Historic Preservation and Offshore Wind Energy: Lessons Learned from the Cape Wind Saga

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Lessons Learned from the Cape Wind Saga
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I. INTRODUCTION

The development of renewable sources of energy is vital to the future of the United States.¹ Most significantly, the use of renewable energy sources will reduce dependency on fossil fuels such as coal, oil and gas.² Cutting down on the use of fossil fuels will decrease greenhouse gas emissions and air pollution, ultimately improving air quality.³ One major untapped renewable energy source in the United States is offshore wind energy.⁴ The wind resources off the coasts of the United States contain more potential energy than the total amount of current installed electric capacity in the entire country.⁵ A study conducted by the United States Department of Energy concluded that offshore wind farms can generate enough electricity to power the entire United States.⁶ Many other countries including Denmark, Netherlands, United Kingdom and Sweden have successfully utilized offshore wind energy.⁷ Yet for a number of reasons, including poor economics, an uncertain regulatory framework, a lengthy review process and local opposition, the United States is years away from developing similar offshore projects.⁸

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² Id.
³ See id.
⁶ Id. Areas between five nautical miles and fifty nautical miles off the coast of the United States contain about 907 gigawatts of wind potential; an amount greater than current installed U.S. electrical capacity. Id.
⁸ Zeller, supra note 4.
In the early 2000’s, it appeared that offshore wind energy was on the horizon for the United States. In November 2001, private developers proposed the construction of America’s first offshore wind farm known as the Cape Wind Project (“Cape Wind”), a project that has the potential to generate enough energy to meet three quarters of Cape Cod’s electricity needs, significantly reduce air pollution and greenhouse gas emissions, and create 1,000 jobs.\(^9\) However, many groups have fought tirelessly to prevent the construction of Cape Wind due to its potential adverse impact on the environment, fishing, navigation, tourism, historic views and submerged cultural artifacts.\(^10\) On April 28, 2010, nearly a decade after its proposal, Cape Wind received federal approval to go forward with the project.\(^11\) However, legal challenges to the decision are likely in the future.\(^12\)

One of the biggest obstacles for Cape Wind and for future offshore projects is the National Historic Preservation Act (“NHPA”). Since the enactment of NHPA in 1966, the United States has been dedicated to protecting places of historic and cultural significance.\(^13\) In more recent years, a movement to promote low-carbon energy through offshore renewable energy projects has grabbed the nation’s attention.\(^14\) While in many cases the interests of historic preservation

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\(^12\) A number of groups have threatened to challenge the decision to approve the project. For example, the Aquinnah tribe released a statement that “[t]he tribe has no choice but to explore all of its options for relief from this decision, including injunctive relief.” Audra Parker of the Alliance to Protect Nantucket Sound stated that “[i]t’s far from over.” Further, a number of environmental groups stated that they will file lawsuits for violations of the Endangered Species Act. Karen Jeffrey, Cape Wind Farm OK’d, Suits Promised, CAPE COD TIMES, Apr. 28, 2010, available at http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20100428/NEWS/4280326.

\(^13\) The National Historic Preservation Act is codified at 16 U.S.C. § 470 et seq.

\(^14\) Kent Garber, Everyone Agrees It’s Time, But the Obstacles Go Well Beyond Matters of Technology. Why Real Change Will Take Nothing Less than a New American Revolution, 146 U.S. NEWS & WORLD REP. 3 (Apr. 1, 2009). President Obama’s inaugural address called for “doubling alternative energy production in the next three years, updating and expanding the nation’s energy infrastructure, saving billions of dollars in energy costs through improved energy efficiency.” Id.
and renewable energy go hand in hand, recently these interests have collided. Specifically, historic preservation laws have stalled the development of offshore wind farms critical to America’s future.

The Cape Wind story illustrates the growing wedge between historic preservation and offshore wind energy, where the designation of Nantucket Sound on the National Register of Historic Places has been a major hurdle to the development of the project. Cape Wind has been deemed a test case for the future of the offshore wind energy industry. The major concern going forward is that the Cape Wind saga will discourage future developers from pursuing similar offshore projects due to the lengthy review process and potential conflicts that may arise with submerged cultural artifacts and historic views. While Cape Wind has faced a number of legal, statutory and regulatory hurdles, the scope of this Note is limited to Cape Wind and the NHPA.

Using the Cape Wind controversy as a case study, this Note discusses the conflict between offshore wind projects and historic preservation. Specifically, this Note argues that the NHPA review process hinders and even discourages the development of offshore wind projects. United States Department of the Interior Secretary Ken Salazar noted of the Cape Wind application: “[t]he worst thing we can do for the country is to be in a state of indecision, and this application

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has been in a state of indecision for a very long time.”

Salazar’s statement regarding the Cape Wind controversy illustrates the federal government’s pressing need to reform the current process for the review and construction of offshore wind farms.

This Note will illustrate lessons learned from the decade long Cape Wind saga. Further, it will provide solutions to the growing tension between historic preservation and offshore wind energy to prevent similar incidents from occurring in the future. Part II provides a general overview of Cape Wind, as well as arguments in favor of and in opposition to Cape Wind’s permit application. Part III then discusses the current permitting process for offshore wind farms in the United States. Part IV then discusses in detail Cape Wind and the NHPA review process. Part V proposes reform measures to the current NHPA review process for offshore wind projects, specifically an expedited NHPA review process. This Note concludes by arguing that such reforms to the NHPA review process will resolve tensions between renewable energy and historic preservation, and more importantly help the United States more efficiently implement offshore wind projects. It is important for the federal government to learn from the Cape Wind saga and take measures to prevent such conflicts from happening in the future.

II. CAPE WIND: AN OVERVIEW

The Cape Wind saga traces back to November 2001, when green entrepreneur Jim Gordon suggested that he could cut Massachusetts carbon emissions by 734,000 tons each year. Gordon, president of Cape Wind Associates, LLC (“CWA”), submitted an application to the Army Corps of Engineers (“Corps”) for a permit to construct a wind energy plant in Nantucket Sound, setting in motion a decade long debate over the construction of a wind farm off the coast of Massachusetts.

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17 Katie Zezima, Interior Secretary Sees Little Hope for Consensus on Wind Farm, N.Y. TIMES, Feb. 3, 2010, at A18.
of Cape Cod, Massachusetts.\(^{19}\) The proposed project now known as Cape Wind would be the nation’s first offshore wind farm, providing enough energy to meet three quarters of Cape Cod’s electricity needs.\(^{20}\) What Gordon did not know is that it would be almost a decade before a final decision would be reached on his application.

A. Details of the Project

At the forefront of Cape Wind is Jim Gordon, who entered the energy industry in 1975 with the goal of weaning New England off of oil-based generation.\(^{21}\) With rising natural gas prices in 1999 and 2000, Gordon saw this as a perfect time to make a move.\(^{22}\) In 2001, Gordon formed Cape Wind Associates with the ultimate goal of providing renewable energy to all of Cape Cod.\(^{23}\) On November 21, 2001, Gordon submitted to the Corps applications under Section 10 of the Rivers and Harbors Appropriation Act of 1899 to construct both a data test tower and a massive offshore wind farm in Nantucket Sound.\(^{24}\)

Gordon’s proposed project would consist of 130 wind turbines covering approximately twenty-six square miles of Nantucket Sound.\(^{25}\) The turbines will be 258 feet tall, each with three 160 foot long blade rotors.\(^{26}\) The base of the turbines will be sixteen feet in diameter, and will be mounted to a single monopole foundation driven eighty feet into the seabed.\(^{27}\) Cape Wind will

\(^{20}\) Cape Wind Assocs., Highlights, supra note 9.
\(^{22}\) Id.
\(^{23}\) Id.
\(^{26}\) Id.
\(^{27}\) Id.
be located in a shallow section of Nantucket Sound known as Horseshoe Shoal. The turbines will range anywhere from five to fourteen miles off the coast, the closest turbine being 5.2 miles off the coast of Point Gammon, a private island in South Yarmouth. CWA estimate that in clear conditions the wind turbines will appear one half-inch above the horizon.

CWA chose Nantucket Sound based on its study of similar wind farms in Europe. Based on the European wind farms, CWA determined that it was necessary to find a site with (1) strong wind resources, (2) shallow depths, and (3) relatively low ocean storm wave heights. CWA determined that Nantucket Sound, in particular Horseshoe Shoal, was the only New England site that met all three of these characteristics. CWA evaluated a total of seventeen sites, ultimately determining that Horseshoe Shoal was technically, environmentally, and economically preferable to the others.

B. The Case for Cape Wind

A number of prominent interest groups support the development of Cape Wind, including Clean Power Now, Greenpeace, American Lung Association, Natural Resources Defense Counsel and Vineyards for Clean Power. Additionally, a poll conducted by Opinion Research Corporation in 2007 showed that eighty-four percent of Massachusetts residents support the

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28 Id.
29 Id.
30 Id.
controversial project.\textsuperscript{34} The main reasons for supporting the project include its potential to reduce air pollution, global warming, and energy costs.\textsuperscript{35}

The benefits that Cape Wind will provide to the Massachusetts region appear to be significant. According to studies done by CWA, the project will lead to improved air quality, energy independence, reduced energy costs, the creation of jobs and boosting the overall economy.\textsuperscript{36} More specifically, a study done by Charles River Associates found that Cape Wind would “save $4.6 billion in New England’s wholesale electric costs over 25 years.”\textsuperscript{37} The turbines also would produce nearly seventy-five percent of the electricity demand of Cape Cod, Nantucket Island and Martha’s Vineyard.\textsuperscript{38} Further, Cape Wind would save the United States around 113 million gallons of oil and keep one million tons of carbon dioxide out of the atmosphere each year.\textsuperscript{39} Finally, the project would create 1,000 manufacturing, construction and assembly jobs, as well as 150 permanent jobs.\textsuperscript{40} At the same time, according to CWA, the project would have minimal adverse impacts on the environment, fishing, historic views and navigation.\textsuperscript{41}

These are just a few of the major benefits that Cape Wind has the potential to provide not only to Massachusetts, but the entire country. Cape Wind’s biggest asset may be its influence on the entire United States renewable energy industry. Renewable energy is vital to the future of

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\textsuperscript{34} Jon Chesto, \textit{Vast Majority Continues to Support Cape Wind}, \textit{The Patriot Ledger}, Aug. 16, 2007, at 36. On Cape Cod, Nantucket and Martha’s Vineyard fifty-eight percent of residents supported the project. \textit{Id}.
\textsuperscript{35} See \textit{id}.
\textsuperscript{38} Cape Wind Assocs., Notable Findings, \textit{supra} note 36.
\textsuperscript{39} \textit{Id}.
\textsuperscript{40} \textit{Id}.
\textsuperscript{41} \textit{Id}.
\end{flushright}
the United State, and Cape Wind has the potential to be a model for the offshore wind energy industry. By approving Cape Wind’s application, the federal government has shown that it is committed to renewable energy. This decision may be the first step in sending a message to the world that the United States is dedicated to fighting global warming and reducing its dependence on foreign oil.

C. The Case Against Cape Wind

Despite all of the potential benefits Cape Wind can provide, the project has met massive resistance since Jim Gordon filed his application in 2001. A wide range of interest groups including the Alliance to Protect Nantucket Sound, the Ocean Conservancy, the Earth Institute, the Advisory Council on Historic Preservation (“ACHP”) and Native American tribes have raised valid concerns regarding the construction of Cape Wind.42 These groups have been backed by a number of powerful individuals such as former U.S. Senator Edward Kennedy, former Massachusetts Governor and presidential candidate Mitt Romney, former Massachusetts Attorney General Tom Reilly and billionaire oil heir William Koch.43 The main reasons these groups oppose the project are its adverse impact on the environment, tourism, birds, submerged cultural artifacts and historic views.44

The most substantiated concerns raised by these groups are Cape Wind’s adverse impact on historic views and sacred Native American rituals. Two Massachusetts Native American tribes allege that the project would disturb their spiritual sun greetings and submerged ancestral burying grounds.45 Additionally, the ACHP found that the project will have an adverse visual

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43 See id.
44 Id.
impact “on 34 historic properties including 16 historic districts and 12 individually significant properties on Cape Cod, Martha’s Vineyard, and Nantucket Island, and six properties of religious and cultural significance to tribes.” The Alliance to Protect Nantucket Sound has been at the forefront of the opposition of Cape Wind. The Alliance is concerned that noise and disturbance from the project could result in damage to or loss of habitat, changes in species behavior and usage, increased avian mortality and overall changes in Nantucket Sound’s ecology. The Alliance is also concerned with a potential oil spill during the construction of the project and its impact on endangered species. Finally, the Alliance is also concerned with Cape Wind’s impact on the economy. The Alliance estimates the project could result in “[a] reduction in employment of 1173-2533 jobs, a reduction in tourist spending of $57 million to $123 million, a related drop in output of $94 million to $203 million and a drop in earnings of $28 million to $61 million, and a loss in property values of $1.35 billion.”

Both groups have made strong arguments in support of and in opposition to the project. CWA and its backers have provided substantial evidence showing the project’s potential benefits on air quality, job creation and the economy. They have also provided evidence that the project will have minimal adverse impacts on the environment, birds, tourism and historic views. Yet the Alliance and other groups objecting to the project have provided equally convincing evidence disputing CWA’s findings.

46 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 (Apr. 2, 2010), available At http://www.achp.gov/docs/CapeWindComments.pdf.
48 Id.
Ultimately, the federal government found CWA’s findings more persuasive and approved the project. This decision came down to a determination of what the government found a more compelling interest: renewable energy on one side; historic views, cultural artifacts and Native American sacred rituals on the other side. Yet the decision of the federal government to approve Cape Wind will not be the last.

III. CURRENT PERMITTING PROCESS FOR OFFSHORE WIND FARMS

In order to fully grasp the NHPA review of Cape Wind, it is necessary to provide an overview of the current permitting process for offshore wind farms. Obtaining a permit to move forward with the project has been a major obstacle for CWA, mainly due to an uncertain regulatory framework and the lack of guidance provided to agencies in charge of reviewing applications.

The proposed project would be sited between approximately five and thirteen miles off the coast of Cape Cod. Since Congress passed the Submerged Lands Act in 1953, states have jurisdiction to the seabed within three miles of their shores. That same year, Congress enacted the Outer Continental Shelf Lands Act (“OSCLA”), which gave the federal government jurisdiction over the outer continental shelf (“OCS”), submerged lands lying more than three miles offshore.

Relying on the fact that the proposed project fell entirely on the OCS, CWA sought out the proper federal agency to submit its application. In November 2001, CWA decided to file its

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50 Cape Wind Assocs., Project at a Glance, supra note 25.
52 Id. § 1331.
application with the United States Army Corps of Engineers. At the time it was unclear whether the Corps had regulatory authority over the project, but it decided to go forward with the review process based on Section 10 of the Federal Rivers and Harbors Act. Under the Federal Rivers and Harbors Act, the Corps must approve the creation of any obstruction in the navigable waters of the United States. The Corps require a Section 10 permit for “the construction of artificial islands, installations, and other devices on the seabed, to the seaward limit of the outer continental shelf.”

Before the Corps could go forward with reviewing CWA’s application, two lawsuits were brought challenging the Corps authority over the project. The first round of litigation occurred in 2003, when CWA was sued in the Federal District Court for the District of Massachusetts by Ten Taxpayers Citizen Group. The group challenged the Corps approval of Cape Wind’s application for the construction of a 187-foot tall test tower in Nantucket Sound. The tower would gather important water and wind data for the project. Essentially, Ten Taxpayers claimed that CWA should be required to obtain a state permit. The group claimed that CWA should not be able to construct the tower without first complying with Massachusetts’s fisheries regulations. However, the district court judge dismissed Ten Taxpayers claim, stating that the project fell entirely on federal waters and that nothing in the Federal Rivers and Harbors Act granted jurisdiction over non-fishing activities to the state. The Court explained that “[h]ad

55 Id.
56 33 C.F.R. §322.3(b).
58 Id. at 99.
59 Id.
60 Id.
61 Id.
Congress intended to entrust Massachusetts with the task of policing the entire Nantucket Sound for environmental disturbances that could impact fishing, it would have done so. Instead Congress used limiting language, compelling the conclusion that Massachusetts has no jurisdiction to regulate the construction of a scientific research tower in federal waters.”

Shortly thereafter, CWA faced a second round of litigation. Also in 2003, the Alliance, the Ocean Conservancy and the Earth Institute came together to oppose the Corps approval of the same test tower in Nantucket Sound. The groups challenged the Corps approval of the monitoring station, culminating in the case of *Alliance to Protect Nantucket Sound, Inc. v. U.S. Department of Army.* The main issue in the case was the reach of the Corps permitting authority on the OCS. The case ultimately turned on the court’s statutory interpretation of the OSCLA, which extends the Corps jurisdiction to:

all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources.

The Second Circuit ruled in favor of the Corps, holding that the Corps had the authority to issue CWA’s permit under OSCLA. The Court focused on the legislative history of OSCLA, noting that “Congress made clear that the existing authority of the Corps applies to all artificial islands and fixed structures.”

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62 Id. at 101.
64 398 F.3d 105 (1st Cir. 2005).
67 Id.
Relying on the decisions in these two cases, the Corps went forward with reviewing CWA’s application. The Corps first step in the process was putting together an environmental impact statement (“EIS”) as required by the National Environmental Policy Act (“NEPA”). Under NEPA, federal agencies are required to consider whether an action may “significantly affect the quality of the human environment.” The agency must consider “unique characteristics of the geographic area such as proximity to historic or cultural resources” and “the degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places.” NEPA also requires that agencies prepare an EIS “concurrently with and integrated with environmental impact analyses and related surveys and studies required by the National Historic Preservation Act.” On November 8, 2004, the Corps released a detailed 3,800 page Draft Environmental Impact Statement (“DEIS”) to the public. The DEIS in considerable detail analyzed the project’s impact on air and water quality, visual impact, cultural resources, navigation, wildlife, geological conditions and other characteristics of Nantucket Sound.

Less than a year after conducting countless studies and completing the 3,800 DEIS, Congress passed the Energy Policy Act of 2005. The Energy Policy Act replaced the Corps with the Mineral Management Service (“MMS”) as the lead agency in charge of Cape Wind’s application. The Energy Policy Act granted the MMS the authority to issue leases, easements,

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69 Id. § 4332 (2)(C).
70 40 C.F.R. § 1508.27(b)(8) (2008).
71 Id. § 1502.25(a).
73 Cape Wind DEIS I, supra note 32.
75 Id.
or rights-of-way for renewable energy projects such as wind farms on the OCS.\textsuperscript{76} The Energy Policy Act was a step in the right direction for the offshore wind industry by clearly putting MMS in charge of issuing permits. No longer would developers and federal agencies be left in confusion regarding who was in charge of reviewing applications. However, much to the chagrin of CWA, MMS determined that a new DEIS would be required. On January 16, 2009, MMS released its Final Environmental Impact Statement (“FEIS”).\textsuperscript{77} CWA cleared a major hurdle when MMS determined that the project would have no lasting adverse impacts.\textsuperscript{78} MMS conducted all surveys and studies required by the NHPA, as well as engaging in the scoping, identification, assessment, and consultation called for in the NHPA.\textsuperscript{79}

After nearly a decade long battle to get the project in motion, it finally appeared that Cape Wind would receive approval. Yet things would not be so easy for Jim Gordon and CWA. In the fall of 2009, the Aquinnah and Mashpee Wampanoag tribes decided to enter the controversy. The tribes claimed the wind turbines in Nantucket Sound would interfere with their spiritual sun greetings and disturb submerged ancestral burying grounds.\textsuperscript{80} The tribes requested that Nantucket Sound be placed on the National Register of Historic Places, setting in motion yet another lengthy review process for Cape Wind.\textsuperscript{81}

\textsuperscript{76} Id. § 1337(p).
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Daley, supra note 45.
\textsuperscript{81} Id.
IV. CAPE WIND & THE NATIONAL HISTORIC PRESERVATION ACT

After years of litigation, environmental studies, NEPA review and a number of other legal and nonlegal hurdles, Jim Gordon’s vision of the nation’s first offshore wind farm was on the horizon. This vision came to a sudden halt when the Aquinnah and Mashpee Wampanoag Tribes voiced its opposition to Cape Wind. The tribes claimed that Nantucket Sound was eligible to be placed on the National Register, and on January 4, 2010, the National Park Service agreed.\footnote{Beth Daley, More than Cape Wind Affected by historic Label, Park Service Move Sets a Precedent, BOSTON GLOBE, Jan. 6, 2010, at A1.} This determination triggered yet another review process, this time under the NHPA.

A. General Overview of the Section 106 Review Process

The NHPA operates in three ways: (1) it authorizes the expansion and maintenance of the National Register of Historic Places;\footnote{16 U.S.C. §470(a)(1)(A) (2006).} (2) it establishes the Section 106 review process;\footnote{Id. §470(f).} and (3) it imposes stewardship obligations upon federal agencies that include preserving historic properties owned by the federal government.\footnote{Id. § 470(a)(1)(A).} Section 106 has been called the “regulatory heart” of the NHPA.\footnote{JULIA H. MILLER, A LAYPERSON’S GUIDE TO HISTORIC PRESERVATION LAW (2004).} Section 106 at its core requires federal agencies, prior to the issuance of a permit, to take into account the effects of that undertaking on properties listed or eligible for listing on the National Register of Historic Places.\footnote{16 U.S.C. § 460(f).} Further, the agency “shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable
opportunity to comment with regard to such undertaking. Courts have described Section 106 review as a “stop, look, and listen” process.

The ACHP has established a four-step process for complying with Section 106. First, the agency must determine if Section 106 applies to the project. Second, the agency must identify historic properties and cultural resources that may be in the area of potential effect of proposed activities. Third, the agency must determine whether the project will adversely impact any identified historic properties. Finally, the agency must enter into discussions with the State Historic Preservation Office (“SHPO”) or Tribal Historic Preservation Officers (“THPO”), affected Native American tribes, and other interested parties on mitigation steps and attempt to reach a Memorandum of Agreement (“MOA”). If no agreement can be reached after meeting all of the procedural requirements of Section 106, the head of the federal agency in charge of reviewing the application has the authority to approve or deny the application.

B. Section 106 Review Process Applied to Cape Wind

The Section 106 review process in the case of Cape Wind has been a lengthy and inconsistent process. The MMS at times appeared to be unsure as to how to proceed through the Section 106 review process. However, with some help from the ACHP, MMS fulfilled all of its obligations

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88 Id.
89 See, e.g., Bus. & Residents Alliance v. Jackson, 430 F.3d 584, 591 (2d Cir. 2005).
90 For a more detailed explanation of the ACHP Section 106 review process, see ADVISORY COUNCIL ON HISTORIC PRESERVATION, PROTECTING HISTORIC PROPERTIES: A CITIZEN'S GUIDE TO SECTION 106 REVIEW (2001), available at www.achp.gov/citizensguide.pdf.
92 Id. § 800.16(1)(2).
93 Id. § 800.5.
94 Id. § 800.2(c)(1)(i).
95 Id. § 800.7(c).
under Section 106. The major steps taken by MMS were determining that Cape Wind was a federal undertaking, determining the potential adverse impacts of the project on historic properties, consulting with interested parties, and finally allowing the ACHP to comment on the application.

i. Threshold Issues

In order to fall within the purview of Section 106, two threshold requirements must be met. First, the agency must determine that the project is a federal undertaking. Second, the agency must determine that the undertaking will impact historic properties. Clearly both threshold requirements were met in the case of Cape Wind.

First, Cape Wind constitutes a federal undertaking under the NHPA. NHPA defines an 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 carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval." Cape Wind clearly meets the requirements of the NHPA definition. The project requires a permit from a federal agency; initially the Corps then MMS under the Energy Policy Act of 2005.

The project also meets the second threshold; effecting a site listed on the National Register. On January 4, 2010, almost nine years after Cape Wind submitted its application, it

97 Id.
98 36 C.F.R. § 800.16(y) (2008).
was determined that Nantucket Sound was eligible for placement on the Register.\textsuperscript{100} The National Park Service’s determination was quite controversial, sparking considerable debate regarding whether Nantucket Sound should be placed on the National Register.\textsuperscript{101}

The criteria for inclusion on the National Register include: (a) being associated with events that have made a significant contribution to the broad patterns of our history; (b) that are associated with the lives significant persons in our past; (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or (d) that have yielded, or may be likely to yield, information important in prehistory or history.\textsuperscript{102} The Keeper of the National Register determined that

Nantucket Sound is eligible for listing in the National Register as a traditional cultural property and as an historic and archeological property associated with and that that has yielded and has the potential to yield important information about the Native American exploration and settlement of Cape Cod and the islands.\textsuperscript{103}

More specifically, the Keeper found Nantucket Sound eligible under all four criteria set forth in the NHPA. First, Nantucket Sound was found eligible for its associations with the ancient and historic period Native American exploration and settlement of Cape Cod and the Islands, and with the central events of the Wampanoags’ stories of Maushop and Squant/Squannit.\textsuperscript{104} Second, the NPS found Nantucket Sound eligible for its association with

\begin{footnotesize}
\begin{enumerate}
\item Daley, supra note 82. For example, Ian Bowles, Massachusetts’s secretary of energy and environmental affairs, said the decision would cause profound harm to future activities in the sound. \textit{Id.}
\item 36 C.F.R. § 604.
\item National Park Service, \textit{supra} note 100.
\end{enumerate}
\end{footnotesize}
significant persons including Maushop and Squant/Squannit.\textsuperscript{105} Third, it was found eligible as a significant and distinguishable entity integral to Wampanoags’ folklife traditions, practices, cosmology, religion, material culture, foodways, mentoring, and narratives.\textsuperscript{106} Finally, it was eligible for the important cultural, historical, and scientific information it has yielded and/or may be likely to yield through archeology, history, and ethnography about access to resources, patterns of settlement, mobility, and land use prior to and after 6,000 years ago as a result of the inundation of the Sound.\textsuperscript{107} The NPS also determined that Nantucket Sound is important for the significant information it provides and can provide about the cultural practices and traditions of the Native Americans of Cape Cod and the Islands in relationship with other peoples since ancient times.\textsuperscript{108}

The NPS cited considerable evidence to support its determination that Nantucket Sound is a place of historic and cultural significance. Yet for a number of reasons, CWA and its supporters vehemently disagreed. First, CWA strongly believed that the Wampanoags received payments from the Alliance to Protect Nantucket Sound to come forward and request that Nantucket Sound be declared a traditional cultural property.\textsuperscript{109} Even more outrageous to CWA, the Aquinnah Wampanoags are trying to build its own wind farm near the Gay Head cliffs that are designated as a National Historic Landmark.\textsuperscript{110} Another reason CWA disagreed with the placement is the fact that no portion of the ocean was previously listed on the Register.\textsuperscript{111} Supporters of the project argued that this decision has the potential to “case a legal shadow over

\textsuperscript{105} Id.  
\textsuperscript{106} Id.  
\textsuperscript{107} Id.  
\textsuperscript{108} Id.  
\textsuperscript{110} Id.  
\textsuperscript{111} Editorial, A Cynical Gimmick Against Cape Wind, BOSTON GLOBE, Oct. 27, 2009, at 10.
any new pipeline, oil rig, or harbor reconstruction on any US coastline."\textsuperscript{112} The decision also
could discourage the future development of wind farms off the United States coast. Finally,
other tribes in the Cape Cod region, including the Pocasset Wampanoag of Massachusetts,
disagreed with the placement of Nantucket Sound on the Register. Chairman of the Pocasset
Wampanoag, George Spring Buffalo, stated that his tribal elders had never seen or heard about
the Mashpee and Gay Heard Wampanoag sacred rituals of saluting the sun.\textsuperscript{113}

\textit{ii. Determination of Adverse Effects}

Despite considerable debate regarding the placement of Nantucket Sound on the Register,
MMS had to go forward with the Section 106 review process. The next step in the process was
determining and documenting the area of potential effects ("APE") for the undertaking.\textsuperscript{114} The
determination of the APE officially traces back to 2004 when the Corps issued an adverse
determination for sixteen historic properties.\textsuperscript{115} Despite the fact that there was clear evidence
that the project would adversely impact a number of historic properties, it was not until 2008 that
MMS formally initiated the Section 106 review process.

In July and September 2008, MMS held consultation meetings and issued its own
determination of effect in December 2008.\textsuperscript{116} These meetings included an explanation of the
project to the public, a discussion of its potential impact on Native American tribes, and served

\textsuperscript{112} Id.
\textsuperscript{113} Mass. Wampanoag Tribe Supports Cape Wind Farm, BUSINESS WEEK, Mar. 5, 2010, available at
\textsuperscript{114} 36 C.F.R. § 800.4(a)(1) (2008). The determination of APE is based on: 1) a review of “existing information
[concerning] historic properties within the [APE],” 2) information provided from parties “likely to have knowledge
of, or concerns with, historic properties in the area,” and 3) knowledge gathered from Indian tribes regarding
properties that they perceive to have “religious and cultural significance.” Id. §§ 800.4(a)(2)-(4).
\textsuperscript{115} ADVISORY COUNCIL ON HISTORIC PRESERVATION, CASE DIGEST: SECTION 106 IN ACTION (2009), available at
\textsuperscript{116} Id.
to inform and educate the MMS about tribal concerns.\textsuperscript{117} MMS consulted with a number of groups during this stage of the review process, including the SHPO, the National Trust for Historic Preservation, governments and historical commissions from local communities within the view shed of the proposed project, the Mashpee Wampanoag Tribe, the Wampanoag Tribe of Gay Head (Aquinnah), a coalition of local citizens dedicated to preservation of the natural and historic setting of Nantucket Sound, and others.\textsuperscript{118} Following these meetings, MMS determined that twenty-nine historic properties would be adversely impacted by the project.\textsuperscript{119} This finding raised some eyebrows because the Corps found an adverse impact on only sixteen historic properties. A finding of “no adverse effect … fulfills the agency official’s responsibilities under section 106.”\textsuperscript{120} However, because MMS found an adverse effect, “the agency official shall consult further to resolve the adverse effect.”\textsuperscript{121}

MMS released a finding of adverse effect on December 29, 2009.\textsuperscript{122} The ACHP had issues with MMS’s compliance with this portion of Section 106, namely MMS’s effort to identify historic properties that may be affected.\textsuperscript{123} The ACHP was specifically concerned with the eligibility of Nantucket Sound as a historic property, and the ongoing consultation with the two tribes.\textsuperscript{124} The ACHP expressed its concerns to MMS, who thereafter conducted visits with the Mashpee Wampanoag Tribe and the Wampanoag Tribe of Gay Head in August 2009.\textsuperscript{125} Following its meeting with the tribes, MMS found two additional sites, the Nantucket Historic

\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} 36 C.F.R. § 800.5(d)(1).
\textsuperscript{121} Id. § 800.5(d)(2).
\textsuperscript{122} ADVISORY COUNCIL ON HISTORIC PRESERVATION, supra note 115.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
District and the Kennedy Compound, adversely impacted by Cape Wind, and requested formal comment from the National Park Service. However, MMS also determined that Nantucket Sound was not eligible for placement on the National Register. The Massachusetts SHPO disagreed with MMS’ finding, so MMS requested a formal determination by the NPS. As mentioned earlier, the NPS ultimately determined that Nantucket Sound was eligible for placement on the Register. Therefore, MMS was required to issue a revised Finding of Adverse Effect for Cape Wind on January 13, 2010, showing that the project will have an adverse effect on Nantucket Sound. The revised determination of effect found that the project will have an adverse effect on thirty-four historic properties.

### iii. Consultation with Interested Parties

Because MMS determined the project will cause adverse effects to historic properties within the APE, the next step in the review process is consultation the SHPO/THPO, interested parties, and the ACHP. The agency must enter into discussions with these groups in order to “develop and evaluate alternatives or modifications that could avoid, minimize, or mitigate adverse effects of historic properties.” Further, the agency must “provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking.” The ultimate goal of discussions is to reach a memorandum of agreement (“MOA”) between the agency and

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127 *Id.*
128 *Id.*
129 *Id.*
130 *Id.*
131 *Id.*
132 36 C.F.R. § 800.5(d)(2).
133 *Id.* § 800.6(a).
134 *Id.* § 800.6(a)(4).
the SHPO/THPO.\textsuperscript{135} If a MOA is executed, the agency has fulfilled its obligations under Section 106.\textsuperscript{136}

The consultation meetings didn’t go so smoothly in the case of Cape Wind. The MMS held a total of eight Section 106 consultations.\textsuperscript{137} At the June 16, 2009 consultation meeting, MMS released a draft MOA containing several proposed mitigation measures.\textsuperscript{138} Interested parties were requested to review the MOA for upcoming consultation meetings.\textsuperscript{139} The final meeting was held on January 13, 2010, where the Secretary of the Interior, Kenneth Salazar, requested that consulting parties and the public submit comments regarding the project and suggestions for resolution to MMS by February 12, 2010.\textsuperscript{140} During the meeting, Salazar announced his intention to finalize a decision on the application by the end of April.\textsuperscript{141} Salazar further laid out the steps necessary to move toward a decision, including a public comment period, consideration of public comments, and announcement by March 1, 2010 whether further consultation would be productive.\textsuperscript{142}

During the consultation meets a number of mitigation efforts were discussed. Among the major mitigation efforts proposed in the draft MOA include: (1) “[p]otential nighttime visual impacts would be lessened by the reduction in … nighttime lighting;” (2) [r]evisions to the layout have narrowed the breadth of the visual impact;” (3) the turbines “would be required to be painted in an off-white color, to reduce contrast with the sea and sky yet remain visible to birds;” (4) “MMS would apply a 60 m no-activity buffer zone around the three potential historic

\textsuperscript{135} Id. § 800.6(b)(1)(iv).
\textsuperscript{136} Id. § 800.6(c).
\textsuperscript{137} Id. § 800.6(c).
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
resources (i.e. potential shipwreck sites) identified during the marine archaeological remote-sensing survey of the proposed project area; (5) lowering wind turbine height; and (6) financial remunerations for the tribes. After receiving over 40,000 comments, Secretary Salazar determined that further consultation would not be productive, and officially terminated consultation on March 1, 2010. Salazar found that a MOA could not be reached between the parties. The SHPO and tribes did not believe the mitigation measures would be effective. Under Section 106, once consultation is terminated, the ACHP must issue its recommendations within forty-five days to the agency in charge of the application.

iv. ACHP’s Recommendation of Cape Wind’s Application

The final stage in the Section 106 review process is allowing the ACHP to issue its recommendation on the project. On April 2, 2010, ACHP released its comments on Cape Wind. The ACHP found that the “historic properties affected by the Project are significant extensive and closely interrelated,” and that “[a]dverse effects on historic properties will be direct and indirect, cannot be avoided, and cannot be satisfactorily mitigated.” In sum, the ACHP recommended that the Secretary not approve the Project. The ACHP noted:

The indirect and direct effects of the Project on the collection of historic properties would be pervasive, destructive, and, in the instance of seabed

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143 Mineral Management Services, supra note 125.
144 Id.
145 Salazar explained: “Through this Section 106 consultation process, it has become clear that it is not possible to proceed with the Proposed Project in a manner that will be acceptable to all the interested parties, including the Tribes. Mitigation measures such as those that have been proposed by various parties, and by MMS, cannot bridge the divide.” Id.
146 36 C.F.R. § 800.7(a)(1).
147 Id. § 800.9.
149 Id.
construction, permanent. By their nature and scope, the effects cannot be adequately mitigated at the proposed site. The development of renewable energy projects is not inherently incompatible with protection of historic resources, so long as full consideration is given to historic properties early in the identification of potential locations. The ACHP believes that wind energy production on the OCS in the vicinity of the current project area could proceed in a manner that would be consistent with protecting Nantucket Sound and the surrounding historic properties. It appears that the selection of nearby alternatives might result in far fewer adverse effects to historic properties, and holds the possibility that those effects could be acceptably minimized or mitigated.150

The ACHP also pointed out a number of flaws in the administration of the Section 106 review process in the case of Cape Wind. First, ACHP noted that Section 106 was initiated late in the review process.151 Second, “[t]ribal consultation under Section 106 as consulted by the Corps and by MMS was tentative, inconsistent, and late.152 Finally, ACHP noted that 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.”153 The ACHP also suggested a number of general recommendations regarding the Section 106 review process for offshore wind farms that will be discussed in more detail in Part V of this Note.

Following ACHP’s comment on Cape Wind, Secretary of the Interior Ken Salazar had the sole authority to approve or deny the application. On April 28, 2010, Salazar approved the Cape Wind project.154 He stated:

[a]fter careful consideration of all the concerns expressed during the lengthy review and consultation process and thorough analyses of the many factors involved, I find that the public benefits weigh in favor of approving the Cape

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150 Id.
151 Id.
152 Id.
153 Id.
Wind project at the Horseshoe Shoal location. With this decision we are beginning a new direction in our Nation’s energy future, ushering in America’s first offshore wind energy facility and opening a new chapter in the history of this region.\textsuperscript{155}

Without a doubt Salazar’s decision is a step in the right direction. A decision to deny Cape Wind would have gutted the offshore wind industry in the United States before it even started.\textsuperscript{156} Yet many hurdles lie in the horizon for Cape Wind and the rest of the offshore wind industry in the United States. It is important to learn from all that went wrong during the decade long Cape Wind saga and implement measures that will prevent such conflicts from taking place in the future.

V. MEASURES TO RESOLVE THE TENSION BETWEEN HISTORIC PRESERVATION & OFFSHORE WIND ENERGY: EXPEDITED NHPA REVIEW

The Cape Wind saga is just one of many conflicts that will continue to hinder the development of offshore wind farms if the current Section 106 review process is not reformed. Cape Wind shed light on a number of issues with the current administration of the Section 106 review process, including late initiation of Section 106 in the planning process and tentative and late consultation with tribes. More importantly, the designation of Nantucket Sound on the National Register shed light on a larger problem with the Section 106 review process as applied to offshore wind farms. Namely, the decision by the NPS to list a portion of the ocean on the Register has the potential to effectively halt the development of offshore wind farms along the entire United States coast. It is hard to imagine any offshore sites for wind farms that will not result in adverse visual impacts on historic properties, interfere with Native American spiritual

\textsuperscript{155} Id.
\textsuperscript{156} The governors of six East Coast states wrote a letter stating that turning down the application “would establish a precedent that would make it difficult, if not impossible, to site offshore wind projects anywhere along the Eastern Seaboard.” Pressure is Building on Disputed Wind Farms, N.Y. TIMES, Apr. 26, 2010, available at http://dealbook.blogs.nytimes.com/2010/04/26/pressure-is-building-on-disputed-wind-farm/.
sun greetings or disturb submerged cultural artifacts. Similar claims under the NHPA will be made for every single proposed wind project on the OCS.

It is therefore necessary for Congress to implement procedures in the NHPA to make sure that similar historic objections to offshore wind farms are handled more efficiently. Specifically, the government needs to implement procedures in the NHPA to prevent such conflicts from emerging in the first place while at the same time expediting the review process once conflicts are identified. Below are measures Congress should consider in the NHPA that expedite the review process in order to develop offshore wind farms so vital to the future of the United States. At the same time measures will be proposed to ensure that historic and cultural properties are still protected despite an expedited review process.

In order for the expedited NHPA review process to kick in, there must be a triggering event. Due to the benefits of and need for renewable energy in the United States, any permit application filed with the MMS proposing to develop an offshore wind farm should trigger expedited NHPA review. This standard would be easy to administer and prevent any litigation or other conflicts from arising over whether expedited review is proper.

A. Pre-Filing Program

The first glaring issue with the Section 106 review of Cape Wind is that it was initiated too late in the process. By the time the review process was initiated, the developers had invested considerable time, money and effort in locating an ideal site for the project. However, because the Section 106 review process was initiated late, the developers and MMS were unaware of a number of potential adverse impacts of the project on historic properties. Therefore, measures must be introduced to begin the Section 106 review process as early as possible.
Before a formal permit application is filed, agencies and developers should be required to take a number of pre-filing actions. By requiring agencies and developers to make an investment upfront to thoroughly review the application, considerable time and money will be saved in the long run by avoiding controversy and litigation as seen in Cape Wind. Essentially, Section 106 review would shift to an earlier stage in the process, which would weed out potential conflicts between historic preservation and offshore wind projects early on in the process.

First, MMS in conjunction with the developers should be required to hold open houses as part of a community outreach program prior to the filing of the application. Open houses will serve as an informal public hearing before the review process even begins, allowing the developers to share details of the project with the public, as well as allowing the public to voice concerns with the project. Public input at open houses early on in the process will be beneficial to all interested parties. Not only will open houses give the public an opportunity to voice its concerns, but it will also provide developers with possible mitigation efforts to take into consideration before getting too committed to its construction plan.

Shortly after open houses, the MMS should hold scoping meetings in order to thoroughly review the impact of the project on historic properties and investigate possible alternatives. Once again public input should be an integral part of the scoping meetings. MMS should provide the public with an overview of the project; details of the Section 106 review process and respond to questions from the public. Scoping meetings will be another opportunity to allow public input and help developers with mitigation efforts. The pre-filing requirements are all about providing the MMS and the developer with notice of possible conflicts with historic properties before the developer becomes too committed to a specific location. It is not until these two consultation meetings are held that the MMS can go forward with reviewing the
application and drafting an EIS. Therefore, the MMS and developers will have an incentive to conduct these consultation meetings early on because without conducting the meetings formal applications cannot be filed.

B. Use of Information Technology: Wind Farm Construction Notification System and Electronic Section-106 System

The second glaring issue with the Cape Wind Section 106 review process was poor communication and consultation with interested parties. In order to more effectively communicate with interested parties, the MMS should take advantage of information technology. The MMS should implement a Wind Farm Construction Notification System ("WFCNS") and Electronic Section-106 System ("E-106"). These systems have been successful in expediting the review process in the communications tower context.157 The Tower Construction Notification ("TCNS") in the communications context "provides Tribes/NHOs and State Historic Preservation Officers with early notification of proposed towers in order to facilitate compliance with the Commission's rules, and streamline the review process for construction of towers and other Commission undertakings."158 The E-106 system is a "voluntary system designed to save users time and resources by automating and expediting the exchange of information and correspondence in the Section 106 process."159

These two systems should be implemented in the context of offshore wind farms, allowing information to be shared more efficiently with Native American Tribes and SHPOs. The systems would also allow Native American Tribes, SHPOs and other interested parties to directly contact developers and the MMS if they have concerns over proposed wind projects, as

158 Id.
159 Id.
well as give these parties the opportunity to share mitigating options with the MMS. The WFCNS and E-106 are two fairly simple ways to expedite the NHPA review process by encouraging early and thorough consultation with Native American tribes and SHPOs.

C. Categorical Exclusions

Possibly the most significant issue illustrated by the Cape Wind Section 106 review process is the lack of standards to determine appropriate sites for offshore wind projects. One way to solve this problem is through a categorical exclusion provision in an expedited NHPA review process. Essentially, this provision would operate in two manners. First, certain areas of the ocean would be completely off limits from wind farm development. Second, smaller-scale wind farms in areas of the ocean that are determined to have minimal impact on historic properties are exempt from the Section 106 review process.

In order to implement a categorical exclusion provision, it would be necessary to develop a sophisticated ocean zoning system. Zoning the ocean would be a lengthy and burdensome process. Many scholars and politicians have urged the federal government to implement an ocean zoning system. For purposes of this Note, only a brief overview of ocean zoning will be provided.\(^{160}\) Ocean zoning would essentially operate in the same manner as land zoning, where certain areas of the ocean would be designated for particular uses. A number of states, including Massachusetts and Rhode Island, currently have ocean zoning systems in place.\(^{161}\) However, these zoning systems only extend three miles into the ocean, leavening the outer continental shelf, which falls under the jurisdiction of the federal government, largely unregulated.\(^{162}\)


\(^{162}\) Id.
the current system, 20 federal agencies administer nearly 140 ocean-related laws, resulting in a chaotic process over ocean rights.\textsuperscript{163} One commentator astutely remarked of the current system:

The ocean is getting crowded: Fishermen are competing with offshore wind projects, oil rigs along with sand miners, recreational boaters, liquefied gas tankers and fish farmers. So a growing number of groups -- including policymakers, academics, activists and industry officials -- now say it's time to divvy up space in the sea.\textsuperscript{164}

A categorical exclusion provisions would only be effective with a well designed ocean zoning scheme. This scheme should establish specific zones where wind farms are feasible and other zones where wind farm are prohibited. Once this system is in place, developers will have a better sense of potential siting locations for wind farms. Additionally, developers will have an incentive to develop wind farms on location that will have the least potential to adversely affect historic properties because these locations will be except from Section 106 review.

D. Enforceable Deadlines

A final issue with the Section 106 review of Cape Wind was its sheer length. In order to expedite the NHPA review process, enforceable deadlines must be set for all interested parties. Following the pre-filing requirements set forth in Part V.B.2, and once the developer formally submits its application permit, the MMS should have thirty days to determine whether the undertaking has the potential to impact historic properties. The MMS should take into consideration comments made at the pre-filing meetings, and should also consult with the SHPO, THPO and Native Americans tribes. If the MMS determines that the project will not impact historic properties, the MMS has no further Section 106 obligations. However, if the MMS determines the project could impact historic properties, the MMS shall have thirty days to identify historic properties that may be affected. During this time period, the MMS should


\textsuperscript{164} Id.
consult with the SHPO and THPO and any Indian or Native Hawaiian tribes in the area. Following the thirty day time period, the MMS shall provide documentation to the public of its findings.

Next, the MMS must make an assessment of adverse effects on historic properties within thirty days. Once again the agency should consult with the SHPO and THPO and any Indian or Native Hawaiian tribes in the area. If all interested parties agree with the MMS determination that there will be no adverse effect, the project shall go forward. However, if the MMS finds that there is an adverse impact, or if the parties disagree, the agency should begin a consultation process to seek ways to mitigate adverse effects.

Within thirty days of a finding of adverse effects, the agency shall conduct a public hearing with the SHPO and THPO and other interested parties present. If the parties can reach a Memorandum of Agreement (“MOA”) which outlines measures that the MMS will take to mitigate adverse effects, the MOA should be submitted to the public and the project shall go forward. In no MOA is reached, the parties should continue to work towards an agreement. Ultimately, the Section 106 review process should last a maximum of 180 days; starting from the point the MMS determines that the undertaking has the potential to effect historic properties. These time frames provide a reasonable amount of time to adequately review the application.

In addition, a statute of limitations should be set to make claims that an undertaking will impact historic properties. Parties should be prohibited from asserting that a historic property will be impacted by an undertaking more than one year after the filing of a permit application. With the use of the information technology measures discussed in Part V.B, interested parties should be sufficiently on notice to potential projects that will impact historic properties. In the
case of Cape Wind it was not until nine years after the filing of its application that the tribes claimed the project would interfere with its spiritual sung greetings. It is unfair to developers who invest considerable time and money finding a feasible site to be derailed by claims so late in the process. One year is sufficient time for SHPOs, THPOs, Indian tribes and members of the public to make a claim that an undertaking will impact historic properties.

E. Mandatory Clean Up

In order to ensure that historic and cultural properties are protected during an expedited NHPA review process, additional safeguards must be implemented. The first measure would be a mandatory clean up provision. Offshore wind turbines do not last forever. CWA predicts that the wind turbines will last twenty years or more.\textsuperscript{165} At this point turbines will need to be replaced, repaired or taken down. Optimistically wind turbines will be replaced or repaired in order to continue to reap the benefits of offshore wind energy. If for some reason turbines are not replaced or repaired, developers would be required to remove all visible traces of the turbines. In addition, developers would be required to restore the area as close as possible to its natural condition. This requirement will ensure that offshore wind farms do not have a lasting adverse impact on historic views or the environment. Failure to comply with the mandatory clean up provision would result in large fines for developers.

F. Chance Finds Clause

A second safeguard that must be implemented is a chance finds clause. Under an expedited NHPA review process, most conflicts between offshore wind farms and historic preservation will be avoided. However, there will be some conflicts that cannot be anticipated. A chance find clause would require developers to halt operations when any unanticipated cultural or historic

object is discovered on the seabed. Upon discovery, developers would be required to report the finding to the MMS. The MMS would be required to conduct a new Section 106 review, taking into consideration the impact of the project on the archaeological find. Once again, failure to comply with the chance finds clause would result in fines for the developer.

G. Programmatic Agreement

Rather than amending Section 106 of the NHPA, another possible course of action is to reach a programmatic agreement for offshore wind farms. Programmatic agreements may be used (1) when effects on historic properties are similar and repetitive or are multi-State or regional in scope; (2) when effects on historic properties cannot be fully determined prior to approval of an undertaking; (3) when nonfederal parties are delegated major decision making responsibilities; (4) where routine management activities are undertaken at Federal installations, facilities, or other land management units; or (5) where other circumstances warrant a departure from the normal section 106 process.

Programmatic agreements have been successful in other contexts, notably for the construction of communications towers and in emergency circumstances. In regards to communications towers, a Nationwide Programmatic Agreement (“NPA”) was reached on September 9, 2004, “designed to facilitate deployment of infrastructure by streamlining the NHPA review process, where appropriate, while continuing to protect historic properties.” The NPA was developed by representative of the Federal Communications Commission, the ACHP, the National Conference of SHPO, American Indian tribes, and the communications

\[166\] 36 C.F.R. § 800.14. “The Council and the agency official may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.”

\[167\] Id. § 800.14(b).

industry. Some of the major aspects of the NPA include enforceable deadlines for SHPO and Commission review under Section 106, undertakings that are categorically excluded from Section 106, and outlining procedures for communication with Indian tribes regarding protection of historic properties.

A similar agreement should be considered for the offshore wind industry. Many of the same measures discussed in Part V.B can be implemented in a programmatic agreement rather than through an expedited NHPA review process. A programmatic agreement should prescribe enforceable deadlines under Section 106, undertakings that are categorically excluded from NHPA review, establish pre-filing requirements, and so forth. A programmatic agreement would be an effective way to streamline and expedite the NHPA review process for renewable energy development without reforming the NHPA. The main issue with going this route is that it is unlikely an agreement could be reached. As the Cape Wind saga illustrates, the development of offshore wind farms is a hotly contested issue. It is improbable that the parties would come to gether to reach a programmatic agreement. Further, there are many different groups that have a stake in offshore wind development; therefore it would be difficult to reach a programmatic agreement due to the variety and number of parties involved.

These measures are just a few ways that the federal government can expedite the NHPA review process without jeopardizing historic and cultural properties. If the federal government is truly committed to renewable energy in the United States, it must learn from the Cape Wind saga and strongly consider an expedited NHPA review process.

\[^{169}\text{Id. at 164.}\]
\[^{170}\text{Id.}\]
VI. CONCLUSION

Now is the time for the United States to take advantage of the vast sources of renewable energy off the coasts of the United States. Yet as the Cape Wind story illustrates, the NHPA is one of many barriers standing in the way of offshore wind energy in the United States. While Salazar’s approval of Cape Wind is a step in the right direction, similar decade long conflicts will emerge in the future if the process is not reformed. The Cape Wind saga should serve as a blueprint of what not to do in the future. New wind developers and investors will not wait the ten years that Cape Wind Associates did to receive approval. The federal government must show that it is truly dedicated to renewable energy by implementing an expedited NHPA review process. Otherwise, all of the momentum gained by Cape Wind’s approval will be lost in the wind.