



PERMITTING COUNCIL

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MEMORANDUM

To: Federal Permitting Improvement Steering Council (Permitting Council)
Agency Chief Environmental Review and Permitting Officers (Agency CERPOs)

From: Alexander Herrgott, Executive Director

Date: January 12, 2021

Re: Executive Director Role and Responsibilities in Determining Whether a Project is a Covered Project Pursuant to Title 41 of the Fixing America's Surface Transportation Act (FAST-41)

I. Purpose

On January 13, 2017, the Office of Management and Budget (OMB) and the Council on Environmental Quality (CEQ) issued OMB M-17-14, Guidance to Federal Agencies Regarding the Environmental Review and Authorization Process for Infrastructure Projects (2017 Guidance), which provides 87 pages of guidance to Federal Permitting Improvement Steering Council (Permitting Council) member agencies to carry out their FAST-41 responsibilities. Pursuant to 42 U.S.C. § 4370m-1(c)(1)(D), the 2017 Guidance does not contain guidance specific to the Permitting Council Executive Director to carry out his FAST-41 responsibilities. *See* 2017 Guidance at 11-12. Based on experience administering the FAST-41 program, the Permitting Council Executive Director has determined that clarification of the Executive Director's role and responsibilities in determining whether a project is a FAST-41 covered project is necessary to: (i) resolve areas of confusion among implementing Federal agencies and project sponsors; and (ii) more closely align the FAST-41 project coverage procedure with FAST-41 statutory requirements.

II. Executive Director Procedure Related to FAST-41 Project Coverage Determinations

The Executive Director has limited discretion to reject a project sponsor's application for FAST-41 coverage. The FAST-41 statute expressly requires the Executive Director to create an entry on the Permitting Dashboard within 14 days of receipt of a FAST-41 project initiation notice (FIN) unless the Executive Director, or the facilitating or lead agency,¹ determines that the project *is not* a FAST-41 covered project. 42 U.S.C. § 4370m-2(b)(2)(A)(ii). The Executive Director will consult with the facilitating or lead agency as soon as possible after FIN receipt to

¹ Because a lead agency displaces a facilitating agency, a project under consideration for FAST-41 coverage will have *either* a lead agency *or* a facilitating agency; never both. 42 U.S.C. §§ 4370m-2(a)(5)(A) & (B).



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ensure that the project either is added to the Permitting Dashboard or a determination is made that the project is not a covered project within 14 days of FIN receipt.

The project sponsor bears the burden of demonstrating in its FIN that a project is a covered project. *See* 42 U.S.C. § 4370m(6) (covered project criteria); 42 U.S.C. § 4370m-2(a)(1)(C) (required FIN contents). If a submitted project FIN lacks information sufficient to determine that project is a FAST-41 covered project, then the project is not a FAST-41 covered project and the Executive Director will not create an entry for the project on the Permitting Dashboard. To the extent practicable, the Executive Director will engage in pre-FIN coordination with the prospective project sponsor and potential lead or facilitating agency to help ensure that any submitted FIN contains information sufficient to determine whether the project is a covered project.

When determining whether a project is a FAST-41 covered project, the Executive Director will first determine whether the proposed project fits under one or more of the FAST-41 sectors identified in 42 U.S.C. § 4370m(6)(A) and 40 C.F.R § 1900.2. If the project could be categorized under multiple FAST-41 sectors, then the Executive Director will consult with the facilitating or lead agency to determine which FAST-41 sector is most suitable for the project in light of the Permitting Council-issued recommend performance schedules for various project types. *See* 42 U.S.C. § 4370m-1(c)(1)(C).

Pursuant to 42 U.S.C. § 4370m-2(b)(2)(A)(ii), either the facilitating or lead agency,² or the Permitting Council Executive Director, can initially determine that a project is not a covered project. If the facilitating or lead agency initially determines that a project is not a covered project, then 42 U.S.C. § 4370m-2(b)(2)(B) allows the project sponsor to submit to the Executive Director a further explanation as to why the project is a covered project. The Permitting Council Executive Director then has 14 days from the date of the facilitating or lead agency's adverse determination to render a "final and conclusive" determination as to whether the project is a covered project. 42 U.S.C. § 4370m-2(b)(2)(C). FAST-41 does not provide the project sponsor with any administrative appeal option in the circumstance where the Permitting Council Executive Director, rather than the facilitating or lead agency, initially determines that the project is not a covered project.

FAST-41 does not expressly require the Executive Director or the facilitating or lead agency to notify the project sponsor of a determination that the project is not a covered project. If the Executive Director determines that the project is not a covered project, then the Executive Director will provide the project sponsor with an explanation of the basis of the Executive Director's determination within 14 days of FIN receipt. In the absence of such notice from the Executive Director or the facilitating or lead agency, a project sponsor may regard the Executive

² Because a lead agency displaces a facilitating agency pursuant to 42 U.S.C. §§ 4370m-2(a)(5)(A) & (B), the hypothetical situation raised in the 2017 Guidance where the lead agency and facilitating agency disagree about whether a project is a covered project never can arise. *See* 2017 Guidance at 33.



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Director’s failure to timely create an entry on the Permitting Dashboard as a *de facto* determination that the project is not a covered project, which triggers the subsequent 14-day period within which the project sponsor may seek from the Executive Director a “final and conclusive” determination of project coverage. *See* 42 U.S.C. §§ 4370m-2(b)(2)(B)&(C).

III. The Executive Director Will Offer Assistance to Agencies to Facilitate Timely Establishment of Coordinated Project Plans (CPP)

FAST-41 requires the facilitating or lead agency to establish a compliant CPP, including a comprehensive project permitting timetable, within 60 days of the day on which the Executive Director creates an entry for a project on the Permitting Dashboard.³ The Executive Director will offer to provide whatever assistance is needed to help agencies timely meet their CPP obligations, particularly in circumstances where imperfect project-related information or other project- or permitting-related uncertainty make it difficult to establish a precise permitting timetable or milestones.

Date: 01/12/2021

Alexander Herrgott

Alexander Herrgott
Executive Director
Federal Permitting Improvement Steering Council

³ 42 U.S.C. §§ 4370m-2(c)(1)(A) (CPP required “not later than 60 days after the date on which the Executive Director must make a specific entry for the project on the Dashboard under [42 U.S.C. § 4370m-2](b)(2)(A)”); 4370m-2(c)(1)(B)(ii) (CPP must contain a permitting timetable that “sets forth a comprehensive schedule of dates by which all environmental reviews and authorizations . . . must be made.”); 4370m-2(c)(2)(A)(permitting timetable must include “intermediate and final completion dates for action by each participating agency on any Federal environmental review or authorization required for the project.”).