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and Counsel**

September 13, 2023

John M. Burth
Adirondack Park Agency
PO Box 99
Ray Brook, NY 12977

Beth Magee
New York State Department of Environmental Conservation
Region 5
232 Golf Course Rd.
Warrensburg, NY 12885

**RE: Barton Mines Corporation, LLC
APA Project 2021-0245
Proposed Ruby Mountain Mine Expansion
Land Use Area: Low Intensity Use and
Town of Johnsburg, Warren County**

Dear Mr. Burth and Ms. Magee:

Protect the Adirondacks (“PROTECT”) submits this letter to reiterate our request that the Adirondack Park Agency (“APA”) and the Department of Environmental Conservation (“DEC”) include, as part of its permit application review for the above project, an evaluation of the direct and upstream greenhouse gas (“GHG”) emissions associated with the major expansion of the Ruby Mountain Mine proposed by Barton Mining Corporation, LLC (“Barton”) in the Town of Johnsburg, Warren County (“the Project”). As discussed in detail below, the Climate Leadership and Community Protection Act (“CLCPA”) requires all state agencies, “[i]n considering and issuing permits, licenses, and other administrative approvals and decisions,” to determine whether such action “will be inconsistent with or will interfere with the attainment of the statewide [GHG] emission limits” established in Article 75 of the Environmental Conservation Law (“ECL”). Climate Leadership and Community Protection Act, Ch. 106, Laws of 2019, § 7(2).

Barton’s proposed expansion will result in increased GHG emissions from on-site machinery and industrial equipment and from additional truck

traffic. To date, Barton has failed to submit an analysis of the Project's direct and upstream GHG emissions and, to our knowledge, neither the APA nor the DEC have taken any steps to evaluate the Project's potential GHG emissions. PROTECT first requested that APA and DEC include a GHG emissions analysis as part of its review of the Project in its comment letter dated July 22, 2022. Ltr. from Peter Bauer, PROTECT Executive Director, to Rob Lore, APA and Beth Magee, DEC at 7-8. The APA subsequently issued a Notice of Incomplete Application, dated June 12, 2023 and DEC issued technical comments on the application dated July 7, 2023. Neither of these requested any information concerning the Project's potential or projected direct and upstream GHG emissions. PROTECT urges APA and DEC either to request that the applicant provide an analysis of the Project's direct and upstream GHG emissions or confirm that the agencies are conducting their analysis of those emissions as required by the CLCPA.

The CLCPA Mandates a GHG Emissions Analysis for All Permit Applications

The CLCPA establishes economy-wide requirements to reduce Statewide GHG emissions. Article 75 of the ECL (enacted as part of the CLCPA) requires the Department of Environmental Conservation ("DEC") to promulgate regulations ensuring that Statewide GHG emissions be reduced to 40% below 1990 levels by 2030, and 85% below 1990 levels by 2050. ECL § 75-0107(1). As required by the CLCPA, DEC promulgated regulations translating the statutorily required statewide GHG emission percentage reduction limits into specific limits based on estimated 1990 GHG emission levels. *See* 6 NYCRR Part 496. The regulations establish Statewide GHG emissions limits for 2030 and 2050, respectively, of 245.87 and 61.47 million metric tons of carbon dioxide equivalents (measured on a 20-year Global Warming Potential basis). *Id.*

Section 7(2) of the CLCPA imposes a mandatory duty on all State agencies to consider the GHG emissions associated with the issuance of a permit or approval:

In considering and issuing permits, licenses, and other administrative approvals and decisions . . . all state agencies, offices, authorities and divisions shall consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide [GHG] emissions limits established in [ECL Article 75]. Where such decisions are deemed to be inconsistent with or will interfere with the attainment of the statewide [GHG] emissions limits, each agency, office, authority or division shall provide a detailed statement of justification as to why such limits/criteria may not be met, and identify alternatives or [GHG] mitigation measures to be required where such project is located.

Ch. 106, Laws of 2019, § 7(2).

After enactment of the CLCPA and promulgation of the GHG emissions limits, DEC denied two permit applications based on section 7(2) of the CLCPA: the applications by Danskammer Energy, LLC ("Danskammer") and Astoria Gas Turbine Power, LLC ("Astoria") for Clean Air Act Title V permits associated with construction and repowering of natural gas-fired electric generating plants. In denying the applications, DEC stated:

Section 7(2) of the [CLCPA] has three elements. First . . . the Department must consider whether a Title V permit for the Project would be inconsistent with or interfere with the attainment of the Statewide GHG emission limits established in ECL Article 75. Second, if the issuance of a Title V permit for the Project would be inconsistent with or would interfere with the Statewide GHG emission limits, then the Department must also provide a detailed statement of justification for the Project notwithstanding the inconsistency. Third, in the event a sufficient justification is available, the Department must also identify alternatives or GHG mitigation measures to be required for the Project.

DEC, Notice of Denial of Title V Air Permit (Oct. 27, 2021) at 6, available at https://www.dec.ny.gov/docs/permits_ej_operations_pdf/danskammerdecision102721.pdf.

Based on its review of the projected direct and upstream GHG emissions associated with the Danskammer project, DEC concluded that it could not issue the requested permit:

As described further below . . . the Project would be inconsistent with or would interfere with the attainment of the Statewide [GHG] emission limits established in Article 75 of the [ECL]. Moreover, Danskammer has not demonstrated that the Project is justified as it has failed to show either a short term or long term reliability need for the Project. Nor has Danskammer identified adequate alternatives or GHG mitigation measures. Accordingly, given that the Department is unable to satisfy these elements required by Section 7(2) of the [CLCPA] the Department is compelled to deny the Title V Application.

Id. at 2.

As explained by DEC, “[t]his determination of inconsistency is based primarily on the fact that the Project would be a new source of a substantial amount of GHG emissions, including both direct and upstream GHG emissions” *Id.* at 7. Of particular importance is the fact that DEC based its denial on GHG emissions analyses prepared by Danskammer, including “the responses to DEC’s three separate [Notices of Incomplete Applications] as submitted by the Applicant.” *Id.*

DEC undertook a similar analysis in denying the Astoria application, concluding that denial of the application was required because the Department was unable to satisfy the elements required by Section 7(2) of the CLCPA. DEC, Notice of Denial of Title V Air Permit (Oct. 27, 2021), available at https://www.dec.ny.gov/docs/permits_ej_operations_pdf/nrgastoriadecision102721.pdf.

A legal challenge to DEC’s denial of the Danskammer permit application was recently dismissed, with the Court concluding that “to give Section 7 [of the CLCPA] meaning, the Court finds that the plain language of the statute must be interpreted to grant the DEC the requisite authority to deny a permit when the grant of the permit would be inconsistent with or interfere with the attainment of the goals of the CLCPA, and the grant cannot otherwise be justified or the adverse effects mitigated.” *Danskammer Energy, LLC v. Dep’t. of Env’tl. Conserv.*, 76 Misc.3d 196, 250 (Sup. Ct. Orange County, June 8, 2022).

Accordingly, PROTECT again urges APA and DEC to fulfill their obligation under the CLCPA either by requesting the applicant to provide an analysis of the Project's direct and upstream GHG emissions or confirming that the agencies are conducting their own analysis of those emissions.

On behalf of the Board of Directors of Protect the Adirondacks, please let me express our gratitude for the opportunity to submit these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Amato". The signature is fluid and cursive, with a large initial "C" and a distinct "A" at the end.

Christopher Amato
Conservation Director and Counsel
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