



## PERMITTING COUNCIL

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

**April 21, 2023**

#### **Ocean Wind 1 Project—Section 10/404 (USACE), Section 408 (USACE), MMPA (NMFS), OCS Air Permit (EPA)**

##### **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 lead agency for both NEPA and FAST-41.

On March 1, 2022, 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. This is the fifth Executive Director Determination on requests to extend final completion dates on the Project’s permitting timetable.<sup>1</sup>

BOEM requests an extension of the final completion date for all authorizations from the United States Army Corps of Engineers (USACE). This includes authorizations under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (often referred to as “Section 10”); Section 404 of the Clean Water Act, 33 U.S.C. § 1344 (often referred to as “Section 404”); and Section 14 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 408 (often referred to as “Section

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<sup>1</sup> The previous four Executive Director Determinations for the Project are available here:

<https://www.permits.performance.gov/sites/permits.dot.gov/files/2022-09/2022-09-23%20final%20Ocean%20Wind%201%20ED%20Determination%20on%20the%20Record%20Signed.pdf>

<https://www.permits.performance.gov/sites/permits.dot.gov/files/2022-11/2022-11-18%20FINAL%20Ocean%20Wind%201%20ED%20Determination%20on%20the%20Record%20signed.pdf>

<https://www.permits.performance.gov/sites/permits.dot.gov/files/2022-12/2022-12-16%20Ocean%20Wind%201%20ED%20Determination%20on%20the%20Record%20-%20FWS%20ESA%20nd%20request%20%281%29.pdf>

<https://www.permits.performance.gov/sites/permits.dot.gov/files/2023-01/2023-1-31%20final%20Ocean%20Wind%201%20ED%20Determination%20on%20the%20Record%20-%20COP%20ROD%20s106%20signed%20%282%29.pdf>

408”) (together, Sections 10/404/408). BOEM’s request also includes an extension of an incidental take authorization under the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1361 *et seq.*, from the United States Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NMFS). Finally, BOEM seeks an extension of the final completion date for the Environmental Protection Agency’s (EPA) Outer Continental Shelf (OCS) air permit decision under Section 328 of the Clean Air Act, 42 U.S.C. § 7627.<sup>2</sup>

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

## II. Legal Standard

Pursuant to 42 U.S.C. §§ 4370m-2(c)(2)(D)(i)(II) & (IV), a lead agency may extend a final completion date by more than 30 days beyond the original final completion date only after consulting with the project sponsor and obtaining Executive Director approval. After receiving an extension request, the Executive Director must consult with the project sponsor and make a determination on the record whether to grant the requested date change. The Executive Director’s determination is based on consideration of “relevant factors,” including, but 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. § 4370m-2(c)(2)(D)(iv)(I).

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<sup>2</sup> This Executive Director Determination does not address modification of one action that BOEM included in its request because the Executive Director did not receive BOEM’s request with enough time to make a decision more than 30 days in advance of the completion date for the action. *See* 42 U.S.C. § 4370m-2(c)(2)(D)(ii) (a completion date may not be modified within 30 days of the completion date). The relevant action is consultation under the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, with the United States Department of the Interior, Fish and Wildlife Service (FWS). BOEM and FWS will be establishing an alternative completion date and adhering to the statutory procedures required by 42 U.S.C. § 4370m-2(c)(2)(F) until ESA consultation concludes.

### III. Background

BOEM’s modification request included the interim and final completion dates shown in the table immediately below. BOEM’s justification for the modification requests are detailed thereafter.

Action Agency	Action	Milestone	Original Date	Requested Date
USACE	Section 10/404	Section 10/404 Final Verification/ Permit Decision Rendered	7/13/2023	10/5/2023
USACE	Section 408	Issuance of Decision	7/13/2023	10/5/2023
NMFS	MMPA	Publish Final ITA Regulations in Federal Register	6/27/2023	9/5/2023
NMFS	MMPA	ITA Decision Rendered	7/27/2023	10/5/2023
EPA	OCS Air Permit	Issuance of Final Decision/Permit Approval	6/29/2023	1/4/2024

#### Sections 10/404/408 and MMPA

USACE’s Sections 10/404/408 and NMFS’ MMPA actions are dependent upon the timing of BOEM’s issuance of a Record of Decision (ROD) to conclude the NEPA review. BOEM previously extended the completion date for issuance of a ROD to July 7, 2023.<sup>3</sup>

USACE requests a review of 90 days between issuance of the ROD and issuance of USACE’s decisions under Sections 10/404/408. BOEM therefore asks for an extension of the final completion dates for the Sections 10/404/408 to October 5, 2023, based on the ROD completion date.

<sup>3</sup> See Executive Director Determination dated January 31, 2023, (“January 2023 ED Determination”) granting an extension of completion dates for the Construction and Operations Plan, NEPA, and Section 106 actions, available at <https://www.permits.performance.gov/sites/permits.dot.gov/files/2023-01/2023-1-31%20final%20Ocean%20Wind%20ED%20Determination%20on%20the%20Record%20-%20COP%20ROD%20s106%20signed%20%282%29.pdf>

NMFS has indicated that publishing final incidental take regulations pursuant to the MMPA should occur no sooner than 60 days after ROD issuance with the final completion date for the MMPA action following 30 days thereafter. Accordingly, BOEM requests that the completion date labeled “Publish Final ITA Regulations in Federal Register” be extended to September 5, 2023, and the completion date for “ITA decision rendered” be extended to October 5, 2023, based on the ROD completion date.

### OCS Air Permit

BOEM requests an extension of the final completion date for EPA’s OCS air permit action to January 4, 2024. This is based, in part, on a 90-day review period between issuance of BOEM’s ROD and issuance of the OCS air permit decision. It also accounts for a one-year statutory deadline that the Clean Air Act gives EPA to reach an OCS air permitting decision following EPA’s determination that a project sponsor has submitted a complete application.<sup>4</sup> Here, EPA deemed the Project Sponsor’s OCS air permit application complete on January 4, 2023, after spending about nine months engaging with the Project Sponsor on deficiencies EPA found in the Project Sponsor’s initial application submission.

The Project Sponsor had submitted its initial application in March 2022, but EPA found deficiencies in the application including, among other things, omission of air quality impact analyses of the National Ambient Air Quality Standards (NAAQS) and the Prevention of Significant Deterioration (PSD) Class I and Class II increments, Class I air quality related values analysis, ambient air monitoring requirements, and additional impact analyses such as visibility, soils and vegetation, and growth. The Project Sponsor submitted revised applications in July 2022 and September 2022, but EPA found that those revisions did not address all the deficiencies previously identified. The Project Sponsor provided additional necessary supporting documentation on multiple dates, most recently December 22, 2022, and EPA provided feedback to the Project Sponsor on its various submittals.

The modeling components of the application were particularly challenging for this Project. Given the proximity of the Project to an onshore Class 1 Wilderness Area as defined by the Clean Air Act and the magnitude of expected construction emissions from the Project, the PSD regulations required more extensive modeling than has been conducted for other offshore wind projects to understand the Project’s public health and environmental impacts and demonstrate compliance with NAAQS and PSD increment requirements.

Additionally, EPA and offshore wind developers both have acknowledged that because offshore wind energy projects are still fairly new there is no precedent for modeling the construction emissions from wind energy projects. Existing modeling tools were constructed to model emissions from stationary sources rather than from moving vessels undertaking a suite of offshore construction activities.

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<sup>4</sup> See 42 U.S.C. § 7475(c).

In light of these challenges, EPA coordinated extensively with the Project Sponsor throughout the application submission process to ensure the OCS air permit application contained a sound air quality analysis that met EPA's requirements.

#### Consultation on Modifications

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 extensions.

The Executive Director also 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 permitting timetable modifications.

#### **IV. Discussion**

As detailed in the Executive Director's Determination dated January 31, 2023, BOEM extended the ROD final completion date for reasons outside any Federal agency's control.<sup>5</sup> BOEM's present extension request reasonably seeks to align the completion dates for the USACE Sections 10/404/408 and NMFS MMPA actions with the updated completion date for the ROD.

With respect to EPA's OCS air permit, the Executive Director appreciates EPA's close coordination with the Project Sponsor throughout the application submission process. With the offshore wind industry being relatively new in the United States, it is reasonable that agencies and project sponsors will need to collaborate to identify appropriate methodologies and modeling tools to provide the data agencies need to meet their statutory objectives. The Executive Director anticipates that, as the offshore wind industry matures, the time periods between initial application submission and the application being deemed complete will shorten as project sponsors gain a better understanding of what needs to be submitted in the first instance.

Given the facts as stated above, the Executive Director concludes that the requested extensions are warranted.

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<sup>5</sup> BOEM's decision is dependent upon state actions that were delayed because the Project Sponsor was delayed in its submissions to the state. *See* January 2023 ED Determination.

**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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Christine Harada  
Executive Director  
Federal Permitting Improvement Steering Council