SAVE OUR SOUND
alliance to protect nantucket sound

June 23, 2009

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

Dear Ms. Simon:

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

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

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

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.

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.

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.
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> 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

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[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:

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[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)).

> [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:

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[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).

> 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

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[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.

<u>The Incorrect Application of the NEPA Purpose and Need Statement to the Cape Wind Proposal</u>. 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.

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[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.

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.

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[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 Winergy Power proposal on Long Island.[43] Furthermore,

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[36] *Calvert Cliffs' Coordinaating 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.

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.

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[44] *Id*. at 103-106.
[45] *Id*. at 106-110.
[46] *See* Final EIS Comments at 55-57.
[47] Jorn Madslien, *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

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.

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: "In 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

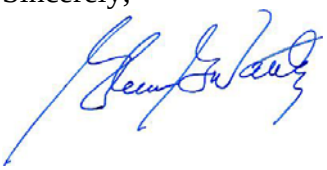
[56] Memorandum for the Heads of Executive Departments and Agencies, *National Policy for the Oceans, Our Coasts, and the Great Lakes* (June 12, 2009), *available at:* http://www.whitehouse.gov/the_press_office/Presidential-Proclamation-National-Oceans-Month-and-Memorandum-regarding-national-policy-for-the-oceans/ (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.

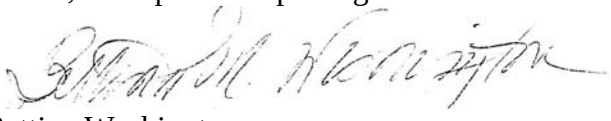
Thank you for considering these comments. Please let APNS know if it can be of further assistance.

Sincerely,



Glenn G. Wattley
President & CEO

George "Chuckie" Green
THPO, Mashpee Wampanoag Tribe



Bettina Washington
THPO, Wampanoag Tribe of Gay Head Aquinnah

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

www.saveoursound.org

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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
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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