

"የΡ∿ርԺ Δ⊅Δ° ЬϽϧ⊁৬∩Րϧ Qikiqtani Inuit Association

Thursday, March 10, 2016

ハトハハキンc ユーニー・トレイー Serving the communities of

> △<∧⊲^ҁ≺ь Arctic Bay

P°∿\∆^c Cape Dorset

Ե∿Ր%ጋቪ∧ Clyde River

△D ∠△C)% Grise Fiord

くっくとり Hall Beach

∆لےر⊸ Igloolik

کدطک^c Igaluit

ρι**Γ**ρς Kimmirut

く[°] σ[%])[%] Pangnirtung

Pond Inlet

[°]PP[®]C[°]Z⊲[®] Qikiqtarjuaq

% Resolute Bay

トーΡユ ⊲% Sanikiluaq Mr. Ryan Barry
Executive Director
Nunavut Impact Review Board
P.O. Box 1360
Cambridge Bay, NU, X0B 0C0

Dear Mr. Barry,

The Feb. 17th, 2016 letter from Baffinland (the Proponent) to the Nunavut Impact Review Board (NIRB, the Board) announced a further modification to the Phase II Proposal (Phase II) for the Mary River Project (the Project). Given the lack of precedent regarding the application of the Nunavut Project Planning and Assessment Act (NUPPAA, the Act) in relation to the Project, the Qikiqtani Inuit Association (QIA) requests clarification from NIRB on several issues, in order to better understand how the regulatory review will proceed for Phase II. QIA takes the position that NUPPAA now applies to the Project, and that the review process detailed therein should be followed consistent with 12.4.3 of the NLCA. QIA will formulate specific positions on the Project modifications as information is presented and the regulatory process unfolds.

Application of NUPPAA to the Phase II Project

It is QIA's understanding that Baffinland's additional changes to the Phase II Proposal constitute the 4th iteration of the Project, and the 3rd modification in as many years. In both of the past cases where NIRB has been confronted by Project modifications, (i.e. the Early Revenue Phase (ERP) and October, 2014 Phase II Proposal), reconsideration of terms and conditions of the Project Certificate, as described in 12.8.2 of the Nunavut Land Claims Agreement (NLCA), has been employed at the request of the Proponent, specifically,

12.8.2 b) the circumstances relating to the project or the effect of the terms and conditions are significantly different from those anticipated at the time the certificate was issued.

One interpretation of this provision is that it relates more closely to external circumstances relating to the Project, such as changes in the legal or physical environment, rather than significant changes to the Project itself; however, the wording of the NLCA is not clear. As an alternative, in the case of the Phase II Proposal and its subsequent modification, Section 12.4.3 of the NLCA may be more appropriate and prevent potential avoidance of screening and review under the NLCA.

ለት^ናበናቄጋ^c ውሬሮ ቴ ኦժቴ ህ Serving the communities of

> ∆'∧⊲'≺ь Arctic Bay

P°∿L∆^c Cape Dorset

b∿r%⊃i∧b Clyde River

△▷∠△○% Grise Fiord

くっくとり Hall Beach

> ∆لےرہ Igloolik

کدہک^c Iqaluit

ριΓρ^c Kimmirut

く[°] σ[%])[%] Pangnirtung

Pond Inlet

[°]PP[®]C[°]Z⊲[®] Qikiqtarjuaq

% Resolute Bay

۲۰۹۵ کد Sanikiluag 12.4.3 Any application for a component or activity of a project proposal that has been permitted to proceed in accordance with these provisions shall be exempt from the requirement for screening by NIRB unless

- a) such component or activity was not part of the original proposal; or
- b) its inclusion would significantly modify the project.

QIA asserts that both Section 12.4.3 a) and b) are true regarding the Phase II Proposal and its recent modification and that screening and review is required. Application of Section 12.4.3 to a significant change in the Project appears to be more in line with the intent of the NLCA than 12.8.2. Interestingly, Baffinland's announcement of the initial Mary River Project development proposal sent to parties on March 14th, 2008 stated just that,

"Due to the size and scope of the Mary River Project, it is Baffinland's opinion that a Part 5 review is appropriate. An amendment to the [development] Plan, if necessary, would require a review under the NLCA in any event."

Fortunately, recent legislation has come into force that may provide additional guidance to stakeholders and regulatory agencies in dealing with project modifications. The Mary River Project was approved and was being carried out when NUPPAA came into force on July 9th, 2015, meaning that, consistent with Sec. 235 (1), specifically subsections a) and d), NUPPAA would not apply to the Project.

Projects – assessment under Agreement

235 (1) This Act does not apply in respect of

(a) a project that is being assessed under the Agreement or is being, or has been, lawfully carried out on the day on which this section comes into force;

..

(d) a project that was approved under the Agreement before the day on which this section comes into force and commenced within five years of that day.

However, Sec. 235 (2) stipulates that a significant modification to the Project would require NUPPAA to apply to the Project.

Exception – significant modification

235 (2) Despite subsection (1), if, after this section comes into force, there is a significant modification, within the meaning of section 145, to a project referred to in any of paragraphs (1) (a) to (d), this Act applies to that project.

Aት (በናቴ) c pac of bdo l Serving the communities of

> △'∧⊲'≺ь Arctic Bay

P[~]\L\D^c Cape Dorset

b[∿]Clyde River

ベトノ△^C) Grise Fiord

ጎσናታ⁶ Hall Beach

> ∆لےرہ Igloolik

کدطک^ر Iqaluit

PLT >c Kimmirut

く[°] σ[%])[%] Pangnirtung

Pond Inlet

%PP%C⁴√4% Qikiqtarjuaq

% Resolute Bay

トーβー Δ% Sanikiluaq Furthermore, Sec. 145 & 146 indicate that a significant modification to the original project is subject to an assessment.

Modifications to Project After Assessment

- Modification not significant

145 If the carrying out of a work or activity is a project within the meaning of subsection 2 (1) and modifies a project that has been approved under this Part, that work or activity is, despite paragraphs 74(a) and (b), not subject to an assessment under this Part unless that work or activity is a significant modification to the original project.

- Significant modification

146 (1) For greater certainty, if the work or activity referred to in section 145 is a significant modification to the original project, it is subject to an assessment under this Part.

Neither the NLCA nor NUPPAA appear to contain any prescriptive language that describes which body or regulatory agency would determine whether a significant modification has been made to a project. However, in NIRB's Feb, 22nd, 2016 letter to the INAC Minister, the Phase II Proposal and its recent modification were both described by NIRB as being a "significant change" from the original Project and the 2014 Phase II proposal. This description suggests that, as a regulatory body, NIRB supports an assessment of the Phase II modification through NUPPAA. QIA agrees that the Phase II proposals are significant modifications that require an assessment. Thankfully, NUPPAA contains prescriptive language of what constitutes an assessment; namely, a review by the Nunavut Planning Commission (NPC) for conformity to any applicable Land Use Plan (which may result in a Ministerial exemption in the event of non-conformity), followed by screening and review by NIRB.

NIRB retains the right to modify the terms and conditions of a project certificate (NLCA 12.8, NUPPAA 112), but the additional clarity found in NUPPAA offers guidance on how NIRB may choose to conduct its activities regarding the Phase II proposals.

Additionally, the Board's letter to the Minister inquiring about the continued applicability of the Phase II exemption from the North Baffin Regional Land Use Plan (NBRLUP) again suggests that the Board considers it possible that an assessment under NUPPAA is required, starting with a review of a modified Phase II Proposal by the NPC or possibly Ministerial exemption. QIA presumes that resolving this question was the purpose of NIRB's February 22nd, 2016 letter to the Minister.

QIA requests clarification from as to whether, in the Board's opinion, the modified Project Proposal should undergo an assessment as prescribed by NUPPAA and the NLCA, or if the Board will again, at the request of the Proponent, forgo screening and review to instead reconsider the terms and conditions of the Project Certificate? To be clear, QIA would advocate for the former.

ለት የበናቴን የ ውደሮ ው የ የተመጠር Serving the communities of

∆<∧<p>
∆
Arctic Bay

P°∿レΔ^c Cape Dorset

Ь℃%ጋቪ∧⁵ Clyde River

⊲⊳∠∆^c)[%] Grise Fiord

くっくとり Hall Beach

> ∆لے Igloolik

کدطک^ر Iqaluit

PLT >c

く[°] σ[%])[%] Pangnirtung

Fond Inlet

⁶Pρ⁶C⁶₹4⁶ Qikiqtarjuaq

% Resolute Bay

۲۰۹۵ کد ۲۰۰۳ Sanikiluaq Should an assessment under NUPPAA not be undertaken in this instance, QIA would then pose the following question to the Board: what degree of project modification is needed before a Proponent would be required to re-apply for screening and review, or can certificates be amended *ad infinitum* regardless of the potential impacts and departure from the original scope of the approved project?

It is worth mentioning that this clarification is required whether the Minister's exemption continues to apply to the modified Proposal or not, as the Board may choose either path if the modified proposal is passed to the Board by the NPC following its conformity review, or the Minister via an exemption.

Additional Information Required

During the announcement of Phase II of the Project in October, 2014 BIMC provided parties the 24 page *Second Amendment to Project Certificate No. 005 Project Description*. This document was considered sufficient for parties to provide comments on revising the guidelines for the development of an Environmental Impact Statement, but it was not wholly sufficient to allow for community engagement and interested parties as it left stakeholders and community members with more questions about the Project than answers.

In the months following the release of the *Project Description*, Baffinland and QIA jointly participated in 4 separate workshops in the community of Mittimatalik to understand how contemporary Inuit land use in the area could potentially be affected by Phase II activities, as well as understanding community concerns and possible mitigation measures. In each workshop, BIMC provided more information than was previously available in the *Project Description* and the prior workshop. It is only through this continual stream of new information about Phase II project activities that community engagement has been possible. In QIA's view, this is not a normal or preferred method of advancing a significant project change.

By way of Baffinland's Feb 17th, 2016 letter to the Board, parties are now aware that the Project is again changing, yet this letter is not a project proposal or description; it is a notice of intent to further modify both the marine and terrestrial components of a proposed modification to the Project. The Proponent indicates that a comprehensive EIS will be available in September, 2016, but stops there, implying that no further information will be provided in the interim.

The lack of a revised and updated project proposal or description presents several obstacles to both community and stakeholder engagement and the regulatory process. QIA is currently unable to adequately describe and discuss the additional changes to the Project Proposal when working with Beneficiaries. If no additional information is provided prior to the EIS, and NIRB elects to reconsider the Project Certificate rather than require screening and review, QIA has serious concerns about its own ability to effectively engage Beneficiaries and advocate for their interests within the short timelines of the reconsideration process. NIRB's January 14th, 2013 press release on the ERP makes this clear,

ለት^ርበና^ቈጋ^ር ውሬሮ[°] ው^ነ Þዕራ ሢ Serving the communities of

> △'∧⊲'≺ь Arctic Bay

P^αUΔ^c
Cape Dorset

b[∿]Clyde River

△▷∠△○% Grise Fiord

くっくとり Hall Beach

> ∆لےرہ Igloolik

کدطک^ر Iqaluit

ρι<mark>Γ</mark>ρς Kimmirut

く[°] σ[%])[%] Pangnirtung

Pond Inlet

[°]PP[®]C[°]Z√S[®] Qikiqtarjuaq

% Resolute Bay

トーP ユ d% Sanikiluaq "The timelines associated with the reconsideration of the terms and conditions of a NIRB Project Certificate are significantly shorter than for the original review of the associated Project"

Much as NIRB has indicated in its Feb. 22nd, 2016 letter that the Board is unable to assess continued applicability of the Minister's Exemption to the newly modified Project, without a revised Proposal, the case may be the same for the recently amended guidelines. Furthermore, what information is available to the Minister to determine if the previous Phase II exemption continues to apply to the modification of the Phase II Proposal, when no updated Phase II Proposal has been provided?

To be clear, QIA does not wish to unnecessarily delay or block the Project from proceeding. Likewise, QIA does not presume to support or reject the Phase II Proposal or its recent modification. Our goals are to ensure that sufficient information is made available to all parties such that Beneficiaries and residents of the region are able to understand the scope of the Project, and are well informed before entering into a public review process. Regulators, stakeholders and other interveners also need adequate time and information about the Project and its modification. Only then can informed decisions be made about which legislative tools and regulatory review processes are appropriate, given the circumstances and express requirements of the NLCA and NUPPAA. QIA believes a review under 12.4.3 of the NLCA to be appropriate in this case.

QIA seeks clarification from the Board on the application of NUPPAA to the Project and where the line is drawn between an assessment triggered by significant modification to the Project and a reconsideration of terms and conditions of the Project Certificate as requested by the Proponent – the latter resulting in the avoidance of an assessment and screening of the significant modification.

QIA looks forward to the Board's response, and would be pleased to speak further with you on these matters should you wish to do so.

Sincerely,

Navarana Beveridge Executive Director

Qikiqtani Inuit Association

Cc:

Carolyn Bennet, Minister of Indigenous and Northern Affairs Andrew Nakashuk, Chairman, Nunavut Planning Commission Erik Madsen, VP Sustainable Development, Health, Safety & Environment