



PERMITTING COUNCIL

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

June 15, 2023

Atlantic Shores South Project; COP (BOEM), Section 106 (BOEM), Section 408 (USACE)

I. SUMMARY

The Atlantic Shores South Project (Project), sponsored by Atlantic Shores Offshore 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 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. § 306108.¹ BOEM also requests an extension of the United States Army Corps of Engineers (USACE) authorization under Section 14 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 408 (Section 408).

¹ This Executive Director Determination does not address modification of the seven other actions on the Project's FAST-41 permitting timetable because the Executive Director did not receive a 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:

1. BOEM's environmental review under NEPA;
2. 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.*;
3. Consultation with the United States Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NMFS) under the ESA;
4. 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.*;
5. Incidental take authorization (ITA) from NMFS under the Marine Mammal Protection Act, 16 U.S.C. § 1361 *et seq.*; and
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.

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

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 | 12/22/2023 | 6/24/2024 |
| BOEM | Section 106 | Section 106 Consultation Concluded | 9/26/2023 | 1/10/2024 |
| USACE | Section 408 | Section 408 Issuance of Decision | 12/22/2023 | 7/23/2024 |

Section 106

BOEM requests an extension for the conclusion of Section 106 consultation based on the timing of submissions from the Project Sponsor. BOEM had intended to initiate consultation on September 30, 2022, but was unable to do so until May 4, 2023, after receiving a sufficient offshore Historic Resources Visual Effects Assessment, Visual Impact Assessment, and Terrestrial Archeological Resource Assessment from the Project Sponsor.

BOEM is using the NEPA substitution process, laid out in 36 C.F.R. § 800.8, to fulfill the Section 106 consultation obligations. The delay in the Section 106 process, therefore, also held up the NEPA process because it prevented completion of the draft environmental impact statement (EIS) and the subsequent final EIS and Record of Decision.

COP

The COP final completion date is dependent upon the final completion date of BOEM's NEPA action. BOEM requests that the COP final completion date be extended 90 days beyond the final completion date for the ROD.

Section 408

The Section 408 final completion date is 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 Section 408 decision. While USACE may, in some instances, issue a permit decision 90 days after the ROD is issued, in this case the agency needs additional time because the Project has the potential to impact two USACE ongoing civil works studies. As a result, USACE must evaluate whether the Project will impact the usefulness of the USACE studies or the public interest, and review is needed at both the USACE district and division levels. Based on these circumstances, USACE is seeking a 120-day rather than 90-day review period post issuance of the ROD.

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

IV. DISCUSSION

The primary driver of the schedule shift for this Project is the timing of sufficient Section 106 submissions. Nonetheless, all proposed date shifts were mutually agreed upon by all impacted agencies and the Project Sponsor after significant coordination. Given these circumstances, the Executive Director finds that 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, and Section 408 actions, and the permitting timetable shall be revised accordingly.



Christine Harada
Executive Director
Federal Permitting Improvement Steering Council