

RECONCILING THE PAST WITH THE FUTURE: THE CAPE WIND PROJECT AND THE NATIONAL HISTORIC PRESERVATION ACT

INTRODUCTION

To the south of Cape Cod lies a body of water marked by the ubiquitous presence of high winds and, of late, a pervasive sense of national controversy. This landscape, Nantucket Sound, is the proposed site of the nation's first offshore wind farm. The brainchild of Cape Wind Associates, the project made its debut in a July 2001 *Boston Globe* article¹ announcing Cape Wind's general proposal for a wind farm to be located just off of Nantucket. Details of the proposal, calling for 170 turbines to be located on a twenty-five-square-mile section² of Horseshoe Shoal, an area located within the Sound, surfaced later that year. Nearly ten years later, the project is seemingly soon to be realized: Cape Wind Associates achieved project approval in April of 2010 when Secretary of the Interior Ken Salazar signed off on its proposal for a 130-turbine³ wind farm on Horseshoe Shoal.⁴ By October of 2010, Cape Wind Associates possessed a lease, signed by the Secretary, authorizing the project.⁵

The permitting achievements of 2010 were the result of compliance with federal and state statutes and permitting procedures as well as hard fought battles in court rooms, newspapers, public meetings, and the court of public opinion. Having overcome numerous well-funded and politically powerful opponents, regulatory hurdles, and continuous lawsuits, Cape Wind is poised to construct America's first offshore wind farm, bringing renewable energy to the Cape and the Islands and setting precedent for coastal communities throughout the nation.

The approval of the Department of the Interior (DOI) does not, however, by itself, signify an end to the legal, political, and public-image issues that have plagued Cape Wind since its inception. In January of 2010,

1. Jeffrey Krasner, *Offshore Wind Farm Blows into Cape View*, BOS. GLOBE, July 28, 2001, at A1.

2. WENDY WILLIAMS & ROBERT WHITCOMB, *CAPE WIND: MONEY, CELEBRITY, CLASS, POLITICS, AND THE BATTLE FOR OUR ENERGY FUTURE ON NANTUCKET SOUND* 141 (2006); U.S. Dep't of Energy, *Interior Department Approves Cape Wind, the First U.S. Offshore Wind Farm*, EERE NETWORK NEWS (May 5, 2010), http://apps1.eere.energy.gov/news/news_detail.cfm/news_id=15982.

3. U.S. Dep't of Energy, *supra* note 2 (noting that the decrease from 170 turbines to 130 turbines was a concession by Cape Wind to its opponents).

4. Patrick Cassidy, *Cape Wind Farm Approved*, CAPE COD TIMES, Apr. 29, 2010, <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20100429/NEWS/100429748>.

5. Patrick Cassidy, *U.S. Interior Secretary Signs Lease for Cape Wind*, CAPE COD TIMES, Oct. 6, 2010, <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20101006/NEWS11/101009851&cid=sitesearch>.

the National Park Service announced that Nantucket Sound was eligible for listing on the National Register of Historic Places.⁶ The announcement came as a result of a request for a determination of eligibility by the Minerals Management Service (MMS)⁷ due to the lack of agreement between the MMS and the Massachusetts State Historic Preservation Officer (SHPO) of the Massachusetts Historical Commission, the Mashpee Wampanoag Tribe, and the Wampanoag Tribe of Gay Head.⁸ The two tribes, with the financial and political backing of Cape Wind's main opposition, the Alliance to Protect Nantucket Sound (Alliance), contend that the project is detrimental to their ancestral burial grounds and their spiritual sun greeting.⁹ To properly greet the sun from the shoreline of Nantucket Sound, the tribes claim to require an unobstructed view, free of wind turbines.¹⁰ Both tribes immediately announced plans to file suit, citing at least fourteen legal shortcomings by the MMS under the National Historic Preservation Act of 1966 (NHPA).¹¹ And indeed, by July of 2011, the Wampanoag Tribe of Gay Head filed suit in the United States District Court for the District of Columbia alleging, among other things, that the DOI and MMS violated the NHPA in issuing a positive Record of Decision for Cape Wind.¹² The fact that the project has gained federal approval indicates that the MMS did not believe the procedural mechanisms of the NHPA to be a defeating factor in the permitting of Cape Wind. Indeed, the MMS terminated the consultation mandated under the NHPA prior to the issuance of DOI approval for Cape Wind.¹³ In light of the recently filed lawsuit, the MMS's procedure in complying with the NHPA deserves legal

6. Press Release, Nat'l Park Serv., Nantucket Sound Found Eligible for Listing in National Register (Jan. 4, 2010) [hereinafter NPS Press Release], *available at* <http://home.nps.gov/news/release.htm?id=944>.

7. The Minerals Management Service is now the Bureau of Ocean Energy Management, Regulation and Enforcement. Navigation and Navigable Waters, Organizational Amendments, 76 Fed. Reg. 31,831 (June 20, 2011).

8. NPS Press Release, *supra* note 6.

9. Beth Daley, *2 Tribes Object to Cape Wind Turbines; Say Nantucket Sound Is Cultural Property*, BOS. GLOBE, Oct. 26, 2009, at A1.

10. *Id.*

11. Kim Alderman, *Aquinnah Threaten Lawsuit over Cape Wind*, CULTURAL PROP. & ARCHAEOLOGY BLOG (Apr. 28, 2010), <http://culturalpropertylaw.wordpress.com/2010/04/28/aquinnah-threaten-lawsuit-over-cape-wind/>.

12. Complaint at 2–3, Wampanoag Tribe of Gay Head v. Bronwich, No. 1:2011cv01238 (D.D.C. filed July 6, 2011) [hereinafter Complaint], *available at* <http://www.courthousenews.com/2011/07/08/Wind.pdf>.

13. BUREAU OF OCEAN ENERGY MGMT., DEP'T OF THE INTERIOR, TERMINATION OF THE NHPA SECTION 106 CONSULTATION FOR THE CAPE WIND ENERGY PROJECT (2010) [hereinafter BOEMRE], *available at* http://www.boemre.gov/offshore/renewableenergy/PDFs/CapeWind/Tripathi/Appendix_2_CW106.pdf.

analysis. This Note will examine the nature of the historical argument, the mandates of the NHPA and the MMS's compliance with those mandates, as well as the likelihood of success for the recently filed suit based upon the jurisprudence of the D.C. Circuit.

Part I of this Note provides background on both the project itself and the tribes' historical and religious arguments. This Part will offer an overview of the regulatory and permitting process the project has gone through, the project's opponents and their role in attempting to stop the project, and Nantucket Sound as a historic and cultural property.

Part II addresses the National Historic Preservation Act. The NHPA will be introduced generally, followed by an explanation and legal analysis of section 106 and a brief overview regarding the role of the Advisory Council on Historic Preservation. Section 106 requires consultation between the federal agency licensing the project, the Advisory Council on Historic Preservation, and interested groups affected by the proposed project.¹⁴ In this case, the DOI terminated the section 106 consultation largely as a result of both tribes' unwillingness to agree to any type of compromise or specific mitigating measures.¹⁵ The termination, as well as the MMS's interpretation of and actions under the NHPA, constitute essential elements in determining whether the MMS violated the NHPA in the course of approving Cape Wind.

Part III will touch on the likely outcome of the lawsuit. Using the jurisprudence of the D.C. Circuit, predictions as to the suit's chances of success will be discussed. This Part will argue that in approving Cape Wind, the MMS did not violate the NHPA and that the Wampanoag Tribe's lawsuit will ultimately be unsuccessful.

I. CAPE WIND: THE PROJECT, THE PROCESS, THE POLITICS

In the past ten years, the Cape Wind project has become a polarizing force within the political and economic culture of the Cape and the Islands. The filed lawsuit does not exist in a vacuum, and as such, understanding the project's background and its path to approval is essential in understanding the current legal disagreement.

14. 16 U.S.C. § 470f (2006).

15. Press Release, Dep't of the Interior, Secretary Salazar Moves toward Final Decision on Cape Wind (Mar. 1, 2010), *available at* http://www.doi.gov/news/pressreleases/2010_03_01_release.cfm; MINERALS MGMT. SERV., FACT SHEET: EFFORTS TO REACH DECISION ON THE CAPE WIND PROJECT (2010) [hereinafter MMS FACT SHEET], *available at* <http://www.doi.gov/news/doinews/upload/Fact-Sheet-Cape-Wind-with-SOL-edits-04-28-10.pdf>.

A. The Regulatory and Permitting Process

Following the July 2001 *Boston Globe* article¹⁶ announcing the project in general terms, Cape Wind Associates filed a permit application with the Army Corps of Engineers in November of 2001¹⁷ with the expectation that the project would be underway by 2004.¹⁸ The project faced its first major legal hurdle in the fall of 2002 when local boaters filed suit challenging the permitting process that allowed Cape Wind to install a single tower in Nantucket Sound to collect scientific measurements.¹⁹ The plaintiff, Ten Taxpayer Citizen Group, contended that the Army Corps of Engineers permit, by itself, was not enough to build the tower—a license from the Commonwealth of Massachusetts was also necessary.²⁰ The United States District Court for the District of Massachusetts²¹ dismissed the lawsuit, holding that the permit from the Army Corps of Engineers²² was sufficient.²³ Addressing the issue in his opinion, Judge Joseph Tauro ominously predicted that “[t]his case may well be the first skirmish in an eventual battle over the construction . . . of a windmill farm in Nantucket Sound.”²⁴

By December of 2004, the Army Corps of Engineers had released a favorable 3,800-page Draft Environmental Impact Statement (DEIS).²⁵ The release set in motion a series of public hearings held throughout the Commonwealth, designed to procure public comment on the project.²⁶ The meetings attracted vocal populations from both sides of the debate, including heavy hitters within Massachusetts politics such as then-Governor

16. Krasner, *supra* note 1.

17. Jim Geraghty, *President Obama vs. Senator Kennedy*, NAT’L REV. ONLINE (Jan. 26, 2009, 4:00 A.M.), <http://www.nationalreview.com/articles/226748/president-obama-vs-senator-kennedy/jim-geraghty>.

18. James Quilter, *Timeline—The Nine-Year Saga of Cape Wind*, WINDPOWER MONTHLY, (Apr. 29, 2010, 2:14 PM), <http://www.windpowermonthly.com/news/1000169/Timeline---nine-year-saga-Cape-Wind/>.

19. *Id.*

20. *Ten Taxpayers Citizen Grp. v. Cape Wind Assocs.*, 278 F. Supp. 2d 98, 100 (D. Mass. 2003).

21. The plaintiff in the case, *Ten Taxpayers Citizen Group*, originally filed the lawsuit in Barnstable Superior Court where they received a temporary restraining order for the project. *Id.* at 99. As a result, Cape Wind removed the case to federal court under federal question jurisdiction. *Id.* at 98.

22. The same court would rule in *Alliance to Protect Nantucket Sound, Inc. v. U.S. Army Corps of Engineers* that the federal permit had been validly issued. 288 F. Supp. 2d 64, 82 (D. Mass. 2003).

23. *Ten Taxpayers Citizen Group*, 278 F. Supp. 2d at 100–01.

24. *Id.* at 99.

25. WILLIAMS & WHITCOMB, *supra* note 2, at xi–xvi.

26. Meetings were held on Martha’s Vineyard and Nantucket and in Yarmouth and Cambridge. *First U.S. Offshore Wind Farm Wins Positive Impact Rating*, ENV’T NEWS SERVICE (Nov. 9, 2004), <http://www.ens-newswire.com/ens/nov2004/2004-11-09-03.html>.

Mitt Romney and then-Congressman William Delahunt.²⁷ At this stage, the DEIS indicated “that Cape Wind will produce compelling public benefits with positive environmental and economic impacts.”²⁸

In addition, Cape Wind was concurrently adhering to state procedures for the licensing of the project. Though the turbines will be located in federal waters, the transmission lines bringing the energy to the mainland will traverse state waters, effectively giving state and local officials a larger regulatory stake in the process.²⁹ The project underwent review under “the Massachusetts Environmental Policy Act (MEPA) which requires an Environmental Impact Review (EIR) and the Cape Cod Commission’s Development of Regional Impact (DRI) process.”³⁰

The Energy Policy Act of 2005 served to transfer federal oversight of the project from the Army Corps of Engineers to the Minerals Management Service (MMS) of the Department of the Interior.³¹ Section 388 of the Act empowered the MMS to grant easements for alternative energy-related uses on the outer continental shelf.³² Once authority was transferred, Cape Wind submitted a new application to the MMS in 2005.³³ The MMS’s DEIS was published on January 18, 2008, followed by a period of public comment.³⁴ The Final Environmental Impact Statement (FEIS), published on January 21, 2009, indicated that impacts from the project were “expected to be mostly negligible or minor.”³⁵ In March of 2010, just prior to Secretary Salazar’s approval of the project, the MMS completed an Environmental Assessment (EA) to determine if “any new information existed that would alter or inform the FEIS.”³⁶ The EA concluded that there was no new significant information.³⁷ The end of April 2010 signaled a giant victory for Cape Wind with a positive “record of decision” from the Department of the Interior.³⁸ Secretary Salazar, in his announcement of the approval, noted that he “was approving the Cape Wind project ‘with modifications that will

27. WILLIAMS & WHITCOMB, *supra* note 2, at xvi, 227.

28. *Permitting Update*, CAPEWIND.ORG, <http://www.capewind.org/printarticle72.htm> (last visited Dec. 1, 2011) [hereinafter *Permitting Update*].

29. Beth Daley, *SJC Ruling Gives Cape Wind Project Green Light to Build*, BOS. GLOBE, Sept. 1, 2010, at B1.

30. *Permitting Update*, *supra* note 28.

31. *Id.*

32. Energy Policy Act of 2005 § 388, 43 U.S.C. § 1337(p) (2006).

33. MMS FACT SHEET, *supra* note 15.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. Patrick Cassidy, *Salazar Approves Offshore Wind Farm*, CAPE COD TIMES, Apr. 28, 2010, <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20100428/NEWS11/100429768&cid=sitesearch>.

protect the historical, cultural and environmental resources' of Nantucket Sound."³⁹

B. The Project's Opponents

From the project's announcement in the summer of 2001 to its approval in the spring of 2010, the proposal for the nation's first offshore wind farm has attracted the ire of some of the wealthiest and most politically powerful Cape residents. Leading the charge was Senator Ted Kennedy, a man whose family name has become synonymous with Cape Cod and, indeed, Nantucket Sound, via the iconic images of his brother and sister-in-law sailing their *Wianno Senior* through its waters.⁴⁰

Opposition crossed party lines, as Governor Mitt Romney reneged on his campaign promise to go after the Commonwealth's polluting energy producers, preferring their emissions to "not pretty"⁴¹ turbines within a "national treasure."⁴² Beyond local and national politicians, historian-author David McCullough and famed broadcaster Walter Cronkite, who later switched his position, took up the cause of the Alliance.⁴³ The Alliance attracted celebrity as well as wealth. Buoyed by the money of American industry, the Alliance has found allies in families such as the Mellons, the DuPonts and the Kochs, as well as yacht clubs and private, ocean-front communities throughout the Cape.⁴⁴

C. Nantucket Sound As a Historical and Cultural Property

The Sound itself, while perhaps lacking the typical visual indicators of development and expansion, is undoubtedly as dynamic a landscape as any found on shore. Over the past 400 years, the residents of Cape Cod and the Islands have used the Sound in varying ways to meet their changing needs as a community. In addition to the fish and shellfish industries, the Nantucket whaling industry, at its height, attracted thousands of ships to the

39. *Id.*

40. See *John and Jackie Go Sailing, 1953* (photograph), LIFE, <http://www.life.com/gallery/25521/remembering-jackie#index/1> (last visited Dec. 1, 2011).

41. WILLIAMS & WHITCOMB, *supra* note 2, at xvi, 227.

42. *Id.*

43. *Id.* at xxi, 141.

44. See *id.* at xv; Alliance to Protect Nantucket Sound, *Stakeholders: Elected Officials and Organizations Concerned with Cape Wind*, SAVE OUR SOUND, http://www.saveoursound.org/about_us/stakeholders/ (last visited Dec. 1, 2011).

Sound every year.⁴⁵ The steamship ferry, first introduced to the Sound in the early nineteenth century, soon became a ubiquitous feature on the water, carrying tourists and residents from the Islands to the mainland.⁴⁶ And, by the early twentieth century, as the automobile became more widely available and ostentatious displays of wealth, socially entrenched via the excess of the 1920s, reached the mainstream, the coastlines bordering the Sound emerged as the tourist destinations and second-home locations they remain today.⁴⁷

Beyond the historical economic uses, the Sound has also served as a cultural and spiritual property for the Wampanoag tribes who occupied the shoreline of the Sound thousands of years prior to the arrival of Bartholomew Gosnold in 1602⁴⁸ and the Pilgrims in 1620.⁴⁹ For these tribes, portions of which occupy both Nantucket and Martha's Vineyard as well as Cape Cod, the Sound serves as an ancestral burial ground given that the seabed of the Sound was once dry land.⁵⁰ Furthermore, the two tribes⁵¹ involved in the current NHPA-centered debate—the Mashpee Wampanoag and the Gay Head Wampanoag of Aquinnah—contend that they require an unobstructed view of the horizon over Nantucket Sound as part of their spiritual sun greeting.⁵² The proposed turbines, which will span 440 feet from their lowest visible point to their highest visible point, will allegedly undermine the spiritual ceremony.⁵³ The combination of cultural and religious significance attached to this property by certain members of the two tribes has made compromise difficult and has cast Nantucket Sound as a battleground between the traditions of the past and the necessities of the future while inviting the oversight of the National Historical Preservation Act and its protective mechanisms.

45. NATHANIEL PHILBRICK, *AWAY OFF SHORE: NANTUCKET ISLAND AND ITS PEOPLE, 1602–1890*, at 212 (1994).

46. HARRY B. TURNER, *THE STORY OF THE ISLAND STEAMERS* 66 (1910).

47. JAMES C. O'CONNELL, *BECOMING CAPE COD: CREATING A SEASIDE RESORT*, at ix (2003).

48. Bartholomew Gosnold is commonly recognized as the European discoverer of Cape Cod and is credited with giving Cape Cod its name. 12 STATE STREET TRUST COMPANY, *SOME EVENTS OF BOSTON AND ITS NEIGHBORS* 1 (1917).

49. EDWARD CHANNING, *A STUDENT'S HISTORY OF THE UNITED STATES* 78 (new ed. 1902).

50. Daley, *supra* note 9.

51. While both the Mashpee and Gay Head Wampanoag tribes participated in the section 106 consultation and publicly threatened legal action following project approval, the recently filed law suit names only the Wampanoag Tribe of Gay Head. Complaint, *supra* note 12, at 1.

52. Daley, *supra* note 9. Even in the unlikely event that the wind farm is not built as a result of this debate, the view of the horizon will continue to be obstructed. Wide-scale development of the shoreline combined with private boating and ferry services create obstructions at every viewpoint.

53. *Frequently Asked Questions*, CAPE WIND, <http://www.capewind.org/FAQ-Category4-Cape+Wind+Basics-Parent0-myfaq-yes.htm> (last visited Dec. 1, 2011).

II. THE NATIONAL HISTORIC PRESERVATION ACT OF 1966

A. An Overview of the National Historic Preservation Act

In the immediate aftermath of World War II, the American landscape found itself overwhelmed by the forces of modernism, rapid expansion, and population growth. Such forces, while representative of America's cemented superpower status, often left in their wake the discarded remnants of the American past. Congress responded to the widespread destruction and demolition of historic properties by passing the National Historic Preservation Act of 1966.⁵⁴ Essentially, Congress passed the NHPA to combat a massive growth of national infrastructure without regard to the historical and cultural properties affected by the projects.⁵⁵ The NHPA reflected both congressional recognition that the nation's past would constitute a vital part of the nation's future,⁵⁶ and that the governmental and non-governmental entities overseeing historic preservation at the time required the resources of a federal statute.⁵⁷ The NHPA is, at its core, a balancing statute.⁵⁸ In the statute's Declaration of Policy of the Federal Government, the statute states:

It shall be the policy of the Federal Government, in cooperation with other nations and in partnership with the States, local governments, Indian tribes, and private organizations and individuals to . . . use measures, including financial and technical assistance, to foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations.⁵⁹

Under the NHPA, the Secretary of the Interior is authorized to “maintain a National Register of Historic Places;”⁶⁰ “accept a nomination directly from any person or local government for inclusion of a property on the National

54. *40th Anniversary National Historic Preservation Act*, NAT'L PARK SERV., <http://www.nps.gov/history/40th/> (last visited Dec. 1, 2011); National Historic Preservation Act of 1966, Pub. L. No. 89-665, § 1, 80 Stat. 915 (codified at 16 U.S.C. § 470(b)(4)–(5) (2006)).

55. 16 U.S.C. § 470(b)(4)–(5).

56. *Id.* § 470(b)(4).

57. *Id.* § 470(b)(6)–(7).

58. *See id.* § 470 (declaring that it shall be the policy of the federal government to strike a “productive harmony” between historic preservation and the needs of modern society).

59. *Id.* § 470-1(1).

60. *Id.* § 470a(a)(1)(A).

Register;”⁶¹ designate a State Historic Preservation Officer;⁶² and “establish a program and promulgate regulations to assist Indian tribes”⁶³ among other responsibilities and duties.

Nantucket Sound, a body of water encompassing over 500 square miles, “is by far the largest body of water ever found eligible for listing on the national historic register.”⁶⁴ In determining the Sound’s eligibility, the Keeper of the National Register of Historic Places relied almost exclusively on factors relating to the Sound’s relationship with the Wampanoag tribes and the information the Sound might yield about life in the region prior to the arrival of Europeans.⁶⁵ The NHPA generally provides for supporting the preservation of religious properties, provided that the preservation maintains a secular purpose,⁶⁶ and more specifically provides for the preservation of areas and sites of “traditional religious and cultural importance to an Indian tribe.”⁶⁷ Notably, Nantucket Sound has not yet been listed on the National Register of Historic Places; it has merely been found eligible for listing.⁶⁸ An actual listing on the National Register could be delayed indefinitely, especially if Cape Wind supporters, specifically Massachusetts Governor Deval Patrick, use their political clout to block the listing.⁶⁹

B. Section 106 of the National Historic Preservation Act

The announcement that Nantucket Sound had been found eligible for listing on the National Historic Register signaled neither a loss for Cape Wind, nor a win for the two tribes and the Alliance to Protect Nantucket Sound. Instead, the announcement triggered section 106 of the NHPA which requires federal agencies overseeing any undertaking⁷⁰ to “prior to the issuance of any license . . . take into account the effect of the

61. *Id.* § 470a(a)(4).

62. *Id.* § 470a(b)(1)(A).

63. *Id.* § 470a(d)(1)(A).

64. Abby Goodnough, *For Controversial Wind Farm off Cape Cod, Latest Hurdle is Spiritual*, N.Y. TIMES, Jan. 4, 2010, at A11.

65. NPS Press Release, *supra* note 6.

66. 16 U.S.C. § 470a(e)(4).

67. *Id.* § 470a(d)(6)(A).

68. BOEMRE, *supra* note 13.

69. Beth Daley, *Some Worried Nantucket Sound Designation Will Hurt Other Development*, BOS. GLOBE GREEN BLOG (Jan. 5, 2010), http://www.boston.com/lifestyle/green/greenblog/2010/01/some_worried_nantucket_sound_d.html.

70. The NHPA defines “undertaking” as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including . . . those requiring a Federal permit license, or approval.” 16 U.S.C. § 470w(7)(C).

undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.”⁷¹ The NHPA further mandates that the head of the responsible federal agency must, “to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark.”⁷² Essentially, section 106 of the NHPA requires a consultation between interested parties and the governmental entity overseeing the project. This consultation, in theory, serves as a mechanism whereby interested parties can attempt to reach some consensus as to possible modifications to the project that may assist in better preserving the landmark.

It is important to note that neither section 106, nor the NHPA as a whole, requires that a project be abandoned in the event that it adversely affects a registered or eligible historic landmark.⁷³ Indeed, “Section 106 encourages, but does not mandate, preservation. The process provides for the consideration of alternatives that promote preservation and offers the public and stakeholders the opportunity to influence federal decisions.”⁷⁴ In January of 2010, shortly following the announcement that Nantucket Sound was eligible for listing on the National Historic Register, Secretary Salazar announced plans to convene a section 106 consultation meeting.⁷⁵ This meeting initiated a public comment period for the revised Finding of Adverse Effect.⁷⁶ The meeting also addressed the recent addition of Nantucket Sound as an eligible historic property, as the announcement of project approval for Cape Wind could not be made until after the consultation process was completed.⁷⁷ At this point, section 106 consultation meetings had been occurring, pursuant to 36 C.F.R. § 800.3 for years, as there are other eligible and registered historic properties that the wind farm will adversely affect.⁷⁸ The addition of Nantucket Sound as a traditional cultural property in January of 2010 simply added an additional site to the process, albeit it a very large site.⁷⁹ Indeed, likely as a result of its size and the structural realities of the project, Nantucket Sound was the only

71. *Id.* § 470f.

72. *Id.* § 470h(2)(f).

73. *Id.* § 470.

74. ADVISORY COUNCIL ON HISTORIC PRES., SECTION 106 FACT SHEET 1, *available at* <http://www.achp.gov/docs/Section106FactSheet.pdf> (last visited Dec. 1, 2011).

75. MMS FACT SHEET, *supra* note 15.

76. *Id.* On December 29, 2008, the MMS released a “Findings of Adverse Effect.” The report found that the proposed wind farm will have “an adverse indirect visual effect on 28 historic properties and one cultural (Tribal) property.” *Id.*

77. BOEMRE, *supra* note 13.

78. *Id.*

79. *Id.*

historical property found to suffer a direct physical adverse effect by the proposed wind farm.⁸⁰ Such effects were discussed in a series of Government-to-Government meetings, between the Department of the Interior and the tribal leaders of the Mashpee and Gay Head Wampanoag tribes, pursuant to Executive Order 13175, throughout late 2009 and early 2010.⁸¹ Revised Findings of Adverse Effect were released and opened to comments in February of 2010.⁸² Shortly thereafter, on March 1, 2010,⁸³ Secretary Salazar, recognizing that the mitigation measures proposed were not satisfactory to either of the tribes or any of the interested parties and “that further consultation [would] not be productive,”⁸⁴ terminated the section 106 consultation.⁸⁵

Secretary Salazar properly terminated the section 106 consultation, pursuant to 36 C.F.R. § 800.7(a), when it became clear that no interested party would agree to enough mitigation to make the consultation productive.⁸⁶ Furthermore, the Secretary complied with section 110 of the NHPA by, “to the *maximum extent possible*, undertak[ing] such planning and actions as may be necessary to *minimize* harm to such landmark.”⁸⁷ The statute mandates only that maximum efforts be made to minimize harm, not that efforts be made to completely prevent harm from befalling a historic landmark.⁸⁸ The MMS further complied with section 110 of the NHPA as it requested comment on the Proposed Project by the Advisory Council on Historic Preservation (ACHP).⁸⁹

The NHPA served to create a new, independent federal agency, the ACHP.⁹⁰ The ACHP, as a federal agency, acts to “promote[] the preservation, enhancement, and productive use of our nation’s historic resources, and advises the President and Congress on national historic preservation policy.”⁹¹ Comprised of twenty three members, the ACHP acts as the “only entity with the legal responsibility to encourage federal

80. *Id.*

81. *Id.*

82. MMS FACT SHEET, *supra* note 15.

83. Record of Decision for the Cape Wind Energy Project; Secretary of the Interior’s Response to Comments from the Advisory Council on Historic Preservation on the Cape Wind Energy Project, 75 Fed. Reg. 34,152 (June 16, 2010) [hereinafter Record of Decision].

84. Failure to Resolve Adverse Effects, 36 C.F.R. § 800.7(a) (2011).

85. BOEMRE, *supra* note 13.

86. *Id.*; MMS Fact Sheet, *supra* note 15.

87. 16 U.S.C. § 470h(2)(f) (2006) (emphasis added).

88. *Id.*

89. BOEMRE, *supra* note 13.

90. 16 U.S.C. § 470i.

91. *About the ACHP: General Information*, ADVISORY COUNCIL ON HISTORIC PRES., <http://www.achp.gov/aboutachp.html> (last updated May 13, 2011).

agencies to factor historic preservation into federal project requirements.”⁹² The most prominent section 106 cases come under the purview of the ACHP’s Executive Committee, overseen by the Chairman and Vice Chairman, with less complicated cases overseen by the Federal Agency Programs arm of the ACHP which “works with federal agencies to help improve how they consider historic preservation values in their programs.”⁹³

*C. The ACHP’s Comments on the Nantucket Sound Section 106
Consultation Process*

The ACHP’s comments pursuant to section 110 of the NHPA, released on April 2, 2010,⁹⁴ did not recommend project approval.⁹⁵ Their disapproval indicated that “[t]he indirect and direct effects of the Project on the collection of historic properties would be pervasive, destructive, and, in the instance of seabed construction, permanent.”⁹⁶ The comments highlighted four specific reasons as the basis for their conclusion:

[(1)] MMS has stewardship responsibilities for historic properties on the OCS [Outer Continental Shelf;]

[(2)] Section 106 was initiated late in the planning process[;]

[(3)] Tribal consultation under Section 106 as conducted by the Corps and by MMS was tentative, inconsistent, and late[; and]

[(4)] The marine archaeological survey work to determine the potential for the presence of intact archaeological sites is limited and the feasibility of any post-review discovery protocols is uncertain.⁹⁷

92. *Id.*

93. *Id.*

94. Pursuant to 36 C.F.R. § 800.7(c)(4), Secretary Salazar responded to the ACHP’s comments. Record of Decision, *supra* note 83, at 34,153.

95. ADVISORY COUNCIL ON HISTORIC PRES., COMMENTS OF THE ADVISORY COUNCIL ON HISTORIC PRESERVATION ON THE PROPOSED AUTHORIZATION BY THE MINERALS MANAGEMENT SERVICE FOR CAPE WIND ASSOCIATES, LLC TO CONSTRUCT THE CAPE WIND ENERGY PROJECT ON HORSESHOE SHOAL IN NANTUCKET SOUND, MASSACHUSETTS 6 (2010) [hereinafter ACHP], available at <http://www.achp.gov/docs/CapeWindComments.pdf>.

96. *Id.* at 5.

97. *Id.* at 4–5.

These factors, combined with the ACHP's view that the nature and scope of the adverse effects would be of such a degree that no adequate mitigation measures could be implemented, ultimately led to the ACHP's disapproval of the project.⁹⁸

The contention that the "MMS has stewardship responsibilities for historic properties on the OCS,"⁹⁹ and the implication that, in approving the project, the MMS would be ignoring those responsibilities, is summarily incorrect. The NHPA requires federal agencies to "foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony."¹⁰⁰ This language requires agencies, in reaching a decision on undertakings that may affect historic and prehistoric areas, to engage in a balancing that accounts for preservation and respect of the past with the necessities and realities of the future.¹⁰¹ Renewable energy is both a reality and a necessity of our current and future world. Continued reliance on fossil fuels compromises the environmental health of our nation as well as our domestic safety in such a way that by continuing to advance a nonrenewable-based energy policy we are endangering the structural integrity and continued existence of America's treasured and sacred past.

Furthermore, Nantucket Sound is not a static entity devoid of a modern human imprint or economic utility. This is a landscape that has, for thousands of years, been used, and often abused, in an evolving manner, consistent with the technological and economic realities and needs of the time.¹⁰² It is not as if Cape Wind honed in upon a landscape that has been tirelessly preserved for generations and sought to defile it with a wind farm. This project is simply another step on a trajectory that has involved industry and technology for centuries.

In fulfilling their responsibilities under the NHPA,¹⁰³ the MMS and Secretary Salazar weighed the adverse effects with the benefits provided by the project: clean, renewable energy; the creation of hundreds of jobs; and a precedential project for the United States in terms of offshore wind energy.¹⁰⁴ Ultimately, while Nantucket Sound itself, and the historic sites

98. *Id.* at 5.

99. *Id.* at 4.

100. 16 U.S.C. § 470-1(1) (2006).

101. *See id.* (dictating that the policy of the Federal Government shall be to "foster conditions under which our modern society and our prehistoric resources can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations").

102. PHILBRICK, *supra* note 45, at 212. (discussing the volume of ships in the Sound during the height of the whaling industry); HARRY B. TURNER, *THE STORY OF THE ISLAND STEAMERS* 3 (1910); JAMES C. O'CONNELL, *BECOMING CAPE COD: CREATING A SEASIDE RESORT* ix (2003).

103. 16 U.S.C. § 470-1(1).

104. Press Release, Dep't of the Interior, Secretary Salazar Announces Approval of Cape Wind

that line its shoreline, may be eligible for listing, or currently listed on the National Register for religious, cultural, and historical purposes, the reality is that Nantucket Sound also possesses an economic history, which the construction of the proposed wind farm is consistent with. The MMS met their obligations under the NHPA and have met their responsibilities for historic properties and stewardship on the Outer Continental Shelf.

The ACHP further contends that “Section 106 was initiated late in the planning process.”¹⁰⁵ Neither the NHPA, nor those regulations pertaining to section 106, offer concrete or absolute guidelines as to the timing of the section 106 consultation process. Section 106 of the NHPA states simply that “*prior* to the issuance of any license [the agency must] take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.”¹⁰⁶ Furthermore, under the NHPA’s section 106 language, the federal agency must “afford the Advisory Council on Historic Preservation . . . a *reasonable* opportunity to comment with regard to such undertaking.”¹⁰⁷ Here, the section 106 consultation process began and ended prior to Secretary Salazar’s approval of the project in late April of 2010. The MMS began the section 106 consultation process in June of 2008,¹⁰⁸ a date that is decidedly *prior* to the announcement of approval in April 2010¹⁰⁹ and the issuance of a lease in October of 2010.¹¹⁰ Furthermore, the section 106 consultation involved the ACHP from the start in 2008, and the ACHP had been involved in a section 106 consultation with the Army Corps of Engineers prior to that.¹¹¹ The Energy Act of 2005, in transferring oversight to the MMS from the Army Corps of Engineers,¹¹² effectively started much of the process over. Surely, the MMS should not be penalized for coming in late in the process, through no fault of its own, and as a result restarting the section 106 consultation at a later point. The regulations governing the section 106 consultation process also do not outline specific times or timelines for the consultation. The regulations stipulate that an agency *should*, but not *shall*, coordinate the section 106 consultation with

Energy Project on Outer Continental Shelf of Massachusetts (Apr. 28, 2010) [hereinafter DOI Press Release], available at <http://www.doi.gov/news/doinews/Secretary-Salazar-Announces-Approval-of-Cape-Wind-Energy-Project-on-Outer-Continental-Shelf-off-Massachusetts.cfm>.

105. ACHP, *supra* note 95, at 4.

106. 16 U.S.C. § 470f (emphasis added).

107. *Id.* (emphasis added).

108. ACHP, *supra* note 95, at 1.

109. Cassidy, *supra* note 4, at A1.

110. Cassidy, *supra* note 5.

111. ACHP, *supra* note 95, at 1.

112. 43 U.S.C. § 1337(p).

other reviews, such as those required under NEPA.¹¹³ This regulation speaks largely to a mechanism of convenience, not requirement, for the agency, as information garnered during a NEPA review may be useful in completing the requirements of section 106. While the initial NEPA review that led to the release of a January 2008 DEIS by the MMS did not coincide directly with the section 106 consultation process beginning in June of 2008, the NEPA review leading to a FEIS in January of 2009 did coincide with the section 106 consultation, though again, this is not a mandatory requirement under the section 106 regulations.¹¹⁴ Indeed, the only real reference to time within the regulation governing the section 106 process deals with expediting the process when the agency and the State Historic Preservation Officer (SHPO) feel it is appropriate and where the consulting parties and the public have had adequate time to comment.¹¹⁵

Under this complaint, the ACHP further argues that “MMS did not resolve the eligibility status of potential historic properties such as Nantucket Sound until late in the section 106 process.”¹¹⁶ In November of 2009, the MMS requested a Determination of Eligibility from the National Park Service to resolve a disagreement between the MMS, the SHPO and the two tribes as to whether Nantucket Sound was eligible for listing on the National Register of Historic Places.¹¹⁷ Again, while the regulations pertaining to section 106 require the federal agency to help identify properties of historical value to Indian tribes, the regulations do not speak to time requirements, nor do they require an agency to blindly accept a site as historical at the say-so of an Indian tribe.¹¹⁸ The Secretary could not have granted approval to Cape Wind until the completion of the section 106 consultation process.¹¹⁹ This suggests that the time at which Nantucket Sound entered the section 106 fray is of little consequence, as the MMS knew that the section 106 consultation needed to be completed for *all* of the historical sites prior to issuing project approval.¹²⁰ Additionally, though Nantucket Sound was identified as eligible for listing on the National Register during the latter portion of the section 106 consultation, the process had already involved and included discussions regarding historical sites of a similar nature and with similar issues to those of the Sound.

113. Initiation of the Section 106 Process, 36 C.F.R. § 800.3(2)(b) (2011).

114. MMS FACT SHEET, *supra* note 15.

115. 36 C.F.R. § 800.3(2)(b).

116. ACHP, *supra* note 95, at 4.

117. NPS Press Release, *supra* note 6; BOEMRE, *supra* note 13.

118. Identification of Historic Properties, 36 C.F.R. § 800.4(a)(4) (2011).

119. 16 U.S.C. § 470f.

120. *Id.*

Though the Sound undoubtedly brought new issues into the fray, as the seabed construction will have a direct effect on the property, the section 106 consultation pertaining to this site is complete under the wording of both the NHPA and the regulations that govern the section 106 consultation process. That none of the mitigating solutions proposed by the MMS were accepted by the ACHP or the two tribes does not reflect a failure of the section 106 consultation, but rather the lack of some interested parties' willingness to cooperate or reach consensus.

Along the same lines, the ACHP contends that "[t]ribal consultation under section 106 as conducted by the Corps and by MMS was tentative, inconsistent, and late."¹²¹ This argument ignores the lack of express time requirements in the NHPA or the section 106 regulations and fails to recognize that, simply because the Government-to-Government consultations and meetings regarding the religious and cultural significance of the Sound happened on the latter end of the section 106 consultation process, it is not an indication that the process was in any way lacking or in violation of the pertinent statutory and regulatory requirements.

The text of the regulation states that "[t]he agency official shall make a *reasonable and good faith* effort to identify any Indian tribes . . . that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties."¹²² Furthermore, the MMS conducted the first of its Government-to-Government meetings with the Wampanoag Tribe of Gay Head (Aquinnah Wampanoag) and Mashpee Wampanoag Tribe in May of 2006.¹²³ Outreach efforts towards the two tribes nearly four years before issuance of project approval would arguably qualify as a reasonable and good-faith effort to engage the tribes as consulting parties. From July 2008 to January 2010, the MMS held eight full section 106 consultation meetings, which included the two tribes.¹²⁴ The commencement of Government-to-Government meetings in 2006, and full consultation meetings beginning in the summer of 2008, would also strongly suggest that tribal consultation under section 106 was not "tentative, inconsistent, [or] late," especially considering that the MMS only took over the permitting of the project in 2005.¹²⁵ Neither the NHPA nor the section 106 regulations prescribe a quantity of meetings between the

121. ACHP, *supra* note 95, at 4.

122. 36 C.F.R. § 800.3(f)(2) (emphasis added).

123. BUREAU OF OCEAN ENERGY MGMT., REGULATION AND ENFORCEMENT, FACTS ON THE CAPE WIND ENERGY PROJECT, 1 (Oct. 14, 2010), *available at* <http://www.boemre.gov/offshore/renewableenergy/PDFs/CapeWindFactSheet10-14-2010.pdf>.

124. *Id.* at 2.

125. ACHP, *supra* note 95, at 4; MMS FACT SHEET, *supra* note 15.

federal agency and the Indian tribe. Based upon the reasonable and good faith standards articulated in 36 C.F.R. §800.3(f)(2), the MMS's number of meetings and the timing of the meetings satisfy the regulatory standard.

Finally, the ACHP argues that “[t]he marine archaeological survey work to determine the potential for the presence of intact archaeological sites is limited and the feasibility of any post-review discovery protocols is uncertain.”¹²⁶ The MMS complied with section 106 regulations by finding that Nantucket Sound would be adversely affected by the proposed wind farm.¹²⁷ This finding was necessary as “[a]n adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register.”¹²⁸ In determining an adverse effect, the regulation does not require an exhaustive inquiry on the part of the federal agency. The marine archaeological work that was done was, as the ACHP admitted, “sufficient to assess the potential for archaeological resources in the section 106 process.”¹²⁹ This is all the statute and the regulation requires. Surely, the MMS cannot be faulted for failure to extend its inquiry past the stage required by the section 106 regulations. Furthermore, in the mitigation measures that will be implemented (despite the non-agreement by the tribes and the ACHP) the DOI will require the developer to “conduct additional seabed surveys to ensure that any submerged archaeological resources are protected prior to bottom disturbing activities.”¹³⁰ Additionally, “a Chance Finds Clause in the lease [will] require[] the developer to halt operations and notify Interior of any unanticipated archaeological find.”¹³¹ Such actions are consistent with 36 C.F.R. § 800.6(a), which requires the agency to, in consultation with interested parties, “develop and evaluate alternatives or modifications to the undertaking that *could* avoid, minimize, or mitigate adverse effects on historic properties.”¹³² The regulations do not require that the mitigation go so far as to abandon the undertaking, only that alternatives should be explored that may minimize the expected adverse effects.¹³³ The agency required these modifications of Cape Wind’s proposal despite the fact that the two tribes effectively walked away from the bargaining table

126. ACHP, *supra* note 95, at 5.

127. Revised Finding of Adverse Effect for Cape Wind Project, 75 Fed. Reg. 3922 (Jan. 25, 2010).

128. Assessment of Adverse Effects, 36 C.F.R. § 800.5(a)(1) (2011).

129. ACHP, *supra* note 95, at 5.

130. DOI Press Release, *supra* note 104.

131. *Id.*

132. Resolution of Adverse Effects, 36 C.F.R. § 800.6(a) (emphasis added).

133. *Id.*

by refusing to submit to a compromise,¹³⁴ which ultimately led to a termination of the section 106 consultation.¹³⁵

The ACHP's comments essentially argue for a disapproval and relocation of the proposed wind farm, but the NHPA and the section 106 regulations mandate neither.¹³⁶ Section 106 is, in essence, a balancing provision.¹³⁷ Secretary Salazar and the MMS balanced the short-term and long-term public benefit of the project against the mostly temporary¹³⁸ adverse effects the undertaking may have on surrounding historic properties. Ultimately, the section 106 consultation process, among others, led the Secretary to approve the project with the inclusion of some modifications to be incorporated by the developer in the construction and operation of the wind farm.¹³⁹ Such conclusions are the goal of the NHPA, as the statute was not passed to stifle development, but to provide a statutory guideline by which federal agencies, developers and interested members of the public could consult with one another on how to best undertake new projects while respecting and preserving the history that surrounds them.¹⁴⁰

III. THE LIKELY OUTCOME OF THE LAWSUIT

The April 2010 announcement of approval provoked a near instant litany of threats to file suit. Indeed, two days before Secretary Salazar's announcement of project approval, the Aquinnah Wampanoag announced they had "retained a lawyer experienced in tribal historic preservation efforts"¹⁴¹ and had "identified over [fourteen] legal shortcomings by the Minerals Management Service under the National Historic Preservation Act."¹⁴² Threats to file eventually became a reality and by July 2011 the Aquinnah Wampanoag filed its complaint for declaratory and injunctive relief against the BOEMRE formerly known as MMS, Secretary Salazar,

134. See MMS FACT SHEET, *supra* note 15 (noting DOI's inclusion of mitigating measures in its approval of the project, the tribes' opposition to the project, and the ultimate termination of consultations).

135. *Id.* at 2.

136. *Id.*

137. 16 U.S.C. § 470 (2006).

138. The project will be removed after 30 years. BOEMRE, *supra* note 13, at 5.

139. MMS FACT SHEET, *supra* note 15, at 3; Cassidy, *supra* note 4, at A1; DOI Press Release, *supra* note 104.

140. 16 U.S.C. § 470-1(1).

141. Beth Daley, *Aquinnah Tribe Says it is Prepared to Sue if Cape Wind is Approved*, THE GREEN BLOG (Apr. 26, 2010, 2:49 PM), http://www.boston.com/lifestyle/green/greenblog/2010/04/aquinnah_tribe_says_they_are_p.html.

142. *Id.*

and BOEMRE Director Michael Bromwich in the United States District Court for the District of Columbia, alleging, among other things, lack of meaningful consultation between the BOEMRE and the tribe under the NHPA.¹⁴³ Specifically, the tribe alleges a lack of meaningful and adequate consultation under section 106 of the NHPA, including alleged violations of mandatory duties related to the timing of the consultation and the treatment of the tribe as a government entity.¹⁴⁴ Many of the allegations employ language nearly identical to the ACHP's 2010 comments.¹⁴⁵ Among the relief sought, the tribe requests “[a]n injunction requiring Defendants to withdraw the 2011 ROD [record of decision] and not re-issue a ROD until Defendants’ violations of federal law have been remedied.”¹⁴⁶

Prior to the filing of the suit, experts, including environmental law professors from Vermont Law School (VLS) and Boston College Law School, predicted that such suits will ultimately serve only to delay, not destroy, the project. VLS Professor Patrick Parenteau noted, “People have been poring over this project with a fine-tooth comb for so long that my litigator’s instinct tells me it’s going to be very hard to find a fatal flaw in what they’ve done.”¹⁴⁷ Now, with the suit filed, an analysis of D.C. Circuit law in the context of an alleged section 106 violation will help determine if that instinct will prove correct. In looking to the tribes’ request for injunctive relief regarding the section 106 claim, the tribes would have to overcome a balancing of factors very similar to the process involved in a section 106 consultation, under which they were already unsuccessful. The D.C. Circuit relies upon a four-factor test in determining whether a preliminary injunction should be granted: “(1) the likelihood that the party seeking the injunction will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed without the injunction; (3) the prospect that others will be harmed if the injunction issues; and (4) the public interest.”¹⁴⁸ With the exception of the first factor, these are all issues that the MMS dealt with in the section 106 consultation that ultimately led

143. Complaint, *supra* note 12, at 1–3. The complaint also alleges violations under the National Environmental Policy Act and the Administrative Procedure Act.

144. *Id.* at 25–27.

145. *Id.*; ACHP, *supra* note 95, at 4.

146. Complaint, *supra* note 12, at 27.

147. Jonathan Saltzman, *Litigation is Likely to Result in Delay Only, Specialists Say*, BOS. GLOBE, Apr. 29, 2010, at A9.

148. *Goddard Eng’rs Ass’n v. Nat’l Aeronautics & Space Admin.*, 917 F.2d 1313, 1313 (D.C. Cir. 1990).

the DOI to decide to approve the wind farm.¹⁴⁹ The tribes will need to show some major error on the part of the BOEMRE/MMS, which is unlikely given the amount of time dedicated to vetting the project, to satisfy those factors and earn a preliminary injunction.

While the relevant jurisprudence of the D.C. Circuit is relatively sparse as compared to other circuits,¹⁵⁰ those cases that discuss the intent and requirements of section 106 extend a high level of deference to the stated purpose of the NHPA. In *McMillan Park Committee v. National Capital Planning Commission*, the D.C. Circuit discussed the purpose of Section 106 in reaching its conclusion that the Commission's approval of an amendment permitting commercial development in McMillian Park did not constitute an undertaking, and therefore the NHPA had not been violated. The court observed that once the section 106 consultation project is triggered, agencies must "work with state historic preservation officers and the Advisory Council in tailoring proposed undertakings so that, to the extent possible, they do not harm historic properties."¹⁵¹ The court's own description of the section 106 process acknowledges the balancing inherent in the consultation process. Federal agencies are not required to abandon projects at any sign of adverse impact to a historic property. Instead, section 106 requires a collaborative effort to mitigate such harm "to the extent possible."¹⁵²

Along similar lines, the D.C. Circuit in *Lee v. Thornburgh* decided that the NHPA was not applicable in the building of a particular D.C. prison, which required the demolition of a hospital found eligible for listing on the National Register of Historic Places. The court found that Congress intended for the NHPA to be "aimed solely at discouraging federal agencies from *ignoring* preservation values in projects they initiate, approve funds

149. BUREAU OF OCEAN ENERGY MGMT., DEP'T OF THE INTERIOR, RECORD OF DECISION: CAPE WIND ENERGY PROJECT 4 (2011), available at http://www.boemre.gov/offshore/RenewableEnergy/PDFs/CapeWind/Record_of_Decision42011.pdf.

150. This case also could have been brought in the First Circuit, where case law reviewing agency decisions under section 106 is more developed and highly deferential to the agency. See, e.g., *Neighborhood Ass'n of the Back Bay Inc. v. Fed. Transit Admin.*, 463 F.3d 50, 59 (1st Cir. 2006) (holding that under section 106 the federal agency had "jurisdiction to make the finding, even though it d[id] not have interpretive authority" of the section 106 regulations); *Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d 161, 168 (1st Cir. 2003). "[C]onsultation is not the same thing as control over a project . . . [T]he choice whether to approve the undertaking ultimately remains with the agency." *Id.* (quoting *Save Our Heritage, Inc. v. Fed. Aviation Admin.*, 269 F.2d 49, 62 (1st Cir. 2001)).

151. *McMillan Park Comm. v. Nat'l Capital Planning Comm'n*, 968 F.2d 1283, 1285 (D.C. Cir. 1992).

152. *Id.*

for or otherwise control.”¹⁵³ While the court acknowledges that “[f]ederal agencies . . . are commanded to value preservation,” at its core “[t]he National Historic Preservation Act is a narrow statute. Its main thrust is to encourage preservation of historic sites and buildings rather than to mandate it.”¹⁵⁴ The case reiterates the inherent balancing of the NHPA and strongly implies that federal agencies are not mandated to choose the least impactful route when it comes to historic sites. Consideration and collaboration may be required, but the NHPA in no way creates a hierarchy with historic preservation at the top.

Agency deference in a section 106 context is made clear by the D.C. Circuit in *Davis v. Latschar*, as “[t]he requirements of Section 106 . . . do not require the [agency] to engage in any particular preservation activities; rather, Section 106 only requires that the [agency] consult the SHPO and the ACHP and consider the impacts of its undertaking.”¹⁵⁵ Similarly, in *National Trust for Historic Preservation v. Blanck*, the D.C. Circuit held that “Section 106 is universally interpreted as requiring agencies to consult and consider and not to engage in any particular preservation activities per se.”¹⁵⁶

At the district court level in *Lee*, where the tribe’s case is currently pending, the court engaged in a revealing discussion as to the process by which a section 106 consultation must take place, observing that section 106 “neither . . . forbid[s] the destruction of historic sites nor . . . command[s] their preservation.”¹⁵⁷ In cases like that of Cape Wind, section 106 requires that

if an adverse effect is projected . . . the agency is required to consult with the State Historic Preservation Officer to seek ways to avoid or reduce the effects on the property; the Advisory Council is also permitted to participate in the consultation. Ultimately, however, the agency head is free to terminate the consultation process and proceed with the undertaking.¹⁵⁸

The district court here, in addition to acknowledging the high level of deference extended to agencies in the context of the section 106 process, reiterated the lack of a mandate within the NHPA to abandon projects that

153. *Lee v. Thornburgh*, 877 F.2d 1053, 1056 (D.C. Cir. 1989) (emphasis added).

154. *Id.* at 1058.

155. *Davis v. Latschar*, 202 F.3d 359, 370 (D.C. Cir. 2000).

156. *Nat’l Trust for Historic Pres. v. Blanck*, 938 F. Supp. 908, 918 (D.D.C. 1996).

157. *Lee v. Thornburgh*, 707 F. Supp. 600, 604 (D.D.C. 1989) (alterations in original) (quoting *U.S. v. 162.20 Acres of Land*, 639 F.2d 299, 302 (5th Cir. 1981)).

158. *Id.*

adversely impact historic properties.¹⁵⁹ Furthermore, the Section 106 summary by the court gives a general outline as to the proper procedure for a federal agency undertaking the consultation process and clearly indicates that the federal agency holds the power of termination.¹⁶⁰

The record established by the MMS and the DOI strongly suggests that both the procedural and substantive requirements of a section 106 consultation under the NHPA and the accompanying regulations were properly carried out. The Secretary's response to the ACHP's comments, as well as the general announcement of project approval, clearly outline the substantive balancing process thoughtfully engaged in by the MMS and the Secretary. Furthermore, records dating back to May 2006, when the first Government-to-Government meeting between the MMS and the tribes took place, as well as records from July 2008 onward detailing consultation meetings, certainly weigh in the agency's favor for a finding that they adhered to the procedural requirement of consultation. In combination, the inclination for agency deference, the agency's power to terminate, and the lack of necessity to withhold project approval due to a finding of an adverse effect under section 106, creates a large evidentiary hurdle for litigants seeking to upend a project on the basis of an improper section 106 consultation process or finding.

Quite clearly, the least damaging alternative to the seabed of Nantucket Sound is to relocate the proposed undertaking. This is the approach advocated for by the ACHP in their comments,¹⁶¹ and by the tribes.¹⁶² Such a decision, however, is not mandated by the NHPA. In choosing to keep the project in Nantucket Sound, while adopting mitigating measures, the MMS and the Secretary of the Interior did not violate the NHPA. The jurisprudence of the D.C. Circuit firmly establishes that the NHPA is a balancing statute, and that as long as the statutory and regulatory requirements of section 106 are followed, courts will largely defer to the agency's decision.¹⁶³ The consultation meetings held by the MMS were not a charade carried out merely to fulfill section 106. Instead, the MMS carefully developed methods to mitigate the adverse effects of the project, while keeping in mind and recognizing that the project will only be in place for 30 years.¹⁶⁴ The fact that the methods chosen to mitigate the adverse

159. *Id.*

160. *Id.*

161. ACHP, *supra* note 95, at 5.

162. Daley, *supra* note 141.

163. *Advocates for Transp. Alts. v. U.S. Army Corps of Eng'rs*, 453 F. Supp. 2d 289, 304 (D. Mass. 2006).

164. BOEMRE, *supra* note 13, at 5.

effects were not to the liking of the ACHP or the tribes, who instead advocated for the extreme method of project relocation which would serve to start the entire permitting process over again, does not invalidate the MMS's findings nor the Secretary's ultimate decision to approve the project. Barring any unforeseen evidence of agency failure to properly conduct the section 106 consultation, it is highly likely that a court will defer to the agency and uphold the approval of the project at the proposed site.

CONCLUSION

For centuries Nantucket Sound has played host to industry and commerce, providing a livelihood and a culture for those who inhabit its shores. That the Sound itself and the sites that line its shoreline have great historic and cultural significance is by now a matter of common knowledge that few seek to challenge. Instead, the historical significance of the Sound and its surrounding sites has been seized as a pawn in a larger legal game to prevent, or at least significantly delay, the construction of a wind farm. In 1966, Congress passed the NHPA not to halt or derail industry and infrastructure, but to create a statutory framework in which the government could balance the public benefit of a proposed undertaking with the possible adverse effects of such an undertaking on designated historic sites. Section 106 of the NHPA presents both a substantive and procedural obligation for federal agencies seeking to fund or license a proposed undertaking, with specifics provided by regulations created by the ACHP. In order to satisfy section 106 an agency must both consult with the ACHP and interested parties, including Indian tribes, and weigh the benefits of the proposed project with the possible adverse effects. The NHPA also calls for mitigating measures to be discussed and employed so as to minimize the possible adverse effects.

The aforementioned regulations and statutory provisions were strictly followed by the MMS from the onset of its involvement in the Cape Wind permitting process. Neither the fact that the MMS failed to adhere to processes or timelines not mandated by the NHPA or the regulations, nor that the MMS ultimately approved the proposed project serve as indicators of agency impropriety. That the result reached was not the choice of the ACHP or the tribes is not cause for a decision of reversal or a court-order injunction—though it surely will be used as such. Ultimately, when the tribes' lawsuit filed on the basis of agency impropriety under the NHPA reaches the bench, the request for relief will likely be denied. Barring extreme instances of agency incompetence, judicial review of the section 106 consultation process is extremely deferential to the agency, especially

in cases such as this where the agency adhered to all regulations and statutory provisions.

Nantucket Sound is undoubtedly a historic and dynamic landscape, deserving of protection in all forms, including environmental. In constructing a wind farm on the shoals of the Sound, we are both following a historical trajectory of commerce and industry upon these waters and shedding a tradition of biological and hydrological degradation within the Sound. Cape Wind's proposed wind farm has cleared every regulatory hurdle, including those imposed by the NHPA, and as such any lawsuit seeking to delay or derail the project under the NHPA should be summarily dismissed.

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