



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 4, 2022

SunZia Southwest Transmission Project - Endangered Species Act Consultation

I. Summary

The SunZia Southwest Transmission Project (Project), sponsored by SunZia Transmission, 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 of Land Management (BLM) 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 BLM the lead agency for both NEPA and FAST-41.

BLM is responsible for undertaking consultation with the United States Department of the Interior Fish and Wildlife Service (FWS) pursuant to the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.* On October 19, 2022, BLM 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. BLM is requesting an extension of the final completion date by which FWS will conclude ESA consultation with BLM from December 6, 2022, to January 23, 2023. BLM requests this extension because, after BLM submitted its Biological Assessment and request for consultation, FWS asked BLM to submit additional information to ensure a complete consultation package that would enable FWS to complete formal consultation under the ESA. 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

BLM requested ESA consultation with FWS on June 14, 2022, by submitting an ESA consultation request package to FWS. At that time, the target date for the subsequent interim milestone on the Federal Permitting Dashboard — labeled “Consultation Package Deemed Complete-Formal” — was July 19, 2022. On July 11, 2022, FWS requested that BLM provide additional information related to river crossings and vegetative disturbance. FWS sought this information to better inform its analysis of potential impacts to the silvery minnow. BLM and FWS then agreed to move the date for FWS to deem the consultation package complete to September 9, 2022, to accommodate the time needed for BLM to gather the requested information and for FWS to review it.

FWS deemed BLM’s ESA consultation package complete on September 9, 2022, and the agencies now request that the final completion date for ESA consultation for the Project be moved to January 23, 2023. The requested date is in accordance with the regulatory timeframes specified by FWS for formal consultation. FWS has indicated it needs the full time period allotted by regulation to develop its Biological Opinion and conclude formal consultation for this Project.

BLM has indicated that modifying the final completion date for consultation under the ESA will not impact the timing of issuance of BLM’s NEPA Record of Decision on its

Environmental Impact Statement. BLM has informed the Executive Director that it has consulted with the Project Sponsor regarding this requested change to the final completion date for ESA consultation, and the Project Sponsor does not object to extending the date on the permitting timetable for the Project.

Finally, the Executive Director consulted with the Project Sponsor, as required by 42 U.S.C. § 4370m-2(c)(2)(D)(i)(IV). The Project Sponsor noted that BLM's requested extension could negatively impact the Project's construction schedule insofar as moving the date could prevent the Project Sponsor from timely obtaining approval from the Middle Rio Grande Conservation District for completing vegetative work the Project Sponsor had planned to do in February 2023 before the commencement of a seasonal restriction that runs from March - November. The Project Sponsor indicated that, if BLM and FWS are able to complete the ESA consultation in early January 2023, the Project Sponsor will still be able to timely apply for the necessary approval from the Middle Rio Grande Conservation District to complete the vegetative work ahead of the seasonal restriction. The Project Sponsor also informed the Executive Director that it has an excellent working relationship with FWS. The Project Sponsor further expressed its confidence that the FWS is working as expeditiously as possible to complete its review. As such, given its solid working relationship and successful collaboration to date with the federal agencies, the Project Sponsor has informed the Executive Director that it does not object to the requested extension.

IV. Discussion

In discussions with the Executive Director, BLM and FWS have explained that obtaining all the information necessary for ESA consultation is regularly an iterative process. FWS indicated that it is difficult to identify the level of detail necessary for consultation in advance of receiving an ESA consultation package from a lead agency because each ESA consultation must be based on the particular facts for each project, such as the species involved, project location, or the construction methods. Thus, after reviewing the initial ESA consultation package submitted by a lead agency, FWS often finds that it must request additional information. The Executive Director acknowledges that a reasonable amount of iterative discussion between the lead agency and FWS may be necessary to clarify the facts and obtain the requisite information for a particular project. Nonetheless, the Executive Director is mindful that excessive back-and-forth between federal agencies has the potential to result in deleterious impacts on project schedules. Thus, while assured that the iterative process underlying the request for extension of the final completion date for the ESA consultation in this instance is not only justified but will result in a better project outcome, the Executive Director continues to encourage lead agencies and the FWS to identify improvements to the overall federal authorization process by applying lessons learned from each ESA consultation.

The Executive Director notes that this is the second time in as many months that a lead agency has requested a greater than 30-day modification of an ESA consultation completion because of the need for a lead agency to provide additional information to FWS after submitting a consultation request package.¹ In both instances, the lead agency, FWS, and the project sponsor engaged in comprehensive coordination and all stakeholders expressed confidence that FWS is proceeding with its review efficiently and effectively. The Executive Director recognizes that a high level of coordination among and between federal agencies and project sponsors has provided the foundation for granting requested extensions of permitting timetables notwithstanding the potential for slight disruptions to project schedules.

The Executive Director also finds it significant that extending the completion date for ESA consultation will not extend the overall Project permitting timetable. Given these circumstances, extending the final completion date for ESA consultation is warranted.

V. Determination

For the reasons identified above, BLM’s extension request is **GRANTED**, and the permitting timetable is revised as requested.



Christine Harada (Nov 4, 2022 05:26 CDT)

Christine Harada
Executive Director
Federal Permitting Improvement Steering Council

¹ See “Executive Director Determination re Extending FAST-41 Final Completion Date by More than 30 Days” for Ocean Wind 1 Project, Endangered Species Act Consultation, dated September 23, 2022, available at: <https://www.permits.performance.gov/fpisc-content/ocean-wind-1-project-ed-determination-endangered-species-act-consultation-092322>