



## PERMITTING COUNCIL

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### **Executive Director Determination on the Record For Extension of FAST-41 Final Completion Date by More Than 30 Days**

**November 18, 2022**

#### **Ocean Wind 1 Project - Essential Fish Habitat (EFH) & Endangered Species Act (ESA) Consultations**

##### **I. Summary**

The Ocean Wind 1 Project (Project), sponsored by Ocean 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 United States Department of the Interior - Bureau Ocean Energy Management (BOEM) is the lead agency with 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.

BOEM is responsible for undertaking essential fish habitat (EFH) consultation with the United States Department of Commerce - National Oceanic and Atmospheric Administration (NOAA) pursuant to Section 305 of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.* On October 19, 2022, BOEM submitted a request to the Executive Director of the Federal Permitting Improvement Steering Council to modify the Project’s permitting timetable on the Federal Permitting Dashboard by extending the final completion date by which NOAA will conclude its EFH consultation and issue conservation recommendations. BOEM has requested an extension of the final completion date currently posted on the Federal Permitting Dashboard for the EFH consultation from December 21, 2022, to February 24, 2023, because it received new or refined information from the Project Sponsor, after BOEM had submitted an EFH assessment and request for consultation to NOAA.

BOEM also is responsible for undertaking consultation with NOAA pursuant to the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.* On November 10, 2022, BOEM submitted a request to the Executive Director to extend the final completion date by which NOAA will conclude ESA consultation with BOEM from February 9, 2023, to March 13, 2023. BOEM has requested this extension because, in addition to incorporating the recent information from the project sponsor into a revised EFH assessment, BOEM also included the new information in an addendum to the Biological Assessment that BOEM had previously submitted to NOAA in support of BOEM’s request for ESA consultation. The extension of the final

completion date on the Permitting Dashboard for the EFH and ESA consultations will afford NOAA necessary additional time to review the new information.

For the following reasons, the extension request is **GRANTED**, and the Project permitting timetable will be revised accordingly.

## **II. Legal Standard**

A lead agency may modify a permitting timetable only after: (1) consulting with the Executive Director regarding the potential modification; (2) consulting with the participating agencies, the Executive Director, and the project sponsor and reaching agreement on a different completion date with the affected cooperating agencies; and (3) providing a written justification for the modification. 42 U.S.C. §§ 4370m-2(c)(2)(D)(i)(I-III).

If the proposed modification entails extending a final completion date by more than 30 days beyond the original final completion date, the lead agency additionally must submit a request to the Executive Director. The Executive Director then must consult with the project sponsor and make a determination on the record, based on consideration of relevant factors, whether to grant the modification. 42 U.S.C. § 4370m-2(c)(2)(D)(i)(IV). The relevant factors considered by the Executive Director include, but are 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). Executive Director determinations to extend permitting timetables by more than 30 days beyond an original final completion date are not subject to judicial review. 42 U.S.C. § 370m-2(c)(2)(D)(iv)(I).

### III. Background

#### A. EFH

BOEM initiated EFH consultation with NOAA on February 11, 2022, by submitting an EFH assessment and request for consultation. At that time, the target date for the subsequent interim milestone on the Federal Permitting Dashboard — labeled “NOAA determines EFH Assessment is Complete” — was October 12, 2022. On October 4, 2022, the Project Sponsor provided new Project information related to Federal channel dredging and refinements to the information that had been submitted to NOAA as part of its EFH consultation request. The refinements pertain to the use of temporary sheet piling during export cable installation and submerged aquatic vegetation mitigation and monitoring. After discussion, BOEM and NOAA agreed to move the date for NOAA to make a completeness determination for the EFH assessment from October 12, 2022, to December 16, 2022, to allow BOEM time to revise the EFH assessment to incorporate the Project Sponsor’s recently-submitted information. BOEM submitted the revised EFH assessment to NOAA on November 16, 2022.

BOEM now requests that the Executive Director move the final date on the Federal Permitting Dashboard for completion of the EFH consultation to February 24, 2023. The length of the requested movement equates to the length of the date change made for NOAA’s determination that the EFH assessment is complete. NOAA has informed the Executive Director that it anticipates needing the full length of time originally allotted for issuing EFH conservation recommendations.

#### B. ESA

BOEM also initiated ESA consultation with NOAA on February 11, 2022, by submitting a Biological Assessment and request for consultation. NOAA determined that BOEM’s ESA consultation package was complete on September 12, 2022. However, the information provided by the Project Sponsor on October 4, 2022, is relevant not only to the EFH consultation but also to the ESA consultation. Accordingly, BOEM prepared and submitted to NOAA on November 16, 2022, an addendum to the Biological Assessment. BOEM is requesting additional time for ESA consultation to accommodate NOAA’s review of the Biological Assessment addendum.<sup>1</sup>

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<sup>1</sup> In its discussions with the Executive Director regarding this request, BOEM has noted that modifying the final completion date for the EFH and ESA consultations may impact the timing of issuance of BOEM’s NEPA Record of Decision (ROD) on its Environmental Impact Statement. Nonetheless, BOEM is not yet prepared to identify and request a date movement on the Federal Permitting Dashboard for the ROD because other ongoing federal authorizations and consultations also may impact the ROD schedule.

### C. Consultation on Date Movement with Project Sponsor

BOEM has informed the Executive Director that it consulted with the Project Sponsor regarding the extensions of the final completion dates for the EFH and ESA consultations, and that the Project Sponsor does not object.

Finally, the Executive Director consulted with the Project Sponsor regarding BOEM's requests, as required by 42 U.S.C. § 4370m-2(c)(2)(D)(i)(IV). The Project Sponsor questioned NOAA's decision to treat the refinements it shared with BOEM as "new information" that warranted NOAA pausing its review of the EFH and ESA consultation packages while BOEM revised the EFH assessment and prepared an addendum to the ESA Biological Assessment. The Project Sponsor further noted that it had thought it was engaged in an ongoing dialogue with NOAA and other stakeholders to determine the most appropriate mitigation strategy for submerged aquatic vegetation. The Project Sponsor informed the Executive Director that it therefore was puzzled about NOAA's determination that the additional information amounted to a "new" issue requiring revision of the EFH assessment. Despite those questions, the Project Sponsor confirmed to the Executive Director that it does not object to the requested extension of final completion dates.

## IV. Discussion

In discussions with the Executive Director, NOAA has explained that before it can review an EFH assessment for consultation and make EFH conservation recommendations, it requires all potential impacts to essential fish habitat to be included in the EFH assessment submitted by a consulting agency. Similarly, NOAA requires all project activities be included in an ESA Biological Assessment. NOAA also indicated that staffing constraints make it extremely difficult to undertake reviews if the relevant and requisite information is provided in a piece-meal fashion. The Executive Director notes that NOAA has announced it is addressing potential inefficiencies caused by resource constraints with the funds provided to NOAA in the Inflation Reduction Act of 2022<sup>2</sup> for the purpose of conducting more efficient, accurate, and timely reviews for planning, permitting, and approval processes.<sup>3</sup>

The Federal government should not create disincentives for project sponsors to submit timely, accurate, and up-to-date information as it becomes available. Thus, the Executive Director encourages NOAA to continue to work with BOEM and project sponsors to find ways to incorporate project refinements into the EFH and ESA consultation processes in a way that does not unduly slow the consultation or permitting process. The Executive Director also

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<sup>2</sup> Pub. L. No. 117-169, 136 Stat. 1818, (August 16, 2022).

<sup>3</sup> See <https://www.noaa.gov/news-release/statement-from-noaa-administrator-on-signing-of-historic-inflation-reduction-act>.

recognizes that, depending on the nature and extent of new or refined information, NOAA may have to undertake additional analyses to meet its statutory obligations. The Executive Director supports NOAA's effort to have a comprehensive understanding of a project's potential EFH impacts before making its EFH conservation recommendations. However, the Executive Director also notes that it is imprudent and counterproductive to create a disincentive for project sponsors to make refinements to a project that may result in fewer EFH or endangered species impacts and better project outcomes because submission of additional project information causes undue delays. Such an approach may discourage project sponsors from, for example, making project improvements or modifying construction methods to utilize best practices developed across the industry or new technologies identified during the course of the permitting process.

Nonetheless, given the facts as described above, extending the final completion dates for EFH and ESA consultations are warranted.

## V. Determination

For the reasons identified above, BOEM's extension requests are **GRANTED**, and the permitting timetable is revised as requested.



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Christine Harada  
Executive Director  
Federal Permitting Improvement Steering Council