

Federal Permitting Improvement Steering Council

Standard Operating Procedure

Applying the Discretionary Standard for FAST-41 Covered Projects

PURPOSE

The Federal Permitting Improvement Steering Council (Council) establishes this standard operating procedure (SOP) to set forth a process by which a facilitating or lead agency, as applicable, may obtain an opinion of the Council on whether a project is covered under the discretionary standard set forth in section 41001(6) of Title 41 of the Fixing America's Surface Transportation Act (FAST-41), Pub. L. No. 114-94 (Dec. 4, 2015) (codified at 42 U.S.C. § 4370m(6)(A)(ii)).

DEFINITIONS

1. The "Chair," as defined at 42 U.S.C. § 4370m-1(b)(1), means the Executive Director, who shall serve as Chair of the Council.
2. A "Cooperating agency" as defined at 42 U.S.C. § 4370m(4), means any agency with jurisdiction under Federal law or special expertise as described in 40 C.F.R. § 1501.6 (as in effect on December 4, 2015).
3. The "Council," as defined at 42 U.S.C. § 4370m(5), means the Federal Permitting Improvement Steering Council established under 42 U.S.C. § 4370m-1(a) and is composed of the Chair and Council members.
4. The "Council members," as defined at 42 U.S.C. § 4370m-1(b), are the Chair, members designated by the head of each agency considered under 42 U.S.C. § 4370m-1(b)(2)(B), and the Chairman of the Council on Environmental Quality and the Director of the Office of Management and Budget per 42 U.S.C. § 4370m-1(b)(3).
5. A "Covered project," as defined at 42 U.S.C. § 4370m(6), means 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 Council that—
 - (i)
 - (I) is subject to NEPA;
 - (II) is likely to require a total investment of more than \$200,000,000; and
 - (III) does not qualify for abbreviated authorization or environmental review processes under any applicable law; or
 - (ii) is subject to NEPA and the size and complexity of which, in the opinion of the Council, make the project likely to benefit from enhanced oversight and coordination, including a project likely to require—
 - (I) authorization from or environmental review involving more than two Federal agencies; or

(II) the preparation of an environmental impact statement under NEPA.

Does not include—

- (i) any project subject to 23 U.S.C. § 139;
 - (ii) any project subject to 33 U.S.C. § 2348; or
 - (iii) except as expressly provided in 42 U.S.C. 4370m–2(f) and 23 U.S.C. § 139(o), the requirements and other provisions of FAST-41, does not apply to programs administered now and in the future by the Department of Transportation or its operating administrations under title 23, 46, or 49, United States Code, including direct loan and loan guarantee programs, or other Federal statutes or programs or projects administered by an agency pursuant to their authority under title 49, United States Code.
6. A “Facilitating agency,” as defined at 42 U.S.C. § 4370m(13) means the agency that receives the initial notification from the project sponsor required under 42 U.S.C. § 4370m-2(a).
 7. A “Lead agency,” as defined at 42 U.S.C. § 4370m(15) means the agency with principal responsibility for an environmental review of a covered project under NEPA and 40 C.F.R. §§ 1500-1508 (or successor regulations).
 8. “NEPA” means the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 et seq.).
 9. A “Participating agency,” as defined at 42 U.S.C. § 4370m(17), means an agency participating in an environmental review or authorization for a covered project in accordance with 42 U.S.C. § 4370m-2.
 10. A “Project sponsor,” as defined at 42 U.S.C. § 4370m(18) means an entity, including any private, public, or public-private entity, seeking an authorization for a covered project.
 11. A “Quorum” means a number greater than 50 percent of the Council members (or their designees).

BACKGROUND

The Office of Management and Budget (OMB) and the Council on Environmental Quality (CEQ) issued the *Memorandum for Heads of Federal Departments and Agencies: Guidance to Federal Agencies Regarding the Environmental Review and Authorization Process for Infrastructure Projects (M-17-14)* (FAST-41 Implementation Guidance) on January 13, 2017 to assist agencies in carrying out their responsibilities under FAST-41.

The FAST-41 Implementation Guidance states that subsection (i) of the definition for “covered project” is referred to as the “objective” standard for becoming a covered project and subsection (ii) is referred to as the “discretionary” standard.¹ A project need only meet one of the standards to be considered a covered project. The discretionary standard provides the Council with the ability to designate as covered those projects that meet the threshold/baseline requirement of having more

¹ FAST-41 Implementation Guidance, page 18.

than two Federal agencies involved,² are likely to require the preparation of an EIS,³ are from one of the sectors covered under FAST-41, are not expressly exempt or excluded,⁴ but do not meet the objective standard described above.⁵

PROCEDURE

The Council shall use the following procedure when it receives a request by a facilitating or lead agency⁶, as appropriate, to designate a project as covered under the discretionary standard.

1. Requests

- a. **General.** The project sponsor shall submit to the Chair and facilitating or lead agency, as appropriate and designated in Section 3.3 of the FAST-41 Implementation Guidance⁷, a FAST-41 Initiation Notice (FIN) of a proposed project. The facilitating or lead agency, as appropriate, will make a determination on whether a completed FIN should be considered under the discretionary standard. If the facilitating or lead agency determines that the completed FIN should be considered under the discretionary standard it will forward its determination to all Council members as outlined below.
- b. **Contents.** Each determination submitted to all Council members by the facilitating or lead agency, as appropriate, in accordance with Section 1.a. shall include:
 - i. A copy of the FIN with the following information⁸:
 1. A statement of the purposes and objectives of the proposed project;
 2. A concise description, including the general location of the proposed project and a summary of geospatial information, if available, illustrating the project area and the locations, if any, of environmental, cultural, and historic resources;
 3. A statement regarding the technical and financial ability of the project sponsor to construct the proposed project;
 4. A statement of any Federal financing, environmental reviews, and authorizations anticipated to be required to complete the proposed project; and
 5. An assessment that the proposed project meets the definition of covered project and a statement of reasons supporting the assessment.

² "Involvement of more than two Federal agencies should be used as a baseline/threshold for consideration [when designating projects on a discretionary basis], but not as a determinative basis for designation." FAST-41 Implementation Guidance at p. 23.

³ 42 USC 4370m(6)(A)(ii)(II).

⁴ 42 U.S.C. § 4370m(6)(B). Also, as expressly provided in 42 U.S.C. 4370m-2(f) and 23 U.S.C. § 139(o), the requirements and other provisions of FAST-41 does not apply to (1) programs administered now and in the future by the Department of Transportation or its operating administrations under title 23, 46, or 49, United States Code, including direct loan and loan guarantee programs, or other Federal statutes or programs or projects administered by an agency pursuant to their authority under title 49, United States Code; or (2) any project subject to 33 U.S.C. § 2348.

⁵ FAST-41 Implementation Guidance, page 23.

⁶ This does not foreclose the appeal procedures from applying and the Executive Director possibly making a determination to bring forth a request for a project to be covered under the discretionary standard. FAST-41 Implementation Guidance, pages 33-34.

⁷ FAST-41 Implementation Guidance, pages 19-21.

⁸ FAST-41 Implementation Guidance, pages 31-32.

6. Any other information as may be required by Section 3.6 of the FAST-41 Implementation Guidance.
- ii. The recommendation of the facilitating or lead agency, as appropriate, with the following information:
 1. A detailed rationale to support its recommendation;
 - a. A statement that project is likely to involve more than two Federal agencies and a list of such agencies⁹ ;
 - b. An explanation of how the project would benefit from enhanced oversight and coordination procedures in FAST-41; and
 - c. An explanation of how enhanced oversight and coordination will benefit public health, safety, and the environment.
 - d. An explanation of why the project is likely to require the preparation of an environmental impact statement under NEPA.¹⁰
 2. A list of agencies consulted on the recommendation¹¹;

2. Transmittal and Recommendation

- a. **General.** No later than five (5) calendar days after receiving what the facilitating or lead agency deems a completed FIN, submitted in accordance with Section 1, the facilitating or lead agency's Council member will transmit its determination to all Council members on whether the Council should allow the project to be covered under the discretionary standard.
- b. **Supplemental Information.** Each Council member will have two (2) calendar days to review the information sent under Section 2.a. and communicate to all Council members whether additional information is needed prior to the Council member being able to vote on whether the project should be allowed under the discretionary standard. If a Council member alerts the facilitating or lead agency's, as appropriate, Council member that additional information is needed, the facilitating or lead agency's, as appropriate, Council member will either provide the information to all Council members within four (4) calendar days of the request or, if necessary, request additional information from the project sponsor. If additional information is requested from the project sponsor, the FIN is deemed incomplete and the 14 day clock is paused.

⁹ "Involvement of more than two Federal agencies should be used as a baseline/threshold for consideration [when designating projects on a discretionary basis], but not as a determinative basis for designation." FAST-41 Implementation Guidance at p. 23.

¹⁰ The 'likely to require the preparation of an EIS' criterion is from the statutory text of the discretionary standard at 42 USC 4370m(6)(A)(ii)(II). The Implementation Guidance at p. 23 further uses this criterion to determine project "complexity" and whether a project would be likely to benefit from "enhanced oversight and coordination."

¹¹ The facilitating or lead agency, as appropriate, should consult with all reasonably anticipated participating and cooperating agencies prior to sending out its recommendation.

3. Council Meetings

- a. **General.** The Council will meet upon the request of the Chair, in person or by remote participation, to discuss and vote on any request submitted under section 1.a, no later than eight (8) calendar days after the facilitating or lead agency, as appropriate, transmits its determination under Section 2.a and subject to any pauses per Section 2.b.
- b. **Notice of Meetings.** The Chair shall transmit date, time and location of the meeting to all Council members at least one (1) calendar day before each meeting.

4. Remote Participation. Council members (or their designees) may participate in Council meetings by remote participation. Council members (or their designees) who participate in a meeting by such means shall be considered present for all purposes, including the presence of a quorum.

5. Decision-Making. The decision (yea or nay) regarding the inclusion of the project as a covered project under the discretionary standard shall require the majority vote of a quorum of Council members. A tie or a negative majority vote of a quorum of Council members will result in the disapproval of the project as a covered project.

6. Proxy. A Council member may designate a substitute to participate in a Council meeting for the purposes of voting on a request submitted under Section 1. A person designated to substitute for the Council member at the Council meeting shall present the Council with credentials of authority by letter, email, or other form of appointment acceptable to the Council, stating the scope or limitations of the individual's voting authority.

7. Adjournment of a Meeting. If a quorum is not present at a Council meeting, the Chair shall adjourn the meeting and reschedule the meeting as soon as practicable. If it is determined in advance of a scheduled Council meeting that a quorum of Council members will not be available, the Chair shall cancel and reschedule the meeting as soon as practicable.

8. Record of Action. The Chair shall create a record of actions and decisions of the Council, and distribute the record of actions and decisions to all Council members within fourteen (14) calendar days of the meeting.

9. Effective Date. Unless otherwise specified by the Council, Council actions with regard to the request shall take effect when adopted and remain in effect until superseded.

10. Notification to Project Sponsor. The facilitating or lead agency, as appropriate will e-mail a letter to the project sponsor, and copy all Council members, within 14 calendar days of the completed FIN submission to communicate the decision of the Council. The letter should contain agency specific information from the initial recommendation as applicable if it aligns with the Council's decision. In the case where the recommendation did not align with the Council's decision, the letter should reflect only the Council's opinion.

11. Entry of Project on Permitting Dashboard. If the vote was to allow the project as a covered

project under the discretionary standard then the Executive Director shall make an entry on the Permitting Dashboard within 14 calendar days of the completed FIN submission.

GENERAL

- 12. Amendment.** The majority vote of a quorum must approve any decision to amend, suspend, revoke, or waive this standard operating procedure.

- 13. Limitation.** These procedures set out internal operating policies and processes for the Council. They are not intended to, and do not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, the Council, the Chair, a Council member, or the Departments, agencies, entities, officers, employees, or agents thereof, or any other person.

April 30, 2018

DATE

Angela Colamaria

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Federal Permitting Improvement Steering Council