



## PERMITTING COUNCIL

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

January 12, 2024

#### New England Wind Project — COP; Section 10/404; OCS Air Permit

#### I. SUMMARY

The New England Wind Project (Project), sponsored by Park City Wind, LLC, a wholly owned subsidiary of Avangrid Renewables, 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. 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, which makes BOEM the lead agency for both NEPA and FAST-41.

On December 15, 2023, BOEM submitted a request to the Federal Permitting Improvement Steering Council Executive Director (Executive Director) to extend several final completion dates on the Project's permitting timetable. BOEM's request includes an extension for its Construction and Operations Plan (COP) decision. BOEM also requests an extension of the final completion date for the United States Army Corps of Engineers (USACE) permit decisions 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). 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. This is BOEM's third request to extend various completion dates on the Project's permitting timetable.<sup>1</sup>

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

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<sup>1</sup> The previous two Executive Director Determinations for the Project are available here:  
[https://www.permits.performance.gov/sites/permits.dot.gov/files/2023-05/2023-05-10%20New%20England%20Wind%20ED%20Determination\\_0.pdf](https://www.permits.performance.gov/sites/permits.dot.gov/files/2023-05/2023-05-10%20New%20England%20Wind%20ED%20Determination_0.pdf)  
<https://www.permits.performance.gov/sites/permits.dot.gov/files/2023-11/2023-11-22%20New%20England%20Wind%20ED%20Deter%28signed%29.pdf>

## 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).

### III. BACKGROUND

BOEM submitted a request to change the final completion dates shown in the table immediately below.

Action Agency	Action	Milestone	Original Date	Currently Posted Date	Requested Date
BOEM	COP	Issuance of decision for permit/approval	10/1/2023	3/25/2024	7/1/2024
USACE	Section 10/404	Section 10/404 Final Verification/Permit Decision Rendered	10/1/2023	3/25/2024	7/1/2024
EPA	OCS air permit	Issuance of Final Decision for Permit/Approval	10/1/2023	2/13/2024	5/1/2024

The completion dates for the COP, Section 10/404, and OCS air permit are dependent on the timing of issuance of the Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) under NEPA. Although the NEPA action is not part of this Executive Director Determination, BOEM has established alternative completion dates that extend the timeline for the NEPA action.<sup>2</sup> The shift in the NEPA schedule, in turn, is due to the timing of BOEM’s consultation with the Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NMFS) under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531, and the timing of incidental take authorization (ITA), which is issued by NMFS under the Marine Mammal Protection Act (MMPA), 16 U.S.C. §§ 1361.<sup>3</sup>

NMFS published a proposed ITA rule in the Federal Register in June 2023 and had been working toward publishing the final ITA rule in February 2024. However, NMFS had

<sup>2</sup> BOEM neither timely modified nor met the posted completion dates for the NEPA action, and therefore BOEM has established alternative completion dates and has been adhering to the statutory procedures required by 42 U.S.C. § 4370m-2(c)(2)(F) for the NEPA action.

<sup>3</sup> Like BOEM’s NEPA action, the completion dates for the ESA-NMFS and MMPA actions were neither timely modified nor met, and therefore NMFS has established alternative completion dates and has been adhering to the statutory procedures required by 42 U.S.C. § 4370m-2(c)(2)(F) for the ESA and MMPA actions.

recommended, but not required, more sophisticated modeling in recognition of the likely overestimate of impacts from the simplistic modeling approach the project sponsor conducted initially. Thus the Project Sponsor undertook additional acoustic and exposure modeling for foundation installation (impact pile driving, vibratory pile driving, and drilling) to more accurately represent their project's potential foundation installation noise impacts on protected species after publication of the DEIS and the MMPA proposed rule.

The Project Sponsor submitted some of the updated acoustic modeling to NMFS and BOEM in September 2023 and provided a consolidated revision on November 7, 2023. In response to agency comments, the Project Sponsor provided revised memos on December 5, 2023, and January 9, 2024. As of January 11, 2024, the Project Sponsor had not submitted the revised acoustic hydroacoustic modeling report which contains detailed information on the results summary provided in the memo. NMFS and BOEM nonetheless are not proposing to shift the posted MMPA milestones at this time.

The updated modeling information also impacts the timing of ESA consultation with NMFS because BOEM is incorporating the updated modeling information into a Biological Assessment (BA) addendum, which will delay NMFS' ability to analyze the proposed action and draft the Biological Opinion. The agencies thus have set an alternative completion date of February 16, 2024, for the conclusion of ESA consultation, which is a shift of 98 days from the previously-scheduled date of November 10, 2023.

BOEM has indicated it needs two weeks after ESA consultation concludes to incorporate the completed ESA consultation into the FEIS. Therefore, BOEM has identified an alternative completion date of March 1, 2024, for publication of the FEIS, with the ROD correspondingly moving to April 1, 2024.

Because the COP decision date is dependent on the NEPA action, BOEM has requested to move the COP completion date by 98 days to July 1, 2024.

The Section 10/404 final completion date is also dependent upon the final completion date of the NEPA action. USACE requests a review of 90 days between issuance of the ROD and issuance of USACE's decisions.

With respect to EPA's OCS air permit, typically, to meet all requirements applicable to EPA's action under its OCS permitting regulations, EPA needs 90 days after BOEM's issuance of the ROD to review the ROD and verify that associated documents address requirements EPA must meet under statutes other than the Clean Air Act (CAA). The requirements of these other statutes

apply independent of the deadlines under the CAA that may apply to a portion of EPA's OCS permitting action.<sup>4</sup>

EPA actions under the CAA are exempt from NEPA, pursuant to Section 7(c) of the Energy Supply and Environmental Coordination Act of 1974 (15 U.S.C. § 793(c)(1)). However, EPA's OCS permitting regulations at 40 CFR Part 55 direct that "review by the Administrator conducted pursuant to this section shall be coordinated with the environmental reviews under [NEPA] to the extent feasible and reasonable." 40 CFR § 55.6(b)(6).<sup>5</sup> In most cases, one feasible and reasonable way to achieve this coordination is by EPA considering the ROD and associated documents before issuing its OCS permit decisions under its regulations at 40 CFR Part 55.

In addition, issuing an OCS permitting decision after considering the ROD and associated documents helps EPA to ensure its action complies with other laws, such as the ESA. Under Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), the EPA must ensure that any action authorized, funded, or carried out by the EPA (including issuing OCS permits) is not likely to jeopardize the continued existence of any federally listed endangered species or threatened species or result in the destruction or adverse modification of such species' designated critical habitat. If the EPA's action to issue an OCS permit may affect a federally listed species or designated critical habitat, the relevant ESA implementing regulations at 50 CFR Part 402 require consultation between the EPA and the U.S. Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS), depending on the species at issue. For actions like OCS wind energy projects that require approvals from multiple federal agencies, the lead agency for NEPA is also often the agency taking the lead on ESA consultation and compliance with other federal laws, such as the National Historic Preservation Act (NHPA), the Coastal Zone Management Act (CZMA), and the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA).<sup>6</sup> Thus, it is necessary for EPA to review the ROD and associated documents before issuing an OCS air

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<sup>4</sup> The requirement to obtain an OCS permit under 40 CFR Part 55 includes, but is not limited to, the requirements to obtain preconstruction and operating permits under other parts of the CAA and applicable regulations. 40 CFR §§ 55.3(b), 55.6, 55.13, 55.14. The one-year deadline to grant or deny the permit action after the date of filing of a complete permit application applies only to an application for a permit under the Prevention of Significant Deterioration program (42 U.S.C. § 7475(c)), which is one component of a broader preconstruction permitting program known as New Source Review. A longer 18-month deadline applies to decisions on applications for the operating permits required under Title V of the Clean Air Act. 42 USC § 7661b(c). Because most OCS sources are subject to PSD and title V permitting requirements, the best way for EPA to reconcile these overlapping requirements is to complete action on the entire OCS permit application by the deadline for the PSD component of the OCS permit.

<sup>5</sup> This requirement applies to sources located within 25 miles of the state seaward boundary "[w]henver any proposed OCS source or modification to an existing OCS source is subject to action by a Federal agency that might necessitate preparation of an environmental impact statement pursuant to the National Environmental Policy Act (42 U.S.C. § 4321)." *Id.*

<sup>6</sup> At EPA's request, BOEM has accepted the role of lead Federal agency for compliance with the ESA, NHPA, and MSFCMA for OCS wind energy development projects off the Atlantic Coast. *See, e.g.*, letter dated September 24, 2018, from James F. Bennett, Office of Renewable Energy Program, Bureau of Ocean Energy Management, U.S. Department of the Interior, to John Filippelli, Clean Air and Sustainability Division, EPA Region 2.

permitting decision so EPA can ensure that relying on the actions of the lead agency will fulfill EPA's responsibilities under the ESA and these other statutes.

With the shift in the ROD date for New England Wind to April 1, 2024, EPA seeks to extend the milestone date for the issuance of final decision for permit/approval of the OCS air permit action to May 1, 2024, to enable EPA to ensure compliance with the ESA and other federal statutes, while continuing to meet the substantive requirements of the CAA for OCS and Prevention of Significant Deterioration permitting and coordinating its OCS permitting action with the NEPA process, in accordance with 40 CFR § 55.6(b)(6).

#### 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). BOEM notes that the Project Sponsor is concerned about the proposed timetable modifications because there is no longer any buffer in the schedule between securing Federal approvals and mobilizing to commence onshore construction. The Project Sponsor also indicated that any further delay will compromise their ability to maintain a schedule that satisfies their commitments to the Town of Barnstable.

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 Project Sponsor has concerns about the continued shifts in the schedule.

#### **IV. DISCUSSION**

Offshore wind development in the Atlantic is pioneering renewable energy development and in so doing is encountering many novel environmental challenges. The mitigation required to approve project construction near critically endangered species such as the right whale is complex, and the iterative process to reach agreement cannot always be accurately predicted when developing schedules when projects begin. In this case, the Project Sponsor conducted a more thorough review and analysis of the Project's noise-related impacts on protected species, and the agencies sought time to review and incorporate that new information into their permitting decisions. However, we must continue to seek opportunities to be innovative in our permitting process as we work to increase permitting efficiencies without compromising the quality of any reviews. The Executive Director will continue to work with the BOEM and NMFS to identify and implement process improvements to more quickly elevate the potential for impacts to the permitting timetables for off-shore wind projects so that issues can be resolved in a timely manner.

**V. DETERMINATION**

BOEM's extension request is **GRANTED**, and the permitting timetable shall be revised as requested.



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Eric B. Beightel  
Executive Director  
Federal Permitting Improvement Steering Council