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CENTER FOR BIOLOGICAL DIVERSITY * DEFENDERS OF WILDLIFE *
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SOCIETY * TRUSTEES FOR ALASKA * WATERLEGACY * WESTERN
ORGANIZATION OF RESOURCE COUNCILS * WORLD WILDLIFE FUND**

December 28, 2020

VIA REGULATIONS.GOV

Federal Permitting Improvement Steering Council
1800 F St., NW
Washington, DC 20405

Re: Comments on the Proposed Rule to Add Mining as a Sector of Projects Eligible for Coverage under FAST-41, FPISC Case 2020-001 / RIN 3121-AA01, 85 Fed. Reg. 75,998 (Nov. 27, 2020)

Dear Federal Permitting Improvement Steering Council members,

The undersigned groups submit these comments on the proposed rule that would 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 withdraw 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 up permitting. 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.

Furthermore, before the Council can add mining as a covered sector, which is a far-reaching proposal that would have “substantial direct effects” on Indian tribes, the Council must conduct meaningful government-to-government consultation with all potentially affected Tribal governments.¹ The Council must also 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. We are lawyers, scientists, grassroots organizers, policy consultants, and environmental specialists working to combat harmful environmental, economic, social, cultural, and health impacts of mining and promote sustainable solutions. Collectively, we represent members, constituents, and clients across the nation who are on the front lines of the mining industry's worst impacts—which are too often rooted in a rushed, inadequate permitting process.

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

Mining poses serious environmental and human health risks over a very long timescale, 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 According to the most recent Toxic Release Inventory by the Environmental Protection Agency (EPA), the metal mining sector was responsible for 41 percent of the 3.4 billion pounds of toxic substances that were released into

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, *2019 TRI Fact Sheet: Industry Sector, Metal Mining, 2122*, (Oct. 2020).

the environment in 2019, even though the sector only manages five percent of all the toxic waste produced by American industries.⁴

There are no truly safe options to dispose of mine waste. Most waste 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. A 2012 review of currently operating copper porphyry mines in the United States accounting for over 90 percent of United States copper production found that 82 percent of the mines resulted in water quality impacts from failure to capture and control mine-affected water.⁵ A 2017 report on the track record of currently operating United States gold mines found that 20 out of 27 mines (74 percent) failed to capture and treat contaminated mine water, resulting in water quality impacts.⁶

In addition to pollution from regular accidents and chronic leaks, these facilities also threaten the environment and public health with catastrophic releases. For example, in 2015, 92 years after mining ceased, a catastrophic accident occurred at the Gold King Mine in Colorado resulting in three million gallons of heavy metal-contaminated water pouring into the San Juan River upstream from thousands of local residents and the Navajo Nation.⁷ In 2014, a sudden breach of a tailings containment dam at the contemporary Mount Polley copper and gold mine in British Columbia spilled over six billion gallons of toxic mine waste and wastewater into the surrounding watershed.⁸

Unfortunately, these catastrophes cannot be dismissed as isolated incidents. A 2019 report identified an increasing trend in the number of catastrophic tailings failures globally, including in the United States.⁹ The increase is, in part, attributed to the increase in mining of lower grade ore deposits facilitated by new technology.¹⁰

⁴ *Id.*

⁵ B. Gestring, 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) (Earthworks 2012).

⁶ B. Gestring & J. Hadder, Earthworks, *U.S. Gold Mines Spills & Failure Report: The Track Record of Environmental Impacts Resulting from Pipeline Spills, Accidental Releases and Failure to Capture and Treat Mine Impacted Water* (July 2017) (Earthworks 2017).

⁷ H. Van Denburg *et al.*, *The Gold King Mine: From An 1887 Claim, Private Profits and Social Costs*, COLORADO PUBLIC RADIO (Aug. 17, 2015).

⁸ E. Schoenfeld, *Mount Polley Mine to discharge wastewater*, ALASKA PUBLIC MEDIA (Dec. 2, 2015).

⁹ D. M. Chambers, Ph.D., *The Increasing Number of Tailings Facility Failures: Navigating the Decade 2020-2029*, presented at Canadian Dam Association Annual Conference, October 6-10, 2019.

¹⁰ L. N. Bowker & D. M. Chambers, *The Risk, Public Liability and Economics of Tailings Storage Facility Failures* (July 21, 2015).

One of the primary contributing causes of lasting pollution from mines—acid mine drainage—is well understood. Yet, no modern hard rock mines have demonstrated that acid mine drainage can be stopped once it occurs on a large scale.¹¹ Polluted water still flows from Roman mines built over 1,500 years ago.¹² Furthermore, the adverse water quality impacts of hardrock mining are often underestimated during the mine permitting process. One study found that more than three-quarters of mines failed to meet water quality standards despite predicting otherwise when proposed.¹³ A 2018 review of all major operating hardrock mines in Montana that began production after 1980 found that water quality predictions made during the permitting process were consistently underestimated, with significant impacts resulting from repeated spills of cyanide and uncontrolled acid mine drainage among others.¹⁴ A 2020 report on the track record of major hardrock mines in Alaska found that 80 percent failed to capture or control contaminated mine water, resulting in water quality violations that often occurred over an extended period of time.¹⁵ It also found that 40 percent of the mines (2 out of 5 mines) resulted in metals pollution on National Park Service lands designated as National Monuments.



Acid mine drainage from Zortman Landusky Mine requires capture and treatment in perpetuity.

Climate change is also exacerbating the risks and uncertainties associated with hardrock mining. The increasing frequency of extreme weather events and changing temperatures and precipitation patterns affect the safety and stability of mining operations and infrastructure.¹⁶ Mine-specific examples of these types of impacts include major spills resulting from large storm events¹⁷ and

¹¹ L. Sumi, Earthworks, *Polluting the Future: How Mining Companies Are Contaminating Our Nation's Waters In Perpetuity* at 4 (May 2013).

¹² S.R. Jennings *et al.*, Reclamation Research Group, LLC, *Acid Mine Drainage and Effects on Fish Health and Ecology: A Review* at 4 (June 2008).

¹³ A. Maest *et al.*, *Predicted versus actual water quality at hardrock mine sites: effect of inherent geochemical and hydrologic characteristics*, presented at 7th International Conference on Acid Rock Drainage (ICARD), March 26-30, 2006.

¹⁴ L. Zannoli, *Track Record: Montana Modern Hardrock Mining, Water Quality Impacts and Reclamation Bonding* (Sept. 2018).

¹⁵ B. Gestring, *Alaska Metal Mines: The track record of impacts to land and water from the failure to capture and treat mine pollution* (Mar. 2020).

¹⁶ BSR, *Adapting to Climate Change: A Guide for the Mining Industry* (undated).

¹⁷ R. D. Williams, U.S. Bureau of Land Management, *Climate Change - Extreme Conditions: Do Plans of Operations Need to Include an Ark?*, presented at Mine Design Operations & Closure Conference, Apr. 29-May 3, 2012.

damage to mine waste cover systems from unexpected wildfires.¹⁸ The increased risks to hardrock mining from global warming is particularly acute in Alaska, where temperatures are warming much faster than the national rate, causing permafrost to thaw and disrupting mining operations.¹⁹ Industry and regulatory agencies are still working to understand and address these risks.²⁰ Existing regulations lag behind, and this proposal to fast-track permitting will simply exacerbate the problem by reducing the time for meaningful review.

Agencies cannot be hurried in grappling with these grave impacts during the permitting process, particularly when studies already show that the National Environmental Policy Act (NEPA) process used to identify potential impacts of hardrock mining proposals on public health and the environment routinely underestimate them.²¹

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 near mines vary as well. 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 analyses. 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 Ecoflight, may help the Council picture the potential scale and scope of these operations:

¹⁸ B. Maehl, Spectrum Engineering and Environmental LLC, *July Wildfire: Zortman Landusky Mine*, presented at Montana Tech, Mine Design Operations and Closure Conference, 2018.

¹⁹ N. Herz, *As Arctic Warming Accelerates Permafrost Thaw Hits Red Dog Mine with 20 Million Bill*, ALASKA PUBLIC MEDIA (Sept. 1, 2009).

²⁰ International Council on Mining & Metals, *Adapting to a Changing Climate: Building resilience in the mining and metals industry* (2019).

²¹ *Supra* p. 4.



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 further.



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. Groundwater pollution from the mine extends over tens of square miles.



Tailings impoundment at the Thompson Creek Mine in Idaho. The lighter beige object toward the top of the photo is a 600-foot-tall sand dam holding back tailings that would otherwise spill into the Salmon River. Research shows that the number of catastrophic failures at tailings impoundments like these is increasing globally.

As these photos underscore, the consequences of inappropriately fast-tracking permitting for even one mine project could be severe and long-lasting for the communities and environments affected. Thus, the Council’s projection that adding mining as a covered sector would prompt “only” ten FAST-41 Initiation Notices through 2022²² does not assuage commenters’ concerns.

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 or the U. S. Forest Service to approve a mine plan is two years.²³ In Alaska, the environmental impact

²² 85 Fed. Reg. 75,998, 76,000 (Nov. 27, 2020).

²³ 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).

statement (EIS) process for large mine permits has averaged two years and eight months.²⁴ 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,²⁵ with Nevada, Arizona, and Alaska ranking among the top ten in the world for individual jurisdictions.²⁶ 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.²⁷

A September 8, 2017, letter from the National Mining Association to the Council on Environmental Quality and a July 28, 2017, letter from the Pebble Limited Partnership to the 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.²⁸ For example, among the minerals for which we rely on imports for 100 percent of our consumption, some are not prevalent or not commercially recoverable in the United States,²⁹ some have very little demand,³⁰ and some pose significant

²⁴ D. Chambers, *Alaska Mines EIS Completion History* (2018).

²⁵ A. Stedman & K. Green, *Fraser Institute Survey of Mining Companies, 2017: Executive Summary* at 2 (2018).

²⁶ A. Stedman & K. Green, *Fraser Institute Annual Survey of Mining Companies, 2017* at 9, Fig. 3 (2018).

²⁷ GAO Mine Plan Review Study at 23.

²⁸ See Letter from K. Sweeney, National Mining Association to A. Hergott, Council on Environmental Quality at 1 (Sept. 8, 2017) (Sweeney Letter) (citing 2017 USGS Mineral Commodity Summaries); Letter from T. Collier, Pebble Ltd. Partnership, to J. Pflieger, Federal Permitting Improvement Steering Council at 1 (July 28, 2017) (referring to the USGS Mineral Commodity Summaries).

²⁹ 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.”).

³⁰ *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”).

health and safety concerns.³¹ 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 in support of adding mining to FAST-41 also do not establish that permitting delays are a significant impediment to mining projects in the United States.³² 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.³³ 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.³⁴ 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.³⁵ A 2016 GAO study describes survey results identifying the length of permitting time for new mines as a factor 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.”³⁶

Finally, the National Mining Association cites a document that was prepared *for* the association.³⁷ This document presents only the industry perspective, discounting delays caused

³¹ *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.”).

³² 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.

³³ Behre Dolbear, *2014 Ranking of Countries for Mining Investment: “Where Not to Invest”* at 2, 6.

³⁴ U.S. Department 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.).

³⁵ National Research Council, *Hardrock Mining on Federal Lands*, National Academy Press at 55 (Washington, D.C. 1999).

³⁶ See GAO, *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).

³⁷ SNL Metals & Mining, *Permitting, Economic Value and Mining in the United States* (June 2015).

by project proponents and by, for example, rushed permits that were later invalidated.³⁸ 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.”³⁹ 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.”⁴⁰ 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.”⁴¹ The GAO scrutinized and rejected unreliable data.⁴² Its methodology is transparent, and its results are verifiable.⁴³

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. As noted above, a 2012 report reviewed the track record of 14 currently operating United States copper mines accounting for 87 percent of United States copper production.⁴⁴ Based on a review of state and federal government documents, it found that 92 percent of the mines failed to capture and control mine seepage; 100 percent experienced spills and other accidental releases and 28 percent experienced partial or total tailings dam failures.⁴⁵ The report concluded that copper porphyry mines are often associated with acid mine drainage, metals leaching and/or accidental releases of toxic materials.⁴⁶ 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 percent of United States gold production.⁴⁷ Water quality impacts were identified at 74 percent of these operations.⁴⁸

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 United States.⁴⁹ Rather than hurrying the permitting process, the data demonstrates that agencies should take greater care.

³⁸ *See id.* at 13 (noting that litigation led to the revocation of an air permit in one of the case studies).

³⁹ *Id.* at 7.

⁴⁰ *Id.* at PDF 32.

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

⁴² *Id.*, App. I at 38-39.

⁴³ *Id.*, App. I, 38-41, “Scope and Methodology.”

⁴⁴ *See Earthworks 2012.*

⁴⁵ *Id.* at 4-5.

⁴⁶ *Id.*

⁴⁷ *Earthworks 2017* at 6.

⁴⁸ *Id.* at 8.

⁴⁹ *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).

3. FAST-41 contains provisions that would undermine rigorous and careful 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.”⁵⁰ 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.⁵¹

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.”⁵² This schedule “shall follow the performance schedules established” for the sector, “but may vary” based on several enumerated factors.⁵³ Cooperating agencies must concur in the timeline,⁵⁴ but if they do not, the Executive Director can resolve disputes.⁵⁵

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.⁵⁶ 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.⁵⁷ Any modification that extends the timetable by more than half its original length requires approval

⁵⁰ 42 U.S.C. § 4370m-1(c)(1)(C)(i).

⁵¹ *Id.* § 4370m-1(c)(1)(C)(ii)(II)(aa), (bb).

⁵² *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).

⁵³ *Id.* § 4370m-2(c)(2)(B).

⁵⁴ *Id.* § 4370m-2(c)(2)(A).

⁵⁵ *Id.* § 4370m-2(c)(2)(C).

⁵⁶ *Id.* § 4370m-2(c)(2)(D)(i)(I).

⁵⁷ *Id.* § 4370m-2(c)(2)(D)(i)(II), (III).

from the Executive Director *and* the Director of the Office of Management and Budget, and triggers a requirement to submit reports to Congress.⁵⁸

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.⁵⁹ 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.⁶⁰ 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.⁶¹ 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.⁶² 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.

Fast-tracking federal mine permits could also interfere with state mine permitting processes. One obvious example is a state's right under Clean Water Act section 401 to effectively deny or condition a federal discharge permit for any project that would not comply with state water quality standards.⁶³ In order to preserve this right, a state must act on an application "within a reasonable period of time,"⁶⁴ the length of which is to be determined by the applicable federal permitting agency.⁶⁵ If FAST-41's directive to speed permitting influences federal agencies' determination of what constitutes a reasonable period of time for covered projects, state environmental agencies will also be forced to act faster, potentially without adequate information, or risk forfeiting the protection of state water quality.

Second, FAST-41 establishes short default lengths for comment periods in environmental reviews. For draft EISs, "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 the deadline for good cause."⁶⁶ For all other NEPA comment periods, "the lead agency shall establish a comment

⁵⁸ *Id.* § 4370m-2(c)(2)(D)(iii)(I), (II).

⁵⁹ *See supra* Part 2.

⁶⁰ *See supra* Part 1.

⁶¹ *See id.*

⁶² *See, e.g.*, 42 U.S.C. § 4370m-2(c)(2)(D)(i)(II); *id.* § 4370m-2(c)(2)(D)(iii)(II).

⁶³ *See* 33 U.S.C. § 1341.

⁶⁴ *Id.* § 1341(a)(1).

⁶⁵ 40 C.F.R. § 121.6

⁶⁶ 42 U.S.C. § 4370m-4(d)(1).

period of not more than 45 days . . . unless . . . the lead agency extends the deadline for good cause.”⁶⁷ Likewise, when a 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.⁶⁸ The minimum comment period allowed for draft EISs by Council on Environmental Quality regulations is 45 days.⁶⁹ In other words, FAST-41’s default comment period range for draft EISs 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 EISs for mines consist of thousands of pages of detailed technical information requiring many hundreds to thousands of 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 EIS 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.⁷⁰

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.”⁷¹ The reasonable range of alternatives is to be determined “[a]s early as practicable during the environmental review, but not later than the commencement of scoping.”⁷²

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

⁶⁷ *Id.* § 4370m-4(d)(2).

⁶⁸ *Id.* § 4370m-4(b)(1)(D).

⁶⁹ *See* 40 C.F.R. § 1506.10(c).

⁷⁰ 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 Engineers, 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.*

⁷¹ 42 U.S.C. § 4370m-4(c)(4).

⁷² *Id.* § 4370m-4(c)(1)(A).

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.⁷³ This is significantly shorter than, for example, the six-year statute of limitations that applies to Administrative Procedure Act claims against the government.⁷⁴ 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 of the problem.⁷⁵

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.

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

Pebble Limited Partnership (Pebble) is one of the industry groups that 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

⁷³ *Id.* § 4370m-6(a)(1)(A).

⁷⁴ *See, e.g., James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1094 (D.C. Cir. 1996).

⁷⁵ 42 U.S.C. § 4370m-6(a)(1)(B).

over an estimated 11 billion metric tons of potentially acid-generating waste rock and toxic mine tailings in its geologically active headwaters.⁷⁶ Even if the mine waste could be contained perfectly forever, construction of the mine itself could destroy an estimated 166 miles of streams and tributaries and 4,100 acres of wetlands that are vital to salmon.⁷⁷

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.⁷⁸ As the late, former Senator Ted Stevens (R-Alaska) famously said, the Pebble Mine “is the wrong mine in the wrong place.”⁷⁹ On November 25, 2020, the Army Corps of Engineers agreed, denying Pebble’s application to discharge fill and dredged material into waters of the United States because the mine would cause significant degradation to aquatic resources and would be contrary to the public interest.

All mines warrant rigorous environmental review, ample public participation, and a citizenry that is empowered to defend its rights in court, but that has proven especially true of the Pebble Mine. Yet, if the Council finalizes this proposed rule, even a project as profoundly ill-advised as the Pebble Mine could potentially become a covered project.

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. It took the Army Corps of Engineers nearly four years from the date of Pebble’s application to issue a decision. However, consistent with the GAO’s findings about the most common causes of federal permitting delays, Pebble itself caused significant delays in the process by applying for permits without submitting adequate supporting information, and by substantially revising its plan so many times that the data gaps only grew larger throughout the permitting process. At the time of the Army Corps’ decision, Pebble still had submitted only untested, unsupported conceptual plans to store the mine’s toxic tailings and treat the unprecedented 6.8 billion gallons of wastewater the mine would need to process during operations annually.⁸⁰

⁷⁶ 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).

⁷⁷ 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).

⁷⁸ *Id.* at ES-6.

⁷⁹ L. Welch, *Remembering Stevens: senator was as a straight-shooter on seafood*, ALASKA JOURNAL OF COMMERCE (Aug. 19, 2010).

⁸⁰ Earthjustice *et al.*, Comments on Pebble Limited Partnership’s application for State water quality certification, Department of Army Public Notice Reference No. POA-2017-00271 (Aug. 24, 2020).

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, or any project like it.

5. Adding mining as a covered sector requires additional process.

Before the Council can add mining as a covered sector under FAST-41, the Council must 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.”⁸¹ 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.”⁸² 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.”⁸³

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.⁸⁴ Similarly, adding mining to FAST-41 would have substantial direct effects on tribes that engage in mining or mine permitting.⁸⁵

The Council must also evaluate and address the proposal’s potential to disproportionately impact minority and low-income populations.⁸⁶ 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.

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.

CONCLUSION

The Council should not add mining as a covered sector under FAST-41.

Respectfully,

⁸¹ Exec. Order No. 13,175, 65 Fed. Reg. at 67,249.

⁸² *Id.* § 3(c)(3), at 67,250.

⁸³ *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 401 (D.S.D. 1995).

⁸⁴ Exec. Order No. 13,175, § 1(a), 65 Fed. Reg. at 67,249.

⁸⁵ *See, e.g.*, 42 U.S.C. § 4370m-2(c)(3) (describing procedures for cooperating state, local, and tribal governments).

⁸⁶ *See* Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994).

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