

NUNAVUT IMPACT REVIEW BOARD

MARY RIVER PHASE 2 PROPOSAL

BAFFINLAND IRON MINES CORPORATION

NIRB File. No. 08MN053

**BAFFINLAND RESPONSE TO THE APRIL 27, 2021**

**NOTICE OF OBJECTION OF THE MITTIMATALIK HUNTERS AND TRAPPERS  
ORGANIZATION REGARDING ADMISSIBILITY OF BAFFINLAND EXHIBITS**

**I. SUMMARY OF RESPONSE TO MOTION OF THE MHTO**

1. Baffinland Iron Mines Corporation (“**Baffinland**”) opposes the objection of the Mittimatalik Hunters and Trappers Organization (the “**MHTO**”) dated April 27, 2021 (the “**MHTO Submission**”), and states that the following documents should properly be marked as Exhibits by the Nunavut Impact Review Board (the “**NIRB**” or “**Board**”) and considered in the Phase 2 Proposal proceeding before the Board:
  - 210414 BIM New Support Slides – IT4M (NIRB Registry No. 334663) (the “**Support Slides**”);
  - 21409 BIM Ltr NIRB Re Updated Engagement Summary, Commitment List and Revised Draft PC 005-IMTE (NIRB Registry No. 334460) (the “**Updated Engagement Summary Update**”);
  - 210406 2021 Draft Commitment List – IMTE (NIRB Registry No. 334329) (the “**Draft Commitment List**”);
  - 210408 BIM CRT Video ENV Monitoring-IA2E (NIRB Registry No. 334439) (the “**Monitoring Video**”);

- 210406 2021 Community Roundtable Presentation – IMTM (NIRB Registry No. 334354) (the “**Community Roundtable Presentation Supplemental Slides – English**”);
- 210407 2021 Community Roundtable Presentation-IMTM (NIRB Registry No. 334428) (the “**Community Roundtable Presentation Supplemental Slides – French**”);
- 210406 FAQ Hearing Pamphlet – IMTE (NIRB Registry No. 334353) (the “**FAQ Pamphlet**”); and
- 210322 BIM Appendix 12 (within Responses to Questions) at pdf page 270 (doc ID 334147) (the “**Adaptive Management Plan Update**”)

(collectively, the “**Baffinland Documents**”).

2. Baffinland submitted the Baffinland Documents to the NIRB for the following reasons: they are in reply to issues raised during the proceeding, they provide information regarding new commitments recently made by Baffinland, or they seek to explain technical issues in plainer terms or graphically for the benefit of community members, NIRB staff and the NIRB.
3. All such documents are properly admissible, and in fact, should be considered by NIRB in its assessment. There is no prejudice to any party should they be admitted as evidence in the Phase 2 proceeding. The slides could be used in conjunction with oral explanations or responses to questions during the community roundtable to help illustrate the points or information in a meaningful way.
4. The MHTO Submission objecting to the admission of the Baffinland Documents relies on a selective and misleading interpretation of the NIRB Rules of Procedure. Further, the MHTO Submission takes an overly inflexible and formalistic approach to the admission of evidence in a public hearing, which is contrary to the NIRB’s Rules of Procedure and the Nunavut Agreement regarding how evidence is to be treated.

5. Baffinland's position on the admissibility of the Baffinland Documents is set out below in further detail.

## II. **FACTS**

### (a) **Description of the Documents at Issue**

6. To provide an accurate understanding of the admissibility of the Baffinland Documents, it is important to consider the type of information in each of the documents and the purpose for which it is being offered in the Phase 2 proceeding. The following paragraphs set out that information.

#### (vi) **Support Slides**

7. The Support Slides provide updated information to the NIRB and Parties regarding new mitigation measures, employment benefits, and refinements to the proposed adaptive management plan for the Phase 2 Proposal:
  - Slides 1 and 2 provide a graphic representation of potential wind fencing mitigation measures for dust control, which is a potential dust mitigation described in previous NIRB filings. In particular, Baffinland filed a "Dust Summary Report on April 6, 2021, in advance of the April 2021 Public Hearing Session (NIRB Registry No. 334330);
  - Slides 3 to 7 provide information regarding employment benefits with the Phase 2 Proposal, including recently developed commitments that are also described in the draft Commitment List (NIRB Registry No. 334329) and Updated Community Engagement Update (NIRB Registry No. 334460);
  - Slides 8 to 11 provide photographs of aspects of the mining process at Mary River, including crushing, hauling and stacking;

- Slides 12 and 13 are placeholders for Baffinland to play recordings of narwhal vocalizations during the Public Hearing prepared in response to a request by the Hamlet of Sanirajak for such recordings during the January-February 2021 Public Hearing session.<sup>1</sup>
  - Slide 14 includes two graphic representations of ship noise; and
  - Slide 15 provides a graphic representation of the manner in which the proposed Adaptive Management Plan will be implemented, evaluated and adjusted. The slide presents similar information to that included at page 311 of the “BIM Responses to Questions” filing (NIRB Registry No. 334147).
8. With respect to the slides that describe additional commitments, Baffinland recently developed these commitments in consultation with other Parties after the adjournment of the Public Hearing in February 2021. Baffinland made these updated commitments in response to concerns raised by Parties, including concerns raised by Parties as recently as the Public Hearing held in April 2021.
9. As an example of those new commitments is Baffinland’s commitment to provide employment in the affected communities (the “**Communities**”), which Baffinland has made as of March 2021. During the Public Hearing session in January-February 2021, participants raised concerns that employment with Baffinland was being offered at the mine site, which might not be suitable employment for those with caregiver or other responsibilities who need to remain in the community and cannot undertake a two-week rotational work schedule.<sup>2</sup> The Hamlet of Pond Inlet had also raised the topic of more community-based employment with Baffinland at the November 2019 Public Hearing session.<sup>3</sup> In response to this concern, Baffinland has committed to employing a number

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<sup>1</sup> Public hearing transcript for February 3, 2021 (NIRB Registry No. 333453), p.1588.

<sup>2</sup> See, for example, the public hearing transcript for February 3, 2021 (NIRB Registry No. 333453), at pp.1629 to 1630.

<sup>3</sup> Public hearing transcript for November 2, 2019 (NIRB Registry No. 327559), p. 217.

of individuals in each of the affected Communities. This commitment is directly relevant and responsive to the issues raised by participants and the Hamlet of Pond Inlet.

**(ii) Engagement Summary**

10. The Engagement Summary Update is a summary of Baffinland’s engagement efforts with communities since filing its last engagement update with NIRB on January 18, 2021. Baffinland has filed updates to its community engagement efforts with the NIRB throughout the Phase 2 Proposal assessment process. The information in the most recently filed Engagement Summary brings current Baffinland’s engagement efforts since the adjournment of the public hearing in February 2021 and the position of Parties with respect to any outstanding concerns.
11. In its Pre-Hearing Conference Report, the NIRB specifically noted the following: “The NIRB notes that the Proponent and/or Parties are expected to advise the Board as to whether there are any outstanding concerns that remain following any additional engagement or consultation meetings and of respective documents in order to address unresolved issues.”<sup>4</sup>
12. Due to multiple adjournments of the Public Hearing, and engagement efforts after those adjournments, Baffinland has had to file multiple updates with the NIRB regarding those additional engagement efforts. The Engagement Summary Update brings current the engagement efforts of Baffinland since the adjournment of the Public Hearing in February 2021, and is responsive to the NIRB’s request for such information. Engagement efforts are ongoing and should additional engagements be completed prior to the recommencement of the Public Hearing, a further update will be filed with NIRB.

**(iii) Draft Commitment List**

13. In review proceedings the NIRB expects that the proponent will provide an updated commitment list as outstanding issues are resolved by way of new commitments. It is

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<sup>4</sup> Pre-Hearing Conference Decision Report dated October 30, 2020 (NIRB Registry No. 331868), p. 9 [“PHC Decision Report”].

common practice for the commitment list to be updated throughout the hearing process and for a final commitment list to be filed just prior to the close of the NIRB public record, to ensure that the NIRB has an up to date understanding of the commitments proposed. Throughout the Phase 2 proceeding, Baffinland has filed its Draft Commitment List, providing updates to that list as it has made new commitments to satisfy and/or address parties' technical issues. Baffinland notes that several parties, including the MHTO, indicated during the Pre-Hearing Conference held in October 2020 that they would be looking for additional commitments or would be working with Baffinland on refinements to commitment wording.<sup>5</sup> The expectation is that Baffinland will continue to make and refine its commitments throughout the assessment process, including the period both leading up to as well as during the Public Hearing.

14. In its Pre-Hearing Conference Report dated October 30, 2020, the NIRB clearly articulated that Baffinland's commitment list together with the list of any unresolved issues would form the basis of issues to be discussed at the Public Hearing.<sup>6</sup> The NIRB expects to receive information about Baffinland's commitment list as those commitments must be considered by the NIRB in its assessment.
15. Similar to the situation regarding the Engagement Summary Update, Baffinland has continued to make and refine its commitment list for the Phase 2 Proposal, including during the periods of adjournment of the Public Hearing. The Draft Commitment List is being submitted to the NIRB as an update of those further commitments Baffinland has made since the adjournment of the Public Hearing in February 2021. It would be illogical and unfair to Baffinland if NIRB did not rely upon Baffinland's most up to date commitment list in making its recommendation report to the Minister.

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<sup>5</sup> See PHC Decision Report.

<sup>6</sup> See PHC Decision Report at p. 61.

**(iv) Monitoring Video**

16. The Monitoring Video is not new. It was played during Baffinland's Terrestrial presentation at the Public Hearing on November 4, 2019, and representatives of the MHTO watched the Monitoring Video at that time.<sup>7</sup>
17. The Monitoring Video is narrated by one of Baffinland's full-time Inuit environmental technicians, Mick Kappaq from Sanikiluaq. The purpose of the Monitoring Video is to provide information to community members at the Community Roundtable portion of the Public Hearing about the participation of Inuit in monitoring the existing Project, which will be further enhanced by a robust Inuit-led monitoring program through commitments made as part of the Inuit Certainty Agreement.
18. The Monitoring Video is relevant for that purpose, and given it has already been played during the Technical Session portion of the Public Hearing, there is no prejudice to Parties should it be replayed at the Community Roundtable.

**(v) Community Roundtable Presentation Supplemental Slides**

19. The Community Roundtable Presentations provide updates to the presentations Baffinland filed on January 20 and February 1, 2021, in advance of the Community Roundtable portion of the Public Hearing. They have been updated to provide a more graphics based approach to present the information, and to reflect additional commitments made by Baffinland as a result of its engagements between February – April 2021. There is no prejudice to any party to file the Community Roundtable Presentation Supplemental Slides at this time, well in advance of any resumption of the Public Hearing, including the Community Roundtable portion.

**(vi) FAQ Pamphlet**

20. The information in the FAQ Pamphlet provides answers to questions Baffinland has heard from community members, as well as updates regarding commitments Baffinland

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<sup>7</sup> Public hearing transcript for November 4, 2019 (NIRB Registry No. 327561), p. 581.

has made regarding mitigation, monitoring under the Inuit Certainty Agreement, available training and career opportunities, and benefits for the North Baffin communities. This is information Baffinland expects would be of interest to participants attending the Community Roundtable portion of the Public Hearing. It has also been publicly available on Baffinland's website for some time.

21. The FAQ Pamphlet provides very general information at a high level in a question and answer format. The information contained in the FAQ Pamphlet is not new and has previously been provided by Baffinland in other written technical submissions as well as in its Technical Session presentations. The FAQ Pamphlet is designed to provide some of that information in a non-technical, accessible format in both English and Inuktitut.
22. As noted above, given the Community Roundtable portion of the Public Hearing was adjourned, there is no prejudice to any party for this document to be admitted at this time.

**(vii) Adaptive Management Plan Update**

23. The Adaptive Management Plan Update is Appendix 12 to Baffinland's Responses to Written Questions, filed March 23, 2021. Appendix 12 is an update to the NIRB regarding Baffinland's Adaptive Management Plans for the Environmental Management Plan for the Phase 2 Proposal. It provides an update on the progress Baffinland and the QIA have made with respect to the preparation of the monitoring plans. It also includes an update that Baffinland had provided to QIA with the Initial Objectives, Indicators, Thresholds and Responses associated with each of the monitoring plans in the form of Threshold Action and Response Plans and associated Moderate and High Action Mitigation (Response) Toolkits.
24. This information is directly relevant and responsive to issues identified by Parties including concerns about the progress of development of the final Adaptive Management Plan.<sup>8</sup> The NIRB Chairperson also asked questions about the Indicators and Thresholds

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<sup>8</sup> See, for example, the public hearing transcripts for January 25, 2021 (NIRB Registry No. 333445), at pp. 86-87, 136-137, 149-150, and 155-157; January 26, 2021 (NIRB Registry No. 333446), at pp. 325; January 29, 2021

during the hearing in January and February 2021.<sup>9</sup> The Adaptive Management Plan Update is information provided in reply to such questions and concerns. It is entirely appropriate and necessary for Baffinland to provide evidence as to the progress made regarding the development of the Adaptive Management Plan, including the Initial Objectives, Indicators, Thresholds and Responses.

**(a) Factual Inaccuracies in MHTO Submission**

25. In specific response to paragraph 5 of the MHTO's Notice of Objection, Baffinland states that the MHTO incorrectly summarized the NIRB's decision with respect to Oceans North's late filing of its presentation materials. On January 29, 2021, when Oceans North filed revised presentation materials during the course of the Public Hearing, Baffinland reserved its right to object to those filings with the NIRB. As a result of Baffinland reserving its objection, the NIRB did not immediately enter the Oceans North presentation materials as exhibits but instead sought submissions from the parties with respect to the admissibility of those materials.
26. On February 27, 2021, the NIRB asked parties for their submissions with respect to the admission of a number of documents, including the late-filed presentation materials of Oceans North.<sup>10</sup>
27. After considering its position, Baffinland decided not to pursue its objection regarding the late filing of the Oceans North presentation materials and made no submissions with respect to those materials.
28. On April 6, 2021, the NIRB issued its procedural guidance on the motions, including Baffinland's reservation with respect to the late-filed presentation materials of Oceans

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(NIRB Registry No. 333449) at pp. 969-970; January 30, 2021 (NIRB Registry No. 333450), at pp. 1104-1105; and February 1, 2021 (NIRB Registry No. 333451), at pp. 1328-1330, 1340-42.

<sup>9</sup> See, for example, the public hearing transcript for January 25, 2021 (NIRB Registry No. 333445) at p. 204; January 27, 2021 (NIRB Registry No. 333447) at pp. 464-465.

<sup>10</sup> See NIRB Registry No. 333203.

North.<sup>11</sup> In that letter, the NIRB provided its procedural guidance on the motions, and decided that on the basis that the objection had not been spoken to further by Baffinland, the Oceans North presentation materials be entered as filed, despite being filed late. The Oceans North presentation materials which were filed during the course of the Public Hearing in January and February 2021, remain on the NIRB Public Registry.<sup>12</sup>

29. Accordingly, contrary to what has been stated by the MHTO, other Parties have been permitted to file documents during the course of the hearing itself, for reference during proceedings underway.

### **III. NIRB RULES OF PROCEDURE AND RELEVANT COMMON LAW**

#### **(a) NIRB's Rules of Procedure**

30. The MHTO Submission outlines only select rules of evidence from the NIRB Rules of Procedure. Rule 33.1 of the Board's Rules of Procedure is also relevant:

33.1 The Board may allow the admission of evidence that would not normally be admissible under the strict rules of evidence.

31. In addition, the following Rules of Procedure are also relevant.

38.6 Where an oral hearing is in progress, a party entering a document as an exhibit shall provide copies of the document to the Board and all other parties.

38.7 Unless the Board otherwise directs, no documentary evidence may be presented at an oral hearing unless the evidence is filed and served in accordance with these Rules.

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<sup>11</sup> See NIRB Registry No. 334349.

<sup>12</sup> See NIRB Registry Nos. 333011, 333009, 332741, 332740 and 332749.

32. The NIRB Rules of Procedure specifically acknowledge that there will be circumstances when documents are filed less than 15 days prior to the start of the hearing, and will be accepted by the Board.

**(b) No Prejudice to any Party**

33. With respect to the MHTO's argument there is prejudice due to the timing of when the Baffinland Documents were filed, it is important to consider that the Public Hearing has not yet completed. Baffinland's position is that, taking into account the nature of the Baffinland Documents, there is no prejudice to any party on the basis that the Baffinland Documents were filed less than 15 days prior to the recommencement of the Public Hearing. However, if there was any prejudice, such prejudice has since been remedied through the passage of time.
34. As the Public Hearing was adjourned unexpectedly on April 14, 2021, Parties have now had more than 15 days with the Baffinland Documents to consider them prior to the resumption of the Public Hearing. Accordingly, any prejudice that may have existed due to the timing of when the Baffinland Documents were filed has been addressed by the adjournment.
35. It is open to the MHTO to include any submissions on these materials they wish to make in their Final Written Summaries that will be filed with the Board at the end of the Public Hearing.

**(c) Common Law – Admissibility of Reply Evidence**

36. The MHTO has taken issue with respect to the Baffinland Documents, many of which are being provided in reply to issues raised by Parties in the Phase 2 proceeding. The common law jurisprudence is clear that evidence provided by the applicant in reply to issues raised is properly admissible. The case law distinguishes between evidence-in-chief and evidence proffered in reply and is clear that procedural fairness requires that the applicant, which in this case is Baffinland, has the last word through reply evidence.

37. This issue was raised during the Trans Mountain proceeding before the National Energy Board, and the National Energy Board articulated the applicant's right of reply evidence in the following way:

*In administrative proceedings, the applicant bears the onus of providing evidence to establish its case. **Therefore, administrative procedure and fairness provide for the applicant to be given the last word; that is, through final reply evidence, in both written and oral hearings.** Reply evidence should not be evidence that the applicant should have filed as part of its evidence-in-chief (that is, the applicant cannot split its case to avoid presenting certain evidence until after the other parties have filed their evidence), and it should be evidence that responds to new issues raised in intervenor evidence.*

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*Further, so long as reply evidence is not evidence that the applicant should have brought forward as part of its evidence-in-chief to meet its onus, and it is properly responding to new issues raised by intervenors, then the fact that it may contain new expert opinion or technical analysis is not a basis for finding it improper. Trans Mountain is entitled to provide evidence that attempts to rebut the evidence of intervenors. Intervenors do not have a final right of reply simply because Trans Mountain filed reply evidence that seeks to rebut or contradict theirs – this is frequently the nature of reply evidence. Also, at this point, the Board is not assigning weight to Trans Mountain's reply evidence or any other evidence on the record.<sup>13</sup>*

38. This ruling was appealed to the Federal Court of Appeal, which upheld the National Energy Board's decision. The Federal Court of Appeal held that there was no procedural

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<sup>13</sup> National Energy Board Hearing Order OH-001-2014, Ruling No. 96, dated October 8, 2015, pp. 4-5.

unfairness arising from the National Energy Board's decision to refuse to strike portions of Trans Mountain's reply evidence.<sup>14</sup>

#### IV. ANALYSIS

##### (a) Documents are Relevant and Necessary to Board's Assessment

39. The Baffinland Documents are not "new evidence" as characterized by the MHTO. Instead, they are documents that were prepared in response to issues raised by participants in the Phase 2 Proposal review process, or represent new commitments made by Baffinland to address concerns raised. Contrary to what the MHTO indicates in its submission, the NIRB commonly admits these types of documents into evidence and in fact expects proponents to provide them as they are important to the NIRB's assessment.
40. Contrary to statements made by the MHTO in paragraph 14 of its submission, benefits resulting from the Phase 2 project are entirely relevant, and in fact, required to be taken into account by the NIRB in its assessment.
41. As outlined in s. 103(h)(i) of the Nunavut Project and Planning Assessment Act, the NIRB must take into account "...measures, including those proposed by the proponent, that should be taken to optimize the benefits of the project, with specific consideration given to expressed community and regional preferences in regard to benefits." In deciding whether to recommend the Phase 2 Proposal to proceed, the NIRB is required to take into account those measures Baffinland is proposing to optimize the benefits of the Project.

##### (b) Prejudice to Baffinland if Documents Not Admitted and Considered by NIRB

42. As noted by the National Energy Board, administrative procedure and fairness provide for the applicant to be given the last word; that is, through final reply evidence, in both written and oral hearings. Without admission of the Baffinland Documents, the NIRB

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<sup>14</sup> *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 at paras. 316-321.

will not be provided with a complete picture of all of the commitments Baffinland has made, or progress made on the proposed Adaptive Management Plan. Community members will not be provided with relevant and accessible information.

43. To deny the admission of the Baffinland Documents is unhelpful to the NIRB's consideration of the Phase 2 Proposal and procedurally unfair to Baffinland. Baffinland will suffer prejudice if the Baffinland Documents are not admitted into evidence by the NIRB as the NIRB will have made its recommendation to the Minister on the basis of an incomplete evidentiary record.
44. Finally, as outlined above, there is no prejudice to any Party should the Baffinland Documents be admitted.
45. For all of the reasons cited, Baffinland submits the NIRB should admit all of the Baffinland Documents into evidence for consideration as part of the Phase 2 Proposal assessment process.

Dated May 6, 2021

"Lawson Lundell LLP"  
Lawson Lundell LLP  
Solicitors for Baffinland Iron Mines  
Corporation