



Via email (info@nirb.ca)

January 10, 2022

Kaviq Kaluraq
Chairperson
Nunavut Impact Review Board
PO Box 1360
Cambridge Bay, NU X0B 0C0

Dear Ms. Kaluraq:

Re: Final Written Submission of Nunavut Tunngavik Incorporate (“NTI”) on the Assessment by the Nunavut Impact Review Board (“NIRB”) of Baffinland Iron Mines Corporation’s (“Baffinland”) Phase 2 Proposal with proposed amendments to the approved Mary River Project (NIRB File No. 08MN053)

Summary

To start, NTI acknowledges the considerable efforts in this assessment process of NIRB, all the interveners, particularly Inuit and Elders who have participated with dedication in this demanding review of the Phase 2 Proposal that has taken place over a number of years, and that has occurred during a global pandemic.

The collection and incorporation of Inuit Qaujimagatugangit, as well as Inuit knowledge, views and concerns generally, is fundamental to NIRB’s assessment process and to the effective implementation of Project certificates by all responsible parties. In the review of the Phase 2 Proposal, NIRB must consider Inuit Qaujimagatugangit, Inuit knowledge and views when assessing whether this Proposal:

- enhances and protects the existing and future well-being of Inuit, residents and communities taking into account the interests of other Canadians;
- reflects the priorities and values of the residents of the Nunavut Settlement Area, and
- would unduly prejudice the ecosystemic integrity of the Nunavut Settlement Area.

In carrying out their regulatory roles, NIRB, and the Ministers who will receive NIRB’s recommendation regarding the Phase 2 Proposal, play critical roles in ensuring that the vision and obligations in the *Nunavut Agreement* for Inuit self-determination, self-reliance, Inuit cultural and social well-being, wildlife harvesting and the maintenance of ecosystemic integrity are fulfilled.

As NTI has previously stated, the outcome of this assessment process is of high importance to Inuit. The scope of the approved Mary River Project, in combination with the Phase 2 Proposal,

would be immense and see over 30 Million tonnes per annum (“MPTA”) of iron ore mined, transported by an extensive rail line, and shipped through Nunavut’s marine waters and in international waters. The Phase 2 Proposal solely, if approved, will result in the mining, transportation by rail and the shipping of 12 MPTA of iron ore through Milne Inlet (with operational flexibility to increase to 14.4 MPTA), which almost triples the approved original Early Revenue Phase amount of 4.2 MPTA that saw shipping of the iron ore begin through Milne Inlet in 2015. The Phase 2 Proposal has the potential for significant economic and social benefits and may also have an unacceptable level of impact on Inuit harvesting, wildlife, land, fresh water and marine environments. During the hearing process for Phase 2 Proposal, substantial evidence has been placed on the record by Inuit, and other interveners, that there are existing impacts from the current Mary River Project to Inuit harvesting, wildlife and the environment that are not being adequately monitored or mitigated that cannot be ignored. There is also evidence on the record, including from Inuit, the Qikiqtani Inuit Association (“QIA”), Hunters and Trappers Organizations (“HTOs”), NTI and other interveners that the “no significance” assessments of Baffinland regarding potential impacts to wildlife, the environment and Inuit harvesting from the Phase 2 Project do not fully consider western science or reflect Inuit Qaujimajatuqangit, Inuit values and understandings.

NTI Position

NTI continues to believe that the Mary River Project has the potential to provide extensive economic and social benefits to Inuit when impacts on Inuit harvesting, wildlife and the environment can be adequately monitored and mitigated in partnership with Inuit and through the incorporation of Inuit Qaujimajatuqangit. Unfortunately, the evidence points to substantial issues with the Phase 2 Proposal and with the existing Mary River Project as current impacts are not being adequately monitored or mitigated to the standards required by Inuit.

At this time, NTI cannot support the approval of the Phase 2 Proposal by the NIRB, or the Minister, until there is:

- i. substantial progress in addressing current impacts from the existing Mary River Project through stronger Project terms and conditions and implementation measures that satisfy Inuit concerns, and
- ii. improvements to the Phase 2 Proposal that provide for greater integration of Inuit views, Inuit Qaujimajatuqangit and western science in the assessment of potential impacts from the Phase 2 Project and the monitoring and mitigation of any impacts.

NTI also supports the arguments and positions taken by QIA in their Final Written Submission. This final written submission elaborates on role of NTI and Inuit organizations in this assessment and provides further process and technical concerns.

Role of NTI and Inuit Organizations in Upholding Rights

NTI represents the Inuit of Nunavut for the purpose of their Aboriginal and treaty rights, including those under the *Nunavut Agreement*. NTI and any Inuit Organisation designated by NTI under the *Nunavut Agreement* are authorized to act on behalf of the Inuit of Nunavut respecting their Aboriginal and treaty rights. QIA is a Designated Inuit Organization (“DIO”)

under the *Nunavut Agreement* and represents Qikiqtani Inuit through processes led by NIRB, as well as other processes before the Institutions of Public Government (“IPGs”).

In the review process of the Phase 2 Proposal for the Mary River Project, NTI supports QIA, the HTOs and communities generally in addressing issues that are of concern to all Inuit in Nunavut including the promotion of Inuit culture and the safeguarding of Nunavut’s wildlife, environment, culture, lands and economy. NTI’s also has a role as a landowner as the current Mary River Project is extracting iron-ore from a deposit on subsurface Inuit Owned Lands. Additionally, NTI’s role extends to ensuring that IPG processes are in keeping with the *Nunavut Agreement*, Aboriginal rights and uphold Inuit participation and consultation requirements.

With respect to harvesting rights of Inuit under the *Nunavut Agreement*, NTI’s role is to ensure they are recognized and protected through implementation of the *Nunavut Agreement* and are not infringed upon. Article 5 of the *Nunavut Agreement* legally guarantees Inuit many rights in harvesting and wildlife co-management. For example, under Section 5.6.1 of the *Nunavut Agreement*, Inuit have the right to harvest wildlife to their full level of economic, social, and cultural needs when there is no total allowable harvest level established and under Section 5.6.3 when a total allowable harvest for a stock or population of wildlife has been established by the Nunavut Wildlife Management Board (Sections 5.6.16 to 5.6.18), an Inuk shall have the right to harvest that species in accordance to the terms of Article 5. Inuit rights in the *Nunavut Agreement* are entrenched under Section 35 of the Canadian Constitution.

In this review process, the impact of the Mary River Project and the Phase 2 Proposal on wildlife and Inuit harvesting rights is a critical matter. NTI supports the efforts of QIA and the HTOs on this key issue. As NTI has indicated in its written responses to questions, NTI is of the view that Inuit harvesting rights have already been impacted without appropriate accommodations by the Mary River Project. One example of the impact on harvesting rights has been the decline in narwhal near the community of Pond Inlet that has resulted in the inability of Pond Inlet hunters to harvest to the level that they are entitled to under the *Nunavut Agreement*.

The Process and Significant Events

2018 – Phase 2 Proposal and Production Increase Proposal

In 2018, NIRB received Baffinland’s current Phase 2 Proposal for the Mary River Project. In 2018, Baffinland also submitted a Production Increase, Fuel Storage and Milne Port Accommodations Modification Proposal (“Production Increase Proposal”). As part of the Production Increase Proposal, Baffinland requested to increase the maximum volume of ore that would be permitted to be trucked from the Mary River site to the Milne Port via the Tote Road from 4.2 MPTA to 6 MPTA and with an accompanying increase in shipping from the Milne Port. Baffinland indicated to NIRB that it predicted that the Production Increase Proposal would not result in any significant ecosystemic and socio-economic effects.

On August 30, 2018, NIRB recommended to the Minister that the production increase from 4.2 MPTA to 6 MPTA not be approved as the proposed activities could result in adverse ecosystemic effects and there was a lack of clarity on potential impacts from activities.¹ On September 30,

¹ Nunavut Impact Review Board, Reconsideration Report and Recommendations Production Increase Proposal Baffinland Iron Mine Corporation NIRB File No. 08MN053, August 31, 2018.

2018, the Minister of Intergovernmental and Northern Affairs by letter indicated that on behalf of the responsible Ministers, the decision was to allow the production increase with additional terms and conditions requiring performance audits and to address concerns regarding impacts from dust and on marine mammals.

2019 - Public Hearing on Phase 2 Proposal Suspended

In November 2019 (November 2-6), the NIRB began the public hearing process for the assessment of the Phase 2 Proposal. On November 6, 2019, NTI made an oral motion to suspend the continuation of the public hearing for a period of nine to twelve (9-12) months. NTI made the motion as there were many unresolved technical issues, information gaps and community representatives did not have relevant materials in Inuktitut required to fully participate in the process and understand the potential impacts and mitigation measures related to the Phase 2 Proposal. It was evident at the public hearing that Inuit had extensive concerns regarding the potential and actual adverse impacts on the environment from the Mary River Project including to wildlife habitat, to the socio-economic well-being of Inuit and to Inuit harvesting activities. The NIRB adjourned public hearing on November 6 and cancelled the Community Roundtable session in Pond Inlet scheduled for November 8-9, 2019.

On December 19, 2019, the NIRB issued a Record of Proceedings and Disposition of Motions Report for the November 2019 Public Hearing and found that the technical record was incomplete, with less than half of the technical presentations and questioning having concluded by the end of the public hearing on November 6, 2019. The NIRB suspended the continuation of the public hearing for several months to allow for a detailed review of technical issues during another Technical Meeting that would be followed by a Pre-hearing Conference with a Community Round Table. The NIRB also directed Baffinland to provide an updated project scope with clarification on operational flexibility and supplemental materials.

2020 -2021 – Continuation of the review process for the Phase 2 Proposal

Technical Meeting, Community Roundtable and Pre-Hearing Conference

On March 12, 2020, the NIRB cancelled the in-person Technical Meeting, Pre-Hearing Conference and Community Roundtable scheduled for March 16 - 25, 2020 due to public health concerns and restrictions related to the COVID-19 pandemic. The Technical Meeting took place September 14-18, 2021 by teleconference, while the Community Roundtable and Pre-Hearing Conference took place from September 28 to October 1, 2020 in a hybrid in-person and video-conferencing format.

In its final submission at the Community Roundtable, NTI expressed that:

- community members are continuing to observe major impacts from the current project on important wildlife populations that Inuit rely on;
- community members are concerned with the impacts of marine vessels and traffic on marine mammals, especially narwhal and seals;
- there are concerns with the conclusions of Baffinland regarding the significance of impacts and that these conclusions do not reflect Inuit observations, knowledge and Inuit Qaujimaqatqangit;
- there are concerns about red dust throughout the area and on sea ice and the inability of community members to access good water and impacts on fish;

- there are also many outstanding concerns about the railway and its impacts on caribou, other wildlife and Inuit harvesting; and
- there are concerns about the impacts on wildlife and harvesting from the Phase 2 Proposal and parties must ensure these critical issues are addressed before the public hearing.

NTI also stressed in its submissions to the NIRB that procedural fairness requirements and obligations for Inuit participation and Inuit oral decision-making in the assessment process as required under the *Nunavut Agreement* and *Nunavut Planning and Project Assessment Act* were required to be met during the pandemic.

Public Hearing and Technical Issues

NTI's technical issues are on the public record through evidence provided throughout the public hearing process including during the public hearing dates that took place over the periods of January 25 to February 6, 2021, April 12 to 14, 2021 and November 1-6, 2021. These are further described below and supported by the submissions of various other interveners and community representatives.

Technical Issues

Marine Mammals

NTI cannot support Baffinland's Phase 2 Proposal significance determinations regarding impacts on marine mammals, particularly for narwhal and ringed seal, when Inuit representatives and scientists do not accept those determinations. Community representatives, QIA and Fisheries and Oceans Canada ("DFO") scientists do not agree with Baffinland that the Phase 2 Proposal will not have a significant impact on marine mammals. DFO has specifically stated that there is "uncertainty in both the efficacy of the mitigations proposed and the ability of current monitoring programs to detect project impacts, should they occur...[and] remains concerned that the impacts to marine mammals from project related shipping activities may not be fully mitigated or avoided".²

NTI also agrees with interveners, including DFO, that the selection of only one Early Warning Indicator for impacts on narwhal is insufficient and that an additional indicator is required on narwhal body and health condition that also incorporates Inuit Qaujimajatuqangit. NTI recommends that any or all of the following items could be added as Early Warning Indicators: stock size estimate, body condition, measurements of stress such as cortisol levels, and other observations of behaviour such as changes in migration, presence and absence in historical areas of occupation, and body condition as informed by Inuit Qaujimajatuqangit and observations.

NTI also emphasizes that the narwhal stock size is not stable. DFO has determined that stock size of Eclipse Sound has decreased from about 20,000 animals in 2004 to about 12,000 in 2016. The abundance estimate was reported at about 10,000 animals in 2019 and a preliminary abundance estimate of about 5,000 animals in 2020.³ The reason for the declining trend remains

² Fisheries and Oceans Canada, Updated Written Submission Baffinland Iron Mines Corporation Mary River "Phase 2 Development" Project Proposal, January 15, 2020 (DFO File No.: 07-HCAA-CA7-00050 NIRB File No.: 08MN053), p. 3.

³ 210407-08MN053-BIM Tech Memo Re Preliminary Sum of 2020 Narwhal Monitoring Programs-IMTM (available on-line on the Nunavut Wildlife Management Board website).

uncertain and requires further investigation. It is clear that the decline in the narwhal population and lack of availability of narwhal is impacting local Inuit harvesting. For example, in 2018 the harvest of narwhal from the community of Pond Inlet was recorded to be 64 animals although the Total Allowable Harvest is 236 animals. However, harvest has increased since then, but Inuit have reported that considerably more hunting effort is required because narwhal and other marine mammals are not as regularly observed or found in expected areas.

NTI is also concerned that Inuit are observing several changes to narwhal and ringed seal. Hunters are reporting that some narwhal and ringed seal that are harvested are skinny and without much body fat. Hunters also reported the absence of ringed seal from certain traditional hunting areas. NTI notes that Baffinland has indicated that they have not conducted studies related to the potential impacts on ringed seal. Given the lack of attention by Baffinland on ringed seal and Inuit observations of impacts, Baffinland's determination that the Phase 2 Project will have no significant impact to seal, or to Inuit harvesting of seal, is not reliable or credible.

NTI remains concerned that there are significant gaps in the incorporation of Inuit Qaujimaqatuqangit in establishing thresholds and management responses to mitigate impacts on marine mammals.

Caribou

NTI remains concerned about the proposed mitigation measures to address impacts on caribou and notes that the Government of Nunavut ("GN") has stated that it does not share Baffinland's high confidence in its terrestrial assessment significance determinations. NTI is not convinced that there will be no significant impact of the proposed railway on caribou migration and habitat use based on Baffinland's assessment because it is primarily a theoretical and modeling exercise. Although a Zone of Influence ("ZOI") has been empirically defined as an area of reduced caribou occupancy around a human footprint (Johnson et al. 2005, Boulanger et al. 2012, Johnson and Russell 2014), there is considerable variability and uncertainty in the dynamic behavioural and ecological processes that may drive the observed patterns of occurrence. For example, ZOI was studied for a major mainland migratory herd (Bathurst herd) that typically exhibits seasonal migratory behavior that is different from a tundra wintering herd such as Baffin Island caribou. Further, the ZOI likely varies over time and space and specific to the project. The ZOI is dependent upon multiple factors including variable disturbance intensity associated with human activity, as well as behavioural responses by caribou that change seasonally and integrate previous experiences and innate dynamic responses of individuals and groups including group size. Unfortunately, there is no project specific data because of the lack of caribou during the period of project activity. Therefore, responses of Baffin Island caribou to the entirety of this novel linear infrastructure and noise remain highly uncertain. For example, the exact permeability of the railway and roads remain uncertain, which could result in habitat loss and fragmentation.

Inuit Harvesting

NTI emphasizes that Inuit have been voicing for many years that that Inuit harvesting of marine mammals is being impacted by the current Mary River Project. The NIRB documented impacts to Inuit harvesting during its review of Baffinland's Production Increase Proposal in 2018. The impacts to Inuit harvesting of marine mammals will likely increase with the Phase 2 Proposal.

During the public hearing, Inuit from affected communities also provided observations of the impacts of existing project activities on aquatic, and terrestrial wildlife, and the environment. Hunters are reporting declining narwhal numbers and that narwhal and ringed seal that are harvested are skinny and without much body fat. NTI cannot assess whether these effects are only due to the Mary River Project, but Baffinland should be required to monitor cumulative impacts and how the Mary River Project is contributing to significant impacts on the environment, wildlife and Inuit harvesting.

NTI is also concerned that there are no current requirements for Early Warning Indicators for impacts on Inuit harvesting and recommends that these be put in place for the current Mary River Project.

Dust

NTI is aware that dust remains a major issue and the impact on available drinking water and vegetation remains a major concern to Inuit who use this area. Negative impacts on the terrestrial wildlife and the environment are being reported by Inuit hunters due to dust from the current production and transportation activities. NTI acknowledges that Baffinland has committed to addressing the issue of dust from the Mary River Project and ensuring that proper dust controls are put in place. These new measures to adequately mitigate the impacts of dust should be reflected in amended terms and conditions for the current Mary River Project.

Inuit Qaujimajatuqangit

Baffinland has acknowledged that the collection and use of Inuit Qaujimajatuqangit should already be occurring. NTI is concerned that the Public Hearing record shows that the integration of Inuit Qaujimajatuqangit has not yet occurred in monitoring and in adaptive management responses (see QIA written response to the Mittimatalik HTO question 36).

Inuit Qaujimajatuqangit should be integrated into the monitoring, early warning indicators and adaptive management responses for the current Project. NTI does not support waiting for Phase 2 to integrate Inuit Qaujimajatuqangit. NTI does not see a barrier to NIRB recommending a role for Inuit organizations, particularly at the community level, in Project monitoring. The incorporation of Inuit knowledge and Inuit Qaujimajatuqangit in project monitoring of impacts, particularly for wildlife and harvesting, necessitates participation of Inuit to ensure NIRB is supplied with a complete package of the best available information on project impacts.

Transboundary Ecosystemic and Socio-economic Impacts

NTI remains concerned that transboundary ecosystemic and socio-economic impacts have not been adequately assessed through the Phase 2 Proposal. NTI does not agree with Baffinland's submission that the information and documents provided to the NIRB under the *Convention on Environmental Impact Assessment in a Transboundary Context* ("ESPOO Convention") should be given little weight and that these documents cannot be treated as technical evidence because the documents were provided by the Government of Canada. In 2020, when interveners were informed that Greenland would submit information via the Government of Canada, there were no objections. Additionally, the technical comments provided by the Greenlandic government departments, communities and organizations are relevant and reference impacts to marine mammals and harvesting in Greenland from proposed Phase 2 activities, which is within the scope of the NIRB's review. For example, the Greenland Institute of Natural Resources raises

concerns over environmental impacts from activities in Canadian waters during the period from July to November 15 that may have major impacts on the populations of narwhals, belugas, Greenland whales (bowhead whales) and walruses in Greenland.⁴ The potential impacts described by the Greenlandic government, communities and organizations raise legitimate concerns regarding Baffinland's assessment of potential transboundary ecosystemic and socio-economic impacts.

Baffinland states in its submission on the documents submitted under the ESPOO Convention that:

The assessment specifically considered the issue of whether there would be effects on marine mammals within the Nunavut Settlement Area, and whether those would result in transboundary effects. As stated, the conclusion of that assessment was that there were no significant effects within the Nunavut Settlement Area, and no significant transboundary effects.⁵

As discussed, NTI does not agree that there will be no significant effects on marine mammals and Inuit harvesting within the Nunavut Settlement Area from the Phase 2 Proposal. By extension, if it accepted that there are impacts on marine mammals and Inuit harvesting within the Nunavut Settlement Area, it is likely that there are also transboundary impacts as indicated by the Greenlandic organizations.

The NIRB has the obligation to address transboundary ecosystemic and socio-economic impacts of projects in accordance with section 113 of the *Nunavut Planning and Project Assessment Act* ("NuPPAA"), which states that "[t]he ecosystemic and socio-economic impacts of the project, both inside and outside of the designated area [Nunavut Settlement Area and Outer Land Fast Ice Zone], must be taken into account for the purposes of sections 101 to 112". The reference to "sections 101 to 112" includes factors to be considered by the NIRB in conducting a review of a project under subsection 103(1).

Given the NIRB's mandate to assess the transboundary ecosystemic and socio-economic impacts of the Phase 2 Project and the relevance of the documents provided under the ESPOO Convention, it is essential that these documents be considered in the NIRB assessment.

Approach to Inuit Rights in the Assessment Process

Inuit rights in the *Nunavut Agreement* are constitutionally protected. Inuit rights that are relevant to this assessment include wildlife harvesting rights under Article 5, the right to active participation in the assessment process under Section 12.2.4 (a) and (b), and the right that NIRB take into account Inuit well-being and priorities under Section 12.5.5 (a) and (c).

Given the significant impacts on Inuit rights, particularly harvesting rights, from the Phase 2 Proposal and the right to active participation in this assessment process, the NIRB must meet the consent requirement under the framework of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) and the standard of "deep consultation" and "accommodation" described by the Supreme Court of Canada in *Clyde River (Hamlet) v. Petroleum GeoServices Inc.*⁶

⁴ Greenland Institute of Natural Resources, June 14, 2021, p. 1 and 2.

⁵ Baffinland, Written Comment Submission to Information Contained in the Espoo Materials, December 17, 2021, pgs. 1-2.

⁶ *Clyde River (Hamlet) v. Petroleum GeoServices Inc.*, 2017 SCC 40.

Additionally, the NIRB has substantive obligations that are more rigorous than the common law duty to consult. Specifically, Sections 12.5.5 (a) and (c) of the *Nunavut Agreement* state that:

12.5.5 NIRB shall, when reviewing any project proposal, take into account all matters that are relevant to its mandate, including the following:

(a) whether the project would enhance and protect the existing and future well-being of the residents and communities of the Nunavut Settlement Area, taking into account the interests of other Canadians;...

(c) whether the proposal reflects the priorities and values of the residents of the Nunavut Settlement Area;

The obligation on the NIRB to verify that the Phase 2 Proposal will enhance and protect the existing and future well-being of Inuit and communities and that it reflects Inuit priorities and values is a substantive obligation. This obligation requires that the NIRB recommendation be shaped by Inuit views and knowledge as expressed by community representatives, community organizations including the HTOs, and QIA as the main DIO.

Overall Conclusion

The level of impact from the Phase 2 Proposal must be acceptable to Inuit. In all cases, resource development activities must be carried out in a manner that do not jeopardize the continuity of Inuit culture and traditions particularly harvesting practices and access to country food. Until it is clear from both a scientific and Inuit knowledge perspective that Baffinland can sufficiently mitigate impacts to wildlife, Inuit harvesting and address other important Inuit concerns, NTI is not in a position to support Phase 2 at this time.

NTI endorses QIA's decision not to support Baffinland's Phase 2 Proposal for the Mary River Project and agrees with QIA that NIRB must report to the Minister that the current Phase 2 proposal should not proceed until Baffinland provides an updated proposal that satisfactorily addresses Inuit concerns.

NTI also supports resolving outstanding issues regarding the impacts from the current Mary River Project, particularly from dust and marine shipping. Current terms and conditions should be strengthened to address current impacts and insufficient Inuit involvement in decision-making related to monitoring, mitigation measures, adaptive management and the incorporation of Inuit Qaujimajatuqangit.

NTI requests that NIRB reconsider the terms and conditions for the current Mary River Project to strengthen terms and conditions in order that Inuit concerns regarding impacts on freshwater resources, caribou, marine wildlife and Inuit wildlife harvesting are satisfactorily monitored and mitigated integrating Inuit Qaujimajatuqangit. NIRB has the authority to modify the current terms and conditions under section 12.8.2 (a) of the *Nunavut Agreement*.

Sincerely,

A handwritten signature in blue ink, appearing to read 'DK', with a stylized flourish at the end.

David Kunuk
Chief Operating Officer