



PERMITTING COUNCIL

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Executive Director Determination re Extending FAST-41 Final Completion Date by More Than 30 Days

December 16, 2022

Ocean Wind 1 Project; Endangered Species Act Consultation (FWS)

I. Summary

The Ocean Wind 1 Project (Project), sponsored by Ocean Wind, LLC (Project Sponsor), is a “covered project” under Title 41 of the Fixing America’s Surface Transportation Act (FAST-41), 42 U.S.C. § 4370m *et seq.* The Department of the Interior, Bureau of Ocean Energy Management (BOEM), has principal responsibility for an environmental review for the Project under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 *et seq.*, which makes BOEM the NEPA lead agency and also the lead agency for FAST-41. BOEM is responsible for undertaking consultation with the Department of the Interior, Fish and Wildlife Service (FWS) pursuant to the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.* On November 29, 2022, BOEM submitted a request to the Executive Director of the Federal Permitting Improvement Steering Council to modify the Project’s permitting timetable on the Federal Permitting Dashboard by extending the final completion date by which FWS will conclude ESA consultation with BOEM from January 5, 2023, to April 3, 2023.

This is BOEM’s second extension request for the FWS-ESA consultation. BOEM requested the first extension because, after BOEM submitted its initial request for consultation, FWS required BOEM to submit additional information to enable FWS to make a determination under the ESA. BOEM requests this second extension because, after the Executive Director approved the first extension, FWS requested more information and BOEM prepared a revised Biological Assessment (BA) incorporating FWS’ requested information, as well as additional information received from the Project Sponsor. For the following reasons, the extension request is **GRANTED**, and the Project permitting timetable will be revised accordingly.

II. Legal Standard

A lead agency may modify a permitting timetable only after: (1) consulting with the Executive Director regarding the potential modification; (2) reaching agreement on a different completion date with the affected cooperating agencies, after consulting with the participating agencies, the Executive Director, and the project sponsor; and (3) providing a written justification for the modification. 42 U.S.C. §§ 4370m-2(c)(2)(D)(i)(I-III).

If the proposed modification entails extending a final completion date by more than 30 days beyond the original final completion date, the lead agency additionally must submit a request to the Executive Director. The Executive Director then must consult with the project sponsor and make a determination on the record, based on consideration of relevant factors, whether to grant the modification. 42 U.S.C. § 4370m-2(c)(2)(D)(i)(IV). The “relevant factors” that the Executive Director considers include, but are not limited to:

- (i) the size and complexity of the covered project;
- (ii) the resources available to each participating agency;
- (iii) the regional or national economic significance of the project;
- (iv) the sensitivity of the natural or historic resources that may be affected by the project;
- (v) the financing plan for the project; and
- (vi) the extent to which similar projects in geographic proximity to the project were recently subject to environmental review or similar procedures under State law.

42 U.S.C. § 4370m-2(c)(2)(B). Executive Director determinations to extend permitting timetables by more than 30 days beyond an original final completion date are not subject to judicial review. 42 U.S.C. § 370m-2(c)(2)(D)(iv)(I).

III. Background

BOEM initiated ESA consultation with FWS on May 27, 2022, by submitting to FWS an ESA consultation request package that included a BA. On July 1, 2022, FWS asked BOEM for additional information. BOEM provided much of the requested information by August 23, 2022, although two reports remained outstanding. The reports that FWS had requested in July, but were not included in BOEM’s August submission, included a bat acoustic survey report (which BOEM received from the Project Sponsor on October 14, 2022) and a rufa red knot habitat assessment report (which BOEM received from the Project Sponsor on November 15, 2022).

Based on FWS’ July 1 information request, on August 31, 2022, BOEM submitted a request to the Executive Director to extend the final completion date for FWS-ESA consultation from October 24, 2022, to January 5, 2023. The Executive Director approved BOEM’s extension request on September 23, 2022.¹

¹ “Executive Director Determination re Extending FAST-41 Final Completion Date by More than 30 Days” for Ocean Wind 1 Project, Endangered Species Act Consultation, dated September 23, 2022, available at: <https://www.permits.performance.gov/fpisc-content/ocean-wind-1-project-ed-determination-endangered-species-act-consultation-092322>

In response to BOEM's August 23rd submission, FWS had additional questions and information requests. Namely, FWS sought documentation demonstrating that the Project Sponsor had qualified technical experts complete comprehensive field surveys for some species of birds (the eastern black rail, saltmarsh sparrow, and Knieskern's beaked rush). FWS and BOEM agreed that BOEM would submit a revised BA that included the newly-requested information as well as analysis based on the bat acoustic survey report and rufa red knot habitat assessment FWS had also requested.

As noted above, the Project Sponsor provided the bat acoustic and rufa red knot reports to BOEM on October 14 and November 15, respectively. The Project Sponsor provided documentation regarding field surveys for the eastern black rail, saltmarsh sparrow, and Knieskern's beaked rush on October 12. The Project Sponsor also submitted an updated Construction and Operations Plan (COP) to BOEM on October 14.

BOEM incorporated all the information provided by the Project Sponsor – both the responses to FWS' information requests and the COP updates – into a revised BA that was submitted to FWS on November 25, 2022. To provide 135 days from receipt of the revised BA for the formal consultation process (90 days for consultation plus 45 days for FWS to deliver a biological opinion),² BOEM requested an extension of the final FWS-ESA consultation date to April 3, 2023.

BOEM consulted with the Project Sponsor per 42 U.S.C. § 4370m-2(c)(2)(D)(i)(I) regarding change of the final ESA consultation completion date to April 3, 2023, and represents that the Project Sponsor has no objection to the proposed permitting timetable extension.

The Executive Director similarly consulted with the Project Sponsor as required by 42 U.S.C. § 4370m-2(c)(2)(D)(i)(IV) and confirms the Project Sponsor does not object to the requested date change.

IV. Discussion

The Executive Director appreciates BOEM's comprehensive coordination with FWS and the Project Sponsor on the ESA consultation process. The Executive Director notes, however, that BOEM has requested two extensions of the FWS-ESA consultation completion date primarily as a result of FWS' multiple requests for additional information during the consultation process. The Executive Director recognizes FWS has asked for this additional information because it seeks a better information base from which to formulate a biological opinion. The Executive Director supports FWS' efforts to have a comprehensive understanding of a project's potential impacts on a listed species or critical habitation. When additional information is needed, the Executive Director encourages FWS to identify and request all

² See 50 C.F.R. § 402.14(e).

additional information at one time to the greatest extent practicable to streamline the consultation process. The Executive Director encourages FWS to continue to work with BOEM and project sponsors to identify when and how to request additional information in a manner that does not unduly slow the consultation process.

The Executive Director additionally calls attention to BOEM's role as the Federal agency requesting formal consultation. BOEM and FWS had to mutually agree to extend formal consultation when FWS requested additional information,³ and thus BOEM had the opportunity to engage with FWS regarding what scientific or commercial data is presently available or is practicable to obtain during the period of consultation. The Executive Director reiterates her willingness to use her role as a convener for Permitting Council agencies to provide assistance in ensuring that, where FWS believes additional information may be helpful, BOEM and FWS will collaborate to determine whether a mutual extension of formal consultation is necessary or, instead, whether BOEM has satisfied the information standard laid out in the ESA statute such that FWS should proceed to issue a biological opinion using the best scientific and commercial data available.⁴

The Executive Director expects FWS and BOEM will demonstrate they are actively engaged in improving the consultation process. The Executive Director will consider any future extension requests for consultation on this Project mindfully, in light of the two extensions already granted and the overall permitting timetable.

In sum, when presented with future extension requests, the Executive Director will approve such requests where she finds that best practices and process improvements are being utilized. Given the facts before her in this instance, the Executive Director concludes that an extension of the completion date for FWS-ESA consultation is warranted.

V. Determination

For the reasons identified above, BOEM's extension request is **GRANTED**, and the permitting timetable is revised as requested.



Christine Harada
Executive Director
Federal Permitting Improvement Steering Council

³ See 50 C.F.R. § 402.14(e)-(f).

⁴ The implementing regulations provide that “[i]f no extension of formal consultation is agreed to, the [FWS] Director will issue a biological opinion using the best scientific and commercial data available.” 50 C.F.R. § 402.14(f).