



PERMITTING COUNCIL

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Executive Director Determination on Request to Extend FAST-41 Final Completion Date by More Than 30 Days

July 28, 2023

Seminole Pumped Storage Project—Section 404 (USACE), ESA (FWS), Lease of Power Privilege (BOR), Right-of-Way Authorization (BLM)

I. SUMMARY

The Seminole Pumped Storage (Project), sponsored by rPlus Hydro (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 Federal Energy Regulatory Commission (FERC) has 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 FERC the lead agency for both NEPA and FAST-41.¹

On July 10, 2023, FERC published a public notice that FERC had revised the permitting timetable completion dates for its own actions related to the Project.² On July 13, 2023, in its role as lead agency, FERC submitted a request to the Federal Permitting Improvement Steering Council Executive Director (Executive Director) to extend completion dates for the Federal cooperating agencies’ actions on the Project’s permitting timetable. FERC’s request includes an extension of the final completion date for the United States Army Corps of Engineers (USACE) permit decision under Section 404 of the Clean Water Act, 33 U.S.C. § 1344 (Section 404). FERC also requests an extension for consultation with the Department of the Interior, Fish and Wildlife Service (FWS) pursuant to the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.* FERC additionally requests an extension for the Department of the Interior, Bureau of Reclamation (BOR) Lease of Power Privilege, and the Department of the Interior, Bureau of Land Management (BLM) Right-of-Way Authorization.

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

¹ 42 U.S.C. § 4370m(15).

² <https://elibrary.ferc.gov/eLibrary/filedownload?fileid=418CCE15-1853-C262-964C-89413F500000>. Pursuant to the FAST-41 savings and limitations clauses at 42 U.S.C. §§ 4370m-6(d)(1) and 4370m-6(e)(2), respectively, in light of FERC’s regulations preventing disclosure of the nature and timing of proposed actions by the Commission (18 C.F.R. § 3c.2(b)), FERC is not required to obtain Executive Director authorization to modify FERC’s final completion dates on a FAST-41 permitting timetable. *See* Attachment A for additional information.

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 in a FAST-41 covered project permitting timetable by more than 30 days beyond the original final completion date only after consulting with the project sponsor and obtaining Executive Director approval.³ After receiving an extension request, the Executive Director consults with the project sponsor to make a determination on the record whether to grant the requested date change. The Executive Director’s determination is 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.

42 U.S.C. §§ 4370m-2(c)(2)(B) and 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).

III. BACKGROUND

After FERC established and published the original permitting timetable for the Project, the Project Sponsor agreed to conduct additional studies requested by other Federal and state agencies reviewing the Project. The Project Sponsor indicated it could submit the additional studies and information by November 2023.

Following an assessment of the acceptability of the requests for additional studies,⁴ FERC issued letters on July 5, 2023, requiring the additional studies and imposing a deadline of November 30, 2023, for submission of the study reports and additional information. On July 10, 2023, FERC modified the completion dates for its NEPA, licensing, and Section 106 consultation actions, as shown in Table 1.

³ See note 2, *supra*.

⁴ See <https://elibrary.ferc.gov/eLibrary/filedownload?fileid=01EB683D-B96F-CE9F-9701-892715300000> and <https://elibrary.ferc.gov/eLibrary/filedownload?fileid=01EB683D-B96F-CE9F-9701-892715300000>.

Table 1

Action Agency	Action	Milestone	Original Date	Requested Date
FERC	NEPA	Issuance of Notice of Intent to Prepare Environmental Impact Statement (EIS)	11/12/2023	4/26/2024
FERC	NEPA	Scoping	11/12/2023	4/26/2024
FERC	NEPA	Official Notice of Availability of a Draft EIS published in the Federal Register	5/15/2024	10/25/2024
FERC	NEPA	Official Notice of Availability of a Final EIS published in the Federal Register	11/22/2024	5/9/2025
FERC	NEPA	Issuance of Lead Agency Record of Decision (ROD)	2/20/2025	9/18/2025
FERC	Non-Federal Hydropower Licenses	Application Deemed Complete	8/30/2023	2/12/2024
FERC	Non-Federal Hydropower Licenses	Final Decision/Agency Action	2/20/2025	9/18/2025
FERC	Section 106	Section 106 Consultation Concluded	2/20/2025	9/18/2025

FERC extended the “application deemed complete” date for the non-federal hydropower license to account for the time needed for the Project Sponsor to complete the additional studies and submit the required information. The final licensing decision and all the NEPA completion dates cascade from the date when the application is deemed complete. The duration between completion dates remains consistent between the original and modified permitting timetables with the exception of the NEPA Record of Decision (ROD) and final license decision.⁵ On the original permitting timetable the ROD and license decision followed three months after issuance of the Final EIS, but on the modified permitting timetable the ROD and license decision are four months after the Final EIS due to the timing of Commission meetings. The Commission is not scheduled to meet three months after the Final EIS, which would be August 2025, and therefore

⁵ The ROD and final licensing decision occur on the same date as they are the same issuance (*i.e.*, the Commission’s license order).

the completion date for the ROD and license decision are the subsequently scheduled Commission meeting, which is September 18, 2025. Finally, FERC modified the Section 106 consultation completion date consistent with the ROD and license decision because the Commission’s Orders include the requirement that the Project Sponsor comply with any agreement resulting from the Section 106 consultation process.

After revising its own schedule, on July 13, 2023, FERC submitted a request to modify the cooperating agencies’ interim and final completion dates, as shown in Table 2.

Table 2

Action Agency	Action	Milestone	Original Date	Requested Date
USACE	Section 404	Final Verification/Permit Decision Rendered	12/23/2024	10/20/2025
FWS	ESA	ESA Consultation Request Package Submitted	5/15/2024	10/25/2024
FWS	ESA	FWS determines ESA Consultation Package is Complete - Formal	7/1/2024	1/24/2025
FWS	ESA	ESA Consultation Concludes	9/27/2024	3/24/2025
BOR	Lease of Power Privilege	Issuance of the Lease of Power Privilege Contract	8/20/2025	3/18/2026
BLM	Right-of-Way	Final decision/agency action	7/21/2025	2/18/2026

The timing of the completion dates for the Section 404, ESA, Lease of Power Privilege, and Right-of-Way Authorization actions are each dependent on the timing of FERC’s actions. With respect to the ESA, FWS typically asks consulting agencies to submit a consultation request package when the Draft EIS is published. This is true here, with the ESA consultation request package date proposed to be extended to October 25, 2024—the same date FERC intends to issue the Draft EIS. The remaining ESA dates are proposed to be moved proportionately with the modified date for submission of the consultation request package.

The timing of USACE's Section 404 permit decision hinges on the conclusion of Section 106 consultation, ESA consultation, and FERC's issuance of a ROD. Thus, USACE is proposing to extend the date for issuing its permit decision to 30 days after FERC's ROD is issued and Section 106 consultation is concluded and 6 months after the conclusion of ESA consultation. Similarly, the authorizations from BOR and BLM are dependent on issuance of a final EIS and ROD that adequately address those agencies' actions, and BOR and BLM are seeking extensions that correlate proportionately with the date changes FERC already has implemented for its own actions.

Consultation with Project Sponsor on Extension Requests

Prior to submitting its extension request to the Executive Director, FERC consulted with the Project Sponsor per 42 U.S.C. § 4370m-2(c)(2)(D)(i)(I) and represents that the Project Sponsor has no objection to the proposed permitting timetable extension.

The Executive Director also has consulted with the Project Sponsor, as required by 42 U.S.C. § 4370m-2(c)(2)(D)(i)(IV), and the Executive Director has confirmed the Project Sponsor does not object to the requested permitting timetable modifications.

IV. DISCUSSION

FERC staff determined the need for the additional studies and information to be submitted by the Project Sponsor in response to requests from the various cooperating agencies and modified its own completion dates consistent with that decision. The cooperating agency completion dates presented to the Executive Director for modification are dependent on the timing of FERC's actions and are proposed to be modified consistent with FERC's completion date extensions. Given that the requested modifications must be made to maintain a consistent and coordinated permitting timetable in response to FERC's previous changes, which are not subject to Executive Director review and approval, the requested extensions are warranted.

V. DETERMINATION

FERC's request to modify the cooperating agencies' completion dates on the permitting timetable is **GRANTED**, and the permitting timetable shall be revised accordingly.



Eric Beightel
Executive Director
Federal Permitting Improvement Steering Council

ATTACHMENT A

Under Title 41 of the Fixing America’s Surface Transportation Act (FAST-41), 42 U.S.C. §§ 4370m *et seq.*, a permitting timetable modification that necessitates an extension of a final completion date by more than 30 days after the original final completion date must be submitted to the Federal Permitting Improvement Steering Council Executive Director (Executive Director) for approval.⁶ Regulations promulgated by the Federal Energy Regulatory Commission (FERC), however, provide that “the nature and time of any proposed action by the Commission are confidential and shall not be divulged to anyone outside the Commission.” 18 C.F.R. § 3c.2(b). Pursuant to the FAST-41 savings clause at 42 U.S.C. § 4370m-6(d)(1), nothing in FAST-41 “supersedes, amends, or modifies any Federal statute or affects the responsibility of any Federal officer to comply with or enforce any statute.” Relatedly, the limitations provision at 42 U.S.C. § 4370m-6(e)(2) provides that 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.” In light of these statutory provisions, the Executive Director is careful to administer FAST-41 in a way that avoids unreasonably interfering with or confounding an agency’s administration of any Federal regulatory or permitting program.⁷

Because FERC’s regulatory program prohibits the anticipatory disclosure of permitting timetable actions and completion dates, which otherwise would be required by FAST-41, FERC’s completion dates cannot be subject to the FAST-41 requirement that Executive Director authorize the extension of FERC’s completion dates at least 30 days before they are scheduled to occur.⁸ However, cooperating agency completion dates which are affected by FERC’s permitting timetable changes remain subject to the FAST-41 completion date modification provisions, including Executive Director review and authorization—at least 30 days in advance—of any proposed extension of a final completion date in excess of 30 days. Accordingly, pursuant to 42 U.S.C. § 4370m-2(c)(2)(D)(i)(iv), FERC, as a lead agency, submits for Executive Director review and approval any proposed modifications to cooperating agencies’ completion dates on projects for which FERC is the facilitating or lead agency.

⁶ 42 U.S.C. § 4370m-2(c)(2)(D)(i)(IV).

⁷ See Federal Permitting Improvement Steering Council, Data Management Guide for FAST-41 Covered Projects on the Permitting Dashboard, at 36-37 (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); In re Atlantic Shores North, Executive Director Determination of Covered Project Status (Sep. 2, 2022). Executive Director Determinations of Covered Project Status are available at <https://www.permits.performance.gov/fpisc-content/fast-41-resources>.

⁸ See 42 U.S.C. 42 U.S.C. §§ 4370m-2(c)(2)(D)(i)(II) (prohibiting modification of a completion date within 30 days of the posted completion date); 4370m-2(c)(2)(D)(i)(IV) (requiring Executive Director authorization to extend a final completion date by more than 30 days).