



# FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL

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**To:** Agencies Responsible for Creating, Managing, and Implementing a FAST-41 Covered Project Permitting Timetable

**From:** Eric Beightel, Executive Director

**Date:** November 13, 2023

**Re:** Requesting Executive Director Authorization to Modify Completion Dates in a FAST-41 Covered Project Permitting Timetable Pursuant to 42 U.S.C. § 4370m-2(c)(2)(D)(i)(IV).

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## **I. Summary**

The Federal Permitting Improvement Steering Council (Permitting Council) was established to facilitate a coordinated, timely, predictable, and transparent Federal decision-making process for the environmental review and authorization of FAST-41 covered projects. The FAST-41 statute requires the facilitating or lead agency<sup>1</sup> to maintain an accurate permitting timetable for a covered projects on the Permitting Dashboard. The FAST-41 statute prohibits a facilitating or lead agency from modifying any completion date in a FAST-41 covered project permitting timetable that results in a final completion date being extended by more than 30 days without authorization from the Executive Director.<sup>2</sup> This memorandum articulates the Executive Director's expectations for permitting timetable management and factors the Executive Director will consider when determining whether to authorize completion date extensions.

Executive Director authorizations to extend completion dates are based on fact-specific considerations and are not guaranteed. Generally, the Executive Director will consider approving a request for an extension under the following circumstances:

- The Executive Director only will consider a request for extension that is submitted at least 50 calendar days in advance of the date that the agency seeks to extend, unless the facilitating or lead agency demonstrates that submitting a late request is unavoidable.
- The Executive Director may authorize an extension of a final completion date by more than 30 days if the facilitating or lead agency, in consultation with the

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<sup>1</sup> A facilitating agency is the Federal agency that receives the notice of the initiation of a FAST-41 covered project (a.k.a., "FAST-41 Initiation Notice," or "FIN") from the project sponsor and, until a lead agency is designated pursuant to NEPA, is the Federal agency responsible for fulfilling most of the Federal agency FAST-41 responsibilities, including determining whether the project is a covered project, creating the FAST-41 coordinated project plan and permitting timetable, and managing and modifying the FAST-41 permitting timetable in compliance with statutory requirements. Once identified, the lead agency becomes responsible for fulfilling these FAST-41 responsibilities. 42 U.S.C. § 4370m-2(a)(5)(A).

<sup>2</sup> 42 U.S.C. § 4370m-2(c)(2)(D)(i)(IV).

relevant cooperating agencies and the project sponsor,<sup>3</sup> demonstrates they have taken all feasible steps to meet the originally posted final completion date and have determined that a delay of more than 30 days is unavoidable.<sup>4</sup>

- The Executive Director only will authorize an extension of a completion date that previously has been extended by more than 30 days in circumstances where the issues that have resulted in the delay are new and unexpected, and the agency demonstrates the anticipated delay cannot be avoided through short-term re-prioritization of agency permitting resources and effort.

If the Executive Director does not approve—or is unable to timely act upon—the agency’s request for authority to extend the completion date, then the completion date that is currently posted on the Permitting Dashboard will not be modified and the agency responsible for that action must either comply with the posted completion date or fall into nonconformance with the FAST-41 permitting timetable.<sup>5</sup> Interlaced throughout the discussion of the items bulleted above, this memorandum identifies strategies agencies can use to minimize the need for extensions in their permitting timetables and practices that should be avoided in requesting extensions.

## **II. Agencies Should Submit Requests to the Executive Director for Authorization to Extend Completion Dates at Least 50 Days Before the Completion Date to be Extended.**

It is important for agencies to submit their requests for Executive Director authorization in a timely fashion to ensure agency compliance with FAST-41 requirements and allow sufficient time for the Executive Director to act on such requests in the deliberate manner contemplated in the FAST-41 statute.

FAST-41 requires a facilitating or lead agency to consult with the Executive Director at least 15 days before consulting other required parties regarding modifying a completion date,<sup>6</sup> and further prohibits the modification of interim or final completion dates within 30-days of the completion date (30-day lockout).<sup>7</sup> FAST-41 also requires a facilitating or lead agency to obtain authorization from the Executive Director prior to modifying any completion date that results in a final completion date being extended by more than 30 days.<sup>8</sup> The Executive Director may only grant such authority after consulting with the project sponsor and making a determination on the record based on consideration of relevant factors.<sup>9</sup> In deciding whether to grant the request, the Executive Director considers the lead agency or affected cooperating agency’s written justification for the modification.<sup>10</sup> The Executive Director follows up as needed with each affected agency to understand the underlying facts that gave rise to the extension request. These

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<sup>3</sup> See 42 U.S.C. §§ 4370m-2(c)(2)(D)(i)(II) & 4370m-4(e)(1).

<sup>4</sup> 42 U.S.C. § 4370m-2(c)(2)(B) provides a baseline of factors for consideration in approving a request to extend a permitting timetable by more than 30 days. This memorandum provides further clarification of the Executive Director’s expectations of lead and facilitating agencies, reflecting lessons learned through implementing the statute.

<sup>5</sup> Agencies that do not comply with posted permitting timetable completion dates are subject to the FAST-41 nonconformance requirements at 42 U.S.C. § 4370m-2(c)(2)(F) and are reported quarterly to Congress pursuant to 42 U.S.C. § 4370m-7(a)(2).

<sup>6</sup> 42 U.S.C. § 4370m-2(c)(2)(D)(i)(I)

<sup>7</sup> 42 U.S.C. § 4370m-2(c)(2)(D)(ii).

<sup>8</sup> 42 U.S.C. § 4370m-2(c)(2)(D)(i)(IV).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

inquiries can reveal differing agency views with respect to the rationale and need for the extension, which the Executive Director works to reconcile.

Considering the 15-day notice, 30-day lockout period, and the consultation and coordination required to modify any completion date that will result in extending a final completion date by more than 30-days, the Executive Director, in consultation with the agencies, has determined that agencies must submit requests to modify completion dates at least 50 days in advance of the completion date proposed for modification<sup>11</sup> unless the facilitating or lead agency demonstrates that submitting a late request is unavoidable. The 50-day timeline is necessary to facilitate agencies' compliance with the statutory 30-day lockout period and to give the Executive Director sufficient time to consult with the project sponsor and the relevant agencies and prepare a written determination addressing relevant factors that are identified in the statute.<sup>12</sup>

Untimely requests may preclude the Executive Director from making any determination before the 30-day lockout period forecloses modification of the completion date. This would place the agency responsible for the completion date in noncompliance with FAST-41 if the agency does not meet the originally posted completion date.<sup>13</sup> At a minimum, waiting until the last minute to extend completion dates that the agency knows will need to be extended undermines the very purpose of a FAST-41 permitting timetable, which is to provide transparency and predictability in the Federal permitting process.

Timely submission of requests for authorization to extend completion dates is critical to the deliberate, predictable, transparent, and statutorily compliant management of FAST-41 permitting timetables.

### **III. Agencies Should Submit a Request for Executive Director Authorization to Extend a Completion Date Only After Determining that a Delay in Excess of 30 Days Is Unavoidable.**

Agencies should request Executive Director authorization to modify any completion date that will result in extending a final completion date by more than 30 days only after the agency has taken all practicable means to meet the posted completion date and determined that extending the permitting timetable is unavoidable. This is consistent with the purpose of FAST-41, which is to facilitate a coordinated, timely, predictable, and transparent Federal decision-making process for the environmental review and authorization of FAST-41 covered projects. FAST-41 works toward this goal by, at the outset, requiring the facilitating or lead agency and the cooperating agencies to create a covered project permitting timetable in consultation with the project sponsor.<sup>14</sup> Cooperating agencies must concur on the contents of the permitting timetable before it can be finalized and posted to the Permitting Dashboard.<sup>15</sup> The permitting timetable must contain intermediate and final completion dates for all Federal environmental reviews<sup>16</sup> and

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<sup>11</sup> See Permitting Council Data Management Guide for FAST-41 Covered Projects on the Permitting Dashboard, at 34-46 (Jan. 2022), <https://www.permits.performance.gov/fpisc-content/data-management-guide>.

<sup>12</sup> *Id.*, see 42 U.S.C. § 4370m-2(c)(2)(B)

<sup>13</sup> See *supra*, note 20.

<sup>14</sup> 42 U.S.C. § 4370m-2(c)(2)(A).

<sup>15</sup> *Id.*

<sup>16</sup> 42 U.S.C. § 4370m(11) (“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 NEPA.”).

authorizations<sup>17</sup> that are needed to construct and operate the project.<sup>18</sup> After the permitting timetable is established and posted to the Permitting Dashboard, FAST-41 requires each agency to coordinate internally and with each other throughout the permitting process to identify and resolve any issues that might cause delay in the execution of a covered project's permitting timetable.<sup>19</sup>

The Executive Director expects that agencies have allocated sufficient resources (or have requested sufficient resources from the Environmental Review Improvement Fund<sup>20</sup> (ERIF)) to establish the interagency and project sponsor communication channels and internal escalation procedures necessary such that the need for significant permitting timetable extensions is uncommon. The Executive Director recognizes that there will be circumstances that may pose challenges to an agency's ability to meet the schedule on a permitting timetable, including where a completion date depends on the submission of project sponsor information. In such circumstances, the Executive Director recommends that the agency coordinate with the Office of Executive Director's (OED) Infrastructure Project Management (IPM) team to help facilitate conversations with the project sponsor to minimize the need for any extension of a final completion date in excess of 30 days.

Agency project teams and Chief Environmental Review and Permitting Officers (CERPOs)<sup>21</sup> may also avoid extensions to the agency's posted permitting timetable schedules by leveraging the IPM Team and other OED staff resources. The Executive Director's staff can help identify, elevate, and resolve project permitting related issues with cooperating agencies and project sponsors, and help preserve predictability in the Federal permitting process.

#### **IV. Agencies Should Submit a Request for Executive Director Authorization to Again Extend a Previously Extended Completion Date Only When the Issues are New and Unexpected.**

Agencies should seek Executive Director authorization to extend a completion date that previously has been extended by more than 30 days only in circumstances where an unexpected issue has arisen, and the anticipated delay cannot be avoided through short-term re-prioritization of agency permitting resources and effort.

When establishing the initial permitting timetable, agencies have the discretion to set completion dates for individual actions based not only on their expertise, experience,

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<sup>17</sup> 42 U.S.C. § 4370m(3) (“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 . . . .”)

<sup>18</sup> *Id.*

<sup>19</sup> See 42 U.S.C. § 4370m-4(e)(1) (lead, cooperating, and participating agencies must “work cooperatively . . . to identify and resolve issues that could delay completion of an environmental review or authorization required for the [FAST-41 covered] project”); see also *id.* § 4370m-4(e)(3) (cooperating and participating agencies must “identify, as early as practicable, . . . any issues that could substantially delay or prevent an agency from completing any environmental review or authorization required for the project,” and communicate them to the project sponsor).

<sup>20</sup> To date, the Permitting Council Executive Director and the Director of the Office of Management and Budget have approved over \$50 million in ERIF transfers to agencies to facilitate timely and efficient environmental reviews and authorizations for FAST-41 covered projects. See 42 U.S.C. § 4370m-8(d)(3).

<sup>21</sup> For a description of the roles and responsibilities of agency CERPOs, which include facilitating agency compliance with posted FAST-41 permitting timetables, facilitating efficient and timely processes for environmental reviews and authorizations for covered projects, and supporting timely identification and resolution of potential disputes within and among agencies, see 42 U.S.C. § 4370m-1(c).

understanding of the project's unique circumstances, but also on consultation with the cooperating agencies and the project sponsor to coordinate permitting efforts and information needs. Prior to obtaining Executive Director authorization for an initial extension of a completion date that necessitates extending a final completion date by more than 30 days, the Executive Director expects that all of the agencies involved have carefully considered the work and coordination remaining and, based on project-specific circumstances, determined how much additional time is necessary to complete the required permitting action.<sup>22</sup> Given the detailed assessment of timing needs agencies should have engaged in prior to seeking a first extension, agencies generally should not need to request subsequent extensions. Additional extensions of the same completion date undermine the predictability of the Federal permitting process.

The Executive Director is particularly disinclined to authorize agency requests to extend an already extended completion date by a trivial time period (i.e., several days), because a short-term agency push to meet a previously extended permitting timetable completion date is preferable to diverting agency resources toward processing a subsequent permitting timetable extension request. Extending completion dates by a short time requires the same amount of effort on the part of the agencies, the project sponsor, and the Executive Director, as extensions in excess of 30 days. Instead of using agency resources to seek a brief extension, Agencies should direct those resources toward completing the permitting action itself.

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Please do not hesitate to reach out to this office or the IPM Team member assigned to your FAST-41 covered project with any questions concerning this memorandum, or for assistance managing or implementing your FAST-41 covered project's permitting timetable.

Date: 11/14/23



Eric Beightel  
Executive Director  
Federal Permitting Improvement  
Steering Council

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<sup>22</sup> See 42 U.S.C. § 4370m-2(c)(2)(D)(i)(II) (facilitating or lead agency only may change a permitting timetable completion date after obtaining concurrence of the affected cooperating agencies and consulting with the project sponsor and the Executive Director).