

Updates

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Federal Permitting Council Proposes Adding Mining Sector Under "FAST-41"

The Federal Permit Improvement Steering Council on November 27, 2020, proposed to add mining to the list of infrastructure sectors that are covered by Title 41 of the Fixing America's Surface Transportation Act (FAST-41). [85 FR 75998 \(Nov. 27, 2020\)](#). Current infrastructure sectors covered by the FAST-41 coordination and transparency law are renewable and conventional energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines, and manufacturing.

The proposal is open for public comment until December 28, 2020. Based on public comment, the permitting council will decide, by majority vote, whether to exercise for the first time its authority to designate a sector to add to FAST-41's statutory list of infrastructure sectors.

Background on the Permitting Council, FAST-41 Sectors, and "Covered" Projects

FAST-41, enacted on December 4, 2015, created the permitting council as part of a new governance structure, set of procedures, and funding authorities designed to improve the timeliness, predictability, and transparency of the federal environmental review and authorization process for certain covered infrastructure projects across a broad range of sectors. See 42 U.S.C. §§ 4370m – 4370m-12. The permitting council is chaired by a presidentially appointed executive director and FAST-41 identifies 13 heads of federal agencies that must designate a member, at the deputy secretary level or higher, to serve on the council with the director of the Office of Management and Budget and the chairman of the Council on Environmental Quality. According to implementing guidance issued by OMB and CEQ, the FAST-41 law is intended to provide covered projects with:

- Increased predictability through the publication of project-specific permitting timetables and clear processes to modify permitting timetables and resolve issues
- Increased transparency and accountability over the federal environmental review and authorization process
- Improved early coordination of agencies' schedules and synchronization of environmental reviews and authorizations

For further detail see OMB and CEQ, "Guidance to Federal Agencies Regarding the Environmental Review and Authorization Processes for Infrastructure Projects," at 9 ([Memorandum M-17-14, Jan. 13, 2017](#)). Agency performance on covered projects is tracked on a [permitting dashboard](#) and assessed in an [accountability scorecard](#) by OMB, CEQ, and the executive director of the permitting council.

FAST-41 is applicable to "any activity in the United States that requires authorization or environmental review by a Federal agency involving construction of infrastructure for renewable or conventional energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines, manufacturing, or any other sector as determined by a majority vote of the [Permitting] Council." See 42 U.S.C. § 4370m(6)(A). To become a "covered project" under FAST-41, a project sponsor must show that its project is subject to environmental review under the National Environmental Policy Act; is likely to require a total investment of more than \$200,000,000; and does not qualify for abbreviated approvals and environmental reviews. The permitting council may also include other projects in FAST-41 sectors that are

subject to NEPA and for which, due to their size and complexity, the applicable federal agencies determine the FAST-41 coordination process and oversight would be beneficial.

FAST-41 does not supersede, amend, or modify any federal statute, including NEPA, and it does not create a presumption that a covered project will be approved or favorably reviewed by any agency. See 42 U.S.C. §§ 4370m-6(d), 4370m-11. Permitting timetables established under the FAST-41 process must be consistent with any other relevant time periods established under federal law and must not prevent any FAST-41 cooperating or participating agency from discharging any obligation under federal law in connection with a covered project. See 42 U.S.C. § 4370m-2(c)(2)(E).

Permitting Council Proposal

The FAST-41 statute lists the sectors for covered projects and authorizes the permitting council to designate additional sectors for coverage. See 42 U.S.C. § 4370m(6)(A). Following requests from the mining industry that the permitting council add mining as a FAST-41 sector, in 2017 the permitting council adopted procedures for the consideration of the addition of a sector. See [Permitting Council Standard Operating Procedure: Evaluate Whether to Approve the Addition of a New Sector of Infrastructure under FAST-41 \(Dec. 17, 2017\)](#). The permitting council's current proposal is an expansion of its original May 14, 2019, proposal, which was limited to the extraction of locatable, leasable, and saleable minerals of federal land. On January 15, 2020, the permitting council announced that it had voted to add "non-energy mining" as a new FAST-41 infrastructure sector "to increase access to a domestic source of minerals that are critical to the nation's economy and security." See Permitting Council, Mining Press Release (Jan. 15, 2020). In its press release, the permitting council stated that Congress had already included mining for conventional energy sources, including extraction of coal, oil shale, and uranium.

In its current proposal, the permitting council defines "mining" broadly as "the process of extracting ore, minerals, or raw materials from the ground" without being limited to federal land or mineral resources. The definition specifically excludes the extraction of oil and natural gas. The proposal explains that some forms of mining may already be included in the statutory list of infrastructure sectors, such as "pipelines" and "conventional energy." The proposal would expand FAST-41 to cover projects (1) "that involve the construction of infrastructure," (2) to extract ore, minerals, or raw materials from the ground, and (3) that meet the other "covered project" criteria listed above. The permitting council notes that its proposal is consistent with administration policy statements in two executive orders from 2017: E.O. 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects," 82 Fed. R. 40463 (Aug. 24, 2017); and E.O. 13817, "A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals," 82 Fed. Reg. 60835 (Dec. 26, 2017).

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