



NUNAVUT PLANNING COMMISSION

NORTH BAFFIN REGIONAL LAND USE PLAN AMENDMENT APPLICATION – REPORT OF EXECUTIVE DIRECTOR

APPLICANT	Baffinland Iron Mines Corporation
PROJECT:	Amendment Application relating to Mary River Project
FILE NO(S):	148420
PLANNING REGION(S):	Qikiqtani (North Baffin)
APPLICABLE LAND USE PLAN(S)	North Baffin Regional Land Use Plan (NBRLUP)
DATE OF REPORT:	August 28, 2017
SUMMARY OF REPORT:	The Executive Director recommends a public review of the Amendment Application in accordance with section 3.5.12 of the NBRLUP

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EXECUTIVE SUMMARY

- The North Baffin Regional Land Use Plan (NBRLUP) was previously amended to allow Baffinland to build a haul road from Mary River mine to the port at Milne Inlet, which is currently being used.
- A 2011 proposal by Baffinland to build a railway from Mary River mine to the southern boundary of the North Baffin Region, along the route to Steensby Inlet, to date has not proceeded, and Baffinland informs the NPC the cost of building a railway to Steensby Inlet is many times the cost of building a railway to Milne Inlet.
- NBRLUP does not allow Baffinland to build a railway to Milne Inlet Port Site. Baffinland has applied for a plan amendment to Appendix Q of the NBRLUP, to add a railway of approximately 110 km in length to the list of types of transportation permitted between Mary River and Milne Inlet Port Site, generally following the routing of the existing Tote Road to connect the Mary River Mine Site with the Milne Inlet Port Site.
- At the Milne Inlet Port Site, the development of a second ore dock to accommodate Cape sized vessels, a second ship loader, railway unloading and maintenance facilities, and additional support infrastructure, in addition to an enclosed crushing facility.
- The ore shipping season is proposed to be from July 01 to November 15, annually. All efforts will also be made to ship fuel and freight during the open water season. However, Baffinland is seeking the ability to conduct winter sea lift of freight if required to support on-going operations, and has proposed an amendment to the NBRLUP that would have the effect of allowing Baffinland, or any other proponent, to conduct icebreaking activities at any time and at any frequency between December 1st and the last day of February, which may conflict with sections 3.2.1, 3.3.1, and Appendix Q of the NBRLUP itself.
- The Executive Director recommends the Commissioners commence a written public review, with a direction to staff to issue notices that will solicit applications for standing and comments on the application together, including on whether one or more public hearings in affected communities are required, and other specific issues to address in the course of the public review noted herein.

RELEVANT FACTS

Background

Due to the complexity of the file, a brief history of the Mary River Project and relevant correspondence is provided:

1. In January 2007, the NPC issued Baffinland Iron Mines Corporation (**Baffinland**) a positive conformity determination for a bulk sampling research program, noting the improvements to the Milne Inlet Tote Road was for research purposes and therefore “does not constitute a proposal to *develop* a transportation and / or communications corridor”, and “does not constitute a positive conformity determination with respect to a development of a corridor”.
2. In April, 2008, the NPC issued Baffinland a positive conformity determination for the Mary River Project and the NPC and Nunavut Impact Review Board (**NIRB**) subsequently conducted a public review of the proposed railway corridor to Steensby Port in accordance with section 3.5.10 to 3.5.12 of the NBRLUP.
3. After the NIRB issued a project certificate for the Mary River Project in December 2012, Baffinland asked the NIRB to reconsider the Mary River Project under Sections 12.8.2 and 12.8.3 of the Nunavut Agreement and proposed new works and activities, specifically transporting ore along an existing tote road, developing a permanent ore dock at Milne Inlet, and shipping ore to markets overseas during the ice-free season. The NPC advised NIRB and the proponent on February 7, 2013 that a new conformity determination was required, and on February 11, 2013, NIRB confirmed that it would require a conformity determination by the NPC prior to initiating the NIRB’s reconsideration process.
4. Baffinland submitted a proposal for new works and activities to the NPC (the Early Revenue Phase proposal). The NPC determined that the Early Revenue Phase proposal involved the development of a transportation corridor and Baffinland submitted an application for amendment to the NBRLUP in accordance with section 3.5.11 of the plan. Between January 7 and January 10, 2014, the NPC held public hearings in Clyde River, Grise Fiord, Resolute, Arctic Bay, and Pond Inlet, and subsequently received submissions by participants.
5. Several participants raised concerns that Baffinland was proposing to conduct icebreaking, noting the high risk of importing invasive species in ballast water. Baffinland subsequently advised the NPC that the Early Revenue Phase proposal and proposed amendment to the NBRLUP did not propose any disruption of landfast ice or pack ice and the NPC proceeded on that basis.
6. On April 28, 2014, the amendment to the NBRLUP was approved for inclusion of a transportation/communications corridor. The approved amendment for both the terrestrial and marine component of the transportation corridor is an insert to the NBRLUP titled Appendix “Q”.
7. On October 29, 2014, the Baffinland submitted a request for a conformity determination with the NBRLUP regarding a proposed Phase 2 of the Mary River project (**Mary River Phase 2**). As summarized by the NPC’s Conformity Officer in a Negative Conformity Determination Recommendation (**NCDR**), Baffinland proposed to roughly triple the amount

of ore to be trucked and shipped annually through Milne Inlet Port, and to increase shipping to approximately 150 total transits throughout the ice-free season, including trans-shipping in the ice-free season, continuous ice management and icebreaking until March.¹ The NCDR recommended that the Commissioners find that Baffinland's proposal did not conform to sections 3.2.1 and 3.3.1 of the NBRLUP, which for ease of reference provide:

3.2.1 All land users shall refer to the land values and concerns in Appendix G, and to the Areas of Importance map, to determine important land values and concerns in areas where they plan to work, as well as to adjust their work plans to conserve these values. [CR] Those who regulate the areas shall ensure through the project approval process that these values are conserved. [A]

3.3.1 All land uses shall be conducted in keeping with the policy of sustainable development in order to protect the opportunities for domestic harvesting. All land users shall avoid harm to wildlife and wildlife habitat and damage to community travel routes through the timing of their operations, through careful selection of the location of their main camps and travel routes, and through other mitigative measures. In order to achieve these ends, all land users shall follow the Code of Good Conduct contained in Appendix H. [CR]

8. Baffinland was given a copy of the NCDR and made reply submissions noting that Appendix Q should be read as contemplating icebreaking. On April 8, 2015 the Commissioners issued a Negative Conformity Determination (the **Negative Determination**) on the basis that the proposed icebreaking did not conform with sections 3.2.1 or 3.3.1 of the NBRLUP, and that Appendix Q ensured that the rights and values protected by sections 3.2.1 and 3.3.1 were not affected by the establishment of the transportation corridor. The Commissioners wrote:

"... the Commission does not interpret Appendix Q to say that navigation **through ice** conforms with the NBRLUP where it conflicts with conformity requirements 3.2.1 and 3.3.1 that protect the same values expressly preserved by Appendix Q itself."²

[emphasis in original]

¹ NPC Conformity Officer, *Negative Conformity Determination Recommendation Re: Mary River Project Phase 2*, NWB File: 2AM MRY1325; DFO File: NU-07-HCAA-CA7-0050; NIRB File: 08MN053 (March 5, 2015).

² Nunavut Planning Commission, *Conformity Determination by the Commissioners, Re: Mary River Project Phase 2*, NWB File: 2AM MRY1325; DFO File: NU-07-HCAA-CA7-0050; NIRB File: 08MN053 (April 8, 2015), para. 24.

9. In the Negative Determination the Commissioners set out their interpretation of sections 3.2.1 and 3.3.1 of the NBRLUP. The Commissioners concluded that in accordance with the action item in section 3.2.1 the Commission itself must ensure both that the land values and concerns identified in Areas of Importance in Appendix G, as well as access to those areas, are conserved.³ The Commissioners also concluded that the Code of Good Conduct in Appendix H must be read together with the wording of section 3.3.1 as requiring “land users to time their operations to avoid harm to wildlife and wildlife habitat and damage to community travel routes.”⁴
10. Baffinland subsequently wrote to the Minister and in July 2015 received an exemption from the NBRLUP in respect of the Mary River Phase 2 proposal. In February 2016, during the NIRB’s review of the Mary River Phase 2 proposal, Baffinland decided that a railway was needed to Milne Inlet instead of a road and changed Phase 2, to include the development of a railway from Mary River to Milne Inlet. The Minister asked NIRB to decide if the project would need to return to NPC for a conformity determination on the railway, and the NIRB referred the project back to NPC in December 2016.
11. In January, 2017, the NPC gave Baffinland a positive conformity determination for a one-time proposal to break ice for resupply of the Mary River Project, NPC File No. 148423, but on February 16, 2017 Baffinland withdrew its proposal citing community concerns about icebreaking in March.

Milne Inlet Railway & Icebreaking Proposal

12. On February 3, 2017, Baffinland sent a new project proposal (the **Milne Inlet Railway & Icebreaking Proposal**) to the NPC to conduct its conformity review as directed by the NIRB.
13. Baffinland visited Pond Inlet and Arctic Bay and asked residents about the proposed railway only. Baffinland provided a written record of evidence of consultation regarding the proposed amendment and NPC staff has made an initial assessment of the record of consultations, summarized in the **Initial Assessment of Amendment Application** section below.
14. On March 6, 2017, the NPC wrote to Baffinland confirming the proposed activities had not been previously assessed by the NPC and that more information under section 3.5.11 of the NBRLUP was required.

³ *Ibid.* at para. 27 – 31.

⁴ *Ibid.* at para. 32 – 38.

15. On March 17, 2017 Baffinland formally provided a request to amend the NBRLUP to allow a rail line from Mary River to Milne Inlet, additional infrastructure at the Milne Inlet Port Site, and icebreaking from December to February.
16. On April 7, 2017, in order to initiate the public review process I (the **Executive Director**) provided Laura Gemmal of the GC a detailed Workplan and Budget for a full public review in the event the assessment required full regional public representation.
17. On May 5, 2017 the Commissioners hold a teleconference passing a motion:
 - a. Directing the Executive Director not to proceed with any project activities outside of the approved budget and workplan for the Contribution Agreement Funding (**CAF**), and
 - b. To suspend the Baffinland Amendment Application until INAC confirms the funding request
18. Baffinland provided NPC a letter dated May 9, 2017 seeking confirmation that their proposed Amendment Application was received, assessed by its staff and whether it would be considered at the next in-person Commission meeting.
19. On May 17, 2017, the NPC provided an update to Baffinland that the Commissioners will be considering the Executive Director's report related to their proposed amendment at the next in-person meeting tentative scheduled for September of 2017.
20. On June 2, 2017 Baffinland responded to the Executive Director emphasizing the importance of advancing the proposed amendment and concern that the delay may result in process uncertainty – increases in costs, and postponed accrual of additional benefits of the North Baffin Communities.
21. On June 30, 2017 Baffinland asked the NPC to allow the Mary River Phase 2 proposal to proceed to the full environmental assessment by the NIRB, based on a perceived inaction by the NPC contrary to *NuPPAA* section 59 (2), and that it is not open to the NPC to refuse to consider or fail to process a proposed amendment that has been submitted under section 59(1) of *NuPPAA*. Baffinland asked that both the Minister and the Commission resolve any issues causing delays as soon as possible, or failing resolution, advise the Baffinland on the need to pursue a Ministerial exemption.
22. On July 4, 2017, the NPC replied to Baffinland's June 30th letter, noting the NPC's need for supplementary funding from INAC to proceed.
23. On July 7, 2017, the NPC sent a letter to the Minister of Indigenous and Northern Affairs Canada, the Honourable Carolyn Bennett, regarding the NPC's need for supplementary

- funding to process the Baffinland Amendment Application and the importance of the approved NBRLUP's implementation and amendment requirements.
24. On July 20, 2017 the QIA and the NTI sent a joint letter addressed to both Chairman Nakashuk and Minister Bennett requesting that the NPC initiate its review of the Baffinland Amendment Application consistent with *NuPPAA* section 59 (2) and NPC's Internal Procedures section 4.7, and provide certainty and clarity as to the next steps as soon as possible. Both the QIA and the NTI also confirmed it would be premature to conclude that 1) a public review (including a public hearing is necessary in this case, or 2) NPC cannot move ahead because of funding issues relating to a public review. They asked that the NPC conduct a public review in accordance with subsection 4.7 (c) of the Internal Procedures.
 25. July 27, 2017 NPC responds to the QIA and the NTI with respect to their position on the file, and advises that the NPC is fully committed to ensuring that the residents affected by the Baffinland Amendment Application have an opportunity to adequately participate in a public review and that the degree of public involvement will be determined after the Commissioners have assessed the Amendment Application and the Executive Director's written report. The letter said that once adequate funding is provided to the NPC, the NPC will advise the parties as to the next steps.
 26. On July 28, 2017 the Government of Nunavut (**GN**) advised the NPC had not been posting in its public registry as required by *NuPPAA* all of the relevant documents related to the Baffinland's application to amend the NBRLUP, and that the GN agrees with the QIA and the NTI's assessment that while it was committed to taking part in an "efficient and meaningful public review process" that "a full public review and public hearing" is not necessary.
 27. On August 4, 2017, the Government of Canada informed the Commission that it would not provide supplementary funding for the public review of the Baffinland Amendment Application.
 28. On August 14, 2017, the Government of Canada, the Government of Nunavut, and QIA announced their agreement on the boundaries of the Lancaster Sound national marine conservation area, which will encompass Milne Inlet and the marine corridor. Initiatives to create marine conservation areas under the *Canada National Marine Conservation Areas Act* are subject to the NPC's *Broad Planning Policies, Objectives and Goals* (2007) (**BPPOG**) and applicable land use plans, but once established the the Lancaster Sound national marine conservation area will be exempt from the NPC's BPPOG and applicable land use plans in accordance with section 70 of the *NuPPAA*.

APPLICABLE LAWS

29. The Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen In Right of Canada, Signed May 25, 1993, as amended (the **Nunavut Agreement**) reads:

11.2.1 The following principles shall guide the development of planning policies, priorities and objectives:

(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;

(b) 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;

(c) the planning process shall ensure land use plans reflect the priorities and values of the residents of the planning regions;

(d) the public planning process shall provide an opportunity for the active and informed participation and support of Inuit and other residents affected by the land use plans; such participation shall be promoted through various means, including ready access to all relevant materials, appropriate and realistic schedules, recruitment and training of local residents to participate in comprehensive land use planning;

(e) plans shall provide for the conservation, development and utilization of land;

(f) the planning process shall be systematic and integrated with all other planning processes and operations, including the impact review process contained in the Agreement; and

(g) an effective land use planning process requires the active participation of both Government and Inuit.

30. Section 11.3.1 of the Nunavut Agreement reads:

11.3.1 A land use plan shall be a document containing text, schedules, figures and maps for the establishment of objectives and guidelines for short-term and long-term development, taking into account factors such as the following:

- (a) demographic considerations;
- (b) the natural resource base and existing patterns of natural resource use;
- (c) economic opportunities and needs;
- (d) transportation and communication services and corridors;
- (e) energy requirements, sources and availability;
- (f) community infrastructural requirements, including health, housing, education and other social services;
- (g) environmental considerations, including Parks and Conservation Areas, and wildlife habitat;
- (h) cultural factors and priorities, including the protection and preservation of archaeological sites and outpost camps; and
- (i) special local and regional considerations.

31. Section 11.3.2 of the Nunavut Agreement says that the purpose of a land use plan “shall be 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.”

32. The NPC has three major responsibilities listed under section 11.4.1 of the Nunavut Agreement:

11.4.1 A Nunavut Planning Commission (NPC) shall be established with the major responsibilities to:

- (a) establish broad planning policies, objectives and goals for the Nunavut Settlement Area in conjunction with Government;
- (b) develop, consistent with other provisions of this Article, land use plans that guide and direct resource use and development in the Nunavut Settlement Area; and
- (c) generally, fulfill the objectives of the Agreement in the manner described, and in accordance with the general principles mentioned in Section 11.2.1, as well as such additional functions as may be agreed upon from time to time by Government and the DIO.

33. The NPC has the mandate to receive applications to amend land use plans, to conduct public reviews of proposed amendments, and to make recommendations to the Minister of Indian Affairs and Northern Development and the Territorial Government Minister responsible for Renewable Resources to amend land use plans under Part 6 of Article 11 of the Nunavut Agreement.

34. The *Nunavut Planning and Project Assessment Act (NuPPAA)* continues the NPC as it was established under the Nunavut Agreement. Similar to section 11.4.1 of the Nunavut Agreement, the *NuPPAA* reads in various sections:

41. The Commission is responsible for the establishment, in conjunction with the Government of Canada or the Government of Nunavut, or both, taking into account their respective jurisdictions, of broad planning policies, priorities and objectives for the designated area regarding the conservation, development, management and use of land.

...

48 (1) A land use plan must provide for the conservation and use of land and guide and direct resource use and development and must, in particular, provide for a strategy regarding the implementation of the plan and take into account

(a) the broad planning policies, priorities and objectives established for the designated area;

(b) the specific planning objectives and planning variables identified for any applicable planning region;

(c) the factors referred to in section 11.3.1 of the Agreement; and

(d) Inuit objectives for Inuit owned lands.

...

15. The Commission must exercise its powers and perform its duties and functions with a view to fulfilling the objectives of the Agreement in relation to land use planning in accordance with the principles referred to in section 11.2.1 of the Agreement.

35. The *NuPPAA* provides the following in respect of plan amendments:

59 (1) The federal Minister, the territorial Minister, the designated Inuit organization or any person, including a corporation or other organization, affected by a land use plan may propose to the Commission an amendment to that plan.

(2) The Commission must consider the proposed amendment and, if it considers it appropriate to do so, conduct a public review in accordance with the by-laws and rules made under section 17.

(3) The Commission may, on its own initiative, propose an amendment to a land use plan and must subsequently conduct a public review in accordance with the by-laws and rules made under section 17.

(4) If the Commission conducts a public review in respect of a proposed amendment, the Commission must make the proposal public in a manner that is designed to promote public participation in its examination.

60 The Commission must consider the submissions made during a public review in respect of a proposed amendment and may make any revisions to the proposed amendment that it considers appropriate.

61 (1) The Commission must submit the original or revised proposed amendment to the federal Minister, the territorial Minister and the designated Inuit organization with a written report of any public review and its recommendation as to whether the amendment should be accepted or rejected, in whole or in part.

(2) Despite subsection (1), the Commission may, following public review, withdraw a proposed amendment that it initiated.

62 (1) As soon as practicable after receiving the proposed amendment, the federal Minister, territorial Minister and designated Inuit organization must accept the Commission's recommendation jointly or reject it, in whole or in part, with written reasons.

(2) If the Commission's recommendation is rejected, in whole or in part, by the federal Minister, the territorial Minister or the designated Inuit organization, the Commission must, after considering the reasons, which it may make public, undertake once again any measures in relation to the holding of a public review under subsections 59(2) and (4) and section 60 that it considers necessary, make any changes it considers appropriate and submit a revised proposed amendment to the federal Minister, territorial Minister and designated Inuit organization.

(3) As soon as practicable after receiving a revised proposed amendment, the federal Minister, territorial Minister and designated Inuit organization must accept it jointly or reject it with written reasons.

(4) Any amendment to a land use plan based on an original or revised proposal for amendment comes into force when it is approved under subsection (1) or (3).

(5) The Commission must make any amendment to a land use plan public.

- 63 The Commission must, in exercising its powers and performing its duties and functions under section 60 and subsection 62(2), consult with the Nunavut Water Board and take into account any recommendations provided by that Board under subsection 36(1) of the Nunavut Waters and Nunavut Surface Rights Tribunal Act.
- 64 The Commission must, in exercising its powers and performing its duties and functions under section 60 and subsection 62(2), give great weight to the views and wishes of the municipalities in the area to which the proposed amendment relates.
- 65 In exercising their powers and performing their duties and functions under subsections 59(2) and (3), section 60 and subsections 62(1) to (3), the Commission, the federal Minister, the territorial Minister and the designated Inuit organization must take into account all relevant factors, including the purposes set out in section 47, the requirements set out in section 48 and existing rights and interests.
36. Unlike some statutory boards who owe Inuit a duty of consultation on the grounds that they exercise executive power by making final decisions,⁵ the NPC only recommends whether or not to amend existing land use plans. The Government of Canada, or the “Crown”, owes Inuit a duty to consult that cannot be delegated to others, and in accordance with section 65 of the *NuPPAA* both levels of government and the Designated Inuit Organization must consider existing rights and interests before making a decision in respect of the amendment.

APPLICABLE LAND USE PLANS

37. Where the NPC receives a project proposal that proposes to develop a transportation and/or communications corridor that pertains to the North Baffin Planning Region, the NBRLUP requires a detailed application to amend the relevant land use plan, and a public review of a proposed corridor with the NIRB or an environmental assessment panel appointed under article 12.4.7 of the Nunavut Agreement. It reads:
- 3.5.10 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. [A]

⁵ See e.g. *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 at para 29 (finding that because the National Energy Board makes final decisions it exercises executive powers and the board’s decision “constitutes Crown action that may trigger the duty to consult”).

- 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]
- 3.5.12 The NPC, and either NIRB or a panel acting under section 12.4.7 of the [Nunavut Agreement], shall publicly review the proposed corridor to determine whether the proposal adequately meets the guidelines set out in Appendices J and K. Once it is determined that a proposal does meet the guidelines, the NPC may request the ministers to amend the plan to include the new transportation corridor. [A][CR]
38. The NBRLUP requires the NIRB, or a federal environmental assessment panel, be involved in the plan amendment (or coordinated activities). In the previous plan amendment for this project, NIRB conducted its own review of the proposal to determine if it met Appendices J and K.
39. As noted above, in the Negative Determination of April 8, 2015, the Commissioners interpreted a proposal by Baffinland to conduct continuous icebreaking as not being in conformity with sections 3.2.1 and 3.3.1, which were not affected by the addition of a transportation corridor in Appendix Q. As set out above, repeated again for ease of reference, sections 3.2.1 and 3.3.1 of the NBRLUP provide:
- 3.2.1 All land users shall refer to the land values and concerns in Appendix G, and to the Areas of Importance map, to determine important land values and concerns in areas where they plan to work, as well as to adjust their work plans to conserve these values. [CR] Those who regulate the areas shall ensure through the project approval process that these values are conserved. [A]
- 3.3.1 All land uses shall be conducted in keeping with the policy of sustainable development in order to protect the opportunities for domestic harvesting. All land users shall avoid harm to wildlife and wildlife habitat and damage to community travel routes through the timing of their operations, through careful selection of the location of their main camps and travel routes, and through other mitigative measures. In order to achieve these ends, all land users shall follow the Code of Good Conduct contained in Appendix H. [CR]
40. At the conclusion of that public review, the NPC retains discretion whether to recommend a proposed amendment to the ministers. Both section 3.5.11 and 3.5.12 of the NBRLUP are marked as “conformity requirements” which must be completed before a final conformity determination may be made.

41. Under section 61 and 62 of the *NuPPAA*, once NPC makes a recommendation on a plan amendment to the federal Minister, territorial Minister and designated Inuit organization, the recommendation may be accepted, or rejected with written reasons. NPC must consider the reasons and undertake any measures in relation to the holding of a public review that it considers necessary and submit a revised proposed amendment. Once the federal Minister, territorial Minister and designated Inuit organization and NPC are in agreement, and after having taken into consideration all relevant factors and existing rights and interests as required by section 65 of the *NuPPAA*, the NBRLUP may be modified.

APPLICABLE RULES, INTERNAL PROCEDURES, AND BROAD PLANNING POLICIES, OBJECTIVES AND GOALS

42. In accordance with the Nunavut Agreement and the *NuPPAA*, the NPC's *Rules of Procedure for Public Hearings and Public Reviews (RPHPR)* enacted by the Commissioners broadly define the parties to the public review of an Amendment Application, provides various procedures for public reviews and hearings, and sets out the factors which the NPC's delegates must consider in addition to those set out in Appendices J and K of the NBRLUP in conducting public reviews of Amendment Applications for transportation corridors.

43. Rule 7.3 of the *RPHPR* provides:

7.1 In conducting all public hearings and public reviews, the Commission shall be principally guided by:

- (a) The general principles set forth in section 11.2.1 of the Agreement; and
- (b) The major responsibilities of the Commission in section 11.4.1 of the Agreement.

...

7.3 Where the Commission conducts a public review of an Amendment Application, in addition to the factors in section 7.1 of these rules, the Commission shall also take the following into account:

- (a) The factors listed in section 11.3.1 of the Agreement;
- (b) The purpose of land use plans as established by section 11.3.2 of the Agreement;
- (c) Any planning policies, priorities and objectives regarding the conservation, development, management and use of land applicable to the land to which the

Amendment Application relates developed by the Commission under Article 11, Part 2 of the Agreement, as may be amended from time to time; and

(d) Any principles that guided the development of the applicable land use plan to which the Amendment Application relates that are contained in that land use plan, whether express or implied.

44. The Commission also has an Internal Procedure on Plan Amendments. Section 4.5 of the Internal Procedure on Plan Amendments states:

“The Executive Director will prepare a written report for the Commission that will include:

(a) the proposed amendment;

(b) an initial analysis of the proposed amendment based on the intent of the land use plan and any guidelines contained in the plan and the NA.”

45. Section 4.7 of the Internal Procedure on Plan Amendments is set up to work under *NuPPAA*. It states:

“As soon as practicable after the Commission meeting where the proposed amendment is considered, the applicant will be advised in writing of the decision by the Commissioners that:

(a) The proposed amendment is not consistent with approved planning policies and objectives, or the purpose of the land use plan, and the Commission has recommended that it be rejected in whole or in part;

(b) The proposed amendment is appropriate, no public review is required, and the Commission has recommended that it be accepted; or

(c) The proposed amendment requires a public review before a recommendation can be made.”

46. The wording of section 3.5.12 the NBRLUP suggests a public review must be held notwithstanding sections 4.7 a) and 4.7 b) of the Internal Procedure on Plan Amendments.

47. Sections 5.1 and 5.2 of the Internal Procedure on Plan Amendments state:

5.1 If the Commission determines under 4.7(c) that a public review is required, it will be undertaken in accordance with the NPC’s approved workplan. The public review will be conducted in accordance with the Rules of Procedure for Public Hearings and Public Reviews in a manner considered appropriate by NPC [Commissioners] to derive the most meaningful insights and input from the public.

- 5.2 A Public Review provides an opportunity for public input; it does not necessarily imply a public meeting or hearing. The need for a public meeting will depend on the significance of the amendment and the degree of public concern / interest the Commission anticipates the proposal may generate. If the Commission believes the level of public concern/ interest is not significant, the public review may be conducted by providing the opportunity for written submissions or presentation at a regular Commission meeting.
48. The *RPHPR* provides the following requirements for notices issues in respect of a public review of an Amendment Application:
- 11.1 Where an Amendment Applicant files an Amendment Application with the Commission pursuant to section 11.6.1 of the Agreement:
- (a) the Commission shall place the Amendment Application and any related documents in its public record; and
 - (b) the Commission shall consider the Amendment Application, including whether a public review of the Amendment Application is appropriate or required by an applicable land use plan; ...
- 11.2 The public review period begins on the date the Commission elects in its sole discretion to hold a public review to consider an Amendment Application and ends on a date specified by the Commission in the notice of proceeding.
- 11.3 Recognizing the tradition of Inuit oral communication and decision making, the Commission may in its discretion elect to receive the submission of representations, information and evidence in a public review either in a written hearing, in an oral hearing, or both as the Commission considers appropriate pursuant to Section 37 of these Rules.
- 11.4 The Commission may in its discretion reconsider its election under Rule 11.3 at any time, and provide an amended notice pursuant to Rule 6.5.
- 11.5 A notice of public review shall set out the procedures for the public review, including:
- (a) a general description of the public review including its intent, and the purpose and legal basis of the proceeding;
 - (b) the issues to be addressed in the proceeding and the potential consequences of the Commission's decision;
 - (c) how interested persons who may be affected may acquire more information including inspecting relevant documents filed with the Commission, and these Rules;

(d) the procedures and timelines for interested persons to apply for standing to submit representations to the Commission;

(e) the procedures and timelines for parties to inform the Commission of an intention to participate in the proceedings;

(f) the procedure and format for filing representations with the Commission, including the scheduled dates, times, locations, and types of hearings, whether written, formal hearing or informal hearings, at which submissions may be made under Section 32 of these rules, if any;

(g) in the case of an oral hearing, the date, time and place of the hearing;

(h) contact information for the Commission.

(i) Contain a schedule showing the time limits for filing and serving any of the following:

(i) Requests for standing by interested persons;

(ii) Parties to notify the Commission of an intention to participate;

(iii) Written submissions by all participants;

(iv) Responses to written submissions;

(v) Reply to responses to written submissions by Amendment Applicant;

(vi) Filing of documentary evidence;

(vii) Written arguments; and

(viii) Any other procedural step the Commission considers necessary.

(j) Contain the requirements for the content and form of written submissions and the form of written argument;

(k) Indicate the address of the location or locations where the documents filed with the Commission in relation to the proceedings may be publicly viewed or otherwise obtained; and

(l) Contain any other information the Commission considers necessary.

49. Section 11.2.1 of the Nunavut Agreement is the list of principles that guide the development of the NPC's BPPOG, and Rule 7.3(c) of the RPHPR refers to the "planning policies, priorities and objectives" contained in the NPC's BPPOG, cited above.

50. For example, the BPPOG says under Goal 2 “Protecting and Sustaining the Environment”:

Broad Land Use Planning Objectives It is an objective of the Nunavut Planning Commission that Land Use Planning:	Broad Land Use Planning Policies It is a policy of the Nunavut Planning Commission that Land Use Planning:
C addresses environmental, economic, Inuit cultural and social concerns regarding transportation corridors, including all-season roads and marine shipping routes, and ship to shore activities.	C1 ensures environmental, economic, Inuit cultural and social concerns are considered in decisions regarding transportation. C2 identifies methods to manage ship traffic, ship to shore activities and routes in marine areas of Nunavut. C3 recognizes that Arctic waters adjacent to the mainland and islands of the Canadian Arctic are to be navigated only in a manner that respects the welfare of Inuit and the ecological balance that exists in the water, ice and land areas of the Canadian Arctic.

51. BPPOG Goal 4, “Building Healthy Communities” also provides, for example:

Broad Land Use Planning Objectives It is an objective of the Nunavut Planning Commission that Land Use Planning:	Broad Land Use Planning Policies It is a policy of the Nunavut Planning Commission that Land Use Planning:
A ensures the social, cultural, economic and environmental endeavours of the human community are central to land use planning and implementation.	A.1 promotes the social, cultural, conservation and economic goals of the communities. A.2 supports social and economic development initiatives. A.3 supports Inuit social and cultural needs and aspirations by providing special management to areas of archaeological, historical or cultural importance.

52. Under Goal 5 “Encouraging Sustainable Economic Development” the BPPOG reads:

Broad Land Use Planning Objectives It is an objective of the Nunavut Planning Commission that Land Use Planning:	Broad Land Use Planning Policies It is a policy of the Nunavut Planning Commission that Land Use Planning:
C.1 takes into account geographic areas of value for non-renewable resources or other	C.1 assesses the economic potential of land uses for consideration in planning

commercial values and identifies development opportunities associated with those areas. C.2 recognizes the economic goals, opportunities and needs of communities specifically, and the Nunavut Settlement Area generally.	decisions. C.2 requires consultation with Nunavut communities and other planning partners to identify appropriate development to achieve their economic goals.
D recognizes that the development of resources requires efficient and safe transportation infrastructure and corridors.	D takes into account Nunavummiut interests related to land, air and marine transportation corridors.

53. These are only a few example of relevant portions of the BPPOG.

INITIAL ASSESSMENT OF AMENDMENT APPLICATION

54. As noted above, Baffinland visited the communities and asked residents about the proposed railway only, but its consultation record does not enable staff to determine whether potentially affected communities had concerns about the proposal to add icebreaking to the NBRLUP that would warrant public hearings.

55. The initial assessment of this plan amendment by staff is that the proposed amendment for the railway would be supported by Sections 3.5.10, 3.5.11, and 3.5.12, and Appendixes J and K, of the NBRLUP. The NBRLUP specifically states that transportation corridors should be multi-modal whenever possible, and the company is proposing to build a railway next to an existing road. See map in Schedule "B", illustrating the location of the existing road and the new railway proposed.

56. The *RPHPR* provides:

11.6 An Amendment Application must include the following information:

- (a) The land use plan to which the Amendment Application relates;
- (b) The identity of the Amendment Applicant, and where the Amendment Applicant is a person, a description of how the person is affected by the land use plan;
- (c) A list of all proposed amendments, and their purpose, including the applicable sections of the land use plan, the current uses of the land, the proposed changes, and a description of how these meet the principles contained in Rules 7.1 and 7.3 above; and
- (d) Any information required by the applicable land use plan.

- 11.7 In determining whether the Amendment Application is complete in that it contains the required information under these rules, the Commission may consult with parties, participants, and the public through the public review process. The Commission may be required to undertake such consultations prior to determining that an Amendment Application is complete if required to do so by the applicable land use plan.
57. It is not clear if icebreaking in December, January, and February is consistent with the NBRLUP, and whether there are concerns from the people of the North Baffin region, in particular the residents of Pond Inlet as the proposed ice breaking route is extensively used by Pond Inlet hunters.
58. While Baffinland states they want to break ice only twice a year between December and February, the practical effect of the wording of the Amendment Application would allow any number of proponents to propose any number of icebreaking transits in this same period, and such projects may or may not be subject to screening by the NIRB.
59. As noted above, icebreaking in the marine component of the Milne Inlet Transportation Corridor was not contemplated in the Commission's previous public review of a proposed amendment to the NBRLUP by Baffinland, and Inuit, Nunavummiut, municipalities, Hunters and Trappers Organizations and the public may have concerns regarding the effects of expressly establishing an icebreaking corridor on traditional cultural activities, community travel routes, wildlife and the environment.
60. Consideration of this proposed amendment should also take into account the Commission's reasoning in its Negative Determination noted above relating to the Baffinland Mary River Project Phase 2 proposal, as the Commissioners decided that the icebreaking proposal was not in conformity with sections 3.2.1 and 3.3.1 of the NBRLUP which were protected by the wording of Appendix Q.
61. As noted above, the NPC has received correspondence from BIMC, NTI and QIA, the Government of Nunavut, and the Government of Canada (enclosed). Generally, these parties have taken the position that a written public review, rather than more expensive community sessions, is appropriate in this case. The Government of Canada declined to provide supplementary funding for the Commission to carry out public hearings on that basis.
62. Historically, written correspondence with the residents of the of the Nunavut Settlement Area has consistently demonstrated a difficulty in securing written briefs due a lack of resources within communities to prepare written reports, as well as the tradition of Inuit oral communication.
63. The scope of a public review can be:
- a. written format only;

- b. written submissions with an oral public hearing or Commissioners' meeting in Pond Inlet alone; or
 - c. written submissions and public hearings in multiple potentially-affected communities.
- 64. NPC staff anticipate the community of Pond Inlet will request an oral hearing due to potential impacts of icebreaking on community travel routes, and **would recommend a public hearing in that community if adequate funds can be made available.**
- 65. The Commissioners need to consider and decide on the need for a public review on the Milne Inlet Railway & Icebreaking Proposal Amendment Application.
- 66. If a decision is made to proceed with the public review, the Commissioners will need to approve a notice to the communities to seek applications for standing, written submissions on the proposed amendment itself, and if necessary determine whether a Public Hearing is desired in one or more communities.

RECOMMENDATIONS

The Executive Director recommends the following steps to the Commissioners:

1. Out of expediency and fairness to Baffinland, Commission staff have conducted an initial assessment of the proposal as set out in this report, and recommend that notwithstanding the Internal Procedure that says the Commission will hold an in-person meeting to consider the Amendment Application and this report, next scheduled for the fall of 2017, the Commissioners hold a "virtual meeting" under the Commission's By-laws to consider and vote upon the Amendment Application and this report.
2. In light of Baffinland's existing consultation record and in particular the Government of Canada's correspondence of August 4, 2017, Commission staff recommend the Commissioners make an initial determination to proceed with a written public review, issue notices of public review in accordance with the Commission's *Rules of Procedure for Public Hearings and Public Reviews (RPHPR)*, and ask that parties making submissions indicate whether they take the position that a hearing in their community is or is not required. Commissioners will then be able to determine on the basis of written submissions whether to hold one or more public hearings or meetings and re-engage the Government of Canada for supplementary funding at that time if required.
3. If the Commissioners determine a public review is required under section 3.5.12 of the NBRLUP:

- a. Out of expediency and fairness to Baffinland and others affected by the Amendment Application, Commission staff recommend the Commissioners issue a direction on procedure to vary rule 23.2 of the *RPHPR* requiring interested persons be granted standing before making representations and submitting evidence, and instead combine into a single public notice asking parties and interested persons to send **both written submissions together with applications for standing and/or notices to participate within 30 days of the date of the public notice**. The recommended timelines for the public review are appended to this report as Schedule “C”.
- b. If the Commissioners direct staff to issue notices as recommended herein, it is recommended that in addition to the requirements in rule 11 of the *RPHPR*, notices indicate the practical effects of the proposed amendments to the NBRLUP will affect conformity determinations for any future project that may be proposed, whether by Baffinland or any other proponent.
- c. For the purpose of a public review, NPC staff recommend that:
 - i. The Amendment Application be considered on its own merits, and not limited by Baffinland’s corresponding project proposal;
 - ii. When considering the appropriate scope of the public review, including whether a public hearing is required, the Commissioners consider the practical effect of the proposal to amend Appendix Q to allow icebreaking as enabling any proponent to propose any number of ship movements including icebreaking to ship “freight” (an undefined term which could conceivably include any type of ship cargo) between December 1st and the last day of February in any year. Section 153 of the *NuPPAA* says that NIRB scopes but does not screen normal community resupply or individual ship movements that are not related to another project, meaning that many ship movements through ice may not be screened by the NIRB before proceeding to other regulatory authorities.
 - iii. One issue in the public review should be to determine whether the proposed amendment to Appendix Q of the NBRLUP to allow icebreaking is consistent with NBRLUP sections 3.2.1, 3.3.1 and the wording of Appendix Q that preserves wildlife harvesting and traditional activities including hunting, fishing, camping and any other activity considered by residents to be important in maintaining a traditional lifestyle, as those were interpreted in relation to proposed icebreaking in the Negative Determination. If they are not consistent, the Commissioners may need to

make revisions to the proposed amendment, or consequential amendments to other parts of the NBRLUP.

All of which is respectfully presented to the Commissioners this 28th day of August, 2017.

A handwritten signature in black ink, appearing to read "S Ehaloak". The signature is fluid and cursive, with a long horizontal stroke at the end.

Sharon Ehaloak, Executive Director

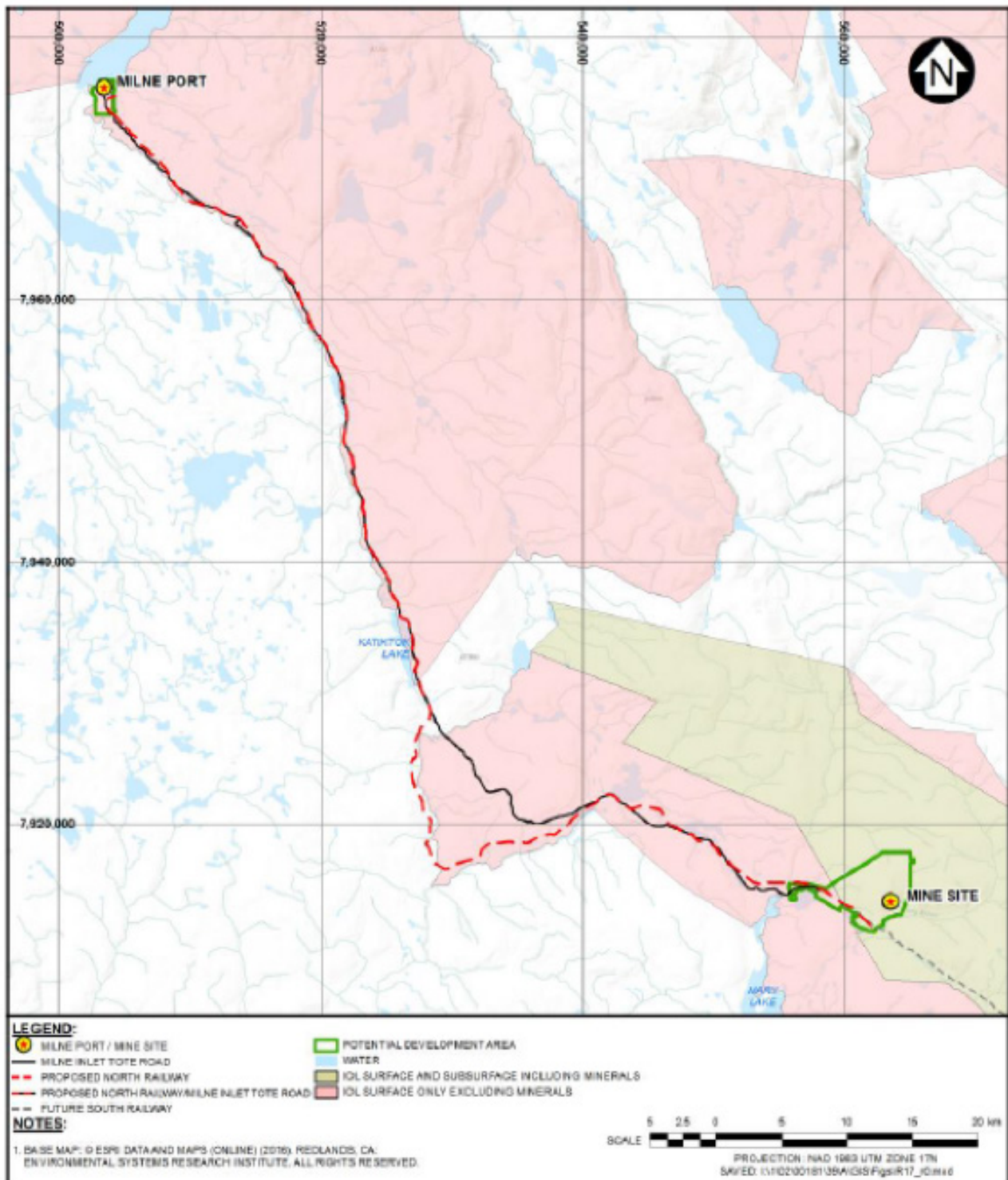
Schedule “A”: Relevant Documents and Correspondence

1. January 22, 2007, NPC Positive Conformity Determination, Baffinland Bulk Sampling Program
2. April 2, 2014 NPC NBRLUP Amendment Application Reasons for Decision from Public Review
3. March 5, 2015 NPC Conformity Officer, Negative Conformity Determination Recommendation
4. April 8, 2015 NPC Commissioners Negative Conformity Determination
5. May 21, 2015, Baffinland Letter to Minister Valcourt
6. July 13, 2015 Minister Valcourt letter to Baffinland
7. February 3, 2017, Baffinland Project Proposal for the Mary River Phase 2 Expansion Project
8. March 6, 2017, NPC letter to Baffinland
9. March 17, 2017 Baffinland request to amend the NBRLUP
10. April 7, 2017, NPC detailed Workplan and Budget to INAC
11. April 29, 2017 email from Laura Gemmal (INAC)
12. May 2, 2017, NPC email to Laura Gemmal (INAC)
13. May 5, 2017 Commissioners motion
14. May 9, 2017 Baffinland letter to NPC
15. May 17, 2017, NPC letter to Baffinland
16. June 2, 2017 Baffinland letter to NPC
17. June 30, 2017 Baffinland letter NPC
18. July 7, 2017, NPC letter to Minister of Indigenous and Northern Affairs Canada
19. July 20, 2017, Joint letter from QIA and NTI to NPC Chairman Nakashuk and INAC Minister Bennett
20. July 27, 2017 NPC letter to QIA and the NTI
21. July 28, 2017 Government of Nunavut letter to NPC

22. August 4, 2017, INAC letter to NPC.

Schedule "B": Map Of Road And New Proposed Railway

The Northern Transportation Corridor and Proposed North Railway



Schedule “C”: Recommended Steps and Timelines

If the Commissioners resolve to proceed with a written public review, subject to a later determination that one or more public hearings are required, staff propose the following timeline to meet Sections 4.5, 4.7 c), 5.1, and 5.2 of the Internal Procedure in an expedited fashion:

Date	Task	Rationale/Comment
Month 1	Commissioners consider proposed amendment and initial assessment by staff, decide to accept or reject staff recommendations. Write to the Minister pursuant to section 3.5.11 of the NBRLUP to confirm NIRB or appoint a panel to review. Mail out letters and notices to communities giving one month timeline to provide written submissions. Notice to be sent to the communities, posted in public places, and in newspapers.	The NBRLUP states that a public review is required for any proposed transportation corridor. The Minister must decide if this amendment will be a NIRB review or a panel review. NIRB or a federal panel may choose to hold a separate public review.
Month 2	Reach agreement with NIRB or panel regarding their role under Section 3.5.12 NBRLUP.	With allowance for mail delivery and any holidays, hamlets, HTOs, residents and others will be given 4 weeks to provide written comments including applications for standing. This process allows the Commissioners to gauge level of public interest in a public hearing the North Baffin planning region, and to obtain applications for standing and comments on the proposed amendment together. Note rule 23.2 of the RPHPR says interested persons must be granted standing before making representations or submitting evidence, and a direction on procedure varying that rule is recommended out of fairness to the applicant and for expediency.

Months 2 and 3	Staff will provide a report to the Commissioners summarizing submissions. Existing participants given time to comment on applications for standing, if any. Commissioners consider applications for standing and comments on those applications, then all written submissions of "participants" (both parties and interested persons granted standing).	Whether one or more Public Hearings is required and the location thereof will be determined based on the results of written submissions. Supplementary funding or reallocation of core budget may be necessary if there is a need for public hearing.
Month 3	If necessary, hold one or more public hearings on the proposed plan amendment to the NBRLUP to allow for a Milne Inlet railway and icebreaking.	First day of Public Hearing can be no sooner than one month after Notice of Public Hearing is released. Rules of Procedure require 30 days before a Public Hearing that notifications to all parties be made.