

EARTHJUSTICE * EARTHWORKS * NATURAL RESOURCES DEFENSE COUNCIL

March 30, 2018

VIA EMAIL

Federal Permitting Improvement Steering Council
1800 F St., NW
Washington, DC 20405
E: FAST.FortyOne@fpisc.gov
E: Janet.pfleeger@fpisc.gov

Re: Comments on the proposal to add mining as a covered sector under FAST-41

Dear Federal Permitting Improvement Steering Council members,

Earthjustice, Earthworks, and the Natural Resources Defense Council (NRDC) submit these comments on the proposal to add mining as a covered sector under Title 41 of the Fixing America's Surface Transportation Act (FAST-41), Pub. L. No. 114-94, § 41001(6)(A) (Dec. 4, 2015) (codified at 42 U.S.C. § 4370m(6)(A)). The Council should reject this proposal. There are good reasons Congress chose not to include mining in FAST-41. Mining has more harmful impacts than any of the covered sectors. Mining produces vast quantities of waste, including toxic waste, that must be managed in perpetuity. Even with modern mining technology, chronic seepage and sudden accidental releases to the environment are the norm, and are likely to increase as mining companies develop increasingly lower grade deposits. Every mine and mine location is unique, posing technical challenges that can sometimes take a very long time to analyze, through no fault of a permitting agency. All of this suggests that we need more rigorous and flexible permitting to reduce the damage and public costs imposed by mining, not a law like FAST-41 that is designed to make permitting quicker and the environmental review more focused on an alternative identified as preferred before analysis is complete.

Even setting aside the very important reasons why we need more careful mine permitting, there is also no competing need to speed permitting up. Surveyed mining companies report that the United States is already among the most attractive jurisdictions in the world to invest in mining. Mine permits on federal lands take an average of just two years to complete, which is competitive with other developed countries' permitting timelines. When federal permitting is delayed, research shows that those delays are most often due to either a lack of information from the project proponent or a lack of agency resources, neither of which FAST-41 is designed to address.

Before the Council could add mining as a covered sector, it would need to conduct public notice and comment and government-to-government consultation with Indian tribes. Notice and comment is required by the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, and is also necessary to ensure that the Council's decision is well-informed. For such a far-reaching proposal as this that would have "substantial direct effects" on tribes, meaningful government-to-

government consultation is also called for.¹ In addition, the Council must evaluate the proposal's potential to disproportionately affect minority and low-income populations.²

Our organizations have significant experience with the federal permitting processes for mines and how those mines affect communities and the environment. Earthjustice is a national nonprofit public interest environmental law firm that frequently represents local residents, non-governmental organizations, Indian tribes, and others adversely affected by proposed or ongoing mining operations. Earthjustice represents its clients in the permitting process and in litigation.

Earthworks is a national nonprofit organization dedicated to protecting communities from the adverse environmental, economic, social, cultural, and health impacts of mining while promoting sustainable solutions. Working closely with communities and grassroots groups, and using sound science, Earthworks frequently comments on proposed permits for mines and engages with federal and state agencies in those processes.

NRDC is an international nonprofit environmental organization with more than 3 million members and online activists. Since 1970, NRDC's lawyers, scientists, and other environmental specialists have worked to protect the world's natural resources, public health, and the environment. For the past decade, NRDC attorneys have worked closely with Bristol Bay communities, residents, tribes, commercial fishermen, and others affected by the proposed Pebble Mine to engage federal, state and local agencies; communicate with mining companies and investors; comment on mine proposals and permits; and litigate.

1. A rigorous and flexible approach to mine permitting is essential.

Mining poses serious environmental and human health risks over a very long time scale, so it requires the utmost care in permitting to ensure that those risks are minimized. Mining releases more toxic waste into the environment than any other sector of the economy, and much more than any of those identified by Congress in FAST-41.³ There are no truly safe options to dispose of mine waste. Most is stored in perpetuity in enormous containment structures that are vulnerable to failure and often require water capture and/or treatment indefinitely. Accidents and unintended seepage are commonplace.

According to the most recent Toxic Release Inventory by the Environmental Protection Agency (EPA), the metal mining sector was responsible for 44% of the 3.44 billion pounds of toxic substances that were released into the environment in 2016, even though the sector only manages 6% of all the toxic waste produced by American industries.⁴ Analysis of government documents

¹ Exec. Order No. 13,175, § 1(a), 65 Fed. Reg. 67,249, 67,249 (Nov. 6, 2000).

² See Exec. Order No. 12,898, 59 Fed. Reg. 7,269 (Feb. 16, 1994).

³ Environmental Protection Agency, *TRI National Analysis 2016: Comparing Industry Sectors at 2* (Jan. 2018).

⁴ *Id.* at 1-2.

reveals that just 40 mines will generate an estimated 17 to 27 billion gallons of polluted water annually, forever.⁵

In addition to pollution from regular accidents and chronic leaks, these facilities also threaten the environment and public health with catastrophic releases. A catastrophic accident occurred at the Gold King Mine in Colorado, for example, 92 years after mining ceased, resulting in three million gallons of heavy metal-contaminated water pouring into the San Juan River upstream of thousands of local residents and the Navajo Nation.⁶ In 2014, a sudden loss of containment at the modern Mount Polley copper and gold mine in British Columbia spilled over six billion gallons of toxic mine waste and wastewater into the surrounding watershed.⁷

One of the primary contributing causes of lasting pollution from mines—acid mine drainage—is well understood. Yet, no modern hard rock open pit mines have demonstrated that acid mine drainage can be stopped once it occurs on a large scale.⁸ Polluted water still flows from Roman mines built over 1,500 years ago.⁹ Agencies cannot be hurried in grappling with these grave impacts during the permitting process.

Every mine and mine location is unique, and permitting needs to remain flexible in order to adjust to contingencies and challenges as they unfold. Mine sites vary in terms of hydrology, which affects how much excess water they will need to discharge and where accidental releases are likely to migrate. Geology varies, dictating what kinds of storage facilities the land can support and how much waste the mine will produce. Seismology varies, affecting the potential for waste storage failures and seepage. The ecological setting, the cultural and historical resources, and the communities vary. Mines use different processes for mineral extraction, and different excavation approaches to develop the ore deposits. They vary in footprint and throughput volume. Typically, a mine operates for many decades, constantly expanding its footprint and increasing its waste storage, with ever-increasing risk of new toxic releases and other impacts. Much of the information that affects the time needed for permitting cannot be finalized until well into the process. If agencies could not extend the permitting timeline as necessary to accommodate new information, that would needlessly constrain the process and create an incentive to rush difficult issues. Further, the Council staff lacks adequate resources and funding to undertake the substantial additional burden of overseeing permitting for the large, diverse, and highly technical mining sector.

The following photos of large hardrock mines, taken by Earthworks' Bonnie Gestring, may help the Council picture the potential scale and scope of these operations:

⁵ Earthworks, *Polluting the Future: How Mining Companies Are Contaminating Our Nation's Waters In Perpetuity* at 7 (May 2013) (Polluting the Future).

⁶ H. Van Denburg *et al.*, *The Gold King Mine: From An 1887 Claim, Private Profits and Social Costs*, COLORADO PUBLIC RADIO (Aug. 17, 2015).

⁷ E. Schoenfeld, *Mount Polley Mine to discharge wastewater*, ALASKA PUBLIC MEDIA, (Dec. 2, 2015).

⁸ Polluting the Future at 4.

⁹ S.R. Jennings *et al.*, "Acid Mine Drainage and Effects on Fish Health and Ecology: A Review," Reclamation Research Group, LLC at 4 (June 2008).



The Twin Creeks Mine, Humboldt County, Nevada. This mine uses cyanide leaching to extract gold. The red object in the photo is the surface of the tailings pond water, which is not covered. The edge of one of the mine pits appears in the bottom right side of the photo. Since this photo was taken, the tailings pond has been expanded backward from the facility shown.



The Lone Tree Mine, Humboldt County, Nevada. This mine used cyanide leaching to extract gold and silver. Mining finished in 2007. The water body in the photo is the former mine pit, now a contaminated lake that requires long-term management.



The Bingham Canyon Mine, AKA the Kennecott Copper Mine, Salt Lake County, Utah. This open pit copper mine's pit is more than half a mile deep and covers 1,900 acres.

2. Mine permitting is already prompt.

The United States already permits mines in a timely manner. According to the Government Accountability Office (GAO), the average time it takes the Bureau of Land Management (BLM) or Forest Service to approve a mine plan is two years.¹⁰ In Alaska, the environmental impact statement (EIS) process for large mine permits has averaged two years and eight months.¹¹ This time period is competitive with most western democracies with robust mining industries such as Australia, Canada, Chile, and Norway. An independent survey of mining companies conducted by the Fraser Institute confirms this: the United States as a region is among the top three in the world for investment attractiveness,¹² with Nevada, Arizona, and Alaska ranking among the top ten in the world for individual jurisdictions.¹³ To the extent that permitting times vary by state, that variation is inherent in our federalist system, which allows states to set their own priorities and enact stricter regulations for the mining sector.

When a federal authorization takes longer than average, the GAO report found that the primary reasons are the poor quality of information provided by project proponents and the agencies' limited resources, not a lack of accountability to meet deadlines.¹⁴

The September 8, 2017, letter from the National Mining Association to the Council on Environmental Quality and the July 28, 2017, letter from the Pebble Limited Partnership to the Federal Permitting Improvement Steering Council do not provide credible evidence that mine permitting takes too long in the United States. To begin with, the mere fact that the United States imports minerals does not imply that the United States is producing a less-than-ideal quantity of those minerals, nor does it imply that our mine permitting process is too slow.¹⁵ For example, among the minerals for which we rely on imports for 100% of our consumption, some

¹⁰ GAO, *Hardrock Mining: BLM and Forest Service Have Taken Some Actions to Expedite the Mine Plan Review Process but Could Do More*, GAO-16-165 at 13 (Jan. 2016) (GAO Mine Plan Review Study).

¹¹ Chambers, 2018.

¹² A. Stedman & K. Green, *Fraser Institute Survey of Mining Companies, 2017: Executive Summary* at 2 (2018).

¹³ A. Stedman & K. Green, *Fraser Institute Annual Survey of Mining Companies, 2017* at 9, Fig. 3 (2018).

¹⁴ GAO Mine Plan Review Study at 23.

¹⁵ See Letter from K. Sweeney, Nat'l Mining Ass'n to A. Hergott, Council on Env'tl Quality at 1 (Sept. 8, 2017) (Sweeney Letter) (citing 2017 USGS Mineral Commodity Summaries); Letter from T. Collier, Pebble Ltd. Partnership, to J. Pflieger, Fed. Permitting Improvement Steering Council at 1 (July 28, 2017) (referring to the USGS Mineral Commodity Summaries).

are not prevalent or not commercially recoverable in the United States,¹⁶ some have very little demand,¹⁷ and some pose significant health and safety concerns.¹⁸ These and many other factors that limit domestic production have nothing to do with the speed of permitting.

The documents cited by the National Mining Association also do not establish that permitting delays are a significant impediment to mining projects in the United States.¹⁹ One of the cited documents, an internal survey of a group of mining companies, discusses permitting delays only in the context of ranking the United States among the top three places in the world in terms of attractiveness to mining investors.²⁰ Two other documents note that permitting delay can occur, but draw no conclusions about its overall significance to the industry nor make any specific suggestions for reform.²¹ One of the studies is nearly twenty years old, offers only the most general analysis of delay in federal permitting, and acknowledges that “the completeness and technical adequacy of the permit information provided by the operator” and “availability of sufficient agency staff and technical resources” can affect the time required.²² A 2016 GAO study describes survey results identifying the length of permitting time for new mines as a factor

¹⁶ U.S. Geological Survey, *Mineral Commodity Summaries 2017* at 116 (Jan. 2017) (“Domestic niobium resources are of low grade, some are mineralogically complex, and most are not commercially recoverable.”); *id.* at 166 (“Domestic tantalum resources are of low grade, some are mineralogically complex, and most are not commercially recoverable.”); *id.* at 111 (“Domestic resources are uneconomic because of the high cost of the hand labor required to mine and process sheet mica from pegmatites.”); *id.* at 75 (“Domestic resources of graphite are relatively small”); *id.* at 107 (“Land-based manganese resources are large but irregularly distributed; those in the United States are very low grade and have potentially high extraction costs.”).

¹⁷ *Id.* at 173 (“Domestic demand for thorium alloys, compounds, and metals was limited and believed to be largely for research purposes.”); *id.* at 46 (“Consumption, import, and export data for cesium have not been available since the late 1980s [C]esium metal is not traded in commercial quantities”).

¹⁸ *Id.* at 28-29 (“The last U.S. producer of asbestos ceased operations in 2002 as a result of the decline in U.S. and international asbestos markets associated with health and liability issues Numerous materials substitute for asbestos.”); *id.* at 171 (“Thallium metal and its compounds are highly toxic materials and are strictly controlled to prevent harm to humans and the environment.”).

¹⁹ See Sweeney Letter. The Pebble Limited Partnership cited no factual support other than the U.S. Geological Survey Commodity Summaries, which describes the minerals that we import.

²⁰ Behre Dolbear, *2014 Ranking of Countries for Mining Investment: “Where Not to Invest,”* at 2, 6.

²¹ U.S. Dep’t of Energy, *Critical Materials Strategy* at 56 (Dec. 2011) (describing the permitting process for rare earth elements as “often lengthy,” in part because of state standards that overlay the federal requirements); U.S. Geological Survey, *The Principal Rare Earth Elements Deposits of the United States—A Summary of Domestic Deposits and a Global Perspective* at 19-23 (2010) (noting that permitting of rare earth element mines can take longer than in other countries, but not characterizing this as a significant impediment to domestic production.).

²² Nat’l Research Council, *Hardrock Mining on Federal Lands*, Nat’l Academy Press at 55 (Washington, D.C. 1999).

with significant potential to limit production of critical materials; however, the Department of Energy accurately criticized these survey results as biased due to heavy representation by industry, and the GAO itself admitted that the survey respondents were a “nongeneralizable sample of experts.”²³

Finally, the Association cites a document that was prepared *for* the National Mining Association.²⁴ This document presents only the industry perspective, discounting delays caused by project proponents and by, for example, rushed permits that were later invalidated.²⁵ Most importantly, there is no support for, or explanation of, the assertion that “it takes on average seven to 10 years to secure the permits needed to commence operations in the U.S.”²⁶ The report provides no explanation of how this figure was derived, except perhaps in its disclaimer that the consulting firm authoring the report relies on “private sources,” that the firm “has not independently verified such information,” and that it makes “[n]o representation or warranty . . . as to the accuracy, completeness or fairness of such information.”²⁷ By contrast, the GAO study finding that the approval of mine plans on federal lands takes an average of about two years sought to “obtain sufficient, appropriate evidence to provide a reasonable basis for [its] findings and conclusions.”²⁸ The GAO scrutinized and rejected unreliable data.²⁹ Its methodology is transparent, and its results are verifiable.³⁰

Data indicates that if anything, the permitting process needs to be more rigorous, not faster, if it is to effectively evaluate and mitigate water quality impacts. Significant impacts to water quality continue to occur as a result of modern mining. A 2012 report reviewed the track record of 14 currently operating U.S. copper mines accounting for 87% of U.S. copper production.³¹ Based on a review of state and federal government documents, it found that 92% of the mines failed to capture and control mine seepage; 100% experienced spills and other accidental releases and 28% experienced partial or total tailings dam failures.³² The report concluded that copper porphyry mines are often associated with acid mine drainage, metals leaching and/or accidental

²³ See U.S. Gov’t Accountability Office, *Advanced Technologies: Strengthened Federal Approach Needed to Help Identify and Mitigate Supply Risks for Critical Raw Materials* at 58-59 & App. I, p. 64 (Sept. 2016); see also *id.* at 55-56 (making no recommendation to accelerate permitting).

²⁴ SNL Metals & Mining, *Permitting, Economic Value and Mining in the United States* (June 2015).

²⁵ See *id.* at 13 (noting that litigation led to the revocation of an air permit in one of the case studies).

²⁶ *Id.* at 7.

²⁷ *Id.* at PDF 32.

²⁸ GAO Mine Plan Review Study, App. I at 41.

²⁹ *Id.*, App. I at 38-39.

³⁰ *Id.*, App. I, 38-41, “Scope and Methodology.”

³¹ Earthworks, *U.S. Copper Porphyry Mines: The Track Record of Water Quality Impacts Resulting from Pipeline Spills, Tailings Failures and Water Collection and Treatment Failures* (July 2012) (Revised Nov. 2012).

³² *Id.* at 4-5.

releases of toxic materials.³³ A similar report was released in 2017, entitled “U.S. Gold Mines: Spills & Failures Report,” which reviewed 27 currently operating gold mines accounting for 93% of U.S. gold production.³⁴ Water quality impacts were identified at 74% of these operations.³⁵

These reports demonstrate that the modern mine permitting process has failed to effectively identify and mitigate potential water quality impacts from currently operating mines in the U.S.³⁶ Rather than hurrying the permitting process, the data demonstrates that agencies should take greater care.

3. FAST-41 contains provisions that would undermine the goal of more rigorous permitting of mines.

We are concerned about the effects of applying four FAST-41 features to the mining sector. These features are designed to make permitting for covered sectors faster and more predictable for the applicant—priorities that are misplaced, as discussed in sections 1 and 2 of these comments, in light of the status, global perception, and tangible results of federal mine permitting.

First, FAST-41 provides for the establishment of permitting timelines of limited flexibility at both sector and project levels. At the sector level, the Executive Director, in consultation with the Council, must “develop recommended performance schedules, including intermediate and final completion dates, for environmental reviews and authorizations most commonly required for each category of covered projects.”³⁷ Final completion dates in the performance schedules “shall not exceed the average time to complete an environmental review or authorization for a project within that category,” calculated based on data from the preceding two years.³⁸

At the project level, 74 days after the applicant submits an acceptable notice of initiation of a proposed covered project, the facilitating or lead agency must establish “a comprehensive schedule of dates by which all environmental reviews and authorizations, and to the maximum extent possible, State permits, reviews and approvals must be made.”³⁹ This schedule “shall follow the performance schedules established” for the sector, “but may vary” based on several

³³ *Id.*

³⁴ Earthworks, *U.S. Gold Mines: Spills & Failures Report* at 6 (July 2017).

³⁵ *Id.* at 8.

³⁶ See also J. Kuipers *et al.*, *Comparison of Predicted and Actual Water Quality at Hardrock Mines: The reliability of predictions in Environmental Impact Statements* (2006).

³⁷ 42 U.S.C. § 4370m-1(c)(1)(C)(i).

³⁸ *Id.* § 4370m-1(c)(1)(C)(ii)(II)(aa), (bb).

³⁹ *Id.* § 4370m-2(b)(2)(A)(ii) (the Executive Director must make a specific entry on the Dashboard for a project within 14 days after receiving an acceptable notice of initiation); *id.* § 4370m-2(c)(1)(A) (the facilitating or lead agency must establish a coordinated project plan “[n]ot later than 60 days after the date on which the Executive Director must make a specific entry for the project on the Dashboard”); *id.* § 4370m-2(c)(1)(B)(ii) (the coordinated project plan must include a permitting timetable with a comprehensive schedule for environmental review and approval).

enumerated factors.⁴⁰ Cooperating agencies must concur in the timeline,⁴¹ but if they do not, the Executive Director can resolve disputes.⁴²

The timetable can only be modified under certain circumstances, and the more significant the modification is, the more difficult are the steps to achieve it. There must be agreement between the lead or facilitating agency and cooperating agencies regarding modification.⁴³ The lead or facilitating agency must provide written justification for the change, and must get approval from the Executive Director to extend a final completion date by more than 30 days.⁴⁴ Any modification that extends the timetable by more than half its original length requires approval from the Executive Director *and* the Director of the Office of Management and Budget, and triggers a requirement to submit reports to Congress.⁴⁵

These FAST-41 provisions limiting the flexibility of the permitting timeline should not apply to the mining sector. They are designed to make permitting move faster than it already does, which is not necessary for the mining sector in most cases.⁴⁶ Establishing, as the default recommended timeline, something equal to or less than the average time spent on permitting makes no sense in a sector with such dramatic variation in the length of time needed for permitting.⁴⁷ The particulars of a mine and mine site should drive permitting schedules, not a statutory framework that pushes agencies to keep pace with a hypothetical average mine. At the same time, these provisions fail to address what the GAO has identified as primary causes of the few mine permitting delays that do occur—insufficient agency resources and low quality information from project proponents.⁴⁸ Applying these provisions to mining would undermine the need for even more rigorous and deliberate management of mine waste, and for permitting agencies to be able to respond nimbly to information about what is needed at a particular mine. Agency staff could be forced to spend time writing reports to explain delays that could otherwise be spent working through the permitting process.⁴⁹ Agencies will have an incentive to cut corners in order to meet deadlines, reducing the quality of permitting decisions, putting communities and ecosystems at risk, and leaving permits vulnerable to litigation. In a sector where accidental releases of toxic waste and water quality impacts are so widespread and severe, there should be no incentive to hurry permitting.

Second, FAST-41 establishes short default lengths for comment periods in environmental reviews. For draft environmental impact statements, “the lead agency shall establish a comment period of not less than 45 days and not more than 60 days . . . unless” the lead agency “extends

⁴⁰ *Id.* § 4370m-2(c)(2)(B).

⁴¹ *Id.* § 4370m-2(c)(2)(A).

⁴² *Id.* § 4370m-2(c)(2)(C).

⁴³ *Id.* § 4370m-2(c)(2)(D)(i)(I).

⁴⁴ *Id.* § 4370m-2(c)(2)(D)(i)(II), (III).

⁴⁵ *Id.* § 4370m-2(c)(2)(D)(iii)(I), (II).

⁴⁶ *See supra* pp. 7-10.

⁴⁷ *See supra* pp. 2-3.

⁴⁸ *See id.*

⁴⁹ *See, e.g.*, 42 U.S.C. § 4370m-2(c)(2)(D)(i)(II); *id.* § 4370m-2(c)(2)(D)(iii)(II).

the deadline for good cause.”⁵⁰ For all other National Environmental Policy Act (NEPA) comment periods, “the lead agency shall establish a comment period of not more than 45 days . . . unless . . . the lead agency extends the deadline for good cause.”⁵¹ Likewise, when a the lead agency adopts state environmental review documents that require supplementation, the comment period on the federal supplementation is limited to 45 days unless extended for good cause.⁵² The minimum comment period allowed for draft environmental impact statements by Council on Environmental Quality regulations is 45 days.⁵³ In other words, FAST-41’s default comment period range for draft environmental impact statements is between the legal minimum and fifteen days later.

These FAST-41 provisions limiting comment periods on environmental review documents should not apply to mining, either. For the same reasons that mining requires careful permitting, it also requires significant time for public review and robust public input. Draft environmental impact statements for mines consist of thousands of pages of detailed technical information requiring many hours of review. Citizen groups that want to participate meaningfully in the administrative process must often hire experts to help sort through it all. Those without expert help must muddle through as best they can, which takes even more time. And mines affect people of all walks of life, including people who live in extremely remote areas with limited communication access and people who rely on seasonal subsistence or employment, all of which can make it more difficult to devote hours and hours to reviewing and preparing comments on a draft environmental impact statement during the appointed comment period. Agencies should retain full discretion to establish comment periods appropriate to the need, which may extend well beyond the regulatory minimums.⁵⁴

Third, FAST-41 provides that in environmental reviews, “the preferred alternative for a project, after being identified, may be developed to a higher level of detail than other alternatives . . . if the lead agency determines that the development of the higher level of detail will not prevent . . . the lead agency from making an impartial decision as to whether to accept another alternative” or prevent the public “from commenting on the preferred and other alternatives.”⁵⁵ The reasonable

⁵⁰ *Id.* § 4370m-4(d)(1).

⁵¹ *Id.* § 4370m-4(d)(2).

⁵² *Id.* § 4370m-4(b)(1)(D).

⁵³ *See* 40 C.F.R. § 1506.10(c).

⁵⁴ For one large mine in a remote location in Alaska, for example, the Army Corps of Engineers determined that appropriate comment periods were 105 days for NEPA scoping and six months for the draft EIS. *See* 77 Fed. Reg. 74,470, 74,471 (Dec. 14, 2012) (scoping comment period extends from December 14, 2012 to March 29, 2013); Army Corps of Eng’rs, Special Public Notice, Comment Period Extension for Donlin Gold Mine POA-1995-120 (Apr. 26, 2016) (157-day draft EIS comment deadline ending April 30, 2016 extended to May 31, 2016). Both comment periods ran at least in part during the winter, when travel can be accomplished by snow machine and subsistence hunting, fishing, and gathering are not at their peak, making commenting a more realistic possibility for many Alaskans. *Id.*

⁵⁵ 42 U.S.C. § 4370m-4(c)(4).

range of alternatives is to be determined “[a]s early as practicable during the environmental review, but not later than the commencement of scoping.”⁵⁶

These FAST-41 provisions governing alternatives should not apply to mining, either. There are many ways to manage the multiple challenges of mine development, access, and waste disposal and management. As the environmental review of a mining project proceeds, unforeseen challenges and better alternatives may emerge. It is also common in the EIS process for provisions of competing alternatives to be adopted into a final agency preferred alternative. If agencies are directed to establish the reasonable range of alternatives even before the scoping period during which they would normally just begin to get a sense of public concerns, that will tend to stifle the identification of new reasonable alternatives that would normally come to light during the full EIS process. Similarly, if alternatives competing with the preferred alternative are not developed or not developed as fully, then useful provisions will be lost. Placing disproportionate resources into studying an alternative identified as “preferred” early in the project will inherently bias the decision in that direction and risks overlooking or dismissing viable options that may better protect communities and ecosystems from the severe risks of mining. Whatever this provision’s merits are for other sectors, it should not be applied to mining, where the consequences of biased analysis and decision-making are severe and long-lasting.

Fourth, FAST-41 places limits on judicial review. Actions seeking judicial review of authorizations of covered projects are barred unless filed within two years of the agency’s decision.⁵⁷ This is significantly shorter than, for example, the six-year statute of limitations that applies to Administrative Procedure Act claims against the government.⁵⁸ FAST-41 also bars NEPA cases unless the party that files the case submitted a comment during the NEPA process, even if a different person submitted comments about the same issue such that the agency was on notice.⁵⁹

These FAST-41 limits on judicial review should not apply to mining. Especially when it comes to an industry that produces vast quantities of harmful waste over a period of decades, is subject to failures, accidents, and errors, and imposes significant costs on the public that may last forever, citizen access to the courts is a vital tool that should not be abridged in any respect.

In sum, even though many of these FAST-41 provisions are qualified and allow deviation under certain circumstances, each one puts a thumb on the scale in favor of fast permitting action that limits needed flexibility. With contemporary federal mine permitting already delivering timely permits, and in light of the widespread continuation of mine accidents and pollution, these provisions would get the government’s priorities for the mining sector exactly backward. They should not apply to mining.

⁵⁶ *Id.* § 4370m-4(c)(1)(A).

⁵⁷ *Id.* § 4370m-6(a)(1)(A).

⁵⁸ *See, e.g., James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1094 (D.C. Cir. 1996).

⁵⁹ 42 U.S.C. § 4370m-6(a)(1)(B).

4. The Pebble Mine is a prime example of why FAST-41 should not cover mining.

Pebble Limited Partnership (Pebble) has requested the Council add mining as a covered sector. The proposed Pebble Mine is a prime example of why mining is inappropriate for FAST-41 timelines and limits on public participation. The Pebble Mine would jeopardize the most valuable wild salmon fishery left in the world: Bristol Bay. This low-grade, open-pit mine could grow larger than the island of Manhattan and threaten Bristol Bay by storing over 11 billion metric tons of potentially acid-generating waste rock and toxic mine tailings in its geologically active headwaters.⁶⁰ Even if the mine waste could be contained perfectly forever, construction of the mine itself could destroy 166 miles of streams and tributaries and 4,100 acres of wetlands that are vital to salmon.⁶¹ Widely opposed by the public both in and out of Alaska, the mine would do so much damage that in 2014, EPA made a rare proposal to use Clean Water Act section 404(c) to limit its potential size in order to prevent “unacceptable adverse effects” on fishery areas.⁶² In denying Pebble’s request to withdraw that proposal, EPA Administrator Scott Pruitt recently explained:

[I]t is my judgment at this time that any mining projects in the [Bristol Bay] region likely pose a risk to the abundant natural resources that exist there. Until we know the full extent of that risk, those natural resources and world-class fisheries deserve the utmost protection.⁶³

As the late, former Senator Ted Stevens (R-Alaska) famously said, “it is the wrong mine in the wrong place.”⁶⁴ All mines warrant rigorous environmental review, ample public participation, and a citizenry that is empowered to defend its rights in court, but that is especially true of the Pebble Mine.

The Pebble Mine is also a prime example of why agencies responsible for permitting mines should not be accountable to a timetable based on an “average” mine. Consistent with the GAO’s findings about the most common causes of federal permitting delays, Pebble recently applied for permits without submitting adequate supporting information. In its Clean Water Act section 404 permit application submitted to the Army Corps of Engineers in December 2017,

⁶⁰ EPA, *Proposed Determination of the U.S. Environmental Protection Agency Region 10 Pursuant to Section 404(c) of the Clean Water Act* at ES-2 (July 2014) (Proposed Determination); EPA, *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska*, Vol. I at ES-11 (Jan. 2014) (PAG waste rock plus TSF capacities for the Pebble 6.5 stage mine scenario).

⁶¹ Proposed Determination at ES-4 (showing that the Pebble 6.5 stage mine scenario would destroy 94 miles of streams with documented anadromous fish occurrence and 72 miles of tributaries of those streams, as well as 4,100 acres of wetlands, lakes, and ponds that are contiguous with streams with documented anadromous fish occurrence).

⁶² *Id.* at ES-6.

⁶³ EPA News Releases, *EPA Administrator Scott Pruitt Suspends Withdrawal of Proposed Determination in Bristol Bay Watershed, Will Solicit Additional Comments* (Jan. 26, 2018).

⁶⁴ L. Welch, *Remembering Stevens: senator was as a straight-shooter on seafood*, ALASKA JOURNAL OF COMMERCE (Aug. 19, 2010).

Pebble proposed several previously undisclosed components to the project, including a 188-mile long natural gas pipeline, a large port and dredged channel in Cook Inlet waters, use of an ice-breaking barge to make a daily round-trip crossing of Lake Iliamna, a 230-megawatt power plant, and the construction of more than 80 miles of private roads that will have more than 200 stream crossings and at least eight bridges. Yet, Pebble did not submit any baseline studies from which the agencies can begin evaluating the impacts of the new components. The only baseline studies publicly available are more than a decade old, with data collected from 2004 to 2008. And those baseline studies focus solely on the mine site, failing entirely to include newly proposed project components such as the transportation corridor, Iliamna Lake ferry, and the proposed port site. These previously unanticipated components will require significant additional study and a correspondingly longer review process than would be required for a mine submitting a fully supported application.

For all of these reasons, FAST-41's limited-flexibility timelines, short default public comment periods, and limitations on judicial review would be completely inappropriate as applied to the Pebble Mine project.

5. Adding mining as a covered sector constitutes rulemaking and requires additional process.

We urge the Council simply to vote no on Pebble's proposal. However, if the Council proposes to add mining as a covered sector under FAST-41, significant additional procedures are necessary, both as a matter of law and as a matter of good policy, in order to ensure that the Council's decision is well-informed and explained to the public. Mining is ubiquitous, affecting people in every state. Reaching out to select stakeholders simply will not give the Council a complete picture of what adding mining to FAST-41 will mean in practice. Nor will such a limited process give tribes and members of the public fair notice and the opportunity to share their views to the Council.

Before the Council can add mining as a covered sector under FAST-4, the Council must conduct public notice and comment. With few exceptions, the Administrative Procedure Act requires that agencies notify the public and take public comment before making rules.⁶⁵ As a body comprised of members of government agencies that is charged with implementing a federal law, the Council itself is an "authority of the Government of the United States," i.e., an "agency" subject to APA requirements.⁶⁶ Adding mining as a covered sector under FAST-41 is "an agency statement of general or particular applicability and future effect designed to implement . . . or prescribe law," i.e., a "rule."⁶⁷ APA requirements apply except where expressly superseded or modified by another statute.⁶⁸ FAST-41 expressly states, "Nothing in this

⁶⁵ 5 U.S.C. § 553.

⁶⁶ *Id.* § 551(1).

⁶⁷ *Id.* § 551(4); *see Batterton v. Marshall*, 648 F.2d 694, 700 (D.C. Cir. 1980) (The APA's definition of a rule "include[s] nearly every statement an agency may make"); *see also* 42 U.S.C. § 4370m(6) (authorizing the Council to add sectors).

⁶⁸ 5 U.S.C. § 559.

subchapter supersedes, amends, or modifies *any* Federal statute.”⁶⁹ Therefore, the Council may not add mining to FAST-41 without conducting public notice and comment.

Before the Council can add mining as a covered sector under FAST-41, the Council must also conduct government-to-government consultation with interested Indian tribes across the nation. It is the policy of the United States “to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications,” and “to strengthen the United States government-to-government relationships with Indian tribes.”⁷⁰ Thus, when taking actions that implicate tribes and tribal resources and rights, federal agencies must consult with those tribes about the action and alternatives that would “preserve the prerogatives and authority of Indian tribes.”⁷¹ Meaningful consultation requires formal meetings with tribes “in advance with the decision maker or with intermediaries with clear authority to present tribal views to the . . . decision maker.”⁷²

By rushing and limiting the flexibility of environmental review, setting short default public comment periods, allowing a focus on preferred alternatives, and limiting judicial review of permitting decisions, adding mining to FAST-41 would have “substantial direct effects” on tribes concerned with the harmful effects of mining.⁷³ Similarly, adding mining to FAST-41 would have substantial direct effects on tribes that engage in mining or mine permitting.⁷⁴

The Council must also evaluate and address the proposal’s potential to disproportionately impact minority and low-income populations.⁷⁵ For example, these populations may have comparatively fewer resources to engage in the public process for mine permitting, leading to a disproportionate impact from the FAST-41 provisions that would tend to abbreviate that process.

All of these procedures are critical to ensure that any decision to include mining in FAST-41 is rational and adequately justified, and that the many people affected by mining have an opportunity to understand and participate in the Council’s decision. The Council may not, and should not, forgo them.

⁶⁹ 42 U.S.C. § 4370m-6(d)(1) (emphasis added).

⁷⁰ Exec. Order No. 13,175, 65 Fed. Reg. at 67,249.

⁷¹ *Id.* § 3(c)(3), at 67,250.

⁷² *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 401 (D.S.D. 1995).

⁷³ Exec. Order No. 13,175, § 1(a), 65 Fed. Reg. at 67,249.

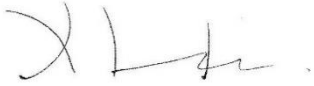
⁷⁴ *See, e.g.*, 42 U.S.C. § 4370m-2(c)(3) (describing procedures for cooperating state, local, and tribal governments).

⁷⁵ *See* Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994).

CONCLUSION

We urge the Council to reject any proposal to add mining as a covered sector under FAST-41.

Respectfully,



Erin Whalen
Senior Associate Attorney
EARTHJUSTICE



Tom Waldo
Staff Attorney
EARTHJUSTICE



Bonnie Gestring
Northwest Program Director
EARTHWORKS



Taryn Kiekow Heimer
Deputy Director, Marine Mammal
Protection Project
NATURAL RESOURCES
DEFENSE COUNCIL

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