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The Case for Permitting Reform

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This is the first article in Womble Bond Dickinson's Energy & Natural Resources thought leadership series titled *Striking the Balance: Permitting Reforms for Mining and the Energy Transition*. In this series, we'll explore the pathways to finding a balance between responsible regulatory oversight and allowing businesses to operate efficiently and effectively. Stay tuned for future installments.

Green technologies require minerals and metals to accomplish the energy transition. Clear regulation is needed to ensure that these critical minerals are mined in an environmentally and socially responsible manner. But the lengthy mining regulatory processes threaten to constrict supply of these vital minerals.

"The Energy Transition" includes the transition of power generation to renewable resources (such as wind and solar) and the transition of transportation to electric vehicles. These elements of the Energy Transition will require the incorporation of charging stations and utility scale storage in transmission infrastructure. The International Energy Agency estimates that demand for metals used in renewable technologies is on pace to double by 2040 from its 2020 benchmark (with electric vehicles and battery storage technologies accounting for much of the increase), with the possibility of growing even more quickly during that period if global climate-focused policies are implemented.[1] As compared to 2020 benchmarks, demand for lithium could increase 13-fold by 2040; graphite, 8-fold; nickel, 7-fold; cobalt, 6-fold; manganese and rare earth elements, 3-fold; and copper, 2-fold.[2]

All these metals needed to accomplish the Energy Transition will come from mines, and there is not enough mining at present to meet this demand. It takes a long time to bring a mine into production. Many factors that affect the pace of mine development, but the permitting process stands out as a key bottleneck.

The technical advisory firm ERM states the issue succinctly: "[N]ew critical minerals mining projects can take up to 20 years to be developed as project timelines are routinely beset by delays. If the average time to production does not reduce to between 5 and 10 years, there is a risk that a critical

minerals shortage before 2030 could cause the global 2050 net zero emissions target to be missed."[3] Permitting-related issues cause nearly 40 percent of mining delays, making it the primary obstacle to obtaining adequate critical minerals, and, by extension, to achieving stated greenhouse gas emissions goals in the coming years.[4]

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Permitting delays are particularly acute in the United States. As Daniel Yergin notes, "Our country is suffering from a permitting pandemic – it leads to paralysis, lack of economic resolve, and a great deal of pain."[5] The impact is wide-ranging. Ford Motor Company, for example, sent a letter to the Department of the Interior noting that the current "lengthy, costly and inefficient permitting process" makes it difficult for American businesses to invest in the extraction and processing of critical minerals in the United States.[6]

The Department of the Interior recently led an Interagency Working Group on mining law reform. According to the Interagency Working Group, the length of time from initial exploration to the start of commercial production in the United States is about 16 years.[7] The Interagency Working Group claims that this "gestation period" is fairly consistent with the worldwide average, but also admits that this number does not account for delays from litigation brought under the National Environmental Policy Act (NEPA).[8] As will be discussed later in this series, delays from NEPA challenges are a significant impediment to mine development.

Much of that 16-year period is devoted to permitting. A study by SNL Metal and Mining in 2015 found that the permitting process in the United States averages 10 years.[9] SNL also found that the delays significantly diminished the value of mining investments. Logically, more complex or controversial projects will take longer to be permitted.

These issues are not exclusive to the United States. For example, in Sweden it took nine years for the Kallak iron ore mine to secure its exploitation permit.[10] Western Australia is often cited as a jurisdiction with efficient permitting, yet their Environmental Protection Authority has recently considered taking on a new role to review five-year mine plans. Australian miners have expressed concerns about delays created by this additional step in the permitting process.[11] In Peru, Buenaventura suspended operations at the Colquijirca Tajo Norte lead-silver mine due to permitting delays.[12]

While there seems to be a general consensus in the United States that there are some permitting efficiencies to be gained, there is also opposition to broad reforms to the NEPA process. Opponents argue that (i) dramatic reform to the permitting process is not required because delays arise for multiple reasons, not just from delays in permitting and (ii) substantial diminishment of the permitting process could create less environmental protection and promote approval of mining projects without complete consideration of environmental justice and with inadequate stakeholder consultation.

We find ourselves in paradoxical situation. The critical minerals required by the principal technologies that support a transition to greener energy can only be obtained by mining. Permitting regulations aim to assure that mines are developed in a responsible manner, but inefficient permitting or challenges to permits designed to slow or stop mine development are an obstacle to obtaining the materials needed to run the technologies that will enable us to protect the environment. The ideal balance will be to develop a process that enables efficient approval of mining activity while assuring that this activity occurs in a responsible manner. This series of articles will explore the pathways to that balance.

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[1] IEA, The Role of Critical Minerals in Clean Energy Transitions," at 46 (rev. 2022).
[2] *Id*. at 47.
[3] ERM, Critical minerals: How the mining sector can accelerate the energy transition
[4] Id. (2017-2023 data)
[5] Shane Lasley, Will US permit a clean energy transition, North of 60 Mining News (September 12, 2023)
[6] Cecilia Jamasmie, Ford asks US gov't to speed up mining permits, mining.com (August 31, 2022)
[7] Interagency Working Group, Recommendations to Improve Mining on Public Lands at 54 (2023).
[8] Id.
[9] SNL Metals and Mining, Permitting, Economic Value and Mining in the United States (2015)
[10] Eva Liedholm Johnson, Magnus Ericsson, Anton Löf, The mining permitting process in selected developed economies, Land Use Policy (August 2023)
[11] Peter Ker, Bauxite miner hits out at West Australia's permitting delays, Financial Review (August 22, 2023)
[12] Cecilia Jamasmie, Buenaventura suspends Peru mine on permitting delays, mining.com (October 5, 2023)

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