



PERMITTING COUNCIL

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

August 17, 2023

**Maryland Offshore Wind Project; COP (BOEM), Section 106 (BOEM), MMPA (NMFS);
Section 10/404 (USACE); Section 408 (USACE)**

I. SUMMARY

The Maryland Offshore Wind Project (Project), sponsored by US Wind, Inc. (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 environmental review for the Project under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, which makes BOEM the lead agency for both NEPA and FAST-41.

On July 21, 2023, BOEM submitted a request to the Federal Permitting Improvement Steering Council Executive Director (Executive Director) to extend interim and final completion dates for various Federal actions on the Project's permitting timetable. BOEM's request includes extensions for its 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 also seeks an extension for incidental take authorization (ITA) under the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1361 *et seq.*, issued by the United States Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NMFS). Finally, 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") and Section 404 of the Clean Water Act, 33 U.S.C. § 1344 (often referred to as "Section 404") (together, Sections 10/404). It also includes authorization under Section 14 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 408 (often referred to as "Section 408").¹

¹ This Executive Director Determination does not address modification of certain other actions on the Project's FAST-41 permitting timetable because the Executive Director did not receive the request for date extensions 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 actions to which this applies include the following: BOEM's environmental review under NEPA; consultation with the United States Department of the Interior, Fish and Wildlife Service (FWS) under the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*; consultation with NMFS under the ESA; and consultation with NMFS on essential fish habitat (EFH) pursuant to Section 305 of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.* If the agencies responsible for these actions are unable to meet the completion dates currently posted on the Federal Permitting Dashboard, they will need to establish alternative completion dates and adhere to the statutory

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) and 4370m-2(c)(2)(D)(i)(IV). 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).

procedures required by 42 U.S.C. § 4370m-2(c)(2)(F) until they take final action on their respective actions.

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 are detailed thereafter.

Action Agency	Action	Milestone	Original Date	Current Date	Requested Date
BOEM	COP	Issuance of decision for permit/approval	8/23/2024	8/23/2024	9/27/2024
BOEM	Section 106	Section 106 Consultation Concluded	4/21/2023	5/17/2024	6/21/2024
NMFS	MMPA	Publish Proposed ITA in Federal Register	10/6/2023	12/5/2023	1/4/2024
NMFS	MMPA	Publish Final ITA in Federal Register	7/26/2024	8/26/2024	9/30/2024
NMFS	MMPA	ITA Decision Rendered	8/26/2024	9/25/2024	10/31/2024
USACE	Section 10/404	Final Verification / Permit Decision Rendered	9/24/2024	10/24/2024	11/29/2024
USACE	Section 408	Issuance of Decision	9/24/2024	10/24/2024	11/29/2024

The completion dates for the COP, Section 106, MMPA, Section 10/404, and Section 408 actions are dependent on the timing of issuance of the final Environmental Impact Statement (EIS) and Record of Decision (ROD) under NEPA. While the NEPA action is not part of this Executive Director Determination,² BOEM anticipates it will not meet the currently-posted NEPA completion dates; instead, BOEM will be establishing alternative completion dates.³ The shift in the NEPA schedule is partially a result of BOEM asking the Project Sponsor

² See *supra*, n.1.

³ See 42 U.S.C. § 4370m-2(c)(2)(F)(ii)(II) (requiring establishment of alternative completion dates).

to provide additional information on various assessments for incorporation into the draft environmental impact statement (EIS). The assessments for which BOEM requested additional information include the offshore and onshore Historic Resources Visual Effects Assessment, Visual Impact Assessment, Marine Archaeological Resource Assessment, and the Terrestrial Archeological Resource Assessment. The NEPA shift is also due to the Project Sponsor notifying BOEM of an anticipated update to the COP related to additional dredging, modified cable routes, and refinement of operation and maintenance facility details. Based on these factors, BOEM expects to establish alternative completion dates of October 6, 2023, for the draft EIS; June 14, 2024, for the final EIS; and July 31, 2024, for the ROD.

BOEM requests that the COP final decision date be extended based on BOEM's anticipated movement of the ROD final completion date.

Because BOEM is meeting its Section 106 consultation obligations through the Section 106 NEPA substitution process, as provided in 36 C.F.R. § 800.8, the Section 106 consultation will conclude after the final EIS is issued and shortly before issuance of the NEPA ROD.

For the MMPA milestones, if supported by the administrative record, NMFS would publish the final incidental take authorization regulations at least six months after publication of the proposed regulations and approximately 60 days after issuance of the ROD, to allow NMFS to ensure the final regulations are consistent with the ROD. The MMPA final completion date (issuance of incidental take authorization) follows 30 days after publication of final incidental take authorization regulations.

The Section 10/404 and Section 408 final completion dates are also 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 decisions.

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).

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 confirmed the Project Sponsor does not object to the requested permitting timetable modifications.

IV. DISCUSSION

The factors contributing to the shift in the NEPA schedule, which underlies the permitting timetable movements addressed in this Executive Director Determination, are typical for projects of this magnitude and complexity. Agencies often request additional information from project sponsors to understand the full scope of project impacts. The ongoing challenge is in determining how much information is necessary, but that does not seem to be at issue in this instance. Project sponsors regularly make refinements to projects as new information comes to light, necessitating provision of updated project documents to reviewing agencies. That is precisely what occurred here. Given these facts, the Executive Director concludes the requested extensions are warranted.

V. DETERMINATION

BOEM's extension request is **GRANTED** for the COP, Section 106, MMPA, Section 10/404, and Section 408 actions, and the permitting timetable shall be revised accordingly.



Eric Beightel
Executive Director
Federal Permitting Improvement Steering Council