



NIRB File No. 08MN053

November 26, 2013

Sharon Ehaloak
Executive Director
Nunavut Planning Commission
P.O. Box 2101
Cambridge Bay, NU X0B 0C0

Sent via email: sehaloak@nunavut.ca

Re: Further Clarification for the NPC-NIRB Joint Review of the NBRLUP Transportation Corridor Application associated with Baffinland's ERP Proposal

Dear Sharon Ehaloak:

Thank you for the Nunavut Planning Commission's (NPC or 'the Commission') November 24, 2013 response to concerns raised by the Nunavut Impact Review Board (NIRB or 'the Board') in correspondence to NPC dated November 22, 2013. The Board appreciates the clarification received regarding the NPC's intentions to conduct public hearings associated with the NPC-NIRB joint review of the North Baffin Regional Land Use Plan (NBRLUP) transportation corridor application associated with Baffinland Iron Mines Corporation's (Baffinland) Early Revenue Phase (ERP) proposal for the Mary River Project (NIRB File No. 08MN053).

Although the Board will not be participating in the NPC's public hearings at the beginning of January, the NIRB supports the NPC continuing to carry out what public consultation it feels is necessary to support its role in the NBRLUP joint review process. As previously committed, the Board will continue to participate in the joint review by providing the NPC with its input regarding the transportation corridor application as facilitated through the NIRB's ongoing assessment for the ERP proposal. To ensure that both the NIRB and the NPC have a more complete understanding of the joint review process and outcomes going forward, the NIRB wishes to take this opportunity to further clarify the Board's views such that they may receive the Commission's continued consideration.

2009-2012 NPC-NIRB Joint Review for portion of Railway for the Mary River Project

In 2008 the NPC determined that the original Mary River project proposal positively conformed to the North Baffin Regional Land Use Plan, and the Commission further required Baffinland to submit an application to amend the NBRLUP for a portion of the proposed railway which was determined to constitute development of a transportation corridor (the "original transportation corridor application").

It is correct that the NIRB previously reviewed the Mary River project proposal pursuant to Article 12, Part 5 of the Nunavut Land Claims Agreement (NLCA) and also that, concurrently with this NIRB Part 5 Review process the NPC and NIRB coordinated a joint review of the transportation corridor application for a portion of the proposed railway for the Mary River project pursuant to the relevant provision of the NBRLUP. The NPC and the NIRB worked collaboratively to develop a structured process to evaluate Baffinland's transportation corridor application against the provisions of the NBRLUP while not unduly hindering the NIRB's Part 5 Review for the entire Mary River project proposal. While the NPC-NIRB joint review process for the original transportation corridor application was coordinated with the NIRB Part 5 Review process, in conversations with the NPC the NIRB staff did repeatedly note that this land use planning process was designed to provide the Commission with information required to make a determination whether to amend the North Baffin Regional Land Use Plan and, as such, was best led by the NPC with inputs at appropriate intervals from the NIRB. At the time the NIRB further noted that its inputs into this joint review process would be derived from its ongoing public Part 5 Review process, which would conclude with the issuance of a Final Hearing Report. This report was issued by the NIRB on September 14, 2012 and provides a detailed overview of the procedural history for the NPC-NIRB joint review process in Section 1.8, pages 16-20.¹

The NPC previously committed to concluding the NBRLUP joint review for the original transportation corridor application following issuance of the NIRB's Project Certificate for the Mary River Project. Although the NIRB's Project Certificate was issued on December 28, 2012, the NPC has yet to conclude that joint review by either bringing forward a request to amend the NBRLUP or confirming that no such amendment request will be brought forward. This point was raised in the Board's most recent correspondence to the NPC with clarification requested from the NPC regarding its currently anticipated timeline for communicating a decision as to whether or not an NBRLUP amendment is required for the original Mary River project. The NIRB looks forward to receiving a response from the NPC on this point.

In making this clarification request to the NPC, the Board is of the view that a conclusion to the first joint review of a transportation corridor application conducted under the provisions of the NBRLUP would greatly assist all parties with understanding the objectives and outcome associated with the joint review process.

Current NPC-NIRB Joint Review for Tote Road and Shipping for the ERP Proposal

More recently, in 2013 the NPC determined that Baffinland's proposed development of the Milne Inlet Tote Road and shipping through Milne Inlet associated with the Early Revenue Phase proposal required a new application to amend the NBRLUP, the "current transportation corridor application".

In responding to the NIRB's concerns for the recently announced public hearings scheduled by the NPC for the NPC-NIRB joint review of Baffinland's current transportation corridor application, the Commission stated the following:

¹ The Final Hearing Report for the NIRB's Review of Baffinland Iron Mines Corporation's Mary River project proposal (NIRB File No. 08MN053) can be accessed online from the NIRB's public registry at the following location: <http://ftp.nirb.ca/02-REVIEWS/COMPLETED%20REVIEWS/08MN053-BAFFINLAND%20MARY%20RIVER/2-REVIEW/10-FINAL%20HEARING%20DECISION/>

“At no point did the NPC believe it had been conclusively decided that the public review process would be limited to information sessions, as is the practice of the NIRB. In the NPC’s opinion this do not [sic] provide sufficient opportunity to the public to make representations on such an important matter...

...the NPC felt the information sessions the NIRB conducted for the railway, which merely informed the public that the NPC and the NIRB were reviewing the amendment application, did not provide the same opportunity for any Inuit, other resident of Nunavut who is potentially affected by the Amendment Application at issue, or the public to meaningfully participate in the potential amendment of the North Baffin Regional Land Use Plan (NBRLUP). The NPC is of the view that greater public involvement in the review of the ERP is necessary to satisfy the NPC’s express and implied obligations in the NLCA to act in the public interest.”

To be clear, the NIRB’s intended inputs into the NPC-NIRB joint review of the current transportation corridor application was communicated to the NPC, all parties and the public on September 23, 2013, and has been coordinated with the NIRB’s assessment of the entire Early Revenue Phase proposal pursuant to the NLCA, Article 12, Section 12.8.2. These inputs include information obtained through multiple public commenting opportunities, community information sessions, technical meetings and public hearings, efforts which require the NIRB to regularly conduct public outreach including process explanations and updates and posting of submissions to an online public registry for the benefit of all parties. These approaches to gathering community information are consistent with the NIRB’s method for participation in the joint review process for the original transportation corridor application through the 2009-2012 period. The suggestion that the NIRB’s input into the joint review process through its ongoing assessment of the ERP proposal under the NLCA Article 12 would be based solely on NIRB’s participation in standalone community information sessions or the public hearings recently scheduled by the NPC does not accurately capture the comprehensive and inclusive actions taken by the NIRB during the consideration of the current transportation corridor application to date, as well as during the NIRB’s consideration of the original transportation corridor application.

With respect to the conduct of NPC’s proposed public hearings, the NIRB appreciates that the NPC has recently developed Rules of Procedure to add clarity and structure to its processes. While the NIRB did receive a copy of the NPC’s Rules of Procedure on November 14, 2013 the Board had not been expressly invited to comment on the Rules (as contemplated in Section 3.2 of the Rules when the Rules were intended to apply to a joint review process), had not had the opportunity to review this document in detail and was unaware of their intended application to the NPC-NIRB joint review process until receipt of the NPC’s public notice on November 18, 2013 which announced public hearings which would be conducted pursuant to these Rules. With the significant deviation from previous processes announced by the NPC at the time of its public notice of hearings, the NIRB was left without an understanding of key procedural aspects of the NPC’s planned hearings including the expected role of the NIRB, the intended outcome of the process, the intentions with respect to how information gathered at the NPC hearings will be expected to support the activities and decision-making associated with the joint review and the likely timing of the NPC’s conclusion of the joint review. As emphasized in the NIRB’s previous correspondence, these procedural questions are matters of significant consequence to the NIRB as we attempt to determine the nature, extent and overall utility of the NIRB’s contribution to the joint review.

In making the inquiries of the NPC in our correspondence of November 22 and advising that the NIRB would be unable to participate or agree to apply the NPC's newly adopted rules of procedure to public hearings in which the NIRB is an active participant, the NIRB was not suggesting that the NPC could not conduct, as the NPC sees fit, the Commission's own process, governed by the practices or rules of procedure that the NPC determines are appropriate. The NIRB recognizes that the NPC occupies the lead role in the land use planning process and as such is entitled to establish its own procedures for carrying out this function, including the development of Rules of Procedure pursuant to NLCA Section 11.4.16, much as the NIRB operates under its own Rules of Procedure established pursuant to NLCA Section 12.2.23. Rather, the NIRB's response was to indicate, in a transparent manner to the NPC, the public and all parties involved in the review of the current transportation corridor application that the NIRB will be unable to participate as the Board has been left without an understanding of key procedural aspects of the NPC's planned hearings. As it was unclear to the NIRB what the Board's expected role in the NPC's public hearings was to be in any event, the NIRB had no expectation that the NPC would be unable to continue with its plans if the NIRB chose not to participate, or would otherwise suspend the NPC's own consideration process associated with the current transportation corridor application.

Further, as the NIRB recognizes the NPC's ability to set procedure for its own processes, the NIRB's earlier correspondence provided no comment on the extent to which the Commission's new rules should govern its planned hearings; it was an indication that the NIRB cannot agree to be bound in a jointly conducted process by rules of procedure that are not the result of consultation between the parties and with the public. In addition, given the NPC's limited distribution of notice of its scheduled hearings on November 18, 2013 and follow up discussions with the NPC staff, the NIRB felt it necessary to draw the Commission's attention to the Board's specific concerns regarding the provision of notice to potentially affected parties and the establishment of deadlines for written submissions.

Conclusion

The NIRB appreciates that the NPC's procedures and processes for implementing the provisions of the NBRLUP are established at the discretion of the Commission and may continue to develop and be modified as considered necessary and appropriate by the Commission. The Board acknowledges the NPC's lead role in the NPC-NIRB joint review process under the NBRLUP and supports the Commission in its efforts to conduct the type of community consultation the NPC considers necessary, however, the NIRB does not intend to participate in the NPC's upcoming public hearings. The NIRB will however continue to participate in the joint review process by continuing with the process and inputs outlined in our September 23, 2013 letter in fulfillment of the Board's obligations under the NPC-NIRB joint review process. Further, the Board has no objection to the Commission continuing to structure its associated procedures as the NPC determines to be appropriate for its purposes. The Board has recently shared its email distribution list for the Mary River file with the NPC and the NIRB looks forward to continued cooperation for the purposes of promoting awareness and engagement in these public processes whether led by the NPC or by the NIRB.

In closing, the Board remains responsible for providing the NPC with its assessment input regarding the transportation corridor application associated with Baffinland's ERP proposal and the criteria established by the NBRLUP for the joint review of transportation corridor

applications. To this end, as previously communicated, the Board reaffirms its intention to solicit input from interested parties relevant to the NBRLUP criteria and Baffinland's application where possible through the NIRB's ongoing assessment of the ERP proposal under NLCA Section 12.8.2, including at the upcoming Technical Meetings in Iqaluit, November 26-28, 2013.

Should you have any questions or require further clarification regarding the issues discussed in this correspondence, please contact the undersigned via email at rbarry@nirb.ca at your convenience.

Sincerely,

A handwritten signature in black ink that reads "Ryan Barry". The signature is written in a cursive style with a long horizontal line extending to the right from the end of the name.

Ryan Barry
Executive Director
Nunavut Impact Review Board

cc: The Honorable Bernard Valcourt, Minister of Aboriginal Affairs and Northern Development
Erik Madsen, Baffinland Iron Mines Corporation
Brian Aglukark, Nunavut Planning Commission
Mary River Distribution List