

A R T I C L E S

# THIS PERMIT REFORM ALREADY WORKS. WHY AREN'T MORE MINING PROJECTS USING IT?

by Jamie Pleune and Edward Boling

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## SUMMARY

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In January 2021, the mining sector was made eligible for coverage under the Fixing America's Surface Transportation Act (FAST-41) program, a pilot project designed to expedite federal permitting. Although mining projects have been eligible for over two years, only recently was the first one posted on the Permitting Dashboard. This Article explains the structural provisions of the FAST-41 program; describes performance data from FAST-41 projects completed during the past five years, concluding that the Act's procedures promote efficiency, transparency, and predictability; explores common causes of delay, with a focus on mine permit processing; and addresses agency capacity challenges at the Bureau of Land Management. It concludes that the FAST-41 process is well-situated to expedite mine permitting without compromising public engagement, analytical rigor, or environmental protections.

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In January 2021, the Federal Permitting Improvement Steering Council (the Permitting Council) issued a final rule, adding mining as a sector of projects covered by Title 41 of the Fixing America's Surface Transportation (FAST) Act (FAST-41).<sup>1</sup> It was an unusual move, for a few reasons, but one that promised to improve timeliness, efficiency, predictability, and transparency of the deci-

sionmaking process for mine permit applicants who used the program.

Though the U.S. Congress often works in mysterious ways, it still seems unusual to find a multi-section infrastructure permitting law (FAST-41) buried within a surface transportation law (the FAST Act) extended through rulemaking to apply to mining.<sup>2</sup> The FAST Act was signed into law on December 4, 2015.<sup>3</sup> It was the first multi-year federal transportation bill in a decade, and within its 500-page expanse lay the seeds of a pilot project intended to reform the permitting process for complex, multiagency projects.<sup>4</sup>

Codified at 42 U.S.C. §4370m and situated adjacent to the National Environmental Policy Act (NEPA),<sup>5</sup> FAST-41 contains highly detailed procedural rules for federal agen-

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1. Adding Mining as a Sector of Projects Eligible for Coverage Under Title 41 of the Fixing America's Surface Transportation Act, 86 Fed. Reg. 1281 (Jan. 8, 2021).

2. Notwithstanding the Act's titular focus on transportation, it actually includes 10 sectors, many of which are not exclusive to transportation. Those sectors are renewable energy production, conventional energy production, electricity transmission, aviation, ports and waterways, water resource projects, broadband, pipelines, manufacturing, and, of course, surface transportation. 42 U.S.C. §4370m(6)(A).

3. Pub. L. No. 114-94, 129 Stat. 1312 (2015) (codified at 42 U.S.C. §§4370m et seq.); see generally 86 Fed. Reg. 1281.

4. Thomas C. Jensen et al., *Infrastructure Permit Streamlining Under the FAST Act*, 46 ELR 10369, 10369 (May 2016).

5. 42 U.S.C. §§4321-4370h, ELR STAT. NEPA §2-209.

cies to follow in issuing permits for major infrastructure projects.<sup>6</sup> The procedures (more on that later) focus on improving efficiency and transparency during the permitting process through better communication, coordination, sequencing, and dispute resolution between the multiple authorities involved in permitting complex projects.<sup>7</sup>

Critically, the FAST-41 program, as it came to be called, seeks to achieve ambitious permitting time frames—and stay on schedule—without reducing environmental protections.<sup>8</sup> According to the Federal Infrastructure Permitting Dashboard, the FAST-41 program “does not alter any applicable statutory or regulatory requirement, environmental law, regulation, or review process, or public involvement procedure,” nor does it “predetermine the outcome of any Federal decision-making process.”<sup>9</sup> In other words, the program seeks to achieve expedited permitting time frames solely through improved management and communication protocols.

To oversee and implement these procedures, the Act established the Permitting Council,<sup>10</sup> which brings us to the second reason that the rulemaking adding mining as a sector within FAST-41 was an unusual move. As the *Federal Register* notice acknowledged,<sup>11</sup> FAST-41 included a sunset date of December 4, 2022, for the Permitting Council—a looming deadline that was less than two years away when the rulemaking was finalized.<sup>12</sup> This made for some tangled reasoning in the “Economic Analysis” section of the rulemaking, where the Permitting Council estimated that the rule would have a minimal economic impact because the sunset date would “act as a disincentive to the project sponsors who are most likely to be interested in FAST-41 coverage.”<sup>13</sup>

The sunset date was a potential problem that never materialized. Less than a year later, President Joseph Biden signed the Infrastructure Investment and Jobs Act (IIJA),

which reauthorized FAST-41 and repealed the sunset provision,<sup>14</sup> making the Permitting Council a permanent executive branch agency.<sup>15</sup> Although the streamlining procedures available through FAST-41 are now permanent, there appears to be some other disincentive that deters mining projects from participating in this voluntary program.

As of May 9, 2023, there is only one project on the Dashboard listed under the mining sector.<sup>16</sup> Considering the policy support announced by the Biden Administration for sustainable production of “strategic and critical materials necessary for the clean energy transition—such as lithium, nickel, cobalt, graphite, and manganese for large capacity batteries,”<sup>17</sup> the lack of projects is surprising. Given that the FAST-41 procedures directly address many of the most common causes of delay in the mine permitting process, the lack of participation in the program is perplexing.

This Article proceeds as follows. Part I explains the structural provisions of the FAST-41 program. Part II describes performance data from FAST-41 projects completed during the past five years, and concludes that the Act’s procedures promote efficiency, transparency, and predictability. Part III explores common causes of delay in the permitting process, with a focus on issues that affect mine permit processing. Part IV focuses on agency capacity challenges at the Bureau of Land Management (BLM). Part V concludes that the FAST-41 process is well-situated to address common causes of delay in the mine permitting process without compromising public engagement, analytical rigor, or environmental protections.

## I. What Is FAST-41?

According to the bill’s U.S. Senate report, FAST-41 is a voluntary program that seeks to improve the permitting process for major infrastructure projects through three structural changes: (1) deadline-setting and better coordination of permitting decisions; (2) enhanced procedural transparency; and (3) a shorter statute of limitations for litigation challenging permitting decisions.<sup>18</sup> The Act also created the Permitting Council, which is not only instru-

6. Jensen et al., *supra* note 4. Title 41 began its life as the Federal Permitting Improvement Act introduced by Sens. Angus King (I-Me.), Rob Portman (R-Ohio), and Claire McCaskill (D-Mo.), but it was added to the FAST Act as a convenient vehicle for enactment. Despite its inclusion in the FAST Act, it exempts surface transportation and water resource projects that are subject to other streamlining and transparency provisions. See 42 U.S.C. §4370m(6)(B) (exempting projects subject to 23 U.S.C. §139 and 33 U.S.C. §2348 from eligibility as “covered projects”).

7. FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL, RECOMMENDED BEST PRACTICES FOR ENVIRONMENTAL REVIEWS AND AUTHORIZATIONS FOR INFRASTRUCTURE PROJECTS 1 (2017) [hereinafter PERMITTING COUNCIL, BEST PRACTICES FY2017] (describing the law as creating “a new governance structure, set of procedures, and authority to establish a fee or transfer appropriations from certain agencies to improve the timeliness, predictability, and transparency of the Federal environmental review and authorization process for covered infrastructure projects”).

8. 86 Fed. Reg. at 1283 (countering misunderstanding in submitted comments that FAST-41 created an alternate, “expedited” project review and permitting regime and clarifying that “[t]he FAST-41 statute expressly does not supersede NEPA or affect any other agency statutory or regulatory requirement”).

9. Permitting Dashboard, *Title 41 of the Fixing America’s Surface Transportation Act (FAST-41)*, <https://www.permits.performance.gov/about/title-41-fixing-americas-surface-transportation-act-fast-41> (last updated Nov. 15, 2021).

10. 42 U.S.C. §4370m-1 (2022).

11. 86 Fed. Reg. at 1285.

12. 42 U.S.C. §4370m-12.

13. 86 Fed. Reg. at 1285.

14. Pub. L. No. 117-58, div. G, tit. VII, §70801(h), 135 Stat. 429 (2021).

15. FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL, QUARTERLY AGENCY PERFORMANCE REPORT, Q1 JANUARY-MARCH 2 (2022) [hereinafter PERMITTING COUNCIL, Q1 2022 REPORT].

16. Permitting Dashboard, *FAST-41 Covered Projects*, <https://www.permits.performance.gov/permitting-project/south32-hermosa-critical-minerals-project> (last visited May 9, 2023).

17. Presidential Determination No. 2022-16, Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as Amended, on Insulation (June 6, 2022); BIDEN-HARRIS ADMINISTRATION FUNDAMENTAL PRINCIPLES FOR DOMESTIC MINING REFORM (2022), <https://www.doi.gov/sites/doi.gov/files/biden-harris-administration-fundamental-principles-for-domestic-mining-reform.pdf>.

18. COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, REPORT TO ACCOMPANY S. 280: TO IMPROVE THE EFFICIENCY, MANAGEMENT, AND INTERAGENCY COORDINATION OF THE FEDERAL PERMITTING PROCESS THROUGH REFORMS OVERSEEN BY THE DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET, AND FOR OTHER REASONS, S. REP. NO. 114-112, at 3 (2015); Jensen et al., *supra* note 4, at 10370.

mental in achieving coordination during the permitting process, but also provides added value.

The Permitting Council is responsible for establishing recommended performance schedules that establish a data-based benchmark for how long common permitting actions should take.<sup>19</sup> The Council also serves as a forum for identifying and propagating best practices and opportunities to address cross-cutting issues through programmatic or systemic solutions.<sup>20</sup> An annual report to Congress provides further accountability by assessing the degree to which each agency has implemented those best practices.<sup>21</sup>

The FAST Act procedures and practices were not conceived in a vacuum—they codified recommendations made by an interagency steering committee tasked with identifying a strategic plan for modernizing infrastructure permitting.<sup>22</sup> In May 2013, President Barack Obama issued a Presidential Memorandum—Modernizing Federal Infrastructure Review and Permitting Regulations, Policies, and Procedures—announcing the federal goal of “cutting aggregate timelines for major infrastructure projects in half, while also improving outcomes for communities and the environment.”<sup>23</sup> The Memorandum touted improvements achieved over the past year in response to Executive Order No. 13604, Improving Performance of Federal Permitting and Review of Infrastructure Projects, issued on March 22, 2012.<sup>24</sup> Agencies had implemented practices that “achieved better outcomes for communities and the environment and realized substantial time savings in review and permitting by prioritizing the deployment of resources to specific sectors and projects, and by implementing best-management practices.”<sup>25</sup>

Some of the best management practices included integrating project reviews among agencies with permitting responsibilities; ensuring early coordination with other federal agencies; strategically reaching out to stakeholders; incorporating local planning goals into project designs; utilizing landscape- and watershed-level mitigation practices; ensuring data practices that minimized redundancy by sharing scientific and environmental data in open-data formats; and increasing transparency through electronic tracking of review and permitting schedules.<sup>26</sup> In order to institutionalize and build upon these practices, the presi-

dent initiated an interagency steering committee charged with several tasks intended to modernize the permitting process.<sup>27</sup> In 2014, the steering committee issued an implementation plan with multiple recommendations, many of which were codified in the procedures and practices of FAST-41.<sup>28</sup> The goal was to make permitting more efficient, while improving social and environmental outcomes.

### A. FAST-41 Procedures

Eligibility for the voluntary FAST-41 program hinges on whether a project is considered a “covered project.”<sup>29</sup> To become a covered project, a project sponsor must submit an initial application demonstrating that the project meets statutory standards.<sup>30</sup> FAST-41 guidance summarizes these standards into two categories: objective and discretionary. The “objective” standard requires that the project is subject to review under NEPA, is likely to involve investment of more than \$200 million, and is not eligible for abbreviated authorization or environmental review under any other law.<sup>31</sup> The “discretionary” standard requires that the project be “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,” particularly where the project is likely to require authorization from more than two federal agencies and require the preparation of an environmental impact statement (EIS).<sup>32</sup>

The IIJA added two additional eligibility standards, for projects that are covered by a programmatic plan for facilitating the development of carbon dioxide pipelines,<sup>33</sup> and for projects that are subject to NEPA, sponsored by an Indian tribe, an Alaska Native corporation, or a Native Hawaiian organization, and located on their land.<sup>34</sup> In addition to these statutory requirements, the application

19. 42 U.S.C. §4370m-1(c)(1)(C).

20. Despite the difficulty finding them online, the annual Recommended Best Practices Reports are informative and interesting. Links to each report are available at Permitting Dashboard, *Reports and Publications*, <https://www.permits.performance.gov/fpisc-content/reports-and-publications> (last updated Mar. 13, 2023).

21. *Id.* (providing links to the Annual Reports to Congress).

22. See Alejandro E. Camacho, *Bulldozing Infrastructure Planning and the Environment Through Trump’s Executive Order 13807*, 91 U. COLO. L. REV. 511, 536-37 (2020) (describing the origin story of FAST-41, including Executive Order No. 13604, the creation of an interagency steering committee, and how these efforts interfaced with earlier streamlining measures, including the Permitting Dashboard and the One Federal Decision framework).

23. Memorandum for Heads of Executive Departments and Agencies on Modernizing Federal Infrastructure Review and Permitting Regulations, Policies, and Procedures (May 17, 2013) [hereinafter Memorandum on Modernizing Federal Infrastructure].

24. *Id.*; Exec. Order No. 13604, 77 Fed. Reg. 18887 (Mar. 22, 2012).

25. Memorandum on Modernizing Federal Infrastructure, *supra* note 23.

26. *Id.*

27. *Id.* §1.

28. STEERING COMMITTEE ON FEDERAL INFRASTRUCTURE PERMITTING AND REVIEW PROCESS IMPROVEMENT, IMPLEMENTATION PLAN FOR THE PRESIDENTIAL MEMORANDUM ON MODERNIZING INFRASTRUCTURE PERMITTING (2014). For more details on this history, see Camacho, *supra* note 22, at 536-38.

29. 42 U.S.C. §4370m(6)(A) (defining “covered project” as 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, carbon capture, or any other sector as determined by a majority vote of the Permitting Council).

*But see id.* §4370m(6)(B) (excluding some projects). See also OFFICE OF MANAGEMENT AND BUDGET & COUNCIL ON ENVIRONMENTAL QUALITY, MB M-17-14, GUIDANCE TO FEDERAL AGENCIES REGARDING THE ENVIRONMENTAL REVIEW AND AUTHORIZATION PROCESS FOR INFRASTRUCTURE PROJECTS §4.6 (2017) [hereinafter FAST-41 GUIDANCE] (clarifying that participation in FAST-41 is voluntary for new projects).

30. 42 U.S.C. §4370m(6)(A).

31. *Id.* §4370m(6)(A)(i); FAST-41 GUIDANCE, *supra* note 29, §3.1 (referring to this as the “objective” standard). The 2021 amendments added additional objective standards for carbon capture and sequestration projects and for certain projects sponsored by tribal governments, Alaska Native corporations, and certain qualifying Hawaiian projects).

32. 42 U.S.C. §4370(6)(A)(iv); FAST-41 GUIDANCE, *supra* note 29, §3.6 (referring to this as the “discretionary” standard).

33. 42 U.S.C. §4370m(6)(A)(ii).

34. *Id.* §4370m(6)(A)(iii).

must contain sufficient detail to allow agencies to create a comprehensive and complete project permitting timetable within 60 days of initial project coverage.<sup>35</sup> The permitting timetable is part of a coordinated project plan (CPP), which is a central element of the FAST-41 procedures and described in more detail below.<sup>36</sup>

The initial application described above is called a FAST-41 initiation notice (FIN),<sup>37</sup> and must be submitted to the executive director of the Permitting Council as well as the “facilitating agency.”<sup>38</sup> Although the statute is vague about the identity of a “facilitating agency,”<sup>39</sup> the Permitting Council published a table identifying the presumptive facilitating agency for projects within each sector.<sup>40</sup> The web page describing the FAST-41 process clarifies that most applicants contact the executive director prior to submitting a FIN.<sup>41</sup> FAST-41 guidance also strongly encourages pre-notification coordination.<sup>42</sup>

During a pre-application meeting, the executive director coordinates an interagency meeting with the project sponsor to identify key issues for immediate attention, discuss possible mitigation, and identify anticipated permitting milestones.<sup>43</sup> Through this process, the “facilitating agency” serves as the lead federal point of contact for communications with the project sponsor until a lead agency is established.<sup>44</sup> In practice, most project sponsors have already established a working relationship with a lead agency prior to initiating the FIN, and the provision for a “facilitating agency” merely serves as a backstop if the lead agency is unknown.

After a FIN is received, the facilitating agency has 14 days to confirm whether the project qualifies as a “covered project,”<sup>45</sup> which includes confirming that the application is sufficiently complete to determine which federal agencies would need to be invited as FAST-41 cooperating or participating agencies.<sup>46</sup> Once coverage has been determined,

the executive director must post the project to the Permitting Dashboard,<sup>47</sup> which is an online, searchable database that tracks the status of federal environmental reviews and authorizations for all covered projects.<sup>48</sup>

Posting a project to the Dashboard triggers a series of actions with statutory time frames necessary to coordinate environmental review and authorization of the covered project.<sup>49</sup> First, the facilitating agency (or lead agency) has 21 days to “identify all Federal and non-federal agencies and governmental entities likely to have financing, environmental review, authorization, or other responsibilities with respect to the proposed project”<sup>50</sup> and to invite them to become participating<sup>51</sup> or cooperating<sup>52</sup> agencies.<sup>53</sup> The invitation must include a 14-calendar-day RSVP deadline.<sup>54</sup>

All invited agencies are designated as participating or cooperating agencies unless the agency determines, in a written response, that it lacks authority or jurisdiction or declines to participate.<sup>55</sup> The purpose of this invitation is to avoid delays caused by objections raised late in the process. Agencies must declare their interest or decline to participate at this stage.<sup>56</sup> Although FAST-41 does not apply to state, tribal, or local governments, agencies are encouraged to include these permitting authorities where possible.<sup>57</sup> All of these steps must be completed within 45 days.<sup>58</sup>

Second, the facilitating or lead agency must provide an “expeditious process” for the project sponsor to meet with each cooperating and participating agency,<sup>59</sup> and within 60 days, each agency must provide the following information to the project sponsor: the availability of information and tools to facilitate early planning; key issues of concern to the agency and the public; and issues that must be addressed before an environmental review or authorization can be completed.<sup>60</sup> This process is intended to inform the third step, which is creation of the CPP.

35. *Id.* §4370m-2(c)(1)(A); FAST-41 GUIDANCE, *supra* note 29, §4.6 (project description must be sufficient at the outset to facilitate appropriate level of analysis under NEPA and interagency coordination on all required permits/authorizations). *See also* 42 U.S.C. §4370m-2(a)(1)(C) (describing the information that should be included in a FAST-41 initiation notice (FIN)).

36. 42 U.S.C. §4370m-2(c)(1) (defining a CPP as “a concise plan for coordinating public and agency participation in, and completion of, any required Federal environmental review and authorization for this project”).

37. Permitting Dashboard, *The FAST-41 Process*, <https://www.permits.performance.gov/fpisc-content/fast-41-process> (last updated Aug. 16, 2022).

38. 42 U.S.C. §4370m-2(a)(1)(A).

39. The statute circularly defines the term “facilitating agency” as the agency that receives the initial notification from the project sponsor. *Id.* §4370m(13).

40. FAST-41 GUIDANCE, *supra* note 29, §3.3; Permitting Dashboard, *Project Type and Facilitating Agency*, <https://www.permits.performance.gov/tools/project-type-and-facilitating-agency> (last updated June 29, 2016).

41. Permitting Dashboard, *supra* note 37.

42. FAST-41 GUIDANCE, *supra* note 29, §§4.2, 4.3.

43. Permitting Dashboard, *supra* note 37.

44. FAST-41 GUIDANCE, *supra* note 29, §2.11.

45. *Id.* §4.4 (“Upon receipt, the facilitating agency (or lead agency, as appropriate) is required to determine whether the information contained in the Initiation Notice is complete and whether the project meets the definition of a covered project.”).

46. *Id.* §4.6:

The contents of the Initiation Notice . . . must include sufficiently-detailed information for the facilitating agency to determine whether the project is a covered project and what agencies would need to be invited as FAST-41 cooperating or participating agen-

cies. If the facilitating agency determines that the information submitted is incomplete, then the 14-day deadline for the Executive Director’s posting of the project entry will not commence.

47. *Id.* §§4.4, 4.12; 42 U.S.C. §4370m-2(b)(2)(A).

48. 42 U.S.C. §4370m-2(b)(1)(A); Permitting Dashboard, *About the Federal Infrastructure Permitting Dashboard*, <https://www.permits.performance.gov/about> (last updated Aug. 27, 2019).

49. FAST-41 GUIDANCE, *supra* note 29, §4.13.

50. 42 U.S.C. §4370m-2(a)(2)(A).

51. The statute defines a “participating agency” as one “participating in an environmental review or authorization of a covered project” in accordance with the Act’s procedures. 42 U.S.C. §4370m(17).

52. A “cooperating agency” is defined by reference to one of NEPA’s implementing regulations, 40 C.F.R. §1508.1, which refers to any federal agency, other than a lead agency, that has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) analyzed under NEPA. 42 U.S.C. §4370m(4); 40 C.F.R. §1508.1(e).

53. 42 U.S.C. §4370m-2(a)(2).

54. *Id.* §4370m-2(a)(2)(B).

55. *Id.* §4370m-2(a)(3).

56. Exclusion is not absolute. The statute includes a “changed circumstances” provision in which an agency that opted out may request designation as a participating or cooperating agency based on a showing of changed circumstances. *Id.* §4370m-2(a)(3)(B). This ensures that unexpected impacts, discovered later in the process, can still be addressed.

57. *Id.* §4370m-2(c)(3)(C); FAST-41 GUIDANCE, *supra* note 29, §4.14.

58. FAST-41 GUIDANCE, *supra* note 29, §§4.13, 4.14.

59. 42 U.S.C. §4370m-2(d).

60. *Id.*

Within 60 days of posting a project on the Dashboard, the facilitating or lead agency, in consultation with the coordinating and participating agencies, must create a CPP, which is defined as “a concise plan for coordinating public and agency participation in, and completion of, any required Federal environmental review and authorization for the project.”<sup>61</sup> Agencies are encouraged to formalize the CPP through a memorandum of understanding (MOU).<sup>62</sup>

The CPP must include (1) a list of all entities with environmental review or authorization responsibility for the project (including roles and responsibilities); (2) a permitting timeline, setting forth a comprehensive schedule of dates by which all environmental reviews and authorizations must be made (including state permits, where possible); (3) a discussion of potential avoidance, minimization, and mitigation strategies (if required by applicable law and known); and (4) plans and a schedule for public and tribal outreach and coordination.<sup>63</sup> The CPP must be updated quarterly as the project progresses and requirements come into sharper focus.<sup>64</sup>

Part of the CPP includes a permitting timetable that includes intermediate and final completion dates for action by each participating agency on any federal environmental review or authorization required for the project.<sup>65</sup> The permitting timetable must be posted to the Dashboard and publicly tracked.<sup>66</sup> Although the permitting timetable in the CPP should mirror standardized deadlines,<sup>67</sup> the statute identifies factors that may justify altering the presumptive time frames.<sup>68</sup>

Those factors include the size and complexity of the project; resources available to participating agencies; the regional or national economic significance of the project; the financing plan for the project; and the extent to which similar projects in geographic proximity were recently subject to environmental review or similar procedures under state law.<sup>69</sup> The statute also creates procedures for modifying a permitting timetable after it has been agreed upon,<sup>70</sup> and for resolving disputes between agencies regarding any element of the permitting timetable.<sup>71</sup>

Once the CPP and permitting timetables have been established, every federal agency involved has a duty to conform to the established intermediate and final completion dates,<sup>72</sup> which are posted on the Permitting Dashboard.<sup>73</sup> As decisions are made, or information is received from a permit applicant, that information is posted to the Dash-

board.<sup>74</sup> Agencies that miss a deadline or believe that they will miss a deadline must submit a written justification for missing the deadline, identify an alternative deadline, and provide monthly reports to the executive director until the delayed action or authorization is finalized.<sup>75</sup> All of that information is posted on the Permitting Dashboard.<sup>76</sup>

To ensure that the material on the Dashboard is transparent and useful for the public, the statute clarifies that each posting must include relevant information about the project and the applicable law.<sup>77</sup> Required information includes how to access documents, the status of mitigation measures agreed to as part of the permitting process, the status of any litigation that is directly relevant to the project, and information about project-related public meetings, hearings, and comment periods.<sup>78</sup>

Since federal agencies are not the only permitting authorities, the statute encourages cooperation with state, local, or tribal governments.<sup>79</sup> Federal agencies may negotiate an MOU to coordinate the federal process with state, local, or tribal permitting requirements.<sup>80</sup> Through these negotiations, a state, local, or tribal permitting authority would become a cooperating agency and subject to the streamlining provisions of FAST-41.<sup>81</sup> To encourage coordination, a state, local, or tribal agency may also limit their status of cooperating agency to the NEPA process.<sup>82</sup>

The FAST-41 procedures are intended to produce several results. First, they should coordinate the necessary environmental reviews and authorizations into a single synchronized process.<sup>83</sup> This should also shorten timelines by encouraging concurrent (rather than sequential) analyses, where possible.<sup>84</sup> Third, the project sponsor (and the public) should enjoy increased transparency and predictability.<sup>85</sup> As discussed in Part II, all three results have been achieved, particularly for projects that were able to engage in the FAST-41 process from the beginning.<sup>86</sup>

61. *Id.* §4370m-2(c)(1).

62. *Id.* §4370m-2(c)(1)(C); FAST-41 GUIDANCE, *supra* note 29, §4.22.

63. 42 U.S.C. §4370m-2(c)(1)(B).

64. FAST-41 GUIDANCE, *supra* note 29, §4.23.

65. 42 U.S.C. §4370m-2(c)(2).

66. FAST-41 GUIDANCE, *supra* note 29, §4.23(ii).

67. Under FAST-41, the Permitting Council is instructed to create recommended performance schedules for common environmental reviews and authorizations. 42 U.S.C. §4370m-1(c)(1)(C). These should inform the permitting timetable. *Id.* §4370m-2(c)(2)(B).

68. *Id.* §4370m-2(c)(2)(B).

69. *Id.*

70. *Id.* §4370m-2(c)(2)(D); FAST-41 GUIDANCE, *supra* note 29, §4.31.

71. 42 U.S.C. §4370m-2(c)(2)(C); FAST-41 GUIDANCE, *supra* note 29, §4.30.

72. 42 U.S.C. §4370m-2(c)(2)(F).

73. *Id.* §4370m-1(b)(4).

74. *Id.*

75. *Id.* §4370m-2(c)(2)(F)(ii); *see also* FAST-41 GUIDANCE, *supra* note 29, §§4.28, 4.33 (recognizing that some deadlines may be contingent on the completion of other actions, and that circumstances beyond the control of the government may schedule adjustments).

76. 42 U.S.C. §4370m-2(b); *see also* Permitting Dashboard, *All Projects*, <https://www.permits.performance.gov/projects> (last visited May 1, 2023).

77. 42 U.S.C. §4370m-2(c)(3)(A).

78. *Id.*

79. *Id.* §4370m-2(c)(3).

80. *Id.* §4370m-2(c)(3)(C). This provision was used with the state of Louisiana in relation to the Mid-Barataria Sediment Diversion Project discussed below in Part II. The MOU is available at <https://gov.louisiana.gov/assets/docs/Issues/Coastal/CPRA-Trump-MOU-Midbarataria-1.26.18.pdf>.

81. FAST-41 GUIDANCE, *supra* note 29, §4.19.

82. *Id.*

83. *Id.* §4.38.

84. *Id.* §4.39.

85. *Compare* OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF THE INTERIOR, REPORT NO. CR-EV-MOA-0003-2013, ONSHORE OIL AND GAS PERMITTING 1 (2014) [hereinafter OIG, ONSHORE OIL AND GAS PERMITTING] (observing that with respect to the application for permit to drill (APD) process, “neither the BLM nor the operator can predict when the permit will be approved”).

86. When FAST-41 was first passed, some in-progress projects became part of the program’s inventory. 42 U.S.C. §4370m-1(c)(1)(A) (instructing the executive director of the Permitting Council to develop an inventory of projects eligible for the program). These projects did not receive the benefit of pre-application consultation and early stakeholder coordination; neverthe-

## B. The Permitting Council

A central feature of FAST-41 is establishment of the Permitting Council, which creates accountability within and between agencies. Additionally, through its reporting obligations, the Council propagates best practices that extend beyond FAST-41 projects.

The Permitting Council has an executive director, appointed by the president of the United States, who also serves as chair of the Council.<sup>87</sup> The chair of the Council on Environmental Quality (CEQ) and the director of the Office of Management and Budget (OMB) are standing members of the Council.<sup>88</sup> Thirteen agencies<sup>89</sup> involved in permitting must designate a member of the agency, with the minimal rank of deputy secretary, who would serve on the Council.<sup>90</sup> Additionally, each agency must appoint an “Agency CERPO,”<sup>91</sup> which is defined as the “chief environmental review and permitting officer of an agency.”<sup>92</sup> The Agency CERPO reports directly to the applicable agency councilmember,<sup>93</sup> and is responsible for providing technical and practical assistance.<sup>94</sup>

The Permitting Council has several benefits. First, it creates accountability. Each agency has two named individuals (the Permitting Council member and the CERPO) who bear responsibility for representing the agency during negotiations, ensuring the agency’s compliance with permitting schedules, updating information on the Permitting Dashboard, and implementing best practices.<sup>95</sup> Second, through frequent meetings and management of the annual Recommended Best Practices Report, the Permitting Council reduces the silo effect that can occur when agencies operate independently.<sup>96</sup> Third, regular meetings provide an oppor-

tunity for agencies to proactively identify and quickly resolve unexpected challenges when they arise.<sup>97</sup> Fourth, it provides a mechanism for agencies to coordinate data collection and information-sharing,<sup>98</sup> focusing particularly on decisions that are dependent on each other (e.g., where one federal agency cannot move forward in its process without information or a decision from another federal agency).<sup>99</sup>

The statute tasked the executive director of the Permitting Council with many chores, including the development of an inventory of covered projects pending environmental review or authorization from any federal agency that would serve as the first batch of FAST-41 projects,<sup>100</sup> development of recommended performance schedules for common environmental reviews and authorizations,<sup>101</sup> and issuance of guidance to effectuate best practices identified by the Council.<sup>102</sup> It also created the Environmental Review Improvement Fund,<sup>103</sup> and authorized the Permitting Council to create a fee structure to recover reasonable costs incurred in conducting environmental reviews and authorizations.<sup>104</sup>

less, participation in FAST-41 improved transparency and efficiency. Projects that used FAST-41 procedures from initiation show even better results. See *infra* notes 111-31 and related discussion; OFFICE OF THE EXECUTIVE DIRECTOR, FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL, ANNUAL REPORT TO CONGRESS FISCAL YEAR 2020, at 4, 12-13 (2021) [hereinafter PERMITTING COUNCIL, 2020 ANNUAL REPORT TO CONGRESS].

87. 42 U.S.C. §4370m-1(b)(3).

88. *Id.*

89. The statute lists the following heads of agencies required to designate a councilmember: (1) Secretary of Agriculture; (2) Secretary of the Army; (3) Secretary of Commerce; (4) Secretary of the Interior; (5) Secretary of Energy; (6) Secretary of Transportation; (7) Secretary of Defense; (8) Administrator of the Environmental Protection Agency; (9) chairman of the Federal Energy Regulatory Commission; (10) chairman of the Nuclear Regulatory Commission; (11) Secretary of Homeland Security; (12) Secretary of Housing and Urban Development; and (13) chairman of the Advisory Council on Historic Preservation. *Id.* §4370m-1(b)(2)(B). Additionally, the executive director is authorized to invite “any other head of a federal agency” to participate as a member of the Council. *Id.* §4370m-1(b)(2)(B)(xiv).

90. *Id.* §4370m-1(b)(2).

91. *Id.* §4370m-1(b)(2)(A)(iii)(I).

92. *Id.* §4370m(2).

93. *Id.* §4370m-1(b)(2)(A)(iii)(II).

94. *Id.* §4370m-1(c)(3).

95. *Id.* §4370m-1(b)(2)(A)(i) & (iii); FAST-41 GUIDANCE, *supra* note 29, §§2.3, 2.6.

96. See, e.g., FAST-41 GUIDANCE, *supra* note 29, app. A, tbl.1 (listing responsibilities of the Council including regular meetings, issuance of guidance, development of best practice recommendations, and at least annual meetings with groups or individuals representing state, tribal, and local governments that are engaged in the infrastructure permitting process); see also OFFICE OF THE EXECUTIVE DIRECTOR, FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL, RECOMMENDED BEST PRACTICES FOR PROJECT REVIEW AND

PERMITTING FOR INFRASTRUCTURE PROJECTS FOR FISCAL YEAR 2018, at 9 (2017) [hereinafter PERMITTING COUNCIL, BEST PRACTICES FY2018]:

Establishing regular meetings or meetings at project checkpoints allows for the various agencies to ensure a shared understanding of the project and next steps, as well as communicating any project changes. These meetings provide an opportunity to check that the different groups have sufficient information to move forward with the next steps of the process. The establishment and consistent use of common terminology across all documents for a particular project is important during this interagency coordination to ensure accuracy and shared understanding.

see also FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL, FISCAL YEAR 2024 BUDGET REQUEST 4 (2023) [hereinafter PERMITTING COUNCIL, FY2024 BUDGET REQUEST] (explaining that the Permitting Council “functions as a Federal center for permitting excellence by supporting agency implementation of FAST-41 and providing fora for sharing information and lessons learned”).

97. See, e.g., OFFICE OF THE EXECUTIVE DIRECTOR, FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL, FISCAL YEAR 2021 RECOMMENDED BEST PRACTICES FOR PROJECT REVIEW AND PERMITTING FOR INFRASTRUCTURE PROJECTS 3, 6 (2021) [hereinafter PERMITTING COUNCIL, BEST PRACTICES FY2021] (identifying ways for agencies to “efficiently predict, elevate, and resolve issues quickly—ultimately improving the timeliness of agency project review and permitting processes”).

98. *Id.* at 8 (clarifying that “this coordination includes determining who needs to provide information, to whom, and by when with particular attention to the critical path for the project review and permitting process”).

99. See, e.g., FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL, ANNUAL REPORT TO CONGRESS 13 (2021) [hereinafter PERMITTING COUNCIL, 2021 ANNUAL REPORT TO CONGRESS] (reporting that out of 29 projects undergoing active federal review, 17 projects (59%) identified a total of 157 dependencies).

100. 42 U.S.C. §4370m-1(c)(1)(A).

101. *Id.* §4370m-1(c)(1)(C).

102. *Id.* §4370m-1(c)(1)(D); PERMITTING COUNCIL, FY2024 BUDGET REQUEST, *supra* note 96, at 4, explaining that the

Executive Director manages each project’s permitting timetable on the Federal Permitting Dashboard, assesses agency compliance with FAST-41 permitting timetable requirements, mediates disputes with respect to permitting timetable contents, ensures quick elevation of issues to the appropriate Federal decision makers, and renders administrative decisions with respect to project coverage and certain extensions of FAST-41 permitting timetables.

103. 42 U.S.C. §4370m-8(d).

104. *Id.* §4370m-8(a); Fees for Governance, Oversight, and Processing of Environmental Reviews and Authorizations by the Federal Permitting Improvement Steering Council, 83 Fed. Reg. 44846 (Sept. 4, 2018) (proposing regulations that impose a \$200,000 initiation fee for covered projects); Fees for Governance, Oversight, and Processing of Environmental Reviews and

When the IJA made the Permitting Council a permanent independent agency, it also expanded the Permitting Council's duties and authority. It increased the Council's reporting obligations to Congress,<sup>105</sup> clarified the executive director of the Permitting Council's authority to create a fee structure for permitting (through notice-and-comment rulemaking),<sup>106</sup> and empowered the executive director to spend money in "support of the role of the Council as a Federal center for permitting excellence" and to transfer funds to "other federal agencies, state, tribal, and local governments to facilitate timely and efficient environmental reviews and authorizations for covered projects."<sup>107</sup> The Inflation Reduction Act capitalized the Permitting Council and the Environmental Review Improvement Fund by appropriating \$350 million for the next nine years. In other words, what began as a pilot project has become a new agency, devoted to "permitting excellence" and authorized to spend money to achieve that result.

Notably, the procedures in FAST-41 and the duties of the Permitting Council do not elevate speed over excellent deliberation.<sup>108</sup> This distinguishes FAST-41 and the Permitting Council from other streamlining efforts that seek to achieve speed (rather than efficient deliberation) through arbitrary deadlines, truncated analyses, and penalties.<sup>109</sup> In fact, FAST-41 guidance explicitly clarifies that "FAST-41 does not supersede, amend, or modify any federal statute, such as the National Environmental Policy Act of 1969 (NEPA), nor does it create a presumption that a covered project will be approved or favorably reviewed by any agency."<sup>110</sup>

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Authorizations by the Federal Permitting Improvement Steering Council; Withdrawal, 86 Fed. Reg. 26888 (May 18, 2021) (withdrawing proposed rulemaking to impose an initiation fee out of concern that it would dissuade participants, particularly in light of the statutory sunset imposed on the program (that was later repealed)).

105. Pub. L. No. 117-58, §70801(f), 135 Stat. 429 (2021).

106. *Id.* The original version only authorized the heads of agencies, in consultation with the executive director of the Permitting Council, to issue regulations establishing a fee structure for permitting. See Pub. L. No. 114-94, div. D, tit. XLI, §41009, 129 Stat. 1312 (2015). The funds raised through this fee structure are deposited in the Environmental Review Improvement Fund. 42 U.S.C. §4370m-8(d).

107. 42 U.S.C. §4370m-8; *id.* §4370m-1(c)(2)(B) (requiring publication and encouraging propagation of best practices that include early stakeholder engagement, timely decisions, improved coordination, increased transparency, reduced administrative burdens, use of geographic information systems, training materials, etc.).

108. *Id.* §4370m-1(c)(2)(B) (emphasizing "permitting excellence"); *id.* §4370m-2(c)(2)(B) (identifying factors that justify an extended time frame for deliberation); *id.* §4370m-6(e) (clarifying that nothing in the statute creates a presumption of approval or interferes with any power, jurisdiction, responsibility, or authority of a federal agency); FAST-41 GUIDANCE, *supra* note 29, §1.3 (clarifying that "FAST-41 should not be read as authority to supersede or modify statutory or regulatory timelines established for the review of projects under the various environmental permitting and review laws").

109. See, e.g., 33 U.S.C. §2348(h)(5) (mandating that agencies complete the environmental review process "using the shortest existing applicable process" and imposing financial penalties on federal agencies that did not meet arbitrary decision deadlines); 23 U.S.C. §139(h)(7) (same); Camacho, *supra* note 22, at 512-32 (providing a thorough description of the consequences of Executive Order No. 13807, which imposed similarly draconian expectations and elevated speed over deliberation).

110. FAST-41 GUIDANCE, *supra* note 29, §1.3; *id.* §3.9 (noting that participation in FAST-41 does not "create a presumption that a covered project will be approved, favorably reviewed by any agency, or receive Federal funding");

It has been more than seven years since the FAST Act was enacted. The Permitting Council has developed and implemented the Permitting Dashboard, created a comprehensive inventory of environmental reviews and authorizations, and produced six Recommended Best Practices Reports and Annual Reports to Congress. At this point, it is fair to ask whether these reforms worked, and whether they should inform current efforts to design permit reform.

## II. Does FAST-41 Work?

The statutory requirements of FAST-41 are intended to increase predictability, improve transparency and accountability, and maximize interagency coordination during the federal permitting process for large infrastructure projects, ultimately providing a more efficient and streamlined process.<sup>111</sup> Whether it works can be answered quantitatively and qualitatively.

Quantitatively, there is strong evidence that the program improves predictability and transparency. Agencies use the Permitting Dashboard and meet their deadlines most of the time.<sup>112</sup> Additionally, the predictability of projects is improving. In the Fiscal Year 2017 Report to Congress, the average rate of agency conformance with permitting milestones in the second quarter of 2017 was 55% (it improved by the end of the year).<sup>113</sup> In 2022, the Council reported that although missed permitting milestones was a "fairly common occurrence in the past," that had changed.<sup>114</sup> As agencies began taking a more active role in managing their permitting timetables, "instances of 'missed' dates became rare."<sup>115</sup>

In 2021, only two milestones across the entire FAST-41 portfolio were missed.<sup>116</sup> In 2022, there were no missed deadlines, until one was reported in the last quarter.<sup>117</sup> Moreover, when deadlines were modified, it was rarely due to government factors. In fiscal year 2021, agencies modified 50 milestones for covered projects, but only seven of these changes were attributable to government factors

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see also PERMITTING COUNCIL, FY2024 BUDGET REQUEST, *supra* note 96, at 5 (noting that not all covered projects result in project approval, but that FAST-41 commits to prompt deliberation in deciding not to move forward, and listing three projects in 2023 that were not approved).

111. FAST-41 GUIDANCE, *supra* note 29, §1.1.

112. See, e.g., FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL, QUARTERLY AGENCY PERFORMANCE REPORT, FISCAL Q4 (JULY-SEPTEMBER) (2022) [hereinafter PERMITTING COUNCIL, Q4 2022 REPORT] (reporting that out of 26 projects in active review—each of which contained multiple internal deadlines—there was only one missed deadline and three deadline extensions).

113. OFFICE OF THE EXECUTIVE DIRECTOR, FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL, ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2017, at 1 (2018) (noting that it improved by the end of the year).

114. PERMITTING COUNCIL, Q1 2022 REPORT, *supra* note 15, at 2.

115. *Id.*

116. *Id.*

117. PERMITTING COUNCIL, Q4 2022 REPORT, *supra* note 112, at 5; see also PERMITTING COUNCIL, 2020 ANNUAL REPORT TO CONGRESS, *supra* note 86, at 15 (reporting that in 2020, milestones that were modified because agencies were ahead of schedule represent the most common reason for schedule change and increased by 3% from the previous year while project sponsor requests for milestone extensions decreased by 8% and interagency reasons for extensions decreased by 6%).

(internal or interagency actions).<sup>118</sup> The majority of modifications were attributable to the project sponsor or updating a planned date.<sup>119</sup>

Tracking the reasons for modifications brings transparency to the NEPA process. In 2018, CEQ observed that in many cases, an EIS timeline may not represent continuous activity. “Delays may be attributed to the agency, the applicant, Congress, the needs of cooperating agencies, States, Tribes, and local interests or public controversy.”<sup>120</sup> Although this was understood, these types of delays were not regularly identified or tracked. Understanding the cause—and extent—of delays ensures that solutions will be crafted to fit the problem.

One reason for such a marked improvement in meeting milestones is the FAST-41 procedures themselves. The first set of FAST-41 projects did not voluntarily apply and were brought into the program midstream.<sup>121</sup> These projects did not benefit from the early planning and consultation procedures afforded through the FAST-41 process. The first year of completion for projects that used the FAST-41 system from inception was 2020.<sup>122</sup> The difference is noticeable. In 2021, projects that were brought into the FAST-41 program midstream only completed 37% of all tracked permitting milestones on time.<sup>123</sup> In contrast, projects that voluntarily joined FAST-41 met 67% of all permitting milestones on time.<sup>124</sup> Early coordination explains the difference.

There is also reason to believe that timeliness will continue to improve. Under the FAST-41 process, a “missed date” on the Permitting Dashboard prompts discussion within the Permitting Council.<sup>125</sup> Senior-level officials are expected to work together to identify the issues, address them in a coordinated way, and implement a resolution that meets the needs of all agencies involved, so that missed interim milestones do not throw off the overall permitting schedule.<sup>126</sup> This reporting process also allows the Permitting Council to track recurring problems and proactively address issues that cause agencies to miss deadlines.<sup>127</sup>

It is tempting to look for simple statistics, like whether projects that go through FAST-41 are completed more quickly than projects that do not use the program. There is some evidence supporting that claim. The 2020 Annual Report to Congress offered both quantitative and qualitative evidence of the program’s success. Between 2010 and

2018, the average time across all agencies for a project to complete an EIS was 4.5 years.<sup>128</sup> In contrast, the average time to complete an EIS for projects that went through the FAST-41 process was 2.5 years.<sup>129</sup>

Though attractive, this statistic elevates simplicity over accuracy. First, the difference is less stark when one considers that the median time to complete a project across all agencies was only 3.6 years and that one-quarter of all EISs took less than 2.2 years.<sup>130</sup> Additionally, assuming that projects going through FAST-41 will only take 2.5 years might be overly optimistic. At the time that statistic was published, the sample size of projects that had voluntarily joined FAST-41 was small. Moreover, due to the infancy of the program, there is a risk of selection bias—that this statistic only includes projects that were completed quickly.<sup>131</sup> And as described in more detail below, looking for a one-size-fits-all time frame ignores differences in the complexity of projects. A time frame of 2.5 years may be overly optimistic for a complex project and overly lethargic for a simple one.

Despite this wrinkle regarding time frames, it is clear that certainty improved. On average, voluntary FAST-41 projects were completed within one month of the original schedule developed under FAST-41.<sup>132</sup>

Several vignettes and quotes from project sponsors support these statistics and offer qualitative evidence that the FAST-41 procedures improve efficiency and transparency. For example, Ricardo Graf, the managing partner and chief development officer for Arevia Power, made the following statement about the Gemini Solar Project:

It was very clear to us early on that if it wasn’t for Gemini Solar’s covered status as a FAST-41 project that we would not have had the level of schedule transparency, accountability, and coordination among the multiple Federal and state agencies involved in the process. Participation in FAST-41 brought these agencies to the table with one organized voice and one schedule (posted online!) which was key to efficiently and effectively navigating the NEPA and various permitting processes.<sup>133</sup>

At the time of permitting, the Gemini Solar Project was the largest solar photovoltaic and battery storage facility on federal lands and reportedly one of the largest renewable energy projects of its kind.<sup>134</sup> The permitting pro-

118. PERMITTING COUNCIL, 2021 ANNUAL REPORT TO CONGRESS, *supra* note 99, at 17.

119. *Id.* at 15 (explaining that when permitting timetables establish dates far into the future, those often require slight adjustments).

120. CEQ, ENVIRONMENTAL IMPACT STATEMENT TIMELINES (2010-2017), at 2 (2018), [https://ceq.doe.gov/docs/nepa-practice/CEQ\\_EIS\\_Timelines\\_Report\\_2018-12-14.pdf](https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timelines_Report_2018-12-14.pdf).

121. 42 U.S.C. §4370m-1(c)(1)(A) (directing the executive director of the Permitting Council to establish an inventory of covered projects that are pending environmental review or authorization and to add covered projects to the inventory).

122. PERMITTING COUNCIL, 2020 ANNUAL REPORT TO CONGRESS, *supra* note 86, at 4.

123. *Id.* at 14.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 15.

128. *Id.* at 12.

129. *Id.*

130. CEQ, *supra* note 120, at 1; see also John Ruple et al., *Evidence-Based Recommendations for Improving NEPA Implementation*, 46 COLUM. J. ENV’T L. 273, 294 (2022) (analyzing Forest Service NEPA decisionmaking times and noting that the striking difference between the mean and the median time frames shows skewing by anomalous, lengthy decisions).

131. Ruple et al., *supra* note 130, at 298 (describing risk of selection bias creating a perceived trend in reduced decisionmaking times where pending projects were not included in data sample).

132. PERMITTING COUNCIL, 2020 ANNUAL REPORT TO CONGRESS, *supra* note 86, at 13.

133. *Id.* at 4.

134. *Id.* at 5.



cess took 22 months,<sup>135</sup> which is several months shorter than the fastest quartile of EISs completed outside the FAST-41 process.<sup>136</sup>

The Borderlands Wind Project provides another example. A 100-megawatt wind project located on 17,000 acres of mixed-use land in New Mexico,<sup>137</sup> it voluntarily joined the FAST-41 program midway through its permitting process.<sup>138</sup> Gabe Henehan, the project director for NextEra Energy Resources LLC, stated the following about the difference between the traditional permitting route they took in the beginning of the project and FAST-41 procedures:

The project schedule kept slipping weeks here and there and over time, it added up to months behind schedule, we felt that the project timeline was moving out of control to the point of nearly killing the project. That's when we decided to file for the FAST-41 status. After we gained approval to enter the program, the project timeline was stabilized. I was able to track approvals throughout the process from the online dashboard and report progress to our executives. It gave us certainty and transparency into the process, which we didn't have prior to FAST-41.<sup>139</sup>

This project is notable because certainty and transparency are often cited by project proponents as the biggest barriers to financing. It is also worth describing the logistics involved in permitting the Borderlands Wind Project. The project required authorizations from 13 different federal, state, and local offices.<sup>140</sup>

Additionally, several tribal communities had interests that were potentially affected by the project. Consistent with its duty to engage in government-to-government tribal consultation, as well as the duty to engage in consultation under §106 of the National Historic Preservation Act, BLM reached out to nine Native American tribal governments.<sup>141</sup> Of these, the Pueblo of Zuni became a cooperating agency.<sup>142</sup> The consultation process yielded project modifications, even while logistical hurdles created by the pandemic made it difficult to meet in person and technology challenges made videoconferencing with the tribal government infeasible.<sup>143</sup> Even though the consultation process took five months longer than expected, the impact to the overall project schedule was less than two weeks, and the right-of-way grant (often the longest element of the

project) was completed within two weeks of the original target completion date.<sup>144</sup>

As a final example, the Alaska LNG Project, which has been described as one of the largest liquified natural gas (LNG) projects in the country, also applied to become a FAST-41 project midway through the permitting process. The project began in 2014, became a FAST-41 project in August 2017, and finished the NEPA process in 2020.<sup>145</sup> This \$38-billion project involved an 807-mile natural gas pipeline, a gas transmission line, and a liquefaction facility that included an LNG plant and a marine terminal.<sup>146</sup> It required 70 federal, state, and local authorizations from more than 19 federal and state agencies.<sup>147</sup> Within 60 days of becoming a FAST-41 project, the Federal Energy Regulatory Commission (FERC) as lead agency, and the seven other cooperating agencies who also had permitting or authorization duties, agreed upon a permitting timetable.<sup>148</sup>

Through this process of early engagement, the agencies achieved consensus on methodologies to inform analyses and developed a programmatic approach to analyzing issues associated with the multiple water crossings along the 807 miles of pipeline.<sup>149</sup> Despite the project's complexity, the permitting process was completed within three months of the target completion date set in 2017 when the CPP was created.<sup>150</sup> Lisa Haas, the environment and regulatory manager for Alaska Gasline Development Corporation, made the following observation:

FAST-41 was initiated for the Alaska LNG Project in 2017, and within three years the project approval and permitting process was completed. As a comparison, a similar pipeline project in the state, that was less complex and smaller, took almost two years longer to get to a similar point in the approval process. . . . When there were challenges and obstacles during the permitting process, [the Office of Executive Director for the Permitting Council] coordinated with all the parties to develop a workable strategy to keep the process moving forward and allow on-time delivery of permits.<sup>151</sup>

The president of Alaska Gasline Development Corporation also credited the Permitting Council's guidance for suc-

135. *Id.*

136. CEQ, *supra* note 120, at 1 (reporting that EISs in the 25th percentile took 2.2 years).

137. PERMITTING COUNCIL, 2020 ANNUAL REPORT TO CONGRESS, *supra* note 86, at 6.

138. *Id.*

139. *Id.* at 5.

140. *Id.*

141. U.S. DEPARTMENT OF THE INTERIOR, DOI-BLM-NM-A020-2019-0002-RMP-EIS, BORDERLANDS WIND PROJECT, RECORD OF DECISION FOR ENVIRONMENTAL IMPACT STATEMENT AND RESOURCE MANAGEMENT PLAN AMENDMENT 11-12 (2020).

142. *Id.* at 12.

143. *Id.*

144. PERMITTING COUNCIL, 2020 ANNUAL REPORT TO CONGRESS, *supra* note 86, at 6.

145. Letter from Howard L. Nelson, Shareholder, Greenberg Traurig, to Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, Re: Alaska Development Corporation, Docket No. CP17-178-000 Alaska LNG Project (Aug. 25, 2017) (conveying approved FIN); PERMITTING COUNCIL, 2020 ANNUAL REPORT TO CONGRESS, *supra* note 86, at 7; *see also* Alaska LNG, *Alaska LNG Permits*, <https://alaska-lng.com/regulatory-process/permits/> (last visited Mar. 26, 2023) (describing permitting process and providing link to Permitting Dashboard).

146. PERMITTING COUNCIL, 2020 ANNUAL REPORT TO CONGRESS, *supra* note 86, at 7.

147. *Id.*

148. *Id.* (noting that the agencies involved were the National Oceanic and Atmospheric Administration, U.S. Department of Energy, U.S. Coast Guard, U.S. Army Corps of Engineers, BLM, U.S. Fish and Wildlife Service, and National Park Service).

149. *Id.*

150. *Id.* at 8.

151. *Id.*

cess: “Without their dedication and use of the FAST-41 process, it would undoubtedly have taken months, if not years, longer and significant additional cost for approval of this project.”<sup>152</sup>

These testimonials, which read more like Yelp reviews for an unexpectedly good restaurant, are unique. The enthusiasm from project sponsors suggest that they felt well-served by the program. Unfortunately, 2020 was the only Annual Report to Congress that included testimonials,<sup>153</sup> but there is reason to believe that these testimonials are representative.<sup>154</sup> Other reports developed by the Permitting Council, like the recommended performance schedules, offer additional evidence of success.

One of the responsibilities imposed on the Permitting Council is to “develop recommended performance schedules, including intermediate and final completion dates, for environmental reviews and authorizations most commonly required for each category of covered projects.”<sup>155</sup> The recommended performance schedules are intended to establish a baseline of expected time frames when the most efficient applicable processes are employed, using data from the preceding two calendar years.<sup>156</sup> Over time, the data collected on the Permitting Dashboard will accumulate and be used to inform the recommended performance schedules.<sup>157</sup> Currently, however, the data are still limited by small sample sizes.<sup>158</sup>

In 2020, the Permitting Council published statistics and recommended performance schedules for three sectors that constitute 78% of ongoing FAST-41 projects.<sup>159</sup> Those are electricity transmission, pipeline, and renewable energy production projects.<sup>160</sup> Because there were too few FAST-41 projects to develop sufficient sample sizes, the Permitting Council supplemented the FAST-41 data with randomly selected projects in each sector that did not go through FAST-41.<sup>161</sup> Through this process, each sector had a sample

size of 20 projects that satisfied the \$200-million threshold, which served as a proxy for complexity.<sup>162</sup>

Using this supplemented data set, the Permitting Council gathered information on milestone completion times for projects within these sectors.<sup>163</sup> The median time to complete an EIS for electricity transmission was 2.96 years.<sup>164</sup> For pipelines, the median was 2.08 years.<sup>165</sup> For renewable energy production, the median was 1.98 years.<sup>166</sup> In contrast, across the federal government during a similar time frame, the median time to complete an EIS was 3.6 years.<sup>167</sup> In other words, FAST-41 projects appear to finish EISs more quickly.

Delving into the data more deeply reveals complexities. For example, the data set for energy transmission lines immediately reveals that several of the non-FAST-41 projects have faster timelines.<sup>168</sup> For example, the West Butte Wind Power Project, which was not a FAST-41 project, took 1.48 years to complete.<sup>169</sup> In contrast, the TransWest Express Transmission Project, which was a FAST-41 project, took 5.95 years.<sup>170</sup> Project scale explains the disparity. The West Butte Wind Power Project was a simple project that cost \$212.6 million and required a 100-foot-wide, 3.9-mile-long right-of-way across federal land.<sup>171</sup> In contrast, the TransWest Express Transmission Project was a \$3 billion project that consisted of building a 725-mile, high-voltage power line through Wyoming to Nevada.<sup>172</sup> Additionally, the TransWest project was initiated prior to the enactment of FAST-41 and was brought into the program midstream.

This example provides a good reminder that timelines alone do not reveal efficiency. To accurately compare time frames, the projects within the data set must be similar. However, projects are accepted into the FAST-41 program precisely because they are unusually large or complex, making it difficult to find appropriate comparisons.<sup>173</sup> In light of this, the fact that most FAST-41 projects finish an EIS more quickly than the nationwide average is even more impressive.<sup>174</sup>

External qualitative data also support the conclusion that FAST-41 procedures make the permitting process

152. *Id.* at 7.

153. Hopefully, more qualitative data will be gathered in the future. The FAST-41 guidance encourages agencies to collect information regarding environmental and community outcomes in order to tell a more complete story about how the program is operating. FAST-41 GUIDANCE, *supra* note 29, §7.1.

154. There have been six Annual Reports to Congress. See Permitting Dashboard, *supra* note 20 (providing links to each report). Each report is organized differently and uses different metrics to report on the achievements of the past year. Consequently, it is hard to compare the same statistics year after year. Despite this, the reports convey consistent improvements in timeliness, transparency, and predictability, particularly when read cumulatively.

155. 42 U.S.C. §4370m-1(c)(1)(C)(i).

156. *Id.* §4370m-1(c)(1)(C)(ii).

157. OFFICE OF THE EXECUTIVE DIRECTOR, FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL, RECOMMENDED PERFORMANCE SCHEDULES FOR ENVIRONMENTAL REVIEWS AND AUTHORIZATIONS FOR FAST-41 COVERED INFRASTRUCTURE PROJECTS 3, 5 (2017).

158. OFFICE OF THE EXECUTIVE DIRECTOR, FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL, BASELINE PERFORMANCE SCHEDULES FOR ENVIRONMENTAL REVIEWS AND AUTHORIZATIONS 4 (2019) (noting that only 16 FAST-41 projects had been completed at the time of data collection).

159. *Id.* at iv.

160. *Id.* (“These three sectors comprised 33 of 42 (78 percent) of FAST-41 covered projects . . . on the Permitting Dashboard at the time of report development”).

161. *Id.* at 6 (explaining the process for developing the database).

162. *Id.* (clarifying that the electricity transmission sector only had 19 projects because a 20th project above the cost threshold could not be located).

163. *Id.* at 7-8.

164. *Id.* at 8 (reporting the mean as 3.31 years, and the 25th and 75th percentiles as 2.34 and 4.05 years, respectively).

165. *Id.* (reporting the mean as 2.42 years, and the 25th and 75th percentiles as 1.82 and 2.59 years, respectively).

166. *Id.* (reporting the mean as 2.3 years, and the 25th and 75th percentiles as 1.39 and 3.08 years, respectively).

167. *Id.* (citing CEQ, *supra* note 120).

168. *Id.* at 18 (Appendix A: Electricity Transmission Data, available online).

169. *Id.* (statistics provided in row 9).

170. *Id.* (statistics provided in row 2).

171. *Id.* (row 9, cols. C & D).

172. *Id.* (row 2, cols. C & D).

173. See *id.* at v (“FAST-41 projects are large and complex and likely have complicated sets of environmental effects that could register at the upper end of averages compared to more routine infrastructure projects. Performance schedules for FAST-41 may not be able to appropriately inform similar projects that are not subject to FAST-41 requirements.”).

174. See *supra* notes 128-29 (comparing the nationwide average of 4.5 years to the FAST-41 average of 2.5 years).

more transparent and accountable.<sup>175</sup> Stakeholders interviewed by the U.S. Government Accountability Office (GAO) reported that the Permitting Dashboard increased the predictability and efficiency of permitting decisions by allowing all stakeholders to be fully informed about the environmental review and authorization process.<sup>176</sup> Other stakeholders emphasized the value of the high-level oversight afforded by the Permitting Council to enforce deadlines and improve coordination between agencies.<sup>177</sup> Early engagement also created opportunities for permitting authorities to enter into MOUs establishing roles and responsibilities.<sup>178</sup> Although FAST-41 only directly affects federal agencies, the opportunities for coordination extend to state, local, and tribal permitting authorities.

As an example, the GAO report discussed the Mid-Barataria Sediment Diversion Project, which was a complex FAST-41 project focused on restoring ecosystems damaged by coastal erosion and the *Deepwater Horizon* oil spill, which oiled more than 684 miles of wetlands across the Gulf of Mexico, particularly in the Barataria Bay.<sup>179</sup> With the U.S. Army Corps of Engineers (the Corps) as lead agency, six federal agencies entered into an MOU with several Louisiana state agencies, accelerating the environmental review and permitting process by nearly two years.<sup>180</sup> Due to the complexity of this project, many project participants believe that it would not have been possible without the coordination procedures afforded through the FAST-41 process. GAO attributed this efficiency to enhanced interagency coordination.<sup>181</sup> Moreover, GAO concluded that the primary challenge facing FAST-41 was a lack of awareness of the program and misunderstanding of how it works.<sup>182</sup>

There is another indicator of success, which focuses more on the quality of federal permitting, rather than speed. Despite its relative youth, the Permitting Council has already developed useful tools for improving federal decisionmaking that were sorely needed. One example is its focus on improving tribal consultation and strengthening nation-to-nation relationships.<sup>183</sup> Despite the importance of

these responsibilities, functional hurdles often reduce them to empty words.

To avoid this, the Permitting Council focused on improving practical tools, such as upgrading the Department of Housing and Urban Development's Tribal Directory Assessment Tool.<sup>184</sup> This is the only publicly available database that provides information on counties where tribes have ancestral interests; however, in the past, it has been riddled with inaccuracies and out-of-date information. The Permitting Council used its funds to make technical upgrades to this tool and ensure sustained accuracy of tribal contact data.<sup>185</sup> It also initiated trainings to ensure federal agency staff understood the roles and considerations necessary to engage in meaningful government-to-government relations with affected native communities.<sup>186</sup>

Additionally, through consultation with Native American stakeholders, the Permitting Council issued draft and final guidance for early tribal engagement.<sup>187</sup> These tools, focused on practicality and implementation, take meaningful steps toward fulfilling the government's obligation to engage with tribal communities in a government-to-government relationship during the permitting process. Tools like these promote sound decisionmaking and fair procedures, as well as efficiency.

In summary, the quantitative and qualitative information available indicate that the FAST-41 procedures promote efficiency, transparency, and predictability for complex projects with significant environmental impacts that require multiple permits from different agencies. These efficiencies are achieved through CPPs that impose accountability on agencies to meet deadlines; improved communication with project proponents to ensure that applications are complete and contain the right information; and improved interagency coordination that prioritizes early engagement, shared data management, concurrent rather than sequential reviews, and regular communication to address issues as they arise.

### III. Common Causes of Delay in the Mine Permitting Process

#### A. Agency Capacity, Incomplete Information, and Lack of Coordination

The most common scapegoat for delays in any permitting process is NEPA; however, multiple studies indicate that reality is more nuanced. NEPA is a far-reaching procedural statute that applies to all "major Federal actions significantly affecting the quality of the human environment."<sup>188</sup> It requires federal agencies to analyze and disclose the

175. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-20-19, INFRASTRUCTURE PROJECTS: ACTIONS NEEDED TO FULLY DEVELOP PERFORMANCE SCHEDULES FOR ENVIRONMENTAL REVIEWS 20-21 (2019) [hereinafter GAO, ACTIONS NEEDED TO FULLY DEVELOP PERFORMANCE SCHEDULES].

176. *Id.* at 20.

177. *Id.* at 21.

178. *Id.*

179. *Id.* at 22.

180. *Id.*; see also *supra* note 80 (describing and providing a link to the MOU).

181. GAO, ACTIONS NEEDED TO FULLY DEVELOP PERFORMANCE SCHEDULES, *supra* note 175, at 22; see also Mark Schleifstein, *Louisiana Granted Final Funds for Unprecedented Coastal Restoration Project*, NOLA.COM (Mar. 9, 2023), [https://www.nola.com/news/environment/louisiana-granted-final-funds-for-major-diversion-project/article\\_da97ad26-bde9-11ed-b0a067b-ce40fb68d.html](https://www.nola.com/news/environment/louisiana-granted-final-funds-for-major-diversion-project/article_da97ad26-bde9-11ed-b0a067b-ce40fb68d.html) (reporting that Louisiana was granted the final necessary funds to build the unprecedented Mid-Barataria Sediment Diversion Project aimed at helping slow land loss devastating the coast).

182. GAO, ACTIONS NEEDED TO FULLY DEVELOP PERFORMANCE SCHEDULES, *supra* note 175, at 22-23 (noting that in one case, the lead agency discouraged a project sponsor from applying to the FAST-41 program, saying that participation would result in schedule delays).

183. PERMITTING COUNCIL, FY2024 BUDGET REQUEST, *supra* note 96, at 9.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 10; FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL, RECOMMENDED BEST PRACTICES: FISCAL YEAR 2022, [https://www.permits.performance.gov/sites/permits.dot.gov/files/2022-10/FY22%20Recommended%20Best%20Practices\\_September%202022.pdf](https://www.permits.performance.gov/sites/permits.dot.gov/files/2022-10/FY22%20Recommended%20Best%20Practices_September%202022.pdf).

188. 42 U.S.C. §4332(2)(C).

potential impacts a project may have on environmental, human health, cultural, and historical resources.

NEPA does not operate in a vacuum. Since its passage 53 years ago, it has been incorporated into the fabric of the administrative state and often provides the analytical structure justifying decisions made by federal agencies, including permit approvals or denials. As the Congressional Research Service (CRS) explains, “[m]ost agencies used NEPA as an umbrella statute—that is, a framework to coordinate or demonstrate compliance with any studies, reviews, or consultations required by any other environmental laws.”<sup>189</sup> For this reason, even though the requirements of NEPA are only one part of a much larger, adaptive system of permits, the NEPA process and the permitting process are often conflated, and the analysis required by NEPA is often blamed for creating delays.<sup>190</sup>

Recent empirical research suggests that the story is more complex. A team of researchers from the Stegner Center at the University of Utah investigated 41,000 U.S. Forest Service decisions subject to NEPA between 2004 and 2020.<sup>191</sup> They observed that the majority of decisions were made within a reasonable time frame for the complexity of the project; however, a small percentage of projects consistently took much longer, regardless of the complexity of the project.<sup>192</sup> They sought to identify what caused some projects to get bogged down, while others were completed efficiently.

The Stegner team first observed that reducing the level of analytical rigor does not necessarily produce faster decisions.<sup>193</sup> NEPA’s implementing regulations utilize a tiered decisionmaking framework.<sup>194</sup> Decisions that will have a significant impact on the environment undergo searching review through an EIS.<sup>195</sup> More benign projects with uncertain environmental impacts undergo a less thorough analysis referred to as an environmental assessment (EA).<sup>196</sup> Projects with a presumptively insignificant effect on the

environment undergo a truncated analysis through a categorical exclusion (CE).<sup>197</sup>

The team observed that at each level of review, the slowest 10% of decisions take longer than the median time to complete a more rigorous analysis. For example, the slowest 10% of CEs took 1.3 years, while the median time to complete an EA is 1.2 years. Turning to EAs, the slowest 10% of decisions take 3.6 years, while the median time to complete an EIS was 2.8 years.<sup>198</sup> In other words, reducing the rigor of environmental analysis did not always produce faster decisions.

The Stegner team’s research has implications for permit reform. First, it suggests that rigorous environmental analyses can be (and are) conducted efficiently within the existing regulatory regime. The fastest 25% of EISs were completed more quickly than the slowest 25% of EAs. Similarly, the fastest 25% of EAs were completed more quickly than the slowest 25% of CEs.<sup>199</sup> This suggests that it is not necessary to sacrifice analytical rigor in order to achieve efficiency. If delays were caused solely by analytical rigor, such a consistent overlap in time frames would not be likely. Moreover, decisions subject to a truncated analysis were not immune from delay. The slowest 10% of CEs took longer to complete than the fastest 10% of EISs.<sup>200</sup> Thus, reducing analytical rigor does not guarantee efficiency.

This evidence begs the question: if analytical rigor is not the primary cause of delay, what is? Despite developing a multivariate regression analysis that analyzed four different factors, including the complexity of each project,<sup>201</sup> the Stegner team could not accurately predict which projects would proceed efficiently and which ones would encounter delays using NEPA-specific information.<sup>202</sup> This led them to conclude that factors outside the analytical requirements of NEPA contribute significantly to project delays.<sup>203</sup> Combining their empirical results with a literature review, they identified three primary causes of delay: (1) insufficient agency capacity; (2) delays receiving information from permit applicants; and (3) compliance with other laws.<sup>204</sup> Looking to other agencies and disciplines, these three general categories of delay have been identified repeatedly.

In 2014, the Office of Inspector General (OIG) for the U.S. Department of the Interior (DOI) investigated BLM’s effectiveness and efficiency in processing applications for permits to drill (APDs) on federal and Indian oil and gas leases.<sup>205</sup> The APD is the final stage of development of an oil and gas well, and these applications enjoy a statutory

189. CRS, THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA): BACKGROUND AND IMPLEMENTATION 1 (2011).

190. See, e.g., Jerusalem Demsas, *Not Everyone Should Have a Say*, ATLANTIC (Oct. 19, 2022), <https://www.theatlantic.com/ideas/archive/2022/10/environmentalists-nimby-permitting-reform-nepa/671775/>; Ezra Klein, *Government Is Flailing, in Part Because Liberals Hobbled It*, N.Y. TIMES (Mar. 13, 2022), <https://www.nytimes.com/2022/03/13/opinion/berkeley-enrollment-climate-crisis.html>; Press Release, Office of Sen. Ted Cruz, Sens. Cruz, Lee, and Cramer Introduce UNSHACKLE Act to Reform NEPA (Oct. 27, 2020), [https://www.cruz.senate.gov/?p=press\\_release&id=5446](https://www.cruz.senate.gov/?p=press_release&id=5446) (quoting Senator Cruz as saying, “For years, NEPA’s burdensome requirements have left countless infrastructure projects in a state of judicial and bureaucratic limbo, stunting job creation and economic growth in communities across the country.”); DIANE KATZ, HERITAGE FOUNDATION, BACKGROUNDER NO. 3293, TIME TO REPEAL THE OBSOLETE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) 1, 4 (2018), [https://www.heritage.org/sites/default/files/2018-03/BG3293\\_0.pdf](https://www.heritage.org/sites/default/files/2018-03/BG3293_0.pdf) [<https://perma.cc/YH8A-42T4>]. See also GAO, GAO-14-370, NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES 1 (2014) (reporting views of detractors).

191. Ruple et al., *supra* note 130, at 273.

192. *Id.* at 293-97.

193. *Id.* at 302-04.

194. 40 C.F.R. §1501.3 (identifying the three levels of review).

195. 42 U.S.C. §4332(C); 40 C.F.R. §1502.3 (describing statutory requirements of an EIS).

196. 40 C.F.R. §1501.5 (describing the analysis to be included in an EA).

197. See *id.* §1501.4 (discussing CEs).

198. Ruple et al., *supra* note 130, at 304; see also Jamie Pleune, *Playing the Long Game: Expediting Permitting Without Compromising Protections*, 52 ELR 10893, 10899 (Nov. 2022) (providing tables comparing decision completion times at different levels of review).

199. Ruple et al., *supra* note 130, at 297.

200. *Id.* (providing chart showing that the slowest 10% of CEs took an average of 481 days to complete, while the fastest 10% of EISs took an average of 395 days to complete).

201. *Id.* at 297-98 (describing development of regression model).

202. *Id.* at 299.

203. *Id.*

204. *Id.* at 307-10, 313-17, 318.

205. OIG, ONSHORE OIL AND GAS PERMITTING, *supra* note 85.

presumption that a CE applies, requiring only the most truncated analysis under NEPA.<sup>206</sup> According to the report, BLM receives approximately 5,000 new APDs each year, which it processes at 33 different field offices.<sup>207</sup> The average time to process an APD is 228 days.<sup>208</sup>

However, this number does not tell the whole story. Even though the same legal standard applies to every APD, the average processing times vary widely between field offices.<sup>209</sup> According to a chart produced by the OIG, five field offices work twice as fast as the average, with processing times of less than 100 days.<sup>210</sup> The most efficient office, Anchorage, Alaska, achieved an average processing time of 37 days.<sup>211</sup> In contrast, Buffalo, Wyoming, and Miles City, Montana, take nearly 10 times longer, with average processing times exceeding 300 days.<sup>212</sup>

Because the same legal standard applies to each application, analytical rigor cannot be blamed for delay. So, why the variation? The OIG identified three major factors: agency capacity,<sup>213</sup> incomplete applications exacerbated by poor data management,<sup>214</sup> and poor coordination among the specialists responsible for processing the APD.<sup>215</sup> Field offices that addressed these problems improved their processing times.<sup>216</sup>

A similar pattern emerged in a 2016 GAO report investigating causes of delay in hard-rock mine permitting

between 2010 and 2014.<sup>217</sup> Like the Stegner Center, the GAO observed that the majority of mine permit applications were processed efficiently, but a minority encountered delays. Specifically, between 2010 and 2014, BLM and the Forest Service approved 68 mine plans of operations. The majority (55%) were processed in less than 18 months, and 63% were processed in under two years.<sup>218</sup> The remaining 37% were spread out over a wide time frame, with six applications taking longer than four years.

The identifiable sources of delay fell into the three categories identified by the Stegner team and the OIG. Those were insufficient allocation of resources (e.g., number of staff, staff expertise, funding, infrastructure, training, and/or computer technology)<sup>219</sup>; waiting for information from an applicant following a permit application that was incomplete or vague or responding to a changed mine plan<sup>220</sup>; and compliance with other legal requirements and/or ineffective agency coordination or collaboration during the mine plan review process.<sup>221</sup>

These problems are not new. In 1999, the National Research Council (NRC) investigated the hard-rock mine permitting process.<sup>222</sup> Regarding agency capacity, they observed, “Staff shortages are likely to be at least partially responsible for excessive delays experienced in NEPA reviews and issuance of permits that the Committee repeatedly heard described. . . . The availability of competent staff was another concern raised. . . . The needed levels of expertise are not always readily available to regulatory agencies.”<sup>223</sup> NRC had a different perspective on time spent waiting for operator responses, observing that data collection and analysis requirements were often “poorly coordinated, excessively expensive, and of uneven value in protecting the environment.”<sup>224</sup>

The NRC report focused heavily on delays caused by poor coordination between agencies or authorities with different legal responsibilities, including:

Timing of environmental review and permitting is affected by agencies’ ability to coordinate with one another . . . . Where coordination among state and federal regulatory agencies is high, environmental review and permitting appears to be faster . . . . Where separate agencies engage in serial permitting rather than coordinating their review efforts, the process—including data gathering—can take longer.<sup>225</sup>

They concluded, “The efficiency of NEPA review and permitting is in large part a management matter. The land

206. 42 U.S.C. §15942; *see also* Ruple et al., *supra* note 130, at 310-13 (describing the regulatory framework for processing APDs).

207. OIG, ONSHORE OIL AND GAS PERMITTING, *supra* note 85, at 1.

208. *Id.* at 6.

209. *Id.* at 19 (Appendix 2: APD Average Processing Days).

210. *Id.*

211. *Id.* at 7.

212. *Id.* at 7, 19.

213. *Id.* at 9 (“Many field offices and agencies were understaffed. . . . Understaffing critical positions—including adjudicators, petroleum engineers, geologists, and natural resource specialists—increases processing times, particularly at offices receiving a high number of APDs.”).

214. *Id.* at 4 (“BLM often cannot finalize its decision because the operator needs to furnish more information or because additional processing steps are needed.”); *id.* at 6 (noting that in addition to other challenges, “operators also bear responsibility by often failing to provide the required information for the Government’s review”); *id.* at 8 (noting that the database used by BLM “does not provide sufficient workflow information to serve as a management tool” and it “hindered office employees” in part because “one cannot determine an APD’s status at anytime in the process”); *id.* at 11 (noting that most field offices rely on a manual filing system in which employees are expected to review and file permits and supporting documents in hard copy, even if initially received electronically, which wastes time, effort, and physical resources).

215. *Id.* at 6 (identifying weaknesses in oversight and accountability as a primary source of delay); *id.* at 7 (observing that even though the APD review involves numerous specialists, including adjudicators, petroleum engineers, geologists, biologists, and archeologists, most field offices “do not assign a manager to direct the process and focus efforts toward timely completion”); *see also* GAO, GAO-20-329, OIL AND GAS PERMITTING: ACTIONS NEEDED TO IMPROVE BLM’S REVIEW PROCESS AND DATA SYSTEM 11, 14 (2020) (finding that almost half of approved APDs never get put to use, which drains staff resources and contributes to delay).

216. OIG, ONSHORE OIL AND GAS PERMITTING, *supra* note 85, at 10 (describing practices that augment staff capacity in overburdened offices and reduce APD backlogs); *id.* at 12 (field offices that conduct outreach training for oil and gas operators report reduced instances of incomplete APD packages and save time completing the reviews); *id.* at 7 (noting that the field office in Silt, Colorado, assigned a supervisor to oversee the APD process and achieved processing times of 108 days versus the average of 228 days).

217. GAO, HARDROCK MINING: BLM AND FOREST SERVICE HAVE TAKEN SOME ACTIONS TO EXPEDITE THE MINE PLAN REVIEW PROCESS BUT COULD DO MORE 6-7 (2016) [hereinafter GAO, HARDROCK MINING]; Pleune, *supra* note 198, at 10898.

218. GAO, HARDROCK MINING, *supra* note 217, at 16.

219. *Id.*

220. *Id.*

221. *Id.*

222. NRC, HARDROCK MINING ON FEDERAL LANDS (1999).

223. *Id.* at 74.

224. *Id.* at 86.

225. *Id.* at 55.

management agency with lead responsibility should set and achieve deadlines and have sufficient qualified staff to do so.”<sup>226</sup>

These four very different reports identify similar categories of problems that cause delay in the permitting process. Those are (1) agency capacity—which includes sufficient staff, relevant expertise, and reliable budgets; (2) obtaining the right information from operators; and (3) coordination between permitting authorities (intraagency, interagency, state, and local). All of these sources of delay can be resolved without compromising analytical rigor, sacrificing environmental protections, or eschewing the goal of informed decisionmaking.<sup>227</sup>

Before moving on, it is worth observing that these three categories are not independent. The first category—agency capacity—affects the other two. Without sufficient staff or expertise, an agency cannot provide support or training to assist operators in submitting complete applications with the required information. It is also unlikely that they will effectively engage in proactive coordination. Despite this reality, threats to cut budgets for regulatory agencies persist alongside demands for permit reform. At the end of January, the top U.S. House of Representatives appropriator, Mike Simpson (R-Idaho), warned DOI and the U.S. Environmental Protection Agency (EPA) to “prepare for some big spending cuts” even as he acknowledged that agencies need sufficient staff to move quickly on permits.<sup>228</sup>

## B. Under a Spotlight: Agency Capacity Issues at BLM

While many environmental agencies experienced a reduction in capacity during the Donald Trump Administration,<sup>229</sup> BLM faces additional challenges. This is significant for mine permitting because BLM manages the federal mineral estate.<sup>230</sup> BLM has long been identified as a

short-staffed agency.<sup>231</sup> In 2014, Neil Kornze, then-director of BLM, observed that BLM has “the smallest budget and staff of any major federal land-management agency,” even though it “fulfills what is arguably the most complex mission of any land-use agency—managing for multiple use and sustained yield over roughly 250 million surface acres and 700 million acres of mineral estate.”<sup>232</sup> Despite its complex mission and heavy work load, between January 2017 and May 2021, BLM endured various hiring restrictions.<sup>233</sup>

Additionally, in 2019, the agency abruptly moved its headquarters staff from Washington, D.C., to Grand Junction, Colorado, and dramatically reorganized the headquarters offices and duties at the same time.<sup>234</sup> Together, these two management decisions eviscerated the headquarters team, which is responsible for issuing policy and guidance.<sup>235</sup> This adversely impacted mine permitting capacity because one source of delay in mine permitting is unclear guidance on how to balance legal priorities, such as conflicting legal requirements.<sup>236</sup> According to GAO, the decisions to relocate and reorganize were made without communicating with employees or key stakeholders,<sup>237</sup> were devoid of any data analysis,<sup>238</sup> and were implemented without a plan for adjusting to reorganization or filling vacancies.<sup>239</sup>

Numbers speak louder than adjectives to describe the effect of these two management decisions on BLM’s headquarters office, which is responsible for developing guidance, coordinating state, district, and field offices, and managing the implementation of agency policies.<sup>240</sup> At the time BLM abruptly notified headquarters staff that they would be moved to Grand Junction (a western town without a direct flight to Washington, D.C.), there were already 132 vacancies in the office, which is 42% of the intended

226. *Id.* at 123.

227. See *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm.*, 449 F.2d 1109, 1115, 1 ELR 20346 (D.C. Cir. 1971) (concluding that the purpose of undergoing NEPA’s procedural requirements is to “aid in the agencies’ own decision making process and advise other interested agencies and the public of the environmental consequences of planned federal action”).

228. Kelsey Brugger & Kevin Bogardus, *Interior-EPA Appropriator: “Substantial Reductions” Coming*, E&E NEWS (Jan. 31, 2023).

229. See, e.g., Lisa Friedman, *Depleted Under Trump, a Traumatized E.P.A. Struggles With Its Mission*, N.Y. TIMES (Jan. 23, 2023), <https://www.nytimes.com/2023/01/23/climate/environmental-protection-agency-epa-funding.html> (noting that the exodus of 1,200 scientists and policy experts under the Trump Administration has resulted in a capacity deficit that creates “constant delays” that frustrate regulated industries); Letter from Suzanne Martin, Deputy Inspector General for Evaluation and Inspections, OIG, to Roselyn Tso, Director, Indian Health Service, Re: Initial Observations of IHS Capacity to Manage Supplemental \$3.5 Billion Appropriated to Sanitation Facilities Construction Projects (Sept. 26, 2022) (observing staff challenges in Indian Health Services, including vacancies in supporting departments, like Human Resources, threaten the agency’s ability to fulfill new responsibilities under the IHA).

230. U.S. Department of the Interior, BLM, *About the BLM Oil and Gas Program*, <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/about> (last visited Mar. 26, 2023).

231. Since 2011, GAO has listed BLM’s management of federal oil and gas resources as a program that is at high risk, partly due to human capital challenges. As of 2019, none of the recommendations related to human capital have been resolved. GAO, GAO-19-157SP, HIGH-RISK SERIES: SUBSTANTIAL EFFORTS NEEDED TO ACHIEVE GREATER PROGRESS ON HIGH-RISK AREAS 103 (2019) [hereinafter GAO, PROGRESS ON HIGH-RISK AREAS].

232. Letter from Neil Kornze, Director, BLM, to Kimberly Elmore, Assistant Inspector General for Audits, Inspections, and Evaluations, OIG, Re: Office of the Inspector General Draft Evaluation Report “Onshore Oil and Gas Permitting, U.S. Department of the Interior” (May 9, 2019), reprinted in OIG, ONSHORE OIL AND GAS PERMITTING, *supra* note 85, at 21.

233. GAO, GAO-22-104247, BUREAU OF LAND MANAGEMENT: BETTER WORKFORCE PLANNING AND DATA WOULD HELP MITIGATE THE EFFECTS OF RECENT STAFF VACANCIES 8 (2021) [hereinafter GAO, BLM: BETTER WORKFORCE PLANNING TO ADDRESS VACANCIES].

234. GAO, GAO-20-397R, BUREAU OF LAND MANAGEMENT: AGENCY’S REORGANIZATION EFFORTS DID NOT SUBSTANTIALLY ADDRESS KEY PRACTICES FOR EFFECTIVE REFORMS (2020) [hereinafter GAO, BLM: REORGANIZATIONS DID NOT INCORPORATE EFFECTIVE PRACTICES].

235. *Id.* at 3.

236. GAO, HARDROCK MINING, *supra* note 217, at 22; NRC, *supra* note 222, at 5 (recommending that agencies “regularly update technical and policy guidance documents to clarify how statutes and regulations should be interpreted and enforced”); Pleune, *supra* note 198, at 10901-02 (suggesting that one way to improve the efficiency of mine permitting would be to create tools that make the legal structure, permitting requirements, and available information more transparent).

237. GAO, BLM: REORGANIZATIONS DID NOT INCORPORATE EFFECTIVE PRACTICES, *supra* note 234, at 6, 10-11.

238. *Id.* at 8, 10.

239. *Id.* at 8.

240. *Id.* at 3.

staff of 311.<sup>241</sup> Of the 179 staff that were notified about relocation, 81 turned down the reassignment or separated from their position.<sup>242</sup> This reduced headquarters staff to approximately 90 people—32%—of its intended capacity.<sup>243</sup> Moreover, the reorganization plan dispersed headquarters staff among various offices, with only 39 positions centrally located in Grand Junction.<sup>244</sup> Several groups expressed concern that these actions would significantly reduce BLM management effectiveness, particularly by “eliminating BLM’s participation in the daily legislative, budget, and policy discussions with Interior, OMB, other agencies, and Congress in Washington, D.C.”<sup>245</sup>

The problem of headquarters vacancies did not confine itself to that office.<sup>246</sup> Due to hiring restrictions, BLM began temporarily filling headquarters positions with state and field office staff (assignments referred to as details), which created confusion and produced a ripple effect that led to reduced capacity in both state and field offices.<sup>247</sup> Without a strategy to recruit applicants for vacant leadership positions or an analysis of how the attrition rate would affect the agency’s ability to fulfill its duties, the effect of these vacancies persisted.<sup>248</sup> As GAO observed, “if turnover is not strategically managed and monitored and succession plans are not in place, gaps can develop in an agency’s institutional knowledge and leadership as experienced employees leave.”<sup>249</sup>

Unsurprisingly, these unplanned vacancies and lack of leadership disrupted BLM’s ability to fulfill its responsibilities.<sup>250</sup> In November 2021, GAO conducted a follow-up report, observing, “All of the BLM staff we interviewed told us about challenges in completing their duties because of headquarters vacancies,” particularly in “creating or clarifying guidance or policy.”<sup>251</sup> One staff member reported that his office relied on “outdated policy guidance in order to make decisions.”<sup>252</sup> Another staff member reported that the

vacancies had delayed plans to upgrade information technology systems.<sup>253</sup> This last example starkly illustrates how a lack of staff can exacerbate other causes of delay. Recall that the GAO report on APD permit processing times identified poor data management and inefficient technology as one source of delay in processing APD permits.<sup>254</sup>

The importance of institutional knowledge in a complex regulatory field, like mine permitting, cannot be overstated. BLM did not just lose staff members, it also lost experience, which further affects the agency’s ability to fulfill its duties.<sup>255</sup> “One staff member said that the loss of institutional knowledge about laws and regulations meant that BLM was not able to provide knowledgeable input on proposed rules and legislation.”<sup>256</sup> Another staff member remarked that the “rapid loss of experienced staff during relocation hindered knowledge transfer.”<sup>257</sup>

As NRC eloquently observed, due to the complexity of the regulatory system, mining regulation, permitting, and monitoring “becomes a series of negotiations carried on against a background of regulatory requirements and programs. This means that governmental regulators at all levels need a significant degree of sophistication and training in order to make these programs efficient and effective.”<sup>258</sup> Anyone who can recall their first few years of practice—or anytime engaging in a new field—understands that inexperience causes inefficiency. Leadership, mentoring, and training can reduce this cause of inefficiency. Left alone, however, inexperience flounders.

Work force management problems do not resolve themselves. This is evident from BLM’s track record in oil and gas management. Since 2011, that program has been on GAO’s list of programs that are at high risk of fraud, waste, abuse, and mismanagement.<sup>259</sup> One reason for the classification has been a lack of staff.<sup>260</sup> As of the most recent report in 2019, persistent recommendations to resolve BLM’s human capital challenges remain outstanding.<sup>261</sup>

Resolving work force management means focusing on hiring, retaining, and training necessary staff.<sup>262</sup> This includes assessing the effectiveness of incentives, like sala-

241. *Id.*

242. *Id.* at 3, 13.

243. *Id.* at 3 (132 preexisting vacancies + 81 relocation-related vacancies = 213 vacancies/311 positions produce a vacancy rate of 68% and a staff capacity of 32%).

244. *Id.* (describing reorganization in which 39 headquarters staff (12%) would be located in the Grand Junction “headquarters”; 213 (68%) would be dispersed between other state offices, the National Operations Center in Denver, Colorado, or the National Training Center in Phoenix, Arizona; and 59 (18%) would be reassigned to state or field office duties). *See also* GAO, BLM: BETTER WORKFORCE PLANNING TO ADDRESS VACANCIES, *supra* note 233, at 13 (making the same point, but using slightly different numbers).

245. GAO, BLM: REORGANIZATIONS DID NOT INCORPORATE EFFECTIVE PRACTICES, *supra* note 234, at 6.

246. As John Muir observed, “When we try to pick out anything by itself, we find it hitched to everything else in the Universe.” JOHN MUIR, MY FIRST SUMMER IN THE SIERRA 110 (1911).

247. GAO, BLM: BETTER WORKFORCE PLANNING TO ADDRESS VACANCIES, *supra* note 233, at 17-18 (adding that “almost all staff we interviewed said that the increased reliance on details negatively affected their office’s performance”).

248. *Id.* at 10.

249. *Id.* at 11.

250. *Id.* at 9 n.28 (noting that a DOI official asked GAO to “suspend all our BLM-related oil and gas management engagements for 6 months because the high turnover rate would prohibit BLM from responding to our requests for information and data. A BLM official told us they needed additional time to respond to inquiries due to staffing changes from the relocation.”).

251. *Id.* at 17.

252. *Id.*

253. *Id.*

254. *See* OIG, ONSHORE OIL AND GAS PERMITTING, *supra* note 85, at 11.

255. GAO, BLM: BETTER WORKFORCE PLANNING TO ADDRESS VACANCIES, *supra* note 233, at 20 (“almost all [staff members] told us that the loss of experienced staff negatively affected their offices’ ability to conduct its duties”).

256. *Id.*

257. *Id.*

258. NRC, *supra* note 222, at 54.

259. GAO, PROGRESS ON HIGH-RISK AREAS, *supra* note 231, at 1 (“Since the early 1990s, our high-risk program has focused attention on government operations with greater vulnerabilities to fraud, waste, abuse, and mismanagement, or that are in need of transformation to address economy, efficiency, or effectiveness challenges.”); *id.* at 103 (“Management of federal oil and gas resources was added to the High-Risk List in 2011 . . . . This high risk area has three segments: royalty determination and collection, human capital challenges, and restructuring of offshore oil and gas oversight.”).

260. *Id.* at 103 (“Human Capital. Interior continues to experience problems hiring, training, and retaining sufficient staff to oversee and manage oil and gas operations on federal lands and waters.”).

261. *Id.* at 107 (“In 2016, we made five recommendations to Interior and all remain open. Interior needs to fully implement our recommendations to address its human capital challenges.”).

262. *Id.*

ries, to hire and retain key staff; evaluating training programs to ensure they are meeting the needs of the bureau; developing technical competencies in staff; and creating a mechanism to facilitate collaboration across bureaus.<sup>263</sup> In 2020, GAO observed that the failure to engage in work force planning was not only affecting the management of federal oil and gas resources, but also BLM's efforts to fill other vacancies, including the dramatic loss of headquarters staff.<sup>264</sup>

As of November 2021, the situation had not meaningfully changed—BLM still did not have a strategic work force plan.<sup>265</sup> Senior officials told GAO that “they do not have consistent and reliable data on vacancies agency-wide or the use of details.”<sup>266</sup> Even though they acknowledge that vacancies in key headquarters positions cause delay and increased reliance on details has affected their office's performance,<sup>267</sup> BLM does not have a reliable system to track vacancies across the agency.<sup>268</sup> Obviously, the agency cannot make strategic decisions about filling vacancies if it does not know that they exist.<sup>269</sup>

This lack of data presents serious efficiency problems when positions that are central to the agency's mission remain empty. As GAO observed:

[W]ithout a strategic workforce plan that addresses the significant workforce changes the agency has experienced in recent years, BLM lacks reasonable assurance that it will have the workforce necessary to achieve its mission and goals in managing millions of acres of public lands and associated natural, cultural, and historic resources.<sup>270</sup>

Thankfully, BLM's most recent budget appears to be grappling with these problems<sup>271</sup>; however, human capital challenges do not resolve overnight. In summary, any meaningful discussion about expediting mine permitting on public lands must include ways to resolve BLM's work force challenges.

#### IV. FAST-41 Procedures Address Common Causes of Delay Without Compromising Public Engagement, Analytical Rigor, or Environmental Protections

The FAST-41 procedures address many of the common causes of unproductive delay<sup>272</sup> in processing mine permits.

To begin with, the CPP creates accountability within agencies to meet deadlines. This decreases the likelihood that a FAST-41 permit application will encounter delays caused by insufficient staff capacity for three reasons. First, the visibility associated with missing a deadline is undesirable. While this does not address capacity issues within the agency as a whole, it makes it more likely that sufficient staff will be assigned to avoid resource bottlenecks while processing the FAST-41 permit.<sup>273</sup> Ideally, the practice of work force forecasting will eventually expand beyond FAST-41 projects and improve work force planning within the agency as a whole.<sup>274</sup>

Additionally, using the Permitting Council as a resource, agencies can expand their staff capacity for a project through liaisons, temporarily funded positions, or details.<sup>275</sup> The augmented funds in the Environmental Review Improvement Fund will further expand the Permitting Council's ability to support interagency detail and rotation opportunities.<sup>276</sup> Finally, the Permitting Council also encourages supplementing agency budgets through a

272. See Pleune, *supra* note 198, at 10896-97.

273. FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL, FISCAL YEAR 2020 RECOMMENDED BEST PRACTICES (2020) [hereinafter PERMITTING COUNCIL, RECOMMENDED BEST PRACTICES FY2020] (introductory letter from Alex Herrgott, executive director, identifying “forecasting agency workload” as a best practice intended to accelerate project reviews); PERMITTING COUNCIL, FY2024 BUDGET REQUEST, *supra* note 96, at 4 (noting that the Permitting Council occasionally “redirects resources as needed to resolve permitting bottlenecks and to provide capacity to Federal, state, local, and tribal stakeholders to make environmental reviews and authorizations for infrastructure projects more efficient and timely”). *But see* FAST-41 GUIDANCE, *supra* note 29, §§3.8, 3.9 (asserting that participation in FAST-41 does not create a presumption that a project will be expedited or prioritized over applications already in agencies' queues).

274. See, e.g., GAO, GAO-22-104054, ARMY CORPS OF ENGINEERS, WORKFORCE PLANNING FOLLOWS MOST LEADING PRACTICES BUT COULD BE ENHANCED WITH ADDITIONAL ACTIONS (2021) (describing ways in which the Corps implemented strategic work force planning to ensure sufficient human capital to meet the agency's core mission objectives).

275. See FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL, ANNUAL REPORT TO CONGRESS FISCAL YEAR 2019, at 31-32 (2020) [hereinafter PERMITTING COUNCIL, ANNUAL REPORT TO CONGRESS FY2019] (acknowledging that “appropriate staffing fosters enhanced early coordination activities and a greater ability for agencies to meet milestones” and committing to “work to build interagency relationships and create resources for non-Federal project sponsors in order to bridge the gap between agencies with staff constraints and agencies or applicants who could fund appropriate positions”); PERMITTING COUNCIL, FY2024 BUDGET REQUEST, *supra* note 96, at 22 (noting that with the approval of the OMB director, the executive director may transfer funds “to other Federal agencies and state, tribal, and local governments to facilitate timely and efficient environmental reviews and authorizations for FAST-41 covered projects”).

276. 42 U.S.C. §4370m-8(d)(1) & (2); PERMITTING COUNCIL, FY2024 BUDGET REQUEST, *supra* note 96, at 7 (noting that funding provided in the Inflation Reduction Act would improve access to the benefits of FAST-41 for tribal-sponsored projects and expand opportunities to transfer funds directly to state, local, and tribal governments to facilitate permitting delayed by insufficient resources).

263. *Id.*

264. GAO, BLM: REORGANIZATIONS DID NOT INCORPORATE EFFECTIVE PRACTICES, *supra* note 234, at 9.

265. *Id.* at 23.

266. *Id.*

267. GAO, BLM: BETTER WORKFORCE PLANNING TO ADDRESS VACANCIES, *supra* note 233, at 1.

268. *Id.* at 18.

269. *Id.* (“Without complete and reliable data on vacancies and details across the agency, BLM officials do not have complete information to make decisions about filling vacancies and initiating details to help the agency achieve its mission and goals.”)

270. *Id.* at 25.

271. U.S. Department of the Interior, Office of Budget, *FY2023 Interior Budget in Brief*, <https://www.doi.gov/budget/appropriations/2023/highlights> (last visited Mar. 26, 2023).



variety of means in order to support accelerated development and review of permit applications.<sup>277</sup> These resources could be used where an agency is too short-staffed to meet a deadline.

Second, FAST-41 best practices and procedures encourage pre-application meetings with project proponents in an effort to avoid delays later in the process caused by incomplete applications, waiting for supplemental information from an operator, or changes to mine plan operations.<sup>278</sup> The pre-application procedures encouraged by FAST-41 help project sponsors incorporate environmental and social sensitivities into the design of the project early, when impact avoidance is still feasible and cost effective.<sup>279</sup> Additionally, project sponsors can benefit from agencies' experience with addressing controversial or complex impacts in other similar projects.<sup>280</sup> This results in fewer modifications later in the process.<sup>281</sup> It also reduces permit review times by minimizing the amount of additional information agencies must request during the review process.<sup>282</sup> The Permitting Council identified these pre-application meetings as a best practice likely to improve permit review times.<sup>283</sup>

277. PERMITTING COUNCIL, FY2024 BUDGET REQUEST, *supra* note 96, at 32 (encouraging Congress to authorize agencies to accept external funds to provide dedicated resources to streamline cross-agency coordination and project delivery and reduce the overall time frame and cost of an environmental review or authorization); PERMITTING COUNCIL, BEST PRACTICES FY2018, *supra* note 96, at 29 (describing program through which the Corps is authorized to obtain funds from qualifying applicants and those funds are used to hire additional personnel and to participate in activities that streamline and facilitate the permit process, such as synchronizing the permit review process with the NEPA process or developing general permits).

278. GAO, HARDROCK MINING, *supra* note 217, at 6-7 (identifying incomplete applications and waiting for information from an operator as sources of delay); NRC, *supra* note 222, at 86 (identifying poorly coordinated data collection requests as a source of delay).

279. PERMITTING COUNCIL, RECOMMENDED BEST PRACTICES FY2020, *supra* note 273, at 8 (identifying pre-application/pre-official review processes as a best practice and explaining that it creates an opportunity to identify complex or controversial issues or circumstances early); OFFICE OF ENERGY PROJECTS, FERC, SUGGESTED BEST PRACTICES FOR INDUSTRY OUTREACH PROGRAMS TO STAKEHOLDERS (2015) (educating project sponsors about the benefits of utilizing the structured pre-application process).

280. FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL, FISCAL YEAR 2019 RECOMMENDED BEST PRACTICES 3 (2020) [hereinafter PERMITTING COUNCIL, RECOMMENDED BEST PRACTICES FY2019] (recommending that lead agencies utilize pre-application/pre-official review processes so that project sponsors can obtain relevant information about addressing controversial or complex impacts and benefit from agencies' previous experience with similar problems); PERMITTING COUNCIL, RECOMMENDED BEST PRACTICES FY2020, *supra* note 273, at 3 (same).

281. OFFICE OF ENERGY PROJECTS, FERC, *supra* note 279, at 17 (explaining that unlike the traditional filing process, where environmental review begins after the filing of an application, the pre-filing process devotes significant resources to a project before an application is filed in order to identify, avoid, and minimize environmental and social concerns before the commercial aspects and project scope are solidified).

282. PERMITTING COUNCIL, BEST PRACTICES FY2017, *supra* note 7, at 25 (describing benefits of pre-application process implemented by the Corps where permit applicants can meet with the Corps and other agencies to discuss their proposal and learn about regulatory requirements before finalizing the application).

283. 42 U.S.C. §4370m-1(c)(2)(B)(i) (directing the Permitting Council to issue recommendations on best practices for improving (among other things) enhanced early stakeholder engagement); PERMITTING COUNCIL, BEST PRACTICES FY2018, *supra* note 96, at 3 (identifying pre-application meetings as a best practice); PERMITTING COUNCIL, RECOMMENDED BEST PRACTICES FY2019, *supra* note 280, at 3 (recommending that lead agencies utilize pre-application/pre-official review processes so that project sponsors can obtain relevant information about addressing controversial or complex impacts and benefit from

Despite the benefits of pre-submittal meetings, they are not standard practice within BLM.<sup>284</sup> Only a few state offices have developed guidance on holding pre-submittal meetings with mine operators, while others remain silent.<sup>285</sup> In contrast, other agencies, like FERC, have created specific guidance on conducting effective pre-application meetings and even facilitate public participation and stakeholder engagement as part of the pre-application process.<sup>286</sup> FERC asserts that engaging stakeholders and the public early results in a better project with fewer surprise changes at the end.<sup>287</sup>

As an example success story for this best practice, the Permitting Council described the Nexus Gas Transmission Project, which was a 250-mile natural gas pipeline traversing Pennsylvania, West Virginia, Ohio, and Michigan.<sup>288</sup> During the pre-application process, which included extensive public participation, the project sponsors incorporated 239 route alternatives and variations in the pipeline design to address landowner requests, avoid sensitive resources, or respond to engineering restraints.<sup>289</sup> This feedback resulted in a 91% change from the original proposed route design—a number of modifications that would have been prohibitively expensive at the end of the review process.<sup>290</sup> Using this information at the beginning of the process improved efficiency and arguably resulted in a better end result and a final application that was processed more expeditiously.<sup>291</sup>

agencies' previous experience with similar problems); PERMITTING COUNCIL, RECOMMENDED BEST PRACTICES FY2020, *supra* note 273, at 3 (same).

284. In 2011, BLM issued guidance encouraging pre-application meetings for renewable energy projects, but the guidance expired, and it does not appear that the policy expanded beyond its narrow application. BLM Instruction Memorandum 2011-061, Solar and Wind Energy Applications—Pre-Application and Screening (Feb. 7, 2011).

285. GAO, HARDROCK MINING, *supra* note 217, at 24-25 (identifying pre-submittal meetings as an appropriate tool to improve the quality of mine application submittals and recognizing that, where implemented, these meetings improve efficiency); *id.* at 26 ("BLM and Forest Service officials leading the hardrock mining programs said they did not think it was necessary to further encourage offices to hold pre-plan submittal meetings, leaving discretion to the regions.").

286. One agency with a robust pre-application process is FERC. *See, e.g.*, 18 C.F.R. §157.21 (2022) (regulations detailing FERC's pre-filing procedures that are voluntary for all projects except LNG terminals); OFFICE OF ENERGY PROJECTS, FERC, *supra* note 279 (informative brochure explaining benefits of using the pre-filing procedures, including stakeholder outreach at the beginning, rather than the end, of the permitting process). The Nuclear Regulatory Commission also developed robust pre-application procedures, consistent with the Permitting Council's best practice recommendations. *See* PERMITTING COUNCIL, ANNUAL REPORT TO CONGRESS FY2019, *supra* note 275, at 8 (describing the Nuclear Regulatory Commission's progress developing guidance for pre-application review, including updated guidance on the format and content of applications that reflect lessons learned in the Commission's systemic review of nuclear power plant applications).

287. OFFICE OF ENERGY PROJECTS, FERC, *supra* note 279, at 5:

In our experience, project sponsors have realized substantial benefits from implementing a stakeholder outreach program as part of their project development model. . . . Although not all projects will experience the same level of benefit, we believe that the absence of public outreach in the planning of a project leads to unnecessary delays.

288. PERMITTING COUNCIL, BEST PRACTICES FY2018, *supra* note 96, at 17.

289. *Id.*

290. *Id.*

291. This is not to say that early engagement eliminated local opposition in every community. *See* Heidi Gorovitz Robertson, *Cities and Citizens Seethe: A Case Study of Local Efforts to Influence Natural Gas Pipeline Routing Decisions*, 122 W. VA. L. REV. 881, 907-34 (2020) (describing FERC's extensive public engagement and local opposition in three Ohio towns).

Incidentally, the Nexus Gas Transmission Project also demonstrates a conundrum with finding permitting success stories. The ideal result of implementing a best practice, like pre-application meetings, is the avoidance of a bad result, like project delays from unexpected impacts or local opposition. If the best practice works, the bad result will not occur. Which means that a success story must prove a negative. That is one reason that FAST-41 guidance encourages agencies to report on environmental and community outcomes.<sup>292</sup> It makes sense intuitively that such substantial route alterations would address many concerns and reduce opposition, but there is no way to prove what would have happened if the pipeline construction had proceeded as originally designed.

Moreover, the absence of opposition is an unrealistic standard to demonstrate success. With large projects, like the Nexus Gas Transmission Line, it would be virtually impossible to avoid all opposition.<sup>293</sup> Thus, recognizing success requires enough familiarity with the process to understand what could have happened in a given scenario. FAST-41 procedures also seek to avoid delays caused by uncoordinated information gathering.<sup>294</sup>

Best practices encourage agencies to develop and use environmental review and authorization templates, flow charts, and/or checklists to ensure that all necessary information is identified in the beginning of the process and collected in a predictable format.<sup>295</sup> Best practices also encourage agencies to enhance or use joint processes, including programmatic agreements with state, local, and tribal governments, to avoid duplicative data collection or analysis.<sup>296</sup> Agencies are also encouraged to develop or utilize joint application processes among federal, state, local, and tribal governments with similar authorities to reduce duplication and avoid unintentional conflicts.<sup>297</sup>

For example, the Federal Highway Administration (FHWA) noticed that programmatic agreements with states increased the efficiency of permitting and environmental analyses by specifying the roles and responsibilities of parties, standardizing coordination and compliance procedures, facilitating relationships between state and federal agencies, sharing staff resources, and ultimately improving environmental outcomes.<sup>298</sup> Despite these benefits, they were rarely used.<sup>299</sup> FHWA partnered with the American Association of State Highway and Transportation Officials to develop a user-friendly web-based tool that guides practitioners through the process of developing and implementing a programmatic agreement, including common phrasing, clauses, scope, and structure.<sup>300</sup>

The guide includes relevant examples of successes and challenges.<sup>301</sup> Two years after publication of that document, all states had at least one programmatic agreement and 37 states had two or more.<sup>302</sup> Because the Permitting Council actively supports joint processes that avoid uncoordinated data management, mine permit applications that go through the FAST-41 process are more likely to enjoy the benefit of “innovative arrangements to reduce duplicative processes that involve multiple Federal agencies and/or state agencies.”<sup>303</sup>

Finally, FAST-41 focuses heavily on avoiding delays caused by poor interagency coordination.<sup>304</sup> As described in detail above, the CPP encourages the development of con-

292. FAST-41 GUIDANCE, *supra* note 29, §7:

Historically, performance improvements have centered around reductions in environmental review and project delivery timeframes, but providing information on all performance dimensions of the environmental review process (for example, cost-effectiveness, timeliness, and quality in terms of value added) tells a more complete story of how the process is operating. The quality of the environmental review process should be measured by how a project evolved during the process.

293. Robertson, *supra* note 291, at 907-34 (detailing some local opposition to the pipeline).

294. See 42 U.S.C. §4370m-1(c)(2)(B)(5) (including the goal of “reducing information collection requirements and other administrative burdens on agencies, project sponsors, and other interested parties” as a best practice).

295. PERMITTING COUNCIL, BEST PRACTICES FY2018, *supra* note 96, at 11; see also Pleune, *supra* note 198, at 10903 (identifying flow charts, checklists, and templates as a way to avoid unproductive delays in the mine permitting process).

296. PERMITTING COUNCIL, RECOMMENDED BEST PRACTICES FY2019, *supra* note 280, at 5.

297. Permitting Council, Best Practices FY2018, *supra* note 96, at 24; Permitting Council, Annual Report to Congress FY2019, *supra* note 275, at 42-45 (providing assessment criteria to determine whether agencies have implemented this best practice); PERMITTING COUNCIL, 2020 ANNUAL REPORT TO CONGRESS, *supra* note 86, at 38 (reporting that the Permitting Council encourages agencies to develop and update programmatic agreements and MOUs and to “consider implementing innovative arrangements to reduce duplicative processes that involve multiple Federal agencies and/or state agencies where possible”).

298. BEST PRACTICES FY2018, *supra* note 96, at 27; U.S. DEPARTMENT OF TRANSPORTATION & AMERICAN ASSOCIATION OF STATE HIGHWAY AND TRANSPORTATION OFFICIALS, ROADMAP FOR DEVELOPING AND IMPLEMENTING PROGRAMMATIC AGREEMENTS 3 (2016) [hereinafter ROADMAP FOR PROGRAMMATIC AGREEMENTS].

299. PERMITTING COUNCIL, BEST PRACTICES FY2018, *supra* note 96, at 27.

300. *Id.*; ROADMAP FOR PROGRAMMATIC AGREEMENTS, *supra* note 298, at 12, 20.

301. See, e.g., ROADMAP FOR PROGRAMMATIC AGREEMENTS, *supra* note 298, at 10-11 (providing examples of costs and benefits of different Endangered Species Act §7 programmatic agreements).

302. PERMITTING COUNCIL, BEST PRACTICES FY2018, *supra* note 96, at 27.

303. PERMITTING COUNCIL, 2020 ANNUAL REPORT TO CONGRESS, *supra* note 86, at 39.

304. See 42 U.S.C. §4370m-1(c)(2)(B)(iii) (instructing the Permitting Council to issue recommendations for best practices designed to improve “coordination between Federal and non-Federal governmental entities, including through the development of common data standards and terminology across agencies”); PERMITTING COUNCIL, BEST PRACTICES FY2017, *supra* note 7, at 3-5 (identifying best practices to synchronize the efforts of federal, state, and tribal authorities in permitting process); PERMITTING COUNCIL, BEST PRACTICES FY2018, *supra* note 96, at 3 (identifying practices to improve coordination between federal and nonfederal authorities, including joint application processes, interagency liaison positions, MOUs, and regularly scheduled meetings); PERMITTING COUNCIL, RECOMMENDED BEST PRACTICES FY2019, *supra* note 280, at 4 (recommending practices to improve coordination, particularly with tribal governments, by updating agency policies regarding government-to-government consultation, developing protocols for consultation and/or joint environmental review procedures with tribal governments, and ensuring that agency staff are competent in the agency’s tribal consultation policy and their federal responsibility in consultations with federally recognized tribes); PERMITTING COUNCIL, RECOMMENDED BEST PRACTICES FY2020, *supra* note 273, at 7 (encouraging development of programmatic agreements and/or joint processes to coordinate federal and nonfederal environmental decisionmaking procedures); PERMITTING COUNCIL, BEST PRACTICES FY2021, *supra* note 97, at 6 (encouraging agencies to implement internal-facing processes that will facilitate the efficiency and timeliness of interagency coordination).

current, rather than sequential, analyses.<sup>305</sup> Early and coordinated stakeholder engagement enhances the efficiency of this process.<sup>306</sup> The Permitting Dashboard creates accountability between agencies and the public, reducing the likelihood that a decision will linger on the back of someone's desk.<sup>307</sup> Finally, enhanced oversight from the executive director of the Permitting Council creates an opportunity for issues to be addressed early, and in a coordinated manner.<sup>308</sup> All of these procedures are likely to facilitate more efficient mine permit processing.

## V. Conclusion

“Permit reform” has become a common phrase. However, there is no single “permit law.” Complex projects, like mine permits, implicate a variety of legal standards and permitting authorities, many of which are not federal. The procedures established in FAST-41 target the common sources

of delay that have been identified in several permitting processes, including mine permitting. On average, even very complex projects that use FAST-41 complete the permitting process more quickly than average time frames.

Notably, these efficiencies are achieved without reducing analytical rigor or eliminating environmental protections. In fact, many of the early stakeholder engagement procedures encouraged by FAST-41 best practices rely upon enhanced public participation early in the process to identify, avoid, and mitigate harms at the most cost-effective time in a project's life cycle. Due to FAST-41's focus on developing structural efficiencies, such as online resources, shared data management protocols, and enduring programmatic agreements between permitting authorities, it is likely that the efficiencies achievable through the program will only improve through time. For these reasons, more mine permit applicants should give the program a try.

305. FAST-41 GUIDANCE, *supra* note 29, §4.28 (explaining that “the timetable *should* include concurrent rather than sequential reviews whenever possible”); NRC, *supra* note 222, at 81 (“Where coordination among state and federal regulatory agencies is high, environmental review and permitting appears to be faster . . . where separate agencies engage in serial permitting, rather than coordinating their review efforts, the process—including data gathering—can take longer.”).

306. See FAST-41 GUIDANCE, *supra* note 29, §3.8 (explaining that an anticipated benefit of participating in FAST-41 is enhanced coordination, which “has been known to help expedite reviews by allowing early communication of project goals and discussion of potential alternatives with permitting agencies and stakeholders”; another benefit is “enhanced public participation,” which “helps build trust, improve stakeholder-buy in, and reduce the risk of litigation”). See also FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL, ANNUAL REPORT TO CONGRESS FISCAL YEAR 2016, at 16 (2017) (describing a successful model of federal-state coordination where representatives from DOI meet regularly with representatives from California state agencies with responsibilities for permitting renewable energy and transmission projects, and jointly review a common set of project applications, identifying and resolving issues early in the process, developing joint project permitting milestones, aligning state and federal processes, establishing best management practices for project developers, and providing a venue for renewable energy stakeholders to speak directly to federal and state policy leaders).

307. FAST-41 GUIDANCE, *supra* note 29, §3.8 (explaining that enhanced accountability is an anticipated benefit of using FAST-41); PERMITTING COUNCIL, ANNUAL REPORT TO CONGRESS FY2019, *supra* note 275, at 11 (describing ways in which the FAST-41 early coordination framework changed internal operations at the Corps because “increased communication and coordination results in better leveraging of information, reducing duplication of effort, and preventing any regulatory inconsistencies that can delay decisionmaking”).

308. See FAST-41 GUIDANCE, *supra* note 29, §3.8 (“Covered projects benefit from high-level oversight on the permitting process from the FPISC [Federal Permitting Improvement Steering Council] Executive Director . . . . There have been instances when high level visibility and oversight on the permitting process has helped to resolve challenges in Federal permitting and reviews.”).