



November 22, 2023

John G. Cossa  
General Counsel  
Federal Permitting Improvement Steering Council  
1800 M St. NW, Suite 6006  
Washington, DC 20036

*Submitted via Regulations.gov*

RE: Permitting Council Docket Number 2023–001; RIN 3121–AA04

Dear Mr. Cossa:

I appreciate this opportunity to provide comments on the proposed rule “to revise the scope of ‘mining’ as a sector with infrastructure projects eligible for coverage under Title 41 of the Fixing America's Surface Transportation Act (FAST–41).”<sup>1</sup>

The Council should not narrow the coverage of FAST-41 or pick mineral “winners and losers.” My comment, though, focuses on how the agency has failed to provide sufficient explanations for the proposed changes, making the changes arbitrary and capricious.

### **Improper Explanations for the Proposed Changes**

On January 8, 2021, the Permitting Council (Council) finalized a rule adding the mining sector as a covered sector eligible for FAST-41 coverage.<sup>2</sup> As the Council explains in the proposed rule, “the definition of ‘mining’ ... was broad, and encompassed ‘the process of extracting ore, minerals, or raw materials from the ground’ except for oil and gas extraction.”<sup>3</sup>

Now, less than three years later, the Council asserts that it is proposing to both limit the mining sector to critical minerals mining projects and to expand the mining sector<sup>4</sup> by covering

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<sup>1</sup> “Revising Scope of the Mining Sector of Projects that are Eligible for Coverage of the Fixing America's Surface Transportation Act,” Federal Permitting Improvement Steering Council, Proposed Rule, 88 Fed. Reg. 65350, September 22, 2023, <https://www.regulations.gov/document/GSA-GSA-2023-0024-0001> (accessed November 22, 2023).

<sup>2</sup> “Adding Mining as a Sector of Projects Eligible for Coverage Under Title 41 of the Fixing America's Surface Transportation Act,” Federal Permitting Improvement Steering Council, Final Rule, 86 Fed. Reg. 1281, January 8, 2021, <https://www.federalregister.gov/documents/2021/01/08/2021-00088/adding-mining-as-a-sector-of-projects-eligible-for-coverage-under-title-41-of-the-fixing-americas> (accessed November 22, 2023).

<sup>3</sup> 88 Fed. Reg. at 65352.

<sup>4</sup> As will be explained, the Council is not adding infrastructure for supply chain activities by expanding the mining sector definition.

infrastructure that support critical minerals supply chain activities. Regarding the expansion, the Council explains that this “will help ensure that qualified critical minerals supply chain projects beyond critical minerals mining can obtain FAST–41 coverage.”<sup>5</sup>

**Limiting the mining sector.** It is difficult to ascertain the Council’s thinking on why it is appropriate to narrow “mining” to solely cover critical minerals mining projects. The proposed rule explains that the Biden administration believes a more efficient and transparent review process for critical minerals projects is important.<sup>6</sup> After this discussion, the proposed rule states:

FAST–41 is an ideal tool for achieving these objectives, and the Permitting Council believes that Federal resources should be targeted, to the maximum extent practicable, toward the pool of projects that are most likely to deliver on the Administration’s critical minerals priorities and in line with publicly stated mining reform principles.<sup>7</sup>

The Council’s apparent rationale for this dramatic change to limit the definition of mining is to focus on critical minerals mining. For this proposed decision to potentially be supported by that rationale, there must be some evidence to show that the existing broad<sup>8</sup> definition of “mining” would make it more difficult to “deliver on the Administration’s critical minerals priorities.” There is no such evidence. In fact, the Council itself provides evidence to the contrary:

In the time since the Permitting Council voted to designate mining as a FAST–41 sector in January 2021, the Permitting Council has not received any FINs [FAST–41 Initiation Notices] seeking FAST–41 coverage for a non-critical minerals mining project. Limiting the mining sector to critical minerals mining infrastructure projects is not expected to result in a substantial change in the number of mining related project proposals.<sup>9</sup>

Not only has the Council failed to provide a reasoned explanation for this proposed change, it has inadvertently made an argument as to why such a change is unwarranted. As a result, the proposed change is arbitrary and capricious.<sup>10</sup>

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<sup>5</sup> 88 Fed. Reg. at p. 65350.

<sup>6</sup> The Biden administration’s referenced interest in critical minerals does not state that other mining projects are unimportant and therefore should not receive any of the benefits from FAST-41. This is a yet another reason why the proposed change is unreasonable.

<sup>7</sup> 88 Fed. Reg. at p. 65352.

<sup>8</sup> In no way is this comment suggesting that the existing mining definition is “broad.”

<sup>9</sup> 88 Fed. Reg. at p. 65352.

<sup>10</sup> “Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.” *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016), <https://supreme.justia.com/cases/federal/us/579/15-415/> (accessed November 22, 2023); See also *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U. S. 967 (2005), <https://supreme.justia.com/cases/federal/us/545/967/> (accessed November 22, 2023); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983), <https://supreme.justia.com/cases/federal/us/463/29/>; and David H. Becker, “Changing Direction in Administrative Agency Rulemaking: ‘Reasoned Analysis,’ The Roadless Rule Repeal, and the 2006 National Park Service Management Policies,” *Environs*, University of California, Davis School of Law, Volume 30, No. 1, p. 65, <https://environs.law.ucdavis.edu/volumes/30/1/becker.pdf> (accessed November 22, 2023).

**Allegedly expanding the mining sector.** The Council states that it is proposing to “expand the scope of the sector to include infrastructure constructed to support critical minerals supply chain activities, including critical minerals beneficiation, processing, and recycling.”

Yet this is an inaccurate statement of the change. The proposed rule does not add critical minerals supply chain infrastructure by changing the definition or the scope of the “mining” sector. The proposed rule actually deletes the mining sector under proposed § 1900.2. It then replaces “mining” under § 1900.2 with a new sector, “Critical minerals mining, extraction, beneficiation, processing, and recycling.”

The agency does not provide a reasoned explanation for either removing mining as a sector or creating a new critical minerals sector nor does it even explain that is it taking these actions.

The regulatory text does show the changes, but the agency fails to discuss the changes. Even worse, throughout the rule, the agency wrongly conveys that the addition of supply chain infrastructure is being made through an expansion of the existing “mining” sector, whereas the proposed rule would create a completely new sector that is not limited to “mining,” as defined in the proposed rule or as commonly understood.<sup>11</sup>

For all of these reasons, the proposed change to include supply chain infrastructure is arbitrary and capricious.

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I strongly urge the Council to withdraw the proposed rule. Narrowing the definition of the mining sector is misguided because it would remove FAST-41 coverage for important mining activities. Further, as shown in this comment, there are major procedural problems with the proposed rule, including a failure to provide reasoned explanations for the proposed changes.

Sincerely,

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<sup>11</sup>The proposed rule’s definition of mining is “a process for which the primary purpose is extracting minerals from the ground. Mining does not include the process of extracting oil or natural gas.” 88 Fed. Reg. at 65536. The proposed supply chain activities go beyond this definition. The proposed critical minerals sector is not a redefined mining sector but a new sector focused on certain minerals (i.e. critical minerals) not on mining. The proposed new sector’s name indicates that it goes beyond mining: “Critical minerals mining, extraction, beneficiation, processing, and recycling.” 88 Fed. Reg. at 65536.