



## PERMITTING COUNCIL

Transparency • Efficiency • Accountability

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

June 6, 2023

**Sunrise Wind Farm; NEPA (BOEM), COP (BOEM), Section 106 (BOEM), MMPA (NOAA-NMFS), Sections 10/404/408 (USACE), NPS Permit (NPS), Clean Water Act Section 402 (EPA), OCS Air Permit (EPA)**

#### I. SUMMARY

The Sunrise Wind Farm Project (Project), sponsored by Sunrise 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.<sup>1</sup>

BOEM's current request includes extensions for its NEPA action, Construction and Operations Plan (COP) decision, and consultation under Section 106 of the National Historic Preservation Act (Section 106), 54 U.S.C. § 306108.<sup>2</sup> BOEM 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). BOEM also requests an extension of all authorizations from the United States Army Corps of Engineers

---

<sup>1</sup> The previous Executive Director Determination for the Project, signed November 11, 2021, extended the Construction and Operations Plan completion date because the original completion date was entered in error. *See* <https://www.permits.performance.gov/fpisc-content/executive-director-determination-re-extending-date-sunrise-wind-farm>

<sup>2</sup> This Executive Director Determination does not address modification of one action that BOEM included in its 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 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 relevant action is consultation under the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, with the United States Department of the Interior, Fish and Wildlife Service (FWS). BOEM and FWS will be establishing an alternative completion date and adhering to the statutory procedures required by 42 U.S.C. § 4370m-2(c)(2)(F) until ESA consultation concludes.

(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”); Section 404 of the Clean Water Act, 33 U.S.C. § 1344 (often referred to as “Section 404”); and Section 14 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 408 (often referred to as “Section 408”) (together, Sections 10/404/408). BOEM also requests an extension of the National Park Service’s right-of-way and special use permits. 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, and water permit decision under Section 402 of the Clean Water Act, 33 U.S.C. § 1342 (often referred to as “Section 402”).

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	NEPA	Official Notice of Availability of a Final Environmental Impact Statement (FEIS) Published in the Federal Register	7/7/2023	10/20/2023
BOEM	NEPA	Issuance of Record of Decision (ROD)	8/17/2023	12/4/2023
BOEM	COP	Issuance of decision for permit/approval	11/17/2023	3/4/2024
BOEM	Section 106	Section 106 Consultation Concluded	8/21/2023	12/4/2023
NMFS	MMPA	Publish Final ITA Regulations in Federal Register	10/20/2023	2/2/2024
NMFS	MMPA	Incidental Take Authorization Decision Rendered	11/20/2023	3/4/2024
USACE	Section 10/404	Section 10/404 Final Verification/Permit Decision Rendered	11/15/2023	3/4/2024
USACE	Section 408	Section 408 Issuance of Decision	11/15/2023	3/4/2024
NPS	NPS permit	Final decision/agency action	11/17/2023	3/4/2024
EPA	Clean Water Act Section 402 Permit	EPA authorizes discharge under individual permit	9/29/2023	3/4/2024
EPA	OCS air permit	Issuance of Final Decision for Permit/Approval	11/17/2023	3/21/2024

## NEPA

BOEM requests an extension of completion dates for its NEPA action based on the following: (1) alternatives discussions between the lead and cooperating agencies; (2) an extension of the public comment period for the Draft Environmental Impact Statement (DEIS); and (3) Project design changes necessitating additional analysis.

First, BOEM and the cooperating agencies had extensive alternatives discussions for this Project prior to issuing the DEIS. This caused a delay of about two months as BOEM could not complete the DEIS until the agencies agreed upon the range of alternatives to be included in the NEPA review.

Second, BOEM extended the DEIS public comment period from 45 days to 60 days due to the comment period overlapping Federal holidays. This extended several action completion dates, including the ROD, by nearly three weeks.

Third, in February 2023, the Project Sponsor notified BOEM that it was removing 22 of the COP's original 102 potential wind turbine generator positions due to the presence of glauconite sands in the lease area. Based on the design change BOEM undertook additional analysis on the preferred alternative under development for the FEIS, which 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.* The timing of consultations is relevant to the NEPA schedule because the date for the FEIS often occurs after the consultations conclude, allowing BOEM to incorporate measures from the final consultation documents into the FEIS.

### **COP, Section 106, MMPA, Sections 10/404/408, NPS Permits, and Clean Water Act Section 402 Permit**

The completion dates for the COP, Section 106, MMPA, Sections 10/404/408, NPS permits and Clean Water Act Section 402 permit actions are all 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 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. This timing allows 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 the final incidental take authorization regulations.

For the Sections 10/404/408 decisions, USACE requests a review of 90 days after issuance of the ROD.

NPS requests 90 days between issuance of the ROD and issuance of the NPS permits.

EPA requests a review of 90 days after issuance of the ROD for the Clean Water Act Section 402 permit.

### **OCS Air Permit**

BOEM requests an extension of the final completion date for the OCS air permit based on a one-year statutory deadline provided by the Clean Air Act for EPA to reach an OCS air permitting decision following their determination that a project sponsor has submitted a complete application. Here, EPA deemed the Project Sponsor's OCS air permit application complete on March 21, 2023, after spending about five months engaging with the Project Sponsor on deficiencies EPA found in the Project Sponsor's initial application submission. Accordingly, the requested final completion date for the OCS air permit action is March 21, 2024.

### **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. This paragraph describes the context for the requested change from the Project Sponsor's perspective. From the Project Sponsor's perspective there were three different contributing factors to the overall delay. The first two factors were (1) extension of agency selection of DEIS alternatives; (2) extension of the DEIS public comment period from 45 to 60 days; and (3) a delay to the start of the ESA and EFH consultations. This occurred because glauconite sands in portions of the lease area made certain turbine positions infeasible and prompted the Project Sponsor to refine a feasible layout that includes positions either within the

project design envelope or assessed within the DEIS alternatives. The Project Sponsor feels that refinements to the Project design that are within the Project’s design envelope or assessed within the DEIS alternatives should not be treated as new information warranting a reset of consultation deadlines. From the Project Sponsor’s perspective, removal of turbines is not “new information” 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 some 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 the agencies seem to avoid starting the 135-day clock by delaying the initiation of consultation as, in this case, almost a year passed from when consultation was first requested to when it was initiated.

#### IV. DISCUSSION

The Executive Director commends the agencies on active engagement on Project alternatives. The Federal agencies have now developed screening criteria to identify the range of alternatives to be analyzed, thus streamlining identification of alternatives for future projects.

It is the Executive Director’s view that the interplay between project refinements and consultation processes presents opportunities for process improvements.<sup>3</sup> It is important for the Federal government to encourage developers to modify project designs in a way that lessens overall project impacts based on either stakeholder and technical input or adoption of alternatives proposed in a DEIS. Thus, the Executive Director encourages the Federal agencies to work with each other 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 and preserves the economic viability of the project.

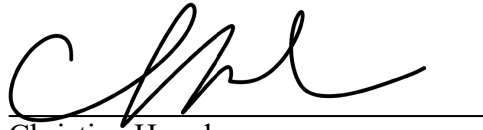
Given the facts as described above, extending the completion dates addressed in this Executive Director Determination are warranted.

---

<sup>3</sup> See the Executive Director Determination for the Ocean Wind 1 Project, dated November 18, 2022, available at <https://www.permits.performance.gov/sites/permits.dot.gov/files/2022-11/2022-11-18%20FINAL%20Ocean%20Wind%20ED%20Determination%20on%20the%20Record%20signed.pdf>, and the Executive Director Determination for Revolution Wind, dated May 31, 2023, available at <https://www.permits.performance.gov/sites/permits.dot.gov/files/2023-05/2023-05-31%20Rev%20Wind%20ED%20Determination%20on%20the%20Record.pdf>.

**V. DETERMINATION**

BOEM's extension request is **GRANTED** for the NEPA, COP, Section 106, MMPA, Sections 10/404/408, NPS permits, Clean Water Act Section 402 permit, and OCS air permit actions. The permitting timetable shall be revised accordingly.



Christine Harada  
Executive Director  
Federal Permitting Improvement Steering Council