

7.0 Summary of Consulting Parties' and Public Views

Public notice of availability of a Draft Environmental Impact Statement (DEIS) was presented in Federal Register Vol. 73, No. 13 on Friday, January 18, 2008. Comments from federal, state, and local government agencies as well as other interested parties were requested.

The main content of the consulting parties' comments concerns a previously applied distinction between the USACE's and MMS's approach to evaluating adverse visual effects to historic properties and the scope of historic properties considered in terms of their National Register status. That distinction has now been nullified as MMS has adopted the USACE's approach to assessing adverse visual effects and their findings, and used the USACE's consultant to conduct additional analysis on historic properties not previously considered but brought to MMS's attention through consultation. Consulting parties also expressed concerns regarding potential impacts to the viewshed of TCPs not located within Tribal grounds and to submerged ancestral sites within Nantucket Sound. The consideration of the impacts of the project on the twenty-eight above ground historic structures, five onshore TCPs, and Nantucket Sound have culminated in the preparation of this document. All comments have been taken into consideration and efforts have been made to avoid, minimize, and mitigate against adverse effects.

A comment matrix summarizing the views presented by the consulting parties as a result of the Section 106 consultation process is presented as Appendix A; copies of these and other correspondence are provided as Appendices B – D. Contact information for the consulting parties is presented as Appendix E, and Appendix F presents internal technical memoranda between MMS and its consultants.

Appendix A:

Copies of Views Provided by Consulting Parties During the Section 106 Process for the Cape Wind Energy Project



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 reinitiate 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

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□ 508-775-9767 □ Fax: 508-775-9725

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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.

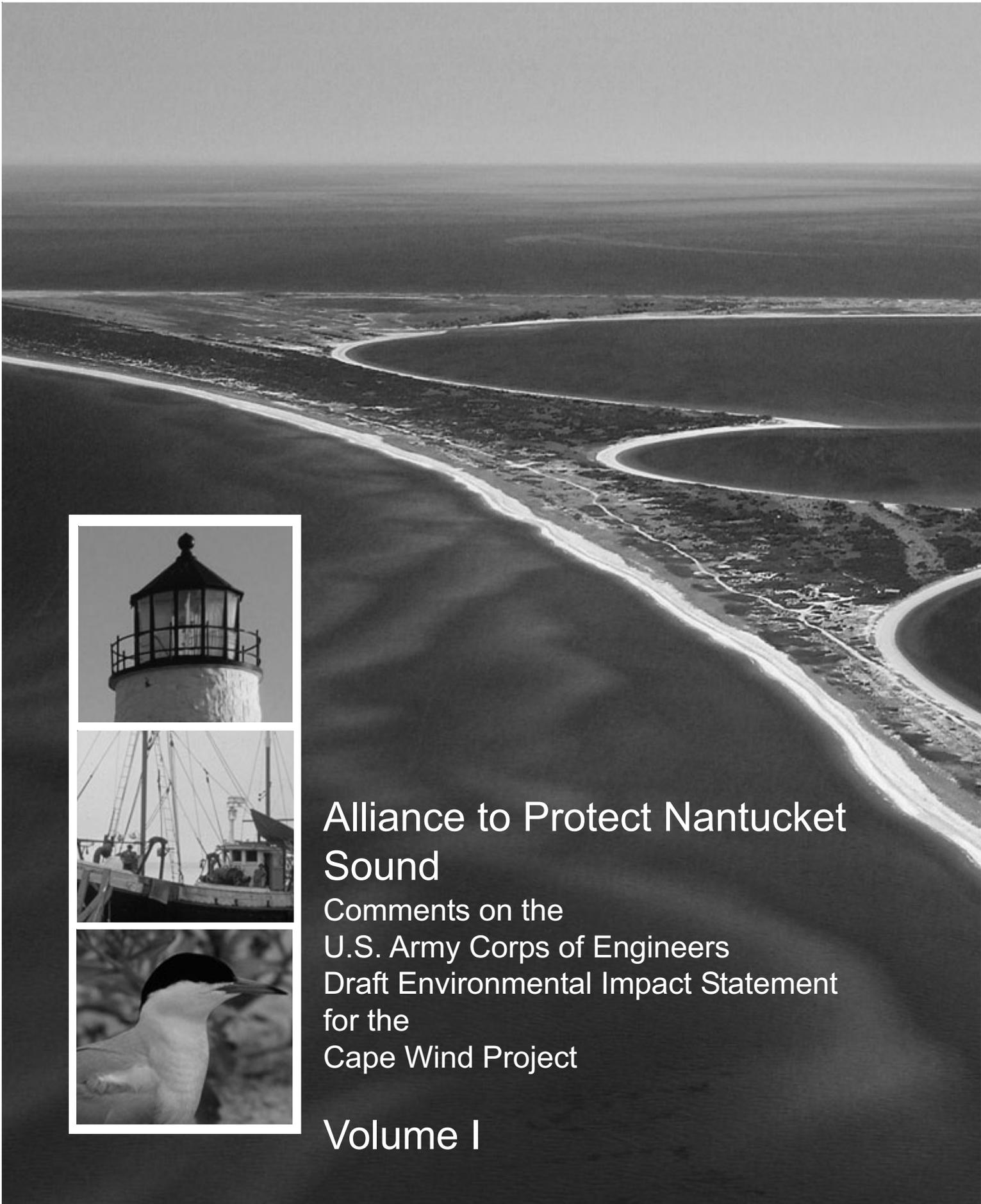
Sincerely,



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 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).

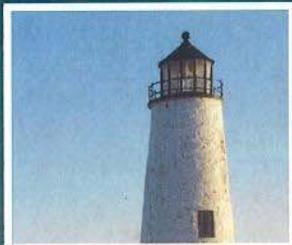
In May 2002, the Corps appears to have initiated informal ESA section 7 consultation with the Northeast Regional Office of NMFS concerning construction of the data tower in Nantucket Sound. The purpose of the tower was to collect data for use in assessing the pros and cons of constructing the full wind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

April 21, 2008

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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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Herndon, Virginia 20170

Dr. Andrew D. Krueger, Alternative Energy Programs
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Dr. Christopher Horrell, RPA
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Minerals Management Service
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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
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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
Brona Simon, Massachusetts State Historic Preservation Officer
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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,



John F. Clark
Of Counsel
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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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*Via facsimile.



June 23, 2009

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

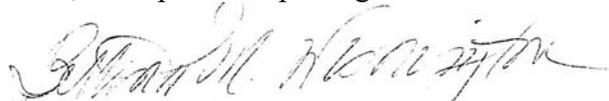
Sincerely,



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
Herndon, VA 20170

John M. Fowler, Executive Director
Advisory Council on Historic Preservation
Old Post Office Building
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Washington, DC 20004

Ms. Brona Simon
State Historic Preservation Officer
Massachusetts Historical Commission
The MA Archives Building
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.

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MEMORANDUM

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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.

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

www.saveoursound.org

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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

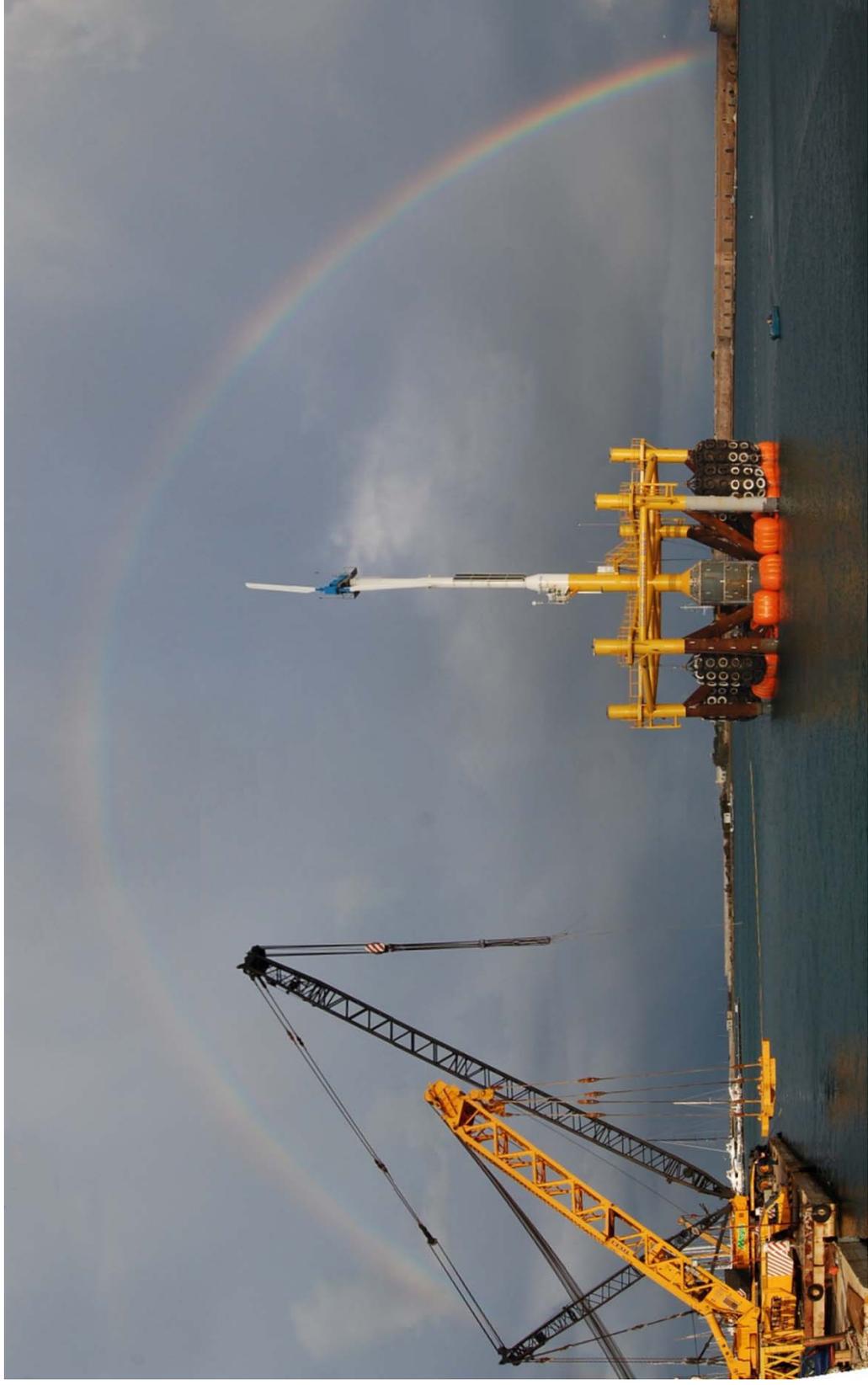


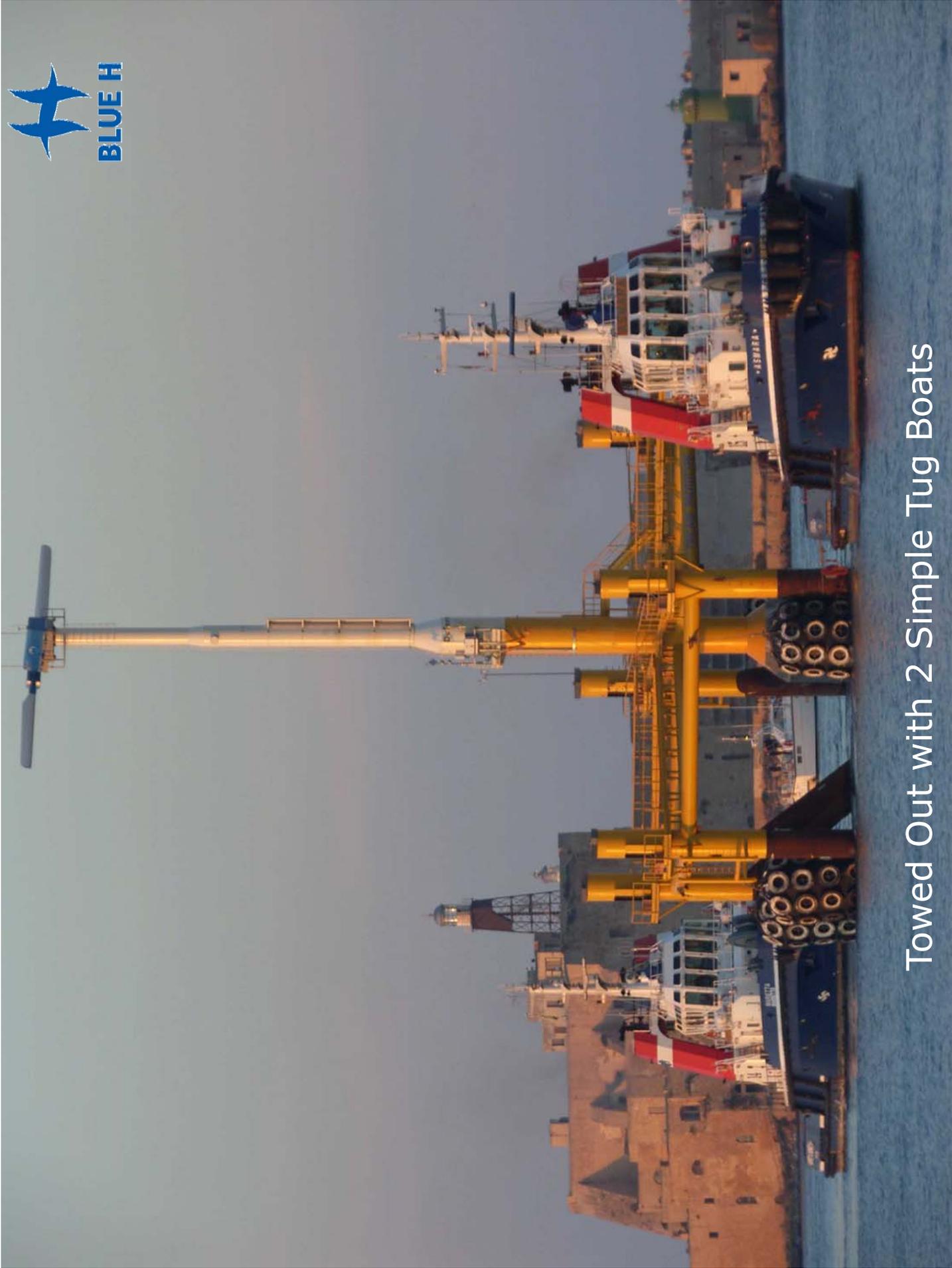
11.5 nautical miles from the coast



Prototype – Launching

The unit is in 4 meters of water

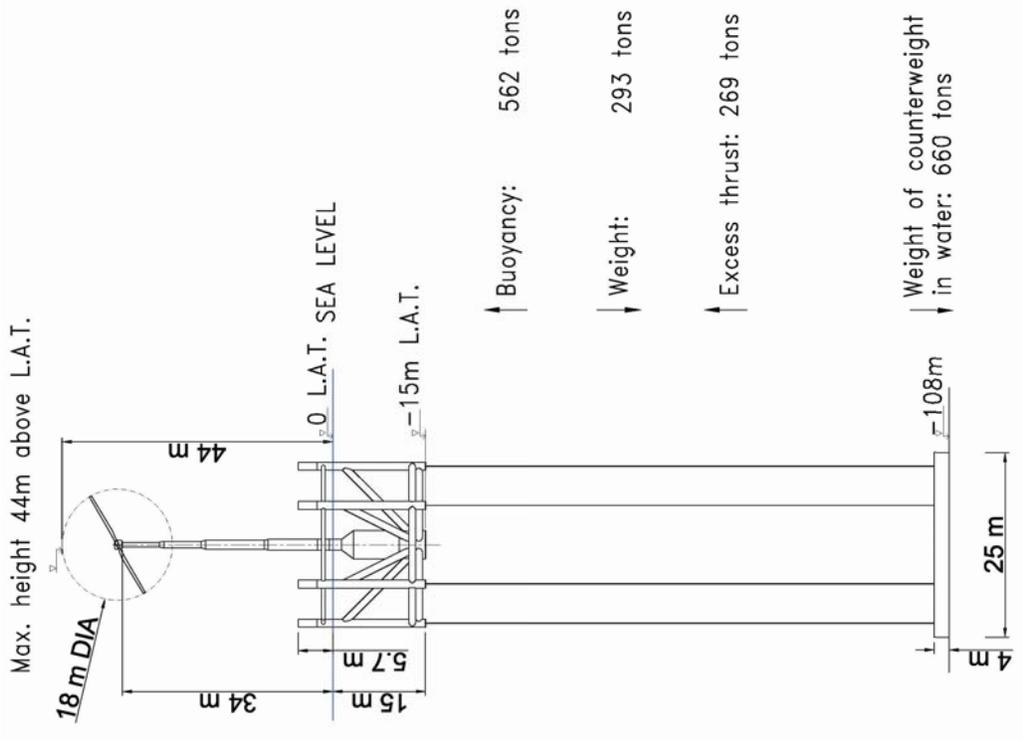




Towed Out with 2 Simple Tug Boats



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



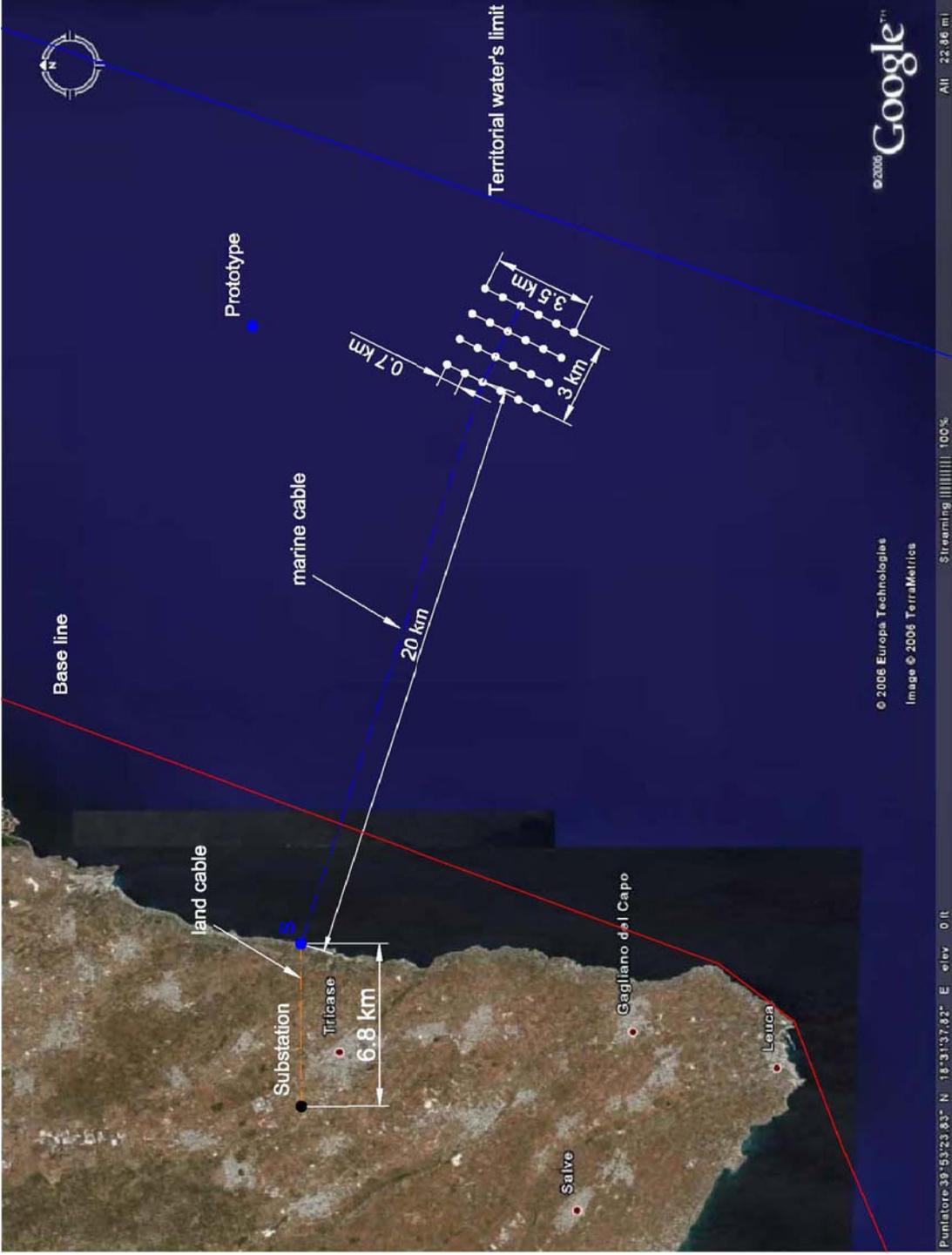


Planned Italian Sites – Prototype off Tricase



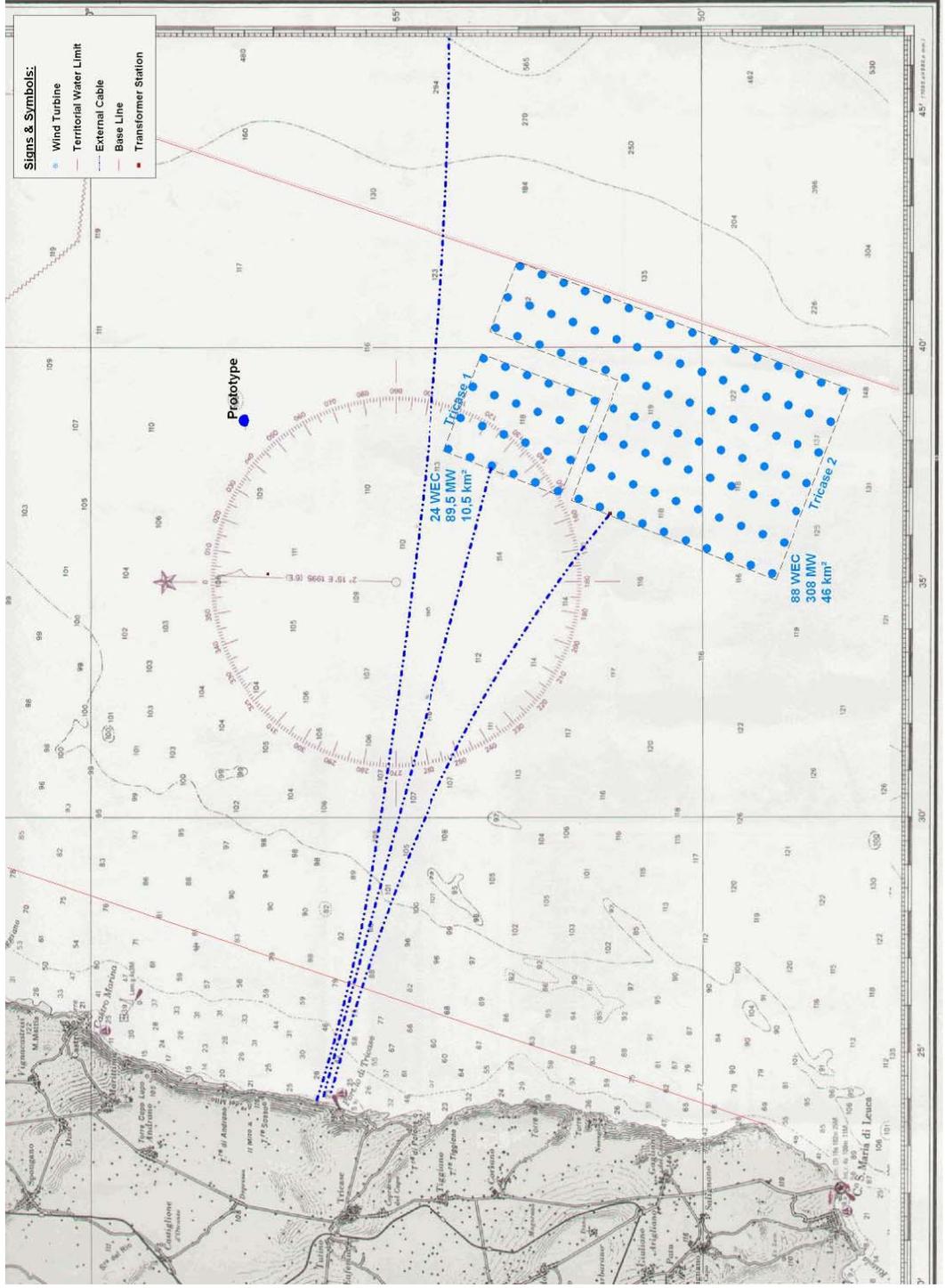


Blue H Skysaver Tricase 1 Wind Farm





Blue H Skysaver Tricase 1 Wind Farm





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)

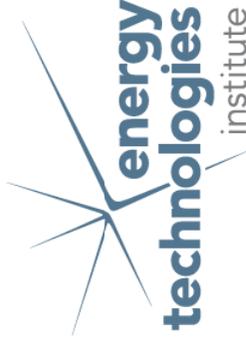


Energy Technologies Institute Announces First Projects to Benefit from £1.7 Billion Initiative

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

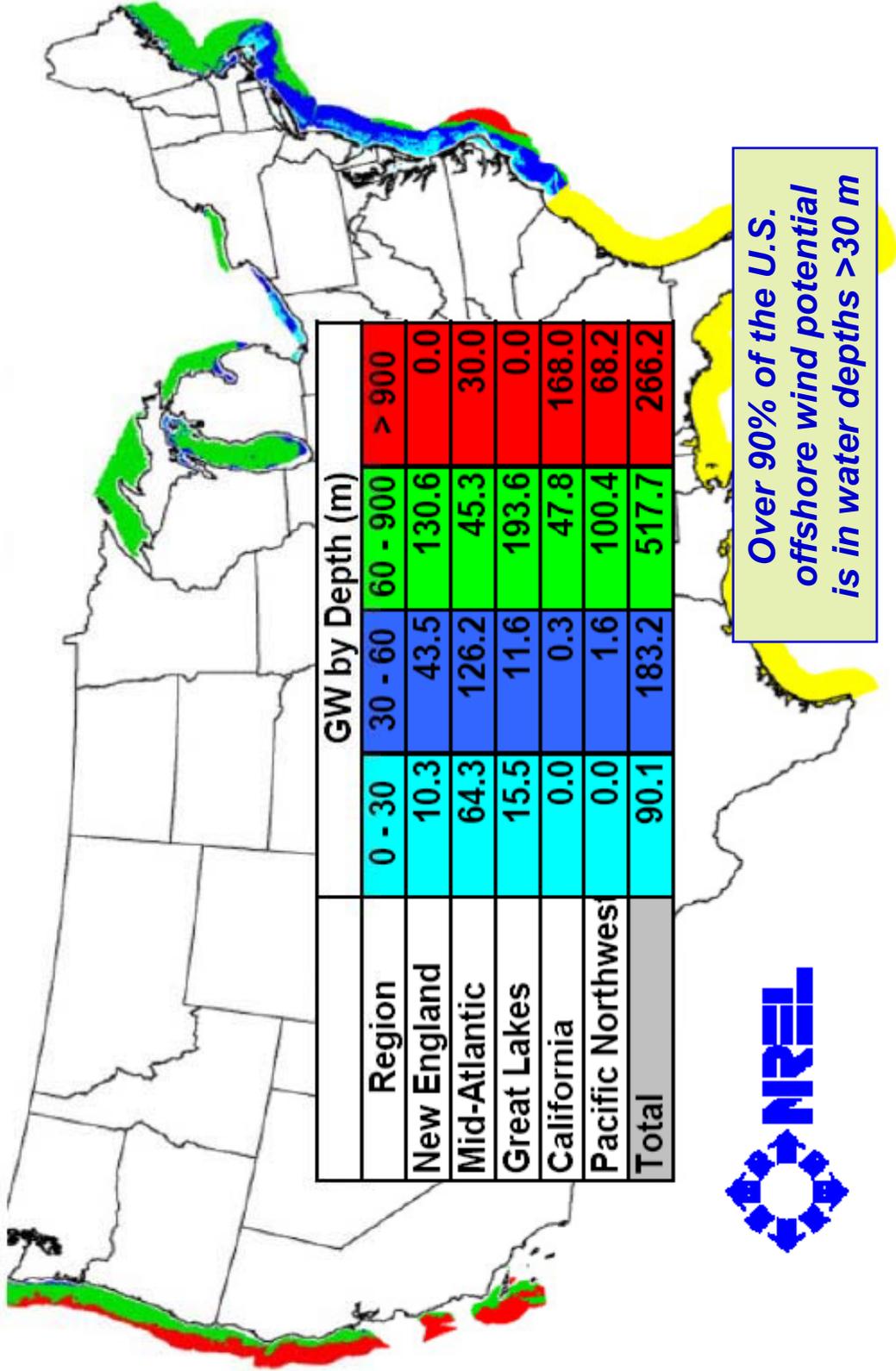
“**Project Deepwater Turbine:** A consortium led by **Blue H Technologies** with representatives from UK groups including **BAE Systems**, the **Centre for Environment, Fisheries, and Aquaculture (CEFAS)**, **EDF Energy**, **Romax**, and **SLP Energy** .

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”



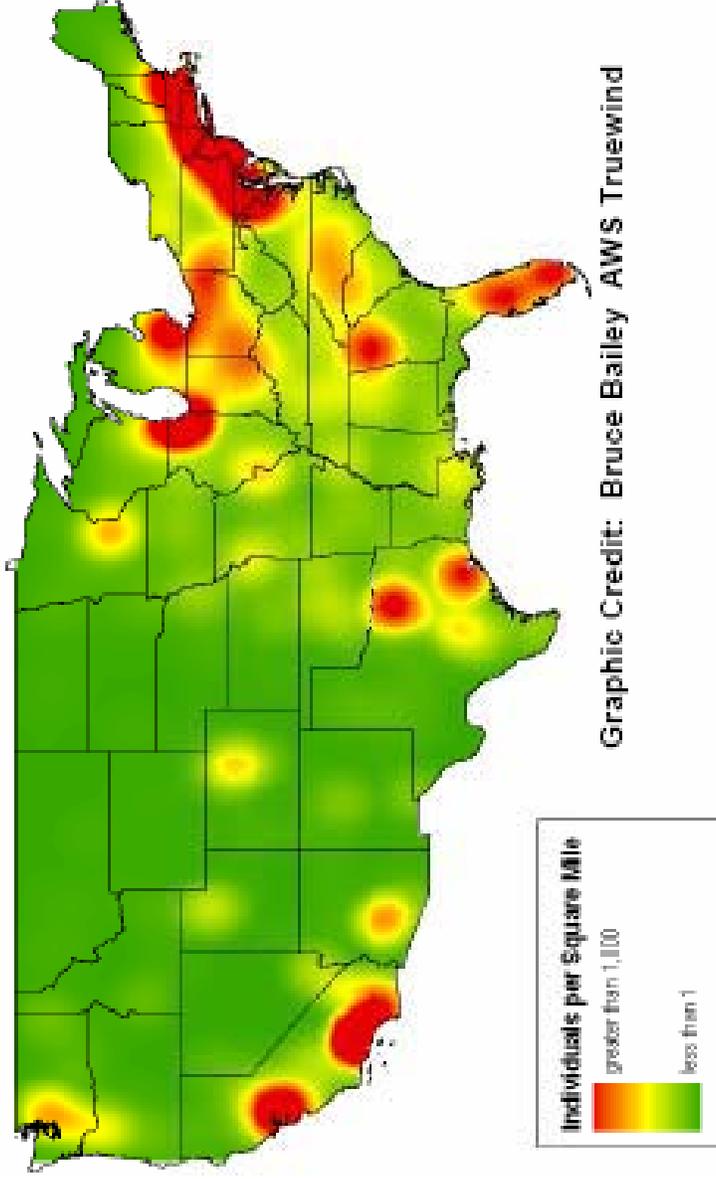
Over 90% of the U.S. offshore wind potential is in water depths >30 m





28 Coastal States Use 78% of the Electricity

US Population Concentration



Graphic Credit: Bruce Bailey AWS Truewind



Blue H USA LLC

- Massachusetts Office

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Boston, MA 02109

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www.bluehusa.com
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**

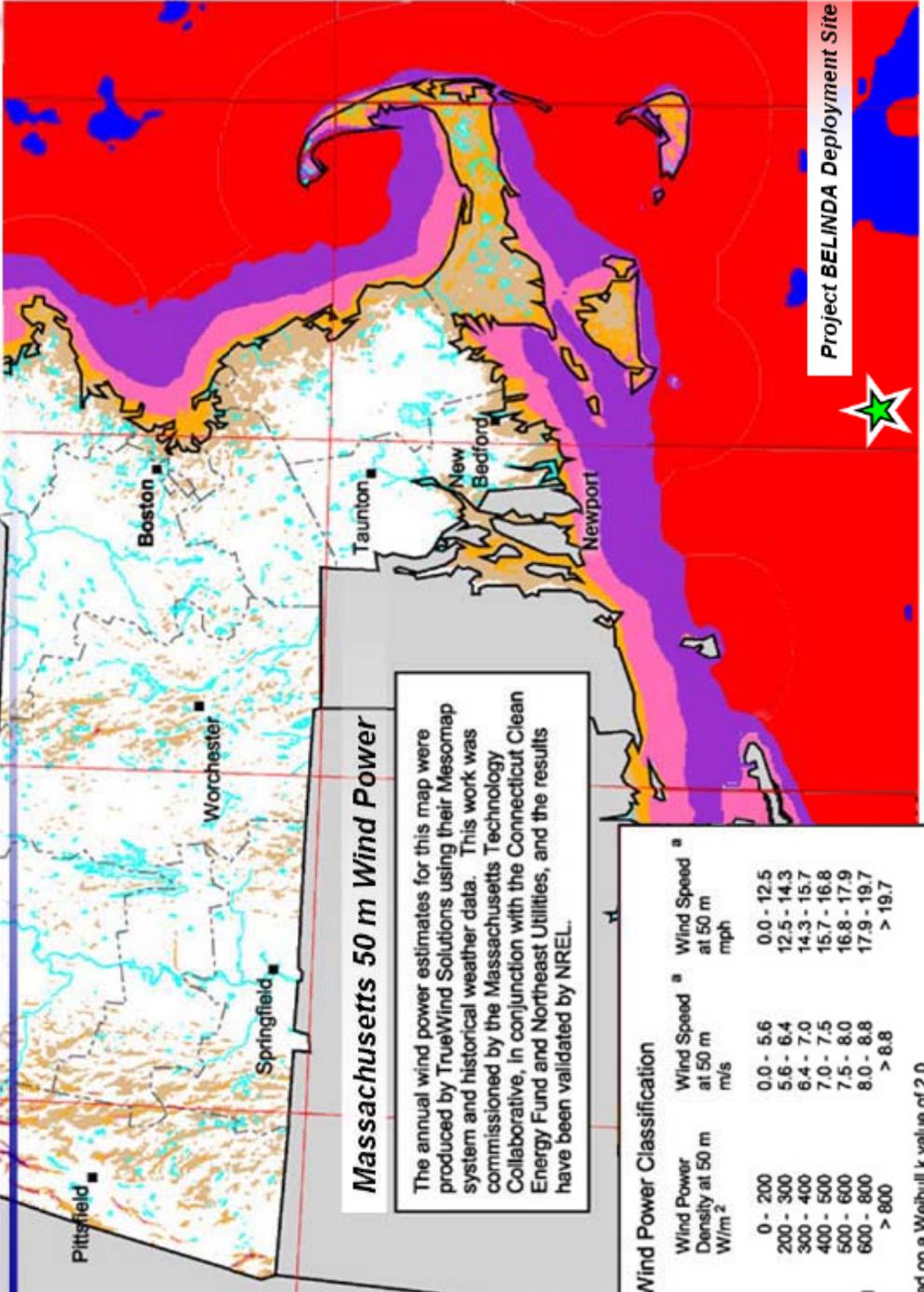




Massachusetts: Offshore Wind Map



U.S. Department of Energy
National Renewable Energy Laboratory



Massachusetts 50 m Wind Power

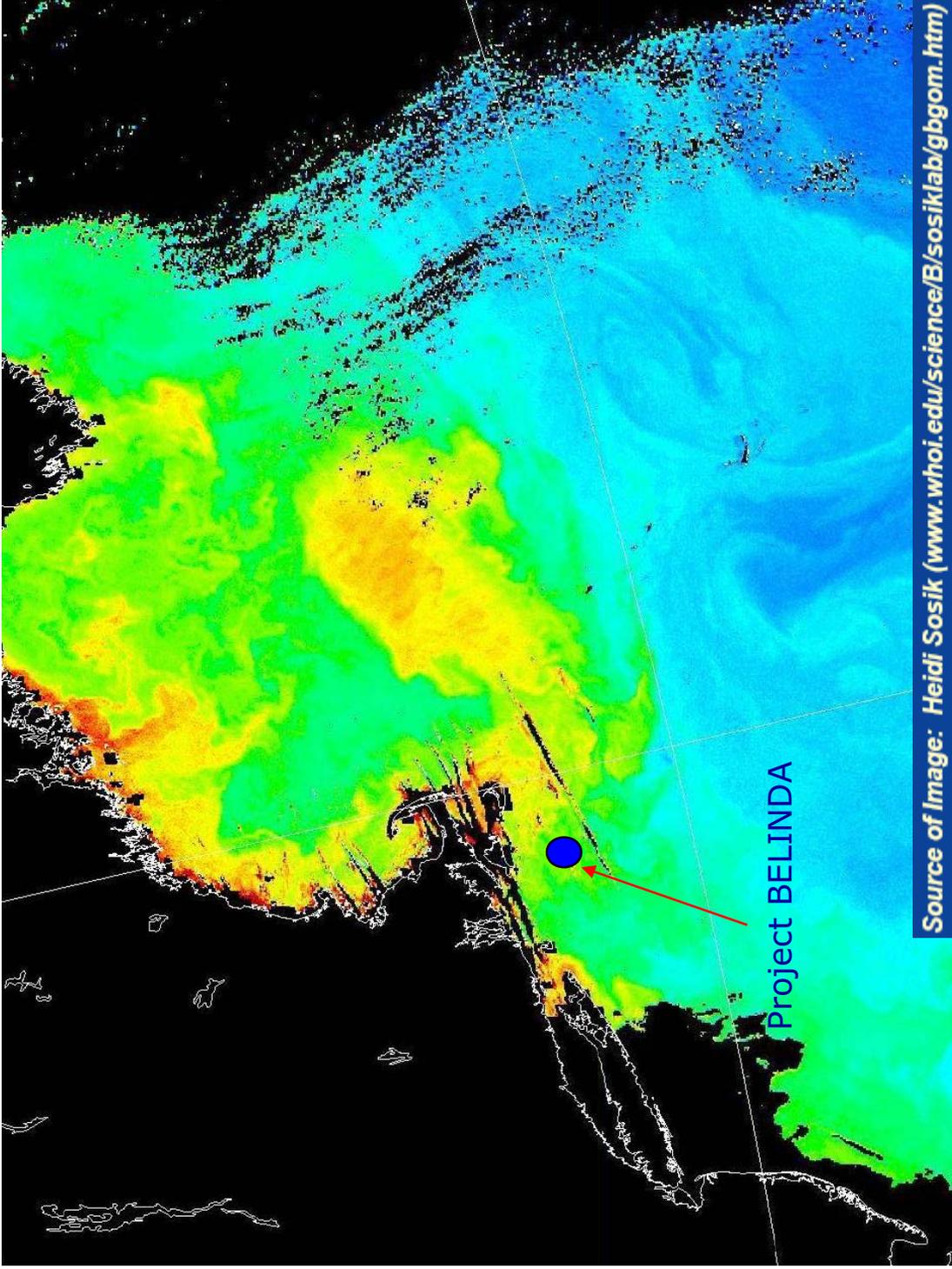
The annual wind power estimates for this map were produced by TrueWind Solutions using their Mesomap system and historical weather data. This work was commissioned by the Massachusetts Technology Collaborative, in conjunction with the Connecticut Clean Energy Fund and Northeast Utilities, and the results 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.

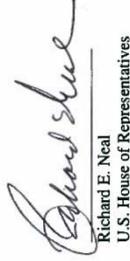
Sincerely,


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

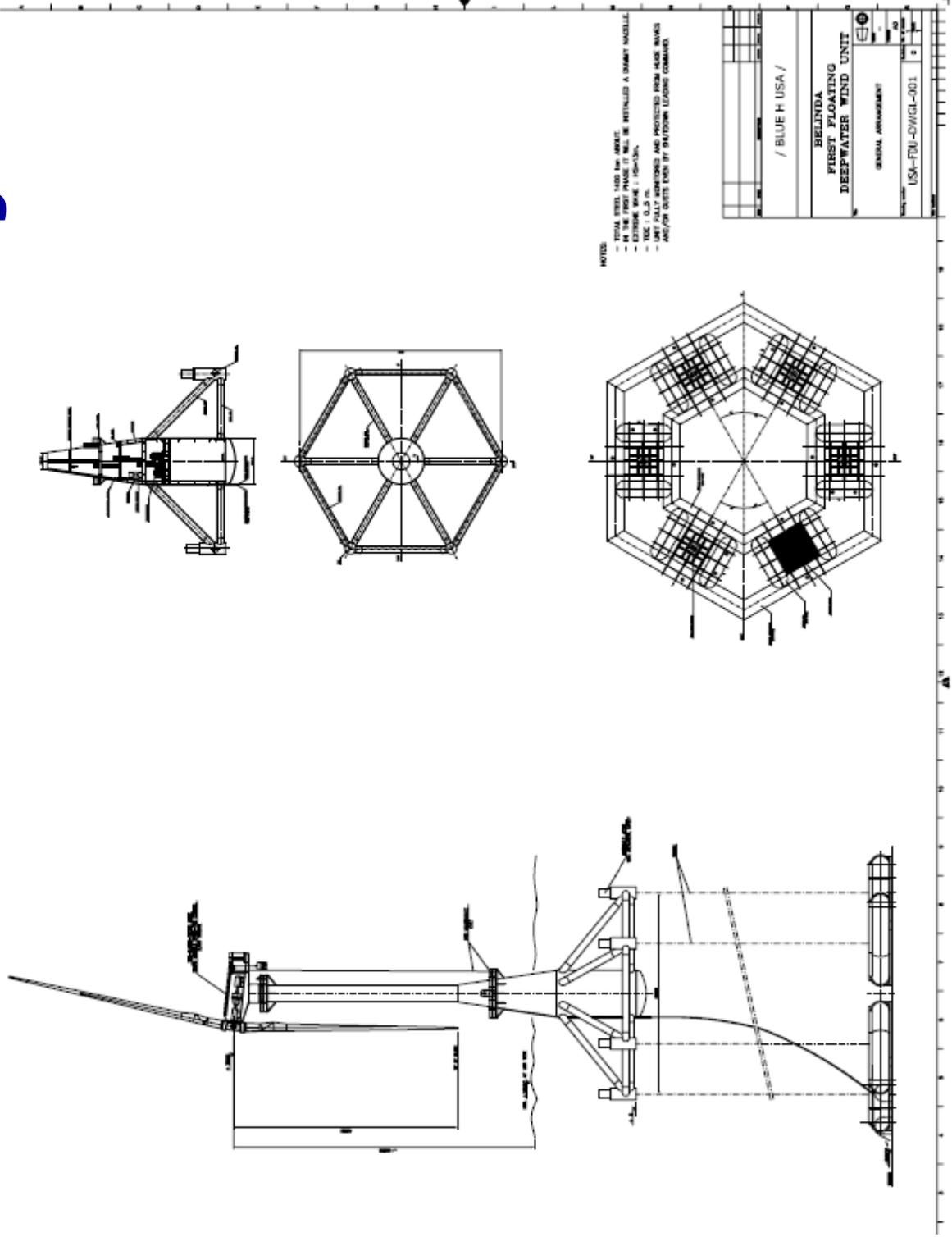


Blue H USA in Maine

- 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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Boston, MA 02109

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(617) 371-2950 fax

www.bluehusa.com
info@bluehusa.com



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.

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

www.saveoursound.org

a 501 (c)(3) tax-exempt organization

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

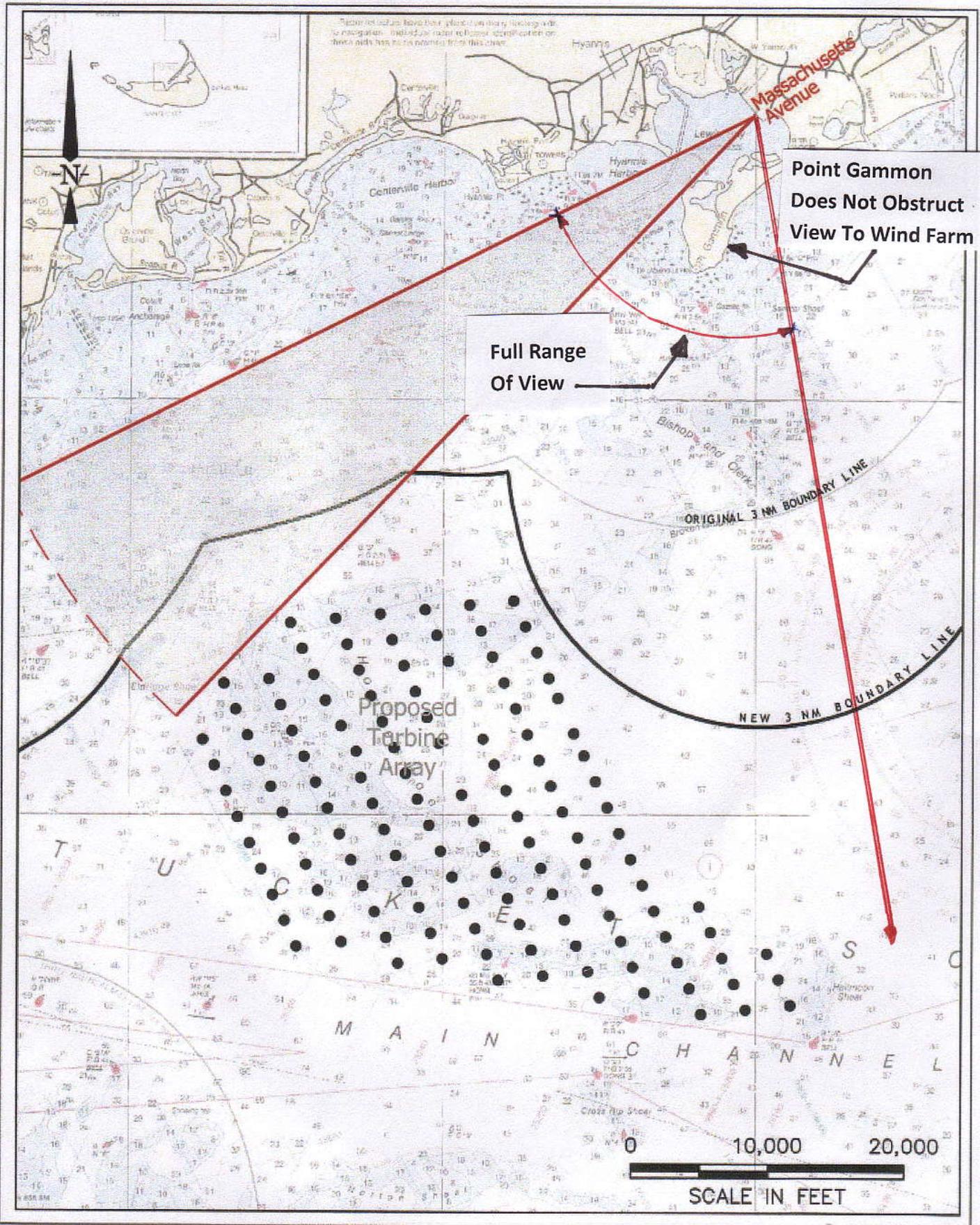
Cc: John Eddins, Advisory Council on Historic Preservation (ACHP)
Brona Simon, MA Historical Commission
Anne Lattinville, MA Historical Commission
Cheryl Andrews-Maltais, Chairwoman, Aquinnah Wampanoag Tribe of Gay Head
Bettina Washington, THPO, Wampanoag Tribe of Gay Head
George Green, Mashpee Wampanoag 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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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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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."

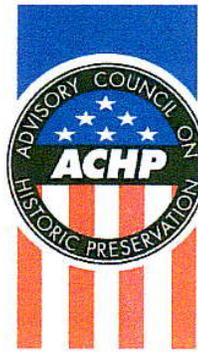
The delay comes after the Coast Guard, on the heels of a request by Representative James Oberstar of Minnesota, decided to further review and hold a public comment period on a study it commissioned in October to evaluate the 130 turbines' impact on ship radar. The Coast Guard has provided the Minerals 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

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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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

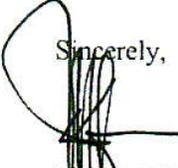
and now are planned sometime in early 2009. Based on recent information, it appears that MMS is considering accepting the effect determinations previously made by the Corps and is also considering additional recommendations about the identification of historic properties and effects made by consulting 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
Mark Voigt, Nantucket Historic Commission

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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 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).

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
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November 23, 2009

The Honorable Kenneth Salazar
Secretary of the Interior
US Department of the Interior
1849 C Street, NW
Washington, DC 20240

Dr. Janet Snyder Matthews
Associate Director for Cultural Resources,
Keeper of the National Register of Historic Places
National Park Service
1849 C Street, NW
Washington, DC 20240

Re: Request for Determination of Eligibility of Nantucket Sound for Listing on the National Register as a Traditional Cultural Property (“TCP”).

Dear Mr. Secretary and Dr. Snyder Mathews,

Cape Wind Associates, LLC (“CWA”) hereby comments on the request for a Determination of Eligibility for the listing of Nantucket Sound as a Traditional Cultural Property (“TCP”). In particular, we respond to the November 5, 2009, report of the Massachusetts State Historic Preservation Officer (“SHPO”) opining that the approximately 600 square miles of heavily utilized ocean waters of Nantucket Sound are eligible for listing as a TCP. While the SHPO correctly notes that there is “an enormous body of recognized secular scholarship” respecting the issues at hand, such sources do not support the conclusion of the SHPO. As discussed below, the bulk of the authorities cited by the SHPO in fact have little or no applicability to Nantucket Sound; rather, most of such materials apply to other bodies of water, primarily those to the west of Martha’s Vineyard, *i.e.*, Vineyard Sound, Rhode Island Sound and the waters immediately off of Gay Head. With respect to visual impacts to potential ceremonial sites, none of such impacts would, under the well-established guidelines, cause Nantucket Sound to be eligible for listing. The Keeper should thus promptly confirm the determination of the MMS that Nantucket Sound is not eligible for listing as a TCP.

I. Eligibility Requests for Natural Features Such as Nantucket Sound Face Heavy Burdens.

As an initial matter, National Register policies provide that attempts to nominate natural features for listing face a heavy burden of proof, as follows: “The National Register discourages the nomination of natural features without sound documentation of the historical or cultural significance.” Guidelines for Evaluating and Documenting Traditional Cultural Properties, National Register Bulletin (2002) (the “TCP Guidelines”) at 11. Such Guidelines further provide that “it is difficult to distinguish between properties having real significance and those whose putative significance is spurious,” and that supporting assertions should thus be questioned and “subjected to critical analysis,” including “careful analysis” of the asserting party’s motives. Id. at 3-4, 11. Additional National Register guidance also provides that a natural feature can only be eligible if its importance is documented and “if the site can be clearly defined,” as it is “critical ... that the activities be documented and that the associations not be so diffuse that the physical resource cannot be adequately defined.” How to Apply the National Register Criteria for Evaluation, National Register Bulletin (2002), at 4-5.

Nantucket Sound has not been shown to meet these demanding standards. With specific reference to the foregoing requirement of “definite borders,” it is particularly notable that the United States Supreme Court has determined that Nantucket Sound does not constitute a “coastal water body,” “inland waters,” or “internal waters” (such as a lake, bay or river), but an unenclosed portion of the territorial or “high seas.” United States v. Maine, 475 U.S. 89 (1986). The Supreme Court further found that Nantucket Sound lacks historic identity as a discrete body of water, noting, with respect to historic maps from the 17th and 18th centuries, that “none of these maps identified Nantucket Sound as a separate body of water even though they did identify other bodies of water such as Cape Cod Bay, Buzzards Bay, and, in some cases, Vineyard Sound,” and that the historic record “did not support Massachusetts’ contention that the area’s inhabitants established a special relationship with the protected waters of Nantucket Sound as opposed to the surrounding waters and ocean in general.” Id. at n.16. Nantucket Sound has thus been held to constitute approximately 600 square miles of unenclosed ocean and high seas, and is well beyond both the scale and nature of any appropriate TCP proposal.

II. Visibility from Ceremonial Sites would not Make the Sound Eligible for Listing as a TCP.

The essence of the Tribes’ claim has been that the entirety of Nantucket Sound is eligible to be listed as a Traditional Cultural Property because it is visible, under certain conditions, from other undisclosed land-based sites allegedly used for religious and cultural tribal ceremonies:

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).

Joint Letter of The Alliance to Protect Nantucket Sound and Wampanoag Tribes, June 23, 2009, at 4. The SHPO similarly relies upon religious Tribal practices “dependent on reverential viewsheds of Nantucket Sound.” SHPO at 12. However, even if the land-based ceremonial sites were deemed to be TCPs, the Tribes’ and SHPO’s fundamental premise (*i.e.*, that the boundaries of such TCPs should therefore extend into the ocean as far as the eye can see) is contrary to the published guidance and policies of the National Register, as well as the established precedent in similar cases. As discussed in detail in our letter of July 6, 2009, enclosed herewith and incorporated by reference, such authorities plainly discourage the nomination of natural features and water bodies, require substantial documentation of alleged eligibility factors, and provide that TCPs associated with ceremonial sites are properly limited to “immediate viewsheds” and within “reasonable” and “well-defined” boundaries.¹ As discussed in detail in such letter, Nantucket Sound’s 600 square miles of unenclosed and heavily utilized ocean fall far short of meeting each of such governing requirements.

III. The Ethnographic Data Relied upon by the SHPO Recounts Legendary Events Occurring Primarily Outside of Nantucket Sound and Therefore Cannot Support an Eligibility Determination Under Criterion A, B, or C.

While the SHPO further based her opinion on extensive ethnographic data regarding “the central origin story” of the Wampanoags, she repeatedly and mistakenly attributed the associated events as having taken place in Nantucket Sound. The cited legends regarding the giant known as Maushop in fact focus events in and around the far western tip of Martha’s Vineyard (*i.e.*, as might be expected, near the Tribal lands of the Acquinnah Wampanoags²), and the associated waters to the west of the Island, including Vineyard Sound and Rhode Island Sound, but not Nantucket Sound. For example, while the SHPO states that Maushop “drop[ped] rocks in

¹ See, *e.g.*, and as discussed in our attached letter of July 6 at 3-5, TCP Guidelines, at 20 (TCP boundaries of mountain-top Tribal ceremonial site limited to “immediate viewshed” of approximately one-half mile, thus excluding the significant but more remote vistas); Defining Boundaries for National Register Properties (1997), at 27 (TCP boundaries of mountain-top Tribal ceremonial site properly limited to the immediate 510 acres, thus excluding the significant but more remote viewsheds); *Id.* at 19 (TCP boundaries of oceanfront Dune Shack District on Cape Cod include only viewsheds extending to the coastline, but not the more remote ocean viewsheds of acknowledged significance); *Id.* at 22 (TCP boundaries of mountain-top scenic drive extend to a 50-foot width from the road’s center line, so as to exclude the acknowledged but more remote “scenic vistas”).

² The above-mentioned concentration of the Tribal legend events in the immediate vicinity of Gay Head, the location where the Wampanoags are proposing their own wind turbine project, should raise serious questions as to the motive and legitimacy of asserted cultural claims. As discussed in detail at pages 7-8 of our enclosed July 6th letter, the Wampanoags have filed for a \$50,000 grant to pursue a wind power project at the “preferred site” of the Gay Head Cliffs, notwithstanding the Tribe’s acknowledgement that “Gay Head Cliffs is a national monument with strong and cultural significance.” The enclosed materials indicate two proposed locations, on Tribal lands, within approximately 115 meters and 175 m of the National Historic Landmark of the Gay Head cliffs, as well as within approximately 97 m and 194 m from the “Lookout Point” designated for viewing the cliffs, within areas designated as “Scenic Landscapes” and “Protected and Recreational Open Space.” The contention that a project located some 25 miles from tribal lands would somehow undermine Tribal culture is thus severely undermined by the simultaneous proposal of the Wampanoag wind project in “designated scenic landscape” areas, in immediate vicinity to a National Historic Landmark, and at the very center of tribal life.

Nantucket Sound to create Devil's Bridge" (SHPO at 11), nautical charts indicate that Devil's Bridge is in fact located off of Gay Head at the western shore of Martha's Vineyard, and not in Nantucket Sound.

Further, one of the primary ethnographic resources cited by the SHPO (William S. Simmons 1986: 192) confirms that the Devil's Bridge legend relates to the rocky submerged structures extending westerly from Gay Head towards Cuttyhunk said to have been created by Maushop, a "mighty giant" living in the vicinity of Gay Head, at the western tip of the Island. In building his "[Devil's] bridge, Maushop is said to have excavated earth and rocks from the Gay Head cliffs (which explains the origin of the circular depression known as Devil's Den) which was carried as material in his shoe," and that "Maushop projected the bridge by which to cross over to Cuttyhunk and remain there, and laid the foundation with rocks brought from the opposite shore." Simmons further recounts a version of the Maushop legend whereby, while residing at Gay Head, in order "to facilitate the catching of fish, he threw a really large stone, in proper distances, into the sea, on which he might walk with greater ease to the South. This is now called Devil's Bridge." *Id.* Such references to legendary events in waters in and around Vineyard Sound thus offer absolutely no support for a TCP designation of an entirely different water body, *i.e.*, Nantucket Sound.

The SHPO also geographically misstates the central legend of Maushop's separating the Elizabeth Islands and Noman's Land from Martha's Vineyard by stating that he did so by dragging his toe across Nantucket Sound. SHPO at 11. Again, the geographic misstatement is obvious, as the Elizabeth Islands are separated to the west of Martha's Vineyard by Vineyard Sound, and not Nantucket Sound, and Noman's Land is located to the South of Gay Head, and not in Nantucket Sound. Simmons similarly recounts the same legend so as to confirm the event's location away from Nantucket Sound, as Maushop is said to have "dragged his toe to create the passage across the beach that joins Noman's Land to Gay Head," and that "after separating Noman's Land from Gay Head ... and throwing his wife at Saconet Point [R.I.] where she still remains a misshapen rock, he went away nobody knew whither" (Simmons 176, 178).

Similarly, while the SHPO also references the legend that the multi-colored, Miocene fossil-bearing clays at Gay Head are the "remains of Maushops ancient cooking fires," such cliffs are located at the extreme western point of Martha's Vineyard, and thus far removed from the waters of Nantucket Sound, which are located to the east of the island. (And, notably, to the extent the Cliffs were deemed to have legendary significance, they are thus in immediate proximity to the Wampanoags' own proposed wind project, as discussed in note 2 above.)

By mistakenly attributing to Nantucket Sound central legendary events occurring elsewhere, and thus affecting other bodies of water, the SHPO has made an improper application of the National Register Criteria for Evaluation. Indeed, Criteria A (association with events that have made a significant contribution to history, *i.e.*, central events of the Maushop legend) and Criteria B (association with lives of persons significant in our past, *i.e.*, Maushop) are thus not satisfied by the extensive ethnographic and ethnohistorical record referenced by the SHPO, when properly applied to Nantucket Sound. Nor do such materials satisfy Criteria C (sites that embody

a distinctive characteristics of type, or method of “construction”), a criteria that cannot be met a by a natural feature such as Nantucket Sound, irrespective of legendary events. Indeed, contrary to the understanding of the SHPO (SHPO at 15), the TCP Guidelines confirm that “this subcriterion [C] applies to properties that have construction, or contained constructed entities that is, building, structures, or built objects.” TCP Guidelines at 13. The ethnographic legend materials cited by the SHPO thus do not meet the requirements of Criteria A, B, or C, when such criteria are properly applied to Nantucket Sound.

IV. The SHPO Relies upon Historical Usages and Dependence upon Marine Resources that are either not Particular to, or not Located within, Nantucket Sound, and Therefore Cannot Support an Eligibility Determination Under Criteria A, B or C.

The SHPO similarly relies upon accounts of historic usage and dependence upon marine resources that are either not particular to, or not located within, Nantucket Sound. As an initial matter, the SHPO cites to examples of historic presence that would apply equally and broadly throughout the region, and without particular applicability to Nantucket Sound. For example, the SHPO states that “ancient Native Americans in Southern New England rely considerably on marine resources” (SHPO at 3), that they used coastal marine resources “throughout the Cape and Islands and Southeastern Massachusetts regions” (SHPO at 5), and that access to marine resources contributed to social organizations “distinctive to Southern New England” (SHPO at 5). Thus, the SHPO relies largely upon regional patterns of general and diffuse applicability that are not uniquely or particularly applicable to Nantucket Sound, and would thus not justify site-specific TCP status.

The SHPO further relies upon additional historical data on the utilization of various resources that have little or no geographical applicability to Nantucket Sound and, in any event, are not particular to Nantucket Sound. With respect to historic whaling activities, the SHPO cites to an account of a Wampanoag harpooning a whale “south of the Azores” (SHPO at 6), noting the parallel to the fictional Wampanoag character Tashtego in Herman Melville’s Moby Dick, which recounted a whaling expedition leaving from New Bedford for the whaling grounds of the Indian Ocean (SHPO at 6-7), such that in both cases the whaling events obviously occurred far away from Nantucket Sound. The SHPO further references a historic marine rescue of the 1884 wreck of the City of Columbus “on Devil’s Bridge in Nantucket Sound.” As discussed above, however, Devil’s Bridge is located off the far western end of Martha’s Vineyard and not in Nantucket Sound. And while the SHPO cites to contemporary fishing activities, she once again geographically misstates such activities as being within Nantucket Sound: “Male relatives taught [boys] where to find the best fishing spots – *Wampanoag fishing spots* – like the shoals of Devil’s Bridge [in Nantucket Sound] or the waters just off Noman’s Land Island.” SHPO at 8. Again, both of the cited locations are in the vicinity of the Aquinnah Wampanoag tribal lands at Gay Head, but not Nantucket Sound.

In any event, the mere fact that Tribal members had a historical presence in the area is insufficient to establish TCP eligibility. The National Register Bulletin, How to Apply the National Register Criteria for Evaluation, Part IV, provides that historic sites, should be established to “include only portions of the site retaining historic integrity and documented to have been directly associated with the event.” Id. at Section III, p. 42. If a general assertion of historic presence or usage would suffice to show TCP eligibility, the very same factual claim could be applied as easily to virtually all of the land areas of New England and all of the surrounding waters, an absurd result that is inconsistent with established policies and precedent. It is also notable that the extensive geophysical and geological offshore site work conducted for the Proposed Undertaking showed “no evidence of material cultural remains”. See, FEIS at 5-242. Accordingly, the general assertion of historic presence cited by the SHPO does not provide a basis to establish TCP eligibility for Nantucket Sound under Criteria A, B or C.

V. **The Sound has Not Yielded, and has Not Been Shown to be Likely to Yield, Important Prehistoric or Historic Information and is Therefore Not Eligible under Criterion D.**

The SHPO has also failed to demonstrate that Nantucket Sound has yielded, or is likely to yield, important prehistoric or historic information, as would be required by eligibility Criterion D. As set forth in CWA’s Final Environmental Impact Statements prepared by the MMS, CWA’s site has undergone extensive subsurface testing, including the taking of 87 vibracores and 22 borings, with the FEIS drawing the conclusion that testing “showed no evidence of material cultural remains.” See, FEIS at 5-242. In contrast, the SHPO merely speculates, but provide no factual support for the assertion, that significant archeological information would someday likely be discovered, notwithstanding the complete absence of any such results in connection with any studies which have been conducted. Such an undocumented claim cannot be used to justify the serious consequences of designating Nantucket Sound as a TCP.

In that regard, we also note the guidance of the TCP Guidelines to the effect that Criterion D is typically “secondary” to some other qualification: “Generally speaking, however, a Traditional Cultural Property’s history of yielding, or potential to yield, information, if relevant to its significance at all is secondary to its association with a traditional history and culture of the group that ascribes significance to it.” Id. at 14. Thus, extensive testing has not yielded indication of the likelihood of significant information, it is purely speculative to suggest that at some future date such a discovery could occur, and, in any event, and as discussed above, there has been no showing of any other basis of eligibility to which the suggested potential could have “secondary” and associated relevance.

VI. A Determination of Eligibility Would Have Far Reaching and Unpredictable Adverse Effects.

The Keeper should further consider that a determination of National Register eligibility of a highly-utilized area of unenclosed ocean as large as Nantucket Sound would have far-reaching, unpredictable and adverse consequences. First, if the unenclosed ocean could be so listed under these facts, it would be far easier to list enclosed (and thus “well-defined”) waters, for which the very same cultural and historical usage claims could as easily be made (including, for example, Vineyard Sound, Buzzards Bay, Narragansett Bay, Cape Cod Bay, Dorchester Bay, Chesapeake Bay etc.). Second, the Tribes have already indicated an intent to expand their cultural claims geographically, as recent press indicates that the WTA tribal representative now maintains that all areas around Martha’s Vineyard are “culturally significant,” including both sunrise (eastern) and sunset (western) views: “When asked during a meeting on the draft plan to indicate what areas of Martha’s Vineyard were culturally significant to the tribe [the WTA representative] said she drew a big circle around the entire island,” noting that “you can see the sun rise out of the water and see the sun set on the water.” Cape Cod Times, July 1, 2009. Third, if such highly-utilized waters themselves became TCPs, all actions in, affecting, or visible therefrom could become subject to National Historic Preservation Act (“NHPA”) review, including commercial fishing, marinas and wharves, cell towers, bridges, marine and avian transportation, and virtually all activity traditionally associated with designated port areas, a result far beyond the intended reach of the NHPA and seriously detrimental to the interests of the Commonwealth and Nation.

VII. With Respect to the Requirement of Continued Historical “Integrity,” The Keeper Should Recognize that Coastal Windmills Have Long Been an Integral Part of the Visual Heritage of Cape Cod, and that Nantucket Sound and the Surrounding Coastlines Have Become Heavily Utilized and Densely Developed Areas.

The Keeper should evaluate Nantucket Sound within a historical context that recognizes that (i) the Sound today is heavily utilized and has a densely developed shoreline, and (ii) extensive, widespread and highly visible arrays of coastal windmills have long been an integral part of the visual history and heritage of Cape Cod. The Advisory Council’s regulations in this regard identify “adverse affects” as those that alter “the characteristics of a historic property that qualify the project for inclusion in the National Register,” including changes to those physical features “within the property’s setting that contribute to its historic significance.” 36 CFR 800.5 (a)(i), a (2)(iv).

In this case, the review should thus consider the historical fact that, from the time of the Revolution through the close of the nineteenth century, wind power was an integral and defining feature of the visual character of the region’s coasts, thus altering its prior appearance. Cape Codders revolutionized American salt production in the late 18th century by utilizing wind power to pump seawater landward for evaporation, such that “soon the wooden skeletons of

rustic windmills were seen on the edge of most Cape Cod towns,” and by 1837 “Cape Cod alone had 658 salt companies producing more than 26,000 tons per year.” Kurlansky, Salt: A World History (Penguin 2002) at 223, 246. Cape historian William Quinn (The Saltworks of Historic Cape Cod: A Record of the Nineteenth Century Economic Boom in Barnstable County, Parnassus Imprints 1993) similarly described the “phenomenal growth” of wind-powered saltworks in highly visible locations all along the coast of Cape Cod:

Many changes on the peninsula were brought about by the rapid development of the saltworks. The barren seaside on Cape Cod was considered wild land by the original settlers.

The Cape’s upland beach areas had been left mostly in their natural state until the saltworks construction began. This widespread building completely changed the seaside landscape. The prolific use of these natural areas created a new rural scenery with covered vats as far as the eye could see.

The business began to multiply rapidly after several improvements had been implemented. Just before 1800, saltworks were being constructed all over Cape Cod.

Quinn, Id at 22-23 (emphasis added).

Quinn’s work further provides photographs demonstrating the prominent coastal visibility of such wind structures throughout the nineteenth century, including locations in proximity (both spatial and temporal) to many of the designated sites now of concern. Attached as Exhibit A in this regard are typical examples of historic shorefront windmills, with the author’s statement that “these structures dotted the landscapes near the shores of every Cape Cod town.” Id. With specific respect to Barnstable, Exhibit B shows the historic coastal windmills of the Crocker saltworks, as well as extensive evaporation structures which “covered a vast area of the land next to the present day Barnstable Harbor.” Id. at 111. With respect to Yarmouth, Exhibit C shows extensive coastal wind and salt structures in both South Yarmouth and East Yarmouth. With respect to the areas of Osterville, Wianno, Lewis Bay and Hyannis Harbor, Exhibit D shows that extensive wind-powered saltworks were deployed in all such coastal areas, as indicated by the 1849 U.S. Coastal Survey Map. Id. at 116-117. Exhibit E in turn shows the historic Nickerson wind and salt facilities at Chatham, which were listed by assessor’s records as including 4,400 feet of saltworks. Id. at 154.

The Keeper should also recognize that, to this day, windmills are revered as a symbol of the historical heritage of the Cape, as evidenced by the historical monument depicted on Exhibit F, commemorating the site where John Sears in 1776 revolutionized the American salt industry by utilizing the wind power of Cape Cod. Id. at 20. Thus, the historic continuity of the Sound should be evaluated within a historical context that recognizes the long standing, prominent and visible presence of wind facilities that caused substantial visual alteration of the coastal areas of the Sound.

The Honorable Kenneth Salazar
Dr. Janet Snyder Matthews
November 23, 2009
Page 9

The Keeper should also recognize that the coastline of Nantucket Sound has now been even more densely developed, and that today the Sound is itself heavily utilized for a wide range of uses, including marine transportation, shipping and commercial fishing. Indeed, project opponents now working in tandem with the Tribes describe Nantucket Sound on their website as containing “major shipping lanes,” “lucrative fishing ground,” “heavily travelled navigation and shipping lanes,” and “heavily trafficked waters.” The Keeper should thus recognize the modern reality that intense development and usage in and around Nantucket Sound has substantially altered the historical “integrity” of the area as it once existed.

VIII. Conclusion.

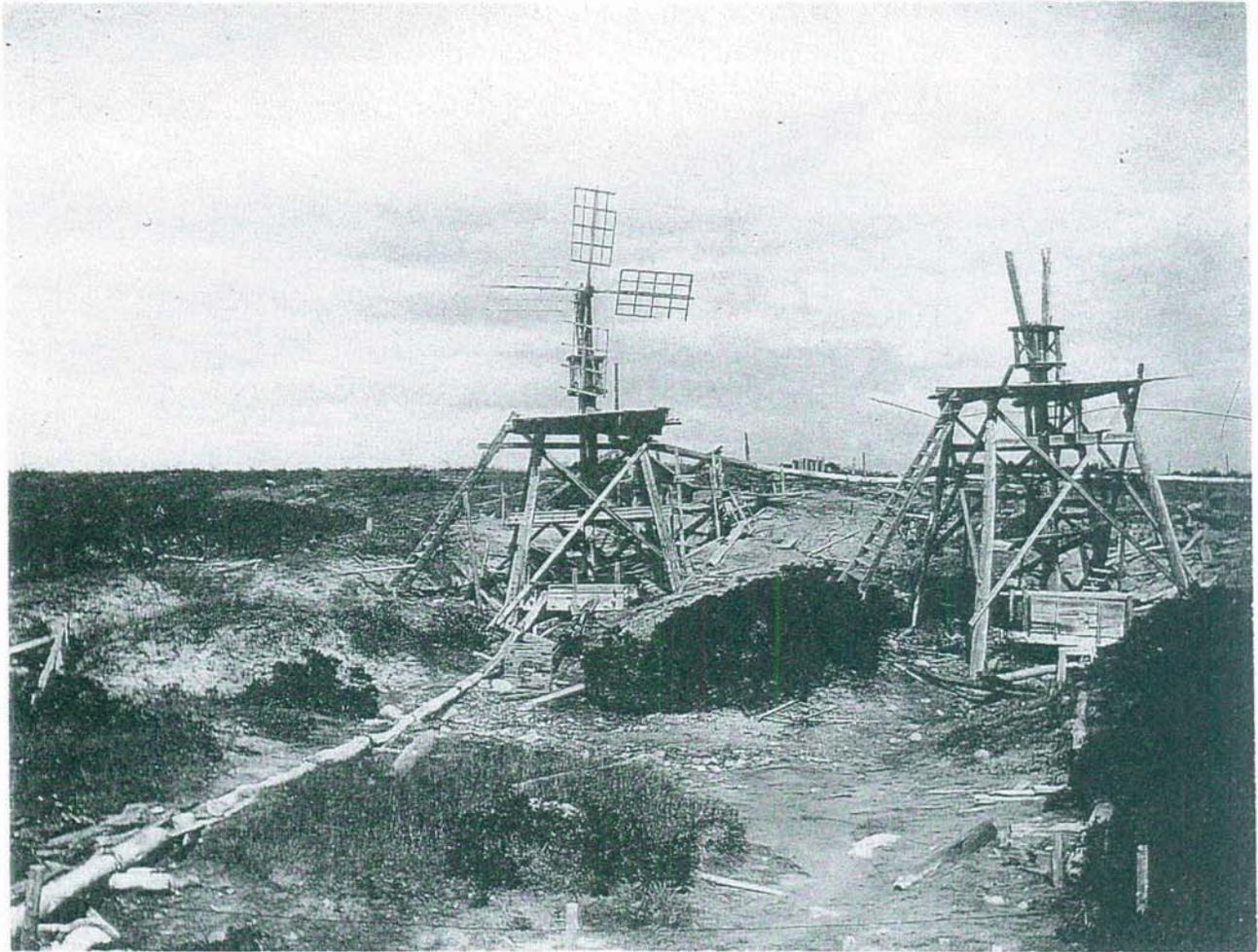
As discussed above, the Keeper should promptly confirm the non-eligibility determination of the MMS and reject the position of the SHPO that the approximately 600 square miles of unenclosed ocean known as Nantucket Sound should be determined to be eligible for listing on the National Register.

Sincerely,

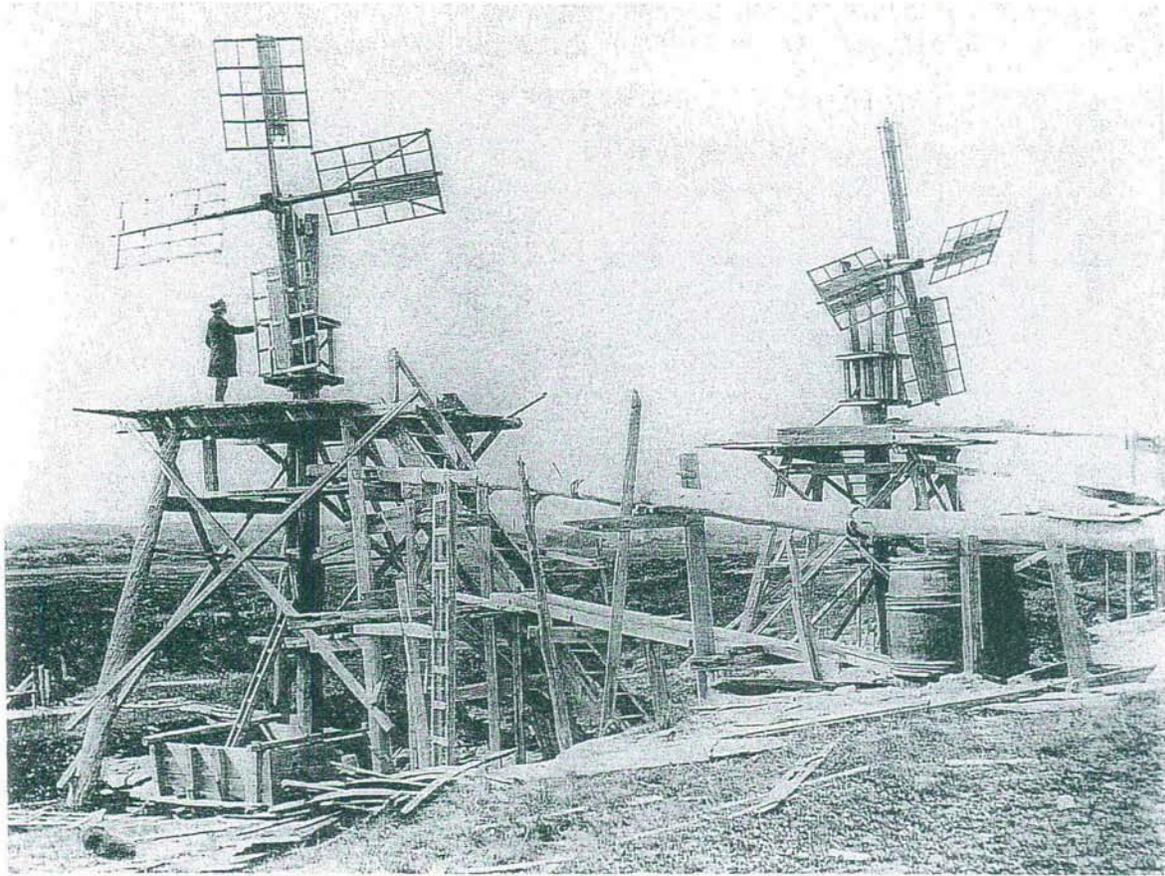
A handwritten signature in blue ink that reads "Dennis J. Duffy". The signature is written in a cursive style with a large, stylized 'D'.

Dennis J. Duffy
Vice President of Regulatory Affairs

Exhibit A

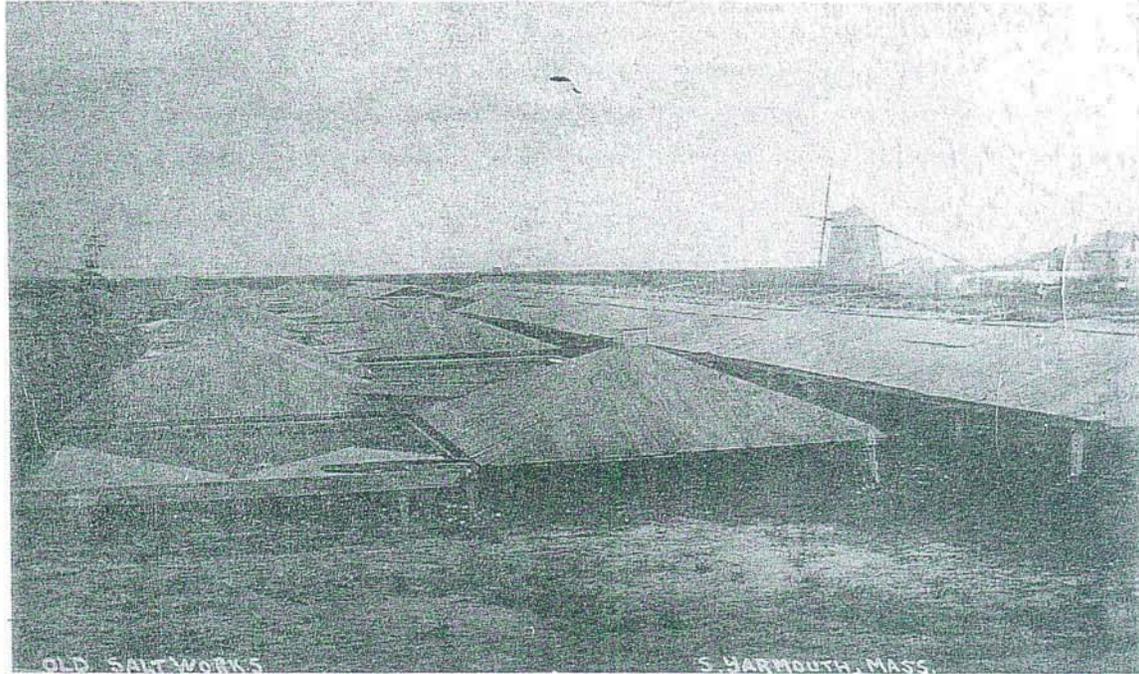


The saltworks began at the shore where windmills pumped sea water from reservoirs up to the evaporating vats to make salt. These structures dotted the landscapes near the shores of every Cape Cod town. *Photo from the H.K. Cummings Collection.*



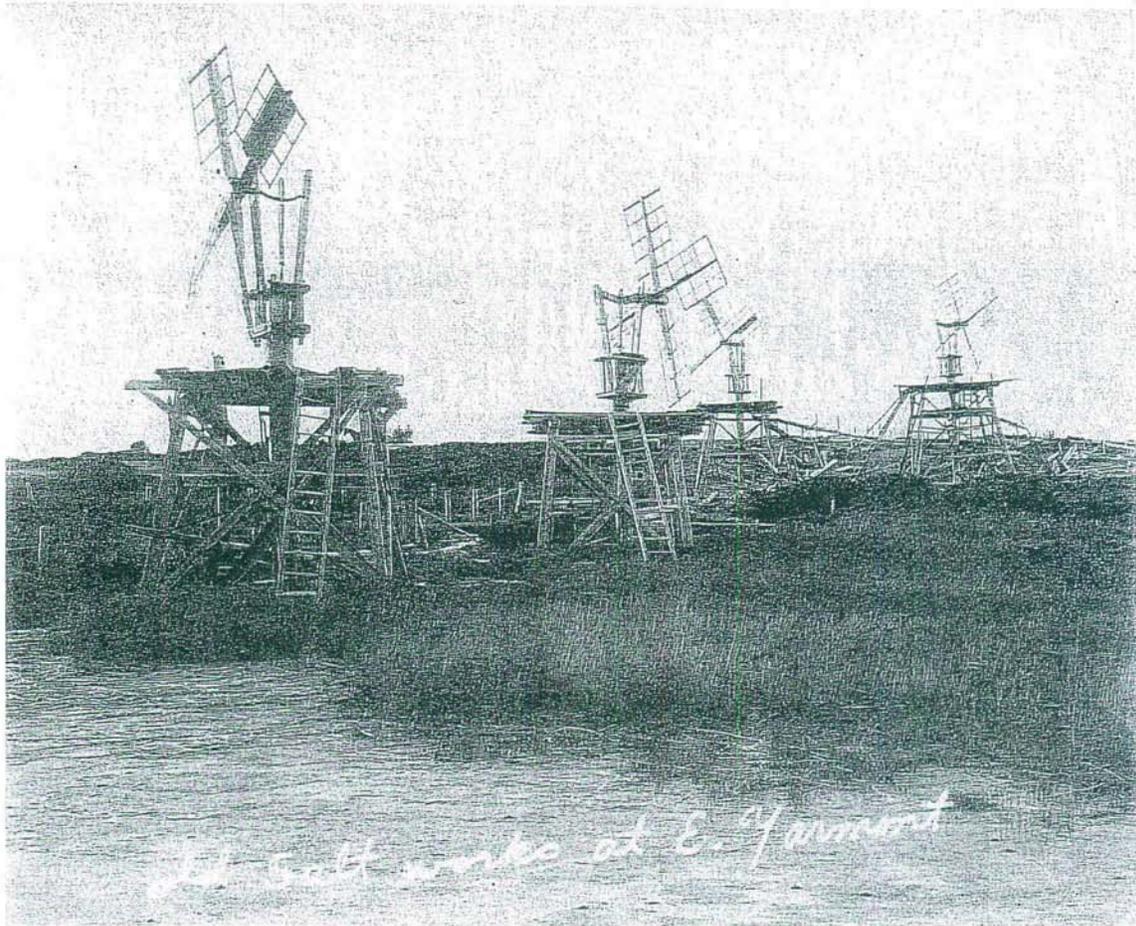
Above: The salt mills at the Crocker saltworks in Barnstable. The size of the pumps can be determined in relation to the man standing beside the wind vanes. A six-foot man would indicate that the diameter of the mill vanes is about eighteen feet with about twenty feet of vane area to catch the wind. The wooden pipes leading to the salt vats were hollowed out logs. They were either drilled or burned out. The pipes were then connected together and sealed with white lead. **Below:** The saltworks of Loring Crocker in Barnstable covered a vast area of the land next to the present day Barnstable Harbor. In this photo there are two horses and buggies. One of these may be a working rig for the man tending the saltworks. *Photos from the collection of Louis Cataldo, Barnstable, Mass.*





Above: The picture is titled "Old Saltworks, S. Yarmouth, Mass. The Judah Baker windmill is on the right side of the photo. It is still in nearly the same area today. **Below:** This photo is taken from an old post card and it is another area of the saltworks at Bass River with the salt mills near the water. Drying rooms and salt vats surround the land next to the dwelling houses in the background. *Photos courtesy of Alec & Audrey Todd, Yarmouth, Mass.*

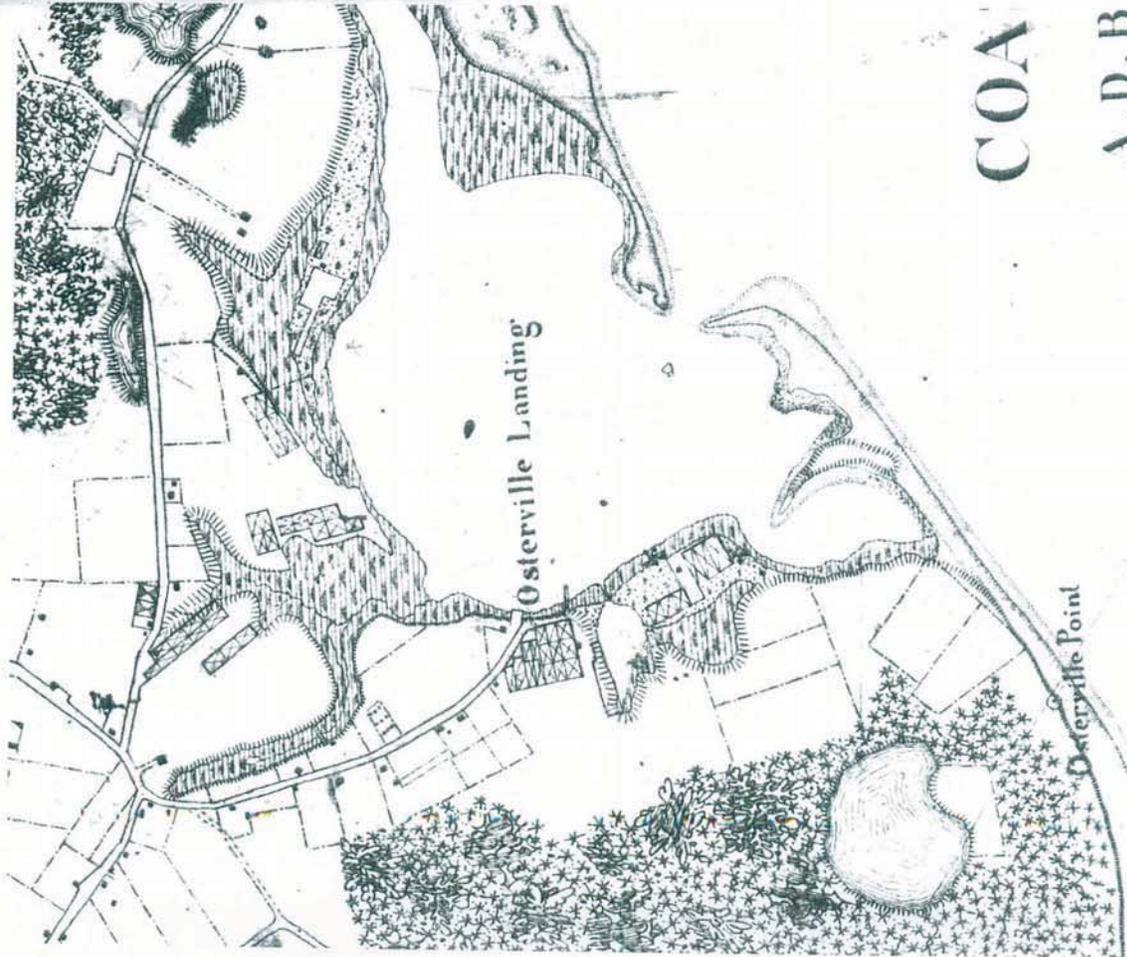




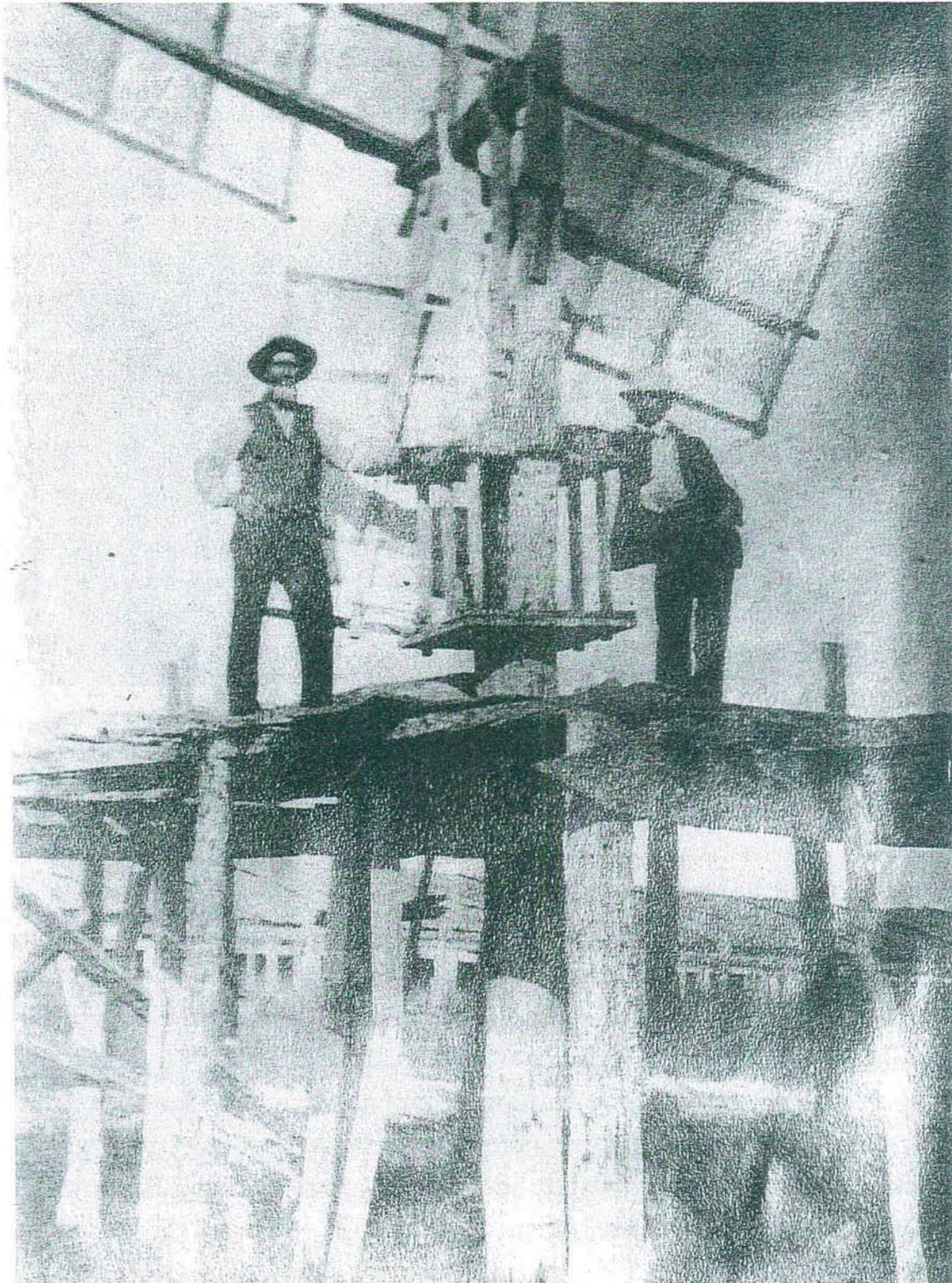
Four salt mills in a row in this photo titled "Saltworks at East Yarmouth." The title locates them near the large area of works on Bass River. *Photo from the Author's collection.*



The Hyannis saltworks were located near Dunbar Point on Lewis Bay and Hyannis harbor. The small x near the center of the map on the beach is the site of a salt mill.



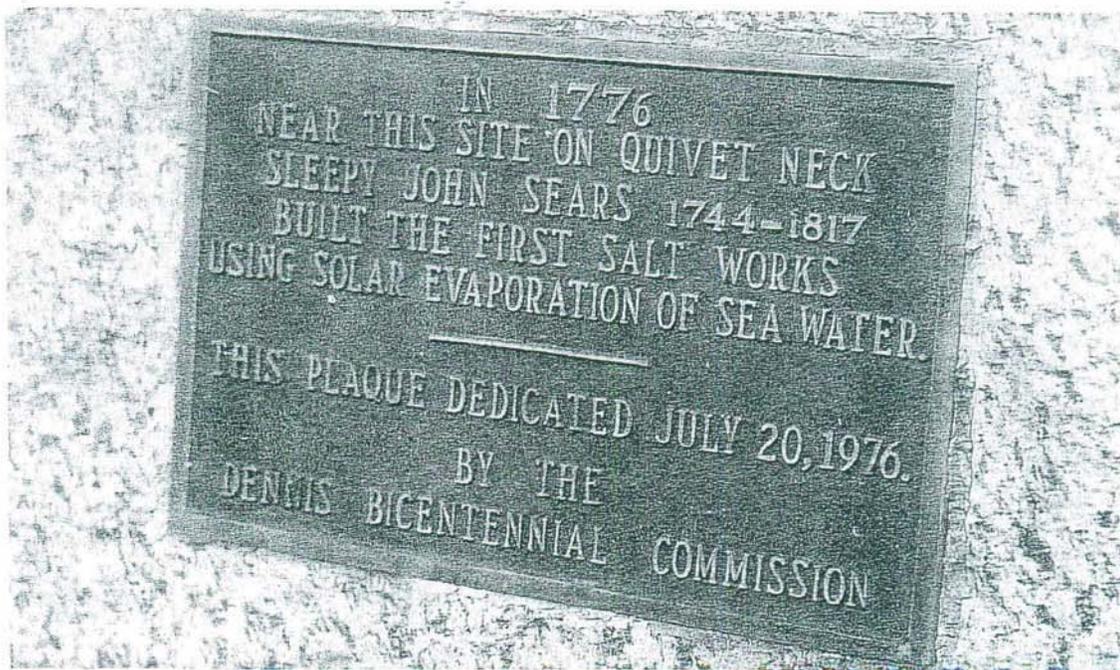
The saltworks in Osterville were located at what is the present East Bay near Wianno. There were several hundred feet of evaporators as depicted in the 1849 U.S. Coast Survey map.



The Assessors listing for the Town of Chatham for the year 1829, on page 160, lists Jesse Nickerson as owning 4,400 feet of saltworks. The men posing atop salt mill might well be his heirs. *Photo from the Library of Congress, Washington, D.C.*



Above: The Dennis Bicentennial Commission dedicated a monument to John Sears in 1976. The boulder lies in the center of a field where some of the Sears saltworks were situated. Below: The bronze plaque is about Mr. Sears who is considered the progenitor of this early industry. *Photo by William P. Quinn.*





Technical Memorandum

Cape Wind Energy Project

Nantucket Sound - Cape Cod, Martha's Vineyard, and
Nantucket, MA

National Register of Historic Places Eligibility Evaluation and Visual Impact Assessment of Additional Properties

November 14, 2008

Submitted to:
Cape Wind LLC
75 Arlington Street
Boston, MA 02116

The Minerals Management Service (MMS) has issued a draft Environmental Impact Statement (DEIS) for the Cape Wind Energy Project (the Project) that is being proposed by Cape Wind LLC (Cape Wind). During a 30-day public comment period established by MMS in Fall 2008 as part of the Section 106 process, consulting parties identified 22 properties that may be eligible for listing in the National Register of Historic Places (National Register) and may be affected by the Project. These properties were additional to those previously evaluated during earlier studies. The specific type of effect under assessment is potential views from onshore historic architectural properties of the visible components of some or all of the Project's proposed 130 offshore wind turbines. The wind park will be located at least five miles offshore of the nearest landform. This Technical Memorandum presents the results of PAL's National Register eligibility evaluation and visual impact assessment, completed at the direction of MMS and Cape Wind.

The 22 properties consisted of 1 historic district recently listed in the National Register, 2 historic districts and 1 individual resource previously evaluated as eligible by the Massachusetts Historical Commission (MHC), and 18 properties that have not been previously evaluated by the MHC. Properties are located in the communities of Falmouth, Yarmouth, Harwich, Chatham, Oak Bluffs, and Tisbury, Massachusetts. The 22 properties are listed in Table 1.

PAL historic preservation staff collected and reviewed existing MHC inventory forms for the identified properties. Staff then conducted site visits to view the existing conditions of each of the individual properties and districts, evaluate National Register eligibility based on existing inventory information and exterior visual factors, and assess the visibility of the proposed wind park area in Nantucket Sound. All field work was conducted from public ways with the exception of the Corey House on Great Island, in Yarmouth (PAL staff was accompanied to that location). Digital photographs were taken of the properties and the views towards the wind park. The results are presented in the attached Table 1, Properties



Identified by Consulting Parties for National Register Evaluation and Visual Impact Assessment, Cape Wind Energy Project.

A total of 13 out of the 18 previously unevaluated properties were recommended as National Register eligible as a result of this evaluation. One additional property may be eligible, but was not visible from a public way and therefore was not viewed (the Jonathan Higgins House in Chatham). Nine of the 13 properties recommended as eligible were found to have open, or in one case limited, views of Nantucket Sound in the direction of the proposed wind park. Nantucket Sound was found to be an element of the setting at each of the nine properties. Four properties in Yarmouth were evaluated as not eligible, due to either extensive alterations or demolition.

Views of Nantucket Sound in the direction of the proposed wind park were classified as 1) open, 2) none to very limited, and 3) none. The visual impact assessment found that 12 of the 22 properties identified by the consulting parties as part of this evaluation have a view to the wind park location and therefore an adverse effect. The 12 properties include one National Register-listed historic district (West Chop in Tisbury), two historic districts previously evaluated as eligible by MHC (Falmouth Heights and Ocean Grove historic districts in Falmouth and Harwich, respectively), and nine properties recommended as eligible as part of this evaluation. The single property previously determined National Register eligible (Seaman's Reading Room in Tisbury) has no view and thus no effect. Eight properties recommended as National Register eligible have open, direct views to the wind park location and will be adversely affected. One property recommended as eligible has a very limited view to the wind park location and will not be adversely affected. Four properties recommended as eligible have no view and will not be affected by views of the proposed wind park.

Table 1. Properties Identified by Consulting Parties for National Register Evaluation and Visual Impact Assessment, Cape Wind Energy Project.

Property	MHC No.	Comment	NRHP Evaluation	View of Wind Park Area	Finding of Effect
Properties on or Previously Identified by MHC as Eligible for the NRHP					
Falmouth Heights HD, Falmouth (approximately 500 components)	FAL.I	Shoreline bluff setting on Vineyard Sound	Eligible (Criteria A and C)	Open	Adverse Effect
Ocean Grove HD, Harwich (approximately 100 components)	HAR.L	Shoreline on Nantucket Sound	Eligible (Criteria A and C)	Open	Adverse Effect
Seaman's Reading Room, Tisbury (in William Street HD, NR listed)	TIS.135	Set back from shore in village setting	Consensus DOE (individual)	None	No Effect
West Chop HD, Tisbury (approximately 100 components)	TIS.D	Shoreline bluff setting facing Nantucket Sound on the east	Listed (Criteria A and C)	Open	Adverse Effect
Properties that have not been Previously Evaluated by MHC for NRHP eligibility					
Property	MHC No.	Comment	NRHP Recommendation	View of Wind Park Area	Finding of Effect
Cape Cod					
Maravista HD, Falmouth (approximately 25 components)	FAL.K	Shoreline on Vineyard Sound	Eligible (Criteria A and C)	Open	Adverse Effect
Menauhant HD, Falmouth (approximately 45 components)	FAL.J	Shoreline on Vineyard Sound	Eligible (Criteria A and C)	Open	Adverse Effect
Church Street HD, Falmouth (contains Nobska Light) (approximately 25 components)	FAL.M	Most of district faces Little Harbor; bluff setting facing Nantucket Sound on the east at Nobska Light	Eligible (Criteria A and C)	Open	Adverse Effect
15 Windemere Road, Yarmouth; full Cape ca. 1750-1775	YAR.304	Moved 1940s, large garage addition since 1979 survey	Not Eligible	n/a	n/a
193 Berry Ave, Yarmouth; Shingle Style summer resort hotel ca. 1900	YAR.289	Windows replaced otherwise same since 1979 survey	Not Eligible	n/a	n/a
268 South Sea Ave, Yarmouth; half-Cape	YAR.273	Replaced or completely rebuilt since 1979 survey	Not Eligible	n/a	n/a
Corey House, Great Island, Yarmouth	No MHC form	Historic house replaced by current house built ca. 1995	Not Eligible	n/a	n/a

PAL: Technical Memorandum

Table 1. Properties Identified by Consulting Parties for National Register Evaluation and Visual Impact Assessment, Cape Wind Energy Project.

Property	MHC No.	Comment	NRHP Recommendation	View of Wind Park Area	Finding of Effect
205 South Street, Yarmouth; Three-quarter Cape, ca. 1770	YAR.365	Moved early/mid 20 th century. Unaltered since 1979 survey	Eligible (Criteria A and C)	None, intervening land and buildings	No Effect
Park Ave. HD, Yarmouth (approximately 25 components)	No MHC form	Most of district set back from Hyannis Harbor	Eligible (Criteria A and C)	Open through harbor mouth	Adverse Effect
Mass. Ave. HD, Yarmouth (approximately 25 components)	No MHC form	Massachusetts Avenue and Shore Road on Hyannis Harbor	Eligible (Criteria A and C)	None, intervening land mass	No Effect
Hithe Cote, 32 Snow Inn Road, Harwich	HAR.211	High elevation above Nantucket Sound	Eligible (prior recommendation – Criteria A and B)	Open	Adverse Effect
Stage Harbor Light, Chatham	CHA.917	Viewed from beach at Hardings Beach	Eligible (prior recommendation – Criteria A and C)	Open	Adverse Effect
Capt. Joshua Nickerson House, 190 Bridge Street, Chatham	CHA.260	Viewed from bridge over Mitchell River at Bridge Street	Eligible (prior recommendation – Criteria A and C)	None, intervening land mass	No Effect
Jonathan Higgins House, 300 Stage Neck Road, Chatham	CHA.419	Not viewed as not visible from public way; on Oyster Pond River; moved here from Wellfleet 1939	Possibly Eligible (MHC requested more information in 1999)	None, intervening land mass	No Effect
Stage Harbor Road HD, Chatham (approximately 50 components)	CHA.K	Most of district set back from Stage Harbor shore	Eligible (prior recommendation – Criteria A and C)	None to very limited; intervening land mass; view through harbor mouth	No Adverse Effect
Champlain Road HD, Chatham (approximately 25 components)	CHA.J	Shoreline bluff setting on Stage Harbor	Eligible (Criteria A and C)	Open	Adverse Effect
Martha's Vineyard					
Cottage City HD, Oak Bluffs (approximately 386 components)	Multiple Area forms	Shoreline bluff setting on Nantucket Sound	Eligible (Criteria A and C)	Open	Adverse Effect
Vineyard Highlands HD, Oak Bluffs (approximately 300 components)	OAK.B	Shoreline bluff setting on Nantucket Sound	Eligible (Criteria A and C)	Open	Adverse Effect

Note: Properties on Cape Cod are presented by town clockwise, west to east

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August 7, 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

Dear Dr. Krueger,

Cape Wind is pleased to submit the following comments to the draft Memorandum of Agreement (MOA) distributed to the Section 106 consulting parties on June 12, 2009.

I.A.8

Last line: *“potential identified archaeological resources.”* should read *“potential unidentified archaeological resources.”*

I.C.1

With respect to additional vibracore work, the Minerals Management Service (MMS) Final Environmental Impact Statement (FEIS) states that the proponent will take approximately 50 additional vibracores and approximately 20 additional borings prior to construction, and that all samples will be reviewed by a marine archaeologist. Cape Wind believes that this plan of work as discussed in the MMS FEIS, coupled with the extensive vibracores and borings already taken and reviewed by a marine archaeologist, provides for more than adequate data to understand the subsurface characteristics and the impact to potential buried cultural resources. Cape Wind believes that locating a vibracore at each proposed turbine foundation would be an imprudent use of resources and is unnecessary to achieve the objective.

I.C.2

All vibracores will be subject to detailed analysis by a qualified technician and an archaeologist; however, it is likely that not all cores will require laboratory analysis. The detailed analysis may include laboratory analysis, if warranted in their professional judgment.

We suggest changing *“detailed laboratory analysis by qualified technicians and archaeologists”* to *“detailed analysis by qualified technician(s) and archaeologist(s).”*

I.C.3

We suggest omitting *“laboratory.”*

Dr. Andrew D. Krueger

August 10, 2009

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I.C.4

We propose the following language:

Provision will be made available for a representative of the Wampanoag Tribe of Gay Head/Aquinnah and/or the Wampanoag Tribe of Mashpee, designated by the respective Tribal Council, to be present on site during the collection of all vibracore samples.

Cape Wind, however, notes that samples retrieved during the collection of vibracores will not be opened or reviewed aboard the vessel.

I.D

The 100 foot buffer, as included in the FEIS, has been accepted by the Massachusetts Board of Underwater Archaeological Resources (Letter to Koning, 2/18/05) and the Massachusetts Historical Commission (Letter to Herzfelder, 2/22/05). A 100 foot buffer is adequate to protect the potential resource and is appropriate given the confined location and shallow depths that result in limited potential for debris to spread. A ten-time greater buffer of 1,000 feet (304.8 meters) would require movement of cables and wind turbine monopiles that is both unduly restrictive and entirely unnecessary.

II.A&B

With respect to compensatory mitigation, Cape Wind has on two occasions so far (once at the April 28, 2009 meeting in the "compensatory mitigation" breakout group and again in a draft MOA submitted by Cape Wind to MMS on June 4, 2009) put forth a provision to provide an aggregate of \$150,000 to mitigate the finding of potential historical impacts of the proposed project.

VII.E

We propose, "*December 31, 2010*" be changed to "*the commercial operation date of the proposed project.*"

Page 6, last full sentence:

We believe the MMS intended to say, "*Execution of this MOA by the MMS, the SHPO, the Council, the USACE and the Proponent and implementation of its terms, is...*"

Page 6

The MMS may want to differentiate more clearly between Signatory Parties and Concurring Parties.

Dr. Andrew D. Krueger

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Page 3

We hope that these comments will help to facilitate and expedite the execution of a MOA by the Section 106 consulting parties.

Sincerely,

A handwritten signature in blue ink, appearing to read "CO", with a long, sweeping flourish extending upwards and to the right.

Craig Olmsted
Project Manager

Cc:

Brona Simon, Massachusetts Historical Commission
John Eddins, Advisory Council on Historic Preservation
Karen Kirk Adams, U.S. Army Corps of Engineers

75 Arlington Street
Suite 704
Boston, MA 02116
617-904-3100
Fax: 617-904-3109
www.capewind.org

July 6, 2009

Dr. Rodney E. Cluck
Project Coordinator
Minerals Management Service
Department of the Interior
United States of America
381 Eldon Street
Mail Stop 4042
Herndon, VA 20164

Re: Eligibility of Nantucket Sound for Listing on the National Register.

Dear Dr. Cluck,

Cape Wind Associates LLC (“CWA”) hereby opposes the request of the Wampanoag Tribe of Gay Head (“WTA”) and the Mashpee Wampanoag Tribe (“MWT,” collectively the “Tribes”) for the Minerals Management Service (“MMS”) to determine that Nantucket Sound is eligible for listing on the National Register as a Traditional Cultural Property (“TCP”). In particular, we respond to the June 23rd letter of the WTA (the “WTA Letter”) and the June 23rd letter of the Alliance to Protect Nantucket Sound (the “Alliance”), the WTA and the MWT (the “Joint Letter”). As set forth below, Nantucket Sound, a heavily utilized and approximately 600 square mile portion of unenclosed ocean, does not meet the basic criteria for such listing. We further note that such Letters make it abundantly clear that “the only course of action” that could satisfy the Tribes and the Alliance is either another project at a different location or the “no action” alternative, neither of which, as we have previously discussed, has any likelihood of being the basis of a consensual MOA. As such, the consultation process is at a fundamental and irreconcilable impasse, and should thus be terminated without further delay, so that the Advisory Council for Historic Preservation (“ACHP”) may proceed promptly to transmit its comments to the Secretary pursuant to 36 CFR § 800.7(c).

I. Introduction.

The essence of the Tribes' claim is that the entirety of Nantucket Sound is eligible to be listed as a Traditional Cultural Property because it is visible, under certain conditions, from other undisclosed land-based sites allegedly used for religious and cultural tribal ceremonies:

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).

Joint Letter, at 4. However, even if the land-based ceremonial sites were deemed to be TCPs, the Tribes' fundamental premise (*i.e.*, that the boundaries of such TCPs should therefore extend into the ocean as far as the eye can see) is contrary to the published guidance and policies of the National Register, as well as the established precedent in similar cases. As discussed below, such authorities discourage the nomination of natural features and water bodies, require substantial documentation of alleged eligibility factors, and provide that TCPs associated with ceremonial sites be limited to within reasonable, immediate and well-defined boundaries.

II. Eligibility Requests for Natural Features Face Heavy Burdens.

As an initial matter, National Register policies provide that attempts to nominate natural features for listing face a heavy burden of proof, as follows: "The National Register discourages the nomination of natural features without sound documentation of the historical or cultural significance." Guidelines for Evaluating and Documenting Traditional Cultural Properties, National Register Bulletin (2002) (the "TCP Guidelines") at 11. Such Guidelines further provide that "it is difficult to distinguish between properties having real significance and those whose putative significance is spurious," and that supporting assertions should thus be questioned and "subjected to critical analysis," including "careful analysis" of the asserting party's motives. *Id.* at 3-4, 11. Additional National Register guidance also provides that a natural feature can only be eligible if its importance is documented and "if the site can be clearly defined," as it is "critical ... that the activities be documented and that the associations not be so diffuse that the physical resource cannot be adequately defined." How to Apply the National Register Criteria for Evaluation, National Register Bulletin (2002), at 4-5. The factual assertions of the Tribes supporting the eligibility of the Sound fall far short of the foregoing standards of documentation and definition.

With specific reference to the foregoing requirement of "definite borders," it is particularly notable that the United States Supreme Court has determined that Nantucket Sound does not constitute a "coastal water body," "inland waters," or "internal waters" (such as a lake, bay or river), but an unenclosed portion of the territorial or "high seas." United States v. Maine, 475 U.S. 89 (1986). The Supreme Court further found that Nantucket Sound lacks historic identity as a discrete body of water, noting, with respect to historic maps from the 17th and 18th centuries, that "none of these maps identified Nantucket Sound as a separate body of water even

though they did identify other bodies of water such as Cape Cod Bay, Buzzards Bay, and, in some cases, Vineyard Sound,” and that the historic maps “did not support Massachusetts’ contention that the area’s inhabitants established a special relationship with the protected waters of Nantucket Sound as opposed to the surrounding waters and ocean in general.” *Id.* at n.16. Nantucket Sound thus constitutes approximately 600 square miles of unenclosed and ill-defined ocean and high seas, and is well beyond both the scale and nature of any appropriate TCP proposal.

III. The Boundaries of TCPs Associated with Ceremonial Sites do not Properly Extend to the Limits of Human Visibility.

Contrary to the fundamental premise of the Tribes, well-established precedent and practice indicate that the boundaries of TCPs associated with ceremonial sites are properly limited to the ceremonial site and its “immediate viewshed” surroundings, with more distant viewshed impacts to be considered, but not to be included within the TCP. The TCP Guidelines provide the example of the Helkau Historic District in northern California, which included tribal religious and traditional ceremonial sites, to which the natural mountain-top viewsheds were acknowledged to be important. As set forth below, the Guidelines indicate that, as practical matter, the boundaries of the TCP were nonetheless required to be defined much more narrowly than the extent of the significant viewsheds, such that the TCP was properly limited to the extent only of the “immediate viewshed” surrounding the ceremonial sites:

Defining the boundaries of a traditional cultural property can present considerable problems. In the case of the Helkau Historic District in northern California, for example, much of the significance of the property in the eyes of its traditional users is related to the fact that it is quiet, and that i[t] presents extensive views of natural landscape without modern intrusions.

These factors are crucial to the medicine making done by traditional religious practitioners in the district. If the boundaries of the district were defined on the basis of these factors, however, the district would take in a substantial portion of California’s North coast range. Practically speaking, the boundaries of a property like the Helkau District must be defined more narrowly, even though this may involve making some rather arbitrary decisions. In the case of the Helkau District, the boundary was finally drawn along topographic lines that included all the locations at which traditional practitioners carry out medicine-making and similar activities, the travel routes between such locations, and the immediate viewshed surround this complex of locations and routes.

TCP Guidelines, at 20 (emphasis added). As shown on the map attached as Exhibit A, the resulting boundaries of the District extended only to “immediate viewshed surroundings,” and are thus within approximately one-half mile from the actual ceremonial sites, thereby excluding the significant but more remote viewsheds from inclusion within the TCP.

Notably, the TCP Guidelines then go on to clarify that visual impacts from beyond the “immediate” boundaries of a ceremonial TCP such as the Helkau District are nonetheless to be considered, not as part of the TCP itself, but as presenting potential “adverse affects” that could result in the “alteration of the character of the [TCP’s] setting” within the meaning of Section 800.9(b)(2) of the ACHP’s Regulations:

The fact that the boundaries of a traditional cultural property may be drawn more narrowly than they would be if they included all significant viewsheds or lands on which noise might be intrusive on the practices that make the property significant does not mean that visual or auditory intrusions occurring outside the boundaries can be ignored. In the context of eligibility determination or nomination, such intrusions if severe enough may compromise the property’s integrity. In planning subsequent to nomination or eligibility determination, the Advisory Council’s regulations define “isolation of the property from or alteration of the character of the property’s setting” as an adverse effect “when that character contributes to the property’s qualification for the National Register” (36 CFR 800.9(b)(2)). Similarly, the Council’s regulations define as adverse effects “introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting” (36 CFR 800.9(b)(3)).

Id. at 21. Thus, the fundamental premise of the Tribes, that the boundaries of a ceremonial TCP should extend as far as the eye can see, is directly contrary to the provisions of the TCP Guidelines, which confirm that (i) the boundaries of a ceremonial TCP are properly limited to the actual site and its “immediate” viewshed, but (ii) impacts upon significant but more remote viewsheds beyond the boundaries of the TCP are to be evaluated and considered pursuant to Section 8.00 of the Regulations (as the MMS has done here) for potential adverse impacts to the TCP.

The National Register bulletin entitled Defining Boundaries for National Register Properties (1997) (the “Boundaries Bulletin”) similarly indicates that the physical boundaries of a National Register property must be both clearly defined and within “reasonable limits,” and that site boundaries should “not exceed the extent of the significant resources and land areas comprising the property,” should “not include buffer zones or acreage not directly contributing to the significance of the property,” and “should exclude peripheral areas that no longer retain integrity.” Id. at 2, 3. The Boundaries Bulletin further indicates that boundaries should not be set arbitrarily, and encourages the usage of “current legal boundaries,” “historic boundaries,” or a “natural feature, such as a shoreline.” Id. at 3.

With specific respect to TCPs associated with traditional ceremonial sites, the Boundaries Bulletin goes on to recommend that boundaries be determined by reference to the area of ceremonial use, whereby the agency would “select boundaries that would encompass the area associated with the traditional use or practice and document the factors that were considered in the boundary’s justification.” Id. at 27. With respect to associated viewsheds, the Boundaries Bulletin provides the instructive example of the Kuchamaa Tecate Peak TCP, which involved a

mountain-top ceremonial location utilized by tribal shamans for the acquisition of knowledge, vision quests and purification ceremonies. Despite the expansive mountain-top viewshed and a tribal assertion of a “sphere of spiritual influence extending for several miles from the mountain,” the boundaries of the TCP were limited to a total of only 510 acres, delineated by the topographical elevation line of 3,000 feet above mean sea level, such that the TCP included the actual locations of ceremonial rituals and the immediate surroundings, but not the more expansive and remote landscapes visible therefrom. *Id.* at 27. Again, such result is directly contrary to the fundamental premise of the Tribes’ position.

The Boundaries Bulletin also references the limitations that were adopted to define the Dune Shacks of Peaked Hill Bars Historic District located on Cape Cod, which presents geographic and factual aspects very similar to the present case. The Dune Shacks District is described as an area including dune shacks “scattered along a 3-mile stretch of unvegetated dunes in view of the Atlantic Ocean” that was historically used as a summer retreat for a colony of artists, writers and poets, to which the natural and ocean viewsheds were acknowledged to be an important component:

The eligible property includes 17 shacks in the surrounding dune landscape. Because the natural landscape served as a setting and inspiration for the inhabitants, the appropriate boundary includes the collected extent of the visible landscape for all the dune shacks in the district. Geographic information systems (GIS) analysis techniques were used to analyze the viewshed for the purpose of defining the district boundaries. Natural features, coastal features, and viewshed were used to define the National Register boundaries of the property.

Id. at 19. Notably, the resulting District was defined by seaward boundaries set by the shoreline, but did not extend into the ocean. Thus, although scenic ocean viewsheds were acknowledged, only those immediate viewsheds within the coastline were included within the borders of the District. As a result, any impacts upon offshore views from more remote ocean activities would be considered for their potential adverse impact upon the District, but the District itself was not extended into the ocean, as the Tribes would now request. *Id.* at 19.¹

¹ Other instructive examples included in the Boundaries Bulletin include the Rocky Butte Scenic Drive Historic District in Oregon and Weyerhaeuser South Bay Log Dump Rural Historic Landscape in Washington State. The Rocky Butte District was described as a “view point on the crest of Rocky Butte,” along with scenic drive approaches to the summit, which “offers a scenic vista of the Columbia River Plain in all directions.” Consistent with the foregoing examples, the boundaries of the District were not extended to include the wide and remote expanse seen from the elevated vantage points. Rather, the District was limited to 21.48 acres “bounded by the 50-foot-wide right of way as measured from the center lines” of the lineal roadway and the referenced viewpoint, but not the associated scenic vistas that extended far below. Boundaries Bulletin at 22. In the Weyerhaeuser example, the District demonstrated a continuity of land and water usage on the Puget Sound waterfront by successive groups from Native Americans to 20th century operators, with the boundaries established to include both upland and tideland areas along an inlet of Puget Sound, as defined by established property ownership boundaries, but not extending further into the waters of Puget Sound. Once again, such boundaries were determined to include the site of significance, plus only reasonable, well-defined and immediate surroundings. *Id.*

IV. The Tribe's Allegations of Historic Usage are also Inadequate to Establish TCP Eligibility.

The additional assertion of the WTA Letter that Tribal members have historically “traversed, fished, cultivated and occupied the entire area” of Nantucket Sound is also insufficient to establish TCP eligibility. Although the National Park Service regulations at 36 CFR Section 60.3 provide that a site that is “the location of the significant event, a prehistoric or historic occupation or activity” may be eligible for listing, the proponent of such a listing must demonstrate eligibility with “sound documentation” and “scholarly search” rather than vague assertion, as indicated by the following National Register Bulletin provision:

A site may not be marked by physical remains if it is a location a prehistoric or historic event or pattern or event and if no buildings, structures, or objects mark the time of events. However, when the location of the prehistoric or historic event cannot be conclusively determined because no other cultural materials were present or survived, documentation must be carefully evaluated to determine whether the traditional recognized or intensive site is accurate.

A site may be a natural landmark strongly associated with significant prehistoric or historical events or patterns of events, if the significance of the natural feature is well documented through scholarly research. Generally, though, the National Register excludes from the definition of “site” natural waterways or bodies of water that served as determinates in the location of communities or a significant in the locality’s subsequent economic development. Or there may have been “avenues of exploration,” that features most appropriate to document the significance of the properties built in association with the waterways.

How to Apply the National Register Criteria for Evaluation, National Register Bulletin, Part IV, p. 3 (emphasis added). Such Bulletin further provides that for historic sites, boundaries should be established that “include only portions of the site retaining historic integrity and documented to have been directly associated with the event.” Id. at Section III, p. 42. The TCP Guidelines similarly instruct that “the association of the property with significant events, and its existence at the time the events took place, must be documented to accepted means of historical research.” Id. at 13.

The general assertions of historic presence and passage fall far short of such standards. Further, as a practical matter, the very same factual assertion (i.e., that members historically traversed, utilized or occupied area) could be applied as easily to virtually all of the land areas of Southeastern New England and much of the surrounding ocean, an absurd result inconsistent with established policies. It is also notable that the extensive geophysical and geological offshore site work conducted for the Proposed Undertaking showed no indication of identifiable cultural remains. See, e.g. FEIS at 5-242. The general and unsupported assertions of historic presence and passage of the WTA Letter thus do not provide a basis to establish TCP eligibility for Nantucket Sound.

V. Executive Order 13007 Does Not Apply.

The MMS should reject the assertion that the provisions of Executive Order 13007, Indian Sacred Sites, is applicable to the proposed undertaking, as such Order by its terms applies only to actions that would adversely affect the physical integrity of sacred sites. "Sacred Site" is defined to be "any specific, discrete, narrowly delineated location on federal lands" that is identified by virtue of its established religious significance to, a ceremonial use by, an Indian religion." As discussed above, Nantucket Sound is approximately 600 square miles of unenclosed ocean and "high seas," and not an enclosed body of water, and accordingly cannot be considered a "specific, discrete, narrowly delineated location." As part of the ocean, it also is not "on federal land" within the meaning of the Order. Further, to the extent that the Tribes maintain that certain on-shore ceremonial sites should be regarded as TCPs or "sacred sites," the Executive Order addresses measures that would adversely affect "the physical integrity" of such sites. As noted above, the only impact to the land-based TCPs would be potential and indirect visual impacts, and would thus not involve any issue regarding the "physical integrity" of such sites.

VI. The Wampanoags' Own Proposal to Develop Wind Power on Tribal Lands Undermines Claims of Cultural Destruction.

The allegation of the Tribes that the distant CWA project would destroy their cultural integrity is severally undermined by the Wampanoags' simultaneous proposal to locate a major wind power project directly on tribal land. Attached hereto as Exhibit B is the WTA's Application for Pre-Development Financing submitted to the Massachusetts Technology Collaborative ("MTC") seeking public funding to investigate the "viability of installing distributed wind energy at the Wampanoag Tribal land on Martha's Vineyard." Id. at 4. Such application goes on to state that the Wampanoag plan is for "a proposed 4 + megawatt wind energy generation facility to be located on the island of Martha's Vineyard on land owned by the Wampanoag tribe," with the proposed wind turbines ranging in size up to 2.1 MW, which would typically involve a height in the range of 400 feet. Id. at 6.

Attached hereto as Exhibit C is the resulting Preliminary Survey of Potential Wind Project Sites prepared for the Wampanoags pursuant to a \$50,000 grant from the MTC, which concludes that the preferred site for the project is at the Gay Head Cliffs, notwithstanding the Report's acknowledgment that the "Gay Head Cliffs is a national monument with strong historic and cultural significance." Id. at 22. With respect to visibility, such report indicates at Figure 2 that the proposed site is of substantially higher elevation than the rest of Martha's Vineyard island. Figure 13 thereof further indicates that the two proposed locations at the Gay Head Cliffs are on tribal lands and, respectively, within approximately 115 meters and 175 meters of the National Historic Landmark of the Gay Head Cliffs, as well as within approximate 97 meters and 194 meters from the "Lookout Point" designated for viewing the Cliffs. Moreover, Figure 10 of the Report indicates that both of such proposed sites for the Wampanoag wind project are within areas designated as "Scenic Landscapes" and "Protected and Recreational Open Space." Thus, the Tribes' assertion that a project located some 25 miles away from Tribal lands would destroy

their culture is severely undermined by the simultaneous proposal of the Wampanoag wind project on tribal lands that are designated as “scenic landscape” and “open space” areas, in immediate vicinity to a National Historic Landmark, and at the very center of WTA’s tribal life.

VII. The Joint Letter Misstates the Facts Regarding the Eligibility of Nantucket Sound as a Marine Sanctuary.

The agencies should also disregard the assertion of the Joint Letter that Nantucket Sound qualifies for a National Marine Sanctuary status. To the contrary, and as the Alliance is well aware, the past nomination of Nantucket Sound for Federal Marine Sanctuary designation was rejected on the merits. As discussed in the release of the Massachusetts Coastal Zone Management (“MCZM”) Program attached as Exhibit D, the Federal Government in 1981 reviewed and rejected, on the merits, a request to place the Federal waters of the Sound on the “active candidate” list for Marine Sanctuary designation. As indicated in such release, the Federal review process involved nine months of public comment and concluded that such area “does not adequately meet site selection criteria for consideration,” and that most of the potentially eligible resources were in the state waters close to shore “and not in the [federal] area of the Sound.”

The MCZM release also notes that the Massachusetts Governor took the position that “the state Ocean Sanctuary program adequately protected the peripheral [state] waters of the Sound and that a Federal presence was not desirable in these areas.” Since that time, the Sound has never advanced to “active candidate” status, and the relevant regulations at 15 CFR 922.10 provide that “the [Site Evaluation List or “SEL”] is currently inactive.” Nor should any potential listing status have any implication upon the current proceedings, since such regulations further expressly provide that “placement of a site on the SEL, or selection of a site from the SEL as an active candidate for designation as provided for in 922.21, by itself shall not subject the site to any regulatory control under the Act.”

MMS should also give deference to the fact that Massachusetts has affirmatively confirmed that it neither asserts any sanctuary claim, nor seeks sanctuary status, regarding Nantucket Sound. In its 2004 decision regarding the proposed undertaking of CWA, the Federal Court of Appeals for the First Circuit noted that “the Massachusetts Department of Environmental Management, which is charged with implementing the Ocean Sanctuaries Act, including the ‘care, oversight and control’ of [state] ocean sanctuaries, has expressly disclaimed authority over Horseshoe Shoal.”² Ten Taxpayers, et al. v. Cape Wind Associates, LLC, 373 F.3d 183, 195 (1st Cir. 2004), cert denied, 160 L.Ed.2d 1069 (U.S. 2005). The First Circuit’s decision also cited to the statement of the Massachusetts Ocean Sanctuaries Coordinator which expressly confirmed that Massachusetts neither claims nor seeks any sanctuary jurisdiction for the Shoal, as follows:

² With respect to state sanctuary status, an adjudicatory decision of the Massachusetts Energy Facilities Siting Board to which the Alliance was a party (Cape Wind Associates, EFSB 02-2 (2005), pp. 9-13) rejected the same arguments of the Alliance and found that the Massachusetts Ocean Sanctuary Act of 1971, as then in affect, did not prohibit “facilities associated with the generation, transmission and distribution of electrical power.” G.L. c. 132A, Sec. 16.

While I appreciate your legal research ... relative to state jurisdiction claims, the Department and the Ocean Sanctuaries Program have not claimed jurisdiction over the area of the sound which includes Horseshoe Shoals, and respectfully decline to seek to expand our current jurisdiction.

Ten Taxpayers, 373 F.3d. at 196. All agencies should thus disregard the suggestion that Nantucket Sound is eligible for National Marine Sanctuary status, or that the Commonwealth seeks such status, and dismiss the matter as irrelevant to the matter at hand.

VIII. MMS Should Reject the Alliance's Restated Arguments Regarding NEPA Alternative Issues.

The MMS and other agencies should also reject the attempt of the Joint Letter to repeat the very same NEPA issues of the Alliance which have been fully rebutted, considered and rejected. Indeed, the lead agency in each case (the ACOE and then the MMS) has spent considerable time in resolving these now long-settled issues, which need not be re-opened at the eleventh hour, after the issuance of a Final EIS. While we do not intend to re-argue these issues, we would refer any interested agencies to our letter of July 28, 2006 responding to MMS's Notice of Intent to Prepare an EIS on the Cape Wind Project, which includes a summary of our position on the issues, which has remained consistent over the seven years of project review.

As a final note respecting alternatives, we also call you attention to the recent federal court decision in this Circuit which confirms that the requirement at 36 CFR 800.6 of the ACHP's regulations to consult on "alternatives or modifications to the undertaking" is properly focused upon and limiting the potential impacts of the existing proposal, rather than focusing upon other project proposals located away from any affected historic properties:

These references [in Section 800.6] to alternatives are thus more sensibly interpreted as applying only to changes in the existing proposal that could make it more compatible with its surrounding environment. If we were to adopt plaintiffs' argument that HUD must consider completely independent and different proposals for the use of federal funds, i.e., construction outside of the historic district or rehabilitation of existing housing within it, then any proposal for consideration within a historic district would always have to be rejected since the alternatives would always create less of an impact on the district. This court does not believe the NHPA was intended to go so far.

Northwest Bypass Group v. U.S. Army Corps of Engineers, 552 F. Supp.2d 97, 132 (D.N.H. 2008) (emphasis original), quoting Wicker Park Historic Dist. Pres. Fund v. Pierce, 565 F. Supp. 1066-1076 (N.D. Ill. 1982) ("This court finds that neither NHPA nor the regulations impose upon HUD a duty to consider alternative sites for construction or completely different housing proposals...." 565 F. Supp.at 1076). The agencies should thus not allow the delay of further

Dr. Rodney E. Cluck

July 6, 2009

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consultation with parties who have made it clear that they will refuse to consider any measures that would be applicable to “the existing proposal,” *i.e.*, the CWA Project.

IX. A Determination of Eligibility Would Have Far Reaching and Unpredictable Adverse Effects.

MMS should further consider that a determination of National Register eligibility of an area of unenclosed ocean as large as Nantucket Sound would have far-reaching, unpredictable and adverse consequences. First, if the unenclosed ocean could be so listed, it would be far easier to list enclosed (and thus “well-defined”) waters, for which the very same cultural and historical usage claims could be made (including, for example, Vineyard Sound, Buzzards Bay, Narragansett Bay, Cape Cod Bay, Dorchester Bay, etc.) Second, the Tribes have already indicated an intent to expand their position geographically, as recent press indicates that the WTA tribal representative now maintains that all areas around Martha’s Vineyard are “culturally significant,” including both sunrise (eastern) and sunset (western) views: “When asked during a meeting on the draft plan to indicate what areas of Martha’s Vineyard were culturally significant to the tribe [the WTA representative] said she drew a big circle around the entire island,” noting that “you can see the sun rise out of the water and see the sun set on the water.” Cape Cod Times, July 1, 2009. Third, if such waters themselves became TCPs, all actions in, affecting, or visible therefrom would become subject to the NHPA, including commercial fishing, marinas and wharves, cell towers, bridges, marine and avian transportation, and virtually all activity traditionally associated with designated port areas, a result far beyond the intended reach of the NHPA and seriously detrimental to the interests of the Commonwealth. The far more rational and established approach is to limit the boundaries of ceremonial TCPs to the area of usage and immediate surroundings, but to take into consideration remotely-located actions that could potentially affect the TCPs.

X. Conclusion.

As discussed above, the MMS should reject the position of the Wampanoag Tribe of Gay Head and the Mashpee Wampanoag Tribe that the approximately 600 square miles of unenclosed ocean known as Nantucket Sound should, in its entirety, be determined to be eligible for listing on the National Register. Finally, the latest letters of the Tribes and the Alliance have now made it perfectly clear that they had no intention of negotiating in good faith towards measures that would apply to the proposed undertaking (*i.e.*, the CWA Project), and the consultation process is thus at a fundamental and irreconcilable impasse, such that prompt termination and the transmittal of ACHP comments to the Secretary are the appropriate regulatory path.

Sincerely,



Dennis J. Duffy

Vice President of Regulatory Affairs

Dr. Rodney E. Cluck

July 6, 2009

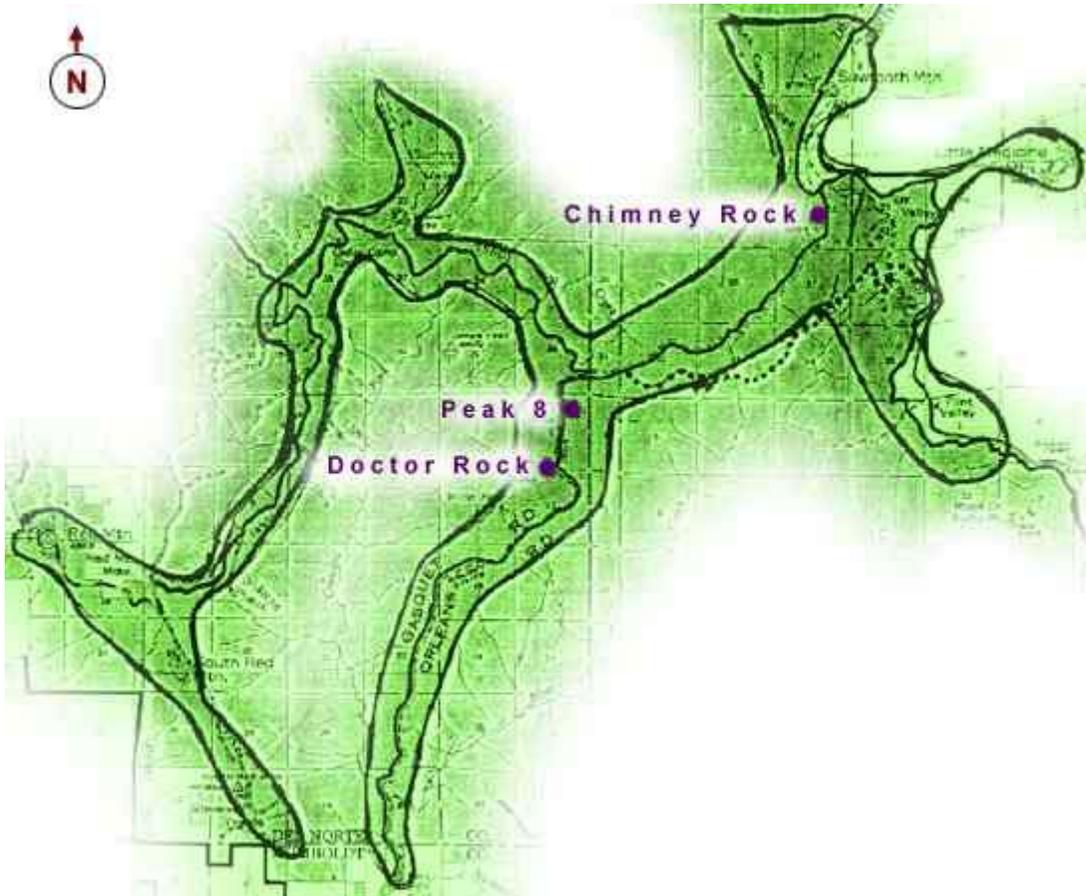
Page 11

cc: Dr. Melanie Stright
Federal Preservation Officer
Dr. Andrew D. Krueger
Alternative Energy Programs
Minerals Management Service
381 Elden Street
Herndon, VA 20170

John M. Fowler, Executive Director
Advisory Council on Historic Preservation
Old Post Office Building
1100 Pennsylvania Avenue, NW, Suite 803
Washington, DC 20004

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

Helkau District Eligible for National Register of Historic Places



Clean Energy Program
APPLICATION FOR PRE-DEVELOPMENT FINANCING

Per Solicitation No. 2004-GP-03

Exhibit B

1. Primary Applicant Wampanoag Tribe on Gay Head (Aquinnah)	2. Partners (if any) One World Energy
3. Short Title of Project Wâpan Project	4. Project Type (check one) Feasibility Study Pre-Development
5. Brief Summary of Project Will Study the feasibility of placing wind turbines on tribal lands in Aquinnah, MA	
6. Funding Sought \$50,000	7. Total Estimated Cost of Project \$100,000 (feasibility study) \$5,000,000 (total project)

Applicant Information

8. Name of Contact Individual Durwood Vanderhoop		9. Title Grantsman/Planner	
10. Mailing Address 20 Black Brook Road			
11. City Aquinnah	12. State MA	13. Mailing Zip 02535	14. Street Zip 02535
15. Telephone 508 645-9265 x116		16. Fax 508 645-3790	
17. Contact e-mail address Durwood@wampanoagtribe.net		18. Applicant Web Address www.wampanoagtribe.net	
19. Type of Entity (circle or highlight all that apply) For-profit company/corporation Not-for-profit organization Individual State govt. agency/authority Federal government Local government Manufacturer – renewable tech. Manufacturer - other technology Professional/trade association Consumer or public interest group Environmental interest/advocacy group Foundation Electric distribution company Natural gas distribution company Energy service company Power plant developer Power generator Electricity broker Competitive Power supplier Aggregator or Buyers Group Cooperative Architect Engineer Builder or real estate developer Academia: K-12, Post-secondary Research organization Financial institution/group			

Generating Facility and Site Information

20. Name of Proposed Generating Facility Uhuru Wāpan		
21. Site Address 20 Black Brook Rd		
22. City / Town Aquinnah	23. State MA	24. Mailing Zip Code 02535
25. Site Owner Contact Person Paul Reeves		26. Contact e-mail address upepo11@aol.com
27. Owner Telephone Number(s) 617 935-1386		28. Fax 617 442-6404
29. Electric Utility Service Territory or Provider NSTAR		
30. Percentage of RECs from the Generating Facility to be sold in accordance with RET Ratepayer Benefit for 10 years: 30 % See Section 4.2.5.3 of the Solicitation: Massachusetts RET Ratepayer Benefit Requirement for more information. Note: 30% will be the assumed percentage if left blank.		

1. Project Summary

The Wampanoag Tribe and One World Energy are planning to investigate the technical, community reaction and economic viability of installing distributed wind energy at the Wampanoag tribal lands on Martha's Vineyard. The wind feasibility study will analyze and evaluate the site, wind resources, permitting issues, visual and community impact and the project economics. It is envisioned that wind turbine(s) ranging from 850 kW to 2.1 MW in size would be well suited to the site and the total project size may range from 1.7 to 6 MW.

The wind resource/production research data, community reaction to the proposed wind farm permitting issues and the project economic forecasting based on collected wind resource and production data on available wind turbines will be analyzed to determine if the potential wind project is viable. The wind feasibility project will conclude with a description of the potential project's viability based on the above mentioned items and next steps in the pre development process for a successful wind project on the site.

2. Project Description

2.1. Applicant and Project Team

a. Applicant

The Wampanoag Tribe of Gay Head (Aquinnah) is Massachusetts' *only* federally acknowledged Tribe and has been since 1987. The Wampanoag people have lived for at least 10,000 years on Martha's Vineyard establishing a way of life based on fishing, hunting and agriculture.

Almost all new employment opportunities for this area are of a seasonal nature simply because of the resort community that the island has become, which has left many Tribal member no choice but to leave the island and look for more affordable housing and better paying jobs. This in numerous ways this has suppressed the Tribe's social and cultural growth but fortunately the Tribal membership continues to grow, now 1100 strong.

Over the years the Tribe has repeatedly demonstrated its ability to administer federal grants and contacts successfully from agencies including the Department of Housing and Urban Development, Environmental Protection Agency, Bureau of Indian Affairs and Indian Health Services, not to mention State and private foundations.

b. One World Energy

One World Energy was founded by Paul Reeves, a twelve-year veteran in the renewable energy industry. Mr. Reeves has extensive experience in the wind-power industry working as a consultant to Distributed Generation Systems Corporation (DISGEN) and for the US Department of Energy as liaison to Communities of Color for wind development and renewable energy utilization. He has also worked under a grant from the Massachusetts Renewable Energy Trust where he developed plans to educate and created renewable energy ownership models for communities of color. Currently Mr. Reeves is the renewable energy specialist for the American Association of Blacks in Energy and the Black Farmers Association.

c. The Productivity Factor, Inc.

As a SOMWBA-certified minority vendor and new entry into the renewable energy field, The Productivity Factor will assist One World Energy in the overall management of the assessment, and if appropriate, pre-development and development processes associated with the overall success of the project. With project development and operations experiences on several continents, over the last three decades, Ralph Jordan brings a myriad of team building, problem solving, and quantitative analyses expertise garnered in public and private endeavors. As a certified facilitator and process improvement specialist who has worked with numerous community organizations, The Productivity Factor's presence on the team assures a structured and formal approach to critical thinking and decision making.

d. Jeff Paulson & Associates

Jeff Paulson is the principal in his own law firm in Minneapolis, and has been practicing in the area of energy law for over twenty years. He was employed at NSP from 1994 to 1998 and while there worked on the development of the Lake Benton I and Lake Benton II projects, among others. Since 1998 his practice has focused on representing clients developing and owning renewable energy projects of all sizes, including most of the wind projects recently built in Minnesota. He has extensive experience in leasing and site acquisition, project ownership structures, permitting, construction and turbine contracting, PPA and interconnection agreement negotiation, and negotiation of financing terms and documents.

e. HDR

HDR is an architectural, engineering and consulting firm that excels at managing complex projects and solving challenges for clients.

As an integrated firm, HDR provides a total spectrum of services for our clients. Our staff professionals represent hundreds of disciplines and partner on blended teams nationwide to provide solutions beyond the scope of traditional A/E/C firms.

f. Wind Logics, Inc.

Wind Logics Inc. (formerly SESCO), a world leader in atmospheric modeling and analysis, has developed innovative methodologies for assessing long-term financial risk associated with wind energy development. The Wind Logics technology suite includes a range of advanced physics-based computer models that are tuned and integrated, ranging from larger-scale weather models to nonlinear wind field models to detailed models based on computational fluid dynamics when required. We can use these models in the appropriate combination to answer your questions regardless of whether your location is on a flat plain or in an area of complex terrain. The Wind Logics models are state-of-the-art, including advanced treatment of things like varying thermal effects during the day and its impact on wind steering through the detailed terrain. ind Energy.

2.2. The Proposed Generation Facility

This is a development plan for a proposed 4+ megawatt wind energy generation facility to be located on the Island of Martha's Vineyard on land owned by the Wampanoag Tribe. The facility would be owned and operated by a local community energy cooperative developed by the tribe. The project will be developed in accordance to an agreement between One World Energy and its team and the Wampanoag Tribe. One World Energy's team has had experience in developing similar small commercial wind facilities in the Midwestern U.S. and structuring their ownership to benefit local communities or charitable endeavors. A summary of wind projects developed by the One World's Energy team, including community-based projects, is attached.

2.2.1 Energy Resources and Technologies

Wind resources in Vineyard and Nantucket Sounds are very favorable. Quantitative evidence in support of this statement with respect to this specific project will be produced as part of the feasibility study being proposed in this grant application.

The feasibility study will also evaluate turbines in the 850 KW to 2.1 MW range. Such turbines are available from several manufactures including GE Wind, Suzlon, Vestas, Gemesa and Bonus/Siemans.

2.2.2 Project Location

The Wampanoag Tribe of Gay Head (Aquinnah) owns approximately 481 acres of land in twelve parcels on the island of Martha's Vineyard, Massachusetts. Most of these parcels are located in the town of Aquinnah on the western tip of the island. Figure 2.2.2 is a map of Aquinnah with tribal lands in red. One parcel is approximately 196 acres in size and is interior to the island. The Wampanoag Community Center is on this parcel at approximately 70.80 West Longitude, 41.33 North Latitude. It is on this 196 acre parcel that we plan to site wind turbines.

Wampanoag Tribal Lands

The Wampanoag Tribe has sovereignty over 483.1 acres of land on Martha's Vineyard.

Most is located on the west end of the island

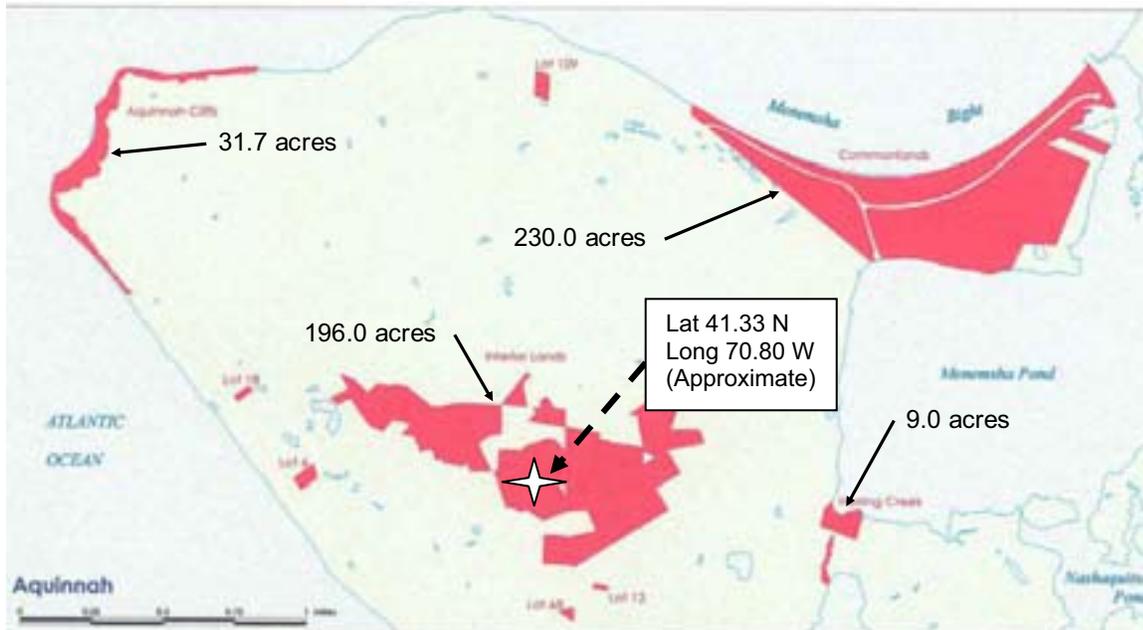


Figure 2.2.2

2.2.3 Site Owner Commitment

The Wampanoag Tribal Council adopted Resolution #2005-17 reproduced below. This resolution clearly commits the Tribe to studying the feasibility of “harnessing wind energy on tribal lands.”

2.2.4 Utility Company to be involved

The utility company is NStar and we have just opened up a dialogue with them. They would like us to come back when we have a more definitive understanding of the siting for our proposed turbine sites

2.3 Project Development Strategy and Status

2.3.1 Prior Feasibility Studies

The wind speed map available on the web site of the Massachusetts Technology Collaborative has been studied. Figure 2.3.1.a shows the section of the wind speed map for the Aquinnah area. Figure 2.2.2 shows the location of tribal lands in Aquinnah. Correlating these two maps and referring to the wind speed key in Figure 2.3.1.b, one can see that the inland tribal holdings are in an area with a mean wind speed between 16.8 and 17.9 mph.

Figure 2.3.1.a

Figure 2.3.1.b

2.3.2 Projected Development Strategy

Our development strategy the wind feasibility study consists of three main tasks each divided into subtasks.

Task 1: Wind Resource, Production and Siting Study

Subtask 1.A: NREL Tall Test Tower

The National Renewable Energy Laboratory (NREL) of the US Department of Energy sponsors an anemometer and test instrumentation loan program for Native American Tribes. With the assistance of NREL, Native American tribes can verify whether wind conditions at their proposed site will support a wind turbine facility. We already have a verbal commitment from NREL's Tony Jimenez that a tower presently in Washington state will be sent to the Wampanoag Tribe as soon as we get funding support.

(A letter formally requesting the loan of a Tall Tower has been sent to NREL. A copy is included as Attachment D.)

Subtask 1.A.1: Prepare Application to NREL for Tall Test

Subtask 1.A.2: Shipping Costs

Subtask 1.A.3: Assembly and Erection

Subtask 1.A.4: Data Recording and Maintenance

Subtask 1.A.5: Disassembly

Subtask 1.B: Wind Logics, Inc Subcontract

Wind Logics Inc. (<http://www.windlogics.com>) is a world leader in atmospheric modeling and analysis. We formally have requested Wind Logics to submit a proposal to us for analytically evaluating the wind resources at the proposed turbine site on Martha's Vineyard. Reproduced below is the proposal and quotation that Wind Logics has responded with.

Task 2: Community Outreach and Partnership Building

Subtask 2.A: Educational Materials

Produce education materials that describe the wind project to the community surrounding the proposed wind project; provide information in education materials that will empower community and tribal group members to make well-informed decisions concerning support of our wind project.

Subtask 2.B: Develop Partner Coalitions

Hold a kick-off event to introduce potential community partners to the project. Build partnerships with other organizations committed to developing wind energy on the Cape and Martha's Vineyard.

Subtask 2.C: Organize Community Forums/Meetings

Cultivate community support by encouraging community participation in the planning process; Inform and educate community on the attributes and benefits of renewable energy resources, benefits to Martha's Vineyard residents, environmental health issues, and the connection with the proposed wind project.

Task 3: Wind Resource Data and Economic Forecasting Analysis

The objectives of these activities will be to (i) identify the permitting and transmission conditions that need to be satisfied for the project to proceed and (ii) develop a project pro forma that reflects expected project costs, revenues, expenses and financing.

A series of pro formas modeling various combinations of scenarios (turbine models, revenues, financing options) will be generated to find the optimal Project components and financial structure.

Subtask 3.A: Permitting and Transmission

Subtask 3.A.1: Permitting

Permitting requirements will be identified and factored into siting and design decisions. It is expected that the pre-permitting process will likely involve the community outreach and education activities described above.

Subtask 3.A.2: Transmission

Activities will include identification of potential interconnection points with

the transmission system that will allow delivery of the Project's output to the offtaker(s), and initiation of system interconnection and transmission studies with ISO-New England and affected transmission utilities to obtain necessary interconnection approvals and estimated interconnection costs. Given the location of tribal property, the range of interconnection options will be limited.

Subtask 3.B: Projected Project Costs, Revenues, Expenses and Financing.

Subtask 3.B.1: Develop Projection of Revenues

Subtask 3.B.1.a: Wind Resource Analysis

As noted, a meteorological tower will be installed to measure site specific data. Wind Logics will be engaged to perform an analysis using publicly available wind data to assess the wind resource at the site both generally and in order to micro site turbines. Several turbine models will be analyzed by Wind Logics using the manufacturer's power curve and wind resource data to compute expected gross production from each turbine at applicable sites.

By applying expected losses for transmission and transformation of the gross production, and losses from operating conditions for each turbine, a net production estimate can be obtained that approximates the amount of energy actually deliverable to the offtaker at the point of delivery. These net production estimates for various turbines and project configurations can be used as the starting point for calculating revenues in each scenario.

Subtask 3.B.1.b: Power Sales

Potential purchasers of the electricity to be produced will be identified along with likely pricing terms based on negotiations and market data. Some research to this effect has already been conducted. Using the expected pricing stream, the revenues associated with electricity sales for each year of the Project can be established

Subtask 3.B.1.c: REC Sales

Similarly, potential purchasers of the renewable energy credits will be located. Several prospective purchasers have already been contacted, and the market is very active. An analysis of the various offers will be incorporated into various pro formas to assess the

best option for the Project.

Subtask 3.B.2: Develop projection of Ongoing Expenses

Subtask 3.B.2.a: Operating Expenses

. Wind generation facilities typically incur certain operating expenses, each of which needs to be explained and included in the expense section of the pro formas. Expense items commonly include:

- Warranty payments – payments to the manufacturer for turbine warranty service
- Operation and maintenance service – payments to the manufacturer for the first five years of O&M service and to other O&M suppliers thereafter, including any necessary reserves for replacement
- Insurance – CGL, property, mechanical breakdown and similar insurance costs
- Taxes – including applicable sales, property and production taxes
- Lease payments – if a lease is required, the expected annual payments will be negotiated
- Electrical usage – costs for station auxiliary
- Miscellaneous fees – accounting and management fees

Using these estimates, available operating cash can be calculated for each year.

Subtask 3.B.2.b: Debt Financing

Depending on the available operating cash and expected project costs and equity investments (see below) various levels of term debt can be modeled, along with possible interest costs, to ascertain the level of interest expense the Project can manage with applicable debt service coverage ratios. The resulting interest expense can be incorporated into each pro forma.

Subtask 3.B.3: Develop Projection of Capital Costs

Project costs will be estimated for all major project components, including:

Subtask 3.B.3.a: Turbines

Quotes for available turbines suitable for use at the site will be

obtained. By comparing the cost of each turbine and its associated equipment and foundation and installation to its expected production and expenses, the optimal turbine for the Project can be determined based on production relative to cost. Other factors in turbine selection will include financial strength of the manufacturer, available O&M support infrastructure and turbine availability. Turbine costs will include towers and all freight to site, as well as commissioning services.

Subtask 3.B.3.b: Foundations

Once specific sites are located, soil borings can be taken and analyzed by the civil engineers for indicative design of the foundations for the turbines. The foundation costs for required steel, concrete and labor at the site can be estimated.

Subtask 3.B.3.c: Electrical

Depending on specific turbine locations and the location of the interconnection point, and related voltage levels for transmission cable, costs for pad transformers, underground cable and related transmission (and, if applicable, substation) costs can be identified.

Subtask 3.B.3.d: Erection and Installation

The availability and cost of cranes of sufficient size, with related installation services, will be analyzed and cost estimates obtained.

Subtask 3.B.3.e: Miscellaneous Costs

Permitting, legal, environmental studies and other soft costs will be estimated based on Project requirements.

A total Project cost estimate for each turbine model and related configuration will be computed and used to assess financing options.

Subtask 3.B.4: Delineate Various Financing Options

All financing options will be explored including (i) simple ownership by the tribe or the tribe with one or two partners; (ii) broader community ownership models, including cooperative structures such as those used by

Minwind Energy and other Midwest entities; and (iii) use of the Minnesota “flip” model in which an outside equity investor is brought in for an initial period of time to capture the full value of federal production tax credits and other tax benefits prior to a “flip” date at which time majority ownership of financial benefits reverts to local owners. It is expected that, economically, the simple ownership model may be preferable in these circumstances, assuming adequate cash is available on the part of the owners. However, broader community participation may be beneficial or necessary to obtain local approvals, and an outside investor may be necessary to assure availability of turbines for the Project. As a result, all scenarios will be modeled.

NOTE: The task breakdown above is used to define the “tasks” in the budget forms of Section 5.

2.3.3 Business and Financial Structures

A specific financial structure will be developed under Subtask 3.B.4 above.

2.3.4 Anticipated Markets

One World Energy has received indication from the General Service Administration that because of One World’s 8(a) minority owned status; the GSA will buy all of the power that One World can broker to it. Also locally, the Cape Light Compact is an interested buyer of green energy. Further definition of markets will be done as part of Subtask 3.B.1.b above.

2.4 Project Risks

At this early stage of the project development cycle, there many unknowns associated with project. While initial thoughts suggest that the project is certainly worthy of further consideration and ultimately may have a bright future, the purpose of this feasibility study funding request is to put these concerns to rest:

a. Community Acceptance

To elaborate on this particular point, the history of the wind farm proposed for Nantucket Sound by Cape Wind Associates, LLC shows the opposition that a proposed wind turbine installation can encounter. Intrinsicly, the Wampanoag proposal should not elicit such vehement resistance because:

It is much smaller (at most 5 turbines compared to 130).

It will not be offshore with potential interference with marine navigation or aquatic life.

It will be owned by a community based organization rather than a for-profit corporation.

It will not be on public land.

None the less, it is only prudent to approach permitting authorities, watchdog organizations and the public thoughtfully and with an awareness of concerns these people can have. To this end, we propose allocating significant resources to Community Outreach and Partnership Building.

- b. Federal, state, and local environmental approvals
- c. Sufficient wind resources
- d. Proximity and capacity of transmission infrastructure
- e. Cooperation of the local utility company

Upon completion of this feasibility analysis portion of the project, we are highly confident that we will have had positive resolution to all of these concerns.

2.5 Project Benefits

2.5.1 Energy

There is little likelihood that electric energy demand will decrease in the future. Replacing electric energy produced by burning fossil fuel with electric energy produced from renewable resources is clearly of great benefit.

With respect to Martha's Vineyard specifically, NSTAR transmits electric energy to the island from the mainland by three 25 KV underwater cables. NSTAR has some concerns with the ability of these cables to reliably support the Vineyard's electric needs. Electricity generation on the island itself will lessen the load on these transmission cables.

2.5.2 Environmental

One graphic way to demonstrate the environmental benefit is to place next to each other a picture of the Canal Electric Generating station and a simulated picture of wind turbines on the Wampanoag's land. Gasses of various types and particulate emissions on the one hand and nothing being added to the air as it passes over the blades of the turbines on the other.

2.5.3 Economic

The technology of modern large (megawatt range) turbines produces electricity at rates that are becoming competitive with fossil fuel generation. Add to that the value of

Renewable Energy Credits and Production Tax credits and one has a profitable business.

Beyond production costs, pollution free wind generation of electricity will reduce the “hidden costs” of conventional electric generation such as medical expenses due to illnesses aggravated by air pollutants and adverse economic consequences of global warming.

3 Project Plan

3.1 Work Plan

The work plan is defined by the tasks of section **2.3.2 Projected Development Strategy**. The scope of these tasks can be seen from their costing in section **5. Budget**.

3.2 Schedule

A preliminary Microsoft Office Project Gantt Chart is included as Attachment B. Microsoft Project will be used throughout the Wâpan Project to track and manage the project.

The task of longest duration is the tall tower anemometer testing because this type of testing is done so as to cover all seasons of the year. It is expected that a positive conclusion regarding the feasibility of this project will be reached without the need for the anemometer test results thus enabling a Feasibility Study Report to be issued by about mid July, 2006.

Anemometer testing will continue for a full year and the results will be included in the project’s Final Report. The usefulness of this data is expected to be that when added to the analytic conclusions of the July Feasibility Study Report, it will make an even more powerful case to convince investors in the merits of the project.

3.3 Deliverables

Copies of educational materials as they are developed under Subtask 2.B

Quarterly reports 3/1/06, 6/1/06 and 9/1/06

Final Report 12/1/06

Feasibility Study Report 7/17/06

4 Management Plan

In order to complete this project, the team will be utilizing a thirty-step methodology. The methodology (see attached) divides the project into the following four phases:

Phase I	Planning	Grey	Steps 10 – 80
Phase II	Financing	Blue	Steps 90 – 160
Phase III	Construction	Yellow	Steps 170 – 210
Phase IV	Operation	Green	Steps 220 – 2605. Budget

The tasks of the budget are defined on section **2.3.2 Projected Development Strategy** above. Please refer to it for those definitions.

The budget itself is presented in the Excel spreadsheet format requested under the solicitation.

6. Attachments

Attachment A: Excel spreadsheet for the project budget as requested in section 5. immediately above.

Attachment B: Microsoft Office Project Gantt Chart of the project schedule

Attachment C: Detailed resumes of the principal participants.

Attachment D: Letter to NREL Requesting the Loan of a Tall Tower Anemometer

Attachment A

Budget in Excel Format

The Excel workbook for the project consists of 6 Excel “sheets”

Sheet 1: Standard Budget Form – Summary

Sheet 2: Rollup of Tasks

Sheet 3: Worksheet A - Task 1 Budget

Sheet 4: Worksheet A - Task 2 Budget

Sheet 5: Worksheet A - Task 3 Budget

Sheet 6: Worksheet B - Travel

Exhibit B
Sheet 1

Standard Budget Form - Summary
Clean Energy Program
 Massachusetts Technology Collaborative

A. Applicant Information

Applicant: Wampanoag Tribe of Gay Head (Aquinnah)	Solicitation No. 2004-GP-03 Pre-Development Financing Initiative
Address: 20 Black Brook Rd Aquinnah, MA 02535	Title of Proposed Project: Wâpan Project
	MTC Funding Requested: 49,357
	Total Project Cost: 98,277
	MTC Funding Percentage: 50.2%

B. Project Budget (from Worksheet A)

	<i>Amount</i>
I. Direct Labor	33,065
II. Subcontractors and Consultants	52,055
III. Direct Materials	3,850
IV. Other Direct Costs	1,300
V. Travel	4,700
VI. General & Admin. Expense/Overhead @ ra 10.00%	3,307
Total Project Cost	98,277
Funding Sought from MTC	49,357
Cost Share	48,920

C. Cost Share

	<i>List Sources</i>	<i>Amount</i>
	Paul Reeves	5,950
	Ralph Jordan	5,950
	Jeff Paulson	1,700
	Durwood Vanderhoop	4,505
	Joseph Turnbull	6,715
	Larry Miles	3,000
	Tribal Members	16,200
	WindLogics, Inc	2,000
	Construction Supplies	500
	Travel Meals & Lodging	2,400
Total Cost Share (should match figure in part B)		48,920

check = ok

Exhibit B



***Preliminary Survey of Potential Wind
Project Sites in Aquinnah,
Massachusetts***

FSRP0023-B

March 3, 2008

Prepared for:

**Massachusetts Technology Collaborative
75 North Drive
Westborough, MA 01581**

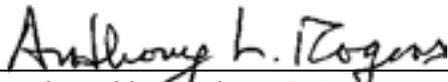
Approvals



Prepared by Mia Divine

March 3, 2008

Date



Reviewed by Anthony L. Rogers

March 3, 2008

Date



Reviewed by Kevin J. Smith

March 3, 2008

Date

Version Block

Version	Release Date	Summary of Changes
A	February 20, 2008	Original
B	March 3, 2008	Revised per client comments

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Introduction

In October 2007 the Town of Aquinnah, Massachusetts, submitted a Municipal Wind Turbine Site Survey Application to the Massachusetts Technology Collaborative (MTC) to request assistance in evaluating municipally-owned property for community-scale wind development potential. Global Energy Concepts (GEC) was contracted by MTC to conduct a preliminary assessment on behalf of the town, including the identification of potential barriers to development, the estimation of wind resource potential, and the identification of potential wind turbine locations. During this review, GEC utilized maps, aerial photos, available wind data, observations from the site visit, and GEC's in-house experience and expertise. This high-level report is not intended as a detailed feasibility study suitable for project development. Further analysis, including wind resource measurement, is recommended prior to project development.

Site Description

The Town of Aquinnah is located on the southwest portion of Martha's Vineyard Island off the southern coast of Massachusetts as shown in Figure 1. The ground elevation ranges from approximately 5 m near the water to 60 m at locations further inland (see Figure 2).

During the site visit, two sites were evaluated for the possible placement of a wind turbine: the Town Hall and Gay Head Cliffs. Aerial photos of each property are provided in Figure 3 and Figure 4. The Town Hall property consists of three parcels totaling 5.8 acres. The parcel adjacent to South Road contains the town office buildings and the fire station. The other two parcels are currently undeveloped; however, there are plans to construct affordable housing units in the northwest parcel. The Gay Head Cliffs property, at the intersection of Lighthouse Road, South Road, and Moshup Trail, consists of seven parcels totaling approximately 16 acres. Gay Head Cliffs is a national monument and the properties host a number of shops, a restaurant, public restroom, and a museum.

Three additional sites were discussed with local representatives and eliminated from further consideration. The town-owned Loran Tower site, located off of Moshup Trail, was eliminated from consideration due to the zoning regulations of this parcel, which prohibit the construction of any structures on the property. The town-owned Lot 33 near Menemsha Pond is a 14-acre parcel that is currently undeveloped and is adjacent to cranberry bogs and land bank properties. This property was eliminated from consideration due to the lack of road access, lack of an on-site electric load, and the significant number of wetlands on the property. The Town Landfill property is a single 6.4-acre parcel located on South Road. The northern portion of the property hosts the capped landfill and a parking lot, while the southern portion is undeveloped wetland. Due to the small size of this parcel and close proximity to homes, the site was eliminated from further consideration.



Figure 1. Location of Aquinnah, Massachusetts

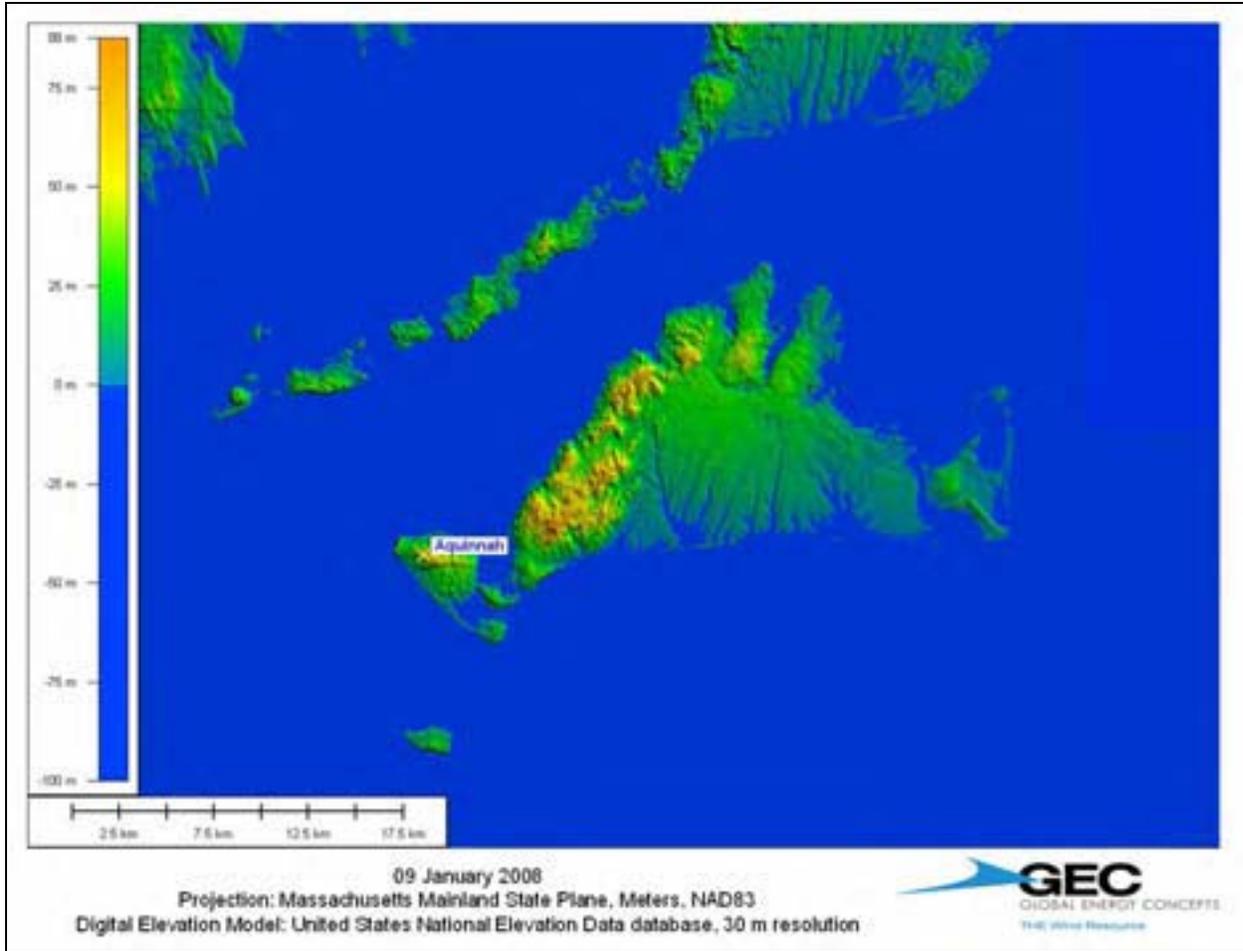


Figure 2. Elevation Map of Aquinnah Area



Figure 3. Aerial Image of the Town Hall Site



Figure 4. Aerial Image of the Gay Head Cliffs Site

Wind Resource Potential

Wind resource information for Massachusetts is available from the New England Wind Map and several weather stations and meteorological (met) towers in the area. This information is used to estimate the range of possible wind speeds in the area; however, the actual wind resource at a particular location is highly site-specific. In order to reduce uncertainty in energy estimates, on-site measurements are recommended prior to the installation of wind turbines at a particular location.

The portion of the New England Wind Map that encompasses Aquinnah is shown in Figure 5. According to the wind map, the estimated wind resource at the Town Hall site is 8.0 to 8.5 m/s at a height of 70 m above ground level. The estimated wind resource at the Gay Head Cliff site is 8.5 to 9.0 m/s at a height of 70 m above ground level. This wind resource range is considered “excellent” according to wind industry standards for developing economically viable projects.

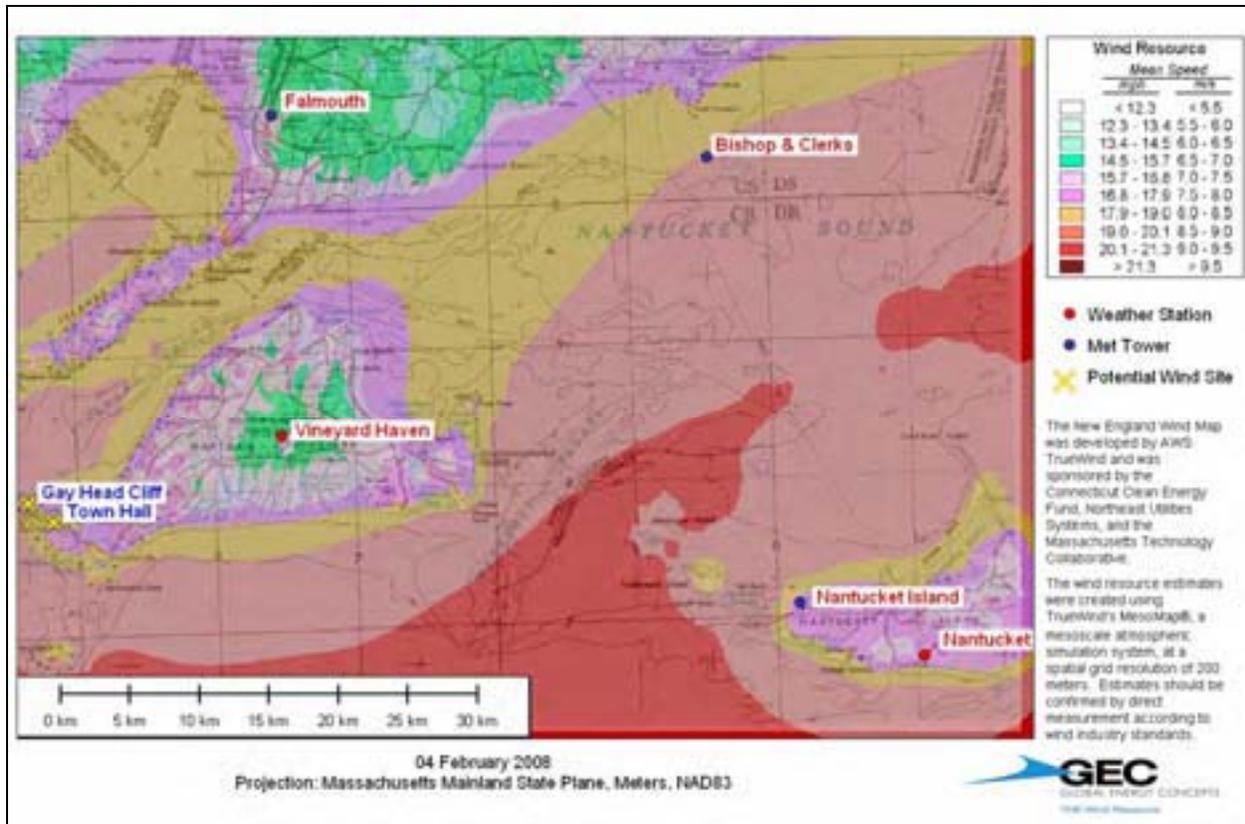


Figure 5. Wind Resource Map of Martha's Vineyard Area

The locations of weather stations and met towers in close proximity to Aquinnah are shown in Figure 5. A summary of the wind data measured at each location is provided in Table 1. Data from the Vineyard Haven and Nantucket weather stations are maintained by the National Climatic Data Center. Data loggers at these stations record hourly wind speed and direction data at a height of 10 m (33 ft) above ground level. Data from Bishop and Clerks, Falmouth, and Nantucket Island were obtained from met towers installed and maintained by the University of Massachusetts at Amherst (UMass). Data loggers at these towers record 10-minute wind speed and direction data at various heights above ground level for a period of one year. In GEC's experience the annual average wind speed in the area typically varies by up to 6% from year to year. To account for this variability, GEC has included a range of wind speeds around the one-year average recorded from the UMass met towers.

Table 1. Summary of Available Wind Data

Location	Coordinates (MA State Plane Meters, NAD83)		Elevation (m)	Measurement Height (m)	Annual Average Wind Speed (m/s)	Wind Class ⁴
	Easting	Northing				
Vineyard Haven ¹	274019	794035	18	10	4.6	2
Nantucket ¹	320613	779119	12	10	5.5	3
Bishop & Clerk's ²	304261	814555	0	15	7.1 - 8.1	7
Falmouth ²	273273	817686	40	39	5.2 – 5.8	1 - 2
Nantucket Island ²	311513	782081	3	68	8.3 – 9.3	5 - 7
Gay Head Cliffs ³	255667	788707	28	70	8.5 – 9.0	6
Town Hall ³	257534	788406	49	70	8.0 – 8.5	5

[1] Source: National Climatic Data Center, based on a 10-year period of measurement

[2] Source: University of Massachusetts Amherst Renewable Energy Research Lab. Based on a 1-year period of measurement and includes a +/- 6% range to account for inter-annual fluctuations in the average wind speed.

[3] Source: AWS Truewind New England Wind Map estimate

[4] Based on the Department of Energy's Wind Power Classification System

While the wind map suggests a Class 5 to Class 6 wind resource at the Aquinnah sites, on-site measurements from locations surrounding Aquinnah indicate that the resource varies from Class 2 to Class 7. This underscores the site-specific nature of the wind resource and the uncertainty in the wind map estimate. Collecting on-site measurements at the potential wind turbine location is the best way to determine the wind resource at a particular site and to reduce uncertainty in the energy production estimate.

The wind rose for Aquinnah according to the New England Wind Map is shown in Figure 6. The wind rose indicates a prevailing southwest wind direction. Aquinnah is located on the southwest coast of Martha's Vineyard Island and is thus well exposed to the strong winds off of the ocean. The Gay Head Cliffs site has few trees or other surrounding obstructions, as shown in Figure 7. At the Town Hall site the primary obstructions to the winds from the southwest are trees, which were observed to be up to 10 m in height, as shown in Figure 8.

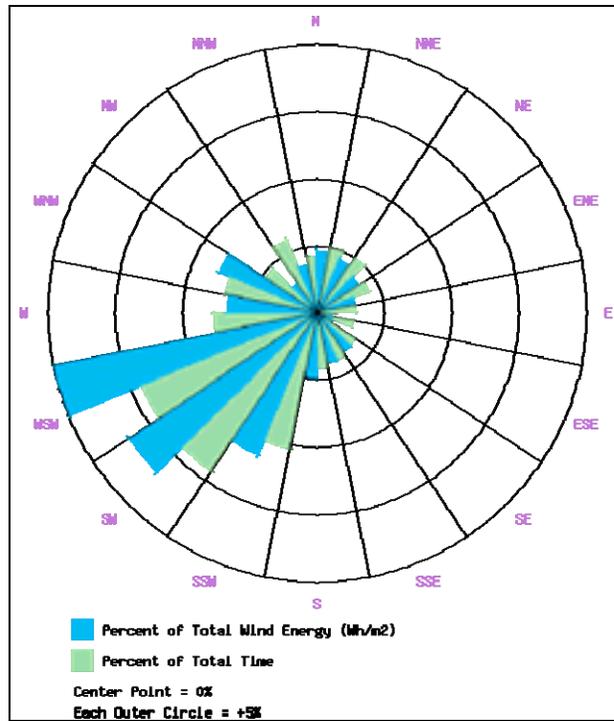


Figure 6. Area Wind Rose

(Source: New England Wind Map, AWS Truewind)



Figure 7. Gay Head Cliffs Property, Facing Southwest



Figure 8. Example of Tree Coverage at the Town Hall Site

Potential Offset of Electrical Loads and Electrical Grid Access

Under current net-metering regulations in Massachusetts, any net excess electricity generated by a wind turbine rated at 60 kW or less can be credited to the customer's next monthly utility bill at the average market rate. For a wind turbine greater than 60 kW in size, the utility is not obligated to purchase excess electricity. New net-metering legislation is currently being discussed in the Massachusetts legislature, which would increase the eligible wind turbine size to up to 2 MW and allow for virtual net-metering. Virtual net-metering would allow the Town of Aquinnah to aggregate municipal electric loads from different meters under one virtual meter that would be supplied by the wind project. Any unused wind-generated electricity would be credited towards the next month's energy consumption.

As an alternative to net metering, wind-generated electricity could be sold directly to the wholesale market through a power purchase agreement. However, the wholesale market rate is likely to be significantly less than the retail rate and will lead to a longer payback period than if the wind-generated electricity were to be used on site to displace retail electric rates. The sale of renewable energy credits (RECs) may help to improve project economics; however, the long-term market for RECs is highly uncertain.

Typically, the most cost-effective development scenario for community-scale wind projects is a behind-the-meter installation where the entire output of a wind project serves to offset the retail electric rates of on-site electric load, such as a school or wastewater treatment plant. However, in Aquinnah, the electric demand at each of the proposed wind project sites is minimal. Without an on-site electric load or virtual net-metering legislation in place, identifying a viable economic scenario for a community-scale wind project in Aquinnah is a significant barrier to development.

Table 2 provides estimated energy production from different sizes of wind turbines that may be appropriate for Aquinnah (project scale is discussed further in a later section), based on the wind resource at the Gay Head Cliffs site.

Table 2. P50 Energy Estimates from Example Wind Turbines at Gay Head Cliffs Site

Turbine Type	Rated Capacity (kW)	Hub Height (m)	Estimated Net Annual Energy Production (MWh/yr)	Estimated Net Capacity Factor ¹
Fuhrlander FL600	600	50	2,100 – 2,280	40 – 43%
Vestas RRB V47-600	600	65	1,930 – 2,100	37 – 40%
Enertech E-48	600	65	2,090 – 2,260	40 – 43%
Distributed Energy Systems NW100/21	100	32	260 – 290	30 – 33%

[1] Defined as the ratio of estimated energy production to the maximum possible energy production if the wind turbine were to operate at rated power for the entire year.

In calculating annual energy production from various wind turbines, GEC used the estimated annual average wind speed range of 8.5 to 9.0 m/s at a height of 70 m above ground level from the New England Wind Map. The wind speed is adjusted to the various turbine hub heights using the power law¹ and a wind shear exponent of 0.22 based on estimates from the New England Wind Map. An annual wind frequency distribution was created using a Weibull shape factor of 2.27 from the New England Wind Map. GEC estimated the annual average air density in Aquinnah to be 1.24 kg/m³ based on an annual average temperature of 10°C and a site elevation of 30 m. The standard wind turbine power curves provided by the manufacturers were adjusted to the site air density. GEC estimates aggregate energy losses of 18%, which includes downtime for maintenance and component repair, weather-related downtime, electrical line losses, blade soiling and degradation, turbulence, faults, and other factors.

The energy production and capacity factor estimates listed in Table 2 represent best estimates of the range of P50 values. The estimates rely solely on wind map data, which can have a high degree of uncertainty. Other sources of uncertainty, such as annual and spatial variability in the wind resource, system energy losses, the shape of the wind frequency distribution, and other factors are not included in this preliminary analysis and would further increase the range of possible capacity factor values.

¹ The power law is defined by the equation $(V_1/V_2) = (H_1/H_2)^\alpha$, where V_1 and V_2 are wind speeds at heights H_1 and H_2 , respectively (above ground level), and α is the dimensionless wind shear exponent. This is a typical method of describing the extent to which wind speeds vary with increasing height above the ground.

Electrical Grid Access

Martha's Vineyard Island currently receives power from NSTAR via undersea cables from the mainland with a total capacity of approximately 64 MW. A network of 3-phase, 460-volt power lines serves the island and passes within 200 m of the potential wind project sites in Aquinnah. Connection of a wind turbine to the electrical grid at either of the potential wind project sites does not appear to be a significant barrier to development, although a system interconnect study through NSTAR will need to be completed to confirm this initial opinion.

Transportation and Site Access

Reasonable access to a potential development area is necessary in order to receive turbine and tower components, to allow for the mobilization of cranes, and to allow for reasonable response time from service personnel. Martha's Vineyard Island is only accessible by sea or air as no bridge or tunnel exists to the mainland. The island hosts four harbors that are utilized by ferries, fishing vessels and recreational water craft. Vineyard Haven Harbor at Tisbury (located on the northeast side of the island) is the primary working port, and year-round passenger and vehicle ferry service is available. Fuel and other freight are typically delivered by barge. There are also three airstrips on the island, with Martha's Vineyard Airport being the largest and most heavily used. Local roads are paved but limited to two lanes in width, which can lead to congested traffic during the summer months. In addition to restricted turbine delivery options, the ability of service personnel to access the site will be restricted by the ferry and flight schedules and will likely lead to increased downtime (reducing energy production) and costs for maintenance.

A letter report from Black & Veatch to MTC and the Town of Tisbury summarizes a preliminary assessment of the feasibility of transporting a 600 kW wind turbine and related components onto Martha's Vineyard Island. The length of the blades and tower sections of the wind turbine would be approximately 25 m and the weight of the nacelle would be approximately 28 tons. In the report, Black & Veatch recommended that all components, including a crane large enough to erect the wind turbine, be delivered by barge to Vineyard Haven Terminal. In addition, a smaller crane located on Martha's Vineyard Island may be needed to offload the components from the barge. Once the components are on the island, transportation by truck on surface roads is feasible with some modifications. The primary obstacle is a 90° turn near the terminal at the intersection of Water Street and Beach Street, which would require the temporary removal of fencing and landscaping from the Tisbury Post Office parking lot. Some telephone lines, power lines, and parked cars would also need to be temporarily removed and traffic would need to be diverted. Black & Veatch concludes that delivery of a 600 kW wind turbine to Tisbury appears to be feasible but with additional financial burden to the project that would not be incurred by mainland projects.

When transporting wind turbine components from Tisbury to the potential wind project site in Aquinnah, additional telephone and power lines would likely need to be lifted or temporarily removed along portions of the road. There are also a number of culverts and one bridge that would need to be crossed. The weight limit of these items is currently unknown. A more detailed transportation study including a detailed cost estimate would need to be completed once a wind turbine model and dimensions have been specified.

The municipal parking lot at the Gay Head Cliffs site could be used as a staging area for the assembly of components. At the Town Hall site, an area would need to be cleared of trees.

Aviation Conflicts

Wind turbines must be installed in a manner that meets federal and local air space regulations. The actual effect of a project on air navigation is evaluated on a case by case basis and in consultation with local regulators. The Federal Aviation Administration (FAA) requires that a Notice of Proposed Construction be filed for the construction of any object that would extend more than 200 ft above ground level. For each filed project, the FAA undertakes an initial aeronautical study and issues either a Determination of No Hazard to Air Navigation (DNH) or a Notice of Presumed Hazard (NPH). If an NPH is issued, the FAA will conduct a more extensive analysis to evaluate impacts on air operations. Other local air space regulations may also apply.

Construction of a wind project within 4 miles of airports would be more likely to impact navigable airspace or aviation communications than projects located farther away. Three airport runways are located on Martha's Vineyard Island, each approximately 11 to 15 miles northeast of Aquinnah. Wind turbines in Aquinnah are not likely to pose a hazard to air navigation at these airports based on the small size of the runways and distance from the project site. However, there may be local air space restrictions that could affect turbine location or height. According to local representatives, the FAA imposed a 73.5-m (241-ft) height restriction on a proposed wind project in the Town of Tisbury, which is located closer to Martha's Vineyard Airport than the proposed wind project sites in Aquinnah. However, it is unclear whether the restriction applies to the maximum tip height or the hub height of the turbine. Possible turbine options that would satisfy this potential aviation restriction are presented in a later section.

The FAA online Long-range Radar Tool provides a preliminary estimate of the effect of a wind project on Air Defense and Homeland Security radar. As shown in Figure 9, the area surrounding Aquinnah is flagged as "yellow," which is defined as "likely to impact Air Defense and Homeland Security radars." While the presence of this equipment does not necessarily prohibit wind turbine development in the area, some restrictions in regard to wind turbine placement or height may be imposed. A more detailed aeronautical study is required to determine the extent of the impact and possible mitigation strategies. In addition, potential impacts on other types of radar must be evaluated.

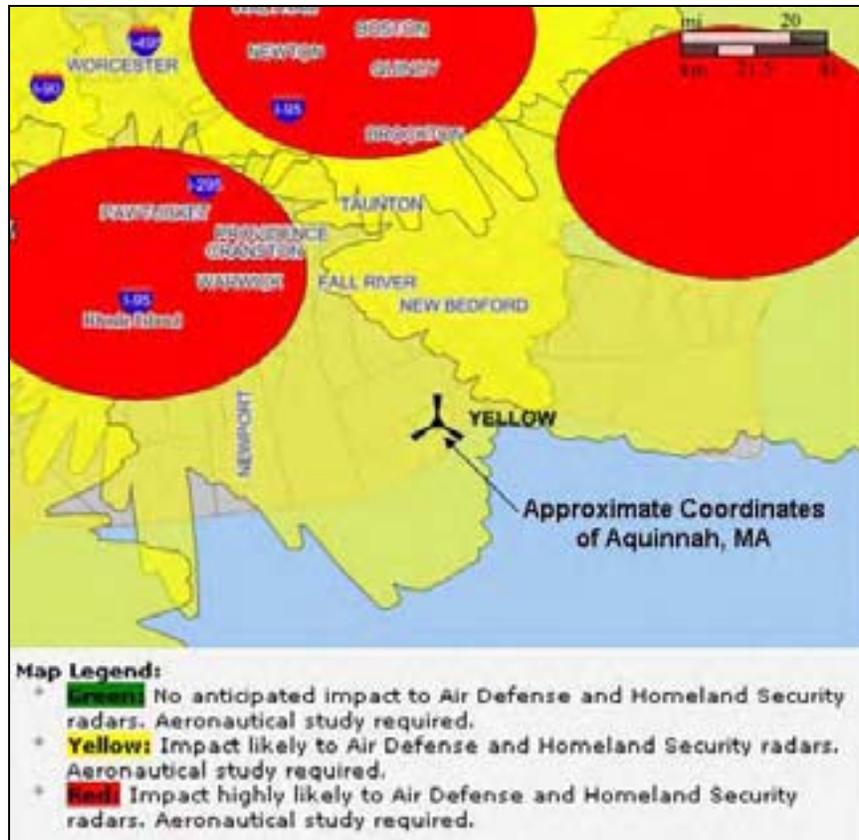


Figure 9. Preliminary Results of FAA Long-range Radar Impact Evaluation

Environmental Issues and Permitting

GEC completed a geographic information system (GIS) analysis to determine the location of sensitive environmental and cultural areas relative to the proposed wind project site. Results of the GIS analysis are shown in Figure 10.

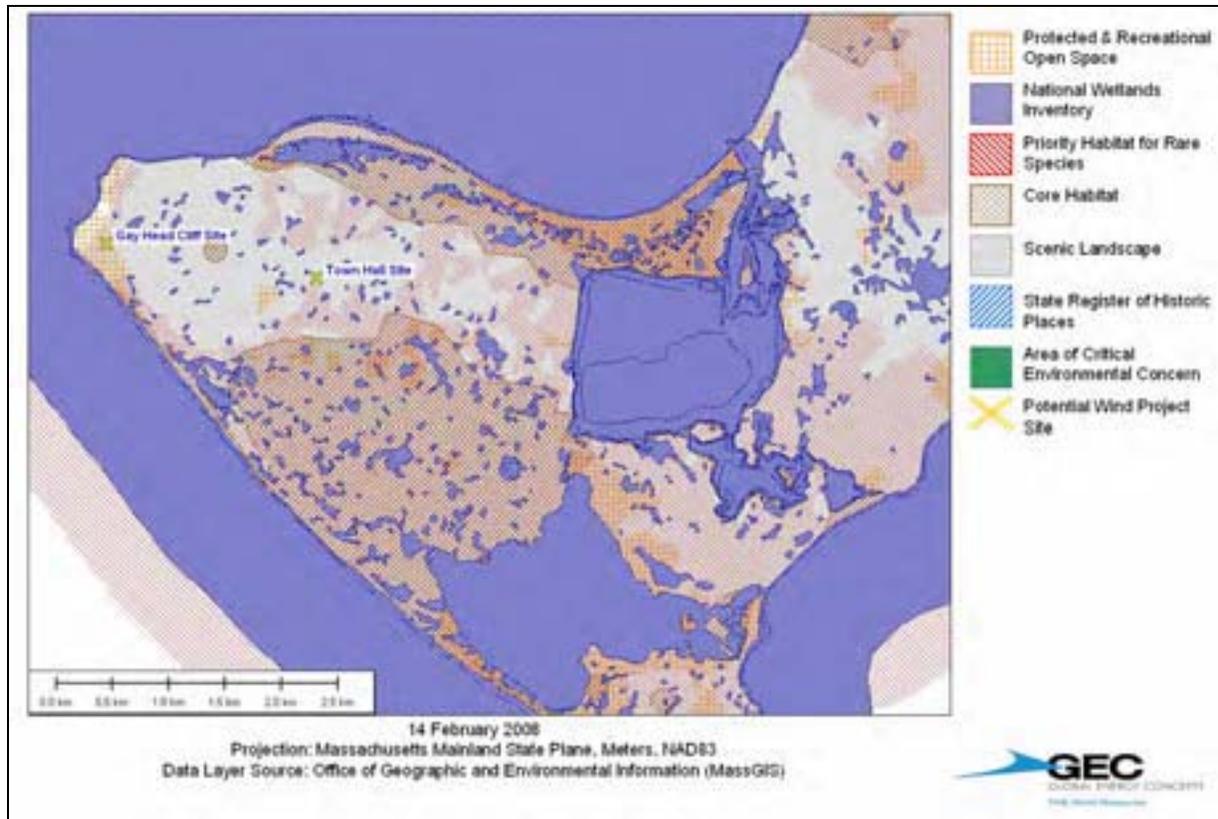


Figure 10. Areas of Potential Environmental and Cultural Concern

Each of the data layers included in the analysis was obtained from the Massachusetts Office of Geographic and Environmental Information (MassGIS) and are described below. These data layers are made available to the public for planning purposes only. More detailed site-specific analyses should be completed to verify the accuracy of these data layers.

- **Areas of Critical Environmental Concern (ACEC)**, last updated March 2007 – ACEC areas are designated by the Secretary of Environmental Affairs as “places that receive special recognition because of the quality, uniqueness and significance of their natural and cultural resources.” There are no areas designated as an ACEC within 30 km of Aquinnah; therefore, conflicts with an ACEC are expected to be minimal.
- **NHESP BioMap Core Habitat**, last updated June 2002 – Core Habitat areas are identified by the Natural Heritage and Endangered Species Program (NHESP) of the Massachusetts Division of Fisheries and Wildlife as areas that provide “the most viable habitat for rare species and natural communities in Massachusetts.” Core Habitat areas are located within 500 m of the Town Hall and Gay Head Cliff sites. Although areas with this designation may not necessarily be prohibited from wind development, a proposed project in these areas would require an increased level of environmental review. Consultation with NHESP is recommended to determine potential impacts and mitigation strategies.
- **NHESP Priority Habitats for Rare Species**, last updated September 2006 – Priority habitats are identified based on observations documented within the last 25 years in the

database of the NHESP, as published in the 12th Edition of the Massachusetts Natural Heritage Atlas. A number of priority habitats are located adjacent to the proposed project locations and along the coast. Consultation with NHESP is recommended to determine potential impacts and mitigation strategies.

- **National Wetlands Inventory (NWI)**, last updated October 2007 – The NWI data set was created by the U.S. Fish and Wildlife Service to identify the approximate location and characteristics of wetlands and deepwater habitats. The map does not indicate any wetlands within the Town Hall or Gay Head Cliffs properties; however, a possible wetland area was observed on the northern portion of the Town Hall property. Wetlands were not observed on the Gay Head Cliffs property and conflicts are expected to be minimal at this site. A wetlands delineation should be completed to verify this conclusion.
- **Protected and Recreational Open Space**, last updated January 2007 – This data layer includes conservation land and outdoor recreation facilities, including parkways, town parks, playing fields, and walking trails owned by federal, state, county, municipal, and nonprofit enterprises. Gay Head Cliffs site is designated as a protected and recreational open space. In addition the Gay Head Cliffs are designated as a National Monument. The impact of this designation is unknown and should be discussed with local representatives.
- **Scenic Landscapes**, last updated July 1999 – Scenic landscapes are identified by the Massachusetts Landscape Inventory Project in the Department of Conservation and Recreation. The majority of Martha's Vineyard Island, including the area around Aquinnah, is designated as a scenic landscape. The implications of this designation on a wind project are not clear and depend on local public opinion.
- **State Register of Historic Places**, last updated January 2000 – This data layer, maintained by the Massachusetts Historical Commission, denotes locations or boundaries of significant historic properties and sites with legal designations under several specific local, state, and federal statutes. There are no registered sites near the potential project sites in Aquinnah. Archaeological sites are not included in this data layer; however, topographic maps indicate that an Indian burial ground is located approximately 800 m south of the Town Hall site.

A map of important bird areas around Martha's Vineyard was obtained from the Massachusetts Audubon Society as shown in Figure 11. An Important Bird Area is a site that provides essential habitat to one or more species of breeding, wintering, or migrating birds. These sites typically support high-priority species, large concentrations of birds, exceptional bird habitat or have substantial research or educational value. Chappaquidick Island, located approximately 25 km east of Aquinnah is designated as an Important Bird Area for shorebirds, waterfowl, and seabirds. Consultation with the Massachusetts Audubon Society is recommended to determine potential impacts and mitigation strategies.



Figure 11. Important Bird Areas

Source: Massachusetts Audubon Society

The permitting process and implications of each of these environmental designations is not clearly defined and can vary from site to site. Since several areas of environmental concern are located in or around the proposed wind project locations, an increased level of environmental review will likely be required. A site-specific environmental survey is recommended.

Telecommunications Conflicts

Wind turbines, like all tall structures, can create interference or degradation of certain communication signals if they are located in the line-of-sight of any communications equipment such as microwave, radio, or satellite dishes. A number of microwave communication stations are located around Martha's Vineyard, the closest of which is 8 km northeast of Aquinnah, as shown in Figure 12. Analysis of microwave line-of-sight is beyond the scope of this review. Due to the remote location of Aquinnah and the distance to known communication towers, signal interference is not expected to be a major barrier to development; however, the actual effect of a project on communications systems will need to be evaluated on a case-by-case basis and in consultation with local regulators and technicians. Such a study would take into account the proposed turbine dimensions, turbine location, and transmittal paths of various types of communication signals in the area.

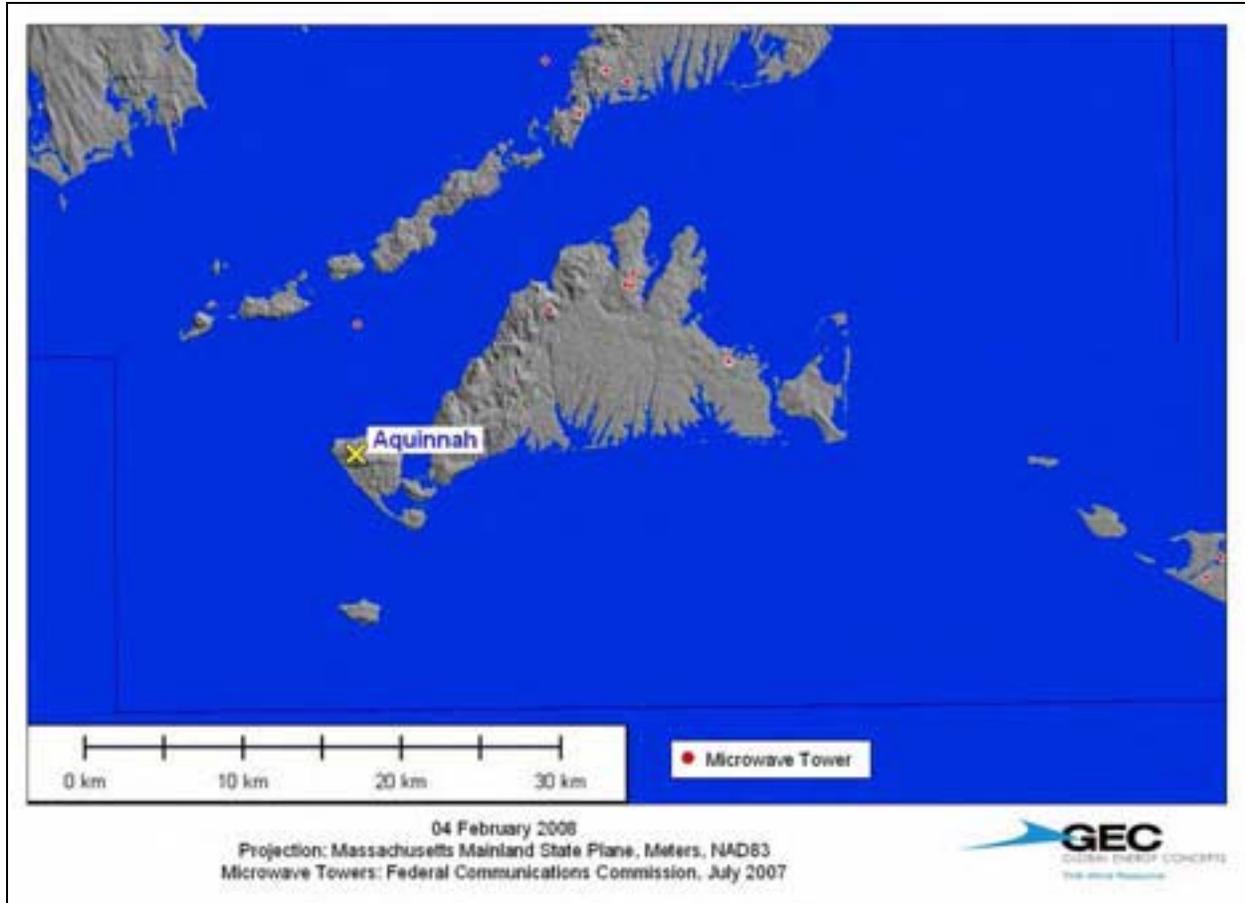


Figure 12. Location of Weather and Microwave Communication Stations near Aquinnah

Social Acceptability

Negative social perceptions of a wind project have the potential to inhibit or terminate wind project development. If neighbors of the sites under consideration are opposed to a wind energy project, the costs and time required for addressing and mitigating their concerns may increase development costs significantly. Primary social concerns include noise from the wind turbine, the visual impact of the wind turbine on the landscape, shadow flicker effects, and public safety.

When operating, wind turbines produce a “swishing” or “whooshing” sound as their rotating blades encounter turbulence in the passing air, as well as some sounds from the mechanical parts such as the gearbox, generator, and cooling fans. Wind turbines are typically quiet enough for people to hold a normal conversation while standing at the base of the tower. If mechanical sounds are significant, it usually means something in the nacelle needs maintenance or repair. At a distance, the sounds generated by a wind turbine are typically masked by the “background noise” of winds blowing through trees or moving around obstacles.

Massachusetts state regulations allow for an increase in noise levels of up to 10 dB over normal background levels at the property boundary. Typically, a distance from the property boundary equivalent to three times the maximum wind turbine tip height is required to satisfy this

regulation. Depending on the background noise levels at the site and the turbine size, a noise setback of approximately 150 to 300 m (492 ft to 984 ft) from the property boundary may be required. Due to the limited dimensions of the Town Hall property and the close proximity of residential areas, the noise setback requirement would likely eliminate this site from further consideration. The Gay Head Cliffs site has more available land area located a greater distance from residences than the Town Hall site. A single wind turbine placed in the center or on the western side of the property is likely to satisfy noise regulations. A sound impact analysis should be completed to verify this conclusion.

The proposed Cape Wind project in Nantucket Sound, located approximately 30 km northeast of Martha's Vineyard has received significant public opposition due to concerns about the aesthetic impact on the landscape. Although a wind project in Aquinnah would be much smaller in scale, a wind turbine would be highly visible and visual concerns might cause opposition to the project. As described previously, Martha's Vineyard Island is designated as a "scenic landscape." In addition, the island is a popular summer vacation destination and the Gay Head Cliffs is a popular tourist attraction and cultural landmark. Photo simulations of a potential wind project, as well as informational community meetings, can help to address any public concern about the visual impact on these areas.

Another potential concern is shadow flicker that can be generated by the rotating blades of a wind turbine during certain ambient lighting conditions. For example, the residences located to the east of the Gay Head Cliffs site may experience shadow flicker as the sun sets in the west and causes the shadow of the wind turbine to fall on the homes to the east. The shadow of the rotating blades can cause an annoyance until the sun changes position in the sky. A shadow flicker analysis can be completed once the turbine dimensions and location are specified.

Public safety concerns are usually focused on the potential for wind turbine failure and ice shedding from the blades. Although incidences of turbine failure that result in tower collapse or components falling to the ground are rare, measures can be taken to minimize the potential impact of such occurrences. Typically, wind turbines are placed a maximum-tip-height distance from the property boundary or occupied buildings. In addition, wind turbines shut down in cases of extreme wind or icing in order to minimize damage. If desired, the wind turbine can be programmed so that a visual inspection is required before restarting the turbine after icing conditions. This will minimize the likelihood that ice shedding from blades will cause damage.

Project Scale

Based on a preliminary review of transportation logistics, it appears feasible that a wind turbine of up to 600 kW in size and with a rotor diameter of up to 50 m can be delivered to sites in Aquinnah. Wind turbines larger than 600 kW in size would likely not be feasible due to the prohibitively high transportation, crane mobilization, and logistical coordination costs and due to the physical limitations of the dock, narrow streets, and tight corners. Table 3 summarizes the dimensions of example wind turbines with rated capacities of up to 600 kW.

Table 3. Example Wind Turbine Models

Turbine Model	Rated Capacity (kW)	Rotor Diameter (m)	Hub Height (m)	Maximum Tip Height (m)	Other
Fuhrlander FL600	600	50	50, 75	75, 100	CS, VP
Vestas RRB V47-600	600	47	50, 65	73.5, 88.5	CS, VP
Enertech E-48	600	48	50, 65	74, 89	CS, FP
Distributed Energy Systems NW100/21	100	21	32	42.5	FP, SG, DD

CS = constant speed

FP = fixed pitch blades

SG = synchronous generator

VS = variable speed

VP = variable pitch blades

DD = direct drive

The Town of Aquinnah is considering a zoning by-law regarding wind turbines; however, it is not yet available. For the purposes of identifying potential wind turbine locations, GEC calculated a fall-zone setback from the property boundary equivalent to the maximum tip height of the potential turbines. The minimum fall-zone setback for the shortest wind turbine option is 42.5 m and the largest setback based on the tallest wind turbine option is 100 m. Based on these setbacks, potential wind turbine locations are identified for the Gay Head Cliffs site and the Town Hall site in Figure 13 and Figure 14, respectively.

The proposed wind turbine locations were selected based on currently available information on the project boundary and setback requirements. Additional factors may influence the final wind turbine location, such as a surveyor's verification of the property boundary, subsurface conditions, constructability of the site, environmental permitting, FAA restrictions, conflicts with communications equipment, noise and shadow flicker impact analysis, or other factors.



Figure 13. Setback Zones and Potential Wind Turbine Locations at Gay Head Cliffs



Figure 14. Setback Zones and Potential Wind Turbine Location at Town Hall Site

Conclusions

Based on a preliminary review, GEC concludes that the Gay Head Cliffs site in Aquinnah has wind development potential; however, key concerns need to be addressed. The primary barrier to development at this site is social acceptability. Gay Head Cliffs is a national monument with strong historic and cultural significance. Although some may consider a wind turbine a positive development for increased tourism in the community, others may place higher value on the preservation and minimal development of the area. Whether or not the community will support a wind turbine at the Gay Head Cliffs site is a primary concern and should be resolved prior to moving forward.

Another significant barrier to development is the lack of on-site electric load at the Gay Head Cliffs site. It is unclear if selling electricity into the local power market is likely to yield a sufficient return on the investment for a community-scale wind project. A subsequent feasibility study should evaluate this and other economic factors in more detail. Enactment of the proposed net-metering law in Massachusetts might improve the economics of the project significantly.

Other potential project barriers are expected to be minimal but should be addressed in a more detailed feasibility study. A communications interference study that includes microwave, radar, and radio signals would determine whether or not a wind turbine at the Gay Head Cliffs site would cause interference with nearby communications towers. To address potential public nuisance concerns, a detailed feasibility study should include photo simulations from viewpoints of concern, a sound impact analysis on nearby residences, and a shadow flicker analysis on surrounding areas. An environmental impact analysis is recommended to determine potential impact of a wind turbine on avian and wildlife species in the area. Finally, a geotechnical investigation is required to confirm the viability of the proposed turbine location and to determine the design and cost of the turbine foundation.

The recommended wind turbine size for the Gay Head Cliffs site is 600 kW or smaller. A turbine of this size could feasibly be delivered to the site. In addition, preliminary analysis of airspace and flight navigation indicates that a turbine of this size in Aquinnah should be approvable following further analysis by the FAA.

The wind resource potential at the Gay Head Cliffs site is estimated to be 8.5 to 9.0 m/s at a height of 70 m above ground level. If the key concerns listed above are addressed, GEC recommends the installation of a met tower on site to verify the wind resource and to collect data necessary for a detailed economic analysis.

Other municipally-owned property was evaluated during the site visit; however, GEC concludes that the wind development potential at these sites is not sufficient to warrant further consideration. The Town Hall site also has a good wind resource potential; however, space constraints at this site would limit the size of a wind turbine to 100 kW or less.

Met Tower Recommendations

In order to collect on-site wind resource data necessary for a detailed feasibility study, GEC recommends the installation of a 50-m met tower at the Gay Head Cliffs site. Ideally, a met tower would be placed at the exact location of the future wind turbine to collect wind resource information for a period of one year. However, the met tower footprint is larger than the wind turbine footprint and the potential wind turbine location at the Gay Head Cliffs site has limited area for the placement of the met tower anchors and guy wires. Therefore, the met tower could be placed in the municipal parking lot, in the backyard of the museum building, or in the circle park. At each of these locations, fencing should be placed around the base of the tower as well as each anchor. Wind resource information collected at these sites would be representative of the expected wind resource at the potential wind turbine location.

NEWSLINES

Massachusetts Coastal Zone Management Program

December 28, 1981

MCZM APPROVES ARCO AND SHELL OCS DRILLING PLANS....

On Thursday, December 3rd, the Massachusetts Office of Coastal Zone Management announced the approval of oil and gas exploration plans and environmental reports for Arco Oil and Gas Company and Shell Oil Company. Arco Oil Company submitted an Exploration Plan and Environmental Report for Blocks 258, 259 and 138 on July 29, 1981. Shell Oil Company submitted an Exploration Plan and Environmental Report for Block 357 on the same date. Both Arco and Shell received approvals for these Blocks over a month in advance of the deadline.

In addition, the Army Corps of Engineers permit applications to place drilling structures and the EPA NPDES permit applications for discharge activities at the specified Blocks have been approved for both Arco and Shell.

MCZM Director Richard Delaney notified both companies that "CZM will monitor the exploratory drilling and related activities to ensure that they are conducted in a manner consistent with the Commonwealth's Coastal Zone Management Program.

...AND CONTINUES NEGOTIATIONS WITH INTERIOR

On Tuesday, December 15th, Governor Edward J. King dispatched Environmental Affairs Secretary John Bewick to Washington to argue the Commonwealth's concerns over oil drilling activities on Georges Bank. Massachusetts Coastal Zone Management Director Richard Delaney and Outer Continental Shelf (OCS) Coordinator Patricia Hughes accompanied Bewick on the trip.

Bewick, Delaney and Hughes met with Interior Department officials to reiterate Governor King's desire for a four-month delay in proposed OCS Lease Sale # 52. In addition, the contingent of Massachusetts environmental officials requested modifications in the Interior Department's proposed five-year leasing program.

"While no policy decisions were made, the meeting succeeded in opening the lines of communication between the Commonwealth and Interior," Delaney observed following the meeting.

"The Department of Interior now has a better understanding of the Commonwealth's position on Lease Sale # 52 and the five-year leasing program. We hope this understanding will result in an OCS leasing process acceptable to the states, Interior and the oil industry," Delaney added.

Delaney expressed grave concern over the Reagan Administration's apparent attempts to lessen the role of coastal states in pre-lease activities and decisions.

"First, the Commerce Department attempted to remove pre-lease activities from the state's federal consistency provisions. Second, the Interior Department proposes a five-year leasing program that not only shortens the time allowed for state review of proposed lease sales but greatly increases the area leased. Finally, the Reagan Administration has proposed a phase-out of federal funding for state coastal programs which will result in zero-funding in fiscal year 1984," Delaney noted.

Referring to CZM's extensive review of federal pre-lease activities, oil company exploration plans and federal permits required for drilling during Lease Sale # 42, Delaney concluded: "Just as we become familiar with both the steps leading up to drilling and the drilling itself, the federal government proposes massive and far-reaching changes in the entire OCS leasing process. We do not oppose oil and gas exploration off our coast. We only require that it take place in an environmentally sound and politically balanced manner."

NANTUCKET SOUND MARINE SANCTUARY UPDATE

After almost nine months of public comment, inter-agency consultation and state-federal discussions, the Office of Coastal Zone Management (OCZM) in Washington has declined to advance Governor King's nomination of the central portion of Nantucket Sound to "Active Candidate" status for a federal Marine Sanctuary designation. This administrative step almost certainly means the end of the line for the nomination.

In a letter dated 27 November 1981, OCZM states that the central Sound area "does not adequately meet site selection criteria for consideration." They further note that "adequate resources exist in Nantucket Sound, however, the majority of these resources are more readily definable in state waters and not in the central area of the Sound." Early in November, Governor King had indicated his belief that the state Ocean Sanctuary program adequately protected the peripheral waters of the Sound and that a federal presence was not desirable in these areas.

The Governor's Marine Sanctuary nomination of the central Sound grew out of a boundary dispute over "stewardship" of those waters. In the past, the Commonwealth had considered them to be under state control and as part of the Cape and Islands Ocean Sanctuary. When a subsequent boundary demarcation indicated that they were federal

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June 10, 2009

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Re: Section 106 Consultation for the Cape Wind Associates (“CWA”) Project

Dear Consulting Parties:

I. Introduction

We are writing in response to the May 5, 2009, letter of the Alliance to Protect Nantucket Sound (the “Alliance”) arguing that it is premature to terminate the ongoing consultation process under Section 106 of the National Historic Preservation Act. The Alliance letter, however, fails to make reference to the sole issue relevant to termination, i.e., whether there is a factual basis to “determine that further consultation would not be productive.” 36 CFR 800.7(a). In this regard, while CWA at the April 28th consultation session indicated willingness to consider meaningful mitigation concessions regarding the proposed project on Horseshoe Shoal, we reconfirmed that we could not consent (after eight years of extensive alternative site analyses, as discussed in detail at Section 3 and 5 of the Minerals Management Service (“MMS”) Federal Environmental Impact Statement (“FEIS”)) to now undertake a different project located outside of Nantucket Sound, a proposition which, as explained below, we do not regard as feasible. Thus, the controlling question seems to be whether the consulting parties can agree (as we hope) upon a Memorandum of Agreement (“MOA”) on terms that do not include our agreement to relocate the proposed project outside of Nantucket Sound; if not, we are unlikely to achieve consensus and further consultation would thus not be productive.

Dr. Melanie Stright
Dr. Andrew D. Krueger
John M. Fowler
Ms. Brona Simon
June 10, 2009
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II. The Agencies should not Tolerate Deliberate Delay Tactics Regarding Continuing Alternative Analyses.

With respect to the further assertions of the Alliance letter regarding alternative sites located outside of Nantucket Sound, the consulting parties should take notice of the fact that the Alliance's stated aim regarding continuing alternative analyses is to delay the review process. With specific respect to alternative site analyses, its own documents confirm that the Alliance's demands are for the improper purpose of causing delay, as indicated by the following provision in its request for proposals (attached as Exhibit A) seeking consultants to review the EIS prepared by the Army Corps of Engineers ("ACOE"): "The identification and analysis of alternative locations are key issues to delay the environmental review process..." The Alliance's words speak for themselves, and agencies should not tolerate the admitted objective of misusing the review process for the improper purpose of delay.¹

III. Practical Limitations Preclude the Suggested Alternative Projects Located Outside of Nantucket Sound.

A. Floating turbines have not yet been demonstrated to be technically or commercially viable.

The consulting parties should not accept the continued assertions of the Alliance that floating turbine technologies have been demonstrated to be technically and commercially viable for use in the open waters of the North Atlantic. Such issue has been dealt with in great detail in the FEIS prepared by the MMS (as well as the Draft Environmental Impact Statement ("DEIS") prepared by the ACOE), and we will not attempt to reargue the matter here. We do note, however, that the documents recently circulated by the Alliance to the Section 106 parties rebut the Alliance's assertions regarding the viability of floating turbines. Blue H's letter of March 23, 2009, as circulated by the Alliance, in fact concedes that its commercial floating turbine does not yet exist; to the contrary, such letter of Blue H explains that only now is it "currently manufacturing" its first commercial unit.

Blue H's February 2, 2009 press release, as also circulated by the Alliance, similarly confirms that even its non-commercial "prototype" was only tested in the summer of 2008, and was only an 80 kilowatt demonstration unit (the output of which equals approximately 1/45 of each of Cape Wind's turbines.) Blue H's April 10 power point at page 10 further confirms that such prototype was "not intended to be connected to the grid." Further, the prototype testing did not involve marine conditions remotely comparable to those of the open

¹ Notably, the Alliance letter also now argues for delay of the consultation on other grounds wholly unrelated to historic preservation, including delay pending a resolution of a national "energy and marine spatial planning process," while its website similarly states that "The Alliance continues to maintain that no decision can be made on Cape Wind until a comprehensive ocean program is in place..." (i.e., requests for continuing delays based upon multiple preconditions that are unrelated to historic preservation issues, and none of which may ever occur.)

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waters of the North Atlantic. Blue H's additional circulated materials also make it clear that it regards the development of commercial-scale floating units as a future prospect, which it consistently expresses in the future tense. In the circulated February press release, for example, Blue H describes its "plans to develop a hybrid concrete/steel 3.5 mw floating wind turbine," while its power point states that "The project aims to design and determine the feasibility and potential of an integrated solution for a 5 mw floating offshore wind turbine....," express acknowledgements by Blue H that such units have not yet been either developed or determined to be commercially feasible.

I would also like to make brief reference to the third party authorities supporting such conclusion which I mentioned at our last session. In a March 3, 2008 story regarding floating turbines, The Boston Globe reported that "There's only one problem; no one knows whether a floating wind farm will work." After interviewing National Renewable Energy Laboratory ("NREL") personnel and Dr. James Manwell, the Director of the UMASS Renewable Energy Laboratory, the Globe further reported that "wind specialists say that it is unlikely that a [floating] commercial-scale wind farm will be operating anytime soon." The Globe goes on to quote Professor Manwell as follows: "Nobody's even talking about floating," he said. "You're going to have to go through testing, verification. It's going to take years." In another recent article addressing the prospect of floating turbines, The Oregonian on October 10, 2008, similarly reported, based upon its interview with Walt Musial, Principal Engineer of the NREL, regarding the potential for deepwater sites, as follows: "Floating foundations appear to be the best option, Musial says, but more research needs to be done. Realistically, commercial projects are a decade away." And, with particular relevance to this consultation, the Martha's Vineyard Gazette on March 14, 2008 reported the following statement of Mr. Musial:

"Blue H ... cannot yet be viewed as an alternative to the kind of reliable energy Cape Wind would be able to produce." "It hasn't been proven yet," he said of the floating turbine technology. "It's very important people's expectations don't get beyond the demonstration project level."

There is thus substantial evidence, including the statements of Blue H circulated by the Alliance, that supports and validates the conclusion of the MMS that floating wind turbines have not yet achieved the demonstrated technical and commercial status that would allow them to be a viable alternative, as summarized by MMS Section 3.3.4.8 of the FEIS:

A variety of platform, mooring, and anchoring technologies have been proposed for floating wind turbine systems. This technology remains in its infancy and is not expected to be commercially viable for at least ten to fifteen years. As such, development of a marine wind energy project compliant with foundation technology is not consistent with the purpose and need of the proposed action as described in Section 1.1.

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B. The seabed-based technology required for the South of Tuckernuck Island (“STI”) site has not yet been demonstrated to be either a viable or preferable alternative.

i. The deeper water and greater wave exposure of the STI site would require materially different and unproven technology.

To the extent that the consulting parties engage in further discussion regarding the alternative project location at the STI site, they should be aware of the record evidence documenting serious obstacles and disadvantages of such a proposal. The STI alternative site is located outside of Nantucket Sound, approximately 3.79 miles southwest of Tuckernuck Island, with water depths to approximately 100 feet and an extreme storm wave height of approximately 52.5 feet, and is discussed in detail at Section 3.3.5.2 of the FEIS. Most importantly, and as the FEIS explains, such substantially greater water depth and storm wave exposure would require a multi-caisson foundation design materially different from the industry-proven technology of monopile foundations applicable to CWA’s proposed project, as follows:

The quad-caisson foundation, a fabricated steel structure, would be utilized for all WTGs installed on a water depth greater than 65 feet (20 m). This structure would consist of four tower foundation that support the tower interface (see Figure 3.3.5-2). This structure will require fabrication and installation due to its large size and the more challenging sea conditions off the southern coast of Nantucket Island.

Id. at 3-16. MMS further explained why the state-of-the-art monopile technology would not be viable in the 100 foot depths of the STI site:

The monopile is the current state of the art for offshore foundations, and this technology is limited by deeper water depths because of the horizontal loading forces of waves and wind. At water depths greater than about 70 ft (21.3 m) the monopile diameter becomes so large and the wall thickness so great in order to withstand the loading over greater height above the bottom, that it is not technologically feasible to manufacture, transport and install a monopile of this design, and a different type of foundation design is required (e.g., multi-legged foundation). Water depths in the 65 to 147 ft (20 to 45 m) range are currently being pursued on several demonstration projects (such as the Beatrice Demonstration Project).

Id. at 3-3. Thus, the FEIS acknowledges that “state-of-the-art” technology would not be suitable for the conditions of the STI alternative site, which would require technology described to still be in the experimental and “demonstration” stages.

- ii. **The record indicates that such a STI alternative would be neither feasible nor financeable.**
 - a. **The deeper waters and higher waves of the STI site would require technology that has not yet been demonstrated to be viable.**

The available information further indicates that the equipment required for the deeper water and greater wave profile of the STI site has not yet been demonstrated to be technically or commercially feasible, and would thus not be likely to be financed within the current horizon. As indicated above, the FEIS concludes that such alternative could not be completed with today's "state-of-the-art" technology, and would thus require technology that has not yet been shown to be commercially viable:

Foundations for 65 to 147 ft (20 to 45 m) water depths are currently being explored in order to determine their technological feasibility within the requirements for a commercial scale project to be economically viable. Typically, it is expected that to go to these greater water depths would require tri-pod or quadra-pod foundations in order to get the anchoring and stability necessary in deeper water. ... The economic viability for large scale commercial application of this technology has yet to be determined and most estimates place this design at least 5 to 10 years into the future (see Table 3.2.1-1).

FEIS at 3-5 (emphasis added).

Moreover, the Final Environmental Impact Report ("FEIR") prepared pursuant to the Massachusetts Environmental Policy Act ("MEPA") specifically addressed such issue and similarly determined that such technology, even if promising for the future, has not yet been commercially deployed or tested in a comparable marine environment, such that it would be unlikely that the STI alternative could be financed or economically feasible in the foreseeable commercial marketplace:

As previously discussed in the DEIR, two of the primary considerations for design of a foundation type are the water depth and the wave regime. The South of Tuckernuck Island site has average water depths of approximately 75 feet and estimated extreme storm waves of approximately 52 feet. Greater water depth and storm waves require taller foundations resulting in greater bending moments at the point of fixity, at the seabed interface and in the tower. In addition, the foundation would need to be designed to avoid the occurrence of excitation frequencies from the wave regime. In order to properly install WTGs in this environment, and to insure that the dynamic response of the structure and its interaction with the wave loading do not result in

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catastrophic failure due to system resonance (see Appendix 3.2-E), significantly larger foundations would be required. Such technology has not been demonstrated over any significant period of time. Although a demonstration of two lattice type foundations in deeper water is underway off the coast of the UK, it is located in an environment that is measurably less severe than that South of Tuckernuck Island. Results from this UK demonstration would not be directly relevant to a site with different environmental conditions. The stress, strain and fatigue measurements would not be comparable. It is unlikely that foundations of a design required for a wind farm at the South of Tuckernuck Island alternative will be commercially proven in the foreseeable future.

Even if the technology was commercially proven, the mass of monopiles and quad caisson pile structures envisioned to be necessary at the South of Tuckernuck Island alternative is estimated to be approximately a third to one half greater than for the shallow water alternative within Nantucket Sound at Horseshoe Shoal.

When combined with other technical factors such as installation equipment requirements, site access and availability, the installation cost at the South of Tuckernuck alternative would be substantially greater than the Preferred Alternative at Horseshoe Shoal. Further, because no other offshore wind installation has been sited in a similar environment (and there is thus no demonstrated field performance), is unlikely that such a project would be financeable in the commercial marketplace.

FEIR at 3-54, 55.

Numerous third parties also support the foregoing conclusion that the technology required for the STI site has not yet been demonstrated to be either technically or commercially viable, but that lessons learned from initial projects utilizing today's technology, such as Cape Wind, could foster the development of technological advances that would allow future deployment in deeper waters. In his written comments to the MMS, Professor Manwell of the UMass Renewable Energy Laboratory offered the following summary to that effect:

It is quite understandable that Cape Wind proposes its project in the relatively shallow and protected waters of Nantucket Sound ... The possibility of eventually going further and deeper will be enhanced by the experience that will be gained with the turbines in Nantucket Sound. It should also be noted that, although there is much benefit to be had by learning from offshore wind experience in Europe, there is no substitute for experience here as well. The northeast coast of the United States is not the same as either the Baltic or the North Sea. It is prudent that the first projects be relatively close to shore, and in relatively shallow water before moving further out. Nantucket Sound is a good place to begin.

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The following portion of an NREL presentation to the 2007 Cape & Islands Energy Technology Workshop at the Woods Hole Research Center similarly indicated that while Cape Wind's proposed technology "is here today," technologies for deeper water are still only an "experimental" prospect, but could be advanced by experiences gained in more shallow waters:

Technology Summary

- Shallow water offshore wind (<25m) is here today but will need experience in US waters to bring down costs and establish infrastructure.
- Transitional and deep water wind is experimental but will grow from shallow offshore experience and sustained R&D.
- A fully funded R&D effort for deep water wind would take 10-20 years to commercialize.
- Ocean Energy systems are in a nascent stage but may be accelerated by wind experience.

NREL Slide, attached as Exhibit B. Greg Watson, Vice President of the Massachusetts Technology Collaborative, concurred similarly, as reported in the regional press:

For Greg Watson, vice president for sustainable development and renewable energy for the Massachusetts Technology Collaborative, the deepwater question is both a challenge and an opportunity. Watson said that, whether it be off Hull, Cape Cod, Long Island or somewhere else, the nation would need practical experience in near-shore wind farms before it literally ventured into deeper waters. The deepwater solution, if there is one, is still in the future. "We could be talking 10 to 15 years but it all depends on the resources we put into it," said Watson, referring to the need for "an Apollo mentality" from the nation and its leaders.

The Cape Codder, 8/25/06 (emphasis added). Thus, extensive information and informed opinion supports the proposition that the technology required for the deeper water and extreme waves of the STI alternative site has not yet been demonstrated to be technically or commercially viable.

b. The attributes of the STI site would also present financial obstacles and uncertainties that would seriously undermine project revenues, financial certainty, and financial viability.

In addition to the lack of demonstrated operating performance of the required technology, the consulting parties should recognize that the attributes of the STI site would also place substantial revenue-related obstacles to economic viability. First, as noted above, the larger foundations that would be required would present substantially higher capital costs, as noted in the FEIS:

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Also, with greater wave heights the foundation has to extend further above the sea surface before the connection with the tower can be made, since the foundation is the component designed for wave impact and contact with sea water. The larger the foundation, the more costly it becomes. Foundations generally make up roughly 1/4th to 1/3rd the cost of an offshore wind project.

Id. at 3-3 (emphasis added).² Second, the combination of greater depth and wave exposure also indicate substantially higher wear and tear, maintenance and replacement costs, and/or increased fatigue and failure that would raise serious concerns as to unpredictable costs and reductions in operating ability, and thus operating revenues:

Waves affect an offshore wind turbine in two primary ways. Either a large wave exerts tremendous horizontal loading on the foundation as it passes by, with the worst case scenario being failure of the structural integrity and collapse of the tower (Report No. 3.2.1-1) or, large waves cause repetitive horizontal movement of the tower, nacelle and rotors that creates excessive wear and tear of moving parts and necessitating increased maintenance and replacement, or a worse case scenario being fatigue of moving parts so that the turbine breaks down more frequently and does not operate enough to cover costs.

Id. Third, the wave heights at the STI site occurring during substantial periods of the year would prohibit operations and maintenance personnel from accessing the offshore units from their vessels, thereby leading to further uncertainty as to resulting reductions in operating ability, and thus in operating revenues:

A secondary aspect of wave heights that can affect offshore wind project operations and maintenance is the number of days out of the year when wave heights exceed the ability to get maintenance personnel transferred from vessels to the tower in order to do required maintenance. While multiple maintenance crews can be deployed simultaneously to make up for missed days, at some point there is a diminishing return on performing maintenance. If extended periods of time occur when a proportion of wind turbines cannot operate because of breakdown or lack of maintenance, then the generation revenue drops and the project

² Consistent therewith, Appendix F of the FEIS presented a ranking, for comparison purposes only, of alternative sites which estimated that revenues of a project at STI would have to be substantially higher (by approximately 17%) than at the proposed site. Notably, the Alliance's primary public criticism of the proposed project is that it would be too expensive; they therefore strain credibility by simultaneously now advocating for alternatives outside of Nantucket Sound which, even if technically and commercially viable, would incur higher costs and thus require substantially higher revenue streams.

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economics suffer. Current technology for maintenance access limits the suitable wave height to approximately 4.9 ft (1.5 m) or less.

Id. at 3-4. Thus, the STI alternative, even if the requisite equipment were technically viable, would in this application undermine economic viability by (i) substantially increasing capital costs, (ii) presenting additional exposures and uncertainties as to maintenance and replacement costs, and (iii) limiting the operations and maintenance activities needed to assure predictable and reliable operations, and thus creating additional uncertainties as to lost operating revenues. As discussed below, such additional costs and financial uncertainties would be particularly troublesome in today's commercial "project finance" marketplace, where renewable energy projects are typically financed solely in reliance upon the project's own assets and net revenues. We accordingly do not believe the STI alternative would be financeable under today's commercial conditions.

c. The nature of today's project finance market requires both proven technology and predictable revenues.

The consulting parties should also recognize that the commercial viability of any renewable energy project must be considered in the context of today's post-restructuring electricity markets, where (i) electric revenues are set by market forces (as opposed to "cost-of-service" pricing) and (ii) renewable energy projects are typically financed on a "project-financed" basis secured solely by the project's assets and revenues. See, National Renewable Energy Laboratory ("NREL") Technical Paper (Financing Projects That Use Clean-Energy Technologies: An Overview of Barriers and Opportunities, NREL/TP-600-38723. October 2005) ("Project financing is ... a crucial enabler on the critical path to large-scale deployment of [renewable energy] technologies.") Under such arrangements, project lenders look to the assets and forecasted net revenues generated by the project as both the source of repayment and as security for the project loan. Id. Thus, renewable energy project lenders require a high degree of confidence as to the predictability of project costs and revenues in order to determine the project's ability to cover its debt service obligations. See J. McKinsey, Insights on Renewable Energy Project Finance, NREL ECAI Web Forum (Jan. 2008);³ M. Malloy, International project Finance: Risk Analysis and Regulatory Concerns, 19 Transnat'l Law 89 (2004) (in a project finance transaction, particular emphasis is on asset-related risks, such as technology risks, construction and operational risks).⁴ With particular importance to the current situation, the

³ Available at http://www.nrel.gov/analysis/collab_analysis/pdfs/2008/0807_wf_mckinsey.pdf

⁴ Consistent with the foregoing, The Bank for International Settlements ("BIS"), a multinational bank for the central banks of ten large industrialized countries, has developed technical guidelines for rating project finance risks associated with large projects (Basel Committee on Banking Supervision, Working Paper on the Internal Ratings-Based Approach to Specialized Lending Exposures Oct. 2001), and such guidelines evaluate a project's capacity, under a range of operating environments and assumptions, to generate adequate debt service coverage in order to assess a bank's project financing risk exposure.

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NREL Technical Paper goes on to specify the difficulties presented by any proposal to utilize still-unproven technologies in the context of project finance transactions:

Project investors worry foremost about technology risk. This worry must be effectively addressed as a prerequisite to any dialogue with lenders and equity investors, or they won't provide financing. Project-financing lenders will not accept the risk that the technology will be unable to perform consistently in a commercial setting to commercial standards over the life of the project.

Supra. at 3.

E.R. Yescombe in his treatise Principles of Project Finance (Academic Press 2002) similarly recognized the need of project finance lenders to achieve "a high degree of confidence" as to both the demonstrated operating effectiveness of the project technology and the predictable net revenues arising from project operations:

[L]enders have to be confident that they will be repaid, especially taking into account the high level of debt inherent in a project finance transaction. This means that they need to have a high degree of confidence that the project (a) can be completed on time and on budget, (b) is technically capable of operating as designed, and (c) that there will be enough net cash flow from the project's operation to cover their debt service adequately. Project economics also need to be robust enough to cover any temporary problems that may arise.

Id. at 13, 160 (emphasis added).

In this instance, replacing CWA's proposed project with an STI alternative would materially undermine the uniquely "high level of confidence" required by project finance lenders by (i) introducing unproven technology that has never been commercially deployed or tested under comparable conditions, (ii) substantially increasing the amounts and uncertainties of capital, maintenance and replacement costs, and (iii) curtailing the offshore maintenance activities needed to assure operations (and operating revenues) at expected and predictable levels. It is also important to acknowledge that obtaining project financing for the first offshore wind farm in the United States would be challenging in any event, such that adding additional financial risk and uncertainty would significantly undermine the likelihood of commercial viability.

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iii. The record further indicates that the STI alternative, even if it were technically and commercially feasible, would not be preferable to the proposed action, when all factors are considered.

In any event, MMS and the Massachusetts review process have evaluated the potential impacts of the STI site (including impacts relevant to the Section 106 process) and such evaluations do not indicate that such alternative would, on balance, be preferable to the proposed project. With respect to visual impacts, the FEIS did conclude that the alternative would be preferable as to visibility from the designated Cape sites, but not from the Islands: “The South of Tuckernuck Island Alternative would be located close to Nantucket and the east end of Martha’s Vineyard and would have visual impact from those locations. However, it would be far away from Cape Cod and would be rarely visible from that area (see Figure 3.3.5-4).” *Id.* at 3-19.⁵

The FEIS goes on to conclude, however, that the lesser potential for visual impacts to historical resources on the Cape would also be offset by greater environmental impacts inherent to the STI alternative, including greater impacts to subtidal resources associated with the structures required by the site’s location, water depths and wave exposures, as follows:

Environmental impacts associated with the South of Tuckernuck Island Alternative would be greater than the proposed action with respect to avifauna, subtidal resources, non-ESA mammals, fish and fisheries, and essential fish habitat, and less than the proposed action with respect to impacts on visual resources.

With respect to avifauna, the South of Tuckernuck Alternative would have greater potential for impact to terrestrial coastal, and marine birds than the proposed action ...

With respect to subtidal resources, the additional pilings, cross-braces, and scour protection required at the South of Tuckernuck Island Alternative because of the greater depth at the site, substantially increase (by more than 10 times) the vertical habitat structure available for colonization by benthos for the life of the Project. However, anchoring impacts associated with construction at the South of Tuckernuck Island Alternative would be twice that of the proposed action and would result in greater overall impact to benthos including shellfish. The South of Tuckernuck Island Alternative also would have greater impacts on benthic resources as a result of the much longer interconnection line requirement compared to that of the site of the proposed action. The

⁵ The FEIS further noted that, while it would not be visible from the Cape sites of concern, “the South of Tuckernuck Island Alternative would be visible from historic properties and areas cultural and religious importance, and thus would affect cultural resources as a result of such visual impacts.” *Id.*

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greater impacts on benthos also result in greater impacts on fish and fisheries and essential fish habitat, which utilize the benthic resources and would be affected due to greater duration of construction and turbidity impacts. The greater size of the foundations at the South of Tuckernuck Island Alternative would also attract greater numbers of fish at the site due to the larger increase in hard bottom structure than the proposed action.

With respect to non-ESA mammals, the South of Tuckernuck Island Alternative is in closer proximity to seal haul-out and breeding sites than the proposed action, and therefore, development at this site has a greater potential to impact seals both during construction and operation. In addition, there is greater potential to impact whales at the South of Tuckernuck Island Alternative than the site of the proposed action since the site is proximate to historical sightings of these mammals.

Id. at 3-17 (emphasis added.)

The adverse environmental impacts of the STI alternative were also evaluated in great detail in the Draft and Final Environmental Impact Reports (“DEIR/FEIR”) prepared pursuant to the Massachusetts Environmental Protection Act (“MEPA”). With respect to adverse environmental impacts, the DEIR similarly concluded that such alternative would present greater environmental impacts, noting that “largely due to the quad cassion foundations and longer interconnecting cable length, the STI alternative (as compared to the proposal on [Horseshoe Shoal]) results in 68% greater impacts to benthic habits using scour mats and 70% greater impacts from rock armoring if used,” and that “selection of this alternative could result in more potential impacts to the north Atlantic right whale than the proposed Project.” Id. at 3-53. Such report further indicated that, while the proposed Horseshoe Shoal site is not with any low altitude IFR aviation routes, “the Proposed South of Tuckernuck Island Alternative site is located within the pathway of two low altitude IFR routes (US Government Flight Information Publication – IFR Enroute Low Altitude-US).” Id. at 3-90. Such report further indicates that, in response to the request of the Massachusetts Historical Commission (“MHC”) (per MHC letter dated July 21, 2005), a Visual Impact Assessment was conducted for the South of Tuckernuck Island Alternative, which indicated increased adverse effects of visibility from both the Nantucket Historic District and Cape Poge Light.

Thus, both the state and federal reviews of the STI alternative outside of Nantucket Sound similarly found that the benefits of reduced visibility of the designated Cape sites would be offset by increased visibility from the Islands, as well as significantly greater adverse impacts in various factors (e.g., benthic, avifuna, marine mammal, fish and fisheries resources, seals, North Atlantic right whales and aviation flight paths) that would argue strongly against a conclusion of overall preferability.

IV. The Section 106 Process should Recognize that Coastal Windmills have been an Integral Part of the Visual History and Heritage of Cape Cod.

Cape Wind also believes strongly that the consulting parties should evaluate the potential visual impacts of the proposed project upon historical resources within a context that recognizes that extensive, widespread and highly visible arrays of coastal windmills have been an integral part of the visual history and heritage of Cape Cod, particularly with respect to those historical periods that are of significance to many of the identified historical properties. The Advisory Council's regulations in this regard identify "adverse affects" as those that alter "the characteristics of a historic property that qualify the project for inclusion in the Nation Register," including changes to those physical features "within the property's setting that contribute to its historic significance." 36 CFR 800.5 (a)(i), a (2)(iv).⁶ Thus, the evaluation of adverse visual impacts to historical properties should give due consideration to the visual conditions that existed during the time period to which the site's historical importance relates, and which thus establishes the "setting" relevant to its historical significance.

In this case, the review should thus consider the historical fact that, from the time of the Revolution through the close of the nineteenth century, wind power was an integral and defining feature of the visual character of the region's coasts. Cape Codders revolutionized American salt production in the late 18th century by utilizing wind power to pump seawater landward for evaporation, such that "soon the wooden skeletons of rustic windmills were seen on the edge of most Cape Cod towns," and by 1837 "Cape Cod alone had 658 salt companies producing more than 26,000 tons per year." Kurlansky, Salt: A World History (Penguin 2002) at 223, 246. Cape historian William Quinn (The Saltworks of Historic Cape Cod: A Record of the Nineteenth Century Economic Boom in Barnstable County, Parnassus Imprints 1993) similarly described the "phenomenal growth" of wind-powered saltworks in highly visible locations along the coast of Cape Cod:

Many changes on the peninsula were brought about by the rapid development of the saltworks. The barren seaside on Cape Cod was considered wild land by the original settlers.

The Cape's upland beach areas had been left mostly in their natural state until the saltworks construction began. This widespread building completely changed the seaside landscape. The prolific use of these natural areas created a new rural scenery with covered vats as far as the eye could see.

⁶ The Department of Interior's Standards and Guidelines for Preservation Planning similarly provide that "the historic context is the cornerstone of the planning process," that "evaluation uses the historic context as the framework within which to apply the criteria for evaluation," and that the agency defining a historic context should "identify the concept, time period and geographical limits for this historical context." (Emphasis added.)

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The business began to multiply rapidly after several improvements had been implemented. Just before 1800, saltworks were being constructed all over Cape Cod.

Quinn, Id. 22-23.

Quinn's work further includes photographs demonstrating the prominent coastal visibility of such wind structures throughout the nineteenth century, including locations in proximity (both spatial and temporal) to many of the designated sites now of concern. Attached as Exhibit C in this regard are typical examples of historic shorefront windmills, with the author's statement that "these structures dotted the landscapes near the shores of every Cape Cod town." Id. With specific respect to Barnstable, Exhibit D shows the historic coastal windmills of the Crocker saltworks, as well as extensive evaporation structures which "covered a vast area of the land next to the present day Barnstable Harbor." Id. at 111. With respect to Yarmouth, Exhibit E shows extensive coastal wind and salt structures in both South Yarmouth and East Yarmouth. With respect to the areas of Osterville, Wianno, Lewis Bay and Hyannis Harbor, Exhibit F shows that extensive wind-powered saltworks were deployed in all such coastal areas, as indicated by the 1849 U.S. Coastal Survey Map. Id. 116-117. Exhibit G in turn shows the historic Nickerson wind and salt facilities at Chatham, which were listed by assessor's records as including 4,400 feet of saltworks. Id. at 154.

The Consulting Parties should also recognize that, to this day, windmills are revered as a symbol of the historical heritage of the Cape, as evidenced by the historical monument depicted on Exhibit H, commemorating the site where John Sears in 1776 revolutionized the American salt industry by utilizing the wind power of Cape Cod. Id. at 20. Thus, the potential impacts of proposed wind facilities should be evaluated within a historical context that recognizes the long standing, prominent and visible presence of wind facilities throughout the historical periods of relevance to many of the identified historical resources, and which thus defines the "setting" relevant to historical significance of such sites.

V. Conclusion.

As set forth above, CWA respectfully requests that the Consulting Parties now either: (i) enter into an MOA with mitigation terms that would apply to CWA's proposed project on Horseshoe Shoal in the event that such project is approved by the Secretary; or (ii) recognize that further consultation would otherwise not be productive and should thus be terminated. Notably, the Consulting Parties could enter into such an MOA without necessarily agreeing that CWA's proposed project constitutes the preferred alternative, or that it should ultimately be approved. We also view such a course of action to be consistent with the federal case law, which indicates that the requirement at 36 CFR 800.6 of the ACHP's regulations to consult on "alternatives or modifications to the undertaking" is more properly focused upon mitigating the

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existing proposal, as opposed to focusing upon different proposals located away from historic properties:

These references [in Section 800.6] to alternatives are thus more sensibly interpreted as applying only to changes in the **existing** proposal that could make it more compatible with its surrounding environment. If we were to adopt plaintiffs' argument that HUD must consider completely independent and different proposals for the use of federal funds, *i.e.*, construction outside of the historic district or rehabilitation of existing housing within it, then any proposal for consideration within a historic district would always have to be rejected since the alternatives would always create less of an impact on the district. This court does not believe the NHPA was intended to go so far.

Northwest Bypass Group v. U.S. Army Corps of Engineers, 552 F. Supp.2d 97, 132 (D.N.H. 2008) (emphasis original), quoting Wicker Park Historic Dist. Pres. Fund v. Pierce, 565 F. Supp. 1066-1076 (N.D. Ill. 1982).

We thus suggest an MOA including mitigation provisions for CWA's proposed action, which would be applicable in the event that CWA's proposal is approved by the Secretary. If, however, the Consulting Parties cannot reach a prompt consensus upon such an MOA, we would appear to be at an impasse, such that further consultation would not be productive and should be terminated.

Sincerely,



Dennis J. Duffy
Vice President – Regulatory Affairs

Alternatives Analysis Request For Proposal

Background

The Alliance to Protect Nantucket Sound is a non profit organization dedicated to the long term preservation of Nantucket Sound. The Alliance was first formed in response to a proposal by a private developer, Cape Wind Associates, to develop a 24 square-mile area on Horseshoe Shoal as a wind energy generation plant. While the Alliance supports renewable energy, it opposes the planned wind energy facility in Nantucket Sound due to inherent adverse economic and environmental impacts, as well as the lack of an appropriate review and permitting process and the absence of federal guidelines for offshore wind energy development.

The Alliance objects to the project because it would:

- Desecrate a national treasure;
- Introduce substantial visual, noise and light pollution;
- Violate the public trust through use of public land for private gain;
- Result in a high net cost to the public in terms of subsidies and tax credits, negative impacts on tourism, jobs and property values
- Threaten the environment in terms of endangered avian and marine species;
- Eliminate an important fishery in Nantucket Sound;
- Pose significant navigational hazards for commercial and recreational vessels, as well as a danger to small aircraft;
- Exacerbate transmission congestion problems in southeastern Massachusetts, increasing the potential for blackouts.

The Army Corps of Engineers is engaged in an environmental review as part of the permitting process for the wind energy plant. The identification and analysis of alternative locations are key issues to delay the environmental review process and ensure that less environmentally destructive options are considered.

Objective

The objective of the study is to identify viable alternative sites for a renewable energy facility. The preliminary purpose and need statement that is being used by the Army Corps of Engineers (ACQE) characterizes the project as a "commercial scale renewable energy facility tying into or providing power to the New England grid." This purpose and need statement too narrowly defines the purpose of the project and does not adequately consider the project purpose from the public's perspective or the relevant region from a technological perspective. This study should work both within the paradigm set up by the Corps - by using the Corps' purpose and need statement and its siting criteria - and outside the Corps' paradigm - by redrafting the purpose and need statement



Offshore Renewable Energy



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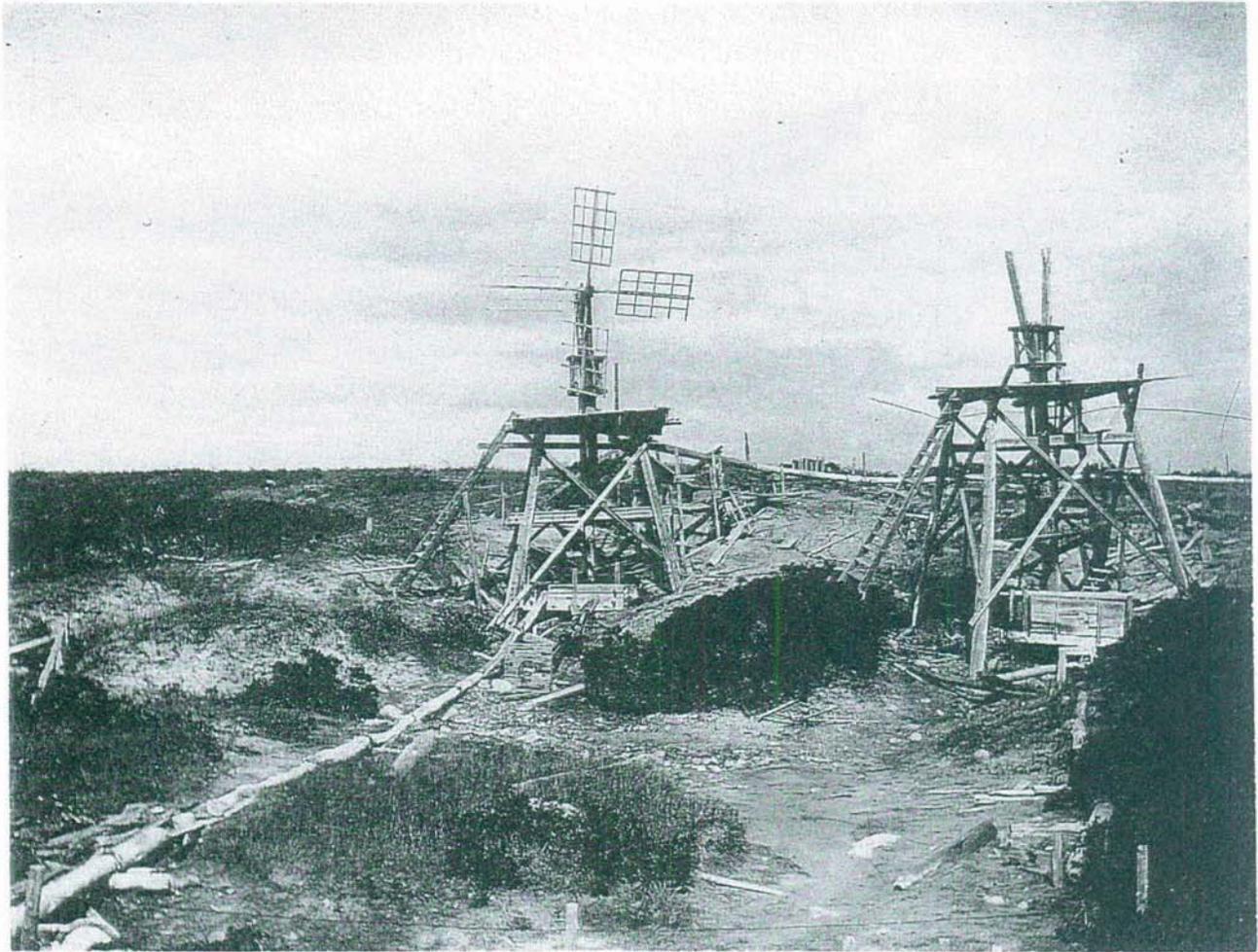


Cape & Islands Energy Technology Strategy Workshop
November 15, 2007
Woods Hole Research Center

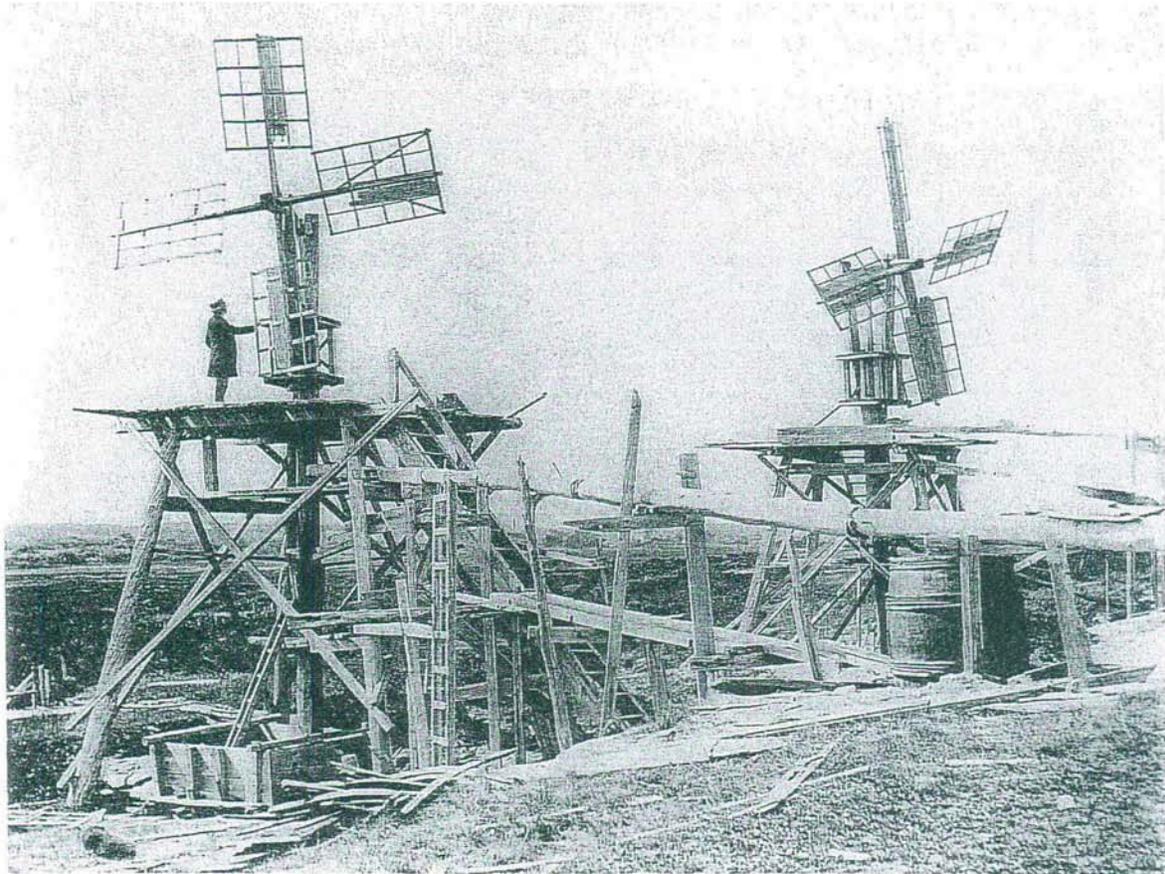
Technology Summary

- ❑ Shallow water offshore wind (<25m) is here today but will need experience in US waters to bring down costs and establish infrastructure.
- ❑ Transitional and deep water wind is experimental but will grow from shallow offshore experience and sustained R&D.
- ❑ A fully funded R&D effort for deep water wind would take 10-20 years to commercialize.
- ❑ Ocean Energy systems are in a nascent stage but may be accelerated by wind experience.

Exhibit C



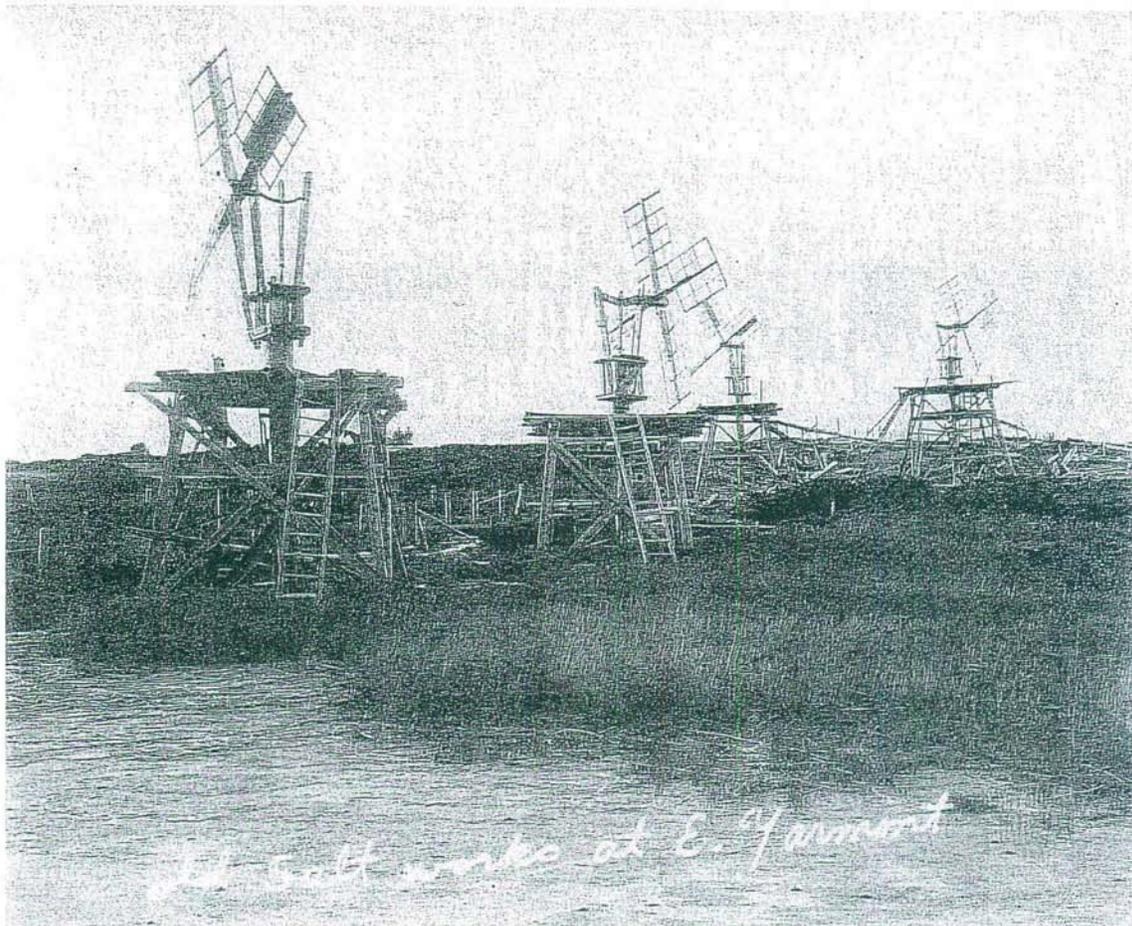
The saltworks began at the shore where windmills pumped sea water from reservoirs up to the evaporating vats to make salt. These structures dotted the landscapes near the shores of every Cape Cod town. *Photo from the H.K. Cummings Collection.*



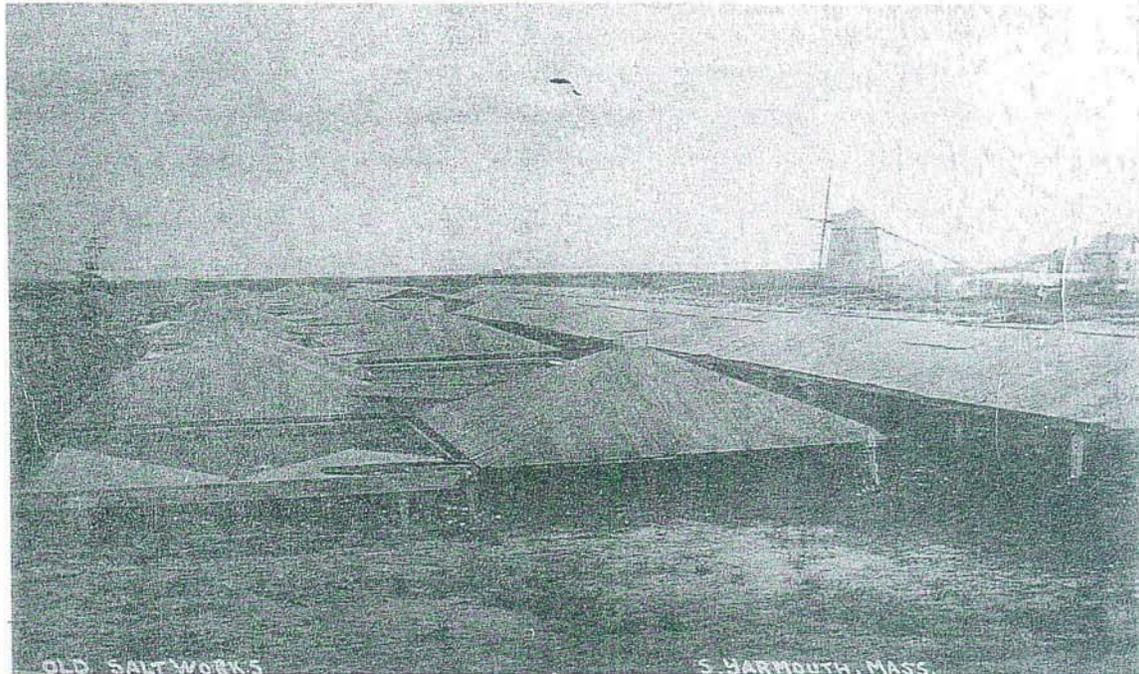
Above: The salt mills at the Crocker saltworks in Barnstable. The size of the pumps can be determined in relation to the man standing beside the wind vanes. A six-foot man would indicate that the diameter of the mill vanes is about eighteen feet with about twenty feet of vane area to catch the wind. The wooden pipes leading to the salt vats were hollowed out logs. They were either drilled or burned out. The pipes were then connected together and sealed with white lead. **Below:** The saltworks of Loring Crocker in Barnstable covered a vast area of the land next to the present day Barnstable Harbor. In this photo there are two horses and buggies. One of these may be a working rig for the man tending the saltworks. *Photos from the collection of Louis Cataldo, Barnstable, Mass.*



Exhibit E-1



Four salt mills in a row in this photo titled "Saltworks at East Yarmouth." The title locates them near the large area of works on Bass River. *Photo from the Author's collection.*

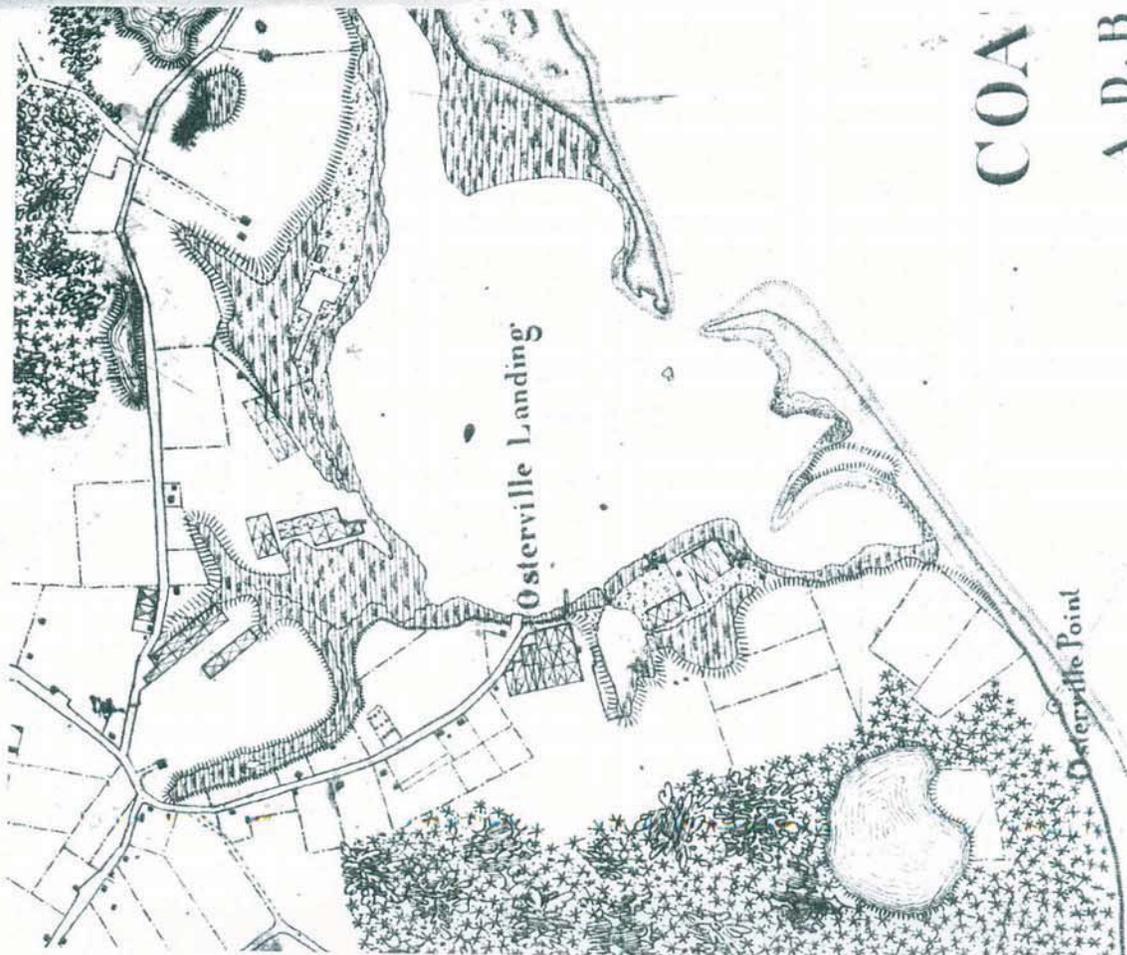


Above: The picture is titled "Old Saltworks, S. Yarmouth, Mass. The Judah Baker windmill is on the right side of the photo. It is still in nearly the same area today. **Below:** This photo is taken from an old post card and it is another area of the saltworks at Bass River with the salt mills near the water. Drying rooms and salt vats surround the land next to the dwelling houses in the background. *Photos courtesy of Alec & Audrey Todd, Yarmouth, Mass.*

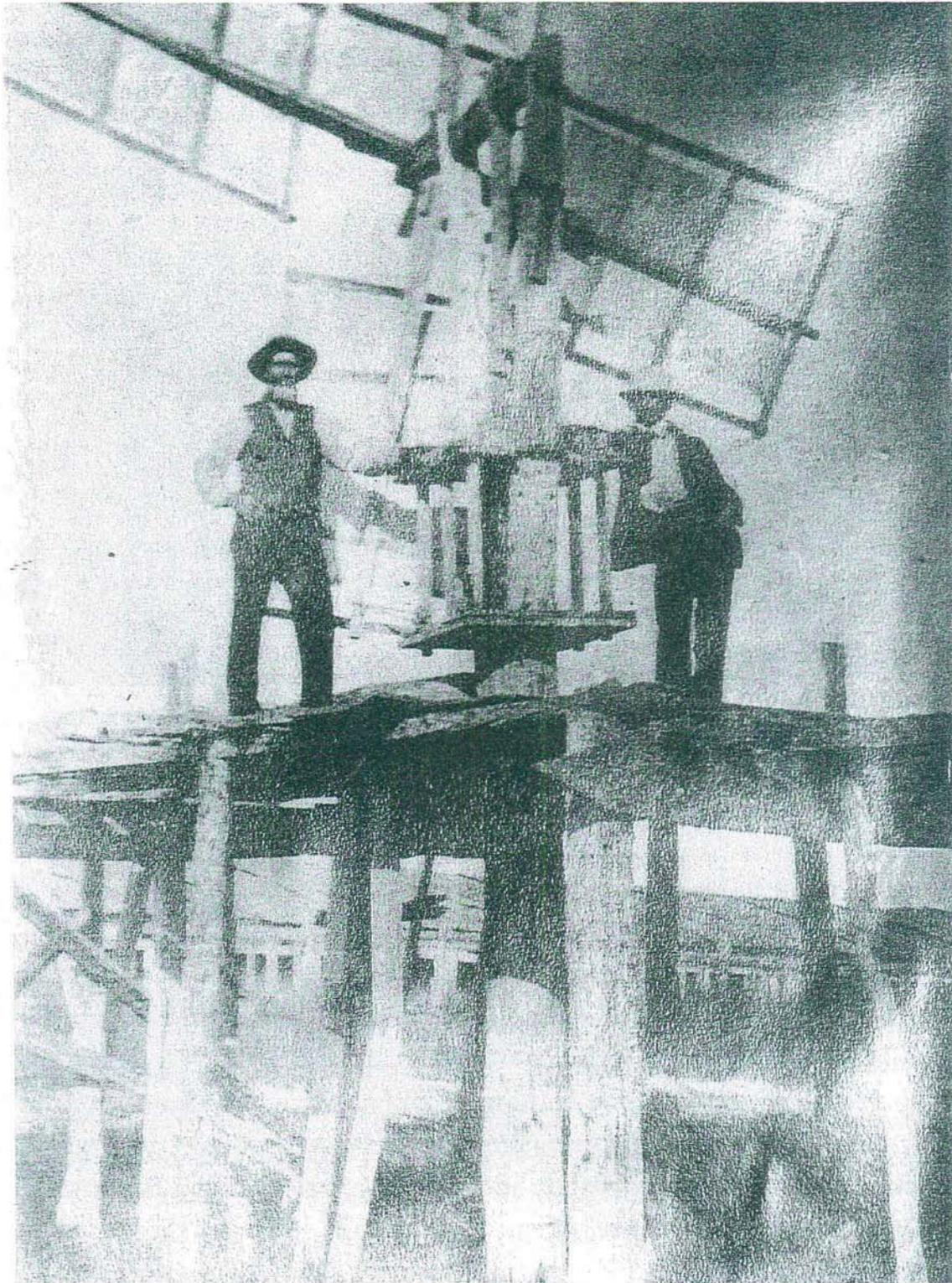




The Hyannis saltworks were located near Dunbar Point on Lewis Bay and Hyannis harbor. The small x near the center of the map on the beach is the site of a salt mill.



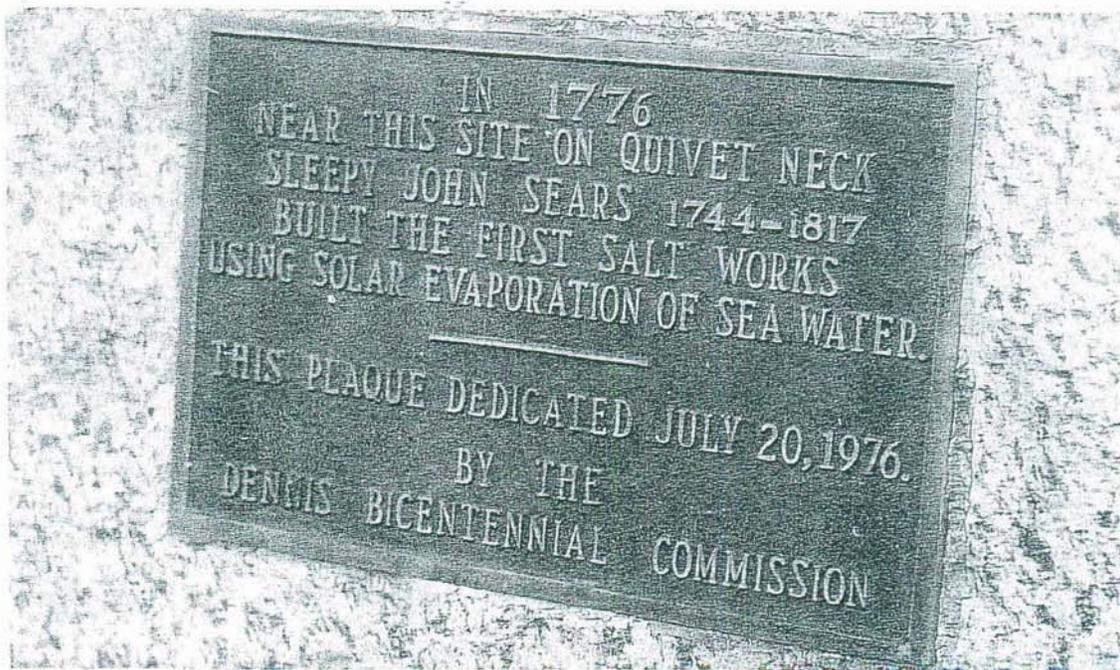
The saltworks in Osterville were located at what is the present East Bay near Wianno. There were several hundred feet of evaporators as depicted in the 1849 U.S. Coast Survey map.



The Assessors listing for the Town of Chatham for the year 1829, on page 160, lists Jesse Nickerson as owning 4,400 feet of saltworks. The men posing atop salt mill might well be his heirs. *Photo from the Library of Congress, Washington, D.C.*



Above: The Dennis Bicentennial Commission dedicated a monument to John Sears in 1976. The boulder lies in the center of a field where some of the Sears saltworks were situated. Below: The bronze plaque is about Mr. Sears who is considered the progenitor of this early industry. *Photo by William P. Quinn.*





April 9, 2009

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

**Re: *Cape Wind Energy Project
Consideration of Historic Preservation Issues in Alternatives Analyses
Nantucket Sound, Massachusetts***

Dear Dr. Krueger:

The letter dated April 1, 2009 from Reid J. Nelson of the Advisory Council on Historic Preservation (ACHP) requested clarification regarding how historic preservation issues were considered in the alternatives analyses conducted for the Cape Wind Energy Project (the Project). The alternatives analyses conducted over the last eight years under the National Environmental Policy Act (NEPA) review were designed to thoroughly consider potential impacts to all environmental resources, including cultural resources to comply with Section 106 of the National Historic Preservation Act (NHPA). The attached list summarizes the various alternatives considered and includes the cultural and visual issues identified for each, as well as other salient issues. The summary includes citations of the source documents, where the detailed assessments may be found. Three related figures and one table are also provided.

The summary demonstrates that historic preservation issues have been addressed, as requested by ACHP in its letter, for siting of the wind turbines, the design (layout) of the facility, the level of audible impacts for various alternatives, and in operations (particularly for visual impacts). The potential impacts of long-term maintenance (minimal boat traffic and repairs) were considered as part of the overall NEPA assessment.

If you have any questions, please contact me at (781)489-1110 or sfaldetta@essgroup.com.

Sincerely,

ESS GROUP, INC.

Sarah K. Faldetta
Senior Scientist

Attachments

C: Rodney Cluck, MMS
Melanie Stright, MMS
Rachel Pachter, Cape Wind Associates, LLC
Geri Edens, McKenna, Long & Aldridge
Deborah Cox, PAL, Inc.



Cape Wind Project
Summary of Consideration of Alternatives
Pertaining to Historic Preservation Issues

The alternatives analyzed since 2001 as part of the NEPA process consistently included consideration of potential impacts to cultural resources, to assist in compliance with Section 106 of the NHPA. This summary has been compiled from the following sources:

1. Combined United States Army Corps of Engineers Draft Environmental Impact Statement and Massachusetts Executive Office of Environmental Affairs Draft Environmental Impact Report, issued November 2004 (USACE DEIS/DEIR)
2. Massachusetts Environmental Protection Act Final Environmental Impact Report issued February 15, 2007 (MEPA FEIR)
3. Minerals Management Service Final Environmental Impact Statement issued January 2009 (MMS FEIS), which included and superseded the alternatives analysis in the MMS Draft EIS issued January 2008.
4. Preliminary Marine Archaeological Sensitivity Assessment of Cape Wind Energy Project Alternatives: Horseshoe Shoal; Combination New Bedford/Buzzards Bay and Reduced Horseshoe Shoal; Monomoy and Handkerchief Shoals; Tuckernuck Shoal and South of Tuckernuck Island, Massachusetts and Technical Memorandum, Cape Wind Terrestrial Alternative, Massachusetts Military Reservation: Archaeological Sensitivity Assessment. Both by PAL, Inc., issued January 2004 and March 9, 2004 respectively (contained in Appendix 3-I in Volume 2 and Section 3.4.3.2.11 of Volume 1 of USACE DEIS/DEIR).
5. Known Historic Properties on Cape Cod, Martha's Vineyard and Nantucket issued by PAL, Inc. on October 16, 2002 (list contained in Appendix 5.10B in Volume 3; locations shown on 4 sheets of Figure 5.10-1 of USACE DEIS/DEIR).
6. Marine Archaeological Sensitivity Assessment: Cape Wind Energy Project issued by PAL, Inc. on June 2003 (contained in Appendix 5.10-C-1 in USACE DEIS/DEIR).
7. Visual Impact Assessment for South of Tuckernuck Island Alternative: Final Environmental Impact Report issued by PAL, Inc. (contained in Appendix 3.2-D and Section 3.12 of the MEPA FEIR).
8. Marine Archaeological Reconnaissance Survey: Cape Wind Energy Project issued by PAL, Inc. March 2004 (contained in Appendix 5.10-C-2 in USACE DEIS/DEIR).
9. Visual Impact Assessment of Multiple Historic Properties: Cape Wind Energy Project, issued by PAL, Inc. June 2005 (contained in Appendix 5.10F of USACE DEIS/DEIR).
10. Supplemental Marine Archaeological Reconnaissance Survey of Revised Layout Offshore Project Area issued by PAL, Inc. (contained in Appendix 3.11-B and Section 3.11 of the MEPA FEIR).

A. SUMMARY OF PRELIMINARY ALTERNATIVES ANALYSES

Preliminary Site Screening Criteria (from 3.4.1 USACE DEIS)

- Area with wind power classification of 4 or greater (average winds of greater than 15.7 mph at 50 meters above ground/sea level): necessary for commercial wind energy project;

Sufficient surplus electric transmission capacity to transport 200 – 1,500 megawatt (MW) to centers throughout Independent Systems Operation-New England (ISO-NE) transmission system;

- Commercially-available land or permissible use of offshore area sufficient to accommodate a 200 – 1,500 MW wind energy project.

Preliminary Screening Analysis Process (from 3.4.2 USACE DEIS/DEIR)

- 17 alternative sites in New England Region were identified by the USACE through the public scoping process and meetings/consultations with cooperating agencies and were determined to be reasonable. These were then evaluated using the preliminary site screening criteria:
 - 8 upland alternatives: 1 viable option
 - 9 offshore alternatives: 3 viable options

Preliminary Screening Results (from 3.4.1 USACE DEIS/DEIR)

- Four alternatives (one upland and three offshore) were identified to warrant detailed analysis (these alternatives are shown in the attached Figure 3-20 of the USACE DEIS/DEIR):
 1. Upland Alternative: Massachusetts Military Reservation (MMR) was the only upland site evaluated that had only one limiting criteria (wind power classification of 3). Wind resources lower than the optimal 4 or greater would require taller, more visible turbine structures. Nonetheless, MMR was deemed the best upland alternative due to its large land area (though that land would likely not be available due to ongoing military operations at the location).
 2. Offshore Deep Water Alternative: South of Martha's Vineyard site would have the least impact from extreme storm waves (ESW) but would have potential hazards from unexploded military ordinance and was therefore omitted from further consideration. South of Tuckernuck Island, Nantucket is outside of military hazards but would have similar ocean conditions as the South of Martha's Vineyard site and would likely be more feasible.
 3. Offshore Shallow Water Combination Alternative: Offshore New Bedford has insufficient winds but is close enough to Nantucket Sound to combine that location with Horseshoe Shoal to form a shallow water combination alternative.
 4. Offshore Shallow Water Alternative: Nantucket Sound has the best options for wind resources and fewest limiting factors (i.e. marine mammals, seabed composition); three sub-site alternatives were identified and evaluated.

B. SUMMARY OF DETAILED ALTERNATIVES ANALYSES

Detailed Analysis of Alternatives Overview (from 3.4.3 USACE DEIS/DEIR)

Based upon the results of the preliminary screening analyses, four alternatives were found that warranted detailed analyses. These were assessed for potential impacts to cultural resources, in addition to environmental resources, as summarized below and by area.

- Results of a PAL archaeological sensitivity assessment of alternatives (Appendix 3-I of the USACE DEIS/DEIR) found that three of the four sites that underwent detailed analysis

have moderate to high potential for containing previously unrecorded, potentially significant archaeological resources. These were MMR, Nantucket Sound and the New Bedford/Horseshoe Shoal combination alternative. South of Tuckernuck Island was found to have low archaeological sensitivity for potential submerged Native American and Euro-American resources. The South of Tuckernuck Island and New Bedford Alternatives had relatively fewer historic properties in the Project viewshed; the New Bedford combination would include a Nantucket Sound sub-site and therefore would include more historic properties in the viewshed than the former two alternatives.

- Nantucket Sound Alternative (three sub-sites) had the greatest number of National Register-listed or eligible historic properties within the viewshed.

1. Massachusetts Military Reservation

- 23 known prehistoric archaeological sites within or immediately adjacent to the proposed MMR Site – none represent significant archaeological resources (from Appendix 3-I and Section 3.4.3.2.11 USACE DEIS/DEIR):
 - 13 previously identified sites located next to fresh water kettle ponds or swamps – low density deposits of lithic chipping debris (short-term activity areas) from stone tool manufacture/maintenance;
 - 10 sites in upland sections of MMR were isolated find spots with lithic flakes or tool fragments;
- No previously listed historic archaeological sites are located within MMR Site;
- MMR Site area has low potential to contain historic period resources;
- Low visual contrast because of existing structures on land;
- High levels of ambient light expected;
- The area contains low, moderate and high archaeological sensitivity;
- The area of potential effect (APE) for noise was considered the polygon encompassing the wind turbine generators and the associated work areas. Modeling indicates that temporary construction noise may be audible (from 3.4.3 USACE DEIS/DEIR).

2. South of Tuckernuck Island

- Deeper waters at this alternative would require multi-pile installations, which are commercially unproven as yet in deep water wind projects;
- Two aboveground historic properties within the viewshed of this Alternative: all of Nantucket Island (a National Historic Landmark) and Cape Poge Light, Martha's Vineyard (from Appendix 5.10B, Figure 5.10-1 and Section 3.4.3.2.11 USACE DEIS/DEIR);
- Site is not visible from Cape Cod;
- Site would have an Adverse Effect on the Nantucket Island National Historic Landmark and on the Cape Poge Lighthouse on Martha's Vineyard (Appendix 3.2-D and Section 3.12 of the MEPA FEIR);
- Flashing lights at night will affect least number of viewers in this Alternative;
- No known submerged historic properties or archaeological sites in area of Tuckernuck Island (Appendix 3-I and Section 3.4.3.2.11 of USACE DEIS/DEIR);
- No known wrecks in search area;

- Low Euro-American archaeological sensitivity, low Native American archaeological sensitivity;
- There would be impacts to ambient sound levels from construction, decommission and operation, the highest of which would be during construction (from 3.3.5.2 MMS FEIS);

3. New Bedford/Horseshoe Shoal

- 13 historic properties were identified with expected visibility of the WTGs (from Appendix 3-I and Section 3.4.3.2.11 USACE DEIS/DEIR);
- One known wreck and one obstruction were identified within the study area;
- Two shipwrecks were identified by MHC and MBUAR in study area;
- PAL assigned the New Bedford/Buzzard's Bay portion of alternative a high Euro-American archaeological sensitivity and a moderate Native American archaeological sensitivity;
- Reduced Horseshoe Shoal portion of site has high Euro-American archaeological sensitivity, high Native American archaeological sensitivity (from Appendix 5.10-F, USACE DEIS/DEIR);
- High levels of ambient light expected (from 3.4.3.2.11 USACE DEIS/DEIR);
- Lights on WTGs will be most visible from shore in this Alternative;
- The area of potential effect (APE) for noise was considered the polygon encompassing the wind turbine generators (WTGs) and the associated work areas (from 3.4.3 USACE DEIS/DEIR).

4. Nantucket Sound: Three Sub-Sites

Sub-sites are far enough from shore to minimize potential visual impacts but close enough to shore to facilitate submarine cable interconnections.

A. Monomoy/Handkerchief Shoal – determined to be technically, environmentally, and economically constrained:

- Numerous T&E listed species use area for migration, breeding or general habitat; well-known seal haul-out in winter; refuge for protected birds (from 3.4.3.2.1 and 3.4.3.2.4 USACE DEIS/DEIR);
- Inadequate water sheet area for installation of 130 WTGs (from 3.4.4.2 USACE DEIS/DEIR);
- Highest of sub-sites for commercial fishing activity use (from 3.4.3.2.5 USACE DEIS/DEIR);
- Limited options for feasible submarine cable interconnections (from 3.4.4.2 USACE DEIS/DEIR);
- Moderate Euro-American archaeological sensitivity, moderate Native American archaeological sensitivity (from Appendix 3-I and Section 3.4.2.11, USACE DEIS/DEIR);
- No known submerged historic properties or archaeological sites in search area recorded in National or State Registers, Massachusetts Board of Underwater Archaeological Resources (MBUAR) or Massachusetts Historical Commission (MHC);
- No known wrecks in search area, but five wrecks listed in Northern Shipwreck Database (the database) as within vicinity of Site (between 1853 – 1899);
- Least number of historic properties in viewshed (from 3.4.3.2.12 USACE DEIS/DEIR);

- The area of potential effect (APE) for noise was considered the polygon encompassing the wind turbine generators (WTGs) and the associated work areas (from 3.4.3 USACE DEIS/DEIR). There would be impacts to ambient sound levels from construction, decommissioning and operation, the highest of which would occur during construction (from 3.3.5.2 MMS FEIS);
- B. Tuckernuck Shoal** – determined to be technically, environmentally, and economically constrained:
 - In close proximity to significant bird and marine mammal habitat; Muskeget Island is one of two US breeding locations for grey seal; nearby islands well-known seal haul-out in winter (from 3.4.3.2.1 and 3.4.3.2.4 USACE DEIS/DEIR);
 - Area of defined navigation channels serving as entry point to Nantucket Sound and nearby commercial ports – makes it difficult to site WTGs and cables (from 3.4.3.2.10 USACE DEIS/DEIR);
 - High use commercial fishing activity (from 3.4.3.2.5 USACE DEIS/DEIR);
 - Limited options for feasible submarine cable interconnections (from 3.4.4.3 USACE DEIS/DEIR);
 - High visual impacts for Martha’s Vineyard, Nantucket Islands (from 3.4.3.2.12 USACE DEIS/DEIR);
 - Alternative has high Euro-American archaeological sensitivity, high Native American archaeological sensitivity (from Appendix 3-I and 3.4.2.11, USACE DEIS/DEIR);
 - No known submerged historic properties or archaeological sites recorded in the area in National or State Registers, MBUAR or MHC;
 - Two unidentified wrecks in search area; database reports 102 vessel casualties from 1799-1937 (17 reported to have been removed);
 - There would be impacts to ambient sound levels from construction, decommissioning and operation, the highest of which would occur during construction (from 3.3.5.2 MMS FEIS).
- C. Horseshoe Shoal** – determined to be technically, environmentally, and economically feasible:
 - Not a significant habitat or migratory pathway for marine mammals – no significant seal haul-outs in close proximity (from 3.4.3.2.4 USACE DEIS/DEIR);
 - Adequate water sheet area for installation of 130 WTGs (from 3.4.4.4 USACE DEIS/DEIR);
 - Ideal subsurface geological conditions for installation of wind park (from 3.4.3.2.2 USACE DEIS/DEIR);
 - Limited options for feasible submarine cable interconnections (from 3.4.4.4 USACE DEIS/DEIR);
 - Less commercial fishing activity than other sub-sites (from 3.4.3.2.5 USACE DEIS/DEIR);
 - Feasible distance for submarine cable interconnections (from 3.4.3.2.12 USACE DEIS/DEIR);
 - PAL found visual ‘adverse effect’ on 2 NHLs, 4 historic districts, 10 individual properties (from Appendix 5.10 F, USACE DEIS/DEIR);

- High Euro-American archaeological sensitivity, high Native American archaeological sensitivity (Appendix 5.10-C-1 of USACE DEIS/DEIR; Appendix 3.11-B and Section 3.11 of MEPA FEIR);
- No submerged historic properties or archaeological sites recorded in the area in National or State Registers, MBUAR or MHC (from Appendix 5.10-C-1 and Section 3.4.3.2.11 USACE DEIS/DEIR);
- No wrecks or obstructions in search area, 18 vessel casualties from 1819 – 1963 in vicinity (from 3.4.3.2.11 USACE DEIS/DEIR);
- Geophysical and geotechnical surveys indicate possibility of limited former land surfaces surviving post-glacial marine transgression in easternmost portion of Site. These limited areas were assigned high sensitivity for potential Native American archaeological resources, although none were found (from Appendix 5.10-C-2 and Section 3.4.3.2.11 USACE DEIS/DEIR);
- All areas of high archaeological sensitivity for potential Euro-American and Native American archaeological resources were avoided by Project re-design (Appendix 3.11-B and Section 3.11 of MEPA FEIR);
- Temporary construction noise from pile driving may or may not be audible at land areas near to the closest turbines when those are installed, depending upon wind speed and direction. Operational noise will be inaudible on Cape Cod, Martha's Vineyard and Nantucket (from 3.4.3 USACE DEIS/DEIR and 3.13.6 of the MEPA FEIR).

Additional Geographic Alternatives (from 3.3.1 of the MMS FEIS)

Building upon the analysis of alternatives that the USACE had previously conducted, the MMS identified and initially screened 9 wind farm sites (in addition to the proposed action on Horseshoe Shoal) along the coast from Maine to Rhode Island. These are shown on the attached Figure 3.3.3-1 from the MMS FEIS. The sites were chosen based on geographic diversity, having at least some potential in terms of wind resources, and the necessary area required for the proposed facility size. Several of the alternatives had been previously reviewed during the USACE analyses; however a number of sites were analyzed for the first time by MMS. The Phelps Bank site was chosen as a result of a comment/request by the Massachusetts Office of Coastal Zone Management that an alternative be evaluated for a site located more than 25 miles offshore with water depths less than 150 feet. The Offshore Nauset site was chosen as a result of agency interests in comparing a deep water alternative. The ten sites (including the proposed location) evaluated by MMS were:

1. Offshore Portland, Maine
2. Offshore Cape Ann, Massachusetts
3. Offshore Boston, Massachusetts
4. Offshore Nauset Massachusetts (east of Nauset Beach)
5. Nantucket Shoals (southeast of Nantucket Island Massachusetts)
6. Phelps Bank, (southeast of Nantucket Island Massachusetts)
7. East of Block Island, Rhode Island
8. Monomoy Shoals (East of Monomoy, Massachusetts)
9. South of Tuckernuck Island,

10. Horseshoe Shoal (proposed action).

As detailed in Section 3.3.3 of the MMS FEIS, preliminary siting criteria were applied to the alternatives resulting in 7 sites being eliminated from further consideration due to physical constraints. Monomoy Shoals, South of Tuckernuck Island, and Horseshoe Shoal were then subjected to more detailed analysis by MMS, along with several non-geographic alternatives which were subsets of the proposed action on Horseshoe Shoal. In addition to the information provided in the USACE DEIS/DEIR, the following three sites were described in Section 3.3.5 of the MMS FEIS.

- **Monomoy Shoals** - This alternative would require an area slightly larger than the proposed action, covering a total of 25.9 square miles. Locating the project here would have greater impacts on avifauna, sub-tidal resources, non-ESA mammals, fish and fisheries, essential fish habitat and threatened and endangered species because of its proximity to Monomoy Island National Wildlife Refuge, but would have less visual impact on historic structures (see attached Table 3.3.5-1 from the MMS FEIS). This alternative would also require a longer interconnection cable length adding to overall cost, and greater wave heights would prolong construction and decommissioning. With respect to cultural resources, no submerged historic properties or archaeological sites are recorded in the Monomoy Shoals alternative area. However, there could be visual impacts to visitors to the Cape Cod National Seashore and to Tribal areas of cultural and religious significance.
- **South of Tuckernuck Island** – This alternative site has water depths ranging from 15 to 100 feet below mean lower low water (MLLW), and would require an area covering approximately 36 square miles. The broad range in water depth would require the use of different types of foundations at this site, using three different diameter monopile structures and two different foundation structures. The wave heights at this location are also of concern with respect to construction and decommissioning. Deeper water, multi-membered foundation structures could provide additional resources for colonizing benthos and in turn for the fish feeding on them. A much longer interconnection line would also be needed for this alternative. Although this area is farther away from the shores of Cape Cod, the South of Tuckernuck Island alternative would be visible from historic properties and from Tribal areas of cultural and religious significance.
- **Horseshoe Shoal** – The proposed location is not expected to cause impacts jeopardizing to populations of threatened and endangered species. The total area of permanent benthic disturbance is calculated at 0.67 acres. The proposed action would result in visual impacts to areas along the south coast of Cape Cod, areas along the shorelines of Nantucket and Martha's Vineyard oriented toward the project site, some historic properties, and Tribal areas of cultural and religious importance

In addition to the above alternative locations, MMS FEIS also took into consideration non-geographic alternatives, as discussed below.

Non-Geographic Alternatives (from 3.3.6 MMS FEIS – see attached Figure 3.3.5-1)

- **Smaller Project** - The Smaller Project Alternative on Horseshoe Shoal is located in the same area as the proposed action but contains half the number of WTGs and thus, half the

generation capacity of the proposed action. The views of the Smaller Project Alternative would result in a reduced breadth of visual impacts when looking out at the horizon from Nantucket or Cape Cod. With respect to cultural resources, no submerged historic properties or archaeological sites are recorded in the area of this alternative. Construction related noise impacts to humans would be reduced as this alternative would be farther from Nantucket and Cape Cod. Also, with half the quantity of turbines, construction and decommissioning noise will be lessened.

- **Phased Development** - The Phased Development Alternative on Horseshoe Shoal would utilize the same site as the proposed action and would employ the same transmission cable system layout. This alternative would be constructed in two phases, with time in between to allow for monitoring of operations. The first phase would consist of 65 of the total 130 turbines, installed in the western half of the proposed project area. The remaining turbines would be installed in the eastern half after a monitoring period. Visual impacts would be the same as the proposed project once this alternative was operational. With respect to cultural resources, no submerged historic properties or archaeological sites have been recorded in the area of this alternative (the same as the proposed action).
- **Condensed Array** - The Condensed Array Alternative would reduce the overall area of the array from 25 square miles to 16 square miles, reducing the overall breadth of the project. However, the concentration of structures would be increased and thus could create a different visual impact than the proposed action. Construction noise impacts to humans would be slightly less because of increased distance to the turbine array from shore. The operational noise would be the same as the proposed project.
- **No Action Alternative** - The No Action Alternative would result in no construction or operation of the turbine array at all. This would eliminate any visual or cultural impacts of the proposed project on any historic or archaeological resource.

In summary, the detailed alternatives analyses undertaken for the Project have fully and consistently considered potential impacts to all environmental resources including historic properties, cultural resources and visual impacts (see attached Table 3.3.5-1 of the MMS FEIS Appendix A).

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February 18, 2009

Rodney E. Cluck, Ph.D.
Chief Environmental Science Branch
Alternative Energy Program
Minerals Management Service
381 Elden Street
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**Re: Responses to Massachusetts Historical Commission Comments on MMS's
Finding of Adverse Effect
Cape Wind Energy Project
Nantucket Sound, Massachusetts**

Dear Dr. Cluck:

We are writing to respond to the comments of the Massachusetts Historical Commission (MHC) in its letter dated February 6, 2009 regarding MMS's Finding of Adverse Effect (Finding) under Section 106 of the National Historic Preservation Act (NHPA). MHC's comments mischaracterize the extensive work that has been done to consider potential impacts on historic and cultural properties, misapply the requirements of the NHPA and the National Environmental Policy Act (NEPA), and are inconsistent with MHC's previous positions. There is also no factual or legal support for MHC's assertion that MMS's Finding is incomplete, that consideration of mitigation measures is premature, or that the EIS should be supplemented after the Section 106 process is complete. Further, it appears that MHC does not intend to engage in continued consultation to resolve adverse effects or to conclude the Section 106 process in a timely and constructive manner under a Memorandum of Agreement. CWA thus believes that continued consultation with MHC will not be productive and will only further delay the project and that MMS should consider terminating the consultation with MHC and proceeding to resolve adverse effects with the Advisory Council.

1. MHC has Failed to Participate in the Section 106 Process in a Timely and Constructive Manner.

As an initial matter, Cape Wind Associates (CWA) questions whether MHC has acted in good faith to fulfill its role under MMS's Section 106 process. Under the NHPA, MHC as the State Historic Preservation Officer (SHPO) must "consult with federal agencies on federal undertakings that may affect historic properties." 16 U.S.C. § 470a(b)(3)(I). The Advisory Council regulations further direct MHC to "advise *and assist* Federal agencies in carrying out their 106 responsibilities." 36 C.F.R § 800.1(c)(1)(i) (emphasis added).

The regulations thus clearly contemplate that MHC will work cooperatively with MMS to facilitate the Section 106 process and ensure that historic properties are "taken into consideration at all levels of planning and development." *Id.* Courts have observed that "consultation with the SHPO is an integral part of the Section 106 consultation process." *Pueblo of Sandia v. United States*, 50 F.3d 856, 862 (10th Cir. 1995). Yet it is our understanding that MHC has repeatedly been unwilling to meet or otherwise communicate with MMS (including repeated failure to return phone calls) outside of the consulting party meetings, and has offered only limited guidance in written comments. As a result, MMS has had to conduct the Section 106 process without the benefit of MHC's constructive engagement and without a clear understanding of MHC's concerns. Rather, MHC's principal input into the process has been to criticize MMS's work after-the-fact, a tactic which has only served to complicate and delay the process. MHC's comments on MMS's Finding should thus not be given the level of deference they may otherwise deserve had MHC participated constructively in the Section 106 process.

2. MHC's Opinion That the Documentation Supporting the Finding is Incomplete and Insufficient is Unfounded.

MHC contends that the MMS's documentation for its Finding is incomplete and insufficient under Advisory Council regulation Section 800.11, yet does not provide specific details to support its assertion, other than to say that the Finding should now be revised to address the demands of MHC and other consulting parties, including avowed opponents of the Project. MHC then asserts, without reference to the relevant standards, that the EIS includes inconsistent and insufficient information about cultural resources.

The Advisory Council has explained in this regard that the purpose of the documentation standard is "to provide *basic information* so that a third-party reviewer can understand the basis for an agency's finding or proposed decision." 65 Fed. Reg. 77698 (Dec. 12, 2000) (emphasis added). Section 800.11 therefore requires a finding to include a description of the undertaking, the steps taken to identify historic properties, the historic properties affected, the undertaking's effects on historic properties, as well as an explanation as to why the criteria of adverse effect were found applicable and copies or summaries of consulting parties' views. MMS's Finding addresses each of these requirements and clearly provides the "basic information" necessary to understand MMS's conclusions.

Moreover, MHC is aware that the Finding is supported by extensive identification and assessment efforts that began in November 2001. Over the past eight years, MHC has received, commented upon, and concurred with numerous studies and reports evaluating potential project impacts on historical and cultural resources. Nevertheless, PAL has now prepared yet another document that details the extensive property identification efforts that have been conducted, summarizes the visual simulation analyses that were performed, and addresses issues raised by the consulting parties at the third Section 106 consultation meeting conducted by MMS on January 29, 2009 (PAL Report). The PAL memorandum and attachments should negate any legitimate question concerning the adequacy of documentation.

3. MHC Mischaracterizes the Methodology Used to Identify Historic Properties.

MHC incorrectly criticizes the methodology used to identify historic properties as a “sampling methodology” and suggests that MMS could “estimate the total number of individual historic properties in the Area of Potential Effect, as only represented in the *sample* of historic properties that were used in the study.” MHC thereby distorts the methodology used to identify historic properties in an apparent attempt to artificially increase the number of historic properties affected by the project. As set forth below, the methodology of the study involved no form of “sampling.”

As the PAL memorandum details, in 2002 PAL developed a list and map of *all* historic properties in the 10 towns on Cape Cod, Martha’s Vineyard and Nantucket that had shorelines oriented toward the project that were (1) listed or formally determined eligible for inclusion on the National Register of Historic Places, (2) in Massachusetts Historical Commission’s (MHC) Inventory of Historic and Archaeological Assets of the Commonwealth for which MHC has concurred with an eligibility recommendation, or (3) on the State Register of Historic Places (State Register), including local historic districts, which MHC has found are eligible for the National Register. Those identified historic properties along the south side of Cape Cod, the north and east sides of Martha’s Vineyard, and the north side of Nantucket were then visited to determine whether the property could reasonably have an open view of the project. The Area of Potential Effect (APE) was thereafter defined as historic properties meeting the stated criteria with open views of visible components of the wind park. PAL found 16 individual properties and historic districts would be adversely affected by the visible components of the offshore wind turbines.

This methodology was supplemented by the consulting parties’ identification in 2008 of 30 additional properties potentially within the APE. Twelve of these 30 properties were found to meet the stated criteria and have a view of the proposed project, and therefore would be adversely affected by views of the offshore wind turbines. The total number of individually-listed above-ground historic properties and districts found by PAL to have an adverse effect is 28 (16 previously determined as adversely affected and 12 determined as adversely affected in 2008). In addition, where an individual property within a designated historic district was found to be adversely affected, *i.e.*, had a reasonable view of the project, all properties within the district were considered adversely affected. This approach captured numerous additional

properties, irrespective of whether there were views of the project. Thus, the results of these efforts can hardly be characterized as a mere representative “sampling” of historic properties, when all historic properties meeting the stated criteria that reasonably have a view of the project were considered.

To the extent that MHC is raising the concern expressed at the January 29, 2009 consulting party meeting that the identification efforts have not considered potential properties that, when viewed from third-party vantage points, are affected because a portion of the project may be in the field of vision, PAL explains in its memorandum that such an additional identification effort would not be reasonably required or useful in this instance, given the 5 to 15 mile distances of the project from the potentially affected resource and the relatively even topography. As PAL explained, under those conditions, the character-defining features of individual historic properties, or groups of historic properties, against the shoreline mass would not be distinguished in a manner that would reasonably enhance the analysis. The NHPA requires that MMS “make a reasonable and good faith effort to identify historic properties; determine whether identified properties are eligible for listing on the National Register . . .; assess the effects of the undertaking on any eligible historic properties found; determine whether the affect will be adverse; and avoid or mitigate any adverse effects.” *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 805 (9th Cir. 1999). The extensive efforts undertaken to identify historic properties and assess the potential effects of the project far exceed the NHPA’s standard of reasonableness and good faith.

4. The NHPA Does Not Require a Detailed Analysis of Alternatives Prior to Consideration of Mitigation Measures.

MHC next asserts that a “more explicit effort to consider feasible project alternatives” should be undertaken to understand what effects to historic properties can be feasibly avoided or minimized. MHC then criticizes the FEIS, asserting that the “analysis gives the sense that the proposed project schedule and project profitability are given more weight than the consideration of avoiding or minimizing adverse effects to historic properties.” MHC further states that “until a more complete alternatives analysis for cultural resources is undertaken, consideration of mitigation measures is premature.” In fact, alternatives have been fully considered and evaluated, as shown by the many studies conducted that include assessment of potential impacts on historic properties under various alternatives listed in Attachment A of PAL’s memorandum. While MHC's letter makes it sound like the effort to address historic impacts began recently and has a ways to run, that effort is now eight years old, as detailed in the chronology of effort to consider impacts on historic properties in Attachment B of PAL’s memorandum. For eight years, historic preservation has received sustained and careful attention. We stand at the end of a process, not at its middle or beginning, and MHC's attempt to reinitiate an exhausted process is without merit.

In fact, neither the NHPA nor the Advisory Council regulations require that MMS prepare a detailed analysis of alternatives before making its effects determination or proceeding to resolve adverse effects. See *Neighborhood Association of the Back Bay v. Federal Transit Administration*, 463 F.3d 50, 61 (1st Cir. 2006) (noting that “there is nothing in the statute or

regulations that requires the consideration of alternatives in making the no adverse effect determination”). Section 8.00.6 of the regulations further provide, when adverse effects have been identified, for the consulting parties to continue to consult to “develop and evaluate” alternatives or modifications as a means of considering how the identified adverse effects may be avoided, minimized, or mitigated. 36 C.F.R. §800.6. Thus, alternatives were properly considered throughout the planning process, but are now particularly discussed by the consulting parties under Section 800.6, *after* the federal agency has reached a finding of adverse effect. The Corps and MMS have adhered to these procedural requirements throughout the 8 year process.

In this case, consideration of the Project’s potential impacts on historic and cultural properties was initiated at the inception of the project. During the course of the EIS development process, numerous meetings were held with the USACE, MMS, MHC, and other interested agencies to address alternatives and the consideration of potential historic and cultural impacts. The chronology in Attachment B of PAL’s memorandum documents the extensive efforts that have been undertaken to address historic and cultural impacts and shows that PAL, CWA, and the Corps met with MHC as early as February 2004 to specifically discuss alternatives. Moreover, MHC was fully informed that the project was redesigned twice, each time in a manner that minimized impacts to the two National Historic Landmarks in the APE. Further, the two alternatives cited by MHC (deep water and floating turbines) were in fact considered in the FEIS and found not to be feasible alternatives. FEIS at E-5.6. Thus, to demand that MMS now reinitiate the alternative analysis is not reasonable or constructive.

5. MHC Improperly Suggests that a Supplemental EIS is Necessary.

MHC also attempts to blur the requirements of the NHPA and NEPA, stating that the data and conclusions about impacts to cultural resources in the final EIS are incomplete and not reliable, further suggesting that MMS supplement the EIS after the Section 106 process is complete and before the Record of Decision is issued.

As the Advisory Council has recognized, however, “the NHPA and NEPA are independent statutes with separate obligations for Federal agencies.” 65 Fed. Reg. at 77709. While the regulations suggest that the agency’s NHPA review be coordinated with reviews under other statutes, including NEPA, this is an agency directive intended to benefit the agency by preventing duplication of effort so that the agency can “use information developed for other reviews” to satisfy the NHPA. The Advisory Council has stated that the agency official “‘should coordinate,’ implying encouragement, but not a requirement.” *Id.* at 77703. In addition, while the Advisory Council regulations allow an agency to use the NEPA process to substitute for the Section 106 process, MMS has not chosen to do so. It is only when an agency opts to rely on NEPA to satisfy Section 106 that the Advisory Council regulations impose standards for developing the EIS. *Id.* at 77709 (noting that section 800.8 applies only when an agency “independently chooses NEPA documents/process to substitute for the regular section 106 process). MHC is incorrect to suggest that the Section 106 process and NEPA are interdependent and therefore require MMS to address MHC’s criticisms of the FEIS in the Section 106 process and then supplement the FEIS to include the issues raised in the Section 106 process.

Indeed, courts have found that the Advisory Council regulations “permit an agency to defer completion of the NHPA process until *after* the NEPA process has run its course (and the environmentally preferred alternatives chosen), but require that NHPA issues be resolved by the time that the license is issued.” *Mid State Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 554 (8th Cir. 2004) (en banc); *see also City of Alexandria, Virginia v. Slater*, 198 F.3d 862 (D.C. Cir. 1999). MMS’s Record of Decision for the project will be informed by the information developed in both the NEPA and Section 106 processes. There is no legal basis for MMS to consider supplementing the FEIS before issuing the ROD to include information developed during the Section 106 process. Under NEPA, a supplemental EIS is required only when new information presents “a seriously different picture of the likely environmental consequences of the proposed action” not adequately discussed in the original impact statement. *See State of Wisconsin v. Weinberger*, 745 F.2d 412 (7th Cir. 1984). Given the attention that has been given to the project’s potential impacts on historical and cultural resources over the past eight years, there is no credible suggestion of “new information” that would meet such a rigorous standard. In any event, consideration of such issue at this time would be premature, at best.

6. Conclusion.

It is apparent to CWA that MHC does not intend to engage in a good faith effort to discuss resolution of adverse effects. Indeed, MHC has made it clear that it has no intent to discuss mitigation measures unless MMS reverses course in response to entirely unreasonable demands, including the reinitiation of its consideration of alternatives in the FEIS. Further consultation efforts with MHC are therefore not likely to be productive. MMS should consider terminating the consultation and, in accordance with section 800.7, proceed to resolve adverse effects and execute a Memorandum of Agreement with the Advisory Council.

Thank you for your consideration of these comments.

Sincerely,



Dennis Duffy
Vice President

cc: B. Simon, Massachusetts Historical Commission
J. Eddins, Advisory Council for Historic Preservation



PRESERVATION PLANNING
ARCHAEOLOGY
ARCHITECTURAL HISTORY
EDUCATION

Public
Archaeology
Laboratory

November 24, 2008

Dr. Rodney E. Cluck
Chief, Environmental Sciences Branch
U.S. Department of the Interior
Minerals Management Service
381 Elden Street
Herndon, Virginia 20170

Re: Cape Wind Energy Project
Historic Properties Effect Evaluation

Dear Dr. Cluck:

In a letter dated September 30, 2008, the Town of Yarmouth requested that the Minerals Management Service consider the Cape Wind Energy Project's potential effects on properties in the Town that had not been part of PAL's previous analyses for the Army Corps of Engineers.

Eight properties, including five within the South Yarmouth/Bass River Historic District which is listed in the National Register of Historic Places, were identified by the Town as having a possible view of the wind park. The three individual properties are located at 92 Berry Avenue; 50 South Sea Avenue; and 185 South Sea Avenue. The five properties within the Historic District are at 21-4 Pleasant Street; 24 Frothingham Way; off-Pleasant Street; 170 Pleasant Street; and 149 River Street.

The property locations were visited on Monday, November 24, 2008. PAL is of the opinion that the wind farm will not be visible from any of the properties, including from any location within the Historic District. We are recommending that there will be no effect on these properties.

If you have any questions or need further information please do not hesitate to call me at your convenience.

Sincerely,

Deborah C. Cox, RPA
President

/bb

cc: M. Stright, MMS
C. Olmsted, Cape Wind Associates

210 Lonsdale Avenue
Pawtucket, RI 02860
TEL 401.728.8780
FAX 401.728.8784



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Massachusetts Historical Commission

Fax Transmittal Memorandum

To: Christopher Horrell, MMS 504-736-2407
Fax #: 703-787-1612

From: Brona Simon, SHPO Date: 11/5/09

Re: Cape Wind Energy Project Pages, including cover sheet: 24

Comments: SHPO opinion 11/5/09 attached.
Original is in the mail.

If this communication has been received in error, please notify us immediately.

220 Morrissey Boulevard, Boston, Massachusetts 02125
Tel: (617) 727-8470 - Fax: (617) 727-5128 - Website: www.state.ma.us/sec/mhc



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Massachusetts Historical Commission

December 15, 2009

Christopher Horrell
Acting Federal Preservation Officer
Minerals Management Service
1201 Elmwood Park Blvd
New Orleans, LA 70123-2394

RE: Cape Wind Energy Project. MHC #RC.29785.

Dear Mr. Horrell:

This is in response to your letter dated November 17, 2009, with which you enclosed the "Minerals Management Service National Register Determination of Eligibility for the Wampanoag Sites on Cape Cod and Martha's Vineyard, MA." I have reviewed the materials submitted and have the following comments.

Mashpee

I agree with your opinion that the two locations in Mashpee that are Traditional Cultural Properties (TCP's) to the Mashpee Wampanoag Tribe, meet the criteria of eligibility for listing in the National Register of Historic Places under the National Register criteria that you cite in your submittal. In addition, I agree with your determination that both of these TCP's are within the Area of Potential Effect (APE) of the proposed Cape Wind project, based on the photographs and descriptions that you submitted. I also concur with your determination that the proposed Cape Wind project will have an "adverse effect" on these two TCP's through the introduction of visual elements that alter the setting and are out of character with the historic, cultural and religious practices of the Mashpee Wampanoag Tribe (36 CFR 800.5(a)(2)(iv) and (v)).

Martha's Vineyard

In your submittal, you describe 12 places on Martha's Vineyard that are Traditional Cultural Properties (TCP's) to the Wampanoag Tribe of Gay Head (Aquinnah). These properties may meet the criteria of eligibility for listing in the National Register as TCP's, sites, and/or historic properties. A number of these properties are included in the Inventory of Historic and Archaeological Assets of the Commonwealth; thus this office has additional historical and archaeological information that you did not reference and yet would be germane to evaluating the historical significance of the sites.

You have determined that nine (or possibly ten) of these properties are not located with the Area of Potential Effect (APE) of the proposed Cape Wind project, and thus you did not render a determination as to their National Register eligibility. This office understands and respects the Tribe's concerns that the locations of these properties be kept confidential. Since the locations of the properties are confidential, we cannot comment on your determination regarding the APE and the TCP's on Martha's Vineyard. Under the Section 106 regulations (36 CFR 800.11(c)) and

Section 304 of the National Historic Preservation Act, MMS should seek the comments of the Secretary of Interior and the Advisory Council on Historic preservation regarding confidentiality.

Area of Project Effect

In your submittal to this office, you determined that the Cape Wind APE should not be expanded due to the Wampanoag Tribe of Gay Head (Aquinnah)'s concerns about oil spills from construction and maintenance vessels. This office does not have any expertise in analyzing or projecting the expanse of possible oil spills. We are in receipt of a copy of the Advisory Council's December 11, 2009 letter to the THPO and will defer to the Council's opinion that expansion of the APE is not supported by the simulation and modeling that was included in the project FEIS.

If you have any questions concerning these comments, please feel free to contact me.

Sincerely,



Brona Simon
State Historic Preservation Officer
Executive Director
Massachusetts Historical Commission

xc: Walter D. Cruickshank, Minerals Management Service
Andrew D. Krueger, Minerals Management Service
Craig Olmsted, Cape Wind Associates, LLC
John Eddins, Advisory Council on Historic Preservation
Carol Shull, Keeper of the National Register, National Park Service
Bettina Washington, Wampanoag Tribe of Gay Head (Aquinnah) THPO
George Green, Jr., Mashpee Wampanoag Tribe THPO
John Brown, Narragansett Tribe THPO
Cheryl Andrews-Maltais, Wampanoag Tribe of Gay Head (Aquinnah) Chairwoman
Cedric Cromwell, Mashpee Wampanoag Tribe Chairman
Bruce Bozsum, Mohegan Indian Tribe Chairman
Michael J. Thomas, Mashantucket Pequot Tribe Chairman
Bill Bolger, National Park Service
Karen Kirk Adams, USACOE-NED-Regulatory
David Saunders, US DOI Bureau of Indian Affairs Eastern Region
Betsy Merritt, National Trust for Historic Preservation
Roberta Lane, National Trust for Historic Preservation
Mark Voigt, Nantucket Historic District Commission
Sarah Korjeff, Cape Cod Commission
Audra Parker, Alliance to Protect Nantucket Sound
Matthew F. Pawa, Esq.
Clean Power Now
Aquinnah Historical Commission
Barnstable Historical Commission
Chatham Historical Commission
Edgartown Historical Commission
Falmouth Historical Commission
Mashpee Historical Commission
Oak Bluffs Historical Commission
Yarmouth Historical Commission



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Massachusetts Historical Commission

November 5, 2009

Christopher Horrell
Acting Federal Preservation Officer
Minerals Management Service
1201 Elmwood Park Blvd
New Orleans, LA 70123-2394

RE: National Register Eligibility Opinion for Nantucket Sound Traditional Cultural Property, MA.
Cape Wind Energy Project. MHC #RC.29785.

Dear Mr. Horrell:

This is in response to your letter dated October 9, 2009, with which you enclosed the "Minerals Management Service National Register Eligibility Determination for Nantucket Sound as a Traditional Cultural Property and Historic Property."

It is the role of the State Historic Preservation Officer (SHPO) to form an independent opinion regarding the National Register-eligibility of a property based on factual research sources in archaeology, history, and ethnography.

After review of the materials that you submitted, and review of pertinent archaeological, historical, and ethnographic sources, I disagree with your finding that Nantucket Sound is not eligible for listing in the National Register of Historic Places as a Traditional Cultural Property.

Please find enclosed the opinion of the Massachusetts SHPO that Nantucket Sound is a Wampanoag Traditional Cultural Property that meets the Criteria of Eligibility (36 CFR Part 60) for listing in the National Register of Historic Places under Criteria A, B, C, and D at the local level of significance.

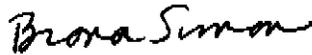
The enclosed opinion of the Massachusetts SHPO summarizes considerable archaeological, historical, and ethnographic information that substantiates that Nantucket Sound is historically significant. The historical significance of Nantucket Sound relates to the Native American exploration and settlement of Cape Cod and the Islands and with the central events of the Wampanoag origin story of Maushop and Squant/Squannit (Criterion A); for its association with Maushop and Squant/Squannit (Criterion B); as a significant and distinguishable entity integral to Wampanoag folklife traditions, practices, cosmology, and religion (Criterion C); and, for the important information it has yielded and/or may be likely to yield through archaeology, history, and ethnography (Criterion D).

While my office's independent research findings support the opinions of the Wampanoag Tribe of Gay Head (Aquinnah) Tribal Historic Preservation Officer and the Mashpee Wampanoag Tribe that Nantucket Sound is a significant Traditional Cultural Property to the Wampanoag, the Massachusetts SHPO has not been party to any of the consultation meetings that MMS has held directly with the Tribes.

Because we have a difference of opinion, the MMS should seek a formal Determination of Eligibility (36 CFR 63) from the Keeper of the National Register pursuant to 36 CFR 800.4(c)(2). Please enclose a copy of this letter and the enclosed Massachusetts SHPO's opinion with your submittal to the Keeper of the National Register, as well as any additional comments from the Wampanoag Tribe of Gay Head (Aquinnah) or Mashpee Wampanoag Tribe.

Please contact me if you have any questions or need additional information.

Sincerely,



Brona Simon
State Historic Preservation Officer
Executive Director
Massachusetts Historical Commission

Enclosure

xc w/ enclosure:

Walter D. Cruickshank, Minerals Management Service
Andrew D. Krueger, Minerals Management Service
Craig Olmsted, Cape Wind Associates, LLC
John Eddins, Advisory Council on Historic Preservation
Janet Snyder Matthews, Keeper of the National Register, National Park Service
Bettina Washington, Wampanoag Tribe of Gay Head (Aquinnah) THPO
George Green, Jr., Mashpee Wampanoag Tribe THPO
John Brown, Narragansett Tribe THPO
Cheryl Andrews-Maltais, Wampanoag Tribe of Gay Head (Aquinnah) Chairwoman
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Bruce Bozsum, Mohegan Indian Tribe Chairman
Michael J. Thomas, Mashantucket Pequot Tribe Chairman
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Audra Parker, Alliance to Protect Nantucket Sound
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Clean Power Now
Aquinnah Historical Commission
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Chatham Historical Commission
Edgartown Historical Commission
Falmouth Historical Commission
Mashpee Historical Commission
Oak Bluffs Historical Commission
Yarmouth Historical Commission

Massachusetts Historical Commission
Office of the Massachusetts State Historic Preservation Officer
OPINION: ELIGIBILITY FOR NATIONAL REGISTER OF HISTORIC PLACES
Nantucket Sound Wampanoag Traditional Cultural Property

November 5, 2009

There is extensive archaeological, historical, and ethnographic information that supports the opinions of the Tribal Historic Preservation Officer of the Wampanoag Tribe of Gay Head (Aquinnah) (Washington 2009) and the resolution of the Tribal Council of the Mashpee Wampanoag Tribe (2009) that Nantucket Sound is a Traditional Cultural Property that is eligible for listing in the National Register of Historic Places.

It is the opinion of the Massachusetts SHPO that Nantucket Sound as a Wampanoag Traditional Cultural Property meets the Criteria of Eligibility (36 CFR Part 60) for listing in the National Register of Historic Places under Criteria A, B, C, and D at the local level of significance. The historical significance of Nantucket Sound relates to the Native American exploration and settlement of Cape Cod and the Islands and with the central events of the Wampanoag origin story of Maushop and Squant/Squannit (Criterion A); for its association with Maushop and Squant/Squannit (Criterion B); as a significant and distinguishable entity integral to Wampanoag folklife traditions, practices, cosmology, and religion (Criterion C); and, for the important information it has yielded and/or may be likely to yield through archaeology, history, and ethnography (Criterion D).

The following summary of this information is intended to highlight pertinent historical "patterns or trends" (National Register of Historic Places [NRHP] 1997a: 7) as historic contexts in order to apply the Criteria of Eligibility (36 C.F.R. Part 60). Evaluation for National Register eligibility does not require an exhaustive and comprehensive compendium of all available information, but rather, an "illustrative" summary to demonstrate that an historic property is "representative of its theme, place, and time" (NRHP 1997b: 39, 49).

Archaeological Data

Prior to ca. 6,000 years ago, Nantucket Sound was exposed land (Uchupi et al. 1996). Native groups would have occupied the exposed lands, and focused their gathering and hunting and

social activities near fresh water and estuarine settings that are now submerged under the waters of Nantucket Sound. The Pleistocene-Holocene geology of Nantucket Sound shows the area ice-free by about 18,000 calendar years ago, containing favorable environmental settings in transformation that provided abundant resources and opportunities for Paleoindian exploration and occupation (Poppe et al. 2008; Ridge 2003). The islands of Nantucket Sound and its shallow submerged features such as Horseshoe Shoal were once hills on a broad coastal plain called the Nantucket Shelf Region (Provincetown Center for Coastal Studies 2005). The geographical boundaries of Nantucket Sound have been established by the US Department of Commerce, Coast and Geodetic Survey (ibid.: 7, 16-17) as follows:

Nantucket Sound is defined as the roughly triangular area of continental shelf that lies between the southern shore of Cape Cod (between Monomoy and Mashpee), and the islands of Martha's Vineyard and Nantucket.... Nantucket Sound constitutes a small, shallow marine basin whose edges are formed by the islands of Nantucket, Martha's Vineyard and Monomoy, the submerged shoals associated with these islands, and by the Cape....At its western end, Nantucket Sound merges with Vineyard Sound [Provincetown Center for Coastal Studies 2005: 7].

The oral tradition of the Aquinnah Wampanoag (Washington 2009) that their ancestors "walked" to Noepe (Martha's Vineyard) is supported by the paleogeographic reconstruction (Dunford and O'Brien: 32) and plausible archaeological interpretations of particular routes used by Paleoindian bands (ibid.: 36). Evidence of the very earliest known explorers in New England dating to the Paleoindian period—presently estimated to have commenced about 13,000 calendar years ago—have been found on Martha's Vineyard (Mahlstedt 1987: 23), Nantucket (Pretola & Little 1988: 49), and Cape Cod (Dunford and O'Brien 1997: 26-36). The dearth of Paleoindian and Early Archaic sites in the now-terrestrial parts of the Cape Cod and Islands region, is considered by archaeologists to be explained in part by the submergence of formerly exposed land where the majority of the earlier sites were located (e.g., Braun 1974: 583; Dincauze & Mulholland 1977; Herbster 2009: 8; Thorbahn et al. 1980: 30). Elsewhere in the New England region, extinct Pleistocene fauna and artifacts dating to the Archaic period have been found accidentally by scallopers dragging the seabed (for examples of previous underwater discoveries in the region, see Bell 2009: 19 & op. cit.). The entire region would have been as intensively used as terrestrial coastal places were used in later periods. Accurate geological

information and modern technologies are now available to locate intact, submerged ancient period sites that survived the dynamic effects of submergence (Merwin et al. 2003).

A major scientific discovery in Nantucket Sound was made during archaeological survey for the Cape Wind Energy project and during previous geological studies (Robinson et al. 2003: 36; Robinson et al. 2004: 59-62; Robinson 2008: 22). Core samples detected submerged, ancient terrestrial soils with preserved wood, charcoal, plants, and seeds in intact contexts that survived the submergence of Nantucket Sound. Radiocarbon dating of these deposits yielded dates of 5,490 B.P., 6,470 B.P., and 10,100 B.P. The core samples from the Cape Wind Energy project survey were interpreted as evidence of an intact upland deciduous forest floor, a fresh or brackish water wetlands, and a shallow freshwater pond or swamp. These are precisely the kinds of ancient landforms and environmental settings where ancient Native American features and artifacts are expected to be found in Nantucket Sound. The discovery of intact, submerged ancient landscape under the waters of Nantucket Sound is historically confirming to the Tribes (Andrews-Maltais 2008; Mashpee Wampanoag Tribe 2009; Washington 2009).

Survey results from Nantucket Sound demonstrate that Southern New England waters, and Nantucket Sound in particular, contain preserved landforms that have integrity, and a high likelihood of yielding important archaeological information. Submerged environments are likely to have preserved artifacts made of wood, plant material, leather, bone, and antler that are not typically preserved at terrestrial sites. Submerged sites have the potential to yield whole categories of ancient material culture that are usually absent from terrestrial sites. Nantucket Sound is likely to provide a more complete view of the range of technologies developed and refined by ancient Native Americans in New England, site selection, land use, and settlement patterns from the Paleoindian through the Archaic periods that New England archaeologists previously thought had probably been lost completely to the rising sea (Bell 2009: 19-21, 31 & op. cit.; Merwin et al. 2003; Stright 1986, 1990).

Ancient Native Americans in Southern New England relied considerably on marine resources and marine settings for subsistence, transportation, and for symbolic and ritual purposes (Bragdon 1996; Salwen 1978; Snow 1978; Strauss 1987; Willoughby 1935). The appearance by at least 7,500 years ago of specialized groundstone tools, particularly gouges, celts, axes, and adzes are considered to be evidence for *mushoon* (dugout canoe) manufacturing. Skin- and bark-on-frame boats were also used in this region (Bell 2009: 37 n4 & op. cit.; Salwen

1978: 163-164). Wampum produced from quahog shell was made for symbolic and ritual purposes, and was widely exchanged throughout the Northeast (Bragdon 1996: 97-98; Bragdon 2009: 104-105). Marine animals were rendered as effigies in stone objects (Willoughby 1935), whose forms, functions, and symbolism linked to cosmology and shamanistic practices, particularly those associated with water places (cf. Bragdon 1995). Graves were often placed in view of water. Ritual and religious activities are intensely focal in mortuary practices (Vitelli 2009).

Marine resources from Nantucket Sound were taken and used by both coastal and inland Native populations. Archaeological sites along the coasts, on the islands, and inland include habitation and resource processing areas. Many have prodigious amounts of preserved faunal remains of marine resources (fish, shellfish, marine mammals, waterfowl, crustaceans, turtles), and specialized gear and features, required for hunting, gathering, processing, cooking, and disposal. Distinctive and inventive Native technology traditions maintained for millennia include varieties of rock and wood fishing weirs; woven nets with notched or perforated rock sinkers, and animistic lures; traps; baskets; bone and antler fish hooks, harpoons, and projectile points; chipped and ground stone tools for capturing, cutting, gutting, scraping, pounding, and for boat making; wooden drying and cooking racks; pottery; and, pits and middens (see, e.g., Little & Schoeninger 1995; Ritchie 1969; Salwen 1978: 162; Snow 1978: 60, 65-67; Speck & Dexter 1948; Willoughby 1935; for particular excavated data, refer to Massachusetts Historical Commission 1978- index entries "Aquinnah," "Cape Cod and the Islands," Mashpee," etc., q.v.). Inland sites have understandably fewer quantities of preserved shell and bone from marine and coastal species, likely because fish and perishable shellfish meat were smoked or dried on the shore with the more archaeologically durable shells left behind, and also because faunal remains of any kind are usually not well preserved at inland sites. The presence of any marine resources at inland sites indicates connections and interrelationships of inland and coastal populations, and likely the cooperative and negotiated sharing of access to coastal and marine resource-gathering places (Mulholland 1988: 149-154).

In time, many species of land and marine plants and animals were displaced or became extinct, while other species moved into this region, all under the observation of the resident Native peoples. These changes could be protracted or at other times dramatically quick, noticeable within a person's lifetime and fixed in the social memory of the people. Ancient

Native American groups adapted to this ever-changing environment, as they transformed habitats and landscapes, moving ahead of sea level rise. As the habitable land area decreased with the rising ocean waters, and human population increased, social organization and certain social practices also changed creatively. Some retained their coastal orientation for recurrent settlement, subsistence, and for transportation. Native Americans adapted their tools and tool forms, and their gathering, hunting, and fishing techniques as plant and animal species became more or less available. Through intelligence, creativity, experimentation, and agency informed by their distinctive culture and “archive of knowledge” (Handsman 2008; Vitelli 2009) as “genealogies of practice” (Mills & Walker 2008), the Wampanoags affected and transformed the evolving geographic and ecological settings of Nantucket Sound as their homelands.

Bragdon (1999: 85) considered the innovative developments of politically complex social organizations distinctive to Southern New England. She postulated the presence of “chiefdoms” with “contingent” sedentism and despite popular conceptions, apparently without primary reliance upon maize agriculture in coastal places (Bragdon 1996; Chilton 2006; Mulholland 1988: 146; Stein 2007). She pointed to leading “factors” in these sociopolitical arrangements including “access to marine resources, particularly certain species of shellfish; [and] occupation of ‘edge’ environments, especially fresh and saltwater estuaries which provided the greatest variety and abundance of food sources” (Bragdon 1999: 85). Bradley (2005: 52-55 & op. cit.) provided a useful summary of the regional archaeological site data viewed as “an environmental and cultural network” oriented to marsh and estuarine settings (Bradley 2005: 52). The exceptionally diverse environmental setting of Nantucket Sound, with social networks allowing or limiting access to bordering coastal lands and wetlands and abundant marine and marine-dependent resources, were foremost factors that allowed the development of innovative, autonomous sociopolitical structures for the Wampanoag Nation.

Historical Data

The earlier written descriptions of the coastal inhabitants describe the use of coastal marine resources by resident Wampanoags (Mulholland 1988: 152; Ritchie 1969: 3-9; Salwen 1978). Wampanoags have regularly been involved in shellfishing, fishing and whaling for individual, family, and group subsistence and for commercial purposes in Nantucket Sound and throughout the Cape and Islands and Southeastern Massachusetts regions (Andrews 1985; McBride &

Cherau 1996; Speck & Dexter 1948). Transactions by Sachems recorded in 17th- and 18th-century Nantucket deeds include reserving rights to beached whales (Little & Andrews 1982). There were “Indian fishing houses” in Nantucket in the 18th century (Little 1981).

The Mashpee Wampanoag were, in the 17th century, sometimes referred to by the English colonists as the “South Sea Indians,” a geographic reference to Nantucket Sound (Barber 1841: 47; he spelled it “Marshpee”). Of Mashpee Barber (1841: 47-48) writes that the town

is bounded on the south by the ocean. It is well fitted for an Indian residence, being indented by two bays, and shoots into several necks or points of land. It is also watered by several streams and ponds. These, with the ocean, afford an abundant supply of fish of various kinds. ...Many of the Indians are employed in the whale fisheries, and they are said to make the first-rate whalers. In 1837, they built a small vessel...commanded by a capable, enterprising Indian. This vessel is employed in carrying their wood to Nantucket.

Wampanoags have long participated in the fishery and whaling industries, usually historically as skilled laborers, but also for personal and group sustenance. It has also been documented that there have been notable Wampanoags and other New England Indian men and women who historically achieved business successes in marine-dependent industries. The Mashpee Wampanoag advisor and educator, Ramona Peters (2006: 43 n1) writes that, “a majority of nineteenth-century Wampanoag men from Mashpee and Aquinnah participated in the whaling industry.” Mandell (2008), Nicholas (2002, 2005), Silverman (2001, 2005), and Vickers (1981, 1983, 1985) have intensively studied and documented social and economic organization of 17th, 18th, and 19th-century Native communities to seafaring and to the maritime setting of their homelands. Important whaling ports in the vicinity included Nantucket, New Bedford, Falmouth, and Wellfleet. Whale species were hunted in Nantucket Sound, and the waters of Nantucket Sound became familiarly associated with the historic whaling industry.

Laura Orleans (2000: 10, 23, 36-37) through the “Faces of Whaling” oral and documentary history project for the National Park Service recognized Wampanoag historical narratives still circulating about the whaling industry, focused on Amos Smalley (1877-1961). Smalley was an Aquinnah Wampanoag who harpooned a white whale in 1902 south of the Azores. Smalley (1957) recounted the event in a *Reader's Digest* article, was interviewed by several newspaper reporters, and appeared on a 1958 national television program. Smalley told the story to many Wampanoag directly. Smalley's feat has been remembered and retold by

descendants with parallels drawn to the Aquinnah Wampanoag character “Tashtego” from Herman Melville’s epic novel, *Moby-Dick* (Anonymous 2007; Gaillard 1998: 120; Kinney 2009: 197; Orleans 2000: 23, 36, 50; Peters 1987: 14; Simmons 1986: 232). Smalley’s dramatic story is an important part of Wampanoag history and of this area’s whaling history generally.

Orleans’ (2000: 23) history project interviewed Edith Andrews (an Aquinnah Wampanoag) and documented information about Smalley, and about her great-great-grandfather Amos Haskins (1816-1861), a Wampanoag whaling captain. Andrew’s great-grandfather, Samuel Haskins (born ca. 1840), manned a rescue boat that responded to the tragic 1884 wreck of the *City of Columbus* on Devil’s Bridge in Nantucket Sound. Orleans (2000: 9-10) indicates the potential for much more information about the role of Native Americans in the region’s historic maritime industry from additional oral, genealogical, and documentary sources (see also Aquinnah Cultural Center Inc. n.d. [ca. 2008]; Boston Children’s Museum n.d. [ca. 2004]; and, Wampanoag Tribe of Gay Head (Aquinnah) n.d. [ca. 2005] for additional examples of contemporary Wampanoag historical consciousness of these and related subjects documented from oral and written sources).

Mandell (2008: 165) notes that in the early 19th century “a few members of the [Aquinnah] tribe owned boats and fished near shore,” but by the mid-19th century there were increased economic opportunities from commercial and recreational marine fishing in Nantucket Sound. Both Mashpee and Aquinnah Wampanoags led and sustained tourists to their homelands, and were at the forefront of the mid-19th-century Cape Cod recreational tourism movement (ibid.: 131). “Gay Head’s location at the edge of the Elizabeth Islands and prime fishing grounds gave them an advantage” as increased urban markets for seafood also gave former whalers who bought fishing boats continued income (ibid.: 165). Wampanoags continue to derive income from guiding tourists to their fishing and scenic coastal places of Nantucket Sound, which are advantaged as opportunities for “teaching moments” to convey their folklife, history, and cosmology to their visitors. Marine fishing in Nantucket Sound and shellfishing at its shores were and continue to be vital parts of the sustenance and economic strategy for resident Wampanoags that “used the land and water in ways that combined old and new methods” (ibid.: 164).

Speck and Dexter’s (1948) ethnographic fieldwork in Mashpee and Gay Head obtained detailed historical information about traditional and modern marine practices, material culture,

foodways, and folklore spanning from the mid-19th to the mid-20th century. A great variety of species were taken from Nantucket Sound and along its shores. Speck and Dexter (1948: 261-262, Figs. 1-3) described and illustrated Wampanoag artifacts made from horseshoe crabs: awls, needles, and a spear made from the tail; “lucky bones” made from the male’s chelicerae; and a basket fashioned from two horseshoe crab shells “tied together rim to rim”, likely the same kind of “handbaskets made of crabshells wrought together” observed in a Cape Cod *wetu* (wigwam) by the *Mayflower* explorers in 1620 (quoted in Handsman 2008: 169). By including archaeological, ethnographic, and historical and modern ecological data in their study, Speck and Dexter (1948) appreciated the continuities and changes in marine subsistence practices and methods.

Gertrude Haynes Aikens (Princess Evening Star) whose memory dated from the early 20th century said “South Mashpee [on Nantucket Sound] was the salt-water fishing and hunting place of the town.” She recollected Wampanoag women, men, and children quahogging, oystering, and eel fishing (Aiken[s] 1970: 19). Eel traps and eel pots were woven like baskets (Boston Children’s Museum, n.d. [ca. 2004]; Wolverton 2003: 350, 367 n37). The Peabody Museum of Archaeology and Ethnography at Harvard University curates a Mashpee Wampanoag eel trap collected in 1917 (catalogue #17-16-10/87069).

Earl Mills, Sr. (Chief Flying Eagle) relates how his father, Ferdinand Wilson Mills taught him fishing techniques in Mashpee (Mills & Mann 2006: 36, 45). Mills writes that his father wore “a red felt hat just like his father [i.e., Mills’ paternal grandfather] did, and decorate[d] it with lures, shells, and feathers. That was his way of expressing his attachment to and his respect for nature. Whenever he went fishing, he would pin onto that hat several fishhooks” (ibid.: 36). Through his recollections, Mills conveys the importance of generational connections for raising children in traditional ways that instill an appreciation of Indian perspectives on the relationship of people to the natural world and the resources it provides to feed and sustain them. Even in his clothing, Mills’ father meaningfully signals his “Indianness,” conveys direct connections to Mills’ paternal grandfather, and expresses “attachment” and “respect” for the natural world, including its marine resources (cf. Patton 2007).

For the Aquinnah Wampanoag, as well, “Male relatives taught [boys] where to find the best fishing spots—*Wampanoag fishing spots*—like the shoals of Devil’s Bridge [in Nantucket Sound] or the waters just off Noman’s Land island” (Silverman 2005: 242, emphasis added).

Silverman (2005: 242-243) appreciated the generational training of both boys and girls in the “customs that supported the Wampanoags’ sense of peoplehood. The significance of these acts rested in elders bequeathing to younger generations specialized knowledge about living off Wampanoag land.”

In another book (Mills & Breen 2001: 72), Earl Mills, Sr. relates the vital connections of food gathering from land and “sacred waters.” Russell M. Peters (1992: 14, 15) explains the *appanaug* (“seafood cooking” or clambake) as a ceremonial event. Peters’ story features his then-12-year-old grandson Steven who learns traditional ways, including gathering clams at Popponesset Bay on Nantucket Sound, where Steven can sense his “ancestor’s presence.” Steven is taught by his grandfather who had “learned how to prepare an *appanaug* from his father, who had learned from his father before him. In turn...Steven would pass the tradition on to his own children.... ‘We’re carrying on a tradition that our ancestors gave us’ ” (Peters 1992: 13, 18). Mills’ (Mills & Breen 2001; Mills & Mann 2006) and Peters’ (1987, 1992) accounts exemplify how Wampanoag

practices and beliefs endow the experiences of hunting, trapping, gathering, collecting, and farming with richly elaborated social meaning. These activities are ways to ‘keep in touch’ with supernatural helpers. To seek and take food is to experience directly with the supernatural the kind of ‘demand exchange’ often conducted with human beings [Bragdon 1996: 196].

Bragdon (1996: 131-136) discovered that even Wampanoag metaphorical language reveals an interwoven cultural conception of food, eating, and occupation of lands, with an ethic of reciprocity and expectations of sustainability by what was offered by the land and sea and through the labors of their fellows.

On August 17, 2002, the Wampanoag Indigenous Program at Plimoth Plantation organized a *mushoon* trip between Vineyard Sound and Nantucket Sound, from Falmouth to Tashmoo (at Tisbury on Martha’s Vineyard), using two *mushoonash* made at the museum’s Wampanoag Homesite (Coombs 2004a; Peters 2002). Months of practice and preparation preceded the event, renewing traditional skills with traditional nautical technology. “[S]o people wouldn’t have to ply the waters on an empty stomach,” food was provided to the participants during their practice sessions, and an *appanaug* was held on Lobsterville Beach after the paddlers arrived on Martha’s Vineyard (Coombs 2004a).

It was a trip of very historic import as it happened within the ancestral Wampanoag homeland, and with Wampanoag people from several tribes: Aquinnah, Mashpee, and Manomet (Herring Pond). Other staff and community members of other nations joined us as well, including Micmac, Narragansett, and Pequot.... The trip is something we feel was meant to happen when it did.... It was a trip meant to happen. A circle completed [Coombs 2004a].

The voyage was timed to coincide with the annual Legends of Maushop Pageant held by the Aquinnah Wampanoag. Coombs' (2004a) and Peters' (2002) accounts convey that the experience for the participants was evocatively "mystical," "very spiritual," and "historic." Coombs (ibid.) wrote that the goal of the project "was to acknowledge the navigational prowess of our ancestors; to celebrate our traditional way of life which we understand to be viable and sustainable; and to remind us of our connection to our ancestors, the earth and waters, and our responsibility to them." When Coombs, an Aquinnah Wampanoag educator and historian, concluded that "it was indeed a day of mending the hoop," she invoked a conventional phrase that expresses sanctity of contemporary Native American community-building and renewal of connections through collaboration, cooperation, and mentoring by traditional cultural practices occurring within traditional homelands.

The modern Aquinnah Wampanoag shellfish hatchery, and development of a Mashpee hatchery, are promising examples of how autonomous Wampanoags can seek to achieve economic benefit by cooperatively fostering indigenous marine resources while negotiating the modern global economy and creatively adapting to regional and global climate change (Vosk 2008).

Nantucket Sound and its marine resources, then, provide the setting, source, and content for Wampanoag traditions, cosmology, and practices through foodways, material culture, mentoring, and historical narratives, including the most important origin story of the Wampanoag homelands.

Ethnographic Data

The events of the central origin story of the Wampanoag homelands take place in Nantucket Sound. Simmons (1986: 172-234) presents several sequent versions of the story of Maushop, his wife Squant (also known as Old Squant, Granny Squant, and Squannit as pronounced in Mashpee [Peters 1987: 66; Simmons 1986: 173], and both names spelled variously), and their

children. The story involves the giant Maushop who attempts to rescue Wampanoag children kidnapped from land and taken offshore by a huge bird. Maushop discovers Noepe (Martha's Vineyard) and creates Nantucket and other islands. He transforms Squant/Squannit into other islands or rocks. He drags his big toe across Nantucket Sound to separate the Elizabeth Islands or Noman's Land from Martha's Vineyard, and drops rocks in Nantucket Sound to create Devil's Bridge. Maushop transforms his children into whales. He sends or flings dead or dying whales ashore or cooks whales to feed his people. Details of the story explain how Maushop "withdrew" after the Europeans arrived—Silverman (2005: 33; cf. Simmons 1986: 175-176) says "The Wampanoags proffered differing accounts of Moshup's disappearance, but in [short] time [by 1787] many of them would point to his disgust at the arrival of Englishmen"—"leaving only indirect evidence of his presence" (Simmons 1986: 172). Landscape features and characteristics such as the multicolored, Miocene fossil-bearing clays at Gay Head that indeed have the appearance of "an immense archaeological midden" (Simmons 1986: 174) are considered to be the remains of Maushop's ancient cooking fires. Ocean fog from Nantucket Sound is said to be the smoke from Maushop's pipe. Granny Squant/Squannit is usually a fearsome character to be placated with gifts, or better avoided altogether, in stories told to children to discipline and control their behavior. Speck and Dexter (1948: 260) said that "One bivalve, the common jingle shell (*Anomia simplex*), played a part in local (Gay Head) Wampanoag fables and myths, in which the shells are referred to as 'Granny Squanit's toe nails.' These were doubtless used as toys for children because of their bright golden and silver colors and the jingle sounds which they make."

The earliest written version of the Maushop story was published in 1643, an "impressive historical pedigree" (Simmons 1986: 233, 295 n1) that indicates that the origin story has great antiquity. This story and its variants continue to be related by and among Mashpee and Aquinnah Wampanoag in modern times (e.g., Andrews-Maltais 2009; Anonymous 2007; Aquinnah Cultural Center Inc., n.d. [ca. 2008]; Bingham 1970: 22; Coombs 2004a; Manning & Eccher 2001; Peters 1987: 66; Silverman 2005: 33 n68; Simmons 1986: 220-233; Simmons 1992: 323-325), demonstrating the continued *central* cultural significance of the story's maritime-related themes and symbolism linked to cultural identity and place, what Crosby (1993) characterizes as a "spiritual landscape." Simmons (1986: 234, *emphasis added*) recognizes that "the [Maushop-

Squant/Squannit] legends *still convey* a self-contained magical world where the ancestors, landscape, weather, sounds, and sea creatures are alive in distinctly Indian ways.”

Christie (2009) more generally explains that, “In conventional anthropological literature, ‘landscape’ is the term applied to the meaning local people bestow on their cultural and physical surroundings.” Christie wrote that “Landscape is a powerful factor in the operation of memory because of the associations narrators make between the local landscape and the events of the stories they tell. Ancestors and mythological events often become fixed in a specific landscape and act as timeless reference points” (Christie 2009). The theoretical, anthropological issues of historical *and contemporary* New England Indian identity created through “history,” “memory” and “landscapes” as ancestral homelands are considered in recent, current, and developing research by Bragdon (1992, 2009), Bruchac (2005), Coombs (2004b), Handsman (1991, 2008), Handsman and Lamb Richmond (1995), Lightfoot (2008), Mandell (2008), Mills and Walker (2008), Paynter (2002), Robinson (2000), Silliman (2009) and Vitelli (2009) among others. While these theoretical approaches to archaeological, historical, and ethnographic data to conceptualize historical and contemporary Native special places within homelands are chiefly of interest to anthropologists, these contemporary anthropological interpretive approaches are relevant to the consideration of spaces and places as “Traditional Cultural Properties” as conceived by Parker and King (1998) in *Guidelines for Evaluating and Documenting Traditional Cultural Properties*.

The very meaning of “Wampanoag” rendered in English as the phrase “People of the First Light or Dawn” refers to their relationship to Nantucket Sound as integral to their homelands, their history, their present, and their future. The evocative phrase “People of the First Light” is like a “tiny imagist poem” (Edward Sapir, quoted in Bragdon 1996: 135) packed with meaning. The word “Wampanoag” is both temporally literal—they have always been/are/will be the first people to see the sunrise over the water—and symbolically referential: they are *of* the place, it is how they identify themselves and how others know them. The Tribes have provided documentation about the religious qualities and characteristics of Nantucket Sound. The Tribes have referred to their cultural identity and to their religious practices as dependent on their reverential viewsheds of Nantucket Sound. These qualities and characteristics to the Wampanoag are also in their contemporaneity, history, folklife traditions, and cosmology. These define their identity as a people, embody their settled place in the region, and have historical, cosmological,

and religious meanings to them. For the Mashpee Wampanoag Tribe and the Wampanoag Tribe of Gay Head (Aquinnah), and to other Indian Nations as invited visitors to ceremonial events, Nantucket Sound is a central and important locale for their folkways. The Wampanoag people value Nantucket Sound as integral to their culturally rich, multidimensional folklife for its symbolic and religious qualities, and because marine resources play an important role in the training of generations in the continuation of their material culture, foodways, practices, cosmology, and narrative traditions.

Evaluation Considerations

The Massachusetts State Historic Preservation Officer (SHPO) recognizes that in addition to the “Criteria Consideration” for religious properties (36 C.F.R. Part 60), the National Register of Historic Places (NRHP 1997a: 5) also “[g]enerally...excludes from the definition of ‘site’ natural waterways or bodies of water that served as determinants in the location of communities or were significant in the locality’s subsequent economic development. While they may have been ‘avenues of exploration,’ the features most appropriate to document this significance are the properties built in association with the waterways.” This guideline is actually a minor point in a longer discussion about the definition of “site” for the purposes of considering if a “property type” is National Register-eligible. The meaning of “natural” is intended to contrast artificial waterways and water bodies such as historic canals, aqueducts and constructed reservoirs.

Although there is no specific exclusionary language about waterways and water bodies for National Register consideration in the regulations (36 C.F.R. Part 60) or the law (16 U.S.C. 470 et seq.), practitioners of the evaluation process apply this guideline to the particular historic contexts documented for specific historic properties (NRHP 1997a; Parker & King 1998). A Traditional Cultural Property is a special historic “property type.” This general guideline to exclude natural waterways and water bodies, and the religious property consideration, *does not apply* to Traditional Cultural Properties “with sound documentation...of historical or cultural significance” (Parker & King 1998: 11; see also, *ibid.*: 14, 20; see also NRHP 1997a: 27).

Nevertheless, the significant historical qualities and characteristics of Nantucket Sound as an historic property per se—and not also as a Traditional Cultural Property with the sound documentation summarized here—are not limited to the specific exclusionary categories of the guideline. It is the opinion of the Massachusetts SHPO that none of the exclusionary criteria

considerations and evaluation issues outlined in the law, regulations, and guidance documents is pertinent to Nantucket Sound as a Traditional Cultural Property.

As to the Criteria Consideration for Nantucket Sound as a religious property—affirmed by the Tribes and documented through scholarship—the National Register guidance documents provide considerable explanation as to why this exclusion *does not apply* to historical Traditional Cultural Properties and to those religious properties and traditions “having secular scholarly recognition” (NRHP 1997a: 26-28; Parker & King 1998: 1, 2, 3, 5, 14-15):

Application of this criteria consideration to traditional cultural properties is fraught with the potential for ethnocentrism and discrimination. In many traditional societies, including most American Indian societies, the clear distinction made by Euroamerican society between religion and the rest of culture does not exist. As a result, properties that have traditional cultural significance are regularly discussed by those who value them in terms that have religious connotations [Parker & King 1998: 14].

In simplest terms, the fact that a property is used for religious purposes by a traditional group, such as seeking supernatural visions, collecting or preparing native medicines, or carrying out ceremonies, or is described by the group in terms that are classified by the outside observer as “religious” should not by itself be taken to make the property ineligible, since these activities may be expressions of traditional cultural beliefs and may be intrinsic to the continuation of traditional cultural practices [ibid.: 15].

The Section 106 regulations provide explicit direction to federal agencies to evaluate properties that have religious significance to Native American tribes: “The agency official *shall acknowledge* that Indian tribes...possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them” (36 C.F.R. 800.4(c)(1), emphasis added). The Tribes have provided documentation about the religious qualities and characteristics of Nantucket Sound. The religious beliefs and practices of the Wampanoag are the subjects of an enormous body of recognized secular scholarship well known to regional archaeologists, ethnohistorians, and ethnographers (e.g., Bragdon 1996, 2009; Silverman 2003, 2005; Simmons 1981; Vitelli 2009; & op. cit.).

Conclusion

The identity and culture of the indigenous Wampanoag are inextricably linked to Nantucket Sound. The long archaeological and historical record of dependence upon marine resources and

the ocean setting are well documented, with many illustrative historical and contemporary examples of the specific use of Nantucket Sound by the Wampanoag. Many more examples are documented in the references cited, and additional archaeological, historical, and ethnographic research could locate even more specific examples about these “Native maritime tribes” (Mandell 2008: 165). Their folklife of traditional practices, symbolism, material culture, foodways, mentoring, and narratives are sourced from and shaped by their relationship to Nantucket Sound. The traditional cultural significance of Nantucket Sound as an historical, symbolic, and sacred central place to the Wampanoag is supported by the opinions of the Tribal Historic Preservation Officer of the Wampanoag Tribe of Gay Head (Aquinnah) and the resolution of the Tribal Council of the Mashpee Wampanoag Tribe; by contemporary Wampanoag historical consciousness of important persons, places, and events in recorded oral and written narratives; and by scholars in ethnohistory. Nantucket Sound is a Traditional Cultural Property that is eligible for listing in the National Register of Historic Places at the local level of significance.

In the Massachusetts SHPO’s opinion, Nantucket Sound as a Traditional Cultural Property is a “site” that has integrity of “relationship” and “condition” (Parker & King 1998: 11-12) including location, setting, materials, feeling, and association. It meets Criterion A for its associations with the ancient and historical period Native American exploration and settlement of Cape Cod and the Islands, and with the central events of the Wampanoag origin story of Maushop and Squant/Squannit; Criterion B for its association with Maushop and Squant/Squannit; Criterion C as a significant and distinguishable entity integral to Wampanoag folklife traditions, practices, cosmology, religion, material culture, foodways, mentoring, and narratives; and, Criterion D for the important cultural, historical, and scientific information it has yielded and/or may be likely to yield through archaeology, history, and ethnography about the nature, timing, and changes of occupation, settlement, and land use prior to 6,000 years ago and after as a result of ocean submergence, about maritime resource use and technologies, about sociopolitical adaptations and innovations related to maritime resource acquisition and access sharing and/or resource exchange, about cultural practices and traditions of the Native Americans of Cape Cod and the Islands in relationship with other peoples in ancient and historical times, and about transformations brought about by European exploration, American settlement, and marine resource exploitation within Wampanoag homelands.

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The Commonwealth of Massachusetts

William Francis Galvin, Secretary of the Commonwealth
Massachusetts Historical Commission

October 8, 2008

Rodney E. Cluck
Project Manager
Melanie Stright
Federal Preservation Officer
Alternative Energy Program
Minerals Management Service
381 Elden Street
Mail Stop 4080
Herndon, VA 20170

RE: Cape Wind Energy Project, Nantucket Sound, MA. MHC #RC.29785.

Dear Mr. Cluck and Ms. Stright:

This correspondence is offered in response to your request for additional written comments from consulting parties following the meeting held on Cape Cod on September 9, 2008. Specifically, you have asked consulting parties to comment on the necessity for additional identification of historic properties and on the differing approaches to the assessment of adverse effects by the U.S. Army Corps of Engineers and the Minerals Management Service.

With regard to the assessment of adverse effects and the application of the criteria of effect to the preferred alternative, the MHC has the following comments. The MHC remains concerned that MMS has only identified three adverse effects in contrast to all of the "adverse effects" which were previously identified by the United States Army Corps of Engineers (COE) when the COE was the lead federal agency for this project. Specifically, the MHC concurred with the COE's prior determination that the preferred alternative for the Cape Wind project would have an **adverse effect** on the following historic properties: the Nobska Point Light Station (Falmouth); the Cotuit Historic District, the Col. Charles Codman Estate, the Wianno Historic District, the Wianno Club, the Hyannis Port Historic District, and the Kennedy Compound (all in Barnstable); the Monomoy Point Lighthouse (Chatham); the West Chop Light Station (Tisbury); the East Chop Light Station and the Dr. Harrison A. Tucker Cottage (both in Oak Bluffs); the Edgartown Village Historic District, the Edgartown Harbor Lighthouse, and the Cape Poge Light (Edgartown); and the Nantucket Great Point Light and the Nantucket National Historic Landmark District (Nantucket). 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 CFR 800.5(a)(2)(iv and v)).

The MHC is particularly concerned that the MMS has not included the Nantucket Historic District (Nantucket Island) in its adverse effect determinations. It should be noted that the entire island is a historic district that has been designated as a National Historic Landmark, not only for its historic villages, but for the integrity of its cultural landscape and scattered historic buildings. The Nantucket Historic District retains its character and maritime setting, and the introduction of

the project into its setting is an adverse effect. The MHC believes that the effect to this National Historic Landmark, as evidenced by earlier visual analysis, is a direct adverse effect on the historic resource (36 CFR 800.5(a)(2)(iv and v)).

MHC believes that the MMS's contractor, TRC, Inc., has incorrectly applied the criteria of effect by defining a set radius for their analysis and by using percentages of buildings as a basis for determining effects. The MHC requests that MMS reexamine the methodology used to apply the criteria and again seek the comments of the consulting parties. It is critically important to assess the effects of the project's entirety and to ensure that the scope of historic properties affected is accurate in order for the remainder of the steps in the Section 106 process to be meaningful and productive.

With regard to the identification of additional historic properties, the MHC offers the following comments. The MHC originally concurred with the COE's methodology for a representative sampling of historic properties from which to conduct visual studies. The Alliance to Protect Nantucket Sound (APNS) has provided additional information concerning locations of historic properties from which additional visual analysis should be performed. The MHC agrees that the APNS's research recently provided to your agency (a copy of which was received at this office) provides the basis for necessary additional identification efforts and subsequent visual analysis. Of particular interest is the Falmouth Heights Historic District area. MHC opinion of the district at Falmouth Heights is that it meets the criteria for listing in the National Register of Historic Places.

In light of new information produced during the consultation process thus far, the MHC strongly urges the MMS to reconsider both the identification efforts and the application of the criteria of effect for the project.

These comments are offered to assist in compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (36 CFR 800). Please contact Ann Lattinville or Edward L. Bell of my staff if you have any questions.

Sincerely,



Brona Simon
State Historic Preservation Officer
Executive Director
Massachusetts Historical Commission

xc: see attached

xc:

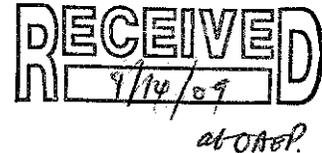
Cape Wind Associates, LLC
Don Klima, Advisory Council on Historic Preservation
John Eddins, Advisory Council on Historic Preservation
Betsy Merritt, National Trust for Historic Preservation
Wendy Nicholas, National Trust for Historic Preservation
Rebecca Williams, National Trust for Historic Preservation
George Price, Superintendent, Cape Cod National Seashore
Caroline Hall, National Park Service
Bill Bolger, National Park Service
Secretary Ian A. Bowles, EEA, MEPA Unit
Conrad C. Lautenbacher, Jr. NOAA
Karen Kirk Adams, USACOE-NED-Regulatory
Kate Atwood, USACOE-NED
John S. Wilson USFW
Bettina Washington, Wampanoag Tribe of Gay Head (Aquinnah)
George Green, Jr., Mashpee Wampanoag Tribe
Massachusetts Coastal Zone Management
Victor Mastone, Board of Underwater Archaeological Resources
Massachusetts Commission on Indian Affairs
Sarah Korjeff, Cape Cod Commission
Falmouth Historical Commission
Yarmouth Historical Commission
Mashpee Historical Commission
Barnstable Historical Commission
Nantucket Historical Commission
Edgartown Historical Commission
Oak Bluffs Historical Commission
Chatham Historical Commission
Alliance to Protect Nantucket Sound
Clean Power Now



The Commonwealth of Massachusetts

September 10, 2009 William Francis Galvin, Secretary of the Commonwealth
Massachusetts Historical Commission

Walter D. Cruickshank
Deputy Director
Minerals Management Service
U.S. Department of the Interior
381 Elden Street, MS 4090
Herndon, VA 20170



RE: Cape Wind Energy Project

Dear Mr. Cruickshank:

The Massachusetts Historical Commission (MHC), the office of the Massachusetts State Historic Preservation Officer (SHPO), is in receipt of your letter faxed on September 9, 2009, regarding your proposed next Section 106 consultation meeting for September 30, 2009 in Washington, DC.

As SHPO, I respectfully request that you arrange to have the next Section 106 consultation meeting in Hyannis, Massachusetts, so that I, as SHPO, as well as other local consulting parties will be able to attend.

Sincerely,

Brona Simon
State Historic Preservation Officer
Massachusetts Historical Commission

xc:

Craig Olmsted, Cape Wind Associates, LLC
John Eddins, Advisory Council on Historic Preservation
Betina Washington, Wampanoag Tribe of Gay Head (Aquinnah) THPO
George (Chuckie) Green, Jr., Mashpee Wampanoag Tribe THPO
John Brown, Narragansett Tribe THPO
Bruce Bozsum, Mohegan Indian Tribe Chairman
Michael J. Thomas, Mashantucket Pequot Tribe Chairman
Janet Matthews, National Park Service
Bill Bolger, National Park Service
Karen Kirk Adams, USACOE-NED-Regulatory
Betsy Merritt, National Trust for Historic Preservation
Roberta Lane, National Trust for Historic Preservation
David Saunders, US DOI Bureau of Indian Affairs Eastern Region
Sarah Korjeff, Cape Cod Commission
Glenn G. Wattle, Alliance to Protect Nantucket Sound
Mark Voigt, Nantucket Historical Commission
Matthew F. Pawa, Esq.



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Massachusetts Historical Commission

February 6, 2009

Rodney E. Cluck
Project Manager
Alternative Energy Program
Minerals Management Service
381 Elden Street
Mail Stop 4080
Herndon, VA 20170

RE: Cape Wind Energy Project, Nantucket Sound, MA. MHC #RC.29785.

Dear Mr. Cluck:

Staff of the Massachusetts Historical Commission (MHC), the office of the Massachusetts State Historic Preservation Officer (SHPO), have reviewed the Finding of Adverse Effect (Finding) which was received at this office on January 12, 2009. In addition, the MHC has reviewed the Final Environmental Impact Statement (EIS) prepared for the project referenced above, and participated in the consultation meeting held in Boston on January 29, 2009. The MHC has considered comments made by other consulting parties and the public, and initial responses provided by staff of the Mineral Management Service (MMS), the project proponents, and consultants. After review and consideration of this information, the MHC has the following comments.

The MHC agrees with the MMS that the project will have an "adverse effect" (36 CFR 800.5) on historic properties. In MHC's opinion, the documentation (36 CFR 800.11) provided in the Finding is incomplete and insufficient. The MMS should revise the Finding to address comments of the MHC and other consulting parties. The Final EIS was prepared without the benefit of this Finding, and the EIS includes inconsistent and insufficient information about cultural resources.

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. The method and rationale for the identification effort should be summarized in the Finding. Other consulting parties continue to raise concerns about the sufficiency of the sampling methodology to characterize the magnitude of the project effects on chiefly "above-ground historic resources". In considering the project's effects in their entirety, the MMS could estimate the total number of individual historic properties in the Area of Project Effect, as only represented in the sample of historic properties that were used in the study.

The Final EIS (page 2-2) indicates, "the maximum WTG [Wind Turbine Generator] height has increased to 440 ft (134 m) (originally 417 ft [127 m])." The discussion of the survey methods for the above-ground historic resources and the visual simulations should indicate whether or not the 440 ft height was used as the survey standard. If not, the survey methods should include an evaluation of the overall reliability and validity of the survey sample to represent the effects to the historic properties in the Area of Potential Effect. It is apparent, however, based on a representative sample of above-ground historic properties that

the undertaking as a whole—whether the WTG height is 417 or 440 ft—will have an “adverse effect” on National Register-eligible and listed properties, including National Historic Landmarks.

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, “to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking” (36 CFR 800.10).

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 the Final EIS does not convey a fully considered and convincing effort to examine ways to reduce or avoid effects to cultural resources. Some alternatives that do avoid and/or minimize effects to cultural resources are rejected. For instance, one alternative for floating turbines further offshore is a technologically and commercially feasible technology that according to the Final EIS will be available in a relatively short while if not presently. But it is not adopted because it does not fit with the project’s anticipated schedule. Another, deeper water alternative that would also minimize or avoid impacts is dismissed because of increased construction costs. The analysis gives the sense that the proposed project schedule and project profitability are given more weight than the consideration of avoiding or minimizing adverse effects to historic properties. Until a more complete alternatives analysis for cultural resources is undertaken, consideration of mitigation measures is premature (36 CFR 800.6(b)(2)).

THPOs have commented that the identification, evaluation, and consideration of effects to Traditional Cultural Properties (TCPs) is not yet completed or sufficiently documented in the Finding or the Final EIS. It is not clear if the “Mashpee Wampanoag Sacred Historic Site” identified by the MMS is the same property of concern to the Wampanoag Tribe of Gay Head (Aquinnah) (WTGHA), or if there are other historic TCPs in the area of project effect that are separate and distinct to the WTGHA or to the Mashpee Wampanoag Tribe. The Finding does not explicitly state that the one identified TCP is National Register-eligible, and does not explain its significant historic characteristics. The only significant quality of the one identified historic TCP considered in the Finding and the Final EIS is a visual quality, and the analysis of effects are all predicated on particular viewing locations. Comments provided at the consultation meeting by a representative to the THPO of the WTGHA corroborated that visual qualities are not the only significant historic characteristic to consider. The MHC encourages the MMS to continue government-to-government consultation with THPOs to ensure that an adequate identification and evaluation effort has been conducted for TCPs, and to continue to consult directly with the THPOs to consider alternatives to avoid, minimize, or mitigate adverse effects to TCPs, as well as properties of “religious and cultural significance” affected by the project. Documentation that is prepared by MMS should continue to be sensitive to not disclosing some kinds of information. MMS, however, should provide summary information in the Finding that ensures the other consulting parties and the public that these matters are addressed to the THPOs’ satisfaction.

MHC also learned at the consultation meeting that additional core samples will be taken for each WTG location, and that the results of the coring will be evaluated by a qualified archaeologist. MHC is interested in learning more about the proposed additional sampling, having the opportunity to review and comment on the qualifications and on the scope and methodology which should be consistent with the Secretary of Interior’s Standards for Archeology and Historic Preservation (48 Fed. Reg. 190 (1983)), and to reviewing and commenting on the results.

The Finding mentions that the proposed lease agreement will include a "chance find clause." The statement should be revised to indicate that the provisions of 36 CFR 800.13 for post-review discoveries will be followed, and MHC recommends that the "unanticipated discoveries plan" prepared by the project consultants be included as an appendix to the Finding.

MHC's review of the Final EIS noted several discrepancies in the document relating to cultural resources, and also noted that the consideration of impacts for NEPA are still pending the outcome of the Section 106 review. The Final EIS summary (page E-12) appears to deemphasize or not address impacts to cultural resources. The MHC recognizes that the Final EIS is not a decision-making document *per se*, but the Record of Decision (ROD) will in fact rely upon it. It is important, therefore, that the ROD is based on an accurate and complete EIS. The data and conclusions about impacts to cultural resources considered in the Final EIS are incomplete, and also in some places not reliable because of the same problems noted above for the Finding. The MMS indicated that it would consider supplementing the Final EIS, and MHC encourages the MMS to supplement the Final EIS after the Section 106 consultation process is concluded and prior to issuing the ROD.

These comments are offered to assist in compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (36 CFR 800). Please contact Edward L. Bell of my staff if you have any questions.

Sincerely,



Brona Simon
State Historic Preservation Officer
Executive Director
Massachusetts Historical Commission

xc: see attached

xc:

Cape Wind Associates, LLC
Reid J. Nelson, Advisory Council on Historic Preservation
John Eddins, Advisory Council on Historic Preservation
Betsy Merritt, National Trust for Historic Preservation
Wendy Nicholas, National Trust for Historic Preservation
Rebecca Williams, National Trust for Historic Preservation
James T. Kardatzke, US DOI Bureau of Indian Affairs Eastern Region
David Saunders, US DOI Bureau of Indian Affairs Eastern Region
George Price, Superintendent, Cape Cod National Seashore
Caroline Hall, National Park Service
Bill Bolger, National Park Service
Conrad C. Lautenbacher, Jr. NOAA
Karen Kirk Adams, USACOE-NED-Regulatory
Kate Atwood, USACOE-NED
John S. Wilson USFW
Bettina Washington, Wampanoag Tribe of Gay Head (Aquinnah)
George Green, Jr., Mashpee Wampanoag Tribe
Massachusetts Commission on Indian Affairs
Secretary Ian A. Bowles, Massachusetts EEA, Attn. MEPA Unit
Massachusetts Coastal Zone Management
Victor Mastone, Board of Underwater Archaeological Resources
Sarah Korjeff, Cape Cod Commission
Falmouth Historical Commission
Yarmouth Historical Commission
Mashpee Historical Commission
Barnstable Historical Commission
Nantucket Historical Commission
Edgartown Historical Commission
Oak Bluffs Historical Commission
Chatham Historical Commission
Glenn G. Wattlely, Alliance to Protect Nantucket Sound
Clean Power Now
Sarah K. Faldetta, ESS Group Inc.
Deborah C. Cox, PAL
T. Destry Jarvis, ORAPS, LLC



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Massachusetts Historical Commission

February 6, 2009

Rodney E. Cluck
Project Manager
Alternative Energy Program
Minerals Management Service
381 Elden Street
Mail Stop 4080
Herndon, VA 20170

RE: Cape Wind Energy Project, Nantucket Sound, MA. MHC #RC.29785.

Dear Mr. Cluck:

Staff of the Massachusetts Historical Commission (MHC), the office of the Massachusetts State Historic Preservation Officer (SHPO), have reviewed the Finding of Adverse Effect (Finding) which was received at this office on January 12, 2009. In addition, the MHC has reviewed the Final Environmental Impact Statement (EIS) prepared for the project referenced above, and participated in the consultation meeting held in Boston on January 29, 2009. The MHC has considered comments made by other consulting parties and the public, and initial responses provided by staff of the Mineral Management Service (MMS), the project proponents, and consultants. After review and consideration of this information, the MHC has the following comments.

The MHC agrees with the MMS that the project will have an "adverse effect" (36 CFR 800.5) on historic properties. In MHC's opinion, the documentation (36 CFR 800.11) provided in the Finding is incomplete and insufficient. The MMS should revise the Finding to address comments of the MHC and other consulting parties. The Final EIS was prepared without the benefit of this Finding, and the EIS includes inconsistent and insufficient information about cultural resources.

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. The method and rationale for the identification effort should be summarized in the Finding. Other consulting parties continue to raise concerns about the sufficiency of the sampling methodology to characterize the magnitude of the project effects on chiefly "above-ground historic resources". In considering the project's effects in their entirety, the MMS could estimate the total number of individual historic properties in the Area of Project Effect, as only represented in the sample of historic properties that were used in the study.

The Final EIS (page 2-2) indicates, "the maximum WTG [Wind Turbine Generator] height has increased to 440 ft (134 m) (originally 417 ft [127 m])." The discussion of the survey methods for the above-ground historic resources and the visual simulations should indicate whether or not the 440 ft height was used as the survey standard. If not, the survey methods should include an evaluation of the overall reliability and validity of the survey sample to represent the effects to the historic properties in the Area of Potential Effect. It is apparent, however, based on a representative sample of above-ground historic properties that

the undertaking as a whole—whether the WTG height is 417 or 440 ft—will have an “adverse effect” on National Register-eligible and listed properties, including National Historic Landmarks.

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, “to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking” (36 CFR 800.10).

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 the Final EIS does not convey a fully considered and convincing effort to examine ways to reduce or avoid effects to cultural resources. Some alternatives that do avoid and/or minimize effects to cultural resources are rejected. For instance, one alternative for floating turbines further offshore is a technologically and commercially feasible technology that according to the Final EIS will be available in a relatively short while if not presently. But it is not adopted because it does not fit with the project’s anticipated schedule. Another, deeper water alternative that would also minimize or avoid impacts is dismissed because of increased construction costs. The analysis gives the sense that the proposed project schedule and project profitability are given more weight than the consideration of avoiding or minimizing adverse effects to historic properties. Until a more complete alternatives analysis for cultural resources is undertaken, consideration of mitigation measures is premature (36 CFR 800.6(b)(2)).

THPOs have commented that the identification, evaluation, and consideration of effects to Traditional Cultural Properties (TCPs) is not yet completed or sufficiently documented in the Finding or the Final EIS. It is not clear if the “Mashpee Wampanoag Sacred Historic Site” identified by the MMS is the same property of concern to the Wampanoag Tribe of Gay Head (Aquinnah) (WTGHA), or if there are other historic TCPs in the area of project effect that are separate and distinct to the WTGHA or to the Mashpee Wampanoag Tribe. The Finding does not explicitly state that the one identified TCP is National Register-eligible, and does not explain its significant historic characteristics. The only significant quality of the one identified historic TCP considered in the Finding and the Final EIS is a visual quality, and the analysis of effects are all predicated on particular viewing locations. Comments provided at the consultation meeting by a representative to the THPO of the WTGHA corroborated that visual qualities are not the only significant historic characteristic to consider. The MHC encourages the MMS to continue government-to-government consultation with THPOs to ensure that an adequate identification and evaluation effort has been conducted for TCPs, and to continue to consult directly with the THPOs to consider alternatives to avoid, minimize, or mitigate adverse effects to TCPs, as well as properties of “religious and cultural significance” affected by the project. Documentation that is prepared by MMS should continue to be sensitive to not disclosing some kinds of information. MMS, however, should provide summary information in the Finding that ensures the other consulting parties and the public that these matters are addressed to the THPOs’ satisfaction.

MHC also learned at the consultation meeting that additional core samples will be taken for each WTG location, and that the results of the coring will be evaluated by a qualified archaeologist. MHC is interested in learning more about the proposed additional sampling, having the opportunity to review and comment on the qualifications and on the scope and methodology which should be consistent with the Secretary of Interior’s Standards for Archeology and Historic Preservation (48 Fed. Reg. 190 (1983)), and to reviewing and commenting on the results.

The Finding mentions that the proposed lease agreement will include a "chance find clause." The statement should be revised to indicate that the provisions of 36 CFR 800.13 for post-review discoveries will be followed, and MHC recommends that the "unanticipated discoveries plan" prepared by the project consultants be included as an appendix to the Finding.

MHC's review of the Final EIS noted several discrepancies in the document relating to cultural resources, and also noted that the consideration of impacts for NEPA are still pending the outcome of the Section 106 review. The Final EIS summary (page E-12) appears to deemphasize or not address impacts to cultural resources. The MHC recognizes that the Final EIS is not a decision-making document *per se*, but the Record of Decision (ROD) will in fact rely upon it. It is important, therefore, that the ROD is based on an accurate and complete EIS. The data and conclusions about impacts to cultural resources considered in the Final EIS are incomplete, and also in some places not reliable because of the same problems noted above for the Finding. The MMS indicated that it would consider supplementing the Final EIS, and MHC encourages the MMS to supplement the Final EIS after the Section 106 consultation process is concluded and prior to issuing the ROD.

These comments are offered to assist in compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (36 CFR 800). Please contact Edward L. Bell of my staff if you have any questions.

Sincerely,



Brona Simon
State Historic Preservation Officer
Executive Director
Massachusetts Historical Commission

xc: see attached

xc:

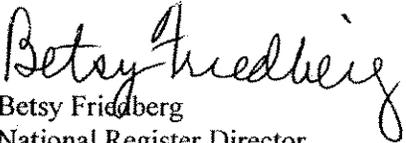
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Karen Kirk Adams, USACOE-NED-Regulatory
Kate Atwood, USACOE-NED
John S. Wilson USFW
Bettina Washington, Wampanoag Tribe of Gay Head (Aquinnah)
George Green, Jr., Mashpee Wampanoag Tribe
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Clean Power Now
Sarah K. Faldetta, ESS Group Inc.
Deborah C. Cox, PAL
T. Destry Jarvis, ORAPS, LLC

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



Mashpee Wampanoag Tribe

November 20, 2009

Larry EchoHawk
Assistant Secretary of Indian Affairs
United States Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dear Secretary EchoHawk:

On behalf of the Mashpee Wampanoag Tribe – the People of the First Light - I want to request your support for the protection of our Tribe's religious and cultural heritage in Nantucket Sound, an ocean area regulated by the federal government. And we request your advocacy in a process currently underway before the Department's Minerals Management Service (MMS) to allow the construction of a massive wind-turbine electricity generating project in the Sound in the area of our religious cultural heritage.

The area where these massive turbines would be built includes waters, rivers, and historic lands used by our ancestors for eons for traditional gatherings, ceremonial events, and for fishing. This area has sustained us – both physically and spiritually – from time immemorial. And the Sound does so today as tribal members routinely hunt, fish, gather resources, and practice traditional spiritual ceremonies there.

Our ancient and current connection to this bountiful and sustaining area is beyond question. It has sustained us for millennia allowing us to remain a people in spite of pressure to assimilate and give up our heritage. We refused to give up our sovereignty and rights to natural resources in the past and continue to refuse now. This spirit has kept us whole and it is the bedrock on which we survive today.

The question is will the MMS hear us and fairly apply federal law protecting our religious cultural resources. Unfortunately, it is now apparent that MMS is not going to that.

The Mashpee Wampanoag Tribe after years of effort was finally recognized by the federal government in 2007. As a recognized Tribe, we are entitled to the protection of federal law and preservation of our way of life. This extends to the MMS process underway to allow the proposed electricity generation project. Indeed MMS has known for decades that the entire continental shelf might contain religious and cultural sites, and that as a general proposition any federal action on the shelf would trigger satisfying the requirements of federal antiquities law.

The Tribe raised its historic religious cultural concerns with the MMS more than five years ago and believed we would be an active partner in decision-making. However MMS delayed the required formal consultation with interested parties under Section 106 of the Act until June of 2008, and refused to undertake its responsibilities in a coordinated fashion with the development of the environmental impacts statement. To date, MMS has not made a reasonable and good faith effort to identify religious cultural heritage sites in the area and has failed to conduct research, oral history interviews, or field investigations necessary to do so. We have been on this land for thousands of years and are not swayed by those who argue a delay of a few months is somehow catastrophic to their project. It is essential to our rights and compliance with federal law that MMS undertake appropriate identification and evaluation of the religious and cultural resources of the Mashpee Wampanoag Tribe.

This delay by MMS and our reiteration of our rights have resulted in enormous pressures on MMS and the Tribe. It has created a poisonous public atmosphere for the Tribe which is being accused of an 11th hour effort to kill the project, and pressure on MMS to sweep aside its responsibilities to us and approve the project. The Tribe's cultural rights have been asserted for years in the process and MMS's refusal to do its job now should not be turned around to subject the Tribe to public accusations and even ridicule. MMS's statutory responsibilities should be carried out regardless of timing pressures asserted by others.

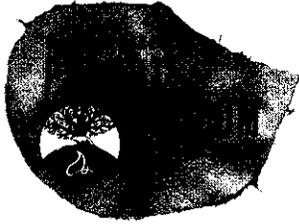
MMS's recent September 8, 2009 letter to the Tribe and others justifying its treatment of our concerns is unacceptable. It fails to explain why MMS would in effect sweep such concerns under the rug, delay formal consultation until very late in the process, and allow pressure to build to approve this massive project. As a result MMS is going to make its decision without a full or fair understanding of our religious cultural heritage – a decision which MMS interestingly acknowledges will adversely affect that heritage.

Your intervention is essential. We would like to meet with you at your earliest possible convenience to explain this unfortunate and unnecessary situation in more detail, and request that you ask Secretary Salazar for his commitment for MMS to fully comply with federal law, regulations and policies protecting religious cultural rights of recognized tribes.

I look forward to your reply.

Sincerely,


Cedric Cromwell, Chairman
Mashpee Wampanoag Tribe



11-20-09

Mr. Christopher Horrell,
Acting Federal Preservation Officer
Minerals Management Service
1201 Elmwood Park Blvd.
New Orleans, LA 70123-2394

Re: NATIONAL REGISTER ELIGIBILITY OPINION FOR NANTUCKET SOUND
TRADITIONAL CULTURAL PROPERTY, MA
CAPE WIND ENERGY PROJECT MHC # RC.29785.

Dear Mr. Horrell,

I am in receipt of a letter forwarded to me regarding the opinion of the Acting Federal Preservation Officer that Nantucket Sound is not eligible and does not meet the criteria for the National Register as a Traditional Cultural Property and Historic Property. I disagree with this determination, and I am in agreement with the Wampanoag Tribe of Gay Head (Aquinnah), the Mashpee Wampanoag Tribe and the Massachusetts State Historic Preservation Officer (SHPO) that Nantucket Sound is a Wampanoag Traditional Cultural Property that meets the Criteria of Eligibility (36 CFR Part 60) for listing in the National Register of Historic Places under Criteria A, B, C, and D at the local level of significance.

Sincerely,

Kathleen Knowles,
Tribal Historic Preservation Officer
Mashantucket Pequot Tribe

MASHANTUCKET PEQUOT MUSEUM
& RESEARCH CENTER

110 Pequot Trail, PO Box 3180
Mashantucket, CT 06338
Phone: 860 396 6800
Fax: 860 396 6850
www.pequotmuseum.org



Mashpee Wampanoag Tribe

483 Great Neck Rd. P.O. Box 1048 Mashpee, MA 02649

Phone (508) 477-0208 Fax (508) 477-1218

November 1, 2009

Christopher Horrell Ph.D.R.P.A.
Acting Federal Preservation Officer
Minerals Management Service
Gulf of Mexico OCS region
1201 Elmwood Park Boulevard
New Orleans, Louisiana 70123-2394

Dear Dr. Horrell,

In response to your draft version of site visits among MMS and the Mashpee Wampanoag Tribe (The Tribe). The Tribe feels that the modeling done by Cape Wind is impossible to prove or predict fuel spills, we on Cape Cod are subject to loss of our home insurance because the modeling tells them we are due for a category 5 hurricane. Again MMS depends on the proponent to provide this information, but even if true, it will only effect historic property when it happens and should have been addressed" early in the undertakings planning process so a broad range of alternatives may be considered during the planning process for the undertaking" (36 CFR part 800 §800.1(c)) instead of starting the process after the release of the DEIS.

August 5, 2009-Visit with the Mashpee Wampanoag Tribe

I am pleased to say that the site visit was accurately described and can be shared with the SHPO. The Tribe does not want this information released in a public document for fear of destruction of sites and invasion of ceremonial privacy. The Tribe approved the site visits to comply with the request from the MMS, even though MMS had all ready determined adverse effect on a sacred historic burial ground listed in the FEIS. This was an expression of our good faith effort to provide the agency the information needed for their deliberations. We are always concerned when we share our sacred places with government agencies, especially with agencies that have not followed their own regulation.

Amending Determination of Adverse Effect

I was also pleased to read that "MMS recommends that the "Minerals Management Service Documentation of Adverse Effect" document be amended to include two additional Traditional Cultural Properties that are eligible for listing on the National Register and will be adversely affected by the proposed project." This makes it hard for me to understand why we cannot consider the alternatives contained in sec three to "avoid, minimize, or mitigate" as the regulation states. Avoidance of adverse effects should be first and foremost to protect religious freedoms of America's first citizens also our ancestor buried beneath the waters of Nantucket Sound

Besides the fact that our religious freedom are impacted and our ancestors may be impacted is that 26 register properties will be effected, we are sacrificing a National Treasure and shared resources for the profits of a single group of investors

Finally I look forward to continuing the 106 process.

Respectfully Yours,

A handwritten signature in cursive script that reads "George 'Chuckie' Green".

George "Chuckie" Green
Tribal Historic Preservation Authority
Mashpee Wampanoag Tribe

Cc.

Sen. Paul Kirk
Rep. William Delahunt
Assist Sec Larry Echo-Hawk
Dr. Andrew Kruegar MMS
John Fowler ACHP

Tribal Historic
Preservation Office



Protecting & Preserving
Our Culture

September 17, 2009

National Park Service
National Register of Historic Places
1201 Eye St., NW (2280)
Washington, DC 20005
Attn: Ms. Janet Snyder-Matthews, PHD

Dear Ms. Snyder-Matthews,

The Tribal Historic Preservation Officer of the Wampanoag Tribe of Gay Head (Aquinnah) being duly authorized by the governing body of the Tribe, hereby requests an official determination of eligibility for the eastern vista viewshed over Nantucket Sound, located off the coast of Cape Cod, Massachusetts, for inclusion in the National Register of Historic Places. This request is being made pursuant to the Cape Wind Project application through the Section 106 process of the National Historic Preservation Act.

Since time immemorial, the Wampanoag and/or Indigenous Northeastern Woodlands Indian People have; either traversed, fished, cultivated, interred our ancestors and/or occupied the entire area including the location currently under consideration for this undertaking.

We consider the eastern vista viewshed over Nantucket Sound, located off the coast of Cape Cod, Massachusetts, eligible for inclusion in the National Register of Historic Places as the Wampanoag People consider this viewshed a Traditional Cultural Property.

We are the Wampanoag People, "The People of the First Light or Dawn", this is how we identify ourselves and how other Tribes recognize us. The unobstructed view of this expanse of water, bordered by the south shore of Cape Cod on it's north side, by Nantucket on the southern side and Martha's Vineyard on it's western side is of utmost importance to the Wampanoag People.

The WTHPO asserts that the eastern vista viewshed is essential to the Wampanoag People for our cultural beliefs, identity and spirituality. This viewshed is one of the places where our People historically had, and continue, to have a connection in

practicing our cultural ceremony and traditions. Here is where we still arrive to greet the new day, watch for celestial observations in the night sky and follow the migration of the sun and stars in change with the seasons. This viewshed has remained undefiled; affording our People continuous use since time immemorial and it defines our place in the indigenous world; for ourselves, for our sister Mashpee Wampanoag tribe, to our extended Native families and the Peoples across Turtle Island.

Our oral history proclaims that we walked across this expanse of land, now covered by water, and our leader Moshup created Noepe, (currently called Martha's Vineyard), and it's surrounding islands, including Nantucket. This is the path the Aquinnah Wampanoag people took to arrive at our present location and defines our relationship to the rest of the Wampanoag Nation and other American Indian tribes in New England and beyond. Our history has been, and continues to be, defined by this unique placement on Mother Earth.

In addition to the designation as a Traditional Cultural Property, we consider the eastern vista viewshed over Nantucket Sound, located off the coast of Cape Cod, Massachusetts, eligible for inclusion in the National Register of Historic Places under the following criteria:

Criteria A. " Properties that are associated with events that have made a significant contribution to the broad patterns of our history"; *and*

Criteria D. "Properties that have yielded or may be likely to yield, information important in prehistory or history."

Evidence of our ancient history has been brought forth from the floor of the Nantucket Shoals, long forgotten archeological data of a time when our Peoples would have walked miles out to what is now the Continental Shelf, to carry out our ancient ceremonial practices and foraging for sustenance from the ocean. Although there have been re-discoveries of archeological evidence, the continuing advancement of archeological and scientific methodologies will yield further confirmation of our oral histories.

We respectfully submit this nomination to the Keeper to determine its eligibility for placement in the National Register of Historic Places.

In Balance, Harmony and Peace,



Bettina M. Washington
Tribal Historic Preservation Officer
Wampanoag Tribe of Gay Head (Aquinnah)

cc: Ken Salazar, Secretary of the Interior
Larry Echohawk, Asst. Secretary of the Interior
John Fowler, ACHP
John P. Eddins, ACHP
John L. Berrey, ACHP
Tobias J. Vanderhoop, Culture and Historic Commission, WTGH(A)
George Green, Jr., THPA, Mashpee Wampanoag Tribe

John Brown, THPO, Narragansett Indian Tribe
Brona Simon, SHPO, Commonwealth of Massachusetts
Senator John F. Kerry, Commonwealth of Massachusetts
Representative William D. Delahunt, Commonwealth of Massachusetts
Chris Horrell, Mineral Management Services
Andrew Kruger, Mineral Management Services

Routing Slip for ODM-09-0417-- Appropriate Action --

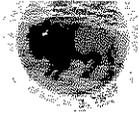
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Control Information

Control #: ODM-09-0417	Control Type: MISC	Control Date: 9/1/2009	
Rec/Int Date: 9/1/2009	Exec Sec #: 00007406	LM#:	
Resp Office: ADOMM	Surname:		
Corr. Date: 7/17/2009	Corr. Type: LETTER	Corr. Source:	
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TO: Title/Organization:	Last Name:	First Name:	
CITIZEN	HORRELL	CHRIS	
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FROM: Title/Organization:	Last Name:	First Name:	
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FOR SIGNATURE OF: Title:	Organization:	Date Due:	Date Signed:
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Subject: CAPE WIND			
Comments:			

Action Information

10/9/09 Rec'd at OSEP



TASKING PROFILE

ACCN #:	ESO-00007406	Status:	Closed	Fiscal Year:	2009
Document Date:	Received Date:	Due Date:	Action Office:	Signature Level:	Doc Source:
07/17/2009	08/21/2009		LMS	AA	ITL

To (Recipient): Horrell, Chris

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

Subject Text: Courtesy copy of letter expressing the Wampanoag Tribe of Gay Head's dissatisfaction with the MMS's handling of the government-to-government consultation regarding the Cape Wind project

Req. Surnames:

Mail Carrier: **Mail Track #:**

Cross Ref:

Copies To: SIO-OES

Status Tracking: 08/31/2009 14:22:49 PM - Carrie Richardson : Per BIA, needs to go to MMS

Correspondence Specialist and Phone: SIO-OES Carrie Richardson/202-208-3181 *CMR*

Closed

Comments:

Signed:



TASKING PROFILE

ACCN #: ESO-00007406 **Status:** Closed **Fiscal Year:** 2009
Document Date: 07/17/2009 **Received Date:** 08/21/2009 **Due Date:** **Action Office:** BIA **Signature Level:** AA **Doc Source:** ITL

To (Recipient): Horrell, Chris
From (Author): Washington, Bettina M.

Tribal Historic Preservation Officer
Wampanoag Tribe of Gay Head
20 Black Brook Road
Aquinnah, MA 02535

Subject Text: Courtesy copy of letter expressing the Wampanoag Tribe of Gay Head's dissatisfaction with the MMS's handling of the government-to-government consultation regarding the Cape Wind project

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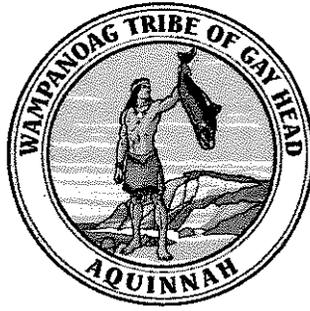
Correspondence Specialist and Phone: SIO-OES Carrie Richardson/202-208-3181 *CMR*

Closed

Comments:

Signed:

*Redirection back
to Exec Sec for
MMS
ESO
7406
20 Aug*



Tribal Historic Preservation Office
20 Black Brook Road
Aquinnah, MA 02535

July 17, 2009

Mr. Christopher Horrell
Mineral Management Services
1201 Elmwood Park Blvd.
New Orleans, LA 70123

Dear Mr. Horrell,

I am in receipt of your latest email dated July 16, 2009 concerning the next consultation meeting between the Wampanoag Tribe of Gay Head (Aquinnah) (WTGH(A)) and Mineral Management Services (MMS). I would like to clarify the expectations of the Tribe on the continued Government-to-Government Section 106 Consultation meeting tentatively scheduled for the beginning of August.

The WTGH (A) THPO is deeply dissatisfied with and highly suspicious of MMS and its cancellation of our proposed July 18th - 19th consultation. The July consultation meeting was discussed at the June 3rd meeting, a lead-time of nearly 6 weeks. When we spoke at the June 16th (Tuesday) meeting all was well, handshakes to meet in July. The following Monday, June 22nd, I receive an email from you that states MMS had to cancel the consultation meeting as "many of us will be unavailable those days". Apparently not only were many of the MMS Cape Wind team unavailable, all of the MMS Cape Wind team must have been unavailable as your agency had to resort to calling in Mr. Barros, who has not been involved with the consultation process since July 2007, to be the lone representative of MMS.

The Tribe does not agree that Mr. Barros is familiar with the project, he has not been involved in any of the government-to-government and/or stakeholder consultation meetings since 2007 and therefore has not heard first hand our concerns past the original meeting. The Tribe does not appreciate having personnel changes in the middle of the consultation. The Tribe considers consultation as a *process of forming a relationship between the two governments*, and when there is a personnel change, a new relationship

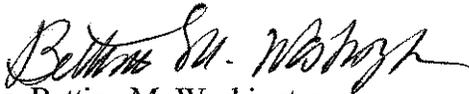
and level of understanding and trust must be established before the consultation can proceed.

We do not extend an invitation to attend our cultural events without due consideration to our People. While the public comes to view the pageant, they are not privy to spending time with tribal members, learn first hand the cultural significance of the pageant and its importance to our continued tribal presence. Allowing others to see our oral history being passed on generation-to-generation is an occurrence we consider a privilege.

As stated above, your email was received on the 16th of July. The available dates for the next consultation with the WTGH (A) THPO are August 3rd and 4th, just over two weeks away. By sending this letter, and agreeing to meet with MMS, though it is on short notice, **the WTGH (A) and it's THPO office declares its commitment to government-to-government Section 106 consultation.** The WTGH (A) THPO expects that MMS will uphold its trust responsibility to the Tribe and if necessary, correct the misinformed individuals and/or organizations who are not familiar with the numerous executive orders, laws and regulations that have been enacted and enabled to ensure that the federal government's trust responsibility to consult with American Indian Tribes will be upheld. Regardless of outside entities and/or organizations calling for the termination of Section 106 consultation, the WTGH (A) THPO office will not be rushed through the consultation concerning the Cape Wind project.

The Tribe expects as stated in the letter dated June 23rd, 2009 to Dr. Rodney Cluck, all federal agencies that were present at the June 3rd meeting will be in attendance for the August consultation. The Tribe expects that MMS will be contacting the federal agency representatives and coordinating the necessary travel arrangements and/or providing the necessary information for any individual/federal government agency that is interested in attending the consultation.

In Balance, Peace and Harmony,



Bettina M. Washington
Tribal Historic Preservation Officer
Wampanoag Tribe of Gay Head (Aquinnah)

cc. Secretary Ken Salazar, Dept. of the Interior
Asst. Secretary Larry Echohawk, Dept. of the Interior
Mr. Richard Larrabee, Program Integrity Division
Mr. George Green, Mashpee Wampanoag Tribe
Senator Edward Kennedy
Senator John Kerry
Congressman William Delahunt
Mr. John Fowler, ACHP
Mr. John Eddins, ACHP
Ms. Charlene Vaughn, ACHP
Ms. Valarie Hauser, Native American Liaison, ACHP

Mr. David Saunders, BIA
Ms. Karen Adams, ACOE
Ms. Kathleen Atwood, ACOE
Ms. Brona Simon, SHPO, Commonwealth of Massachusetts
Mr. Tobias Vanderhoop, WTGH (A) Culture and Historic Commission – Chair
Dr. Rodney Cluck, Project Manager, MMS
Ms. Melaine Strait, Federal Preservation Officer, MMS

This correspondence has been sent electronically where possible with a hard copy to follow via USPS mail.



AA → BIA

AS-19-22 JUL 09 15:43

Tribal Historic Preservation Office
20 Black Brook Road
Aquinnah, MA 02535

July 21, 2009

Assistant Secretary Larry Echohawk
Department of the Interior
Bureau of Indian Affairs
1849 C Street, NW
Washington, DC 20240

Dear Assistant Secretary Echohawk,

Enclosed please find a letter written to Mr. Christopher Horrell of Mineral Management Services concerning the tentative consultation meeting next month on Martha's Vineyard.

Sincerely,

Bettina M. Washington
Tribal Historic Preservation Officer
Wampanoag Tribe of Gay Head (Aquinnah)



Tribal Historic Preservation Office
20 Black Brook Road
Aquinnah, MA 02535

June 23, 2009

Dr. Rodney Cluck
Mineral Management Services
381 Elden Street
Herdon, VA 22070

Dear Dr. Cluck,

I am writing to clarify the Wampanoag Tribe of Gay Head (Aquinnah) position on the last two meetings, June 3rd and June 16th held in Hyannis, MA; the incomplete Section 106 consultation process, including commentary on the next scheduled tribal consultation request.

These comments are offered and considered to be in conjunction with the expected ongoing and continued Government-to-Government consultation between the United States government, Mineral Management Service as the lead Federal Agency and the Wampanoag Tribe of Gay Head (Aquinnah) (herein denoted as the Tribe), a Sovereign Indian tribal Nation and the Tribal Historic Preservation Office (THPO) as required and intended under the National Historic Preservation Act (NHPA) Section 106, 35 CFR Part 800, and including but not limited to: The National Environmental Policy Act, American Indian Religious Freedom Act, Native American Graves Protection and Repatriation Act, Archeological Resource Protection Act, Executive Order 13007-Indian Sacred Sites, Executive Order 13175 – Consultation and coordination with Indian Tribal Governments; Executive Order 12898 – Executive Order on Environmental Justice and the implementing regulations for these, as well as all other relevant Executive Orders, Federal Laws, statutes and regulations.

Since time immemorial, the Wampanoag and or Indigenous Northeastern Woodlands Indian People have; either traversed, fished, cultivated and occupied the entire area including the location currently under consideration for this undertaking. First and foremost, the Wampanoag Tribe of Gay Head (Aquinnah) considers the Nantucket Sound, in and of itself, traditional cultural property. The Nantucket Sound viewscape is essential to our spiritual well-being and the Cape Wind project will destroy this sacred site.

Executive Order 13007, Protection of Sacred Sites, states under *Section 1. (a)(2)...avoid adversely affecting the physical integrity of such sacred sites* and under subsection *iii. "Sacred site" means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.*

Through the Section 106 consultation, it is the federal agency's trust responsibility to protect the Tribe's traditional cultural property and sacred properties from adverse effects, desecration and destruction.

At the June 3rd meeting, I had copies of the 36 CFR 800 regulations and asked how many of the MMS representatives had read them. Wyndy Rausenberger of the solicitor's office was the only person who raised her hand in the room. I then stated that might be the reason why this consultation has been so flawed. Even so, it appeared that all others in the room except the Mashpee Wampanoag Tribe and Wampanoag Tribe of Gay Head (Aquinnah) were ready to skip over previous problems with our consultation and start speaking about alternatives, however I insisted we start at the beginning of the regulations and review the steps that should have been taken to date.

As per the regulations, 36 CFR 800.4(a) *Determine scope of identification efforts. In consultation with the SHPO/THPO, the agency official shall: (1) Determine and document the area of potential effects.* I asked if the APE has been defined. MMS had made the determination that the areas that may be visually affected by the wind farm defined the APE. To date, MMS has not come to Martha's Vineyard Island to view the project from the vantage point of the viewscape that Cape Wind will destroy. MMS came to our reservation, located at the western end of the Island and made an incorrect assumption that because the wind farm could not be seen from our reservation, it would have no adverse effect on our People or their culture. Therefore, MMS has not complied with regulation 800.4(a)(4) *Gather information from any Indian tribe or Native Hawaiian organization identified pursuant to 800.3(f) to assist in identifying properties, **including those located off tribal lands...***(bold added)

In addition, MMS has not complied with 800.4(c)(1) *Apply National Register criteria In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties and guided by the Secretary's Standards and Guidelines for Evaluation, the agency official shall apply the National Register criteria (36CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility.... The Agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.*

The Tribe asserts that we consider Nantucket Sound a Traditional Cultural Property and is eligible for the listing in the National Register of Historic Places. Wyndy Rausenberger of MMS states that because she spoke with personnel in the Keeper's Office and was told that an area of water and/or waterways usually does not qualify for eligibility for the

National Register of Historic Places, MMS has taken that conversation as a determination. That is not how an official determination is made; an official form must be submitted. At the stakeholders meeting on June 16th, I questioned as to whether she had completed and submitted the proper form, there was no answer. This crucial step has not been completed. Therefore it was determined that MMS will be completing the necessary paperwork to get a formal determination of eligibility from the Keepers Office. At that meeting the Massachusetts SHPO verbally agreed that she would consider the Nantucket Sound a Traditional Cultural Property to the Mashpee Wampanoag Tribe and the Wampanoag Tribe of Gay Head (Aquinnah).

The Tribe has maintained from the start there would be an adverse effect with the placement of the wind farm in the Nantucket Sound as found in regulation 800.5(a)(2) (i) *Physical destruction of or damage to all or part of the property;..(iv)Change of the character of the property's use or of physical features with the property's setting that contribute to its historic significance; (v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features. and, (vii)Transfer, lease or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.* MMS has agreed that there will be an adverse effect on the traditional cultural property and cultural practices of the Wampanoag People.

Since both parties agree that there will be an adverse effect, the agency is trying to proceed with section 800.6 – *Resolution of adverse effects*. However, the agency cannot fulfill the regulation 800.6(a)(1)*Notify the Council and determine Council participation. The agency official shall notify the council of the adverse effect finding by providing the documentation specified in 800.11(e)*. Since our consultation is not completed, the information is incomplete, and therefore any agreements and/or decisions would be premature.

At the June 16th stakeholders meeting, MMS was trying to get the stakeholders to look at alternative sites. First, the “Summary of Impacts for Main Alternatives Relative to Proposed Action” that we were reviewing was so confusing, even MMS had to go back into the FEIS to understand how to read the chart. It was discovered that incorrect symbols were used in the chart, resulting in opposite meanings from the original intent. Both George Green and I had to bring up the point that since the Section 106 consultation with the tribes was not complete, the cultural information on the chart could not be complete and MMS was asking the stakeholders to make a decision using incomplete and misleading information.

At the May comment meeting, I asked where the oil for the transformer would be berthed from, a representative from Cape Wind had said it would most likely berth from Woods Hole. When we met on June 3, 2009, I asked the same question and you told me it would come out of Quonset, RI. The original consultation did not include these cultural and historic areas and were not considered for adverse effect due to the lack of adverse visual effect. The Tribe is now aware that No. 2 oil will be transported from Quonset, RI through the Vineyard Sound into Nantucket Sound, the site of the proposed wind farm. This shipping route has not been considered in the Tribe's Section 106 consultation and includes, but not limited to, Narragansett Bay, the Taunton River Watershed, Buzzards Bay, Vineyard Sound, Menemsha and Squibnocket Ponds, and Lake Tashmoo. There has

been not been any consultation at all concerning this new information and we are making an official request to expand the area of potential effect to include all these waterways and shorelines.

The new information concerning the transportation of oil through the Vineyard Sound denotes that the Tribe was misled and therefore the consultation was not conducted properly and certainly shows a deficiency in the level of effort and good faith as stated per regulation 800.4(b)(1) *Level of effort. The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. The agency official shall take in to account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects.*

This expansion of the APE will require extensive review of the north shores of Martha's Vineyard and Elizabeth Islands per the requirement under 800.4(a)(4) *Gather information from any Indian tribe or Native Hawaiian organization identified pursuant to 800.3(f) to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register, recognizing that an Indian tribe or Native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature and activities associated with such sites.*

Once we identify the eligible properties, the historic significance must be evaluated as stated in 800.4(c)(1) *Apply National Register criteria. In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties and guided by the Secretary's Standards and Guidelines for Evaluation, the agency official shall apply the National Register criteria (36CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibilityThe agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.* and 800.4(c)(2) *Determine whether a property is eligible.* (see list of historic places for possible inclusion on National Register of Historic Places) It will then follow that criteria 800.10 will apply to those Historic Places, **800.10 Special requirements for protecting National Historic Landmarks.** (a) *Statutory requirement. Section 110(f) of the act requires that the agency official, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking. When commenting on such undertakings, the Council shall use the process set forth in § 800.6 through 800.7 and give special consideration to protecting National Historic Landmarks as specified in this section.*

While our tribal Section 106 consultation process with MMS is far from over, it should also be noted that while the THPO has the authority to speak for the Tribe, our individual tribal members have the right to comment in their own voice concerning this new information and this forum has been denied to them. They are due their right to comment in the public consultation process as stated in 36 CFR Part 800.2 *Participants in the*

Section 106 process (F)(c)(5)(d)(1) Nature of involvement. The views of the public are essential to informed Federal decision making in the section 106 process.

As we discussed alternatives at the June 16th meeting, David Saunders from the Bureau of Indian Affairs (BIA) asked if the Tribe could support either the proposed project or an alternative located off the south coast of Nantucket. My response is that the south of Nantucket is still near our Island home and we will need to do more work in order to know whether it can be considered as an acceptable alternative site. The Nantucket Horseshoe Shoals is not an acceptable site. Therefore until we complete further study, my response is no action/denial of the permit. We are heartened that the BIA was present to show its support for the tribal concerns.

Since last September, throughout our comment meetings I had asked for a balloon test in the project area. At the June 3rd meeting the request was discussed and I was quite surprised that you voiced a deep concern for the environmental effects of such a test. Apparently, the effects would be devastating for a short test, but not for permanent structures over the next 20 years. There was also mention of the cost that such a test would be and that MMS would not be able to support this project. Please send a summary of the estimated costs as soon as possible to my attention so we may continue our discussion at our next tribal consultation meeting.

As the Tribe is still in ongoing consultation with MMS, at the June 3rd meeting we had requested a consultation meeting on Martha's Vineyard on July 17th and 18th or the 18th and 19th, 2009. At the June 16th meeting, I spoke with Chris Horrell and Wyndy Rausenberger and we were looking forward to meeting next month, the 18th and 19th. Yesterday I received an email from Chris that many of the MMS personnel will not be able to meet on June 18th. In addition, he wasn't sure who from MMS was invited. The Tribe was not contacted as to who should be at the June 3rd meeting, why is this an issue now? Anyone who was at the June 3rd may attend the consultation, with the exception of Brandie Carrier Jones as I do not believe we need a moderator. MMS can provide a recorder for the formal meeting portion of our consultation. If the intent of the visit is to get the most information, then it would follow, the more people from MMS, BIA and ACHP that attend, the better. The Tribe will have a cultural event that pertains directly to our oral history and its relationship to the Cape Wind Project hence the specific date. I would strongly urge those personnel that can make the consultation to be in attendance to achieve a greater understanding of our culture.

In January, MMS said the tribes were to blame for the lack of Section 106 consultation, we find this accusation vexing. A federal agency that hasn't read the 36 CFR 800 regulations is attempting to conduct consultation, failing miserably at it, and managing to make the consultation dates they set, but can't make the dates the Tribe requests even if it's given a large lead time. I will consider the cancellation of the July consultation on the Island a complete failure of compliance of MMS consultation responsibilities.

Earlier this month, a group of looters of American Indian items of cultural patrimony were arrested. Assistant Secretary of the Department of the Interior and head of the Bureau of Indian Affairs, Larry Echohawk stated, "Today's action should give American Indians and Alaska Natives assurance that the Obama Administration is serious about preserving and protecting their cultural property." Whether an item is stolen or a sacred

site is destroyed, they are gone from our People and our culture forever. We are expecting the same assurance and federal trust responsibility to preserve and protect our traditional cultural properties.

In Balance, Harmony and Peace,

Bettina M. Washington

Bettina M. Washington
Tribal Historic Preservation Officer
Wampanoag Tribe of Gay Head (Aquinnah)

cc. Secretary Ken Salazar, Dept. of the Interior
Asst. Secretary Larry Echohawk, Dept. of the Interior
Mr. Richard Larrabee, Program Integrity Division
Mr. George Green, Mashpee Wampanoag Tribe
Senator Edward Kennedy
Senator John Kerry
Congressman William Delahunt
Mr. John Fowler, ACHP
Mr. John Eddins, ACHP
Ms. Charlene Vaughn, ACHP
Ms. Valarie Hauser, Native American Liaison, ACHP
Mr. David Saunders, BIA
Ms. Karen Adams, ACOE
Ms. Kathleen Atwood, ACOE
Ms. Brona Simon, SHPO, Commonwealth of Massachusetts
Mr. Tobias Vanderhoop, CHC – Chair
Ms. Melaine Strait, Federal Preservation Officer, MMS
Mr. Christopher Horrell, MMS

This correspondence has been sent electronically where possible with a hard copy to follow via mail.

List of Historic Places due to expansion in Area of Potential Effect

Including, but not limited to:

Gay Head Cliffs – National Natural Landmark
Gay Head Lighthouse – National Register
Moshup's Bridge (Devil's Bridge)/Cuttyhunk
Menemsha Village
Menemsha Pond
Squibnocket Pond
Prospect Hill
Peaked Hill (SHPO recognizes eligibility)
Menemsha Clay works
Cedar Tree Neck
Lake Tashmoo
Penikese Island



Mashpee Wampanoag Tribe
483 Great Neck Rd. P.O. Box 1048 Mashpee ma 02649



Andrew Krueger
Minerals Management Service
U.S. Department of the Interior
31 Elden Street
Herndon, Va.02170

Dear Andrew,

I have reviewed the proposed agenda for the June 16th 106 consultation meeting. It has also been brought to my attention M.M.S. is under the impression that Secretary Kempthorne grandfathered this project in a way that no other geographic location could be considered as an alternative, if this is true we demand that M.M.S. provide support documentation to verify.

MMS has told the tribes that all alternatives listed in the alternative section 3.3.5 could be considered, if this is not true it is an indication that all consultation has been an empty exercise showing a lack of good faith.

The problem might come from a lack of understanding 36CFRPart 800, when asked who had read 36CFRPart800 only Wyndy Rausenberger of the solicitor's office raised her hand this was very troubling to me. MMS has a trust responsibility under section 106 of the National Historic Preservation Act (NHPA) 36CFRPart800 or Executive Order 13175 to conduct TRUE and MEANINGFUL Government to Government consultation, which if the above is true M.M.S. has not met.

MMS has already determined that this project location will have an adverse effect on 28 Historic Properties, one Historic District and Native American sacred sites and you know there is an alternative site that could avoid any adverse effects on historic properties.

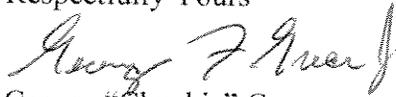
M.M.S. has also failed in its trust responsibility to preserve the physical integrity of our sacred sites; the southeastern view shed and our right to our religious and spiritual practices as defined in Executive Order 13007 and the American Indian Religious Freedom Act

In closing I would like to quote from 36CFRPart800 s800.1(c) Timing. The agency official must complete the section 106 process "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license." This does not prohibit agency official from conducting or authorizing nondestructive project planning activities before completing compliance with the section 106, provided such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties. The agency official SHALL ensure that the section 106 process is initiated early in the undertaking's,

Andrew Krueger
Minerals Management Service
U.S. Department of the Interior
31 Elden Street
Herndon, Va.0217

Planning process so that a broad range of alternatives may be considered during the planning process for the undertaking.

Respectfully Yours



George "Chuckie" Green
Designee on Historic Preservation
Mashpee Wampanoag Tribe

Cc

The Honorable Kenneth Salazar
Honorable Mary Bomar, Director NPS
Senator Edward Kennedy
Senator John Kerry
Senator Byron Dorgan
Congressman William Delahunt
Congressman Barney Frank
Franklin Keel Regional Director BIA
John Nau III, Chairman ACHP
Larry Echohawk



Mashpee Wampanoag Tribe
483 Great Neck Rd. P.O. Box 1048 Mashpee, MA 02649
Phone (508) 477-0208 Fax (508) 477-1218

March 19, 2009

Rodney E. Cluck
Minerals Management Service
U.S. Department of the Interior
31 Elden Street
Herndon, Va.02170

Dear Dr. Cluck,

The Mashpee Wampanoag Tribe (The Tribe) feels this document should not have been released before the completion of the 106 process, as your document confirms on pg. E12 Cultural Recourses, "Pending on outcome of Section 106 process". Minerals Management Service (MMS) has ignored the Tribe's Religious freedom, maybe because the 106 process, like the document, is incomplete.

On page 5-243 you reference my DEIS comments. You quote a legal remedy and then dismiss it by saying, "...however in practicality it is entirely possible that unanticipated archeological sites (e.g. tribal ancestral sites) could be inadvertently disturbed during lease activities and it would neither be recognized nor reported."

On page 7-2 you state, "In June 2008 MMS initiated formal consultation under Section 106" and the first meeting was July 23rd. At that meeting we discussed meeting format. Our next meeting was September 8th at which we discussed why the 300 foot Area of Potential Effect did not apply. We also proposed site visits, which were never scheduled.

In the next section you say you had formal meetings with the Mashpee Wampanoag Tribe on July 26, 2006, but the Tribe was not federally recognized until February 15, 2007.

All these things are just examples of disrespect of tribal rights, incomplete research and distortion of the facts.

Respectfully Yours,

A handwritten signature in black ink, appearing to read 'George Green'.

George "Chuckie" Green
Mashpee Wampanoag Tribe

Routing Slip for ODM-09-0234

Print Close

Control Information

Control #: ODM-09-0234	Control Type: DIRC	Control Date: 5/12/2009	
Rec/Int Date: 5/12/2009	Exec Sec #: 00002427	LM#:	
Resp Office: ADOMM	Surname:		
Corr. Date: 3/11/2009	Corr. Type: TELEPHONE	Corr. Source:	
TO: Title/Organization:	Last Name:	First Name:	
SECRETARY	SALAZAR	KEN L.	
THROUGH: Title/Organization:			
FROM: Title/Organization:	Last Name:	First Name:	
EASTERN TRIBES, INC.	COOK	MICHAEL J.	
FOR SIGNATURE OF: Title:	Organization:	Date Due:	Date Signed:
ASSOCIATE DIRECTOR	ADOMM	5/26/2009	
Subject: CAPE WIND PROJECT			
Comments:			

Action Information**Date Sent (5/12/2009)**

Action Office: ODM	Action Date:	Action Taken:
Action Name:	Send To: ADOMM	Date Sent: 5/12/2009
Action Requested: ASSIGN	Due Back: 5/26/2009	
Comments:		



UNITED SOUTH AND EASTERN TRIBES, INC.
711 Stewarts Ferry Pike • Suite 100 • Nashville, TN 37214
Telephone: (615) 872-7900 • Fax: (615) 872-7417

March 11, 2009

The Honorable Kenneth L. Salazar
Secretary of the Interior
1849 C Street, NW
Room 6156
Washington, DC 20240

RE: USET Resolution 2009-026: *Call to Department of Interior to Halt Minerals Management Services Action on Cape Wind Project, Nantucket Sound, Massachusetts*

Dear Honorable Kenneth Salazar:

On behalf of United South and Eastern Tribes, Inc. (USET), the attached resolution is presented for your information and advocacy in support of our member tribes.

This resolution is one of many resolutions on various areas of Indian affairs policy approved by the USET Board of Directors at the recent 2009 USET Impact Week Meeting and is a public expression and stance on a specific issue affecting Indian Country.

USET is an intertribal organization comprised of 25 federally recognized Tribes from twelve states and we look forward to working with you to carry out the intent of this resolution. As appropriate, would you please provide acknowledgement of receipt of this resolution including actions that have been taken or planned on our behalf?

Please call the USET office at (615) 872-7900 if you have questions.

Sincerely,

UNITED SOUTH AND EASTERN TRIBES, INC.

Michael J. Cook
Executive Director

(w/Attachment)

RECEIVED
MARCH 25 2009

2009 MAR 25 10:00Z

RECEIVED

449827

"Because there is strength in Unity"



United South and Eastern Tribes, Inc.
711 Stewarts Ferry Pike • Suite 100 • Nashville, TN 37214
(P): 615-872-7900 • (F): 615-872-7417

USET Resolution No. 2009:026

CALL TO DEPARTMENT OF INTERIOR TO HALT MINERALS MANAGEMENT SERVICES ACTION ON CAPE WIND PROJECT, NANTUCKET SOUND, MASSACHUSETTS

- WHEREAS,** United South and Eastern Tribes, Incorporated (USET) is an intertribal organization comprised of twenty-five (25) federally recognized Tribes; and
- WHEREAS,** the actions taken by the USET Board of Directors officially represent the intentions of each member Tribe, as the Board of Directors comprises delegates from the member Tribes' leadership; and
- WHEREAS,** The Wampanoag Tribe of Gay Head (Aquinnah), People of the First Light, are opposed to the Cape Wind Project being considered for development in Nantucket Sound, part of their Ancient Homelands of the Wampanoag People; and
- WHEREAS,** The Wampanoag Tribe of Gay Head (Aquinnah) regards Nantucket Sound as a Traditional Cultural Property (TCP) and Sacred Site; and
- WHEREAS,** the Cape Winds Wind Farm Project will forever change the physical integrity of the Sacred Site; and will ruin the eastern vista viewshed, essential to maintaining the Tribal identity of the Wampanoag people and their spiritual wellbeing; and
- WHEREAS,** the Minerals Management Services (MMS) has failed to fully comply with the National Historic Preservation Act, Section 106 process and has not completed the required consultation with the Wampanoag Tribe of Gay Head (Aquinnah); and
- WHEREAS,** due to this failure to fully consult in compliance with the Act; we consider the Final Environmental Impact Study incomplete and invalid; therefore, be it
- RESOLVED** the USET Board of Directors calls upon the Department of the Interior to halt any further Mineral Management Services action on the Cape Winds Wind Farm Project due to the lack of or failure to complete good faith meaningful consultation, lack of compliance with existing regulations and failure to adequately consider reasonable and/or other viable alternatives.

CERTIFICATION

This resolution was duly passed at the USET Impact Week Meeting, at which a quorum was present, in Arlington, VA, on Thursday, February 12, 2009.

Brian Patterson, President
United South and Eastern Tribes, Inc.

Robert McGhee, Secretary
United South and Eastern Tribes, Inc.

"Because there is strength in Unity"



DEPARTMENT OF THE INTERIOR
TASKING PROFILE

ACCN #: ESO-00002427 **Status:** Open **Fiscal Year:** 2009
Document Date: 03/11/2009 **Received Date:** 03/24/2009 **Due Date:** 04/21/2009 **Action Office:** BIA **Signature Level:** DR **Doc Source:** ITL

Incoming To: Salazar, Ken

Addressee: Cook, Michael J.

Executive Director
United South and eastern Tribes, Inc
711 Stewarts Ferry Pike, Ste 100
Nahsville, TN 37214

Subject Text: Writing to request the Department to stop minerals management services action on the Cape Wind Project, Nantucket Sound, Massachusetts ? USET Resolution 2009-026. Please provide an acknowledgment of

Req. Surnames:

Mail Carrier: PM

Mail Track #:

Cress Ref:

Copies To: SIO-OES

Status Tracking:

Correspondence Specialist and Phone: SIO-OES Carrie Richardson/202-208-3181

CMR

Closed

Comments:

Signed:



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.

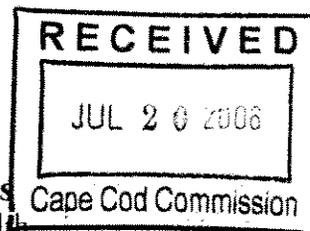
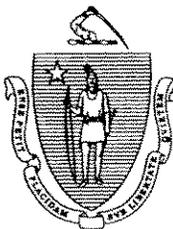
Thank you for the opportunity to provide comments. Please make these comments available to the other consulting parties.

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.

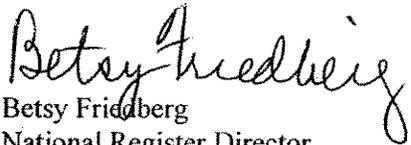
After 1910, interest in spiritualism waned, and the area transitioned to a summer cottage colony similar to other Harwich communities. Most of the other houses in the neighborhood had been constructed by 1928, though there are also some later capes and ranches that were constructed as infill throughout 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

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Matthew F. Pawa

Mark R. Rielly
Benjamin A. Krass

June 29, 2009

Via Electronic & First Class Mail

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

Re: *Section 106 Consultation Process for Cape Wind Project*

Dear Dr. Krueger:

This firm represents Clean Power Now, Inc. (“CPN”). CPN is a nonprofit organization based on Cape Cod that represents over 12,000 members who support the Cape Wind project because they believe it is an appropriate and necessary response to the potentially dramatic adverse impacts of global warming, sea level rise, dependence on foreign oil, and the health impacts of local and regional air pollution. CPN has intervened and taken an active role in state administrative and judicial proceedings regarding the Cape Wind project and has a direct stake in the outcome of the Cape Wind project. Accordingly, please consider this CPN’s formal request, pursuant to 36 C.F.R. Section 800.3(f)(3), to participate as a consulting party in the ongoing Section 106 process regarding Cape Wind.

It has come to our attention that the Minerals Management Service (“MMS”) may have accorded the Alliance to Protect Nantucket Sound (“APNS”) “consulting party” status in the Section 106 consultation process. 36 C.F.R. § 800.2(c)(5). In order to provide MMS with a true representation of the public’s position with respect to the project and its alleged impacts, CPN requests that MMS grant it the same status as APNS. CPN also hereby requests a list of all consulting parties.

Andrew Krueger, PhD
June 29, 2009
Page 2

Thank you for your attention to this matter and we look forward to receiving MMS's response to CPN's request in the near future. In the meantime, kindly advise me of the schedule of any upcoming meetings, hearing or conferences in connection with the Section 106 process.

Sincerely,

CLEAN POWER NOW, INC.

By its attorney,

/s/ Matthew F. Pawa

Matthew F. Pawa
Mark R. Rielly

cc: Secretary Kenneth Salazar, U.S. Department of the Interior
Governor Deval Patrick
Liz Birnbaum, Director, Mineral Management Service
Walter Cruickshank, Mineral Management Service
Brona Simon, Massachusetts Historical Commission
David Rosenzweig, Esq., counsel for Cape Wind Associates, LLC
Barbara Hill, Executive Director, Clean Power Now, Inc.

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Matthew F. Pawa

Mark R. Rielly
Benjamin A. Krass

July 15, 2009

Via Electronic & First Class Mail

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

Re: *Section 106 Consultation Process for Cape Wind Project*

Dear Dr. Krueger:

Thank you for your letter of July 10, 2009, confirming that the Minerals Management Service (“MMS”) has granted the request of Clean Power Now, Inc. (“CPN”) to be a consulting party in the ongoing National Historic Preservation Act (“NHPA”) Section 106 process regarding the Cape Wind project. I write on behalf of CPN regarding two issues.

Termination of the Section 106 Process. CPN respectfully submits that the Section 106 process should be terminated at this time. MMS’ obligations under Section 106 are purely procedural.¹ MMS has prepared both an EIS under NEPA that addresses effects on historic

¹ See *Oglala Sioux Tribe v. United States Army Corps of Eng'rs*, 537 F. Supp. 2d 161, 173 (D.D.C. 2008) (“[t]he case law in this and other circuits holds that an agency’s duty to act under the NHPA...is procedural in nature.”) (quotation omitted); *CTIA - The Wireless Ass'n v. Fed. Commc'n Comm'n*, 466 F.3d 105, 107 (D.C. Cir. 2006) (“the Act does not require [a federal agency] to engage in any particular preservation activities; rather, Section 106 only requires that the [agency] consult the [State Historic Preservation Office] and the [Advisory Council on Historic Preservation] and consider the impacts of its undertaking.”) (quotation omitted). MMS “may fulfill its NHPA obligations by either following the old, non-integrated Section 106 process, see 36 C.F.R. §§ 800.3-800.6, or through the new integrated NEPA/NHPA process, see 36 C.F.R. § 800.8.” *Preservation Coalition v. Fed. Transit Admin.*, 356 F.3d 444, 453 (2d Cir.

Andrew Krueger, PhD
Minerals Management Service
July 15, 2009

properties and is undertaking a separate and comprehensive Section 106 consultation process. MMS has expanded its efforts to identify historic properties beyond the original effort of the U.S. Army Corps of Engineers, which began back in 2001. *See* Public Archeology Laboratory, *Briefing Memorandum on Cape Wind Energy Project* (Feb. 17, 2009). With the release of MMS' Finding of Adverse Effect for the Cape Energy Project in December, 2008, the identification and assessment of adverse impact phases of the Section 106 process are now complete.

However, recent correspondence from the Alliance to Protect Nantucket Sound ("APNS") (May 5, 2009), the Wampanoag Tribe of Gay Head (Aquinnah) (June 23, 2009) and the Massachusetts Historical Commission/State Historic Preservation Officer ("MHC/SHPO") (Feb. 6, 2009) strongly indicate that these consulting parties refuse even to concur in the MMS Finding of Adverse Effect determination, and instead question MMS' good faith and seek further, unnecessary identification efforts. Furthermore, these consulting parties refuse to proceed to the next phase of resolving the adverse impacts in a memorandum of agreement. *See* 36 C.F.R. § 800.6. These consulting parties have left no doubt that the only acceptable outcome to this consultation process is one where the Cape Wind project is moved out of Nantucket Sound. MMS already has analyzed all alternative locations and determined that no alternatives exist that would be technologically feasible and/or cause less environmental impact. *See* MMS, Finding of Adverse Effect § 6.3.1 (Dec. 2008) at 35. The entrenched positions of these consulting parties shows that "further consultation will not be productive," 36 C.F.R. § 800.7(a), and counsels in favor of termination of the consulting process.

In fact, to the extent that MHC/SHPO is refusing MMS' requests to concur in its Finding of Adverse Effect and to cooperate in crafting a memorandum of agreement it is violating state law. On May 27, 2009, the Massachusetts Energy Facilities Siting Board granted a Certificate of Public Interest and Environmental Impact ("Certificate") to Cape Wind for the construction of a transmission line in the state waters of Nantucket Sound (and on land) for this project. By statute, this Certificate is "a composite of all individual permits, approvals or authorizations which would otherwise be necessary for the construction and operation of the facility." *See* Mass. Gen. Laws c. 164, § 69K. While MHC/SHPO has never had any authority to issue any state "permits, approvals or authorizations" for the project, MHC/SHPO is nonetheless a state agency, *see* Mass. Gen. Laws c. 9, § 26, that is bound by the following provision of the state

2004). The authorization of federal agencies to use the preparation of Environmental Impact Statements and Environmental Assessments under NEPA procedures to meet Section 106 requirements was "expected to be a major opportunity for agencies with well-developed NEPA processes to simplify concurrent reviews, reduce costs to applicants and avoid redundant paperwork." 64 Fed. Reg. 27044, 27060 (May 18, 1999) (Final Rule of Advisory Council on Historic Preservation).

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Minerals Management Service
July 15, 2009

Certificate statute:

Notwithstanding the provisions of any other law to the contrary, a certificate may be so issued and when so issued, no state agency or local government shall require any approval, consent, permit, certificate or condition for the construction, operation or maintenance of the facility with respect to which the certificate is issued ***and no state agency or local government shall impose or enforce any law, ordinance, by-law, rule or regulation nor take any action nor fail to take any action which would delay or prevent the construction, operation or maintenance of such facility.***

Id. (emphases added). Under a decision of the Massachusetts Supreme Judicial Court, state authorization for the transmission line is contingent upon full federal permitting of the wind farm itself, which lies entirely in federal waters. *See Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 448 Mass. 45, 52 (2006). In other words, delaying approval of the wind farm delays the construction and operation of the transmission project. Thus, MHC/SHPO cannot take any action or discretionary position or fail to act in any manner that would further delay or prolong the consultation process since doing so would be in clear violation of its unambiguous state statutory obligation not to delay construction and operation of the transmission project. MHC/SHPO has no federal legal obligation that is inconsistent with this state law. While MMS is required to consult with MHC/SHPO under federal law, MHC/SHPO is not required under federal law to take any particular position in this process. MHC/SHPO's state law obligations prohibit it from taking any position in the consulting process that would delay the project.

CPN is prepared to take legal action under state law to prevent MHC/SHPO from further obstructing and delaying the resolution of the Section 106 process and, by extension, the construction and operation of the Cape Wind project. However, CPN believes that such legal action is unnecessary because MMS must take cognizance of state law. MMS should now simply terminate the Section 106 consultation process and proceed to request comment from the Advisory Council pursuant to 36 C.F.R. § 800.7.

Nantucket Sound Is Not Eligible for Listing on the NHP Register. CPN further submits that MMS should resist any attempt by consulting parties to further delay the project by suggesting that the entire Nantucket Sound is a Traditional Cultural Property eligible for listing on the National Register of Historic Places. The National Park Service's guidance documents are very clear that open waterways like Nantucket Sound are not eligible for listing on the NHP Register: "***Generally, though, the National Register excludes from the definition of 'site'***

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July 15, 2009

natural waterways or bodies of water . . .” National Register Bulletin 15, *How to Apply the National Register Criteria for Evaluation*, at 5. Nantucket Sound is not a natural feature like a rock outcropping or a grove of trees that may figure prominently in tribal rituals, but rather is an open body of water covering a massive geographic area. CPN is unaware of any such area ever being designated as a historic site.

The case of the Helkau Historic District in northern California illustrates that Traditional Cultural Properties cannot encompass vast landscapes or seascapes, but must be limited geographically:

[M]uch of the significance of the property in the eyes of its traditional users is related to the fact that it is quiet, and that i[t] presents extensive views of natural landscape without modern intrusions.

These factors are crucial to the medicine making done by traditional religious practitioners in the district. If the boundaries of the district were defined on the basis of these factors, however, the district would take in a substantial portion of California’s North Coast Range. Practically speaking, the boundaries of a property like the Helkau District *must be defined more narrowly*, even though this may involve some rather arbitrary decisions. In the case of the Helkau District, the boundary was finally drawn along topographic lines that included all the locations at which traditional practitioners carry out medicine-making and similar activities, the travel routes between such locations and the *immediate viewshed* surround[ing] this complex of locations and routes.”

National Register Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*, at 20 (emphases added). Accordingly, there is no basis for considering the entire Nantucket Sound as eligible for listing on the National Register.

Finally, as to the alleged impacts, CPN understands that the Wampanoag Tribe of Gay Head (Aquinnah) opposes the project because it “considers the Nantucket Sound, in and of itself, traditional cultural property,” and contends that the “Nantucket Sound viewscape is essential to our spiritual well-being and the Cape Wind project will destroy this sacred site.” Ltr. from B. Washington to R. Cluck, June 23, 2009 at 1. Given that the Wampanoag Tribe is currently proposing to erect a 2.1 MW, approximately 400-foot tall turbine on the coast of Martha’s Vineyard directly on the best spot in Aquinnah to view the water, this claim of irreparable impact cannot be credible. In any event, the view from Aquinnah is in the wrong direction: the visual analysis “from Gay Head/Aquinnah to the proposed location indicates that no portions of the offshore turbines in the array would be visible to the viewers at Gay Head/Aquinnah.” MMS, *Documentation of Section 106 Finding of Adverse Effect* § 5.2.2 (Dec. 29, 2008), at 33.

Andrew Krueger, PhD
Minerals Management Service
July 15, 2009

MMS must take into account the long history of frivolous opposition to the Cape Wind project, and should also question the credibility of the Alliance's purported concern with tribal issues.² MHC/SHPO and the Alliance are simply seeking delay by adding another set of frivolous legal claims to the long list of failed challenges to this project. Environmental and historic preservation laws are intended to elucidate real potential impacts, not cause death by a thousand cuts.

MMS can be perfectly comfortable that it has given the consulting parties every opportunity to identify historic properties and to suggest ways to mitigate the adverse effects, if any, on those properties. Further consultation will be fruitless and the process should be terminated. Thank you for your attention to this matter.

Sincerely,

CLEAN POWER NOW, INC.

By its attorneys,

/s/ Matthew F. Pawa

Matthew F. Pawa

Mark R. Rielly

² Barnstable and other opponents of the Cape Wind project have filed numerous federal and state cases and appeals, some of which are pending at this time. *E.g.*, *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dept. of Army*, 288 F. Supp. 2d. 64 (2003),1 *aff'd* 398 F.3d 105 (1st Cir. 2005); *Ten Taxpayers Citizen Group v. Cape Wind Assocs., LLC*, 278 F. Supp. 2d 98 (2003), *aff'd* 373 F.3d 183 (1st Cir. 2004); *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 448 Mass. 45 (2006); *Ten Taxpayer Citizens Group v. Sec'y of the Exec. Office of Envtl. Affairs*, Civ. Action No. 2007-00296 (Super. Ct. Barnstable 2007); *Town of Barnstable v. Cape Wind Assocs., LLC*, Civ. Action No. 2007-00506 (Super. Ct. Barnstable 2007); *Town of Barnstable v. Massachusetts Energy Facilities Siting Bd.*, Civ. Action No. 2008-00281 (Super. Ct. Barnstable 2008); *Town of Barnstable v. Massachusetts Energy Facilities Siting Bd.*, Civ. Action No. 2008-00399 (Super. Ct. Barnstable 2008); *Ten Residents of Massachusetts, et al. v. Cape Wind Assoc., LLC*, Civ. Action No. 2009-00107 (Super. Ct. Barnstable 2009); *Town of Barnstable v. Cape Wind Assoc., LLC*, Civ. Action No. 2009-00109 (Super. Ct. Barnstable 2009); *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, Docket No. SJ-2009-0326 (Mass. 2009); *Town of Barnstable v. Massachusetts Energy Facilities Siting Bd.*, Docket No. SJ-2009-0334 (Mass. 2009); and *Cape Cod Commission v. Energy Facilities Siting Bd.*, Docket No. SJ-2009-0335 (Mass. 2009).

Andrew Krueger, PhD
Minerals Management Service
July 15, 2009

LAW OFFICE OF MATTHEW F. PAWA, P.C.
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cc: Consulting party service list
Barbara Hill, Executive Director, Clean Power Now, Inc.



659-B-123

The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Massachusetts Historical Commission

August 11, 2004

Christine A. Godfrey
Chief, Regulatory Division
US Army Corps of Engineers
696 Virginia Road
Concord, MA 01742-2751

ATTN.: Karen Kirk Adams

RE: Cape Wind Energy Project, Barnstable and Yarmouth, MA.
MHC #RC.29785. COENED-R #199902477. EOEA #12643. PAL #1485.01.

Dear Ms. Godfrey:

The Massachusetts Historical Commission (MHC), office of the State Historic Preservation Officer, is in receipt of your correspondence of July 14, 2004, received at this office on July 19, 2004, concerning the above referenced project and containing your determination of effect for historic properties and a draft Programmatic Agreement. The MHC is also in receipt of the technical report, *Visual Assessment of Multiple Historic Properties, Cape Wind Energy Project*, prepared by the PAL. After a review of the materials submitted, MHC has the following comments.

The MHC concurs with your determination that the preferred alternative for the Cape Wind project will have an **adverse effect** on the following historic properties: the Nobska Point Light Station (Falmouth); the Cotuit Historic District, the Col. Charles Codman Estate, the Wianno Historic District, the Wianno Club, the Hyannis Port Historic District, and the Kennedy Compound (all in Barnstable); the Monomoy Point Lighthouse (Chatham); the West Chop Light Station (Tisbury); the East Chop Light Station and the Dr. Harrison A. Tucker Cottage (both in Oak Bluffs); the Edgartown Village Historic District, the Edgartown Harbor Lighthouse, and the Cape Poge Light (Edgartown); and the Nantucket Great Point Light and the Nantucket National Historic Landmark District (Nantucket). 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 CFR 800.5(a)(2)(iv and v)).

An effect determination has not yet been prepared for archaeological properties. MHC's comments of May 19, 2004, on the results of the marine reconnaissance archaeological survey, provided recommendations, including the implementation of archaeological investigations to locate and identify National Register-eligible properties in the project Area of Potential Effect (APE). As the avoidance analysis and identification survey have not yet been advanced, and as modifications to the APE are contemplated (because of the likely adjustments in the locations of project facilities), it is not possible at this time for the MHC and consulting parties to provide substantive comments on what effects the proposed project may have on significant archaeological resources.

The MHC understands that the Corps will continue to consider public comments on this undertaking received during the Massachusetts Environmental Policy Act (MEPA) and National Environmental Policy Act (NEPA) review processes in fulfillment of the requirements set forth at 36 CFR 800.2. Under the provisions of 36 CFR 800.2, the MHC recommends that the Corps identify consulting parties identified during the public comment period for the EIR/EIS review. While the regulations at 36 CFR 800 allow for the drafting of Programmatic Agreements in order to govern the resolution of the adverse effects in situations where the undertaking involves a complex project (36 CFR 800.14(b)), the MHC is concerned that the draft Programmatic Agreement does not include provisions for public comment or language that adequately describes a meaningful consideration of alternatives to the preferred alternative that would avoid, minimize or mitigate the effects of the proposed project. While the MHC is aware that the NEPA/MEPA process provides the vehicle for disseminating information concerning the proposed project and for receiving public comment in compliance with Section 106 of the National Historic Preservation Act, the mechanism by which the adverse effect is to be considered and resolved through consultation (36 CFR 800.6) must be more clearly and firmly established. Thus, it is premature to submit comments on the draft Programmatic Agreement.

According to 36 CFR 800.14(b)((3)), "consultation to develop a programmatic agreement for dealing with the potential adverse effects of complex projects...shall follow Sec. 800.6." In light of this provision, MHC requests the opportunity to comment more fully on a Programmatic Agreement following its publication in the DEIR/EIS, when the supporting documentation regarding consideration of alternatives is made available and the MHC, the Tribal Historic Preservation Officer (THPO), and other consulting and interested parties have been afforded the opportunity to review it. This will also enable the Corps to take public comment into account concerning the project and to develop a meaningful mechanism for public involvement in the resolution of the adverse effects of the proposed project.

The MHC recommends that a more substantive method be established for project design that will minimize visual impacts during the day and night. The Corps and the proponent should consider alternative locations, configurations, designs, and light fixtures to minimize or avoid the adverse effects. The Corps and the proponent should consider and propose additional mitigation programs that would provide other permanent public benefits and which might directly benefit the preservation of historic properties and the public, should the alternatives study fail to identify a prudent or feasible alternative that would avoid the adverse effects.

Because the identification, evaluation, and consultation process for the project is incomplete for archaeological properties, the draft Programmatic Agreement is also premature until comments are received from consulting parties and the public. The MHC recommends that the Corps develop a more detailed plan for the identification and evaluation of archaeological properties.

The Massachusetts Board of Underwater Archaeological Resources (MBUAR) should be recognized as an agency with expertise on archaeological identification and evaluation surveys. The MBUAR, the THPO, and the Massachusetts Commission on Indian Affairs should be included among those with whom the Corps will consult on archaeological identification and evaluation surveys and the effect finding and proposed treatment, in addition to consultation with the MHC. Procedures for identification and evaluation surveys should be consistent not only with 36 CFR 800, but also with 950 CMR 70 (terrestrial survey areas) and 312 CMR 2 (marine survey areas). Any mitigation program should provide permanent public benefits and directly benefit the preservation of archaeological properties. An Unanticipated Discoveries Plan for Archaeological Resources should be fully consistent with the Massachusetts Unmarked Burial Law and NAGPRA, whichever may apply depending on the location of the discovery in non-Federal or Federal lands, respectively.

A consultation process on effects to cultural resources during operation and maintenance of the facilities should also be developed as well as emergency consultation (consistent with 36 CFR 800.12) in the event that an emergency occurs during operation. The Corps should develop procedures requiring review and consultation on effects to cultural resources if the project should be terminated during or after construction, or if dismantling of the facilities is proposed.

These comments are offered to assist in compliance with Section 106 of the National Historic Preservation Act of 1966 as amended (36 CFR 800), MGL c. 9, ss. 26-27C (950 CMR 70-71), MEPA (301 CMR 11), and the Secretary of Interior's Standards and Guidelines for Archeology and Historic Preservation (48 Fed. Reg. 190(1983)). Please contact Edward L. Bell or Ann Lattinville of my staff if you have any immediate questions.

Sincerely,



Brona Simon
State Archaeologist
Deputy State Historic Preservation Officer
Massachusetts Historical Commission

xc:

Don Klima, Advisory Council on Historic Preservation
Kate Atwood, USACORPS
Rebecca Watson, DOI/Land and Minerals
Conrad C. Lautenbacher, Jr. NOAA
Cheryl Andrews-Maltais, THPO, Wampanoag Tribe of Gay Head (Aquinnah)
Massachusetts Commission on Indian Affairs
Cape Wind Associates, LLC
Terry Orr, Environmental Science Services, Inc.
Deborah C. Cox, PAL
Secretary Bob Durand, EOEA Attn. MEPA Unit
Massachusetts Coastal Zone Management
Victor Mastone, EOEA, Board of Underwater Archaeological Resources
Cape Cod Commission
Yarmouth Historical Commission
Mashpee Historical Commission
Barnstable Historical Commission
Nantucket Historical Commission
Edgartown Historical Commission
Oak Bluffs Historical Commission
Chatham Historical Commission
Alliance to Protect Nantucket Sound
Clean Power Now

October 8, 2008

Melanie Stright, Ph.D.
Federal Historic Preservation Officer
Minerals Management Service
381 Elden Street
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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

Dear Drs. Stright and Cluck:

As a town official in Chatham and a elected member of the Barnstable County Assembly I

have been designated one of the 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. I have reviewed the comments sent to you dated Oct. 6 by Susan Nickerson of the Alliance to Protect Nantucket Sound. I strongly agree with the recommendations made by Ms Nickerson, particularly the need for MMS to redo the visual impacts analysis using a qualified contractor with expertise in historic preservation which is not TRC.

The historic character of Nantucket Sound is very important to the people of Chatham, a traditional fishing and maritime community with a heavy reliance on tourism for our economic base. I urge you to scrap the flawed analysis by TRC and begin the process anew.

sincerely,

Ronald J. Bergstrom
Chatham Board of Selectman.



TOWN OF YARMOUTH

1146 ROUTE 28 SOUTH YARMOUTH MASSACHUSETTS 02664-4492

Telephone (508) 398-2231, Ext. 271, 270 — Fax (508) 398-2365

BOARD OF
SELECTMEN

TOWN
ADMINISTRATOR
Robert C. Lawton, Jr.

March 5, 2009

Dr. Rodney E. Cluck
Cape Wind Program Manager
Mail Stop 4080
4 Barnstable Road
Hyannis, MA 02601

Dr. Melanie Straight
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 Consultants; Nantucket Sound Historic and Tribal Archaeological Resources

Dear Dr. Cluck & Dr. Straight:

The Town of Yarmouth has reviewed a recent letter sent to you by the Save our Sound Alliance to Protect Nantucket Sound and would like to be recorded as agreeing with the points raised in their letter to you dated March 3rd, 2009.

Thank you for your consideration of the position of the Town of Yarmouth.

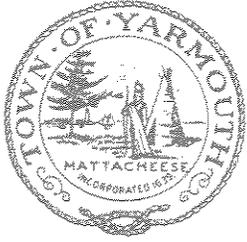
Respectfully,

Robert C. Lawton Jr.
Town Administrator

cc: Board of Selectmen
Attorney Jeffrey Bernstein

Mp3





TOWN OF YARMOUTH

1146 ROUTE 28 SOUTH YARMOUTH MASSACHUSETTS 02664-4492

Telephone (508) 398-2231, Ext. 271, 270 — Fax (508) 398-2365

BOARD OF
SELECTMEN

TOWN
ADMINISTRATOR
Robert C. Lawton, Jr.

September 30, 2008

Dr. Rodney Cluck
U.S. Department of the Interior
Minerals Management Service
Environmental Division
381 Elden Street
Herndon, VA 20170

Dear Dr. Cluck,

The Board of Selectmen of the Town of Yarmouth has recently become aware that the US Minerals Management Service (MMS) is engaged in a section 106 consultation process under the National Historic Preservation Act with regard to the proposed Cape Wind project. Since the Town of Yarmouth has considerable historic resources within its borders, we would like bring a number of matters to your attention. Foremost, we are concerned that MMS' consideration of the historic resources of Yarmouth falls short, since evidence in the record indicates that consideration of these impacts is incomplete at best.

Further, we are concerned that adequate notice has not been given in advance of the consultation process meetings. Towns with limited staff that are trying to deal effectively with important matters need to be able to arrange time and priorities to accommodate meeting schedules. We request that MMS provide us a detailed schedule of forthcoming meetings with at least one month in advance notice of final meeting dates that have been selected.

As part of your section 106 consultation process, we ask that MMS:

- Fully explore above-ground historic resources of the Town of Yarmouth to determine if all eligible resources have been considered as required under federal law;
- Ensure that properties in Yarmouth eligible for inclusion on the National Register, but not necessarily identified or already listed, are considered. The entire universe of historic properties mandated by Section 106 of the National Historic Preservation Act (NHPA) and the regulations of the Advisory Council on Historic Preservation (ACHP) must be included. For example, the South Yarmouth/Bass River Historic District (designated 1990) contains approximately 423 resources. This district will be affected by the Cape Wind project, but has not been considered.
- The findings of the Army Corps of Engineers (ACOE) in previous analyses of Cape towns, and current findings of MMS, show clearly that adverse effect determinations are biased toward those communities that have undertaken a comprehensive evaluation and designation of National Register properties. Where towns have not had the resources to undertake this kind of work, it is incumbent on MMS to carry out the proper analyses.



Attached is a summary of potentially affected historic properties in Yarmouth that was developed in 2004, based on previous work of the Yarmouth Historic Commission. Please note in particular the existence of the following two historic districts that are in close proximity to the Cape Wind project and that were not considered in your analysis or in the earlier one by ACOE:

• ***Park Ave. Historic District, 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.

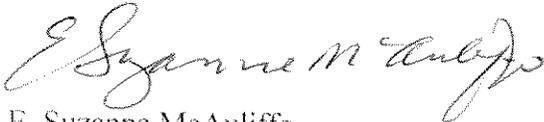
• ***Mass. Ave. Historic District, Yarmouth (approximately 25 components)***

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.

The Town of Yarmouth requests MMS to revise its visual effects analysis so as to apply the standards recommended by the ACHP and include all of the areas and properties that should be considered for the Town.

We also take this opportunity to remind MMS of its obligation to finalize your agency's overall regulations covering all offshore energy development matters in a Record of Decision in advance of concluding your review of the Cape Wind project, and to fully apply these regulations to the Cape Wind project and set up a supplemental comment period. Not only is this the logical sequence, but it is our understanding that Section 106 compliance must be completed, and the findings applied, to the Final Environmental Impact Statement on Cape Wind. We are depending on MMS to defend the public interest in this regard, and ensure the public that all impacts and alternatives have been properly considered.

Very truly yours,



E. Suzanne McAuliffe
Chairman Yarmouth Board of Selectmen
for the Board

YARMOUTH

Revised 11/18/2004; some inventory #s changed or added and some estimations of visibility changed following review of actual map locations

Summary

NR Eligible Properties

NR Eligible Individual Properties: 20

NR Eligible Areas/# Resources (approximate): 2/50

Survey Status non-professional survey; evaluated to identify NR-eligible properties 1989 by consultant Candace Jenkins for MHC and YHC

MHC NR Recommendations yes

NR Properties Considered by PAL

None

NR Properties with Possible Visibility Not Considered by PAL

☛ South Yarmouth/Bass River Historic District (1990) 423 resources

Individual Properties That May Meet NR Criteria

- #304 **15 Windmere Rd., full Cape (c1750-75) , West Yarmouth**
Recommended for individual nomination by 1989 consultant; Visibility likely
- #289 **193 Berry Ave., shingle resort hotel, c1900, West Yarmouth**
Recommended for individual nomination by 1989 consultant; Visibility likely
Preferred overland cable route??
- #292 **92 Berry Ave., sidehall GR, c1840, West Yarmouth**
Recommended for individual nomination by 1989 consultant; Visibility possible
Preferred overland cable route??
- #297 **28 Lewis Road, W. Yarmouth Community Bldg., 1854**
Route 28 vicinity; Only remaining 19th century public school
Recommended for individual nomination by 1989 consultant; Visibility unlikely

- #303 **281 Main St., gambrel Cape, shingles repl. by aluminum, c1750**
Route 28 vicinity; eligible for individual nomination despite siding; high priority due to rarity of form which is not effected by siding;
Recommended for individual nomination by 1989 consultant; Visibility unlikely
- #302 **300 Main St., W. Yarmouth Congo. Church, 1835**
Route 28 vicinity; eligible for individual nomination despite siding; strong historical associations override this unfortunate alteration;
Recommended for individual nomination by 1989 consultant; Visibility unlikely
- **25 Baxter Rd., full Cape, 2 outbuildings, c1800**
Route 28 vicinity; no inventory form listed in MACRIS
Recommended for individual nomination by 1989 consultant; Visibility unlikely
- #279 **50 South Sea Ave., 1/2 Cape, c1800, Route 28 vicinity**
Recommended for individual nomination by 1989 consultant; Visibility possible
- #278 **89 South Sea Ave., 1/2 Cape, Route 28 vicinity**
Recommended for individual nomination by 1989 consultant; Visibility unlikely
- #274 **185 South Sea Ave., 1/2 Cape, Crowell/Eberton House, Route 28 vicinity**
Recommended for individual nomination by 1989 consultant; Visibility possible
- #273 **268 South Sea Ave., 1/2 Cape, Route 28 vicinity**
Recommended for individual nomination by 1989 consultant; Visibility likely
- 28 South Sea Ave. should be thoroughly looked at to identify other early houses, Route 28 vicinity
Recommended for individual nomination by 1989 consultant; Visibility possible
- **Great Island, Corey House, Route 28 vicinity**
Recommended for individual nomination by 1989 consultant; Visibility likely
Not identified on MACRIS under Great Island Road; exact location unknown
- #365 **205 South St., 3/4 Cape (end of road), c1770**
South Yarmouth/Bass River area
Recommended for individual nomination by 1989 consultant; Visibility likely
- #363 **71 South St., GR with motor court, c1850/1920s**
South Yarmouth/Bass River area
Recommended for individual nomination by 1989 consultant; Visibility unlikely
- #416 **214 Pleasant St., poor pic., c1670, South Yarmouth/Bass River area**
Recommended for individual nomination by 1989 consultant; Visibility possible
- #415 **24 Frothingham Way, 2 story early Federal, c1780**

- South Yarmouth/Bass River area
Recommended for individual nomination by 1989 consultant; Visibility possible
- #414 **off-Pleasant St., 1/2 Cape, c1780, South Yarmouth/Bass River area**
Recommended for individual nomination by 1989 consultant; Visibility possible
- #413 **170 Pleasant St., full Cape, c1790, South Yarmouth/Bass River area**
Recommended for individual nomination by 1989 consultant; Visibility possible
- #341 **149 River St., full Cape, c1750, South Yarmouth/Bass River area**
Recommended for individual nomination by 1989 consultant; Visibility possible
- #346 **9 Breezy Point Way/Willow St., 3/4 Cape, South Yarmouth/Bass River area**
Recommended for individual nomination by 1989 consultant; Visibility unlikely

Areas That May Meet NR Criteria

Park Avenue summer resort area

Status

Recommended for district nomination by 1989 consultant

Location

#239-267-Park Avenue summer resort area (adj. to Hyannis) turn-of-the-century, West Yarmouth

Significance

Collection of summer resort houses overlooking Nantucket South

Resources included in Area approximately 25

Visibility

Visibility likely

Massachusetts Avenue summer resort area

Status

Recommended for district nomination by 1989 consultant

Location

#286-292-Massachusetts Avenue summer resort area; turn-of-the-century, West Yarmouth; small district including Mass. Ave. between Broadway and Webster, Webster St., and east side of Columbus Ave.) Mass. Ave.

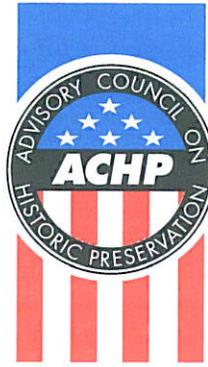
Significance

Collection of summer resort houses overlooking Nantucket Sound; area is especially important as an intact turn-of-the-century summer colony that has not been impacted by the alterations and modern infill seen in other similar areas

Resources included in Area approximately 25

Visibility

Visibility likely



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.

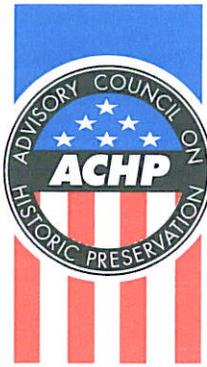
Finally, we note that in the FEIS, MMS references plans (Draft Oil Spill Response Plan and Emergency Response Plan) that have been developed to deal with oil and fuel spills that might occur during construction, operation, and deconstruction of the project. These emphasize controlling the spread and 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

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.

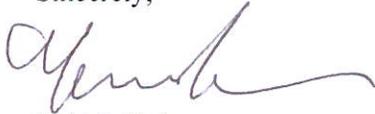
It is important that MMS not be irrevocably bound by conclusions reached in the NEPA process, but to be open to good faith consultation of mitigation measures during the Section 106 review process.

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.

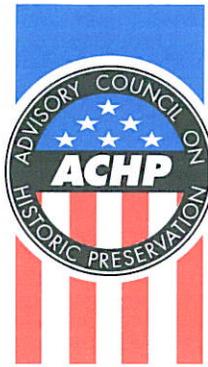
However, should MMS, the Massachusetts SHPO or the ACHP conclude that an agreement cannot be reached, then, pursuant to Section §800.7 of the regulations, any of the parties may terminate consultation, which would lead to formal comments from the ACHP. The regulations provide for a 45-day period for 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

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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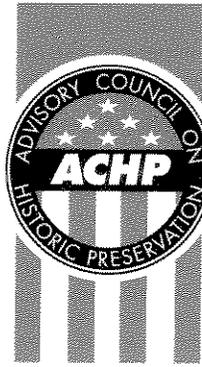
Finally, we understand that the Wampanoag Tribe of Gay Head (Aquinnah) and the Mashpee Wampanoag Tribe both raised the issue of additional historic properties of significance to them. We recommend that MMS elicit sufficient information from the Tribes regarding these properties so that their National 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,



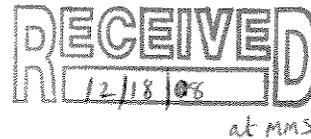
Reid Nelson
Director
Office of Federal Agency Programs



Preserving America's Heritage

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

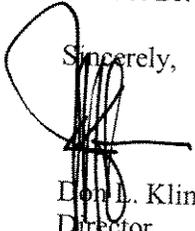
and now are planned sometime in early 2009. Based on recent information, it appears that MMS is considering accepting the effect determinations previously made by the Corps and is also considering additional recommendations about the identification of historic properties and effects made by consulting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



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 1

1 CONGRESS STREET, SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023

December 1, 2009

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

Re: Cape Wind Energy Project

Dear Dr. Krueger:

As we have discussed, your signature below will confirm that the Mineral Management Service (MMS) will assume lead Federal agency status for the purpose of National Historic Preservation Act (NHPA) section 106 compliance for the Cape Wind Energy Project. Under the Advisory Council on Historic Preservation (ACHP) regulations at 36 CFR Part 800, the Cape Wind Energy Project is a Federal undertaking. More than one Federal agency is involved in this undertaking.

In accordance with 36 CFR § 800.2(a)(2), as the United States Environmental Protection Agency's (EPA) designee, MMS will identify the appropriate official to serve as the agency official to fulfill the collective responsibilities of EPA and the MMS under section 106. In addition, although EPA recognizes that as the lead Federal agency, MMS will take the lead on drafting relevant agreements as part of the NHPA section 106 process, EPA would appreciate the opportunity to review and, if appropriate, be a signatory to these documents.

We request that you sign this letter in the signature block provided below. By signing this letter, MMS acknowledges and accepts EPA's designation of MMS as the lead Federal agency for NHPA compliance in connection with the Cape Wind Energy Project. In addition, please return a signed copy of this letter to EPA.

Should you have any questions or concerns about this letter, please feel free to contact Ida McDonnell in my office at 617-918-1653, or LeAnn Jensen in the EPA Region 1 Office of Regional Counsel at 617-918-1072.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen Perkins".

Stephen Perkins, Director
Office of Ecosystem Protection

Toll Free • 1-888-372-7341

Internet Address (URL) • <http://www.epa.gov/region1>

Recycled/Recyclable • Printed with Vegetable Oil Based Inks on Recycled Paper (Minimum 30% Postconsumer)

cc: John Eddins, Advisory Council on Historic Preservation
Brona Simon, Massachusetts Historical Commission
Karen Adams, Army Corps of Engineers
Bruce Bozum, Mohegan Indian Tribe
John Brown, Narragansett Indian Tribe
Michael Thomas, Mashantucket Pequot Tribe
Bettina Washington, Wampanoag Tribe of Gay Head (Aquinnah)
George Green, Mashpee Wampanoag Tribe
Brendan McCahill, EPA Region 1
LeAnn Jensen, EPA Region 1

Acknowledgement by the Mineral Management Service

Name:
Title:

Date



National Park Service
U.S. Department of the Interior

National Register of Historic Places
National Historic Landmarks Program

202/354-2211 phone
202/371-2229 fax

Visit or Courier:
1201 Eye Street, NW
8th Floor
Washington, DC 20005

USPS mailing address:
1849 C Street, NW
Mail Stop 2280
Washington, DC 20240

National Register of Historic Places/ National Historic Landmarks Program Fax

To: Poojan Tripathi

Fax number: 703-787-1026

From: Patrick Andrus

Date: 9/10/09

Pages to follow: 29

Comments:

Poojan: Enclosed are

- 1) 5 page memo on Dune Shacks - see p. 3 of memo for 7 characteristics of TCPs
- 2) Turner's Falls DOE notification - (21 pages)
- 3) Letter & Tribal Resolution from Mashpee Wampanoag Tribe (3 pages)
- 4) Letter from Paul Loether in response (1 page)

call if you need anything

Patrick Andrus - National Register 202.354.2218



United States Department of the Interior

NATIONAL PARK SERVICE
1849 C Street, N.W.
Washington, D.C. 20240

IN REPLY REFER TO:

H32(2280)

MAY 24 2007

Memorandum

To: Chrysendra Walter, Acting Regional Director, Northeast Region

From: Janet Snyder Matthews, Keeper, National Register of Historic Places *Janet Snyder Matthews*

Subject: Potential New Area of Significance, Dune Shacks of the Peaked Hill Bars Historic District, Barnstable County, Massachusetts

On January 26, 2007, you requested a determination of whether or not the District noted above meets the National Register criteria for recognition as a Traditional Cultural Property (TCP). Based on our review of this issue as summarized below, we have concluded that the District does not satisfy these requirements.

Background

The Dune Shacks of the Peaked Hill Bars Historic District was determined eligible for listing in the National Register of Historic Places on May 12, 1989, under National Register criteria A, B, and C. The District covered approximately 1,500 acres, included both the dune shacks and the dune landscape, and was described as a historic cultural landscape with a concentration of natural and cultural resources. The Determination of Eligibility was based on recognition that the District is significant under criteria A, B, and C for its role in the development of American art, literature, and theater; for its association with the life of American poet Harry Kemp; and for its architecture. In the DOE decision, the Dune Shacks of the Peaked Hill Historic District represents "a historic cultural landscape comprised of a distinctive, significant concentration of natural and cultural resources united by their shared historic use as a summer retreat for the Provincetown colony of artists, writers, poets, actors, and others....the District is significant for the shacks' collective use by the artistic community."

Recently, the National Park Service additionally evaluated the Dune Shacks of Peaked Hill Bars Historic District to establish whether the District may also be identified for its significance as a TCP with reference to Criterion A. To assist in this evaluation, the National Park Service hired, as consultants, ethnographers who prepared the following two studies:

- Robert J. Wolfe, "Dwelling in the Dunes: Traditional Use of the Dune Shacks of the Peaked Hill Bars Historic District, Cape Cod" (August 2005) and

- Robert J. Wolfe and T. J. Ferguson, "Traditional Cultural Property Assessment, Dune Shacks of the Peaked Hill Bars Historic District, Cape Cod National Seashore" (May 3, 2006).

Request from Northeast Regional Office

Your memorandum of January 26, 2007, indicated that the Northeast Regional Office staff, after review of the studies, the original National Register Determination of Eligibility (DOE), and other relevant information, provided the following opinion with respect to this issue:

- The District has historical significance as described in the DOE;
- Members of core families preserve knowledge of shack histories and local traditions of shack use and maintenance that is greatly valued by NPS;
- Agreement with the general assessment by consultants Wolfe and Ferguson that the Lower Cape towns of Provincetown, North Truro, and Wellfleet may well be considered as the "community" for purposes of this determination, but believe that the dune dwellers and their networks of friends are not, as a whole, a segment of the Lower Cape community because significant numbers of them are permanent residents in other, off-Cape communities and thus are not associated with the historic context of the Lower Cape community;
- The dune families and their individualized networks are not a community in the sense used in National Register Bulletin # 38: *Guidelines for Evaluating and Documenting Traditional Cultural Properties* due to their widely dispersed residential patterns, and because many individuals have few associations with each other except during short periods of seasonal dune occupation; they are more properly characterized as a collectivity practicing similar lifestyles while they are in the District; and
- The District should therefore not be considered eligible as a TCP under National Register Bulletin # 38.

Massachusetts SHPO Opinion

In a letter dated October 20, 2006, to George E. Price, Jr., Superintendent of Cape Cod National Seashore, Brona Simon, Deputy State Historic Preservation Officer for Massachusetts, disagreed with the opinion of the Northeast Regional Office staff, indicating that in her opinion, the detailed assessments written by Wolf and Ferguson:

- Rely heavily upon the guidance and definitions provided in National Register Bulletin # 38;
- Provide a reasoned discussion of the definitions of "community," "subgroup," "traditional culture," and "coterie;"
- Identify the long-term families, residents, and caretakers of the Dune Shacks as a subgroup of the Provincetown-Lower Cape Community, and of the Portuguese-Yankee maritime and writer/artists communities;
- Categorize dune shack residents and caretakers as carriers of the cultural traditions associated with living in the harsh conditions and natural setting of the dune shacks; and

- Identify dune shack supporters as a secondary group of tradition bearers who interact within the Provincetown community and help pass on the traditions of dune shack living.

Comments Received

Although not required by law or policy, to ensure an opportunity for adequate public input, our office provided a 45-day public comment period ending on March 17, 2007, regarding this issue. Our office reviewed the complete record associated with the District's 1989 Determination of Eligibility, as well as all materials received by our office regarding whether the District may also be identified for its significance as a TCP with reference to Criterion A. During the comment period, the National Register office received over 100 letters, many of which enclosed photographs, pages from publications, and other memorabilia. In addition, the Peaked Hill Trust submitted a sizeable notebook that included extensive transcribed interviews, letters, and email messages that testified to the importance of the dune shacks to Trust members.

The letters received fell into three distinct groups: 1) letters from long-term users of the dune shacks, whose families had occupied the shacks for extended periods of time on a seasonal basis; 2) letters from short-term users of the dune shacks, whose use was made possible through the lottery of the Peaked Hill Trust; and 3) letters from interested individuals who testified to the importance of preserving the shacks. The Peaked Hill Trust notebook provided substantial documentation that the short-term users of the dune shacks also were an important constituency in defining the dune shack society. (Since the 1989 Determination of Eligibility, the National Park Service has worked with organizations such as the Peaked Hill Trust, to make the dune shacks available to a broad constituency of short-term users.)

Traditional Cultural Properties

National Register Bulletins provide guidance and technical information regarding the evaluation of cultural resources. National Register Bulletin # 38 provides flexible guidance regarding the evaluation and documentation of TCPs. In general, as discussed more fully in the Bulletin, a TCP has the following characteristics:

- A living, traditional group or community;
- The group/community must have existed historically and the same group/community continues to the present;
- The group/community must share cultural practices, customs, or beliefs that are rooted in the group/community's history;
- These shared cultural practices, customs, or beliefs must continue to be held or practiced today;
- These shared cultural practices, customs, or beliefs must be important in maintaining the continuing cultural identity and values of the group/community;
- The group must transmit or pass down these shared cultural practices, customs, or beliefs through the generations, usually orally or through practice; and
- These shared cultural practices, customs, or beliefs must be associated with a tangible place, and the place must be directly associated with the identified cultural practices.

Why the Dune Shacks of the Peaked Hill Historic District Does Not Have Significance as a TCP

Our review of the submitted materials demonstrates that the District should not be identified for its significance as a TCP with reference to Criterion A. In this regard, it is particularly important that the District does not meet one of the most important characteristics of a TCP—that **“the group/community must have existed historically and the same group/community continues to the present.”** The groups that claim traditional associations with the Dune Shacks of the Peaked Hill Bars Historic District cover a range of peoples, including long-term occupants of the dune shacks, short-term occupants, transient visitors, residents of the Provincetown-Lower Cape Community, and likely other groups beyond the immediate locality. The groups that are culturally identified with the District were historically (and continue to be) fluid, evolving, and different from one year to the next.

In making this determination, we considered the Wolfe report, “Dwelling in the Dunes” and the Wolfe and Ferguson report, “Traditional Cultural Property Assessment.” Our review found that these reports focus on a relatively small component of the multiple groups that claim traditional associations with the Dune Shacks of the Peaked Hill Bars Historic District—the long-term families and their friends who use, care for, and maintain dune shacks. In the “Dwelling in the Dunes” report, Wolfe states that “the primary sources of information for this ethnographic report were long-term shack residents.” The report lists 47 long-term residents who were interviewed for the report and who were associated with particular principal dune shacks. As a consequence, “Dwelling in the Dunes” provides intensive and detailed information on the long-term residents who value the District and the shacks. The Wolfe and Ferguson report, “Traditional Cultural Property Assessment” builds on the Wolfe report and focuses on the significance of the Dune Shacks of the Peaked Hill Bars Historic District to the long-term dune shack families.

This focus on a small component of the multiple groups that claim traditional associations with the District is in marked contrast with a substantial number of letters that were mailed to the National Register office during the 45-day comment period that expressed concern that the reports had defined the associated community too narrowly. Within this group of letters, some respondents did not believe that it was possible to identify a group of people who represented the cultural focus of the shack district because this group was always changing. The groups included long-term as well as casual, transient visitors. The extensive notebook provided by the Peaked Hill Trust, which included transcribed interviews with Trust members, as well as letters, confirmed the character of the associated community. Many members of the Peaked Hill Trust felt that transient users/tenants had not been included in the Wolfe report, but that they constituted an important component to shack culture.

Effects of the Decision

The fact that the Dune Shacks of the Peaked Hill Historic District should not be identified for its significance as a TCP with reference to Criterion A does not materially affect the 1989 Determination of Eligibility of the Dune Shacks of Peaked Hill Bars Historic District for listing in the National Register of Historic Places under criteria A, B, and C for its role in the development of American art, literature, and theater; for its association with the life of American

poet Harry Kemp; and for its architecture. The property remains as eligible for inclusion in the National Register and will be treated in accordance with this designation. Nor does it affect the ongoing responsibility of park management to consult with the community and the various groups within the community on its planning and management activities. As the property has been determined eligible for the National Register, we recommend that the park prepare and submit a nomination of the District for listing in the National Register.

Thank you for your cooperation and assistance in providing information on this matter. Please note that a copy of this memorandum will be retained in the permanent National Register file for the Dune Shacks of the Peaked Hill Bars Historic District. If you have other questions regarding this matter, please contact Paul Loether, Chief of the National Register of Historic Places and National Historic Landmarks Programs at (202) 354-2003 or paul_loether@nps.gov.

cc: George E. Price, Jr., Superintendent, Cape Cod National Seashore
Ronald Kaufman, Chairman, Cape Cod National Seashore Advisory Commission
U.S. Senator Edward M. Kennedy
U.S. Representative William Delahunt
Brona Simon, Executive Director/State Historic Preservation Officer, Massachusetts
Provincetown Board of Selectmen
Truro Board of Selectmen
Provincetown Historical Commission
Truro Historical Commission
Kelly Fanizzo, Advisory Council on Historic Preservation
Robert J. Wolfe, Robert J. Wolfe and Associates
T. J. Ferguson
Keith A. Bergman, Town Manager, Provincetown Town Hall
John Thomas, Chair, Cape Cod National Seashore GMP Implementation Advisory
Committee



United States Department of the Interior

NATIONAL PARK SERVICE
1849 C Street, N.W.
Washington, D.C. 20240

IN REPLY REFER TO:

DETERMINATION OF ELIGIBILITY NOTIFICATION

National Register of Historic Places
National Park Service

Name of Property: The Turners Falls Sacred Ceremonial Hill Site (Formerly, The Airport Improvement Project - Turners Falls Municipal Airport)

Location: Franklin County

State: Massachusetts

Request submitted by: John C. Silva, Manager, Environmental Programs, FAA, New England Division

Date received: 05/25/2007 Additional information received 11/07/2008

Opinion of the State Historic Preservation Officer:

Eligible Not Eligible No Response Need More Information

Comments:

The Secretary of the Interior has determined that this property is:

Eligible Applicable criteria: A, D Not Eligible

Comment: See attached comments.

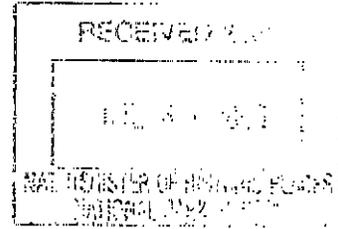
Documentation Insufficient
(Please see accompanying sheet explaining additional materials required)

Janet Snyder Matthews
Keeper of the National Register

Date: 12/11/2008



Mashpee Wampanoag Tribe
 483 Great Neck Rd. P.O. Box 1048 Mashpee, MA 02649
 Phone (508) 477-0208 Fax (508) 477-1218



July 24, 2009

J. Paul Loether
 Chief
 National Register of Historic Places
 National Historic Landmarks Program
 1849 C Street N.W.
 Mail Stop 2280
 Washington D.C. 20240

Dear Chief Loether,

Enclosed is a resolution voted by the Mashpee Wampanoag Tribal Council Board of Directors on July 14, 2009. The Mashpee Wampanoag Tribe holds Nantucket sound as sacred and has a historic and religious connection to it and sees it as a Traditional Cultural Property

Respectfully Yours,

George "Chuckie" Green

George "Chuckie" Green
 Tribal Designee for Historic Preservation
 Mashpee Wampanoag Tribe

Mashpee Wampanoag Tribe

P.O. Box 1048
Mashpee, MA. 02649
(508)477-0208

**2009-RES-022****Horseshoe Shoal Resolution**

WHEREAS, the Mashpee Wampanoag Tribe is federal recognized Tribe entitled to the immunities and privileges available to Indian tribes by virtue of their government - to -government relationship with the United States; and

WHEREAS, the Mashpee Wampanoag Tribe is a member of the Great Wampanoag Nation, known as "The People of the First Light" and have since time immemorial occupied the land and waters from Narragansett Bay to the Neponset estuaries and maintained a spiritual, cultural and traditional connection to their traditional homeland; and

WHEREAS, as the People of the First Light; one of the most important components of our religious, cultural and ceremonial practices is our ability to embrace and give prayer of thanksgiving to the first light . These ceremonial, spiritual and religious practices require an unobstructed view of the sunrise over Nantucket Sound; and

WHEREAS, the Wampanoag people have walked these lands for nine thousand years, including both upland and land under the ocean and we must preserve the spiritual integrity and sanctity of the eastern horizon, vista and horizon view-shed, central to our religion ; and

WHEREAS, our oral traditions teach us that our people lived , raised families, hunted, fished and buried our dead on this land now known as Horseshoe Shoals and their descendents still live on Cape Cod and Martha's Vineyard and carry on our culture, traditions and religion; and

WHEREAS, the Wampanoag Tribe, the Colonies, the state of Massachusetts and the United States share a long maritime history and a National Treasure that has significant spiritual, cultural, traditional and historic value to all.

NOW THEREFORE, BE IT RESOLVED that the Mashpee Wampanoag Tribe requests the National Park Service (NPS) determined that Nantucket Sound is a **Traditional Cultural Property**; and

BE IT FURTHER RESOLVED that the Mashpee Wampanoag Tribe since time immemorial has a traditional, cultural, spiritual and religious connection to the Sound and have determined that Nantucket Sound is a **Traditional Cultural Property**; and

BE IT FINALLY RESOLVED that the Mashpee Wampanoag Tribe approves and submits this resolution to the National Park Service (NPS)

CERTIFICATION

We, the undersigned Chairman and Secretary of the Tribal Council of the Mashpee Wampanoag Tribe, hereby, certify that the Tribal Council is composed of 13 members of whom 10 constituting a quorum, were present at a meeting thereof, duly and regularly called, noticed, convened and held on the 15th day of July, 2009, and that the foregoing Resolution was duly adopted by the affirmative vote of 9 members, with 0 opposing, and with 0 not voting.

DATED THIS 15th day of July, 2009


Cedric Cromwell, Chairman
Mashpee Wampanoag Tribal Council

ATTEST:


Marie Stone, Secretary
Mashpee Wampanoag Tribal Council

H32(2280)

AUG 17 2009

Mr. George "Chuckie" Green
Tribal Designee for Historic Preservation
Mashpee Wampanoag Tribe
483 Great Neck Road
P.O. Box 1048
Mashpee, Massachusetts 02649

Dear Mr. Green

Thank you for your letter of July 24, 2009, to the National Register of Historic Places submitting a Mashpee Wampanoag Tribal Resolution (2009-RES-022 Horseshoe Shoal Resolution) requesting that the National Park Service determine Nantucket Sound a Traditional Cultural Property.

Historic places listed in or formally determined to be eligible for listing in the National Register can be recognized as Traditional Cultural Properties through one of two processes; either by nomination to the National Register of Historic Places by the appropriate State, Federal or Tribal Historic Preservation Officer (as stipulated in Federal Regulations 36 CFR Part 60), or in response to a determination of eligibility request by the appropriate Federal Preservation Officer as part of a Section 106 review of a Federal undertaking (as stipulated in Federal regulations 36 CFR Part 63). The National Park Service does not have the authority to recognize historic properties as having traditional cultural significance outside of this regulatory framework.

Sincerely,

J. Paul Loether

J. Paul Loether, Chief
National Register of Historic Places
and National Historic Landmarks Program



United States Department of the Interior

NATIONAL PARK SERVICE
1849 C Street, N.W.
Washington, D.C. 20240

IN REPLY REFER TO:

H32(2280)

OCT 16 2009

Memorandum

To: Director, Minerals Management Service

OCT 20 2009

Through: Deputy Assistant Secretary for Fish, Wildlife and Parks

From:  Director

Subject: Cape Wind Energy Project, Nantucket Sound, Massachusetts

Attached is a copy of the National Park Service's comment on the project noted above. The comment was prepared at the request of Minerals Management Service pursuant to a recommendation by the Advisory Council for Historic Preservation. If you or your staff have any questions regarding the attached document, please contact Dr. Antoinette Lee, Assistant Associate Director, Historical Documentation Programs, at 202-354-2272 or via electronic mail at toni_lee@nps.gov.

Attachment

National Park Service Comment on Effects of Proposed Cape Wind Energy Project, Nantucket Sound, Massachusetts, on National Historic Landmarks

Background

At the request of the Minerals Management Service (MMS), the National Park Service (NPS) issues this comment on whether the proposed Cape Wind Energy Project (Project) would constitute a “direct and adverse effect” on the Nantucket Historic District and the Kennedy Compound, both National Historic Landmark (NHL) properties. This comment follows the September 4, 2009, meeting of MMS, NPS, and Department officials, and is as a result of the recommendation to the MMS by the Advisory Council on Historic Preservation (ACHP) to seek such comment from the NPS.

MMS’s position as summarized in its April 29, 2009, email to NPS is that adverse effects posed by the Project are “indirect visual effects, not direct physical effects” and as a result, the undertaking is not subject to the provisions of Section 110(f) of the National Historic Preservation Act (NHPA). MMS’s Finding of Adverse Effect concluded that the Project “constitutes an adverse effect for the 28 above-ground historic properties (see Table 4.1)...in that the undertaking will change the character of the properties’ setting that contributes to their historic significance; and the undertaking introduces visual elements that are out of character with the properties.” Both the Nantucket Historic District and the Kennedy Compound are included in Table 4.1. Subsequently, MMS stated its position that Section 110(f) of the NHPA is not applicable “in situations involving effects that are only indirect.”¹

It is the understanding of the NPS that the Project Section 106 consulting parties, which include the Massachusetts Historical Commission (SHPO), the Mashpee Wampanoag Tribe (THPO), and the Wampanoag Tribe of Gay Head, Aquinnah (THPO), have concurred that the visual intrusion resulting from the Project will have an adverse effect on both the Nantucket Historic District NHL and the Kennedy Compound NHL. The NPS further understands that MMS and the consulting parties do not necessarily agree as to the degree of adverse effect and whether the adverse effect on these two NHLs is or is not direct.

The NHPA (at 16 USC 470h-2), establishes Federal agency responsibilities for the preservation of historic properties. Where NHLs are concerned, Section 110(f) (16 USC 407h-2(f) provides that:

Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such

¹ Brandi M. Carrier Jones, ed. *Minerals Management Service Documentation of Section 106 Finding of Adverse Effect, Prepared for Submission to Massachusetts Historical Commission Pursuant to 36 CFR 800.6(a)(3) for the Cape Wind Energy Project*. Lusby, MD: Minerals Management Service, December 29, 2008, 30, 34, and 35. Walter D. Cruickshank, *Proposed Cape Wind Energy Project, Nantucket Sound, Massachusetts*. Washington DC: Minerals Management Service, September 8, 2009, 2.

landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. [underlining added]

Moreover, pursuant to Section 101(g) (16 USC 470a(g)), the Secretary of the Interior has promulgated guidelines for these Federal agency responsibilities, *The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act (Secretary's Standards)*, (*Federal Register*, April 24, 1998, pages 20496-20505). Standard 4 of these Guidelines, (j)–(l) pertain specifically to NHLs, including the process to be followed if an effect is direct and adverse.

The Nantucket Historic District, which includes the island of Nantucket, Massachusetts, in its entirety, was designated as an NHL by the Secretary of the Interior on November 13, 1966. The Kennedy Compound, which fronts the northern side of Nantucket Sound at Hyannis Port, Massachusetts, was designated as an NHL by the Secretary on November 28, 1972.

Summary of NPS Comment

Determinations like this are necessarily made on a case by case basis, on the facts of a particular undertaking, and the NHL at issue. Although this comment considers two NHLs, in reaching its conclusions the NPS considered the effects of the Project on each of the two NHLs. Following a detailed review of NPS file documentation for both NHLs, area nautical charts and topographical maps, the Project *Final Environmental Impact Statement (FEIS)*, MMS's *Section 106 Finding of Effect*, pertinent National Register Bulletins, and other documentation, as well as professionally prepared viewshed assessments and computer-simulated photographs including those used in the following pages, the NPS finds that the Project will have an adverse effect on the historic Nantucket Sound settings of both NHLs. However, NPS further finds that this adverse effect is not "direct."

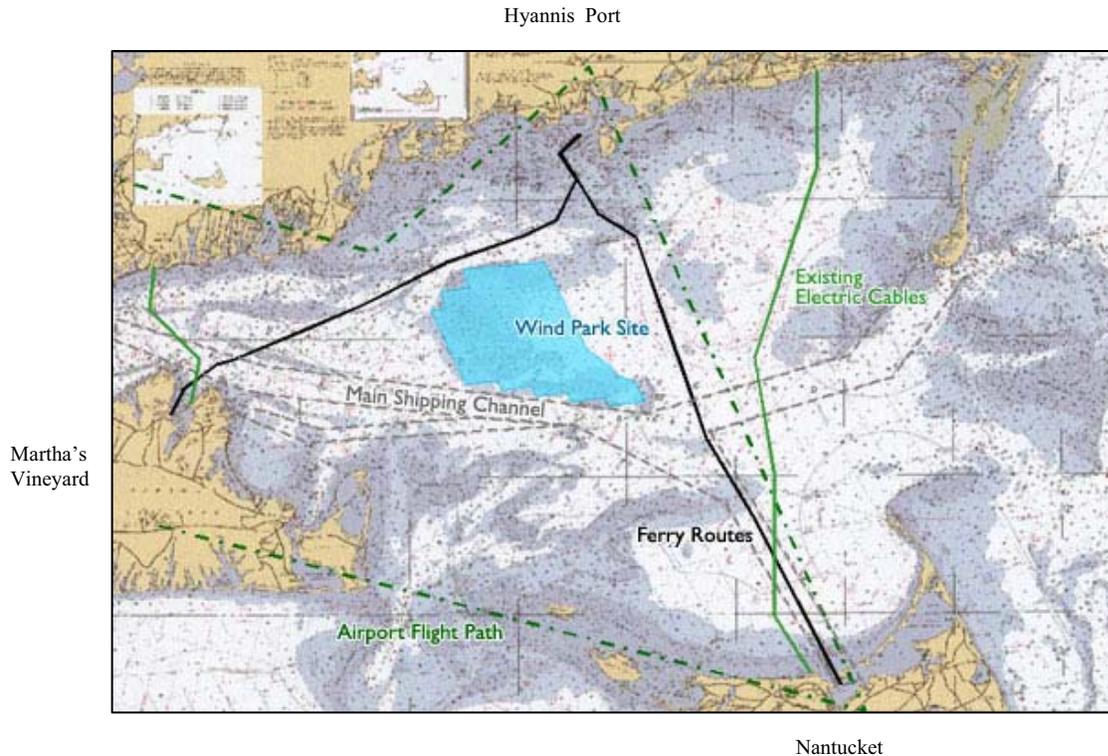
Project Overview

The proposed site of the Project encompasses most of Horseshoe Shoal, which is located in Nantucket Sound approximately 6 miles south/southwest of Hyannis Port and the Kennedy Compound NHL, 9 miles east/northeast of Martha's Vineyard, and 13 miles northwest of Nantucket and the Nantucket Historic District NHL (see following map). Neither Horseshoe Shoal nor Nantucket Sound are within the boundaries of either NHL.

"The proposed project entails the construction, operation, and decommissioning of 130 Wind Turbine Generators (WTGs) located in a grid pattern on and near Horseshoe Shoal in Nantucket Sound, Massachusetts, as well as an Electrical Service Platform (ESP), inner-array cables, and two transmission cables (USDOJ MMS 2008; Figure 2.1)."² All WTGs will be mounted on tubular, conical steel towers set atop monopile foundations. The maximum tip height reached by any WTG rotor blade will be 440 feet; minimum water clearance for rotor-blade tips will be 75 feet. Individual WTG/tower units will be located between 0.3 and 0.5 miles from each other and placed within an approximately 24-square-mile footprint. All WTGs must

² Brandi M. Carrier Jones, Section 2.0.

include navigation and aviation warning lights conforming to standards established by the United States Coast Guard (USCG) and the Federal Aviation Administration (FAA).



Map of Nantucket Sound, Massachusetts, showing relationship of proposed Cape Wind Energy Project “Wind Park Site” in relation to Hyannis Port, Nantucket Island, and extant flight paths, shipping channels, ferry routes, and undersea electrical cables. (<http://www.capewind.org/article7.htm>).

Each of the 130 WTGs will generate electricity independently of each other. Solid dielectric submarine inner-array cables from each WTG will interconnect with the grid and terminate at the ESP; the ESP would serve as the common interconnection point for all WTGs. The proposed submarine transmission cable system is approximately 20.1 kilometers (km; 12.5 miles [mi]) in length extending from the ESP to the landfall location in Yarmouth, MA. Of the 20.1 km, 12.2 km [7.6 mi] are located within the Massachusetts territorial line (approximately 5.6 km [3.5 mi] from shore). The two submarine transmission cables would travel north to northeast through Nantucket Sound and into Lewis Bay, passing by the western side of Egg Island and making landfall at New Hampshire Avenue, in Yarmouth (USDOJ MMS 2008).³

Area of Potential Effect

As stated in the MMS’s *Finding of Adverse Effect*, the Project’s Area of Potential Effect is defined as follows:

The Area of Potential Effect (APE) for the onshore component of the proposed project

³ *Ibid.*

includes areas where physical ground disturbance would occur during construction, operation and maintenance, and decommissioning (e.g., the areas along the overland route to the Barnstable Switching Station where the transmission cable will tie-in), as well as those areas within view of the site of the proposed project (e.g., historic properties on Cape Cod, Martha's Vineyard, and Nantucket from which open views of the visible components of the proposed project, e.g. WTGs would be possible). The APE for offshore archaeological resources includes the footprints of the WTG structures on the sea floor; the work area around each WTG where marine sediments may be disturbed; the jet plowed trenches for installation of the inner-array cables connecting the WTGs to the ESP; the jet plowed trenches for the transmission cable system from the ESP to the landfall site; and associated marine work areas such as anchor drop areas (USDOJ MMS 2008).⁴

Applicable Laws, Regulations, and Requirements

Pursuant to the provisions of the Historic Sites Act of 1935 and 36 CFR 65.2(b), upon designation by the Secretary of the Interior NHLs are automatically listed in the National Register of Historic Places (NR) and therefore subject to the provisions of Section 106 of NHPA. Section 106 regulations also contain provisions to protect NHLs. *Special Requirements for Protecting National Historic Landmarks*.⁵ There are also guidance documents to assist in the compliance with these requirements, providing advice, instructions and examples. Due to Federal permitting requirements, the Project constitutes a Federally-assisted undertaking subject to the administrative oversight of MMS. As a Federal undertaking, the Project is subject to review under Section 106 of NHPA (16 USC 470f), which provides:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or Federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.

To aid the ACHP, the ACHP may but is not required to request the Secretary of the Interior to report on that undertaking, “detailing the significance of any historic property, describing the effects...and recommending measures to avoid, minimize or mitigate adverse effects.” This report is produced by NPS and is referred to as a Section 213 Report because it is authorized by

⁴ Brandi M. Carrier Jones, Section 2.1.

⁵ 36 CFR 800.10, Special requirements for protecting NHLs, reiterates text of Section 110(f) of NHPA which: “requires that the agency official, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking. When commenting on such undertakings, the Council shall use the process set forth in §§800.6 through 800.7 and give special consideration to protecting National Historic Landmarks as specified in this section.” See also *The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act*, Section 4(l).

NHPA Section 213 (16 USC 470u). The ACHP has specifically not requested a Section 213 Report on the Project, instead asking for this comment.

The Section 110(f) review process is similar to that required under Section 106, but requires Federal agencies to exercise a higher standard of care prior to the approval of any Federal undertaking that may directly and adversely affect NHLs. Agencies are mandated to engage in such planning and action as may be necessary to minimize harm to NHLs, and to obtain ACHP comments on the undertaking. As in the case of the Project, Section 110(f) reviews are generally accomplished under the regulations implementing Section 106, 36 CFR 800. Additional guidance regarding a Federal agency's responsibility for implementing Section 110(f) is provided under the *Secretary Standards*, Standard 4, Guidelines (j), (k), and (l).

The regulations for the implementation of Section 106, at 36 CFR 800, define an "effect" as meaning an "alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register," (36 CFR 800.16(i)), and an "adverse effect" in 36 CFR 800.5(a)(1) as:

[W]hen 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. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

These regulations were promulgated by the ACHP and when ACHP revised them in 2000, it was asked about the definition of "adverse effects," and what was meant by "when an undertaking 'may' alter 'indirectly any' of the characteristics making the property eligible in a way that would diminish the integrity of the property's 'feeling' or 'association.'" The ACHP responded that:

...adverse effect criteria are linked specifically to objective National Register criteria published by the National Park Service. The National Register criteria itself expands on the meaning of its terms and provides various examples. These criteria have been fleshed out through consideration and application countless times, over the years, since the program began, and explained through various guidance documents.⁶

The NPS has described "direct" effects and "indirect" effects within the context of Section 106 reviews in guidance documents, including the 1997 NPS *National Register Bulletin: Defining Boundaries for National Register Properties*, which provides:

To be in compliance with the act [Section 106 of NHPA], Federal agencies must identify and evaluate National Register eligibility of properties within the area of potential effect and evaluate the effect of the undertaking on eligible properties. The area of potential effect is

⁶ *Federal Register*, December 12, 2000, 77707.

*defined as the area in which eligible properties may be affected by the undertaking, including direct effects (such as destruction of the property) and indirect effects (such as visual, audible, and atmospheric changes which affect the character and setting of the property). The area of potential effect may include historic properties that are well beyond the limits of the undertaking. For example, a Federal undertaking outside of the defined boundaries of a rural traditional cultural property or an urban historic district can have visual, economic, traffic, and social effects on the setting, feeling, and association of the eligible resources.*⁷

The ACHP, when it revised its regulations in 2000, was also asked the role of proximity of an undertaking to an historic site. The ACHP stated:

*The standard set forth under section 106 is effect, not proximity. While it is possible that distance separating an undertaking from a particular historic property may remove any effects, such a determination should be made on a case by case basis, and is not suitable for a generalization. Different undertakings simply have different areas of potential effects according to several factors such as the nature of the undertaking itself, the nature of the historic property at issue, and topography.*⁸

Relationship Between Historic Significance and Integrity

As the above definition of adverse effects indicates, determination of adverse effect requires an informed understanding of the integrity of a historic resource's character-defining features. The NPS's 1999 *National Register Bulletin: How to Prepare National Historic Landmark Nominations (Bulletin)*, defines integrity as "the ability of an historic property to convey its historical associations or attributes."⁹ The *Bulletin* notes that, while the evaluation of integrity is somewhat subjective, "it must be grounded in an understanding of a property's physical features and how they relate to its historical associations or attributes."¹⁰

The *Bulletin* identifies and describes seven aspects of integrity that are, in various combinations, used to evaluate NHLs: location, design, setting, materials, workmanship, feeling, and association. Unlike other properties listed in the NR, NHLs must possess several, and usually most of these aspects to a "high" degree. The retention of specific aspects of integrity is paramount in conveying a property's significance. Determining which of these aspects are most important to a particular property requires knowing why, where, and when the property is significant.

The *Bulletin* identifies the three factors utilized by the NPS in assessing the integrity of NHLs:

- *Define the essential physical features that must be present to high degree for a property to represent its significance;*

⁷ *National Register Bulletin: Defining Boundaries for National Register Properties*. Washington DC: National Park Service, 1997, 1. See also NPS-28, *Cultural Resources*, chapter 5, "Assessing Effects," pages 59-61.

⁸ Advisory Council on Historic Preservation, Protection of Historic Properties, 36 CFR 800, Final rule; revision of current regulations, *Federal Register*, Vol. 65, No. 239, Tuesday, December 12, 2000, 77707.

⁹ *National Register Bulletin: How to Prepare National Historic Landmark Nominations*. Washington DC: National Park Service, 1999, 36.

¹⁰ *Ibid.*

- *Determine whether the essential physical features are apparent enough to convey the property's significance; and*
- *Compare the property with similar properties in the nationally significant theme.*¹¹

National Historic Landmarks Documentation

Documentation regarding the location, boundaries, significance, and integrity of the Nantucket Historic District and the Kennedy Compound as well as photographs and maps for each resource, are maintained by the NPS in the files of the NR and NHL Program in Washington, DC. NR and NHL files include original nomination documents as well as all supplementary documentation and communications collected on each resource since its date of listing/designation. NPS routinely utilizes such file documentation for a variety of preservation and educational purposes, including as a core reference source in the Section 106 and Section 110(f) decision-making processes. The following statements of significance for the Nantucket Historic District and the Kennedy Compound are summaries compiled by NPS from documentation currently maintained in the file for each resource.

National Significance of the Nantucket Historic District

The Nantucket Historic District is nationally significant both for its association with the American whaling industry (NHL Criterion 1) and for its remarkable concentration of well-preserved, whaling-industry related architecture (NHL Criterion 4). The island's principal historic village, Nantucket Town, remains one of the finest surviving architectural and environmental examples of an early 19th-century seaport town in New England. The Nantucket Historic District includes the entire island of Nantucket (30,000 acres and some 75 miles of coastline).



¹¹ *Ibid.*, 37.

Typical View of Nantucket Harbor, Nantucket Historic District. Anonymous (<http://www.new-england-weekender.com/nantucketisland.html>).

Prior to European contact, Algonquian-speaking Native Americans, who subsisted by planting maize, beans, and squash, exploiting the rich aquatic resources in the ponds and along the shoreline, and hunting sea mammals such as seals and whales near the shore, inhabited the island. Archeological evidence indicates that these Algonquians were a part of a larger and culturally linked community that extended from Saco Bay in Maine, to the Housatonic River area in Connecticut, and from Long Island inland to southern New Hampshire and Vermont. Europeans first settled on Nantucket in the mid-17th century. Although Europeans originally lived alongside the Native American population, they eventually came to dominate the island.

Between the 1740s and 1840s, Nantucket became the world's leading whaling port and the island became synonymous with the great age of New England whaling. The island's dominance in this industry stemmed from both its geography and innovations developed by the islanders. Crews from Nantucket led the way not only in finding new hunting areas, but also in developing new techniques of whaling. Nantucket crews were also the first to understand the Gulf Stream, which an islander then mapped for the nation's Postmaster General.

During the height of the whaling industry in the early 19th century, Nantucket's population numbered almost 10,000. The island also boasted five wharves, 10 rope walks, 36 candle factories, sail lofts, cooper shops, and boatyards and shipyards. The island's harbor shoreline was lined with commercial and industrial buildings associated with the whaling industry and, in adjacent Nantucket Town, wealthy sea captains and merchants built magnificent homes. However, much of the island's early commercial building stock was destroyed in a 19th-century fire. Although many of the island's commercial buildings and structures specifically associated with the whaling industry are no longer extant, many significant residences and associated structures remain intact, and the harbor, which was of central importance to the whaling industry, remains an active seaport. These surviving buildings and structures and the continuous use of Nantucket Town's harbor for commercial purposes provide historical continuity and add to the quality of the landmark as a whole.

The well-preserved physical forms, plan, and materials associated with the island's historic villages are a physical manifestation of the island's wealth, which was derived from the island's successful whaling industry. Because the national significance of Nantucket rests on its heritage as a maritime community associated with whaling, the island's building stock, historic villages, and harbor are of central importance to the property's designation as an NHL. In this regard, these key elements of the Nantucket Historic District as a whole retain a degree of integrity sufficiently high enough to effectively convey the essential ambiance of an early 19th-century whaling community.

National Significance of the Kennedy Compound

The Kennedy Compound, a six-acre family enclave in Hyannis Port, Massachusetts, is nationally significant for its association with the Kennedy family (NHL Criterion 2). The compound includes homes formerly owned by Ambassador Joseph P. Kennedy, President John F. Kennedy,

and U.S. Attorney General and Senator Robert F. Kennedy. After 1982 and up to his death in 2009, U.S. Senator Edward M. Kennedy used the home of Ambassador Joseph P. Kennedy as his residence on Cape Cod.

In 1929, Joseph Kennedy acquired the Hyannis Port house after renting it for three summers. The family's ethnic and religious identity, which became an issue with John F. Kennedy's presidential campaign in 1960, was intrinsically linked to the choice of Hyannis Port as the setting for the family's summer home. At the time Joseph Kennedy purchased the property, Hyannis Port, unlike Cohasset, Massachusetts where Kennedy and his family had spent one summer, was more welcoming to Irish Catholics.

The compound's first and foremost residence, the Joseph P. Kennedy House, is prominently situated fronting Nantucket Sound slightly more than a mile west of Cape Cod's Lewis Bay. While not nationally significant for its architecture, the early 20th-century summer "cottage" was greatly expanded by Joseph Kennedy, and today remains one of the most impressive historic properties in Hyannis Port. As adults, John F. and Robert F. Kennedy, bought the houses adjacent to their father's, significantly expanding the property held by the Kennedy family, and thereby creating a large compound with multiple residences. While the compound served as a private retreat for the family, the political activities of the Kennedy family ensured that the property was in the forefront of the national consciousness during the early 1960s. In 1972, the significance of the compound was formally recognized when the property was designated by the Secretary of the Interior as an NHL.



Right-to-left: The Joseph P. Kennedy and John F. Kennedy House (part of the Kennedy Compound, Hyannis Port, Mass). Robert Spencer for the *New York Times* (<http://travel.nytimes.com/2006/08/18/travel/escapes/18down.html>).

The significance of the property is embodied in both the buildings and structures that make up the compound as well as the relationships between these buildings and structures, and the

association of the whole with the Kennedy family. It was in and around the Joseph P. Kennedy house that the Kennedy children spent their formative summers engaging in various competitive pursuits, such as football, tennis, swimming, and sailing, all of which were encouraged by their father. John F. Kennedy's 1960 presidential campaign was also planned in and around his father's and his own house. More broadly, the relationship of the various buildings and structures, specifically their close proximity to one another, illustrates and reflects the inter-relationships between the family members, both in terms of their familial as well as their political relationships.

The large lawns associated with the property are especially significant for their association with both the Kennedys' well-known and widely publicized practice of playing family football games as well as John F. Kennedy's campaign for the Presidency. In 1960, Kennedy spent two weeks at the compound before embarking on his fall election campaign. During this crucial two-week period, Kennedy frequently met with the press in his front yard; pictures of him on the Hyannis Port lawn were commonly featured in the national media, forming a backdrop to Kennedy's campaign and, ultimately, his presidency. After his election to office, Kennedy found it difficult for security reasons to stay at the compound, but he did fly in to the compound every weekend during the summer of 1961 and numerous U.S. and foreign officials met with him there. The Kennedy children all learned to sail, and members of the family were frequently photographed sailing or swimming around the property. As president, John F. Kennedy also often used his family's yacht to entertain foreign officials.

Overall, the property's national significance relies solely on its strong and continuing association with the various members of the Kennedy family. This significance rests in great measure upon the family's recreational use of the property, the proximity of the houses to one another, and the compound's proximity to the water. The compound's exceptional significance continues to be evident as a result of its continued high integrity.

Particularly key aspects of the high integrity associated with the Kennedy Compound are: location, materials, design, workmanship, feeling, and association. The integrity of the compound's oceanfront setting relies primarily on its ability to reflect the water activities in which the Kennedy family habitually engaged—the compound's immediate viewshed—and secondarily on its ability to afford unobstructed-to-the-horizon, ocean views.

Analysis

The national significance and high level of integrity of the Nantucket Historic District are intimately tied to the ability of the physical form, plan, and materials of its historic villages, buildings, structures, and immediate waterfront setting to convey both a way of life and historic patterns of construction and development. Historically, the district's island setting served to limit the impact of outside factors with respect to the creation and retention of historic fabric and life ways. As with most maritime communities, Nantucket's relationship with the water—particularly its main harbor, inlets, coastline, and the expanses of open water that surround the island—is far more significant historically with respect to transportation and commerce than from a scenic standpoint. However, unobstructed ocean views to the horizon in all directions enhance the district's historic sense of place and contribute to district's overall sense of high

integrity of historic setting. For the district as a whole, the most important aspects of integrity continue to be location, design, materials, workmanship, association, and feeling conveyed through, the forms, plans, and materials of its villages, buildings, structures, and Nantucket Town's harbor waterfront.

The national significance of the Kennedy Compound is principally embodied in the buildings, structures, plantings, and lots that combine to form the compound. Thus, location, materials, design, workmanship, and materials function as the core aspects of integrity. These aspects undergird the compound's ability to clearly convey its integrity of feeling and association with Kennedy family. As with Nantucket, while unobstructed ocean views to the horizon enhance the compound's historic sense of place and contribute to the NHL's overall integrity of setting, it is the preservation of a sizable, immediate ocean waterfront setting that is most critical to the property's overall ability to convey its significance and high integrity of historic feeling and association.

Because the Project is not located within the boundary of either NHL, essentially the only aspect of integrity that comes into play in evaluating the undertaking for adverse effect is integrity of setting, which is defined by the NPS as follows:

*Setting is the physical environment of a historic property. It refers to the historic character of the place in which the property played its historical role. It involves how, not just where, the property is situated and its historical relationship to surrounding features and open space. The physical features that constitute the historic setting of a historic property can be either natural or manmade and include such elements as topographic features, vegetation, simple manmade paths or fences, and the relationships between buildings and other features or open spaces.*¹²

In the case of the Nantucket Historic District, located approximately 13 miles from the Project footprint, a detailed Project shoreline visibility assessment completed by Environmental Design and Research (EDR) in July 2006, indicated that the WTGs will not be visible at all from more than 60% of the island's total coastline, and barely visible at most from the remainder of the island as a whole (see Figure 2 and Figure 1, Sheet 13 of 14).¹³ According to EDR's assessment, the Project will partially interrupt 41 percent of the visible seascape horizon as viewed from Hyannis Port and the Kennedy Compound, located approximately 6 miles from the Project footprint (see Figure 1, Sheet 4 of 14).¹⁴ Thus, while these long-distance interruptions visually "diminish" each NHL's overall integrity of setting, they will not impair the far more significant, essential character-defining aspects and high integrity associated with the immediate coastal waterfront settings of either NHL.

Conclusion

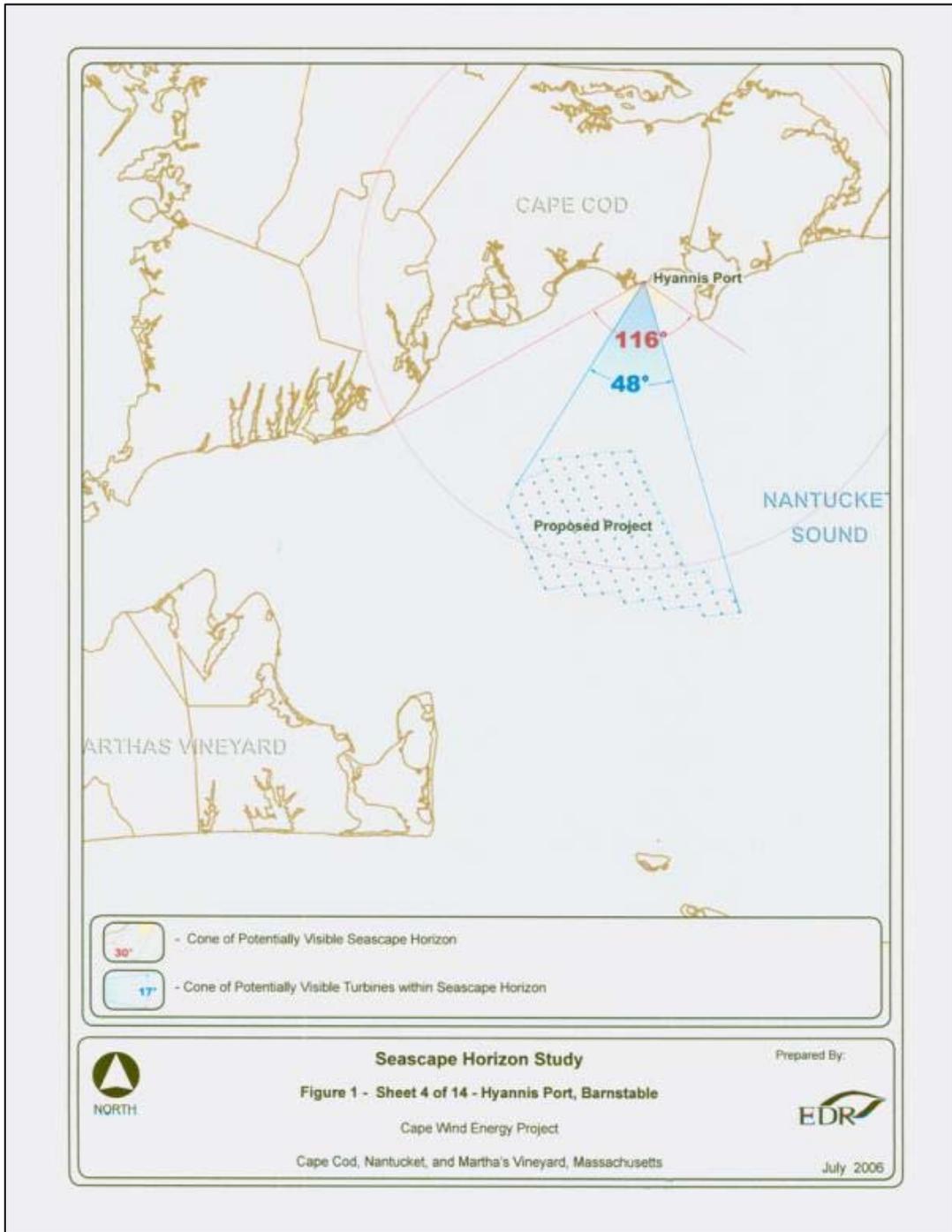
NPS's analysis of the adverse effect of the Project on the Nantucket Historic District and the Kennedy Compound is based on the unique circumstances of each NHL. They both owe part of

¹² *Bulletin*, 36-37.

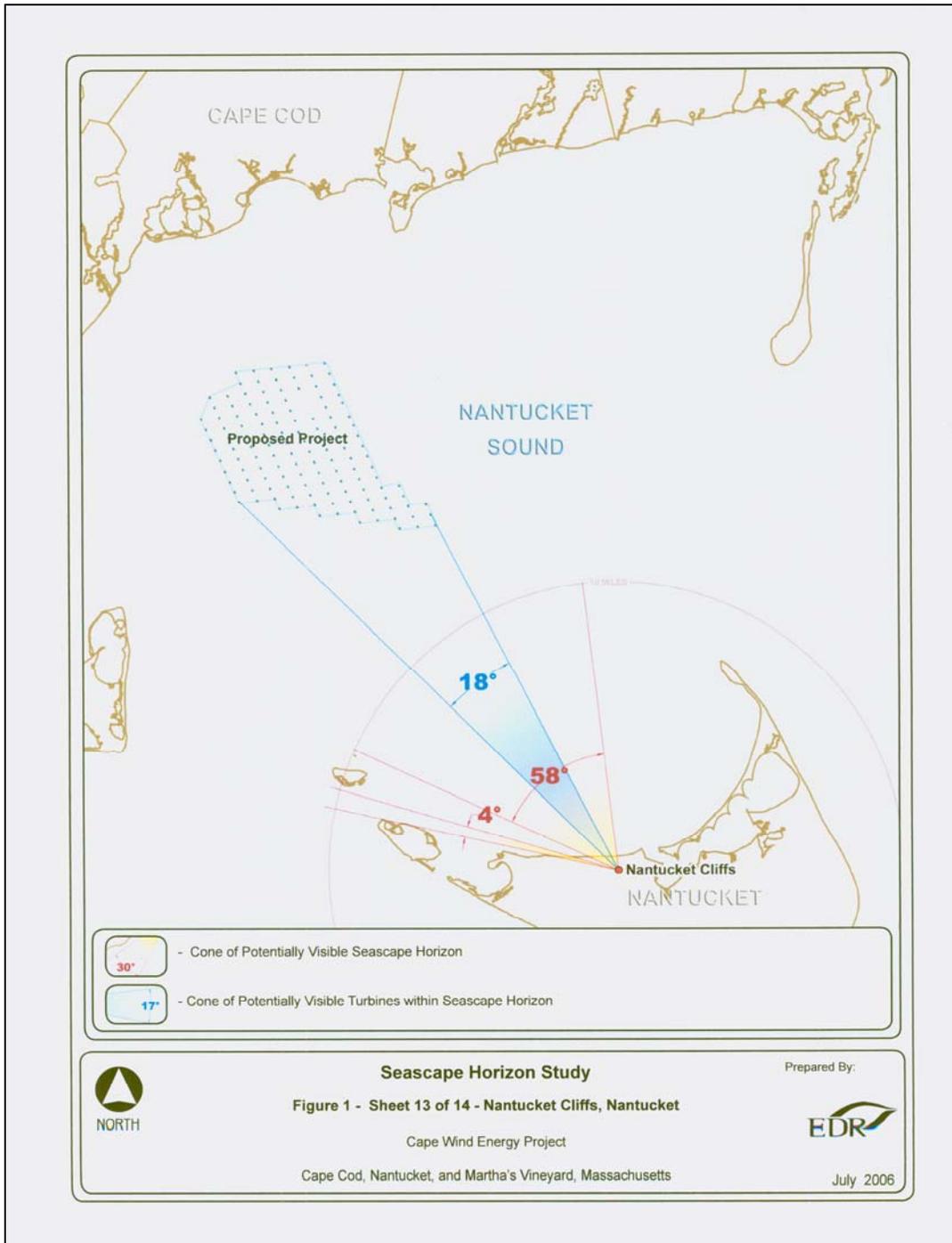
¹³ *Seascape and Shoreline Visibility Assessment Cape Wind Energy Project Cape Cod, Martha's Vineyard and Nantucket Massachusetts*. Syracuse, NY: Environmental Design and Research in July 2006, Figure 2.

¹⁴ *Ibid.*, Figure 1, Sheet 1. See also *Ibid.*, Figure 1 Sheet 4 of 14.

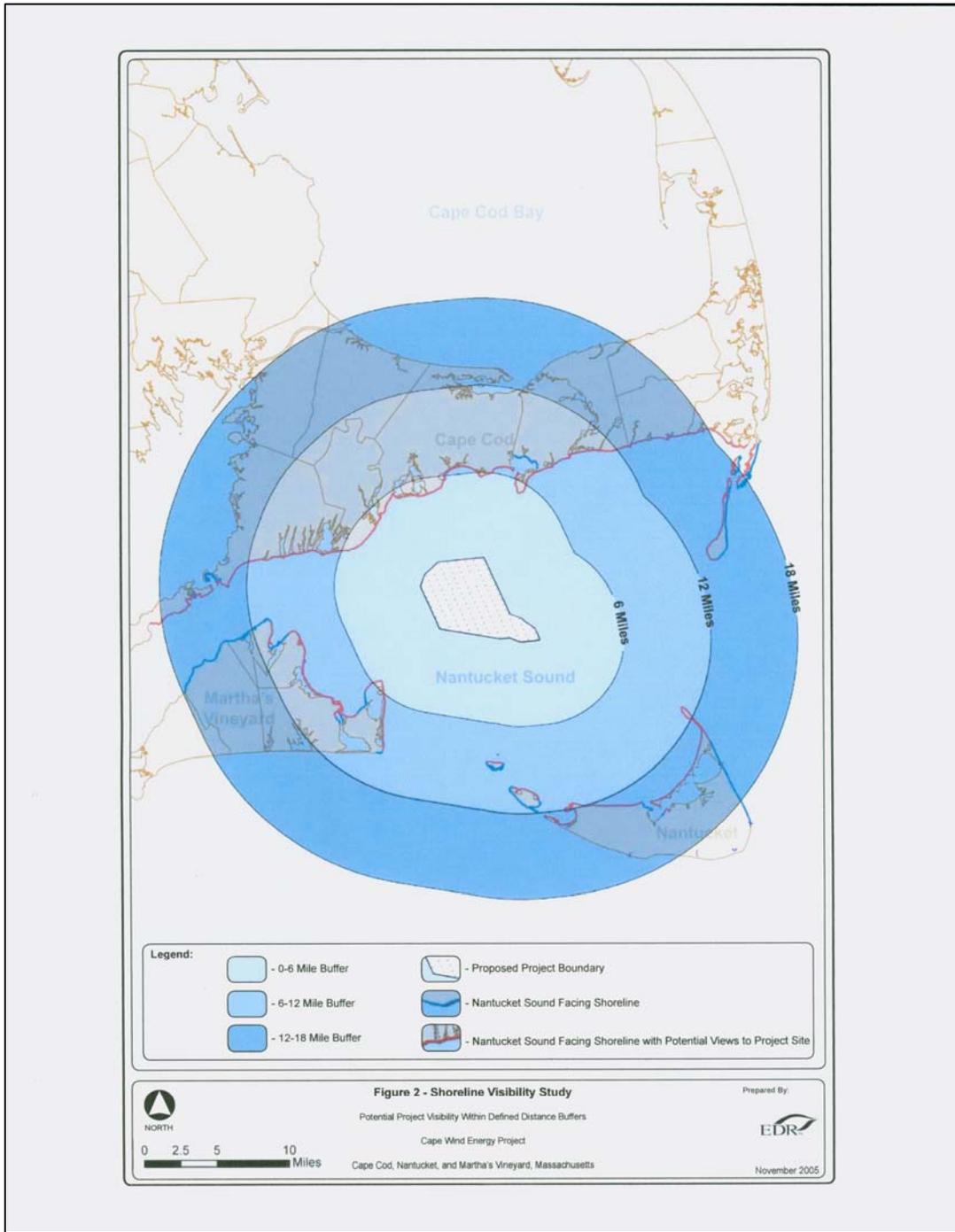
their significance to their relationship to the water of Nantucket Sound. In this respect, the Project will have an adverse effect on both the Nantucket Historic District and the Kennedy Compound. However, the Project will have no direct adverse effect within or even immediately adjacent to the boundaries of either NHL. The adverse effect involved results solely from the visual intrusiveness caused by the introduction of a concentration of modern WTGs within the historic viewsheds of both NHLs. In both cases adverse effect will be limited to the partial obstruction of long-distance, open-to-the-horizon views historically associated with the resources. Given that the adverse effect to each NHL is visual only, limited in overall scope and impact, and does not diminish the core significance of either NHL, NPS concludes that the adverse effect of the undertaking that is the subject of this comment is indirect rather than direct. As these determinations are necessarily made on a case by case basis, the conclusions the NPS reaches here that the visual intrusions are not a direct and adverse effect does not affect the NPS's ability in other circumstances to find that a visual intrusion can cause a direct and adverse effect on an NHL.



Environmental Design and Research, Seascape Horizon Study Figure 1 – Sheet 4 of 14 – Nantucket Cliffs, Nantucket. *Seascape and Shoreline Visibility Assessment Cape Wind Energy Project Cape Cod, Martha's Vineyard and Nantucket Massachusetts, July 2006.*



Environmental Design and Research, Seascape Horizon Study Figure 1 – Sheet 13 of 14 – Nantucket Cliffs, Nantucket. *Seascape and Shoreline Visibility Assessment Cape Wind Energy Project Cape Cod, Martha's Vineyard and Nantucket Massachusetts, July 2006.*



Environmental Design and Research, Figure 1 – Shoreline Visibility Study – Nantucket Cliffs, Nantucket. *Seascape and Shoreline Visibility Assessment Cape Wind Energy Project Cape Cod, Martha's Vineyard and Nantucket Massachusetts*, July 2006.



Computer simulation: Cape WTG park as viewed from Nantucket Cliffs (viewpoint distance from WTG=13.62 miles; camera elevation=44.51 feet; turbine paint color=off white). Environmental Design and Research (<http://www.capewind.org/modules.php?op=modload&name=Sections&file=index&req=viewarticle&artid=9&page=1>).



Computer simulation: Cape Wind WTG park as viewed from Hyannis Port, slightly west of Kennedy Compound (viewpoint distance from WTG=5.97 miles; camera elevation=22.44 feet; turbine paint color=off white). Environmental Design and Research (http://www.saveoursound.org/site/PageServer?pagename=CapeWind_Threats_View).

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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 black ink, 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.

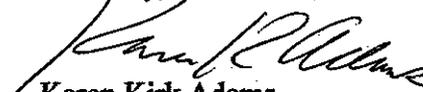
During a review of a permit application, the Corps consults with involved parties to consider possible alternatives or measures to avoid or minimize the adverse effects of the proposed activity. We then formalize any agreement, either through permit conditioning or by signing a Memorandum of Agreement (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 Morrissey 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>



TOWN OF YARMOUTH

1146 ROUTE 28 SOUTH YARMOUTH MASSACHUSETTS 02664-4492
Telephone (508) 398-2231, Ext. 271, 270 — Fax (508) 398-2365

BOARD OF
SELECTMEN

TOWN
ADMINISTRATOR
Robert C. Lawton, Jr.

November 8, 2004

Ms. Karen K. Adams
Regulatory Division
Department of the Army
New England District
Corps of Engineers
696 Virginia Road
Concord, Ma. 01742-2751

Dear Ms. Adams:

The Town of Yarmouth received your recent letter asking if the Town of Yarmouth wished to participate in a review of potential impacts to historic properties of a permit application from Cape Wind Associates LLC.

Our office forwarded this request to the Yarmouth Historic Commission to determine if they had an interest in participating directly. The Commission responded stating they believe that the State Historic Commission would be better suited to review the historic impact for the various towns on Cape Cod rather than the Town of Yarmouth Historic Commission specifically looking at only the Yarmouth Impact.

The Town appreciates being notified of the review and would ask that the town remain on your mailing list for any future reviews of this project.

Respectfully,

Robert C. Lawton, Jr.
Town Administrator

cc: Historic Commission
Board of Selectmen

jd

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REGULATORY DIVISION





WIANNO CLUB

1 March 2005

Christine A. Godfrey
Karen Kirk Adams
Regulatory Division
U.S. Army Corps of Engineers
696 Virginia Road
Concord, MA 01742-2751

Re: Cape Wind Project

Dear Ms. Godfrey and Ms. Adams:

In early January 2005, the Wianno Club sent a letter to the Corps of Engineers asking that it include the Club as a consulting party in the review of the Cape Wind Project under Section 106 of the National Historic Preservation Act. To date the Corps has not responded to this request and the Section 106 review of this project has continued without the participation of our Club.

As mentioned in earlier correspondence, the Wianno Club building has, since 1979, been listed on the National Register of Historic Places as a significant historic building. The Club is also the centerpiece of the very substantial summer colony known as the Wianno Historic District. For these reasons, we feel it very important that Wianno Club be fully informed and included in discussions concerning the Cape Wind Project.

We respectfully request your reply in the affirmative that the Club will be included in all discussions that might ultimately have an adverse effect on this historic property.

Yours truly,

Thomas J. Swan, Jr.
Wianno Club President

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MAR - 3 2005
REGULATORY DIVISION



HISTORIC DISTRICT COMMISSION

established 1955

37 Washington Street
Nantucket, Massachusetts 02554

Telephone: 508.228.7231

Fax: 508.325.7572

COMMISSIONERS

Dirk Roggeveen
Chairman

Linda Williams

Dawn Hill
Secretary

John McLaughlin

Valerie Norton

ASSOCIATE COMMISSIONERS

Wendy McRae

Diane Coombs

Brian Conroy

STAFF

Mark W. Voigt
Administrator
mvoigt@town.nantucket.net

Aaron Marcavitch
Assistant Administrator
amarcavitch@town.nantucket.net

Katy Horgan
Office Administrator
khorgan@town.nantucket.net

Ann Medina
Office Assistant

October 25, 2004

Ms. Karen Adams
Regulatory Division, CENAE-R
Department of the Army
New England District Corps of Engineers
696 Virginia Road
Concord, Massachusetts, 01742-2751

RE: permit application from Cape Wind Associates

Dear Ms. Adams:

Thank you for your letter inviting our local government to participate in the review process concerning the above referenced application. I have discussed this issue with my Chairman and as Administrator for the Historic District Commission (HDC), I will serve as our local review board representative. Therefore the contact information contained in the letterhead above and to the side should suffice.

Thank you again for the invitation,

Respectfully,

Mark W. Voigt, AICP,
Administrator, Nantucket Historic District Commission

pc: Dirk Roggeveen, Chairman

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OCT 27 2004

REGULATORY DIVISION

Town and County of Nantucket
Board of Selectmen • County Commissioners

Timothy M. Soverino, Chairman
Douglas L. Bennett
Michael A. Glowacki
Finn Murphy
Bruce L. Watts



16 Broad Street
Nantucket, Massachusetts 02554

Telephone (508) 228-7255
Facsimile (508) 228-7272
www.nantucket-ma.gov

C. Elizabeth Gibson
Town & County Administrator

November 15, 2004

Karen K. Adams
Regulatory Division
Department of the Army
New England District
696 Virginia Road
Concord, MA 01742-2751

Dear Ms. Adams:

The Town of Nantucket thanks you for the invitation to participate in the review of potential impacts to historical properties from the Cape Wind Project. The Town would like to designate its Historical District Commission (HDC) as our consulting party. The contact for the HDC is:

Mark Voigt, Administrator
Town of Nantucket
37 Washington Street
Nantucket, MA 02554
508-228-7231

Again, thank you for the opportunity to participate.

Sincerely,

A handwritten signature in cursive script that reads "C. Elizabeth Gibson".

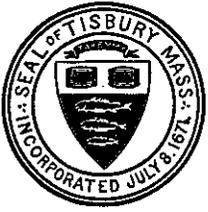
C. Elizabeth Gibson
Town Administrator

cc: Mark Voigt, HDC Administrator
Historic District Commission

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REGULATORY DIVISION



TOWN OF TISBURY

OFFICE OF THE SELECTMEN

BOX 1239 - 51 SPRING STREET

VINEYARD HAVEN, MASSACHUSETTS 02568

TEL: (508) 696-4200

FAX: (508) 693-5876

November 29, 2004

Karen Kirk Adams
Regulatory Division - CENAE-R
Department of the Army
New England District - Corps of Engineers
696 Virginia Road
Concord, MA 01742-2751

Re: Local Government Participation in Review Process of Cape Wind Assoc. Turbine Project

Dear Ms. Adams:

The Tisbury Selectmen discussed your letter of October 15, 2004, regarding the above at their meeting on November 16, 2004.

After some discussion, the Selectmen agreed that they wished to participate in the process as a consulting party and voted to designate Selectman Raymond P. LaPorte as their representative for the review process.

Mr. LaPorte can be reached at the following address:

Raymond P. LaPorte
PO Box 2281
Vineyard Haven, MA 02568
Phone: 508-693-3857 (Home); 508-693-6789 (Work)
FAX: 508-693-7289

Sincerely yours,

Aase M. Jones
Assistant to the Town Administrator

BOSLETTERS/82

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REGULATORY DIVISION



Wianno Club

FOUNDED 1916

107 Sea View Avenue
Post Office Box 249
Osterville, MA 02655-0249
Telephone 508-428-6981 Fax 508-428-9036

December 22, 2004

Christine A. Godfrey
Karen Kirk Adams
John Almeida
Regulatory Division
U.S. Army Corps of Engineers
696 Virginia Road
Concord, MA 01742-2751

Re: Cape Wind Project

Dear Ms. Godfrey and Ms. Adams:

I am writing on behalf of the Wianno Club located in Osterville, Massachusetts. We would like to request the Corps of Engineers to include our club as a consulting party in the review of the Cape Wind Energy Project under Section 106 of the National Historic Preservation Act.

As you know, the Wianno Club building has since 1979 been listed on the National Register of Historic Places as a significant historic building. We are informed that the Army Corps of Engineers has concluded, and the Massachusetts State Historic Preservation Officer ("SHPO") has agreed, that the Cape Wind project in Nantucket Sound will have an adverse effect on the Wianno Club building. This conclusion has caused great concern among our members.

We would like to see copies of the reports or studies that led to the adverse effect conclusion. We also request to know what other adverse effects, if any, might be expected from this project to our Club and its members. We would also like to be included and have our views heard in the discussions and meetings that we assume are or will be going on to identify, consider and decide upon measures to avoid, lessen or mitigate the adverse effect to our club building from this project.

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We hope you will promptly consider and grant our request. Please contact me if you require anything further from us in support of our request, or if you have any questions about our club.

Very truly yours,



Thomas J. Swan, Jr.
President

cc: Ellen Roy Herzfelder, Executive Office Environmental Affairs
Phil Dascombe, Cape Cod Commission
Truman Henson, Massachusetts Coastal Zone Management Office
Brona Simon, Massachusetts Historic Commission
Beverly Wright, Wampanoag Tribe of Gay Head Indians
Cheryl Andrews-Maltais, THPO, Wampanoag Tribe of Gay Head
John Pagini, Nantucket Planning and Economic Development Commission
Betsy Merritt, National Trust for Historic Preservation
Don Klima, Advisory Council on Historic Preservation
Kate Atwood, USACORPS
Rebecca Watson, DOI/Land and Minerals
Massachusetts Commission on Indian Affairs
Terry Orr, Environmental Science Services, Inc.
Deborah C. Cox, PAL
Victor Mastone, EOE, Board of Underwater Archaeological Resources
Yarmouth Historical Commission
Mashpee Historical Commission
Barnstable Historical Commission
Nantucket Historical Commission
Edgartown Historical Commission
Oak Bluffs Historical Commission
Chatham Historical Commission



Town of Oak Bluffs

Board of Selectmen

Roger W. Wey, Chairman
Richard D. Combra
Gregory A. Coogan
Michael M. Dutton
Kerry F. Scott
M. Casey Sharpe, Town Administrator

308

17 November 2004

Ms. Karen K. Adams,
Regulatory Division
Department of the Army
New England District Corps of Engineers
696 Virginia Road
Concord, MA 01742-2751

RE: Cape Winds Associates, LLC Permit Application

Dear Ms. Adams;

The Town of Oak Bluffs very much appreciates the opportunity to act as a consulting party in the above-referenced application and we are anxious to participate in the process. We have selected our representative, Mr. David Grunden, Oak Bluffs Shellfish Constable, who can be reached by telephone at (508) 693-0072, by e-mail at obscallop@gis.net and at this address.

Respectfully,

Casey Sharpe
Casey Sharpe

pc: David Grunden

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NOV 22 2004

REGULATORY DIVISION



**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

