



Recent Development in the Law Concerning Critical Minerals

What has changed and what remains the same

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What are Critical Minerals?

- Established by the Department of the Interior (USGS) under Section 7002 of the Energy Act of 2020 (the Energy Act) (Pub. L. 116-260).
- On February 24, 2022, Final List was promulgated, including fifty minerals.
- Aluminum, antimony, arsenic, barite, beryllium, bismuth, cerium, cesium, chromium, cobalt, dysprosium, erbium, europium, fluorspar, gadolinium, gallium, germanium, graphite, hafnium, holmium, indium, iridium, lanthanum, lithium, lutetium, magnesium, manganese, neodymium, nickel, niobium, palladium, platinum, praseodymium, rhodium, rubidium, ruthenium, samarium, scandium, tantalum, tellurium, terbium, thulium, tin, titanium, tungsten, vanadium, ytterbium, yttrium, zinc, and zirconium.

Why are Critical Minerals critical?

- Energy Act of 2020 provides the ‘dictionary’ definition:
 - (2) CRITICAL MATERIAL.—The term “critical material” means— (A) any non-fuel mineral, element, substance, or material that...— (i) has a high risk of a supply chain disruption; and (ii) serves an essential function in 1 or more energy technologies, including technologies that produce, transmit, store, and conserve energy.
- Practically/Politically
 - Demand increasing, generally resilient from external shocks
 - Supply stems from countries of origin with unacceptable risks of political shock
 - Political concerns indicate robust demand/spending insulated from broader economic concerns
 - EU’s Critical Raw Materials 4th (30, with light/heavy REE catchall) (2011-2020); “Critical Raw Materials Resilience: Charting a Path towards greater Security and Sustainability”
 - “The Competitiveness Bill” (S.1260): Critical Supply Chain Resiliency Program
- **Political will to promote domestic supplies, but how does that look on the ground?**

So what?

- What is the immediate effect of the designation?
 - Very little
- Infrastructure Bill (Pub. L. 117-58) and the Energy Act
 - DO: Promote agency coordination, non-binding exhortations to act more quickly
 - DO NOT: Fundamentally change the permitting process
- Disconnect between identified issue and action taken;
 - Permitting issues stem from foundational environmental laws—unpalatable;
 - Mine permitting is technically complex and touch on many laws—unavoidable;
 - NEPA, CERCLA, CAA, CWA, TSCA, RCRA, etc.
 - Judicial Review
- Instead the approach has been the hair of the dog: procedural reform

Procedure to Procedure

- Avoiding major fights over reforms to the foundational laws discussed previously, the focus has been on streamlining and adjusting the procedure within that framework.
- FAST-41
 - Fixing America’s Surface Transportation Act
 - Recently made permanent through the Infrastructure Bill; recently added mining
 - Federal Permitting Improvement Council (<https://www.permits.performance.gov/>)
- “Competitiveness” Bill
 - Council on Manufacturing and Industrial Innovation Functions
 - “harmonize the Federal permitting process relating to manufacturing and industrial innovation, as appropriate”
- Executive Order 14017: America’s Supply Chains

An unsolved problem with many solutions

- Federal permitting reform is difficult because it is the nexus of so many competing interests in a very technically demanding field that is unforgiving of mistakes.
- Efforts to address this issue have focused on agency-side adjustments to the internal process for considering permits
 - Will have some effect, but remains to be seen.
 - Likely all we can do without providing
- Basic rules for effective permitting remain unchanged
 - Work quickly, build a plan and framework before going public
 - Engage stakeholders early, gain local support (vis-à-vis national orgs)
- American mining remains the cleanest, greenest in the world.

Questions?



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