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**Via Email**

June 21, 2024

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

**RE: Comments on Barton “White Paper”  
Barton Mines Expansion  
Town of Johnsbury, Warren County**

Dear Mr. Burth:

Protect the Adirondacks (“PROTECT”) submits these additional comments concerning the application by Barton Mines Corporation, LLC (“Barton”) for expansion of the Ruby Mountain Mine in the Town of Johnsbury, Warren County.

Specifically, this letter responds to legal arguments made in a submission from Barton, characterized by Barton as a “white paper” and apparently received by the Adirondack Park Agency (“APA”) on May 24, 2024, claiming that the APA lacks authority to issue a five-year permit for the proposed mine expansion. As discussed below, Barton’s letter mischaracterizes the applicable law and seeks to undermine and nullify the APA’s environmental review obligations under the Adirondack Park Agency Act (“APA Act”), Executive Law article 27. Contrary to Barton’s claim, APA has authority to issue a five-year permit, and a permit term limited to five years is particularly warranted in light of Barton’s failure to provide critical engineering information regarding the massive on-site waste disposal facility it proposes to significantly expand.

**The “White Paper” is Unsigned and Therefore Inadmissible**

Barton’s submission, entitled, “The Life of Mine Standard for Permitting Mining Projects in New York State,” is undated and unattributed. Despite being a legal memorandum that cites statutes and case law, asserts legal interpretations and makes legal arguments, the submission bears no attorney or law firm signature and provides no information concerning its authorship. On this ground alone, the anonymous submission is inadmissible and should be rejected.

While this matter is not before a court, the Rules of the Chief Administrator of the Courts are instructive and provide:

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Signature. Every pleading, written motion, and other paper, served on another party or filed or submitted to the court shall be signed by an attorney . . . with the name of the attorney . . . clearly printed or typed directly below the signature. Absent good cause shown, the court shall strike any unsigned paper if the omission of the signature is not corrected promptly after being called to the attention of the attorney . . . .

22 NYCRR § 130-1.1(a). The Rules make clear that the signature requirement is crucial to prevent fraudulent, frivolous or inaccurate filings:

Certification. By signing a paper, an attorney . . . certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, (1) the presentation of the paper or the contentions therein are not frivolous . . . and (2) where the paper is an initiating pleading, (i) the matter was not obtained through illegal conduct . . . and (ii) the matter was not obtained in violation of {the rule prohibiting unsolicited communications with a potential client).

*Id.* § 130-1.1(b).

Although these rules apply to judicial proceedings, it is standard practice for submissions—legal or otherwise—to an administrative agency to comply with the signature requirement for the same reason: to ensure the legitimacy of the submission. This requirement has been adopted by APA and applies to all submissions for major project permit applications, including Barton’s mine expansion application. *See*, APA Application for Major Projects General Information Request at 9 (requiring person signing a major project application to affirm that “I have personally examined and am familiar with the information submitted in this application, including all attachments. I believe this information to be true, accurate and complete. in addition, in the case of any project sponsor corporation, limited liability corporation, partnership or other legal entity, I also affirm that I am authorized to submit this application on behalf of that entity”). Because Barton’s “White Paper” submission is unsigned and thus fails to comply with both standard practice for legal submissions and with APA application signing requirements, APA should reject the submission and disregard it.

Even if APA chooses to consider Barton’s submission, it is legally flawed and APA should not alter its position regarding the five-year permit term.

### **DEC’s Mining Permit Jurisdiction Does Not Eliminate or Truncate APA Review**

Barton’s submission objects to APA “approving at this time only the early phase of the project, with subsequent phases subject to new permit application requirements and *de novo* review.” White Paper at 1. Barton argues that APA’s approach is “legally impermissible under the Mined Land Reclamation [Law]. . . [and is] at odds with the Department of Environmental Conservation’s (“DEC’s”) longstanding Life of Mine Review Policy (“LOM Policy”).” *Id.* Barton goes on to claim that Environmental Conservation Law § 23-2703(2) vests “exclusive jurisdiction in the DEC to regulate mining operations and reclamation activities” and that “APA is without authority to substantively regulate mining activities or reclamation.” *Id.* Barton’s argument is contradicted by the plain language of the APA Act, inconsistent with prior mining permits issued by APA, and not supported by the case law interpreting the Mined Land Reclamation Law (“MLRL”).

Barton’s planned major expansion of its Ruby Mountain Mine, located on lands classified Rural Use, Resource Management and Industrial Use by the Adirondack Park Land Use and Development Plan Map, is a Class A regional project as defined by the APA Act and therefore requires an APA permit. Executive Law §§ 810(e)(1)(d), 810(e)(12), 810(e)(17); 810(f)(1), 810(f)(8). APA cannot lawfully issue the permit unless it makes a finding that “[t]he project would not have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park or upon the ability of the public to provide supporting facilities and services made necessary by the project, taking into account the commercial, industrial, residential, recreational or other benefits that might be derived from the project.” *Id.* § 809(10)(e); *Matter of Jorling v. Adirondack Park Agency*, 214 AD3d 98, 105 (3d Dept. 2023 (in reviewing proposed marina expansion, “APA was required to . . . determine” whether findings required by APA Act § 809(10)(e) could be made before issuing permit). Barton does not—and cannot—square its claim that APA’s review “is preempted by the MLRL” with APA’s statutory duty to make the findings required as a prerequisite to issuing a Class A regional project permit for the proposed mine expansion. White Paper at 1.

Barton’s reliance on *Hunt Bros., Inc. v. Glennon*, 81 NY2d 906 (1993) is misplaced because that decision refutes, rather than supports, Barton’s preemption argument. Indeed, in *Hunt Bros.* the Court of Appeals specifically rejected the mining company’s argument that APA’s regulation of mining activities is preempted by the MLRL:

The statute creating and empowering the APA is aimed at establishing a superagency to regulate development in the Adirondack Park region, which the Legislature has singled out for special protection because of its unique environmental significance . . . *Inasmuch as the APA's mission concerns the broad area of land use planning within the Adirondack Park district, its enabling statute is not a law "relating to the extractive mining industry." Consequently, ECL 23-2703 . . . does not deprive the agency of all jurisdiction to regulate petitioner's activities.*

81 NY2d at 909; (emphasis added). Moreover, as noted by the Court, there is concurrent “no ‘bureaucratic competition’ or ‘confusion’ over the respective roles of the APA and the DEC regarding the regulation of mining operations . . . within the Adirondack Park” because “the DEC and the APA, as well as the State Department of Health, have been party to a Memorandum of Understanding under which the agencies have agreed to coordinate their respective regulatory responsibilities with regard to projects in the Park.” 81 NY2d at 909-910.

Barton’s preemption argument is also contradicted by previous permits issued by APA for mining operations. To cite just one recent example, the Red Rock Quarry permit issued by APA in January 2022, included permit conditions regarding lighting; signs; vegetative cutting; location and depth of mining operations; days and hours when drilling, blasting and crushing are permitted; the hours when truck traffic is permitted; the number of truck trips allowed per day; and reclamation of the site. In fact, Barton’s prior APA permits included conditions governing maximum final grades for all earth slopes; riser details for settling basin outlets; stormwater runoff interceptors; restrictions on the waste pile height and size; revegetation requirements for the waste pile; blasting restrictions; restrictions on water withdrawals; erosion and sedimentation control; dust control; wetland

protection and mitigation; removal of trees and vegetation; control of noise impacts; and truck traffic. *See, e.g.*, APA Permit Nos. 79-140, 79-356, 81-20, 87-39.

Barton’s additional argument that APA’s approach violates DEC’s purported Life of Mine Policy is wrong on several counts. First, Barton provides no citation to the alleged policy and it apparently does not exist; there is no “Life of Mine” policy included on DEC’s website, either as a DEC policy or Division of Mineral Resources technical guidance. In fact, the only reference to the purported policy is in a 36 year-old court decision, which referred to DEC’s “so-called ‘Life of Mine Review Policy’” as being “described in a DEC internal memorandum.” *Guptill Holding Corp. v. Williams*, 140 AD2d 12, 15-17 (3d Dept. 1988). Thus, it is doubtful that the policy cited by Barton exists.

Second, even if a Life of Mine policy exists, it is a DEC internal policy, not an APA policy, and thus is not binding on APA. Nor is the policy binding even on DEC. *See Matter of Adirondack Wild: Friends of the Forest Preserve v New York State Adirondack Park Agency*, 161 AD3d 169 at 177-178 (3d Dept. 2018) (“An administrative agency’s internal guidelines are not binding rules or regulations because they do not impose fixed, general principle(s) to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers”).

### **APA’s Phased Approval Approach is Consistent With its Regulations and With APA’s Prior Permitting of Barton’s Operations**

In any event, APA’s approach is consistent with its own regulations for phased projects and is warranted considering Barton’s failure to provide basic information about the long-term impacts of its proposed mine expansion. The APA regulations provide that “[p]ermits may be granted for the development of large scale projects or other projects to be undertaken in sections, subject to conditions relating to improvements and services for and completion of the total project that the agency deems reasonable and necessary.” 9 NYCRR § 572.6(a). The regulations specifically provide for APA’s phase-by-phase approval of large scale projects: “An agency decision *relating to a section of a project* shall contain findings and conclusions with respect to the likely impact of the entire project and its compliance with section 809(9) or 809(10) of the Adirondack Park Agency Act.” *Id.* § 572.6(d); (emphasis added). Indeed, APA’s prior Class A regional project permits issued to Barton adopted the same phased approval approach. *See* APA Permit No. 79-140 at 1 (providing conceptual review approval of mining plan “subject to re-examination based on final design”); APA Permit No. 79-356 at 6 (“The project sponsors are proposing the initial phase of a mineral extraction use on a 580 acre parcel of land on the slopes of Ruby Mountain and Big Thirteenth Lake Mountain . . . The project sponsor[s] will be submitting at least one additional Application for Project Permit for the mineral extraction use . . . .”); APA Permit No. 81-20 at 9 (“This permit authorizes the final phase as described in the project sponsor’s Application for Project Permit received October 22, 1979”).<sup>1</sup>

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<sup>1</sup>APA has taken a phased approach to the ongoing review of other mineral extraction/industrial use project applications, such as the Peckham Materials Corporation project in the Town of Chester mentioned by Barton. APA issued a permit to Peckham on April 4, 2023 (APA Permit 2023-0016) that authorizes mineral extraction, and other activities, and expires in November 2028, unless an application for an new permit term is received prior to that time. *See* <https://apa.ny.gov/Projects/PermitsIssued/P2023-0016-Permit-Final.pdf>.

APA's phased approval approach is necessary because of Barton's failure to provide crucial information concerning, among other things, its massive on-site solid waste disposal facility. As stated in the expert report submitted as part of PROTECT's January 10, 2024 comments:

The permit application document refers to the October 30, 2023 geotechnical assessment letter by Knight Piesold as a "certification". The geotechnical letter is clearly titled as an "assessment" and explicitly states in the conclusions that the assessment should not be taken as an engineering approval. The Knight Piesold assessment indicates that the tailings storage facility is likely to be geotechnically feasible, but is contingent on several key assumptions. Several assumptions are related to means and methods of site preparation and material placement with quality control testing. The authors rightly state that a qualified geotechnical engineer needs to be closely engaged with ongoing investigations, monitoring, and redesign, if necessary. *The application documents provide insufficient detail about the ongoing investigation and monitoring program and do not clearly designate who will be managing, overseeing, and certifying the program. A design of the expansion needs to be included in the application documents that is stamped by a qualified geotechnical engineer licensed in the State of New York.*

Report of Sterling Environmental Engineering, P.C. (Jan. 10, 2024) at 4; (emphasis added).

Rather than complying with APA's reasonable request that Barton have its waste pile submission signed by a New York-licensed professional engineer, Barton protested that "[w]e are not aware of any past mining application/permit in the Adirondack Park that had a similar requirement" and demanded that APA "advise us of the reasoning for this requirement." Email from Bernard Melewski, Esq. to Corrie Magee (APA) re: Follow Up to Your Call (Jan. 19, 2024). Barton had the same response to APA's request that its noise analysis be signed by a New York-licensed engineer. *Id.*

### **APA's Approach is Not Inconsistent With SEQRA**

Lastly, Barton's claim that APA's phased approval approach "is fundamentally inconsistent with the policies and substantive requirements of SEQRA," White Paper at 5, is meritless and utterly at odds with its argument that APA lacks any substantive environmental review authority over the Barton mine expansion. Barton's white paper correctly notes that projects subject to APA permit requirements are exempt from SEQRA because "the APA's mandates under Executive Law [section] 809 are more protective of the environment than is SEQRA. *Id.* at 5-6, citing *Association for Protection of the Adirondacks v. Town Bd. of Town of Tupper Lake*, 64 AD3d 825, 826-27 (3d Dept. 2009). Yet Barton simultaneously claims that "[t]he MLRL expressly limits the scope of the APA's jurisdiction over mining projects, vesting exclusive jurisdiction in the DEC to regulate mining operations and reclamation activities." *Id.* at 2. Thus, Barton is seeking, in essence, a complete exemption from SEQRA-type review of its major expansion by claiming that APA has no authority to conduct an environmental review of its project (and to impose appropriate permit conditions to mitigate or avoid adverse environmental impacts) but at the same time claiming

exemption from SEQRA due to APA's permit jurisdiction (that requires a greater-than-SEQRA review of environmental impacts). APA should reject Barton's legally flawed, self-serving and circular claims. APA should reject Barton's legally flawed, self-serving and circular claims.

On behalf of the Board of Directors of Protect the Adirondacks, please accept our gratitude for the opportunity to share our comments on the Barton Mines application.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Amato", written in a cursive style.

Christopher Amato  
Conservation Director and Counsel

Cc: Beth Magee  
New York State Department of Environmental Conservation  
Region 5  
232 Golf Course Rd.  
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