

PART 220—[REMOVED]

■ Accordingly, for the reasons stated in the preamble and under the authority of 5 U.S.C. 301, the Corps removes 33 CFR part 220.

R.D. James,

Assistant Secretary of the Army (Civil Works).

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COUNCIL ON ENVIRONMENTAL QUALITY**40 CFR Part 1519**

RIN 0331–AA04

Guidance Document Procedures

AGENCY: Council on Environmental Quality.

ACTION: Final rule.

SUMMARY: Pursuant to Executive Order (E.O.) 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents,” this final rule establishes the process that the Council on Environmental Quality (CEQ) will follow for issuing guidance documents. E.O. 13891 requires Federal agencies to finalize regulations or amend existing regulations to establish processes and procedures for issuing guidance documents.

DATES: This rule is effective January 8, 2021.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

On October 9, 2019, President Trump issued E.O. 13891,¹ which addresses the development, use, and public availability of agency guidance documents. It requires agencies to promulgate or update existing regulations setting forth their procedures for issuing guidance documents. In accordance with section 6 of E.O. 13891, on October 31, 2019, the Office of Management and Budget (OMB) issued memorandum M–20–02, “Guidance Implementing Executive Order 13891, Titled ‘Promoting the Rule of Law Through Improved Agency Guidance Documents’” (OMB M–20–02)² to provide guidance and implement the Executive order. OMB

M–20–02 provides agencies with additional instruction on how to implement E.O. 13891, including the required rulemaking.

I. Summary of Final Rule

In this final rule, CEQ adds a new part 1519 to the Code of Federal Regulations to set out its procedures for the development and issuance of guidance documents consistent with the direction and reflecting the policies described in E.O. 13891 and OMB M–20–02.

A. Section 1519.1, “Purpose”

Section 1519.1, “Purpose,” states that the purpose of part 1519 is to implement E.O. 13891, and explains CEQ’s process for developing and issuing guidance.

B. Section 1519.2, “Guidance Document Procedures”

Section 1519.2, “Guidance document procedures,” defines “guidance documents” in paragraph (a) and describes documents that do not meet that definition in paragraph (b), consistent with section 2(b)³ of the E.O. and Q2 of OMB M–20–02.

Paragraph (c) of § 1519.2 lists the minimum requirements for any document meeting the definition of a guidance document consistent with Q22 of OMB M–20–02, including a title, unique identification number, date, indication of whether it revises or replaces prior guidance, summaries, and legal citations. Additionally, consistent with section 4(i) of E.O. 13891, paragraph (c)(6) includes a requirement that each guidance document clearly state that it does not bind the public, except as authorized by law or as incorporated into a contract.

Paragraph (c)(11) of § 1519.2 specifies that any guidance document must be posted on CEQ’s website. E.O. 13891 also directed Federal agencies to make guidance documents publicly available in an indexed, searchable database online. As described in the **Federal Register** notice published today, CEQ has complied with this requirement through its website [whitehouse.gov/ceq/resources](https://www.whitehouse.gov/ceq/resources).⁴ As noted on this website, CEQ may not cite, use, or rely on any guidance that is not posted on its web pages except to establish historical facts. CEQ also makes clear that CEQ’s guidance documents lack the force and effect of law, unless expressly

authorized by statute or incorporated into a contract.

Finally, paragraph (d) of § 1519.2 requires the CEQ Office of the General Counsel to review and clear all guidance documents before CEQ issues them.

C. Section 1519.3, “Procedures for the Public To Request Withdrawal or Modification of a Guidance Document”

Consistent with section 4(ii) of E.O. 13891, § 1519.3, “Procedures for the public to request withdrawal or modification of a guidance document,” addresses the process for members of the public to petition CEQ to withdraw or modify a particular guidance document, including designation of the Office of the General Counsel as the office within CEQ to which the public should direct such petitions. CEQ intends to provide additional instructions on its guidance website, including appropriate contact information and format of the petitions.

D. Section 1519.4, “Significant Guidance Documents”

Finally, § 1519.4, “Significant guidance documents,” addresses specific requirements for a subset of “guidance documents” that are “significant guidance documents” as defined by section 2(c) of E.O. 13891. Paragraph (a) sets forth that definition. OMB’s Office of Information and Regulatory Affairs (OIRA) makes the final determination of whether a guidance document is significant. If OIRA makes such a determination for a particular guidance document, this section will also apply. Consistent with section 4(iii) of E.O. 13891, paragraph (b) sets forth procedural requirements, including public notice and comment for at least 30 days, unless an exception applies; public response to major concerns raised in comments; approval on a non-delegable basis by the Chairman, or an official acting as Chairman; review by OIRA under Executive Order 12866; and compliance with the applicable requirements for regulations or rules.

II. Rulemaking Analyses and Notices**A. Regulatory Procedures**

Under the Administrative Procedure Act, an agency may waive notice and comment procedures if an action is an interpretative rule, a general statement of policy, or a rule of agency organization, procedure, or practice. See 5 U.S.C. 553(b)(A). This rule describes the internal process that CEQ will follow to comply with the requirements specified in E.O. 13891 when issuing guidance documents as defined by the

³ E.O. 13891 section 2(b) lists the following as exclusions to the definition of guidance document. 84 FR at 55235–36.

⁴ CEQ’s website, [whitehouse.gov/ceq/resources](https://www.whitehouse.gov/ceq/resources), includes links to CEQ guidance documents and resources, some of which are provided on [nepa.gov](https://www.nepa.gov) and [sustainability.gov](https://www.sustainability.gov).

¹ 84 FR 55235 (Oct. 15, 2019).

² OMB M–20–02 is available at <https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf>.

E.O. Because this rule is one of agency organization, procedure, or practice, it is exempt from the requirement to provide prior notice and opportunity for public comment.

B. Regulatory Planning and Review (E.O. 12866 and E.O. 13563)

E.O. 12866 provides that OIRA will review all significant rules. E.O. 13563 reaffirms the principles of E.O. 12866, calling for improvements in the Federal government's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory objectives. OMB determined that this final rule does not meet the requirements for a significant regulatory action under E.O. 12866, as supplemented by E.O. 13563, and therefore it was not subject to review.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act, as amended (RFA), 5 U.S.C. 601 *et seq.*, and E.O. 13272 do not apply to this rulemaking because it is not subject to the notice and comment requirements of 5 U.S.C. 553(b).

D. Unfunded Mandates Reform Act

A statement containing the information required by the Unfunded Mandates Reform Act, 2 U.S.C. 1531 *et seq.*, is not required. This rule will not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year, and it will not have a significant or unique effect on State, local, or Tribal governments, or the private sector.

E. Reducing Regulation and Controlling Regulatory Costs (E.O. 13771)

This rule is not an E.O. 13771 regulatory action because this rule is not significant under E.O. 12866.

F. Federalism (E.O. 13132)

Under the criteria in section 1 of E.O. 13132, this rule will not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement because it will not substantially and directly affect the relationship between the Federal and State governments.

G. National Environmental Policy Act

The purpose of this rulemaking is to formalize the CEQ's administrative procedures for issuing guidance documents, as required by E.O. 13891. CEQ has determined that the final rule is a non-major Federal action under the National Environmental Policy Act, 42

U.S.C. 4321 *et seq.*, and would not have any effect on the environment because it merely outlines internal CEQ administrative procedures and does not authorize any activity or commit resources to a project that may affect the environment.

H. Paperwork Reduction Act

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* This rule will not impose recordkeeping or reporting requirements on State, local, or Tribal governments, individuals, businesses, or organizations.

List of Subjects in 40 CFR Part 1519

Administrative practice and procedure, Guidance.

Mary B. Neumayr,
Chairman.

■ For the reasons stated in the preamble, the Council on Environmental Quality adds 40 CFR part 1519 as follows:

PART 1519—GUIDANCE DOCUMENTS

Sec.

1519.1 Purpose.

1519.2 Guidance document procedures.

1519.3 Procedures for the public to request withdrawal or modification of a guidance document.

1519.4 Significant guidance documents.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; and E.O. 13891, 84 FR 55235.

§ 1519.1 Purpose.

(a) This part implements Executive Order 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents,” and reflects the policies described in that order. The provisions in this part address the Council on Environmental Quality's procedures for the development and issuance of agency guidance documents. This part explains what constitutes guidance documents, and sets forth the minimum requirements for guidance documents, the procedures to request withdrawal or modification of guidance documents, and the additional requirements and procedures for significant guidance documents.

(b) This part is intended to improve the internal management of the Council on Environmental Quality. It is not intended to and does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies or other entities, its officers or employees, or any other person.

(c) If Executive Order 13891 or any provision thereof is rescinded or superseded, this part remains in effect.

§ 1519.2 Guidance document procedures.

(a) *Definition of guidance documents.* For purposes of this part, guidance documents are agency statements of general applicability, intended to have future effect on the behavior of regulated parties, that set forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation.

(b) *Documents excluded from the definition of guidance documents.* Guidance documents do not include:

(1) Agency statements of specific, rather than general, applicability.
(2) Agency statements that do not set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation.

(3) Legislative rules promulgated under 5 U.S.C. 553 (or similar statutory provisions), or exempt from rulemaking requirements under 5 U.S.C. 553(a).

(4) Rules of agency organization, procedure, or practice that are not anticipated to have substantial future effect on the behavior of regulated parties or the public.

(5) Decisions of agency adjudication.

(6) Documents or agency statements that are directed solely to the Council on Environmental Quality or other agencies (or personnel of such agencies) that are not anticipated to have substantial future effect on the behavior of regulated parties or the public.

(7) Legal briefs and other court filings.

(8) Legal advice or opinions from the Council on Environmental Quality's Office of the General Counsel.

(9) Categories of guidance documents made exempt from Executive Order 13891 by the Administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs through memoranda issued pursuant to section 4(b) of Executive Order 13891.

(c) *Elements of guidance documents.* In general, each guidance document must:

(1) Provide the title of the guidance document;

(2) Provide a unique document identification number;

(3) Identify the Council on Environmental Quality and any office, as appropriate, issuing the guidance document;

(4) Include the date of issuance;

(5) Include the term “guidance”;

(6) Include a disclaimer clarifying that it does not have the force and effect of law; is not meant to bind the public in any way; and is intended only to provide clarity to the public regarding

existing requirements under the law or agency policies. When a guidance document is binding because the law authorizes binding guidance or because a contract incorporates the guidance, the Council on Environmental Quality must modify the disclaimer to reflect accordingly;

(7) If it is a revision to or a replacement of a previously issued guidance document, identify the guidance document that it revises or replaces;

(8) Include a short summary of the subject matter covered in the guidance document at the top of the document;

(9) Identify the activities to which and the persons to whom the guidance document applies;

(10) Include the citation to the statutory provision or regulation to which the guidance document applies or which it interprets; and

(11) Be posted on the Council on Environmental Quality's website.

(d) *Review and clearance.* The Office of the General Counsel must review and clear all proposed guidance documents before issuance.

§ 1519.3 Procedures for the public to request withdrawal or modification of a guidance document.

(a) Any member of the public may petition the Council on Environmental Quality to withdraw or modify a guidance document.

(b) The petitioner must submit the request for the withdrawal or modification of a guidance document in writing to the Office of the General Counsel. The petition must contain a statement of the reasons for the petition and any supporting documents to support the petitioner's request.

(c) Upon receipt of a petition for withdrawal or modification of a guidance document, the Office of the General Counsel will consult with the relevant offices and coordinate the response to the petition.

(d) The Council on Environmental Quality should respond to a petition in writing, including electronically, within 90 days of receipt of a petition. The response should state whether the petition is granted, granted in part and denied in part, denied, or provisionally denied for lack of adequate information. If the petition is provisionally denied for lack of adequate information, the response should indicate what additional information is necessary to adjudicate the petition. The Office of the General Counsel should respond to the petition in writing no later than 90 days after receipt of the necessary additional information. The response should state

whether the petition is granted, granted in part and denied in part, or denied.

(e) The Council on Environmental Quality may consider in a coordinated manner or provide a coordinated response to similar petitions for withdrawal or modification.

(f) The Council on Environmental Quality need not respond to petitions under this part for withdrawal or modification of documents that do not meet the definition of a guidance document.

§ 1519.4 Significant guidance documents.

(a) *Significant guidance documents definition.* For the purposes of this section, significant guidance documents are guidance documents that may be reasonably anticipated to:

(1) Lead to an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles of Executive Order 12866.

(b) *Actions the Council on Environmental Quality will take before issuing significant guidance documents.* When the Office of Management and Budget's Office of Information and Regulatory Affairs determines that a guidance document is a significant guidance document, the Council on Environmental Quality must:

(1) Submit the guidance document for review by the Office of Information and Regulatory Affairs under Executive Order 12866;

(2) Publish the draft significant guidance document in the **Federal Register** for a public notice and comment period of at least 30 days;

(i) This provision will not apply if the Council on Environmental Quality for good cause finds that notice and public comment is impracticable, unnecessary, or contrary to the public interest.

(ii) If such a finding is made, the Council on Environmental Quality must incorporate such a finding and a brief statement of its reasoning into the significant guidance document.

(3) Obtain approval on a non-delegable basis from the Chairman or an official who is serving in an acting capacity as the Chairman.

(4) Provide a public response to major concerns raised in comments on the draft significant guidance document.

(5) Announce the availability of the final significant guidance document.

(6) Comply with the applicable requirements for regulations or rules, including significant regulatory actions, set forth in Executive Orders 12866, "Regulatory Planning and Review," 13563, "Improving Regulation and Regulatory Review," 13609, "Promoting International Regulatory Cooperation," 13771, "Reducing Regulation and Controlling Regulatory Costs," and 13777, "Enforcing the Regulatory Reform Agenda."

(c) *Exemption.* This section will not apply if the Chairman or an official who is serving in an acting capacity as the Chairman of the Council on Environmental Quality and the Administrator of the Office of Information and Regulatory Affairs agree that exigency, safety, health, or other compelling cause warrants an exemption from some or all requirements.

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FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL

40 CFR Chapter IX

[Agency Docket Number 2020-001]

RIN 3121-AA01

Adding Mining as a Sector of Projects Eligible for Coverage Under Title 41 of the Fixing America's Surface Transportation Act

AGENCY: Federal Permitting Improvement Steering Council.

ACTION: Final rule.

SUMMARY: The Federal Permitting Improvement Steering Council (Permitting Council) has voted to add mining as a sector with infrastructure projects eligible for coverage under Title 41 of the Fixing America's Surface Transportation Act (FAST-41). A new part will be included in the Code of Federal Regulations that adds mining to the list of statutory FAST-41 sectors. The addition of mining as a FAST-41 sector will allow qualified mining infrastructure projects to become FAST-41 covered projects. FAST-41 coverage will help Federal agencies coordinate their environmental and project review efforts to improve the timeliness, efficiency, predictability, and transparency of the decision-making processes associated with covered