



THE SECRETARY OF THE INTERIOR

WASHINGTON
APR 28 2010

Mr. John L. Nau III
Chair, Advisory Council on Historic Preservation
1100 Pennsylvania Avenue NW, Suite 803
Old Post Office Building
Washington, D.C. 20004

Dear Chairman Nau:

Thank you for the Advisory Council on Historic Preservation's (ACHP) April 2, 2010, letter responding to my March 1, 2010, request for ACHP comment on the proposed Cape Wind Energy Project (Project or undertaking) pursuant to 36 CFR 800.7(a)(1). I appreciate the attention that you and your staff gave to this matter, and your timely response.

I have personally reviewed your letter and have discussed the issues that it raises with my senior team at the Department. Your letter concludes that "adverse effects on historic properties will be direct and indirect, cannot be avoided, and cannot be satisfactorily mitigated." The ACHP letter reached this conclusion based on its finding that the Project "will adversely affect the viewsheds" of 34 historic and/or traditional cultural properties in the area, and "construction of the Project will have an additional direct adverse effect on the Nantucket Sound seabed."

I understand and appreciate the views of the Advisory Council and have taken them into account as we considered the effects of the Project. Nonetheless, as explained below, I do not fully embrace all of the views expressed by the Advisory Council. Also, given the variety of factors that are appropriately considered in making my decision, including considerations relating to the importance of developing new renewable energy sources, I find that the balance of considerations weighs in favor of approving the Cape Wind Project. Accordingly, I am executing today a Record of Decision (ROD) that approves the Project, conditioned upon certain other required permits and approvals as described in the ROD, and on specific mitigation measures designed to ensure that potential adverse effects are minimized. These mitigation measures will be binding conditions or stipulations to the permissions granted in the ROD.

A number of factors led to this decision to approve the Project. I am mindful of our unique relationship with the Wampanoag Tribe of Gay Head (Aquinnah) and the Mashpee Wampanoag Tribe (Tribes or Wampanoag Tribes) and their concerns regarding the protection of cultural, historic, and natural resources. I carefully considered the Tribes' concerns, the need to preserve the abundant environmental resources and rich cultural heritage of America that exists near the Project location, together with the Administration's priority for diversifying the Nation's energy portfolio to include renewable energy in an effort to gain energy independence and security,

battle climate change, and create jobs. After careful review of the Project need, the alternatives and all of the analyses, the concerns expressed through the many agency consultations and input including the ACHP's comments throughout its participation in the NHPA consultation process, and the potential impacts to Nantucket Sound and environs, the Department finds that the public benefits support approval of the Project at the Horseshoe Shoal location.

With this decision I initiate a new direction in our Nation's energy future with the ushering in of America's first offshore wind energy facility. This decision will commence a new chapter to the rich history of this region.

Background

The Minerals Management Service (MMS), which I oversee, has described the Project in detail in a variety of public documents, including in the environmental impact statement prepared under the National Environmental Policy Act (NEPA). The Project includes the construction, operation, and decommissioning of 130 wind turbine generators (WTG) in a grid pattern within a 25-square mile area on Horseshoe Shoal in Nantucket Sound. The Project also includes a 66.5-mile buried submarine transmission cable system, a centrally located electric service platform, and two 115-kilovolt lines (totaling 25 miles) connecting to the mainland power grid. Horseshoe Shoal is located approximately 5.2 miles from the mainland shoreline, 13.8 miles from Nantucket Island and 9 miles from Martha's Vineyard. Nantucket Sound is presently used for commercial fishing, shipping, and recreational purposes in addition to traditional cultural practices and marine-focused subsistence.

As part of the NEPA process, MMS evaluated nine alternative geographic locations along the Atlantic coast from Maine to Rhode Island, three non-geographical alternatives, the proposed action, and the no action alternative. In addition, MMS considered onshore, near shore and dispersed sites, and other forms of alternative energy production. In accordance with NEPA, all alternatives, including the proposed Project, were subject to screening criteria, including analysis related to MMS' purpose and need, economic viability and technological feasibility.

With regard to historic preservation issues, MMS conducted a thorough review and analysis under the National Historic Preservation Act (NHPA) including a robust Section 106 consultation and has provided the consultation records, the historic property and archeological surveys, and the MMS findings of effects on historic properties to the ACHP. A summary of the consultation history is laid out below. The MMS has also responded in detail to the ACHP's requests for eligibility and effects determinations from MMS and the National Park Service (NPS). This response to the ACHP will not restate, but merely summarize the Project and its effects on historic properties as determined by the MMS and the NPS. It will also summarize the consultation record, explain the mitigation measures MMS will require for the Project and then respond to the specific comments and recommendations included in the ACHP letter of April 2, 2010.

At the outset, however, it bears emphasis that the Department has taken extraordinary steps to undertake a thorough evaluation of potential impacts involving historic properties and traditional cultural properties, including government-to-government consultations with the Tribes. While

the Advisory Council's letter acknowledged these efforts, it noted that Section 106 was initiated late in the planning process, after NEPA's scoping process had been completed, and the initial investigation undertaken by the Corps focused on historic properties that already were designated. The Council's letter also criticized the tribal consultation conducted by the MMS as "tentative, inconsistent, and late."

In my view, this commentary is both misleading and unfair. Likewise, the ACHP's suggestion that the tribal consultation occurred after the Project location had been set is not correct. The tribal consultation undertaken by myself and others in the Department was serious, thorough, and timely. The EIS evaluated several alternative locations, and I can assure you that I had not made a decision on whether the project would go forward before we engaged in government-to-government consultations with the Tribes. Indeed, the tribal consultation process and the related historic preservation-related discussions, begun in 2005, have been the primary focus of attention for the entire Department over nearly the past year. Often, historic preservation-related issues and/or tribal issues are treated as side issues of lesser importance. That has not been the case here.

History of Consultation

The Department and MMS have taken seriously the concerns expressed by all consulting parties, including the Massachusetts State Historic Preservation Office (MA SHPO) (MA/Massachusetts Historic Commission (MHC), the ACHP, the NPS and the Keeper of National Register of Historic Places, and the Wampanoag Tribes. The MMS has determined that through implementation of the required mitigation measures and monitoring requirements incorporated into the ROD, impacts to the historic properties will be minimized as much as practicable. The MMS will ensure that cultural resources will not be harmed or destroyed during the construction, maintenance, and decommissioning of the Project.

As you know, NHPA and tribal consultation for the Project was initiated in 2002 by the U.S. Army Corps of Engineers (USACE), shortly after the scoping for the initial draft environmental impact statement that the agency was preparing. The USACE specifically invited the Wampanoag Tribe of Gay Head-Aquinnah (Aquinnah)¹ to participate in consultation.

The Energy Policy Act enacted in August of 2005 designated MMS as the regulatory agency for offshore wind energy projects and 4 months later, in December of 2005, MMS conducted its first consultation meeting as lead agency for the Project. The ACHP, the Massachusetts Historical Commission and the Aquinnah were among the consulting parties in attendance at that meeting. In May of 2006, MMS published its intent to prepare a new environmental impact statement. Formal NHPA and government-to-government meetings were conducted in 2006, 2007, 2008, 2009 and earlier this year. Since the MMS took over as lead agency for the Project in 2005, the record reflects at least 21 formal meetings with consulting parties. These were in addition to the agency coordination and consultation meetings on the environmental impact statement. Effects on historic properties were also discussed at those meetings as well. In addition to formal

¹ The Mashpee Wampanoag Tribe (Mashpee) was formally recognized in 2007, but has been involved in consultation since 2004.

meetings, the consultation record is replete with informal communications, correspondence and e-mail exchanges and telephone calls with consulting parties.

The ACHP has been engaged with consultation regarding the Project since March of 2005.² In 2008, the ACHP provided observations and advice to MMS regarding Section 106 and NEPA compliance and noted with approval its steps to comply with the NHPA at that point and advising on the next steps in the process. The ACHP noted 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 [outer continental shelf]” and that there is “limited precedent” 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.”³ The MMS took into account the ACHP’s recommendations regarding identification of historic properties, continued consultation and determined that the Project would have an adverse effect on 34 historic properties.⁴

On April 1, 2009, the ACHP gave further advice regarding the status of the consultation for the Project, noting that because of the MMS determination that the Project would have adverse effects to historic properties, it was now consulting on resolving such effects.⁵ The ACHP suggested that MMS should consult with the Tribes to attempt to resolve the Tribes’ concerns with the Project, and should be prepared to discuss mitigation of visual effects on two NHLs, long term cumulative effects resulting from operation and maintenance of the facility, and alternative sites better suited for the Project. The MMS has addressed each of these concerns in the consultation process and the ROD.

On June 23, 2009, the ACHP requested that MMS resolve three issues related to the National Historic Preservation Act (NHPA) Section 106 process.⁶ The first issue related to the eligibility of Nantucket Sound for inclusion on the National Register of Historic Places as a Traditional Cultural Property. The second issue related to the Project’s potential to have adverse visual impacts on the Nantucket Island and Kennedy Compound National Historic Landmark Districts. The final issue related to additional site visits with the Mashpee and Aquinnah Tribes.

As for the first issue, on October 9, 2009, MMS submitted to the SHPO for concurrence its determination that Nantucket Sound itself was not eligible for listing on the National Register. On November 5, 2009, the SHPO informed MMS that it disagreed and that the MMS should seek a formal determination of eligibility from the Keeper of the National Register of Historic Places, which MMS did on November 18, 2009. On January 4, 2010, the Keeper of the National Register of Historic Places announced her determination that Nantucket Sound is eligible for listing in the National Register for its significance as a Traditional Cultural Property and as an historic and archaeological property. In its revised finding of adverse effect,⁷ MMS evaluated effects to the Nantucket Sound Traditional Cultural Property and determined that the Proposed

² See ACHP Letter to MMS dated December 17, 2008 at 2.

³ *Id.* at 3. The ACHP also acknowledged that the NHPA “does not require Federal agencies to preserve all historic properties, or even avoid adverse effects to such.”

⁴ See Minerals Management Service Documentation of Section 106 Finding of Adverse Effect, 2008.

⁵ See ACHP Letter to MMS dated April 1, 2009 at 2.

⁶ See ACHP Letter to MMS dated June 23, 2009.

⁷ See Minerals Management Service Documentation of Section 106 Finding of Adverse Effect (Revised), 2010.

Action would have an adverse effect on it. The MMS solicited comments on the Revised Finding from consulting parties and the public.

With respect to the second issue, the MMS solicited an opinion from the NPS regarding the visual impacts to Nantucket Island and the Kennedy Compound National Historic Landmark Districts. In a letter dated October 16, 2009, the NPS concurred that the impacts to both Nantucket Island and the Kennedy Compound National Historic Landmark Districts would constitute an indirect adverse effect. The NPS stated “while these long-distance interruptions visually “diminish” each National Historic Landmark’s (NHL) 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. . . . 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.”⁸

Regarding the final issue raised by the ACHP, on August 3-5, 2009, the MMS accompanied the Aquinnah and Mashpee Tribes to visit additional places on Martha’s Vineyard and Cape Cod important to them that the Tribes believe would be impacted by the Proposed Action. On December 15, 2009, the Massachusetts State Historic Preservation Officer (SHPO) concurred with MMS’s determination that two additional sites identified to the MMS by the Mashpee during these site visits are eligible for listing in the National Register of Historic Places as Traditional Cultural Properties. In addition, the MMS determined that two other properties identified by the Aquinnah were also eligible for listing as Traditional Cultural Properties. In its Revised Finding, MMS determined that these four new Traditional Cultural Properties will be subject to adverse visual effects by the proposed undertaking. The SHPO concurred with the MMS Revised Finding’s adverse effect determination on February 12, 2010.

Most recently, I personally participated in the Section 106 process this year. I convened a Section 106 consultation meeting in Washington, D.C. on January 13, 2010. I was joined by Deputy Secretary David J. Hayes, Solicitor Hilary Tompkins, and MMS Director Liz Birnbaum. The purpose of the meeting was to discuss the adverse effects of the Project, including the recent Keeper determination, the revised findings, and the proposed mitigation measures. On that same day, I also participated in a government-to-government meeting with leaders of the Mashpee Wampanoag Tribe and the Wampanoag Tribe of Gay Head (Aquinnah) to discuss their views of the proposed project. I also held a meeting with the signatory parties to determine if there was agreement on entering a Memorandum of Agreement. Additionally, on February 2, 2010, I visited tribal cultural sites with the Mashpee Wampanoag Tribe and the Wampanoag Tribe of Gay Head (Aquinnah) Tribes and viewed the proposed Project site.

⁸ See October 16, 2009 letter from NPS to MMS.

In addition, Deputy Secretary David J. Hayes and Associate Deputy Secretary Laura Davis led additional government-to-government consultations with the Wampanoag Tribe of Gay Head (Aquinnah) and Mashpee Wampanoag Tribe on February 9, 2010 and February 9 and 19, 2010, respectively, which provided additional opportunities for the MMS to ascertain the Tribes' assessment of the proposed project and their opinions regarding proposed mitigation measures.

After nearly 5 years of formal NHPA consultation on the Project and a diligent effort to identify historic properties, assess the effects of the Project on them, and to resolve the Project's adverse effects that were found, earlier this year it became clear that further consultation would not result in agreement among the consulting parties on how to resolve the adverse effects, and this Department terminated consultation. This termination triggered the ACHP's responsibility to provide its final comments on the Project and adverse effects.

MMS Consideration of ACHP's Specific Comments and Recommendations

As noted at the outset, I have taken into account and given serious consideration to the ACHP's comments, as well as the concerns expressed and information provided by the Tribes and other consulting parties regarding potential impacts to historic resources and Traditional Cultural Properties (TCP) in and around Nantucket Sound.

As a general matter, I disagree with the Advisory Council's conclusion that visual impacts from the proposed offshore wind farm, which will be situated at some distance from Cape Cod, Nantucket Island, and Martha's Vineyard, provide a rationale for rejecting the siting of the Project. In fact, as discussed above, the NPS emphasized in its review of the project that the visual effects on the NHLs were indirect, long-distance, and did not impair the "far more significant, essential character-defining aspects and high integrity associated with the immediate coastal waterfront settings of either NHL."⁹ Furthermore, the NHPA mandates that a Federal agency must minimize harm only to the "maximum extent possible" and only in those situations where the Federal undertaking may *directly and adversely affect* any NHL. 16 U.S.C. § 470h-2(f). Here, there is no direct, adverse effect on an NHL. Nonetheless, MMS will require mitigation measures to the design and configuration of the Wind Turbine Generators (WTGs) to address the visual impacts of the Project on the 34 historic properties. These required mitigation measures include: elimination of daytime lighting on the WTG unless the Coast Guard requires it for navigation safety; reduction in Federal Aviation Administration (FAA) nighttime lighting; revisions to the Project layout to narrow the breadth of visual impacts from the NHLs; and painting the WTG an off-white color to reduce contrast with the sea and sky. These mitigation requirements, coupled with the overall distance from which the Project will be viewed at any location, will reduce the visual impacts of the Project.

It is also important to note that Nantucket Sound is a working water landscape, with daily visual and physical impacts related to ongoing activities including recreational and commercial fishing, ferry and other commercial boating operations, and other recreational and commercial activities. Visual impacts associated with Nantucket Sound and its associated shorelines abound; it is not an untouched landscape.

⁹ See October 16, 2009 letter from NPS to MMS.

Likewise, I disagree with the Advisory Council's conclusion that it is impossible to mitigate the impacts associated with the installation of the piers for wind turbines in the seabed in Nantucket Sound. Piers for bridges, transmission lines, or other purposes are routinely constructed in relatively shallow waters consistent with those found in the Horseshoe Shoals area of Nantucket Sound.

A number of marine archaeological studies have indicated that there is a low probability that these areas contain submerged archaeological resources. Most of the area has been extensively reworked and disturbed by marine activities and processes. Nonetheless, the Department will require additional marine archaeological surveys in the Area of Potential Effect (APE) to ensure that any submerged archaeological resources (historic or prehistoric) are accounted for prior to any bottom disturbing activities.

In particular, in order to adequately protect archaeological resources in the Project's APE, MMS will require that additional and detailed archaeological surveys and activities be undertaken. MMS will require a supplemental survey of the entire WTG array out to 1,000 feet beyond the APE; a supplemental survey of the proposed transmission line corridor; and that one or more cores be extracted from the location of each WTG and subjected to geotechnical analysis for the presence/absence of preserved landscapes or paleosols. The core sample itself will be examined by an archaeologist and a tribal representative, if the Tribes desire participation, as well as a geoscientist to confirm the absence or presence of any indicators suggesting the possibility of cultural habitation. The MMS will also include a "Chance Finds" clause in the lease document that will apply in the event of an unanticipated discovery of cultural resources or indicators likely to suggest the possibility of cultural habitation.

These new and comprehensive requirements go beyond previous surveys undertaken by the applicant for the Project, which only assessed potential impacts associated with the monopole locations and a narrow corridor along the proposed transmission line corridor. The additional mitigation requirements will allow a full assessment of impacts to the sea floor from the construction of the Project and associated transmission line by providing sufficiently detailed data to distinguish potential cultural resources from point-source marine debris, and allow development of adequate avoidance criteria for any cultural or historic resources.

These measures will protect potential cultural resources even though it is unlikely that many (or, possibly, any) will be located. While it is possible and even likely that human beings from the very distant past lived in the Project area, many land surfaces from a time during the last glaciation when sea level was some 45-60 meters lower than present were destroyed, truncated, and abraded when sea level rose. It is not out of the question that some of these surfaces may exist relatively undamaged under the bottom of Nantucket Sound, but the preliminary remote sensing data suggests this will not be the case. Nonetheless, the chance finds clause and additional comprehensive pre-construction surveys detailed above will identify and mitigate any impacts. In the unlikely event that a burial is located in the Project's APE, the requirements of the Native American Graves Protection and Repatriation Act and the Archeological Resources Protection Act will be assiduously adhered to.

Throughout the Section 106 consultation process, the Department worked to ascertain the views of the Aquinnah and Mashpee Tribes on any adverse effects of the Proposed Project to sites of cultural importance to the Tribes, as well as mitigation measures the Tribes might consider appropriate to address identified effects. The Tribes were clear in communicating their belief that the impacts to cultural resources cannot be properly mitigated. The Department respects this position.

The Department recognizes that, with approval of the Project, cultural and historic preservation issues will remain a continued concern for the Tribes. The Department further recognizes that the mitigation actions identified for the Project are not directly responsive to concerns raised by the Tribes. The Department nonetheless remains committed to exploring mitigation measures to advance the preservation of the cultural and historic interests of the Tribes, if the Tribes approve of such actions.

The Department will therefore continue in efforts to engage in government-to-government communication with the Tribes on these matters if the Tribes are amenable to participating in further discussions. If the Tribes are amenable to pursuing Project mitigation actions, the Department will work with the Tribes and the State of Massachusetts in furtherance of the preservation of the cultural and historic interests of the Tribes. The following are potential mitigation measures that the Department may require in that regard: financial support for to-be-identified cultural and/or historical tribal interests, with such support amounting to up to \$200,000 per year for the assumed 21 year life of the Project by Cape Wind, split equally between the Tribes, augmented by the State of Massachusetts' commitment of up to \$3.5 million from its Coastal Zone Management (CZM) Office-administered Project mitigation fund to address impacts to historic and cultural resources in or near Nantucket Sound. In addition, the State of Massachusetts may agree to restrict any additional structural development in the State waters of Nantucket Sound, in order to limit additional visual impacts to the Tribes' traditional cultural properties.

The following are specific responses to the comments and recommendations of the ACHP organized using headings in the ACHP's comment letter.

“The historic properties affected by the Project are significant, extensive, and closely interrelated.”

The MMS previously acknowledged that the Project will adversely affect 34 historic properties that MMS had identified, including 16 historic districts and 12 individually historic properties on Cape Cod, Martha's Vineyard, and Nantucket Island and 6 properties of religious and cultural significance to the tribes, including Nantucket Sound. Two of the historic districts are National Historic Landmarks (NHLs): the Nantucket Historic District and the Kennedy Compound. It addressed these impacts in the FEIS, its NHPA assessment and findings documents, and in the follow-up Environmental Assessment that it released in March 2010.

Concerning the two NHLs, as noted above, at the request of the ACHP, MMS solicited an opinion from the NPS regarding the visual impacts to the Nantucket Island and the Kennedy Compound. On October 16, 2009, the NPS found that the impacts to both would constitute an

indirect¹⁰ adverse effect. The MMS agrees with the NPS that the effects on these NHLs are indirect and the construction of the proposed undertaking will not diminish the core significance of either NHL.

With regard to the general conclusion that the historic properties are significant, extensive, and closely interrelated, the Department has taken reasonable steps to identify historic properties, assess any adverse effects on such properties, propose steps to resolve any adverse effects, and conduct a comprehensive and thorough Section 106 consultation process. Given the presence of historic properties that have traditional cultural importance to the Tribes, the Department took special measures to ensure that it was informed of the Tribes' views and repeatedly sought input as to any resolution of adverse effects. In fact, I visited certain areas myself with representatives of both of the Wampanoag Tribes to better understand the cultural value of the historic properties. The Department worked with the Massachusetts SHPO as well to determine what issues of concern existed. The MMS also addressed the Keeper's eligibility determination in January issued earlier this year in a manner consistent with the NHPA regulation to determine what adverse impacts existed to the Nantucket Sound. Lastly, MMS worked with all the consulting parties to ascertain whether an agreement could be reached and shared a draft Memorandum of Agreement with the parties to seek input on mitigation measures. All of these steps demonstrate the Department's recognition of the importance of complying with the Section 106 process and how it ensured that all affected properties were identified and considered under the NHPA process in a comprehensive fashion.

The ACHP also should acknowledge that none of the 34 historic properties, save the seabed of Nantucket Sound, will be physically impacted by the Project. Nantucket Sound and its environs are the setting of many historical and modern uses, including significant commercial and recreational activities like boating, fishing, and aviation. The Nantucket Sound is a working landscape that has evolved and benefited from changing technologies, uses and industrial activity. The area has many historical and modern uses, including significant commercial, recreational, and other activities such as fishing, aviation, and boating. For instance, a number of tall structures, including broadcast towers, cellular base station towers, local public safety communications towers, and towers for industrial and business uses are now located in and around the area of Nantucket Sound.¹¹ Moreover, three different submarine transmission cable systems already traverse the seabed to connect mainland energy sources to Martha's Vineyard and Nantucket Island. The Nantucket Sound and the waters around the islands of Nantucket and Martha's Vineyard support a diverse array of recreational boating and water activities.¹² This discussion is not intended to diminish the cultural or historical significance of the properties in and around the Nantucket Sound or the Sound itself. Rather, it demonstrates that commercial, recreational and other resource intensive activities and interests have long coexisted with the cultural and historic attributes of the Nantucket Sound and its people.

¹⁰ The ACHP has questioned the NPS distinction between direct and indirect visual effects, but courts have held that effect determinations are a substantive decision delegated to agencies by the NHPA. *Valley Community Pres. Comm'n v. Mineta*, 231 F. Supp. 2d 23, 38 (D.D.C. 2002) ("effects of an undertaking on historic property . . . is solely the responsibility of the agency under Section 106").

¹¹ See Final EIS dated January, 2009 at p. 4-185.

¹² *Id.* at p. 4-169.

“Adverse effects on historic properties will be direct and indirect, cannot be avoided, and cannot be satisfactorily mitigated.”

The ACHP comments state that the Project will adversely affect the viewsheds of all 28 identified onshore historic properties (districts or individual properties). The ACHP further concludes that the Project “will change the character of the historic properties’ setting that inextricably contributes to their historic significance.” The MMS in its Revised Finding of Adverse Effect concluded that the Project would have an indirect, adverse visual effect for the 25 year life of the project on the 28 onshore historic properties. The Revised Finding concluded, however, that there would not be any direct, physical effects to the onshore historic structures and districts. Similarly, the Revised Finding concluded that any effects to the two NHLs (Kennedy Compound and Nantucket Historic District) would not be direct, nor within or immediately adjacent to these properties, and rather, would be limited to the partial obstruction of the long-distance, open to the horizon views historically associated with the resources. The ACHP comments also state that the Project will have a “significant adverse effect” to the Tribes’ traditional, cultural practices as carried out in relation to the six eligible traditional cultural properties. Through multiple government-to-government consultations, the MMS was made aware of the Tribes’ view regarding the importance of an unobstructed viewshed and is also keenly aware of the concerns and opinions expressed by the MA SHPO, the Keeper, and the ACHP with regard to the cultural significance and the traditional cultural practices of the Tribes. Indeed, given the importance of the issue, I personally visited the area to witness firsthand the cultural practices of the Tribes.

The MMS recognized in its Revised Findings that there will be adverse effects from the Project that are indirect, visual effects. It is important to note that these viewshed effects are not direct or destructive to these onshore traditional, cultural properties. In light of these concerns, the MMS has required changes to the design and configuration of the WTGs to diminish the visual effects of the project on traditional cultural practices, specifically: there will be no daytime Federal Aviation Administration (FAA) lighting on the WTGs, unless the U.S. Coast Guard requires some “day beacons” to ensure navigation safety; FAA nighttime lighting requirements have been reduced, lessening potential nighttime visual impacts; the number of turbines has been reduced from 170 to 130, including eliminating turbines to reduce the visual impacts from the Kennedy Compound NHL; the WTG array has been reconfigured to move it farther away from Nantucket Island and reduce the breadth of the array that is visible from the Nantucket Historic District; the WTGs will be required to be painted an off-white color to reduce contrast with the sea and sky, yet remain visible to birds; and the upland transmission route was located entirely below ground within paved roads and existing utility rights of way to avoid visual impacts and potential impacts to unidentified archeological or historic resources. These mitigation measures, coupled with the overall distance from which the Project will be viewed, will limit the visual disturbance. These visual impacts should not be considered in isolation from the currently impacted viewshed from virtually every angle of Nantucket Sound, including commercial and residential development, boat traffic, ferry traffic and permanent structures in the Sound and along its shoreline.

The ACHP also concludes, without reference to the record, that the Project will result in the “physical destruction, damage, and alternative of part of the seabed of Nantucket Sound.” The

comments further state that there is a potential for the Project to destroy archeological resources and that the Tribes consider the Nantucket Sound to be ancestral lands and any construction will be viewed as a direct, physical intrusion adversely affecting the integrity of the Sound.

Consistent with the NHPA, the MMS conducted an assessment of adverse effects once the Keeper issued the determination that the Nantucket Sound is eligible for listing in the National Register as a TCP and as an historic or archeological resource. As part of the evaluation the MMS relied upon a number of studies regarding offshore cultural resources, specifically a Marine Archaeological Sensitivity Assessment, followed by a Marine Archaeological Reconnaissance Survey, as well as a follow-up survey once the WTG array was revised. There also was a subsequent compilation of shipwreck losses in 2007 in the general vicinity of the project area. The archaeological studies indicated that there was low probability that these areas contained submerged archaeological resources as a majority of the area had been extensively reworked and disturbed by marine transgressive processes. A possible exception was in the eastern offshore area based on results of vibracore samples; however, no cultural materials were identified and the turbine array was adjusted to avoid these potential prehistoric areas. Likewise, with regard to three potential areas likely to involve shipwrecks in the vicinity of Horseshoe Shoal, MMS will apply a 1,000 foot no activity buffer zone with additional contingencies to avoid any disturbance.

Thus, to date there has been no discovery of buried landscapes in the Project location. In this regard, ACHP's statement that there is a "high potential for encountering and damaging or destroying potentially significant historic or archaeological resources" is without support in the record. Nonetheless, MMS will require additional surveys in the exact locations of seabed disturbance to ensure that any such resources are identified prior to construction. Specifically, MMS will require additional marine archaeological survey data acquisition that ensures 100 percent seafloor coverage out to 1000 feet beyond the APE using a full suite of remote sensing tools; MMS will require additional predictive modeling and settlement pattern analysis; and MMS will require additional geotechnical coring and analysis to aid in the identification of intact landforms that could contain archaeological materials. Further, if such surveys fail to detect any such resources, the chance finds clause included in the lease will ensure that if any are discovered during lease activities, MMS will be notified and operations will cease in that area until further assessment and consultation occurs. The MMS will invite the Tribes to participate reviewing and analyzing such potential discoveries. In addition to the chance finds clause in the lease and the mitigation measures described in the ROD, the Project's seabed disturbing activities will be subject to protections and processes contained in the Native American Graves Protection and Repatriation Act and the Archeological Resources Protection Act.

"MMS' has stewardship responsibilities for historic properties on the OCS."

The Department is well aware of its stewardship responsibilities and believes that its actions in this instance have demonstrated this awareness. Over the course of many years, MMS has devoted substantial resources and time to ensure that it has complied with the Section 106 process in a thorough and sound manner. I respectfully disagree with the ACHP that approving the Project is "inconsistent with the policies and admonitions of the NHPA and Executive Order 13287." The ACHP has also acknowledged that the NHPA "does not require Federal agencies to

preserve all historic properties, or even avoid adverse effects to such.”¹³ I believe that this undertaking can be developed responsibly and with consideration to the historic and cultural resources in the project area.

“The Section 106 process was initiated late in the planning process/tribal consultation under Section 106 as conducted by the USACE and by MMS was tentative, inconsistent, and late.”

I disagree that MMS initiated Section 106 Process late in the planning process. As noted above, MMS held its first Section 106 consultation meeting in late 2005, a mere 4 months after Congress gave it regulatory authority over the Project, and prior to initiating scoping on the EIS.

I also disagree with ACHP’s assessment of MMS’ tribal consultation efforts. Tribal consultation is of immense importance to the Department and MMS and we take this critique very seriously. The MMS recognizes that communication with the Tribes can always improve and continued government-to-government communication with the Tribes will continue for the life of the Project.

“The marine archaeological survey work to determine the potential for presence of intact archaeological sites is limited and the feasibility of any post review discovery protocols in uncertain.”

As discussed in greater detail above, MMS will require additional marine archaeological survey work conducted in and beyond the APE to ensure that any submerged archaeological resources (historic or prehistoric) are accounted for prior to any bottom disturbing activities. There will also be detailed mitigation measures as part of the Lease, for avoiding or treating cultural resources that may be encountered during the construction, maintenance, and decommissioning of this Project.

“Project-Specific Recommendations.”

The ACHP has recommended that this project not be approved, and that the Project cannot be adequately mitigated at the proposed site. The ACHP states, without support and without acknowledging the vigorous review of alternative locations in the NEPA process, that there may be alternative sites nearby resulting in far fewer adverse effects to historic properties. The MMS disagrees. Alternatives were addressed in detail in the FEIS, the follow-up EA, and in the NHPA consultation process.

“General Recommendations”

The ACHP suggests that MMS develop a program alternative that recognizes the unique nature of developing offshore renewable projects in this type of setting. The MMS intends to engage in further discussions with the ACHP to explore how this could work. We agree that our joint

¹³ See ACHP Letter to MMS dated December 17, 2008 at 3.

efforts on the Project “will provide valuable lessons learned that could be applied to the development of a program alternative.”

I also note that the ACHP has identified other programmatic or policy issues that you would like all Federal agencies to address or that the ACHP intends to address. Many of these initiatives are already underway within the Department. I would like to assure you that as Secretary, I take seriously my joint statutory responsibility with ACHP to keep watch over our important national heritage. I will ensure that the Department continues to work closely with the ACHP on these important issues.

Substantive Protections for Historic and Cultural Landscapes

In addition to the NHPA, among other laws that address individual sites, artifacts and discrete properties, Congress has established an array of laws to preserve and protect significant cultural and natural landscapes, including the authorities to set aside for full preservation large areas as national parks, wildlife and sanctuaries, wilderness areas, national conservation areas, and national monuments. These are the appropriate mechanisms for setting aside large areas of land for preservation and other substantive protections. The processes the Department follows in designating such large landscapes for protection under these authorities ensure robust consideration of the public interest, and the positive and negative trade-offs of permanently setting aside land due to cultural or other concerns. The Department has effectively used these authorities to permanently protect cultural heritage areas such as Canyon de Chelly, Mesa Verde, Crater Lake, the Channel Islands, and Catoclin Mountain, to name just a few.

In contrast, NHPA provides procedural, not substantive protection. As the ACHP has noted, an agency is not precluded from making a decision that will have impacts to eligible historic or cultural resources. The intent of the NHPA is to ensure that Federal agencies take into account the effects of Federal decisions on historic properties. For this reason the Department relies on the ACHP to advise it on historic preservation concerns of which the Department may be unaware. To this end, the ACHP regulations provide that the Department must consider the comments of the ACHP on particular projects on which ACHP’s participation is required or invited. The Department, however, as the decisionmaking authority that must balance broad, national public interest priorities in all of its decisions, is bound to take ACHP’s comments seriously, but is not legally bound to follow the ACHP’s recommendations or conclusions. *Coliseum Square Ass’n, Inc. v. Jackson*, 465 F.3d 215, 242 (5th Cir. 2006) (“[A]n agency has no duty to abandon or modify a project if the project is found to have an adverse effect that is not avoided or mitigated, but only to follow the mandated NHPA procedures”).

In conclusion, there are more issues on which we do agree than on those that we do not. I assure you that under my watch, all agencies in the Department of the Interior will take our stewardship obligation for heritage resources seriously, and will work together with the ACHP to care for them.

Sincerely,

A handwritten signature in black ink that reads "Ken Salazar". The signature is written in a cursive, slightly slanted style.

Ken Salazar

cc: Honorable Deval Patrick, Governor, State of Massachusetts
Jim Gordon, Cape Wind Associates LLC
Honorable Cheryl Andrews-Maltais, Wampanoag Tribe of Gay Head (Aquinnah)
Honorable Cedric Cromwell, Mashpee Wampanoag Tribe
Brona Simon, Massachusetts State Historic Preservation Officer