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Federal Permitting Improvement Steering Council Executive Director Determination of Covered Project Status

July 22, 2022

In Re Virgo Solar and Solar 373 Projects

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 Virgo Solar and Solar 373 projects (Projects). The Projects are two proposals to construct commercial scale solar projects on lands managed by the Department of the Interior’s (DOI) Bureau of Land Management (BLM). On June 24, 2022, DOI responded to the Project Sponsors’ notice of the initiation of a proposed covered project (FAST-41 Initiation Notice, a.k.a., “FIN”)¹ stating that, because BLM is considering conducting a competitive solar energy application process for the tracts of land on which the Projects are proposed, the Projects are not “appropriate for inclusion on the FAST-41 Permitting Dashboard at this time.”²

Interpreting DOI’s communications as determinations that the projects are not FAST-41 “covered projects” as defined in 42 U.S.C. § 4370m(6), on July 7, 2022, the Project Sponsor submitted further information to the Executive Director of the Federal Permitting Improvement Steering Council (Permitting Council) pursuant to 42 U.S.C. § 4370m-2(b)(2)(B), explaining why the projects are FAST-41 covered projects. The Project Sponsor seeks an Executive Director determination, pursuant to 42 U.S.C. § 4370m-2(b)(2)(C), that the Projects are FAST-41 covered projects, which would require the Executive Director to create an entry for each Project on the Federal Permitting Dashboard.³

After receiving the Project Sponsor’s July 7, 2022, letters, the Office of the Executive Director (OED) consulted with DOI with respect to DOI’s June 24, 2022, determination that the Projects are not “appropriate for inclusion on the FAST-41 Permitting Dashboard at this time.” After review, the Executive Director concludes as follows:

- (1) In its response to the Project Sponsor, DOI did not specifically address whether the Projects are “covered projects” pursuant to 42 U.S.C. § 4370m-2(b)(2)(A)(ii).
- (2) Pursuant to BLM regulations implementing the Federal Land Policy and Management Act of 1976 (FLPMA), BLM determined that competitive interest exists in the areas where the Project Sponsor proposes to locate the Projects and will hold a competitive sale for the right to apply for a right-of-way (ROW) in each area.

¹ See Exhibit 1 (Project FINs).

² See Exhibit 2 (DOI Letters).

³ See Exhibit 3 (Project Sponsor Further Explanations).

- (3) Pursuant to BLM's regulations, the winner of each competitive process will obtain the exclusive right to apply for a ROW on which to propose a project in the competed area; all other bidders will not be able to apply for a project in that location and will be refunded their application fees pursuant to BLM's regulations.
- (4) Because the Project Sponsor is not eligible to apply for a BLM ROW for either of the Projects until it has won the corresponding competitive process for each, it is not yet legally possible for the Project Sponsor's notice of the initiation of a proposed covered project (FIN) to contain a "proposed project" for purposes of 42 U.S.C. §§ 4370m-2(a)(1)(A) and 4370m-2(a)(1)(C)(i)-(v).
- (5) Adding the Projects to the Permitting Dashboard pursuant to 42 U.S.C. § 4370m-2(b)(2)(C)(ii) before the Project Sponsor, or possibly a different project sponsor, has prevailed in BLM's competitive sale would require DOI and the relevant Federal agencies immediately to engage in the potentially meaningless administrative exercise of coordinating with the Project Sponsor, the State, and each other, in developing a FAST-41 coordinated project plan (CPP) and comprehensive permitting timetable for each of the Projects within 60 calendar days of Dashboard addition.
- (6) Adding the Projects to the Permitting Dashboard pursuant to 42 U.S.C. § 4370m-2(b)(2)(C)(ii) likewise may require DOI and other Federal agencies to engage in the similarly meaningless CPP and permitting timetable process for any of the other project sponsors who are competitively interested in obtaining a ROW in the same area and who seek FAST-41 coverage, despite that only project sponsors with winning bids will ultimately prevail in obtaining the right to apply for a project ROW.
- (7) Administering FAST-41 to require DOI to undertake such resource-intensive administrative processes before BLM has identified the "preferred applicant" for each ROW pursuant to BLM's competitive application issuance regulations would unreasonably interfere with the administration of BLM's ROW program, in violation of the FAST-41 limitations provision at 42 U.S.C. § 4370m-6(e)(2).

Accordingly, the Executive Director agrees with DOI that adding the projects to the Permitting Dashboard at this time is inappropriate.

This determination does not prejudice the Project Sponsor's ability to seek or obtain FAST-41 coverage for either or both Projects if the Project Sponsor prevails in either or both of BLM's upcoming competitive processes. The Project Sponsor also may seek FAST-41 coverage for a project located on lands that are not subject to competitive application rights or a competitive ROW issuance process.

II. Discussion

A. Legal Background

1. FAST-41 "Covered Project"

Through posting and management on the Federal Permitting Dashboard, FAST-41 provides procedural and transparency benefits to "covered projects." FAST-41 defines a

“covered project,” in relevant part, as follows:

42 U.S.C. § 4370m(6) Covered project

(A) In general

The term “covered project” means 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, carbon capture, or any other sector as determined by a majority vote of the Council that—

- (i) (I) is subject to NEPA [*i.e.*, the National Environmental Policy Act];
- (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;

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With certain exclusions that are not relevant here, a proposed project that meets these criteria is a “covered project” for purposes of FAST-41.

2. FAST-41 Notice of the Initiation of a Proposed Covered Project (a.k.a., “FIN”) Requirements

Participation in the FAST-41 program is voluntary. To become a FAST-41 covered project, a Project Sponsor must submit a FIN to the Executive Director and the appropriate facilitating or lead agency.⁴ Pursuant to 42 U.S.C. § 4370m-2(a)(1)(C), the FIN must contain the following information:

- (i) a statement of the purposes and objectives of the proposed project;
- (ii) a concise description, including the general location of the proposed project and a summary of geospatial information, if available, illustrating the project area and the locations, if any, of environmental, cultural, and historic resources;

⁴ A “facilitating agency” is the agency responsible for reviewing a project FIN and carrying out the primary agency functions under FAST-41 until a lead agency is identified for the project pursuant to the National Environmental Policy Act (NEPA). *See* 42 U.S.C. §§ 4370m(13) (defining “facilitating agency”); 4370m(15) (defining “lead agency”); 4370m-1(c)(1)(B); and 4370m-2(a)(5). Pursuant to 42 U.S.C. § 4370m-1(c)(1)(B), the Executive Director has designated DOI as the facilitating agency for solar projects. *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 20.

- (iii) a statement regarding the technical and financial ability of the project sponsor to construct the proposed project;
- (iv) a statement of any Federal financing, environmental reviews, and authorizations anticipated to be required to complete the proposed project; and
- (v) an assessment that the proposed project meets the definition of a covered project under section 4370m of this title and a statement of reasons supporting the assessment.

3. Processing a FIN and Determining Project Coverage

The facilitating or lead agency first determines if the FIN is complete. If the FIN lacks sufficient or actionable information for any of the above five criteria, then the following processes and their associated timetables do not apply. *See* FAST-41 Guidance at 31-33.

Within 14 days of receiving a complete FIN, the Permitting Council Executive Director must create an entry for the project on the Permitting Dashboard unless the Executive Director, or the facilitating or lead agency, determines that the project sponsor failed to demonstrate in the FIN that the project is a covered project.⁵ 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 further information explaining why the project is a covered project.⁶ Within 14 days of receiving a project sponsor’s additional information, the 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.⁷

4. The FAST-41 Limitations Provision

Pursuant to 42 U.S.C. § 4370m-6(e)(2), 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.” Accordingly, the Permitting Council is careful to administer FAST-41 provisions in a way that avoids interfering in or confounding the administration of any Federal regulatory or permitting program and harmonizes the implementation of FAST-41’s provisions with existing agency requirements and programs.⁸

5. Competitive Application Offering for BLM ROWs for Solar Projects

The BLM issues ROWs for solar energy projects pursuant to subchapter V of the Federal

⁵ 42 U.S.C. §§ 4370m-2(a)(1)(C)(v), 4370m-2(b)(2)(A)(ii).

⁶ *Id.* § 4370m-2(b)(2)(B).

⁷ *Id.* § 4370m-2(b)(2)(C).

⁸ *See also* Federal Permitting Improvement Steering Council, Data Management Guide for FAST-41 Covered Projects on the Permitting Dashboard (DMG), at 36 (April 2022) (where an existing agency requirement conflicts with a FAST-41 requirement, the FAST-41 requirement must move aside, and the existing agency requirement controls).

Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771, and implementing regulations at 43 C.F.R. part 2800. Pursuant to 43 C.F.R. § 2804.30, for solar energy development outside designated leasing areas, BLM may offer the right to apply for a solar ROW through a competitive process. Pursuant to BLM's regulations, the successful bidder for an area becomes the "preferred applicant."⁹ Only the preferred applicant may apply for a solar energy development ROW grant authorizing the preferred applicant to locate a solar energy project on the competed area.¹⁰ Unsuccessful bidders will be refunded bids and application filing fees, less reasonable costs incurred by the United States.¹¹

B. Factual Background

On June 10, 2022, the Project Sponsor submitted two FINs to the Executive Director and DOI (the FAST-41 facilitating agency for solar projects)¹² seeking FAST-41 covered project status for the Projects. The Projects described in the FINs would be located on BLM-managed lands that are outside BLM designated leasing areas in the Amargosa Valley area of Clark County, Nevada.¹³ In response to the FINs, on June 24, 2022, DOI sent two letters to the Project Sponsor stating that BLM had received competitive interest in the same geographic areas on which the Project Sponsor proposed to locate the Projects, and BLM is considering using a competitive bid procedure for solar development of those areas.¹⁴ The letters convey that due to BLM's interest in pursuing competitive issuance of application rights to obtain ROWs for the tracts, the Projects are not "appropriate for inclusion on the FAST-41 Permitting Dashboard at this time."¹⁵ The letters do not discuss any FAST-41 requirements or criteria, including the FAST-41 FIN submission requirements or covered project criteria.

On July 7, 2022, the Executive Director received two virtually identical letters from the Project Sponsor, one entitled, "ArreviaVirgoAppeal," and the other entitled, "Arrevia373Appeal" (collectively, Project Sponsor Letters). The Project Sponsor Letters each invoke the FAST-41 provision at 42 U.S.C. § 4370m-2(b)(2)(B) that allows Project Sponsors to submit to the Executive Director "further explanation" as to why a project is a FAST-41 covered project.¹⁶ Each Project Sponsor Letter explains how, in the Project Sponsor's view, the Project meets the FAST-41 "covered project" definition.¹⁷ The Project Sponsor Letters also state that DOI "provided no rationale or justification on what eligibility criteria for FAST-41 coverage has not been met by the [Projects]" and request that "[i]f there are any eligibility issues that are identified during the Executive Director's review that were not identified in the enclosed DOI letter, [that] the Executive Director determination allows for [the Project Sponsor] to respond to any newly identified eligibility concern as it is impossible to provide further information to an

⁹ 43 C.F.R. § 2804.30(f).

¹⁰ *Id.* § 2804.30(g).

¹¹ *Id.* §§ 2804.12(c)(2), 2804.30(e)(4).

¹² *See* FAST-41 Guidance at 20.

¹³ Exhibit 1 (Project FINs).

¹⁴ *See* Exhibit 2 (DOI Letters).

¹⁵ *Id.*

¹⁶ *Id.* at 1.

¹⁷ *Id.*

eligibility criterion not clearly identified in the DOI letter.”¹⁸ The Project Sponsor Letters note that the Project Sponsor paid the BLM application fee of \$15/acre, totaling \$94,395 for the Virgo Project and \$80,220 for the Solar 373 Project, and that BLM has deposited the checks.¹⁹

After receiving the Project Sponsor Letters, the Executive Director met with relevant DOI and BLM officials to discuss the Project Sponsor FINs, DOI’s responses, and the Project Sponsor Letters. During that discussion, the Executive Director learned that BLM has received at least 10 other solar project applications for the same parcels on which the Projects would be located, and, therefore, BLM fully intends to competitively offer application rights to develop the parcels pursuant to 43 C.F.R. § 2804.30. The BLM has sent “interested party letters” to all parties who have expressed interest in these tracts, including the Project Sponsor, to confirm competitive interest before engaging in a competitive auction of these parcels.²⁰

C. Analysis

As noted in the Project Sponsor Letters, the DOI letters do not directly state that the Projects described in the FINs fail to meet the definition of a covered project at 42 U.S.C. § 4370m(6). Thus, the DOI Letters arguably do not actually make a determination regarding the covered project status of the projects described in the FINs. Without reaching the question of whether the Projects are FAST-41 covered projects, the DOI letters assert that, because BLM has identified competitive interest in the specific geographic areas in which the Project Sponsor proposes to locate its projects and intends to competitively identify a “preferred applicant” for these areas pursuant to its competitive application rights issuance regulations, adding the Projects to the Dashboard as FAST-41 covered projects is inappropriate at this time. DOI’s determination that the Projects are not appropriate for inclusion on the FAST-41 Permitting Dashboard at this time is predicated on the conclusion that the FIN does not describe a “proposed project” because the Project Sponsor will not be eligible to propose a project unless and until BLM’s competitive process is concluded and the Project Sponsor is the “preferred applicant.” The Executive Director agrees.

It is axiomatic that agencies should administer their statutory programs to give full force and effect to all aspects of the statute they administer and avoid rendering superfluous any applicable statutory provision.²¹ In this circumstance, relevant statutory provisions include the FIN requirements contained in 42 U.S.C. § 4370m-2(a)(1)(C), and the FAST-41 limitations

¹⁸ *Id.* at 2.

¹⁹ *Id.*

²⁰ See Exhibit 4 (Interested Party Letter).

²¹ See *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991); *Inhabitants of Montclair Tp. v. Ramsdell*, 107 U.S. 147, 152 (1883).

provision at 42 U.S.C. § 4370m-6(e)(2). These provisions provide justification for declining to add the Projects to the Dashboard as FAST-41 covered projects at this time.

1. The FIN Does Not Contain a “Proposed Project.”

Before a project can be posted to the Permitting Dashboard, the Executive Director and the facilitating agency must receive a complete and sufficient FIN.²² The FIN must meet five criteria, only one of which is a demonstration that the project meets the definition of a covered project. Each of the five criteria, on the other hand, requires there to be a “proposed project.” But under applicable BLM regulations for solar ROW issuance, a project sponsor cannot even propose a project until it first obtains the right to do so by winning the competitive offer and becoming the “preferred applicant.” 43 C.F.R. § 2804.30(f); BLM Competitive Offering Letter at 3 (characterizing the competitive process as a “competitive application offering”). Accordingly, and in light of the applicable BLM regulatory program, the Project Sponsor FINs do not contain a “proposed” project as required.

The FAST-41 Guidance considers the issue of FIN deficiency and explains that when a deficient FIN is received, the statutory provisions regarding determining whether a project is a covered project and the processes for adding a covered project to the Permitting Dashboard do not apply.²³ Indeed, the Permitting Council has rejected project FINs that do not meet the requirements of 42 U.S.C. § 4370m-2(a)(1)(C). For example, in 2020, the Executive Director rejected a FIN for the Graphite One/Graphite Creek project because the FIN failed to sufficiently articulate a “project” as required.²⁴

Because, in circumstances where BLM offers the right to apply for a solar energy development ROW grant through a competitive process BLM’s regulations do not allow the Project Sponsor to propose a project until *after* the Project Sponsor wins the competitive offer, the FINs submitted by the Project Sponsor do not describe a “proposed project” for the purposes of 42 U.S.C. § 4370m-2(a)(1)(C). If the Project Sponsor wins the exclusive right to apply for one or both of the ROWs on which it proposes to locate a project, the Project Sponsor may submit a FIN seeking FAST-41 coverage for such a project[s].

2. Adding the Project to the Dashboard as a FAST-41 Covered Project Would Interfere with BLM’s Administration of its ROW Issuance Program under FPLMA.

Because FAST-41 is a blanket statutory scheme layered over a panoply of disparate pre-existing Federal land use management and permitting regimes under a variety of Federal statutes, the FAST-41 limitations provision at 42 U.S.C. § 4370m-6(e)(2) counsels that FAST-41’s provisions must be applied in light of BLM’s FLPMA regulatory program for identifying a preferred applicant for a solar project ROW in circumstances where competition exists in the

²² See FAST-41 Guidance at 31.

²³ FAST-41 Guidance at 31-33.

²⁴ See July 20, 2020 Letter from A. Herrgott to D. Smith re Coverage of Graphite One/Graphite Creek Project Under Title 41 of the Fixing America’s Surface Transportation Act (FAST-41).

same BLM ROW area. BLM acknowledges that, if there were no competitive interest in the tracts for which the Project Sponsor seeks a ROW, then likely there would be no barrier to FAST-41 coverage and posting on the Dashboard for the Projects. However, BLM has determined that there are at least 10 other prospective applicants interested in proposing to acquire solar energy ROWs in precisely the same areas as those sought by the Project Sponsor. BLM has sent interested party letters to interested project sponsors, including the Project Sponsor. Pursuant to BLM's regulations, BLM will not consider or begin to process any of the possible applicants' proposals—including identifying either the environmental reviews and authorizations needed for the project or cooperating and participating agencies—until *after* BLM completes the competitive process and identifies a winner. Once identified, the winner does not actually obtain the ROW on which to locate the project. Instead, the winner becomes the preferred applicant, which, after paying BLM the winning bid amount, will gain the *exclusive right to apply* to obtain a ROW from BLM for its solar project. Only after BLM has identified the preferred applicant will BLM process the application and engage in the environmental review and authorization process contemplated for Dashboard posting and management by the FAST-41 statute. All the unsuccessful participants in the competitive offer will be unable to apply for a ROW in the competed area, will not have their projects subject to the Federal environmental review and authorization process, and will be refunded their application fees according to BLM's regulations.

Adding a project to the Dashboard as a FAST-41 covered project before the BLM competitive process is complete would impermissibly interfere with BLM's administration of solar energy ROW issuance program, potentially create substantial unnecessary administrative burden for BLM, the Executive Director, cooperating and participating agencies, and the State, and lead to absurd results.²⁵ Because 42 U.S.C. § 4370m-6(e)(2) requires the Permitting Council to administer FAST-41's provisions to avoid such outcomes, the Projects cannot be added to the FAST-41 Dashboard, or be subject to FAST-41's provisions, unless the Project Sponsor has been identified as the preferred applicant follow BLM's competitive process.

The issue relates to the interplay between FAST-41's requirements and the requirements of BLM's regulatory program for selecting preferred applicants and subsequently processing their solar ROW applications. If the Executive Director added the Projects to the Permitting Dashboard as the Project Sponsor desires, then 42 U.S.C. § 4370m-2(c)(1)(A) would require BLM to create a CPP and comprehensive permitting timetable for each Project within 60 calendar days. Pursuant to FAST-41 statutory requirements, the CPP must be developed in consultation with each cooperating and participating agency and must establish a concise plan for coordinating all public and agency participation in, and completion of, any required Federal environmental review and authorization for the project.²⁶

Creating a CPP and a comprehensive permitting timetable for a FAST-41 covered project within 60 days of adding the project to the Permitting Dashboard is no small task and requires

²⁵ Agencies should interpret statute to avoid an absurd or manifestly unjust result. *See Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989).

²⁶ 42 U.S.C. § 4370m-2(c)(1)(A). For the purposes of FAST-41, the term “environmental review” means “the agency procedures and processes for applying a categorical exclusion or for preparing an environmental assessment, an environmental impact statement, or other document required under [the National Environmental Policy Act].” 42

the immediate mobilization and commitment of significant agency and interagency resources. Requiring BLM, the cooperating and participating agencies, the State, and potentially the Executive Director and the Office of Management and Budget to devote such resources to a project that has yet to participate in, much less win, a competitive process for obtaining the exclusive right to apply for a Federal ROW on which to locate the project, would cause premature and unnecessary dislocation in BLM's ROW issuance program. It would force BLM, as well as the cooperating and participating agencies, to evaluate various aspects of the project and its project's merits *before* BLM has even determined, pursuant to its regulatory program, which project has won the right to apply for such an evaluation. If the Project Sponsor does not prevail in the competitive offer process, then the interagency coordination needed for the creation of the CPP and the work expended to create a comprehensive permitting timetable for either of the Projects would have been an entirely wasteful and fruitless expenditure of substantial Federal resources. Worse, if the Projects were added to the FAST-41 Dashboard at this point in the process, then presumably any of the other eight project proponents that have expressed interest in this designated leasing area would be able to seek and immediately obtain FAST-41 coverage as well. This is precisely the result that the FAST-41 limitations provision is intended to prevent.

III. Conclusion

The Executive Director will not add the Projects to the Permitting Dashboard pursuant to 42 U.S.C. § 4370m-2(b)(2) because the Project Sponsor does not yet have a proposed project to include in a FIN for FAST-41 coverage insofar as BLM has decided to issue the right to apply for a ROW grant competitively. Additionally, adding the Projects to the Permitting Dashboard would impermissibly interfere with BLM's administration of its ROW grant issuance program under FLPMA pursuant to 42 U.S.C. § 4370m-6(e)(2).

The Executive Director generally will not add projects to the Dashboard as "covered projects" in circumstances where an agency has decided to competitively issue exclusive rights to apply for project approval in a particular location (including competitive lease sales and sales of easements and ROWs). In such circumstances, the Executive Director only will consider the FINs of project sponsors that have succeeded in obtaining the exclusive entitlement to receive Federal consideration of the project and undergo the Federal environmental review and authorization process to which FAST-41 applies.

This opinion does not prejudice the ability of project sponsors to seek and obtain FAST-41 coverage for projects that are not subject to competitive application or lease issuance processes. As BLM acknowledges, but for competitive interest among 10 potential applicants and BLM's decision to undertake a competitive offering process, the Projects likely would have been added to the Dashboard as FAST-41 covered projects, for which BLM would have timely proceeded to create CPPs and permitting timetables.

U.S.C. § 4370m(11). The term "authorization" means "any license, permit, approval, finding, determination, or other administrative decision issued by an agency and any interagency consultation that is required or authorized under Federal law in order to site, construct, reconstruct, or commence operations of a covered project administered by a Federal agency or, in the case of a State that chooses to participate in the environmental review and authorization process . . . a State agency." 42 U.S.C. § 4370m(11).

This decision does not prejudice the ability of the Project Sponsor to seek and obtain FAST-41 coverage for either Project in the event the Project Sponsor is successful in obtaining the exclusive right to apply for a BLM ROW, or for obtaining FAST-41 coverage for a different project located on lands that are not subject to a competitive rights or competitive ROW issuance process.

Dated: July 22, 2022



Christine Harada
Executive Director
Federal Permitting Improvement Steering Council