



November 27, 2017

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**Re: Forthcoming Modifications to Mary River Project and Related Projects**

The Nunavut Planning Commission (the “NPC”) recently received correspondence from the Nunavut Impact Review Board (“NIRB”) dated November 14, 2017 informing us that Baffinland Iron Mines Corporation (“BIMC”) approached the NIRB and Nunavut Water Board (“NWB”) to propose additional modifications to the Mary River Project currently under assessment. As you know, Phase 2 of the Mary River project was significantly modified during assessment by the NIRB in December 2016, was resubmitted to the NPC in February 2017 for a new conformity determination, and is presently on hold pending the outcome of a public review on a plan amendment application. I write to seek clarification from BIMC on whether these further modifications relate to the Phase 2 project, including whether they ought to be considered relevant to the impending plan amendment hearings and if so whether BIMC will be seeking an adjournment of those hearings.

The Mary River Project has a long history in the Nunavut regulatory system, which I briefly summarize as follows (this is not a complete history):

- In January 2007, the NPC issued BIMC a positive conformity determination for a bulk sampling research program, noting that proposed improvements to the Milne Inlet tote road were being undertaken for research purposes and were therefore exempt from the requirement of a plan amendment to develop a transportation corridor.
- In April 2008 the NPC issued a positive conformity determination for the Mary River Project.
- On December 28, 2012, the NIRB issued Project Certificate No. 005 for the Mary River Project.
- On January 13, 2013, BIMC requested a reconsideration of the terms and conditions of the NIRB Project Certificate to carry out an “Early Revenue Phase” of the Mary River Project, the NWB continued with its licencing process on the basis that the modifications did not affect the scope of the water licences, and the NIRB directed BIMC to submit the Early Revenue Phase proposal to the NPC.

- In January 2014 the NPC carried out a public review of a plan amendment to permit the development of BIMC's terrestrial and marine transportation corridor proposed in the Early Revenue Phase project, and Appendix Q of the North Baffin Regional Land Use Plan was approved April 28, 2014.
- In October 2014, BIMC submitted a new project proposal to the NPC for Phase 2 of the Mary River Project.
- On April 8, 2015 the NPC issued a negative conformity determination for Phase 2 of the Mary River Project on the grounds that the icebreaking proposed in that project proposal were not in conformity with the North Baffin Regional Land Use Plan including Appendix Q, thereby terminating the assessment of Phase 2 of the Mary River Project.
- On July 9, 2015, the *Nunavut Planning and Project Assessment Act*, S.C. 2013, c. 14, s. 2 (*NuPPAA*) was brought into force.
- On July 13, 2015, then Minister B. Valcourt granted Phase 2 of the Mary River Project an exemption from the NPC's negative conformity determination, and the NIRB subsequently started its review of the Phase 2 project.
- BIMC made subsequent changes to the Phase 2 project to propose a railway, and in December, 2016, the NIRB informed BIMC that the changes constituted a "significant modification", that the Phase 2 project was subject to the *NuPPAA*, and that under section 141 of the *NuPPAA* BIMC had to resubmit the modified Phase 2 project to the NPC for a new conformity determination.
- BIMC submitted a proposal for the significant modifications to Phase 2 to the NPC on February 3, 2017.
- In March, 2017 BIMC asked the NPC to pause its conformity determination process and applied to amend the North Baffin Regional Land Use Plan.
- On October 24, 2017, BIMC informed the NPC it was abandoning its requested amendment of the plan to permit icebreaking for winter resupply.
- On November 6 and 7, 2017 BIMC approached the NWB and NIRB respectively proposing further modifications to the Mary River Project.
- On November 14, 2017, the NIRB wrote to BIMC and copied the NPC, noting that BIMC has not demonstrated the further modifications are separate and distinct from the Phase 2 project currently being assessed by the NPC, and in fact that the further modifications are supported by reports in the Phase 2 development proposal, and noting the difficulty that multiple modifications to a project still under assessment is causing.
- As of the writing of this letter, BIMC has not informed the NPC directly of any further modifications to the Phase 2 project currently before the NPC.
- The NPC is holding a public hearing on BIMC's application to amend the North Baffin Regional Land Use Plan in Pond Inlet next week, on December 4 and 5, 2017.

### **Applicable Legislative Scheme**

The *NuPPAA* applies to Phase 2 of the Mary River Project. The NIRB's letter of December 19, 2016 found that the "significant modification" made by BIMC to the Phase 2 project triggered the application of the *NuPPAA*, and directed BIMC to notify the NPC of the modification in accordance with section 141 of the *NuPPAA*.<sup>1</sup> For ease of reference, section 141 of the *NuPPAA* reads:

141 (1) A proponent must, as soon as practicable, notify the Commission in writing of any significant modification to a project that is under assessment under this Part. The notice must

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<sup>1</sup> Alternatively, because of the timing of the Minister's exemption on July 13, 2015, the Phase 2 project does not appear to have been exempt from the *NuPPAA* under section 235 of the Act when NIRB commenced its assessment.

include a description of the modification that is prepared in accordance with the by-laws and rules made under paragraph 17(1)(e).

(2) On receipt of a notice under subsection (1), the assessment of the original project is terminated and an assessment of the modified project must be carried out under this Part as if the Commission had received a project proposal under section 76.

(3) The person or body exercising powers or performing duties or functions under this Part in respect of the modified project must consider, and may rely on, any assessment activities carried out under this Part in respect of the original project.

BIMC complied with the substantive obligation placed on it by subsection 141(1) by submitting a modified project to the NPC on February 3, 2017. BIMC's submission of the modified project "terminated" the assessment of the original Phase 2 of the Mary River Project by virtue of the effect of subsection 141(2) of the *NuPPAA* because the assessment of the original Phase 2 project under Part II of the *NuPPAA* was not completed before BIMC made significant modifications and terminated the assessment of the original project. When the NPC proceeds with its consideration of the modified Phase 2, it considers the entire Phase 2 project as it has been modified and resubmitted under section 76 of the *NuPPAA*, and not only the "significant modifications" themselves.

For clarity, the Minister's exemption of the Phase 2 project on July 13, 2015 was applicable to the original project, the assessment of which was terminated by BIMC on February 3, 2017. Although the issue of icebreaking was originally a proposed issue for discussion in the impending plan amendment hearings, on October 24, 2017 BIMC notified the NPC that it was abandoning its proposal to amend the plan to allow icebreaking and that issue will not be determined by the Commissioners. The NPC assumes BIMC will also be making further modifications to the Phase 2 proposal to remove proposed icebreaking activities.

### **Effect of Significant Modifications During Assessment**

Making multiple modifications to projects during assessment, or shortly after assessment, has the effect of causing confusion, complications, and uncertainty both within the system and for the public at large. As set out in the NIRB's letter of November 14, 2017,

... Taking varied approaches with numerous applications to multiple regulators may create **unnecessary difficulty and confusion for regulators, reviewers and the proponent alike**, as parties find it **challenging to properly delineate the scope, regulatory path and timelines** for the individual applications and to understand **how these applications may be affected by subsequent modification requests**.

...

When not carefully planned and executed by the proponent in consultation with the Boards, **submission of multiple applications simultaneously or successively to one or more of the Boards can create unnecessary confusion, overlap, and difficulty for all involved**.

[emphasis added]

The NIRB's letter also says that it is "unable to confirm that the proposed project modifications are consistent with the scope of the Mary River Project and associated Early Revenue Phase" and that it "recommends that Baffinland modify and resubmit its proposal when it is able to demonstrate that the proposed modifications to the Mary River Project included in the Upgrade Project Proposal are independent of and not integrally linked to the Phase 2 Development Proposal under consideration by the NPC."

The NPC has not yet received a project from BIMC or a notice of modification made to the Phase 2 project and it is unclear how these forthcoming modifications relate to the NPC's conformity determination and the December 4 and 5 hearing of BIMC's plan amendment application in Pond Inlet. The NPC asks BIMC to advise the NPC immediately if an adjournment is being sought to permit consideration of these further modifications.

### Project Splitting

The NPC agrees with the NIRB's concern that the manner in which modifications are being made to the Mary River Project and the Phase 2 project is causing unnecessary confusion. As noted above, the NIRB's letter of December 19, 2016 directed BIMC to notify the NPC of significant modifications made to Phase 2 of the Mary River Project under section 141 of the *NuPPAA*. BIMC submitted a modified project to the NPC in February 2017. As also noted above, the NPC understands that additional modifications, including removing icebreaking from Phase 2, may be forthcoming.

In accordance with *NuPPAA* subsection 141(2), the NPC must assess the modified project "as if the Commission had received a project proposal under section 76". For reference, section 76 of the *NuPPAA* reads in part:

- 76 (1) The proponent of a project to be carried out, in whole or in part, in the designated area must submit a project proposal to the Commission.
- (2) A project proposal must contain a description of the project prepared in accordance with the by-laws and rules made under paragraph 17(1)(e).
- (3) A proponent who intends to undertake two or more projects that are so closely related that they can be considered to form a single project must submit a single project proposal in respect of those projects, and they are deemed to be a single project for the purposes of this Act.

...

Under section 76(3) of the *NuPPAA* proponents must submit a single project proposal to the NPC where projects are so closely related that they can be considered to form a single project. In order to simplify the modifications to the Phase 2 project that are presently before the NPC, the NPC will be requiring BIMC to resubmit the modified Phase 2 project as a single project, and asks that BIMC include any of the forthcoming modifications recently proposed that closely relate to Phase 2. The NPC will assess the final modified Phase 2 project proposal for conformity based on the North Baffin Land Use Plan, as it may be amended, and BIMC bears the onus of ensuring it has applied for amendments that will enable it to carry out the project it wishes to carry out, and the risk of a negative conformity determination if it does not.

Sincerely,



Sharon Ehaloak, Executive Director  
Nunavut Planning Commission

cc: Megan Lord-Hoyle, Baffinland Iron Mines Corporation  
Ryan Barry, Nunavut Impact Review Board  
Stephanie Autut, Nunavut Water Board  
David Hohnstein, Nunavut Water Board  
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