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Nunavunmi Parnaiyiit
Nunavut Planning Commission
Commission d'Aménagement du Nunavut

July 30, 2013

Mr. Oliver Curran
Baffinland Iron Mines Corporation
2275 Upper Middle Road East, Suite 300
Oakville, OT, Canada L6H 0C3

BY E MAIL oliver.curran@baffinland.com

Dear Mr. Curran

Re: REQUEST FOR SUBMISSIONS ON POSSIBLE DEVELOPMENT OF TRANSPORTATION CORRIDOR AND THE GENERAL APPLICATION OF THE NORTH BAFFIN REGIONAL LAND USE PLAN TO THE MARY RIVER PROJECT EARLY REVENUE PHASE DFO File NU-07 NIRB File # 08MN053 Baffinland Mines Early Revenue Phase

The above-noted proposal has been forwarded to the Nunavut Planning Commission (NPC) for determination of its conformity with the North Baffin Regional Land Use Plan (NBRLUP) under the Nunavut Land Claims Agreement (NLCA) and Nunavut Land Claims Agreement Act, S.C. 1993, c. 29. NPC is currently reviewing the proposal and wants to provide Baffinland Iron Mines (Baffinland) the opportunity to review the matters which NPC may consider in making its determination. NPC invites you to make submissions on what is set out below and to provide any further information that you feel would assist the NPC in making its decision. As discussed below, NPC may determine that the project proposal for the Early Revenue Phase (ERP) of the Mary River Project constitutes the **development** of a transportation corridor, whether new or existing, for which NPC has not received an application to amend the NBRLUP. Further, NPC is considering the effect and meaning of defined terms within the NLCA and the NBRLUP both specifically, within the context of a transportation corridor, and generally within the context of the NBRLUP.

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If NPC determines that the project proposal is not in conformity with the land use plan, section 11.5.11 of the NLCA provides that the proponent may apply to the appropriate Minister for exemption, and the Minister may exempt the project proposal from the plan and shall, subject to sections 12.3.2 and 12.3.3, refer it to NIRB for screening. Because NBRLUP does not contemplate variances, non-conforming projects shall not be sent to NIRB until such exemption is obtained. A proponent may also submit a new project proposal for a conformity determination, or apply for an amendment to the NBRLUP.

EFFECT OF PREVIOUS POSITIVE CONFORMITY DETERMINATION

1. **Whether a previous positive conformity determination precludes future conformity determinations or applications to amend NBRLUP for proposed corridors if a new project proposal is made for an existing project or an application is made to extend a project and corresponding licences, permits and authorizations**

Land use planning plays a critical role in the development of Nunavut, and is distinct from the environmental impact assessment process. One of NPC's major responsibilities under section 11.4.1(c) of the NLCA is to "fulfill the objectives of the Agreement in the manner described, and in accordance with the general principles mentioned in Section 11.2.1." Section 11.2.1(b) of the NLCA provides that the "primary purpose of land use planning in the Nunavut Settlement Area shall be to protect and promote the existing and future well being of those persons ordinarily resident and communities of the Nunavut Settlement Area taking into account the interests of all Canadians; special attention shall be devoted to protecting and promoting the existing and future well-being of Inuit and Inuit Owned Lands". Section 11.3.2 of the NLCA also says that land use plans "protect and promote the existing and future well-being of the residents and communities of the Nunavut Settlement Area, taking into account the interests of all Canadians, and to protect, and where necessary, to restore the environmental integrity of the Nunavut Settlement Area."

NPC has reviewed Baffinland's prior applications for conformity determinations for the Mary River Project which the NPC approved as complying with the NBRLUP in 2007 and 2008. The Final Environmental Impact Statement illustrates the proposed transportation corridors along the Milne Inlet Tote Road and shipping from Milne Inlet, but no review by NPC under a joint panel contemplated in section 3.5.11 and 3.5.12 of the NBRLUP has been performed for the existing tote road, permanent port at Milne Inlet and the shipping route through the Milne Inlet, Eclipse Sound and Baffin Bay that would warrant NPC recommending amendments to the NBRLUP to the appropriate Minister. Is it Baffinland's position that a previous positive conformity determination precludes the need for additional conformity determinations if a new project proposal is made for an existing project? Is it Baffinland's position that an amendment of an

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approved land use plan is not required if a proponent of an existing project proposes to "**develop**" a transportation or communications corridor? Does Baffinland say that a previous positive conformity determination also precludes the need for NPC's conformity determinations for applications to extend projects when the original authorizations expire?

APPLICATIONS TO DEVELOP A TRANSPORTATION CORRIDOR

2. Defining the word "develop" in section 3.5.11 of the NBRLUP.

Where any party wishes to develop a transportation and/or communications corridor in the North Baffin region, section 3.5.11 of the NBRLUP reads in its entirety:

> 3.5.11 All parties **wishing to develop** a transportation and/or communications corridor **shall submit** to the NPC a detailed application for an amendment. This application must include an assessment of alternative routes, plus the cumulative effects of the preferred route. It shall provide reasonable options for other identifiable transportation and utility facilities. [A][CR][1]
>
> [emphasis added]

The NPC notes that the words "develop" and "corridor" in section 3.5.11 of the NBRLUP are not defined in the plan. Note that section 3.5.11 of the NBRLUP is also not limited to "new" corridors.

It appears the meaning of the word "develop" can be interpreted very broadly. While NPC is not bound by the definition in section 6.1.1 of the NLCA, NPC notes that the NLCA defines "development", within Article 6 only, as follows:

> "development" means any commercial or industrial undertaking, any municipal, territorial, provincial or federal government undertaking or extension thereof, on land or water in the Nunavut Settlement Area and in Zones I and II but does not include:
>
> (a) marine transportation; or
>
> (b) any wildlife measure or use approved in accordance with Article 5;
>
> "wildlife" does not include flora.

Sections 6.2.2 and 6.2.3 of the NLCA set out the conditions where "marine transportation directly associated with any commercial or industrial … undertaking, or

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[1] The annotation [CR] is defined in the North Baffin Regional Land Use Plan chapter 3.2, fn. 7 as follows: "[CR] refers to "conformity requirements" that, on approval of the plan, will be applied by the NPC in determining the conformity of project proposals with the plan under s. 11.5.10 of the NLCA."

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any extension thereof, on land or water in the Nunavut Settlement Area and in Zones I and II…" is defined as a "development" when the Government of Canada specify a person, a fund, or both, capable of assuming liability for marine transportation. NPC makes no determination, in this correspondence, on whether the physical activities the ERP proposes to undertake constitute a "development" for the purpose of Article 6 of the NLCA, but understands that the contemplated increases in ore truck traffic are significant and ship traffic increases the intensity of the use of the marine corridor and would be directly associated with a **commercial or industrial undertaking** on both land and water in the Nunavut Settlement Area.

The word "development" is also defined in section 1 of the Nunavut *Planning Act*, as:

> (a) the carrying out of any construction or excavation or other operations in, on, over or under land, or
>
> (b) the making of any **change in the use or the intensity of use** of any land or building.[2]
>
> [emphasis added]

Recognizing that NPC must interpret these undefined words, such as "develop" and "development", NPC welcomes any submissions Baffinland may wish to provide on the definition of "develop" as it appears in section 3.5.11 of the NBRLUP and whether the ERP project proposal should be considered a "development".

NPC wishes to be clear on the position of Baffinland regarding existing transportation corridors and whether they can be significantly developed and not trigger any Land Use Planning considerations. NPC would welcome any elaboration on your position that you may wish to make. On July 9, 2013 Baffinland submitted answers to a conformity questionnaire that NPC provided. More recent correspondence from Baffinland appears to suggest that **any development** inside a transportation corridor is, alternatively, either beyond the review of NPC or that NPC can only give such development a 'positive determination'.

Examining the change in use and the change in intensity of use and using Baffinland's numbers for truck traffic on the existing Tote road, for example, table 1-2.1 "Key Project Facts (ERP and Approved Project) (Cont'd)" in the Addendum to the Final Environmental Impact Statement appears to indicate that 140 tonne trucks will be passing a point on the road every 10 minutes 24 hours per day. Is NPC's interpretation of the data supplied correct and if so, is it Baffinland's position that such change in use is not a Land Use Planning consideration?

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[2] *Planning Act*, R.S.N.W.T. 1988, c. P-7, s.1 as duplicated for Nunavut by s.29 of the *Nunavut Act*, S.C. 1993, c. 28, as amended.

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In interpreting the meaning of "corridor" in section 3.5.11, the NPC is guided by section 3.5.10 of the NBRLUP which reads:

> While ensuring the respect of applicable Canadian international obligations in the region, the NPC shall implement the concept of a transportation and/or communications "corridor" as a land use policy having general application, and applying to land and water routes throughout the region, based on the processes outlined in Appendices J and K.

Baffinland's letter of July 18, 2013 refers to the "Tote Road as a terrestrial corridor, and the shipping route as a marine corridor", which it says received positive conformity determination from the NPC as part of the Mary River Project on April 30, 2008. Please advise why Baffinland does not consider the ERP as a **project proposal for development** of a transportation "corridor".

3. Is the definition of "project proposal" in the NLCA relevant to whether a transportation corridor, whether new or existing, is being developed.

NPC's mandate to carry out conformity determinations of project proposals is not limited to the proposed construction of **physical works**, such as the construction of a permanent new marine shipping port, but also relates to **physical activities**, such as increased truck traffic, on the scale mentioned above, and increased shipping and associated operations. In determining whether a project proposal is in conformity with a land use plan, NPC acts pursuant to section 11.5.10 of the NLCA which reads:

> 11.5.10 The NPC shall review all applications for project proposals. Upon receipt and review of a project proposal, the NPC or members thereof or officers reporting to the NPC shall:
>
> (a) determine whether the project proposals are in conformity with plans; and
>
> (b) forward the project proposals with its determination and any recommendations to the appropriate federal and territorial agencies.
>
> The land use plan may make provision for the NPC to approve minor variances.

The term "project proposal" is defined in Article 1 of the NLCA as follows:

> "project proposal" means a **physical work** that a proponent proposes to construct, operate, modify, decommission, abandon or otherwise carry out, **or a physical activity** that a proponent proposes to undertake or otherwise carry out, such work or activity being within the Nunavut Settlement Area, except as provided in Section 12.11.1;

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Independent of the new infrastructure proposed as physical works by way of permanent fixed ore dock construction at Milne Inlet and a change in use of the dock, for example, NPC must consider whether the increased intensity of use of the Milne Inlet Tote Road and Milne Inlet proposed by the ERP are "physical activities" that Baffinland proposes to undertake or otherwise carry out within the Nunavut Settlement Area. NPC seeks your submissions on whether the inclusion of "physical activity" within the definition of "project proposal" is relevant to determining whether a transportation corridor is being developed.

In the clear alternative, NPC asks whether Baffinland submits that once a transportation corridor exists, the defined term "project proposal" has no meaning or effect as it relates to new physical works or physical activities it proposes to undertake pursuant to the ERP within those transportation corridors. In other words, does the existence of a transportation corridor allow any new future physical works or physical activities or development of, on, within, or using that corridor, without any further consideration by NPC? Specifically, is Baffinland of the view that the physical works and physical activities newly proposed by the ERP are entirely a matter for environmental screening and are exempt from the land use planning process established in the NLCA?

4. **Whether the Milne Inlet Tote Road easement or existing transportation corridors mean the changes proposed by the ERP do not constitute the "development" of a transportation corridor.**

Baffinland letter dated June 12, 2013 and the *Project Proposal for NPC Conformity Review* enclosed with that letter informed NPC the ERP **proposes physical activities not previously contemplated by the previous project proposals reviewed by the NPC**. These include increases in the intensity of use of both the terrestrial corridor and the marine corridor, as well as new physical works at Milne Inlet that would link these two transportation corridors at a single "key transportation hub" as Baffinland calls it. The June 12, 2013 *Project Proposal for NPC Conformity Review* also calls the new "fixed ore dock construction and the development of the ore stockpile and reclaim area" the "essential infrastructure required for ore shipment". Baffinland's references to the existence of a public right of access easement for the Milne Inlet Tote Road, and the existence of the terrestrial and marine transportation corridors that Baffinland says were developed as a result of prior positive conformity determinations by the NPC. NPC invites submissions on whether the easements and prior developments precludes NPC's considerations of the new "essential infrastructure" proposed or, alternatively, that the increased intensity of use does not constitute the "development" of a transportation corridor.

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ISSUE OF CONFORMITY WITH NBRLUP

5. Whether increased intensity of use of Milne Inlet Tote Road and shipping from Milne Inlet conforms with NBRLUP

Finally, NPC wishes to draw Baffinland's attention to the issue of whether the increased intensity of use of the Milne Inlet Tote Road by ore trucks and increased shipping from Milne Inlet conforms with the NBRLUP. We specifically seek your submissions on the effect of the inclusion of "physical activity" in the definition of "project proposal". Baffinland's letter, dated June 12, 2013, said that these were a "modification of the works and activities" previously approved as conforming with the NBRLUP. A review of the NPC file indicates that the commercial shipment of ore for the life of the mine and associated dock construction, for example, were never referred to NPC for previous consideration. NPC must, under section 6.2 of the NBRLUP, first consider whether the relevant conformity requirements in Chapter 3 have been satisfied before considering whether the type of land use has been engaged in or previously contemplated. As noted above, these are new activities relating to the Mary River Project, not previously considered by the NPC in its prior conformity determinations. NPC welcomes submissions on whether a change in the intensity of a physical activity in a project proposal triggers a review by NPC with the conformity requirements in chapter 3 of the NBRLUP.

NPC also observes that one of the central principles it is required to follow as provided in article 11.2.1(a) of the NLCA reads:

> (a) people are a functional part of a dynamic biophysical environment, and land use cannot be planned and managed without reference to the human community; accordingly, social, cultural and economic endeavours of the human community must be central to land use planning and implementation;

NPC notes that Volume 4 of the Addendum to the Final Environmental Impact Statement includes the following explanation of the changes that will result at Milne Inlet and the Milne Inlet Tote Road as a result of the ERP at section 10.5.2, and as summarized in Table 4-10.2 of Volume 4:

> Milne Port, Eclipse Sound and Pond Inlet (Change)
>
> Milne Port will be the base for an open water shipping route north toward Baffin Bay.
>
> Project-related shipping through Pond Inlet to Milne Inlet is not expected to meaningfully affect use of the open water by hunters in boats, although sighting vessels associated with the Project will occur. Project ore carriers and other vessels will generally stay within the middle of the waters of Pond Inlet and Eclipse Sound, staying away from the coastline. It is expected that hunters in

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boats will remain closer to the coast in most instances. Although the ships will not have an effect on people's ability to travel through Milne Inlet and Eclipse Sound, public safety interactions will exist. Public safety will be mitigated by community public safety awareness, informing the community of vessel movements, potentially tracking the route and timing of ship's passage, and by periodic public meetings and information sessions.

Milne Inlet Tote Road (Change)

The Milne Inlet Tote Road between the Mine Site and Milne Port will be used throughout the Construction, Operations and Closure Phases. The road will be used as a transportation link providing supplies to the Mine Site and transporting ore to Milne Port. During the Construction Phase, approximately 120 trucks will travel along the Milne Inlet Tote Road each day, year-round. Once the mine is in operation approximately 110 trucks will travel along the road per day.

The NPC does not see a reference to public safety interactions that might result from increased ore truck size and intensity of vehicle traffic on the Milne Inlet Tote Road. Any clarification that Baffinland wishes to provide on this point would be appreciated. Does Baffinland submit that the physical activities proposed by the ERP should not trigger a conformity determination process by NPC?

Request for submissions

Accordingly, before the NPC reaches a decision on whether the project proposal for the ERP conforms with the NBRLUP, the NPC is requesting your submissions, and any further information you can provide, on the following:

1. If a new project proposal or an application to extend a project is made for an existing project, whether a previous positive conformity determination precludes the need for additional conformity determinations or an amendment of an approved land use plan where a party wishes to develop a transportation or communications corridor.
2. NPC welcomes any submissions Baffinland may wish to make on the definition of "develop" as it appears in section 3.5.11 of the NBRLUP and whether the ERP project proposal should be considered a "development".
3. Is the definition of "project proposal" in the NLCA as including a "physical work" or "physical activity" relevant to determining whether a transportation corridor, whether new or existing, is being developed; in the alternative does an existing transportation corridor wholly exempt all project proposals relating to that corridor from land use planning.
4. Whether the Milne Inlet Tote Road easement or existing transportation corridors mean the changes proposed by the ERP do not constitute the "development" of a transportation corridor.
5. Whether increased intensity of use of Milne Inlet Tote Road and shipping from Milne Inlet conforms with NBRLUP.

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Please advise within 3 business days, by 4 p.m. on Friday August 2, 2013, whether Baffinland intends to make any submissions or to provide further information. If NPC does not receive a reply, it will proceed with its conformity determination. If Baffinland does intend to make submissions on these issues, NPC asks that Baffinland make those submissions within 15 days of receipt of this letter.

Please note that should Baffinland wish to reconsider its decision not to submit an application to amend the NBRLUP under section 3.5.11 of the NBRLUP, NPC would activate the joint review panel process under section 3.5.12 of the NBRLUP without delay. NPC does see that Appendix 1B – 4, "Concordance with EIS Guidelines (Appendices J and K of the North Baffin Regional Land Use Plan)" in the Addendum to the Final Environmental Impact Statement expressly refers to the Appendices J and K of the NBRLUP. These are the guidelines applied by NPC and either NIRB or a review panel appointed under section 3.5.12 of the NBRLUP uses to publicly review proposed transportation corridors. NPC expressly does not make any finding of whether Appendices J and K have been satisfied by the Addendum to the Final Environmental Impact Statement in the absence of an application for an amendment by the proponent under section 3.5.11 of the NBRLUP.

Thank you,

Brian Aglukark,
Director, Implementation

Cc: Mr. Ryan Barry, NIRB
Ms. Georgina Williston, DFO
Mr. Bernie MacIsaac, QIA
Ms. Phyllis Beaulieu, NWB
Ms. Tracey McCaie, AANDC

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