



**NIRB File No.: 08MN053**  
NWB File No.: 2AM-MRY1325  
QIA File No.: LUA-2008-008  
DFO File No.: 2008 MR

June 10, 2021

To: The Mary River Distribution List

Re: **Disposition of Objections to the Filing of Various Documents on the Public Hearing Record Associated with the Extension of the Reconvened Public Hearing for Baffinland's "Phase 2 Development Proposal"**

Dear Parties,

During the extension of the reconvened Public Hearing for Baffinland Iron Mines Corp.'s (Baffinland) "Phase 2 Development Proposal" (the April 2021 Public Hearing session) three (3) Intervenor proposed that the Nunavut Impact Review Board (NIRB or Board) accept the following documents to be entered as Exhibits on the Public Hearing Record:

- 1) A suggested Term and Condition to be added to Project Certificate No. 005 filed with the Board by Environment and Climate Change Canada on April 13, 2021 (Doc ID No. 334634) and marked for identification as **Exhibit 90**.
- 2) Two sets of PowerPoint slides filed with the Board on April 14, 2021 by Baffinland, one slide deck containing slides with information that has been previously filed with the Board (Doc ID No. 334662) marked for identification as **Exhibit 91** and one slide deck containing slides with new information (Doc ID No. 334663) and marked for identification as **Exhibit 92**.
- 3) A single page excerpt of the transcript of the examination on Affidavit of Brian Penney during the Nunavut Court of Justice Proceedings regarding the Injunction against the Mine Site protestors, filed with the Board on April 14, 2021 by the World Wildlife Fund (Doc ID: 334682) and marked for identification as **Exhibit 93**.

At the time the Board suspended the April 2021 Public Hearing session on April 14, 2021, due to a COVID-19 outbreak in Iqaluit the Board had requested that parties wishing to file objections or comments with respect to the marked Exhibits file their responses with the Board on April 15, 2021. Due to the suspension of proceedings, this deadline was also suspended. On April 27, 2021, the Board issued correspondence to Parties notifying that due to the disruption of the proceedings, the Board extended the original April 15, 2021 deadline to May 6, 2021 to allow parties to provide

written objections and comments regarding the Board's filing of marked Exhibits 90-93 on the Public Hearing Record for the file. On or before, May 6, 2021 the Board received comments from the following Intervenor. In addition to commenting on the marked Exhibits, several parties filed objections to the Board's inclusion of several documents previously filed by Baffinland in early April, 2021 on the Public Hearing Record.

For the convenient references of reviewers, Table 1 below provides a summary of the objections and other comment submissions received by the Board. All submissions received can be accessed on the NIRB's online public registry for this assessment by searching, the NIRB's registry using the specified Document ID numbers and the following project identifier: [www.nirb.ca/project/124701](http://www.nirb.ca/project/124701).

**Table 1:  
Summary of Objections and Comments Received**

Commenting Party	Summary	Document ID
Baffinland	<b>Does Not Object to filing of Exhibit 90;</b> however, Baffinland does not agree with the proposed T&C as presented and reserves the right to make further submissions regarding it.	335196
	<b>Opposes the Objection of the Hamlet of Pond Inlet to filing Exhibit 91 and 92.</b> Baffinland notes that the proposed slides provide information regarding new commitments (mitigations for dust control and employment benefits) and seek to clarify issues graphically. Baffinland further asserts that these slides could be used alongside oral explanations to facilitate discussions without prejudice to any party.	335197
	<b>Comments in Opposition to the Objection of the Mittimatilik Hunters and Trappers Organization (MHTO) to filing Exhibits 91 and 92 and documents identified as Items 2-8 in the MHTO's Objection Submission)</b> Baffinland notes that the materials in Exhibit 91 were all previously filed with the Board and there should be no objection to the Board's receipt of these materials. With respect to the new slides included in <b>Exhibit 92</b> Baffinland indicates these materials provide information regarding new commitments (mitigations for dust control and employment benefits) and seek to clarify issues graphically in respect of answers to written questions previously filed with the Board. Baffinland further asserts that these slides could be used alongside oral explanations to facilitate	335198

Commenting Party	Summary	Document ID
Baffinland (continued)	discussions without prejudice to any party. Baffinland also notes that the additional documents that were filed with the Board in early April and that the MHTO indicates should be excluded from the Public Registry as late-filed submissions are standard submissions that are expected of Proponents during an assessment. Baffinland indicates there is substantial value in these documents for parties because they summarize updates that have taken place since the close of the reconvened Public Hearing and the April 2021 Public Hearing session. Baffinland also highlights several inaccuracies in the MHTO's Objection Submission including but not limited to: incorrect summaries of the Board's decision with respect to Oceans North's late filing on January 29, 2021 and limited citations of the Board's Rules of Procedure excluding additional rules that may apply. Additionally, Baffinland asserts that any prejudice noted by the MHTO due to limited review time for these documents has been remedied due to the suspension of the April 2021 Public Hearing session on April 14, 2021 and the passage of time since then. Baffinland provides a case law example from a Trans Mountain Proceedings before the National Energy Board to illustrate that procedural fairness affords the Proponent the final right of reply in respect of both written and oral evidence, citing the following passage.  <i>"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."</i>	
	<b>Comments in Opposition to the Objection of the QIA to filing Exhibit 92.</b> Baffinland's opposes the QIA's objection to the filing of the slides in Exhibit for substantially the same reasons as noted above in the Comment Submission filed by Baffinland in response to the MHTO's Objections to filing Exhibit 92.	335199
	<b>Objection to filing of Exhibit 93</b> on the grounds that this transcript is in relation to proceedings in the Nunavut Court of Justice regarding the protest at Mary River in January/ February 2021 and the associated Injunction. Baffinland indicates that these proceedings are	334998

Commenting Party	Summary	Document ID
	independent from the NIRB process, the proceedings in question are still underway and there is no basis for relevance advanced by WWF.	
Nunavut Tunngavik Inc. (NTI)	<b>No Objection to filing of Exhibit 91 and Objects to the filing of Exhibit 92</b> on the grounds that admitting new evidence at this late stage of the review process would be procedurally unfair as this evidence cannot be tested through oral or written questions. NTI further notes that the speculative economic benefits referred to in these slides have not been agreed to or incorporated into an Inuit Impact Benefit Agreement (IIBA) by the QIA. Without these benefits being incorporated into a formal agreement, NTI is uncertain that these benefits will ultimately be available to Inuit.	335000
Qikiqtani Inuit Association (QIA)	<b>No Objection to filing of Exhibit 91 and Objects to the filing of Exhibit 92.</b> QIA is concerned with the introduction of new information late in the assessment process after parties have had the opportunity to question the Proponent. QIA notes they had insufficient time to fully review the materials with particular concern regarding slide 15 of the new information slides as this pertains to Baffinland's adaptive management flow chart which misrepresents the discussions and Inuit Certainty Agreement (ICA) commitments and requires further discussion regarding how adaptive management would work if the Phase 2 Development proposal were to be approved. QIA further notes that with Baffinland's track record of missing Inuit employment targets, lack of discussion, process with QIA to ensure that these benefits are reflected in the IIBA terms, and the lack of implementation planning, these commitments should not be taken into consideration by the Board. QIA indicates that should the Board allow Exhibit 92 to be filed, Parties should be provided an opportunity to question the Proponent on this information.	334956 & 334996
Hamlet of Pond Inlet	<b>Objection to the filing of submissions by Baffinland less than 15 days before</b> the April 2021 Public Hearing session on the grounds that this information is being presented as a last-minute response to concerns raised in the final stages of the assessment process and has not been developed through adequate community consultation. Further, the Hamlet notes that other parties	334999

Commenting Party	Summary	Document ID
	were unable to file late submissions during the January/February 2021 Public Hearing sessions and that the Board's ruling then should also apply now.	
Mittimatalik Hunters and Trappers Organization (MHTO)	<p><b>MHTO Objection to filing the following documents as Exhibits and filed on the Public Registry:</b></p> <ol style="list-style-type: none"> <li><b>Baffinland New Supporting Slides (Exhibit 92; Doc ID: 334663);</b></li> <li><b>Baffinland Letter to NIRB Re: Updated Engagement Summary, Commitment List and Revised Draft PC 005 (Doc ID: 334460);</b></li> <li><b>Draft Commitment List (Doc ID: 334329);</b></li> <li><b>Baffinland CRT Video Re: Env Monitoring (Doc ID: 334439);</b></li> <li><b>2021 Community Roundtable Presentation (Doc ID: 334428);</b></li> <li><b>2021 Community Roundtable Presentation (Doc ID: 334354);</b></li> <li><b>FAQ Hearing Pamphlet (Doc ID: 334353); and</b></li> <li><b>Appendix 12 (within Responses to Questions, pdf page 270 (Doc ID: 334147).</b></li> </ol> <p>The basis for the MHTO's Objection Submission is that:</p> <ul style="list-style-type: none"> <li>all of these materials could be characterized as "late filings" (not filed at least 15 days prior to the reconvened Hearing) and other parties were denied filing for this reason;</li> <li>the nature of the evidence is repetitious, and duplicative in contravention to the Board's Rules of Procedure, Rules 33.3 (d) &amp; (e); and</li> <li>the benefits itemized in the materials were not negotiated with the parties prior to Baffinland including them in the filed materials.</li> </ul> <p>The MHTO also asserts that there has been a breach of procedural fairness limiting Intervenor's ability to make a full and fair case due to the developing body of evidence. They note that this level of uncertainty around the process creates challenges to intervenors in developing their interventions. Finally, the MHTO</p>	335007
MHTO (cont'd)		

Commenting Party	Summary	Document ID
	indicates that the late filings by Baffinland prevent parties from developing questions, consulting experts and preparing responsive evidence, noting that this creates “ <i>serious prejudice to the parties of admitting this evidence outweigh the value of the evidence and it should be excluded by the Board.</i> ”	
Hamlet of Sanirajak	<b>Objects to the filing of Exhibits 91 and 92</b> on the grounds that these documents were not provided to parties 14 days prior to the beginning of the Extended Public Hearing sessions and further that these items were discussed at the April sessions outside of the allotted Agenda time. In addition, the Hamlet raises concerns that the Board strictly enforces time limits and rules with the Intervenor but not with the Proponent, allowing them more flexibility in the proceedings.	335200
Ikajutit Hunters and Trappers Association (IHTA)	<b>Supports the filing of Exhibit 90</b> on the grounds that this term and condition will further secure environmental protection if the Project were approved.	335203
	<b>Objects to Baffinland filing Exhibit 92 and items 2-8 in the MHTO Objection Submission</b> on the grounds that they support the basis for Objections brought forward by the MHTO.	335201
	<b>Supports the filing of Exhibit 93</b> as it is supporting evidence that Baffinland has begun work on Phase 2 of the Mary River Project without authorization from regulatory bodies.	335204
World Wildlife Fund (WWF)	<p><b>Supports the filing of Exhibit 90</b> as there is a need to move away from the use of Heavy fuel oil in Canadian waters to further mitigate against environmental impacts of the Project.</p> <p><b>Objects to Baffinland filing Exhibits 91 and 92</b> due to concerns regarding new information being provided late into the review process. However, given the suspension of the Hearing, WWF submits that Parties should be able to consider the filing through final written submissions and or during the resumption of the Hearing. WWF further notes that these late filings by the Proponent are indicative of an incomplete and ever-changing regulatory</p>	335195

Commenting Party	Summary	Document ID
	<p>submission from the Proponent and reason for the Board to not recommend approval for the Phase 2 Development.</p> <p><b>Comments in Opposition to Baffinland's Objections to WWF's filing of Exhibit 93</b>, WWF submits that these transcripts demonstrate Baffinland's ability and willingness to reduce dust being dispersed on site for the current operations. WWF further suggests that the Board consider this in looking for solutions to the current environmental concerns with the Project prior to increasing production.</p>	

### **The Principles Guiding the Board's Consideration of the Objections and Comments About the Exhibits Marked as Exhibits 90-93 and MHTO's Objections Documents**

In their objections to the Board filing specified documents received from Baffinland just prior to, and during the April 2021 Public Hearing session on the Public Hearing Registry, several parties have characterized these materials as "late-filed" submissions, citing the Board's Rules of Procedure (38.1) to indicate that Board should require all documentation to be filed at least 15 days in advance of the Public Hearing, and stating that the Board's filing of documentation less than 15 days is procedurally unfair and should not be permitted by the Board. However, the Board notes that the full wording of the relevant subsections of Rule 38 of the Board's Rules of Procedure (2009) are not prescriptive, and the Rules contemplate that there may be situations where documentation is filed with the Board less than 15 days prior to a Public Hearing, including during a Public Hearing. The Rules provide describe the process for considering relevant documentation as follows:

#### *38. Relying on documents*

*38.1 Unless the Board directs otherwise, a party wishing to rely on documentary evidence at an oral hearing shall file the documentary evidence with the Board and serve a copy of it on the other parties at least 15 days before the date of the hearing.*

*38.3 If a party is unable to file all documentary evidence 15 days before the oral hearing takes place, the party shall file with the Board and serve on the other parties such documentary evidence that is available at that time and a statement identifying the balance of the documentary evidence to be filed and served and stating when the balance of the documentary evidence will be filed and served.*



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.*

In previous assessments, it is often the case that materials such as updated lists of commitments, suggested terms and conditions in a potential Project Certificate, and updates to relevant mitigation and monitoring plans are filed with the Board by the Proponent and Intervenor in the latter stages of the Public Hearing as the Proponent, Intervenor and communities work together to resolve outstanding issues while the Public Hearing proceeds. This is not unique to the Board's assessment of the "Phase 2 Development Proposal".

In addition to the Board's Rules of Procedure, the following principles apply to the Board's determination of whether to file the marked Exhibits, and/or any other documentation filed with the Board on the Public Hearing Record:

- The Board is entitled to receive and consider all information that is relevant to the assessment, subject to the requirements of procedural fairness for all parties;
- As stated in the Board's previous assessment of the original Mary River Project, Baffinland bears the onus of proof in the assessment:

*The burden of persuading the Board that the Project can, in the Board's judgment, proceed, rests with the Proponent. The community, Elders and Intervenor do not have the onus of persuading the Board that the Proponent has not satisfactorily assessed the anticipated ecosystemic or socio-economic impacts and environmental effects of the Project, or that the steps to avoid and mitigate or compensate for adverse impacts are insufficient. Rather, it is the responsibility of the Proponent, in whose interest the application has been filed, to prepare an impact statement [or impact statement addendum] that fully reflects the NIRB-issued guidelines and Minister's direction so that the Board may conduct a full review of the matters relevant to its mandate and determine whether the Project may proceed, and if so, on what terms and conditions.<sup>1</sup>*

Consequently, procedural fairness dictates that not only will parties and the Board be given an opportunity to test the evidence put forward by Baffinland, but also that Baffinland be given a final opportunity to respond; and

- As noted under Rule 33.3 of the Board's Rules of Procedure makes it clear that if the Board deems evidence to be "admissible" for the purposes of the Public Hearing Record, does not mean that it will, ultimately be found to be relevant and to determine any fact in issue. The Board's determination of relevance to the facts at issue in a specific assessment may not occur until after all relevant evidence has been received and considered by the Board.

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<sup>1</sup> NIRB, *Final Hearing Report, Mary River Project, Baffinland Iron Mines Corporation*, NIRB File No. 08MN053, September 14, 2012.



To close the Board's discussion of the factors considered by the Board to determine which documents should be accepted for filing on the Public Hearing Record for the Board's assessment of the Phase 2 Development Proposal, the Board takes issue with the statement or implication of some parties that the Board has differentially applied the Board's Rules to favour the Proponent by excluding Intervenor's submissions from the Public Hearing Record. When a party provides documents to the Board for filing, in each case, the Board considers the context, including:

- the Board's Rules of Procedure;
- any project-specific procedural directions such as deadlines issued by the Board; and
- the general principles of procedural fairness governing the receipt of relevant evidence on the Public Hearing Record.

to determine whether it is appropriate to receive submissions offered to be filed at any time during the Board's assessment. On the basis of the Board's assessment for each document, some Intervenor materials received after specified deadlines during the assessment have been filed on the Board's Public Hearing Record and some materials have not. The Board has provided parties with an indication regarding why materials have not been accepted for filing when these decisions are made, and it is inaccurate and disrespectful of the Board's processes to state that the Board has differentially applied the applicable Rules and principles to favour one participant over any other participant.

**The Board's Disposition of the Requests to File Exhibits 90-93  
and the MHTO's Objections to the Board's Inclusion of Specific Previously-Filed  
Documents on the Public Hearing Record**

After weighing all the parties' submissions, the applicable Rules of Procedure and the principles applicable to the Board's receipt and consideration of relevant information, including the obligations of procedural fairness, the NIRB's decision-making Panel responsible for the completion of the Board's assessment of the Phase 2 Development Proposal has decided the following:

***Exhibit 90 – Suggested Term and Condition From ECCC (Doc ID No. 334634).***

This document comprises a proposed commitment (and possible term and condition) and reflects the stated position of ECCC. The Panel notes that no Intervenor's objected to this Exhibit being filed on the Public Hearing Record. The Panel also recognizes that Baffinland had approximately 3 hours remaining in their allotted time to question Intervenor's when the April 2021 Public Hearing session was suspended on April 14, 2021 if they wish to question ECCC about the content of the Exhibit. Consequently, the Panel has directed that **the document marked as Exhibit 90 be entered on the Public Hearing Record**. The Board notes that if Baffinland identifies that additional time may be required to question/follow up with Intervenor's in respect of the wording of Exhibit 90, Baffinland may request a few minutes of time be added to Baffinland's time remaining to question Intervenor's when the April 2021 Public Hearing session was suspended.

***Exhibit 91 – PowerPoint Slides from Baffinland containing Previously Filed Information (Doc ID No. 334662)***

Exhibit 91 consists of a compilation of information that has been previously filed by Baffinland and that parties have had an opportunity to respond to over time. There is no basis for objection to the filing of this material, as the Board's Rules of Procedure allow for the Board to receive information during the Public Hearing. The Panel has directed that **the document offered as Exhibit 91 be entered on the Public Hearing Record.**

***Exhibit 92 – PowerPoint Slides from Baffinland containing New Information (Doc ID No. 334663)***

Exhibit 92 consist of slides that have not previously been viewed by the Board, parties or the public. All Intervenors who provided comment in respect of the filing of Exhibits objected to the filing of Exhibit 92. Although Baffinland indicated that several slides within the Exhibit are based on answers to Intervenors' written questions, as the time in the Board's Public Hearing for Intervenors to follow up with Baffinland with respect to their responses to written questions has concluded, Intervenors would not have an opportunity to question Baffinland with respect to any of the material included in the Exhibit considered to be new information/analysis. On this basis, the Panel does not consider it appropriate to file this information on the Public Hearing Record, and **the Panel has directed that the presentation materials marked as Exhibit 92 not be accepted for filing on the Public Hearing Record.**

***Exhibit 93 – An Excerpt of the Transcript of the Examination on Affidavit of Brian Penney during Nunavut Court of Justice Proceedings (Doc ID No. 334682)***

Exhibit 93 is a one-page excerpt of the transcript from the examination of a Corporate Officer of Baffinland in a Nunavut Court of Justice Proceeding that is unrelated to the NIRB's proceedings. WWF indicated that the transcript demonstrates Baffinland's ability and willingness to reduce dust being dispersed on site for the current operations, and other Intervenors commented that excerpt is evidence that Baffinland has begun work on Phase 2 of the Mary River Project without authorization from regulatory bodies. Baffinland objects to the Board filing Exhibit 93 on the basis that it is irrelevant and also challenges that the excerpt does support the assertions by WWF and other Intervenors as described above.

The Panel emphasizes in assessing whether Exhibit 93 should be accepted for filing on the Public Hearing Record, the Panel is not making a ruling with respect to whether Exhibit 93 will ultimately be considered relevant to the Board's assessment. The Panel recognizes that there is support from other Intervenors to the proposed filing of Exhibit 93. With respect to Baffinland's objections to the Board's filing of Exhibit 93, the Board notes that because Baffinland has time remaining to follow up with the facts asserted by WWF on the basis of Exhibit 93, when the extended Public Hearing session resumes, Baffinland will have an opportunity to follow up with WWF directly in respect of Exhibit 93 if they choose to do so. On this basis the Panel has directed that **the document offered as Exhibit 93 be entered on the Public Hearing Record.**

The Board notes that if Baffinland considers it necessary, they may request a few minutes of time be added to their time remaining to question Intervenors when the extended session recommences if they wish to question/follow up with Intervenors in respect of Exhibit 93.

***Previously filed Documents (Items 2-8 from the MHTO's response in Table 1)***

With respect to the MHTO's Objection Submission to all other documents already filed by Baffinland on the Public Hearing Registry, the Board notes that the Board does have discretion to permit the filing of materials less than 15 days prior to the Public Hearing, that parties were given opportunities to follow up during the Intervenors' questioning in respect of the materials provided and that it is standard practice for several of the materials (such as the updated Commitments List, etc.) to be filed on an on-going basis as discussions with parties progress, and the timing of these filings shortly before and during the Public Hearing are not unusual. Consequently, the Panel has **denied the request of the MHTO in their Objection Submission and will not remove the listed items from the Public Hearing Record.**

**Correction**

*"Please note: The Board identified an administrative error that affects the entry into the Public Hearing Record of the Exhibits incorrectly marked as Exhibit 90 and Exhibit 91 during the April 2021 Public Hearing session. As a result of the error, there is already an Exhibit 90 that was previously entered on the Public Hearing Record during the January/February proceedings. Consequently, the Board has corrected the numbering of the two Exhibits entered on the Public Hearing Record, by starting at Exhibit 91 instead of Exhibit 90. The numbering of the two Exhibits will be **corrected** in the Exhibits List for the Public Hearing Record as follows:*

- Exhibit 91 – Suggested Term and Condition from ECCC (Doc ID No. 334634 and erroneously marked for identification as Exhibit 90); and*
- Exhibit 92 – PowerPoint Slides from Baffinland containing Previously Filed Information (Doc ID No. 334662 and erroneously marked for identification as Exhibit 91).*

Should you have any questions regarding the Mary River Project, please contact Cory Barker, Technical Advisor II at [cbarker@nirb.ca](mailto:cbarker@nirb.ca). Any questions regarding procedural matters should be directed to the Board's Executive Director, Karen Costello at (867) 983-4608 or [kcostello@nirb.ca](mailto:kcostello@nirb.ca).

Sincerely,



Marjorie (Kaviq) Kaluraq  
Chairperson  
Nunavut Impact Review Board

cc: Megan Lord-Hoyle, Baffinland Iron Mines Corporation