



PERMITTING COUNCIL

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

November 2, 2023

Empire Wind Energy Project — COP; Section 10/404; Section 408

I. Summary

The Empire Wind Energy Project (Project), sponsored by Equinor Wind US, 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 an environmental review for the Project under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 *et seq.*, which makes BOEM the lead agency for both NEPA and FAST-41.

On September 29, 2023, BOEM submitted a request to the Federal Permitting Improvement Steering Council Executive Director (Executive Director) to extend several final completion dates. This is BOEM’s third Executive Director Determination request to extend completion dates on the Project’s permitting timetable.¹

In the present request, BOEM seeks to modify the final completion date for its Construction and Operations Plan (COP) decision. BOEM also requests an extension of the final completion dates for two permit decisions by the United States Army Corps of Engineers (USACE). This includes a joint 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 (together, Section 10/404). It also includes a permit decision under Section 14 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 408 (Section 408). The final completion date for all three of these decisions are dependent on the release of BOEM’s Record of Decision for the Project, the schedule for which was previously extended by a month.

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

¹ The previous two Executive Director Determinations for the Project are available at:

<https://www.permits.performance.gov/sites/permits.dot.gov/files/2023-03/2023-03-23%20Empire%20Wind%20ED%20Determination%20on%20the%20Record.pdf>;

https://www.permits.performance.gov/sites/permits.dot.gov/files/2023-09/2023-09-07_Empire%20Wind%20Exec%20Dir%20Determination%20OCS%29.pdf

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 COP, Section 10/404, and Section 408 final completion dates, as shown below in Table 1. The COP, Section 10/404, and Section 408 final completion dates are all dependent on the final completion date of BOEM's NEPA action. Table 2 shows the relevant dates for BOEM's NEPA action, and following Table 2 is a narrative explanation of the NEPA date shifts.

Table 1 - Actions included in BOEM’s Request for Executive Director Authorization

Action Agency	Action	Milestone	Original Date	Current Date	Requested Date
BOEM	COP	Issuance of decision for permit/approval	9/8/2023	1/22/2024	2/21/2024
USACE	Section 10/404	Section 10/404 Final Verification/Permit Decision Rendered	9/11/2023	2/20/2024	3/20/2024
USACE	Section 408	Issuance of Final Decision for Permit/Approval	2/20/2024	Same as original	3/20/2024

Table 2 - NEPA Action Completion Dates

Action Agency	Action	Milestone	Original Date	Modified Date	Alternative Completion Date
BOEM	NEPA	Official Notice of Availability of a Final Environmental Impact Statement published in the Federal Register	4/28/2023	9/8/2023	9/15/2023
BOEM	NEPA	Issuance of Lead Agency Record of Decision (Agency Action)	6/12/2023	10/23/2023	11/21/2023

BOEM modified the original NEPA completion dates for multiple reasons, all of which are detailed in the Executive Director Determination for the Project dated March 23, 2023.² That Executive Director Determination authorized extending issuance of the Final Environmental Impact Statement (FEIS) to September 8, 2023, and issuance of the Record of Decision (ROD) to October 23, 2023.

BOEM subsequently missed the extended September 8, 2023, FEIS date due to the timing of 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 *et seq.* BOEM was delayed in providing NMFS with a complete Biological Assessment to satisfy the requirements to initiate ESA consultation. NMFS revised their final two ESA milestones on February 10, 2023, at BOEM's request, to allow additional time to obtain information from the Project Sponsor and submit a complete Biological Assessment. This revision modified the completion date for the final ESA milestone to September 8, 2023, and NMFS concluded ESA consultation on that date (which was the same date BOEM had previously identified to issue the FEIS) with NMFS' issuance of a Biological Opinion containing reasonable and prudent measures, terms and conditions, and conservation recommendations. The FEIS typically incorporates measures resulting from the ESA consultation. After analyzing and incorporating NMFS' recommendations, BOEM published the FEIS on September 15, 2023.

In addition to the impact of the one-week shift of the FEIS on timing for the ROD, BOEM also required additional time to analyze recently-submitted information related to various aspects of the COP prior to issuing the ROD. Specifically, the Project Sponsor on September 11, 2023, submitted information on marine acoustics in response to four open comments on the COP. On August 31, 2023, and September 15, 2023, the Project Sponsor submitted information on glauconite soils in response to 14 open comments on the Marine Site Investigation Report (MSIR).³ Finally, on August 11, 2023, BOEM met with the Project Sponsor to clarify outstanding information requirements on the Safety Management System, and BOEM anticipates receiving the information shortly.

Based on the FEIS extension and the need to review recent information from the Project Sponsor, BOEM created an alternative completion date, moving the ROD date from October 21, 2023, to November 21, 2023.⁴ BOEM is presently concluding a review of the recent

² Available at:

<https://www.permits.performance.gov/sites/permits.dot.gov/files/2023-03/2023-03-23%20Empire%20Wind%20ED%20Determination%20on%20the%20Record.pdf>

³ Glauconite is identified as a (shallow hazard) geohazard due to its susceptibility to crushing, resulting in driving resistance and premature pile installation refusal. BOEM requires project sponsors to sufficiently characterize shallow hazards in the COP, which project sponsors typically accomplish through the MSIR.

⁴ See 42 U.S.C. § 4370m-2(c)(2)(F)(ii) (requiring establishment of alternative completion dates and reporting when a completion date is missed).

submissions. Depending on the sufficiency of that information, BOEM anticipates meeting the new ROD alternative completion date.

Because the COP final completion date is contingent on issuance of the ROD, BOEM requests that the COP final completion date be extended by 30 days, to February 21, 2024.

Like BOEM's COP decision, USACE's Section 10/404 and Section 408 final decisions are dependent upon the final completion date of BOEM's NEPA action. USACE has indicated it needs a review of 120 days between issuance of the ROD and issuance of USACE's Section 10/404 and Section 408 decisions due to the complexity of the Project, which has two cable landfall locations, two separate offshore wind permit applications (Empire 1 and Empire 2) and a connected permit application for the South Brooklyn Marine Terminal.⁵

USACE will use the FEIS and ROD to prepare three separate permit decisions for Empire Wind 1, Empire Wind 2, and the South Brooklyn Marine Terminal. Additionally, some of the permits require water quality certifications from the State of New York, and the state has until February 29, 2024 to issue one water quality certification and until March 13, 2024, to issue another. After the state issues the water quality certifications, EPA conducts a neighboring jurisdiction review. USACE cannot make a permit decision until these processes are complete. Therefore, BOEM requests that the Section 10/404 and Section 408 final completion dates be extended to March 20, 2024.

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 has no objection to the proposed permitting timetable extension.

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

IV. Discussion

The driving factor underlying the COP, Section 10/404, and Section 408 date shifts is the timing of issuance of the ROD. The ROD date was extended, in part, because the ESA consultation was not completed on time, but the length of the extension is also based on the timing of the Project Sponsor's submittal of requested information. Given these circumstances, extending the completion dates addressed in this Executive Director Determination are warranted.

⁵ The South Brooklyn Marine Terminal was discussed in the March 23, 2023 Executive Director Determination.

V. Determination

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



Eric Beightel
Executive Director
Federal Permitting Improvement Steering Council