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Executive Director Determination re Extending FAST-41 Final Completion Date by More Than 30 Days

January 19, 2022

Ten West Link; Right-of-Way Authorization

I. Summary

On January 7, 2022, the Department of the Interior, Bureau of Land Management (BLM), the lead agency for the preparation of an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA) to support permitting decisions for the Ten West Link transmission project (Project)—a “covered project” under Title 41 of the Fixing America’s Surface Transportation Act (FAST-41), 42 U.S.C. §§ 4370m *et seq.*—submitted a request to the Federal Permitting Improvement Steering Council (Permitting Council) Executive Director to extend the final completion date for the BLM action, “Right-of-way authorization,” from February 15, 2022, to August 15, 2022. BLM requests the extension because the BLM action is dependent on the project sponsor first submitting to BLM a bond, and the project sponsor will not confirm when the bond will be provided. For the following reasons, the extension request is **GRANTED**, and the permitting timetable has been 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 under a FAST-41 permitting timetable to a date more than 30 days after the final completion date originally established in the permitting timetable only if it consults with the project sponsor and requests and obtains Executive Director approval. After receiving an extension request from the lead agency, the Executive Director must consult with the project sponsor and make a determination on the record that approves or denies the request 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.



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42 U.S.C. §§ 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).

A completion date in a FAST-41 permitting timetable may not be modified within 30 days of the completion date. 42 U.S.C. § 4370m-2(c)(2)(D)(ii). If an agency does not timely modify a completion date in a FAST-41 permitting timetable, and subsequently fails to comply with the completion date, then the agency is in noncompliance with the permitting timetable, and is subject to special permitting timetable nonconformance protocols. 42 U.S.C. § 4370m-2(c)(2)(F).

III. Background

The original completion date for the BLM action, “Right-of-way authorization” for the Project was December 31, 2018. The project was considered “complete” for FAST-41 purposes on August 4, 2020, upon issuance of the right-of-way authorization. However, BLM had not yet issued the required Notice to Proceed to the project sponsor, and, in October 2021, the permitting timetable was placed back “in progress” pending the agency’s issuance of the Notice to Proceed to the Project sponsor. Pursuant to the stipulations in the right-of-way grant, issuance of the Notice to Proceed is conditioned on the project sponsor providing a bond to BLM. According to the Project Sponsor, provision of the bond is predicated on the California Public Utilities Commission (CPUC) completing review of the Project. Accordingly, and in consultation with the Project sponsor, BLM amended the “Right-of-way authorization” action on the Permitting Dashboard to include a final, “notice to proceed” component, with a final completion date of February 15, 2022.

The CPUC proceeding concluded on November 5, 2021. As the deadline for modifying BLM’s completion date approached (42 U.S.C. § 4370m-2(c)(2)(D)(ii)) without receipt of the project sponsor’s bond, on January 7, 2022, BLM reached out to the project sponsor via email and phone to confirm that the project sponsor would be providing the bond timely, or, in the alternative, to discuss modification of the “notice to proceed” completion date to accommodate the project sponsor’s bonding schedule. The project sponsor would not confirm any date for providing the bond. In the absence of any information from the project sponsor that would allow BLM to estimate when the project sponsor might provide the required bond, BLM requested that the Executive Director extend the “notice to proceed” final completion date until August 15, 2022.

The project sponsor did not respond to the Executive Director’s requests to consult with respect to BLM’s extension request pursuant to 42 U.S.C. § 4370m-2(c)(2)(D)(on the potential extension.



IV. Determination

Pursuant to 42 U.S.C. §§ 4370m-2(c)(2)(D)(ii) and 4370m-2(c)(2)(F), if the lead agency does not modify a FAST-41 completion date sufficiently early (i.e., outside the 30 day period within which date modifications are prohibited (a.k.a., the “30-day lockout period”)), and fails to comply with the completion date posted on the Permitting Dashboard, the agency will be in noncompliance with the permitting timetable, which additionally subjects the agency to special statutory nonconformance protocols, including: (1) establishing an “alternative” completion date for the missed completion date and all actions that are dependent on the missed completion date; (2) submitting to the Executive Director for publication on the Dashboard a written explanation why the completion date that was posted on the Dashboard was missed; and (3) submitting to the Executive Director for posting on the Dashboard monthly status reports describing all agency activities related to the covered project until the final action on the delayed environmental review or authorization is complete. 42 U.S.C. § 4370m-2(c)(2)(F).

The FAST-41 statute does not contemplate a circumstance in which the project sponsor fails to respond to an agency request for information of a consultation request from the Executive Director. Because the requirements of FAST-41 are directed primarily at agencies, the statute appears simply to presume timely project sponsor participation in the FAST-41 processes that are intended to ensure that the project sponsor’s interests are represented in the Federal government’s management of the permitting timetable.

An agency should not have to bear the burden of FAST-41 nonconformance because of a project sponsor’s failure to provide a response to a Federal agency’s request for information, particularly where, as here, the reason for the request was to accommodate the timing of the project sponsor’s action on which the Federal agency’s action depends. Accordingly, the Executive Director will process BLM’s extension request despite that neither BLM nor the Executive Director has been able to confirm the timing of further action from the Project sponsor.

The consultation with the Project sponsor is needed because BLM is attempting to manage the Project permitting timetable to accommodate the time it will take for the project sponsor to secure the bond that is necessary for the issuance of the Notice to Proceed. BLM has no control over, or input into, how, when, or under what circumstances the project sponsor will secure the bond. Provision of the bond is the only remaining action that needs to take place before BLM can issue the Notice to Proceed, and complete the “Right-of-way authorization” action on the Permitting Dashboard. Although 42 U.S.C. § 4370m-2(c)(2)(D)(i)(III) does not expressly identify such a circumstance as grounds for granting extension requests, requesting an extension of a permitting timetable completion date to accommodate the necessary action of a non-federal entity, such as a project sponsor, is a “relevant factor” on which the Executive Director may base granting a permitting timetable extension request.¹

¹ In part to help address issues like the one presented in this circumstance, the Executive Director, in coordination with the other Permitting Council members, currently is working to populate FAST-41 permitting timetables with



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Because the original final completion date for the BLM right-of-way authorization was December 31, 2018, any additional extension will by definition be in excess of 30 days from the original completion date. BLM’s request for an extension until August 15, 2022, is appropriate, because, in the absence of information from the project sponsor, BLM has no way to determine when the project sponsor may submit the necessary bond to BLM, and, by extension, when BLM might be able to issue the Notice to Proceed to the project sponsor. Accordingly, BLM’s extension request is **GRANTED**, and the completion date for the BLM “Right-of-way authorization,” and “notice to proceed” actions have been revised accordingly.

Christine Harada
Executive Director
Federal Permitting Improvement
Steering Council

estimated completion dates for all actions by non-Federal entities, including states and project sponsors. While FAST-41 does not require Federal agencies to include in their permitting timetables completion dates for project sponsor actions, including them may help Permitting Council agencies better manage their own permitting timetables by accounting for and tracking project sponsor actions on which Federal agency actions depend, such as posting a bond or submitting an application for a agency review. Including anticipated completion dates for project sponsor actions also will help communicate the expectation of the Permitting Council that FAST-41 covered project sponsors should be actively engaged, and in close communication with the authorizing agencies with respect to the substance and timing of the environmental review and authorization process for their FAST-41 covered projects. Because they are not required, any completion date for project sponsor action included in a FAST-41 permitting timetable is not subject to the FAST-41 requirements for creating or modifying permitting timetables.