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

May 31, 2023

Revolution Wind Farm: COP (BOEM), Section 106 (BOEM), MMPA (NMFS), OCS Air Permit (EPA)

I. SUMMARY

The Revolution Wind Farm Project (Project), sponsored by Revolution 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 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 May 23, 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. This is the second Executive Director Determination on a request to extend final completion dates on the Project's permitting timetable.¹

BOEM's current 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. § 306108.² BOEM also requests extensions for the Project Sponsor's 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)

¹ The previous Executive Director Determination for the Project, signed May 18, 2022, is available here: <https://www.permits.performance.gov/fpisc-content/executive-director-determination-re-extending-fast-41-final-completion-date-more-30-1>.

² BOEM has also requested modification of the U.S. Army Corps of Engineers (USACE) completion dates for this Project. The Executive Director is still deliberating that request. Additionally, this Executive Director Determination does not address the NEPA action referenced in BOEM's 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 NEPA completion dates. *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). If BOEM is unable to meet the completion dates currently posted on the Federal Permitting Dashboard, it will need to establish alternative completion dates and adhere to the statutory procedures required by 42 U.S.C. § 4370m-2(c)(2)(F) until it completes the final NEPA-related action.

Outer Continental Shelf (OCS) air permit decision under Section 328 of the Clean Air Act, 42 U.S.C. § 7627.

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).

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	Current Date	Requested Date
BOEM	COP	Issuance of decision for permit/approval	10/6/2023	11/20/2023
BOEM	Section 106	Section 106 Consultation Concluded	7/7/2023	8/21/2023
NOAA-NMFS	MMPA	Publish Final ITA Regulations in Federal Register	7/1/2023	10/20/2023
NOAA-NMFS	MMPA	Incidental Take Authorization Decision Rendered	8/1/2023	11/20/2023
EPA	OCS air permit	Issuance of Final Decision for Permit/Approval	7/31/2023	10/6/2023

COP, Section 106, MMPA

The completion dates for the COP, Section 106, and MMPA actions are dependent on the timing of issuance of the Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) under NEPA. The NEPA completion dates are being changed because, in October 2022, the Project Sponsor refined the Project design by removing 21 wind turbines.

As a result of the Project design change, BOEM undertook additional analysis on the preferred alternative under development for the FEIS and accordingly modified the impacts analysis for consultations with NMFS both under the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, and 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.*³ BOEM provided initial ESA and EFH consultation request packages to NMFS in April 2022 but had to update

³ BOEM is also undertaking ESA consultation on the Project with the Department of the Interior, U.S. Fish and Wildlife Service (FWS), but the consultation with FWS is not at issue here.

the consultation request packages with new information following the Project Sponsor's redesign in October 2022. Following several months of coordination among the Federal agencies on updated documents, NMFS deemed the consultation request packages complete in March and April 2023 for the EFH and ESA consultations, respectively.

This additional analysis for the FEIS, and the associated delays in consultations, have resulted in BOEM now not being able to meet the current interim and final completion dates for NEPA. Instead, BOEM will be posting an alternative completion date of July 21, 2023, for issuance of the FEIS and August 21, 2023, for issuance of the ROD.

BOEM requests that the COP final completion date be extended 90 days beyond the final completion date for a ROD.

Because BOEM intends to satisfy its Section 106 consultation obligations through the Section 106 NEPA substitution process, the Section 106 consultation will conclude simultaneously with issuance of the ROD for NEPA.

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.

OCS Air Permit

BOEM requests an extension of the final completion date for the OCS air permit based on a one-year deadline mandated by the Clean Air Act for EPA to reach an OCS air permitting decision, following its determination that a project sponsor has submitted a complete application. Here, EPA deemed the Project Sponsor's OCS air permit application complete on October 7, 2022, after spending about five months engaging with the Project Sponsor to remedy deficiencies EPA found in the Project Sponsor's initial application submission. Accordingly, the requested final completion date for the OCS air permit action is October 6, 2023.

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). The Project Sponsor objects to the basis for extending the permitting timetable due to delays associated with consultations. This paragraph describes the context for the requested change from the Project Sponsor's perspective. The Project Sponsor emphasizes that the refinements to the Project design—the removal of 21 wind turbines—were a good faith effort to reduce viewshed and marine impacts in a technically feasible manner. The Project Sponsor finds it counterintuitive that the Federal agencies are treating reduction of turbine positions within the larger, already-studied project design envelope as an alternative layout requiring more information. From the Project Sponsor's perspective, removal of turbines is not an alternative layout as the impacts are within, and likely smaller than, those already studied as part of the larger maximum impact scenario. To that end, the Project Sponsor points out that to the best of its knowledge, while there were multiple rounds of document updates submitted to NMFS, no impact ratings changed among the various versions submitted. The Project Sponsor additionally notes that many agency requests for information were confirmatory in nature rather than requests for additional details, and the Project Sponsor suggests that such comments could be addressed after consultation is initiated rather than delaying the initiation of consultation. Finally, the Project Sponsor highlights that, by regulation, consultation is supposed to last up to 135 days, but in this case it took almost a year of consultation being requested before it was initiated. Nonetheless, the Project Sponsor appreciates the agencies' efforts to minimize delays and find efficiencies in the schedule now.

IV. DISCUSSION

In discussions with the Executive Director, NMFS has explained that before it can engage in EFH or ESA consultation, all project activities and potential impacts must be included in consultation request packages. The Executive Director respects NMFS' responsibility to understand a project's potential impacts when engaging in consultation. That being said, the project modification in this instance—which reduced the number of turbines so as to reduce impacts—underscores the Executive Director's previous comments encouraging NMFS to work with BOEM and project sponsors to find ways to incorporate project refinements into consultations in a way that does not unduly slow the consultation or permitting process.⁴ While the Executive Director recognizes that NMFS is trying to meaningfully carry out its statutory obligations so that at times project refinements may necessitate additional analysis, the Executive Director maintains that the Federal government should not create disincentives for project sponsors to modify projects in a manner that results in fewer essential fish habitat or endangered species impacts because submission of additional project information causes immoderate delays.

⁴ See Executive Director Determination for the Ocean Wind 1 Project, dated November 18, 2022, available at <https://www.permits.performance.gov/fpisc-content/ocean-wind-1-project-ed-determination-essential-fish-habitat-efh-endangered-species>.

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

V. DETERMINATION

BOEM's extension request is **GRANTED** for the COP, Section 106, MMPA, and OCS air permit actions, and the permitting timetable shall be revised accordingly.



Christine Harada
Executive Director
Federal Permitting Improvement Steering Council