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Executive Director Determination on Request to Extend FAST-41 Final Completion Date by More Than 30 Days

March 23, 2023

Empire Wind Energy Project—NEPA (BOEM), COP (BOEM), Section 106 (BOEM), ESA (NMFS and FWS), EFH (NMFS), Section 10/404 (USACE)

I. Summary

The Empire Wind Energy Project (Project), sponsored by Equinor Wind US, 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 lead agency for both NEPA and FAST-41.

On February 28, 2023, BOEM submitted a request to the Federal Permitting Improvement Steering Council Executive Director (Executive Director) to extend interim and final completion dates for multiple Federal actions on the Project’s permitting timetable. BOEM’s request includes extensions for its NEPA action, Construction and Operations Plan (COP) decision; and consultation under Section 106 of the National Historic Preservation Act (Section 106), 54 U.S.C. § 306108.

BOEM’s request also includes extensions for completion of Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, consultations and essential fish habitat (EFH) consultation pursuant to Section 305 of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.* BOEM must undertake the ESA consultation with both the United States Department of the Interior, Fish and Wildlife Service (FWS) and the United States Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NMFS). BOEM must complete the EFH consultation with NMFS.

Finally, BOEM requests an extension of the final completion date for the United States Army Corps of Engineers (USACE) permit decision under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, and Section 404 of the Clean Water Act, 33 U.S.C. § 1344 (Section 10/404).

For the following reasons, BOEM’s extension request is **GRANTED**, and the Project permitting timetable will be revised accordingly.

II. Legal Standard

A facilitating or 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 necessitates extending a final completion date by more than 30 days beyond the original final completion date, the facilitating or 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 made pursuant to 42 U.S.C. § 4370m-2(c)(2)(D)(i)(IV) are not subject to judicial review. 42 U.S.C. § 370m-2(c)(2)(D)(iv)(I).

III. Background

BOEM submitted a request to change the interim and final completion dates shown in the table immediately below. BOEM’s justification for the extension requests for each action are detailed thereafter.

Action Agency	Action	Milestone	Original Date	Requested Date
BOEM	EIS	Official Notice of Availability of a Final Environmental Impact Statement (EIS) published in the Federal Register	4/28/2023	9/8/2023
BOEM	EIS	Issuance of Record of Decision (ROD)	6/12/2023	10/23/2023
BOEM	COP	Issuance of decision for permit/approval	9/8/2023	1/22/2024
BOEM	Section 106	Section 106 Consultation Concluded	6/12/2023	10/23/2023
NMFS	ESA	ESA Consultation Concludes	3/10/2023	9/8/2023
NMFS	EFH	NOAA-NMFS Issues any EFH Conservation Recommendations	1/9/2023	7/12/2023
FWS	ESA	ESA Consultation Concludes	2/7/2023	5/24/2023
USACE	Section 10/404	Section 10/404 Final Verification/Permit Decision Rendered	9/11/2023	2/20/2024

NEPA (BOEM)

BOEM requests an extension of completion dates for its NEPA action based on the following: (1) several updates to the Project Sponsor’s project design envelope and COP; (2) the addition of a connected action to the EIS; (3) the Project Sponsor’s need to provide additional information for NMFS’ actions, which then needed to be incorporated into the EIS that BOEM was preparing pursuant to NEPA, and (4) the Project Sponsor’s delay in providing sufficient

information for use in developing suitable alternatives for USACE’s Section 10/404 action, which also needed to be included in the EIS.

First, the Project Sponsor submitted revisions to the project design envelope and COP in April, May, and June 2022. BOEM began preparing a Draft EIS (DEIS) in January 2022 and completed a partial subject matter expert review of the DEIS in March 2022. But BOEM could not complete the DEIS until all the Project Sponsor’s revisions had been provided, reviewed, and incorporated into the analysis in the DEIS.

Second, the Project Sponsor requested, and BOEM agreed, that a port upgrade project at the South Brooklyn Marine Terminal be considered a connected action to the construction and operation of the Project (the original proposed action in BOEM’s EIS). The specific activities included in the port upgrade project remained unclear until December 21, 2021, when the New York City Economic Development Corporation submitted its preliminary draft joint permit application to USACE and the New York State Department of Environmental Conservation. The December 21 submission also provided information that helped BOEM clarify which portions of the port upgrades would be included in the proposed action analyzed in BOEM’s EIS. After identifying the relevant cooperating agencies (one Federal, two state, and one city), it took several additional months for BOEM to determine how each entity’s needs could be satisfied in BOEM’s EIS as, although the state requirements are similar in nature to NEPA, the scope of analysis or resource topic vary greatly. On April 13, 2022, BOEM finalized a plan for integration of the connected action into the EIS, including analysis of impacts to each resource area identified for the proposed action, analysis of impacts to resource areas identified only for the connected action, and consideration of alternatives to the connected action. BOEM then needed time to complete the work.

Third, the Project Sponsor provided its initial submission of the draft Marine Mammal Protection Act (MMPA) permit application to NMFS three months later than originally planned,¹ and, after a preliminary review of the information submitted, NMFS determined that the Project Sponsor needed to supply additional information. For example, NMFS requested more acoustic and exposure modeling data for the wind turbine and offshore substation pile installation, including modeling of difficult-to-drive piles that require alternative driving methodologies or increased hammer strength and modeling of the full range of foundation sizes in the project design envelope. The Project Sponsor committed to providing updated acoustic modeling by mid-June 2022. The information provided by the Project Sponsor through the MMPA process is needed for BOEM’s COP/NEPA process because BOEM incorporates the information into the DEIS. Thus, the Project Sponsor’s delay in providing the data required by NMFS impacted BOEM’s ability to timely complete the DEIS.

¹ The completion dates for the MMPA action have already been modified on the Federal Permitting Dashboard and, therefore, are not included in BOEM’s current modification request. But the timing of the MMPA review is relevant because delays in that process underlie BOEM’s current modification request.

Fourth, BOEM did not have sufficient information to develop alternatives that would meet requirements for USACE’s Section 10/404 action until the Project Sponsor submitted permit applications to USACE, which it did in March and June 2022. Those permit applications identified alternatives related to submarine cable routes and landfall sites as well as onshore cable routes and the methods used for the installation of these facilities. After reviewing the permit applications, BOEM was able to develop four alternatives suitable for USACE’s needs and developed an alternatives summary table providing the numerical or qualitative factors used for USACE’s evaluation of the least environmentally damaging practicable alternative.

All of the above—the revisions to the project design envelope and COP; the connected action analysis; the delay in providing information, including modeling data, required by NMFS; and the development of alternatives for USACE’s Section 10/404 action—needed to be incorporated into the DEIS prior to sharing it with cooperating agencies for review and then publishing it for public notice and comment. BOEM originally had planned to provide the DEIS to cooperating agencies for review by April 29, 2022. But based on the timing of BOEM’s receipt of all the information that had to be included in the DEIS, BOEM was unable to provide the DEIS to cooperating agencies for review until August 12, 2022, with publication of the DEIS following on November 18, 2022. BOEM now seeks to extend the date for publication of the Final EIS (FEIS) and ROD due to the delay in publication of the DEIS.

COP (BOEM)

The COP final completion date is dependent upon the final completion date of BOEM’s NEPA action. Therefore, BOEM requests to extend the COP final completion date 90 days beyond the NEPA final completion date.

Section 106 (BOEM)

The Section 106 consultation process is delayed for two reasons. First, there have been multiple changes to the terrestrial area of potential effect (APE) for the Section 106 consultation. These changes are due, in part, to USACE requesting that the Project Sponsor make changes to several submarine cable route approaches and landfall sites to avoid sand borrow areas. The difficulty in identifying the APE for Section 106 also resulted from the Project Sponsor’s ongoing revisions to its onshore facilities.

Second, the Project Sponsor did not provide the Geographic Information System (GIS) and Portable Document Format (PDF) files for their preliminary terrestrial, marine, and visual APEs for the Project until mid-April 2022, which did not allow for sufficient review prior to the April 18, 2022, Section 106 kickoff meeting with consulting parties or for inclusion in the DEIS by the original DEIS publication date.

ESA & EFH (NMFS)

As noted above in the NEPA discussion, there were several factors associated with changes to the project's NEPA schedule. These factors also contributed to delays in the ESA and EFH consultations with NMFS. The Project Sponsor was three months late in submitting its initial MMPA permit application to NMFS, and NMFS requested additional information after the initial submission. The information contained in the MMPA application is used to develop BOEM's biological assessment for the required ESA consultation with NMFS and to develop the EFH assessment. Moreover, the revisions to the proposed action, including modifications to the project design envelope, the project layout, and activities associated with the South Brooklyn Marine Terminal, as described above, also led to delays in completing the consultation documents. Therefore, the factors that impacted the NEPA schedule also underlie the extension request for the NMFS ESA and EFH actions.

ESA (FWS)

BOEM's request for an extension of the FWS ESA completion date is based on the need for the Project Sponsor to input data into the recently updated collision risk model for birds. The model results will also need to be incorporated into BOEM's biological assessment, which will then need to be resubmitted to FWS.

Section 10/404 (USACE)

The Section 10/404 final completion date is dependent upon the final completion date of BOEM's NEPA action. USACE requests a review of 120 days between issuance of the ROD and issuance of USACE's Section 10/404 decision due to the complexity of the Project, and therefore, an extension of the Section 10/404 final completion date is requested based upon the extension of the NEPA completion date.

Consultation with Project Sponsor on Extension Requests

Prior to submitting its extension request to the Executive Director, BOEM consulted with the project sponsor per 42 U.S.C. § 4370m-2(c)(2)(D)(i)(I) and represents that the Project Sponsor has no objection to the proposed permitting timetable extension.

The Executive Director also has consulted with the Project Sponsor, as required by 42 U.S.C. § 4370m-2(c)(2)(D)(i)(IV), and the Executive Director has confirmed the Project Sponsor does not object to the requested permitting timetable modifications.

IV. Discussion

The general themes underlying BOEM’s extension request fall within the broad categories of (1) revisions to the Project or the scope of the NEPA analysis, and (2) project sponsor submissions that an agency determines to be incomplete. As to the first factor, with a project of the size and complexity of the Empire Wind Project, it is not unusual that a project sponsor will revise the project design after the Federal permitting or environmental review process has begun. For example, although not the cause of schedule delays for this Executive Director Determination, the recent discovery of glauconite sand in the Empire Wind lease area has resulted in the need for additional analyses to fully understand the risks to foundation installation in the windfarm development.² All project activities or potential project impacts are analyzed in Federal agency environmental reviews and decision documents. Thus, changes in project design or, like here, requests to include review of a connected action, often result in the need for additional time for the Federal agencies to consider the changed circumstances to meet their statutory obligations. Here, BOEM staff attempted to compress some internal review periods to accommodate review of the Project Sponsor’s revised project information and supplemental filings. The Executive Director appreciates BOEM’s efforts and encourages all Federal lead and cooperating agencies to look for ways to incorporate project refinements into their reviews and consultation processes in a way that does not unduly slow the process.

With respect to the second factor, the Executive Director is mindful that obtaining all the information necessary for a Federal agency to undertake a consultation or engage in the analysis required by its substantive statute is regularly an iterative process. The agencies’ consultations and analyses are based on the circumstances of a particular project, such as the project location, proposed construction methods, or species involved. Therefore, after reviewing a project sponsor’s initial submission it is not unusual for the reviewing or consulting agency to request additional information. In most instances, the iterative process is not only justified but also results in a better project outcome, and the Executive Director is assured that is true for the Empire Wind Project. The Executive Director, however, always encourages lead and consulting agencies to continuously strive to identify improvements to the overall Federal authorization process by applying lessons learned from each consultation and permitting review.

Given the facts as described above, extending all the completion dates addressed in this Executive Director Determination are warranted.

² Bruggeman, G., Middleton, P., Barnhart, B. 2023. Supporting National Environmental Policy Act Documentation for Offshore Wind Energy Development Related to Glauconite Sand. Washington (DC): U.S. Department of the Interior, Bureau of Ocean Energy Management. OCS Study BOEM 2023-011. 16 p.

V. Determination

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



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Federal Permitting Improvement Steering Council