PAUL G. KIRK, JR.
MASSACHUSETTS

United States Senate

WASHINGTON, DC 20510–2103

January 19, 2010

The Honorable Kenneth L. Salazar
Secretary
Department of the Interior
Washington, DC 20240

Dear Mr. Secretary,

I'm grateful for your personal attention in addressing the legal and regulatory issues that continue to plague the controversial Cape Wind proposal, and I commend you for convening a meeting of the parties to the Section 106 historic preservation process in a good faith effort to find consensus. Your meetings were appreciated and, in my view, successful as a starting point to review the flawed manner in which this project has been considered by the Mineral Management Service (MMS).

The meetings last week focused on significant shortcomings in tribal consultation, but similar serious deficiencies in many other areas exist, and those deficiencies explain why this project is so deeply conflicted. I agree that the decision-making process for this project has lasted too long, but what truly offends the principles of good governance is the highly irregular and irresponsible way that MMS has behaved throughout the Cape Wind review by focusing exclusively on this one site, bending every process to serve the selection of that site, and creating deep distrust among nearly all the stakeholders.

At the meetings, you heard Cape Wind say that Nantucket Sound is the ideal site, and from the developer's perspective that may be true. But the site offends virtually every other stakeholder and public interest, and ignoring those many interests is what has brought MMS to this embarrassing juncture where its actions threaten to land Interior in court and undermine the Administration's recently declared policy of openness and consultation with Native American tribes. At this point, good governance demands far more than a speedy decision. It demands a thoughtful and legally supportable process that takes into account the very significant tribal interests, the numerous other deficiencies in MMS actions to date, and the serious consideration of alternative sites, which has never happened with respect to this proposal.

Without resolution, these deficiencies threaten to derail the project, embarrass the Administration, and potentially undermine the entire offshore alternative energy development program just as it is beginning. As a supporter of the Administration's plans to develop a rational and transparent national offshore renewable energy program, I don't want to see one disastrous high-profile project fail and weaken public support for coastal renewable energy development.

I urge the Department of the Interior to demand real answers from MMS with regard to the well-documented deficiencies listed below. Regardless of the general popularity of this proposal for wind energy, Interior has a responsibility to ensure the safety and legality of any

proposed development in Nantucket Sound. The project's proponents may well seek in excess of $1 billion in U.S. taxpayer subsidies for any project the Interior Department decides to approve with respect to Nantucket Sound. As a result, Interior's decision on Cape Wind will essentially be an approval or disapproval of the expenditure of upward to one billion U.S. taxpayer dollars, and Interior should make sure that such funding is available only if the project is in compliance with the law.

Before detailing the number of additional issues that MMS has failed to address adequately with respect to the Cape Wind proposal, it's imperative to recognize that the National Historic Preservation Act (NHPA) Section 106 decision by the National Park Service now requires a full consultation with the two tribes and the State Historic Preservation Officer to determine what is necessary to "minimize and mitigate" the project's impact on protected values. If my understanding of the legal issues is correct, this would mean that an alternative site for the proposed Cape Wind project will now have to be fully considered, among other methods of compliance. Compliance with the law on this issue, however, directly conflicts with Interior's goal of wrapping up all outstanding issues by March 1st, less than six weeks from now.

Furthermore, the Administration stated a very strong commitment to tribal consultation as a principle of governance during a highly public White House meeting last November. MMS has dismissed the concerns of the tribes for nearly a decade, and while I commend you for meeting with the tribes and other stakeholders, I hope Interior does not now conclude that it has fulfilled its responsibilities with respect to the tribes simply by holding these meetings. The law – and the President's own declaration of a new day of cooperation with the tribes – require that their concerns be fully, fairly, and respectfully addressed based on a complete and factual record.

While the meetings with the tribes were a very positive step, you should be aware of one thing that came out of those meetings that demonstrates the utter lack of respect MMS has showed the tribes over the past few years, and the need for sustained consultation and coordination with the tribes moving forward. At the very meetings you convened just days after the National Park Service eligibility determination, MMS released a Section 106 analysis that purports to address the effects of the project on the recently determined eligible traditional cultural property without consulting with the tribes! That the tribes were not consulted on this issue – months after the White House meeting hosted by President Obama – reflects very poorly on MMS and raises questions about the Administration's commitment to tribal consultation.

The failure of MMS to address the tribes' concerns and the historic impacts of this proposal are bad enough, given the amount of time and resources the agency has had to conduct the Cape Wind review. But unfortunately this problem is simply a further indication of a broader pattern of behavior at MMS. Here are a few of the major deficiencies of MMS' review that I believe must be addressed before any final decision on Cape Wind can be made that satisfies the requirements of the law:

1. *Aviation Safety.* The Federal Aviation Administration (FAA) has issued a hazard determination for the project, and is continuing its review of the aviation safety implications of

the proposed project. This process is critical, because it could lead to a finding that the project should be denied, moved, or subjected to major modifications. MMS is legally required to consider public safety before it makes a decision. The Final Environmental Impact Statement (FEIS) was completed, however, one year ago and the FAA findings were not included. There was no public review of the issue based on FAA studies.

2. *Limited Scope of Review.* Throughout the entire review under the previous Administration, beginning with the Corps of Engineers in 2001 and continuing through the MMS review beginning in 2005, the scope of the review has been improperly and narrowly focused on the Cape Wind developer's business objectives. As a result, the review under every federal law has been too limited in its analysis of the project's impacts, cumulative effects, and alternatives. The developer has been allowed to dictate the location, thereby giving rise to significant and persistent conflict.

3. *Exclusion by MMS of Non-Tribal Historic Impacts.* The National Historic Preservation Act (NHPA) covers both tribal and non-tribal historic sites and structures. The non-tribal historic features of Nantucket Sound fared no better than the tribal and cultural features in MMS' review. MMS has drastically and improperly limited the review of non-tribal historic impacts, and excluded scores of historic properties from the adverse impact review.

4. *An Uneconomic Project without Massive and Undisclosed Subsidies.* MMS has determined that the project is not economically viable without massive federal subsidies. Those subsidies can come through the Department of Treasury cash grant/tax credit program and Department of Energy loan guarantees, and could total in excess of $1 billion U.S. taxpayer dollars. Such federal subsidies would be available for a project that appears to be relying on foreign-built turbines, that would not have to comply with federal prevailing wage requirements during construction, and that, unless MMS is forced by Interior to correct its glaring failures, would be facing extensive litigation for multiple violations of U.S. environmental protection laws. I don't know exactly how much in taxpayer funding Cape Wind wants because MMS hasn't forced the developer to disclose its finances, but we know it's at least several hundred million dollars. At a minimum, Interior should insist that the developer reveal how many taxpayer dollars it intends to use to build its for-profit project on public land before any final decision.

5. *Missing Technology.* The Cape Wind proposal is based on the use of a wind turbine that is not available in the U.S, but the developer has never been asked what turbines it will use as an alternative. The only turbines available in the U.S. are much smaller, which means major changes would have to be made to the project in order to build anything at the site. As a consequence, MMS is reviewing the Cape Wind proposal with the full knowledge that the project will not be built as it is now proposed, which is intellectually dishonest. MMS knows something very different than what MMS is now reviewing is likely to be built, but refuses to acknowledge that reality.

At a time of persistent and lingering high unemployment that last year's stimulus bill was designed to ameliorate, it is also imperative that the developer inform Interior exactly where the turbines will be manufactured, particularly if it intends to use U.S. taxpayer dollars to fund much of the project costs. As you know, the funding for the subsidies the developer will seek would come through grants from last year's stimulus bill. If Interior intends to approve a project that is going to seek hundreds of millions of taxpayer dollars intended to create and support American jobs to build a private for-profit facility on public land, Interior should at least ascertain from the developer whether it intends to build these turbines in the United States or to use U.S. taxpayer dollars to purchase the turbines from a foreign supplier. I believe the American people will be justifiably outraged if the Administration approves the expenditure of hundreds of millions of stimulus jobs funding to support manufacturing in another country.

6. *A Deficient NEPA Process.* The FEIS under the National Environmental Policy Act (NEPA) was rushed into release on the final business day of the Bush Administration, in a last-minute attempt to tie the Obama Administration's hands – a fact that should have set off alarm bells at Interior. As a consequence of that rush to completion, the FEIS contains many serious problems. One is the failure to wait for the NHPA Section 106 process to even be started, let alone completed, and the Department is currently addressing this failure. Another failure is not waiting for the FAA's decision. In order for these two issues alone (NHPA and FAA) to be addressed adequately in a sustainable FEIS, a new document with a new public comment period is required.

There are many other problems with the FEIS – particularly the failure to develop or consider alternative sites. Additionally, the Commonwealth of Massachusetts has released its offshore wind plan, calling for extensive development of additional offshore projects, which creates a need for these proposed new developments to be taken into account on any FEIS for Cape Wind.

Another failure of the MMS EIS developed under the Bush Administration is that it relies excessively on post-construction mitigation techniques and so-called "adaptive management" to address unknown impacts. The reliance on adaptive management is tantamount to an admission by MMS that it didn't insist on sufficient information in the review to anticipate the likely effects of this project. MMS' position on mitigation is little more than a "let's see what happens" approach.

7. *Cape Wind Documents Hidden by MMS.* For months, the Alliance to Protect Nantucket Sound has been attempting to obtain the documents exchanged between Cape Wind and the EIS contractor, the private consulting firm TRC, which has a record of promoting wind projects and making money on those contracts. Although MMS is required to release such documents, which would show whether there was inappropriate influence exercised by Cape Wind, it has dragged the response process out and is refusing to release the documents.

Incredibly, MMS has even refused to identify the names of the officials responsible for this decision, claiming the information is privileged. The failure to release these documents not only raises concerns about the objectivity of the review of Cape Wind, it also violates the

President's January 2009 directive for virtually full release of FOIA documents and greater transparency in decision-making. The principles of open and transparent governance, which the Administration supports, require the release of these documents without additional delay.

8. *Insufficient Data on Birds.* For eight years, the U.S. Fish and Wildlife Service (FWS) has argued that Cape Wind needed to gather three years of radar studies to evaluate the proposed project's impacts on avian resources, a position that was detailed in FWS' comments on the Cape Wind DEIS in April 2008. Right after that comment letter was filed, the responsible FWS official was taken off the project. Soon after that, FWS and MMS allowed the review process to proceed under the Endangered Species Act and Migratory Bird Treaty Act, without the required data.

At the same time the previous Administration was ignoring the Fish and Wildlife Service on Cape Wind, it was also operating an advisory committee which included industry lobbyists, and which was developing recommendations to relax the requirements on bird impacts for onshore wind projects. The Obama Administration has recently determined that the advisory committee must have the lobbyists removed. Yet the current Cape Wind administrative record on which MMS continues to depend incorporates the studies that FWS previously determined to be insufficient. Cape Wind could have easily acquired these data at minimal cost – and still can.

9. *Flawed ESA Compliance on Birds.* MMS must also comply with the Endangered Species Act (ESA) before making a final decision. The project will adversely affect two listed bird species – roseate terns and piping plovers. Like the insufficiency of the data for NEPA purposes, there was also an insufficient basis upon which to complete the legally required ESA consultation.

Following the retirement of the FWS Field Supervisor for New England in May 2008 (after the FWS DEIS comments) and the forced transfer of the FWS field biologist, MMS and FWS immediately began the ESA process, which was completed at the very end of the previous Administration. Even though the new FWS team improperly allowed the process to go forward based on insufficient data, they did determine that reasonable and prudent measures needed to authorize "take" – or the killing and maiming of birds – would require the temporary shutdown of the project during bird migration periods and certain weather conditions.

Cape Wind objected to this finding, and used its own financial justification to argue that such a requirement was not reasonable. Incredibly, MMS acquiesced in the developer's position, and overrode the FWS recommendation for the incidental take statement. Such unbridled deference to the financial interests of the applicant is consistent with other egregious examples under the previous Administration of politics and development overriding science and agency expertise in species protection. Some of those actions resulted in substantial breaches of the public trust and violations of law at Interior.

10. *Lack of Compliance with the MBTA.* The project must also comply with the Migratory Bird Treaty Act (MBTA), which prohibits the take of many bird species. Although there is no clear estimate of take due to the failure of the applicant to gather the data requested by

FWS, it is understood that the project will result in the death, dismemberment, and maiming of large numbers of migratory birds in violation of the MBTA.

It is likely that thousands of birds will be killed every year. There is no form of authorization for such take, and the Administration has done nothing to explain how it can approve a project that will certainly kill large numbers of migratory birds without authorization. Such a failure to comply with the requirements of law is arbitrary and capricious.

11. *Obama Administration Ocean Policy.* On June 12th, 2009, President Obama issued a policy calling for a national ocean strategy, including marine spatial planning, to avoid conflicts and protect marine resources and our national marine history and heritage. Conflicts such as the siting of Cape Wind would never arise under such a program, because a location like Nantucket Sound, with so many resources to protect and competing uses, would certainly be excluded from development. Despite the ongoing preparation of this nationwide policy, MMS is proceeding to review and act on the Cape Wind project without applying the requirements that are being developed for the national ocean policy. As a practical reality, this means that the Administration will be affording Nantucket Sound – a site the National Park Service has declared eligible for historic preservation protections and a site that was under consideration for National Marine Sanctuary status – a lower level of consideration than all other coastal waters. This result makes no public policy sense.

12. *Coast Guard.* The Coast Guard initially indicated that the Cape Wind project would interfere with marine navigation, something that is plainly obvious to even the most casual observer, and require significant safety measures. The Coast Guard was considering mitigation measures including project modification to reduce its size and the establishment of a safety zone between the turbine towers and navigation channels, something that is routinely done for European offshore wind projects.

After the Presidential election and before the swearing-in of the new Administration, however, at least one high-level meeting between MMS and the Coast Guard occurred. Following that meeting, the Coast Guard abruptly adopted a position that boaters should simply try to avoid the towers, and that did not prescribe any concrete preventative safety recommendations for the project.

The area of the proposed project is frequently enveloped in dense fog, and compelling studies demonstrate that large-scale wind farms have considerable negative impacts on navigational radars. Coupling this information with the fact that the Coast Guard was considering more robust measures and was familiar with the fact that European nations have adopted 1.5-mile safety zones around offshore wind turbines, I'm concerned that inappropriate pressure was brought to bear on the Coast Guard to insist on virtually no safety conditions for the Cape Wind project by MMS and the previous Administration.

It is clear that the staff at MMS is determined to advance this project no matter what other coordinating federal agencies say, or what federal law requires. In the previous Administration, this result was understood to flow from a decided, almost ideological, fervor for

development of our natural resources at all cost. But this Administration has an opportunity to get it right. The current record developed by MMS is no foundation on which to base a thoughtful, lawful, and defensible decision on such a major project. The Department of the Interior should now insist on open and transparent regulatory review consistent with the principles of good governance, respect for the law, and respect for Native American concerns. It would be virtually impossible to incorporate these principles into the Cape Wind review at this point and complete action by the March 1st deadline Interior has set.

We are all fortunate that an alternative site does exist that has been thoroughly reviewed and, if chosen, would end the conflict over the Nantucket Sound site that the developer has apparently convinced MMS is inevitable. That site, south of Tuckernuck Island, is an alternative that deserves full consideration now, and is, in my view, superior in every important way for the impacted stakeholders.

It is categorically untrue, as the developer suggested at your meetings, that pursuing the site south of Tuckernuck Island would require "starting over." It is a workable and available site that an open, creative and dedicated Interior Department could bring to closure if asked to do so. Equally important, it enjoys broad local support, unlike Cape Wind's current proposal, and it will not result in the endless litigation that will almost surely confront a Record of Decision on the Nantucket Sound site. It would replace the acrimony of the Cape Wind debate with consensus and collaboration.

It's a better way forward for the tribes, for the affected communities, for the Administration, and for the future of offshore wind development. I urge the Department of the Interior to pursue it, and avoid endless litigation that could undermine all the important offshore renewable priorities the Administration is attempting to meet.

With respect and appreciation, and thank you for considering these views,

Sincerely,

Paul G. Kirk, Jr.