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EFFECT OF PREVIOUS POSITIVE CONFORMITY DETERMINATION

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

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

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

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

[emphasis added]

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

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

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

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

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

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

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

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

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

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

(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;

Milne Port, Eclipse Sound and Pond Inlet (Change)

Project-related shipping through Pond Inlet to Milne Inlet is not expected to meaningfully affect use of the open water by hunters in boats, although sighting vessels associated with the Project will occur. Project ore carriers and other vessels will generally stay within the middle of the waters of Pond Inlet and Eclipse Sound, staying away from the coastline. It is expected that hunters in

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

Milne Inlet Tote Road (Change)

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

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

Request for submissions

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

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

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

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

Thank you,



Brian Aglukark,
Director, Implementation

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