



# PERMITTING COUNCIL

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## FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL OFFICE OF THE EXECUTIVE DIRECTOR FINAL DETERMINATION OF COVERED PROJECT STATUS

Case No. 2020-001  
In Re Battle Born Solar Project

### I. Summary

Arevia Power, LLC (Project Sponsor) seeks “coverage” under Title 41 of the Fixing America’s Surface Transportation Act (FAST-41), 42 U.S.C. §§ 4370m *et seq.*, for the Battle Born Solar Project (Project), a 9,063 acre, 850 megawatt (MW) solar energy facility to be located on lands managed by the Department of the Interior’s (DOI) Bureau of Land Management (BLM) in northeast Clark County, Nevada. On September 29, 2020, DOI determined that the Project is not suitable for FAST-41 coverage, and the Executive Director of the Federal Permitting Improvement Steering Council (Permitting Council) accordingly did not create an entry for the Project on the FAST-41 Permitting Dashboard pursuant to 42 U.S.C. § 4370m-2(b)(2)(A)(ii).<sup>1</sup> The Project Sponsor timely appealed the adverse FAST-41 coverage determination to the Executive Director who, pursuant to 42 U.S.C. § 4370m-2(b)(2)(C)(i), must make a “final and conclusive” determination as to whether the Project is a FAST-41 covered project. If the Executive Director determines that the Project is a FAST-41 covered project, then the Executive Director must create an entry for the Project on the Federal Permitting Dashboard pursuant to 42 U.S.C. § 4370m-2(b)(2)(C)(ii).

After reviewing the record, the Executive Director determines that:

- (1) DOI did not determine that the project is not a “covered project” for the purpose of 42 U.S.C. §§ 4370m-2(b)(2)(A)(ii).
- (2) The Project meets the “covered project” criteria in 42 U.S.C. § 4370m(6)(A)(i) and therefore is a FAST-41 covered project.

Accordingly, Executive Director will create an entry for the Project on the Permitting Dashboard as required by 42 U.S.C. §§ 4370m-2(b)(2)(A)(ii) and 4370m-2(b)(2)(C)(ii).

### II. Discussion

#### A. Legal Background

FAST-41 improves the timeliness, predictability, and transparency of the Federal environmental review and authorization processes for “covered” infrastructure projects. 42 U.S.C. §§ 4370m-2, 4370m-4. FAST-41 defines a “covered project” as:

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<sup>1</sup> See 42 U.S.C. §§ 4370m(7) & 4370m-2(b). The Permitting Dashboard is available at <https://www.permits.performance.gov/>.



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any activity in the United States that requires authorization or environmental review by a Federal agency involving construction of infrastructure for renewable or conventional energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines, manufacturing, or any other sector as determined by a majority vote of the Council that--

- (i) (I) is subject to NEPA;  
(II) is likely to require a total investment of more than \$200,000,000; and  
(III) does not qualify for abbreviated authorization or environmental review processes under any applicable law; or
- (ii) is subject to NEPA and the size and complexity of which, in the opinion of the Council, make the project likely to benefit from enhanced oversight and coordination, including a project likely to require--
  - (I) authorization from or environmental review involving more than 2 Federal agencies; or
  - (II) the preparation of an environmental impact statement under NEPA.

*Id.* § 4370m(6)(A). Projects that are subject to the Department of Transportation’s procedures for Efficient Environmental Reviews for Project Decisionmaking pursuant to 23 U.S.C. § 139, and projects subject to the Department of the Army’s Project Acceleration Procedures pursuant to 33 U.S.C. § 2348, are not FAST-41 covered projects, regardless of their other attributes. 42 U.S.C. § 4370m(6)(B).

Participation in the FAST-41 program is voluntary. To become a FAST-41 covered project, a project sponsor must submit to the Permitting Council Executive Director and the appropriate facilitating or lead agency a notice of the initiation of a proposed covered project (also known as a FAST-41 Initiation Notice or “FIN”) demonstrating that the proposed project meets the definition of “covered project” in 42 U.S.C. 4370m(6)(A). *Id.* § 4370m-2(a)(1). Within 14 days of receiving the FIN, the Permitting Council Executive Director must create an entry for the project on the Permitting Dashboard, effectively “covering” the project, unless the Executive Director or the facilitating or lead agency determines that the project *is not* a covered project. *Id.* § 4370m-2(b)(2)(A)(ii).

If the facilitating or lead agency determines that the project is not a covered project, the project sponsor has 14 days to submit to the Permitting Council Executive Director additional information explaining why the project is a covered project. *Id.* § 4370m-2(b)(2)(B). Within 14 days of receiving a project sponsor’s additional information, the Permitting Council Executive director must make a “final and conclusive determination as to whether the project is a covered project” and, if it is a covered project, create an entry on the Permitting Dashboard for the



project. *Id.* § 4370m-2(b)(2)(C); *see* Office of Management and Budget and Council on Environmental Quality, Guidance for Federal Agencies Regarding the Environmental Review and Authorization Process for Infrastructure Projects, M-17-14 (Jan. 13, 2017) (FAST-41 Guidance) at 33.

## B. Factual Background

On September 14, 2020, the Project Sponsor submitted a FIN for the Project (Project FIN) to the Permitting Council Executive Director and DOI, the presumptive lead agency for the Project. *See Exhibit 1*, Project Sponsor FIN submission (including cover email, cover letter, Project FIN, and Technical Support Annex).<sup>2</sup> DOI advised the Executive Director that it was going to determine that the Project was not a FAST-41 covered project.

On September 29, 2020, the Executive Director received an email from DOI's designated FAST-41 chief environmental review and permitting officer (DOI email)<sup>3</sup> stating that, based on an attached BLM Information/Briefing Memorandum that raised concerns about the suitability of the proposed site for project development and the related BLM determination that the project is a "low priority" project, FAST-41 coverage for the Project is inappropriate. *See Exhibit 2*, DOI email at 1; *Exhibit 3*, September 25, 2020 Information/Briefing Memorandum for the Associate Deputy Secretary of the Department of the Interior from the BLM Nevada State Director Re: Battle Born Solar Project (BLM Information/Briefing Memorandum) at 1-2. Accordingly, the Executive Director did not create an entry on the Permitting Dashboard for the Project. It does not appear that DOI shared the DOI email or the BLM Information/Briefing Memorandum with the Project Sponsor, and FAST-41 does not require the agency to do so.

On September 29, 2020, the Project Sponsor submitted a letter to the Executive Director containing additional information and seeking a final and conclusive Executive Director determination as to whether the project is a covered project pursuant to 43 U.S.C. § 4370m-(b)(2)(C). *See Exhibit 4*, September 29, 2020 Letter from Ricardo Graf, Managing Partner, CDO Arevia Power, to Alexander Herrgott, Permitting Council Executive Director, Re: Battle Born Solar Project BLM-SNDO: N-83914 (Project Sponsor Letter). The Project Sponsor Letter states that, although the Project Sponsor is unaware of any agency determination that the Project is not a covered project, the Executive Director's failure to create a Dashboard entry for the Project within 14 days of FIN receipt constitutes a *de facto* determination that the Project is not a covered project, and therefore the 14-day period within which the Project Sponsor may seek a final and conclusive determination of Project coverage from the Executive Director has begun. *Id.* at 1-2; *see* 43 U.S.C. § 4370m-2(b)(2)(B).

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<sup>2</sup> The Project Sponsor previously submitted to the Permitting Council and DOI a draft of the Project FIN, which DOI deemed incomplete. *See* Project FIN cover letter at 1. The preliminary DOI determination is not at issue because the provisions of FAST-41 do not apply to draft FINs or to agency determinations regarding the sufficiency of draft FINs.

<sup>3</sup> *See* 42 U.S.C. §§ 4370m(2) & 4370m-1(b)(2)(A)(iii)(I).



## C. Analysis

FAST-41 does not require the Executive Director or the lead or facilitating agency to provide the project sponsor with notice of an adverse FAST-41 coverage determination. In the absence of such notice or any correspondence from the agencies indicating that the FIN is incomplete,<sup>4</sup> it is reasonable for a project sponsor to regard the Executive Director's failure to create an entry for a project on the Permitting Dashboard within the 14-day period specified in 42 U.S.C. §4370m-2(b)(2)(A)(ii) as a *de facto* determination that the project is not a covered project. Thus the 14-day period within which the Project Sponsor may seek from the Executive Director a final and conclusive determination of project coverage pursuant to 42 U.S.C. § 4370m-2(b)(2)(C) has begun, and the Project Sponsor Letter seeking such a determination was timely received.

Although the DOI email expresses reservations about the utility of FAST-41 coverage for the Project and the BLM Information/Briefing Memorandum suggests potential resource conflicts and possible tension between the requirements of FAST-41 and internal DOI procedures,<sup>5</sup> neither the DOI email nor the BLM Information/Briefing Memorandum conclude that the project is not a “covered project” as defined in 42 U.S.C. § 4370m(6)(A). In the absence of an agency determination that the Project is not a covered project, the Executive Director must add the Project to the Permitting Dashboard as a covered project. 42 U.S.C. § 4370m-2(b)(2)(A)(ii) (requiring the Executive Director to add a project to the Permitting Dashboard unless the Executive Director or the lead or facilitating agency determines that the project is not a covered project).

Moreover, there is every indication that the Project is a covered project. The Project, which involves the construction of a solar energy facility on BLM-managed lands, will “involve construction of infrastructure for renewable . . . energy production,” and is therefore properly categorized as a “renewable energy production” project for the purpose of 42 U.S.C. § 4370m(6)(A). *See* Project FIN at 1. The Project also will require “authorization or environmental review by a federal agency” because, at a minimum, it will require a BLM right-of-way and associated Federal approvals for which environmental review will be required. *See* Project FIN at

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<sup>4</sup> Pursuant to Section 4.6 of the FAST-41 Guidance, the 14-day period specified in 42 U.S.C. § 4370m-2(b)(2)(A)(ii) does not run if the Project FIN is deemed “incomplete.” FAST-41 Guidance at 31.

<sup>5</sup> It is unclear how FAST-41 coverage for the Project “would bypass the administrative remedies that were provided to the company, including appealing to the Interior Board of Land Appeals.... [and] would also bypass the BLM’s prioritization process for solar projects” as BLM asserts (BLM Information/Briefing Memorandum at 1), because FAST-41 coverage expressly does not supersede or affect any internal procedure or decision-making authority of any Federal agency or official, including DOI and BLM. *See, e.g.*, 42 U.S.C. § 4370m-6(d)(1) (FAST-41 does not supersede, amend, or modify any Federal statute or affect the responsibility of any Federal agency officer to comply with or enforce any statute); *id.* § 4370m-6(e)(ii) (“Nothing in [FAST-41] preempts, limits, or interferes with . . . any power, jurisdiction, responsibility, or authority that a Federal, State, or local governmental agency, metropolitan planning organization, Indian tribe, or project sponsor has with respect to carrying out a project or any other provisions of law applicable to any project, plan, or program.”); *see also id.* § 4370m-6(d)(2) (“Nothing in [FAST-41] . . . creates a presumption that a covered project will be approved or favorably reviewed by any agency”); *id.* § 4370m-6(e)(i) (“Nothing in this section preempts, limits, or interferes with . . . any practice of seeking, considering, or responding to public comment”); *id.* § 4370m-11 (NEPA unaffected).



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3, 7; BLM Information/Briefing Memorandum at 2 (acknowledging the need for additional cultural resource studies before potentially elevating the prioritization of the Project for BLM approval). Relatedly, BLM will prepare a NEPA document – most likely an environmental impact statement (EIS) – for the Project, which satisfies the requirement at 42 U.S.C. § 4370m(6)(A)(i)(I) that the project “is subject to NEPA.” *See* Project FIN at 7-8 (discussing the need for and general contents of the Project EIS); BLM Information/Briefing Memorandum at 2 (discussing potential use conflicts and impacts to historic resources).<sup>6</sup>

The Project FIN also credibly asserts that the Project, which is sponsored by entities experienced in the solar energy industry, is likely to require a total investment in excess of \$200 million. *See* Project FIN at 1, 6, 7. It does not appear that the Project qualifies for “abbreviated authorization or environmental review processes under any applicable law,”<sup>7</sup> and the Project is not subject to the Department of Transportation’s procedures for Efficient Environmental Reviews for Project Decisionmaking pursuant to 23 U.S.C. § 139, or the Department of the Army’s Project Acceleration Procedures pursuant to 33 U.S.C. § 2348. *See* Project FIN at 7-8.

Because the Project meets the “covered project” criteria in 42 U.S.C. § 4370m(6)(A)(i), it is a FAST-41 covered project.<sup>8</sup> Accordingly, the Executive Director will create an entry for the Project on the Permitting Dashboard as required by 42 U.S.C. §§ 4370m-2(b)(2)(A)(ii) and 4370m-2(b)(2)(C)(ii). Pursuant to Section 4.8 of the FAST-41 Guidance, the Executive Director will provide a copy of this determination to the Project Sponsor.

Dated: October 6, 2020

*Alexander Herrgott*

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Alexander Herrgott  
Executive Director  
Federal Permitting Improvement Steering Council

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<sup>6</sup> Pursuant to Sections 4.6 and 4.7 of the FAST-41 Guidance, a project might not meet the “subject to NEPA” requirement of 42 U.S.C. § 4370m(6)(A)(i)(I) if the FIN lacks information sufficient to determine whether NEPA applies or if the FIN raises questions regarding financial or technical feasibility. *See* FAST-41 Guidance at 32. DOI raised no such concerns about the Project FIN.

<sup>7</sup> *See* Project FIN at 7; FAST-41 Guidance at 22, 24 (providing guidance for interpreting “abbreviated environmental review process”).

<sup>8</sup> Because the Project is a covered project pursuant to 42 U.S.C. § 4370m(6)(A)(i), we need not determine whether the Project also meets the “discretionary” covered project standard pursuant to 42 U.S.C. § 4370m(6)(A)(ii). *See* FAST-41 Guidance at 18, 23, 33.