existing requirements under the law or agency policies. When a guidance document is binding because the law authorizes binding guidance or because a contract incorporates the guidance, the Council on Environmental Quality must modify the disclaimer to reflect accordingly;

(7) If it is a revision to or a replacement of a previously issued guidance document, identify the guidance document that it revises or replaces;

(8) Include a short summary of the subject matter covered in the guidance document at the top of the document;

(9) Identify the activities to which and the persons to whom the guidance document applies;

(10) Include the citation to the statutory provision or regulation to which the guidance document applies or which it interprets; and

(11) Be posted on the Council on Environmental Quality's website.

(d) *Review and clearance.* The Office of the General Counsel must review and clear all proposed guidance documents before issuance.

**§ 1519.3 Procedures for the public to request withdrawal or modification of a guidance document.**

(a) Any member of the public may petition the Council on Environmental Quality to withdraw or modify a guidance document.

(b) The petitioner must submit the request for the withdrawal or modification of a guidance document in writing to the Office of the General Counsel. The petition must contain a statement of the reasons for the petition and any supporting documents to support the petitioner's request.

(c) Upon receipt of a petition for withdrawal or modification of a guidance document, the Office of the General Counsel will consult with the relevant offices and coordinate the response to the petition.

(d) The Council on Environmental Quality should respond to a petition in writing, including electronically, within 90 days of receipt of a petition. The response should state whether the petition is granted, granted in part and denied in part, denied, or provisionally denied for lack of adequate information. If the petition is provisionally denied for lack of adequate information, the response should indicate what additional information is necessary to adjudicate the petition. The Office of the General Counsel should respond to the petition in writing no later than 90 days after receipt of the necessary additional information. The response should state whether the petition is granted, granted in part and denied in part, or denied.

(e) The Council on Environmental Quality may consider in a coordinated manner or provide a coordinated response to similar petitions for withdrawal or modification.

(f) The Council on Environmental Quality need not respond to petitions under this part for withdrawal or modification of documents that do not meet the definition of a guidance document.

**§ 1519.4 Significant guidance documents.**

(a) *Significant guidance documents definition.* For the purposes of this section, significant guidance documents are guidance documents that may be reasonably anticipated to:

(1) Lead to an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles of Executive Order 12866.

(b) *Actions the Council on Environmental Quality will take before issuing significant guidance documents.* When the Office of Management and Budget's Office of Information and Regulatory Affairs determines that a guidance document is a significant guidance document, the Council on Environmental Quality must:

(1) Submit the guidance document for review by the Office of Information and Regulatory Affairs under Executive Order 12866;

(2) Publish the draft significant guidance document in the **Federal Register** for a public notice and comment period of at least 30 days;

(i) This provision will not apply if the Council on Environmental Quality for good cause finds that notice and public comment is impracticable, unnecessary, or contrary to the public interest.

(ii) If such a finding is made, the Council on Environmental Quality must incorporate such a finding and a brief statement of its reasoning into the significant guidance document.

(3) Obtain approval on a non-delegable basis from the Chairman or an official who is serving in an acting capacity as the Chairman.

(4) Provide a public response to major concerns raised in comments on the draft significant guidance document.

(5) Announce the availability of the final significant guidance document.

(6) Comply with the applicable requirements for regulations or rules, including significant regulatory actions, set forth in Executive Orders 12866, ''Regulatory Planning and Review,'' 13563, ''Improving Regulation and Regulatory Review,'' 13609, ''Promoting International Regulatory Cooperation,'' 13771, ''Reducing Regulation and Controlling Regulatory Costs,'' and 13777, ''Enforcing the Regulatory Reform Agenda.''

(c) *Exemption.* This section will not apply if the Chairman or an official who is serving in an acting capacity as the Chairman of the Council on Environmental Quality and the Administrator of the Office of Information and Regulatory Affairs agree that exigency, safety, health, or other compelling cause warrants an exemption from some or all requirements.

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## FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL

### 40 CFR Chapter IX

**[Agency Docket Number 2020–001]**

**RIN 3121–AA01**

## Adding Mining as a Sector of Projects Eligible for Coverage Under Title 41 of the Fixing America's Surface Transportation Act

**AGENCY:** Federal Permitting Improvement Steering Council.

**ACTION:** Final rule.

**SUMMARY:** The Federal Permitting Improvement Steering Council (Permitting Council) has voted to add mining as a sector with infrastructure projects eligible for coverage under Title 41 of the Fixing America's Surface Transportation Act (FAST–41). A new part will be included in the Code of Federal Regulations that adds mining to the list of statutory FAST–41 sectors. The addition of mining as a FAST–41 sector will allow qualified mining infrastructure projects to become FAST–41 covered projects. FAST–41 coverage will help Federal agencies coordinate their environmental and project review efforts to improve the timeliness, efficiency, predictability, and transparency of the decision-making processes associated with covered

mining projects. The designation of mining as a FAST–41 sector does not predetermine or affect any Federal agency decision with respect to any mining authorization or permit application, nor does it sidestep any required environmental review or public consultation process.

**DATES:** This rule becomes effective on January 8, 2021.

**FOR FURTHER INFORMATION CONTACT:** John G. Cossa, General Counsel, Federal Permitting Improvement Steering Council, 1800 G St. NW, Suite 2400, Washington, DC 20006, *john.cossa@fpisc.gov,* or by telephone at 202–255–6936.

Persons who use a telecommunications device for the deaf may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact this individual during normal business hours or to leave a message at other times. FIRS is available 24 hours a day, 7 days a week. You will receive a reply to a message during normal business hours.

**SUPPLEMENTARY INFORMATION:** On November 27, 2020, the Permitting Council, which comprises the Permitting Council Executive Director; 13 Federal agency council members (including the designees of the Secretaries of Agriculture, Army, Commerce, Interior, Energy, Transportation, Defense, Homeland Security, and Housing and Urban Development, the Administrator of the Environmental Protection Agency, and the Chairmen of the Federal Energy Regulatory Commission, Nuclear Regulatory Commission, and the Advisory Council on Historic Preservation); and additional Permitting Council members, the Chairman of the Council on Environmental Quality (CEQ) and the Director of the Office of Management and Budget (OMB); [1] published in the **Federal Register** a proposed rule to designate mining as a sector of infrastructure projects eligible for coverage under FAST–41, 42 U.S.C. 4370m *et seq.* 85 FR 75998. The comment period for the proposed rule closed on December 28, 2020. The Permitting Council received 6,487 comments, the majority of which were form letters opposed to the proposal. Responses to selected comments are contained in the Responses to Selected Comments section below. The Permitting Council did not alter the regulatory proposal in response to comments.

[1] *See* 42 U.S.C. 4370m–1(b) (Prescribing Permitting Council composition).

The Permitting Council reviewed the comments received, and on January 4, 2021, voted whether to designate mining, as defined in the proposed rule, as a FAST–41 sector. A majority of the Permitting Council, including the Executive Director, Permitting Council members representing the Nuclear Regulatory Commission, Advisory Council on Historic Preservation, Department of Commerce, Department of Energy, Environmental Protection Agency, Army Corps of Engineers, Department of the Interior, Department of Agriculture, Department of Transportation, Department of Defense, and Department of Homeland Security, and the Chairman of CEQ voted in favor of the proposal. The Permitting Council member representing the Department of Housing and Urban Development and the Director of OMB abstained from the vote. The Permitting Council member representing the Federal Energy Regulatory Commission did not vote. No Permitting Council member voted against the proposal.

The Permitting Council continues to believe that, like the other FAST–41 sectors, mining is an important infrastructure sector. Mining projects can involve the construction of significant infrastructure, require substantial investment, and necessitate extensive and complex Federal and state environmental reviews and authorizations. Accordingly, like qualified projects from the statutory FAST–41 sectors, mining projects that satisfy the other covered project criteria of 42 U.S.C. 4370m(6) could benefit from the enhanced interagency coordination, transparency, and predictability provided by FAST–41 coverage. Extending FAST–41 coverage to qualified mining projects is consistent with Executive Order (E.O.) 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, 82 FR 40463 (Aug. 14, 2017) and E.O. 13817, A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals, 82 FR 60835 (Dec. 20, 2017).

Because a majority of the Permitting Council voted in favor of designating mining as a FAST–41 sector pursuant to 42 U.S.C. 4370m(6)(A), the Permitting Council will add part 1900 to title 40 of the Code of Federal Regulations to designate mining as a FAST–41 sector.

## Responses to Selected Comments

The Permitting Council received 6,487 comments, the majority of which were variants of two form letters opposed to adding mining as a FAST–41 sector. Although none of the comments resulted in changes to the proposed rule, the Permitting Council provides the following comment responses to clarify apparent misperceptions in the comment record about the scope and effect of FAST–41 and FAST–41 coverage.

### *Denial of Request for Extension of Time To Comment*

On December 9, 2020, the Permitting Council received a letter undersigned by several non-governmental entities requesting that the Permitting Council extend by an additional 45 days the 30-day comment period for the proposed rule. The letter asserted that the extension was needed because the ongoing COVID–19 crisis and the holiday season limited the ability of potentially affected stakeholders to provide timely comment, particularly given the various and disparate environmental and economic effects of mining. The Permitting Council denied the extension request, explaining that 30 days was sufficient time to provide comment on the proposal, which is administrative in nature and does not make any mining project more or less likely to be approved or implemented, or any environmental or economic effect that may be associated with a mining project to occur.

### *Authority To Designate Mining as a FAST–41 Sector*

Numerous commenters incorrectly argue that the scope of the FAST Act is limited to transportation, and that therefore, the Permitting Council is prohibited from designating mining—which is not transportation—as a FAST–41 sector. While much of the FAST Act does deal with transportation issues, 6 of the 10 statutory FAST–41 sectors—renewable energy production, conventional energy production, electricity transmission, water resource projects, broadband, and manufacturing—are not transportation. 42 U.S.C. 4370m(6)(A). Nothing in FAST–41 suggests that the Permitting Council is prohibited from designating new sectors that are not transportation.

Some commenters make the unsubstantiated assertion that Congress intentionally did not include mining as a FAST–41 sector because the environmental effects of mining allegedly are more severe than the effects of the other FAST–41 sectors. The FAST–41 statute contains no evidence of such Congressional intent. The statute places no limitation on the Permitting Council's authority to add a FAST–41 sector based on that sector's perceived environmental impacts. On the contrary, the only limitation

Congress placed on the Permitting Council's authority to designate a FAST–41 sector is that the designation occur ''by majority vote.'' 42 U.S.C. 4370m(6)(A). Moreover, because compliance with the National Environmental Policy Act (NEPA) is a precondition of FAST–41 project coverage, the fact that a sector has projects with potentially significant environmental impacts militates in favor of adding it as a FAST–41 sector. 42 U.S.C. 4370m(6)(A)(i) & (ii).

*Suitability of Mining Projects for FAST–41 Coverage*

Several commenters argue that designating mining as a FAST–41 sector is inappropriate because mining projects are too complex and diverse for the FAST–41 process and the Permitting Council to manage. One commenter suggested that the Permitting Council lacks adequate resources, funding, and technical expertise to conduct environmental reviews and oversee the permitting process for any covered mining projects, despite the fact that the Permitting Council consists of all the Federal agencies currently responsible for the environmental review and authorization of mining projects and collectively possesses all the technical and environmental expertise that the U.S. government has to bear.

Mining is an appropriate FAST–41 sector precisely because mining projects can be complex and diverse, and can necessitate extensive and coordinated Federal and state environmental review and decision making. The more complex the permitting path, the more likely it is that a project will be able to benefit from the enhanced interagency coordination, transparency, and predictability FAST–41 coverage provides. The Permitting Council's current project portfolio includes some of the largest, most complex, and novel infrastructure projects in the U.S., including multibillion-dollar renewable energy projects (wind and solar) as well as pipeline projects that are hundreds of miles long, cross Federal, state, private, and Tribal lands, and require dozens of permits and authorizations from numerous Federal and state entities. Covered projects also include several unprecedented, multibillion-dollar offshore wind projects, which require close interagency coordination as they are shepherded through the project review and approval process. Two of the FAST–41 covered projects that completed the Federal review process in 2020 are the largest of their kind (a solar renewable energy project and a liquefied natural gas and pipeline project).

Most large-scale infrastructure projects that would be eligible for FAST–41 coverage present environmental, jurisdictional, procedural, and interagency permitting challenges that the Permitting Council works daily to resolve. Through its vote to add mining as a FAST–41 sector, the Permitting Council has signaled its willingness to assist covered mining project sponsors in resolving their complex project review process challenges.

The same commenters who argue that mining projects are too complex and diverse for FAST–41 coverage inconsistently argue that FAST–41 coverage for mining projects is unnecessary because mining permitting in the U.S. is relatively swift, purportedly averaging two years. But the fact that some mining projects may be approved within a relatively short timeframe has no bearing on whether any given mining project may benefit from the enhanced interagency coordination, predictability, efficiency, and transparency that FAST–41 coverage can provide. Additionally, the two-year average permitting timeframe cited by commenters originates in a U.S. Government Accountability Office (GAO) report that only considered the time needed to obtain mining authorizations from Federal land management agencies, and not the estimated time needed to obtain myriad other Federal authorizations and permits that likely would be included in any FAST–41 covered project permitting timetable.[2] The GAO report acknowledges that it sometimes can take ''over 11 years'' to obtain authorizations from Federal land management agencies, not counting these other required authorizations.[3] Several commenters referenced the example of the Kensington Mine in Alaska, which reportedly took 19 years to authorize and required over 90 Federal and State authorizations.

*FAST–41 Does Not Supplant NEPA or Existing Procedural Requirements*

Many of the comments evidence a widespread belief that FAST–41 provides an alternate ''expedited'' project review and permitting regime that supplants NEPA and potentially other permitting and procedural requirements. This is not the case. The FAST–41 statute expressly does not supersede NEPA or affect any other agency statutory or regulatory requirement. *See* 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); 42 U.S.C. 4370m–6(d)(2) (''Nothing in [FAST–41] . . . creates a presumption that a covered project will be approved or favorably reviewed by any agency''); 42 U.S.C. 4370m–6(e)(1) (''Nothing in this section preempts, limits, or interferes with . . . any practice of seeking, considering, or responding to public comment''); 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.''); 42 U.S.C. 4370m–11 (providing that FAST–41 does not amend NEPA).

Although FAST–41 may provide more timely Federal decision making with respect to a covered project, it does not alter the ''rigor'' of any Federal agency's decision making, as some commenters suggest. Longer permitting timeframes should not be confused with rigorous Federal agency decision making. Much of the time savings associated with FAST–41 coverage has been achieved through coordinating interagency efforts, eliminating needless duplication, and engaging agencies and project sponsors to foster improved communication, and not through subverting applicable project review or decision-making procedures.

*FAST–41 Flexibility Mechanisms*

Commenters appear to incorrectly presume that FAST–41 coverage would subject mining projects to an arbitrarily inflexible, ''expedited'' environmental review and authorization process that would prevent Federal decision makers from obtaining and reviewing necessary technical and environmental information, providing opportunities for essential public input, coordinating with relevant state, local, and Tribal governments, and adjusting the FAST–41 project permitting timetable (42 U.S.C. 4370m–2(c)(1)(A), (c)(1)(b)(ii) & (c)(2)) to accommodate adequate NEPA review. But FAST–41 contains precisely the flexibility mechanisms that

[2] GAO, *Hardrock Mining: BLM and Forest Service Have Taken Some Actions to Expedite the Mine Plan Review Process but Could Do More,* GAO–16–165 (Jan. 2016).

[3] *Id.* at 13, 17 (''we identified six categories of federal permits and authorizations that mine operators may need to obtain from entities other than BLM and the Forest Service and seven categories of state and local permits and authorizations across 12 western states that may be required depending on the nature of the mining operations'').

commenters claim it lacks. For example, one comment letter asserts that the recommended performance schedule (RPS) established for a new sector pursuant to 42 U.S.C. 4370m–1(c)(1)(C) limits the flexibility of agencies to craft a permitting timetable that reflects the complexity of the specific project or the impacts of the project on unique environmental or cultural resources. But FAST–41 specifically provides that agencies may modify the RPS based on ''relevant factors,'' including factors such as those identified by the commenter (*i.e.,* to accommodate ''the size and complexity of the covered project'' and ''the sensitivity of the natural or historic resources affected by the project''). 42 U.S.C. 4370m–2(c)(2)(B)(i) & (iv). Indeed, despite the commenter's concern about the RPS provision, the Permitting Council has successfully created a unique permitting timetable for each FAST–41 covered project.

Similarly, commenters' concern that agencies are unable to adjust FAST–41 project permitting timetables as needed to accommodate changed circumstances or new information is unfounded. Pursuant to 42 U.S.C. 4370m–2(c)(2)(D)(i)(I) and (II), agencies may adjust permitting timetable milestones where interagency agreement can be reached about the need for the extension and a written explanation is provided for the record. And if an extension of a milestone would extend a final permitting completion date by more than 30 days, the Permitting Council Executive Director may extend the final permitting timetable date after consulting with relevant agencies and determining on the record that that an extension is warranted based on the same ''relevant factors'' that can be used for deviating from the RPS. 42 U.S.C. 4370m–2(c)(2)(D)(i)(III). In short, nothing in FAST–41 prevents agencies from modifying permitting timetables for the reasons commenters are concerned about.

Commenters' concerns regarding the FAST–41 provision that requires OMB approval and a report to Congress if a permitting timetable exceeds by 50 percent the originally established permitting timetable (150 percent date) are equally misplaced. 42 U.S.C. 4370m–2(c)(2)(D)(iii). Like the milestone extension requirements, the 150 percent date requirement is a transparency and accountability mechanism which, like many of FAST–41's substantive provisions, encourages thoughtful, coordinated, and deliberate agency planning and action. Nothing prevents OMB from granting permitting timetable extensions beyond 50 percent of the original timetable to accommodate any information gap, needed stakeholder consultation, or environmental concern. The Permitting Council agrees with commenters that project sponsor delay can be a significant source of permitting timeline delay. That is why the 150 percent date requirement does not count against an agency when the permitting timetable extension request is for reasons outside the government's control. 42 U.S.C. 4370m–2(c)(2)(D)(iii)(I).

Likewise, and contrary to the assertions of some commenters, FAST–41 does not limit the rights of the public to provide input into the project review process, nor does it affect the discretion of agencies to establish or extend comment periods to obtain essential environmental information. Although FAST–41 establishes default comment periods for various environmental documents,[4] agencies retain discretion to extend any comment period ''for good cause.'' This allows agencies to extend comment periods to provide affected parties sufficient opportunity for timely input, or to obtain any environmental information essential for project review. This requirement is analogous to other Federal programs intended to foster timely and deliberate agency decision making. *See, e.g.,* 23 U.S.C. 139(g)(2) (minimum comment periods for NEPA documents that are subject to Department of Transportation efficient environmental review provisions may be extended when agencies agree or ''for good cause''); 23 CFR 771.123(k) (default comment period for environmental assessments and environmental impact statements that are subject to Department of Transportation efficient environmental review provisions is 45–60 days).

Finally, the FAST 41 provisions that require early development of NEPA alternatives and specify that agencies may develop preferred alternatives to a higher level of detail than other alternatives do not constrain agency discretion to subsequently develop additional NEPA alternatives when needed, and are entirely consistent with controlling CEQ NEPA implementing regulations. 42 U.S.C. 4370m–4(c); *see* 40 CFR 1501.2, 1502.14, 1502.17.

*Federal and State Coordination*

One commenter expressed concern that the application of FAST–41 may interfere with cooperation between state and Federal officials with respect to review and authorization of covered projects. However, FAST–41 encourages Federal-state cooperation by providing states the opportunity to ''opt-in'' to the FAST–41 process (42 U.S.C. 4370m–2(c)(3)), and additionally requires Federal agencies to consult with states before taking certain actions, such as establishing a covered project permitting timetable. 43 U.S.C. 4370m–2(c)(2)(A), *see also* 42 U.S.C. 4370m–3 (interstate compacts); 42 U.S.C. 4370m–5 (delegated state permitting programs).

*FAST–41 Limitations Period*

Several commenters expressed concern that the two-year FAST–41 limitations period contained in 42 U.S.C. 4370m–6(a)(1)(A) may prevent access to the courts by parties affected by mining pollution or violations by mine operators of permit conditions or applicable regulations. Although the FAST–41 limitations period is shorter than the six-year limitations period for claims against the government brought under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.,* the two-year limitations period applies exclusively to Federal authorizations of FAST–41 covered projects. The limitations period does not apply to lawsuits alleging noncompliance with applicable regulations or permit conditions, or to tort claims. Moreover, because all FAST–41 covered project Federal authorizations are publically posted on the Permitting Dashboard,[5] FAST–41 ensures that anyone wishing to challenge the validity of a Federal agency authorization with respect to a covered project will have adequate opportunity to do so.

*Consultation With Indian Tribal Governments; Environmental Justice*

Several commenters assert that the Permitting Council is required to engage in government-to-government consultation with Indian Tribal Governments pursuant to section 5 of E.O. 13175 because Tribes are affected by mining projects. Several commenters similarly argue that the Permitting Council is required to identify and address the disproportionate effects that mining can have on minority and low-income populations pursuant to E.O. 12898.

Designating mining as a FAST–41 sector is a ministerial act that has no effect on Tribes and does not disproportionately affect minority or low-income populations. As explained in the preamble to the proposed rule, only prospective covered project

[4] The default comment period for environmental impact statements is 45–60 days and 45 days for all other NEPA documents. 42 U.S.C. 4370m–4(b)(1)(D) & (d).

[5] Available at *https://www.permits.performance.gov/.*

sponsors and Federal agencies are affected by the rule. Designating mining as a FAST–41 sector does not extend FAST–41 coverage to any project, affect any agency's discretion to issue or deny a mining project permit or authorization, or displace any existing requirement for public involvement or environmental review associated with any covered project. It remains the responsibility of each authorizing agency to weigh the relative environmental and economic merits of their decisions with respect to a covered project in accordance with their own statutory and regulatory authorities and policies. Designating mining as a FAST–41 sector likewise does not affect any Federal agency's obligation to engage in government-to-government consultation with respect to any mining project. Because adding mining as a FAST–41 sector does not affect Tribes or minority and low-income populations, the Permitting Council is not required to engage in government-to-government consultation pursuant to E.O. 13175 or to identify and address any disproportionate effect that mining may have on minority and low-income populations.

*Proposed Definition of ''Mine''*

Two commenters recommended that the Permitting Council consider adopting the definition of ''mine'' from 40 CFR 440.132(g), which includes land and property under or above the surface of an active mining area that is used in, or results from, the work of extracting metal ore or minerals from their natural deposits. The commenters' referenced definition also includes such lands that are used for secondary recovery of metal ore from refuse or other storage piles, wastes, or rock dumps, and mill tailings derived from the mining, cleaning, or concentration of metal ores.

The Permitting Council appreciates the suggestion, but for the purpose of adding a FAST–41 sector pursuant to 42 U.S.C. 4370m(6)(A), the Permitting Council seeks to define ''mining,'' rather than ''mine.'' The Permitting Council did not change the definition of ''mining'' in response to the comment, and believes that the definition in the proposed rule is sufficiently broad to capture the range of mining activities intended (*i.e.,* extracting ore, minerals, or raw materials from the ground).

**Economic Analysis**

Adding mining as a sector with infrastructure projects eligible for coverage under FAST–41could result in improved timeliness, predictability, and transparency associated with the projects that ultimately become FAST–41 covered projects, and for the Federal agencies participating in the FAST–41 process for those covered projects. However, quantifying any potential economic benefits that might result from adding mining as a FAST–41 sector is speculative. Simply providing the option of FAST–41 coverage to qualified mining projects does not assure how many, if any, mining project FAST–41 Initiation Notices (FINs) will be submitted to the Permitting Council for coverage, or how many projects ultimately will be covered. *See* 42 U.S.C. 4370m–2(a)(1)(A) & (C). Nor does it guarantee that any economic benefits would result from such coverage, particularly given that the permitting and environmental review requirements and permitting timetables for each covered project are unique.

Although the Permitting Council cannot predict precisely how many mining projects may become covered projects, the number will be small. The eligibility criteria for FAST–41 coverage are selective; only the largest projects that are the most prepared for Federal review may become covered projects. *See* 42 U.S.C. 4370m(6) (definition of ''covered project'' including $200 million project value threshold or alternative permitting complexity requirement); 4370m–2(c)(1)(A) & (B)(ii), 4370m–2(c)(2)(A) (sponsors must provide agencies with information sufficient to create a comprehensive and complete project permitting timetable within 60 days of initial project coverage); OMB M–17–14, *Guidance to Federal Agencies Regarding the Environmental Review and Authorization Process for Infrastructure Projects* (FAST–41 Guidance), Sec. 3 (Jan. 17, 2017) (project description must be sufficient at the outset to facilitate appropriate level of analysis under NEPA and interagency coordination on all required permits/authorizations). Since the enactment of FAST–41 in 2015, a total of 54 projects have been covered. Of these projects, only 20 were covered as the result of successfully submitted FINs that met the FAST–41 coverage criteria. The remaining 34 projects were statutorily covered as pending projects immediately after the enactment of FAST–41. *See* 43 U.S.C. 4370m–1(c)(1)(A)(i) and 4370m–2(b)(2)(A)(i). The 20 successfully submitted FINs include one conventional energy production project, one electricity transmission project, two pipeline projects, one ports and waterways project, 13 renewable energy production projects, and two water resource projects.

Some commenters expressed the belief that the Permitting Council will receive more interest from potential mining project sponsors, and ultimately cover more mining projects, than estimated in the preamble to the proposed rule. But the Permitting Council continues to anticipate that very few—likely 10 or fewer—mining project FINs will be submitted before the FAST–41 sunset date of December 4, 2022. 42 U.S.C. 4370m–12. This is in part because the Permitting Council expects the sunset date to act as a disincentive to the project sponsors who are likely to be most interested in FAST–41 coverage. Such sponsors include proponents of large or complex mining projects with a significant number of Federal and state authorizations and with longer permitting horizons. It is questionable whether these project sponsors would be able to derive the full benefits of FAST–41 coverage if the FAST–41 program may terminate before the Federal review and decision-making process for the project can be completed.

The Permitting Council notes that the statutory criteria for becoming a FAST–41 covered project is different from the criteria for whether a project is subject to the provisions of E.O. 13807, or E.O. 13766, Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, 82 FR 8567 (Jan. 30, 2017). Accordingly, the fact that a federal agency may have determined that a project is subject to one or both of these E.O.s does not indicate that that project is, would, or could become a FAST–41 covered project. The exclusive means by which a project can become a FAST–41 covered project is through the submission and review of a project FIN in accordance with the FAST–41 covered project criteria at 42 U.S.C. 4370m(6), and the subsequent addition of the project to the Permitting Dashboard by the Permitting Council Executive Director in accordance with 42 U.S.C. 4370m–2(b)(2).

Based on historical experience, only a portion of submitted FINs become covered projects. Since the inception of FAST–41, only 20 submitted FINs have become covered projects across all 10 FAST–41 sectors. To date, the Permitting Council has received fewer than five FINs for projects that involve mining that may potentially have been eligible for coverage under the statutory FAST–41 sectors (*e.g.,* conventional energy). But all of these FINs either were rejected for failing to meet other FAST–41 eligibility criteria or were withdrawn by the project sponsor for other reasons. It is therefore unlikely that adding mining to the 10 statutory

FAST–41 sectors will result in the coverage of a substantial number of new projects.

Designating mining as a FAST–41 sector could result in reduced costs for any mining project sponsor that obtains FAST–41 coverage for its project and for the Federal agencies with review and permitting responsibilities for the covered project by virtue of potentially improved timeliness, predictability, and transparency, associated increased Federal agency coordination, and reduced duplication of Federal and project sponsor effort. However, these benefits are difficult to quantify, particularly given that the Federal permitting and environmental review requirements and the permitting timetable for each project are unique and vary widely from project to project. Because the Permitting Council does not know in advance how many mining projects will become FAST–41 covered projects, what the permitting or environmental review requirements might be for any potential future covered mining project, or what opportunities might exist to coordinate any Federal agency reviews that might be necessary for any such covered mining project, it is impossible to predict with any specificity what, if any, economic benefit might broadly accrue as a result of designating mining as a FAST–41 sector.

Adding mining as a FAST–41 sector will not directly increase or decrease the costs to agencies of complying with the substantive provisions of FAST–41, although there will be costs to the Permitting Council associated with any additional project that might become a covered project.

FAST–41 does not impose any regulatory requirements on covered project sponsors; FAST–41 implementation obligations fall primarily on the government. However, because FAST–41 is a voluntary program, sponsors of mining projects potentially eligible for FAST–41 coverage would incur some costs associated with seeking FAST–41 coverage. These costs associated with a request to be a covered project likely will be small. Seeking FAST–41 coverage involves formulating and submitting a project FIN, which is expected to take only a few hours. *See* 42 U.S.C. 4370m–2(a)(i)(C). Because the Permitting Council anticipates receiving few additional project FINs as a result of adding mining as a FAST–41 sector, and the burden associated with preparing a FIN is minimal, the additional economic cost associated with adding mining as a FAST–41 sector, if any, would be negligible, and likely would be counterbalanced by the benefits of FAST–41 coverage.

**Procedural Matters**

*Regulatory Planning and Review (E.O. 12866) and Improving Regulation and Regulatory Review (E.O. 13563)*

This action is not a significant regulatory action and was not submitted to OMB for further review.

*Reducing Regulation and Controlling Regulatory Costs (E.O. 13771)*

This rule is an E.O. 13771 deregulatory action. A discussion of the potential economic benefits of this rule can be found in the rule's Economic Analysis section.

*Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), 5 U.S.C. 601 et seq.*

Pursuant to 5 U.S.C. 605(b), the Permitting Council certifies that providing the option of FAST–41 coverage for qualified mining projects that are not already eligible for FAST–41 coverage under any of the statutory FAST–41 sectors will not have a significant economic impact on a substantial number of small entities.

The Permitting Council anticipates that the addition of mining as a FAST–41 sector will result in the submission of 10 or fewer mining project FINs, at least some of which, based on the Permitting Council's past experience with project FINs that involve mining, likely will not become FAST–41 covered projects. Though the Permitting Council does not conduct an analysis of the business structures of FAST–41 project sponsors to determine whether they are small entities, it is possible that at least some of the 10 or fewer project sponsors that submit FINs for mining projects could be small entities. However, because 10 or fewer entities likely will be affected, the Permitting Council does not anticipate that adding mining as a FAST–41 sector will affect a substantial number of small entities.

Nor will adding mining as a FAST–41 sector significantly or disproportionately impose costs on any small entity that is affected by the rule. The requirements for submitting a project FIN are simple and not burdensome. The FAST–41 statute only requires the project sponsor to formulate and send to the Permitting Council and the lead or facilitating agency a project FIN that contains: (1) A statement of the purpose and objectives of the project; (2) a description of the general project location; (3) any available geospatial information about project and environmental, cultural, and historic resource locations; (4) a statement regarding the technical and financial ability of the project sponsor to construct the proposed project; (5) a statement of any Federal financing, environmental reviews, and authorizations anticipated to be required to complete the proposed project; and (6) an assessment that the proposed project meets the definition of a covered project pursuant to 42 U.S.C. 4370m(6)(A) with supporting rationale. 42 U.S.C. 4370m–2(a)(1)(A) & (C). Any project sponsor credibly seeking Federal authorization and environmental review for a project that requires $200 million or more in investment will have the information required to submit a project FIN readily available, and preparing and submitting a project FIN should require only a few hours of effort. FAST–41 contains no pre-FIN requirements (although project sponsors are free to consult the Permitting Council with any questions about the FAST–41 program and FIN preparation or submission), and there are no regulations implementing FAST–41 that impose any additional requirements on the project sponsor. The lead or facilitating agency (and in some instances, the Permitting Council Executive Director) will review the FIN in accordance with sections 4.4–4.12 of the FAST–41 Guidance to determine whether the project is a FAST–41 covered project. *See* Fast-41 Guidance at 30–34. If the project is a covered project, FAST–41 imposes no requirements or obligations on the project sponsor that are additional to those imposed by the substantive Federal authorization or environmental review statutes that otherwise apply to the project. Accordingly, adding mining as FAST–41 sector will not significantly affect a substantial number of small entities, and the RFA does not apply.

*Congressional Review Act (CRA), 5 U.S.C. 804*

This rule is not a ''major rule'' as defined under 5 U.S.C. 804(2) because it will not cause a major increase in costs or prices for consumers; individual industries; Federal, state, or local government agencies; or geographic regions. The rule will not have an annual effect on the economy of $100 million or more.

*Unfunded Mandates Reform Act (UMRA), 2 U.S.C. 1501 et seq.*

This rule does not impose an unfunded mandate on state, local, or tribal governments, or on the private sector of more than $100 million per year. The rule does not have a significant or unique effect on state,

local, or tribal governments or the private sector. Therefore, a statement containing the information required by the UMRA is not required. The rule also is not subject to the requirements of UMRA section 203 because it contains no regulatory requirements that might significantly or uniquely affect small governments. The rule contains no requirements that apply to small governments, nor does it impose obligations upon them.

*Federalism (E.O. 13132)*

This action does not have federalism implications under E.O. 13132. The rule will not have a substantial direct effect on the states, on the relationship between the Federal Government and the states, or on the distribution of power and responsibilities among the levels of government. The rule affects only the eligibility of mining project proponents to participate in the voluntary FAST–41 program; it will not affect the obligations or rights of states or local governments or state or local governmental entities.

*Civil Justice Reform (E.O. 12988)*

This rule complies with section 3(a) of E.O. 12988, which requires agencies to review all rules to eliminate errors and ambiguity and to write all regulations to minimize litigation. This rule also meets the criteria of section 3(b)(2), which requires agencies to write all regulations in clear language with clear legal standards.

*Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq.*

The PRA provides that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number issued by OMB. Collections of information include requests and requirements that an individual, partnership, or corporation obtain information, and report it to a Federal agency. *See* 44 U.S.C. 3502(3); 5 CFR 1320.3(c) & (k). The rule does not involve an agency request for information, nor does it require an information response. The rule would not alter any of the other FAST–41 eligibility criteria or implementation of FAST–41, and does not change the information collected from project sponsors seeking FAST–41 coverage. The rule could result in a small increase in the number of project sponsors submitting FINs to the Permitting Council.

*NEPA, 42 U.S.C. 4321 et seq.*

NEPA requires agencies to consider the reasonably foreseeable environmental consequences of major Federal actions significantly affecting the quality of the human environment. The rule does not make any project-level decisions and does not authorize any activity or commit resources to a project that may affect the environment. Furthermore, under FAST–41 all covered projects are subject to NEPA review. 42 U.S.C. 4370m(6)(A).

FAST–41 focuses on facilitating interagency coordination and agency accountability for meeting self-imposed environmental review and permitting timetables and providing certain legal protections for covered projects. The statute expressly does not supersede NEPA or affect any internal procedure or decision-making authority of any agency. *See* 42 U.S.C. 4370m–6(d); 42 U.S.C. 4370m–6(e); 42 U.S.C. 4370m–11. Because FAST–41 coverage does not alter or affect the discretion of any agency to approve or deny any permit or authorization for any project, extending potential FAST–41 eligibility to otherwise qualified mining projects does not make any mining project more or less likely to be permitted, authorized, or constructed, or any environmental effect that may be associated with such a project to occur. *See* 42 U.S.C. 4370m–6(d)(2).

*Effects on the Energy Supply (E.O. 13211)*

This rule is not a significant energy action for the purposes of E.O. 13211 because it will not have any discernible effect on the energy supply. Qualified energy-related mining projects such as coal and uranium are eligible for coverage under FAST–41's ''conventional energy production'' sector. The only additive effect of the rule would be to make mining projects that are unrelated to energy production (and not covered under other statutory FAST–41 sectors) eligible for coverage under FAST–41.

Adding mining as a FAST–41 sector will not extend FAST–41 coverage to any specific project—energy related or otherwise—nor will it permit or authorize any mining project. Qualified applicants must first seek and obtain FAST–41 coverage. Participation in the FAST–41 program does not alter any agency's existing discretion to approve or deny project permits or authorizations, and does not make ultimate project authorization more or less likely. Accordingly, this final rule that adds mining as a FAST–41 sector will not affect the supply, distribution, or use of energy, and is not a ''significant energy action'' for the purpose of E.O. 13211.

*Immediate Effective Date (5 U.S.C. 553(d))*

Section 553(d) of the APA generally requires agencies to publish a rule in the **Federal Register** at least 30 days prior to its effective date. The purpose of this requirement is to inform affected parties and give them a reasonable time to adjust to the requirements of the new rule. *Am. Federation of Gov't Empl., AFL–CIO* v. *Block,* 655 F.2d 1153, 1157 (D.C. Cir. 1981). Pursuant to 5 U.S.C. 553(d)(3), an agency may dispense with the 30-day requirement for good cause.

In this circumstance good cause exists to dispense with the 30 day requirement because the rule designating mining as a FAST–41 sector does not impose any short-term requirement or obligation on any party other than the Permitting Council members who promulgated the rule. The other parties affected by the rule are prospective covered project sponsors, who will not be required to take any prompt action or comply with any new regulatory requirements. Instead, the rule extends to prospective covered project sponsors the opportunity to voluntarily apply for and receive FAST–41 coverage benefits at their discretion. The rule does not require timely project sponsor action to receive potential FAST–41 benefits.

Because a 30-day delayed effective date in this circumstance would not serve the purpose of 5 U.S.C. 553(d), good cause exists to dispense with the requirement. Accordingly this rule takes immediate effect upon publication in the **Federal Register**.

**List of Subjects in 40 CFR Part 1900**

Critical infrastructure, Infrastructure, Mines, Mineral resources, Permitting, Reporting and recordkeeping requirements, Underground mining.

■ For the reasons stated in the preamble to the proposed rule and the preamble above, under the authority stated below, the Federal Permitting Improvement Steering Council hereby adds 40 CFR chapter IX, consisting of part 1900, to read as follows:

## CHAPTER IX—FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL

## PART 1900—FEDERAL PERMITTING IMPROVEMENT

Sec.
1900.1 Definitions.
1900.2 FAST–41 sectors.

**Authority:** 42 U.S.C. 4370m *et seq.*

### § 1900.1 Definitions.

For the purposes of this part, the following terms shall have the meaning indicated:

*FAST–41* means Title 41 of the Fixing America's Surface Transportation Act, 42 U.S.C. 4370m *et seq.*

*Federal Permitting Improvement Steering Council* or *Permitting Council* means the Federal agency established pursuant to 42 U.S.C. 4370m–1(a).

*Mining* means the process of extracting ore, minerals, or raw materials from the ground. *Mining* does not include the process of extracting oil or natural gas from the ground.

**§ 1900.2 FAST–41 sectors.**

Pursuant to 42 U.S.C. 4370m(6)(A), the Federal Permitting Improvement Steering Council has added the following sectors to the statutorily defined list of FAST–41 sectors:

(a) Mining.

(b) [Reserved]

**Nicholas Falvo,**

*Attorney Advisor, Federal Permitting Improvement Steering Council.*

[FR Doc. 2021–00088 Filed 1–7–21; 8:45 am]

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## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

### 44 CFR Part 333

**[Docket ID FEMA–2020–0019]**

**RIN 1660–AB04**

## Emergency Management Priorities and Allocations System (EMPAS)

**AGENCY:** Federal Emergency Management Agency, Department of Homeland Security (DHS).

**ACTION:** Final rule.

**SUMMARY:** This final rule adopts, with minor technical edits, an interim final rule with request for comments published in the **Federal Register** on May 13, 2020, establishing standards and procedures by which the Federal Emergency Management Agency (FEMA) may require certain contracts or orders that promote the national defense be given priority over other contracts or orders and setting new standards and procedures by which FEMA may allocate materials, services, and facilities to promote the national defense under emergency and non-emergency conditions pursuant to section 101 of the Defense Production Act of 1950, as amended. These regulations are part of FEMA's response to the ongoing COVID–19 emergency.

**DATES:** *Effective Date:* This final rule is effective January 8, 2021.

**FOR FURTHER INFORMATION CONTACT:** Marc Geier, Office of Policy and Program Analysis, 202–924–0196, *FEMA-DPA@fema.dhs.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Background and Legal Authority

On May 13, 2020, FEMA published in the **Federal Register** an interim final rule establishing standards and procedures by which FEMA may require certain contracts or orders that promote the national defense be given priority over other contracts or orders and setting new standards and procedures by which FEMA may allocate materials, services, and facilities to promote the national defense under emergency and non-emergency conditions pursuant to section 101 of the Defense Production Act of 1950, as amended. *See* 85 FR 28500.

Section 101 of the Defense Production Act of 1950, as amended (DPA or the Act), authorizes the President to require that performance under contracts or orders (other than contracts of employment) which the President deems necessary or appropriate to promote the national defense take priority over performance under any other contract or order. For the purpose of assuring such priority, the President may require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person the President finds to be capable of their performance.[1] Section 101 also authorizes the President to allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as the President shall deem necessary or appropriate to promote the national defense.[2] Executive Order 13911, ''Delegating Additional Authority Under the Defense Production Act With Respect to Health and Medical Resources To Respond to the Spread of COVID–19,'' 85 FR 18403 (Apr. 1, 2020), delegated the President's authority under Section 101 to the Secretary of Homeland Security with respect to health and medical resources needed to respond to the spread of Coronavirus Disease 2019 (COVID–19) within the United States. The Secretary of Homeland Security has further delegated these authorities to the FEMA Administrator.[3] FEMA published its interim final rule to comply with Section 101(d), which requires agencies delegated authority under Section 101 to issue final rules to establish standards and procedures by which the priorities and allocations authority is used to promote the national defense.

The interim final rule established the Emergency Management Priorities and Allocations System (EMPAS), which became part of the Federal Priorities and Allocations System (FPAS), the body of regulations that establishes standards and procedures for implementing the President's authority under Section 101(a) of the DPA. This rule finalizes the interim final rule.

### II. Discussion Public Comments and FEMA's Responses

The public comment period on the interim final rule closed on June 12, 2020, and four germane public comments were received. One comment was generally supportive of the regulation, pointing out that having the EMPAS rule in place allows FEMA to leverage the DPA in response to the COVID–19 pandemic over an extended period of time or eventually extend it to more general emergency preparedness activities. Given the ongoing COVID–19 pandemic, FEMA is considering use of the EMPAS regulation to combat the COVID–19 pandemic over an extended period of time. Since implementation of the regulation in May, FEMA has modified and extended an order allocating certain scarce and critical materials for domestic use to ensure the resources were not exported from the United States without specific approval by FEMA, and continues to consider options for using EMPAS to address mission needs. *See* 85 FR 48113 (Aug. 10, 2020). Finalizing the EMPAS regulation allows FEMA to respond to public comments in a timely manner and ensures FEMA's continued ability to use its authorities as appropriate in response to the COVID–19 pandemic. FEMA is also better prepared should delegations of priorities and allocations authority for other types of resources be issued in the future, as it will already have a regulatory framework in place.

The commenter suggested that EMPAS authority should be extended to include vaccine active ingredients as well as adjuvant or booster additions to vaccines; measures to permit fill and finish of large numbers of vaccine doses, including glass vials and other packaging; and provide for distribution systems and medical facilities to distribute vaccines when available at the most rapid rate. FEMA's authority pursuant to EMPAS is clear; the

[1] 50 U.S.C. 4511(a)(1).

[2] 50 U.S.C. 4511(a)(2).

[3] DHS Delegation 09052 Rev. 00.1, ''Delegation of Defense Production Act Authority to the Administrator of the Federal Emergency Management Agency'' (Apr. 1, 2020).