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

April 23, 2024

SouthCoast Wind Energy Project — NPDES permit

I. Summary

The SouthCoast Wind Energy Project (Project), sponsored by Ocean Winds North America, LLC on behalf of SouthCoast Wind Energy, 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 environmental review of 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. BOEM submitted a request to the Permitting Council Executive Director (Executive Director) to extend the final completion date for a National Pollutant Discharge Elimination System (NPDES) permit decision under Section 402 of the Clean Water Act from the Environmental Protection Agency (EPA).¹ This is the second extension request for completion dates on the Project's permitting timetable.²

For the following reasons, BOEM's extension request is **GRANTED**, and the Project

¹ This Executive Director Determination does not address modification of the other eight pending Federal actions on the Project's permitting timetable. The actions to which this applies include the following:

1. BOEM's environmental review under NEPA;
2. BOEM's Construction and Operations Plan decision;
3. Consultation under Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108;
4. Consultation with the United States Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NMFS) under the Endangered Species Act (ESA), 16 U.S.C. § 1531;
5. Incidental take authorization (ITA) from NMFS under the Marine Mammal Protection Act, 16 U.S.C. §§ 1361;
6. 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;
7. USACE permit decision under Section 14 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 408 (often referred to as "Section 408"); and
8. EPA's Outer Continental Shelf (OCS) air permit decision under Section 328 of the Clean Air Act, 42 U.S.C. § 7627.

The agencies responsible for these actions have already or will be establishing alternative completion dates and adhering to the statutory procedures required by 42 U.S.C. § 4370m-2(c)(2)(F) until they take final action on their respective actions.

² The previous Executive Director Determination, dated November 30, 2023, is available here:

<https://www.permits.performance.gov/permitting-projects/southcoast-executive-director-determination-ocs-air-permit>

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).

III. Background

BOEM requested to modify the final NPDES permit completion date from September 29, 2024 to March 27, 2025. The NPDES permit completion date is 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. The shift in the NEPA schedule is due to BOEM's consultations 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, which in turn is dependent on the timing of the incidental take authorization (ITA), which is issued by NMFS under the Marine Mammal Protection Act (MMPA), 16 U.S.C. §§ 1361.

The MMPA process took longer than originally anticipated because it was not possible for NMFS to make the required findings under the MMPA for the proposed rule with the action

originally proposed in the initial Incidental Take Authorization (ITA) application. NMFS coordinated extensively with the project sponsor to identify an acceptable resolution and reach an agreement that allowed NMFS to move forward with the proposed rule.

The delay in the MMPA process will in turn delay the initiation of BOEM's ESA consultations with NMFS. BOEM uses the information in the MMPA application to prepare and submit the biological assessment to NMFS. Additionally, it is necessary for NMFS to have all of the required information prior to initiating the ESA consultation, which consists of: a request for ESA consultation from BOEM, as the lead Federal agency for the section 7 consultation; a complete biological assessment (BA) from BOEM; a request for consultation from NMFS Office of Protected Resources for their proposed MMPA action; and a draft of the MMPA incidental take authorization proposed rule, which is a necessary supplement to BOEM's BA.

Returning to the NEPA action, the NEPA process is dependent on the timing of the ESA consultation because a final environmental impact statement (FEIS) typically incorporates the conclusions reached in the consultation as well as any mitigation measures resulting from the consultation. The ESA consultation is scheduled to conclude on November 7, 2024. Accordingly, BOEM has established an alternative completion date for the FEIS of November 15, 2024. The NEPA Record of Decision (ROD) is scheduled to follow on December 20, 2024.

Finally, the completion date for the NPDES permit is dependent on the final completion date for the NEPA action. To meet all requirements applicable to EPA's permit action, EPA needs time following 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 Water Act (CWA). Here, BOEM, on behalf of EPA, is requesting an extension of 97 days beyond issuance of the ROD for the NPDES permit decision completion to occur on March 27, 2025. Normally, only 90 days are requested, however, the additional 7 days in the extension account for federal holidays that will occur after the ROD.

Consultation with Project Sponsor on Extension Requests

Prior to submitting an 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 does not object to the proposed permitting timetable modification.

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

IV. Discussion

The Federal agencies engaged in the SouthCoast project have worked over several months to develop a durable permitting timetable with achievable completion dates while navigating the development of mitigation and monitoring measures for their offshore wind development impacts on the North Atlantic right whale and other marine species protected under the MMPA and ESA. Although this Executive Director Determination approves the movement of one EPA permit action, it also represents movement of multiple alternative completion dates for the overall permitting timetable. This overall shift is associated, in part, with the challenges of permitting offshore wind development while protecting and promoting recovery of the North Atlantic right whale. Because of this, the Executive Director is engaging the agencies involved to look programmatically at additional ways to improve planning, coordination, and permitting offshore wind projects in North Atlantic right whale habitat.

V. Determination

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



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Executive Director
Permitting Council