

Ministre des Affaires autochtones
et du développement du Nord

Minister of Aboriginal Affairs and
Northern Development

Ottawa, Canada K1A 0H4

JUL 13 2015

Ms. Elizabeth Copland
Chairperson
Nunavut Impact Review Board
PO Box 1360
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ecopland@nirb.ca

Mr. Erik Madsen
Vice-President, Sustainable Development,
Health, Safety & Environment
Baffinland Iron Mines Corporation
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Mr. Hunter Tootoo
Chairperson
Nunavut Planning Commission
PO Box 2101
CAMBRIDGE BAY NU X0B 0C0
htootoo@nunavut.ca

Dear Ms. Copland, Mr. Tootoo, and Mr. Madsen:

I am writing to you to transmit my decision with regard to Baffinland Iron Mines Corporation's application for an exemption under section 11.5.11 of the Nunavut Land Claims Agreement. On April 8, 2015, the Nunavut Planning Commission issued a negative conformity determination on the basis that the proposed icebreaking activity for winter shipping did not conform to the North Baffin Regional Land Use Plan as it would prevent or prohibit wildlife harvesting and traditional activities. On May 21, 2015, Baffinland Iron Mines applied to me for an exemption from the North Baffin Regional Land Use Plan.

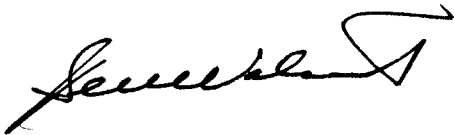
Having carefully considered Baffinland Iron Mines' application for exemption and all the correspondence received before me, as per section 11.5.11 of the Nunavut Land Claims Agreement, I have decided to grant the exemption and I am referring the Phase 2 proposal to the Nunavut Impact Review Board for a screening and subsequent reconsideration process. As per section 11.5.12 of the Nunavut Land Claims Agreement, the reasons for decision can be found in the attached enclosure.

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By way of this letter, I am also responding to correspondence I have received from the Qikiqtani Inuit Association, Nunavut Tunngavik Incorporated, the Government of Nunavut, the Hamlet of Pond Inlet, Oceans North Canada and the NWT & Nunavut Chamber of Mines on matters relating to Baffinland's Phase 2 proposal. I am confident that the ecosystemic and socio-economic impacts of the Phase 2 proposal will be fully considered by the Nunavut Impact Review Board before any recommendation is made.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bernard Valcourt', with a stylized flourish at the end.

Bernard Valcourt, PC, QC, MP

Encl.

c.c.: The Honourable Leona Aglukkaq, PC, MP
The Honourable Peter Taptuna, MLA
The Honourable Johnny Mike, MLA
Mr. Pauloosie Akeeagok
Mr. Enookie Inuarak
Ms. Cathy Towtongie
Mr. Charlie Inuarak
Ms. Brooke Clements
Mr. Christopher Debicki
Mr. Ryan Barry
Mr. Oliver Curran

REASONS FOR DECISION

On April 8, 2015, the Nunavut Planning Commission determined that the project proposal submitted by Baffinland Iron Mines Corporation, referred to as "Phase 2" of the Mary River Project, did not conform to the North Baffin Regional Land Use Plan. On May 21, 2015, Baffinland Iron Mines Corporation applied to me under the Nunavut Land Claims Agreement section 11.5.11, for an exemption from the general requirement that all project proposals must conform to the applicable land use plan. The effect of an exemption is to refer a project proposal to the Nunavut Impact Review Board, so that the board can conduct an environmental and socio-economic impact assessment of the project proposal. Baffinland applied for a ministerial exemption, and did not apply to the Commission for a plan amendment. That being the case, I am legally bound to, and have considered Baffinland's application on its merits.

Land use planning forms part of a comprehensive and integrated system of resource management in the Nunavut Land Claims Agreement. The other components of the system are independent tribunals and ministerial decision-making for wildlife management, environmental and socio-economic impact assessment, fresh water management, and a tribunal for the management of disputes between mineral rights holders and land-owners, should such disputes arise. The design of this system, through a process of land claims negotiation, no less, was and remains a remarkable achievement.

The development of a regional land use plan requires a deep understanding of past and current information about the physical environment and human activities and values. It also forces the planners to predict what the future may hold. This is never easy, and in a region as large and dynamic as the Nunavut Settlement Area, planning can be a challenge.

Despite this, the land use planning regime in the Nunavut Settlement Area requires us to do the best we can to gather, understand and synthesize a wide range of information including those things listed in section 11.3.1 of the Nunavut Land Claims Agreement. On the basis of that information, the planning process determines what uses of lands should be prohibited, and what conditions should be imposed on those uses that are permitted. Sometimes those requirements will be geographically specific, and in other cases, they are general requirements applicable throughout the planning region.

The purpose of all of this is stated in Nunavut Land Claims Agreement section 11.3.2: "... to 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." As I will explain further below, I have applied these same considerations to my decision to grant the requested exemption.

The ability to exempt a project proposal from the requirement that it conform to the applicable land use plan is an important part of the Nunavut Land Claims Agreement's integrated system of resource management. The inclusion of this ability in the regulatory scheme is recognition that sometimes a land use plan could block a project proposal at too early a stage in the regulatory resource management process that should be further assessed within the environmental and socio-economic impact assessment regime. It is important to stress that despite being exempt from the application of the land use plan, if that project proposal cannot be carried out in a manner that is compatible with the requirements of the environmental and socio-economic impact assessment regime, the project proposal will of course fail at that stage.

The Qikiqtani Inuit Association and Nunavut Tunngavik Incorporated have written to me to express their views on Baffinland's application under Nunavut Land Claims Agreement section 11.5.11, on May 20, 2015 and June 4, 2015, respectively, and from Qikiqtani Inuit Association and Nunavut Tunngavik Incorporated jointly on June 8, 2015. I have also received letters from Oceans North Canada dated April 13, 2015 and May 5, 2015; the Government of Nunavut on May 8, 2015; and from the Hamlet of Pond Inlet on June 30, 2015.

The Qikiqtani Inuit Association's May 20, 2015 letter invited me to Pond Inlet for a community discussion of the regulatory process and community concerns around Baffinland's project proposal. While I was unable to accept this invitation, on June 4, 2015, I wrote offering to send Mr. Stephen Traynor acting Director General from the Natural Resources and Environmental Branch on my behalf. I also suggested that the Qikiqtani Inuit Association could share its views in writing.

The Qikiqtani Inuit Association's joint letter with Nunavut Tunngavik Incorporated on June 8, 2015, responds to my suggestion of a written comment on Baffinland's application. I understand there was no follow-up by the Qikiqtani Inuit Association to my offer that Mr. Traynor could attend a community meeting despite several attempts to engage.

Each of the letters from the Qikiqtani Inuit Association and Nunavut Tunngavik Incorporated stress the need for Inuit and public involvement in the development and amendment of land use plans. I agree this is both legally required and entirely appropriate. However, I must respectfully disagree with the suggestion in these letters, and in the letters from Oceans North, that the use of the Ministerial exemption would be contrary to the intent of the Nunavut Land Claims Agreement or would improperly marginalize the Planning Commission's role within the integrated resource management system of the Agreement.

First, it is difficult to see how a process explicitly included within a regulatory scheme could be inconsistent with the intent of that scheme. Second, a ministerial exemption does not bypass or circumvent the Planning Commission. The Commission produced the North Baffin Regional Land Use Plan, including the conformity requirements in the plan. The Commission did as it must, and applied those conformity requirements to the Baffinland project proposal. The Commissioners found that the project proposal did not conform to two particular sections of the North Baffin Regional Land Use Plan.

The Commission had to apply sections 3.2.1 and 3.3.1 of the North Baffin Regional Land Use Plan. Read in their proper context within the plan, those are two very general provisions about “adjusting work-plans” to conserve important land values in special areas (section 3.2.1) and the “policy of sustainable development in order to protect the opportunities for domestic harvesting ... avoid[ing] harm to wildlife and wildlife habitat and damage to community travel routes ... ” (section 3.3.1). In their reasons for decision, the Commissioners identified a concern that icebreaking in particular areas could have negative impacts on wildlife habitat and harvesting, traditional activities and community travel routes. If those impacts were to materialize, those would be serious matters that cannot be taken lightly.

On the other hand, as the Commission mentions in its decision, the North Baffin Regional Land Use Plan has not been reviewed or updated for some time now, and the icebreaking activity that forms part of the proposal was not foreseen at the time the plan was produced. These issues have now been brought to the attention of the proponent, regulators, Inuit and other decision makers. The Commission’s decision was made, and the Commission has played its proper role. The question is what to do next.

I think everyone would agree that Nunavut needs to take advantage of economic development opportunities, but of course not at all costs. Each opportunity must be considered against whatever negative consequences it might bring with it. Where there is a responsible resource development project proposed, it should be carefully considered, but without unnecessary delays. Delays are costly for all of us, and good opportunities can disappear. In Premier Taptuna’s letter to me on May 8, 2015, he stressed the importance of 260 jobs, millions of dollars of wages and benefits, as well as other future benefits that might flow from this project proposal. Premier Taptuna was concerned that any delay may put these benefits at risk. This concern is particularly acute if, as suggested by Baffinland, the economic viability of the existing Baffinland project depends on the Phase 2 project proposal. We must consider not only the risks of proceeding, but also the risks of not proceeding.

I have carefully read the letters from the Qikiqtani Inuit Association and Nunavut Tunngavik Incorporated. I see nothing in those letters that expresses a substantive objection to Baffinland’s Phase 2 project proposal, and nothing stating a view that the project proposal is incompatible with Inuit interests or other land use requirements. While I do see reference to the scale and potential impacts of the project proposal, those statements are in the context of a discussion about whether an exemption is the appropriate process, not about whether the project proposal should move forward at all.

Likewise, Oceans North Canada's letter focusses largely on procedural concerns, but seems confident throughout that Baffinland's operations can be environmentally responsible, at least with careful regulation.

I think it is fair to say that there is reason to be careful or even concerned about the potential negative impacts of Baffinland's Phase 2 project proposal. But at this point there is no reason to believe that the project cannot be assessed and potentially approved, regulated and carried out in a manner that is consistent with the existing and future well-being of the residents and communities, and the environmental integrity, of the Nunavut Settlement Area.

The issue stressed most strongly in the Qikiqtani Inuit Association and Nunavut Tunngavik Incorporated letters is the importance of a public, transparent, consultative, collaborative and accountable process with active and informed participation by Inuit. We share those values. And while those are the characteristics of an effective land use planning process, likewise they are key characteristics of the agreement's ecosystemic and socio-economic impact assessment regime.

So while we may disagree about process, I do believe we are in agreement on fundamental issues. Baffinland's Phase 2 project proposal should be considered. It should be assessed carefully, and proceed only if it can be carried out responsibly, and within the requirements of the Nunavut Land Claims Agreement. The active and informed participation of Inuit in any assessment process is crucial, and collaboration is likely to lead us to better substantive decision making. Finding out whether the project proposal can be carried out responsibly is in all our best interests.

It remains to be seen whether this project proposal will be recommended by the Nunavut Impact Review Board, or subsequently approved by the ministers who will receive the board's recommendation. It is worth remembering that potential impacts on Inuit wildlife harvesting activities is a serious concern that led to the Commissioners' decision. That issue is right at the center of the ecosystemic and socio-economic impact assessment regime, which will follow.

In my reasons above for granting the requested exemption, I have focused on the question of whether I believe exemption and referral to the Nunavut Impact Review Board is an appropriate exercise of ministerial discretion. I conclude that it is.

However, Qikiqtani Inuit Association, Nunavut Tunngavik Incorporated and Oceans North all suggested that an amendment to the North Baffin Regional Land Use Plan would be a preferable path forward. While I believe that my reasons above stand on their own, I do want to respond to those who characterized the decision before me as choice between ministerial exemption and plan amendment.

While an application for plan amendment has potential positive aspects, it would bring with it some significant challenging elements as well. A land use plan is a law of general application, and the provisions of the North Baffin Regional Land Use Plan that the Commission found were not met are intended to operate very generally. An application for plan amendment may well raise issues that are broader than those that would be raised by Baffinland's proposed activities. Indeed, amending provisions of a general nature in the land use plan could have broad implications in the entire region subject to the North Baffin Regional Land Use Plan. This might require the Planning Commission to consider issues that would be entirely unnecessary from a project-specific perspective.

As a general proposition, I do not consider land use plan amendment as an appropriate tool for project-specific regulation. That approach risks creating an unwieldy and unnecessary system of double regulation, where a land use plan amendment process resembles an ecosystemic and socio-economic impact assessment process in all but the name, only to be followed by the actual impact assessment process. This would entail undergoing two subsequent sets of public hearings and inquiries into essentially the same issues, creating an unnecessary burden for institutions of public government, the proponent and all other interested parties, including Inuit organizations and individuals. Additionally, land use planning is not designed for ongoing project-specific regulation and adaptive management; in contrast, those are strengths of the impact assessment regime.

Moreover, the Planning Commission is currently well into a process to replace the North Baffin Regional Land Use Plan with a Nunavut-wide land use plan. The current draft plan takes a very different approach from the North Baffin Regional Land Use Plan. An amendment process for the North Baffin Regional Land Use Plan would focus our attention on a process to amend a plan that is nearing the end of its life, and it is not clear whether or how that process would or should integrate into the development of the new Nunavut-wide land use plan.

While I understand the desire to consider amendments to the North Baffin Regional Land Use Plan before proceeding to impact assessment, in my view this approach would not be the most effective way to ensure that the Baffinland project proposal is assessed thoroughly and regulated effectively. I believe it is appropriate to use the comprehensive system for ecosystemic and socio-economic impact assessment provided in article 12 of the Nunavut Land Claims Agreement. Those processes are designed to facilitate a deep consideration of the potential for adverse impacts of a project proposal and the exploration of project-specific mitigation approaches. That process is fully capable of identifying and addressing the project-specific potential for conflicting interests in the use of the lands and marine areas of the North Baffin region and recommending appropriate mitigation. I understand that the Mayor and Hamlet Council of Pond Inlet share the view that the impact assessment process is the best way to proceed, and would give community members an effective forum to consider and provide input on the project proposal in a timely manner.

As a secondary but important benefit, continuing on to the ecosystemic and socio-economic impact assessment process allows all of us to make best use of limited resources, including the scarce and valuable time of the individual participants in the process. A single and comprehensive process will allow us to make respectful and efficient use of the knowledge and views of Inuit, including harvesters, as well as of outside technical consultants, regulatory authorities, and other interested and informed persons.