



VIA EMAIL

May 10, 2019

Dr. Walter Cruikshank, Acting Director

walter.cruikshank@boem.gov

Ms. Brandi M. Carrier, Archaeologist and Deputy Federal Preservation Officer

brandi.carrier@boem.gov

Mr. Brian Krevor, Environmental Coordinator

brian.krevor@boem.gov

Mr. Pedro Friederick Meléndez Arreaga, Attorney-Advisor

pedro.melendez-arrea@sol.doi.gov

Bureau of Ocean Energy Management

Office of Renewable Energy Programs

45600 Woodland Road, VAM-OREP

Sterling, VA 20166

Re: *Vineyard Wind Offshore Energy Project*
Wind energy project within Lease Area OCS-A 0501

Dear Dr. Cruikshank, Ms. Carrier, Mr. Krevor, and Mr. Meléndez Arreaga:

Thank you for the opportunity to comment on BOEM's Finding of Adverse Effect (FOAE) for Vineyard Wind's Construction and Operations Plan. Cultural Heritage Partners, PLLC and the Law Offices of William J. Cook have jointly prepared this letter on behalf of our client, the Town of Nantucket, to describe our concerns with how the permitting process has been handled to date and to provide input on the Section 106 consultation process and proposed mitigation for the adverse effects of the offshore wind farm proposed by Vineyard Wind, LLC ("Project").

I. Introduction

Despite the significance of the Nantucket Historic District and Nantucket Sound as two of the most important and best-preserved historic and cultural resources in the United States, BOEM is rushing the Vineyard Wind project to completion and failing to address its immediate and long-term adverse effects in a meaningful way. BOEM: (1) improperly issued the FOAE, which is based upon unreliable and incomplete information; (2) required consulting parties, who are still commenting on adverse effects, to suggest resolution measures even before BOEM issued the FOAE; (3) inadequately considered the cumulative effects of the multiple offshore wind farms planned for neighboring lease areas; (4) failed to obtain sufficient input from other federal agencies that are obligated to fulfill statutory and regulatory duties on this project; and (5) is not yet finished identifying historic and cultural properties potentially affected by the project. Nevertheless, BOEM seeks a hurried conclusion and has jumped to mitigation proposals even before fully addressing the adverse effects of the Vineyard Wind project on Nantucket as required through the Section 106 process. BOEM must rectify these missteps before informed consultation can occur.

A. BOEM is rushing through the Section 106 and related processes, giving insufficient time for meaningful community and stakeholder input.

The National Historic Preservation Act (NHPA) of 1966, as amended (54 U.S.C. §§ 300101-307108), requires that the head of any federal agency having direct or indirect jurisdiction over a proposed federal or federally-assisted undertaking consider the effect of that undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register prior to issuing any license or expending any federal funds on the undertaking. Federal agencies including BOEM therefore have a responsibility to ensure that federally funded or permitted actions do not adversely affect significant historic and cultural properties. As the lead agency in the Vineyard Wind project, BOEM must take its Section 106 review obligations seriously.

Yet despite the significance of the historic properties adversely affected by this project in the continuing cultural identity of the community, BOEM has expedited the Section 106 process for no legitimate reason. BOEM appears to have rushed the Section 106 process because of a state power purchase agreement that provided insufficient time for an adequate consideration of the project's impacts. As a result, BOEM required consulting parties to recommend appropriate resolution measures prior to its issuance of the FOAE (which is incomplete, see discussion below), notwithstanding the otherwise-applicable 30-day comment period. The Town of Nantucket maintains that it never agreed to this curtailed deadline, which gave the Town less than 2 weeks to review the FOAE, consult with State Historic Preservation Officers (SHPOs) and the Advisory Council on Historic Preservation (ACHP), and prepare comprehensive mitigation proposals.

BOEM's lack of regard for consulting parties' input started well before this recent push to bring the Vineyard Wind project to a hurried conclusion, however. BOEM did not consult stakeholders or follow the Section 106 process when it was initially examining the possibility of issuing offshore leases in the region and setting the lease areas. In 2012, BOEM executed a Programmatic Agreement (PA) and conducted a Section 106 review of its decision to issue commercial leases within the Massachusetts Wind Energy Area. BOEM did not consult with the Town of Nantucket during development of the PA and is not a party to the PA. Nevertheless, the PA requires BOEM to consider the presence of historic properties before making a decision on a Site Assessment Plan and requires BOEM to avoid all historic properties "by requiring the lessee to relocate the proposed project, resulting in a finding of No historic properties affected" (Stip. 1). Yet BOEM disregarded its own PA and allowed the Section 106 process to proceed even after impacts to a National Historic Landmark were identified.

In 2014, BOEM prepared an environmental assessment before issuing a lease to Vineyard Wind in January 2015. At no point in this multi-year process did BOEM adequately engage or consult Nantucket's stakeholders. Rather, BOEM scheduled poorly publicized comment hearings (such as on November 15, 2012) that Nantucket's residents learned about only shortly before the event. At these meetings, BOEM deflected residents' concerns about the potential visual impacts of the proposed Vineyard Wind project and the proximity of the lease areas to the island, responding that the agency was then assessing only the environmental impacts of the project and that BOEM would review the visual impacts in a future Section 106 process. Since then, however,

the agency has remained unwilling to discuss turbine relocation or removal as part of its Section 106 review.

B. BOEM is taking the required Section 106 steps out of sequence.

BOEM has conducted its Section 106 review improperly, taking the 4 required steps (initiating Section 106 consultation, identifying historic properties, assessing effects, and achieving resolution) out of sequence. BOEM admits that its identification of historic properties potentially affected by the Vineyard Wind project is incomplete, both for historic standing structures and TCPs, and BOEM is still in the process of reviewing archaeological reports that identify important terrestrial and marine cultural resources. Despite these glaring gaps in the review process, the permitting dashboard for federal infrastructure projects now lists the Vineyard Wind Section 106 review as having a projected completion date in mid-August. Such a completion date is untenable, as BOEM must go back and complete the Section 106 steps in the correct order to comply with NHPA.¹

BOEM has prematurely attempted to introduce discussions about how to resolve adverse effects before those adverse effects have been thoroughly identified; indeed, BOEM intended to *decide* mitigation for adverse effects on the webinar held on April 30, 2019. It is inconsistent with both the letter and the intent of the NHPA to jump to mitigation when resource identification is incomplete and consulting parties have not finished commenting on adverse effects. BOEM is still in the process of preparing a visual impact assessment methodology (which indicates that there has been no systematic study of how Vineyard Wind's proposed project will affect historic and traditional properties, both those already identified and those not-yet identified); preparing guidelines for developers to follow in preparing visual simulations; and researching nighttime lighting systems, having published lighting guidelines only in April – well after parties initiated mitigation talks.

II. Consideration of visual impacts has been incomplete and inadequate.

The Town of Nantucket is a pre-eminent maritime and preservation tourism destination prized for its natural and historic beauty. The visual effects of the Vineyard Wind turbines promise to be substantial and are currently being inadequately and inaccurately characterized by Vineyard Wind and BOEM. Additionally, the visual effects simulations are internally inconsistent and do not meet current standards developed by federal agencies with expertise in visual resource impacts analysis.

Offshore wind energy projects have dramatic visual effects on the landscapes in which they are placed. As researchers at Argonne National Laboratory Visual Resource Analysis Laboratory observed:

The seascape visual impacts associated with offshore wind facilities are without precedent; the facilities are very large, with enormously tall structures having colors

¹ Notably, the Section 106 process was not listed on the federal permitting dashboard until *after* the April 30 meeting (BOEM illogically refers to these meetings as “webinars”).

and geometry that contrast strongly with natural seascapes. The synchronized sweeping movement of the massive blades during the day and the synchronized flashing of the lighting at night contribute to the facilities' visibility over very long distances. These impacts are extremely difficult to mitigate, and the only truly effective means of reducing the impacts in a seascape is to site the facilities away from sensitive visual resource areas and viewing locations. *Because distance is so important to reducing or avoiding impacts, an accurate understanding of the relationship between distance and the visibility of utility-scale offshore wind facilities in real settings is critical to the optimal siting of new facilities.*²

Despite the importance of identifying visual impacts associated with wind energy projects, the Vineyard Wind impacts have been inadequately and inaccurately assessed.

Several uncertainties regarding project design increase the challenge of making an accurate determination of visual effects for this project. First, Vineyard Wind is seeking approval for 106 turbine locations and would install up to 100, and BOEM's preferred alternative is 84 turbines. FOAE p.2. Additionally, visual simulations do not take into account the fact that several other wind energy projects are contemplated in partial view of Nantucket. Finally, while BOEM is characterizing these wind turbines as creating temporary impacts with an expected duration of its 30-year lease, it seems likely that this lease will be extended, due to the investment of time and resources in building this project, the submarine cables' projected shelf life of 50-80+ years, and the nation's growing interest in alternative energy. This project represents the first step towards a more industrialized horizon for this historic area, and future offshore wind energy projects can reasonably be expected to present comparable visual impacts. BOEM has not satisfactorily accounted for cumulative effects of these developments.

A. BOEM's analyses are labelled as hypothetical and are deeply flawed.

BOEM recognized the likely significance of visual impacts in 2014 when the agency developed a regional meteorological report and series of visual impacts simulations for the Massachusetts Wind Energy Area leases, as well as multiple visual effects analysis reports – two of which (Madaket Beach Dunes and Tom Nevers Field) were related to Nantucket locations and resources. However, these visual effects analyses are labelled as “hypothetical and not to be used to determine effects of any specific project.” Subsequent project-specific assessments of visual effects, which did not involve the Town of Nantucket until April 2018, have been flawed in several important ways: they have been inconsistent with previous work; the night-time simulations are insufficient and do not fully encompass elements of concern; the visual effects from marine vessels are not considered; and the impact analyses do not address all potential project designs and outcomes.

² Sullivan, Robert, Leslie B. Kirchler, Jackson Cothren, Snow L. Winters (March 2013). Offshore Wind Turbine Visibility and Visual Impact Threshold Distances. Environmental Practice (emphasis added), pp. 33-49.

B. Vineyard Wind's visual effects simulations are deeply flawed.

Comparing BOEM's 2014 analyses with those submitted by Vineyard Wind in the 2018 Construction and Operations Plan (COP) presents additional concerns with regard to the way the Vineyard Wind visual impact assessment simulations have been created:

- The simulations were compiled by Saratoga Associates (for general visual impacts) and Epsilon Associates (for visual impacts to historic properties). The Saratoga Associates simulations include several iterations – for Clear Day, Moderate Haze, and Heavy Haze. The focus on hazy conditions minimizes visual effects, but the meteorological report submitted to BOEM characterizes Nantucket and nearby areas as having high visibility: 300 days out of the year have at least an hour of clear sky, with over 50% of the daylight hours during the year characterized as clear.
- The Saratoga Associates report concludes that 70% to 80% of the time, no weather conditions that might obscure views (rain, fog, and haze) are present. The FOAE notes that the new visual elements proposed in the COP will be visible in the ocean view from the Nantucket Historic District National Historic Landmark up to 68% of the time. A direct comparison between BOEM's visual impacts analysis from 2014 and the Saratoga Associates Clear Day simulations, however, shows that the Vineyard Wind simulation greatly reduces the presumed visual impact in a way that cannot be attributed by changes to turbine design in the Vineyard Wind COP.
- BOEM models are for towers substantially shorter than the 9.5MW MHI turbine preferred by Vineyard Wind (550 feet versus 696 feet).³ It is reasonable to expect that the turbines ultimately used for the project will create a more adverse visual impact. Actual wind turbines are not modeled and there are height discrepancies presented in the models, rendering those simulations entirely unreliable.
- Visual simulations do not model the most impacted sites. The simulations should include views from various heights on Nantucket, including Sanford Farm (a favorite panoramic view) and from Siasconset (the highest elevation on the island). Also, visual simulations should be expanded to include a wide representation of effects on any potentially affected National Register properties.
- Simulations should include back, front and side lit conditions, and each set should replicate lighting conditions over the course of a day (that is, as if the turbines are being viewed at 7AM, 11AM, 3PM, 5PM, 7PM).

Appropriate mitigation cannot be adequately assessed until the differences between the original BOEM analysis and the Vineyard Wind submission are considered and the visual impact analysis methods are assessed.

³ <https://www.vineyardwind.com/press-releases/2018/11/27/vineyard-wind-names-mhi-vestas-offshore-wind-as-preferred-supplier-for-usas-first-utility-scale-offshore-wind-farm>.

C. Dusk and overnight impacts have not been adequately considered.

The simulations created to predict impact of the towers at dusk and overnight, when aviation obstruction lighting will be visible along the horizon, are also deeply flawed. The sunset hour is important to Nantucket residents and visitors, as Nantucket is one of the very few locations on the East Coast where the sun sets over the ocean, and no simulation has been done for this time of day. Nantucket Historic District, the Nantucket Sound TCP, and adjacent islands are cherished worldwide for their relative isolation, unimpeded viewsheds, and dark night sky. BOEM's simulations are only available as 24-hour time lapse videos, which do not accurately characterize how the backlit towers will appear during the iconic sunset hour, nor the impact of the lighting system which will be illuminated every time a plane is within range of the wind farm. For stakeholders such as the Maria Mitchell Association, which rely heavily on Nantucket's dark night sky to conduct their research and to attract tourism, these impacts could be devastating. (The Town has previously made BOEM aware of these concerns. *See* Town's Initial Written Comments Re: Public Scoping for the Draft Environmental Impact Statement for the Vineyard Wind Offshore Wind Energy Project (Apr. 30, 2018); Town's Comments to BOEM in response to the Draft Environmental Impact Statement (DEIS) for Vineyard Wind's proposed Construction and Operations Plan (Feb. 22, 2019); Town Counsel's Letter regarding Finding/MOA/Mitigation (Apr. 19, 2019).)

D. Visual effects *toward* Nantucket have not been considered.

All of the simulations focus on viewsheds from Nantucket to the wind farm and fail to consider visual effects *toward* the Nantucket Historic District and Nantucket Sound TCP (such as the view of the NHL from a boat in the water). This oversight is significant because Nantucket has been and continues to be a marine environment, where travel by sea and marine activities such as fishing are common ways of experiencing the landscape. Assessment of the visual effects of the Nantucket area should consider common paths of marine travel and historically significant views of the island from sea vessels.

One critical example is the Nantucket Shoals, a shallow shelf to the southeast of the island that was a critical navigation hazard. The severity of this danger caused the creation of several lightships to warn vessels away from the dangerously shallow water. The Nantucket Lightship/LV-112, a National Historic Landmark, is one of the only surviving examples of these lightships and draws its significance from its time on the Shoals when it was the first and last sign of the United States Coast for ships traveling to or from Europe. While the "Statue of Liberty of the Sea" is now based in Boston Harbor, her location of significance was around the Nantucket Shoals, and the view between the Shoals, the Vineyard Wind Leasing Area, and Nantucket Island is significant. Visual effects analysis should consider this and other historically significant views from the ocean in making a full consideration of visual effects, especially in light of the fact that National Historic Landmark ships are mobile, and this part of the ocean is their historic setting.

III. BOEM’s Section 110(f) Obligations for the Nantucket Historic District National Historic Landmark and Section 106 Obligations for the Nantucket Sound Traditional Cultural Property have not been met.

The Nantucket Historic District and Nantucket Sound are widely recognized as two of the most significant and intact historic and cultural resources in the United States. Both sites have been integrally linked with the cultural practices and lifeways of Nantucket’s residents for centuries. Because Vineyard Wind’s proposed offshore wind farm will adversely affect these sites – a National Historic Landmark (NHL) and Traditional Cultural Property (TCP) with sacred sites listed in the National Register of Historic Places, respectively – BOEM has a duty to avoid harm to the maximum extent possible.

A. Nantucket National Historic District

BOEM has failed to analyze adverse effects on the Nantucket National Historic District as required by Section 110(f) of the NHPA.⁴ The plain language of Section 110(f) makes clear that agencies must adhere to the NHPA’s underlying purpose – to preserve irreplaceable heritage whenever possible so that “the historical and cultural foundations of the Nation [will be] preserved... in order to give a sense of orientation to the American people.” Section 1(b)(2), National Historic Preservation Act, Pub. L. No. 89-665 (1966), as amended by Pub. L. No. 96-515 (1980). Section 110(f) thus requires federal agencies to exercise a higher standard of care than Section 106 when considering undertakings that may directly and adversely affect NHLs, such as the Vineyard Wind project.

NHLs such as the Nantucket Historic District are designated by the Secretary of the Interior under the authority of the Historic Sites Act of 1935. This Act authorizes the Secretary to identify historic and archaeological sites, buildings, and objects that “possess exceptional value as commemorating or illustrating the history of the United States.” Section 110(f) of the NHPA requires that federal agencies exercise a higher standard of care when considering undertakings that may directly and adversely affect NHLs. Agencies must, “to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to the landmark.” 54 U.S.C. § 306107. When an agency’s undertaking directly and adversely affects an NHL, or when federal permits, licenses, grants, and other programs and projects under its jurisdiction so affect an NHL, the agency should consider all prudent and feasible alternatives to avoid an adverse effect on the NHL. *Id.* Here, by not fully considering how to minimize adverse effects on the Nantucket NHL to and from the island within its viewshed and skipping steps in the Section 106 process, BOEM has failed to comply with the mandate of Section 110(f).⁵

⁴ It is also unclear whether and to what extent BOEM has analyzed adverse effects on the Kennedy Compound NHL. If adverse effects do exist, BOEM would need to meet its Section 110(f) responsibilities with respect to the Kennedy Compound, too.

⁵ Recent federal case law has held that the application of Section 110(f) to “direct” adverse effects refers to direct “causation,” including directly caused visual effects, and is not limited to physical damage. Here, as in the James River case, the adverse visual effects would be “directly” caused by the project, thus triggering Section 110(f), and the NPS letter dated May 8, 2019 confirms this interpretation by the very agency charged by Congress with interpreting Section 110. *National Parks Conservation Association v. Semonite*, 916 F.3d 1075, 1089 (D.C. Cir. 2019).

We strongly disagree with BOEM’s conclusion that visual effects have somehow been adequately minimized. In addition to skipping steps in the Section 106 process as explained above, BOEM has not undertaken all possible planning to avoid harm to the Nantucket Historic District as Section 110(f) requires, including the removal or relocation of select turbines. Stated another way, the Section 110(f) duty that Congress established is that federal agencies must, “to the maximum extent possible,” find ways to minimize harm to National Historic Landmarks when federal undertakings have the potential to harm them. This heightened duty makes sense because National Historic Landmarks—such as the Nantucket Historic District—represent the most significant historic properties in the National Register of Historic Places. BOEM, however, has not yet complied with this duty. For these reasons, BOEM must revise its adverse effects analysis so as to find ways to minimize harm to the Nantucket NHL in accordance with the heightened duty that Section 110(f) requires.

B. Nantucket Sound Traditional Cultural Property

In addition to failing to conduct a Section 110(f) analysis for the NHL, BOEM has also failed to consider adequately how to address adverse effects on the Nantucket Sound Traditional Cultural Property, which should be considered in connection with the Nantucket NHL because of the resources’ immediate proximity to one another as well as their connections to each property’s historic viewsheds and shorelines. BOEM has ignored these connections in the Section 106 process.

As explained by the Advisory Council on Historic Preservation in its comments on the failed Cape Wind project – which apply with the same force here – “[t]he historic properties affected... are significant, extensive, and closely interrelated.”⁶ The ACHP further noted:

[The] historic districts and structures on the Cape and the Islands surrounding Nantucket Sound create a unique context, setting, and identity focused on the Sound and its subsistence, commercial fishing, shipping, and recreational uses. Similarly, according to the Keeper’s determination, the TCPs, including and focusing on Nantucket Sound itself, form part of a larger, culturally significant landscape that should include other eligible archaeological, historic, and traditional cultural sites and properties in proximity of the Sound. Because of its setting and unique identity, the Nantucket Sound has long been the focus of cultural identity and practices of the tribes as well as heritage and recreational tourism for the general population. As evidenced by the Keeper’s determination, the written record, and the public testimony, Nantucket Sound has been for thousands of years and remains still an area of prime national, regional, and local importance because of its substantial economic, recreational, social, cultural, and traditional cultural benefits and attributes.

Id. at 2.

⁶ 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 1-2 (April 2, 2010) (“ACHP Cape Wind Comments”).

Moreover, along with the ACHP, the National Park Service has acknowledged that the Wampanoag Tribe of Gay Head-Aquinnah on Martha's Vineyard and the Mashpee Wampanoag Tribe on Cape Cod attach religious and cultural significance to the Nantucket Sound and to the larger historic district that encompasses the near shore areas of the Sound.⁷ Because of the Nantucket Sound's special status as a TCP with sacred significance to tribes, "[a]dverse effects on historic properties will be direct and indirect, cannot be avoided, and cannot be satisfactorily mitigated."⁸

Just as the Cape Wind project failed to consider adequately the adverse effects on the Nantucket Sound TCP, BOEM has done the same here by failing to analyze completely the adverse visual effects of the turbine field to and from the Nantucket Historic District's and Nantucket Sound's interconnected viewsheds. Vineyard Wind's proposed project will introduce visual elements that are out of character with the area's historic properties and will change the character of the historic properties' setting in ways that inextricably contribute to their historic significance. As the ACHP has already determined, "[t]hese adverse effects would result from the visual intrusions of a high concentration of large-scale modern [wind turbine generators] within the historic viewsheds." *Id.* And BOEM does not even yet understand how the nighttime illumination of the turbines immediately adjacent to the Sound and within close proximity to the Nantucket Historic District will affect the historic resources and the traditional cultural practices that support the Keeper's determination of eligibility of the Nantucket Sound TCP.

In any event, the adverse effects stem from the partial obstruction of long-distance, open-to-the-horizon views historically associated with the Nantucket Historic District and the Nantucket Sound TCP. However, as the ACHP has advised, these are adverse effects that cannot be avoided and cannot be satisfactorily mitigated.⁹ For these reasons, BOEM must take a step back in the Section 106 process and consider how all of the direct, indirect, and cumulative impacts of Vineyard Wind's proposal will affect the Nantucket Historic District NHL and Nantucket Sound TCP and determine how to avoid them.

IV. BOEM has not adequately considered the cumulative effects of offshore wind farms planned for adjacent lease areas.

Because several other offshore wind farms are planned for neighboring lease areas, BOEM cannot view the Vineyard Wind project and its adverse effects on the NHL and TCP in isolation. Indeed, there are currently as many as 6 adjacent wind farm projects planned for the Massachusetts Wind Energy Area: 3 to the west of the current Vineyard Wind project, closer to Block Island and Martha's Vineyard, and 3 to the east, south of Nantucket. The cumulative impact of 7 neighboring wind farms in total would be far greater than adverse effects of the Vineyard Wind project alone; while BOEM "need not speculate about all conceivable impacts" associated with the installation

⁷ See generally U.S. Dep't of the Interior, National Park Service, National Register of Historic Places, Determination of Eligibility Notification for Nantucket Sound (Jan. 4, 2010).

⁸ ACHP Cape Wind Comments at 2-3.

⁹ See ACHP Cape Wind Comments at 2.

of a group of 7 wind farms, the agency “must evaluate the reasonably foreseeable significant effects of the proposed action.”¹⁰ *See also* 36 C.F.R. § 800.5(a)(1).

Viewing Vineyard Wind’s proposed wind farm as a standalone project is illogical and has no independent justification, yet BOEM has not meaningfully evaluated the cumulative effect of having *hundreds* of wind turbines clustered together near the Massachusetts Cape Cod shoreline and offshore Nantucket, specifically. Avoiding a thorough analysis of the cumulative effects of the 7 adjacent wind farms planned in and around Lease Area OCS-A 0501 indeed violates BOEM’s responsibilities under NEPA by artificially segmenting a major federal undertaking into smaller components and ignoring the extent to which the proposed offshore wind projects will set a precedent for future large-scale wind farms in the United States.

V. BOEM’s plan to ensure proper cooperation with other federal agencies, as required by law, is unclear.

Based on the process to date, it appears that not all agencies with a permitting or consultation role have been consulted. The Town is deeply concerned that those agencies will not have sufficient time or information to provide meaningful feedback. Applicable regulations implementing Section 106 (36 CFR Part 800) require the lead federal agency to consult with various parties; other sources likewise require the agencies to work cooperatively to protect the nation’s historic and cultural resources. *See, e.g.*, 54 U.S.C. §§ 302701, 304102; Ex. Ord. No. 11593 (1971); Exec. Ord. No. 13807 and guidance (available at [https://ceq.doe.gov/docs/ceq-regulations-and-guidance/One_Federal_Decision_Framework_Guidance_\(M-18-13\)_2018-03-20.pdf](https://ceq.doe.gov/docs/ceq-regulations-and-guidance/One_Federal_Decision_Framework_Guidance_(M-18-13)_2018-03-20.pdf)). Contrary to these requirements, there is a lack of federal coordination.

In particular, BOEM must consult with the Army Corps of Engineers, the Advisory Council on Historic Preservation, the National Park Service, the Federal Aviation Administration, and the U.S. Coast Guard.

A. Army Corps of Engineers

The plans and timing for the Corps’ involvement, and methods for its compliance with its review obligations, are unclear. The only information we have regarding the Corps’ efforts to comply with its obligations is a general verbal statement of cooperation during the April 30 meeting. Such a statement – which provided no concrete information about the Corps’ role – is plainly insufficient. The Corps plays an important role in permitting this project by issuing permits pursuant to Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. The Corps must meet its own statutory obligations under the NHPA and has an independent legal obligation to ensure the requirements of Section 106 have been met by the lead agency before issuing a permit or signing a memorandum of agreement.

¹⁰ *Dubois v. United States Dep’t of Agric.*, 102 F.3d 1273 (1st Cir. 1996).

B. Advisory Council on Historic Preservation (ACHP)

The ACHP is an independent federal agency responsible for promoting the preservation, enhancement, and sustainable use of the nation's diverse historic resources. Considering that the Vineyard Wind project will cause adverse effects to an NHL and a TCP, the ACHP should have been involved at the earliest stages of BOEM's work. However, the ACHP began consulting only recently, indicating in a letter dated April 26, 2019 that it intends to put its response to the FOAE in writing. It has not yet done so, meaning that BOEM does not have critical input from an agency central to the Section 106 process. BOEM has clearly ignored the ACHP's guidelines designed to guide energy development within the historic preservation regulatory framework. *See* "Energy Development and Historic Preservation: ACHP Recommendations."¹¹

Similarly, because an NHL will be adversely affected by the Vineyard Wind project, the ACHP must notify the Secretary of the Interior. The ACHP may also request that the Secretary provide a report to ACHP detailing the significance of the affected NHL under the NHPA, and recommending measures to avoid, minimize, or mitigate adverse effects. The ACHP must then report the outcome of the Section 106 process to the Secretary and the head of the agency responsible for the undertaking (BOEM). 36 CFR § 800.10. Again, the ACHP has not yet satisfied this legal obligation, and BOEM has not adequately consulted with the ACHP on the project.

C. National Park Service (NPS)

NPS takes its role with respect to effects on NHLs very seriously. As explained on its website:

Section 800.10 of these regulations reiterates the language of section 110(f), directs the agency to seek comments from the ACHP, and — importantly — requires the agency to notify the Secretary of the Interior (in reality, this means your NHL contact with the NPS). *Bottom line: participation by the ACHP and the NPS is critical and necessary when an NHL is affected*, and their additional involvement augments the gathering of information, consideration of effects and consultation required through the Section 106 process. The views of the NPS are very important in consideration of potential threats to an NHL.¹²

Nevertheless, BOEM has not made NPS consultation a priority. While NPS is listed as a Consulting Party, the Town has not seen documentation or evidence of meaningful consultation with NPS, other than its initial comments on adverse effects sent to BOEM on May 8, 2019. Accordingly, any movement toward project approvals, permitting, mitigation agreements, or other final actions enabling the Vineyard Wind project to move forward are uninformed and premature.

¹¹ Available at <https://www.achp.gov/sites/default/files/2017-02/Energy%20Develop%20and%20HP%20ACHP%20policy%20recommendations%206-2010.pdf>

¹² NPS, *Using the National Historic Preservation Act of 1966*, available at <https://www.nps.gov/articles/using-the-national-historic-preservation-act-of-1966.htm> (emphasis added).

D. Federal Aviation Administration (FAA)

The Draft EIS states that “Vineyard Wind may be required, as a condition of COP approval, to use either an Aircraft Detection Lighting System (ADLS) that would automatically activate lights when aircraft approach, or a system that automatically adjusts lighting intensity based on visibility conditions, either of which would require FAA approval.” DEIS at p. 2-6. The FAA must also receive notification of any plans to construct towers of a certain height (generally 200 feet above ground level). Consequently, the FAA must be consulted in this project. Nevertheless, the FAA is not named as a Consulting Party, nor is it listed as signatory on the draft MOA. In short, we have *no information* regarding BOEM’s consultation of the FAA, nor do we have any information regarding Vineyard Wind’s plans to apply for FAA permits and approvals.

As a transportation agency, the FAA must follow regulations originally defined in Section 4(f) of the Department of Transportation Act to avoid a use of Section 4(f) properties – which include National Register and NHL properties – during transportation undertakings unless there is no prudent and feasible alternative. Although the Vineyard Wind project does not involve acquisition of any Section 4(f) land, it does include visual and other impacts that could fall under the category of a constructive use. BOEM should provide information regarding whether a determination of Section 4(f) properties and use has been made by FAA or when such a determination might be made.

E. U.S. Coast Guard (USCG)

Our research indicates that the USCG has an important role to play with respect to offshore wind farms, through participation in BOEM’s state renewable task forces and defining offshore wind energy areas before they are made available to developers. Again, the USCG’s consultation in this project is not clear from the available documents, and we request that BOEM provide information regarding how the USCG has been or will be involved.

F. Requests for information regarding agencies.

Please respond to the following questions regarding the above agencies, as well as any other federal or state agencies with which BOEM anticipates consulting:

- What is the current status of the agency’s involvement?
- What is the anticipated timeline for the agency’s future involvement?
- When will Vineyard Wind submit permit applications to the agency? How long will the agency take to review them?
- What is the agency’s plan to involve Consulting Parties in the review process?
- Will the agency be a signatory on the MOA?

VI. Resource identification is still ongoing.

The recent focus on mitigation is especially premature considering that the first step of Section 106 – identification of historic properties – is incomplete. This is a glaring gap in the

process to-date, and our client cannot possibly finalize a decision on mitigation without a complete inventory.

A. Archaeological and on-shore data is incomplete.

Thus far, we understand that draft archaeological reports have been submitted and were shared with some consulting parties on October 16, 2018; however, the Town of Nantucket has not received these surveys. Communications between BOEM and the tribes suggests that resources of concern, including paleolandforms, were identified as part of this study. Identification of properties should include not only archaeological properties eligible for the National Register, but also properties eligible as traditional cultural properties associated with local tribes.¹³ The COP does not clearly state whether surveys or analyses were conducted to determine whether any on-shore facilities – like onshore cables, landing sites, and substations – may have an effect on historic properties. (The cable will physically cut through the Nantucket Sound TCP.)

B. Affected historic properties have not been properly inventoried and listed for review by consulting parties.

On April 2, 2019 at a consulting parties meeting in Hyannis, Jonathan Patton, representing the office of the Massachusetts State Historic Preservation Officer (SHPO), requested that the Finding of Adverse Effect include a complete listing of all historic properties impacted within the area of potential effect (APE), and was told that the list is present in the “Visual Effects Assessment.” It seems that the agencies are conflating a Visual Effects Assessment with a cultural resource effects assessment. *See NPCA v. Semonite*, 916 F.3d at 1083-84. While the Vineyard Wind Project Historic Properties Visual Assessment (Appendix III-Hb in the COP) refers to historic properties, since the entire islands of Nantucket, Tuckernuck and Musketet comprise the Nantucket Historic District, the NHL-status Historic District is the only property mentioned in the Nantucket section. In contrast, several individually eligible historic properties are considered specifically and individually in the Martha’s Vineyard section. Nantucket contains hundreds of National Register-eligible properties located within the APE, many of which have unique sea views. Greater care towards listing and enumerating historic properties is necessary, particularly given our concerns that views of consulting parties were not adequately solicited when deciding on adverse effect assessment points and important conditions for visual impacts.

C. Post-review discoveries are inadequately considered in the MOA.

In the Memorandum of Agreement, the post-review discoveries clause states that “If properties are discovered that may be historically significant or unanticipated effects on historic properties found, BOEM shall implement the discovery plan included as attachment [ATTACHMENT 5] of this MOA. It is likely that additional historic properties may be discovered during implementation of the undertaking.” This section and Attachment 5 are insufficiently detailed because they do not define whether consulting parties will be notified in the event of a

¹³ For example, Nantucket Sound, a property determined eligible in 2010 as a traditional cultural property associated with the Mashpee Wampanoag Tribe and the Wampanoag Tribe of Gay Head-Aquinnah and which is crossed by the Offshore Export Cable Corridors.

discovery and whether adjustments to mitigation are possible in the event of a discovery. This lack of detail is especially of concern in relation to unanticipated archaeological resources, which may require a treatment plan for archaeologically significant resources that cannot be avoided.

Moreover, the MOA should address unanticipated impacts – on visual, cultural, and historic resources, on tourism, and otherwise – both during the projected 18 months of construction *and* afterwards, during the lengthy lease period. The full impact of a project of this magnitude, particularly when considered in concert with adjacent projects, cannot be projected with certainty, and unanticipated impacts are likely.

VII. BOEM should follow best practices.

BOEM asks the consulting parties to accept certain measures as mitigation that are in fact better defined as minimum best practices for offshore wind farms. For example:

- Restrictions on helicopter maintenance, and limitations on helicopter takings and landings, should be included in this project. Such restrictions should be adopted as best practices for *all* offshore wind shore farms in the region.
- ADLS should be considered a best practice and utilized as a default lighting system on all of these projects. That is, Vineyard Wind should not get credit for using ADLS to mitigate the adverse effects of this project because ADLS should be a required feature of any wind farm development.
- BOEM should follow best management practices available for these projects, such as those recommended by ACHP (cited above) and Argonne National Laboratory’s for mitigating visual impacts of utility-scale renewable energy facilities (<http://visualimpact.anl.gov/visualbmp/>).
- BOEM appears to have accepted Vineyard Wind’s visual simulations without utilizing proper or consistent standards, and without the assistance of qualified experts.
- If there is legitimate doubt about the adequacy of simulations, BOEM cannot reach valid conclusions or move forward with the Section 106 process, and risks any permits issued being vacated by the courts. *See NPCA v. Semonite*, 916 F.3d at 1083-84.

Rather than “placing Nantucket in the unfortunate role of a guinea pig,”¹⁴ BOEM should implement best practices for the Vineyard Wind and adjacent projects. This project, and how it is evaluated and permitted, will set the precedent for all future offshore wind projects. Due to the high cultural and historic sensitivity of Nantucket Island, and its close proximity to the development site and cable routes, best practice criteria *must* be determined and applied to this project. BOEM must adhere to the PA’s requirement that it avoid all historic properties “by

¹⁴ Town’s Comments to BOEM in response to the Draft Environmental Impact Statement (DEIS) for Vineyard Wind’s proposed Construction and Operations Plan (Feb. 22, 2019)

requiring the lessee to relocate the proposed project, resulting in a finding of No historic properties affected” (Stip. 1).

VIII. Mitigation proposals are premature and inadequate.

A. Any discussion of mitigation is premature.

As discussed throughout this letter, it is clear that BOEM is rushing the parties toward a premature and arbitrary decision on mitigation:

- BOEM required consulting parties to provide appropriate resolution measures prior to its issuance of the FOAE (notwithstanding the otherwise-applicable 30-day comment period).
- Consulting parties have not finished commenting on adverse effects.
- BOEM has failed to consider cumulative effects of the multiple offshore wind farms planned for adjoining lease areas.
- BOEM has not obtained sufficient input from other federal agencies that have statutory and regulatory obligations to fulfill on this project.
- Resource identification has not been completed. According to BOEM, mitigation is a way to remedy or offset an adverse effect or a change in a historic property’s qualifying characteristics in such a way as to diminish its integrity. Mitigation proposals cannot be proposed or accepted when affected historic properties are still being identified.

BOEM has defended its approach by stating that current mitigation discussions address only NHL mitigation, leaving room for further mitigation discussions later. This distinction, however, is false: a full understanding of adverse effects on the NHL are fundamental to any mitigation discussion, and mitigation for the NHL cannot be considered in isolation from other adverse effects on historic resources, including but not limited to the Nantucket Sound TCP, for the reasons discussed above.

B. Mitigation proposed to-date is inadequate.

Mitigation discussed during the April 30, 2019 meeting pales in comparison to mitigation paid in other comparable projects,¹⁵ indicating that BOEM and Vineyard Wind are taking advantage of consulting parties who are inexperienced in these matters and who do not fully appreciate the long-term impacts of this project – not to mention the cumulative effect of *all* the offshore wind farms planned for neighboring lease areas. With sufficient time and complete information on adverse effects, more compelling, creative, and valuable mitigation projects –

¹⁵ Vineyard Wind has committed to treatment plans for Gay Head Lighthouse and Nantucket NHL valuing less than \$350,000 (according to BOEM’s presentation for the Section 106 consultation meeting on April 2, 2019). In the Skiffes Creek Transmission Line, Dominion Energy paid \$90M in mitigation.

supporting historic tourism, education, restoration, and preservation – could surely be proposed for sites and properties that will be directly impacted by the project.

Moreover, BOEM should not classify Aircraft Detection Lighting System (ADLS) as mitigation because the Vineyard Wind Lease Area is, at its nearest point, only 12.2 nautical miles from the southeast corner of Martha’s Vineyard and a similar distance to the Nantucket Historic District. Because BOEM can require compliance with the Federal Aviation Administration’s advisory circular AC 70/7460-1L CHG1 (“Obstruction Marking and Lighting”) on projects more than 12 nautical miles offshore (outside U.S. territorial waters), ADLS should be *required as a minimum standard* for offshore wind projects, rather than being treated as a mitigation measure that lessens adverse effects.

C. BOEM should explain the grounds for its rejection of a mitigation fund.

The Town understood that BOEM supported the concept of a Mitigation Fund, as developed in collaboration with local consulting parties in December 2018, to resolve adverse effects. The Town assumed, for purposes of discussion, that the fund would be administered through the Community Foundation for Nantucket and provide all stakeholders on Nantucket – including the dozens of local non-profit organizations, associations, and groups committed to preserving different elements of Nantucket’s history – a fair opportunity to obtain mitigation for the project’s adverse effects.¹⁶ Ongoing mitigation funding is appropriate for a project whose adverse effects will be long-term and cannot reasonably be minimized and whose impacts likely cannot fully be understood before project construction.

Assuming for the sake of argument that adverse effects cannot be avoided or appropriately minimized, the Town continues to believe that a community mitigation fund is the most appropriate and equitable solution for funding local preservation projects to offset the long-lasting impacts of the project on the NHL and TCP. Once the required reviews are complete and adequate consultation has been undertaken, BOEM should initiate a discussion between local stakeholders and Vineyard Wind regarding the amount of the fund.

BOEM has not explained why it changed position and rejected the proposal for a mitigation fund. BOEM’s refusal to support an unspecified mitigation approach where parties agree to a dollar amount and parties subsequently select projects is short-sighted. Those affected by the Vineyard Wind project cannot necessarily know where they will need to deploy mitigation dollars in the future. BOEM and Vineyard Wind need to ensure that Nantucket will have the means to cope with whatever adverse effects the wind farm causes over the next 30-80 years, or longer.

Please provide documentation of BOEM’s consideration and rejection of the mitigation fund proposal.

¹⁶ For instance, see “Example List” in Appendix B of the Town’s April 19, 2019 letter.

IX. Requests for documents and information.

Please provide the following as promptly as possible:

- BOEM’s plans for obtaining accurate and complete visual simulations (Section II above)
- BOEM’s position with respect to cumulative effects of the wind farms in all the neighboring lease areas (Section IV above)
- Information regarding the involvement of other federal and state agencies, and documentation of communications with those agencies (Section V.F above)
- Archaeological reports (Section VI above)
- Any surveys or reviews of on-shore structures (Section VI above)
- Documentation of BOEM’s consideration and rejection of the mitigation fund proposal (Section VIII above)

X. Conclusion.

As BOEM has determined, the Vineyard Wind project will have immediate and long-term adverse effects on the Town of Nantucket, and on other stakeholders and consulting parties who have consistently and unequivocally maintained the importance of “the association of the islands and the ocean, their relative isolation, the extensive preservation of historic elements of the Landmark, and the role of these elements in forming and sustaining the cultural identity of community members.” The position of local stakeholders remains “that the view of an undeveloped ocean is integral to the character, setting, feeling, and association of the resource (Nantucket NHL).”¹⁷

BOEM has failed to understand or address these impacts sufficiently through the Section 106 process. The Town demands that BOEM take immediate steps to correct those egregious errors and proceed in a manner that will ultimately protect the invaluable and unique cultural and historic resources of the island.

Regards,



Marion F. Werkheiser
Managing Member

cc: Attached list

¹⁷ BOEM Finding of Adverse Effect for the Vineyard Wind Project Construction and Operations Plan, at 23.

| Name | Organization |
|--------------------------|--|
| Chris Daniel | Advisory Council on Historic Preservation (ACHP) |
| Jonathan Patton | Massachusetts Historical Commission (SHPO) |
| Brona Simon | Massachusetts Historical Commission (SHPO) |
| John Brown | Narragansett Indian Tribe |
| Bettina Washington | Wampanoag Tribe of Gay Head (Aquinnah) |
| David Weeden | Mashpee Wampanoag |
| Ray Williams | Chappaquiddick Wampanoag Tribe |
| C. Elizabeth Gibson | Town of Nantucket |
| Nathaniel Lowell | Nantucket Planning & Economic Development Commission |
| John Giorgio | Town Counsel; K-P Law |
| Jeffrey Madison | Town of Aquinnah |
| Cormac Collier | Nantucket Conservation Foundation |
| David Gagnon | Maria Mitchell Association |
| Michael May | Nantucket Preservation Trust |
| James Russell | Nantucket Historical Association |
| Stephen Welch | Nantucket Historic District Commission |
| Kathy Schlegel | National Park Service |
| Rachel Pachter | Vineyard Wind |
| Rep. Dylan Fernandes | MA House of Representatives |
| Sen. Julian Cyr | MA State Senate |
| Secretary Matthew Beaton | Executive Office of Energy and Environmental Affairs (EEA) |
| Bill Eubanks | Meyer Glitzenstein & Eubanks LLP |
| Elizabeth S. Merritt | National Trust for Historic Preservation |