

NUNAVUT PLANNING COMMISSION

**NORTH BAFFIN REGIONAL LAND USE PLAN AMENDMENT APPLICATION –
REASONS FOR DECISION FROM PUBLIC REVIEW**

APPLICANT:	Baffinland Iron Mines Corporation
PROJECT:	Early Revenue Phase
FILE NO(S):	DFO File NU-07-0050 NIRB File # 08MN053
PLANING REGION(S):	North Baffin
APPLICABLE LAND USE PLAN(S):	North Baffin Regional Land Use Plan (NBRLUP) ¹
DATE OF DECISION:	April 2, 2014
SUMMARY OF DECISION:	The NPC will draft an amendment to the NBRLUP showing a transportation corridor to recommend to the Ministers.

NOTE

The NPC's public record of the public review is available online at:

http://www.nunavut.ca/en/approved_plans/amendments

Documents submitted to the Nunavut Impact Review Board that are relevant to the NPC's public review are available on the NIRB's public registry at:

<http://ftp.nirb.ca/03-MONITORING/08MN053-MARY%20RIVER%20IRON%20MINE/01-PROJECT%20CERTIFICATE/04-AMENDMENTS/ERP/>

¹ Nunavut Planning Commission, North Baffin Regional Land Use Plan, (June 20 2000) [NBRLUP].

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I. Mandate of the Nunavut Planning Commission (NPC):

A. Mandate Under Nunavut Land Claims Agreement

1. Land use planning plays a critical role in the development of Nunavut, and is distinct from the environmental impact assessment process. Section 11.3.2 of the Nunavut Land Claims Agreement (NLCA)² explains that land use plans “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.” It is also important to note that Article 11 of the NLCA specifies in section 11.1.2 that the word “land’ includes water and resources including wildlife”.
2. Under section 11.4.1 of the NLCA, the NPC’s major responsibilities are 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.
3. Section 11.2.1 of the NLCA reads as follows:

² Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen In Right of Canada, Signed May 25, 1993 [NLCA].

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.

4. Section 11.3.2 of the NLCA says that land use plans “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.”

5. Under section 11.5.10 of the NLCA the NPC has a mandate to carry out conformity determinations of project proposals:

11.5.10 The NPC shall review all applications for project proposals. Upon receipt and review of a project proposal, the NPC or members thereof or officers reporting to the NPC shall:

- (a) determine whether the project proposals are in conformity with plans; and
- (b) forward the project proposals with its determination and any recommendations to the appropriate federal and territorial agencies.

The land use plan may make provision for the NPC to approve minor variances.

6. The term “project proposal” is defined in Article 1 of the NLCA as follows:

“project proposal” means a physical work that a proponent proposes to construct, operate, modify, decommission, abandon or otherwise carry out, or a physical activity that a proponent proposes to undertake or otherwise carry out, such work or activity being within the Nunavut Settlement Area, except as provided in Section 12.11.1;

7. 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 NLCA.

B. Review Requirements under Applicable Land Use Plans

8. 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, section 3.5.11 of the NBRLUP requires a detailed application to amend the relevant land use plan:

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]

9. If an application under section 3.5.11 is made, section 3.5.12 of the NBRLUP requires a public review of a proposed corridor with the NIRB or an environmental assessment panel appointed under article 12.4.7 of the NLCA. At the conclusion of that joint 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.

C. Conduct of public reviews under NPC By-laws, Rules, and Policies

10. In accordance with the NLCA, section 9.4 of the NPC’s *Consolidated By-laws*, section CEDR 1.0 of the *NPC’s Governance Policies*, and the NPC’s *Rules of Procedure for Public Hearings and Public Reviews* (RPHPR) enacted by the Commissioners as an oversight board, the operational activities of the NPC, including drafting of land use plans, conformity determinations, and plan amendments for transportation corridors, have been delegated to the Executive Director of the NPC and its officers and employees who have the necessary skills, knowledge, and expertise to make land use planning decisions.
11. The NPC’s RPHPR broadly defines 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.

II. NPC's Review of the Amendment Application

A. Background of Amendment Application

12. A project certificate was issued for the above-noted project in December of 2012. The proponent, Baffinland Iron Mines Corporation (Baffinland), asked the Nunavut Impact Review Board (NIRB) to reconsider the Mary River Project under Sections 12.8.2 and 12.8.3 of the Nunavut Land Claims Agreement (NLCA). As the ERP proposed physical works and physical activities not contemplated in the project proposals for the Mary River Project previously submitted to the NPC, the NPC advised NIRB and the proponent on February 7, 2013 that a new conformity determination was required. On February 11, 2013, NIRB confirmed that it would require a conformity determination by the NPC prior to initiating the NIRB's reconsideration process. On April 3, 2013, the Honourable Minister of Aboriginal Affairs and Northern Development Canada Bernard Valcourt wrote to the NIRB suggesting that the NIRB reconsideration process proceed concurrently with the NPC conformity determination process.
13. On June 12, 2013 Baffinland wrote directly to the NPC to request a conformity determination. Notwithstanding section 11.5.10 of the NLCA which requires that all project proposals be sent directly to the NPC for conformity

determinations where a land use plan exists, until the *Nunavut Planning and Project Assessment Act* comes into force the NPC continues to receive project proposals from government agencies in receipt of applications for licences, permits or other authorizations rather than from proponents themselves. On June 24, 2013, the NPC received an application from Fisheries and Oceans Canada (DFO) requesting a conformity determination for the ERP and forwarding the ERP project proposal for the NPC's consideration. On July 5, 2013, the NPC wrote to Baffinland attaching a conformity questionnaire,³ which Baffinland completed on July 9, 2013.⁴

14. The NPC invited the proponent to make submissions on several issues on July 30, 2013, including whether changes to the purpose or intensity of the use of physical works and physical activities may constitute a "development" of a transportation or communications corridor requiring an application to amend the NBRLUP.⁵ Baffinland provided its detailed submission on August 2, 2013.⁶

³ Exhibit 1, Letter from C. Tickner, Senior Planner, NPC, to O. Curran, Baffinland Iron Mines Corporation, Re: DFO File NU-07-0050 NIRB File 08MN053 Baffinland Iron Mine Early Revenue Phase (ERP) Curran Jun 13 CR (July 5, 2013) [Exhibit 1]; and Exhibit 2, Nunavut Planning Commission Application to Determine Conformity with the North Baffin Regional Land Use Plan Application # DFO File NU-07-0050 NIRB File 08MN053 Baffinland Iron Mine Early Revenue Phase (ERP) Curran Jun 13 Que [Exhibit 2].

⁴ Exhibit 12, Letter from O. Curran, Director Sustainable Development, Baffinland Iron Mines, to B. Aglukark, Re: DFO File NU-07 NIRB File 08MN053 Baffinland Iron Mines Early Revenue Phase, with attachments (July 9, 2013) [Exhibit 12].

⁵ Exhibit 13, Letter from B. Aglukark to O. Curran, Re: Request for Submissions on Possible Development of Transportation Corridor and the General Application of the North Baffin Regional Land Use Plan to the Mary River Project Early Revenue Phase DFO File NU-07-0050 NIRB File # 08MN053 Baffinland Iron Mine Early Revenue Phase (July 30, 2013) [Exhibit 13].

⁶ Exhibit 14, Letter from E. Madsen, Vice President, Sustainable Development, Health, Safety & Environment, Baffinland Iron Mines Corporation, to B. Aglukark, Re: Application to Determine Conformity with the North Baffin Regional Land Use Plan in connection with the Mary River Early Revenue Phase – DFO File NU-07, NIRB File # 08MN053, attaching Submissions of Baffinland Iron

NPC considered these submissions as well as the proponent's detailed project proposals, correspondence, application to determine conformity questionnaire dated July 9, 2013, and NPC's prior conformity determinations for the Mary River Project.

15. On August 6, 2013 the NPC requested that Baffinland submit an application for the development of a transportation corridor.⁷ Baffinland submitted the requested application on August 9, 2013, noting that the application had been the subject of prior correspondence and submissions.⁸ On August 13, 2013 the NPC issued a conditional conformity determination so that a public review of the proposed development of a transportation corridor under section 3.5.12 of the NBRLUP could occur, stating: "The project proposal conditionally conforms with the NBRLUP, provided that (1) the joint review process for the proposed transportation corridor provided in section 3.5.12 of the NBRLUP is completed, (2) the NPC makes a recommendation to the ministers on whether to amend the plan, and (3) the Ministers determine whether to amend the plan."⁹ The Commission and the Nunavut Impact Review Board, referred to as the Board, then began discussing a public review process.

Mines Corporation in response to the Request for Submissions issued by the Nunavut Planning Commission on July 30, 2013 (August 2, 2013) [Exhibit 14].

⁷ Exhibit 6, Letter from B. Aglukark to O. Curran, Re: Request for an Application for the Development of a Transportation Corridor -- DFO File NU-07 NIRB File # 08MN053 Baffinland Iron Mine Early Revenue Phase (August 6 2013) [Exhibit 6].

⁸ Exhibit 7, Letter from E. Madsen to B. Aglukark, Re: Mary River Project – Early Revenue Phase, enclosing Revised Application to Determine Conformity dated August 9, 2013 (August 9, 2013) [Exhibit 7].

⁹ Exhibit 15, Letter from B. Aglukark to A. Hanson, Director, Technical Services, NIRB, G. Williston, Habitat Management Biologist, Fisheries and Oceans Canada, and O. Curran, Re: Joint Review of

16. On October 11, 2013, the NPC requested that Baffinland provide further information relevant to Appendices J and K of the NBRLUP and suggested that it consider providing a concise summary of relevant information.¹⁰ On November 8, 2013 Baffinland provided the requested information in its *Summary of Information Provided to the NPC in Accordance with Appendices J and K of the NBRLUP (Summary of Information)*.¹¹ Baffinland's *Summary of Information* also included the following caveat:

While this Summary of Information attempts to provide a helpful reference to the relevant information in the ERP Addendum, it should be remembered that **the Summary of Information may omit to refer to some relevant information. For the purposes of the ERP review, by NIRB and by the NPC, Baffinland relies on all of the information in the ERP Addendum**, and any additional supplementary information which may be presented at technical meetings, the final hearing and at any other stage of the review.

[emphasis added]

17. The NPC notes that unlike the process used for the Mary River Project's proposed railway South to Steensby Inlet, where the NPC attended the NIRB's sessions, the NIRB asked the NPC to lead its own review of the ERP in parallel with the NIRB's public review. To conduct the public review, on November 14,

Application to Develop a Corridor, Project Proposal for Early Revenue Phase (ERP) of Mary River Project, DFO File NU-07, NIRB File 08MN053 (August 13, 2013) [Exhibit 15].

¹⁰ Exhibit 9, Letter from B. Aglukark to O. Curran, Re: Joint Review of Transportation Corridor under North Baffin Regional Land Use Plan (October 11, 2013) [Exhibit 9].

¹¹ Exhibit 10, Letter from O. Curran to B. Aglukark, Re: Joint Review of Transportation Corridor under North Baffin Regional Land Use Plan, enclosing Baffinland Early Revenue Phase Summary of Information Provided to the NPC in Accordance with Appendices J and K of the NBRLUP (November 8, 2013) [Exhibit 10, or *Summary of Information*]

2013 the NPC enacted *Rules of Procedure for Public Hearings and Public Reviews* (RPHPR) to govern the process we are now conducting. On November 18, 2013 the NPC issued a first public notice of the public review in an advertisement. On November 22, 2013 the NIRB decided to let the NPC conduct these public hearings alone as part of the public review by both the NPC and the NIRB. The NIRB indicated it would continue to solicit information and documents for its part of the public review, and the NPC will consider the NIRB's Final Report to the Minister and will allow the participants in the NPC's public review to comment on it to the NPC before making a decision on what recommendation to make on the proposed amendment.

18. On November 25, 2013 the NPC issued a subsequent amendment to the first public notice, giving further details to parties potentially affected by the Amendment Application, extending the time for becoming a participant, and setting out a schedule of time limits.¹² The NPC did not receive any applications for a grant of standing by interested persons, and received 11 notices of an intention to participate by parties. The NPC issued Directions on Procedure to all participants on December 15,¹³ and 27, 2013.¹⁴ Between

¹² Nunavut Planning Commission, *Notice of Public Review, First Amendment* (November 25, 2013).

¹³ Nunavut Planning Commission, *Public Review—Directions on Procedure* (December 15, 2013).

¹⁴ Nunavut Planning Commission, *Public Review—Directions on Procedure: Second Direction on Procedure* (December 27, 2013).

January 7 and January 10, 2014, the NPC held public hearings in Clyde River, Grise Fiord, Resolute, Arctic Bay, and Pond Inlet.¹⁵

19. The NPC allowed non-participants to submit comments in writing until 5:00 p.m. January 15, 2014, although no comments were submitted. Participants were asked to submit written arguments on the evidence heard in the oral hearings by January 31, 2014. Baffinland made submissions directly to the NPC (Baffinland January 31, 2014 Submissions),¹⁶ and submissions to the NIRB relating to the NPC's review were referred to the NPC by the NIRB on February 24, 2014. As the NIRB was also conducting a review under section 3.5.12 of the NBRLUP, the NPC considered information submitted to the NIRB that was relevant to the NPC's review, and reviewed the technical submissions and the final submissions to the NIRB by the World Wildlife Fund (WWF), Parks Canada, Transport Canada, and QIA. Parks Canada's submissions to the NIRB dated October 18, 2013 also fully supported the analyses, comments, concerns and conclusions by the Government of Nunavut (GN) on the issue of caribou, Environment Canada (EC) on the issues of seabirds and marine mammals, and

¹⁵ Exhibit 27, Nunavut Planning Commission, Public Hearing January 7th, 2014 – Clyde River [Exhibit 27]; Exhibit 28, Nunavut Planning Commission, Public Hearing January 8th, 2014 – Grise Fiord, (Questions and Answers period only) [Exhibit 28]; Exhibit 29, Nunavut Planning Commission, Public Hearing January 8th, 2014 – Resolute Bay, (Questions and Answers period only) [Exhibit 29]; Exhibit 30, Nunavut Planning Commission Public Hearing January 9th, 2014 – Arctic Bay (Questions and Answers period only) [Exhibit 30]; Exhibit 31, Nunavut Planning Commission Public Hearing January 10th, 2014 – Pond Inlet Questions and Answers period only) [Exhibit 31].

¹⁶ Exhibit 33, Baffinland Iron Mines Corporation, *Nunavut Planning Commission Conditional Conformity Review of the Early Revenue Phase of the Mary River Project under the North Baffin Regional Land Use Plan Submissions of Baffinland Iron Mines Corporation* (January 31, 2014), including schedules [Baffinland January 31, 2014 Submissions].

DFO on the issues of marine mammals and marine shipping; the NPC considered those submissions adopted by Parks Canada as well.

20. On March 17, 2014 the NIRB's Final Report to the Minister was made available to the public and the NPC. Participants were given until 5:00 p.m. Eastern Time on the 7th day after the release of the NIRB's Final Report to make written arguments to the NPC to draw to the NPC's attention any parts of the NIRB Final Report they say are relevant to the NPC public review, and to make any further comments or representations thereon. The NPC received submissions from Baffinland¹⁷ and Transport Canada,¹⁸ and have considered those in reaching its decision.
21. On March 26, 2014, the NPC also directed questions to several participants, including Parks Canada, Transport Canada, Baffinland, and QIA. Those questions were provided to all participants to the public review that had provided the NPC with an address for service. Parks Canada,¹⁹ Transport

¹⁷ Exhibit 36, Letter from E. Madsen to S. Ehaloak, Executive Director, NPC, and B. Aglukark, Re: Conditional Conformity Review of the Early Revenue Phase ("ERP") of the Mary River Project (March 24, 2014), explaining Baffinland's position that the ERP does not propose the development of any new corridors and that no amendment to the NBRLUP should be required, and that if an amendment is required, that its application meets the requirements of Appendices J and K of the NBRLUP, and attaching a table referencing the NIRB's terms and conditions which Baffinland says are relevant to the NPC's review.

¹⁸ Exhibit 37, Letter from M. Taylor, Regional Director General, Prairie and Northern Region, Transport Canada, to B. Aglukark, Re: Transport Canada Response to the Nunavut Planning Commission's (NPC) Request for Comments on the Nunavut Impact Review Board's Mary River Early Revenue Phase Final Public Hearing Report and NPC's Four Additional Marine-Shipping Questions (March 26, 2014) [Exhibit 37].

¹⁹ Exhibit 38, Letter from N. Anilniliak, Nunavut Field Unit Superintendent, Parks Canada, to B. Aglukark (March 31, 2014) [Exhibit 38].

Canada,²⁰ Baffinland,²¹ and QIA²² all provided responses, which the NPC considered.

22. The NPC considered the written material filed by the participants on the record, oral and written submissions from the participants, and the information and views expressed by the people participating at the public hearings having provided Baffinland an opportunity to respond to those comments at the hearings themselves.

B. Issues to Determine and Factors

23. On December 20, 2013 the NPC published the *Scope of Matters to be Considered in the Public Review of Baffinland Iron Mine Corporations (BIMC) Early Revenue Phase (ERP) for the Mary River Project* pursuant to Rule 25.1 of the RPHPR (*Scope of Matters*).²³ The issues identified by the NPC were:

1. Whether the ERP for the Mary River Project meets the information requirements of Appendices J and K of the NBRLUP, and
2. Whether to recommend an amendment to the land use plan based on the factors referred to in Section 7 of the RPHPR, including for the purposes of Rule 7.3(d), chapters 1 and 3 of the NBRLUP.

²⁰ Exhibit 37, *supra* note 18.

²¹ Exhibit 39, e-mail from O. Curran to C. Tickner, RE: Questions For Participants In Baffinland Early Revenue Phase Public Review Process (March 27, 2014)

²² Exhibit 40, e-mail from S. Bathory to C. Tickner, RE: Questions For Participants In Baffinland Early Revenue Phase Public Review Process (March 28, 2014) with attachments.

²³ Nunavut Planning Commission, *Scope of Matters to be Considered in the Public Review of Baffinland Iron Mine Corporations (BIMC) Early Revenue Phase (ERP) for the Mary River Project* (December 19, 2013) [*Scope of Matters*].

24. Baffinland also requested on December 19, 2013 that the NPC consider “the underlying issue of the interpretation of sections 3.5.10, 3.5.11 and 3.5.12 of the NBRLUP, which has to be considered in determining whether an amendment is required, and if so, the scope and nature of the amendment.”²⁴ Baffinland made further submissions on that point in the Baffinland January 31, 2014 Submissions. The NPC addresses this issue below.

C. Summary of Evidence and Submissions by Parties

25. The NPC considered all relevant information collected through its public review process, including all relevant information provided to the NPC through the NIRB’s joint public review under section 3.5.12 of the NBRLUP. A brief summary of some relevant evidence that aided the NPC in reaching its decision on the issues summarized above is provided below.

26. The NPC also wishes to thank the NIRB for its efforts to identify relevant information obtained through its process in its letter to the NPC on November 14, 2013 and in its report to the NPC dated February 24, 2014, attached as Appendix “A” to the NIRB’s Final Hearing Report of March 18, 2014.²⁵ As the NPC and NIRB conducted a joint public review of the proposed transportation corridor under section 3.5.11 and 3.5.12 of the NBRLUP, the NPC considered

²⁴ Letter from O. Curran to B. Aglukark, Re: Procedural Matters and Filings Relating to the NPC’s Review of the Transportation Corridor as part of Baffinland’s Early Revenue Phase (“ERP”) for the Mary River Project (December 19, 2013).

²⁵ Exhibit 35, Nunavut Impact Review Board, *Public Hearing Report, Mary River Project: Early Revenue Phase Proposal*, NIRB File No. 08MN053 (March 17, 2014) online: <<http://ftp.nirb.ca/03-MONITORING/08MN053-MARY%20RIVER%20IRON%20MINE/01-PROJECT%20CERTIFICATE/04-AMENDMENTS/ERP/08-DECISION>> [NIRB Final Report].

information submitted to the NIRB that was relevant to the land use planning aspects of the transportation corridor from the perspective of whether the guidelines in Appendices J and K have been met, and whether to recommend an amendment, rather than whether the ERP should be allowed to proceed and on what conditions as was considered by the NIRB. This approach was at least in part necessitated by Baffinland's reliance on the Final Environmental Impact Statement (FEIS) and the Addendum to the FEIS for the Early Revenue Phase (ERP Addendum) as the basis of its submissions to the NPC.²⁶

27. Baffinland's *Summary of Information*,²⁷ while expressly not as comprehensive as the FEIS and ERP Addendum, provides a useful guide to the information relevant to the NPC's public review of the amendment application contained in those documents. As noted above, the ERP Addendum proposes a number of additional works and activities not previously reviewed by the NPC in its conformity determination of April 2008. The *Summary of Information* lists new physical activities as follows:

a. Mine Site:

- i. Loading of ore into trucks; and
- ii. Ore haulage truck fleet and maintenance facilities.

b. Tote Road:

- i. Haulage of ore at an average of 76 ore truck transits from the Mine Site to Milne Port per day along the Tote Road.

²⁶ See Exhibit 9, *supra* note 10, and Exhibit 10, *supra* note 11.

²⁷ Exhibit 10, *supra* note 11.

c. Milne Port:

i. Ore stockpiling and loading into ships.

d. Marine shipment of ore from Milne Port:

i. 55 approximate transits of ore carriers (Panamax, Supramax, and Post Panamax) from Milne Port per year during the open water season.

28. Baffinland says in the *Summary of Information* that the proposed activities will last for the anticipated 21-year life of the Mary River Project, although it clarified in the public review hearing at Resolute Bay on January 8, 2014 that the 21-year term being discussed in the public review is specifically for one deposit out of nine deposits at the Mary River mine site.

29. The ERP Addendum also proposes physical works relevant to the NPC's review. With respect to the Milne Inlet Tote Road, Volume 3 of the ERP Addendum explains proposed upgrades to the road. These include realignment of the road to bypass four sea container crossings, and new bridges, designed to allow the 190 tonne (gross) ore truck loads that would be transporting iron ore from the mine to the Milne Inlet stockpile year round.²⁸

The ERP Addendum reads at section 2.2 of Volume 3:

The Milne Inlet Tote Road was upgraded during the bulk sampling program in 2008 from a winter road to an all-season road adequate for transporting equipment and ore using 45 t trucks. The upgraded road follows the original alignment as constructed in the 1960s. Upgrades to the road will be **completed as per the Approved Project.** These upgrades will support **the level of traffic proposed with year**

²⁸ Baffinland Iron Mines Corporation, *Early Revenue Phase: Addendum to Final Environmental Impact Statement* [ERP Addendum], Vol. 3, Section 2.2 at p. 13.

round ore haulage from the Mine Site to Milne Port using approximately 150 t trucks.

[emphasis added]

30. Baffinland says that the upgrades to the Milne Inlet Tote Road were previously approved by the NPC as conforming with the NBRLUP for the bulk sampling program.²⁹ Baffinland's submissions to the NPC dated August 2, 2013 quoted the NPC's January 22, 2007 conformity determination as grounds that the previously "proposed improvements of the existing tote road from Milne Inlet to the Mary River camp site does not fall with-in the terms of a proposal for a development of a transportation corridor."³⁰ However, for context, the NPC's January 22, 2007 conformity determination for Baffinland's previous bulk sampling program related to the Mary River Project, included in Baffinland's August 2, 2013 submission,³¹ said in full:

Note – This project proposal includes research on options relating to alternative transportation / communications routes. **As a proposal to conduct research, it does not constitute a proposal to *develop* a transportation and / or communications corridor.** This positive conformity determination for research activities **does not constitute a positive conformity determination with respect to development of a corridor.**

²⁹ See e.g. Exhibit 10, *supra* note 11, at p. 7; Exhibit 12, *supra* note 4, at p. 2; Exhibit 14, *supra* note 5, at p. 14.

³⁰ Exhibit 14, *supra* note 6, at p. 3.

³¹ *Ibid.*

And, the proposed improvements of the existing tote road from Milne Inlet to the Mary River camp site does not fall with-in the terms of a proposal for a development of a transportation corridor.³²

[italics in original, bold emphasis added]

Both the improvements to the Milne Inlet Tote Road and shipping of supplies and ore sample through Milne Inlet were included in the NPC's determination that these constituted research activities.

31. Furthermore, the ERP Addendum Volume 6 – Terrestrial Environments, under section 2.3.2 Potential Effects and Proposed Mitigation also clarifies that the previous upgrades to the Milne Inlet Tote Road reviewed by the NPC in 2007 were temporary, just sufficient to move the bulk sample, and that the road would revert back to winter-only usage:

Milne Inlet Tote Road (Change)

The Milne Inlet Tote Road was initially developed in the 1960s as a **track**. The road was upgraded to all-season capability in 2007–2008 to make the road accessible for conventional highway tri-axle trucks with pup trailers to haul the bulk sample. **At that time, and as indicated in the Definitive Feasibility Study (Aker Kvaerner 2008), upgrades were intended to be temporary and the road was to revert back to use as a winter road only.** Because of the limited duration for use of the road, the upgrades were designed to be **just sufficient to complete the task of moving the bulk sample**. The upgrades were completed primarily to address the following issues;

...³³

³² *Ibid.*, at Schedule 1 “Letter from R. Suluk, Regional Planner, to Mr. Howell, Ms. Beaulieu, Mr. Audia, Re: INAC # N2006C0036, NWB # 2BE-MRY 0406, QIA # Q05L2C14, DFO- Mary River Project, Study of Port location and possible transportation corridor & Bulk Sampling Proposal” (January 22, 2007).

³³ ERP Addendum, *supra* note 28, Vol. 6, Section 2.3.2 at p. 4 – 5.

[emphasis added]

The NPC must consider whether these upgrades to the Milne Inlet Tote Road to a permanent all-season road require an amendment to the NBRLUP for the ERP Addendum to conform to the NBRLUP. The NPC will address this issue in its analysis below.

32. With respect to Milne Inlet, the ERP Addendum describes the physical works that will enable the proposed transportation of ore via Milne Inlet to European markets. Volume 1 of the ERP Addendum summarizes:

Milne Port will be fully developed for the ERP. The site will include a floating freight dock, and ore dock, a 3.5 million tonnes ore stockpile, multiple laydown areas, camps and sewage treatment facilities, fuel tank farm, and miscellaneous warehouses and administrative buildings.³⁴

33. A more detailed description in ERP Addendum Volume 1 also describes a fixed reclaim conveyor to transport ore from the stockpile to the ship loader:

Once the Project Certificate is amended by the NIRB, Baffinland will proceed with the ore dock construction and the development of the ore stockpile and reclaim area (expected in 2014), which are the essential infrastructure required for ore shipment.

An ore stockpile will be constructed at Milne Port to receive ore year-round. **Mobile stacking and reclaim equipment will be used, except for a fixed reclaim conveyor that will be installed from the stockpile to the ship loader.**

An ore dock will be constructed from sheet piling and a ship loader will be installed to load ore carriers during the open-water season.³⁵

³⁴ *Ibid.*, Vol. 1, Section 1.7 at p. 5.

³⁵ *Ibid.*, Vol. 1, Section 2.3.1 at p. 21.

34. ERP Addendum Volume 3, section 2.3.4 describes the Stockpile Reclaim at Milne Port as follows:

Front end loaders will be used to reclaim the iron ore from the stockpiles. The reclaim belt will be installed between and parallel to the two rows of longitudinal stock piles. Belt scales will be installed on the transfer conveyors and product samplers will be installed on each transfer conveyor for quality control purposes.

The dock complex will be equipped with truss supported belt conveyors, with catwalks on one side, mounted on the causeway leading to the dock and a ship loading assembly on the ore dock, perpendicular to the shore. These conveyors will receive iron ore from the feed conveyors discharging at the land end of this dock facility. Full covers over the conveyors will minimize dusting.³⁶

Although this description does not provide the precise dimensions of the proposed stockpile reclaim system, the diagrams of the Milne Port Layout provided by Baffinland appear to show the length of the reclaim belt as being just under 1 kilometre in length from one end to the fixed ore dock.³⁷

Baffinland explains the Milne Port would function with the Milne Inlet Tote Road as “a key transportation hub” and an “essential infrastructure required for ore shipment.”³⁸ The NPC must consider whether these new physical works are themselves a “transportation corridor” for which an amendment of the NBRLUP would be required for the ERP Addendum to conform to the NBRLUP. The NPC will address this issue in its analysis below.

³⁶ *Ibid.*, Vol. 3, Section 2.3.4 at p. 18 – 19.

³⁷ *Ibid.*, at Vol. 1, Figure 1-2.2; reproduced at NIRB Final Report, *supra* note 17, at Figure 3.

³⁸ Exhibit 11, Letter from E. Madsen to B. Aglukark, Re: Mary River Project – Early Revenue Phase (June 12, 2013), including attachments, at Attachment #1 Mary River Project: Early Revenue Phase Project Proposal for Nunavut Planning Commission Conformity Review at p. 11.

35. Baffinland also recognizes:

Pond Inlet is geographically the closest community to the Mary River Mine Site, located approximately 160 km northeast of Mary River. Many residents rely on hunting in the marine environment of Eclipse Sound and Milne Inlet and caribou hunting through the Mary River area. Pond Inlet has the closest land use, historical, and ecosystemic ties to the Mary River area.³⁹

36. The NBRLUP expressly states: “the NPC does not support year-round Arctic shipping.”⁴⁰ Baffinland is clear that, consistent with the NBRLUP, no icebreaking will occur,⁴¹ and confirmed that the statement in Volume 9 of the ERP Addendum at section 4.5.1.3 on the Introduction of Invasive Species which reads: “During winter the full ballast is required to assist in ice breaking, so the entire amount of ballast water (approximately 185,000 m³) will be discharged at the ore dock”, was a typo.⁴² The NPC therefore proceeds on the basis of Baffinland’s repeated reassurances that no icebreaking will occur and there will be “no disruption of either landfast ice or pack ice”.⁴³
37. As explained by the NIRB in a letter to the NPC on November 14, 2013, parties to the NIRB’s review were asked to comment on whether the requirements of NBRLUP Appendix K had been met. The NPC’s first practice directive explained that “For the purpose of Rule 11.1, the public record of the public

³⁹ ERP Addendum, *supra* note 28, Vol. 1, Section 4.2, at p. 35.

⁴⁰ NBRLUP, *supra* note 1, at p. 45.

⁴¹ ERP Addendum, *supra* note 28, Vol. 9 Section 1.4.4.1. at p. 13.

⁴² E-mail from O. Curran to C. Tickner, “RE: Questions For Participants In Baffinland Early Revenue Phase Public Review Process” (March 27, 2014 at 1:22 pm).

⁴³ *Ibid.*

review includes documents relating to the Amendment Application whether filed before or after August 9, 2013, including but not limited to technical submissions made to the NIRB that the NIRB informs the NPR are relevant to its public review.” The following comments were specifically identified by the NIRB in its February 24, 2014 report for the NPC’s consideration with respect to the issue of whether Appendices J and K had been met: Aboriginal Affairs and Northern Development Canada (AANDC); Parks Canada; Transport Canada; and WWF.⁴⁴ As the NPC also needs to reach a decision on whether to recommend an amendment to the NBRLUP, the NPC considered other relevant information contained in the technical submissions the NIRB referred the NPC to in its November 14, 2013 letter,⁴⁵ including Qikiqtani Inuit Association (QIA), the GN, AANDC, EC, DFO, Natural Resources Canada, Transport Canada, Parks Canada, Pond Inlet Hunters and Trappers Organization, Dr. Zacharias Kunuk and Isuma TV, and the WWF.

⁴⁴ Letter from E. Copeland, Chairperson, NIRB, to P. Kabloona, Acting Chairperson, Nunavut Planning Commission, Re: NIRB Contribution to the NPC/NIRB Joint Review of the NBRLUP Transportation Corridor Application for Baffinland Iron Mines Corporation’s “Early Revenue Phase” proposal (February 24, 2014); and *NIRB Contribution to the NPC/NIRB Joint Review of the Transportation Corridor Application under the North Baffin Regional Land Use Plan for Baffinland Iron Mines Corporation’s “Early Revenue Phase” Proposal* (February 24, 2014), including references to information relevant to the NPC’s public review contained in the NIRB Public Hearing File No.: 08MN053, Early Revenue Phase Proposal, Transcripts and giving the NIRB’s opinion that Appendix K had been met.

⁴⁵ Exhibit 17, Letter from A. Hanson, Director, Technical Services, NIRB, to B. Aglukark, Re: Technical Review Comments relevant to the NPC and NIRB Joint Review of the Proposed Transportation Corridor for the Mary River Project Early Revenue Phase proposal (Nov 14, 2014).

38. By letter dated January 10, 2014, the QIA directed the NPC to its final submissions to the NIRB (QIA Final NIRB Submissions).⁴⁶ QIA identified for NPC the portions of its final submissions to NIRB that it considered relevant to the NPC's review of Appendices J and K of the NBRLUP, and moreover made submissions and recommendations on Appendix I of the NBRLUP relating to caribou protection measures. The QIA Final NIRB Submissions final submissions noted that the ERP Addendum lacked key pieces of information, raised many uncertainties, and recommended "tangible tools" to actively monitor and mitigate impacts including receiving input from communities and individuals.⁴⁷ The NPC reviews the issue of caribou protection measures below.

39. As the QIA Final NIRB Submissions also explained, the Mary River Project previously reviewed by the NPC and approved by the NIRB did not include the same intensity of use of the Mary River Tote Road or Milne Port:

If the ERP is approved a fleet of very large (140 t) ore trucks will operate on the Tote Road 24 hours/day and 330 days/year (ERP FEIS v.5, p.3 of 4). This will add 152 truck transits per day, 50,160 extra transits per year, or 25,080 truck round trips or per year with loadings at the mine and unloadings at the port. The approved project does not include this high volume of truck traffic, the much higher mobilization and deposition of dust, or the increased requirement for dust suppression. Dust-related

⁴⁶ Exhibit 25, Letter from S. W. Bathory, Director Major Projects, QIA, to B. Aglukark, RE: NPC Public Hearing, North Baffin Regional Land Use Plan, Baffinland Iron Mines Corporation's Proposed Early Revenue Phase Project (January 10, 2014) at p. 2.

⁴⁷ Letter from P.J. Akeeagok, Acting Executive Director, QIA, to R. Barry, Re: Qikiqtani Inuit Association's Final Written Submission For Baffinland Iron Mines Corporation, Mary River Project, Addendum To The Final Environmental Impact Statement , at p. i - ii [QIA Final NIRB Submission].

impacts will increase at the crushing area where ore is loaded for trucking, along the entire length of the Tote Road, and at Milne Port. ...⁴⁸

As explained by QIA, the proposed traffic on the Milne Inlet Tote Road, approximately 8.3 trucks per hour, is “beyond what has been experienced elsewhere in comparable situations”, and is “significantly higher than other Arctic mining operations where ore haul trucks are involved” meaning there is uncertainty as to the effects of truck traffic on caribou movement,⁴⁹ calving,⁵⁰ and mortality.⁵¹ As summarized below, QIA and Baffinland subsequently reached agreement on the caribou protection measures that would be implemented for the project.

40. Moreover, QIA expressed many concerns about uncertainties in Baffinland’s ERP Addendum regarding shipping.⁵² In particular, QIA noted the risk of importing invasive foreign biota in ballast water,⁵³ which was also raised by others in the NIRB proceeding such as DFO, which ranked final invasion risk for the Rotterdam-Milne Inlet pathway at the highest level.⁵⁴ The NPC understands the risk of introduction of invasive species to be very high, and

⁴⁸ *Ibid.* at Ref. No. FM-1.

⁴⁹ *Ibid.* at Ref. No. B-1.

⁵⁰ *Ibid.* at Ref. No. B-2.

⁵¹ *Ibid.* at Ref. No. B-3.

⁵² *Ibid.* at Ref. No. FM-2.

⁵³ *Ibid.* at Ref. No. FM-3.

⁵⁴ Fisheries and Oceans Canada, *Technical Review Comments: Addendum to the Final Environmental Impact Statement, Baffinland Iron Mines Corporation, Mary River Project, Early Revenue Phase*, submitted to NIRB (October 18, 2013) at p. 37.

the potential impacts on environmental, social, and economic factors to be “far-reaching”,⁵⁵ and potentially irreversible.⁵⁶

41. It bears saying that Baffinmiut are largely dependent on hunting for their food, and consequently any irrevocable and lasting impacts on the ecosystem in this case may directly affect social and economic interests as well. As explained by Parks Canada, caribou and narwhals in particular are significant to Inuit society and culture:

In addition to this ecological integrity linkage, there is also a societal and cultural linkage. Inuit (who are an important component of the landscape and ecology of Sirmilik National Park) have **historically relied on caribou for their survival**. Equally important, **caribou play a significant role in the culture of local Inuit**.

...

The conservation of marine mammals in the proposed NMCA is of interest to PCA. However, in the context the Baffinland Mary River Project Early Revenue Phase Project, narwhals are of particular interest. **Portions of Eclipse Sound and Milne Inlet provide important and perhaps even critical habitat for narwhals, including as nursery habitat. Narwhals also hold particularly unique cultural relevance in the area.**⁵⁷

42. AANDC explained in its Final Written Submission to NIRB dated January 13, 2014 that its technical review in the NIRB review process looked at the following issues: surface water quality and quantity; geotechnical engineering

⁵⁵ QIA Final NIRB Submission, *supra* note 47 at Ref. No. FM-3.

⁵⁶ NIRB Final Report, *supra* note 25 at p. 108.

⁵⁷ Parks Canada, *Parks Canada Agency's comments for the NIRB's Reconsideration of the Project Certificate for Baffinland Iron Mines Corp.'s Mary River Early Revenue Project proposal (NIRB File No. 08MN053)*, (October 18, 2013) at p. 5 – 6.

with respect to permafrost conditions; geochemistry (potential for Acid Rock Drainage / Metal Leaching); site water management, including wastewater treatment; waste management; environmental implications of road and port design, construction and operation; closure and reclamation planning; accidents/malfunctions and hazardous materials handling; Inuit harvesting; local education and training; livelihood and employment; and, contracting and business opportunities. As AANDC also explains, its mandate for the co-management of water resources and the management of Crown land in Nunavut under the applicable laws and policies is broad. In response to NIRB's request, AANDC gave the opinion that the requirements of Appendix K have been met by the ERP Addendum and application to amend the NBRLUP.

43. Parks Canada drew the NPC's attention to the fact that a National Marine Conservation Area in Lancaster Sound (NMCA) has been under discussion for some time, and that there is presently a feasibility study involving Parks Canada and other federal departments, the GN, and QIA.⁵⁸ On March 26, 2014, the NPC directed questions to Parks Canada asking whether these discussions had yet identified any zone(s) in which navigation may be restricted or otherwise prohibited under the federal *Canada National Marine Conservation Areas Act* (S.C. 2002, c. 18). In its response on March 31, 2014, Parks Canada explained that the recommendations regarding feasibility and final boundaries for the NMCA are "likely a year away", and that the identification of zones

⁵⁸ *Ibid.* at p. 3.

would not occur until the subsequent development of an interim zoning plan.⁵⁹ As noted by Parks Canada, the proposed NMCA includes the waters of Pond Inlet, Eclipse Sound, Milne Inlet, and Navy Board Inlet. Parks Canada has not advised the NPC of any reason why the shipping proposed by Baffinland's ERP Addendum would be inconsistent with a NMCA. Parks Canada also said that, given the stage of the feasibility study, it would be "premature to propose a timeline for a submission to the NPC for amending the relevant Land Use Plan."⁶⁰ For certainty, the NPC has not received an application to amend the NBRLUP for the inclusion of a NMCA, and cannot determine whether the proposed marine shipping route would be inconsistent with the NMCA under study.

44. Transport Canada wrote to the NPC on December 24, 2013 to summarize its mandate and to inform the NPC of the existing transportation infrastructure and activity in the area. Specifically, Transport Canada questioned whether a new transportation corridor was being developed:

It is not clear that Baffinland's ERP would involve the development of a new transportation corridor, as (i) shipping already takes place in the waters that would be used during the ERP; (ii) there is an existing off loading facility at Milne Inlet; and (iii) the Milne Inlet Tote Road has existed for some time, with an NLCA-protected public right of access over Inuit Owned Lands for the purposes of transportation.⁶¹

⁵⁹ Exhibit 38, supra note 19 at p. 1 – 2 [Exhibit 38].

⁶⁰ *Ibid.* at p. 2 – 3.

⁶¹ Exhibit 20, Letter from M. Taylor, Regional Director General, Prairie and Northern Region, Transport Canada, to B. Aglukark Re: Public Review of the Baffinland ERP Transportation Corridor (December 24, 2013) at p. 1 [Exhibit 20].

Transport Canada also draws the NPC's attention to the fact that "Marine shipping in Canada, and particularly, in Canada's Arctic waters, is a highly regulated activity." In light of the "robust regulatory framework" summarized in that submission, Transport Canada could not suggest any "technical reason why shipping should not take place in the area covered by the ERP", since "Shipping already safely occurs in the waters that would be used during the ERP of the project."⁶² In submissions made by Transport Canada following the release of the NIRB Final Report, and in answer to specific questions posed by the NPC, Transport Canada further explained on March 26, 2014 that, should the NPC decide to recommend an amendment to the NBRLUP, it would have to consider existing international law and conventions, Canadian regulatory requirements, and the paramount importance of safety of vessel, crew, and the environment.⁶³ Transport Canada recognized the NPC's land use planning expertise and authority, and offered its own expertise to assist the NPC by reviewing any draft amendment to the NBRLUP developed by the NPC prior to its submission to the appropriate ministers for approval.

45. The WWF's technical submissions to the NIRB on October 18, 2013 cautioned that, despite the assurances and conclusions presented in the FEIS and ERP Addendum, that:

...we believe it is likely that there will be loss and reduced quality of Milne Inlet habitat for narwhal, and that this is not in conformity with the

⁶² *Ibid.* at p. 2.

⁶³ Exhibit 37, *supra* note 18.

current regional North Baffin Land Use Plan (s. 3.5.11 and 3.5.12, and Appendices G, J and K), and contrary to the purpose of the proposed Lancaster Sound National Marine Conservation Area.⁶⁴

In WWF's final submissions to the NIRB, however, no mention is made of the project's conformity with the NBRLUP, but endorses an adaptive management framework. The WWF concludes that:

WWF will use the above criteria to assess the effectiveness of ongoing efforts by Baffinland to adequately adapt and limit the impacts of the project. At the same time, we are ready, willing and able to contribute to an adaptive management process to **ensure that this project is carried out in a way that minimizes negative environmental impacts while enhancing long-term benefits for Nunavummiut.**⁶⁵

[emphasis added]

46. Finally, the public hearings provided the NPC an opportunity to review the ERP Addendum in public and to hear from Inuit and other affected residents. The NPC recognizes that the Milne Inlet Tote Road was developed in the 1960s, has been used for transportation, and is a defined easement for a public right of access in the NLCA. The NPC also recognizes that the proposed shipping route has previously been used by the proponent for shipping under its bulk sampling program for which the NPC gave a positive conformity determination in January, 2007. As summarized by Baffinland, the residents of

⁶⁴ Letter from M. von Mirbach, Director, Arctic Program, WWF-Canada, to R. Barry, Executive Director, NIRB, Re: Mary River Project Certificate for Baffinland Iron Mines Corp.'s Early Revenue Phase Proposal (NIRB File No. 08MN053), (October 18, 2013), at p. 13.

⁶⁵ Letter from M. von Mirbach, Director, Arctic Program, WWF-Canada, to R. Barry, Executive Director, NIRB, Re: Mary River Project Certificate for Baffinland Iron Mines Corp.'s Early Revenue Phase proposal (NIRB file # 08MN053), (January 13, 2014), at p. 1 – 2.

the communities visited confirmed these facts,⁶⁶ although they were not in doubt. It is the “unprecedented” intensity of the use of the corridor, as noted by the NIRB Final Report,⁶⁷ that requires the NPC to consider whether such increased intensity of use constitutes a proposal “to develop” a transportation corridor even where one already exists. For example, Ham Kalluk, an elder from Pond Inlet, noted that in the 1960s there was not any heavy equipment being used when Mary River was established.⁶⁸ The NBRLUP itself reads at section 2.1.6:

While communities use local deposits of sand and gravel, large-scale extraction of these resources is not foreseen. **A large iron ore deposit at Mary River is unprofitable to mine, given current world prices.** Coal of generally good quality is present in large quantities, but is not extracted commercially.

[emphasis added]

47. The NPC also heard that Inuit in the communities visited by the NPC are concerned by the potential impacts on wildlife, in particular on wildlife in the marine environment, and what this will mean for hunting.⁶⁹ For example, the issues of socio-economic benefits and food security came up in one NPC public hearing where a member of the public expressed the concern that the proposed shipping may drive belugas away and the Inuit who would typically rely on hunting would have to buy more store-bought food, but that not all

⁶⁶ Exhibit 31, *supra* note 15 at p. 19.

⁶⁷ NIRB Final Report, *supra* note 25, at s. 4.6.3, 4.11.3.

⁶⁸ Exhibit 30, *supra* note 15 at p. 2.

⁶⁹ Exhibit 27, *supra* note 15 at p. 17.

Inuit deprived of the ability to hunt belugas would necessarily be employed at the project.⁷⁰ The NBRLUP explains the importance of wildlife to Inuit as follows:

The North Baffin area is also one of the most important marine mammal habitats in the eastern Arctic. Eighty-five percent of North America's narwhal, and 40% of its beluga whales, in addition to large populations of ringed, harp and bearded seals, are found here. Small colonies of walrus are present, and the endangered bowhead whale summers in the southern part of the region.

...

The abundance of marine and terrestrial wildlife has provided food, clothing and shelter for Inuit and their ancestors for several thousand years. Inuit continue to rely on renewable resources for these things, as well as for their cultural and economic well-being. This reliance forms the basis of a profound relationship with the land.

Most Inuit spend at least some time harvesting renewable resources for domestic use as food, clothing and hunting materials. Some residents derive a portion of their income from sport and commercial harvesting, from arts and crafts made with harvested materials, and outfitting and guiding wilderness trips for tourists.⁷¹

48. The NPC is concerned by the potential for the project proposal to cause changes in the abundance and behavior of wildlife on which Inuit rely. While the Milne Inlet Tote Road may already exist, to the NPC's knowledge it has never been used with the intensity which Baffinland now proposes. Similarly, the level of shipping in the marine corridor proposed to take place throughout the open water season is also unprecedented. However, the NPC also heard

⁷⁰ Exhibit 29, *supra* note 15 at p. 8.

⁷¹ NBRLUP, *supra* note 1, section 2.1.5.

that the anticipated economic opportunities and employment the project represents to the region is worth letting the project proceed, provided that the necessary safeguards exist. Some Inuit believe that wildlife may become accustomed to the presence of the project,⁷² while others believe there will be a decrease in wildlife.⁷³ Baffinland explained in the NPC's Clyde River public hearing that two working groups, the Marine Environment Working Group and the Terrestrial Environment Working Group, including representatives from the Hunters and Trappers Organization and QIA, as well as the GN and DFO, will meet 2 to 3 times annually to regularly review monitoring studies, and that an Inuit Impact Benefit Agreement has been signed with QIA.⁷⁴ In answer to questions about employment opportunities, Baffinland also suggested that communities outside the "5 points of hire" identified as Hall Lake, Igloolik, Arctic Bay, Pond Inlet, and Clyde River might approach QIA to ask about funding to travel to a point of hire to get a job at the Mary River Project.⁷⁵ While the NPC does not have the NIRB's jurisdiction or expertise with respect to assessing environmental impacts and is not responsible for overseeing impact benefit agreements, these issues are nevertheless relevant to the land use planning principles set out below.

⁷² Exhibit 29, supra note 15 at p. 4.

⁷³ Exhibit 30, supra note 15 at p. 3.

⁷⁴ Exhibit 27, supra note 15 at p. 18.

⁷⁵ Exhibit 29, supra note 15 at p. 7.

D. Analysis of Amendment Application, Evidence

49. The NPC has reviewed all relevant evidence obtained through its public review, including written submissions. As this amendment application relates to a transportation and/or communications corridor, the NPC conducted its public review jointly with the Nunavut Impact Review Board and considered all evidence relevant to the NPC's land use planning functions obtained by that board for the purpose of making its determination.

Issue #1: Whether guidelines in Appendices J and K have been met

50. As noted above, the NPC requested further information from Baffinland on October 11, 2013, and received that further information on November 8, 2013. The NPC is not aware of any participant to the public review requesting more information from Baffinland to satisfy Appendix J of the NBRLUP under Rule 16.4 of the RPHPR or otherwise.
51. Appendix J requires the following information:
1. A description of the proposed corridor, including its use, its general routing, the possible environmental and social impacts, and any seasonal considerations that may be appropriate.
 2. A comparison of the proposed route with alternative routes in terms of environmental and social factors as well as technical and cost considerations.
 3. An assessment of the suitability of the corridor for the inclusion of other possible communication and transportation initiatives (roads, transmission lines, pipelines etc.). This assessment should include:
 - The environmental, social and terrain engineering consequences, and the cumulative impacts of the project, and

- The environmental and social impact of the project on nearby settlements or on nearby existing and proposed transportation systems.

52. On the first issue, the NPC has reviewed the FEIS and ERP Addendum including “Appendix 1B - 4 - Concordance with EIS Guidelines (Appendices J and K of the North Baffin Regional Land Use Plan)” and the *Summary of Information* and concludes that the Amendment Application has met the informational requirements of Appendix J. It bears noting that at this stage of its analysis, the NPC only reviews whether sufficient information (both in quantity and quality) has been provided, and does not assess whether the described impacts are desirable or not. The NPC observes the following in particular with respect to the ERP:

- a. The proposed transportation corridor, namely the terrestrial route on the Milne Inlet Tote Road, the stockpile and ship loading facilities at Milne Port, and the marine shipping route from Milne Port through Eclipse Sound to Baffin Bay are well described in the FEIS and ERP Addendum, as are the environmental and social impacts and seasonal considerations.
- b. Baffinland’s *Summary of Information* explains that the FEIS for the Mary River Project a consideration of a number of transportation route alternatives, and identified the Steensby Inlet port site and the Milne Inlet port site as “technically, environmentally and economically

feasible.”⁷⁶ As the NIRB Final Report also notes, “In the FEIS Addendum, the Proponent noted that the Early Revenue Phase Proposal was in fact an alternative means of carrying out the Approved Project, and as such, an alternative to the Early Revenue Phase Proposal is the Approved Project.”⁷⁷ Baffinland’s FEIS and ERP Addendum also sufficiently describe the environmental and social factors as well as technical and cost considerations.

- c. As Baffinland has explained in its evidence and submissions to the NPC, the Milne Inlet Tote Road and proposed marine shipping route have been used, and continue to be used for transportation. The NPC is satisfied on the basis of this evidence that Baffinland has sufficiently assessed the environmental, social and terrain engineering consequences, and the cumulative impacts of the project, and the environmental and social impact of the project on nearby settlements or on nearby existing and proposed transportation systems.
- d. No participant took the position that Appendix J had not been met, although Baffinland suggested that the information requirements of Appendix J “suggest the consideration of a new transportation corridor.”⁷⁸ As discussed elsewhere in these reasons, the NPC considered both the existing Milne Inlet Tote Road and the marine

⁷⁶ Exhibit 10, *supra* note 11 at p. 11.

⁷⁷ NIRB Final Report, *supra* note 25 at p. 148.

⁷⁸ Baffinland January 31, 2014 Submissions, *supra* note 16 at p. 20 – 21.

transportation corridor being used for shipping as “new”, therefore the requirements of Appendix J had to be met.

53. The NPC has also considered whether the guidelines in Appendix K have been met. Appendix K sets out the following guidelines for assessing a new transportation corridor proposal:

1. The corridor width shall be a function of:
 - the number and type of identified facilities within the corridor;
 - physical and biophysical conditions;
 - availability of detailed engineering data for one or more transportation modes within the corridor;
 - safe distances between different facilities within the corridor; and
 - aesthetics.
2. Corridors shall:
 - minimize negative impacts on community lifestyles;
 - improve access to other resources having high potential for development, while still maintaining the shortest practicable distance between the primary resource areas and the trans-shipment location;
 - be designed in accordance with existing and prospective land use capability including topography, soil, permafrost and wildlife; and
 - be designed in accordance with the availability of granular supplies.
3. In keeping with existing legal and legislative requirements, including the NLCA, corridors shall not negatively impact:
 - community business, residential and projected expansion areas;
 - important fish and wildlife harvesting areas;
 - key habitat for fish and wildlife species, especially areas used by endangered species;

- areas of high scenic, historic, cultural and archaeological value.

54. The Amendment Application does meet those guidelines. In particular, the NPC considers that the joint review process set out in section 3.5.12 of the NBRLUP is designed to ensure the NPC has access to the expertise of the environmental assessment body appointed under section 12.4.7 of the NLCA to assist the NPC in making this determination. The NIRB concluded that Appendix K of the NBRLUP has been met.⁷⁹ Although this conclusion is not binding on the NPC, it is highly persuasive.
55. The NPC notes that while the wording of section 3 of Appendix K appears to prohibit any negative impacts of a transportation corridor. The NPC does not interpret this requirement as an absolute prohibition on impacts, as the concept of sustainable development requires balance rather than absolutes. This approach is consistent with both the NBRLUP and the Keewatin Regional Land Use Plan when read in their entirety. As set out in chapter 1.2 of the NBRLUP:

Sustainable development is the overriding principle guiding the preparation of the *North Baffin Regional Land Use Plan*. The NPC has adopted the following definition of sustainable development.

Sustainable development is defined generally as the management of human relationships to the natural environment in such a way that economic, social and cultural needs are met and ecological processes and natural diversity are maintained. For a complete definition of sustainable development, see Chapter 3.

⁷⁹ NIRB Final Report, *supra* note 25 at Appendix A, page B-11

The people of the region have stated clearly and consistently over the years that there must be a balance between industrial development and the environment in order to guarantee the long-term preservation and conservation of the land, wildlife and wildlife habitat.

[emphasis in original]

56. Where the development of a transportation corridor has the potential to have positive socio-economic impacts and benefits to local and regional Nunavummiut, section 3 of Appendix K of the NBRLUP ought to be read as recognizing that **adaptive management appears to be considered an appropriate tool for assessing and reducing anticipated impacts**. The NPC is guided by the NIRB's Final Report which explains:

Closely linked to the precautionary principle is the use of "adaptive management" in an effort to address the potential for adverse impacts to result that were not identified or fully understood at the time a project is assessed. As defined by the Board in the Board's previous assessment of the Mary River Project Proposal:

Adaptive management is an ongoing process of decision-making that involves making initial decisions based on the existing data, subsequently monitoring for potential effects, assessing the effectiveness of the initial decisions (including assessing the effectiveness of mitigation measures) and then adjusting actions going forward to reflect the monitoring data and the effectiveness of measures taken to minimize adverse effects. Adaptive management provides the basis for sound environmental decision-making even in the face of uncertainty surrounding the nature and extent of effects that is often inherent at the environmental assessment stage.

The implementation of adaptive management is both consistent with, and supported by, the Nunavut Impact Review Board's (NIRB) project

monitoring jurisdiction as set out in Part 7 of Article 12 of the Nunavut Land Claims Agreement (NLCA).⁸⁰

57. The *Broad Planning Policies, Objectives and Goals*, approved November 10, 2007 (“**BPPOG**”), which were developed under Article 11, Part 2 of the Agreement, also incorporates the concepts of the adaptive management into the NPC’s land use planning:

Land use planning, as informed by these Broad Planning Policies, Objectives and Goals, will rely on the best available Inuit Qaujimagatuqangit and scientific information as a basis for decisions. **The absence of information does not preclude the necessity to make land use planning decisions and to conclude the plan development process in a timely manner.**

[emphasis added]

58. Upon consideration of the evidence, submissions by the participants to the NPC’s review and parties to the NIRB’s review, and the NIRB’s Final Report containing the NIRB’s letter and recommendation to the NPC dated February 24, 2014, the NPC concludes that Appendix K has been met.
59. On this basis, the NPC has decided that the guidelines in Appendices J and K have been met and shall proceed to consider whether to recommend an amendment to the Ministers.

Issue #2: Whether to recommend an amendment

60. Once the guidelines in Appendices J and K have been met, the NPC may recommend an amendment to the Ministers. This determination is based on

⁸⁰ *Ibid.*, at p. 19.

an analysis of the evidence using the factors set out in section 7 of the RPHPR as approved by the Commissioners, and the documents referred to in the *Scope of Matters* under section 7.3 of the RPHPR, namely the BPPOG and NBRLUP.

61. The *Scope of Matters* referred to the text of Appendices J and K, and outlined the matters, which the NPC would take into account to decide whether to recommend an amendment to the NBRLUP. The *Scope of Matters* quoted the RPHPR at section 7 in part:

- 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.

62. The *Scope of Matters* also directed participants to the NPC's *BPPOG*. The five broad goals in that document are:

- Goal 1 Strengthening Partnership and Institutions;
 - Goal 2 Protecting and Sustaining the Environment;
 - Goal 3 Encouraging Conservation Planning;
 - Goal 4 Building Healthy Communities; and
 - Goal 5 Encouraging Sustainable Economic Development.
63. The NBRLUP itself sets out various principles used in the development of the plan at Chapter 1.2. These include planning principles under the NLCA, compliance with the NLCA, Land Use Planning on Inuit Owned Lands, Using Local and Traditional Knowledge, Relationship to Municipal Plans, and Sustainable Development. Chapter 3 of the NBRLUP also sets out three basic principles:
- **Conserve:** being the wise use of all resources,
 - **Communicate:** where different activities compete for the same resources, and
 - **Develop:** applying “Sustainable development” to mean “the management of human relationships to the natural environment in such a way that economic, social and cultural needs are met and ecological processes and natural diversity are maintained.”
64. Finally, chapter 3.5 of the NBRLUP also sets out principles particular to marine and terrestrial transportation corridors.
65. The NPC has evaluated the evidence in relation to these factors as set out below.

66. In the course of its conformity determination process, the NPC wrote to Baffinland to ask for its submissions on several issues including the interpretation of sections 3.5.10, 3.5.11, and 3.5.12 of the NBRLUP. The NPC considered those submissions in making its conditional conformity determination on August 13, 2013, and again received Baffinland’s submissions on this issue in the public review. Submissions by other participants such as Transport Canada, whether directly to the NPC⁸¹ or to the NIRB for the purpose of advising on the issue of whether Appendices J and K of the NBRLUP had been met, were also considered.
67. Recognizing that the physical activities proposed in the ERP Addendum have been carried out to some extent under previously submitted project proposals the NPC determined to be in conformity with the NBRLUP, an issue arises as to whether the increases in the intensity of physical activities—notably traffic—are sufficiently significant to constitute a proposal “to develop” a transportation corridor such that an amendment to the NBRLUP would be required for the ERP Addendum to conform to the NBRLUP. In terms of physical activities relating to transportation corridors, as distinct from the physical works, following the loading that occurs at the mine site the hauling of iron ore from Mary River to its ultimate destination in Rotterdam involves three stages: first, trucking the ore on the Milne Inlet Tote Road to the Milne Port stockpile; second, transporting the ore using the proposed reclaim belt at

⁸¹ Exhibit 20, *supra* note 61.

the Milne Port from the proposed stockpile to the end of the proposed fixed ore dock; and third, shipping the ore along the described route from Milne Inlet through Eclipse Sound. As DFO, which both forwarded Baffinland's ERP Addendum to the NPC for conformity determination and participated in the NPC's public review,⁸² wrote in the Government of Canada's technical submission to the NIRB dated October 18, 2013:

“...DFO Science is concerned about the long-term impacts of this **new, and unprecedented, scale of shipping activity** for marine mammals in this pristine environment.”

[emphasis added]

Although Transport Canada explains that shipping is highly regulated and already safely occurs in the waters that would be used by the ERP project,⁸³ the increased intensity of use of the Milne Inlet Tote Road, Mile Port involving the transporting of ore from a new stockpile to a new fixed ore dock and the increased volume of marine shipping are all “unprecedented”.

68. Significantly, the NBRLUP does not show the Milne Inlet Tote Road as it is defined in the NLCA, or a marine shipping corridor from Milne Inlet through Eclipse Sound and Lancaster Sound. Although the NBRLUP does not contain similar language, the NPC notes that the Keewatin Regional Land Use Plan explains in concise language that:

⁸² Nunavut Planning Commission, *Public review of the Baffinland Iron Mines Corporation Application to Amend the North Baffin Regional Land Use Plan – Addresses for Service on Participants Updated - 03* (January 2, 2014).

⁸³ Exhibit 20, *supra*, at p. 2.

Existing and proposed transportation corridors and special sites required for land, air and marine travel should be identified in the land use plan. These include summer and winter roads, airports and mining airstrips, and shipping routes and port facilities.⁸⁴

69. For example, the Draft Nunavut Regional Land Use Plan released for public consultation in 2012 by the NPC identifies the Milne Inlet Tote Road and the proposed National Marine Conservation Area in Lancaster Sound. With regards to the Sirmilik National Park and National Marine Conservation Area in Lancaster Sound referenced in the Parks Canada submission to the NIRB, the NPC notes that Article 11 of the NLCA does not apply to or within National Parks, but does apply to Conservation Areas.⁸⁵ The NPC has taken these facts into consideration in its deliberations.
70. With respect to the shipping corridor, Baffinland's ERP Addendum explains "The shipping route to Milne Port from the North Atlantic Ocean is well established through very deep waters", extending "from Baffin Bay ... through Pond Inlet and Eclipse Sound to the head of Milne Port."⁸⁶ Although Baffinland refers to its use of the shipping route as part of the larger Mary River Project that has already been approved, as noted above, no defined shipping corridor is presently included in the NBRLUP. Moreover, Baffinland has never applied for a development of a marine transportation corridor for the Mary River

⁸⁴ Nunavut Planning Commission, Keewatin Regional Land Use Plan (June 20, 2000), at p. 66.

⁸⁵ See NLCA, *supra* note 2, at s. 8.2.10, and s. 9.3.5 ("Articles 11 and 12 shall apply to Conservation Areas. Article 11, however, shall not apply to or within the boundaries of National Historic Parks, once established, or National Historic Sites when administered by the Canadian Parks Service.").

⁸⁶ ERP Addendum, *supra* note 28, Vol. 1, Section 2.5 at p. 27.

Project. NPC's April 30, 2008 conformity determination for the Mary River Project only related to the development of the railway corridor south to Steensby Inlet as applied for by Baffinland on April 9, 2008.⁸⁷ Baffinland did not apply for the development of a marine transportation corridor from Milne Inlet. As Baffinland's own *Summary of Information* document appears to suggest,⁸⁸ the marine shipping route used by Baffinland for resupply and ore shipments was covered by the NPC's 2007 conformity determination of the bulk sampling program, which expressly treated the proposal as being for research purposes rather than for the development of a transportation corridor. Now that Baffinland is no longer proposing ore shipments for research purposes, but rather for the commercial shipment of iron ore to European markets for the life of the mine, the NPC is of the opinion this constitutes the development of a new transportation corridor.

71. The NPC notes that the words "develop" in section 3.5.11 of the NBRLUP is not defined in the plan or Article 11 of the NLCA, and furthermore that section 3.5.11 of the NBRLUP does not limit itself to "new" corridors. The NPC considers its broad mandate under the NLCA, which includes considering the cumulative impacts of project proposals in relation to other "development

⁸⁷ Baffinland January 31, 2014 Submissions, *supra* note 16 at Appendix 1, p. 4; and see Letter from B. Aglukark to D. Chubb, Vice President Sustainable Development, Baffinland Iron Mines Corporation (April 7, 2008) enclosing Application to Determine Conformity with the North Baffin Regional Land Use Plan, completed by Mr. Chubb April 9, 2008, NIRB Registry filename "080430-08MN053-NPC Conformity Requirements and Questionnaire-IMAE.pdf", online: <<http://ftp.nirb.ca/01-SCREENINGS/COMPLETED%20SCREENINGS/2008/08MN053-Baffinland%20Iron%20Mines%20Corporation/01-APPLICATION/>>

⁸⁸ Exhibit 10, *supra* note 11, at p. 7.

activities” where an exemption from NIRB screening may apply under sections 12.3.3 and 13.4.4 of the NLCA, to likewise require a broad definition of the term “develop”. In asking Baffinland to comment on the meaning of “develop” on July 30, 2013, the NPC referred to, but did not consider itself bound by, the definition of “development” in Article 6 of the NLCA and in Nunavut’s *Planning Act*.⁸⁹ Although Baffinland argued those definitions were not relevant as those authorities do not directly apply – which the NPC expressly acknowledges – Baffinland did not suggest any alternative meaning of the word “develop” but instead stated that it was not developing a “new” corridor.⁹⁰ That argument is addressed below. In determining whether a proponent seeks to “develop” a transportation corridor, the NPC considers that because “project proposals” mean both physical works and physical activities, to “develop” may either involve constructing or operating physical works such as infrastructure, or an increase in physical activities relating to an undertaking that significantly changes the use or intensity of use of land or existing physical works.

72. The NPC considers that it is enabled by the language of section 3.5.11 of the NBRLUP to consider whether proposed physical activities independent of proposed physical works would have the effect of creating a new transportation corridor, or whether significant increases in the intensity of use of an existing corridor such that a “development” of a corridor occurs. Thus in a hypothetical case, where hunters and trappers have intermittently crossed a

⁸⁹ Exhibit 13, *supra* note 5 at p. 3 – 5.

⁹⁰ Exhibit 14, *supra* note 5, at p. 22 – 23.

tract of land where no road exists, and a proponent then proposes to have vehicles regularly crossing that land in order to carry out an undertaking in connection with the project proposal but without building a road, the NPC may consider whether that increased intensity of use would have the effect of developing a transportation corridor, and if so whether a public review would be necessary and whether an amendment to the plan is necessary or desirable.

In another scenario, were an annual shipment to resupply a community in Nunavut considered as establishing a marine transportation corridor as a matter of fact without review by the NPC, major project proposals with a shipping component could conceivably wind up placing new ports next to those communities on the grounds that a transportation corridor already exists.

73. Although the Milne Inlet Tote Road and marine shipping from Milne Inlet already exist, these are both a “new” transportation corridor in two senses: it is “new” relative to the NBRLUP, and the significant increase in intensity of use proposed in the project would “develop” it further. Furthermore, as noted above Milne Port will become a key transportation hub where a reclaim conveyor belt will transport iron ore deposited at the stockpile by the ore trucks to the end of the new fixed ore dock where freighters will be loaded. Consequently, the NPC has concluded that the amendment application by Baffinland, proposing to increase terrestrial and marine traffic on an existing corridor, and to construct a transportation hub at Milne Port to complete the

corridor, requires an amendment to the NBRLUP in order to reflect the existing use of the “land” including the marine environment.

74. Since the Amendment Applicant’s submissions also refer to the public right of access to the Milne Inlet Tote Road on Inuit Owned Lands as recognized in Part 4 of Article 21 of the NLCA, for certainty the NPC is not proposing to constrain the public right of access. The NPC’s mandate as provided by the NLCA requires the NPC to perform conformity determinations using the approved land use plans under section 11.5.10, and moreover requires that “special attention” be devoted to “protecting and promoting the existing and future well-being of Inuit and Inuit Owned Lands” as part of the primary purpose of land use planning under section 11.2.1 of the NLCA. The NPC does not consider the Milne Inlet Tote Road as exempt from the NPC’s mandate, whether to consider the conformity of “project proposals” including physical works and physical activities, or in considering land use plan amendments, as this would defeat the purpose of devoting special attention to Inuit Owned Lands, particularly where physical works and activities may have adverse impacts on Inuit and “lands” including water and resources including wildlife.⁹¹ As explained above, the NBRLUP does not presently show the Milne Inlet Tote Road or any marine shipping corridor north from Milne Inlet, yet the NBRLUP approved by the federal and territorial Ministers clearly

⁹¹ NLCA, *supra* note 2, s. 11.1.2.

contemplates the NPC establishing terrestrial and marine corridors within its land use plans.

NBRLUP –Planning principles

75. Section 1.2 of the NBRLUP sets out the primary purpose of the land use plan under the NLCA. It provides that;

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 people ordinarily resident in 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 (11.2.1(b));

76. Residents of the Nunavut Settlement Area who participated in the Public Review did not raise any significant concerns regarding the potential impact to their wellbeing as a result of the transportation corridor. Comments received during the Public Review suggested that if proponent operated within the parameters of the project description as well as any applicable regulations, any perceived negative impact resulting from the transportation corridor would likely be balanced by the potential for positive impact resulting from the project as a whole.
77. Furthermore, the QIA, who represent the interest on the Inuit in the area, did not express any significant concern to the NPC regarding the potential impact to the well-being of Inuit as a result of the transportation corridor.
78. The NPC does not believe or see any reason as to why the interests of all Canadians will be negatively impacted as a result of the transportation

corridor. The transportation corridor forms a critical part of the larger project for which the benefits may benefit all Canadians, provided the potential negative impacts are properly mitigated through the permitting process.

79. The NPC is satisfied that the amendment to show a transportation corridor maintains the primary purpose of land use planning in the North Baffin Region.
80. The NBRLUP sets out some of the ideal features that the former Commission envisioned for the region to help guide land use planning at section 3.1. In particular, the following relate to the non-renewable resource sector:
 - The concept of sustainable development will be widely applied, through the conservation of the region's natural and cultural resources, the establishment of protected areas, and the promotion of self-reliant, long-term, sustainable economic growth in both the renewable and non-renewable sectors.
 - The economy of the region will become more diverse as both renewable and non-renewable resource development continues. Well-trained employees and goods and services will be available from within the region to meet the needs of developers. The infrastructure and income from development will encourage further diversification.
 - Employment opportunities for the region's residents will increase from both the renewable resource base (jobs such as butcher, country foods store entrepreneur, store clerk, tourist guide, hotel manager, outfitter), and the non-renewable resource base (jobs such as driller, miner, resource manager, trucker, engineer, expeditor, pilot).
 - The education levels of the people in the region will increase, allowing residents to successfully compete for technical and professional jobs in government and industry.
 - Non-renewable resource development and tourism will supplement and reinforce the harvesting lifestyle by providing wage employment opportunities and by improving the infrastructure.
81. As expressed in section 3.2.1 of the NBRLUP:

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]

82. The transportation corridor is located within an “Essential Area” as described on the Areas of Importance Map. Essential Areas. Essential Areas are defined in section 1.0 of Appendix G of the NBRLUP as:

- (a) The Area is Essential to the community for hunting, fishing and trapping. The Community can not survive without these areas
 - (b) The area is essential to the biological productivity of wildlife because:
 - wildlife needs the habitat to survive, and alternative habitat (e.g. calving areas, nesting areas, polynyas or migration routes) is not available;
 - the habitat supports rare, threatened or endangered species, or concentrations of wildlife; and/or
 - the habitat is scarce.
 - (c) The area is either protected by legislation or has been proposed by government, other agencies, or communities for formal protection.
- In most cases, these areas have a high diversity of values and meet more than one criterion.

83. The NPC is satisfied that Baffinland has satisfactorily referred to the land values and concerns in Appendix G by recognizing the above values and concerns of the area through the environmental assessment process.

84. Pursuant to section 11.5.9 of the NLCA, the Plan shall be implemented on jurisdictional responsibility. Regulators and proponents are to respect the values outlined in the NBRLUP, including through the issuance of any permits, license or authorization issued.

85. As explained in section 3.2 of the NBRLUP:

The NPC has developed a definition of “sustainable development” that reflects northern priorities:

Sustainable development is defined generally as the management of human relationships to the natural environment in such a way that economic, social and cultural needs are met and ecological processes and natural diversity are maintained.

Sustainable development considers the well-being of social, ecological and economic systems and recognizes that quality of life depends upon all these. This understanding leads to an integrated approach to planning, decision making and monitoring.

...

The NPC believes that renewable and non-renewable resource development projects within the region should proceed in phases, with strict environmental controls, maximum regional benefits and, when necessary, only after demonstration projects and research have proven that the available technology meets government standards and addresses community concerns.

86. In the course of the public review, the NPC considered how the Amendment Application meets the objective of sustainable development.

87. With respect to the Milne Inlet Tote Road, the NPC believes that using the existing road instead of constructing a new road meets the requirement for sustainable development.

NPC's Broad Planning, Policies, Objectives and Goals (BPPOG)

88. To improve the management and planning of land use in the Nunavut Settlement Area, Article 11, Part 2 of the NLCA provides broad principles, objectives, and factors that inform the NPC's planning policies, priorities and

objectives, and the planning process itself. Section 11.4.1(c) of the NLCA requires the NPC to generally fulfill its objectives in accordance with the general principles in section 11.2.1 of the NLCA. While drafted to inform the development of a Nunavut Land Use Plan, the NPC's BPPOG represents the outcome of a collaborative process with Government and the Inuit, and was approved by the Commission in November 2007. As the NPC is presently preparing the Draft Nunavut Land Use Plan for public hearings using the approved BPPOG, for consistency the NPC considered the BPPOG an appropriate summary of the principles in section 11.2.1 of the NLCA to use in considering an amendment to the NBRLUP for a transportation corridor.

89. Through its public review of the Amendment Application, the NPC has provided the residents of the planning region and its planning partners an opportunity to be well informed of the evidence and to have an active role in the review process. This review also took into account the goals outlined in the BPPOG and summarized in the NPC's *Scope of Issues*, namely: Strengthening Partnerships and Institutions, Protecting and Sustaining the Environment, Encouraging Conservation Planning, Building Healthy Communities and Encouraging Sustainable Economic Development. The NPC also considered impacts on the social and cultural life style, economic and the environmental state (wildlife and marine mammals) including conservation, development and utilization of the land, taking into account the principles in section 11.2.1 of the NLCA and the NBRLUP. The NPC provided all the evidence and made it available to the public and provided an opportunity to

comment on the evidence. The NPC has considered all the information and believes these principles have been met.

E. Other Issues Raised By Parties

90. On a side point, Baffinland takes the position in its presentation to the NPC and its Baffinland January 31, 2014 Submissions that the NPC had not previously made a determination of whether an amendment application was required. The NPC does not agree. Its conformity letter dated August 13, 2013, granting conditional conformity to the ERP, read:

... On August 6, 2013, **the NPC requested that the proponent make an application for the development of a transportation corridor under section 3.5.11 of the North Baffin Regional Land Use Plan (NBRLUP).** Baffinland submitted the requested application for an amendment to the NBRLUP for the development of a transportation corridor on August 9, 2013.

The NPC has completed its review of the above-noted project proposal and application to amend the NBRLUP. **The project proposal conditionally conforms with the NBRLUP, provided that (1) the joint review process for the proposed transportation corridor provided in section 3.5.12 of the NBRLUP is completed, (2) the NPC makes a recommendation to the ministers on whether to amend the plan, and (3) the Ministers determine whether to amend the plan.** For clarity, the NPC reserves the right to make its final conformity determination for the project proposal until after a decision by the Ministers has been made on whether to amend the plan. By this letter and additional enclosures, the NPC is forwarding the proponent's application to amend the NBRLUP for a transportation corridor to NIRB for their reference. **Notification will be made to the Minister that the transportation corridor requires review under section 3.5.12 of the NBRLUP.**

[emphasis added]

91. The NPC considered the Amendment Applicant's submissions dated August 2, 2013, which made the argument that no amendment application was required, and asked for an amendment application. Instead of submitting the amendment application, the proponent could have refused to make the application to amend the plan, and in the event the NPC had given a negative conformity determination, could have sought a Ministerial exemption. It is clear that the NPC decided on August 13, 2013, that the ERP required an application under section 3.5.11 of the NBRLUP, and a public review under 3.5.12 of the NBRLUP. The NPC then commenced and carried through with the process as explained in the August 13, 2013 letter. The NPC considers this matter to be settled as it relates to the ERP Amendment Application. In any event, since the Amendment Applicant has attached its August 2, 2013 submissions in the Baffinland January 31, 2014 Submissions, the NPC will address the issues raised insofar as it provides greater certainty with respect to its August 13, 2013 decision.
92. Baffinland appears to accept that a previous positive conformity determination does not preclude the need for a new conformity determination if a new project proposal is made for an existing project, whether for a new phase of a project not previously determined to conform to a land use plan, or for changes to a project being reconsidered by NIRB under Part 8 of Article 12 of the NLCA. This would be true whether a party wishes to build physical works or undertake physical activities. Furthermore, when authorizations for previously-approved project proposals are renewed to extend a project,

authorizing agencies ask NPC to determine whether the project is still in conformity with the applicable land use plan. For certainty, the NPC does not have to decline its jurisdiction to consider land use planning matters simply because a project has received a project certificate or other approval.

93. Baffinland recognizes on page 10 of its August 2, 2013 submissions that NPC's August 30, 2008 positive conformity determination for the Mary River Project development proposal was subject to the "requirement for an amendment under Items 3.5.10, 3.5.11 and 3.5.12 for the transportation corridor proposed for the railway." To be clear, sections 3.5.11 and 3.5.12 of the NBRLUP are annotated as "conformity requirements" ("[CR]"), which means that where a party proposes to develop a transportation corridor, those must be fulfilled prior to the propose corridor being in conformity with the NBRLUP. If any party proposes to "develop" a transportation or communications corridor, the absence of such an application to amend the plan means the NPC could give a negative conformity determination.
94. As explained above, the NPC notes that section 3.5.11 and Appendix J of the NBRLUP does not contain the word "new" in relation to proposed development of transportation or communications corridors, although the word "new" does occur in relation to proposed corridors in section 3.5.12 and Appendix K. In *Interpretation – North Baffin Regional Land Use Plan – Terms 3.5.10, 3.5.11 and 3.5.12*, published by the NPC and referred to in BIMC's

August 2, 2013 submissions,⁹² the NPC had suggested that “new” transportation corridors would require an amendment application, but did not say that pre-existing transportation corridors were exempt from the need for plan amendments. Notwithstanding Baffinland’s reference to a 2008 presentation where the NPC said that an existing marine shipping route would be “grandfathered” and not subject to sections 3.5.10 – 3.5.12 of the NBRLUP, the NPC may not adopt a policy that would fetter the NPC’s discretion to consider whether an amendment application and public review were necessary prior to making a conformity determination. Out of fairness the NPC notified Baffinland of its review of these provisions as they related to the ERP and invited the proponent to make submissions on July 30, 2013.

95. Baffinland did not say that the ERP did not constitute the “development” of a transportation corridor, only that it was not developing a “new” corridor. Again, section 3.5.11 of the NBRLUP does not say that a transportation corridor must be “new” for an amendment application to be required as a conformity requirement. Considering that section 3.5.11 of the NBRLUP is a conformity requirement, and the NPC has a mandate to make conformity determinations for “project proposals” which include physical works, the NPC believes that a change in the use or intensity of physical activities can constitute a “development”. For clarity, NPC considers that section 3.5.11 of the NBRLUP requires project proponents who wish to “develop” a

⁹² Exhibit 3, Nunavut Planning Commission, *Interpretation – North Baffin Regional Land Use Plan – Terms 3.5.10, 3.5.11 and 3.5.12.*

transportation corridor as defined above, whether new or existing, to make a detailed application to amend the NBRLUP, providing the information required by Appendix J and K, for public review by a joint panel as contemplated in section 3.5.12 of the NBRLUP. If the application is for the development of an existing corridor, it is still necessary for the NPC to review, for example, whether alternative routes have been considered and whether a different route would be more suitable. If the most suitable route is on an existing transportation corridor, the NPC has discretion not to recommend an amendment to the plan as it is possible no amendment would be required. If the most suitable route is not an existing transportation corridor, NPC would have to decide whether an amendment to the plan is recommended.

96. In the alternative, as discussed above, in the event that section 3.5.11 of the NBRLUP only applies to the development of “new” transportation or communications corridors, the NPC also determined that Baffinland is developing a “new” transportation corridor.
97. In Exhibit 11, Baffinland’s June 12, 2013 correspondence to the NPC, Baffinland took the position that the ERP could be treated as “not changing the project proposal(s) that have already been reviewed for conformity under Section 11.5.10” by the NPC, specifically because the ERP works and activities “are a modification of the works and activities outlined in Baffinland’s previous project activities that received positive conformity determinations” and that the ERP uses the existing Milne Inlet Tote Road which is a public access easement for transportation. Baffinland maintained this position in its

August 2, 2013 submissions and the Baffinland January 31, 2014 Submissions. For example, Baffinland's August 2, 2013 submission acknowledged that "the ERP contemplates physical works and physical activities that were not assessed in the FEIS of the approved Project", but states that the ERP does not propose to develop a new transportation corridor.

98. The NPC notes the ERP proposes new physical works at Milne Inlet, including a new reclaim conveyor belt to transport the iron ore from a new stockpile out to ships berthed at a new fixed ore dock, for a distance of approximately 1 kilometer. Furthermore, as explained above, although the Milne Inlet Tote Road is an existing transportation corridor and easement defined in the NLCA, the ERP Addendum changes the temporary upgrades to the Milne Inlet Tote Road proposed for the bulk sampling program approved in 2007, to permanent upgrades for the purpose of year-round ore haulage for the life of the mine. The ERP Addendum proposes a permanent alteration to the use of the road, both through making upgrades to the road itself, and by proposing a significant increase in traffic on the road such that an ore truck will pass any given location on the road roughly every 10 minutes where current activities equates to approximately 1 truck every hour.⁹³
99. The NPC considers these new alterations to the Milne Inlet Tote Road constitute the "development" of a transportation corridor.

⁹³ Exhibit 23, Baffinland Iron Mines Corporation, *Mary River Project: Early Revenue Phase, NPC Oral Hearings January 2014*, PowerPoint Presentation, at slide 5, speaker's notes.

100. On a related matter, QIA in its January 10, 2014 submission also asked the NPC to consider its recommendations pertaining to Appendix I of the NBRLUP for caribou protection measures, suggesting that the project as proposed does not conform to the caribou protection measures presently described in Appendix I of the NBRLUP. As noted in the Baffinland January 31, 2014 Submission, QIA and Baffinland subsequently reached agreement on the application of these updated project-specific caribou protection measures. The NPC asked the QIA to provide an explanation on this issue on March 26, 2014, specifically asking whether QIA meant to suggest the NBRLUP would have to be amended for the ERP Addendum to conform to the NBRLUP Appendix I. On March 28, 2014 QIA clarified for the NPC that the “non-conformity” raised in its submission on January 10, 2014 had been rectified by the caribou protection measures subsequently agreed upon with Baffinland. The NPC therefore will not consider that issue further.
101. Although as the QIA submission notes the NBRLUP presently does not have a “Caribou Protection Map”, there is a Caribou Calving Grounds map on page 36 of the NBRLUP and section 3.3.7 of the NBRLUP prohibits development activities within caribou calving areas and requires implementation of caribou protection measures by QIA and DIAND (as it then was) on Inuit Owned and Crown Lands respectively. While chapter 3.4 of the NBRLUP explains that the existing measures in Appendix I are “adequate” although they should be reviewed in light of new knowledge, it also says:

... caribou protection measures apply only when caribou are on calving grounds or at water crossings. At these times, all individual operations - such as mineral exploration - must cease. While these measures may not solve the problem of what to do about long-term development, they do offer flexible interim protection. Given the lack of prospective development in the region, the kinds of measures in Appendix I may be beneficial.

Protection measures could be implemented at least three different ways: as part of a regional land use plan; through the NWMB (wildlife regulations); and through terms and conditions attached to land use authorizations (land use regulations). For example, the Qikiqtani Inuit Association could follow the lead of the Kitikmeot Inuit Association and attach caribou protection measures to permits it grants to companies seeking to work on its lands.

102. The NPC is in the process of preparing a Draft Nunavut Land Use Plan (DNLUP) and the GN has committed to providing the NPC with data and advice that the NPC hopes will enable it to develop such a “Caribou Protection Map” and new caribou protection measures. QIA is encouraged to provide any information it possesses that would assist in the preparation of the DNLUP. In the interim, the NBRLUP provides the following actions and recommendations at sections 3.4.4 and 3.4.5 respectively:

- 3.4.4 Caribou protection measures, based on those suggested in Appendix I - and further developed by DIAND and the QIA Inuit land managers in consultation with NWMB, local HTOs and DSD - shall be implemented for all caribou herds in the North Baffin Planning Region by DIAND and by the QIA. [A]
- 3.4.5 The NPC, the NWMB, NIRB, DIAND, Inuit land managers and DSD should work together to monitor the effectiveness of the caribou protection measures and compliance, and to determine whether special protected areas for caribou are required. [REC]

RECOMMENDATION

103. Based on the analysis of the evidence gathered in the public review, it is the NPC's finding that the guidelines in Appendices J and K have been met and the NPC will recommend an amendment to the NBRLUP.
104. Recognizing that the NBRLUP does not presently show or refer to the existing Milne Inlet Tote Road, whether as a winter-only road or as an all-season road, or the shipping corridor from Milne Inlet through Eclipse Sound to Baffin Bay, the NPC has concluded that the NBRLUP ought to be amended to show a single transportation corridor as follows:
- a. the Milne Inlet Tote Road as a permanent year-round Tote Road on the terms provided in the NLCA;
 - b. Milne Port as a transportation hub for iron ore from the end of the Milne Inlet Tote Road to the end of the proposed fixed ore dock; and
 - c. The marine shipping route north from Milne Inlet through Eclipse Sound to Baffin Bay during the open-water season with no disruption of landfast ice or pack ice.

105. The NPC will prepare a draft amendment to the NBRLUP for submission to the federal and territorial Ministers for their consideration and approval consistent with these reasons.

Signed by the delegates of the Nunavut Planning Commission,

This 2nd of April, 2014,



Sharon Ehaloak,
Executive Director



Brian Aglukark,
Director of Plan Implementation