800	8.0 - 8.8	17.9 - 19.7
7	Superb	> 800	> 8.8	> 19.7

^a Wind speeds are based on a Weibull k value of 2.0



Satellite View of Chlorophyll Distribution Indicator for Marine Resources



Source of Image: Heidi Sosik (www.whoi.edu/science/B/sosiklab/gbgom.htm)



Blue H USA LLC

- Filed Nomination For Lease on March 12, 2008
- Demonstration project intended to launch the deepwater offshore wind energy industry in the United States



Blue H Advantages

- **Blue H:**
- does **not** need to prepare seabed
- does **not** need to use expensive marine services equipment – (monopolistic/oligopolistic control of jack up barges, crane ships, pneumatic hammers for pounding the foundations into the seabed)
- does **not** need assembly at sea
- does **not** have high decommissioning costs

BBC headline above picture to the right:
“Work on Offshore Winds Farms delayed
by late arrival of the jack-up barge”



Source: RMT, Inc.



Blue H Advantages

- **Blue H:**
- has a **shorter construction and installations periods**
- can create a **streaming manufacturing** process similar to the automobile industry
- **less dependent upon weather** conditions
- requires **less inventory**





Congressional Letter of Support Entire Massachusetts Delegation

Congress of the United States
Washington, DC 20515

June 26, 2008

Mr. Randall Luthi
Director
Minerals Management Service
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

Dear Director Luthi:

We are writing to encourage you to evaluate the application submitted by Blue H USA, LLC, for a limited-term lease authorizing data collection and technology testing in support of alternative energy production on the Outer Continental Shelf (OCS).

Section 388 of the Energy Policy Act of 2005 gave the Secretary of the Interior authority over the production of alternative energy on the OCS. As you know, the Secretary subsequently delegated that authority to the Director of the Minerals Management Service (MMS) on March 20, 2006.

On November 6, 2007, the MMS published an interim policy in the Federal Register for the development of alternative energy on the OCS. The interim policy requested the nomination of areas in the OCS for data collection and technology testing for renewable energy. Blue H USA has submitted an application nominating an area in federal waters located 23 miles off the coast of Martha's Vineyard and 45 miles off the coast of New Bedford for data collection and technology testing. Blue H USA is seeking to gather site-specific data on the renewable resource in the nominated area and test its floating platform technology as permitted under the interim policy. Blue H USA also details its plan for construction, operation and removal of the facility as requested in the Federal Register Notice.

In seeking to expand the production of renewable energy in our country, the MMS should evaluate applications nominating areas of the OCS for the development of renewable energy under the interim policy. We therefore encourage you to review and consider the application submitted by Blue H USA, which could prove beneficial for developing future renewable energy resources for Massachusetts and the nation. We thank you for your attention to this matter, and we request that we be informed of any action taken by the Minerals Management Service on the application.

Sincerely,


Edward J. Markey
U.S. House of Representatives


Barney Frank
U.S. House of Representatives


Edward M. Kennedy
U.S. Senate


John F. Kerry
U.S. Senate


Richard E. Neal
U.S. House of Representatives


William D. Delahunt
U.S. House of Representatives


John F. Tierney
U.S. House of Representatives


Stephen F. Lynch
U.S. House of Representatives


John W. Olver
U.S. House of Representatives


James P. McGovern
U.S. House of Representatives


Michael E. Caputo
U.S. House of Representatives


Niki Tsongas
U.S. House of Representatives



Belinda Commercial Project Key Data (Directional)

Number of Turbines	:	120
Rated Power per WEC	:	3.5 MW
Total Rated Power (TRP)	:	420 MW
Area Required	:	40 square miles
Water Depth	:	28 fms to 29 fms
Cable length to Grid	:	48 nautical miles (New Bedford)

Scalable well beyond above figures

***Figures are directional only**



The Time is Right

Massachusetts Governor Deval Patrick

- “Governor Patrick said the state is one of the best places for deepwater wind turbines and his administration wants to exploit that advantage...”
Cape Cod Times May 25, 2007

Governor Patrick Signs Landmark Energy Bill

- By 2030, Massachusetts utilities will be required to obtain 25 percent of electricity from renewables like wind, hydro and solar.
July 2, 2008

Governor Patrick Sets Wind Energy Goal

- 2,000 MW offshore wind capacity by 2020
January 13, 2009



The Time is Right - Maine

Maine Governor John E. Baldacci

- “Turbines placed off Maine’s coast have the potential to produce 133 GW’s of electricity from wind alone. That’s as much electricity as 40 nuclear power plants can produce.”
March 10, 2009 State of the State Address

Former Maine Governor Angus King

- “Only something as ambitious as 1,000 turbines spinning 26 miles off the Maine coast will be able to break the state’s reliance on oil and prevent an economic catastrophe.”
Portland Press Herald April 16, 2008

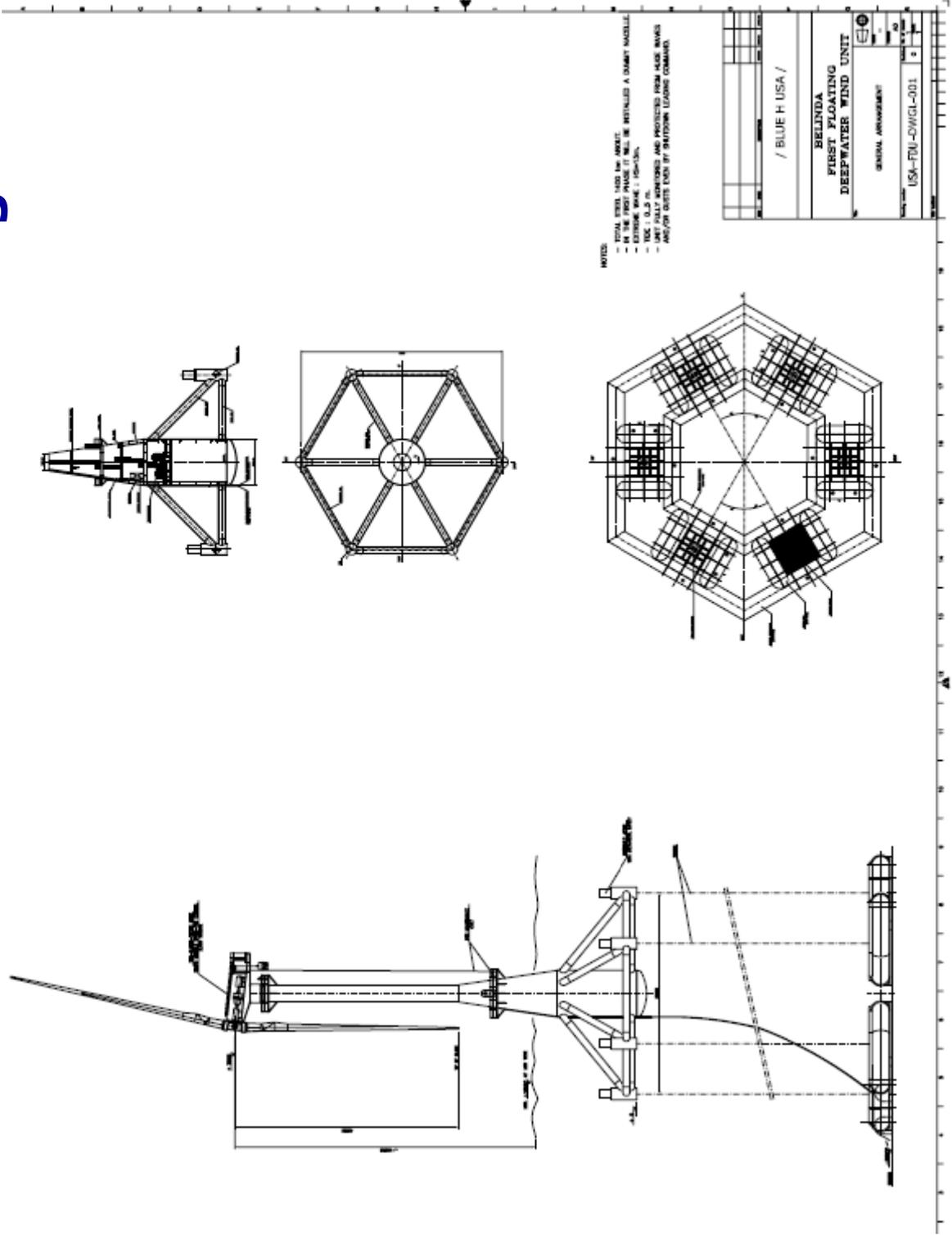


Blue H USA in Maine

- Blue H USA begins meeting with Maine stakeholders in October of 2007
- On August 9, 2008, Blue H USA announces that it is targeting Maine for a commercial deepwater wind farm.
- Blue H USA discusses with state officials next steps to pursue project development
- Blue H USA is identifying Maine participants in site selection, technical assistance, investment, and operations of a future Blue H USA project operating company to be based in Maine.



Belinda First Commercial Unit Diagram





Blue H

First Commercial Unit – Installation in 2009





[Hyperlink to First Commercial Unit Simulation](#)

[Video from file](#)

Thank You!



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New York Times: 3/27/09 Cape Wind Navigates Shifts in Market

By [KATE GALBRAITH](#)



[Cape Wind Associates](#) A computer simulated view of the proposed Cape Wind offshore wind power installation, as it would look from Craigville, Mass.

The controversial and long-delayed [Cape Wind](#) project — which could become the first offshore wind farm in the United States — is [inching forward](#).

The next milestone is a decision by the Interior Department about whether to issue a lease for the project (something that [Interior Secretary Ken Salazar discussed](#) during an interview with The New York Times last week).

But if Cape Wind does manage to leap over all of its hurdles, the question remains: who will make the turbines?

Six years ago, before the project was stalled by [powerful political headwinds](#), Cape Wind developers [selected General Electric to do the work](#).

“G.E. Wind Energy manufactures the most advanced offshore wind turbines available today,” Jim Gordon, the managing general partner of Cape Wind, [said at the time](#).

But G.E. no longer makes any offshore turbines, according to Steve Fludder, the head of G.E.’s [green business unit](#), who sat down for a [wide-ranging interview](#) with The Times on Wednesday.

G.E. has instead focused its turbine business where it sees the vast majority of demand: on land. Offshore wind, said Mr. Fludder, is “just a vastly costlier proposition — not for us but for the world.”

So does that leave the Massachusetts projects — as it were — dangling in the wind? Not exactly, said Mark Rodgers, the communications director for Cape Wind.

The 2003 agreement between Cape Wind developers and G.E., said Mr. Rodgers, was really a more flexible “intent to contract,” and Cape Wind’s thinking has also changed in the interim.

“In the time since, although the offshore G.E. turbine is still available, they really have been emphasizing the onshore market,” Mr. Rodgers said, adding that Cape Wind aimed to announce a contract in the “near future,” and that Siemens and Vestas — both big turbine manufacturers still developing offshore products — are now the front-runners.

As for G.E.’s current approach to the offshore turbine market, “I would say we’re monitoring it,” said Mr. Fludder, who noted that G.E. still has the [old design](#) that Cape Wind had selected.



March 23, 2009

The Honorable Kenneth L. Salazar
Secretary of Interior
1849 C. Street, N.W.
Room 6156
Washington, DC 20240

Dear Secretary Salazar:

Congratulations on your notable accomplishments as Secretary of the U.S. Department of the Interior. Your recent announcement of the Memorandum of Understanding between the Federal Energy Regulatory Commission and the Minerals Management Service (MMS) is indeed an important milestone for offshore wind energy development in the United States.

Per our e-mail message to Joan Padilla dated March 9, 2009; we look forward to meeting with you at some point to discuss Blue H's deepwater offshore wind technology that is now being deployed in Europe for commercial operations. Given your recent comments about the importance of expediting the development of deepwater wind, especially in the Atlantic, attached you will find a copy of the Blue H February 24, 2009 press release which confirms that Blue H is currently manufacturing its first commercial 2.0 MW wind energy unit for delivery this year to a deepwater site off the coast of Tricase, Italy. This is the first unit for a 90 MW project with more to follow. In addition, attached you will also find a copy of the Blue H March 12, 2009 press release which confirms the successful test of design, assembly, launch, float-over, installation, and decommissioning of the world's first deepwater wind turbine.

Since over 90 percent of the offshore wind energy resource off the Atlantic & Pacific coasts is located in deepwaters (i.e. 30 meters and beyond), it is crucial that responsible deepwater wind zones be included in the offshore energy plan for the United States.

We would be pleased to provide additional information as needed. On Wednesday March 25, 2009 we will be meeting with Walter Cruickshank, the Acting Director of MMS, to discuss the features of Blue H's deepwater systems but not limited to: 1) lower cost of capital investment per kW of capacity; 2) access to better winds for higher capacity factors; 3) cost-effective energy production; 4) no conflict and adverse impacts on historic sites, view shed, commercial fishing, endangered species, etc.

Thank you for your attention and we look forward to meeting.

Sincerely,

Raymond A. Dackerman
General Manager
Blue H USA LLC

24. February 2009

BLUE H PRESS

Blue H's GEOMA Project selected by Italian Government

Project GEOMA, a consortium led by Blue H has been selected as one of thirty recipients of Italian public funding under the "Industria 2015" a program announced by Mr Claudio Scajola of the Ministry of Economic development. This Italian based project plans to develop a hybrid concrete/steel 3.5 MW floating wind turbine ideal for the deep waters of the Mediterranean Sea.

The consortium which is led by Blue H R&D from Genoa, consists of Ansaldo Sistemi Industriali (Milan), Blue H Sky Saver (Santeramo in Colle), Cesi Ricerca (Milan), EADS Astrium (Parigi), Progeco (Rosignano), Società Gomma Antivibrante (Milan), TRE Tozzi Renewable Energy (Ravenna) and Università Federico II di Napoli (Napels). It aims to create an integrated solution for a floating wind turbine able to bring down the overall cost of electricity generation in line with economics of onshore wind energy generation, but without the problem of negative visual impact.

The Blue H Consortium is one of two wind energy projects within Industria 2015 which have been selected by a panel of experts. The Italian government is investing in companies that in turn invest in high quality solutions for the environment.

Martin Jakubowski, Technology Architect of Blue H said: "This Industria 2015 award represents an extremely important endorsement of Blue H's floating wind energy solution for the deep waters of the Mediterranean Sea and other oceans. Italy, for instance, has over 8,000 kilometers of coast line. Most of the good wind sites are in deep water far from the coast".

Blue H installed the world's first floating wind turbine prototype in the summer of 2008 in the Strait of Otranto, opposite the municipality of Tricase in Puglia, Southern Italy. The company is currently building the first operational 2MW unit in Brindisi, which it expects to deploy at the same site in the Southern Adriatic Sea in 2009, the first in the planned 90 MW Tricase offshore wind farm, located more than 20 kilometers distant from the beautiful coast line of Puglia.

12. March 2009

BLUE H PRESS

Blue H prepares for authorization of the world's first deepwater wind farm

Sky Saver Srl, Blue H's subsidiary in Puglia, expects to receive consent for a 90 MW wind farm off the coast of Southern Italy, opposite the town of Tricase in the Southern Adriatic providing enough electricity to supply the needs of 75,000 households.

Sky Saver Srl applied for the original permits to secure the concession of its prototype platform back in October 2004 which was granted in February 2007. The primary goal of the prototype was to test the design, assembly, launch, float-over, installation and decommissioning of the world's first deepwater wind turbine. Towards the end of 2007, Sky Saver Srl launched the unit in the harbour of Brindisi and in the summer of 2008, it installed the platform 21.3 kilometers from the coast at 113 meters depth. The concession ran out at the end of 2008 and Sky Saver Srl decommissioned the unit successfully despite the very difficult weather conditions in the Adriatic during this last winter and without the proper equipment it intends to operate during the industrial deployment phase.

Anna Fraccalvieri, Managing Director of Sky Saver Srl said: "Even though it was a challenging experience for the company to carry out this kind of large scale test, we are very satisfied. Clearly the things that went well pleased us greatly, especially with regards to the design, assembly, launch, float-over and installation; at the same time, we managed to learn a great deal from those things that did not go as smoothly as planned, most of which were due to the bad weather conditions, which shows that not only in the North Sea but also in the Strait of Otranto, major marine operations have to be scheduled in summer time. This confirms and reinforces the fact that our strategy for industrial scale deployment is sound."

Sky Saver Srl intends to convert the prototype to a metering station and is planning to deploy it back at its original location before, during and after construction of the Tricase wind farm. The company applied for permits in November 2006 for this 90 MW wind farm and is currently building the first operational 2.4 MW unit in Brindisi, which it expects to deploy offshore Puglia later this year as the first floating wind turbine in its deepwater wind farm.

Blue H installed the world's first floating wind turbine prototype in the summer of 2008 in the Strait of Otranto, opposite the municipality of Tricase in Puglia, Southern Italy. The company is currently building the first operational 2MW unit in Brindisi, which it expects to deploy at the same site in the Southern Adriatic Sea in 2009, the first in the planned 90 MW Tricase offshore wind farm, located more than 20 kilometers distant from the beautiful coast line of Puglia.

For further information, please contact Anne-Marie van Pinxteren at +31 162 424 952.

Email: info@bluehgroup.com

Website: www.bluehgroup.com



March 3, 2009

Dr. Rodney E. Cluck
Cape Wind Program Manager
Mail Stop 4080

Dr. Melanie Stright
Historic Preservation Officer
Mail Stop 4080
Office of Offshore Alternative Energy Programs
Department of Interior
Minerals Management Services
381 Elden Street
Herndon, VA 20170

RE: Section 106 Consultations; Nantucket Sound Historic and Tribal Archaeological Resources

Dear Dr. Cluck and Dr. Stright:

We appreciate the timely receipt of the transcript for the January 29, 2009, Section 106 Historic-Preservation consultation meeting. After reviewing this record, the Alliance to Protect Nantucket Sound (Alliance) has several comments on the meeting itself, as well as remarks on the following two letters:

- February 6, 2009, letter from Ms. Brona Simon, State Historic Preservation Officer (SHPO) with the Massachusetts Historic Commission (MHC); and
- February 17, 2009, letter and briefing memorandum from the Public Archaeological Laboratory (PAL).

In the interest of efficiency, the Alliance offers questions and comments before the next meeting to enable productive use of the consultation period.

January 29th Section 106 Historic Preservation Meeting

During the morning session of the January 29th meeting, the parties engaged in a general discussion about archaeological resources on, and in, the seabed of Horseshoe Shoal. Mr. Destry Jarvis made the key point (on page 30 of the transcript) that the two regional Native American Tribes (The Mashpee Wampanoag Tribe and the Wampanoag Tribe of Gay Head/Aquinnah) represent that their ancestors not only hunted and fished on a once dry Horseshoe Shoal, but also lived there. Citing extensive oral history, the Wampanoag Tribes have documented the fact that the proposed site encompasses sacred burial grounds. As federally-recognized Tribes, the Aquinnah and Mashpee Wampanoag Tribes have sovereign-nation rights. Also, the Mashpee Tribe has maintained its aboriginal rights, which, as you know, are of the utmost importance when addressing the use of Horseshoe Shoal.

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Mr. Jarvis also made the point that archaeological sites in this region can be found on the National Register for Historic Places (NRHP). Therefore, given the importance of Nantucket Sound's archaeological treasures, Mr. Jarvis stated a "thorough evaluation" is required, but he did not "find any of that in the finding document," Minerals Management Service's (MMS) letter of December 29, 2008, that addresses the adverse impact findings on over two dozen historic sites. Mr. Jarvis' statement is consistent with comments found in SHPO Simon's February 6, 2009 letter wherein she also states that "the [F]EIS includes inconsistent and insufficient information about cultural resources."

In response to Mr. Jarvis' comments, Dr. Melanie Stright and Ms. Sarah Faldetta made the following four (4) comments: 1) MMS has developed a marine remote sensing technology for conducting surveys to identify archaeological sites (page 31); 2) "MMS has done a complete survey [of] everything that could be done to identify sites in the Sound" (page 32); 3) that a Cape Wind archaeological study was based on approximately a hundred vibrocore and boring samples within the wind park area (page 32); and 4) organic materials were found and analyzed (page 33).

The above comments and responses evoke several questions/issues. First, the Alliance agrees with Mr. Jarvis' and SHPO Simon's statements that a thorough evaluation is most critical, and that the federal record on the Cape Wind environmental review is somewhat lacking and/or confusing on these matters. The parties agree that an accurate and transparent research analysis and findings record are required.

The Alliance reviewed the Army Corps of Engineers (ACOE) Draft Environmental Impact Statement (DEIS) issued November 2004, the MMS DEIS issued January 2008, and the MMS Final Environmental Impact Statement (FEIS) issued January 16, 2009. Among the thousands of pages, there appears only limited detail and clarity of the employment of marine remote sensing technology. Therefore, the Alliance would like to know:

1. What is the specific name of the MMS world-leading remote sensing technology?
2. Is it the satellite-backed system discussed on MMS' web site?
3. When did the developer perform a remote-sensing program (2005)?
4. Which organization conducted the remote sensing work (several organizations are mentioned in the PAL reports)?
5. How might we find a copy of the detailed study/analysis of the field work Dr. Stright identified for the Cape Wind project? (The PAL reports found in the FEIS record do not present adequate analysis or details.)

The MMS web site indicates that agency policy requires a developer to submit a report on archaeological resources. To clarify, which document is the definitive Cape Wind archaeological report? Greater transparency is needed.

For example, one point of confusion can be seen by comparing the June 2003 PAL report and subsequent statements (or lack thereof) in the FEIS. The PAL report concludes that vibrocore samples indicate that "**the Cape Wind Energy Project offshore study area has potential for containing submerged Native American and historic cultural resources. A portion of the study area may also contain submerged Native American cultural resources**" (PAL report executive

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summary with emphasis added). PAL indicated that more field work is needed because there is a high probability that Native American archeological resources are in the seabed on the eastern edge.¹

However, based on our reading of the FEIS, there is not a transparent record of the supplemental research. There is no detailed discussion of additional samples. The FEIS includes Figure 4.2.5-1A,² which depicts the 2005 June through November exploration program, but the FEIS text does not present any detail. (At least after considerable review the Alliance has not found such.) If a reader of the FEIS would like to know how many vibracore samples were advanced, one must count the samples depicted on Figure 4.2.5-1A to determine that in fact seven (7) samples were advanced in this 2005 program.³ Incidentally, seven (7) samples is a woefully small number. Furthermore, the seven vibracore samples shown on Figure 4.2.5-1A are not positioned on the eastern edge where the PAL 2003 report indicated there is a high probability of archaeological targets. Thus, the 2005 field program appears to have been conducted for other purposes, not for archaeological discovery.

Given the importance of archaeological resources on Horseshoe Shoal and the rights of the sovereign Wampanoag nations, the Alliance's initial conclusion is that a truly "thorough investigation" would require considerably more than seven vibracore samples. Also, given Dr. Stright's comment about remote sensing technology, we would expect the FEIS to contain a figure wherein the data and results of the survey are delineated. MMS and Cape Wind need to establish credible, transparent, and conclusive evidence about the archaeological resources on Horseshoe Shoal. The risk is high that one or more of the 130 monopile wind turbine generators, each up to 18-feet in diameter, will desecrate prehistoric and historic artifacts.

Finally, during the January 29th meeting, Ms. Faldetta stated that approximately 100 vibracore and boring samples were advanced for this proposed action. Are these "100 samples" the ones depicted on FEIS Figures 4.2.5-1 and 4.2.5-1A? The FEIS states the marine surveys advanced 87 vibracore samples and 22 borings samples, 109 in total. If these are the same samples Ms. Faldetta refers to, then more clarification and transparency is needed.

For example, in examining the FEIS figures, it is clear that **the majority of the samples are not taken from Horseshoe Shoal**, but from along the two proposed transmission line paths from the

¹ PAL makes it very clear that vibracore samples produced evidence of paleosols. The report provides excellent context for understanding the physical events in and around Nantucket Sound since the last major ice age. There is little doubt given the PAL analysis that Native Americans occupied Horseshoe Shoal corroborating Wampanoag oral history and the fact that there are perhaps ancient burial grounds in the seabed.

² It is perhaps telling that while the data for Figure 4.2.5-1A were available, MMS did not include this figure in the January 2008 DEIS. Why was this figure not included? And now that Figure 4.2.5-1A is in the FEIS, why is there no discussion within the FEIS? Had Figure 4.2.5-1A been available in the DEIS, the public would have had an opportunity to consider and comment on the seven (7) vibracore samples during the DEIS hearings held March 10 through 13, 2008. Now that Figure 4.2.5-1A is available, the missing text supports the point that the FEIS is not a "final" document and that it was released prematurely.

³ The Alliance notes that in examining the relevant figures, we do not see a sufficient number of sampling to support Ms. Faldetta's statement during the Section 106 January 29, 2009, meeting that "there are vibracores all around the entire area."

wind turbine generator (WTGs) array to landfall. Ms. Faldetta's statements during the January 29th meeting imply that all the samples were "within the wind park area" (page 32). The Alliance would appreciate clarity and accuracy concerning the purpose and findings of the 109 samples.

SHPO Simon's Letter dated February 6, 2009

The Alliance is in complete agreement with SHPO Simon that the analysis of adverse impacts on historic sites from the WTGs must be based on correct physical dimensions, especially with regard to the blade tips that would be 440 feet above sea level. The analysis for Section 106 purposes must include the new array, which features larger 3.6 MW WTGs. The Alliance notes that the height difference from 417 feet to 440 feet is significant, which is not addressed by MMS in the "findings letter." Cape Wind representatives point to the reduction of 170 to 130 WTGs as a meaningful mitigation, although 130 WTGs still make Cape Wind one of the largest offshore power plants in the world. Additionally, the view of any one WTG can present a negative impact on historic sites. In fact, the new array has greater negative impact from the northern edge on the Craigville area and also the Wianno Club, which is listed on the NRHP.

We must consider that the additional 23 feet of maximum height for the blade tip (440 feet versus 417 feet) more than offsets any suggested benefit of fewer WTGs. In fact, the additional 23 feet means the new array will create **greater adverse impact on the view-shed field** by extending the radius of the Area of Potential Effect (APE) at least 0.75 miles.⁴ One taller WTG would increase the APE 33 square miles.⁵ The larger WTGs clearly present greater threat to historic sites, making mitigation more difficult.

Thus, the Alliance agrees with SHPO Simon that the MMS analysis of alternative sites is inadequate and must be reconsidered given the larger WTGs. SHPO Simon is correct that deepwater sites provide promising mitigation. In its April 21, 2008, draft EIS (DEIS) comment letter to MMS, the Alliance emphasized that deepwater technology has advanced to the point that deepwater sites should be considered as alternatives. There are other offshore projects moving forward utilizing deepwater systems.⁶ Thus, the FEIS is grossly misleading, stating that these systems are 10 to 15 years away. Most tellingly, Blue H has been waiting almost one year on MMS to issue a test permit to demonstrate its deepwater system 23 miles south of Martha's Vineyard. Blue H has announced production of a commercial WTG for delivery this year, a 2 MW WTG to be installed in the Strait of Otranto, Puglia, Southern Italy. This will be the first of 45 WTGs for a 90 MW deepwater wind project.⁷

⁴ The taller WTGs mean that a person would be able to see the WTG structure from a greater distance. To the average person standing 5 feet and 7 inches tall on the shoreline, the horizon appears to be approximately 2.9 miles away. The WTG of 440 feet can be seen approximately 28.6 miles from the shore.

⁵ The Alliance made a simple math comparison of the APE of a 417-foot WTG vs. 440 foot WTG.

⁶ The Deepwater Wind project of the coast of Rhode Island is most noteworthy. Additionally, Bluewater Wind's project off the coast of Delaware is also presented as a "deepwater" project. It is Bluewater's corporate policy to site offshore wind projects sufficiently far from the shoreline to avoid conflicts associated with view-shed.

⁷ February 24, 2009, Blue H Group issued a press release announcing that its larger 3.5 MW WTG unit has received R&D funds from the Italian government to complete its design and initial

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Furthermore, the governor of Rhode Island recently announced the Deepwater Wind project, one that is comparable to Cape Wind, which is moving forward, and without stakeholder conflict. The Rhode Island process for selecting a deepwater site involved a stakeholder consensus process. Similarly, Delaware's Bluewater Wind project is also sited in deepwater and is moving forward without conflict. The Alliance supports SHPO Simon's recommendation that considering an alternative site in deepwater would be prudent. A deepwater site would most certainly resolve the Section 106 consultation processes and potentially mitigate issues of impaired aviation and marine safety, commercial fishing restrictions, and endangered species take.⁸

Finally, as noted above, the Alliance agrees with and supports the SHPO's point that the FEIS is incomplete and inconsistent. The Alliance is preparing a detailed comment letter that it will submit to MMS. The Alliance agrees a supplemental FEIS is required. In fact, the Alliance recommended in its DEIS April 21, 2008 comment letter to MMS that a supplemental DEIS was needed to ensure an accurate FEIS. As indicated in the Environmental Protection Agency's (EPA) February 17, 2009 letter to MMS, EPA has also identified deficiencies in the FEIS. As a cooperating agency, EPA supports a revised FEIS for a complete and accurate record.

PAL Letter and Briefing Memorandum

First and foremost, while the PAL letter and briefing memorandum of February 17, 2009, provides considerable information that addresses the record, it does not include sufficient detail and supporting backup to SHPO Simon's concern that the analysis of adverse impacts on historic sites may have incorporated incorrect physical dimensions. The simulation and analysis should have used the WTG tip-height of 440 feet above sea level, which PAL reports as being the case. But, until such a question is fully resolved, it invalidates PAL's opinion that the Section 106 process for historic preservation under the National Historic Preservation Act (NHPA) has been satisfied. As indicated by the transcript of the January 29th meeting, many of the consulting parties raised many questions about the methodology employed for the evaluations. The Alliance supports the SHPO's objective observations that additional analysis or clarification is required before the Section 106 process for historic preservation concludes.

Furthermore, the employment of 440 feet as the height of the blade tip in modeling is important to the analysis of adverse impacts on historic sites, which include National Historic Landmarks (NHL) such as the Island of Nantucket and the Kennedy Compound. The Alliance points out that much has been made of the fact the project now has 130 WTGs, down from 170 WTGs. However, PAL ignores the fact that Cape Wind specified a larger and more powerful 3.6 MW WTG, which is the primary reason for the reduction to 130 WTGs. The fact remains the larger and taller 3.6 MW WTGs create more adverse impacts (a larger APE as discussed above) that counter benefits of fewer WTGs.

deployment. Blue H also reconfirmed its plan to deliver in 2009 its commercial 2.0 MW WTG for the 90 MW wind project mentioned above.

⁸ The Federal Aviation Administration (FAA) recently issued a "presumed hazard determination" to Cape Wind with regard to radar interference. Additionally, the taller WTGs "take" additional airspace resulting in an adverse impact the air traffic across Horseshoe Shoal operating under visual flight rules (VFR). In addressing concerns of adverse impacts to marine safety, the U.S. Coast Guard told the commercial fishermen that they could fish elsewhere.

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Additionally, the PAL briefing memorandum did not adequately address the important issue raised by Mr. Jarvis that the historic sites need to be evaluated from viewing points where both a historic site and the proposed action can be seen. As documented in the transcript, the consulting parties had a robust discussion of the need to evaluate whether the project would be seen from not only the historic site, but also from surrounding vantage points. A clear example discussed is the ferry-ride from Hyannis to Nantucket Island. Today, a person traveling on the ferry can clearly view the Cape Wind data collection tower while also viewing Nantucket Island. This is especially true from the ferry's outside deck. The data collection tower, which at 196 feet tall is 244 feet *shorter* than the 130 proposed WTGS, is located on the far-side of Horseshoe Shoal. These massive 130 WTGs, most of them closer to the ferry route than the data tower, would be certainly visible while traveling to Nantucket Island.

Furthermore, PAL points out that the adverse impact on Nantucket Island, an NHL, is mitigated because the adjusted array is setback by 0.6 miles. While PAL points out the setback of 0.6 miles as a significant step, the fact that the 3.6 MW WTGs reach 23 feet higher (417 feet versus 440 feet) in the new array, the 0.6 mile setback is negated and not a valid mitigation step. Doing the math as noted above, the taller WTG extends the APE by at least 0.75 miles. Thus, the setback of 0.6 miles is negated by the greater viewing radius of 0.75 miles. In summary, despite the setback **the "net-net" impact of the taller WTGs causes greater adverse impact on Nantucket Island.**

Finally, PAL takes issue with the two photographs introduced by Mr. Jarvis at the January 29, 2009, meeting. These show Massachusetts Avenue views of Nantucket Sound that will be adversely impacted by the WTGs. The Alliance appreciates the effort to establish an exact spot from where these photographs were taken. However, Figure 1 in the PAL briefing memorandum is grossly misleading as presented. The "envelop" of sea view from the Massachusetts Avenue position is much wider than represented by the red lines drawn on Figure 1. What PAL failed to point out is that the massive 3.6 MW WTGs that would tower 440 feet above sea level will be seen over the land mass known as Point Gammon.⁹ The Alliance attaches to this letter a true depiction of the "view envelop" for Figure 1 (also Figure 1 for this letter). The sea view from Massachusetts Avenue would include the entire breadth of the proposed action because the WTGs would be seen over Point Gammon.

To demonstrate this point, the Alliance attaches a new photograph (Figure 2) from Massachusetts Avenue. The photograph captures a ferry that is moving beyond Point Gammon. This ship's highest structure rises approximately 70 feet above the water line and it can be clearly seen behind Point Gammon. Additionally, the roof top of the house on Point Gammon is approximately 50 feet high. It is clear that the WTGs, at 440 feet, would be seen behind Point Gammon. Given the scientific capability of PAL (and ESS), the Alliance questions why PAL was not sensitive to this point. Confusion over this issue is a good example of the need to ensure that Section 106 consultation is based on clear and accurate information. This example is further proof that PAL's opinion that

⁹ Turning to Figure 2 of the PAL briefing memorandum, and looking at Photographs No. 1 and No. 2, Point Gammon would be the land mass that defines the left side of the view. Point Gammon has an elevation of approximately 50 feet, which is not sufficiently high enough to block a view of a WTG 440 feet high and approximately 6 to 7 miles away. At a distance of even 7 miles the average person would see approximately 400 feet of the WTG structure.

Section 106 has met the NHPA requirements is incorrect. The Section 106 consultation process, in conjunction with the overall environmental review process, is far from being complete.

Section 106 Meeting

At the next Section 106 Historic Preservation Consultation meeting (indicated by PAL to perhaps take place in mid-March) it would be helpful that the parties discuss the need to establish an accurate, transparent and clear record on the above issues. The Alliance requests a specific discussion focused on the archaeological surveys conducted for the Cape Wind environmental review. Again, it is not obvious from reading the two DEISs and the FEIS that a "thorough evaluation" of archaeological resources on Horseshoe Shoal has been completed. The Alliance would also appreciate knowing the Wampanoags' wishes about additional field study.

Furthermore, MMS needs to address the issues raised by SHPO Simon and Mr. Jarvis. Their concerns were not completely answered by PAL's memorandum. The Alliance is especially interested in an open discussion of alternative sites such as deepwater locations. The Alliance agrees with SHPO Simon that moving Cape Wind to a deepwater site would eliminate the adverse impacts on historic and cultural resources. A deepwater site would also eliminate many other conflicts. As indicated in the Blue H press release, the floating platform system has the promise of being less costly, which was a key determinate in the MMS alternative site analysis. An objective analysis of Horseshoe Shoal versus a deepwater site should result in the conclusion that the deepwater project is less expensive.

Finally, the Alliance will be prepared to discuss the sea view from Massachusetts Avenue, West Yarmouth, and present accurate information that will demonstrate that PAL's Figure 1 is incorrect.

Thank you for your consideration. The Alliance stands ready to meet again to continue the Section 106 historic preservation consultation process.

Sincerely,



Glenn G. Wattley
President and CEO

Attachments

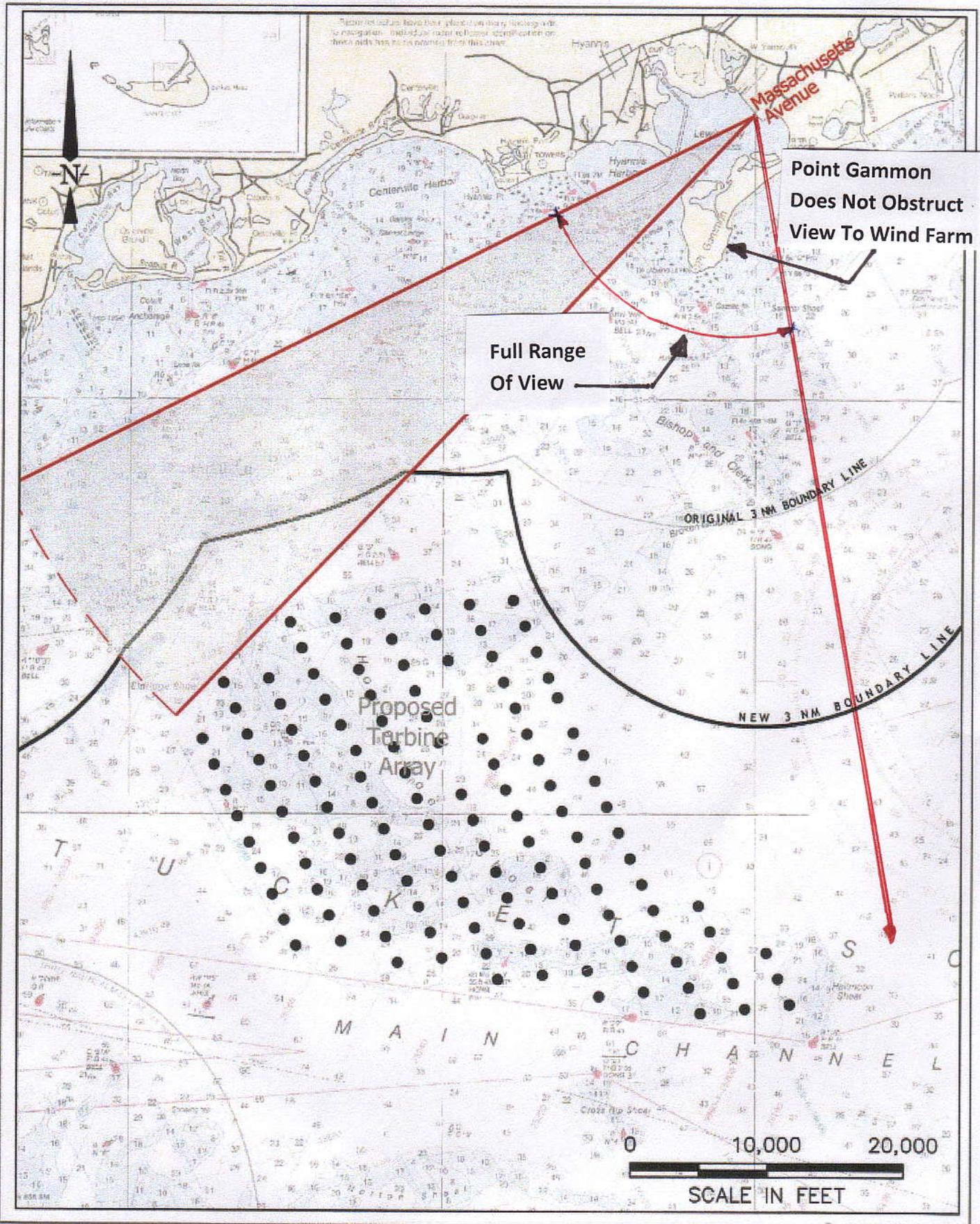
Cc: John Eddins, Advisory Council on Historic Preservation (ACHP)
Brona Simon, MA Historical Commission
Anne Lattinville, MA Historical Commission
Cheryl Andrews-Maltais, Chairwoman, Aquinnah Wampanoag Tribe of Gay Head
Bettina Washington, THPO, Wampanoag Tribe of Gay Head
George Green, Mashpee Wampanoag Tribe
Bill Bolger, National Park Service
Secretary Ian Bowles, Massachusetts EEA, Attn: MEPA Aunt
Karen Adams, U.S. Army Corps

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James T. Kardatzke, U.S. DOI Bureau of Indian Affairs
Roberta Lane, National Trust for Historic Preservation
Elizabeth Merritt, National Trust for Historic Preservation
Conrad C. Lautenbacher, Jr. NOAA
Craig Olmsted, Cape Wind, LLC
Sarah Korjeff, Cape Cod Commission
Jim Powell, Martha's Vineyard Commission
Andrew Vorce, Nantucket Planning and Economic Development Council
Charlie McLaughlin, Town of Barnstable
Patty Daley, Town of Barnstable
Suzanne McAuliffe, Town of Yarmouth
John Cahalane, Town of Mashpee
Sandra Fife, Town of Dennis
Peter Bettencourt, Town of Edgartown
Roger Wey, Town of Oak Bluffs
John R. Bugbee, Town of Tisbury
Libby Gibson, Town of Nantucket
James Merriam, Town of Harwich
Ronald Bergstrom, Town of Chatham
Carey Murphy, Town of Falmouth
John Brown, THPO, Narragansett Indian Tribe
Bruce Bozsum, Chairman, Mohegan Indian Tribe
Michael J. Thomas, Chairman, Mashantucket Pequot Tribe
T. Destry Jarvis, ORAPS, LLC
Victor Mastone, Board of Underwater Archaeological Resources
Reid J. Nelson, Advisory Council on Historic Preservation
Falmouth Historical Commission
Yarmouth Historical Commission
Mashpee Historical Commission
Barnstable Historical Commission
Nantucket Historic Commission
Edgartown Historical Commission
Oak Bluffs Historical Commission
Chatham Historical Commission
Massachusetts Coastal Zone Management
Neil Good, Interested Party

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DATE: Feb 03, 2009 - 2:57PM
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Cape Wind Associates, LLC
Cape Wind Project

Source: APNS Modification of ESS Graphic

Massachusetts Avenue, West Yarmouth
Field of View Through Hyannis Harbor
And Over Point Gammon

Figure
1



Figure 2
View from Massachusetts Avenue, West Yarmouth over Point Gammon



December 30, 2008

Transmitted via Overnight Delivery

The Honorable Randall B. Luthi
United States Dept. of the Interior
Minerals Management Service
Washington, D.C. 20240

RE: Section 106 Consultations; Release of Cape Wind Final Environmental Impact Statement

Dear Director Luthi:

I am writing in reference to a December 19, 2008 *Boston Globe* article (enclosed) that reported the Minerals Management Service (MMS) will not release the Cape Wind Final Environmental Impact Statement (FEIS) in 2008. It implies the release will be in early 2009, the delay caused in part by the U.S. Coast Guard's revised schedule to submit by January 15, 2008 the Commandant's final recommendations for navigational safety terms and conditions for the proposed Cape Wind lease in Nantucket Sound.

The *Globe* report raises a serious concern around MMS' plans for the FEIS release. I would greatly appreciate receiving a response to the following question: Is it MMS' plan to release the FEIS prior to completion of both tribal and historic preservation Section 106 consultations required under the National Historic Preservation Act (NHPA) and other relevant laws?

I enclose for your perusal a December 17, 2008 letter from the Advisory Council on Historic Preservation (ACHP) to Dr. Rodney E. Cluck, MMS Cape Wind Project Manager. This letter makes clear a very critical point, namely that Council on Environmental Quality (CEQ) regulations require a Record of Decision (ROD) to reflect that the Section 106 process has been fully completed and that actions to avoid or minimize harm from the selected alternative have been taken. ACHP goes on to observe that the Section 106 consultation process for the Cape Wind proposal is not complete at this time although indications are that an FEIS and subsequent ROD will soon issue from MMS, likely foreclosing on ACHP's opportunity to comment on the project and the consultation process. This scenario is of great concern to us as the cultural and historic resources that characterize Nantucket Sound deserve the fullest consideration provided by federal law, and the review process must not be short-circuited.

As ACHP documents, MMS held initial meetings in July, and subsequently on September 8th for tribal discussions, and September 9th with all consulting parties for historic preservation discussions. Despite verbal promises, MMS did not hold any meetings in October, November, or December, although there was a general willingness of the parties to meet subject to adequate notice by MMS.

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Additionally, I enclose a December 2, 2008 letter addressed to Dr. Cluck from Cheryl Andrews-Maltais, Chairwoman of the Wampanoag Tribe of Gay Head, Aquinnah. This letter confirms the ACHP observation/position that the Section 106 tribal consultation is not complete. Chairwoman Andrews-Maltais also states, "We also do not consider the actions of [MMS] to be compliant with the Federal Laws, Regulations and Executive Orders" that pertain to Section 106 consultation for sovereign nations.

Yesterday afternoon the consulting parties were notified of a Section 106 consultation meeting scheduled for the end of January, after the Bush Administration leaves office. Therefore the question becomes, will release of the FEIS be held off until the Section 106 process is in fact finished, or will MMS move ahead with the FEIS despite the glaring gap in completion of the NEPA and NHPA review processes? Given the strength of the letters from the ACHP and the Wampanoag Aquinnah Tribe, it would appear disingenuous and a clear abrogation of responsibility under the National Environmental Policy Act and NHPA processes for MMS to complete and release the FEIS prior to completion of the Section 106 tribal and historic preservation consultations.

If you would like to discuss this matter in person, I would be most willing to travel to Washington, DC to meet at your office. Also, as a consulting party for historic preservation, the Alliance to Protect Nantucket Sound stands ready to meet in January for another Section 106 meeting, as has been proposed.

Thank you very much for your anticipated responses to the above questions.

Sincerely,



Glenn G. Wattle
President and CEO

Enclosures

Cc: Honorable Dirk Kempthorne, Secretary, Department of the Interior
Honorable David L. Bernhardt, Solicitor, Department of the Interior
Honorable C. Stephen Allred, Minerals Management Service
Rodney C. Cluck, Ph.D., Program Manager, Minerals Management Service
Melanie Stright, Ph.D., Mineral Management Services
Senator Edward M. Kennedy
Senator John F. Kerry
Representative William D. Delahunt
Representative Nicholas Rahall
James L. Connaughton, Chairman, White House Council on Environmental Quality
George Skibine, Principal Deputy Assistant Secretary, Bureau of Indian Affairs

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Roger Wey, Town of Oak Bluffs
John R. Bugbee, Town of Tisbury
Libby Gibson, Town of Nantucket
James Merriam, Town of Harwich
Ronald Bergstrom, Town of Chatham
Carey Murphy, Town of Falmouth
John Brown, THPO, Narragansett Indian Tribe
Bruce Bozsum, Chairman, Mohegan Indian Tribe
Michael J. Thomas, Chairman, Mashantucket Pequot Tribe

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Final Cape Wind review held until '09

The Boston Globe

By Bina Venkataraman, Globe Correspondent | December 19, 2008

The federal Minerals Management Service expects to delay issuing its final environmental review of the Cape Wind project in Nantucket Sound, previously expected by the end of the year, into 2009.

The new timetable means that the nation's first proposed offshore wind farm almost certainly will not gain final federal approval before the Bush administration leaves office Jan. 20.

Nicholas Pardi, spokesman for the agency, told the Globe last night that it does not "anticipate publishing [the review] by the end of the year."

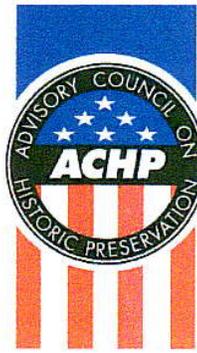
The delay comes after the Coast Guard, on the heels of a request by Representative James Oberstar of Minnesota, decided to further review and hold a public comment period on a study it commissioned in October to evaluate the 130 turbines' impact on ship radar. The Coast Guard has provided the Minerals Management Service its findings but has said it will not give its final recommendations until after Jan. 15. Earlier this month, Coast Guard Captain Raymond Perry said any impact Cape Wind had on navigation could be mitigated.

Yesterday, the two senators from New Mexico, Democrat Jeff Bingaman, chairman of the Energy and Natural Resources Committee, and Pete V. Domenici the committee's ranking Republican, wrote Interior Secretary Dirk Kempthorne and Randall Luthi, director of the Minerals Management Service, urging the agency to release its final environmental review without delay.

They pointed out that the Coast Guard recommendations ordered by law on the navigational safety of Cape Wind had been submitted in August 2007 and that additional navigational safety standards for offshore renewable energy projects were not required.

After the final environmental review is released, the interior secretary must wait 30 days before entering a decision on the project, expected to include terms for a lease.

Audra Parker - executive director of the Alliance to Protect Nantucket Sound, the group that has been the primary opponent of Cape Wind - said: "I think it's a recognition by [the Minerals Management Service] that there are many outstanding issues around public safety and tribal and historical consultation that have yet to be addressed." ■



Preserving America's Heritage

December 17, 2008

Dr. Rodney E. Cluck
MMS Cape Wind Project Manager
Minerals Management Service
381 Elden Street
Herndon, VA 20164

Ref: *Proposed Cape Wind Energy Project*
Nantucket Sound, Massachusetts

Dear Dr. Cluck:

The Advisory Council on Historic Preservation (ACHP) would like to provide the following observations and advice to the Minerals Management Service (MMS) regarding its efforts to comply with Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations, "Protection of Historic Properties" (36 CFR Part 800), for the referenced undertaking. Pursuant to the Energy Policy Act of 2005, the MMS is charged with primary responsibility for environmental analysis and regulatory oversight for renewable energy projects on the Outer Continental Shelf (OCS), including the referenced undertaking. As a result, the MMS has assumed primary responsibility for compliance with Section 106 of the NHPA for this undertaking. The ACHP provides these observations pursuant to Section 36 CFR 800.9(a) of our regulations.

According to recent press reports, the MMS may be considering issuing the Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) for this undertaking prior to the end of December 2008. It is the opinion of the ACHP that the Section 106 process must be completed prior to or concurrent with the signing of a ROD. Section 106 of the NHPA instructs the Federal agency to take into account the effect of the undertaking on any property that is listed in or eligible for the National Register of Historic Places "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license." 16 U.S.C. § 470f (emphasis added). This statutory language makes it clear that a Federal agency must complete its Section 106 responsibilities before ("prior to") reaching its final decision ("approval," "issuance") on an undertaking.

According to the Council on Environmental Quality's (CEQ) regulations, a ROD "shall state . . . what the decision was . . . [and] . . . whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not." 40 C.F.R. § 1502.2 (emphasis added). When a ROD is released, the agency's final decision on an undertaking has been made and the ROD officially states what that agency's final decision "was." In order to fit into the Section 106 timeframe, the ROD should be issued concurrent with

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or after the completion of the Section 106 process. As you know, the execution of a Section 106 agreement, such as a Memorandum of Agreement or Programmatic Agreement, prior to the issuance of a ROD would give the agency this completion. For the reasons stated above, we encourage the MMS to consider the implications of the proposed timing of its issuance of a ROD and to complete the Section 106 process prior to signing the ROD. If the MMS proceeds with issuance of a ROD prior to the conclusion of the Section 106 process, the ACHP must then consider if this action has foreclosed the ACHP's opportunity to comment.

Prior to the enactment of the Energy Policy Act, the Corps of Engineers (Corps), New England District (NAE) was the lead federal agency for the Section 106 consultation related to this undertaking. The ACHP formally entered into the Section 106 consultation with the Corps for the undertaking in March of 2005 upon its determination that the project would adversely affect historic properties on or eligible for the National Register of Historic Places. Since assuming responsibility for renewable energy projects on the OCS, MMS has taken initial steps to take into account the effects of the referenced undertaking on historic properties by requiring a re-analysis of the findings of historic property identification studies conducted by the Corps, by the publication of a Draft Environmental Impact Statement (DEIS) for the Cape Wind project, and in the solicitation of public comments. In the DEIS, MMS recognized adverse effects to three historic properties. A number of consulting parties responded to the DEIS with concerns about how the MMS had been meeting its Section 106 responsibilities to date, specifically with several issues outlined below.

In July 2008, ACHP staff met with MMS staff to discuss the status of the Section 106 process for the undertaking. At that time, the ACHP reminded MMS that the agency needed to continue through the steps of the Section 106 process, in consultation with the Massachusetts State Historic Preservation Officer (SHPO), interested federally recognized Indian tribes (tribes), and other consulting parties to identify and evaluate historic properties, assess effects, and negotiate the resolution of adverse effects. We also reminded MMS that it must provide the public with substantive information about the undertaking and its effects on historic properties, and seek and consider public comment and input. At that meeting, ACHP noted the concerns expressed by consulting parties, about:

- 1) the consideration of alternatives that could remove or lessen potential for adverse effects to historic properties including several National Historic Landmarks (NHLs);
- 2) the definition of the Area of Potential Effects (APE) and the scope of the effort to identify historic properties that might be affected by the undertaking;
- 3) the need to consult with interested tribes on a government-to-government basis and consider concerns they have about effects on potential historic properties of religious and cultural importance; and
- 4) the need to resolve the discrepancies between the determinations made by the Corps, the conclusions of the current MMS DEIS about the number of identified historic properties and determination of effect, and additional concerns of stakeholders and the interested public.

Subsequent to our meeting in July, MMS held a Section 106 consultation meeting for interested tribes on September 8, 2008, and a consultation meeting for all consulting parties on September 9, 2008. ACHP did not attend these initial meetings, but it is our understanding that the purpose of the meetings was to outline the status of the Section 106 process at that point, outline the steps ahead, and request consulting party input on the identification of historic properties and the assessment of effects as presented in the DEIS. Follow-up consulting party meetings were tentatively scheduled for October, November, and December, but have been cancelled each time

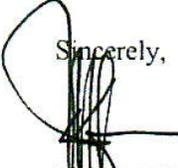
and now are planned sometime in early 2009. Based on recent information, it appears that MMS is considering accepting the effect determinations previously made by the Corps and is also considering additional recommendations about the identification of historic properties and effects made by consulting parties and other stakeholders. This is a positive development.

Following review of materials available to us, the Section 106 process for this undertaking appears to be still at the stage of identification of historic properties that might be affected by the undertaking as set forth in 36 CFR Section 800.4(b) and 800.4(c). According to our regulations, the federal agency must make a "reasonable and good faith effort" to carry out appropriate identification efforts. The agency determines the scope of this effort, in consultation with the appropriate SHPO/THPOs. Notwithstanding the information presented in the DEIS, MMS has yet to formally document its APE to the Massachusetts SHPO and other consulting parties, and identify historic properties within that APE that might be affected by the undertaking. By making formal determinations about the APE, historic properties identified, and effects, the agency sets in motion a series of steps, each with a specific time frame, that allow for formal response from SHPO/THPO and other consulting parties. These initial steps are necessary in order to move toward resolution of the Section 106 process.

We are well aware that MMS is breaking new ground in its effort to assess the effects on historic properties of construction and operation of wind turbine farms in open waters on the OCS. There is limited precedent to be relied on for making determinations about the nature and significance of effects to historic properties, over varying distances, in open seascapes, from temporary structures of this nature. There are also inherent difficulties in identifying and evaluating archaeological sites that might be located below the surface of the ocean floor. As you know, Section 106 of the NHPA does not require Federal agencies to preserve all historic properties, or even avoid adverse effects to such. Rather, it requires that Federal agencies take into account the effects of undertakings on historic properties and attempt to resolve adverse effects, by following the steps of the Section 106 process as set forth in 36 CFR part 800. Because of the unique nature of this type of undertaking, located in this type of setting, MMS may want to consider the utility of developing, in consultation with appropriate stakeholders, a program alternative, pursuant to 36 CFR 800.14, to govern the Section 106 process for future undertakings of this kind. Such an alternative could provide predictability, facilitate the delineation of an appropriate APE, streamline the scope of identification efforts, and provide guidelines for adequate assessment of effects to identified historic properties. The Section 106 consultation for the current undertaking will provide valuable lessons learned that could be applied to the development of a program alternative.

The ACHP looks forward to further assisting the MMS, Massachusetts SHPO, and other consulting parties during the Section 106 process for this undertaking. To facilitate our ongoing involvement, we request that we be copied on all documents and communications relating to the effects of this undertaking on historic properties and properties potentially eligible for inclusion on the NRHP. Should you have any questions or wish to discuss this matter further, please contact Dr. John T. Eddins at 202-606-8553, or by email at jeddins@achp.gov.

Sincerely,



Don L. Klima
Director
Office of Federal Agency Programs



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December 2, 2008

Dr Rodney Cluck
Minerals Management Service
E-Mail: rodney.cluck@mms.gov

Re: Cape Winds Consultation

Good Evening Dr Cluck,

I am writing to inquire as to the validity of several news reports that I am hearing stating that Minerals Management Service (MMS) has completed their investigations and consultations, and will be making their recommendation for the Final Environmental Impact Statement for the Cape Winds Wind Farm within the next week or so. And, that the timeline has been fast-tracked from the 2009 ranges, initially presented to the stakeholders at the initial meetings held in Boston. It is my understanding the stakeholders meeting scheduled for December 15th, 2008 has been postponed until further notice, deepening our concerns.

I have inquired with our Tribal Historic Preservation Officer, Bettina Washington if there had been any response to our comment letter of April 21, 2008, or if your office had begun any meaningful consultation with our office, or if MMS had resumed any contact with us under Section 106 of the National Historic Preservation Act 36 CFR Part 800 or Executive Order 13175 regarding true and meaningful Government to Government Consultation. Her response was simply that there had been no additional consultative meetings and that the "stake holder's" meeting had been cancelled by MMS stating "due to a lack of participation".

It is also my understanding that there has been no further discussion or acknowledgement regarding the agency's considerable responsibility and obligation; to preserve the physical integrity of our Sacred Site; the Eastern Vista View-Shed, and our right to our Religious and Spiritual practices, as identified and defined in Executive Order 13007 and the American Indian Religious Freedom Act.

Additionally, there has been no further discussion regarding our position that the submerged archeological resources and suspected Ancestral burials may be destroyed; and most certainly will be adversely effected by this undertaking. Including the fact that there has been no discussion and or plan to protect or mitigate this situation as prescribed under Section 106 and or Archeological Resource Protection Act.

We are also waiting a formal response to our feasible alternative questions, and the complete record of decision (ROD) up to this point, regarding how and when; MMS fully vetted the recommendation of floating wind turbines, which could be located 25 miles or more off shore, in much more consistent and sustainable winds, not adversely impacting our underwater archeological resources and burials, out of site by the naked eye, out of shipping lanes, out of flight paths and out of avian and marine migratory patterns, which we consider a feasible alternative to the proposed site, scope and size of the proposed wind farm project.

Plus, we are still waiting for a discussion and response to our question regarding the regulatory issue; or actual lack of final regulations, the public benefit for taking our natural resource and public lands away from the citizens, and giving or leasing these shallow waters to a private corporation for private use and private profits.

With all of these issues still unresolved and all of our questions still unanswered, and our requests for additional consultation meetings un-accommodated, I find it hard to imagine that Minerals Management Service would consider any accelerated or premature final decisions. Two meetings at our Tribal Office with a brief lunch at a tourist spot at the Gay Head Cliffs; in our opinion does not fulfill the spirit and intent of meaningful government to government consultation as required by Federal Law.

In closing we state for the record, The Wampanoag Tribe of Gay Head (Aquinnah) did not consider the consultation process complete or concluded, as defined under Section 106 of the National Historic Preservation Act (as Amended) under 36 CRF Part 800. And we do not consider "stakeholder" meetings to be Government to Government Consultation as prescribed by and expected under this Federal Law.

We also do not consider the actions of Minerals Management Service to be compliant with the Federal Laws, Regulations and Executive Orders as identified above and all other related laws, regulations and Executive Orders previously referenced. Nor do we consider Minerals Management Services actions or consultation process consistent with the spirit and intent of each and everyone of the Federal Laws, Regulations and Executive Orders related to the respect, protection and preservation of American Indian Sacred Sites, Traditional Cultural Places, Spiritual and Religious Sites, Places of Spiritual, Religious, Traditional or Cultural Significance, or the basic Trust Responsibility held by all Federal Agencies. And we further assert that Minerals Management Service has deliberately dismissed our previous statements and concerns, as well as failed to address our Traditional, Cultural and Religious beliefs with any proprietary level or respect.

It makes me question why MMS or any of its agents would make a determination to contradict or attempt to overrule a Federally Recognized Indian Tribe's declaration as to the Cultural Significance of our Traditional Cultural Property? And it appears that the evidence upon which the MMS drew its conclusion and buried our concerns in the initial Draft Environmental Impact Statement, omitted some key elements such as: near locational site visits and especially the oral testimonial evidence offered by the Traditional, Cultural and Ceremonial Leaders of our Nation, and other the Indian(s) Nations directly and adversely affected. And the agency seemed to further ignore certain aspects of other related laws, statues and regulations which respects the Tribes, our Culture and Traditions including our Religious and Ceremonial beliefs, which also upholds our rights; and attempts to fulfill the Trust Responsibility of the Federal Agency in the execution of their responsibility in a Federal Undertaking.

Therefore, at this time we are asserting our rights under the National Historic Preservation Act Section 106, 36 CFR Part 800 to call upon the Advisory Council on Historic Preservation to review, and advise upon the consultation process as undertaken by Minerals Management Service thus far, to determine if it has been compliant with the Act and the process as required under the law.

With all due respect, I would request that Minerals Management Service please respond in writing within the next ninety (90) days, to address our concerns and answer the comments, questions and concerns we offered in this letter and our written comment letter dated April 17th, 2008 also attached.

I am hopeful that Minerals Management Service like all other Federal Agencies lives up to its responsibilities and complies with all applicable Federal Laws, intended and expected by all Americans, including those of us who are the Indigenous Americans.

Kutaputush (Thank You)

Cheryl Andrews-Maltais

Cheryl Andrews-Maltais
Chairwoman



October 6, 2008

Melanie Stright, Ph.D.
Federal Historic Preservation Officer
Minerals Management Service
U.S. Department of the Interior
381 Elden Street
Herndon, Virginia 20170

Rodney E. Cluck, Ph.D.
Cape Wind Project Manager
Minerals Management Service
U.S. Department of the Interior
381 Elden Street, Mail Stop 4042
Herndon, Virginia 20170

Dear Drs. Stright and Cluck:

This letter is in response to MMS's grant of a 30-day comment period for consulting parties under section 106 of the National Historic Preservation Act (NHPA) regarding the adverse impacts of the proposed Cape Wind Project in Nantucket Sound. The Alliance to Protect Nantucket Sound (APNS) appreciates this opportunity to express in writing our continuing deep concerns, both with the flawed adverse effects analysis process to date on thousands of historic properties on the Cape and Islands and with the ambiguity as to the process that MMS will follow for section 106 and National Environmental Policy Act (NEPA) compliance.

We also appreciate the two meetings of the consulting parties that have been held by MMS to date. These meetings have just begun to define the key issues. We urge that you provide all of the consulting parties with a clear, detailed schedule of forthcoming meetings. Sufficient advance notice as to the exact date and location of each meeting affects the number of participants who are able to appear in person at the meeting. With regard to the last meeting, the notice letter was date-stamped August 27, but it was not electronically transmitted (via email) to several of the consulting parties until September 3, for a meeting on September 9. This is not sufficient notice.

Historic preservation is an issue of great concern to all of the towns, Islands, Tribes, businesses, and organizations in the Cape region, where the quality of life is deeply dependent on the heritage tourism and recreation-based economy that is threatened by the location of the Cape Wind project. We encourage MMS to engage in outreach to each consulting party to maximize participation in this important issue.

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On September 9, you specifically requested that the consulting parties comment on two elements of the MMS consideration of adverse effects on historic properties caused by the Cape Wind Project's location in the middle of Nantucket Sound:

- Comments on the differences between the evaluation procedures, criteria and methodologies used by your contractor, TRC, and those used by the Army Corps of Engineers' (ACOE) contractor, PAL, for that agency's earlier DEIS, and a recommendation as to which is preferable as MMS carries out the section 106 compliance process; and
- Identification of specific historic properties in the Cape and Islands region that could be affected by Cape Wind, but were left out of the adverse effects analysis to date.

In response to these questions, the key matter is what constitutes an "adverse effect." The methodology used by MMS must be sufficient to identify these effects. As defined in 36 C.F.R. § 800.5:

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 in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register.

Examples of adverse effects noted in this section that apply to the Cape Wind project are "[c]hange of the character of the property's use or of physical features within the property's setting that contribute to its historic significance" (36 C.F.R. § 800.5(a)(2)(iv)) and "[i]ntroduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant features" (36 C.F.R. § 800.5(a)(2)(v)). In almost all cases of historic properties affected by the Cape Wind project, those significant factors at issue are setting, visual/atmospheric/audible elements, and historic association.

Before addressing these two questions, we note that the PAL approach adopted by the ACOE was not itself adequate for NHPA compliance. While it was not as flawed as the current MMS/TRC approach, it should not be assumed that simply adopting the PAL methodology will result in NHPA compliance. Our comments on why the ACOE NHPA compliance effort failed to meet the relevant legal standards are set forth in Exhibit 1.

APNS believes that the TRC¹ criteria and methodology for consideration of effects on historic properties are seriously in error, and do not comply with the guidelines and regulations laid out

¹ The Alliance continues to object to the role of TRC in EIS preparation and NHPA compliance. As noted in previous correspondence, TRC has a business interest in promoting wind energy and

by the Advisory Council on Historic Preservation (ACHP) for application to such projects. In particular, the TRC choice of nine miles distance from the Cape Wind preferred site as the break point between possible visual effects, was arbitrary, and is not supported by any NHPA precedent or factual basis. From the point of view of APNS, it appears this particular distance was chosen by TRC based on the fact that the Nantucket Island National Historic Landmark District is just over nine miles from the project site, and not by any substantive criteria that can be supported or sustained under ACHP standards and guidance. This kind of result-oriented standard-setting violates NHPA.

PAL, on the other hand, did not use a “distance from” criteria, and found that the Nantucket Island National Historic Landmark District *would be adversely affected* by the location of the Cape Wind project in the preferred site. PAL criteria and methodology in this instance is clearly preferable, and meets the ACHP procedural standard for such evaluation. By definition, a site designated as a National Historic Landmark has been recognized to be nationally significant at the highest level of the US government, and is therefore intended to be given the most serious consideration of potential adverse effects when projects like Cape Wind could affect its integrity of setting, feeling, and association which are key component of its historical significance. (*See* 36 C.F.R. § 800.10, special requirements for protecting National Historic Landmarks).

A second critical error in the TRC methodology is the determination to use “percent affected” as a criterion for determining visual effects on historic properties. Arbitrarily choosing any particular percentage of historic properties within a historic district and judging the district to not be affected when this percentage is all that is affected, is not compliant with ACHP guidance, or with ample precedent in similar procedures. The standard guidance from ACHP, affirmed in the September 9 meeting by the Massachusetts Historical Commission, with abundant precedential support, is that *if any historic property within a historic district is adversely affected, then the district as a whole is adversely affected.*

Overall, while it is true that ACHP guidance and precedence leave each administering federal agency with discretion in deciding the scope of section 106 compliance, it is clearly intended that every agency take full and thorough measures to assure that its analysis, in identifying and determining impacts on historic properties, is professionally conducted.² To date, this has not

offshore renewable energy development and should be disqualified from work on this project. In addition, MMS procedures in the selection of TRC failed to satisfy the federal guidance set forth by the Council on Environmental Quality. It also appears that TRC is not technically qualified to perform the role of NHPA contractor. APNS requests that MMS remove TRC from this role and initiate a process to solicit a new contractor, in accordance with federal requirements and guidance.

² Case law has consistently recognized the “stop, look, and listen” intention of the section 106 regulations and the requirement that an agency must adequately and sufficiently identify and evaluate historic properties through consultation with interested parties. *Attakai v. United States*, 746 F. Supp. 1395, 1406-1407 (D. Ariz. 1990) (noting that while the agency remains responsible for determining whether further investigative or evaluative steps are needed, “[w]ithout consultation with the SHPO or reference to other available information, the [agency] has no

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been the case with regard to TRC performance on the Cape Wind section 106 compliance procedures and methods. Consequently, APNS strongly urges that MMS re-initiate the entire visual effects analysis, incorporating all of the professional standards recommended by the ACHP, and covering all of the historic properties on the Cape and Islands, not just limiting the analysis to those properties already listed on the National Register of Historic Places. ACHP guidance to federal agencies certainly contemplates that each agency will thoroughly evaluate/inventory all of the historic properties that may be affected by federal undertakings or permits, and not just those already given recognition. (36 C.F.R. § 800.4).

Attached to this letter as Exhibit 2, is a *sample* list of historic properties that were left out of the TRC analysis, either because of their flawed criteria, or because TRC, by not having done its own inventory of historic properties, did not know of their existence. To be clear, this list is not comprehensive, but merely representative of the flaws in the current analysis. It is the responsibility of MMS and its contractor to conduct a thorough inventory of historic properties as a first step, to evaluate their eligibility for National Register listing, and then to apply the appropriate, accepted criteria and standards to evaluate and assess effects. (36 C.F.R. § 800.5). We greatly appreciate your statement in the meeting of the consulting parties on September 9 that MMS intends to “re-consider” the TRC decision of “no adverse effect” of the Cape Wind Project on the Nantucket Island National Historic Landmark District. For this reconsideration to occur under proper ACHP guidelines, it will require that the analysis be done by experienced professionals, ones with extensive prior work on visual effects to historic properties, which will necessitate a contractor other than TRC. In addition, as noted above, merely reconsidering Nantucket Island is not enough. MMS must conduct the comprehensive analysis of all listed and eligible properties, as required under the NHPA and its regulations.

A standard element of any effects analysis that meets the ACHP guidance is the due consideration of the overall *setting* of the historic property, and the important contribution that the setting makes to the public understanding and appreciation of the historic significance of the property. The quality of the setting is also essential to public enjoyment of the site, and thus to the substantial benefit that the preservation of these historic properties provides to the economy of the Cape region. Again, it appears that the TRC assessment criteria were flawed, by failing to give appropriate consideration to the setting – the cultural landscape and seascape of the Cape and Islands that contribute essential elements to the historic significance of the individual

reasonable basis under the regulations to determine what additional investigation aside from a survey may be warranted, or the reasonable scope of the survey.”); *see also Pueblo of Sandia v. United States*, 50 F.3d 856, 860 (10th Cir. 1995) (holding that the agency responsible for the section 106 process did not make a sufficiently reasonable effort, as required under the regulations, because it failed to pursue information provided by a consulting party about a property possibly eligible for the National Register); *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1438 (C.D. Cal. 1985) (the reviewing agency must consider all potential historic properties that may be impacted under the section 106 process, stating that “[t]he importance and significance of the property are a reflection of its interest to the general public and the scientific community. The value is not enhanced because it is in the National Register or determined eligible for inclusion in the National Register by the Secretary of Interior.”).

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historic properties and districts. TRC significantly modified PAL's description of Nantucket Sound. PAL considered an open unobstructed view of the water to be an integral component of the historic landscape of the subject properties; thus adverse effects were assessed whenever wind turbine generators could be within the seascape view. TRC used the single word 'ocean' as being an important component of the setting, but did not consider the ability to view the wind turbines as necessarily constituting an adverse effect. Excluded from TRC's overly simplistic definition are factors critical to setting, such as the visual effects of the Cape Wind project from vistas, vantage points, or sites (coastal bluffs, ferry boats, etc.) that offer perspectives both on the cultural setting and the Cape Wind project site while not being part of a historic property itself. We strongly urge that MMS ensure any re-consideration of visual effects take this perspective into account.

In addition to the comment topics requested by MMS, APNS is compelled to comment once again on three additional topics that lie at the core of the proper review of the Cape Wind proposal. First, we continue to seek assurance from MMS that the agency's generic regulations covering all offshore energy development matters will be finalized *before* a Record of Decision is signed on Cape Wind, *and fully applied to the review and analysis of the Cape Wind project following a supplemental comment period.* As the Nation's first offshore wind energy project to come before MMS, application of the programmatic regulations following additional public review is essential to protecting the public interest.

Second, we note that NHPA section 106 compliance must be completed, and the findings applied, to the NEPA compliance analysis in the Final Environmental Impact Statement. The legal requirements to include a full analysis of impacts on historic properties, such as can only be achieved through completion of a comprehensive section 106 procedure, as is clear from NEPA, the NEPA regulations, and case law:

- The NEPA statute itself, at section 101(b)(4), provides as one of its declarations of environmental policy that the federal government has an *affirmative duty* to "preserve important historic, cultural and natural aspects of our national heritage".
- The CEQ NEPA regulations state that "[e]ffects and impacts as used in these regulations are synonymous." (Section 1508.8). That same section states that among other things, effects include historic and cultural effects and impacts.
- In defining the term "human environment", the CEQ NEPA regulations at section 1508.14 state that when an EIS "is prepared and economic or social and natural or physical environmental effects are interrelated, then the [EIS] will discuss all of these effects on the human environment."
- NEPA case law reflects these points recognizing the consideration of historic and cultural impacts in NEPA documents. *See, e.g., Morris County Trust For Historic Preservation v. Samuel Pierce, Secretary of HUD*, 714 F.2d 271 (3rd Cir. 1983); citing *Preservation Coalition v. Pierce*, 667 F.2d 851 (9th Cir. 1982); *Wisconsin Heritages, Inc. v. Patricia Harris, Secretary, HUD*, 490 F.Supp. 1334 (E.D. Wis. 1980).

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- The ACHP regulations call upon agencies to address NEPA/NHPA coordination at the front-end of an EIS process, not late in the game and under the kind of time constraints MMS appears to be imposing. As stated in 36 C.F.R. § 800.8: “[a]gencies should consider their section 106 responsibilities *as early as possible in the NEPA process* and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner.” (Emphasis added).

Based on the foregoing, it is not legally permissible to complete a sufficient EIS without the information developed pursuant to the section 106 process. How else can the public be assured that MMS has duly considered all impacts and alternatives? The impact of a proposed action on historic properties and cultural resources must be considered in an EIS. Such an analysis cannot possibly occur unless, as a starting point, the action agency identifies the affected properties and, as a second step, evaluates the impact of the proposal on those properties and, as a third step, evaluates alternatives that would avoid the adverse effects. MMS has not completed any of these steps for the Cape Wind EIS. This issue is discussed in depth in the APNS DEIS comments, at pages 145 – 152 and 220 – 224, and through expert testimony in Appendix 20, 22 and 30. We appreciate your statement that the section 106 process must be completed before the Record of Decision can be signed, but in addition, MMS must note that to satisfy NEPA, the section 106 information and findings must be fully considered in developing the FEIS. Indeed, because of the gross deficiency of the DEIS on this issue it is necessary to hold a supplemental comment period on that document once it has been revised to adequately address historic and cultural impacts.

The third additional topic we wish to address by way of this letter is the statement MMS made in the September 9 meeting that, while it is technically possible for the agency to choose one of the alternate locations described in the Cape Wind DEIS, since there is no license applicant for any alternate site, selection of any such alternate site would not result in a viable wind energy project. Further, MMS conceded that it has not developed the depth of data, through research or analysis, for any of the alternate sites that has been done for the applicant’s preferred site.

Under NEPA and section 388 of the Energy Policy Act of 2005, MMS has clear authority to not only deny the request for Horseshoe Shoal, but also to approve the request for an alternative site, subject to further study *and* upon a decision by this applicant to proceed at the more acceptable location. The all-or-nothing approach described by MMS does nothing more than create incentive for an applicant to limit the availability of information on alternative sites and to “dig in” for its preferred site, regardless of the negative effects. That is precisely what Cape Wind has done. MMS can easily advance the interests of offshore renewable energy development, environmental protection, and historic preservation by undertaking the consensus-based management required by Department of Interior regulations and policy and identifying a community-preferred alternative that Cape Wind could develop.

Finally, we wish to point out that more often than not, when a federal agency undertakes approval of a project that requires compliance with section 106, new or additional historic sites are determined to be eligible for listing on the National Register. In anticipation that the MMS will undertake such an approach, APNS is prepared to recommend, and to work with MMS to

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affirm, that the entirety of Nantucket Sound - the seascape itself - is eligible for listing on the National Register, and is likely to be found nationally significant. A professionally conducted historic site inventory should consider and develop such a recommendation.

Again, we appreciate this opportunity for the consulting parties to communicate our issues and concerns in writing to MMS during this critical re-consideration phase. We look forward to continuation of the section 106 process, and to meeting with you again in October at the next meeting of the Consulting Parties.

Sincerely,



Susan Nickerson
Executive Director

Encs.

cc: John Eddins, Advisory Council on Historic Preservation (ACHP)
Brona Simon, MA Historical Commission
Ann Lattinville, MA Historical Commission
Bettina Washington, THPO, Wampanoag Tribe of Gay Head
George Green, Mashpee Wampanoag Tribe
Bill Bolger, National Park Service
Karen Adams, US Army Corps
Roberta Lane, National Trust for Historic Preservation
Elizabeth Merritt, National Trust for Historic Preservation
Sarah Korjeff, Cape Cod Commission
Jim Powell, Martha's Vineyard Commission
Andrew Vorce, Nantucket Planning and Economic Development Council
Charlie McLaughlin, Town of Barnstable
Suzanne McAuliffe, Town of Yarmouth
John Cahalane, Town of Mashpee
Peter Bettencourt, Town of Edgartown
Patty Daley, Town of Barnstable
Carey Murphy, Town of Falmouth
Ron Bergstrom, Town of Chatham
Michael Dutton, Town of Oak Bluffs
John Brown, Narragansett Indian Tribe
Bruce Bozsum, Mohegan Indian Tribe
Michael J. Thomas Mashantucket Pequot Tribe
Andrew Vorce, County of Nantucket
Libby Gibson, Town of Nantucket
Neil Good
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the act." *See* S. Rep. No. 92-1159, at 5, *reprinted in* 1972 U.S.C.C.A.N. 4285, 4289. The evidence must show only that the offender was "conscious from his knowledge of surrounding circumstances and conditions that his conduct will naturally and probably result in injury [to protected birds.]" *Id.*; *see also Moon Lake*, 45 F. Supp. 2d at 1074. The BGEPA's civil penalties apply to any violation without regard to knowledge or intent. 16 U.S.C. § 668(b).

It is readily apparent that the energy plant could easily result in the taking or killing of bald eagles. If CWA is allowed to proceed with its plans, it will do so "knowingly" and will thus be liable under the BGEPA for any resulting eagle deaths. *See Moon Lake*, 45 F. Supp. at 1086 (finding that the plain language of the BGEPA, as well as the MBTA, applied to the defendant's failure to protect migratory birds from electrical lines). Thus, in addition to being subject to penalty and injunction under the MBTA, the proposed plant could also violate the BGEPA, subjecting it to penalties of far greater severity than those imposed under the MBTA. *See* 16 U.S.C. § 668(a),(b). Consequently, the unacceptable risk for eagle deaths and the consequent violation of the BGEPA argue strongly against the Corps issuing permits for the energy plant.

4. The Permit Application Must Be Denied Because the Energy Plant Will Adversely Affect Properties Protected Under the National Historic Preservation Act.

The National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470 *et seq.*, and the regulations of the Advisory Council on Historic Preservation ("ACHP"), 36 C.F.R. Part 800, require Federal agencies to consider the effects of their actions on historic properties and to take those effects into account during project planning and implementation. As a Federal agency, the Corps is bound by these obligations and has adopted implementing regulations. 33 C.F.R. Part 325 and Appendix C.

Although the Corps claims to have complied with all federal historic protection laws in its evaluation of the proposed project, the DEIS demonstrates that the project will violate the NHPA and weigh heavily against the public interest by causing adverse impacts to certain historic properties and failing to consider potential impacts to others. For these reasons, the permit application must be denied.

a. Background.

In furtherance of the Corps' review of the proposed project, CWA retained a cultural resource management firm, Public Archaeology Laboratory, Inc. ("PAL"), to conduct an assessment of the visual effects to nearby historic properties that would be caused by the proposed project if located at Horseshoe Shoals. (the "Visual Impacts

Assessment" or "VIA").³⁶ The VIA identified a number of historic properties on Cape Cod, Nantucket and Martha's Vineyard that fall within the area of potential effect for visual effects and assesses the effect on these historic properties.

Based on the PAL report, the Corps concluded that the project will have an adverse effect on 16 properties, including two National Historic Landmark ("NHL") properties – the Kennedy Compound and the Nantucket Historic District – four historic districts, and 10 individual historic properties. *See* DEIS at § 1.0. The Corps also concluded that the project will have no effect on one historic district and three individual properties. *See* DEIS, at § 1.0; PAL Visual Impact Assessment at 42.

On August 11, 2004, the Massachusetts State Historic Preservation Officer ("SHPO") concurred with the Corps' determination that the proposed project will have an adverse effect on the historic properties identified by PAL, including the Kennedy Compound NHL and the Nantucket Island NHL.³⁷ For both NHLs, the Massachusetts SHPO concluded as follows: "The adverse effect includes the introduction of visual elements that are out of character with the historic properties and alteration of the setting of the historic properties (36 C.F.R. 800.5(a)(2) (iv. and v.)."

b. The Corps is required by law to minimize to the full extent possible direct adverse effects from the proposed project to NHLs.

The preferred alternative for the construction of the proposed project will directly and adversely affect two historic properties of exceptional national significance to the United States that have been designated by the Secretary of the Interior as NHLs. These two properties are: (1) the Nantucket Historic District ("Nantucket Island NHL"); and (2) the Kennedy Compound ("Kennedy Compound NHL").

Under relevant federal law, including the provisions of Section 110f of the NHPA, 16 U.S.C. § 470h-2(f), Section 800.10 of the regulations of the ACHP, 36

³⁶ The PAL report is entitled "Technical Report – Visual Impact Assessment of Multiple Historic Properties Cape Wind Energy Project – Nantucket Sound, Cape Cod, Martha's Vineyard, and Nantucket, Massachusetts" and is found in the DEIS at Appendix 5.10-F.

³⁷ Letter from Brona Simon, State Archeologist, Deputy State Historic Preservation Officer, Massachusetts Historical Commission, to Christine A. Godfrey, Chief, Regulatory Division, US Army Corps of Engineers, "Cape Wind Energy Project, Barnstable and Yarmouth, MA" (dated Aug. 11, 2004).

C.F.R. Part 800, and Section 2.a. of the regulations of the Corps, 33 C.F.R. Pt. 325, App. C § 2.a, the Corps is required, to the maximum extent possible, to condition any permit issued to CWA as may be necessary to minimize harm to both the Nantucket Island NHL and the Kennedy Compound NHL.

Therefore, the Corps may not allow the proposed project to be constructed on Horseshoe Shoal in Nantucket Sound because of the resulting unavoidable adverse effects to the Nantucket Island NHL and Kennedy Compound NHL, and because the Corps has made it clear that it does not intend to condition the proposed permit, or undertake such planning and action, as necessary to minimize harm to these unique and irreplaceable national landmarks, even though the Corps is required by law to do so.

The only way to protect these two exceptionally significant landmarks as required by law is to mandate that the proposed project be constructed somewhere outside of Nantucket Sound.

(i) Section 110f of the NHPA.

Section 110f of the NHPA places special obligations on federal agencies when undertakings they license or permit may cause direct adverse effects to NHLs. The responsible federal agency is directed by law to minimize harm to such landmarks "to the maximum extent possible." Section 110f provides:

Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.

16 U.S.C. § 470h-2(f).

The Corps has promulgated its own regulations to implement Section 110(f), under which the Corps must take into account the effects of proposed Corps-permitted undertakings on historic properties "both within and beyond the waters of the U.S." 33 C.F.R. Pt. 325, App. C. § 2.a. The Corps is also required by its own regulations to place conditions on permits to minimize harm from such undertakings to NHLs. *Id.* The Corps' regulations provide:

Pursuant to Section 110(f) of the NHPA, the district engineer, where the undertaking that is the subject of a permit action may

directly and adversely affect any National Historic Landmark, shall, to the maximum extent possible, condition any issued permit as may be necessary to minimize harm to such landmark.

Id. Thus, in addition to the procedural requirements of the Corps' historic preservation regulations, this requirement imposes substantive limitations on the Corps' permitting decisions where NHLs may be directly and adversely affected. In contrast to the procedures in its regulations regarding other kinds of effects, which require only that the Corps "take into account" such effects, *id.*, where direct adverse effects to NHLs are possible, the Corps is required to minimize harm to any such landmark "to the maximum extent possible." *Id.*

(ii) The Corps has made a clear finding that the proposed project will directly and adversely affect both the Kennedy Compound and Nantucket Island NHLs.

In the DEIS the Corps acknowledges that the proposed project will cause adverse *visual* effects to the Kennedy Compound NHL and to Nantucket Island NHL. The Corps does not, however, acknowledge in the DEIS its duty to minimize harm to these NHLs "to the maximum extent possible." Since the DEIS treats visual effects separately from other kinds of effects, *see* DEIS, at §5.10.4, it may be that the Corps assumes that where adverse effects to an NHL are only *visual*, such effects will therefore not *directly* adversely affect the NHL. This assumption would be incorrect, unsupported in fact and directly contrary to applicable law.

The evidence that the Corps may be relying on this assumption, that visual effects are not direct effects, and the proof of this assumption's invalidity, are both contained in the conclusions in the Corps' own DEIS. The first evidence is found in the clever and disingenuous way that the DEIS treats the conclusions in PAL's VIA.

In its VIA, the Corps's historic preservation expert, PAL, described the specific nature of the adverse effect to the Kennedy Compound as follows:

The interruption of the natural horizon line by the [wind turbine generators] WTGs and related structures will significantly alter the historic Nantucket Sound setting of the Kennedy Compound, which served as the Summer White House for President John F. Kennedy. It will also impact water views from the Kennedy Compound. These changes constitute a [sic] alteration of the historic character, setting, and viewsheds of this historic property and features make it nationally significant and designated as an

NHL, as well as eligible for inclusion in the National Register. Therefore the Cape Wind Project will have an *Adverse Effect* on the Kennedy Compound.

DEIS, Appendix 5.10-F at p.38. (Emphasis in the original).

An obvious manipulation of these findings is found when we compare PAL's precise findings with the way they are reported in the DEIS, as follows:

The VIA [Visual Impact Assessment] found that the significant *visual* alteration to the historic Nantucket Sound setting caused by the WTGs and related structures will constitute an alteration of the historic character, setting and viewshed of the Kennedy Compound, and features that make it nationally significant and designated as an NHL, as well as eligible for inclusion on the National Register.

DEIS, § 5.10.4.3.2., at p. 5-206. (Emphasis supplied).

The characterization in the DEIS of the conclusions in the VIA is different from the actual conclusions in the VIA itself in a subtle but important way. The VIA states that the turbines will "significantly alter the historic Nantucket Sound setting." The DEIS says that the turbines will cause a "significant *visual* alteration." The statement in the DEIS is, however, incorrect. The alteration of setting described by the VIA is not merely visual, but is clearly a *physical* alteration of the setting that will have profound physical *and* visual effects on that element of the Kennedy Compound NHL. This is clear from the language in the PAL's report and the conclusions of a report from the expert consulting firm Gray and Pape, attached hereto. Ex. 11, at 2.

The physical effect described in the VIA from the addition of the Cape Wind project to the setting for the Kennedy Compound NHL is obvious. Moreover, the visual effect from this physical change is not limited to views *from* the Kennedy Compound (the "viewshed") as implied in the misleading characterization in the DEIS. This significant alteration of the Kennedy Compound's setting will have an effect on views looking toward the Compound from a variety of locations, both on and off shore. The addition to Nantucket Sound of 130 wind generators, each over 400 feet in height above the water, will cause a massive alteration and diminishment of the setting of the Kennedy Compound, and will severely diminish the ability of this landmark to convey its historic feeling and significance.

Similarly, regarding the adverse effect to Nantucket Island NHL, PAL said as follows:

The interruption of the natural horizon line by the [wind turbine generators] WTGs and related structures will alter the historic Nantucket Sound setting of the Nantucket Historic District NHL, a historic early settlement, maritime and premier whaling village, and summer resort. These changes constitute a [sic] alteration of the historic character, setting, and viewsheds that make Nantucket nationally significant and eligible for inclusion in the National Register and a NHL. Therefore the Cape Wind Project will have an *Adverse Effect* on the Nantucket Historic District.

DEIS, Appendix 5.10F, at p. 42. (Emphasis in the original).

This finding from PAL is consistent with the similar finding for the Kennedy Compound, cited above. And again, the DEIS changes the PAL finding ever so slightly in its characterization, as follows:

The VIA [Visual Impact Assessment] found that the *visual* alteration to the historic Nantucket Sound setting caused by the WTGs and related structures will constitute an alteration of the historic character, setting and viewshed of this historic early settlement, maritime and whaling village and summer resort that make Nantucket nationally significant and eligible for inclusion on the National Register and the NHL.

DEIS, Section 5.10.4.3.2., at p. 5-208. (Emphasis supplied.)

Once again, the clear PAL finding that the proposed project will "alter the historic Nantucket Sound setting of the Nantucket Historic District NHL" is changed in the DEIS to a finding of "visual alteration," which is inconsistent with the clear language of the VIA. Once again, the visual effect from this physical change is not limited to views *from* Nantucket Island but will adversely affect views of the island from many directions and approaches, thus diminishing the ability of visitors to appreciate the historic significance of the water approaches to Nantucket.

The alteration of setting described in the VIA is a physical alteration of the Nantucket Sound setting for both these NHLs, and therefore it constitutes a direct adverse effect. The incorrect and unsupported characterization in the DEIS that these effects are merely "visual" is a completely ineffective effort to obscure their true character.

(iii) The relevant facts and the applicable law both support the Corps' finding of direct adverse effect to the Kennedy Compound and Nantucket Island NHLs.

In addition to the findings in the PAL VIA, it is evident from a review of the relevant facts and federal law applicable to this issue, that the proposed project will directly and adversely affect both the Kennedy Compound NHL and the Nantucket Island NHL, as described in the following sections.

(a) The Corps' regulations expressly define as direct adverse effects the kind of effects that the proposed project will cause to the Kennedy Compound and Nantucket Island NHLs.

Under the definitions in the Corps' regulations, an effect to a historic property is defined as follows:

An "effect" on a "designated historic property" occurs when the undertaking may alter the characteristics of the property that qualified the property for inclusion in the National Register. Consideration of effects on "designated historic properties" includes indirect effects of the undertaking. For the purpose of determining effect, alteration to features of a property's location, setting, or use may be relevant, and depending on a property's important characteristics, should be considered.

33 C.F.R. Pt. 325, App. C. § 1.e.

Note that Corps regulations expressly provide that for the purpose of determining effect, consideration may be given to relevant alteration to features of a property's setting. It is clear that the alteration of a historic property's features would necessarily amount to a direct physical effect to that property. In using these terms, Corps regulations make clear that the cognizable effects to a historic property's setting are direct effects that result in a physical alteration of an important part, in fact a defining part, of both that property and that property's eligibility for the National Register.

The criteria for adverse effects in Corps regulations expressly define the alteration of a historic property's setting as an adverse effect to that property when that setting contributes to the property's qualification for the national Register.

The Corps' regulations provide as follows:

Adverse effects on designated historic properties include, but are not limited to: (1) Physical destruction, damage, or alteration of all or part of the property; (2) Isolation of the property from or alteration of the character of the property's setting when that character contributes to the property's qualification for the National Register; (3) Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting; (4) Neglect of a property resulting in its deterioration or destruction; and (5) Transfer, lease, or sale of the property.

33 C.F.R. Pt. 325, App. C. § 15.

Under this provision, of the proposed project will cause direct adverse effects to the Kennedy Compound NHL and the Nantucket Island NHL in two ways, under sections (3) and (4) above, by: (i) altering the character the setting for each of these NHL's, where the character of that setting contributes to each NHL's eligibility for the National Register; and (ii) introducing visual elements that are out of character with both NHLs and that will alter each of their settings.

(b) The proposed project will alter and diminish the setting of both the Kennedy Compound NHL and Nantucket Island NHL.

Historic Preservation experts at the consulting firm of Gray and Pape engaged by APNS to evaluate this matter agree with PAL that, "[t]he waters of Nantucket Sound represent a vital part of the setting of the Nantucket Historic District and the Kennedy Compound." Ex. 11, at 7. Similar to the conclusions of PAL and the Corps, Gray and Pape concludes that:

. . . [T]he Cape Wind energy project will directly and physically alter the shape and outline of the horizon and the water views of the sound from the Kennedy Compound NHL and Nantucket Island NHL. These effects will physically and directly alter, and diminish the integrity of, the character-defining element of the Nantucket Sound setting that is a physical part of these resources

and renders them eligible for the National Register and as National Historic Landmarks.

Id.

In addition to the grounds for this conclusion as described briefly in the VIA, Gray and Pape note that the waters in Nantucket Sound surrounding Nantucket Island would naturally and logically be considered part of the important historic setting of this NHL.³⁸ They point out:

The near shore waters surrounding Nantucket clearly constitute a natural resource exploited by the island's residents and were used for purposes related to the historical significance of the property. The waters immediately surrounding the island supplied sustenance to the island's residents in the form of fish, whales, seals, birds and shellfish. The waters served as the fields and pastures of many of the island's residents, in a nearly identical fashion to the fields and pastures of land-bound farmers. Island residents knew and exploited the near shore fishing and shell fish grounds in a sophisticated manner.

Id. at 5.

In addition, Gray and Pape describe the encompassing nature of the visual effects to Nantucket Island that will be caused by construction of the Cape Wind project because of the physical intrusion into, and alteration of, Nantucket Sound:

The sea passage to [Nantucket] island, by private vessel or ferry, remains a special event, permitting the traveler to prepare oneself for arrival at a special destination and, in the case of Nantucket, a historic property. In essence, Nantucket Sound serves as the foreground to the historic property. The island's setting in the ocean, and the leisurely, ritualized approach over the water, constitute important elements of the historic property's setting. Placing the proposed wind farm astride this approach will

³⁸ As noted above, the Corps' regulations state that it must take into account effects "both within and beyond the waters of the US." 33 C.F.R. Pt. 325, App. C. § 2(a).

significantly alter the setting of the historic property by altering the approach to the property.

Id.

From the admissions in the DEIS and the observations of both PAL and Gray and Pape, there is no doubt that the construction of the proposed project at the preferred alternative site in Horseshoe Shoal will alter and diminish the integrity of the setting for both the Kennedy Compound NHL and the Nantucket Island NHL

(c) The setting of Nantucket Sound is a qualifying characteristic of eligibility for both the Kennedy Compound NHL and Nantucket Island NHL.

The DEIS acknowledges and restates PAL's conclusion that the Nantucket Sound setting for both the Kennedy Compound NHL and the Nantucket Island NHL is one of the elements that make both landmarks nationally significant, as well as one of the elements of their eligibility for the National Register. This is true even though the Corps' regulations state that an "effect" occurs on a designated historic property only when the undertaking may alter a characteristic that qualified (past tense) the property for inclusion in the National Register. 33 C.F.R. Part 325, App. C, § 1(e) ("An 'effect' on a 'designated historic property' occurs when the undertaking may alter the characteristics of the property that *qualified* the property for inclusion in the National Register.") (Emphasis supplied). This provision thus implies that the Corps will consider only qualifying elements of the property that were considered in the written nomination of a property to the National Register or the list of National Historic Landmarks.

The ACHP rules expressly require that in determining the eligibility of properties, federal agencies must consider all relevant characteristics of a historic property that may qualify them for inclusion on the National Register, including those not listed on the original nomination form.³⁹ Thus the identification process must be a

³⁹ 36 C.F.R. §800.4(c)(1). Of course, in the case of the Kennedy Compound NHL as noted in the Gray and Pape report, the qualifying characteristic of setting is noted in the original nomination ("In the case of the Kennedy Compound NHL the property's significance is tied to its association with the Kennedy family. The NHL notes that the property commands sweeping views of Nantucket Sound and was the location where the Kennedy children learned to sail and engage in other important

"fluid and ongoing one." *Friends of Atglen-Susquehanna Trail v. Surface Transportation Bd.*, 252 F.3d 246, 263 (3rd Cir. 2001). Specifically, the ACHP rules state:

The passage of time, changing perceptions of significance, or incomplete prior evaluations *may require* the agency official to reevaluate properties previously determined eligible or ineligible.

36 C.F.R. § 800.4(c)(1) (Emphasis supplied).

Similarly, for purposes of assessing adverse effects, the ACHP regulations expressly require consideration of all qualifying characteristics whether or not identified in the original nomination. The ACHP regulations state:

Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register.

36 C.F.R. § 800.5(a)(1).

Where, as in this case, a conflict exists between the ACHP regulations and the regulations of the Corps, the regulations of the ACHP, to which Congress has given express authority to promulgate comprehensive regulations under the NHPA, control. *See Committee to Save Cleveland's Huletts v. U.S. Army Corps of Engineers*, 163 F. Supp. 2d 776 (N.D. Ohio 2001) ("*Huletts*") *citing Nat'l Ctr. For Preservation Law v. Landrieu*, 496 F. Supp. 716, 742 (D.S.C.) *aff'd per curiam*, 635 F.2d 324 (4th Cir. 1980) (holding that the ACHP has exclusive authority to determine the methods for compliance with NHPA); *Nat'l Trust for Historic Preservation v. U.S. Army Corps of Engineers*, 552 F. Supp. 784, 790-91 (S.D. Ohio 1982) (holding that the ACHP's regulations govern the implementation of § 106 for all federal agencies).

In particular, courts have held that the Corps may not rely on its own regulations to define or restrict the scope of its obligations under the NHPA where those regulations conflict or are inconsistent with the ACHP's regulations. *Huletts*, 163 F. Supp. at 792. In addition, the Corps' interpretation of the correct requirements under the NHPA or the ACHP's rules is not authoritative and is entitled to no particular deference. *See National Trust for Historic Preservation v. Blanck*, 938 F.Supp 908, note 15 (D.D.C. 1996) ("While an agency is entitled to substantial

competitive activities. This clearly indicates that the waters of Nantucket Sound are part of the historically significant setting for the NHL.").

deference when it interprets statutes and regulations whose enforcement is committed to that particular agency, *Orengo Caraballo v. Reich*, 11 F.3d at 192-93, the NHPA delegates to the Army no particular interpretive or enforcement authority. Thus, the Army's interpretation of the NHPA is not entitled to the deference accorded to the Secretary of the Interior.").

In their report, Gray and Pape address the issue of the appropriate boundary of historic significance for Nantucket Island NHL and the Kennedy Compound NHL. They point out that although the area of the waters of Horseshoe Shoal are not included within the boundaries of these two NHLs as described in the nomination forms on file, this is not surprising, nor should it influence a more modern and up-to-date assessment of the extent of the area of historic significance for these properties that takes into account the changing perceptions of significance in the professional historic preservation community of historically important areas surrounding historic properties. The Gray and Pape report states:

The fact that the NHL boundaries contained in the descriptions in the nomination forms for the Kennedy Compound NHL and the Nantucket Island NHL do not encompass into the waters of Nantucket Sound is not surprising, since NRHP guidance regarding the establishment of boundaries is clearly focused on establishing boundaries for terrestrial resources and specifically calls for the use of natural features "such as a shoreline" in the selection of appropriate boundaries.

Ex. 11, at 6.

Nevertheless, given the close associations that these properties have with the sea and maritime industries, the non-inclusion of some portion of the surrounding waters is analogous to the former practice of listing farm buildings in the NRHP without including any of the farmland associated with the buildings. *Id.* at 4.

Gray and Pape conclude that the conclusions in the PAL report and the DEIS almost compel the conclusion that the boundaries of historic significance for both the Kennedy Compound NHL and Nantucket Island NHL extend into Nantucket Sound to include the Horseshoe Shoals area, and that under the ACHP's regulations, this should be acknowledged in the official records of these landmarks in the National Register. Gray and Pape state

The Corps and PAL have concluded, in the DEIS, that the proposed Cape Wind project on Horseshoe Shoals will have an adverse effect upon the setting of the two NHLs. This strongly

suggests that a reevaluation of the boundaries of these NHLs should include Horseshoe Shoals as an important component of the properties' historically significant setting. This conclusion is most consistent with the findings of the Corps and PAL that the proposed Cape Wind Project will have an adverse effect on both properties by altering the character of the properties' setting and by introducing a visual element that is out of character with the properties and their settings

Id. at 7.

Again, the DEIS, the PAL VIA and the expert opinion of Gray and Pape all agree on this key point - that the setting of Nantucket Sound is one qualifying element of eligibility, both for the National Register and as a NHL, for both the Kennedy Compound NHL and Nantucket Island NHL. Gray and Pape take this element into account in voicing their ultimate conclusion that the proposed Project will directly and adversely affect both of these landmarks. The Gray and Pape report concludes:

For the reasons discussed above, we conclude that the Cape Wind project will directly and physically alter the shape and outline of the horizon and the water views of the sound from the Kennedy Compound NHL and Nantucket Island NHL. These effects will physically and directly alter, and diminish the integrity of, the character-defining element of the Nantucket Sound setting that is a physical part of these resources and renders them eligible for the National Register and as National Historic Landmarks.

Id. at 7.

The DEIS admits that the preferred alternative for the proposed energy project will directly and adversely affect the Nantucket Island NHL and the Kennedy Compound NHL. This conclusion is amply supported by both the PAL Visual Impact Assessment and the professional opinion of historic preservation experts at Gray and Pape.

In an earlier draft of the EIS prepared in May 2003, the Corps committed to avoid adverse effects to historic properties where feasible, including by mitigation or alternatives. 5/29/03 Draft DEIS § 5.10.4. In the current DEIS, this language has been omitted and the Corps' regulations require only that it "take into account" effects to historic properties, without any obligation to avoid or mitigate those effects. 33 C.F.R. Pt. 325, App. C., § 2(a). As both PAL and the DEIS acknowledge, however,

the ACHP's rules require the Corps to consult with the SHPO, other consulting parties and identified Indian tribes "to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties." 36 C.F.R. § 800.6(a).

Under these circumstances, the Corps is required by their own regulations and the NHPA to condition any permit to CWA so that harm to these two exceptionally significant, invaluable and irreplaceable national resources is minimized to the maximum extent possible. There are no mitigation measures that will achieve the level of protection of the Kennedy Compound and Nantucket Island NHLs mandated by Federal law. The ACHP rules thus obligate the Corps to evaluate alternative locations for the proposed project somewhere outside of Nantucket Sound.

c. The Corps failed to consider numerous historic properties in its section 106 review.

In preparing the DEIS, the Corps failed to consider visual effects from the proposed project to numerous historic properties in violation of Section 106 of the NHPA. Pursuant to its regulations, the Corps assesses direct and indirect effects on "designated historic properties," which include historic properties listed in or determined eligible for listing in the National Register and historic properties that, in the opinion of the SHPO and the Corps, appear to meet the eligibility criteria. 33 C.F.R. Part 325, Appendix C, §§ 1(a), 15.

The NHPA makes no distinction between eligible properties and "determined eligible" properties, nor does it require the concurrence of the SHPO and the federal agency regarding the eligibility of a property. The NHPA requires federal agencies to assess effects to any property "included in or eligible for inclusion in the National Register." *See* 16 U.S.C. § 470f; 36 C.F.R. § 800.16(1)(1). Federal courts have held that "[t]he [NHPA] definition of 'eligible property' makes no distinction between determined eligible and property that may qualify" and struck down Corps regulations that maintained such a distinction. *See Colorado River Indian Tribes v. Marsh*, 605 F.Supp. 1425, 1437 (C.D. Cal. 1985).

According to the attached report prepared by an expert consultant in architectural history and historic preservation, Candace Jenkins, the Corps made no assessment of 2 properties listed on the National Register, 1 property that has been determined eligible and at least 20 properties that are eligible for inclusion on the

National Register. Ex. 12, at 2-5. In other words, the Corps has failed to assess at least 23 historic properties for visual effects as required under the NHPA.⁴⁰

Specifically, the consultant concluded that the William Street National Register Historic District, the Seaman's Reading Room and the Ritter House, all located in Tisbury, MA, were not assessed by the Corps despite the fact that each property expressly meets the definition of a "Designated historic property" under the Corps' rules. *Id.* at 2. In addition, 4 historic properties in Falmouth, MA, 7 properties in Yarmouth, MA, 1 historic property in Harwich, 5 historic properties in Chatham, MA, 2 historic properties in Oak Bluffs, MA and 1 historic property in Tisbury, MA are all "eligible for inclusion in the National Register," but were not assessed by the Corps. *Id.* at 2-5.

The Corps' failure to assess visual effects to these 23 historic properties violates Section 106 of the NHPA and the Corps' own regulations. Under these circumstances, grant of the permit application would be unlawful and not in the public's historic preservation interests.

5. The Permit Application Must be Denied Because the Energy Plant Will Result in the Unlawful Incidental Take of Marine Mammals in Violation of the Marine Mammal Protection Act.

It is virtually certain that the CWA wind energy plant will cause take of marine mammals. When an activity will result in the take of marine mammals, the courts have ruled that the underlying action is unlawful and subject to injunction. *Kokechik Fishermen's Ass'n*, 839 F.2d 795 (D.C. Cir 1988).⁴¹ In this case, despite the clear fact that unlawful incidental take will occur, CWA has failed to even apply for the required authorization, 16 U.S.C. § 1371(a)(5). As a result, the only possible conclusion is that the project is in violation of the MMPA and must be prohibited.

⁴⁰ The consultant's review was limited to properties that had been recommended for listing by professional consultants as the result of comprehensive surveys or had been evaluated by Massachusetts Historical Commission staff through their National Register Eligibility Opinion process. Exhibit 12, at 2. Many of the properties identified are turn-of-the-century summer resort communities that were planned and sited to take advantage of proximity to Nantucket Sound and the views thereof. *Id.*

⁴¹ The take associated with the CWA project will be significant. As noted in *Kokechik*, even *de minimus* incidental take of a few animals results in a prohibition of the underlying project if no authorization is granted. The ruling in *Kokechik* that a permit for known incidental take is necessary before an action can be approved has been affirmed in *Earth Island Institute v. Mosbacher*, 746 F.Supp 964, 974 (N.D.Cal. 1990).

Eligible Properties Not Assessed by the Corps

Three properties in Tisbury fall under the Army Corps definition of designated properties and appear to have been left off of Table 5.10-1: Historic Properties and Districts Assessed for Wind Park Visibility.

- William Street NRHD, Tisbury (listed NR property) (approximately 56 components)
- Seaman's Reading Room, Tisbury (consensus DOE property)
- Ritter House, Tisbury (listed NR property)

Potentially Eligible Properties Not Assessed by the Corps (Listed by Community)

Falmouth

• *Falmouth Heights HD, Falmouth (approximately 500 components)*

The Falmouth Heights National Register District is significant as the first planned summer resort colony in a town and region that continue to be dominated by that industry. Dating to 1871, the district epitomizes the key characteristics of early seaside resorts. Those characteristics include fine beaches and a scenic location on Vineyard Sound, a land division pattern of small house lots relieved by large public parks, a narrow, winding street system that invites pedestrian rather than automobile use, and an architectural mix of late-19th century Gothic Revival style cottages, turn-of-the-century Colonial Revival and Shingle Style residences, and early-20th century Craftsman bungalows. The district as a whole is significant in the areas of Community Planning and Development, Entertainment and Recreation, and Architecture.

The Falmouth Heights National Register District is important primarily at the local level with a period of significance that extends from its establishment in 1871 through 1940 when development was complete and the area was at its zenith as a popular summer destination. Subsequently, the district entered a period of decline that has only recently been reversed. During that period and the years immediately preceding it, all four of its historic hotels, an observatory/chapel, and a small number of dwellings were demolished. Nevertheless, the great majority of buildings that were present during the period of significance remain today and retain substantial integrity to that period. Many are in the process of rehabilitation, often with respect for historic character. In addition, the original subdivision plan including the street system, building lots, and parks remains nearly intact, and the seaside setting remains unspoiled.

Thus, the Falmouth Heights National Register District possesses substantial integrity of location, design, setting, materials, workmanship, feeling, and associations. It clearly illustrates the evolution of the Town of Falmouth, of Cape Cod, and of coastal New England as renowned summer resorts in the 19th and 20th centuries. The key characteristics cited above are immediately recognizable and create a unique sense of place that clearly distinguishes Falmouth Heights. The district meets criteria A and C of the National Register of Historic Places.

• *Maravista HD, Falmouth (approximately 25 components)*

The name of this area means "view of the sea" in Portuguese. Located just east of Falmouth

Heights, it developed as summer resort area in early 20th century.

- ***Menauhant HD, Falmouth (approximately 45 components)***

Menauhant is a summer resort area that originated in 1874 and continued to develop through the early 20th century. It once included a hotel and long wharf that extended into Nantucket Sound. Buildings and setting are well preserved.

- ***Church Street HD, Falmouth (contains Nobska Light) (approximately 25 components)***

Church Street originated in the early-18th century, but its historical significance dates to the late-19th and early-20th centuries when it became the site of a lighthouse and developed as a summer resort. The area began to assume its present character as an enclave of large summer homes by 1880. Henry H. Fay, son of Joseph Story Fay, and John M. Glidden (see 70, 80 Church St), a principal in the Pacific Guano Company, had erected large estates at the southern tip of the point; they were accessed by a winding road off Woods Hole Road. Frank Foster had also built an estate on the west side of Church Street that ended just mid-way down the point (see 45 Church St). All of these are clearly shown on an 1887 Birds Eye along with the old tavern, and the estates of A.C. Harrison (see 55 Church St) and W.O. Luscombe (demo'ed 1967) all on the west side of Church Street.

By 1908, little had changed except the addition of the Robert Bacon estate south of the tavern (see 93 Church St). In the 1920s, the Glidden estate was substantially remodeled and the Carlton estate (see 90 Church St) was developed around the core of its former water tower. The Colonial Revival style Cooper House (60 Church St) was added in 1929.

Yarmouth

- ***15 Windmere Road, Yarmouth;*** full Cape ca. 1750-1775

- ***193 Berry Ave, Yarmouth;*** Shingle Style summer resort hotel ca. 1900

- ***268 South Sea Ave, Yarmouth;*** half-Cape

- ***Corey House, Great Island, Yarmouth***

- ***205 South Street, Yarmouth;*** Three-quarter Cape, ca. 1770

- ***Park Ave. HD, Yarmouth (approximately 25 components)***

Collection of late 19th and early 20th century summer resort houses overlooking Nantucket Sound; unusually intact summer colony that has not been impacted by the extent of alterations and modern infill seen in other similar areas along Yarmouth's Nantucket Sound coast; includes #239-267-Park Avenue.

- ***Mass. Ave. HD, Yarmouth (approximately 25 components)***

Collection of late 19th and early 20th century summer resort houses overlooking Nantucket Sound; unusually intact summer colony that has not been impacted by the extent of alterations and modern infill seen in other similar areas along Yarmouth's Nantucket Sound coast; includes #286-292-Massachusetts Avenue between Broadway and Webster Street, Webster Street, and the east side of Columbus Avenue.

Harwich

- *Hithe Cote, 32 Snow Inn Road, Harwich*

Chatham

- *Stage Harbor Light, Chatham*

Stage Harbor Light possesses integrity of location, design, setting, materials, workmanship, feeling, and associations with Chatham's maritime history. Commissioned in 1880, it guarded the entrance to Stage Harbor until it was decommissioned in 1935. Although the lantern/lens was removed at the time, the complex remains nearly intact from the 19th century. This is in contrast to many other lighthouse complexes that have been extensively remodeled with artificial siding, new window sash, and interior modernizations. The undeveloped marine setting is an important component of the light's significance. Stage Harbor Light meets criteria A and C of the National Register.

- *Capt. Joshua Nickerson House, 190 Bridge Street, Chatham*

The Captain Joshua Nickerson House possesses integrity of location, design, setting, materials, workmanship, feeling, and associations with Chatham's early 19th century maritime history as well as its later 19th and early 20th century summer resort development. This large and elegant Federal period dwelling, constructed in c1810 overlooking the Mitchell River, illustrates the wealth that some of Chatham's sea captains began to amass after the Revolution. Operated in the 1870s as the Sportsmen's House and the Monomoy House, attracting hunters from the Boston area, it is part of the first phase of Chatham's summer resort development. Returning to use as a private summer home owned by out-of-staters in the early 20th century, it also has clear associations with the second phase. The Nickerson House meets criteria A and C of the National Register.

- *Jonathan Higgins House, 300 Stage Neck Road, Chatham*

Mid-18th century half-Cape moved from Wellfleet in 1939 and restored by architect/architectural historian; may be significant as example of Colonial Revival period in Chatham; located on bluff overlooking Oyster River and Nantucket Sound

- *Stage Harbor Road HD, Chatham (approximately 50 components)*

The Stage Harbor Road Area possesses integrity of location, design, setting, materials, workmanship, feeling, and strong associations with Chatham's period of maritime prosperity.

This road developed as an important internal roadway, connecting Main Street with Stage Harbor and its maritime industries. The area's history continues to be reflected in its large and diverse collection of 18th, 19th, and 20th century dwelling houses that remain with few modern intrusions. The area meets criteria A and C of the National Register.

Includes that portion of Stage Harbor Road that runs north-south between Oyster Pond and Champlain Road as well as the unpaved Atwood Lane. (129-576 Stage Harbor Road and 79 Atwood Lane)

• ***Champlain Road HD, Chatham (approximately 25 components)***

The Champlain Road area is located on the south side of Stage Neck, originally known as Great Neck or Saquanset. Champlain Road appears to date from the early 19th century. The road itself does not appear on the 1836 map, but eight houses are shown strung out along the north bank of Stage Harbor with a large saltworks at the west end. This area, perhaps better than any other, illustrates the predominant role of the sea in Chatham's developmental history. Today, the historic houses are almost all located on the north side of the road facing the harbor; includes the portion of Champlain Road (Street #s 15-205) that parallels Stage Harbor and runs east-west between Stage Harbor Road and the point where Champlain Road turns sharply northward

Oak Bluffs

• ***Cottage City HD, Oak Bluffs (approximately 386 components)***

This recently designated local historic district is now listed in the State Register of Historic Places. It also includes many individual properties that have been recommended for NR listing, especially Waban, Ocean, Nashawena, and Naushon Parks which face directly onto Nantucket Sound. "This area was named for Morris Copeland, an architect whose 1871 "Plan for Oak Bluffs" was the blueprint for the community. The proposed Cottage City Historic District consists of 386 properties. Architectural styles of the proposed district are predominately gingerbread cottages constructed in the 19th century..... In addition to the cottages, the district includes three houses of worship, the Cottage City Town Hall, the country's oldest continuously operating carousel, a gazebo and twelve small parks." (MHC eligibility opinion) The area also has strong associations with Oak Bluffs' Afro-American history.

• ***Vineyard Highlands HD, Oak Bluffs (approximately 300 components)***

This was the third major area developed in central Oak Bluffs following Wesleyan Grove and the Oak Bluffs Land & Wharf Co. area further east. In 1870 several Methodist clergy and laymen connected with the Camp Meeting Association to form the Vineyard Grove Company that proceeded to buy the original acreage and to expand their holdings to about 200 acres. The area was designed by Charles Talbot using the earlier developments as models, including small house lots balanced by numerous parks, all tied together by a curvilinear street system. Summer resort-related development continued into the 20th century.

The area includes several properties related to Oak Bluffs Afro-American heritage. These sites were recorded in a 1999 survey and 21 were recommended for individual listing in the NRHP.

Tisbury

- ***West Chop HD, Tisbury (approximately 100 components)***

This is a well-preserved planned summer resort community with an impressive collection of Shingle Style houses. Occupying the northernmost tip of Tisbury, it includes the West Chop Lighthouse and offers unobstructed views of Nantucket Sound from many locations. It meets criteria A and C of the NRHP.



July 29, 2008

Rodney E. Cluck, Ph.D.
Cape Wind Project Manager
Minerals Management Service
U.S. Department of the Interior
1849 C St., N.W.
Washington, D. C. 20240

RE: Follow-up to July 23, 2008 Consultation Initiation Meeting

Dear Dr. Cluck:

Our thanks to you and your staff at MMS for kicking off the section 106 consultation process for the Cape Wind project last week in Boston. We were heartened by your statement that you understand the requirements of the National Historic Preservation Act (NHPA) to encompass an open process that requires substantive consideration and mitigation of the adverse effects of the proposed project on the numerous historic properties that virtually surround Nantucket Sound, including the possible need to use an alternative location. We were further encouraged by your indication that you are not operating under a specific time schedule for completion of the consultation, but rather will allow the consultation process to be fully utilized so that MMS can gain meaningfully from what you learn, and apply this new knowledge to the required mitigation and incorporate that information into the NEPA process. We were especially reassured by the acknowledgement that the MMS process to date has not fully complied with section 106, especially as to the necessary consideration of adverse visual effects.

However, the meeting did leave us with some concerns and issues that we hope you can incorporate into the process for full consultation that lies ahead.

First, since you have not as yet set forth a detailed schedule for consultation, we thought it prudent and helpful to lay out what we think would be essential elements for the consultation in the coming months. We understand and agree that the five tribes of Native Americans (Mashpee and Aquinnah/Gay Head Wampanoag, Narragansett, Mashantucket Pequot, and Mohegan) have asked for a separate process of government-to-government consultation with MMS as is their right as sovereign nations. Given the sensitive nature of the knowledge held by these tribes, especially as to the location of tribal burials or other remains that could be subject to looting, and the appropriately private nature of the sacred places along on the shores of Nantucket Sound, we concur with their request to private consultation with MMS.

At a minimum, NHPA section 106 consultation meetings going forward should be spread around geographically in order for MMS to have the benefit of engagement at the local level with representatives of all of the adversely affected historic properties. Separate consultation meetings should be scheduled on each of the islands, Nantucket and Martha's Vineyard, as well

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as in each of the affected Towns along the mainland of the Cape. While some meetings could be scheduled in Boston, MMS is not likely to be able to gather all of the required information regarding adverse effects to historic properties, and how to mitigate those adverse effects, without consultation meetings in the immediate vicinity of those properties. (See Enclosure 1 for a list of recommended locations for additional consultation meetings.) Further, MMS should schedule site visits to several key sites/locations to enable full and adequate consideration of visual effect issues. Suggestions for site visits include the waters of Horseshoe Shoal itself in Nantucket Sound, and other properties that we would like to discuss with you as the consultation process unfolds. The site visits should take place in the fall, on days when clear weather conditions prevail and leaves do not obscure the view of the Sound.

Second, given MMS' acknowledgement that its visual effects analysis instructions to its contractors were flawed, we strongly recommend re-initiation of that analysis. Further, as we noted in our comments on the Cape Wind DEIS, this analysis must be done by a firm with experience and expertise in environmental design, landscape architecture, and visual effects assessment. (We are preparing a comprehensive list of historic properties for which visual effects assessments should be conducted, and will forward that to you shortly.)

More specifically, as we discussed during last week's Consultation Initiation Meeting, the scope of the visual effects assessments completed for the DEIS only analyzed visual effects *from* each of the historic properties analyzed (an incomplete list) and did not analyze visual effects from vantage points that simultaneously include both an historic property and the Cape Wind project site, such as from the waters of Nantucket Sound. Given the essential role of cultural settings and historic contexts to the aesthetic quality of historic properties, and to public understanding and appreciation of them, this expanded visual effects analysis is required for a full understanding of the adverse effects of the proposed Cape Wind project, and for proper conduct of required NHPA section 106 consultations.

In addition, further visual effects analysis, which was omitted from the DEIS, is needed on the question of light pollution in the night sky from the wind complex that will significantly alter the experience of Nantucket Sound for area residents and visitors alike. The aesthetic quality of the dark night sky, appreciated by most of the residents of and visitors to the Cape, will be seriously diminished by the powerful safety lights to be mounted on the turbine towers of Cape Wind. These impacts must be analyzed, both as to their adverse cultural resource and economic effects.

Third, while we appreciate the distinction between the NEPA process and the NHPA process and that these are two different laws with different requirements and processes, we were concerned by the statement made by one of your staff during last week's consultation meeting which seemed to us to indicate that MMS views the two processes as being unrelated, essentially occurring on sequential and non-intersecting timelines. This concern was exacerbated by the statement made that MMS is targeting completion of the FEIS by the end of the calendar year, a deadline that is arbitrary, indicative of an intention to rush the project review through to a decision, and incapable of accommodating a sufficient section 106 process.

In contrast, it is our interpretation of these two laws that the NHPA section 106 process produces data and allows MMS to draw conclusions that inform the NEPA process' consideration and

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analysis of alternatives. Therefore, it is our view that NHPA section 106 consultation must be completed prior to MMS internal review and analysis of its final alternatives and impact evaluation in the FEIS. It is entirely appropriate, for example, that information gleaned and conclusions drawn from the section 106 consultation could result in MMS altering the range of alternatives considered and the selection of the Preferred Alternative (or adding materially to the adverse effects mitigation decisions), but only if the section 106 consultation is completed prior to MMS internal decision-making for the FEIS. We would appreciate your confirmation that you share this view of the interrelationship between section 106 and NEPA, and will treat the outcome of the Cape Wind section 106 consultation process accordingly with regard to development of the Cape Wind FEIS.

Fourth, we wish to again stress our stated concern that MMS has misconstrued the meaning, and thus its analysis, of cumulative effects and exacerbated this misperception by suggesting that NEPA contains the only requirement for such assessment of cumulative effects. The cumulative effects analysis that is required of MMS, both for NEPA and NHPA under present circumstances, is to assess and evaluate, and ultimately to mitigate, the adverse effects of the Cape Wind project on the hundreds, if not thousands, of historic properties arrayed around the mainland and island shorelines of Nantucket Sound. Further, it is our assertion that the entirety of Nantucket Sound's waters and shorelands are a nationally significant cultural landscape which necessitates analysis, mitigation and avoidance of adverse effects to the extent possible. The project will have a significant adverse impact cumulatively on this array of historic properties that is distinct from the impact on individual sites. This is a direct effect of the project on a collection of properties that create a distinct historic setting and value that is derived cumulatively from the proximity of, and historic connections among, those individual properties. We wish to be clear that MMS' section 106 duty to evaluate the direct effects of the project on the cumulative historic value of the affected properties is a separate and additional duty to the cumulative effects analysis under NEPA.

Fifth, we request that a transcript of the meeting derived from the tape recording. We note that TRC Companies, Inc. was present at the meeting to record notes. This function under section 106 is not included within TRC's scope of work or assigned duties, as set forth in Appendix B to the May 25, 2006, MOU. The Alliance has previously expressed its concerns over the selection of TRC as the EIS consultant, and states for the record those same objections to TRC's involvement in the section 106 process and the failure to establish a formal role for TRC for this purpose in accordance with applicable procedures and standards. If such a document does exist for TRC's role under section 106, please provide a copy to us.

Finally, the Alliance is deeply troubled by a statement made by Mr. Tom Woodworth of MMS that the agency has not yet decided how the recently proposed offshore renewable energy regulations apply to the Cape Wind project. MMS is already on the record that the new regulations will be finalized before any decision is made on Cape Wind and that Cape Wind will be required to comply with them. Furthermore, we expect that MMS will reopen the comment period on Cape Wind to obtain additional comments based on the applicability of the regulations, once finalized. We request confirmation that MMS will adhere to its previous commitments and public statements in this regard.

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We look forward to receiving your substantive reactions and responses both to our concerns raised in last week's meeting and reiterated in this letter, prior to our next meeting of the Consulting Parties.

Sincerely,



Glenn G. Wattle
President & CEO

Cc: Senator Edward M. Kennedy
Senator John F. Kerry
Representative William Delahunt
Melanie Stright, MMS
John Eddins, Advisory Council on Historic Preservation (ACHP)
Brona Simon, MA Historical Commission
Bettina Washington, THPO, Wampanoag Tribe of Gay Head
George Green, Mashpee Wampanoag Tribe
Bill Bolger, National Park Service
Karen Adams, US Army Corps
Roberta Lane, National Trust for Historic Preservation
Elizabeth Merritt, National Trust for Historic Preservation
Sarah Korjeff, Cape Cod Commission
Jim Powell, Martha's Vineyard Commission
Andrew Vorce, Nantucket Planning and Economic Development Council
Charlie McLaughlin, Town of Barnstable
Suzanne McAuliffe, Town of Yarmouth
John Cahallan, Town of Mashpee
Peter Bettencourt, Town of Edgartown
John Brown, THPO, Narragansett Indian Tribe
Bruce Bozsum, Chairman, Mohegan Indian Tribe
Michael J. Thomas, Chairman, Mashantucket Pequot Tribe

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July 8, 2008

Dr. Rodney E. Cluck
Cape Wind Project Manager
Minerals Management Service
U.S. Department of the Interior
1849 C St., N.W.
Washington, D. C. 20240

RE: Deficiencies in MMS Process Regarding Review of Cape Wind Historic Preservation Issues, and Relevance to Proposed July 23rd Meeting of Consulting Parties

Dear Dr. Cluck:

We are in receipt of your June 25 letter inviting the Alliance to Protect Nantucket Sound (Alliance), and others, to attend a meeting of the consulting parties in Boston on July 23 regarding National Historic Preservation Act (NEPA) Section 106 consultation requirements.

In the comments filed with MMS on April 21, 2008, by the Alliance regarding the Draft EIS for the proposed Cape Wind Project in Nantucket Sound, we pointed out extensive deficiencies in that document regarding the required protection/mitigation for the hundreds of significant historic properties and cultural landscapes around the shores and under the waters of the Sound. Numerous deficiencies and shortcomings are contained in the DEIS that must be addressed in order for MMS to come into compliance with Section 106 of the National Historic Preservation Act and other laws. In order to comply with federal law, MMS must first recognize that:

- The location of the Cape Wind Preferred Alternative is the site that will have the greatest adverse impact on the most historic properties;
- The DEIS utterly failed to acknowledge adverse impacts on numerous historic properties, most of which are on or eligible for listing on the National Register of Historic Places;
- MMS is responsible for assuring an even higher standard of preservation – including from visual impacts - for those historic properties that have been determined by the Secretary of the Interior to be nationally significant – the Kennedy Compound National Historic Landmark and the Nantucket National Historic Landmark District. This higher standard is clearly stated in Section 110(f) of the National Historic Preservation Act, as amended, which requires that MMS must, to the “maximum extent possible,” undertake such planning and action as may be necessary to “minimize harm” to every national historic landmark which may be directly and adversely affected;
- MMS has an affirmative responsibility to choose an alternative that will truly minimize harm to all of these adversely impacted historic properties;

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The visual impact analysis prepared for the DEIS is seriously flawed, and must be re-done;

- The cumulative impact analysis that is required of MMS under NEPA is not just consideration of the impacts of other future development around the Sound, but far more importantly, that thorough consideration must be given under NEPA to the cumulative adverse effects of the Cape Wind Project on multiple, indeed hundreds of significant historic properties all around the shoreline of the Sound, both on the mainland and on the islands. Given the multitude of historic properties that will be adversely affected by the proposed location of the Cape Wind Project, it is this cumulative adverse effect, not some future effect resulting from additional development, that must be evaluated and mitigated; and
- The stated opposition of the two federally recognized Tribes of Native Americans whose ancestral homeland lies around the Sound automatically triggers a separate and extensive process of government-to-government consultation that is not merely procedural, and cannot legally be merged with or absorbed into the process for consultation with other parties that MMS appears to be proposing at present.

Of note with regard to these substantial concerns is the editorial that ran in the Cape Cod Times on July 7, 2008. The Times addressed the shortcomings of the MMS process to date with regard to historic preservation law, and cited compelling statements from the National Trust for Historic Preservation on the need to rectify major drawbacks in the Cape Wind Draft Environmental Impact Statement. A copy of this editorial is attached.

The requirements imposed by the National Historic Preservation Act on every federal agency, including MMS, are clear and explicit, and not merely procedural. MMS must affirmatively consider the adverse effects on historic properties, comparatively weigh these adverse impacts from one alternative project site to another, choose a preferred alternative site based on this analysis, and fully mitigate the remaining adverse effects. To date, MMS has done none of these things, and should be prepared, minimally, to outline the affirmative steps that it will take to address each of these deficiencies, prior to convening any meeting of the Consulting Parties.

It is our sense that all the above actions are clearly needed prior to consultation. Under the present scenario, we feel it may be premature for MMS to convene a meeting of the Consulting Parties before the agency has had the time to outline the steps it will take to fully comply with the law. The Consulting Parties need to know the elements of MMS' plan, yet it appears at this time that MMS does not have a plan in place. Since it will likely take some weeks to prepare the plan MMS will undertake in order to come into compliance with Section 106, we respectfully suggest that MMS consider postponing the July 23rd meeting until this step is complete. We expect it will be beneficial to the outcome of the consultation process if MMS takes the time now to properly plan its remedial strategy and compliance steps and be prepared to openly discuss them at an initial meeting of the Consulting Parties.

Further, we note that several important entities have not been included in the group indicated as Consulting Parties to attend the meeting, and we suggest they be invited. These include the

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Martha's Vineyard Commission, the Nantucket Planning & Economic Development Council, parties responsible for the National Historic Landmarks and other key historic properties (such as Nantucket, the Wianno Club, and the Kennedy Compound), and towns around Nantucket Sound, including those that have requested Cooperating Agency status.

Essentially, we seek acknowledgement from MMS that the purpose for the initial meeting of Consulting Parties will be organizational in nature and will serve to scope out the issues that need to be addressed, the concerns that must be resolved, and the procedures and schedule that will be followed by MMS to address them, before MMS initiates its consultation duties regarding historic preservation. We question whether there is adequate time for this groundwork to be done by July 23rd.

However, should you choose to proceed with the July 23 meeting date, the Alliance will participate with the understanding that this meeting will begin a wholly new phase of the compliance and mitigation process, and one that we trust MMS now fully understands will be thorough enough to completely and accurately consider the truly adverse impacts of the proposed Cape Wind Project on the myriad of historic properties and cultural landscapes of the Nantucket Sound region.

Thank you for your acknowledgement of this letter, and your response to our suggestions.

Sincerely,



Glenn G. Wattle
President & CEO

cc: Melanie Stright, MMS
John Eddins, Advisory Council on Historic Preservation (ACHP)
Brona Simon, MA Historical Commission
Bettina Washington, THPO, Wampanoag Tribe of Gay Head
George Green, Mashpee Wampanoag Tribe
Bill Bolger, National Park Service
Karen Adams, US Army Corps
Roberta Lane, National Trust for Historic Preservation
Elizabeth Merritt, National Trust for Historic Preservation
Sarah Korjeff, Cape Cod Commission
Jim Powell, Martha's Vineyard Commission
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Charlie McLaughlin, Town of Barnstable
Suzanne McAuliffe, Town of Yarmouth
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Peter Bettencourt, Town of Edgartown

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Appendix C

Army Corps of Engineers



DEPARTMENT OF THE ARMY
NEW ENGLAND DISTRICT, CORPS OF ENGINEERS
696 VIRGINIA ROAD
CONCORD, MASSACHUSETTS 01742-2751

October 15, 2004

REPLY TO:
ATTENTION OF:
Regulatory Division
CENAE-R

Falmouth Historical Commission
ATTN: Ms. Ann Sears
Falmouth Town Hall
59 Town Hall Square
Falmouth, MA 02540

Dear Ms. Sears:

The Corps of Engineers is evaluating a permit application from Cape Wind Associates, LLC to install 130 wind turbine structures in Nantucket Sound. We determined that an Environmental Impact Statement (EIS) is required to thoroughly assess the potential impacts and benefits of their proposal. We have been developing the Draft EIS since Spring 2002 and plan to release it for public review and comment within the next few weeks. Review of potential impacts to historical properties under Section 106 of the National Historic Preservation Act is being included in the DEIS. We have begun coordinating with the State Historic Preservation Officer (SHPO) at the Massachusetts Historical Commission and the Wampanoag Tribal Historic Preservation Officer (THPO) as cooperating agencies as required by the National Environmental Policy Act (NEPA). A brief explanation of NEPA and the list of cooperating agencies are enclosed.

Pursuant to the ACHP regulations (36 C.F.R. Part 800) and the Corps' NHPA regulations (33 C.F.R. Part 325, Appendix C), we are inviting local governments to participate in this review as consulting parties. We would like to know if you would like to participate as a consulting party and if so, who will be the representative. Please provide the contact's name, an address (if different than the organization's) and phone number. If you should have any questions, please contact me at 978-318-8828.

Sincerely,

A handwritten signature in cursive script, appearing to read "Karen K. Adams".

Karen K. Adams
Regulatory Division

Cf:
Falmouth Selectmen
Falmouth Town Hall
59 Town Hall Square
Falmouth, Massachusetts 02540



REPLY TO:
ATTENTION OF:

DEPARTMENT OF THE ARMY
NEW ENGLAND DISTRICT, CORPS OF ENGINEERS
696 VIRGINIA ROAD
CONCORD, MASSACHUSETTS 01742-2751

August 5, 2005

Regulatory Division
CENAE-R

Libby Herland, Refuge Manager
Great Meadows National Wildlife Refuge Manager
73 Weir Hill Road
Sudbury, Massachusetts 01776

Dear Ms. Herland:

The U.S. Army Corps of Engineers, New England District (Corps) has prepared a Draft Environmental Impact Statement (DEIS) as part of an application from Cape Wind Associates to construct a wind farm in Nantucket Sound. You have been designated as the point of contact on behalf of your "local government" to consult with the Corps in our review of the Cape Wind Energy Project, in accordance with our responsibilities under Section 106 of the National Historic Preservation Act of 1966, as amended (NHPA). A copy of the DEIS is enclosed on compact disk. The 3,800-page document, in four volumes, is available upon request. We have also enclosed a list of other groups, communities, tribes, and other organizations who have either requested or been chosen to be consulting or interested parties pursuant to the Corps' NHPA regulations (33 CFR Part 325, Appendix C), and the Advisory Council on Historic Preservation regulations (36 CFR Part 800). We are consulting with you to obtain your comments on information presented in the DEIS, regarding the potential effects of the proposed project on designated historic properties.

According to 33 CFR Part 325, Appendix C, 1(a), a **Designated historic property** is a historic property listed in the National Register of Historic Places (National Register), or which has been determined eligible for listing in the National Register. A historic property that, in both the opinion of the State Historic Preservation Officer (SHPO) and the District Engineer, appears to meet the criteria for inclusion in the National Register will be treated as a "designated historic property." An effect on a designated historic property occurs when the undertaking may alter the characteristic of the property that qualified the property for inclusion in the National Register. Consideration of effects on designated historic properties also includes indirect effects of the undertaking. For the Cape Wind Energy Project, this includes the effect that the change in the view from the designated historic property will have on that property.

For the Cape Wind Energy Project, the DEIS includes designated historic properties in communities within potential visual range of the offshore turbines. Historic structures and districts were identified in the Towns of Barnstable, Falmouth, Yarmouth, Dennis, Harwich, Chatham, Nantucket, Oak Bluffs, Tisbury, and Edgartown that meet the following criteria: properties listed or formally determined eligible for inclusion on the National Register; properties in the State's *Inventory of Historic and Archaeological Assets of the Commonwealth (Inventory)* for which the SHPO has concurred with an eligibility recommendation; and,

properties on the State Register of Historic Places, including local historic districts, which the SHPO has found are eligible for the National Register. These properties are listed in Appendix 5.10-B of the DEIS.

Corps regulations pertaining to assessment of potential project impacts on potentially eligible historic properties are set forth in 33 CFR Part 325, Appendix C, Paragraph 5(f) as: *The Corps of Engineers responsibilities to seek eligibility determinations for potentially eligible historic properties is limited to resources located within waters of the U.S. that are directly affected by the undertaking. The Corps responsibilities to identify potentially eligible historic properties are limited to resources located within the permit area that are directly affected by related upland activities. The Corps is not responsible for identifying or assessing potentially eligible historic properties outside the permit area, but will consider the effects of undertakings on any known historic properties that may occur outside the permit area.* Therefore, an architectural inventory of previously unidentified, but potentially eligible historic properties within the project's viewshed is not required by Corps regulations.

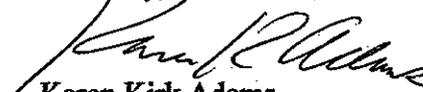
During a review of a permit application, the Corps consults with involved parties to consider possible alternatives or measures to avoid or minimize the adverse effects of the proposed activity. We then formalize any agreement, either through permit conditioning or by signing a Memorandum of Agreement (MOA) or Programmatic Agreement (PA) with these parties.

The DEIS includes the data that we have available, other than sensitive information related to archaeological sites where disclosure of information may create a risk of harm to these resources. This information has been provided to the SHPO at the Massachusetts Historical Commission.

Section 5.10, Cultural and Recreational Resources and Visual Studies, includes the findings of the archaeological survey, identification of the designated historic properties, the visual simulations and our preliminary determinations of effects (also enclosed). We are seeking your comments on the alternatives, and the measures to avoid or minimize adverse effects on designated historic properties within your town or historic district. The PA included as Appendix 5.10-G is a preliminary draft and will be developed further based upon input from the consulting parties.

If you have any questions or comments, please contact me at (978) 318-8828 by September 7, 2005, so that we may determine if a consultation meeting is necessary with all parties and consider your comments for inclusion in the Final EIS.

Sincerely,



Karen Kirk Adams
Regulatory Division

Enclosure

Copy furnished:

**Ms. Cara H. Metz, Executive Director
Massachusetts Historical Commission
Massachusetts Archives Building
220 Morrissey Boulevard
Boston, Massachusetts 02125**

**Andrew Raddant, Regional Environmental Officer
U.S. Department of the Interior
Office of the Secretary
Office of Environmental Policy and Compliance
408 Atlantic Avenue, Room 142
Boston, MA 02210-3334**

**John Wilson
U.S. Fish and Wildlife Service
300 Westgate Center Drive
Hadley, MA 01035**

<p>Mark W. Voight, Administrator Nantucket Historical District Commission 37 Washington Street Nantucket, Massachusetts 02554</p>	<p>Consulting party</p>
<p>Raymond P. LaPorte Town of Tisbury PO Box 2281 Vineyard Haven, MA 02568</p>	<p>Consulting party</p>
<p>David Grunden Town of Oak Bluffs PO Box 1327 Oak Bluffs, MA 02557</p>	<p>Consulting party</p>
<p>Cheryl Andrews-Maltais, THPO Wampanoag Tribe of Gay Head (Aquinnah) 20 Black Brook Road Aquinnah, MA</p>	<p>Consulting party</p>
<p>John Brown Narragansett Tribal Historic Preservation Officer PO Box 700 Wyoming, RI 02890</p>	<p>Consulting party</p>
<p>Brona Simon, Deputy SHPO Massachusetts Historical Commission 220 Morrisey Blvd Boston, MA 02125</p>	<p>Consulting party</p>
<p>Don L. Klima, Director / Dr. Tom McCulloch Advisory Council on Historic Preservation 1100 Pennsylvania Avenue NW, Suite 809 Washington, DC 200044</p>	<p>Consulting party</p>
<p>Libby Herland, Refuge Manager Great Meadows National Wildlife Refuge Manager 73 Weir Hill Road Sudbury, MA 01776</p>	<p>Consulting party</p>
<p>Susan Nickerson, Executive Director Save Our Sound 396 Main Street Hyannis, MA 02601</p>	<p>Interested Party</p>
<p>Thomas J. Swann, President Wianno Club PO Box 249 Osterville, MA 02655-0249</p>	<p>Interested Party</p>



**US Army Corps
of Engineers®
New England District
Economics and Cultural Resources
Section**

Please Deliver To: Ginny Adams

Organization: PAL

Subject: Cape Wind, July 14, 2004 letter

FAX #: (401) 728-8784

of pages (+ header) = 3

From: **Kate Atwood**
US Army Corps of Engineers
696 Virginia Road
Concord, MA 01742-2751

All I've got right now.

Kate



PHONE: (978) 318-8537

FAX: (978) 318-8560

E-Mail: kathleen.a.atwood@usace.army.mil

July 14, 2004

Engineering/Planning Division
Evaluation Branch

Ms. Cara H. Metz, Executive Director
Massachusetts Historical Commission
Massachusetts Archives Building
220 Morrissey Boulevard
Boston, Massachusetts 02125

Dear Ms. Metz:

The Cape Wind Associates, L.L.C., the project proponent, has applied to the U.S. Army Corps of Engineers, New England District (NAE) for a permit pursuant to Section 10 of the Rivers and harbors Act (33 USC 403) to construct a wind park, consisting of 130 wind turbine generators, electric service platform, and transmission lines, on Horseshoe Shoal in Nantucket Sound. NAE is preparing an Environmental Impact Statement (EIS) to comply with the National Environmental Policy Act and Section 106 of the National Historic Preservation Act, as amended.

As part of the EIS, NAE has requested various archaeological surveys, which your office has reviewed and commented on previously. On June 18, 2004, a visual impact assessment, prepared by The Public Archaeology Laboratory, Inc. (PAL) was sent to your office. NAE has reviewed this assessment and we have made determinations of effect for properties listed or determined eligible for the National Register of Historic Places (NR). We would like your concurrence on these determinations of effect.

NAE concurs with PAL's findings of effect. We believe that the proposed project will have no effect on these historic properties: Martha's Vineyard Campground Historic District; the Flying Horses Carousel (also a National Historic Landmark [NHL]); The Arcade in Oak Bluffs; and, the Oak Bluffs Christian Union Chapel.

We believe that the proposed Cape Wind project will have an adverse effect on the following properties: in Falmouth, the Nobska Point Light Station; in Barnstable, the Cotuit Historic District; Col. Charles Codman Estate; Wianno Historic District; Wianno Club (NHL); Hyannis Port Historic District; and, the Kennedy Compound (NHL); in Chatham, Monomoy Point Lighthouse; in Tisbury, the West Chop Light Station; in Oak Bluffs, East Chop Light; and, the Dr. Harrison A. Tucker Cottage; in Edgartown, the Edgartown Village Historic District; Edgartown Harbor Lighthouse; and, Cape Poge Light; in Nantucket, Nantucket Historic District (NHL); and, the Nantucket (Great Point) Light.

As part of the draft EIS, the enclosed Programmatic Agreement (PA) has been prepared in order to avoid, minimize or mitigate for the adverse effects of the proposed

project on historic properties. We are asking for your review and comment on the draft PA.

If you have any questions, please contact Ms. Karen Kirk Adams, EIS Project Manager at (978) 318-8828, or Ms. Kate Atwood, NAE Archaeologist, at (978) 318-8537.

Sincerely,

Enclosure

Appendix D

Cape Cod Commission



CAPE COD COMMISSION

3225 MAIN STREET
P.O. BOX 226
BARNSTABLE, MA 02630
(508) 362-3828
FAX (508) 362-3136

E-mail: frontdesk@capecodcommission.org

October 6, 2008

Melanie J. Stright, PhD
Federal Preservation Officer
Minerals Management Service
381 Elden Street
Herndon, VA 20170

RE: Cape Wind Energy Project - Request for written comments on issues discussed at September 9, 2008 Section 106 meeting

Dear Ms. Stright,

This letter is in response to your request for comments from Consulting Parties regarding two issues discussed at the September 9, 2008 Section 106 meeting for the Cape Wind Energy Project. I am commenting in my capacity as a Cape Cod Commission staff member, and these comments do not represent the opinion of the Cape Cod Commission members themselves.

You requested information about any additional National Register properties or properties potentially eligible for the National Register that have not been previously identified and considered in the Section 106 process for this project. As I stated at the meeting, I am aware of several districts that have been evaluated by staff at the Massachusetts Historical Commission (MHC/SHPO) but have not gone forward in the National Register designation process because of economic or other reasons. The first such district is Falmouth Heights in Falmouth, where a preservation consultant (Candace Jenkins) prepared a National Register nomination in the year 2000 under a grant from the MHC/SHPO. Falmouth Heights is a 335-building district bordering Nantucket Sound and would be within the viewshed of the proposed project, so should be considered in the analysis of potential effects. The second such district is Ocean Grove in Harwich, where a preservation consultant prepared an initial analysis of the district and the MHC/SHPO stated their opinion that the area is eligible for the National Register in a letter of July 11, 2006. (A copy of the letter is attached.) This district also borders on Nantucket Sound and should be considered in the analysis of potential effects from the proposed project. I also mentioned at the meeting that the town of Barnstable has recently hired a consultant (ttl-architects of Portland, Maine) to look at the various undocumented historic resources in the town, including potential expansion of the Craigville National Register District. This district includes views over Craigville Beach to Nantucket Sound. While the consultants have begun their work in Barnstable recently, it would be appropriate to contact them to ensure that any properties within the potential expanded National



Register District are considered in the analysis of potential adverse effects. Since few Cape towns have conducted exhaustive surveys of their historic resources, I believe there are likely numerous other properties along the south coast of Cape Cod that are eligible for listing on the National Register but have not yet been inventoried. An assessment of older waterfront structures in the towns closest to the proposed project may well be warranted to address this gap in information.

You also requested comments on the different approaches taken by PAL and TRC in their assessment of visual effects for the proposed project. Neither PAL nor TRC considered the additional National Register-eligible properties discussed above, and these should be taken into account. Regarding application of the criteria, TRC stated that since the view to the project would be limited within historic districts, and in some parts not visible at all, there would not be an adverse effect on the district. I believe that it is inappropriate to make the decision for the entire district based on this broad premise. In many cases, the individual structures within the historic district may be individually eligible for listing on the National Register, and the impact on these properties should be considered. The determination of adverse effect should acknowledge the significance and integrity of the individual resources within the district whose setting will be directly impacted, and this does not appear to have been considered in the TRC analysis. Given the early date of many of these National Register historic district nominations, I also believe that it is important for the consultant to evaluate the importance of setting to the property's integrity, even if it is not specifically discussed in the nomination.

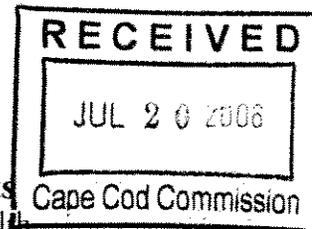
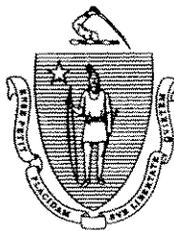
Thank you for the opportunity to provide comments. Please make these comments available to the other consulting parties.

Sincerely,



Sarah Korjeff
Preservation Specialist

Attachment: Letter from MHC/SHPO regarding Ocean Grove, Harwich, July 11, 2006



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Massachusetts Historical Commission

July 11, 2006

Eric E. Dray
Preservation Consultant
6A Cook St.
Provincetown, MA 02657

RE: Ocean Grove, Harwich

Dear Eric:

At your request, staff of the MHC have evaluated the area of Ocean Grove, Harwich, formerly a spiritualist campground, to determine whether it meets the criteria for listing in the National Register of Historic Places. It is our opinion that the area is eligible for listing under Criteria A and C for its historic and architectural significance on the local level, with caveats that would need to be addressed should a nomination be prepared. In particular, there is a need for additional information on the development of the neighborhood after the end of spiritualism in the nineteen teens. Our opinion reads as follows:

"The neighborhood known as Ocean Grove (roughly bounded by Ocean, Park, Pine, and Atlantic Streets at the edge of Nantucket Sound) was established in the mid 1880s as a spiritualist campground. It operated between 1886 and 1910, during which period a number of modest, wood-frame, 1 1/2-story cottages were constructed along the narrow streets on small lots that initially were intended as tent sites. More than half the houses in the area date to this period, and though modest and in some cases altered, there is evidence on several of the buildings of simple gable ornament or patterns of decorative shingles similar to religious campground communities elsewhere on Cape Cod. Operated by the Cape Cod Spiritualist Association, which sold lots to prospective buyers, the 11-acre campground also included the Grove, a communal meeting place (now largely wooded), and The Park (now a parking lot); it may also have included a chapel and a social hall, as well as a group Lodging House, though no remnants of these structures are evident. Though not yet conclusively documented, there is thought that this may be the oldest Spiritualist camp surviving.

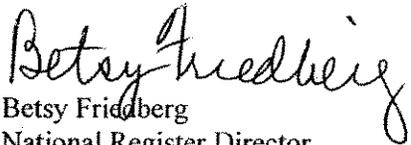
After 1910, interest in spiritualism waned, and the area transitioned to a summer cottage colony similar to other Harwich communities. Most of the other houses in the neighborhood had been constructed by 1928, though there are also some later capes and ranches that were constructed as infill throughout the area. Additional information on this period of the area's history would be necessary for a National Register nomination for this area. Today the majority of houses in the area are those constructed prior to 1928, with alterations including screened porches, rear ells, new window openings, and other alterations indicative of the use of these houses as vacation homes through much of the 20th century and into the 21st; nevertheless, the historic integrity of the district as a whole remains evident. The plan and layout established by the Cape Cod Spiritualist Association remains largely intact.

While it appears that the area is eligible for the National Register under criteria A and C at the local level for its associations with the spiritualist movement, it is also likely that the period of significance for this area would extend past the 1910 end date of the spiritualist presence and would include the use of the neighborhood as a summer cottage colony. Additional information would be necessary on inhabitants in the neighborhood after 1910, and on changes the area has sustained after 1928. Boundaries of the district should be strongly defined and it should be made clear that even with this later layer of significance, and with the changes that the area has undergone, the area retains integrity and the boundaries are well justified. The significance of the area at greater than local level would also need considerable substantiation in a National Register nomination."

If the Harwich Historical Commission is interested in pursuing a National Register nomination for this district, we would be happy to work with them. As you know, a critical component of the nomination process is a public information campaign. The goal is to make sure that all property owners are fully informed throughout the nomination process. A public informational meeting in Harwich early in the nomination's process is always useful; we urge the Harwich Historical Commission to take an active role in public information during the nomination's course, and we are available to help in such efforts. To that end, we recommend that at least one public meeting be held in the community to discuss the nomination at the beginning of the process, just after the evaluation step has been completed. MHC staff would be available at this meeting to discuss the National Register program and the implications of listing. A second meeting would be held later on, just before the nomination goes before the State Review Board for their review. We find that these meetings are the best way to combat constant misunderstandings about the implications of listing on the National Register (most repeatedly, that National Register is not the same as a local historic district ordinance, nor is it the first step toward establishment of such ordinance). It is a more friendly way to expand on the somewhat intimidating packet of information that the National Park Service requires us to send to property owners 30 to 65 days prior to the submission of the nomination to the State Review Board. And, for National Register districts on Cape Cod that are not also local historic districts, it is an opportunity to explain the role that the Cape Cod Commission might play, potentially, in reviewing projects in the district. Sarah Korjeff of the Cape Cod Commission staff has always been available to participate in these meetings along with MHC staff.

If you have questions about our eligibility opinion, please do not hesitate to contact me.

Sincerely,



Betsy Friedberg
National Register Director
Massachusetts Historical Commission

enclosures

cc: Chairperson, Harwich Historical Commission
Susan Brauner, Harwich
Sarah Korjeff, Cape Cod Commission