IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES

B E T W E E N :

WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON, DOUGLAS CLAYTON, DANIEL CLAYTON AND BILCON OF DELAWARE, INC.

Claimants

- and -

GOVERNMENT OF CANADA

Respondent

Comments on the Environmental Assessment of the Whites Point Quarry and Marine Terminal Project

EXPERT REPORT OF DAVID ESTRIN

Certified Environmental Law Specialist

July 8, 2011

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EXECUTIVE SUMMARY

PART I: WHAT ARE A QUARRY PROPONENT'S REASONABLE EXPECTATIONS FOR THE ENVIRONMENTAL ASSESSMENT PROCESS?

When the application for the Whites Point Quarry ("WPQ") was submitted, there would have been no reasonable basis for its proponent to expect that the project would be subjected to a *Canadian Environmental Assessment Act* ("CEAA") Review Panel, let alone a Joint Review Panel.

The WPQ received exceptional treatment under CEAA. Prior to the WPQ, the use of a CEAA Review Panel or Joint Review Panel process for a quarry anywhere in Canada was unprecedented. But for the WPQ, the use of the CEAA or Joint Review Panel process for such a quarry remains unprecedented in the annals of Canadian environmental law.

Public hearings are also exceptional under Nova Scotia EA legislation. There have been no hearings held in Nova Scotia for any quarry or other similar mining type undertaking, other than the WPQ, from the time the Nova Scotia *Environment Act* was enacted in 1994-95, until the present time.

The WPQ Review Panel process illustrates that a requirement for a Panel Review results in significant cost to a private sector proponent in terms of financial resources required, time to approval, and possibly prejudice to the ultimate approval.

We carried out a specific case study review of two other proposed quarry and marine terminal projects processed under CEAA. The Belleoram and Aguathuna projects were remarkably similar to WPQ, and yet only the WPQ – the only one of the three not to have federal government support – was referred to a Panel hearing. The decision to establish the JRP for the WPQ was inconsistent with the treatment of similar projects, supported by governments, where no Review Panel was held. Having regard to the less onerous treatment of these government supported comparable projects and that quarrying involves long-practiced and known techniques, the fact a JRP was appointed for the Bilcon project raises the concern that governments were attempting to appease vocal project opponents and were primarily motivated by subjective political criteria, rather than by requirements of sound environmental decision-making.

We also examined the government-initiated Tiverton Harbour project, just down the road from the WPQ site. It shared the same general marine environment, with the same type of fish and other species, as the ocean proximate to the proposed WPQ. The Tiverton Harbour project required blasting in the ocean itself, as well as the deposit of tonnes of rock on the ocean floor. Yet this government project was required to undergo only the simplest level of assessment under CEAA: a screening. And as another contrast to the WPQ application, government officials found any concerns that harbour blasting might affect marine species could be taken care of by putting conditions on how and when the work would be carried out.

The three case studies demonstrate how, depending on the political objectives of government officials to either expedite and ease environmental assessment requirements or put roadblocks in the path of a project and stop it from coming to fruition, all can be accommodated through the CEAA process. This flexibility may seem appropriate to some but unfortunately provides a very uncertain prospect for project proponents and allows the process to be manipulated and exploited by views that may have nothing to do with the environmental merits of a particular project.

My review of the government documents demonstrated that the WPQ was indeed a political “hot potato” for both the federal government and the Nova Scotia government, and in particular for the elected members of the federal Parliament and Nova Scotia Legislature who represented the Digby Neck area where the quarry was to be located.

My review of government documents also indicates that the decision to refer the project to a Review Panel was politically motivated. Referral to a Review Panel was advantageous to the federal Fisheries Minister and the incumbent representative of the area in the Legislative Assembly of Nova Scotia, Gordon Balser, who was a member of the Conservative governing party, in that requiring a Review Panel would be seen to be responsive to a vocal number of their constituents opposed to the project; referral would require Bilcon to be substantially delayed in having its application processed, require Bilcon to carry out numerous, detailed and expensive studies, potentially discourage the proponent from proceeding with its project, and fulfil the political objective of the Minister of Fisheries (and local Member of Parliament) to have the “process dragged out as long as possible.”

To the extent there was a political agenda by Canada and/or Nova Scotia to hinder or stop the WPQ project, it was not surprising that officials of these governments would arrange to employ a Joint Review Panel process, even if its use was unprecedented for such a relatively small and localized project such as a quarry. Experienced EA officials would know that such a hearing, held in a small community where there was already strong opposition, would put the proponent “under the gun” not only by the community, but most likely also by the Review Panel.

Our examination of government records prior to the referral of the WPQ to a Review Panel indicates that in exercising statutory powers, officials often made choices that were least advantageous to the proponent. Put another way, there was a pattern by officials of making life difficult for the proponent.

This is illustrated by various decisions made by the federal Department of Fisheries and Oceans (“DFO”) in the lead-up to the referral of the project to a Panel. In particular, there are four decisions that stand out as being unusual and unfair, particularly in relation to similar projects:

a) DFO’s decision to become involved with imposing blasting conditions in Bilcon’s *provincial* quarry permit

b) DFO's refusal to authorize Bilcon's blasting plan

c) DFO's imposition of a "comprehensive study" level of environmental assessment when this was not legally authorized (before ultimately referring the project to a Joint Review Panel)

d) DFO's decision to "scope in" the quarry in the environmental assessment, despite there being no credible scientific link between quarry activities and potential harm to fish.

PART II: COMMENTS ON THE WPQ PANEL'S APPROACH AND RECOMMENDATIONS

In my opinion, the WPQ Panel's approach did not provide the legally requisite, usual or fair consideration of the WPQ project. The Panel's approach not only raises issues of jurisdictional error but also serious questions as to the Panel being an impartial forum for the objective evaluation of the project.

There are certain key factors that properly should influence the way in which a Review Panel approaches its task of considering a project and making recommendations to governments.

The criteria which clearly should be relevant to a Review Panel are those established by the statutes governing the EA process and the Terms of Reference mandated by the two governments, provided these appropriately use statutory criteria found in CEAA and the Nova Scotia *Environment Act* from which are derived the jurisdiction of these governments to appoint and use a Review Panel.

Unfortunately in this matter, the Review Panel members misapplied, misused or ignored applicable statutory and other relevant criteria for carrying out an environmental assessment, and instead created or endorsed novel and unprecedented criteria for rejecting the proposal.

Most problematic was the Panel's reliance on the concept – previously unknown to EA law in Canada – of "community core values".

The Panel was charged with determining whether the WPQ project was likely to result in significant adverse "environmental effects". The Panel ultimately determined that the only significant adverse environmental effect likely to result would be the WPQ's impact on the community's core values.

Community core values was not a proper consideration for the Panel to take into account. Impacts on core values are not an "environmental effect", nor were they referred to in the Panel's Terms of Reference or the federal or provincial EA legislation. This was the first and only time a Panel has used community core values to reject a project.

Unlike other Panels that have dealt with divisive projects in an impartial manner, the WPQ Panel appears to have taken sides with one particular vision for the Whites Point area, a vision that emphasized the traditional, rural way of life over industrial development, even though the Panel acknowledged that there was an alternative vision held by others in the community, which emphasized job creation and economic growth.

The Panel used the environmental assessment process not to measure the Project's *environmental* impacts, but to evaluate whether the Project would further the goal of community self-determination, or to measure the Project's local popularity. Neither exercise finds a statutory basis in CEAA.

The WPQ Panel's approach effectively gave the local community a veto, one which it had no legal authority to grant.

Also troubling is the fact that the Panel never gave Bilcon an opportunity specifically to address and respond to the Panel's concept of community core values. Bilcon could not have expected this concept to have any bearing on the Panel's decision, let alone for it to be the determinative factor.

The Panel's interpretation of the term "environmental effect" to include impacts on community core values is not the only instance of the Panel misapplying key EA concepts. Other concepts misapplied by the Panel include the precautionary principle, "adaptive management" and "cumulative effects".

More generally, the Panel misunderstood the very purpose of environmental assessment. It is meant to be a planning exercise that takes place early on in the development of a project, before all details about the project are known, not a licensing exercise. The Panel, however, insisted on an unduly onerous level of detail and certainty from Bilcon, and criticized Bilcon in its final report for not having eliminated all uncertainty.

The Panel failed to employ any of the legal mechanisms available to address any lingering concerns it had regarding the detailed design and impacts of the project. In particular, the Panel failed to recommend any mitigation measures, any terms and conditions for the WPQ approval, or any follow-up and monitoring programs.

The Panel also seems to have unfairly rejected Bilcon's evidence in respect of key issues, such as blasting, as well as the evidence of government witnesses where that evidence supported the project.

Finally, the Panel exceeded its jurisdiction by determining that the project was not "justified in the circumstances". Under CEAA, that is a matter to be determined by government, not the Panel.

PART III: THE DUTY OF GOVERNMENTS UPON RECEIPT OF THE PANEL REPORT

Government actions following the release of the Panel Report appear to be contrary to law in several respects.

First, Canada should have informed the Panel it had no legal authority to reach conclusions about whether the impacts of the project could not be "justified". Under CEAA this was a matter that only the Responsible Authorities for the project had the authority to determine. Rather than asking the Panel to reconsider its recommendation, Canada not only accepted but acted on that recommendation.

Canada should also have recognized that the Panel's recommendation to reject the project turned on the finding that the project's effects on community core values would be a significant adverse "environmental effect", a finding which was legally wrong. This is another reason why Canada should have sent the report back to the Panel.

Further, there is no evidence the Responsible Authorities, the Department of Fisheries and Oceans and Transport Canada, carried out their required statutory duty to conduct an independent analysis of whether there were significant adverse environmental effects that could not be justified. Rather, the RAs appear to have relied on the Panel's conclusion – which it had no jurisdiction to reach – that the effects of the project could not be "justified".

Moreover, both Canada and Nova Scotia acted unfairly towards the proponent in carrying out their respective statutory decision-making following the WPQ report, in particular:

a) although federal officials presented evidence to the Panel, they never stated it was their opinion that the project would cause "significant adverse environmental effects" after mitigation measures were applied or that these effects could not be justified. While they raised issues, none of these were expressed in terms that indicated they had their own basis to conclude the project should not be approved;

b) Nova Scotia officials testified that a number of matters of concern to the Panel could be and were normally taken care of in Nova Scotia by the application of terms and conditions;

c) however, following the hearing, the project was rejected as being unacceptable by both governments. The RAs, the federal Cabinet and the Nova Scotia Minister failed to disclose to the proponent following the hearing that they had reached conclusions contrary to those their officials had previously provided publicly to the JRP and also provided to Bilcon. The RAs and Minister further refused to provide Bilcon the opportunity to be heard by them in respect of their changed position rejecting the Bilcon project;

d) Canada failed to comply with its legal duty to provide reasons for rejecting the WPQ project. It said merely, without explanation, that it accepted the WPQ Panel's recommendations.

Because the Panel Report was fundamentally flawed and based on irrelevant considerations, especially the concept of "community core values", the decisions of the federal and provincial governments to accept the Panel's recommendations were not justified.

EXPERT QUALIFICATIONS

My detailed curriculum vitae is found as Appendix A to this report. Briefly, I have exclusively practiced as an environmental lawyer since 1971 and am an environmental law specialist certified as such by the Law Society of Upper Canada. Since 1973, the year in which environmental assessment was first introduced to the Canadian environmental regulatory scheme, I have been actively involved with EA in various ways, including:

- drafting proposed EA policy initiatives and legislative provisions;

- appearing as counsel at many lengthy (12 months or more) and complex environmental assessment hearings before the Ontario Environmental Assessment and Joint Boards, at different times for opponents and proponents;

- lecturing and writing about EA as part of the overall Canadian environmental law regime in my capacity as Associate Professor (part-time) for 13 years with the Faculty of Environmental Studies at the University of Waterloo as well as in full term law school (University of Ottawa) and environmental engineering (University of Western Ontario) programs;

- advising the federal, Ontario and Alberta governments on EA issues and the Ontario Minister of Environment on EA reforms;

- obtaining a judgment from the Federal Court of Canada, upheld by the Federal Court of Appeal, establishing that federal officials acted unlawfully when, in response to public pressure, they established a CEAA Review Panel to frustrate completion of a major freeway that was then 60% completed;

- in the last few years and currently being counsel to proponents and opponents of major infrastructure projects subject to EA under CEAA and under provincial EA laws, these projects being in various provinces and territories, such as Ontario, Nova Scotia, Newfoundland, Yukon, British Columbia and Alberta.

INTRODUCTION

In early 2003 the Government of Canada and the Province of Nova Scotia agreed to require an environmental assessment (**"EA"**) of Bilcon's proposed Whites Point Quarry (**"WPQ"**) project to be submitted to a Joint Review Panel (**"JRP"**, or **"Panel"**) established by these governments. In November 2007, after considering Bilcon's EA and the views of the public and government officials in a public hearing process, the JRP recommended against the project. Within a few weeks officials in each government accepted the JRP recommendation, with the result that the project was denied EA approval under the *Canadian Environmental Assessment Act* (**"CEAA"**) and the environmental assessment provisions of the Nova Scotia *Environment Act*. As a direct consequence of the Canada-Nova Scotia JRP process and the formal response to this process by Canada and Nova Scotia, Bilcon was legally prevented from obtaining other statutory approvals it required to build and operate the project.

Having regard to my experience in environmental law and in particular environmental assessment issues, I was asked by counsel for Bilcon to consider how EA was applied to the WPQ project, and to provide expert comments in respect of issues that may assist in the evaluation of the NAFTA claim pending before this Tribunal.

My analysis of what transpired in the EA process applied to the Bilcon project, together with my observations and conclusions, are set out in the body of as well as in Attachments E, F and G to this Expert Report.

Brief Introduction to the *Canadian Environmental Assessment Act* and Key Terms

Canadian Environmental Assessment Act

The federal law governing EA in Canada is the *Canadian Environmental Assessment Act*. CEAA took effect in 1995.[1] Amendments to CEAA were passed in 2003, but these were legally inapplicable to the WPQ, as by that time a CEAA EA for the WPQ had been commenced.

A good general guide to the main elements of the federal EA process under CEAA and the three types of EAs that can take place – a screening, comprehensive study, or review panel – is found in **Appendix B – excerpts from the "Responsible Authority's Guide"** prepared and published the Canadian Environmental Assessment Agency (**"CEA Agency"**).

*Responsible Authorities (**"RAs"**)*

These are federal government departments or agencies from which a project proponent must obtain a federal approval or funding before proceeding with a project. The RA has the legal responsibility to ensure a CEAA EA is carried out and that the environmental

[1] S.C.1992 c.37.

effects are not significant or can be justified before issuing any such federal approval or providing funding.

The CEA Agency

The CEA Agency is established under CEAA to advise the federal Environment Minister on decisions the Minister makes under CEAA (e.g. whether to refer a project to a Review Panel or establish a Joint Review Panel with another jurisdiction). The President of the CEA Agency reports directly to the Environment Minister. The advice contains both technical as well as political considerations.

The CEA Agency also provides advice on EA process and EA substance to federal ministries and departments, such as the Department of Fisheries and Oceans and Transport Canada who become RAs or project proponents, as well as other federal agencies (such as the Atlantic Canada Opportunities Agency) who may become involved in the CEAA process by providing funding to assist project proponents.[2]

Legal Significance of CEAA to Project Proponents

CEAA applies directly to government officials who administer federal permitting and approvals legislation. If CEAA is triggered by a particular type of federal permit or approval being sought, or by the intended provision of federal funding or loan guarantees, federal officials are constrained from providing the permit, approval or funding etc. until an EA pursuant to CEAA has been carried out and the relevant federal officials (the Responsible Authority) determine that the project will not cause significant adverse environmental effects without or with mitigation or, if the effects after mitigation are likely to be significantly adverse, that the RA considers that the effects can be “justified”.

[2]The responsibilities of the CEA Agency are set out in sections 61-65 of CEAA.

Preliminary Comments Regarding Partial Production Of Documents By Canada and Nova Scotia

My analysis in this Report is based not only on my knowledge of and experience with environmental assessment in Canada, but also on my review of the documents produced to date to counsel for the investors by Canada and Nova Scotia in the course of their preparation for the NAFTA Arbitration.

However, based on my experience with the type of records that governments make in these types of matters, it is apparent that neither government has made full production. For example, there are essentially no emails or other internal communication records between the key federal Ministers (the federal Minister of Fisheries and Oceans, the federal Environment Minister); between these Ministers and their staff advisors and key assistants; between the Nova Scotia Minister of Environment and Labour and his staff advisors and key assistants; and very few emails between Ministerial staff advisers and the bureaucracy at either the federal or provincial level, or other relevant agencies such as the CEA Agency. The absence or essentially incomplete production of such records is relevant to critical issues including but not limited to the following:

- the considerations as to why these governments determined to subject the Whites Point Quarry to a Joint Review Panel
- the selection of the three JRP members
- the establishment of the Terms of Reference for the JRP
- the formulation of the government response to the JRP's final report

The observations and conclusions I state herein should be understood as necessarily qualified for this reason, and I reserve the right to revise my Expert Report when and if full production is made available.

PART I: WHAT ARE A QUARRY PROPONENT'S REASONABLE EXPECTATIONS FOR THE ENVIRONMENTAL ASSESSMENT PROCESS?

1.1 Summary of Part I

1. **The WPQ is the first and only quarry in Canada subjected to a CEAA Review Panel or Joint Review Panel hearing. Prior to the WPQ, the use of the CEAA or Joint Review Panel process for a quarry anywhere in Canada was unprecedented, and but for the WPQ, the use of the CEAA or Joint Review Panel process for such a quarry remains unprecedented in the annals of Canadian environmental law.**

2. **Prior to the WPQ, there would have been no reasonable basis for a quarry proponent to expect that a proposed quarry project would be subjected to a CEAA Review Panel, let alone a Joint Review Panel.**

3. **Review Panels are exceptional. They are essentially only used for projects of major geographic significance or which involve the generation or handling of hazardous substances in sensitive environments.**

4. **Public hearings are also exceptional under Nova Scotia EA legislation. There have been no hearings held in Nova Scotia for any quarry or other similar mining type undertaking, other than the WPQ, since the Nova Scotia *Environment Act* was enacted in 1994-95.**

5. **The decision by these governments to establish the JRP for the WPQ is inconsistent with the treatment of similar projects, supported by governments, where no Review Panel was held. Having regard to the less onerous treatment of these government supported comparable projects and that quarrying involves long-practiced and known techniques, the fact a JRP was appointed for the Bilcon project raises the concern that these governments were attempting to appease vocal project opponents and were primarily motivated by subjective political criteria, rather than by requirements of sound environmental decision-making.**

6. **This concern is also exemplified, as discussed in Part I, by the fact that even before the decision was made to refer the WPQ to a Review Panel, government officials, in exercising statutory powers, often made choices that were least advantageous to the proponent, e.g. blocking the proponent's ability to conduct test blasting at the WPQ site, on dubious scientific and legal grounds.**

1.2 Panel reviews are very rare – more than 99% of CEAA EAs are screenings

7. In the overall context of EAs under CEAA, review panel public hearings are very rare. According to the CEA Agency:

> Of the approximately 6,500 federal environmental assessments undertaken every year, more than 99 per cent are screenings, the remainder being comprehensive studies and review panels.[3]

8. The current Canadian Environmental Assessment Registry[4] includes a total of 6,103 environmental assessments. Of this total,

- 6,027 (98.8%) are screenings
- 57 (0.9 %) are comprehensive studies
- 19 (0.3 %) are panels or mediation.

It is evident that panel reviews are extremely rare.[5]

9. Screening EAs: Where a project is not described in the comprehensive study list or the exclusion list made under CEAA, a "screening" EA must be carried out and a screening report prepared.[6] For a screening EA the Responsible Authority must consider the factors set out in CEAA s. 16 (1). This is usually accomplished by the RA providing the proponent with its expectations as to technical studies required and the review by the RA of that information. While public notice of screenings is given on the Canadian Environmental Assessment Registry website, it is not mandatory that other opportunities for public participation occur in a screening EA.

10. Comprehensive Study EAs: A specified category of major projects, those referred to on the CEAA Comprehensive Study List[7], require a "comprehensive study " EA.[8] According to the CEA Agency, "A comprehensive study deals with those projects likely to have significant adverse environmental effects. Such projects tend to be large-scale and complex, such as major oil and natural gas

[3]Canadian Environmental Assessment Agency, "Proposed amendments to the Comprehensive Study List Regulations under the Canadian Environmental Assessment Act related to ski area developments in national parks" (2010), available at: http://www.ceaa-acee.gc.ca/default.asp?lang=En&xml=2A83452D-03B7-4210-A15C-687A8319C9FA.

[4]Canadian Environmental Assessment Registry, available at: http://www.ceaa.gc.ca/050/plus-eng.cfm accessed May 20, 2011.

[5]*Ibid.*

[6]CEAA, s. 18(1).

[7]Comprehensive Study List Regulations, SOR/94-638 as amended.

[8]CEAA ss. 21-24 apply to a comprehensive study EA.

developments, transportation projects, water projects, electrical generation projects, mining projects and pipelines”.[9]

11. A comprehensive study EA must consider factors set out in CEAA s. 16(1) as well as s. 16(2) (the purpose of the project, alternative means of carrying out the project and their environmental effects, the need for a follow-up program, and the effects on the capacity of renewable resources to meet the needs of the present and future).

12. A comprehensive study EA also provides mandatory opportunities for the public to participate in the process, e.g., by commenting on conclusions and recommendations and any other aspect of the comprehensive study report, as well to request that the project be referred to a mediator or Review Panel. “Participant funding” is made available through the CEA Agency to assist the public in reviewing technical studies and making submissions to the Responsible Authority and the Agency during the comprehensive study process.[10]

13. Review Panel EAs: CEAA does not require any type of project to be made the subject of a Review Panel EA. As indicated, their use is very rare.

14. Between 1995, when CEAA took effect, and 2003, when the WPQ Panel was requested, only 16 CEAA or Joint Review Panels had been appointed. Between 2003 and 2011, an additional 13 were appointed. The overall average is less than two new panel reviews per year across Canada.[11]

15. A review of the list of Review Panel projects from the CEA Agency website[12] confirms that no quarry project anywhere in Canada, other than the WPQ, has ever been subjected to a CEAA or Joint Review Panel public hearing. **The CEA Agency website list of Review Panels is attached as Appendix C.**

16. Those projects that have been made the subject of a Review Panel hearing are usually major in either geographic scope, e.g. the Mackenzie Gas Pipeline, large oil sands developments in Alberta, diamond, gold and nickel or copper mines occupying large areas in pristine environments and in which Aboriginal people have significant interests, or projects presenting relatively novel environmental issues not previously investigated in an in-depth manner (such as off-shore under-sea petroleum exploitation, and liquefied natural gas terminals).

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[9] CEA Agency, Guide to the Participant Funding Program, available at: http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=9772442E-1&offset=2&toc=show#2.

[10] *Ibid.*

[11] See CEA Agency Website, “Review Panels”, available at: http://www.ceaa.gc.ca/010/type5index-eng.cfm. These statistics do not include seven review panels that were commenced but terminated before completion.

[12] *Ibid.*

17. This is demonstrated by the **Chart, "All Completed CEAA Review Panels & Joint Review Panels (1995-2010) Annotated as to Project Type and Size" attached as Appendix D**. This Chart shows that most of the projects that have been sent to a Review Panel have a much larger footprint than the WPQ project. Many of the natural resource projects cover thousands of hectares, compared to WPQ's 152 hectares.

18. Even a quick glance at the Chart illustrates that many of the projects involved inherently hazardous or novel activities, such as the handling and storage of liquefied natural gas and the management of radioactive materials. In contrast, quarrying is an ancient technology that has been used at least since Roman times.

19. One of the projects sent to a Review Panel referenced on the Chart attached as Appendix D is the Cheviot Coal Mine. An open-pit coal mine might be considered conceptually to be comparable to a basalt quarry; however, the Chart indicates that the footprint of the Cheviot Coal Mine was almost 50 times bigger than the proposed footprint for WPQ. Moreover, a closer analysis reveals that the Cheviot project involved not only the mine itself but also extensive infrastructure needed to support the mine, and that it was located in a particularly sensitive area, proximate to Jasper National Park. The type and extent of activities required for the Cheviot project were clearly of a different order of magnitude and impact than the 152 ha WPQ. Here is how the Federal Court described the project:

> The project involves excavating a series of 30 or more open pits, and the construction of associated infrastructure which includes roads, rail lines and the installation of a new transmission line for the supply of electricity. The undertaking will generate millions of tonnes of waste rock which will be deposited on site in stream valleys and other areas.
>
> The project, being undertaken on the Eastern Slopes of the Rocky Mountains close to the eastern boundary of Jasper National Park, is located in an environmentally rich area that is home to a variety of wildlife.[13]

20. A CEAA Review Panel can be established under two different sections of CEAA, but the decision to establish is always the decision of the federal Environment Minister.

21. Section 25 of CEAA allows a "responsible authority" (in the WPQ case there were two RAs, the Department of Fisheries and Oceans ("**DFO**") and Transport Canada) to ask the Environment Minister to refer a project to a Review Panel:

> Referral to Minister

[13] *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.,* [1999] 3 F.C. 425, at paras. 3-4.

> 25. Subject to paragraphs 20(1)(b) and (c), where at any time a responsible authority is of the opinion that
>
> (a) a project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, may cause significant adverse environmental effects, or
>
> (b) public concerns warrant a reference to a mediator or a review panel,
>
> the responsible authority may request the Minister to refer the project to a mediator or a review panel in accordance with section 29.

22. Alternatively, under s. 28 of CEAA the Environment Minister has the authority to refer a project to a Review Panel without a request from an RA:

> Referral by Minister
>
> 28. (1) Where at any time the Minister is of the opinion that:
>
> (a) a project for which an environmental assessment may be required under section 5, taking into account the implementation of any appropriate mitigation measures, may cause significant adverse environmental effects, or
>
> (b) public concerns warrant a reference to a mediator or a review panel,
>
> the Minister may, after offering to consult with the jurisdiction, within the meaning of subsection 12(5), where the project is to be carried out and after consulting with the responsible authority or, where there is no responsible authority in relation to the project, the appropriate federal authority, refer the project to a mediator or a review panel in accordance with section 29.

23. As can be seen in these sections, there is a pre-condition for the use of a Review Panel: the Environment Minister must be of the opinion that the project, taking into account the implementation of any appropriate mitigation measures, "may cause significant adverse environmental effects" or "public concerns warrant a reference to a…review panel."

24. However, there is no specific CEAA provision that requires the Minister to establish a Review Panel even if these pre-conditions exist. Whether a Review Panel hearing is held is a discretionary decision for the Environment Minister to make, even assuming the pre-conditions are fulfilled.

25. It is important to appreciate that the appointment of a Review Panel does not necessarily mean any new or more detailed studies will be done or other issues

explored beyond those that would be required under a screening or comprehensive study EA[14]. This has been recently affirmed by the CEA Agency:

> The factors that are assessed under both a review panel and comprehensive study process are the same under the *Canadian Environmental Assessment Act*. Both processes deliver high quality environmental assessment that will consider all of the impacts from… [the] projects.[15]

26. In other words, there is no explicably objective environmental rationale as to why a Joint Review Panel EA was established for the WPQ (in contrast, e.g., to a screening EA).

27. Not every project that raises public concerns is referred to a Panel. For example, the refurbishment of the Bruce Power nuclear power plant was subjected only to a screening level EA (less onerous for the proponent than a comprehensive study), even though several public interest groups, including Greenpeace Canada, urged that it be referred to a Panel. The RA, the Canadian Nuclear Safety Commission, determined that a screening was sufficient:

> … the Commission is of the view that, although the proposed project would be a major and complex undertaking, a reasonably accurate assessment of the likelihood and significance of the environmental effects should be possible. The Commission notes that there has been considerable experience within the Canadian nuclear industry and CNSC with many of the types of refurbishment, operating and waste management activities that would be required to complete the project. As such, the Commission was not persuaded that a referral to a panel review on the basis of likely significant or uncertain environmental effects can be justified at this time.[16]

28. But, on the other hand, the use of a Review Panel process clearly can, as is demonstrated in the WPQ case, be prejudicial to a project proponent, in terms of burden, cost, time as well as outcome. The following terms describe important negative aspects of a Review Panel process compared to a screening or even a comprehensive study EA for a project proponent: "time-consuming", "complex", "expensive" as well as "less predictable as to outcome".

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[14] The WPQ JRP in its zeal and use of unprecedented criteria is the exception to this.

[15] CEA Agency Project Manager of the Lower Churchill Generation Project, January 31, 2011 letter to representatives of the Innus de Ekuanitshit rejecting their request that the Island Link transmission component of that project, which was to be processed as a Comprehensive Study, be joined with a Joint Panel Review of the generation component.

[16] Canadian Nuclear Safety Commission, "Record of Proceedings, Including Reasons for Decision in the Matter of Bruce Power, Environmental Assessment Guidelines for the Proposed Refurbishment for Life Extension and Continued Operation of the Bruce A Nuclear Generating Station", July 14, 2005, at p. 3.

1.3 A comparison of the WPQ to other similar projects indicates the use of a Review Panel for the WPQ was highly unusual

29. An objective consideration of the following factors raises significant questions as to whether there was an unspoken government agenda with respect to frustrating the WPQ and its proponent by requiring the use of a complex, time consuming and onerous JRP EA process:

- the 16 year history under CEAA where Review Panel use has been generally restricted to large or novel projects
- that none of these has included a quarry
- the rarity of use of Review Panels generally
- the fact that, as shown below, quarries and marine terminal projects larger than WPQ have been processed under CEAA by means of a comprehensive study EA
- the area of the WPQ project is relatively small compared to much larger projects sent to a Review Panel
- that the WPQ project involved no unknown technology
- that the WPQ federal Responsible Authorities and Expert Agencies were of the view that the project presented no significant adverse environmental effects that could not be mitigated (this was the essence of their presentation to the JRP).

30. While the WPQ project was strenuously opposed by neighbouring residents and others, such opposition by itself is usually given no regard by the Environment Minister as the basis for establishing a Review Panel.

31. This is illustrated by the fact that there has been wide-spread public concern raised about many projects subject to CEAA or the predecessor federal EA process over the last 20 years, yet such opposition has not necessarily resulted in the appointment of a Review Panel. Indeed, the Environment Minister defended at least five court cases challenging his refusal to appoint a Review Panel despite widespread public opposition and demands for a panel. A summary of those five cases is set out in the following chart. It is noteworthy that the earliest court case where the federal Environment Minister refused to accede to public demands for a Review Panel hearing arose in Nova Scotia.

Unsuccessful Citizen Group Federal Court Cases re Federal Government Refusal to Grant Public Demands for CEAA hearings		
Name of Case and Year	**Proposed Type of Project**	**Nature of Group Requesting Hearing**
Cantwell v. Canada (Minister of the Environment) et al. (1991), 6 C.E.L.R. (N.S.) 16; 41 F.T.R. 18 (F.C.T.D.); affd A-124-91, Pratte J.A., judgment dated 6/6/91, F.C.A., not yet reported;	Construction of a coal fired generating station by Nova Scotia Power Corporation – The Point Aconi Project, Boularderie Island, Cape Breton, Nova Scotia	Individuals who lived in the area and groups who were concerned with environmental and social effects of the project
Vancouver Island Peace Society v. Canada, [1992] F.C.J. No.324, [1992] 3 F.C. 42, 53 F.T.R. 300.	Visits of nuclear-powered and nuclear-armed naval vessels to Canadian ports	"Vancouver Island Peace Society was founded in order to challenge the Federal Government in court on the legality of nuclear warships in Canadian waters".[17] They claim to have had support for their position of a full environmental review from municipalities, members of the BC legislature, environmental groups and others.
Pippy Park Conservation Society, Inc. v. Canada (Minister of Environment), [1994] F.C.J. No. 1662, 86 F.T.R. 255.	Construction of a four-lane highway running across area north of St. John's, Newfoundland	Pippy Park is a large park in St. John's, run by the Pippy Park Commission, a semi-autonomous Crown corporation (established in 1968).[18]
Community Before Cars Coalition v. National Capital Commission, [1997] F.C.J. No. 1060, 135 F.T.R. 1.	Widening the Champlain bridge from two to three lanes, crossing over the Ottawa River between Quebec and Ontario	Community Before Cars Coalition was a "coalition of community associations which opposed the proposed widening of the bridge."
Stratégies St-Laurent v. Canada (Minister of the Environment, [1998] F.C.J. No. 1349, 156 F.T.R. 273.	Dredging project in the St. Lawrence River, Quebec	The plaintiffs were all environmental NGOs: Strategies St-Laurent, Societé pour vaincre la pollution SVP, Great Lakes United, la Societé d'amenagement de la Baie Lavalliere Inc., Comité zone d'intervention prioritaire (ZIP) du Lac St-Pierre.

[17] Vancouver Island Peace Society, available at: http://pej.ca/vip/.

[18] Pippy Park, available at: http://www.pippypark.com/index.php?option=com_content&view=article&id=86&Itemid=69.

32. A comparison of the WPQ project and the EA process used for other similar projects where no Review Panel was established is also useful in confirming that the use of a CEAA Review Panel process for the WPQ was highly unusual.

33. Attached to this Expert Report as appendices are case studies of two comparative quarry and marine terminal projects:

Appendix E: Continental Stone Ltd. Crushed Rock Quarry and Marine Terminal Project (Belleoram, Newfoundland) (Consolidated Study Report, August, 2007)

Appendix F: Aguathuna Quarry and Marine Terminal project, Aguathuna, Newfoundland (Consolidated Study Report, July, 1999)

34. These two very similar industrial projects were both subject to CEAA EAs. The purpose, scope and environmental setting for these projects were very similar: to develop a new, large rock quarry and marine terminal on the coast of the Atlantic Ocean, one in the Province of Newfoundland, the other in the Province of Nova Scotia, for the purpose of exporting the crushed rock to foreign markets.

35. In each case they were to be located close to sensitive coastal/marine environments, and close to a community.

36. Though they were both new quarry projects by private sector proponents geared towards export markets, located about one kilometer away from populated areas, the two projects received very different treatment from the WPQ throughout the CEAA EA process, and ultimately a different result.

Summary Comparison of the Treatment under CEAA of the Continental Stone Ltd. (Belleoram) Crushed Rock Quarry and Marine Terminal Project to the WPQ (See **Appendix E** for details)

37. The project proposed for Belleoram, Newfoundland, the Continental Stone Quarry and Marine Terminal project (**"the Belleoram Project"** or **"Belleoram"**) was financially supported by an agency of the Canadian Government, the Atlantic Canada Opportunities Agency (**"ACOA"**). ACOA is under the general supervision of a federal Cabinet Minister and its specific mandate is to promote opportunities for economic development in this region of Canada.[19] According to a government website, Continental Stone Limited is a Canadian-controlled

[19]The object of the Agency is to support and promote opportunity for economic development of Atlantic Canada, with particular emphasis on small and medium-sized enterprises, through policy, program and project development and implementation and through advocacy of the interests of Atlantic Canada in national economic policy, program and project development and implementation: *Atlantic Canada Opportunities Agency Act* (R.S.C., 1985, c. 41 (4th Supp.)).

company, formed through a partnership arrangement between Pennecon Ltd. and Central Construction Limited.[20]

38. Despite the fact that the Belleoram project was much larger than WPQ (approximately six times the size geographically, and up to 300% more production annually), and that it had the same CEAA federal Responsible Authorities (DFO and Transport Canada) as did the WPQ (plus an additional RA – ACOA), the government-supported Belleoram Project was provided a preferential EA process – a much more limited and much less onerous CEAA review – than the WPQ, which received no Canadian government funding or support.

39. The EA process for Belleoram under CEAA was much shorter, less complex, had a much more limited scope, and the EA was reviewed in a manner that was much less onerous for its proponent than what was required in respect of the WPQ.

40. Unlike the WPQ, no Panel Review was held for Belleoram.

41. Unlike the WPQ, only the marine terminal was examined in the Belleoram CEAA EA. Federal officials scoped (restricted) the use of CEAA for the Belleoram project so as to exclude the large new quarry from being evaluated in the comprehensive study report (**"CSR"**); CEAA was used only to study the impacts of the marine terminal.

42. Even though the marine terminal was the only part of the project left for consideration in the CEAA CSR, many of the issues on this aspect identified for Belleoram were similar to those which arose in the WPQ (e.g. ballast water impact on local fisheries).

43. But, again, on these issues, the Belleoram project received preferential treatment in the CSR and by federal officials. In contrast to the WPQ JRP, which raised many significant environmental effects and then theorized why it was not practical or economic for these to be mitigated, federal officials in Belleoram were prepared to identify and require implementation of mitigation measures for potential adverse environmental effects.

44. The rigidity and apparent hostility of the WPQ JRP to that project compared to the reasonable and usual approach taken by federal officials in Belleoram is illustrated by the concern about ballast water potentially being a problem for the

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[20] Website of Team Canada Atlantic, available at: http://www.teamcanadaatlantic.com/NR/exeres/7E9B8D76-E41F-43E4-BF2E-BA4265858360.htm?lang=en. Pennecon Ltd.'s website states that it is a member of the Penney Group of companies, headquartered in St. John's, Province of Newfoundland & Labrador, Canada. Central Construction Limited operates out of Montague, Province of Prince Edward Island, Canada: www.pennecon.com/corporate.

local fishery. This potential environmental effect was present in both projects, but was not considered significant in Belleoram because federal officials were prepared to give credence to the utility of federal *Ballast Water Control and Management Regulations* and other measures the proponent could take to mitigate such concerns. In contrast, the WPQ JRP concluded these regulations were unsatisfactory and could not be relied on; indeed, the JRP went so far as to recommend they be rewritten and be made much more stringent – a recommendation not acted on by federal officials.

45. The CEAA EA process for Belleoram did not require a public Review Panel hearing and took only 1.5 years to get to an approval, whereas CEAA was applied to the WPQ so as to require a Joint Review Panel process that took almost 5 years, and resulted in it being rejected.

46. This significantly preferential CEAA treatment for Belleoram is all the more striking given that it was recognized early on in the Belleoram project process by federal officials that "many of the environmental issues will be similar" to the WPQ, and that some of the same federal offices and officials were involved with both projects at this time.[21]

Summary comparison of the treatment under CEAA of the Aguathuna Quarry and Marine Terminal, Newfoundland and Labrador (Comprehensive Study Report, January 1999) to the WPQ (See Aguathuna Case Study in **Appendix F** for further details)

47. Like WPQ and Belleoram, the Aguathuna project was a large quarry and associated marine terminal. Unlike WPQ, in the Aguathuna case government officials were able to allow the CEAA process to be satisfied without considering the impact of the quarry and without a Review Panel hearing.

48. The Aguathuna project consisted of:

- the development of a quarry to produce 500,000 tons per year of aggregate for a 20 year period, and
- the establishment of a deep-water marine terminal for accommodating Panama Canal-sized vessels (up to 54,446 DWT) with the specific objective of exporting aggregate on these ocean-going vessels.

49. This project was supported financially by the provincial (Newfoundland) government through its Economic Diversification and Growth Enterprises ("EDGE") program funded by the provincial Department of Industry[22].

[21] May 5, 2006 email from Barry Jeffrey to Steven Zwicker (CP07751, p. 025381).

[22] Aguathuna Quarry Development, Environmental Impact Comprehensive Study Report, July 8, 1999, at p.2.

50. The Newfoundland government cleared the project under its *Environmental Assessment Act* within a 10 week period without requiring an Environmental Impact Statement.

51. The project was also supported financially by the Government of Canada through the Atlantic Canada Opportunities Agency.[23]

52. At the outset of the project, Transport Canada had indicated no *Navigable Water Protection Act* (**"NWPA"**) permit would be required for the marine terminal, and therefore CEAA would not be triggered for that reason.

53. Although at an early point DFO had indicated a *Fisheries Act* approval triggering CEAA would likely be required, DFO later changed its view due to "subsequent project re-design/relocation" as described in an internal email.[24] DFO's changed perspective resulted in it not being an RA for any aspect of the project, including the marine terminal. This change in DFO's position resulted in another federal government agency, ACOA, which was providing the federal financial assistance to the project, becoming the sole RA in respect of how CEAA would be applied to the project.

54. This DFO reconsideration of its role so as not to be an RA for a project supported by federal government funding is similar to how the federal government was able to eliminate the quarry portion of the Belleoram Quarry and Marine Terminal project being considered under CEAA – by DFO indicating in that case, without provision of details, that the project proponent reconsidered its design plans for the project.

55. This project cleared the CEAA EA process in 15 months using the comprehensive study report EA method.

56. The Aguathuna Quarry project is an important comparison to WPQ for several reasons, but specifically with respect to the fact that in the case of this government-supported project government officials allowed the CEAA process to be satisfied:

    (a) without considering the impact of the quarry (only the marine terminal was reviewed under CEAA); and

    (b) without a Review Panel hearing being held.

57. Like the Belleoram Quarry and Marine Terminal project, Aguathuna is another example of how the CEAA process can be significantly eased for a project whose Canadian proponent is supported by government funding.

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[23] *Ibid.*

[24] DFO email, June 9, 1998 (CP06671, p. 020298).

<u>Summary Comparison of the Application of CEAA to the Tiverton Harbour Project in Tiverton, Nova Scotia (CEAA Screening, 2003/04) with the WPQ (see **Appendix G** for further details)</u>

58. Although not a new quarry, the Tiverton Harbour project did involve blasting in the ocean close to the location of the proposed WPQ, as well as the dumping of a significant amount of rock in the ocean, all to construct a new harbour facility.

59. This was a proposal of the Government of Canada (the Department of Fisheries and Oceans) to develop a new harbour facility at Tiverton, Nova Scotia, approximately 10 km from the proposed location of the Whites Point Quarry. (Tiverton can be seen on the map on p. 2 of the WPQ Panel Report, just down the road to the south of the WPQ location.) In fact, Tiverton is directly opposite East Ferry, which is on the tip of Digby Neck.

60. The Tiverton Harbour project required blasting of rock at the bottom of the harbour and depositing approximately 65,000 tonnes of rock and stone to create a new breakwater. The area of the harbour to be covered was approximately 9,500 square meters and the length of the proposed breakwater was approximately 220 meters. Additional infill of rock was to occur along the shoreline for a length of approximately 120 meters.

61. In addition to covering these areas of the bottom of the harbour with rock, the project involved the installation of floating docks to allow berthing of up to 20 vessels with these docks being anchored to the breakwater with concrete anchors. Another phase of the project required dredging of the harbour, installing steel pipe piles and the construction of an adjacent marginal wharf.

62. The Tiverton Harbour project provides an important contrast to the WPQ project. As Tiverton is only about 10 km away from the proposed WPQ project, the marine environment (including the species of fish and whales in the vicinity) were similar in both locations:

> Local marine fish species that support important commercial fisheries include lobster, herring and scallop. Smelt migrate near shore in the late fall, and are present throughout the winter in near-shore areas..... Shad and Gaspereau (alewife and blueback herring) are believed to migrate very near the coastline from mid-May through June, staging and feeding in the near-shore areas before migrating into rivers to spawn.
>
> …
>
> In the summer mackerel schools may move in short of feed. Other marine species likely to be found near the project site are winter flounder, sculpin, stickleback and mummichog.
>
> Whales, including Minke Whales and the endangered Right Whale are common in the Bay of Fundy near Tiverton and a whale-watching

> operation is based there. The local lobster-fishing season will run from November 25 – May 31….
>
> Nearby Brier Island is an important staging area for migrating birds and bats. A breeding colony of Turkey Buzzards exists on Long Island [Tiverton is located on Long Island].
>
> Tiverton attracts numerous tourists and birdwatchers.[25]

63. However, the potential for disruption and destruction of fish habitat was greater at Tiverton because of underwater blasting and the deposit of a large volume of rock on the harbour floor. At WPQ no underwater blasting would take place.

64. What is substantially different between the Tiverton Harbour project and WPQ is the manner in which each project was treated under CEAA.

65. First, the Tiverton Harbour project was subject only to a "screening", not to either a comprehensive study or to a Panel Review, despite the fact that the environmental setting of the Tiverton Harbour project was essentially the same as the WPQ project, and that the environmental effects of the Harbour project were potentially similar to or greater than that at the WPQ project, considering that there would be underwater blasting at Tiverton.

66. Secondly, a number of changes to "valued ecosystem components" (**"VECs"**) were recognized as having the potential to cause significant impacts before mitigation – yet federal officials judged these could proceed premised on mitigation measures being put into effect.

67. More specifically, it was acknowledged by the proponent (the Small Craft Harbours Branch of the Department of Fisheries and Oceans) that fish/fish habitat could be affected by the following project activities:

- constructing the breakwater
- the installation of floating docks
- dredging the basin
- constructing service/parking areas
- constructing the marginal wharf.

68. Potential effects identified included:

- Loss of fish habitat
- Release of a deleterious substance
- Suspended solids could affect fish
- The effect on fish of blasting

[25] "Federal Coordination Regulation – Information" (undated) (CP06520, p. 019171).

69. However, in respect of each of the potential effects, mitigation measures were identified which were judged by government officials to result in the significance of residual effects after mitigation to be “insignificant”.

Summary Comments on the Three Comparison Cases

70. These three projects illustrate how, under the CEAA process, government-supported projects can be favoured with a less inclusive examination under CEAA (e.g. the scoping out of the quarry component), less costly studies, shorter time frames and more predictable outcomes, compared to similar projects which governments do not favour. I could have also included others, such as the Sydney Harbour Access Channel Deepening and Sydport Container Terminal Project in Nova Scotia, which received federal funding and was subjected only to a screening level assessment.

71. The Belleoram and Aguathuna projects were remarkably similar to WPQ, and yet only WPQ – the only one of the three not to have federal government support – was referred to a Panel hearing. Likewise the government-initiated Tiverton Harbour project, just down the road from the WPQ site, was subject to the simplest level of assessment under CEAA: a screening.

72. These three case studies demonstrate how, depending on the political objectives of government officials to either expedite and ease environmental assessment requirements or put roadblocks in the path of a project and stop it from coming to fruition, all can be accommodated through the CEAA process. This flexibility may seem appropriate to some but unfortunately provides a very uncertain prospect for project proponents and allows the process to be manipulated and exploited by views that may have nothing to do with the environmental merits of a particular project.

1.4 Panels are also rare under the Nova Scotia EA processes

73. There have been no hearings held in Nova Scotia for any quarry or other similar mining type undertaking, other than the WPQ, since the Nova Scotia *Environment Act* was enacted in 1994-95.

74. In Nova Scotia, since at least 1995, when the current Nova Scotia *Environment Act* was brought into effect, the following undertakings and classes of undertakings (including a modification or extension) are listed as Class I “Mining” in Schedule “A” to the Environmental Assessment Regulations[26] and, pursuant to s. 3 of these regulations, these undertakings are subject to the EA requirements of Part IV of the Nova Scotia *Environment Act*:

[26] Environmental Assessment Regulations, N.S. Reg. 26/95, Schedule “A”, Class I, category B, s. 2(1).

> 1. A facility engaged in the extraction or processing of metallic and non-metallic minerals, coal, peat moss, gypsum, limestone, bituminous shale or oil shale.
>
> 2. (1) …a pit or quarry in excess of 4 ha in area primarily engaged in the extraction of ordinary stone, building or construction stone, sand, gravel or ordinary soil.

75. There have been 28 applications made in these classes of Mining undertakings in Nova Scotia between 2000 and May 2011. Only one, the WPQ, was subjected to a public Review Hearing. Only one was not approved – the WPQ.

76. All other 27 applications were given EA approval by the Nova Scotia Environment Minister without any hearing.

77. In virtually every case the 27 EA approvals were conditional – requiring the applicant to do detailed studies and submit these so as to also obtain approval under Part V Approval under the Nova Scotia *Environment Act* – "Approval and Certificates".

78. There is a clear contrast in the way these 27 EA applications were processed by NS compared to the WPQ. In each of these other cases, EA approval was given contingent on and with the requirement that the proponent prepare many detailed studies as to environmental issues of concern and demonstrate how these could be prevented or mitigated to the satisfaction of the Nova Scotia Department of Environment and Labour. Some conditions required continual revisiting of mitigation and monitoring plans over the life-time of the project, and could require changes to the quarrying plans if mitigation was not satisfactory. Such conditions are discussed and illustrated in Part II of my Expert Report.

79. **A summary table of these 28 quarries, pits and mining EAs obtained from the website of Nova Scotia Environment, is attached as Appendix H.**

80. The approach of requiring further studies, designs, operating procedures and possible alterations of operating plans and areas of the facility where operations may in future be carried out, taken by the Nova Scotia Environment Minister in these 27 other cases, is standard procedure across Canada for the EA approval of industrial type activities by government regulatory agencies both at the provincial and federal levels.

81. This is the same approach that the proponent of the WPQ should have reasonably expected in respect of the processing of the Bilcon application by Nova Scotia, had the application been processed in the usual and expected manner.

Private sector quarry proponents in Nova Scotia are treated differently than quarries developed to serve government road building projects, which are exempt from Nova Scotia EA requirements and therefore cannot be subject to Nova Scotia Review Panel Hearings

82. In Nova Scotia, "a pit or quarry established solely to provide fill or aggregate for road building or maintenance contracts with the Department of Transportation and Infrastructure Renewal", no matter how large, is exempt from Nova Scotia EA law. Therefore, no EA public hearing can be held in Nova Scotia for the approval of such quarries.[27]

83. Putting this another way, if rock from a quarry larger than 4 ha is intended for export, under Nova Scotia law that quarry is subject to EA and potentially may be made the subject of a NS EA public hearing. On the other hand, if the same rock is intended for provincial roads, no EA and no public hearing process can be applied to it.

Nova Scotia's EA practice in the period 2000-2011 avoided requiring any mining or quarry project from being reviewed at hearings, as well as avoided requiring a number of other large industrial projects, some of which involved new marine terminals and ocean filling activities, to be subject to Nova Scotia EA hearings

84. The Nova Scotia Environment Department website lists all projects subject to EA from 2000 to 2011. There were a total of 85 applications reviewed to date in that period. (Of that total, 28 were quarries and related mining projects and, as indicated above, only one of these – the WPQ – was subject to a Review Panel hearing).

85. Another 57 projects (non-mining/quarry projects) were subject to EA in Nova Scotia during that period. An examination of the list of these 57 non-mining/quarry projects indicates that many were of a nature that can raise apprehensions or concerns in nearby communities, and some were in the nature of marine terminals. The type of projects included facilities for:

- dangerous goods bulk storage and handling
- biomedical waste treatment
- waste dangerous goods handling
- waste dangerous goods drum storage
- industrial waste
- asbestos transfer/bulking
- petroleum contaminated soil remediation
- a bulk tank farm
- remediation of soils containing dry cleaning fluids (and related products)

[27] *Ibid*, s. 4(2). The quarry must be operated in accordance with "all applicable guidelines and regulations." A substantially similar exemption existed under previous versions of the regulations.

- two highway projects
- Sydney Harbour Access Channel Deepening and Sydport Container Terminal
- Melford International Terminal
- modification of biomedical and international waste treatment facility
- underground natural gas storage
- remediation of the Sydney Tar Ponds and Coke ovens site
- Keltic Petroleum LNG (liquefied natural gas) marine terminal
- surface coal mine and reclamation project – Prince Mine Site
- Russell Lake West Wetland Reclamation
- Bear Head Liquefied Natural Gas Terminal
- battery storage
- Stellarton surface coal mine extension
- marine terminal at Tupper Point
- various wind farm projects

86. Of these 57 non-quarry/mining projects only three were subjected to Nova Scotia EA Board hearings, despite many of these projects being ones which could potentially create significant adverse environmental and social impacts. Two were highway extensions and one was for the Keltic Petroleum LNG Marine Terminal. A fourth hearing in this period was by a Joint Review Panel with Canada, on the issue of the proposed methods for remediation (including incineration) of highly hazardous waste (including PCBs and dioxins) located immediately adjacent to a residential area in the City of Sydney, Nova Scotia (the Sydney Tar Ponds and Coke Ovens site).

87. Unlike the circumstances of the WPQ Review Panel, where governments were clearly concerned about the project being given an approval, governments *were* the proponents of the Sydney Tar Ponds/Coke Oven remediation project. Canada and Nova Scotia wanted a Review Panel established in order to receive endorsement for proceeding with a project fully supported by government funding and where most of the scientific and engineering solutions were being directed by federal authorities. In my opinion, the holding of a hearing here clearly was to the governments' benefit, in that much public money had already been expended on arriving at the proposed solutions and governments believed that a hearing would allow the public to better understand the appropriateness of their proposed solutions, which indeed were implemented.

88. What is noteworthy, however, are the projects for which Nova Scotia did *not* require EA hearings. In particular, five new major marine terminal projects were proposed in this period, and only one of them was sent to a Nova Scotia EA hearing. These projects are summarized in the chart "Selected Nova Scotia EA Projects – Completed (2000-2011)", which is found as **Appendix I**. The four marine terminal projects for which no hearings were held are described as follows:

(a) Sydney Harbour Access Channel Deepening and Sydport Container Terminal: A new marine container terminal facility. Phase I will involve: dredging the channel that provides access to the South Arm to approximately 17 m depth; constructing a confined disposal facility that will serve as the marine footprint for the new terminal; dredging at the proposed terminal berth line to approximately 16 m depth; infilling of approximately **72 hectares**; completion of a two-berth, 750-800 m long section of wharf within the new terminal footprint, including container storage facilities and an on-dock Intermodal Container Transfer Facility on approximately **41 ha of land**; and minor extension of the existing Sydport on-dock rail spur to connect to the Truro rail line. The intention is to complete a second phase and double terminal capacity by completing an additional two berths and 750-800 m of marginal wharf.

(b) Melford International Terminal: New deepwater port and marine and container terminal on the Strait of Canso at Melford Point, Nova Scotia. Container terminal and associated facilities in the Melford Industrial Reserve, about 10 km southeast of Port Hawkesbury, Nova Scotia. **217 hectare** site with **20.36 km** of dedicated transmission line, through a 51 m wide right-of-way.

(c) Bear Head LNG: Terminal capable of unloading LNG ships of **250,000 m^3**; two LNG storage tanks of **180,000 m^3; 70-135** ships annually; land footprint of terminal appears to be roughly **64 hectares**.

Phase I involves the construction and operation of an approximately 7.5 million-ton-per-annum (mtpa) capacity LNG terminal with a natural gas sendout capacity of 1,000 million standard cubic feet per day (MMscfd). Phase II provides for the future expansion of the sendout capacity to 1,500 MMscfd (approximately 11.3 mtpa).

The marine wharf is composed of a trestle, to be built 180 meters directly out from shore, and a 366 meter jetty situated perpendicular to the trestle. The complete wharf structure is similar to a "T" in shape. The jetty provides the ship berth and unloading facilities.

(d) Marine Terminal – Point Tupper: Marine terminal and land-based coal storage facility to support Point Tupper and (by rail) Trenton coal generation stations nearby; accommodates **70,000 dwt** marine vessels; receiving capacity of **3,000 tonnes/hour**; land footprint appears to be approximately **6 hectares**.

Summary Comments on Nova Scotia EA Hearing Practice

89. In summary, the WPQ was the only quarry in Nova Scotia subject to any EA hearing under either federal or provincial EA laws in the period 1995-2011.

90. In the period 2000-2010, there was only one other private sector project subject to EA public hearing in Nova Scotia during this period – the Keltic Petroleum LNG terminal facility. The two other projects publicly reviewed in Nova Scotia were provincial highways. The fifth project that was subject to a Joint Review Panel, was also a joint government initiative of Nova Scotia and Canada (the Sydney Tar Ponds Remediation).

91. The WPQ Review Panel process illustrates that a requirement for a Panel Review results in significant cost to a private sector proponent in terms of financial resources required, time to approval, and possibly prejudice to the ultimate approval.

92. It can reasonably be inferred, based on the fact Nova Scotia chose to hold less than a handful of EA hearings in this period even though there were many more projects of a potentially controversial type that could have been publicly reviewed, and taking into account that only one of the hearings during this period (other than the WPQ) was for a private project, that Nova Scotia officials are aware of the prejudice a public hearing process can cause to a private sector proponent, and that Nova Scotia officials also understood that prejudice that could be occasioned to Bilcon when Nova Scotia took the initiative, with Canada, to refer the WPQ to a Joint Review Panel.

1.5 <u>The referral of the WPQ project to a Panel was motivated by political concerns</u>

93. As mentioned, the WPQ project was the first and only proposed quarry ever to be subjected to a panel review under CEAA. It appears, in my opinion, that this distinction was a product of political expediency. In other words, the WPQ was sent to a panel because it suited the political powers that be. For these politicians, convening a panel was seen as a way to assuage a relatively large number of their constituents who were active and outspoken in their demands to stop the WPQ from being approved.

94. It appears from my review of the materials in this matter that the WPQ was a political "hot potato" for both the federal government and the Nova Scotia government, and in particular for the elected members of the Federal Parliament and Nova Scotia Legislature who represented the Digby Neck area where the quarry was to be located. The Member of Parliament (**"MP"**) representing the electoral district in which the WPQ project was to be located (West Nova) was the Hon. Robert Thibault, who also coincidentally was the federal Fisheries Minister (Minister of DFO) in the period January 15, 2002 to December 11, 2003. MP Thibault was first elected in November 2000. In the spring of 2003, when the EA process for the WPQ project was gearing up, Fisheries Minister Thibault would have known that the next federal election would likely occur within the next year (it actually occurred on June 28, 2004). In this situation he would have been especially attentive to concerns raised by his constituents about the WPQ's

gowlings

alleged impacts on commercial lobster and other fisheries. And, as Fisheries Minister, Mr. Thibault had unique legal status to invoke a CEAA Review Panel hearing process regarding such matters (assuming the concurrence of his colleague, the federal Environment Minister).

95. Although it is difficult to tell exactly what was happening behind the scenes, as Canada has not produced many of the types of records that are generated involving Ministers and their staffs (such as emails between Minister Thibault and his political aides, and emails between those aides and the bureaucracy, the office of the Environment Minister and the President and senior officials of the CEA Agency, as well as briefing material provided to the federal Cabinet), the evidence is clear that Minister Thibault took a keen interest in the proposed project. For instance, in the spring of 2003 staff within DFO were "getting questions from the Minister's office on a regular basis" about the project.[28] One DFO bureaucrat noted that "This is such a politically hot process".[29] A further DFO record the following day stated "We have been getting requests for briefings on an almost weekly basis"; and a briefing note for the Deputy Minister of Fisheries, April 16, 2003 stated "The Minister's Office continues to enquire about the status of the review and requests that they be kept current with any progress being made."[30]

96. On March 3, 2003, public notice of the proposal to build the dock component of the WPQ project was published in various local newspapers and the *Canada Gazette*, as required by the *Navigable Waters Protection Act*.[31] Minister Thibault, or at least his staff, apparently was upset by the appearance of the notice in the Halifax *Chronicle Herald*. In a biting email to several colleagues that indicates the political sensitivity of the matter and the close personal involvement of the Minister, Tim Surette (DFO Area Director for Southwest Nova Scotia) wrote:

> The Ministers (sic) constituency staff had made a commitment to the residents that they would be advised of any developments on this file to the extend (sic) possible. The Ministers (sic) staff nor I was not aware that the notification was being published.
>
> Given that <u>this file is extremely important to the Minister</u> we must insure that good communication is maintain (sic) by all parties.
>
> The Minister may invoke an inquiry into this matter.[32]

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[28] Email from Bruce Hood (DFO) to Phil Zamora (DFO), April 2, 2003 (CP06311, p. 018655).

[29] Email from Joy Dubé (DFO) to Wendy Morrell, April 2, 2003 (CP05114, p. 015697).

[30] CP05113, p. 015696; CP05089, p. 015654.

[31] Memorandum for the Minister (undated; some time in 2003) (CP06302, p. 01863).

[32] Email from Tim Surette to various DFO officials, March 3, 2003 (CP03408, p. 009699) (emphasis added).

97. Around the same time, the Nova Scotia government would have been acutely aware of the divisiveness of the proposed WPQ project. In a June 20, 2003 memo to Minister Thibault recommending that he refer the matter to a joint review panel, a senior DFO official noted that "[t]he proposed project has been very controversial and the Province is therefore anxious to have federal involvement with assessment of both the terminal and quarry".[33]

98. A few days later, on June 25, 2003, a CEA Agency official emphasized to DFO staff the importance of referring the WPQ project to a joint panel before an election was called in Nova Scotia:

> It is urgent that the letter from Minister Thibault to Minister Anderson referring the Whites Point Quarry and Marine Terminal to a Panel Review be signed and sent to Minister Anderson due to the following:
>
> It is a distinct possibility that the province of Nova Scotia will be announcing an election before or on June 30 and will send out a media release preceding this, indicating that the Whites Point Project, which is very contentious, has been referred to a Panel Review.[34]

99. A senior DFO official wrote the same day that the referral letter must be signed urgently. He noted that:

> …the project is located in our Minister's riding, as well as in the electoral circumscription of the provincial Minister responsible for making decisions on this project, and <u>the announcement of the joint panel review is of the nature to take a lot of public pressure off the Ministers' shoulders for the summer months</u>.[35]

100. In the same vein are the notes of another DFO official from the period leading up to the referral, which state that "Thibault wants process dragged out as long as possible."[36]

101. These documents clearly indicate that the decision to refer the project to a Review Panel was politically motivated. Referral to a Review Panel was advantageous to the federal Fisheries Minister and the incumbent representative of the area in the Legislative Assembly of Nova Scotia, Gordon Balser, who was a member of the Conservative governing party, in that requiring a Review Panel would be seen to be responsive to a vocal number of their constituents opposed

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[33]Memo from Susan Kirby (Assistant Deputy Minister, DFO) to Minister Thibault, June 20, 2003 (CP06305, p. 018639).

[34]Email from Bruce Hood (CEA Agency) to Richard Wex (DFO) and Richard Nadeau (DFO), June 25, 2003 (CP05173, p. 015801).

[35]Email from Richard Nadeau (DFO) to Kaye Love (DFO), June 25, 2003 (CP05180, p. 015816) (emphasis added).

[36]Notes of Bruce Hood (DFO), March-June 2003 (no CP number – document produced by Canada in June 2011).

to the project; referral would require Bilcon to be substantially delayed in having its application processed, require Bilcon to carry out numerous, detailed and expensive studies, potentially discourage the proponent from proceeding with its project, and fulfil the political objective of Minister Thibault to have the "process dragged out as long as possible."

102. Fisheries Minister Thibault's letter requesting a Review Panel was delivered to the federal Minister of the Environment, David Anderson, on June 26, 2003.[37]

103. Those experienced with public hearing EA processes would understand that the appointment of a Review Panel would provide the opportunity for those opposed to a project to have a higher profile platform and funding for attacking the project.

104. Further, those officials establishing a Review Panel process would also understand that panel members who are chosen for this purpose by such officials, even if otherwise apparently neutral, could well become sympathetic to project opponents during the hearing process, as the panel members would not only formally sit but also spend a great deal of time in the small community where there was significant vocal opposition. Government officials choosing to establish a Review Panel clearly would understand that the already manifested public opposition could have a much more substantial influence on the outcome of the process, i.e., recommending the project not be approved, compared to a process which is managed only by government officials, meeting in offices far removed from the site of the proposed project.

105. These advantages to project opponents would have been understood by officials within the Nova Scotia Department of Environment and Labour responsible for EA matters, and to officials in the Canadian Environmental Assessment Agency who were advising both the Environment Minister and Fisheries Minister on the WPQ project.

106. Therefore, assuming there was, as we believe there to have been from a review of the background to this matter, a political agenda by Canada and/or Nova Scotia to hinder or stop the WPQ project, it was not surprising that officials of these governments would arrange to employ a Joint Review Panel process, even if its use was unprecedented for such a relatively small and localized project such as a quarry. Experienced EA officials would know that such a hearing, held in a small community where there was already strong opposition, would put the proponent "under the gun" not only by the community, but most likely also by the Review Panel.

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[37] Letter from Minister Thibault to Minister David Anderson, June 26, 2003 (investor docs Tab 467, p. 001115). See also note 116, *infra*.

107. These government officials would also know that such arrangements, coupled with other steps they took, listed below, would have a high probability of the Review Panel rejecting the Bilcon proposal:

- appointment of panel members especially vetted by them for this hearing
- providing government officials to privately assist the Review Panel members in their consideration of the project
- establishing unusual pre-hearings by the Panel members in the local communities (**"the scoping hearings"**) which occurred over four days, and which allowed the Panel members more time to formally as well as informally absorb local concerns
- allowing the Review Panel members, following the scoping hearings, to substantially change and expand the Environmental Impact Statement (**"EIS"**) requirements from those drafted by officials (the draft EIS Guidelines), resulting in the proponent being required to deal with matters that were novel, well beyond those prescribed by the Panel Terms of Reference, and which were, in some cases, clearly beyond or contrary to the statutory criteria for such EAs.

1.6 Procedure prior to the referral

108. A review of events prior to the referral of the WPQ to a Review Panel indicates that in exercising statutory powers, officials often made those choices that were least advantageous to the proponent. Put another way, there was a pattern by officials of making life difficult for the proponent.

109. This is illustrated by various decisions made by DFO in the lead-up to the referral of the project to a Panel. In particular, there are four decisions that stand out as being unusual and unfair, particularly in relation to similar projects:

- DFO's decision to impose blasting conditions in Bilcon's provincial quarry permit
- DFO's refusal to authorize Bilcon's blasting plan
- DFO's imposition of a comprehensive study level of environmental assessment (before ultimately referring the project to a Joint Review Panel)
- DFO's decision to "scope in" the quarry in the environmental assessment

(a) DFO insinuates itself into the provincial process despite having no regulatory role

110. On April 23, 2002, Nova Stone Exporters (**"Nova Stone"**) applied to the Nova Scotia Department of Environment and Labour (**"NSDEL"**) for approval under the provincial *Environment Act* for the construction and operation of a 3.9 ha test quarry at Whites Cove. The proposed project did not include a dock component and did not trigger a provincial environmental assessment, because it was under 4 ha.[38]

111. Shortly thereafter, Nova Stone entered a partnership called Global Quarry Products with the Clayton family, which owns Bilcon. The plan was to expand the 3.9 ha quarry into a larger quarry on approximately 152 ha, of which 120 would be quarried, as well as a marine terminal servicing the quarry.

112. Paul Buxton was the project manager, first on behalf of Nova Stone and later on behalf of Global Quarry Products.

113. The application for the 3.9 ha test quarry was reviewed by NSDEL Regional Engineer, Robert Balcom, P.Eng., who recommended approval subject to certain conditions.[39]

114. Mr. Balcom noted that "[t]his is a small blast, designed to sample the rock and determine the optimum quantity of explosive required to break the rock into the desired size."[40]

115. The NSDEL forwarded the application to DFO and asked for DFO's comments.[41] Even though DFO determined that the blasting would pose only a "minimal risk to marine mammals", it asked NSDEL for the ability to review the blasting plan once it was prepared. In the words of the DFO Minister:

> Upon review of the proposal, DFO concluded that there were no significant concerns with respect to the legislation administered by the Department. Notwithstanding this, it was determined that blasting on the proposed quarry lands would pose a minimal risk to marine mammals and DFO requested that a blasting design report be provided in advance of any blasting activities. The province agreed to include this as a condition in its approval.[42]

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[38] Application, April 23, 2002 (CP00038, p. 000849).

[39] Report by Robert Balcom entitled "Application for Approval", March 21, 2002, enclosing a draft permit (CP00013.016, p. 000679).

[40] Email from Robert Balcom to Jacqueline Cook (NSDEL), November 6, 2002 (CP00664, p. 002091).

[41] See Briefing Note prepared by Brad Langille (NSDEL), April 11, 2002 (CP00013.030, p. 00673-000763).

[42] Letter from Hon. Robert Thibault, Minister of Fisheries, to L. M.-A. Hubbert (Senior Program Officer, Canada Research Chairs Program), October 23, 2003 (CP00144, p. 001021).

116. NSDEL inserted two conditions, using almost verbatim the wording drafted by DFO, into the final approval which was issued on April 30, 2002.[43] These conditions read:

> 10(h) Blasting shall be conducted in accordance with the Department of Fisheries and Oceans Guidelines for the Use of Explosives In or Near Canadian Fisheries Waters – 1998;
>
> 10(i) A report shall be completed by the proponent in advance of any blasting activity verifying the intended charge size and blast design will not have an adverse effect on marine mammals in the area. This report shall be submitted to the Department of Fisheries and Oceans (DFO), Maritimes Aquatic Species at Risk Office and written acceptance of the report shall be received from DFO and forwarded to the Department before blasting commences.[44]

117. These conditions were in addition to Nova Scotia's "standard terms and conditions" for such projects.[45] Especially problematic was condition 10(i), whereby DFO effectively appropriated from the province the power to decide whether the test quarry could proceed or not.

118. No such conditions were included in the approval for a local construction company to build and operate a quarry at Tiverton, Nova Scotia, only about 10 km away, which was issued by NSDEL around the same time, in March 2003, even though that project also involved blasting within 150 m of the Bay of Fundy.[46] Later, the proponent would repeatedly ask DFO and NSDEL why the WPQ was singled out, but it never received an answer.[47]

119. DFO belatedly recognized that WPQ and the Tiverton quarry had been treated differently – apparently because this was pointed out by the WPQ proponent. The same DFO official who reviewed both proposals wrote to the NSDEL, after the Tiverton quarry had been approved:

> It has been brought to our attention that the assessment of the Tiverton Quarry project did not fully consider potential impacts of blasting on inner

[43] In an April 26, 2002 email to Bob Petrie (NSDEL), Brian Jollymore set out the requested conditions (CP00310, p. 001222).

[44] Approval No. 2002-026397 (investor documents, Tab 585, pp. 002063-002073, p. 002072).

[45] Memo to the Minister of the Environment, July 29, 2002 (CP00318, p 001230); also, NSDEL had, at Nova Stone's request, provided a sample permit with "standard conditions that apply to any rock quarry", which did not include the DFO-requested terms and conditions: fax from NSDEL clerk, January 25, 2002 (investor documents, Tab 414, p. 00941).

[46] Draft briefing note to Nova Scotia Minister of the Environment, July 29, 2003 (CP01634, p. 003467); letter from Minister Ronald Russell, Nova Scotia Minister of Environment, to Hon. Gordon Balser, MLA (Digby/Annapolis), June 4, 2003 (CP00642, p. 002058). See also the e-mail from Phil Zamora (DFO) to Bruce Hood (DFO) *et al.*, December 16, 2003, which indicates that blasting at the Tiverton quarry would occur 150 m from the Bay of Fundy (CP43732, p. 785886).

[47] See *infra* note 122.

> Bay of Fundy (iBoF) Atlantic salmon…. DFO recommends that the blasting plan for this quarry operation be reviewed with full consideration given to iBoF Atlantic salmon. …depending on the outcome of the review, we expect that your department may wish to take these potential effects into consideration and amend your approval.[48]

120. It is remarkable that, in the case of WPQ, DFO sought to achieve through the provincial regulatory process what it had no lawful authority to do under its own enabling legislation, the federal *Fisheries Act*. DFO acknowledged as much, telling NSDEL that it had no trigger for an environmental assessment under CEAA.[49]

121. In fact, the DFO Guidelines referenced in the provincial approval specifically state that DFO cannot require anyone to obtain an authorization for a HADD or for the destruction of fish by means other than fishing:

> Note that application for Authorization under Section 32 and/or Subsection 35(2) is voluntary. Proponents are not prohibited from going ahead with their use of explosives without Authorization. But, if as a result of the use of explosives, fish are destroyed and/or there is a HADD of fish habitat, contravention of Section 32 and/or Subsection 35(1) of the Fisheries Act could occur and the proponent is liable to prosecution.[50]

122. The same view was expressed by Brian Jollymore of DFO when asked by NSDEL whether a DFO authorization was required before blasting could commence. Mr. Jollymore replied:

> Thus you have found a weakness in using legislation that was first drafted before Confederation. A person does not have to apply for permission to do an activity but if you damage fish or fish habitat one is liable under the *Fisheries Act*. However, because prudent individuals do not wish to find themselves on the wrong side of the law or who don't wish to have costly design changes after they are in production, they come to us first.[51]

123. In other words, the *Fisheries Act* authorizations under s. 32 and s. 35(2) are there for the proponent's protection. They are *not* a required precondition to carry out such activities. It should have been up to the proponent to take the risk of proceeding with the blasting plan. If it was confident that there would be no HADD and no destruction of fish – as it was – it should have been able to conduct the blasts. If it turned out to be wrong and HADD or the destruction of fish resulted, it would face the possibility of prosecution. However, instead of

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[48] Letter from Thomas Wheaton (DFO) to Bob Petrie (NSDEL), undated (CP42126, p. 779732).

[49] E-mail from Brian Jollymore (DFO) to Bob Petrie (NSDEL), April 26, 2002 (CP00310, p. 001222): "we have no legislative trigger to request an environmental assessment."

[50] DFO Guidelines for the Use of Explosives in or Near Canadian Fisheries Waters – 1998, p. 7.

[51] Email from Brian Jollymore (DFO) to Brad Langille (NSDEL), April 24, 2002 (CP00311, p. 001223).

letting the proponent take this risk, DFO inserted itself into the *provincial* approval process in order to prevent any blasting.

124. The proponent duly submitted a blasting plan, including an explanation as to how the plan complied with the Guidelines, to DFO on September 17, 2002. The blasting plan indicated that a total of 3,015 lbs of explosives would be used, and that a total of 4,123.8 tonnes of rock would be blasted. It also indicated that a "no blast zone" would be established, meaning that no blasting would take place within 35.6 meters of the high water mark. The 35.6 meter setback was derived from the Guidelines, and was greater than the 30 meter setback required in the provincial permit for the test quarry. The map attached to the blasting plan indicates that the initial test blast site would be well back from the no blast zone.[52]

125. The proponent planned to conduct the initial test blast in late October or early November 2002. No blasting was proposed in the Bay of Fundy; the blasting would take place on land. DFO had not identified any fish-bearing watercourses running through the quarry area. There was no onshore fish habitat or "water frequented by fish" within the meaning of the *Fisheries Act*.[53]

126. On September 30, 2002, DFO wrote to NSDEL saying that "although the [proponent's blasting] plan seems to be within the Guidelines for the use of explosives in or near Canadian fisheries waters, there is insufficient detail to make an assessment on its effects on threatened or endangered marine mammals that may be present at various times of the year", and requesting further information on the number and velocity of detonations, the timing of the detonations, and the composition of the bottom topography.[54]

127. The proponent provided further information to NSDEL on October 8, 2002,[55] which NSDEL forwarded to DFO, but DFO responded on October 30, 2002 saying the information was still inadequate.[56]

128. On November 20, 2002 the proponent submitted a revised blasting plan dated November 18, 2002, incorporating all the information requested to date by DFO.[57] The plan specified that only a one-time initial blast was planned. It

[52]Letter from Paul Buxton to Bob Petrie (Regional Manager, NSDEL) enclosing blasting plan, September 17, 2002 (investor documents, Tab 422, p. 000976).

[53]Letter from Thomas Wheaton (Acting Area Habitat Coordinator, DFO) to NSDEL, September 18, 2002 (CP02845, p. 005479).

[54]Letter from Jim Ross (Section Head, DFO Habitat Management Division), to Bob Petrie (NSDEL), September 30, 2002 (CP00675, p. 002106).

[55]Letter from Paul Buxton to Bob Petrie (NSDEL), October 8, 2002 enclosing the "blast design" (CP42036, p. 779495).

[56]Letter from Jim Ross (DFO) to Bob Petrie (NSDEL), October 30, 2002 (CP00668, p. 002096).

[57]Letter from Paul Buxton to Jim Ross (DFO), November 20, 2002, enclosing the revised blasting plan dated November 18, 2002 (investor documents, Tab 633, p. 002698).

discussed the extensive preparatory investigations that had been conducted by the proponent and its consultants (including the preparation of a technical blast design by Dyno Nobel Ltd.) and described various mitigation and monitoring measures. It reiterated that a setback of 35.6 meters from the water's edge would be used, which distance had been calculated in accordance with the DFO Guidelines.[58] The proponent later specified that the "[t]he horizontal distance between the ordinary high water mark and the closest explosive charge is 73 meters. …this distance is twice the distance indicated in your Blasting Guidelines for the proposed weight of explosives [45 kg] per delay from potential 'fish habitat'".[59]

129. Although the DFO-drafted condition 10(i) in the Nova Scotia approval referred only to the effect of blasting on marine mammals, on December 11, 2002 DFO said it was also concerned about fish and fish habitat: "The information provided is inadequate to give DFO-HMD a sufficient level of confidence that fish, marine mammals, and fish habitat will be adequately protected from the effects of blasting operations at the Whites Cove quarry."[60] DFO identified a number of specific concerns that had nothing at all to do with marine mammals, including whether the proposed 36.5 setback would be sufficient to protect the "spawning, nursery, feeding, shelter and migration areas" of "lobster, scallop, mussels, various species of groundfish, as well as pelagic species such as mackerel", and whether these non-mammal species might suffer "sub-lethal effects" from the blasting.[61]

130. On January 28, 2003, the proponent submitted a detailed response to the new issues raised by DFO.[62] No reply was received until March 27, 2003, when DFO requested yet more information, which the proponent provided the next day.[63]

131. Based on condition 10(i) of the NSDEL permit, DFO simply had no authority to delay or withhold approval of the blasting plan on the basis of any concerns regarding non-mammal species.

132. Meanwhile the province was apparently content to let DFO take the heat from the proponent and its supporters for the delays. In a December 5, 2002 email, Gerard MacLellan wrote to the Deputy Minister of NSDEL, Ronald L'Esperance, saying "No news is good news on this file."[64]

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[58]"Whites Point Quarry Blasting Plan", November 18, 2002 (CP00631, p. 002029).

[59]Letter from Paul Buxton to Bob Petrie (NSDEL), January 28, 2003 (CP42028, p. 779465).

[60]Letter from James Ross (DFO) to Bob Petrie (NSDEL), December 11, 2002 (CP02354, pp. 004717-004718).

[61]DFO table attached to December 11, 2002 letter, *ibid*.

[62]Letter to Bob Petrie (NSDEL), copied to Jim Ross (DFO) (investor documents, Tab 585, pp. 002057-002254, at p. 002187).

[63]Fax from Phil Zamora (DFO) to Paul Buxton, March 27, 2003 (CP24417, p. 690243).

[64]Email from Gerard MacLellan to Ronald L'Esperance, December 5, 2002 (CP02309, p. 004641).

133. It appears that DFO's requests for more and more information were merely stalling tactics. Behind the scenes, DFO acknowledged that it was "flying by the seat of our pants":

> The explosives guidelines are designed chiefly to protect fish. When we use them for protection of marine mammals, we are really flying by the seat of our pants.[65]

134. Then on May 29, 2003 came the letter that thwarted the test quarry. Phil Zamora of the DFO Habitat Management Division (**"DFO-HMD"**) wrote to the proponent saying that after reviewing the revised blasting plan of November 18, 2002 and the additional information submitted by the proponent on January 28, 2003 and March 28, 2003, "DFO has concluded the proposed work is likely to cause destruction of fish, contrary to Section 32 of the Fisheries Act", and that a Section 32 authorization would therefore be required before proceeding with the blasting.[66] The letter did not specify what fish would be destroyed by the blasting.

135. The twist was that this authorization could not actually be issued, because DFO had, by this time, commenced the CEAA process for the larger 152 ha quarry and dock project, of which the test quarry was part.

136. As the May 29, 2003 DFO letter indicated: "A *Fisheries Act* s. 32 authorization is in the Law List Regulations of CEAA and therefore DFO would not be able to issue a s. 32 authorization for the four-hectare blasting plan until the CEAA assessment for **Whites Point Quarry and Marine Terminal**, Digby County, Nova Scotia has been completed" (emphasis in original).

137. DFO's position was essentially that its hands were tied by s. 5(2)(d) of CEAA, which provides that an EA is required before prescribed authorizations (including *Fisheries Act* s. 32 authorizations) are issued.

138. The letter identified that "the species of concern is inner Bay of Fundy Atlantic salmon, which is listed endangered by the Committee on Status of Endangered Wildlife in Canada (COSEWIC)." In an addendum to the letter, entitled "DFO Concerns – Potential Harmful Effects of Blasting at Whites Point", DFO notes that "Although the protection of most fish is achieved by DFO 'Guidelines for the Use of Explosives in or Near Canadian Fisheries Waters' – 1998, the presence of species at risk requires a closer examination than a guideline can provide." In the addendum, DFO states that "a horizontal set back distance from the shore line of 500 meters would be required to protect iBoF salmon of the size that could be found at Whites Point from May to October."

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[65] Email from Dennis Wright (DFO) to Jim Ross (DFO), September 30, 2002 (CP02863, p. 005552).

[66] Letter from Phil Zamora to Paul Buxton, May 29, 2003 (CP33956, p. 738367). Section 32 of the *Fisheries Act* states, "No person shall destroy fish by any means other than fishing except as authorized by the Minister."

139. This was the first time DFO raised the issue of iBoF salmon, even though it had received the initial blasting plan eight and a half months earlier. Under condition 10(h) of the Nova Scotia permit – which DFO itself had drafted – the proponent was required only to abide by the Guidelines, not to go beyond the Guidelines as DFO now demanded. A setback of 500 meters was 15 times greater than the 30 meters mandated in the Nova Scotia approval (which DFO had reviewed and commented on before it was issued).[67] A 500 meter setback would be impossible to achieve within the space available.

140. The addendum to the DFO letter further identified the marine mammals of concern, namely the northern right whale, the blue whale, the harbour porpoise, the fin whale, the minke whale and the humpback whale, and added that "DFO is concerned that there may be potential harmful effects on the colony [of harbour seals at Crowell's Cove within 3 km of the blasting] during the breeding season."

141. Further complicating the matter was the fact that the federal *Species at Risk Act* was enacted in June 2003. The two species of concern were iBoF Atlantic salmon and North Atlantic right whale.

142. Meanwhile DFO's refusal to approve the blasting plan was holding up the test quarry and the proponent's plans for a larger quarry. By June 2003 the proponent was "in a position to commence production of aggregate" at the test quarry – as soon as it obtained DFO's signoff on the blasting plan.[68]

143. The purpose of the test quarry (including the blasting) was to enable the proponent to determine the feasibility of the project, including allowing the proponent to obtain information as to blasting effects to satisfy the CEAA process.[69] As described in a letter from the proponent to the CEA Agency dated April 20, 2003:

> Nova Stone's intentions for the 3.9 ha quarry are to open it in accordance with the Approval and crush rock. This rock will be used initially for the construction of the various environmental controls as set out in the application for the 3.9 Ha quarry and to construct a new access road to the 3.9 ha quarry. …

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[67] Approval, *supra* note 44, s. 9(b)(iii) (0684). The 30 meter setback incorporated into the permit was stipulated by the NSDEL Pit and Quarry Guidelines.

[68] Letter from Paul Buxton (Nova Stone) to Bob Petrie (NSDEL), June 25, 2003. The letter also notes that "Clearing and grubbing of the initial face has been completed and environmental controls including the settling pond have been established", and that "DFO's position [i.e. that DFO could not approve the blasting plan because the EA had begun] is preventing Nova Stone Exporters Inc. from operating the 3.9 ha quarry" (CP00645, p. 002061).

[69] In an undated email (some time in 2003), Ronald L'Esperance (NSDEL) wrote to Gerard MacLellan (NSDEL): "My understanding was that the rpoponent (sic) required test blasts to confirm possible quantity and to monitor effects as part of an overall decision making process for a go/no go decision regarding triggering the EA process." (CP02270, p. 004592).

> While we are gaining sufficient rock for the environmental controls it is our intent to monitor early blasts to ensure compliance with the Terms and Conditions set out in the Approval and also the parameters set out in DFO's Guidelines. The information gathered from the monitoring is seen by Global Quarry Products as a significant part of its CSR ie: a clear demonstration that blasting can be carried out without creating problems. When permits are issued for the larger quarry and the marine terminal the 3.9 ha site will simply be enlarged to the NE in order to provide sufficient rock for shipment over an extended period of time.[70]

144. Exasperated, the proponent made several appeals to DFO and NSDEL, finally writing to the provincial Minister of Environment on October 9, 2003, saying "We have provided more than sufficient information to enable a decision to be made on items 10 h) and 10 i) in the Blasting section of the permit, including a very recent statement on our blasting criteria, and we now insist that a decision be made on the information provided", and that "We are now of the opinion that we are being unfairly treated in this process".[71]

145. In a letter to Paul Buxton dated July 23, 2003, Bob Petrie (District Manager, NSDEL) wrote:

> We acknowledge that the report [required by Condition 10(i) of the permit] has been completed, submitted to DFO and includes mitigation measures to prevent adverse effects to marine mammals. Many of DFO's subsequent comments relate to species other than marine mammals. We recognize that while these are important issues, these are outside the scope of Condition 10(i) and are therefore not considered when determining whether Condition 10(i) has been met.[72]

146. DFO's refusal to process the blasting plan for the test quarry, ostensibly on account of the ongoing EA for the larger quarry was disingenuous for two main reasons. First, at the time it was not at all clear that the 120 ha quarry would be included in the scope of the federal EA. Second, at the time it was not at all clear that, even if the scope included both the land and marine elements of the project, the test quarry would be included. In fact, on September 17, 2003, four months after DFO advised the proponent that it could not process the blasting plan, DFO was still trying to convince the CEA Agency to scope in the test quarry: "DFO

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[70] Letter from Paul Buxton to Derek McDonald (CEA Agency), April 20, 2003 (CP33308, p. 737049).

[71] Letter from Paul Buxton to Minister Kerry Morash, October 9, 2003 (investor documents, Tab 585, p. 002057). NSDEL acknowledged that DFO was overstepping its mandate by considering issues aside from the effects on marine mammals, but refused to concede that the DFO-requested conditions had been satisfied.

[72] Investor documents, Tab 469, p. 001118.

recommends that the 3.9 hectare test quarry associated with this project be included in the scope of the project."[73]

147. The proponent was now caught in a bureaucratic trap created by federal officials. Had DFO reviewed the blasting plan in a timely manner, it could have approved the plan before the CEAA process for the larger quarry was initiated. Had DFO decided not to scope in the test quarry, it would have been able to issue a s. 32 authorization for the test quarry even though the CEAA EA for the larger quarry had begun. Had DFO decided not to require a s. 32 authorization, there would have been no problem.

148. Frustrated by DFO's refusal to agree to the blasting plan, Nova Stone backed out of the entire project. Nova Stone's interest in the 3.9 ha site was transferred to Bilcon and integrated into the EA process for the larger 152 ha quarry. The provincial approval for the test quarry was cancelled.[74] Global Quarry Products was dissolved and Bilcon became the sole proponent.[75]

149. Even though DFO now had no powers under the Nova Scotia permit to require review of the blasting plan (as the permit was cancelled), and the proponent had not applied for any permits under the federal *Fisheries Act* (i.e. a s. 32 or a s. 35(2) authorization) in respect of the blasting, DFO continued to engage in discussions about blasting with the proponent.

150. After months of such discussions, on November 10, 2004, DFO changed its mind on the setback issue, and agreed to 100 meters instead of 500 meters.[76]

151. The blasting plan for the test quarry was never approved by DFO.

152. The proponent's inability to conduct test blasting seriously undermined its efforts to develop a blasting plan for the larger quarry and to convince the Joint Review Panel that blasting at the larger quarry would not have significant environmental effects. The Panel ultimately concluded that there was too much uncertainty around the blasting issue, and this was one of the factors that led it to be fundamentally critical of the adequacy of Bilcon's environmental assessment:

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[73] Letter from Phil Zamora (DFO-HMD) to Steve Chapman (CEAA), September 17, 2003 (CP04504, p. 013421).

[74] On August 23, 2004, Paul Buxton advised Bob Petrie (NSDEL) that Bilcon had taken over the lease for the 3.9 ha site, and that "Bilcon will not be requesting the transfer of the Permit from Nova Stone Exporters Inc. … Bilcon is proceeding with the Panel Review process on the entire Whites Point parcel now under lease and neither Global Quarry Products nor Nova Stone Exporters Inc. will be a part of that process." (investor documents, Tab 485, p. 001152). Mr. Petrie replied on October 26, 2004 confirming that the approval for the 3.9 quarry "has been cancelled" (investor documents, Tab 487, p. 001153).

[75] Whites Point Quarry and Marine Terminal Project, Joint Review Panel Report, October 2007 (**"Panel Report"**) at p. 15.

[76] Letter from Phil Zamora (DFO-HMD) to Paul Buxton, November 10, 2004 (investor documents, Tab 492, p. 001170).

> While the Panel accepts that a conceptual level of detail in a project description may suffice for some elements of an EIS, it concludes that to conduct a full assessment of particular environmental effects it requires clarity regarding the nature of project activities and any alterations proposed to the environment. The Panel found such clarity missing for key components of the Project Description, including the drainage system, protocols for managing ship docking, and blasting activities.[77]

(b) DFO scrambles to find triggers for a federal EA and makes an error of law in imposing a comprehensive study

153. On January 8, 2003, Global Quarry Products submitted a "Navigable Waters Protection Application" to the Coast Guard (which was then part of DFO) in order to construct the dock.[78] In response to a request from the Coast Guard, the proponent submitted further detailed information on January 28, 2003 and February 6, 2003.[79]

154. The proponent submitted a Draft Project Description to the Canadian Environmental Assessment Agency on January 28, 2003.[80] This described the larger quarry (described as "approximately 380 acres") as well as the dock. It stated that a permit under the NWPA would be required for the dock. It did not indicate that any *Fisheries Act* approvals would be required.

155. The Agency forwarded the document to DFO – Habitat Management Division on February 6, 2003. Thomas Wheaton of DFO-HMD replied that:

> After careful review of the document, DFO-HDM has concluded that additional information is required to determine whether or not we are likely to be a Responsible Authority (RA).
>
> DFO-HMD needs more detailed information on the nearshore fish habitat in the area of the proposed marine terminal, dimensions of the marine terminal including: the proposed piles, construction details (type and duration), impacts to tidal and nearshore currents, effluent discharge quality and quantity, etc. DFO-HMD also requires detailed information on the impacts of blasting to the tidal and nearshore environment.[81]

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[77] Panel Report at pp. 25-26.

[78] Navigable Waters Protection Application, sent by Paul Buxton to the Coast Guard on January 8, 2003 (investor documents , Tab 235, p. 000244).

[79] Letters from Paul Buxton to Charlet Myra (Navigable Waters Protection Program, Coast Guard), January 28 and February 6, 2003 (investor documents, Tab 796, p. 003541 and Tab 789, p. 003529).

[80] "Draft Project Description", January 2003 (investor documents, Tab 399, p. 000890).

[81] Letter from Thomas Wheaton to Derek McDonald, February 14, 2003 (CP00430, p. 001411).

156. On February 17, 2003 the Coast Guard advised the DFO Habitat Management Division that a permit was required under s. 5(1) of the *Navigable Waters Protection Act*, and that this would trigger an EA.[82]

157. The proponent submitted a revised, final Project Description to the CEA Agency on March 10, 2003.[83] The Agency forwarded the document to DFO on March 24, 2003.[84]

158. On March 23, 2003, the proponent submitted a revised plan for the dock component of the project to DFO. DFO determined that the terminal would require approval under s. 5(1) of NWPA, and that *Fisheries Act* authorizations under ss. 35(2) and 32 would also "likely" be required. These approval requirements would trigger a CEAA assessment. DFO also determined that the dock was a "marine terminal" under the CEAA Comprehensive Study Regulations and that due to the size of the ship expected to use the dock, it would be a comprehensive study. DFO would likely be the lead RA.

159. A week later, the federal and Nova Scotia governments met to discuss harmonizing the EA process. The possibility of elevating the review to a joint panel was raised, but it was agreed that "Comprehensive Study is the most likely federal EA track, as opposed to a Panel Review".[85]

160. Because the dock required a permit under s. 5(1) of the NWPA, this triggered the need for an EA under CEAA. At that time, these permits were issued by the Coast Guard branch of DFO. The Coast Guard referred the matter to the Habitat Management branch which then became responsible for ensuring the assessment of the dock.[86]

161. On April 14, 2003, Mr. Zamora of DFO wrote a letter to Mr. Buxton advising that an EA would be required before the NWPA permit could be issued. The letter stated that, because the project included a marine terminal designed to handle

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[82] 15699.

[83] "Project Description, Whites Point Quarry and Marine Terminal", March 2003 (investor documents, Tab 434, p.
001033).

[84] Letter from Phil Zamora (DFO) undated (CP05251, p. 016170).

[85] "Highlights and Action Items – Whites Point Inter-Agency EA Meeting, March 31, 2003" (CP02997, p. 007432). See also notes of federal-provincial meeting (author unknown), March 31, 2003 (CP05419, p. 017038).

[86] A March 27, 2003 memo from Phil Zamora of the Habitat Management to Charlet Myra at the Coast Guard, states "I would like to inform you that Habitat Management Division will be responsible to ensure that an environmental assessment of this project is carried out in accordance with the *Canadian Environmental Assessment Act*(CEAA), because of the *Navigable Waters Protection Act* trigger (CP03310, p. 009526).

vessels larger than 25,000 DWT, the type of EA that would be used would be a comprehensive study.[87]

162. In my opinion this was an error of law. In fact, a comprehensive study was not required. Under CEAA, a project only requires a comprehensive study level of EA if it is listed on the Comprehensive Study Regulations (SOR/94-638). These Regulations (in April 2003 and still today) include "The proposed construction, decommissioning or abandonment of … "a marine terminal designed to handle vessels larger than 25 000 DWT".[88] However, the Regulations expressly exempt marine terminals that are built exclusively for "production, processing or manufacturing areas".

163. The definition of "marine terminal" in these Regulations is as follows:

> 'marine terminal' means
>
> (a) an area normally used for berthing ships and includes wharves, bulkheads, quays, piers, docks, submerged lands, and areas, structures and equipment that are
>
> (i) connected with the movement of goods between ships and shore and their associated storage areas, including areas, structures and equipment used for the receiving, handling, holding, consolidating, loading or delivery of waterborne shipments, or
>
> (ii) used for the receiving, holding, regrouping, embarcation or landing of waterborne passengers; and
>
> (b) any area adjacent to the areas, structures and equipment referred to in paragraph (a) that is used for their maintenance.
>
> <u>It does not include</u>
>
> <u>(c) production, processing or manufacturing areas that include docking facilities used exclusively in respect of those areas; or</u>
>
> (d) the storage facilities related to the areas referred to in paragraph (c).[89]

164. Because the proposed dock was to be used exclusively in respect of the quarry production and processing operations, it was not a "marine terminal" at all within the meaning of CEAA. A comprehensive study should never have been considered. Only a screening level assessment was required.[90]

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[87] Letter from Phil Zamora (DFO-HMD) to Paul Buxton, April 14, 2003 (CP00399, p. 001348).

[88] Comprehensive Study Regulations (SOR/94-638), s. 28.

[89] Comprehensive Study Regulations (SOR/94-638), s. 2 (emphasis added).

[90] Section 18 of CEAA provides that a screening shall be conducted for projects not listed on the Comprehensive Study List.

165. The April 14, 2003 DFO letter further stated that "DFO will manage the EA process as the Responsible Authority (RA) under CEAA. The federal EA process will be harmonized with a provincial EA process."[91]

166. The letter advised that the EA would examine both the dock *and* the quarry: "The 'scope of the project' for the purpose of this EA will include the construction, installation, operation, maintenance, modification, decommissioning and abandonment of the quarry and marine terminal." As will be shown, this determination followed lengthy internal deliberations, and was inconsistent with DFO's normal scoping practice.

167. The letter also stated that a HADD authorization would be required, but it did not specify what might cause the HADD, or whether the HADD was in relation to the dock only:

> Based on the information provided in your project description we have also concluded that your project is likely to result in the harmful alteration, disruption or destruction of fish habitat (HADD). If a HADD is likely to occur, the project can only proceed if an authorization under Section 35(2) of the Fisheries Act (FA) is granted. Please find the attached Application for Authorization form to be completed and returned to us. …
>
> A requirement of an authorization is that the proponent must prepare a plan to compensate for any alteration, disruption or destruction which is authorized. The compensation plan and its execution must meet the approval of DFO.
>
> Depending on information gathered from the EA process, other sections of the Fisheries Act may also apply to this project, in particular Section 32. Section 32 gives DFO the authority to prohibit the destruction of fish by any means other than fishing. An application for a Section 32 Authorization will be forwarded to you if and when it is likely to be needed.[92]

168. Even though DFO indicated in the April 14 letter that a HADD authorization was "likely" required, DFO had not in fact determined that such an authorization would be required, at least not in respect of the quarry component. An internal Agency email on April 24, 2003 noted that:

> DFO has not confirmed that they have a HADD trigger for the quarry, but are leaning that way, based on advice from their area habitat coordinator. Based on that, it looks like they will scope in the quarry, too (at least, that's what they've said in a letter to the proponent).[93]

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[91] Letter from Phil Zamora (DFO-HMD) to Paul Buxton, April 14, 2003 (CP00399, p. 001348).

[92] *Ibid.*

[93] Email from Derek McDonald (CEAA) to Carole Giroux (CEAA), April 24, 2003 (CP04790, p. 014465)

169. Bilcon duly submitted a HADD application to DFO on May 19, 2003 in respect of the dock. This amounted to a second trigger for a federal EA, in addition to the application for the NWPA approval. But, Bilcon never submitted a HADD application, or a *Fisheries Act* s. 32 application (destruction of fish by means other than fishing), in respect of the quarry component.

(c) The federal government dithers over whether to "scope in" the quarry, and ultimately decides to do so despite having no legislative authority over the quarry itself

170. Once a federal EA was triggered by the NWPA permit application and the *Fisheries Act* HADD application (both of which related only to the dock component of the project), federal officials considered whether the "scope" of the project being assessed should include the dock and the quarry or just the dock.

171. The question was, initially, DFO's to resolve, as it was the federal "Responsible Authority" for the EA within the meaning of CEAA.

172. The Canadian Environmental Assessment Agency, which provides advice directly to the federal Environment Minister, wanted to scope in the quarry. Steve Chapman wrote on April 2, 2003 to his colleague Derek McDonald: "I'm concerned that DFO may want to only scope in the terminal and not the quarry, so we may have [to] put some pressure on them"; Mr. McDonald responded: "I'm sure they'd prefer to scope it narrowly, but I think the province would have some concerns with that!"[94] (This is another indication of the political sensitivity of the project.)

173. The following day, the Agency wrote to Phil Zamora at DFO pressuring him to scope in the quarry:

> Project splitting is an oft-raised criticism in environmental assessment and has been the root of several legal challenges. In this case, the Agency would have concerns (as would, I suspect, the public) with a move to scope in only the marine component. Aside from it being considered somewhat less than best practice, it would jeopardize the potential for a joint EA, and possibly make both levels of government look bad (e.g. why can't these guys get their acts together? (no pun intended)). Excluding the quarry also presumes that there are no navigable waters or fish habitat on the site, a question which has not yet been explored.[95]

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[94] Email exchange between Derek McDonald (CEA Agency) and Steve Chapman (CEA Agency), April 2, 2003 (CP04492, p. 013401).

[95] Email from Derek McDonald (CEA Agency) to Phil Zamora (DFO), April 3, 2003 (CP04085, p. 11745).

174. Very shortly thereafter, Mr. Zamora made a preliminary decision to scope in the quarry.[96]

175. As mentioned, Mr. Zamora wrote to the proponent on April 14, 2003 and stated that "The 'scope of the project' for the purpose of this EA will include the construction, installation, operation, maintenance, modification, decommissioning and abandonment of the quarry and marine terminal."[97]

176. However, an internal CEA Agency e-mail dated April 28, 2003, identified that DFO was "leaning towards including only the marine terminal":

> There is a potential issue brewing over scoping (isn't there always?). DFO initially indicated they would scope in the marine terminal and quarry, but I hear they are now leaning towards including only the marine terminal. This would likely anger the locally opposed citizens, who have made clear their desire to stop the quarry, and their willingness to use the media and politicians to crank up the pressure. This would be perceived as 'ducking'. Scoping is, of course, an RA decision, but the Agency could get some heat (e.g. 'can't the Agency make them scope it in?') and may have to defend the process.[98]

177. DFO records confirm that DFO struggled with the issue of whether to assess only the dock component. A DFO memo for the Assistant Deputy Minister, Oceans, states that DFO "has determined that the marine shipping terminal portion of the a project proposed by Global Quarry Products/Nova Stone Exporters (proponent) will require approval under the Navigable Waters Protection Act Subsection (Ss.) 5(1) and a Comprehensive Study (CS) level Environmental Assessment (EA) pursuant to the *Canadian Environmental Assessment Act (CEAA)*."[99]

178. The same memo indicates that there was pressure from Nova Scotia to scope in the quarry as well as the dock:

> The Province is responsible for the entire project (terminal and quarry) in its Environmental Impact Assessment (EIA) process and has made representation to DFO for joint EA review, which implies same scope of project for both levels of government. The proposed project has been very controversial and the Province is therefore anxious to have federal involvement with assessment of both the terminal and quarry.

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[96] Email from Phil Zamora (DFO) to Ted Currie, April 8, 2003 (CP05242, p. 016154): "The scope will include the marine terminal and the quarry."

[97] Letter from Phil Zamora (DFO-HMD) to Paul Buxton, April 14, 2003 (CP00399, p. 001348).

[98] Email from Derek McDonald (CEAA) to Robert Deslauriers (CEAA), April 28, 2003 (CP04079, p. 011727).

[99] Memorandum for the Assistant Deputy Minister, Oceans (undated; some time in 2003) (CP05115, p. 015699). See also the memo provided to Minister Thibault on June 20, 2003, which repeats some of the language from this memo (CP06301, p. 018630).

179. The memo also states that "DFO has determined that the marine terminal will require a *CEAA* assessment, however, it has yet to be determined if there is a trigger for assessment of the quarry. It is likely, due to public opposition of the proposal that there will be a court challenge if the scope of project for the *CEAA* assessment does not include both the quarry and terminal."

180. DFO never advised the proponent of its doubts, and that it was considering unscoping the quarry. As far as the proponent knew, DFO intended to scope in the quarry, as it had stated in the April 14 letter.

181. It bears repeating that the CEAA "triggers" related only to the dock component. The need for the CEAA EA arose from the fact that the dock would require a NWPA permit (because the terminal would interfere with navigation and shipping) and likely a HADD permit (because the terminal pilings would, according to DFO, destroy fish habitat). DFO had not identified any CEAA trigger in respect of the quarry itself. Had the proposal been to build only a quarry, with no dock (i.e. to ship rock by truck instead of by ship), *there would have been no need for a federal EA at all*.

182. In sum, the legitimate federal interest in the project related only to the dock, not to the quarry itself. The regulation of the quarry, including its environmental impacts, was a matter of exclusive provincial jurisdiction. No federal permits were required for the quarry itself. Although DFO had suggested that a s. 32 authorization would be required for the potential blasting effects on marine life, this remained speculative.

183. Shortly after he ceased being the Minister of Fisheries (but was still the MP for West Nova), Robert Thibault announced that he opposed the project. In an opinion piece in the Digby Courier entitled "Thibault rejects proposed quarry", Mr. Thibault declared, "I do not think it is an acceptable project".[100] Mr. Thibault explained why he did not take a public stand against the quarry when he was Minister:

> The federal government had no jurisdiction over the quarry itself – only its possible impact on marine life and habitat. As a result, the department became involved only after application was made for a marine terminal, as this affected areas under our responsibility.
>
> As minister of fisheries, I requested a review panel of the project based on my concerns, and those of my department, about the potential damage such a project could have on the marine environment.

184. The decision to scope in the quarry was highly unusual. As discussed in section 1.3 of this Expert Report, the Belleoram Quarry and Marine Terminal and

[100] Robert Thibault, "Thibault rejects proposed quarry", Digby Courier, May 26, 2004 (CP01295, p. 002897) (emphasis added).

Aguathuna Quarry and Marine Terminal projects are comparable projects, both supported by governments, where the environmental effects of the quarry in each case were not included in the CEAA EA.

1.7 <u>The decision to refer the WPQ project to a joint review panel was unusual</u>

185. Another question that arose after the environmental assessment was triggered was whether to elevate the assessment from a comprehensive study to a panel review, the most onerous form of assessment from a proponent's perspective.

186. Even before the environmental assessment was triggered, local officials from both governments were contemplating a panel review. At a federal-provincial meeting on December 3, 2002, "There seemed to be general agreement that due to the size, extent, duration, environmental issues, and extensive public concern, we (DFO, as likely lead RA) may wish to kick the project up to a panel review."[101] At that point the proponent had not even applied for any federal permits or submitted its Project Description to the CEA Agency.

187. On the other hand, an internal DFO email dated February 20, 2003 questioned the wisdom of doing that: "NHQ [national headquarters] has raised the issue that we should consider the national implications of sending a quarry here to a Panel, when there are a number of quarries facing public opposition across the country."[102]

188. On May 26, 2003, DFO asked NSDEL if they would consider a joint panel review.[103] The following day the Deputy Minister at NSDEL advised the Nova Scotia Minister of Environment and Labour: "Given the magnitude of the public concern in the area a panel may be the best way to go." The Minister replied, "Looks like an innovative approach".[104]

189. The Deputy Minister then discussed the matter with the Minister, and issued the following instructions to an official at NSDEL:

> I have now had a chance to speak to the Minister at some length on this matter. Given the local concerns, the magnitude of the proposed future operation (it would have been required to go thru [sic] EA beyond the existing 3.9h) and the intersecting jurisdiction with the Fed, we think it is

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[101] Reg Sweeney (DFO) email to Jim Ross (DFO) and Thomas Wheaton (DFO), December 3, 2002 (CP06193, p. 018292).

[102] Email from Paul Boudreau (DFO) to Phil Zamora (DFO), February 20, 2003 (CP05079, p. 015627).

[103] Email from Bob Langdon (NSDEL, Environmental and Natural Area Management Division) to Ronald L'Esperance (Deputy Minister, NSDEL), May 26, 2003 (CP01878, p. 004035).

[104] Email from Ronald L'Esperance (Deputy Minister, NSDEL) to Minister Ronald Russel, May 27, 2003; printed email has handwritten response from Minister (CP01877, p. 004034).

appropriate to proceed with a joint assessment. We favour the panel approach.[105]

190. In early to mid June discussions were held between the two levels of government on formalizing the decision to appoint a joint review panel.[106] The proponent was left in the dark.[107]

191. On June 4, 2003, DFO wrote to NSDEL to officially gauge NSDEL's interest in a joint panel review. The letter stated:

> DFO has determined that due to the need for a Navigable Waters Protection Act Ss. 5(1) approval, the terminal portion of the project will require an environmental assessment pursuant to the Canadian Environmental Assessment Act (CEAA). The type of assessment required on the terminal is a Comprehensive study, pursuant to the CEAA – Comprehensive Study List SS. 28(c) – marine terminal designed to handle vessels larger than 28,000 DWT.
>
> DFO is presently reviewing the proponent's blasting plan for a 3.9 ha. test quarry and conducting discussions and field work of the overall 155 ha. quarry site to determine if approvals are required under the Fisheries Act Ss. 35(2) or S. 32, either of which would necessitate an environmental assessment under CEAA.[108]

192. The letter went on to say, "In the interest of effectively harmonizing the federal and provincial review processes, DFO is considering referring the project to the Minister of Environment for a Panel Review."

193. At this time the CEA Agency had reservations about DFO's intention to refer the project to a Panel Review. Derek McDonald wrote to his CEA Agency colleague Steve Chapman on June 9, 2003:

> The proponent is, to my knowledge, unaware of DFO's desire to refer. I still feel that a Comp Study with an appropriate scope and public participation plan, would be the correct path – and I have said this to Phil Zamora. To me, a referral to facilitate harmonization reflects poorly on

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[105]Email from Ronald L'Esperance (Deputy Minister, NSDEL) to Bob Langdon (NSDEL), May 28, 2003 (CP05381, p. 016915).

[106]Both levels of government worked together on drafting the federal government's letter to the province proposing a joint panel, and the province's response. See email from Chris Daly (NSDEL) to Derek McDonald and Steve Chapman (CEAA), June 16, 2003 (CP03955, p. 011418) and email from Chris Daly to Derek McDonald (CEAA) and Paul Boudreau (DFO), June 17, 2003 about "get[ting] our ducks in a row to make an announcement by the end of June" (CP04070, p. 011703).

[107]Email from Chris Daly (NSDEL) to Bob Langdon (NSDEL) recounting discussions with DFO and Agency, June 2, 2003: "at this point everything remains confidential (the company does not even know we are planning on going this route yet" (CP05380, p. 016914).

[108]Letter from Paul Boudreau (DFO) to Chris Daly (NSDEL), June 4, 2003 (CP04479, p. 013357, emphasis added).

both governments and is perhaps an undesirable precedent. But, hey, public review is the Canadian way![109]

194. Mr. McDonald followed up with another email to Mr. Chapman the following day, suggesting that DFO's refusal to authorize the blasting plan for the 3.9 ha test quarry is unfair:

> Although not proceeding with the 3.9 ha operation is arguably the 'high road', there is no clear legal impediment to its operation. A cynical view might be that DFO wants to avoid making a decision on the blasting plan and the Agency is a convenient scapegoat.
>
> The proponent is clearly frustrated, and with good reason, I think. Things are dragging. I find it frustrating myself and it's not even my money. [110]

195. Mr. Chapman replied: "Derek, We should communicate via telephone for discussions of this nature. Give me a call."[111]

196. In a June 20, 2003 memo, the Assistant Deputy Minister for Oceans (DFO), Susan Kirby, recommended to Minister Thibault that he refer the matter to a joint review panel. The memo recognized that DFO had jurisdiction over only the terminal; and was still "conducting on-going discussions and field work" to determine if s. 35(2) or s. 32 *Fisheries Act* authorizations would be required, thereby triggering a federal EA of the quarry itself: "DFO may not have a legislative trigger to include the quarry". To the same effect, the memo acknowledged that "the project will potentially effect (sic) a number of valued ecosystem components, responsibility for which does not fall within DFO's jurisdiction."[112]

197. The memo also noted that "The proposed project has been very controversial and the Province is therefore anxious to have federal involvement with assessment of both the terminal and quarry," and that "It is likely, due to public opposition of the proposal that there will be a court challenge if the scope of project for the CEAA assessment does not include both the quarry and terminal."

198. The memo stated that "DFO believes that the project as proposed, is likely to cause environmental effects over a large area of this rich and diverse marine and terrestrial environment as well as on fisheries and tourism, the two largest economic sectors."

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[109] Email from Derek McDonald (CEA Agency) to Steve Chapman (CEA Agency), June 9, 2003 (CP03956, p. 011421).

[110] Email from Derek McDonald (CEA Agency) to Steve Chapman (CEA Agency), June 10, 2003 (CP04074, p. 011713). Mr. Chapman replied, "We should communicate via telephone for discussions of this nature": email from Steve Chapman to Derek McDonald, June 11, 2003 (CP04704, p. 014124).

[111] Email from Steve Chapman (CEA Agency) to Derek McDonald, June 11, 2003 , CP31308, p. 713765.

[112] Memo from Susan Kirby (Assistant Deputy Minister, DFO) to Minister Thibault, June 20, 2003, CP06305, p. 018639 (emphasis added).

199. It concluded:

> For the reason of environmental effects, and in the interest of harmonizing the federal and provincial EA processes, DFO is of the opinion that assessment by a review panel is the most appropriate level of assessment. DFO's role in a Panel Review would be to provide expert testimony to the panel.

200. On June 20, 2003 came the official overture from DFO to NSDEL for a joint panel review. The letter reiterated the point made in the June 4 letter that the only confirmed trigger was the need for a NWPA approval, and that no decision had been made yet whether the 152 ha quarry would require *Fisheries Act* authorizations.[113]

201. It went on to say:

> In light of the information provided by GPQ, DFO believes that the Whites Point Quarry and Marine Terminal Project as proposed is likely to cause environmental effects over a large area on both the land and marine environments.
>
> For that reason, we are looking at all environmental assessment options, including referring the project to the Minister of the Environment for a Panel Review under CEAA.
>
> In the context of harmonizing the provincial and federal environmental assessment processes for this project, and prior to finalizing a decision on the scope of assessment, I am interested to know if your Department would be interested in participating in a joint review panel of this project.

202. On the same day, June 20, 2003, NSDEL replied to DFO saying "we are interested in harmonizing with the federal environmental assessment process" and "we are willing to participate in a joint environmental assessment review panel".[114]

203. Also that day, a draft referral letter was prepared for Minister Thibault's signature.[115]

204. The referral letter was signed by Fisheries Minister Thibault and delivered to Federal Environment Minister Anderson on June 26, 2003. The letter stated:

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[113] Letter from Paul Boudreau (DFO) to Chris Daly (NSDEL), June 20, 2003 (CP00389, p. 001332).

[114] Letter from Chris Daly to Paul Boudreau, June 20, 2003 (CP00390, p. 001334). The letters had been exchanged in draft before being signed – see the email exchange between Chris Daly (NSDEL) and Richard Nadeau (DFO), June 20, 2003, regarding the draft letters (CP03987, p. 011472).

[115] Email from Bruce Hood (CEA Agency) to Steve Chapman (CEA Agency), June 20, 2003, attaching draft referral letter from Minister Thibault to Minister of the Environment David Anderson (CP04463, p. 01331).

> DFO has concluded that various components of the proposed project will likely require authorizations under subsection 35(2) of the Fisheries Act to harmfully alter, disrupt, or destroy fish habitat, and section 32 to destroy fish by means other than fishing. Our analysis has also determined that the marine terminal portion of the project will interfere substantially with navigation, thereby requiring formal approval under subsection 5(1) of the Navigable Waters Protection Act.…
>
> We have determined that the marine terminal component of the proposal meets the criteria for a comprehensive study as defined in the Comprehensive Study List Regulations of the CEAA, 28(c) – marine terminal designed to handle vessels larger than 25,000 Dead Weight Tones (sic).
>
> In light of the information provided by the proponent, DFO believes that the Whites Point Quarry and Marine Terminal, as proposed, are likely to cause environmental effects over a large area of both the marine and terrestrial environments. The project is also subject to an environmental assessment by the province of Nova Scotia. The province has expressed interest to DFO in participating in a joint assessment of the project.
>
> For the above reasons, and in the interest of harmonizing the federal provincial environmental assessment processes, I am of the opinion that an assessment by a review panel is the most appropriate level of assessment. I am therefore referring the proposed Whites Point Quarry and Marine Terminal project to you for a referral to a review panel in accordance with paragraph 21(b) of the CEAA.[116]

205. The proponent was not told of the referral request. The day after the referral letter was sent, DFO noted that:

> The proponent does not know the project is being referred to panel. He knows that a Comprehensive Study is required on the terminal and that the DFO review of the quarry isn't complete – so we don't know yet if there are DFO triggers for a CEAA assessment of the quarry. However, the he (sic) is also aware that it could be referred to panel at any time before or during the Comprehensive Study.[117]

206. The President of the CEA Agency recommended that Environment Minister Anderson approve the referral of the of the WPQ project to a joint review panel and approve the release of the draft Federal-Provincial Agreement that had been drafted for the establishment of a panel for public comment.[118]

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[116] Letter from Minister Thibault to Minister Anderson, June 26, 2003 (investor documents, Tab 467, p. 001115).

[117] Email from Bruce Hood (DFO) to colleagues at DFO, June 27, 2003 (CP05182, p. 015819).

[118] Memo from CEA President Sid Gershberg to Minister Anderson, July 18, 2003 (CP06299, p. 018626).

207. This Canada-Nova Scotia Agreement set out the scope of the project to be assessed. It described the project as "the White's Point Quarry Project, located near Digby, Nova Scotia, as described in Part I of the Appendix attached hereto." The Appendix described the project as follows:

> Bilcon of Nova Scotia Corporation is proposing to construct and operate a basalt quarry, processing facility and marine terminal located on Digby Neck in Digby County, Nova Scotia.
>
> Quarrying is expected to take place on 120 hectares of land, with production expected to be 2 million tonnes of aggregate per year. Approximately 4 hectares of new quarry would be opened each year. The land-based quarry operations are expected to be year-round, with aggregate stockpiled for ship loading once per week. Drilling and blasting of basalt rock, loading, hauling, crushing, screening, washing and stockpiling would be done on-site.
>
> Land-based permanent structures would include rock crushers, screens, closed circuit wash facilities, conveyers, load out tunnel, support structures and environmental control structures. Associated construction processes would include the erection of on-land aggregate processing equipment, conveyers and wash-water pumping systems.
>
> Marine facilities would include a conveyor, ship loader, berthing dolphins and mooring buoys. Construction processes for the marine terminal infrastructure would include the anchoring of pile support structures to the basalt rock extending offshore, as well as the construction of concrete caps as dolphins. Approximately 40,000 tonnes of aggregate would be produced for loading each week.[119]

208. Thus the scope of the project, as determined by the federal and provincial Environment Ministers, included both the dock and the quarry. This is striking in light of the fact that at this point in time, DFO still had not determined conclusively whether there were any *Fisheries Act* triggers in respect of the quarry component of the project.

209. Minister Anderson accepted Minister Thibault's request and officially referred the matter to a joint review panel on August 7, 2003.[120] Minister Anderson also approved the release of the draft federal-provincial agreement for public comment.

[119] The final Joint Panel Agreement, which was signed November 3, 2004, is included in the Joint Review Panel Report (October 2007), at p. 108. The final project description was substantially the same as earlier drafts – except the final version described the proponent as Bilcon instead of Global Quarry Products, as the ownership structure of the proponent had changed: email from Bruce Young (CEA Agency) to NSDEL, July 11, 2003, attaching draft agreement (CP04337, p. 012944); and *ibid.*

[120] Letter from Minister David Anderson to Minister Robert Thibault, August 7, 2003 (CP06298, p. 018625); see also July 18, 2003 memo from Sid Gershberg (President of CEA Agency) to Minister Anderson, with Minister's signed concurrence (CP06299, p. 018626).

210. Again, the proponent received no notice of the referral to a Joint Review Panel. It only learned of the referral in the press. The proponent was not formally advised of the referral until September 10, 2003, when Steve Chapman of the CEA Agency, the Panel Manager, wrote to confirm this.[121] No formal explanation for the referral was provided to the proponent in this letter or otherwise. When asked about the reasons for referral in a September 3 meeting, Mr. Chapman replied that the project had raised environmental concerns, specifically the effect on fish habitat.[122] According to Mr. Buxton's notes of that meeting:

> We asked why the project in Tiverton (the proposed new breakwater) had apparently been approved without any environmental assessment when it would destroy perhaps three acres of fish habitat as compared with Whites Cove which would destroy less than one tenth of an acre of fish habitat.
>
> Chapman had no explanation for this but did note that once a panel review was under way there was no process to go back to a Comprehensive Study Review or any other process. In other words, regardless of any evidence, we are stuck with a panel review.[123]

[121]Letter from Steve Chapman (CEA Agency) to Paul Buxton, September 10, 2003 (CP27276, p. 702085).

00 1129); see also Paul Buxton notes from meeting with federal and provincial officials, September 3, 2003: "We noted that the only information received from the proponent has been through the press" (investor documents, Tab 472a, p. 001123).

[122]Paul Buxton notes from meeting with federal and provincial officials, September 3, 2003 (investor documents, Tab 472a, p. 001123).

[123]*Ibid.*

PART II: COMMENTS ON THE WPQ PANEL'S APPROACH AND RECOMMENDATIONS

2.1 Summary of Part II

211. **In my opinion, the WPQ Panel's approach did not provide the legally requisite, usual or fair consideration of the WPQ project. The approach not only raises issues of jurisdictional error but also serious questions as to the Panel being an impartial forum for the objective evaluation of the project.**

212. **There are certain key factors that properly should influence the way in which a Review Panel approaches its task of considering a project and making recommendations to governments.**

213. **The criteria which clearly should be relevant to a Review Panel are those established by the statutes governing the EA process and the Terms of Reference mandated by the two governments, provided the Terms of Reference appropriately use statutory criteria found in CEAA and the Nova Scotia *Environment Act* from which are derived the jurisdiction of these governments to appoint and use a Review Panel.**

214. **Unfortunately in this matter, as described in some detail below, the Review Panel members misapplied, misused or ignored applicable statutory and other relevant criteria for carrying out an environmental assessment, and instead created or endorsed novel and unprecedented criteria for rejecting the proposal.**

215. **Most problematic was the Panel's reliance on the concept – previously unknown to EA law in Canada – of "community core values".**

216. **The Panel was charged with determining whether the WPQ project was likely to result in significant adverse environmental effects. The Panel ultimately determined that the *only* significant adverse environmental effect likely to result would be the WPQ's impact on the community's core values.**

217. **This was the first and only time a Panel has used community core values to reject a project.**

218. **Community core values was not a proper consideration for the Panel to take into account. Impacts on core values are not an "environmental effect", nor were they referred to in the Panel's Terms of Reference or the federal or provincial EA legislation.**

219. **Unlike other Panels that have dealt with divisive projects in an impartial manner, the WPQ Panel appears to have taken sides with one particular vision for the Whites Point area, a vision that emphasized the traditional, rural way of life over industrial development, even though the Panel acknowledged that there was an alternative vision held by others in the community, which emphasized job creation and economic growth.**

220. **The Panel used the environmental assessment process not to measure the Project's *environmental* impacts, but to evaluate whether the Project would further the goal of community self-determination, or to measure the Project's local popularity. Neither exercise finds a statutory basis in CEAA.**

221. **The WPQ Panel's approach effectively gave the local community a veto, one which it had no legal authority to grant.**

222. **Also troubling is the fact that the Panel never gave Bilcon an opportunity specifically to address and respond to the Panel's concept of community core values. Bilcon could not have expected this concept to have any bearing on the Panel's decision, let alone for it to be the determinative factor.**

223. **The Panel's interpretation of the term "environmental effect" to include impacts on community core values is not the only instance of the Panel misapplying key EA concepts. Other concepts misapplied by the Panel include the precautionary principle, "adaptive management" and "cumulative effects".**

224. **More generally, the Panel misunderstood the very purpose of environmental assessment. It is meant to be a planning exercise that takes place early on in the development of a project, before all details about the project are known, not a licensing exercise. The Panel, however, insisted on an unduly onerous level of detail and certainty from Bilcon, and criticized Bilcon in its final report for not having eliminated all uncertainty.**

225. **The Panel failed to employ any of the legal mechanisms available to address any lingering concerns it had regarding the detailed design and impacts of the project. In particular, the Panel failed to recommend any mitigation measures, any terms and conditions for the WPQ approval, or any follow-up and monitoring programs.**

226. **The Panel also seems to have unfairly rejected Bilcon's evidence in respect of key issues, such as blasting, as well as the evidence of government witnesses where that evidence supported the project.**

227. **Finally, the Panel exceeded its jurisdiction by determining that the project was not "justified in the circumstances". Under CEAA, that is a matter to be determined by government, not the Panel.**

2.2 The Panel's obligation was to evaluate the "significance" of "environmental effects", however its decision was based on "community core values"

(a) Introduction

228. The courses of action available to a Responsible Authority following a panel review turn on whether a project will cause "significant adverse *environmental* effects". If a project will not cause such effects, or if it will cause such effects but they can be justified, an RA may allow the project to proceed. If the project will cause significant adverse environmental effects that cannot be justified, the RA may not take any action to allow the project to proceed.

229. In this case, the Panel discussed many potential project impacts, but identified only one of those as both "significant" and "adverse", namely inconsistency with "community core values".

230. However, inconsistency with community core values is not an *environmental* effect, as defined by CEAA, it is a pure socio-economic effect. As such, it was not open to the Panel to recommend that the RAs reject the Project on the basis of inconsistency with community core values, and it was legally irrelevant to the decision to be made by the RAs under s. 37 of CEAA.

231. CEAA only recognizes socio-economic impacts as "environmental effects" where they are the result of a change that the project causes in the natural environment. For example, if fisheries habitat is destroyed by a project and that causes a loss of fishing income, then that may be considered as an environmental effect. In contrast, pure socio-economic impacts, those not tied to an environmental impact caused by the project, are not "environmental effects" as defined by CEAA. Inconsistency with community core values could not constitute a significant adverse *environmental* effect pursuant to CEAA.

232. This interpretation comes directly from the CEA Agency RA Guide:

> Only environmental effects as defined in the Act can be considered in determinations of significance and the related matters. It follows that the determination of significance and the related matters can consider only:
>
> - direct changes in the environment caused by the project;
> - the effects of these environmental changes on:
>   - o health and socio-economic conditions,
>   - o physical and cultural heritage,
>   - o current use of lands and resources for traditional purposes by aboriginal persons,

- o any structure, site or thing that is of historical, archaeological, paleontological or architectural significance; or

- changes to the project caused by the environment.

For example, the socio-economic effects of a project may or may not be factors in determining significance and the related matters. If a socio-economic effect (such as job losses) is caused by a change in the environment (such as loss of fish habitat), which is in turn caused by the project, then the socio-economic effect **is** an environmental effect within the meaning of the Act and must be considered when determining significance and the related matters. If the socio-economic effect is not caused by a change in the environment, however, but by something else related to the project (for example, reallocation of funding as a result of the project), then the socio-economic effect is ***not*** an environmental effect within the meaning of the Act and cannot be considered in the determination of significance and the related matters.[124]

233. It was simply not open to the Panel to find that the project would cause significant adverse environmental effects on the basis of inconsistency with community core values and to recommend that the Project be rejected on this basis. And because an RA must, pursuant to s. 37, base its decision following a Panel Review on significant adverse *environmental effects*, it was not open to the RAs to accept the Panel's recommendation.

234. It should also be noted that this was a community divided in relation to the WPQ project. Some community members supported the project, and others did not. For the Panel to find that the Project was *inconsistent* with community core values, it had to first find that the values of Project opponents were the only community values that mattered**.** The core values of the community members that supported the Project were completely ignored by the Panel. This is inherently problematic, and implies an anti-Project bias on the part of the Panel that is deeply troubling.

235. The Panel appears to have fundamentally misunderstood the legal requirements of CEAA, and the role of public participation and public concern within the EA process. CEAA is intended to foster public participation and to gather input in relation to a project. It does not, however, give communities a veto over proposed development. It was open to the Panel to hear the community's concerns and to relate these concern to the RA. The RA, in turn, may consider

[124]Federal Environmental Assessment Review Office, "A Reference Guide for the Canadian Environmental Assessment Act, Determining Whether a Project is Likely to Cause Significant Adverse Environmental Effects", November 1994, at p. 184 (emphasis in original): http://www.ceaa.gc.ca/D213D286-2512-47F4-B9C3-08B5C01E5005/Determining_Whether_a_Project_is_Likely_to_Cause_Significant_Adverse_Environmental_Effects.pdf.

community values in determining if significant adverse environmental effects may be "justified in the circumstances". But an assessment of public concern may not, however, stand in for an assessment of the significance of environmental effects.

236. The Panel's recommendation, and the Responsible Authority's decision, were both required to be based on the legal criteria set out in CEAA. The test in s. 37 of CEAA is whether the Project will cause significant adverse environmental effects that cannot be justified. It was not open to the Panel to disregard statutory criteria, nor to substitute other criteria in place of statutory criteria, such as "net community sustainability" or a "reverse onus" in place of the s. 37 test. Independent of public concern in relation to the Project, the Panel's recommendation to the RAs, and the RAs' decision, were both required to comply with the law. Both failed to do so.

237. The Panel's reliance on the finding that the project would be inconsistent with community core values as the basis for recommending rejection of the project was a fundamental legal error. Given that the Panel did not identify any *environmental* effect that it held to be both "adverse" and "significant", in my opinion the Panel *had no legal basis* to recommend rejection of the project under CEAA.

238. The RAs, in turn, had no jurisdictional basis to accept the Panel's recommendation to reject the project, given that no significant adverse *environmental* effects had been identified. Both the Panel and the RAs acted outside their statutory jurisdiction – and therefore without legal authority – in relation to the project.

(b) The Panel must evaluate whether environmental effects will be both "significant" and "adverse"

239. Pursuant to s. 37 of CEAA, following the report of a Panel, there are two potential courses of action available to the RA:

    (a) If the RA determines that a project will cause "significant adverse environmental effects" that cannot be justified, it may not "exercise any power or perform any duty or function" that would allow a project to proceed.

    (b) If the RA has concluded that the project will not cause significant adverse environmental effects, or if such effects may be justified in the circumstances, the RA may exercise any power or perform any duty or function necessary to permit the project to proceed.

240. In either case, the course of action available to the Responsible Authority hinges on whether environmental effects have been identified that are both “adverse” and “significant”.[125]

241. The determination of whether an environmental effect is “significant” is made *after* all relevant mitigation measures are taken into account. If a potential environmental effect exists but is capable of mitigation, it does not constitute a “significant adverse environmental effect”.

242. The Panel’s role is to assess the potential environmental impacts of a project, to consider whether they will be adverse and significant, and whether they can be mitigated. In this case, the Panel identified a wide variety of potential environmental effects, but accepted that most could be mitigated and were, therefore, not found to be “significant”:

> …the Panel accepts that with effective application of appropriate mitigation measures, competent project management and appropriate regulatory oversight, most project effects should not be judged “significant”…[126]

243. In fact, the Panel identified only one potential impact of the WPQ project as both “adverse” and “significant”. This impact was socio-economic in nature, and will be described, for the purpose of my report, as “inconsistency with community core values”.[127]

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[125] 37.(1) Subject to subsections (1.1) to (1.3), the responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the report submitted by a mediator or a review panel or, in the case of a project referred back to the responsible authority pursuant to subsection 23(1), the comprehensive study report:

(a) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate,

(i) the project is not likely to cause significant adverse environmental effects, or

(ii) the project is likely to cause significant adverse environmental effects that can be justified in the circumstances,

the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part; or

(b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part. (CEAA, s. 37(1), emphasis added)

[126] Panel Report at p. 84 (emphasis added).

[127] As conceived and defined by the WPQ JRP: “Core values are beliefs shared by individuals within groups. Core values constitute defining features of communities since they reflect to some degree the manner in which the group has come to hold the attitude, character, preferences and outlooks it has…. Digby Neck and Islands has developed over many years as a result of conditions operating from the time it was first colonized by permanent settlers. Formative conditions experienced by those communities over their lifetimes included limited economic opportunities, dependence on diverse

244. The Panel described the impact as follows:

> …the Panel found that the Project would have a significant adverse effect on a Valued Environmental Component represented by the "core values" of the affected communities. The Panel's review of core values advocated by the communities along Digby Neck and Islands, as well as community and government policy expectations, led the Panel to the conviction that the community has an exceptionally strong and well-defined vision of its future. The proposed injection of an industrial project into the region would undermine and jeopardize community visions and expectations, and lead to irrevocable and undesired changes of quality of life….[128]

245. In essence, the Panel held that the introduction of an extractive property use on Digby Neck and Islands would represent a departure from traditional economic activities, such as fishing and tourism, and was not consistent with the community's self-image or its own vision for future development.

> The Panel concluded that the Project, if approved, would almost certainly change, in a significant manner, local perceptions of community character and identity, while also producing severe and lasting repercussions that might directly affect social networks and community cohesion, and that would be impossible to mitigate. The proposal is not consistent with core values and community visions of the future as expressed in documents, by community leaders and by the majority of community members appearing before the Panel.[129]

246. There are a number of aspects of the Panel's determination in relation to community "core values" that are problematic.

247. First, a human value system is not a "Valued Environmental Component" nor a "Valued Ecosystem Component" (the correct term). A VEC is an aspect of the ecosystem – the natural environment - that is valued by humans. The Canadian Environmental Assessment Agency defines the term as follows:

> Valued Ecosystem Component (VEC): Any part *of the environment* that is considered important by the proponent, public, scientists and government involved in the assessment process. Importance may be determined on the basis of cultural values or scientific concern.[130]

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resource-based livelihoods, and a strong and dynamic land-sea connection…." (Panel Report at pp. 96, 99).

[128] Panel Report at p. 4 (emphasis added).

[129] Panel Report at p. 70.

[130] "Cumulative Effects Assessment Practitioners Guide" (February 1999) at p. 4 (emphasis added). Note that the Panel used the term "Valued *Environmental* Component" instead of "Valued Ecological Component". The term Valued Environmental Component is not used in CEA Agency guidance documents.

248. A VEC may be valued for socio-economic reasons, but the VEC must itself be a component of the environment. For example, healthy fisheries habitat is a VEC, which may be valued either for its role in supporting the aquatic food chair or because it is critical to sustaining a vibrant fishery. But it is a clear error to describe a human value system as a component of the natural world that is valued by humans.

249. The Panel clearly misunderstood the notion of VECs as used in the environmental assessment context and as defined by the CEA Agency, and the Responsible Authorities failed to identify and to correct this misapplication of the VEC concept.

250. Second, the Panel took sides in determining that the project would be *inconsistent* with "community core values", even though the Panel clearly recognized that this was a community divided over the Project:

> The Panel noted with concern the significant split that occurred in the community between supporters and opponents of this initiative…Those advocating the Project focused on the need for jobs and suggested that only year-round residents should influence the outcome….[131]

251. If some community members supported the Project and others did not, then logically the Project was clearly consistent with the "core values" of some members of the community. As the Panel chair Robert Fournier observed during the Panel hearings:

> THE CHAIRPERSON: What seems to be at the heart of all of this is that there are two visions of what people want to see here in this area. I mean, some people see a vision for the future that's built around the environment, and others see it built around a job-based prosperity I suppose is a way of saying it.[132]

252. To find that the Project would be inconsistent with the "core values" of the community – more than inconsistent, would cause "significant" and "adverse" impacts on those values – the Panel had to first take sides.

253. The Panel had to find that the values held by the community members opposed to the Project were the values of the community *as a whole*, or alternatively that they were the only values that mattered when evaluating significance and consistency. In either case, the values of the community members that supported the Project were ignored. In my opinion this was a departure from the Panel's proper role.

[131] Panel Report at p. 70 (emphasis added).

[132] Transcript at pp. 2114-2115 (emphasis added).

254. Third, the Panel misunderstood the way in which public concern is to be considered under CEAA. Public concern does not make an environmental effect "significant". "Significance" is measured in purely scientific terms, and public concern is legally irrelevant to the evaluation of significance.

255. Public concern can be a basis for referring a project to a Panel, and it may bear on an RA's decision on whether a significant adverse environmental effect can be "justified in the circumstances" under s. 37.

256. Whether the public likes or dislikes a project, however, has no bearing on whether the Project's environmental effects are "significant" or "adverse", as the CEA Agency has made clear:

> Public input into the determination of significant adverse environmental effects must, however, limit itself to questions related to scientific analysis and interpretation. The public, for example, could provide new evidence, or offer a different interpretation of the facts, or question the credibility of the conclusions.
>
> Issues that are not directly linked to the scientific analysis of adverse effects, such as long-term unemployment in a community or fundamental personal values, cannot be introduced into the determination at this step. Such public concerns are given prominence elsewhere in the CEAA process. Under the CEAA, serious public concerns can warrant referral of the project to a public review….That is, public concerns – that may or may not have to do with scientific issues – can prompt the EA process to take a closer look at the project.
>
> Only after a public review can it be determined whether significant adverse environmental effects are *justified in the circumstances*, a determination that may well look at such factors as unemployment and public values.[133]

(c) Conflict with "community core values" is not an environmental effect

257. Fourth and perhaps most troubling, inconsistency with community "core values" is simply not an impact that qualifies as an "environmental effect" pursuant to CEAA. As such, it is legally irrelevant to the Panel's recommendation and to the Responsible Authority's decision under s. 37 of CEAA.

258. The "environment" is defined in CEAA with reference to the natural world:

> "environment" means the components of the Earth, and includes

[133] "Responsible Authority's Guide to the Canadian Environmental Assessment Act" (September 1994) at p. 96; see also "A Reference Guide for the Canadian Environmental Assessment Act: Determining Whether a Project is Likely to Cause Significant Adverse Environmental Effects", *supra* note 124.

(a) land, water and air, including all layers of the atmosphere,

(b) all organic and inorganic matter and living organisms, and

(c) the interacting natural systems that include components referred to in paragraphs (a) and (b).

259. Similarly, the term "environmental effect" is defined in relation to changes that a project may cause *in the natural environment*.

260. Socio-economic impacts are considered *only* to the extent that they are caused by a change in the natural environment. For example, if a project will result in the pollution of fishing grounds, then the impact of the destruction of fish habitat on fishing income may be considered. At the relevant time, CEAA defined "environmental effect" as follows:

> "environmental effect" means, in respect of a project,
>
> (a) any change that the project may cause in the environment, including any effect of any such change on health and socio-economic conditions, on physical and cultural heritage, on the current use of lands and resources for traditional purposes by aboriginal persons, or on any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, and
>
> (b) any change to the project that may be caused by the environment,
>
> whether any such change or effect occurs within or outside Canada.[134]

261. A "pure" socio-economic impact, one that is not tied to a change in the natural environment caused by the project, is not considered an "environmental effect" pursuant to CEAA. The CEA Agency offers the following discussion of situations in which socio-economic effects may be considered "environmental effects":

> If a socio-economic effect (such as job losses) is caused by a change in the environment (such as loss of fish habitat), which is in turn caused by the project, then the socio-economic effect is an environmental effect within the meaning of the Act and must be considered….If the socio-economic effect is not caused by a change in the environment, however, but by something else related to the project (for example, reallocation of funding as a result of the project), then the socio-economic effect is not an environmental effect within the meaning of the Act and cannot be considered in the determination of significance and the related matters.[135]

[134] CEAA, s. 2.

[135] "A Reference Guide for the Canadian Environmental Assessment Act: Determining Whether a Project is Likely to Cause Significant Adverse Environmental Effects" at p. 184 (emphasis added).

262. The impact identified by the Panel, inconsistency with community core values, is a pure socio-economic impact, one that has no necessary connection to environmental impact. On the contrary, any development that diverged from a community's self-image, or a community's vision of its future, would be inconsistent with community core values as defined by the Panel.

263. For example, a community with a declining downtown business core may be deeply resistant to the arrival of a big-box multinational retailer. A community worried about the exodus of young residents may find the approval of a new call centre to be "inconsistent" with their vision for future development, if the jobs provided are high volume but part time, low wage, no benefit jobs. A deeply religious and historically Catholic community might find the construction of a mosque inconsistent with "community core values". Communities regularly raise concerns about land uses ranging from strip clubs and massage parlours to Hell's Angels clubhouses. Any of these land uses and economic activities could be "inconsistent with community core values", for reasons completely divorced from the environmental impact of a project.

264. Not only is inconsistency with community core values not an "environmental effect" on its own, it was not tied by the WPQ Panel to any underlying ecological impact that would have brought it within the definition.

265. The Panel purported to find and recommend that the project be rejected on the basis of significant adverse environmental effects pursuant to CEAA:

> 4.3 Summary of Recommendations
>
> The Panel recommends that the Minister of Environment and Labour (Nova Scotia) reject the proposal made by Bilcon of Nova Scotia to create the Whites Point Quarry and Marine Terminal and recommends to the Government of Canada that the Project is likely to cause significant adverse environmental effects that, in the opinion of the Panel, cannot be justified in the circumstances.[136]

266. However, the Panel did not find any impact *on the natural environment* to be both adverse and significant. As such, the Panel had no statutory basis pursuant to CEAA to hold that inconsistency with community core values was a significant adverse *environmental* effect, nor any underlying environmental impact upon which to base this recommendation.

267. The Panel's recommendation that the Project be rejected on the basis of these significant adverse "environmental effects" was, therefore, beyond the Panel's statutory authority, and demonstrated a fundamental misunderstanding of CEAA.

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[136] Panel Report at p. 107.

268. The RAs' acceptance of the Panel's recommendation simply compounded this error, such that both the Panel in recommending rejection and the RAs in accepting this recommendation were acting beyond their jurisdiction.

(d) CEAA does not grant a community "veto"

269. One of the purposes of CEAA is to facilitate public input into decision-making. Public concern is one of two preconditions for referring a project to a Panel.[137] The legislation established a public registry of documents related to an assessment, and CEAA has for many years had a program of participant funding to facilitate effective participation during panel review.

270. Facilitating input and fostering consultation is very different, however, from providing communities with decision-making authority. CEAA does not require community consensus regarding a project, and does not give communities a veto over project approval.

271. A Panel can certainly consider public input, and note community division over a project or opposition to a Project.

272. Where significant adverse environmental effects are identified, public opposition may also be factored into the RA's decision regarding whether such effects can be "justified in the circumstances".

273. A Panel may not, however, recommend the rejection of a project where it has *not* identified "significant adverse *environmental* effects", nor can it simply make up its own criteria to substitute for this test. If a project will not cause significant adverse environmental effects, the Panel must make this finding clear, notwithstanding public concern in relation to the project.

274. In this case, the Panel appears to have treated the environmental assessment process as one requiring community consensus and approval, almost in the nature of a referendum.

275. For the Panel, the introduction of divergent views regarding the project within the community was deeply troubling, as was the notion that development might take place that did not find its genesis within the community:

> One issue raised repeatedly addressed the core value of community interdependency and <u>unity which had characterized Digby Neck and Islands for generations</u>. Beginning with the initial proposals for a quarry and marine terminal, <u>a sharp difference of opinion appeared</u>, polarizing those who viewed 34 jobs as a short-term adjustment to unemployment concerns, and those who saw the proposed change as a fundamental long-term transition away from community values and practices….

[137] CEAA, s. 25.

> [Presentations drew] attention to other values that the Project threatened (such as independence or self-determination of communities to choose their own path rather than having it imposed on them)….[138]

276. In the section of the Panel Report that discusses "Core Values", the Panel went so far as to draw "A Biological Analogy" between the mutation of DNA, and changes that a project can cause in a community. The key difference between biological and community change, the Panel notes, is that communities exercise free will, such that change need not be a random process:

> DNA occurring in all living cells can be thought of as the cell's 'core values'…
>
> Unwanted changes often occur in DNA, resulting from chance mutations…In a similar way, unwanted long-term impacts on a community can bring about transformation of its core values, resulting in altered outcomes that irrevocably change the community.
>
> Change is a natural and often welcomed occurrence in both cells and communities. In biology, it is the fundamental underpinning of the process of natural selection…With communities the analogy breaks down at this point because humans exercise reason and free will…Deciding on development directions typically involves a process of thoughtful deliberation, community introspection and conscious decision-making….
>
> The imposition of a major long-term industrial site on a community that has spoken in strong terms about its intention to take a different developmental path could transform the community with a randomness that communities seek to avoid by engaging in deliberative processes of visioning and planning….[139]

277. It is true that communities can formulate visions and plans, and that there is merit in planning that is grounded in local priorities. What is also clear is that CEAA does not require projects to be the product of community "self determination", nor does CEAA require a project to be supported by the majority of local residents.

278. In this case, the Panel used the environmental assessment process not to measure the Project's *environmental* impacts, but to evaluate whether the Project would further the goal of community self-determination, or to measure the Project's local popularity. Neither exercise finds a statutory basis in CEAA.

279. The WPQ Panel's approach effectively gave the local community a veto, one which it had no legal authority to grant. The Panel appears to have concluded that if a Project does not accord with the community's self-perceptions and plans

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[138] Panel Report at p. 99 (emphasis added).

[139] At p. 100.

for the future, it should not be "imposed" upon the community, and should be recommended for rejection:

> A primary consideration influencing the Panel's decision to recommend rejection of this Project is the adverse impact on a Valued Environmental Component: the people, communities and economy of Digby Neck and Islands.
>
> …The Panel believes that the Project as proposed would undermine community-driven economic development planning…
>
> ….[the Project] is likely to have a significant adverse environmental effect on the people and communities that comprise Digby Neck and Islands, which are without doubt integral, essential and valued components of that environment.[140]

280. To support community economic self-determination, and to work towards development supported by local communities, are laudable goals. They are also, however, wholly outside the legal mandate provided to a Panel pursuant to CEAA.

281. A panel review finding that "public concern" exists is not the equivalent of a finding that the project will cause "significant adverse environmental effects". The Panel may not side-step an examination of environmental effects and recommend rejection of a Project based upon controversy, local unpopularity or "inconsistency with community core values".

282. It is the RA – not the Panel – that considers whether a significant adverse environmental effect may still be "justified in the circumstances". If there are no significant adverse environmental effects, the analysis of whether such effects are "justified in the circumstances" is simply not engaged. It is the "justified in the circumstances" portion of the analysis that would allow the RA to consider public concern.

283. The Panel erred in treating public concern as anything other than public concern. Public concern is not an "environmental effect".

284. The Panel misunderstood the definition of environmental effect, the role of public concern pursuant to CEAA and the statutory basis of decision making under s. 37(1)(b).

285. For all of these reasons, the Panel erred in recommending the rejection of the Project on the grounds of inconsistency with community "core values". The Panel's recommendation in this respect was beyond its jurisdiction under CEAA.

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[140] Panel Report at p. 103 (emphasis added).

286. In this case, the Panel's decision identifies a single impact that is held to be both "significant" and "adverse". That impact, as identified by the Panel, does not constitute an "environmental effect" pursuant to CEAA. Accordingly, it could not legally ground the Panel's recommendation to reject the Project, or the Responsible Authority's acceptance of the Panel's recommendation.

287. Given that the Panel failed to identify any *environmental* effects that were both significant and adverse, there was no legal basis pursuant to CEAA to recommend that the Project not proceed.

(e) Contrast with the Rabaska Project

288. Other Joint Review Panels have encountered communities deeply divided in relation to a proposed project, and have clearly and effectively conveyed these divergent community views to the Responsible Authority, *without* taking sides. The Joint Review Panel for the Rabaska Project, for example, was tasked with the environmental assessment of a liquefied natural gas terminal to be located along the St. Lawrence River in rural Quebec, together with the pipeline that would carry natural gas to the terminal.[141]

289. The Rabaska and WPQ projects had many similarities. In both cases, the projects under review were sited in bucolic rural settings, in communities that evidently cherished the beauty and peace of the unspoiled natural world.[142]

290. Both projects were focused on the extraction of non-renewable resources destined primarily for export markets – aggregate, in the case of WPQ, and natural gas, in the case of Rabaska. As a result, both projects were perceived to be benefiting and serving the needs of others, primarily in the U.S., while the burdens of the projects were perceived to fall locally.[143]

291. Both projects also faced vigorous opposition by some local citizens and local municipalities. In the case of Rabaska, a municipal government was actively challenging the project's compliance with zoning by-laws in Quebec's Superior Court as the Panel review was taking place.[144] The Rabaska Panel noted at the

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[141] Joint Review Panel, Main Report: Rabaska Project: Implementation of an LNG Terminal and Related Infrastructure, May 2007 ("Rabaska Joint Panel Report") available at: http://www.ceaa.gc.ca/050/documents_staticpost/pdfs/24599E.pdf.

[142] See Rabaska Joint Panel Report at p. xviii, Recommendation 4 and Opinion 7, for comments on the integration of the project into the landscape, and p. 32 for public comments.

[143] The Panel noted that it had received comments such as:

"…how can we, through inaction, consent to having families expropriated and having other citizens leave our community for good to satisfy insatiable energy needs, specifically those of our southern neighbours…" and "… if the project was really necessary… of course, then that would be a good reason... in this case, with the project as is, I don't believe it is necessary", Rabaska Joint Panel Report at p. 64.

[144] See Rabaska Joint Review Panel Report, at p. 31 and p. 103.

outset of its report that the level of community involvement, including both written briefs and oral presentations to the Panel, was "without precedent".[145]

292. Both projects faced challenging conditions for marine navigation. In the case of the Rabaska project, public concern centered around the confluence of ice, shallow waters, dense ship traffic and high winds along the St. Lawrence during Quebec's winters.[146] The Rabaska Panel recognized the occurrence of groundings, collisions and accidents along the St. Lawrence.

293. Unlike the WPQ, the Rabaska project also provoked an additional layer of community concern related to the risk of a natural gas explosion and fire at the terminal, or involving the pipeline or tankers carrying natural gas. Community concern existed in relation to accidents, and the potential for sabotage or terrorism. In addition to community concern regarding a change in the nature of local development, the Rabaska Panel faced thorny issues of risk assessment, the difference between risks voluntarily assumed and risks imposed against a community's will, and the low-risk but potentially very serious impacts in the event of an accident.[147]

294. Overall, the tenor of community concern regarding both projects was closely analogous. However, the approach taken by the Rabaska Joint Review Panel differed notably from that of the WPQ Joint Review Panel. Nowhere is this divergence clearer than in the treatment of community concern.

295. The Rabaska Panel did not mince words in conveying deeply held community opposition to the LNG terminal:

> Some participants stated that building the project close to their residences would result in anxiety and stress, because of the negative perception of the terminal's security.... Several residents from Lévis east and Beaumont have experienced intense emotions since the project was announced. One participant evoked the range of emotions undergone by some participants:
>
>> […] these difficult emotions [anger, fear, sadness] are all stirred up in their various forms of expression: frustration, sorrow, deception, concern, anxiety and dread. Sometimes, the situation will give reason to hope, said hope then often being crushed by other elements. Rabaska is a powerful trigger of emotions that are painful, repetitive and hard to manage, because it threatens people's personal space and their deepest values.[148]

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145 Rabaska Joint Review Panel Report at p. 11.

146 Rabaska Joint Review Panel Report, at p. 50.

147 See Rabaska Joint Review Panel Report, at p. 174.

148 Rabaska Joint Review Panel Report at p. 57.

296. The Rabaska Panel was meticulous and respectful in its summary of community opposition, quoting citizens at length in its report. But unlike the WPQ Panel, the Rabaska Panel also conveyed the views of those community members supportive of the project, taking pains to pass on the entire spectrum of community input to the Responsible Authority.[149]

> To this end, the proponent made the following commitments to citizens living within a 1.5- km radius of the facilities (PR3.2, p. 5.12, 5.23 and 5.24):
>
> - To financially compensate any property owner for whom the resale value of his property could diminish because of the project on the basis of fair market value.
>
> - To compensate any property owner who does not want to stay near the facilities by reimbursing all costs related to the sale of his or her present property, the cost of buying a new property and moving costs.
>
> - To negotiate an agreement guaranteeing the maintenance of the market value of all property within a radius of 1.5 km of the facilities with property owners who wish to stay, but who fear that their property might lose its value over the long term because of the project.
>
> - To fully compensate all property owners for insurance premium increases caused by building the project in the region.
>
> ♦ Finding — The Panel takes note of the proponent's commitment to mitigate the project's social impacts through a program of financial compensation for residents living within 1.5 km of the proposed facilities."[150]

297. In relation to community outreach, the Rabaska Joint Review Panel noted that:

> The proponent made a commitment to inform the public and the authorities in advance about any activity likely to cause inconvenience… by posting signs and issuing news releases…. During the operation of the LNG terminal, an oversight committee is planned that would stay abreast of activities to ensure that they are running smoothly and, where necessary, suggest improvements. Beyond this, the proponent will hold two crisis simulations annually. One would be theoretical, "a table top exercise", the other would be more practical, a full simulation involving regional authorities responsible for security…. Also the proponent would hold an annual open house at its facilities….[151]

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[149]For an example of a summary of comments supportive of the Project see Rabaska Joint Review Panel Report at p. 65.

[150]Rabaska Joint Review Panel Report at pp. 176-177(emphasis added).

[151]Rabaska Joint Review Panel Report at p. 178.

298. In addition to reporting on the proponent's efforts in this respect, the Rabaska Joint Review Panel offered recommendations as to additional measures that could facilitate community acceptance, should the project be allowed to proceed:

> Recommendation 6: Should the project be implemented, the Panel recommends that the proponent set up a yearly public information mechanism regarding the project's operational security report, for individuals who could be affected by accidents involving the project's facilities.
>
> Opinion 14 – The Panel is of the opinion that, should additional needs for fire security, public security and emergency measures planning prove necessary for the Municipality of Beaumont, the proponent must cover these costs.[152]

299. In my opinion, the Rabaska Panel struck the correct balance, and discharged its statutory duty appropriately. It conveyed public concern, articulating both opposition and support for the project, to the Responsible Authority. It considered the proponent's efforts to address the "psycho-social impacts" of the project, endorsed the proponent's intention to provide mitigation through property value protection and buy-outs, and offered some additional mitigation measures for consideration. Then it left the political decisions to the politicians, and got back to the business of assessing *environmental effects.*

300. Ultimately, from the perspective of CEAA, the Rabaska Panel concluded that there were no significant adverse environmental effects, taking mitigation measures into account.

301. In stark contrast, the WPQ Panel was not only dismissive of the proponent's mitigation initiatives efforts, it actually appears to have held these efforts against the proponent.

302. In WPQ, Bilcon proposed to monitor a zone of 800 meters around the quarry for impacts on property values. Any decrease in property value would be compensated. In addition, any lands with drilled wells that were affected would be purchased on a voluntary basis, as would the lands of any person opposed to the project, who preferred to leave if the project were approved. The proponent undertook to use lands so acquired in order to supplement the buffer zone around the project:

> If somebody in the immediately local area may feel that perhaps they want to leave the area … if somebody perhaps felt that they did not want to live next door to a proposed quarry and we felt that it was in a zone of influence close to the quarry, then we would negotiate with them.[153]

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[152]Rabaska Joint Review Panel Report at p. xix.

[153]Transcript at p. 144.

303. The WPQ Panel questioned the proponent's purchase of additional buffer lands during the hearing process:

> And the buffer, what are called buffer properties that have been purchased by Bilcon of Delaware in the vicinity of the Project, there are a number of different kinds of uses that are suggested for those properties in the EIS buffer habitat areas. What prevents that from eventually becoming added to the quarry project site?[154]

304. The proponent assured the WPQ Panel that the acquisition of such "buffer properties" was for the purposes of maintaining a buffer strip around the quarry, and that it was willing to consider proposals for conservation easement-type status for buffer lands to address the concern that these lands would be used for expansion:

> We have no intention of employing that land other than as buffer strips. We have made the statement that if the local community wants to come to us and approach us for perhaps other uses of the lands, we would contemplate that.[155]

305. The WPQ Panel appears to reject Bilcon's evidence in relation to the buffer lands, and to substitute its own view of Bilcon's plans for these lands. After reading in an intention to expand the quarry in the face of the proponent's explicit evidence to the contrary, the Panel then criticizes the proponent for failing to consider this "expansion" in the assessment of cumulative effects:

> Ownership of adjacent properties provides the Proponent with the potential opportunity of expansion. The Panel believes that expansion of the present Project and the development of an additional quarry or quarries is reasonably foreseeable, and that scenarios such as that should have been evaluated in the cumulative effects assessment.[156]

306. Given that the "expansion" at issue existed only in the minds of the WPQ Panelists – and was explicitly denied by the proponent during the WPQ Panel hearings – this critique of the proponent is at the least bewildering, but also consistent with bias against the project proceeding.

(f) The precautionary principle does not create a "reverse onus"

307. The WPQ Panel's interpretation of the term "environmental effect" to include impacts on community core values is not the only instance of the Panel misunderstanding and/or misapplying key statutory criteria, or importing and applying extra-statutory criteria to evaluate and subsequently to reject the

[154]Transcript at pp. 143-144.

[155]Transcript at p. 145.

[156]WPQ Panel Report at p. 11.

Project. Another principle that was misapplied by the Panel is the "precautionary principle".

308. The precautionary principle, as set out in Nova Scotia's *Environment Act*, reads as follows:

> (ii) the precautionary principle will be used in decision-making so that where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation (section 2(b)(ii), emphasis added)

309. Simply put, where there is a risk of serious harm, the precautionary principle states that governments will be able to act in order to prevent harm, rather than waiting for conclusive scientific proof.

310. The Supreme Court of Canada has affirmed and applied the precautionary principle as a principle of international law, and one that has been incorporated into certain domestic statutes, in the case of *114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Town)* ("*Spraytech*"). *Spraytech* upheld the right of a municipality to restrict the application of pesticides within its jurisdiction, notwithstanding simultaneous regulation of pesticides by other levels of government. The Supreme Court of Canada described the principle, quoting from the Bergen Ministerial Declaration on Sustainable Development:

> Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.[157]

311. The Panel, however, did not apply the precautionary principle, as developed at international law or recognized by the Supreme Court of Canada. Rather, the Panel invented its own interpretation of the precautionary principle, one which required project proponents to meet a reverse onus. This is how the Panel put it:

> The application of the precautionary principle requires: that the onus of proof rests with the Proponent to show that a proposed action will not lead to serious or irreversible environmental damage…[158]

312. But, as seen by the actual wording of the principle quoted by the Supreme Court, the precautionary principle does not, as the Panel states, reverse the burden of proof, and does not require proponents to prove an *absence* of harm.

313. To require a proponent to prove absence of harm is just as problematic as requiring a regulator to prove the presence of harm, in situations of scientific uncertainty. Requiring proof but reversing the onus simply transfers the problem

[157] *114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Town)*,[2001] 2 S.C.R. 241, at para. 31 (emphasis added).

[158] Panel Report at p. 92 (emphasis added)

from one party to another. It fails to address the underlying issue to which the precautionary principle responds: the need to allow decision-makers to make decisions before conclusive scientific proof is available on either side of an issue.

314. The precautionary principle is only engaged where the scientific evidence is unclear. Its utility is that it allows regulators to act in the face of uncertainty.

315. The Panel's interpretation of the precautionary principle as requiring a reverse onus of proof is incorrect. It is also inconsistent with the jurisprudence of the Supreme Court of Canada, and outside the scope of the legislation that gives the Panel its mandate.

316. There is no statutory basis for the interpretation the Panel gives to the precautionary principle – not in CEAA and not in Nova Scotia's *Environment Act.* Neither statute imposes a reverse onus on the proponent to prove the absence of harm in the name of the precautionary principle, and certainly not as a condition precedent to approval.

317. On the contrary, CEAA explicitly permits an RA to approve a project notwithstanding a significant and adverse environmental effect – provided that effect can be justified in the circumstances. CEAA builds in room for political balancing of social and economic considerations that may, in some cases, override negative environmental impacts and justify the approval of a project.

318. RAs are given explicit statutory authority, in CEAA s. 37(1)(a)(ii), to *approve* a project that will cause "significant adverse environmental effects". Given this statutory authority, it is both inconsistent with CEAA and nonsensical for the Panel to require a Proponent to meet a reverse onus and prove a project's lack of harm through the aegis of the precautionary principle.

319. The Panel's misunderstanding and misapplication of the precautionary principle led it inexorably to an unfair critique of the Proponent's use of "adaptive management". I discuss adaptive management later in my report in section 2.3(d). For now, it will suffice to note that the Panel is scathing in its criticism of the Proponent's commitment to apply adaptive management to respond to change. The Panel emphasizes that Bilcon had a "flawed understanding" of adaptive management. Moreover, "[t]he Proponent proposed to use adaptive management to implement the precautionary principle; the Panel concludes that the EIS treats these two concepts as virtually synonymous."[159]

320. The Panel criticized Bilcon for offering to use adaptive management to respond to change, rather than proving, in advance, in compliance with the Panel's "reverse onus", that the Project would not cause significant adverse environmental impacts. The reasoning appears to be as follows: if a proponent can prove a lack of impact, as the Panel appears to have demanded, there would

[159]Panel Report at pp. 92-93.

be little need to monitor for change, or to commit to employ adaptive management to respond to unexpected changes. Therefore, according to the Panel, proponent's reliance on adaptive management is a way to avoid meeting the reverse onus and proving lack of impact.

321. In fact, adaptive management is a tool to be used, alongside ongoing requirements for monitoring, to address uncertainty. CEAA recognizes that, given the early stage at which environmental assessment is undertaken in relation to a project's life cycle, some unforeseen effects may arise. Predictions may be incorrect. Adaptive management provides a method to respond to unexpected outcomes.

322. The Federal Court of Appeal acknowledged the interrelationship between adaptive management and the precautionary principle in *Pembina Institute for Appropriate Development v. Canada (Attorney General),* [2008] F.C.J. No. 324 (***"Pembina"***), a judicial review brought in relation to the application of CEAA within the context of a Joint Review Panel assessing the Kearl Oil Sands Project in Alberta.

323. In *Pembina*, the Federal Court noted that adaptive management is the necessary corollary of the precautionary principle. It allows decision-makers to assess potential impacts early, while providing the flexibility to adjust to changing circumstances in order to manage future environmental risk:

> An approach that has developed in conjunction with the precautionary principle is that of 'adaptive management'. In *Canadian Parks and Wilderness Society v Canada (Minister of Canadian Heritage)*, 2003 FCA 197, [2003] F.C.J. No. 703, at para. 24, Evans J.A. stated that 'the concept of 'adaptive management' responds to the difficulty, or impossibility, of predicting all the environmental consequences of a project on the basis of existing knowledge', and indicated that adaptive management counters the potentially paralyzing effects of the precautionary principle. Thus, in my opinion, adaptive management permits projects with uncertain, yet potentially adverse environmental impacts to proceed based on flexible management strategies capable of adjusting to new information….
>
> …CEAA represents a sophisticated legislative system for addressing the uncertainty surrounding environmental effects. To this end, it mandates early assessment of adverse environmental consequences as well as mitigation measures, coupled with the flexibility of follow-up processes capable of adapting to new information and changed circumstances. The dynamic and fluid nature of the process means that perfect certainty regarding environmental effects is not required.[160]

[160] *Pembina* at paras. 32-34 (emphasis added).

324. The Panel misunderstood the role of adaptive management, and the utility and appropriateness of the proponent's commitment to use adaptive management, because the Panel misunderstood the precautionary principle itself.

(g) The Panel was incorrect to state that CEAA mandates a precautionary approach

325. Finally, it should be noted that the precautionary principle did not appear in *CEAA* until the Bill C-9 amendments came into force on October 30, 2003. Bill C-9 amended s. 4(1)(a) of *CEAA* as follows:

> To ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects.[161]

326. Prior to this amendment, s. 4(a) stated:

> To ensure that the environmental effects of projects receive careful consideration before responsible authorities take actions in connection with them.[162]

327. Additionally, Bill C-9 added s. 4(2) which reads:

> In the administration of this Act, the Government of Canada, the Minister, the Agency and all bodies subject to the provisions of this Act, including federal authorities and responsible authorities, shall exercise their powers in a manner that protects the environment and human health and applies the precautionary principle.[163]

328. Bill C-9 included a transitional provision which stated: "Any environmental assessment or assessment of the environmental effects of a project commenced under the *Canadian Environmental Assessment Act* before this section comes into force shall be continued and completed as if this Act had not been enacted."[164]

[161] CEAA, as at October 30, 2003, s. 4(1)(a) (emphasis added).

[162] CEAA as at February 17, 2003, s. 4(a).

[163] CEAA, as at October 30, 2003, s. 4(2) (emphasis added).

[164] Bill C-9, *An Act to amend the Canadian Environmental Assessment Act,* 2nd Session, 37th Parl., 2003 cl. 33.

329. The CEA Agency published a guide in October 2003 called "*Canadian Environmental Assessment Act*: *Explanation of the Amendments to the Act.*"[165] This guide explains that:

> An environmental assessment started before the amended Act is brought into force will continue under the old process, even if the amended and new provisions are brought into force at some point during the assessment.
>
> The "grandfathering" approach to transition:
>
> - Avoids the prospect of a change in rules and obligations in mid-assessment; and
>
> - Provides greater certainty about process requirements for federal authorities, proponents and other participants.

330. The environmental assessment of the WPQ project was commenced before the Bill C-9 amendments that added references to the precautionary principle came into force.[166] Therefore the amendments did not apply to the assessment of the WPQ project. Indeed, federal officials acknowledged this. For example, Derek McDonald of the CEA Agency wrote in an email that the Panel review "is under the old process (it depends only on when the EA was started (before C-9, in this case))".[167] In fact, the Agency, in an orientation presentation to the WPQ Panel, advised that "as the Whites Point Quarry project was subject to CEAA before October 2003, the provisions of CEAA in force at the time apply".[168]

331. The Panel was therefore incorrect to state in its report that "[t]he Act … advocates the precautionary principle".[169]

332. Although the Nova Scotia *Environment Act* included a reference to the precautionary principle at the relevant time, the Panel's error in respect of CEAA is in my opinion indicative of its lack of regard for its statutory obligations and constraints.

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[165] CEA Agency, *Canadian Environmental Assessment Act: Explanation of the Amendments to the Act*, October 2003, available at: http://www.ceaa.gc.ca/Content/D/A/C/DACB19EE-468E-422F-8EF6-29A6D84695FC/Explanation_of_the_Amendments_to_the_CEAA.pdf.

[166] The CEA Agency webpage for the Whites Point Quarry and Marine Terminal project provides February 17, 2003 as the "Start Date", available at: http://www.ceaa.gc.ca/default.asp?lang=En&n=D67F0296-1.

[167] Email from Derek McDonald, December 22, 2004 (CP11513 at p. 035952). See also the email from Steve Chapman of the CEA Agency dated January 11, 2008 confirming that the project "falls under the provisions of the Old Act" (CP12861 at p. 039833).

[168] Canadian Environmental Assessment Agency, Presentation: "*Canadian Environmental Assessment Act (CEAA): Presentation to the joint review panel for the Whites Point Quarry and Marine Terminal project*", November 15, 2004, at Slide 4 (CP05024 at p. 015398).

[169] Panel Report at p. 19.

333. In any event the Nova Scotia *Environment Act* reference to the precautionary principle does not create a reverse onus.

(h) Core values have never before been used to reject a project

334. The WPQ Panel was the first and only Panel established under CEAA to recommend the rejection of a project on the basis of “community core values” or any similar concept.

335. None of the 29 reports ever issued by a review panel or a joint review panel under CEAA, except for the WPQ Panel Report, refers to “community core values”. Indeed, other projects that were highly divisive in their community have been recommended for approval, such as the Rabaska Liquefied Natural Gas Terminal in Quebec, discussed above in section 2.2(e).

336. Another example is the Cacouna Energy LNG Terminal Project in Quebec, where the Joint Review Panel noted that “the community remains divided, as opposing positions and development visions face off”, yet recommended the approval of the project, as the environmental effects would not be significant after mitigation and follow-up.[170]

337. Like the WPQ project, the Cacouna project was located next to a sensitive marine environment, and involved a marine terminal component. In both cases there was significant community opposition, including concerns about the impact on tourism. In both cases, the RAs were DFO and Transport Canada.

338. The Cacouna hearings revealed that, like in the case of the WPQ project, there were two competing visions for the community. The Cacouna Panel noted that there were “two visions of development in the area: on one hand industrial, and on the other hand development based on the natural environmental and heritage resources.”[171] Unlike the WPQ Panel, however, the Cacouna Panel did not select which of these two visions was representative of the community’s “core values”. And the Cacouna Panel certainly did not determine that any effects of the proposal on the community’s values constituted a significant adverse environmental effect. The Cacouna Panel ultimately recommended that the project could proceed.

339. Like the Rabaska Panel – but unlike the WPQ Panel – the Cacouna Panel recommended measures that could facilitate community acceptance of the project. Specifically, the Cacouna Panel stated:

> The Panel is of the opinion that Health Canada and the Centre de santé et de services sociaux de Rivière-du-Loup, in collaboration with the

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[170] Cacouna Panel Review Report (November 2006), http://www.ceaa.gc.ca/050/documents/18338/18338E.pdf, at p. 13.

[171] *Ibid.* at p. 136.

> community and the proponent, should participate in determining the need for follow-up on the social impacts on the community of Cacouna. The Panel invites the concerned parties to look at existing public participation techniques in order to determine the best tool for achieving this objective.[172]

(i) The Panel's recommendation to reject the project was based on a factor Bilcon did not have an opportunity to address

340. The notion of community core values is not mentioned in CEAA, the *Nova Scotia Environment Act*, or the Joint Panel Agreement. It most certainly is not one of the factors to be considered that is listed in the Panel's Terms of Reference. Nor can it be found in the EIS Guidelines issued by the Panel, or in any of the Panel's requests for information directed at Bilcon. Although the EIS Guidelines do refer in a general way to assessing the project's effects on the community – e.g. where they require Bilcon to "[d]escribe and evaluate the potential impacts of the Project on social and cultural patterns and social organization. Consider effects on traditional lifestyles, values and culture…"[173] – they do not use the term "community core values", and cannot reasonably be interpreted as requiring Bilcon to develop a characterization of what values are the community's defining "core values". Nor do they give any hint, except perhaps in hindsight, that the Panel considered community core values to be, in and of themselves, a "valued environmental component" that must be protected.

341. It is no wonder that Bilcon did not directly address the concept of community core values in its EIS or its submissions to the Panel. It could not have expected the Panel to consider this concept, let alone for it to form the very basis for the Panel's recommendation against the project.

342. My review of the transcripts of the hearings indicates that the concept was never referred to *per se* by the Panel or any intervenor. Although some intervenors spoke about their vision for the area, and others referred to the regional planning document called *Vision 2000* which the Panel cited in its report as a statement of the community's values[174] (even though the Western Valley Development Authority, which wrote the document, had since been disbanded),[175] it does not appear that any time was set aside for community core values at the hearing or that Bilcon was questioned directly about the concept.

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[172] *Ibid.* at p. 137.

[173] Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project (March 2005) at p. 49 ("EIS Guidelines"), available at: http://www.ceaa-acee.gc.ca/Content/C/C/1/CC1784A9-E99E-4C5D-B7E4-B096155DDB4B/eis-eng.pdf.

[174] Panel Report at p. 10.

[175] *Ibid.* at p. 120.

343. The Ontario Divisional Court in *Thompson v. Ontario (Labour Relations Board)*, affirmed that "it is contrary to the principles of natural justice to decide a matter on grounds which the applicant was not afforded an opportunity to address."[176]

344. Similarly, the authors of the leading text on administrative law in Canada observe that "where a tribunal indicates the grounds upon which it wants submissions but decides on another ground, that too will be a breach of the duty of fairness."[177]

345. In this case, the Panel's recommendation to reject the project was based *solely* on the conclusion that the project was likely to result in a significant adverse environmental effect on community core values – that was the only adverse environmental effect that the Panel ultimately determined was "significant". This amounted to a violation of the principles of natural justice.

2.3 <u>The purpose of environmental assessment and the Panel's approach to the WPQ Project</u>

(a) Environmental assessment is by its nature a preliminary and predictive exercise; the Panel insisted on certainty

346. Throughout the environmental assessment process, the Panel insisted on a level of detail and certainty that, in my experience, is unusual – and indeed completely unwarranted.

347. First, the Panel issued EIS Guidelines to Bilcon that were extremely lengthy, detailed and onerous.

348. The CEA Agency and the NSDEL drafted guidelines for the preparation of the EIS and invited public comments on November 10, 2004. However, after holding public scoping sessions on the draft EIS Guidelines January 6 to 9, 2005 in four communities in the vicinity of the proposed WPQ, and the receipt of written submissions from the public, the Panel decided that the draft EIS Guidelines were not to their liking.

349. As noted in the Panel Report, following the scoping sessions and the receipt of written submissions from the public, "the Panel extensively revised the guidelines and released the completed version of the EIS Guidelines on 31 March 2005".[178]

350. Although in the period 1996-98, shortly after CEAA took effect, approximately five Review Panels were authorized to finalize EIS Guidelines, it thereafter became exceptional for Review Panels to be given that discretion; instead, since then, the EIS Guidelines have been handed to the Panel by the CEA Agency at the time

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[176] [2003] O.J. No. 1347 at para. 2.

[177] D.J.M. Brown *et al., Judicial Review of Administrative Action in Canada* (looseleaf) at p. 10-101.

[178] Panel Report at p. 16.

the Panel was established. In fact, the WPQ is the only instance we have found since 1998 where the Review Panel was given the discretion to hold scoping hearings which allowed it to in effect rewrite the EIS Guidelines.

351. The final EIS Guidelines issued by the WPQ Panel were 75 pages long, and were much more detailed and extensive than the 32 page draft guidelines.

352. The final EIS Guidelines approved by the Panel:

- added a substantial criterion not mentioned in the original draft guidelines – the "precautionary principle";

- defined the precautionary principle to include a "reverse onus", requiring Bilcon to prove that the WPQ project would not lead to environmental damage; this reverse onus, as explained above in my discussion of the precautionary principle (section 2.2(f)), is inconsistent with the Canadian use of the principle and in any event is not one the Panel had authority to apply;

- substantially broadened the concept and requirements of "sustainable development" (from about six lines in the draft EIS Guidelines to a page-long catalogue in the final EIS Guidelines), so as to again place a further burden on the proponent in respect of which it could be difficult to satisfy the Panel.

353. Next, after receiving Bilcon's EIS, the Panel made numerous, onerous "information requests" to Bilcon. Then, during the Panel hearings, the Panel asked Bilcon to provide further detailed information by way of "undertakings". And ultimately, in its report, the Panel criticized Bilcon for providing information that was insufficiently detailed, or for changing certain design details. Some examples of such statements in the Panel Report include the following:

> Uncertainties about the Project's blasting requirements and protocols made it difficult for the Panel to determine the configuration and size of the area over which wildlife would be impacted by operational noise and blasting. Because of the lack of specificity in the Project Description, many questions remain regarding specific impacts on nesting or migrating birds, mammals, lobster, herring, waterfowl etc.[179]
>
> * * *
>
> As a result of critical comments on the EIS by the Panel, government agencies and the public, the Proponent offered several iterations involving significant changes to the design and management procedures of the sedimentation ponds, right to the end of the public hearings.[180]

[179] Panel Report at p. 5.

[180] Panel Report at p. 6.

* * *

The Panel concludes that while the environmental impact statement provided considerable data, in many ways the information provided by the Proponent was inadequate for the requirements of an environmental assessment. The Proponent declined to provide some of the information requested by the Panel, forcing the Panel to obtain required information from government officials, interveners and holders of traditional knowledge, during public hearings. The Panel believes that while it acquired adequate information to assess the likely environmental effects of the Project, a more adequate EIS document and responses to information requests would have facilitated the review process.[181]

* * *

The changing nature of the Project, from its first formal presentation in the EIS through presentations made by the Proponent during the public hearings, created some serious problems for the Panel during the review process. Three prominent examples included: the layout of the project site (with special emphasis on the form and function of the sediment ponds); the mechanics and details of the planned operational blasting regimen; and a clear understanding of the local hydrogeology and the project-related activities that could influence it. All three examples went through repeated changes from their initial presentation in March 2006 to their final consideration in June 2007. Quantitative estimates, physical locations, timing of events, potential impacts and interconnectedness with other aspects of the Project varied to such an extent that the Panel's confidence in the conceptual design and associated quantitative underpinnings was undermined. Each change appeared to have been prompted by questions posed through the information request process or during the hearings. Each project revision led to additional problems that the Proponent had not addressed. When repeated revisions failed to address key environmental concerns, the suitability of the conceptual design became an issue for the Panel.

Information requests were an important part of the assessment process, providing a vehicle to enable greater participation and input by interested parties. While the Proponent responded to those made by the Panel, those submitted by others often received the response of "noted" without further comment. This had the dual effect of reducing the amount of critical and substantive input into the process while exacerbating negative relations between the Proponent and members of the various communities who could be directly impacted by the Project.[182]

* * *

[181] At p. 84.

[182] At pp. 86-7.

> Ambiguity about what the Proponent proposed raised significant problems for the Panel. The project description drifted in response to questions being asked, but not always in ways that resolved the Panel's concerns about adverse environmental effects. Effects prediction and appropriate mitigation measures depend on clarity in a project description. If projects are approved, companies then operate within a context defined by the Project Description, the mitigations associated with predicted effects, and regulatory requirements set by government. Without certainty about what is proposed, parties cannot establish the trust and openness needed for cooperation to minimize the effects of a project through its operation. The Panel concluded that the Proponent did not adequately specify details about elements of the Project Description required for the assessment process.[183]

354. Such statements demonstrate that the Panel fundamentally misunderstood the role of environmental assessment. Environmental assessment is a planning tool meant to ensure that at the earliest stages, while the project is still on the drawing board, the proponent considers how its proposed project may be designed and reconfigured to mitigate its foreseeable environmental impacts. The more detailed regulation of the project is left to the licensing process, which follows the environmental assessment. It is through this licensing process that the authorities conduct a review of the design details and impose any terms and conditions that may be appropriate. These licensing authorities, such as the Nova Scotia Department of Environment and Labour and the federal DFO, are equipped with engineers and other experts to review the technical intricacies of the project and associated mitigation measures.

355. CEAA requires environmental assessments to be "conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made": s. 11(1). As the Federal Court of Appeal explained in *Inverhuron & District Ratepayers' Assn. v. Canada (Minister of the Environment),* this means that some uncertainly about the project's effects is inevitable:

> The essence of the environmental assessment process is to predict the environmental effects of a proposed project and then assess their significance. This process must be conducted as early as practicable in the planning stages of a project. By its very nature, then, the process is subject to some uncertainty. As this Court recognized in *Alberta Wilderness Association v. Express Pipelines Ltd*, "No information about probable future effects of a project can ever be complete or exclude all possible future outcomes." It went on to opine that "... given the nature of the task, we suspect that finality and certainty in environmental assessment can never be achieved."[184]

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[183] At pp. 101-102.

[184] 2001 FCA 203, at para. 55, emphasis added.

356. In *Pembina,* the Federal Court explained further that environmental assessment is by its very nature "predictive and preliminary":

> The adequacy and completeness of the evidence must be evaluated in light of the preliminary nature of a review panel's assessment. In *Express Pipelines, supra*, at para. 14, Hugessen J.A. discussed the predictive and preliminary nature of the panel's role:
>
> > The panel's view that the evidence before it was adequate to allow it to complete that function "as early as is practicable in the planning stages ... and before irrevocable decisions are made" (see section 11(1)) is one with which we will not lightly interfere. By its nature the panel's exercise is predictive and it is not surprising that the statute specifically envisages the possibility of "follow up" programmes. Indeed, given the nature of the task we suspect that finality and certainty in environmental assessment can never be achieved.
>
> This view was echoed in *Inverhuron & District Ratepayers' Association v. Canada (Minister of the Environment)*, 2001 FCA 203, [2001] F.C.J. No. 1008 (QL), at para. 55, by Sexton J.A. Therefore, given the predictive function of an environmental assessment and the existence of follow-up mechanisms envisioned by the CEAA, the Panel's assessment of significance does not extend to the elimination of uncertainty surrounding project effects.[185]

357. It is normal for project details to evolve during and even after the Panel hearing. As noted by the Federal Court in an earlier decision (also involving the Pembina Institute), *Pembina Institute for Appropriate Development v. Canada*, "[s]ince projects are submitted for environmental assessment at an early stage of their development, final determinations of and amendments to project design and construction will continue well beyond the assessment stage."[186]

358. Similarly, the Federal Court held in *Union of Nova Scotia Indians v. Canada (Attorney General)* that environmental assessment is "ongoing and dynamic":

> The Act establishes a process for assessment of environmental effects. The process is ongoing and dynamic, with continuing dialogue between the proponent, the responsible authorities and often, as in this case, interested community groups.[187]

359. And as noted by the Ontario Environmental Assessment Board in *North Simcoe Waste Management Association*:[188]

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[185] *Pembina Institute for Appropriate Development v. Canada (Attorney General),* [2008] F.C.J. No. 324 at para. 23.

[186] 2005 FC 1123.

[187] *Union of Nova Scotia Indians v. Canada (Attorney General)*, [1997] 1 F.C. 325 at para. 32.

[188] Case Number CH87-03, November 17, 1989.

> Environmental assessment has been interpreted consistently by various boards to mean more than just the original documentation submitted by a proponent for consideration by the Minister together with any subsequent or additional material as may be required by the Minister. Once a proposal has reached the hearing stage, the environmental assessment is expanded to encompass all the evidence presented at the hearing, whether written or oral, and whether submitted by the proponent or by intervenors.
>
> This expanded definition reflects the evolving nature of the process and provides the most comprehensive and updated material which the board can use in arriving at its decision. If an environmental assessment were limited to the original written documentation, then there would be no justification for a long expensive hearing where evidence, not only explains, amplifies and supplements initial documentation but may also provide new and often contradictory evidence. That evidence can be crucial in determining the board's decision.

360. Contrary to the well established legal principle affirmed in these and other cases that environmental assessment is a preliminary, predictive and iterative exercise, in which uncertainty is inevitable and the proponent is expected to modify its proposal in response to the feedback received during the process, the WPQ Panel insisted on perfect certainty.

361. The EIS submitted to the Panel by Bilcon was over 3,000 pages long.[189] One witness at the hearings from the Nova Scotia government observed that Bilcon's submission was "one of the best that I've seen thus far".[190] Yet, after receiving the EIS, the WPQ Panel repeatedly demanded more and more detailed information from Bilcon. As noted by the Panel:

> From June 2006 to February 2007, the Panel issued a series of Information Requests to the Proponent, asking for clarifications and additional information. In addition, all comments received during the review period from the public, environmental groups, Aboriginal groups, community organizations, federal and provincial government departments and agencies were submitted to the Proponent.
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> In response, the Proponent produced a revised Project Description in November 2006, and documents responding to questions and comments in February and March 2007.[191]

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[189] Panel Report at p. 102.

[190] Transcript at p. 539. The speaker was Mark Elderkin from the Nova Scotia Department of Natural Resources. He said, "So from what I have seen, to be fair and totally impartial, I was very impressed with the level of rigour for all the taxonomic groups of organisms considered in this EA, and to be frank, it's one of the best that I've seen thus far, and birds included."

[191] Panel Report at p. 17.

362. Then, during the Panel hearings, Bilcon was asked for many more "undertakings", some of them quite detailed and onerous.[192]

363. The WPQ Panel's approach contrasts sharply with that of the Joint Panel in the Kemess North Mine review, where the Joint Panel praised the proponent for its flexibility and adaptability: "as a result of iterations and exchanges made during the environmental assessment process, many issues were resolved through improvements made to the Project design and layout, and to the proposed mitigation and compensation measures."[193]

(b) The Panel did not recommend mitigation measures, follow-up programs or terms and conditions

364. The Panel failed to carry out its responsibilities under CEAA and its Terms of Reference to report on appropriate mitigation measures, monitoring, follow-up programs and measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project.

365. The Panel ignored its responsibility pursuant to s. 34(c)(i) of CEAA to report on "any mitigation measures and follow-up program", as well as its responsibility under its Terms of Reference that the Panel "shall include in its review of the Project consideration of the following factors:

> (m) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the Project;
>
> (n) follow-up and monitoring programs including the need for such programs.

366. In the Kemess Panel Report, the Panel stated that while it was satisfied it had enough information to make recommendations on the potential for the Project to result in significant adverse environmental and other effects, it continued:

> As in other Environmental Assessments, the Panel has conducted its assessment at a strategic level, addressing key issues, and recognizes that, if the Project receives approval, federal and provincial permitting processes will be responsible for setting the final detailed conditions governing implementation of all phases of the project. The Panel took this into consideration when developing the conclusions and recommendations found in this report.[194]

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[192] White Points Quarry Joint Panel Review, Public Hearings June 16 to June 30, 2007, Listing of Undertakings, available at: http://www.ceaa-acee.gc.ca/B4777C6B-docs/WP-1815-001.pdf.

[193] Kemess North Mine Joint Review Panel Report (September 17, 2007), at p. 55, available at: http://www.ceaa.gc.ca/050/documents_staticpost/cearref_3394/24441E.pdf.

[194] *Ibid.* at p.4.

367. The Kemess Panel elaborated on this further in its report as follows:

> The Panel recognizes that its conclusions and recommendations to government are advisory, and that Ministers could choose to reach a different conclusion on the balance of pros and cons in this case. To assist them with their own deliberations, the Panel has provided in this report a detailed account of how the review unfolded, and how the identified issues were addressed. In the event that Ministers disagree with the Panel's advice, and the Project is approved, the Panel has included 32 recommendations in this report for measures which should be taken to help manage and minimize adverse Project effects.[195]

368. Even a quick reference to the Kemess Panel "List of Recommendations" demonstrates that that Panel understood that recommendations could be detailed and require, *inter alia*, the collection of further additional baseline data and that a number of specific aspects of the project be developed further at the permitting stage. For example:

> The Panel recommended that, if the Project is approved, the Proponent at the permitting stage develop detailed measures to address operations-stage icing concerns in downstream drainages, and to ensure that any downstream sedimentation and stream morphology effects are reversible at closure.[196]

369. It is striking that the WPQ Panel failed to avail itself of any of the legal mechanisms available to address any lingering concerns it had regarding the detailed design and impacts of the project. One such mechanism was the Panel's ability to recommend terms and conditions for the final approval of the project by the regulatory authorities. It is quite proper, and indeed routine, for panels under CEAA and joint panels under CEAA and provincial legislation to make such recommendations in their report.

370. It is instructive to examine the recommendations made in respect of the other two projects that had been referred to a Joint Panel assessment under the CEAA and Nova Scotia regimes prior to WPQ project: the Sable Gas Project and the Sydney Tar Ponds and Coke Oven Sites Remediation Project. The Panel in the Sable Gas case issued 46 recommendations, many of them very detailed. These recommendations are attached as **Appendix J** to my report. It will be noted that many of the recommendations are directed to the appropriate regulatory authorities. For instance, Recommendation #1 sets out fairly lengthy conditions that the authorities should include in any approval for the offshore pipeline component of the project. It is worth reproducing this recommendation here to illustrate how the Panel was able to address its concerns about the lack of certain project details during the environmental assessment:

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[195] *Ibid.* at pp. 245-246.

[196] *Ibid.* at p. 68.

RECOMMENDATION 1

The Panel recommends the following conditions for any approval of the Offshore Pipeline that may be granted.

The Proponents shall submit to the National Energy Board, for review, at least one hundred and eighty (180) days prior to the commencement of installation:

(a) the pipeline design data and the final pipeline design, including, but not limited to:

(i) the final Offshore Pipeline Design Basis Memorandum;

(ii) detailed materials specifications;

(iii) any relevant supporting design studies;

(iv) limits of unacceptable spans found during installation, testing and operation, and mitigation

measures to be used if an unacceptable span was to develop; and

(v) construction schematics.

(b) a list of the regulations, standards, codes and specifications used in the design, construction and operation of the pipeline from the Thebaud platform to the Goldboro gas plant, indicating the date of issue;

(c) reports providing results and supporting data from any geotechnical field investigations for the evaluation of:

(i) the potential for slope instability;

(ii) the geotechnical and geological hazards and geothermal regimes which may be encountered during installation and operation of the facilities; and

(iii) the special designs and measures required to safeguard the pipeline.

(d) the pipeline route, detailed on appropriate scale maps, indicating all seabed, geotechnical and other features to a sufficient depth and resolution.

The Proponents shall not start any pipeline installation activity until the final pipeline design has been approved by the National Energy Board.

Unless the National Energy Board otherwise directs, the Proponents shall submit, at least thirty (30) days prior to the commencement of construction, a detailed construction schedule. The Proponents shall

provide the National Energy Board and all other appropriate regulatory authorities with regular updates on the progress of construction activities and with any changes in the schedule as construction progresses.

The Proponents shall submit to the National Energy Board, for review, at least thirty (30) days prior to the commencement of construction, all construction manuals, including:

(a) a pipe laying and pipe trenching manual (including, but not limited to, other pipeline construction activities such as pipeline stabilization or anchoring);

(b) a construction safety manual (containing appropriate procedures for the reporting of any incidents to the NEB);

(c) a pipeline emergency response procedures manual; and

(d) all other manuals relevant to construction, installation and operation of the subsea gathering line from the Thebaud Platform to the Goldboro Gas Plant.

Unless the National Energy Board otherwise directs, the Proponents shall, during construction, for audit purposes, maintain at each construction site a copy of the welding procedures and non destructive testing procedures used on the Project together with all supporting documentation.

The Proponents shall file with the National Energy Board, no later than one hundred and eighty (180) days after completion of the pipe laying, an as-laid pipeline survey report and maps.

The Proponents shall submit to the National Energy Board, for review, at least thirty (30) days prior to “Leave to Open”, an operation and maintenance manual including, but not limited to, inspection and remedial correction procedures for seabed movements causing spanning.

If the National Energy Board determines that the pipeline design assumptions, relative to the pipeline burial, pipeline stability and seabed changes, cannot be confirmed, the Proponents shall submit to the National Energy Board, for review, at least one hundred and eighty (180) days prior to “Leave to Open”, a pipeline in-place monitoring program. This program shall include all the inspection procedures and schedules, and criteria that will initiate specific inspection and remedial action procedures (such as storm conditions and limiting span lengths). This program will also identify all equipment required on-site or near-site for remedial action procedures, as well as any such equipment that has to be brought from remote locations. The program shall include the procedures for reporting incidents to the National Energy Board.

> The Certificate for the subsea pipeline facilities shall be issued to and held by Mobil Oil Canada Ltd. pending the establishment of the legal operating entity for SOEP. Upon establishment of that legal entity, the Proponents shall apply for permission to transfer the Certificate so that the pipeline facilities, in respect of which the Certificate is issued, shall be held and operated by that entity.
>
> The Panel recommends that unless the National Energy Board otherwise directs, any certificate issued should expire on 31 December 2000, unless the construction and installation of the offshore pipeline facilities has commenced by that date.[197]

371. In the Sydney Tar Ponds case, the Panel made 55 recommendations, and stated that its key finding that the project was unlikely to result in significant adverse environmental effects was premised on its recommendations being implemented.[198] These recommendations are attached as **Appendix K** to my report. They include the recommendation that the regulatory authorities not issue any approvals until the proponent has developed detailed groundwater and surface water control measures (Recommendation #7) and that they not approve certain aspects of the project until a pilot study has been completed (Recommendation #13).

372. It is perplexing that the WPQ Panel did not make any similar recommendations to the federal and Nova Scotia licensing authorities, and instead recommended the outright rejection of the project. In my opinion, given the many cases that I have been involved in, it would not have taken much creativity to come up with recommendations that would have addressed many of the Panel's main concerns.

373. For instance, the Panel was concerned that "[u]ncertainties exist regarding possible impacts of quarry activities on the local groundwater", and noted that "[i]n the view of some government departments, additional hydrogeological testing, data collection, analysis and modelling would be required".[199] The Panel could have recommended that before issuing the quarry permit, the Nova Scotia authorities demand exactly such work. (A similar recommendation was included in the Sydney Tar Sands Panel Report.[200]) Another concern was with the uncertainties surrounding the use of explosives.[201] The Panel could have

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[197]The Joint Public Review Panel Report: Sable Gas Projects (October 1997), at pp. 93-94.

[198]Joint Review Panel Environmental Assessment Report: Sydney Tar Ponds and Coke Oven Sites Remediation Project (July 2006), available at: http://www.ceaa.gc.ca/050/documents/19345/19345E.pdf.

[199]WPQ Panel Report at p. 39.

[200]Sydney Tar Ponds Panel Report, *supra* note 197, Recommendations #7 and #8. Other Panels have also made recommendations regarding the study of groundwater prior to proceeding with the project; see for example, the Joint Review Panel report for the Rabaska LNG Terminal and Related Infrastructure Project at p. 201.

[201]WPQ Panel Report at p. 28.

recommended that Bilcon prepare a detailed blasting plan for approval by Nova Scotia and/or federal authorities, or the Panel could have recommended that specific blasting conditions be imposed, such as, say, restrictions on blasting at certain times of day, in certain seasons, or in certain weather or sea conditions.

374. Such terms and conditions are routinely included in "environmental assessment approvals" issued under the Nova Scotia *Environment Act*. A good example is the Sovereign Resources Quarry Expansion project, approved in 2005 following an environmental assessment (by the province only, not the federal government – and without a public hearing). This was a 180 hectare expansion of an existing 19 hectare quarry. The project was to produce roughly 90,000 tonnes of aggregate per year over a 50 year period, which was to be generated by blasting 20 to 30 times per year. During the environmental assessment of the project, concerns were raised about many of the same issues facing Bilcon, including blasting, vibration, noise, dust, and water quality.

375. The many terms and conditions included in the environmental assessment approval for the Sovereign Resources Quarry Expansion project could equally have been applied to the WPQ project to address many of the Panel's concerns. These terms and conditions address the following: noise and vibration, archaeological resources, proximity to residents and public involvement, air quality, groundwater resources, surface water, flora and fauna, wetlands, visual environment, quarry plan and operation, site reclamation, and monitoring and contingency plans.[202]

376. These terms and conditions included a requirement to provide "an updated blast design plan" for review and approval by the province, as well as restrictions on the time of day when blasting can take place.[203] The entire approval is attached as **Appendix L**. Also attached as **Appendix M** and **Appendix N** are the approvals for the Elmsdale Quarry Expansion project and the Rhodena Rock Quarry Expansion, which contain similar detailed terms and conditions. These are attached to illustrate that the normal practice in Nova Scotia is for uncertainties and concerns identified in the environmental assessment process to be resolved through the imposition of detailed terms and conditions.

377. Indeed during the course of the WPQ hearings officials advised the Panel that its concerns could be addressed through the licensing process. For example, an official with the Nova Scotia Department of Environment and Labour told the Panel:

> You know, I understand the concern about ammonia levels and what not, and we would have terms and conditions within the Part V approval that

[202] Environmental Assessment Approval, Sovereign Resources Quarry Expansion, August 29, 2005, available at: http://www.gov.ns.ca/nse/ea/sovereignquarry/Sovereign_Conditions.pdf

[203] *Ibid*, s. 2.1(a) and s. 2.7.

> would address that if that was identified as an issue through this environmental assessment process.[204]

378. Similarly another official with the same department told the Panel:

> It is not unusual for there to be a condition in the approval as well which reconfirms that a Proponent is responsible for replacing, you know, lost or damaged water supplies.[205]

379. The WPQ Panel could and should have recommended such terms and conditions.

380. A number of the recommendations made by the Sydney Tar Ponds Panel addressed the need for a follow-up and monitoring program, including Recommendation #52: "The Panel recommends that approval of the Project be contingent on STPA preparing an adequate monitoring program that addresses all issues raised during the environmental assessment process and has been reviewed and approved by all key federal and provincial departments".[206] The Panel explained that "monitoring would be particularly important because (a) certain aspects of the proposed remediation approach for the Tar Ponds are not totally proven, and (b) contaminants would be remaining on site for a very long time if not in perpetuity."[207] The federal government agreed to implement a follow-up program lasting until 2039.[208]

381. It will be recalled that one of the factors the WPQ Panel was required to address pursuant to its Terms of Reference was: "follow-up and monitoring programs including the need for such programs".[209] The Joint Panel Agreement further stipulated that the Panel's report "shall contain the recommendations of the Panel pursuant to the Nova Scotia *Environment Act* and the Panel's rationale, conclusions and recommendations, <u>including any mitigation measures and follow-up program</u>, pursuant to the *Canadian Environmental Assessment Act* with respect to the environmental assessment of the Project."[210] The term "follow-up program" was defined in the Joint Panel Agreement as follows:

> "Follow-up Program" means a program for
>
> (a) verifying the accuracy of the environmental assessment of the Project, and

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[204] Transcript at p. 1032 (per Bruce Arthur, NSDEL).

[205] Transcript at p. 1265 (per Bob Petrie, NSDEL).

[206] Sydney Tar Ponds Panel Report at p. 138.

[207] *Ibid.* at p. 157.

[208] Sydney Tar Ponds and Coke Ovens Remediation Project, Federal Decision (October 1, 2007), available at: http://www.ceaa-acee.gc.ca/050/details-eng.cfm?evaluation=8989&ForceDecision=Y.

[209] WPQ JRP Panel Terms of Reference, Part III, paragraph (n).

[210] Joint Panel Agreement, s. 1 (emphasis added).

(b) determining the effectiveness of any measures taken to mitigate the adverse environmental effects of the Project.[211]

382. Notwithstanding this requirement, the WPQ Panel ultimately decided not to address follow-up programs in its report: "The Panel considered the possible delineation of follow-up measures but in light of its recommendation to reject the Project has decided not to make any additional recommendations in that respect."[212]

383. The Panel clearly had the duty to discuss follow-up programs that could have been reasonably applied and particularly ones suggested by Bilcon. Without such a discussion, it was improper for the Panel to reach conclusions with respect to the project's unjustifiable significant adverse environmental impacts.

384. The WPQ project was particularly suitable for a follow-up program. The Canadian Environmental Assessment Agency's "Operational Policy Statement: Follow-up Programs under the *Canadian Environmental Assessment Act*" provides a number of examples to "illustrate circumstances that may warrant a follow-up program", including the following:

> ***Public Concerns***
>
> There is a need to address relevant project-related issues of public concern.
>
> ***Accuracy of Predictions***
>
> It is appropriate to verify that the environmental assessment predictions were accurate. For example, a follow-up program could verify whether there are any adverse environmental effects that were not addressed in the assessment.
>
> ***Effectiveness of Mitigation Measures***
>
> There is a need to verify that mitigation measures were effective in successfully addressing the predicted environmental effects.
>
> ***New or Unproven Techniques and Technology***
>
> The environmental effects of a project were assessed using new or unproven analytical or modelling techniques.
>
> The proposed project involves technology or mitigation measures that are new or unproven.
>
> ***Cumulative Environmental Effects***

[211] Joint Panel Agreement, s. 1. Note that this definition is taken from CEAA.

[212] WPQ Panel Report at p. 101.

Cumulative environmental effects assessment is an important or contentious component of the environmental assessment.

Nature of Project

There is limited experience implementing the type of project being proposed in the environmental setting under consideration.

The nature or scale of the project is such that specific types of environmental effects warrant careful monitoring (e.g., air emissions, wastewater discharges, erosion).[213]

385. Many of the issues that concerned the Panel could have been addressed through a properly designed follow-up program.

(c) A comparison with the Keltic Project illustrates how the WPQ Panel could have addressed its concerns about uncertain environmental effects

386. There is a remarkable contrast in how the Nova Scotia Environmental Assessment Board (**"EAB"**) handled the environmental assessment of the Keltic Petrochemicals Inc. proposed Liquefied Natural Gas and Petrochemical Plant facilities proposed for Goldboro, Nova Scotia, compared to how the Joint Review Panel dealt with the WPQ and Marine Terminal proposal.

387. There were many similarities with respect to potential environmental and social concerns shared by these projects. What is remarkable, however, in terms of comparing how they were dealt with by the EA process, is that in the case of Keltic, the Nova Scotia Environmental Assessment Board recommended its approval despite lacking a great deal of information relating to project design and construction and that "many questions had to be deferred to future studies and plans yet to be submitted." Additionally, the Nova Scotia Environmental Assessment Board found that "in many respects the EIA Report submitted by Keltic does not adequately address the Terms of Reference issued by the Nova Scotia Department of Environment and Labour (NSDEL)."[214]

388. According to the Nova Scotia EAB report:

The proposed Keltic LNG and petrochemicals project represents a scale and type of development which would be unique in Nova Scotia, and as

[213]Canadian Environmental Assessment Agency, "Operational Policy Statement: Follow-up Programs under the *Canadian Environmental Assessment Act*" (October 2002; updated November 2007), at pp. 4-5.

[214]Report and recommendations to the Nova Scotia Minister of Environment and Labour, Nova Scotia Environmental Assessment Board full review of the Keltic Petrochemical's Inc. proposed LNG and Petrochemical plant facilities, Goldboro, Nova Scotia, Environmental Impact Assessment, Final Report (February 21, 2007), p. 3 ("Keltic Panel Report") available at: http://www.gov.ns.ca/nse/ea/kelticpetro/KelticEABReport.pdf.

> such would present significant challenges to regulatory agencies having jurisdiction over aspects of the project. …If the project proceeds, this undertaking would significantly alter the socio-economic and bio-physical environment of the proposed project location and surroundings. While some impacts would be positive (employment and investment), other impacts to the environment and on the rural surroundings and way of life would be negative.[215]

389. In essence, the approach of the Nova Scotia Environmental Assessment Board to a project which they themselves recognized had "a scale and type of development which would be unique in Nova Scotia" and which would "present significant challenges to regulatory agencies having jurisdiction over aspects of the project" was and remains a complete contrast to the Joint Review Panel approach to the WPQ EA.

390. Some of the most important differences are the following:

- Despite recognizing that the Keltic project "would significantly alter the socio-economic and bio-physical environment of the proposed project location and surroundings" and that the impacts to the environment and on the "rural surroundings and way of life would be negative" the Nova Scotia Environmental Assessment Board had no overall difficulty in recommending approval of the project.

- The Nova Scotia EAB also understood, unlike the JRP in the WPQ matter, that not having full information at the time of consideration of an Environmental Assessment is normally expected and should not be viewed as prejudicial to the proponent (as was clearly the view of the WPQ JRP). As the Nova Scotia EAB put it: "Environmental assessment is used as a planning tool at an early stage in the project development process. As such, it is typical that the information base relating to project design and construction will be incomplete."[216]

391. The Nova Scotia EAB went on to find that even though there was "a great deal of project detail information which was not available for the conduct of this review" and that "many questions had to be deferred to future studies and plans yet to be submitted," these problems should not stop the Nova Scotia EAB from recommending the approval of the project. As the panel put it:

> On balance, and in consideration of the positive and negative aspects of this proposal, the Panel recommends that the proposed project should proceed, subject to the recommendations as presented in this Report.

[215] *Ibid.* at p. 3.

[216] *Ibid.* at p. 3.

> These recommendations should be attached as conditions of any Ministerial approval for the Keltic project….[217]

392. In essence, the major difference between the approach of the Nova Scotia EAB and the WPQ JRP is that in the case of Keltic the Nova Scotia EAB recommended the approval of the project despite inadequacies of information and analysis but on condition that a number of further studies and specific actions be taken.

393. The approach of the Nova Scotia Environmental Assessment Board requires that many studies be undertaken and other activities be completed before Nova Scotia environment or other Nova Scotia government agencies issues permits for the project or before construction begins. In contrast, in the case of the proposed WPQ, while the JRP also believed that there were similar inadequacies with data, it took the approach of rejecting the project without coming up with solutions such as specific and detailed mitigation or monitoring plans.

394. The WPQ JRP asserted that there was a lack of baseline data and suggested an inability to go ahead with the project, whereas the Nova Scotia EAB in the case of Keltic, while noting the need for further data before the project began, made approval of the project and commencement of construction conditional on Keltic providing the required baseline data and studies before permits are issued.

395. The Nova Scotia EAB in the case of Keltic recommended a number of studies, plans, guidelines be developed in addition to reporting mechanisms, the requirement to obtain further data on several contaminants, the institution of a dispute resolution procedure for ground water issues, proactive monitoring (not waiting for complaints) and mitigation measures that would all be based on the results of further studies.

396. The Nova Scotia Environmental Assessment Board recognized that its recommendations could be attached as conditions of any Ministerial approval for the Keltic project, by the Minister of Environment. As the Nova Scotia EAB put it:

> These recommendations should be attached as conditions of any Ministerial approval for the Keltic project under Section 40(1)(b) of the *Environment Act* and Regulation 26(1) of the *Environmental Assessment Regulations*.[218]

397. Attached to my report as **Appendix O** are the Nova Scotia Environmental Assessment Board recommendations with respect to the Keltic project. These are taken from page 5-14 of the Nova Scotia Environmental Assessment Board Report.

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[217] *Ibid.* at p. 4.

[218] *Ibid.* at p. 4.

398. It is important to note the significance of some of the further studies and recommendations that the Nova Scotia EAB felt comfortable imposing as a condition of giving this project EA clearance under the Nova Scotia Environment Act. We set out below some of these to demonstrate that the Nova Scotia Environmental Assessment Board in the case of Keltic approached the issue of potentially absent, missing or insufficient information or commitments by the proponent in a manner that completely contrasts with the WPQ Panel. For example, at Whites Point, the Panel criticized the proponent for relying on meteorological or other data that was obtained at a location some distance from the proposed site. In contrast, in the case of Keltic, the Environmental Assessment Board recognized that there was an appropriate way of dealing with such a concern, requiring that, *inter alia***:**

- "…prior to any construction activities, the Proponent supply to NSDEL seasonal baseline data for ambient and peak concentrations of gases and aerosols that may be released from the proposed project, including … particulate matter less than 2.5 micrometres in diameter ($PM_{2.5}$) and particulate matter less than less than 10 micrometres in diameter (PM_{10})."

- "…prior to any construction activities, the Proponent collect appropriate meteorological data at the proposed project site for at least two seasons. The Proponent will statistically and quantitatively compare this new data to Shearwater and Yarmouth climate data used in the EIA air quality dispersion model to ensure that valid data is used in the model. The Proponent will identify details about microclimate issues in the project area that could affect the dispersion model. These findings will be given to NSDEL and other appropriate agencies for review."[219]

399. With respect to surface water and wetlands issues (many of which were central concerns to the WPQ JRP) the Nova Scotia EAB also approached this issue in a completely different manner by providing that no permits could be issued until more work was done. For example:

- "That prior to the issuing of any permits, the Environmental Protection and Erosion and Sediment Control Plans be submitted by the Proponent and approved by NSDEL. These Plans must include sufficient detail to enable NSDEL to ensure that erosion and sediment control measures are adequate, particularly with regard to the proposed removal of organic soils and vegetation from the area to be flooded at Meadow Lake, so as to minimize impacts to the lake and downstream systems."

- "That prior to the issuing of any permits, the Wetland Compensation Plan be submitted by the Proponent and approved by NSDEL. This plan must include adequate plans for avoidance, rehabilitation or compensation for disturbance or destruction of wetlands, in accordance with the Wetlands Policy of NSDEL. A

[219] *Ibid.* at pp. 6-7.

> Wetland Compensation Plan is to be added to the list of reports and plans that are to be prepared by the Proponent."[220]

400. The WPQ Panel was concerned about what it considered to be an insufficient buffer zone between wetlands or other water bodies. That was also a concern to the Nova Scotia Environmental Assessment Board, but rather than simply indicating that was going to be a prejudicial issue to the proponent, the Nova Scotia EAB found that it was appropriate to impose a term and condition that increased the set-back as follows: "That the undisturbed buffer zone between wetlands or other water bodies and adjacent construction activities be increased from 15 metres to 30 metres."[221]

401. With respect to groundwater and wells, the WPQ Panel indicated again it could not be positive about how such a concern could be rectified. In contrast, in the Keltic proposal, the Nova Scotia EAB knew that there was an appropriate method to deal with this, again, by imposing terms and conditions. With respect to groundwater, it recommended:

> That the Proponent establish an arbitration and resolution procedure to deal with impacts to wells and drinking water supply for residences near the project area to the satisfaction of NSDEL and Nova Scotia Department of Health Promotion and Protection (NSHPP), to be delivered to homeowners prior to any construction activities. This procedure should specify the types of permanent solutions to be provided in cases where they may be needed.[222]

402. Marine water issues were of apparent major concern to the WPQ Panel. The Nova Scotia Environmental Assessment Board dealt with similar concerns by way of the following recommendations:[223]

- "That NSDEL and appropriate federal authorities require the Proponent to initiate, prior to any construction activities, a marine water and sediment quality monitoring program, with scope and parameters to be determined by those government authorities."

- "That the Proponent conduct, prior to the issuing of any permits, a receiving water assimilative capacity study for Isaacs Harbour, in accordance with NSDEL regulations for wastewater and stormwater discharge approval."

403. Terrestrial habitat was a major concern to the WPQ JRP and it was also an issue in the Keltic proposal. The Nova Scotia EAB imposed conditions in respect of this topic, including the following:

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[220] *Ibid.* at pp. 7-8.

[221] *Ibid.* at p. 8.

[222] *Ibid.* at p. 8.

[223] *Ibid.* at p. 9.

> That NSDEL and NSDNR [Department of Natural Resources] ensure that mitigative and monitoring measures for wildlife and vegetation are adequate and that they are applied as required, and fully documented in the Environmental Protection Plan (EPP).[224]

404. Fisheries, aquaculture and resource harvesting were also a major issue in the WPQ JRP Panel Report. The Nova Scotia EAB again took a positive and concrete approach to these issues by requiring conditions such as the following:[225]

- "That the Proponent complete a more detailed examination of the potential impacts on the salmon migration corridor and the impacts of the Meadow Lake alterations on this corridor prior to the issuing of any permits, with the results to be reported to NSDEL and DFO."

- "That the Proponent develop a detailed communications plan for fishers, and all other boaters and recreational users in relation to shipping traffic, and consideration be given to consulting with Transport Canada to establish a Harbour Master office to ensure safe and timely passage."

405. Finally, the Nova Scotia EAB imposed a long list of "required studies, reports and plans." The following paragraph illustrates how the Nova Scotia EAB took a concrete and positive approach towards this issue, in contrast to the WPQ Panel, which refused to even consider further studies to be carried out:

> 6.2.5.1 The EIA Report provides a list of studies, reports and plans noted by the Panel which the Proponent has committed to deliver. In addition, the Panel has recommended additional work which will be required (section 6.2, this Report). The Panel recommends that NSDEL ensure that a complete and accurate list of required studies, reports and plans is developed, and that these documents are provided by the Proponent to NSDEL and other responsible provincial or federal regulatory authorities. It will be the role of each relevant agency to review the appropriate documents prior to the issuing of any permits which would enable the project to proceed. All such studies, reports and plans will be made available to the public once approved.[226]

406. The list of studies and plans to be completed as recommended by the panel are found at pages 132 and 133 of the EAB Report.

(d) The Panel dismissed Bilcon's approach to "adaptive management"

407. Another tool commonly employed to address uncertainty in the environmental assessment process is "adaptive management". Indeed adaptive management

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[224] *Ibid.* at p. 9.

[225] *Ibid.* at pp. 9.

[226] *Ibid.* at p. 13.

was specifically referenced in the EIS Guidelines issued to Bilcon by the Panel.[227] It is therefore surprising that the Panel was so dismissive of Bilcon's commitment to "adaptive management". (See also section 2.3(d) of my report, above.)

408. The CEA Agency's Operational Policy Statement entitled "Adaptive Management Measures under the *Canadian Environmental Assessment Act*"[228] provides the following explanation of adaptive management:

> In general, adaptive management is a planned and systematic process for continuously improving environmental management practices by learning about their outcomes. Adaptive management provides flexibility to identify and implement new mitigation measures or to modify existing ones during the life of a project.
>
> Planning for adaptive management should commence as early as possible in the EA process. While specific adaptive management measures may not be identifiable at that point, a strategy or plan should be developed to provide context on when, how and where adaptive management may be used. Decisions to adopt specific adaptive management measures can be identified later during the project life-cycle as a result of the analysis of data generated by a rigorously implemented follow-up or monitoring program. Consequently, the concepts of follow-up and adaptive management are directly linked under the Act and in practice. [229]

409. The Operational Policy Statement also explains that it is appropriate to use adaptive management measures when dealing with challenges such as uncertainty and complex ecosystems:

> Due to factors such as the complexities of ecosystems and difficulties predicting details of future development, all EAs involve some level of uncertainty regarding the identification of environmental effects, the assessment of their significance and the effectiveness of mitigation measures. The Act implicitly recognizes uncertainty by requiring a follow-up program for all projects that undergo an assessment by comprehensive study or a review panel.
>
> …
>
> In response to data generated by the follow-up program or monitoring, the proponent should be prepared to initiate adaptive management measures

[227] EIS Guidelines, s. 12.1, *supra* note 173.

[228] CEA Agency, "Operational Policy Statement: Adaptive Management Measures under the *Canadian Environmental Assessment Act*" (2009), available at: http://www.ceaa.gc.ca/50139251-2FE4-4873-B6A1-A190C103333D/Adaptive_Management_Measures_under_the_CEAA.pdf.

[229] *Ibid.* at pp. 1-2.

if mitigation is not adequate to eliminate, reduce or control adverse environmental effects.[230]

410. Similarly, the Federal Court of Appeal observed in *Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage),* that "[t]he concept of 'adaptive management' responds to the difficulty, or impossibility, of predicting all the environmental consequences of a project on the basis of existing knowledge".[231]

411. Bilcon expressed its commitment to adaptive management in the EIS:

> Where there is uncertainty with respect to the effectiveness of measures that are used to prevent serious or irreversible environmental damage, Bilcon will take an adaptive management approach. Adaptive management uses monitoring results to accommodate uncertainty. This will permit early intervention through the use of additional mitigation, or avoidance, to control potential environmental damage.
>
> The use of an adaptive management approach, based on scientifically defensible performance based standards, will be adhered to by Bilcon during the life of the project. Performance based standards are physical, biological and human indicators or thresholds that approximate and rank the quality of the environment in the area. As scientific knowledge expands, these standards may be refined to provide more confidence in environmental decision-making.

412. Bilcon's intentions with respect to the application of adaptive management were further clarified in response to a Request for Information from the Panel.[232]

413. It is evident from Bilcon's submissions that its intention was to apply adaptive management as a tool to modify or replace existing mitigation measures in the event that those measures failed to meet acceptable levels or did not adequately prevent environmental harm. This approach is consistent with the explanation of adaptive management provided in the CEAA Operational Policy Statement.

414. However, the WPQ Panel Report was dismissive of Bilcon's use of adaptive management:

> The Proponent proposed to use adaptive management to implement the precautionary principle; the Panel concludes that the EIS treats these two concepts as virtually synonymous. In the EIS and hearings, the Proponent suggested that once a plan of action for an environmental

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[230] Canadian Environmental Assessment Agency, Operational Policy Statement, "Adaptive Management Measures under the *Canadian Environmental Assessment Act*, 2009" (Ottawa: Her Majesty the Queen in Right of Canada, 2009) p. 2.

[231] 2003 FCA 197 at para. 24. This interpretation of adaptive management was cited approvingly by the Federal Court in *Pembina* at para. 32.

[232] Vol. 2, Section 3.6 of Bilcon's response documents.

> issue had been defined, that course would be adhered to until problems arose, then a process of trial and error (adaptive management) would be employed until the process or issue once again conformed to original expectations. The Proponent described its approach as "precautionary", with the capacity to address a wide variety of issues. The EIS and related documents identify the central role and preferred usage of adaptive management in the proposed project by citing its anticipated implementation on no fewer than 140 occasions.
>
> …
>
> The Panel found little evidence from the EIS, information requests or the hearings to indicate that the Proponent appreciates the difference between the precautionary principle and adaptive management, how each should be implemented or how fundamental the role of science is in the proper implementation of each. The Panel believes that given the Proponent's flawed understanding, the eventual application of these tools would potentially negate any positive intention to offset potential environmental impacts. This could be especially true with regard to the scope and reliability of effects prediction, the appropriateness and technical feasibility of proposed mitigation measures, and the effectiveness of compliance enforcement.[233]

415. I find the Panel's critique on this point confusing and unconvincing. I do not see any error in Bilcon's understanding or proposed application of adaptive management. In my view Bilcon's approach was consistent with the general principles of adaptive management and was entirely appropriate in the circumstances. See also section 2.3(d) of my Expert Report where I conclude that it was the Panel that misunderstood the role of adaptive management.

(e) The Panel did not question Bilcon's experts

416. A recurrent theme in the Panel Report is the lack of certainty about the project, and yet during the hearings the Panel showed little interest in questioning Bilcon's many experts.

417. Bilcon had 19 experts in attendance at various points of the hearing. It would appear from a review of the transcripts that many of them were never asked a single question by the Panel, including experts in:

- Accidents and malfunctions
- Noise and air quality
- Marine biology

[233]Panel Report at pp. 92-93.

- Marine geology
- Marine acoustics
- Fisheries compensation
- Bathymetry
- Hydrogeology

418. Others were asked only cursory questions, including Carlos Johansen, a marine terminal engineer who flew in from Vancouver for the hearings. Following the hearings, Mr. Johansen wrote to the federal Minister of the Environment and the provincial Minister of Environment and Labour:

> I am a consultant to Bilcon of Nova Scotia and have been providing engineering services related to the shipping facilities for the proposed Whites Point Quarry. I have now been advised that the panel has recommended against the project proceeding. At great expense to Bilcon, I was asked to fly across Canada and be available on the first day of the Joint Panel hearings (June 16, 2007). I must express my disappointment at the proceedings. After sitting almost all day, I was finally asked one simple question related to the shiploading facilities. I was prepared to answer many more questions, but for whatever reason the panel chose not to question me further. I have not yet read every word in the panel's report, but I note reference to unanswered questions about shiploading and shipping. I wish I had been asked about some of them.[234]

419. The lack of interest by the Panel in availing itself of expert advice from the Proponents Consultants could be a further indicator that the Panel had prejudged the outcome of its deliberations.

(f) Summary

420. The Panel acted contrary to the purpose of environmental assessment in insisting on certainty regarding the detailed design of the WPQ project and its environmental effects. The Panel mistakenly treated the environmental assessment as a licensing process. Its hostile attitude towards the proponent indicated an inappropriate bias.

421. This approach resulted in a more lengthy and expensive process for the proponent than was necessary. More importantly, it clearly influenced the Panel's critical attitude towards the proponent and also influenced its ultimate decision to recommend against the approval of the project. Even though the Panel may have been uncomfortable with the uncertainty surrounding some aspects of the

[234] Letter dated October 29, 2007 (CP30264, p. 710783).

project, the Panel could and should have dealt with these concerns by making recommendations to the federal and provincial regulatory authorities, including recommendations such as those made by the Sable Gas, Sydney Tar Ponds and Keltic Petroleum Panels directed at ensuring that the authorities required further studies, control measures and monitoring both before and after approving the project.

2.4 The Panel's interpretation of the concept of "cumulative effects"

422. In its Report, the Panel states:

> The Panel believes that in the EIS the Proponent's analysis of the cumulative effects of the project, acting in concert with activities that should be considered as reasonably foreseeable, was not adequate.[235]

423. However, it is evident that the Panel applied an inappropriate and indeed illegal concept of "cumulative effects". Pursuant to its Terms of Reference the Panel was entitled only to take into account the effects of other projects that have already been or "will be carried out". In particular, the Panel was charged with considering:

> h) the environmental effects of the Project, including the environmental effects of malfunctions or accidents that may occur in connection with the Project and any cumulative environmental effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out.[236]

424. This language was drawn verbatim from s. 16(1)(a) of CEAA.

425. Although the term "cumulative environmental effects" is not defined in either the Terms of Reference or CEAA, there is no doubt that on an ordinary, common sense reading, the phrase "will be carried out" connotes a high degree of certainty that the "other projects or activities" will actually be carried out. Merely notional projects are not relevant to the analysis.

426. Indeed, this ordinary, common sense interpretation is supported by the case law. In *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, the Federal Court of Appeal held:

> Only likely cumulative environmental effects must be considered. Projects or activities which have been or will be carried out must be considered. However, only approved projects must be taken into account; uncertain or hypothetical projects or activities need not be considered. The Agency's Reference Guide on Cumulative Effects suggests, however, that "it would

[235] Panel Report at p. 11.

[236] Terms of Reference (emphasis added).

be prudent to consider projects or activities that are in a government approvals process as well."[237]

427. It is true that certain guidance documents issued by the federal government refer to projects that are "reasonably foreseeable", which is the standard purportedly applied by the WPQ Panel. However, this guidance distinguishes between "reasonably foreseeable" projects and merely "hypothetical" ones. The "Operational Policy Statement: Addressing Cumulative Environmental Effects under the *Canadian Environmental Assessment Act*" (March 1999), issued by the CEA Agency, says:

> … the act refers to the consideration of "any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that … will be carried out". Accordingly, in identifying future projects to include in the CEA [cumulative effects assessment], RAs should consider projects that are "certain" and "reasonably foreseeable", as recommended by the Guide. The Act does not require consideration of hypothetical projects, but RAs may choose to do so at their discretion. Information concerning the cumulative effects of the project under assessment combined with hypothetical projects may contributed to future environmental planning. However, it should not be the determining factor in the environmental assessment decision under the Act.[238]

428. It goes on to provide the following definitions:

Certain:

- The action will proceed or there is a high probability the action will proceed.

Reasonably Foreseeable:

- The action may proceed, but there is some uncertainty about this conclusion.

Hypothetical:

- There is considerable uncertainty whether the action will ever proceed.

- Conjectural based on currently available information.[239]

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[237] *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage),* [2001] 2 F.C. 461, at para. 41 (emphasis added).

[238] The Operational Policy Statement was revised in November 2007. All references herein are to the 1999 version, which was in effect during the WPQ Panel Review.

[239] *Ibid.*

429. The EIS Guidelines issued by the Panel asked Bilcon to "[i]dentify and assess the cumulative adverse and beneficial environmental effects of the Project in combination with other past, present or reasonably foreseeable projects or activities in the Bay of Fundy region".[240] The EIS Guidelines stated that "A reasonable degree of certainty should exist that proposed projects and activities will actually proceed for them to be included. Projects that are conceptual in nature or limited as to available information may be insufficiently developed to contribute to this assessment in a meaningful manner."[241] In other words, the EIS Guidelines were clear that Bilcon was not expected to address the impacts of purely hypothetical projects. Accordingly, in its EIS, Bilcon did not consider such purely hypothetical projects.

430. Prior to the hearings, however, the Panel determined that Bilcon's analysis of cumulative effects in the EIS was insufficient and asked for a revised analysis.[242] The Panel's information request referred again to other "past, present and reasonably foreseeable projects".[243] Bilcon duly submitted a revised analysis.[244] In this revised analysis, Bilcon quite properly made it plain that it was not considering "hypothetical" projects.[245] Bilcon identified "reasonably foreseeable" projects in the region including two liquefied natural gas terminals and an oil refinery.

431. In its report, the Panel wrote that it remained unsatisfied with the revised analysis. The Panel noted that "[p]articipants in the environmental review were generally critical of the cumulative effects assessment, more for what was omitted than what was covered."[246] The Panel agreed with this criticism.

432. The Panel also concluded that "the establishment of an expanded or additional quarry or quarries is reasonably foreseeable; such possibilities should have been considered in the cumulative effects assessment," and stated that "[t]he Panel believes that the Project is likely to induce further aggregate extraction activities in the region."[247] This notion of "quarry creep" – that approving the WPQ project would lead inevitably to the approval of other quarries – is something emphasized by several project opponents.[248] The speculation that quarry developers would rush headlong into Nova Scotia as soon as the WPQ project

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[240] EIS Guidelines at p. 50 (emphasis added).

[241] *Ibid.* at p. 51 (emphasis added).

[242] "EIS Information Request" from the Panel to the proponent, July 28, 2006 at pp. 23-24; see also Panel Report at p. 80.

[243] "EIS Information Request" (*ibid*) at p. 23.

[244] "Bilcon Responses: Volume IV (February 2007) (No. 0098, p. 000091).

[245] *Ibid.* at p. 3.

[246] Panel Report at p. 81.

[247] *Ibid.* at p. 83.

[248] *Ibid.* p. 82.

were approved was not something the Panel should or could have taken into account.

433. The Panel did not cite any evidence that any other quarries had been approved, let alone that any were even on the drawing board. These quarries certainly did not fall within the meaning of other projects that "will be carried out", as interpreted by the Federal Court of Appeal. Nor could it be said that these quarries were reasonably foreseeable. Using the Panel's own EIS Guidelines, there was no "reasonable degree of certainty" that such quarries "will actually proceed". Rather, these quarries were, in the language of the Canadian Environmental Assessment Agency's Operational Policy Statement, merely "[c]onjectural based on currently available information", and therefore fell under the "hypothetical" category, not the "reasonably foreseeable" category. In summary, Bilcon addressed the types of other projects that it was asked to address by the Panel. It was unfair and indeed unlawful for the Panel to fault Bilcon for not having addressed hypothetical projects.

434. The Panel stated that the province "had received recent expressions of interest in the development of coastal quarries".[249] In my opinion an "expression of interest" clearly does not establish that a project "will be carried out".

435. The Panel's approach in this regard may be contrasted with the usual approach under CEAA. For example, in the Comprehensive Study Report for the Victor Diamond mine project in northern Ontario, it was noted that there were other sites near the proposed mine "which are known to host diamonds", and that some "grassroots exploration" was already under way in those areas (i.e. "very small and transitory tent camps with some drilling and helicopter use").[250] However, the Report stated that "there are no known plans for taking any such properties to the advanced exploration stage. As such, there are no other 'projects' to include in the cumulative effects analysis."[251] In the WPQ case, the Panel did not even point to evidence that other quarry proponents had reached the stage of conducting "grassroots exploration", let alone evidence that they had received or even applied for regulatory approvals.

436. Moreover, there is an undercurrent of xenophobia or anti-Americanism in the quarry creep line of reasoning. In its report, the Panel seems concerned not just with the spectre of further coastal quarries, but in particular the spectre of further coastal quarries established to satisfy US demand for raw materials. For instance, the Panel notes that:

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[249] *Ibid.* at p. 83.

[250] Victor Diamond Project, Comprehensive Study Report, available at: http://www.ceaa.gc.ca/80C30413-docs/report_e.pdf, at p. 6-144.

[251] *Ibid.* at p. 6-144.

> Good quality rock is abundant on North Mountain and elsewhere in the province to serve export markets. The Bay of Fundy is near a major market for aggregate. …the Proponent commented that there is an "order of magnitude difference" in the difficulty of obtaining a quarry permit in the United States as compared to in Nova Scotia. If this statement is accurate, the Canadian regulatory climate may induce further development of quarries. The Panel concludes that the establishment of an expanded or additional quarry or quarries is reasonably foreseeable; such possibilities should have been considered in the cumulative effects assessment.[252]

437. The Panel goes on to speculate that the "[e]stablishment of other coastal quarries on the Bay of Fundy would likely lead to local community responses similar to those that have occurred on Digby Neck and Islands, and could be expected to be adverse."[253]

438. I note that many opponents of the project who spoke at the Panel hearings made comments that were blatantly anti-American. What bothered them about the project was that Nova Scotia's natural resources were being exploited by a foreign company. Examples of such comments include:

> Is it right that a foreign company can come here, take away our land, leave us with nothing but a sense of frustration and uncertainty on both sides of this issue?[254]

* * *

> In this area, our beautiful shoreline is being targeted for a rock quarry to build roads in the U.S. and like a bad disease, if this gets approval, it has the potential to spread further along the Bay of Fundy...[255]

* * *

> Simply stated, we know Canada has a history of allowing foreign corporations to export our raw resources so that the resource, the profits, the value added and most of the taxes benefit the importing country far more than the producing country.
>
> It's time to move decisively beyond the 19th century hewers of wood mentality. How can we hope to proper by digging up our province, our very heritage, and shipping it off to pave more roads in the US?[256]

[252]Panel Report at p. 83.

[253]*Ibid.* at p. 83.

[254]Transcript at p. 582.

[255]Transcript at p. 891.

[256]Transcript at p. 1509.

* * *

It seems to me the real CFA [Come From Away] is Bilcon, a subsidiary of an American company, whose commitment to this place is to spend the next 50 years blowing up as much of it as possible and shipping it off to another country.[257]

* * *

Didn't we have laws to protect our coastlines from such assaults? How could foreign interests be allowed to come into our country and blast our precious, irreplaceable Fundy rock into gravel for roads in New Jersey? Preposterous.[258]

* * *

Will outside interests be enabled to enter our Province at will to rape and pillage our land, and we will not be able to stop them? Have we become like little children who've gone to sleep, trusting that their parents have locked the doors, only to be awakened in the night by the thief at their bedside?[259]

* * *

And let us not forget NAFTA. Once Bilcon starts extracting Nova Scotia's resources and taking them to New Jersey to build roads, it is not that easy to stop them.[260]

* * *

… I cannot imagine that my husband and I would have retired here had the mountain been pitted with vast holes and in the process of being hauled off in tankers to pave the roads and parking lots of a foreign country.[261]

* * *

Also, for a foreign company to enter this magnificent area, this province, this country to freely, and I mean freely, rape it and remove the very material of which it is made and give nothing in return but a few paltry low-paying jobs is an abomination.[262]

[257]Transcript at p. 1580.

[258]Transcript at p. 1867.

[259]Transcript at p. 3177.

[260]Transcript at p. 1408.

[261]Transcript at p. 1508.

[262]Transcript at pp. 1525-1526.

439. The Panel never interjected to tell these participants that the proponent's country of origin was irrelevant to the Panel's task. By the Panel's willingness to hear such arguments, and its articulation of quarry creep concerns in its report, it seems reasonable to presume that the Panel was actually swayed by concerns of this type. My reading of the Report in the context of what the Panel was told at the hearings is that anti-Americanism was an undercurrent running through the Panel's reasoning on the quarry creep issue.

440. In short, the Panel seems worried that approval of the WPQ quarry would open the floodgates for the development of further coastal quarries to satisfy US demand for aggregate. This was not a relevant consideration.

441. The Panel also faulted Bilcon for not considering the potential effects of an expansion of the WPQ project onto adjacent lands.[263] Such an expansion was entirely speculative. While it is true that Bilcon had obtained an ownership interest in certain lands adjacent to the proposed quarry, Bilcon told the Panel at the hearings that these were simply to create a buffer between the quarry and other neighbours, and not for the expansion of quarry operations.[264] Bilcon stated at the very outset of the hearings that the quarry "will not expand".[265] In its report, the Panel simply disregarded this evidence. Moreover, I find the Panel's concern about the potential expansion of the project is especially perplexing, given that elsewhere in its report it questioned whether the project was economically feasible at all or whether it would have to be hugely scaled down.[266]

442. In any event, even if the Panel refused to believe Bilcon's assertion that the quarry would not expand, the Panel could have addressed its concerns by recommending that terms and conditions be imposed in the quarry licence restricting such an expansion or requiring it to undergo a similarly exhaustive environmental assessment process. During the hearings, an official with the Nova Scotia Department of Environment and Labour advised the Panel that any expansion of the quarry "would require subsequent approval",[267] and another suggested that it could recommend that such an expansion require a joint panel hearing:

> What I guess was (sic) respectfully suggesting to the Panel is that they can make that recommendation to the Minister that the footprint that is outline in the Environment Impact Statement is the footprint of the operation, and any expansion beyond that point could require a full Joint Panel Environmental Assessment.[268]

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[263]Panel Report at p. 83.

[264]Transcript at p. 147.

[265]Transcript at p. 30.

[266]See section 2.8 of my report.

[267]Transcript at p. 1005 (per Bob Petrie, NSDEL).

[268]Transcript at p. 1018 (per Kim McNeil, NSDEL).

2.5 The Panel rejected or ignored Bilcon's evidence, for example in respect of blasting

443. I find it remarkable that the Panel often strained to reach conclusions that were adverse to Bilcon. A good example is the Panel's concern about blasting.

444. The use of explosives was an important issue for the Panel. In its report, the Panel disputes the information about blasting provided by Bilcon. The Panel's doubts about blasting clearly influenced its overall findings against the project.

445. The Report says:

> The Proponent's estimate of the quantity of ANFO needed to yield one tonne of fragmented rock varied by nearly 100% in its submissions between the EIS and the hearings. The first estimate provided in the EIS was 0.4 kg/tonne, while during the hearings the Proponent's expert specified 1 lb/ton (0.45 kg/tonne), and later in an undertaking this became 0.23 kg/tonne. The Proponent's explanation for the discrepancy was that the higher figures were generic and the lower value was more appropriate for basalt.[269]

446. It is true that the EIS submitted by Bilcon included an estimate of 0.4 kg of explosives per tonne of rock.[270] During the hearings, Bilcon's blasting expert, John Melick, was questioned by the Panel about the amount of explosives required for blasting. Mr. Melick stated that Bilcon expected to use approximately one pound of explosives to blast *two* tonnes of rock – he did not, as stated by the Panel, provide an estimate of one pound per tonne.[271] Mr. Melick's estimate was subsequently confirmed by Bilcon in two separate responses to Undertakings – Bilcon's responses to Undertaking #32 and Undertaking #32A both used the figure of 0.23 kg per tonne (which is the same as half a pound per tonne, or one pound per two tonnes).[272] Undertaking #32A explained that the earlier figure of 0.4 kg per tonne used in the EIS was based on "a generic and typical value used in the industry" and was not site-specific; 0.23 kg per tonne was "considered adequate for the specific rock characteristics on-site". In short, the Panel was incorrect to state that there was an inconsistency between Bilcon's blasting expert and its responses to Undertakings. Bilcon provided only one estimate throughout the hearings (0.23 kg per tonne), which was less than the generic estimate that had been included in the initial EIS document.

[269] Panel Report at p. 28.

[270] Environmental Impact Statement of the Whites Point Quarry and Marine Terminal Project (March 2006), s. 11.2.5 (Chapter 11, p. 14).

[271] Whites Point Quarry and Marine Terminal Project, Public Hearings: Transcript (June 20, 2007), Vol. 4 at p. 672.

[272] Bilcon responses to Undertakings #32 and #32A.

447. I find it surprising that the Panel rejected Bilcon's expert's estimate of 0.23 kg and instead substituted its own estimate of 0.45 kg:

> The Panel does not find the value of 0.23 kg of ANFO per tonne of basalt blasted credible. Basalts are denser and more cohesive than virtually any other rock type commonly quarried. The amount of explosives needed to fragment massive basalts would be expected to lie above the generic value rather than below it. In view of the uncertainties about volumes of explosives, the Panel considers it advisable to use precaution and estimates that the amount of explosives used to fragment one tonne of rock could be 0.45 kg. Each blast would then involve 35 tonnes of ANFO with 805 kg in each blast hole, yielding an annual total expenditure of about 900 tonnes of explosives.[273]

448. The Panel appears to have accepted the scepticism of "a retired mining engineer" on the topic of blasting and then come up with an estimate of 0.45 kg on its own:

> During the hearings, a retired mining engineer questioned the Proponent's blasting design and noted inconsistencies between the stated quantities of ANFO that would be used, the number of blasts per year and the annual production rate of aggregate.[274]

449. Although the retired mining engineer is not named in the Panel Report, a review of the transcripts reveals him to be Ashraf Mahtab.[275] Mr. Mahtab was not an impartial, independent expert. In fact he was a leading opponent of the WPQ project from the beginning, and served on the Board of Directors of the Partnership for Sustainable Development of Digby Neck & Islands Society, one of the main anti-quarry groups.[276]

450. Moreover, although Mr. Mahtab indicated that he had obtained graduate degrees in Mining Engineering and Geological Engineering, he also admitted he was not an expert in blasting. During the hearing he said, "I'm not a blaster. I have a background in mining".[277] When asked whether he had any personal experience with blasts of the magnitude being discussed, he stated "No, I don't have. As I mentioned earlier, I have not been involved in blasting."[278]

451. It was clearly inappropriate for the Panel to reject the evidence of Bilcon's blasting expert, who had decades of experience with blasting,[279] in favour of the

[273]Panel Report at pp. 28-30.

[274]Panel Report at pp. 28-29.

[275]Transcript at pp. 2400-2459.

[276]Letter from Mr. Mahtab to Kerry Morash, Minister, Nova Soctia Department of Environment & Labour, dated May 13, 2004 (CP05062, p. 015568).

[277]Transcript at p. 2425

[278]Transcript at p. 2432.

[279]Mr. Melick's CV was included with Bilcon's reply to Undertaking #6.

evidence of a well-known opponent of the project with no blasting experience. Besides, it appears that the Panel mischaracterizes Mr. Mahtab's evidence. In fact Mr. Mahtab did not point out any "inconsistencies between the stated quantities of ANFO that would be used". When asked by the Panel how many pounds of ANFO were needed to produce a tonne of rock, Mr. Mahtab responded, "it's one pound for almost two tonnes. This is what the blaster [Mr. Melick] was saying, I think".[280]

452. In summary, the Panel unfairly criticized Bilcon for providing inconsistent estimates of the amount of explosives at the hearing, when in fact Bilcon consistently used the estimate of 0.23 kg (half a pound) per tonne. It appears that the Panel simply got confused. More seriously, the Panel substituted its own estimate of 0.45 kg per tonne which contradicted the only expert evidence available to it (the evidence of Mr. Melick) and indeed was not supported even by Mr. Mahtab, who used the *same* estimate as Mr. Melick. The 0.45 kg estimate was not "precautionary", it was simply a guess.

453. The Panel's conclusion that Bilcon may have underestimated by half the amount of explosives to be used was then invoked throughout the Panel Report to cast significant doubt upon various aspects of the Project, and appears to have had a considerable impact on the Panel's ultimate recommendations. The following excerpts from the report provide examples of where "uncertainties" with respect to blasting led to an unfavourable finding:

> Uncertainties about the Project's blasting requirements and protocols made it difficult for the Panel to determine the configuration and size of the area over which wildlife would be impacted by operational noise and blasting, and to fully characterize specific impacts on nesting or migrating birds, mammals etc.[281]

* * *

> From the information the Proponent provided, the Panel is not convinced that a single production blast every two weeks would be sufficient to meet production targets without violating NSEL guidelines on peak particle velocities at the nearest structures not on the site.[282]

* * *

> The Panel recognizes that limited data about salmon responses, along with the inability to adequately predict blasting impacts, results in a high

[280]Transcript at p. 2424.
[281]Panel Report at p. 42.
[282]Panel Report at p. 42.

> degree of uncertainty about possible behavioural effects on this endangered population.[283]

454. The blasting issue is perhaps the most striking example, but certainly not the only example, of where the Panel disregarded or misconstrued Bilcon's expert evidence on technical aspects of the project and instead drew its own unsubstantiated conclusions.

2.6 <u>The Panel rejected the expert evidence of government witnesses where that evidence supported the project</u>

455. Not only did the Panel reject the evidence put forward by Bilcon, it also rejected or failed to give appropriate weight to some of the evidence put forward by expert government bodies where that evidence tended to be supportive of the project. For example, the Panel made the following conclusions with respect to Whales, Porpoises and Leatherback Turtles:

> The effects of blasting on marine mammals are poorly understood. The potential impact is difficult to characterize with a reasonable degree of certainty without the benefit of a test blast and greater clarity as to the exact nature of planned operational blasting. Very little is known about the deleterious effects of exposure to noise in marine mammals. Several outcomes are possible: animals sighted within either the 500 m or 2500 m safety zone (depending on the species) could bring about a delay of blasting until the animals moved outside that zone; animals unobserved on the margin of the zone might be encouraged by a blast to move to less noisy surroundings where they would be less available to the local whale watching industry, or they could be mildly annoyed, experience behavioural effects such as alterations in feeding, socializing, logging (resting at the surface) and avoidance behaviour; undetected animals in closer to the blasting could become confused, disoriented and undergo serious alteration in their normal behaviour; some could receive a sharp overpressure that could affect their internal organs and result in slow or immediate death. The Panel believes that direct physical harm and behavioural effects that could undermine survival rates of critically endangered species must be avoided. Hence, the requirement for mitigative measures well beyond those proposed by the Proponent would qualify this as an adverse environmental effect.[284]

456. This conclusion was contrary to the statements made by DFO in its response to an undertaking given with respect to invasive species.[285] DFO made the following submission with respect to the impacts on right whales:

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[283]Panel Report at p. 63.

[284]Panel Report at p. 64.

[285]Undertaking # 31, June 29, 2007.

> The proposed mitigation (monitoring a safety zone for marine mammals prior to blasting) is expected to substantially reduce the risk of a blast occurring while a whale is within a 500m radius during good weather conditions. Given the location of the quarry and the frequency of blasting, physical harm to right whales is considered very unlikely if mitigation is applied rigorously. . . . The ability of the Proponent to monitor a safety zone larger than 500 m is uncertain, and therefore behavioural effects to right whales are considered possible. However, these effects would not necessarily be adverse.[286]

457. With respect to leatherback turtles, the DFO submitted that, "given the infrequent occurrence of this species in the project area, the likelihood of harmful effects to this species from blasting is thought to be low."[287]

458. Another example of where the Panel disregarded government experts is the Panel's conclusion regarding iBoF salmon:

> The Panel recognizes that limited data about salmon responses, along with the inability to adequately predict blasting impacts, results in a high degree of uncertainty about possible behavioural effects on this endangered population.[288]

459. This statement is inconsistent with the conclusion submitted by the DFO that mitigation measures are expected to effectively prevent harm to this species.[289]

460. Likewise the Nova Scotia Department of Environment and Labour did not tell the Panel it anticipated any significant adverse environmental effects that could not be mitigated. As mentioned in section 2.3(b), above, the NSDEL explained to the Panel that where there were concerns, these could be addressed through terms and conditions imposed through the approvals process.

2.7 The Panel doubted the project's viability

461. I find it perplexing that the Panel let its own doubts about the economic viability of the WPQ project – which were not substantiated by the evidence – colour its analysis. The Panel states several times in its report that it questions whether the project can really proceed as proposed. The Panel summarized these doubts in the Executive Summary:

> The Panel was left with questions about the viability of the Project over the proposed 50-year lifespan. Firstly, the Proponent has not been able to acquire the provincially owned Whites Cove Road allotment which bisects

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[286] Undertaking # 31, June 29, 2007 (emphasis added).
[287] Undertaking # 31, June 29, 2007.
[288] Joint Review Panel Report, p. 63.
[289] Undertaking # 31, June 29, 2007.

> the productive portion of the property. Secondly, some property owners are currently reluctant to grant permissions that would allow the Proponent to blast within 800 m of structures they own. Thirdly, an increase of the proposed 30 m coastal buffer zone to 100 m would further reduce the potentially available resource. These restrictions could shorten the life of the reviewed quarry to approximately 16 years or less, unless quarrying was extended into adjacent properties already owned by the Proponent. The proposal before the Panel did not address such a contingency, or the substantial alterations in the operational layout and the potential environmental effects it would entail.[290]

462. After the Panel released its report, Bilcon wrote to the Nova Scotia Minister of Environment and Labour, the Honourable Mark Parent, and pointed out that it had not had an opportunity to rebut the Panel's unfounded assumptions about the project's viability:

> Although the Panel was comprised of three academics, with no particular legal or business experience, it concluded that the project was not economically viable, and that any mitigating measures would simply be too costly. Having little or no practical experience in developing quarries, the Panel was quite frankly not qualified to come to these conclusions, especially since it had no factual basis on which to do so, and did not allow us to respond to its assumptions. If we did not think the project was economically viable, we would not have invested the effort, years, and millions of dollars we have. In any case, Minister, the public policy of Nova Scotia is for you and not the Panel to make, just as our investment decisions are for us and not the Panel to make.[291]

463. Bilcon added that:

> The Panel consistently ignored important information it was given, and drew unwarranted conclusions; like its conclusion that we would not be able to utilize the Whites Cove Road, when the Department of Transportation and Public Works showed how this could be done.[292]

464. The Panel's second-guessing of the economics of the project is especially strange given that the Panel acknowledged that it had no expertise to do so: "The Panel is not in a position to draw conclusions on the economic viability of the Project, as numerous factors other than operating costs and the price of stone in New Jersey need to be considered."[293]

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[290] Panel Report at p. 13. See also, for example, pp. 24-25 and 82.

[291] Letter from Paul Buxton to the Honourable Mark Parent, November 16, 2007 (CP12160 and CP10644, pp. 037333-033540 at p. 037335) (emphasis added).

[292] *Ibid.* at p. 037335.

[293] Panel Report at p. 82.

465. Moreover, an examination of the Panel hearing transcripts supports Bilcon's assertion in its letter to the Minister that the Panel jumped to conclusions about the viability of the project in the absence of evidence – or even despite evidence to the contrary. Let us consider each of the three reasons put forward by the Panel for questioning the project's viability. First was the concern that Bilcon would not be able to access Whites Cove Road, an abandoned road running through the property which was owned but no longer maintained by the provincial government. The particular worry, based on the transcripts, appears to be that the proponent would be forced to cut around the road, leaving an elevated roadway running between two excavations. However, the Panel asked Bilcon's representative, Paul Buxton, directly whether obtaining the roadway was critical to proceeding with the project:

> Mr. GUNTER MUECKE [Panel Member]: And if it remains provincial property, how will it affect the viability of the quarry operations?
>
> What you're dealing with is basically two separate entities separated by what will in the future become a pedestal on which the road sits.
>
> Mr. PAUL BUXTON: Well, it would certainly be an impediment, there's no question about that, and certainly as you know, we did make application to acquire the Whites Cove Road, and it was denied by the Department of Public Works, Transportation and Public Works.
>
> If that situation stays as it is, then of course we will live with it and we have designed around it, and we feel that we can accommodate it.[294]

466. Mr. Buxton later reiterated, "We can live with it".[295]

467. The Panel's second concern was that the 800 m blasting setback from nearby residences would threaten the project's viability. The Panel Report overlooks the fact that this was a concern that had been put directly to Bilcon – and rebutted – during the hearings. The Panel asked Mr. Buxton, whether the project would be viable even if Bilcon could not obtain permission of the owners of structures within 800 m of where blasting would take place. (The Nova Scotia Pit and Quarry Guidelines stipulated that such permission was required.)[296] Bilcon replied that yes, the project would proceed:

> Mr. GUNTER MUECKE: Because the central question on my mind here is if Bilcon is not able to obtain permissions from the remaining property owners, a substantial portion of your property holding, a substantial portion of the resource would not be accessible to you, and my question then is if that state persists, will the quarry be viable?

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[294] Transcript at p. 149 (emphasis added).

[295] Transcript at p. 151.

[296] Panel Report at p. 25.

> Mr. PAUL BUXTON: We believe so. Yes, if setback agreements or the acquisition of properties did not take place prior to contemplating construction date (sic), we would continue with the Project.[297]

468. Despite this answer, and a subsequent undertaking demanded by the Panel and provided by Bilcon illustrating how much rock would be left to extract outside the 800 m setback area,[298] the Panel concluded that the refusal of the neighbours to give permission to blast within the setback area might compromise the viability of the project.[299] In other words the Panel appears to have disregarded Bilcon's evidence on this point, just as it disregarded Bilcon's evidence regarding Whites Cove Road.

469. The Panel's third concern was that increasing the proposed coastal buffer zone from 30 m (which was proposed by Bilcon and was the requirement under the Nova Scotia Pits and Quarries Guidelines) to 100 m (which the Panel believed would offer more protection) would leave Bilcon with too little rock left for the project to be viable. Leaving aside the question of whether the Panel's preference was really supported by the scientific evidence, I note that it does not appear from my review of the transcripts that the Panel ever asked Bilcon whether the expansion of the buffer zone would compromise the project's viability. The Panel's conclusion that it would do so seems to be pure speculation.

470. I note also that in its report the Panel expresses doubts about the affordability of certain mitigation measures. For instance, in respect of wetlands, the Panel says: "Alternative mitigation measures (such as different strategies for developing the site) that might protect the wetland would reduce the amount of the resource that could be extracted and increase project costs, which may not be economically feasible."[300] And in respect of ballast water, the Panel says:

> The Panel believes that the Project carries a reasonable risk of introducing unwanted diseases or invasive organisms to the Bay of Fundy from ballast water. The ships' destination waters in New Jersey are known to carry organisms that may affect a commercially important species and the mainstay of the regional economy. Mitigation measures beyond those codified by Transport Canada are not technically or economically feasible to completely contain the risk at this time. Hence, this must be considered as a potential adverse environmental effect.[301]

471. The Panel further stated that, although generally the mitigation measures proposed by Bilcon might be effective, "in some cases the costs associated with

[297]Transcript at p. 163 (emphasis added).

[298]Undertaking #2 (June 27, 2007).

[299]Panel Report at p. 25.

[300]Panel Report at p. 36.

[301]Panel Report at p. 59 (emphasis added).

mitigation could become prohibitively expensive (thereby undermining the viability of the Project)".[302]

472. As an example of a prohibitively expensive mitigation measure, the Panel mentioned "construction of an artificial breakwater to ensure ship safety". The Panel added that such a breakwater "could seriously alter the local marine ecosystem, creating the potential for significant adverse environmental effects."[303] This is strange, as a review of Bilcon's EIS and the transcripts of the Panel hearing indicates that Bilcon never proposed building a breakwater, and had no opportunity to discuss the potential costs or environmental effects associated with a breakwater.

473. The Panel's doubts about the affordability of mitigation measures appear to be based on speculation. It is hard to imagine that Bilcon would have proposed mitigation measures that were unaffordable, or that it would have chosen to proceed at all with the environmental assessment unless it was reasonably certain the project as a whole would make money.

474. In any event, the viability of the project seems to me a matter that should have been Bilcon's concern and not the Panel's. The Panel could have recommended that terms and conditions be imposed by the appropriate licensing authorities, such as a requirement that Bilcon implement the wetland protection measures the Panel saw fit. If those measures then proved to be impractical, it would have been up to Bilcon to decide whether or not to proceed with the project.

475. What is even more troubling is that these examples of the Panel's failure to take Bilcon at its word, and substituting its own unsubstantiated speculation for the actual evidence, are in my view symptomatic of a wider and deeper problem. The Panel seems to have formed its views about the project early on in the process, and conjured up reasons to support those views that were not supported by the evidence.

2.8 <u>The Panel's consideration of whether the project was "justified in the circumstances"</u>

476. The Panel had no jurisdiction to consider any factor that was not enumerated in its Terms of Reference. In particular, the Panel had no jurisdiction to consider whether the project was "justified", or whether it was in the "public interest" – that is a matter for the government to determine.

[302] Panel Report at p. 96.

[303] Panel Report at p. 96.

(a) The Panel was constrained by the Joint Panel Agreement and the Terms of Reference

477. Both CEAA and the Nova Scotia *Environment Act* provide for the establishment of a joint federal-provincial panel. Both statutes stipulate that the factors to be considered by the joint review panel are those established pursuant to an agreement between the two jurisdictions.[304] CEAA further stipulates that these agreed upon factors must include at least the factors enumerated in s. 16 of CEAA.[305] The Nova Scotia legislation simply says that the two parties may "determine what issues shall be addressed".[306]

478. A Joint Panel Agreement for the WPQ project was signed by the federal Minister of the Environment and the Nova Scotia Minister of Environment and Labour on November 5, 2004. Appended to the Agreement were Terms of Reference setting out the Panel's mandate.[307]

479. The Panel correctly stated that:

> The Joint Panel Agreement and Terms of Reference outline the factors the Panel must consider in preparing its report to the Minister of Environment, Canada, and the Minister of Environment and Labour, Nova Scotia. The review is intended to discharge requirements set out in the *Canadian Environmental Assessment Act* and Part IV of the Nova Scotia Environment Act.[308]

480. The factors set out in the Agreement (and the Terms of Reference which were appended to the Agreement) were the *only* factors that the Panel was authorized to consider. These factors were as follows:

> The Minister of Environment and Labour, Nova Scotia, and the Minister of the Environment, Canada, have determined that the Panel shall include in its review of the Project, consideration of the following factors:
>
> a) purpose of the Project;
>
> b) need for the Project;
>
> c) alternative means of carrying out the Project that are technically and economically feasible and the environmental effects of any such alternative means;
>
> d) alternatives to the Project;

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[304]CEAA, s. 41; *Environment Act*, s. 47.

[305]CEAA, s. 41.

[306]*Environment Act*, s. 47(1)(d).

[307]The Joint Panel Agreement and Terms of Reference comprise Appendix 1 to the Panel Report.

[308]Panel Report at p. 15.

e) the location of the proposed undertaking and the nature and sensitivity of the surrounding area;

f) planned or existing land use in the area of the undertaking;

g) other undertakings in the area;

h) the environmental effects of the Project, including the environmental effects of malfunctions or accidents that may occur in connection with the Project and any cumulative environmental effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out;

i) the socio-economic effects of the Project;

j) the temporal and spatial boundaries of the study area(s);

k) comments from the public that are received during the review;

l) steps taken by the Proponent to address environmental concerns expressed by the public;

m) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the Project;

n) follow-up and monitoring programs including the need for such programs;

o) the capacity of renewable resources that are likely to be significantly affected by the Project to meet the needs of the present and those of the future; and

p) residual adverse effects and their significance.[309]

481. It bears repeating that the factors enumerated above were the only factors the Panel had the lawful authority to consider.[310] It is noteworthy that s. 16 of CEAA makes it clear that although certain factors must be considered by all review panels, other factors may be added at the discretion of the Minister, *not by the*

[309]Terms of Reference, Part III.

[310]The Agreement provides that: “The Report shall include recommendations on all factors set out in section 16 of the Canadian Environmental Assessment Act…” (Article 6.3). Each of the s. 16 factors is reflected in the list of factors in the Terms of Reference, except for paragraph 16(1)(b): “the significance of the effects referred to in paragraph (a)”, i.e. the significance of “the environmental effects of the Project, including the environmental effects of malfunctions or accidents that may occur in connection with the Project and any cumulative environmental effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out”. In other words, the reference to the s. 16 factors in the Agreement does not add anything to the Terms of Reference themselves except to clarify that the significance of the environmental effects must be taken into account.

Panel itself: s. 16(1)(e) provides that "the Minister after consulting with the responsible authority" may require any other relevant matter to be considered by the panel. In other words, the Panel cannot enlarge the mandate set out for it in its Terms of Reference.

482. As noted in the guideline issued by the Minister of the Environment pursuant to s. 58(1)(a) of CEAA, "Procedures for an Assessment by a Review Panel" (November 1997) – which was incorporated by reference in the Terms of Reference for the Panel[311] –"[t]he terms of reference set the bounds of the review, and should serve to clarify expectations for all participants in the process".[312] A Panel may seek clarification or amendment of its Terms of Reference[313], but it may not stray from them.

(b) Justification was not a factor for the Panel to consider

483. The Panel's Recommendation #1 was:

> The Panel recommends that the Minister of Environment and Labour (Nova Scotia) reject the proposal made by Bilcon of Nova Scotia to create the Whites Point Quarry and Marine Terminal and recommends to the Government of Canada that the Project is likely to cause significant adverse environmental effects that, in the opinion of the Panel, cannot be justified in the circumstances.[314]

484. In recommending that the significant adverse environmental effects could not be "justified in the circumstances", the Panel significantly exceeded its jurisdiction. Simply put, the Panel was not asked to make any recommendations or to provide any opinions with respect to justification. That is a matter to be determined exclusively by the Responsible Authorities, with the approval of Cabinet, pursuant to s. 37 of CEAA. As stated in the "Reference Guide: Determining Whether A Project is Likely to Cause Significant Adverse Environmental Effects":

> if there is a determination that the project, taking into account the implementation of appropriate mitigation measures, is likely to cause significant adverse environmental effects, then the RA must also determine whether or not such effects can be justified under the circumstances. The Act is clear that the project may be allowed to proceed if any likely significant adverse environmental effects can be justified in the circumstances. This is the final "test" in the Act.[315]

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[311] Terms of Reference, Part II, para. 11.

[312] "Procedures for an Assessment by a Review Panel", at p. 11.

[313] *Ibid*. at p. 11.

[314] Panel Report, p. 4.

[315] *Supra* note 124 at p. 186.

485. The Panel had only the jurisdiction that was conferred upon it by the Canada-Nova Scotia Agreement and its Terms of Reference. It had no inherent jurisdiction. Nowhere in the Agreement or the Terms of Reference does it say that the Panel may consider justification. The Federal Court has confirmed that a Panel has no jurisdiction to do so: "nothing in the CEAA or the Panel Agreement authorized the Joint Review Panel even to make recommendations about the justification for any effects determined to be significant."[316] That, rather, is a question for the RA to determine.[317]

486. The Federal Court made the same point in *Pembina*:

> Should the Panel determine that the proposed mitigation measures are incapable of reducing the potential adverse environmental effects of a project to insignificance, it has a duty to say so as well. The assessment of the environmental effects of a project and of the proposed mitigation measures occur outside the realm of government policy debate, which by its very nature must take into account a wide array of viewpoints and additional factors that are necessarily excluded by the Panel's focus on project related environmental impacts. In contrast, the responsible authority is authorized, pursuant to s. 37(1)(a)(ii), to permit the project to be carried out in whole or in part even where the project is likely to cause significant adverse environmental effects if those effects "can be justified in the circumstances". Therefore, it is the final decision-maker that is mandated to take into account the wider public policy factors in granting project approval.[318]

487. In WPQ the RAs exacerbated the Panel's jurisdictional error by simply adopting, without reasons – and apparently, without independent analysis – the recommendation of the Panel. The end result was that justification was determined by the Panel, which had no authority to make that determination, rather than by the RAs.[319]

488. This Panel's approach may be contrasted with that of the CEAA Panel in the Prosperity Gold-Copper Mine Project. In that case, the CEAA Panel expressly refused to make any findings or recommendations on justifiability, holding that it had no authority to do so and that it properly fell to the Responsible Authorities:

> The Panel considers that its Terms of Reference were very clear with respect to its mandate on this issue: should the Panel conclude, taking into account applicable mitigation measures, that the Project is likely to cause a significant adverse environmental effect, it shall include in its report information to assist decision makers with respect to the

[316] *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans),* [1998] F.C.J. No. 821, at para. 27.

[317] *Ibid.* at para. 28.

[318] At para. 74 (emphasis added).

[319] See Part III of this report.

> justifiability of any such effect. The Panel itself does not have the mandate to reach a conclusion on justifiability.[320]

489. In my opinion the Prosperity Panel took the correct and only lawful approach to justifiability. It determined that there would be significant adverse environmental effects, but left the assessment regarding justifiability to the federal government (which ultimately decided that these effects could not be justified). The WPQ Panel, on the other hand, overstepped its authority in deciding the justifiability issue.

(c) The "public interest" was not a factor for the Panel to consider

490. The Panel made a similar jurisdictional error in determining whether the project would be in the "public interest".

491. The Panel stated: "The Panel's mandate was to determine whether the Project presented by Bilcon would result in significant adverse or beneficial physical, biological or socio-economic environmental effects and would be in the public interest."[321]

492. That emphatically was *not* the Panel's mandate. The Panel's mandate was set out in its Terms of Reference. The Terms of Reference made no mention of the public interest, or weighing the benefits and burdens of the project. The Panel therefore had no jurisdiction to reach the following conclusion:

> Based on an analysis of the benefits and burdens of the Project, the Panel has concluded that the burdens outweigh the benefits and that it would not be in the public interest to proceed with the Whites Point Quarry and Marine Terminal development.[322]

493. CEAA makes no mention of the "public interest" as a factor in environmental assessment. The term does appear in the Nova Scotia *Environment Act*, but not in the part of the Act dealing with environmental assessment. Nowhere does the provincial Act say that a panel should consider whether a proposal would advance the public interest.

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[320] Report of the Federal Review Panel Prosperity Gold-Copper Mine Project at p. 41, available at: http://www.ceaa-acee.gc.ca/050/documents/46911/46911E.pdf.

[321] Panel Report at p. 4.

[322] Panel Report at p. 4.

(d) The Panel's weighing of the benefits and burdens of the project did not accord with the statutory test

494. The WPQ Panel misunderstood the statutory test in CEAA. Instead, the Panel appears to have been preoccupied with the question of whether the project would make a net contribution to community sustainability:

> The question before the Panel is whether a major quarry and associated marine terminal can coexist with this unique environment in a manner that avoids significant adverse environmental effects, that avoids effects that impair or damage the health of humans or the reasonable enjoyment of life or property, and that makes a net contribution to the sustainability of the region consistent with the spirit and intentions of the concepts advanced at the Earth Conference in Rio in 1992.[323]

495. The degree of social acceptance a project enjoys is relevant information for a Responsible Authority, but as noted, an environmental assessment is not a referendum. The Rabaska Joint Review Panel understood, and respected, the difference between a consultation and a referendum.

496. Environmental assessment can benefit from community input, can improve projects and offer a forum for the airing of community concerns. But it does not create a process of social "licensing". A project cannot be rejected by a panel under CEAA simply because the closest neighbours don't want it in their backyard. This is the classic "NIMBY" ("Not in My Backyard") principle – and in addition to finding no statutory basis in federal or Nova Scotia legislation, decisions would simply never get made if the test was whether the neighbours wanted the project in their backyard.

497. Issues of social equity in relation to controversial industrial projects are rarely simple. Society wants – even demands – the benefits furnished by smelters, nuclear reactors, quarries and liquefied natural gas terminals. Few citizens, however, would volunteer to live next to one. The level at which "net sustainability" is measured, therefore, largely determines the response to a project – the closer one gets to the project site, the more "local" the measurement of "net sustainability", the harder it becomes to balance benefits and burdens, and the more likely the "community" being consulted will reject the project.

498. The Rabaska Joint Review Panel acknowledged the difficulty of siting and making decisions about projects that impose local burdens but bring wider socio-economic benefits:

[323] Panel Report at p. 27.

> Opposition by a majority of the community living in proximity to the project is mainly based on apprehension about risks and the fact that they would be the first to bear the brunt of potential consequences. From this standpoint, an argument based on the principle of fairness would support giving predominant weight to this community's position in regard to the acceptability of the project.
>
> However, extending this approach on a society-wide basis would have the disadvantage of making the conduct of public affairs difficult, if not impossible. This is because the significance of socioeconomic activities (facilities and institutions) to the greater public interest could outweigh local or regional resistance....[324]

499. The Rabaska Joint Review Panel reported differences in public opinion regarding the scale at which sustainable development tradeoffs should be made – do local burdens require local benefits in equal measure? Is it acceptable to impose local burdens on a community in the name of broader socio-economic benefits? At what scale – do the views of those most directly adjacent, within 1 km or 2.5 km, take precedence over the views of others within the municipality? Within the region? Within the province?

500. As noted, the Rabaska Panel recommended that where one municipality's development imposes potentially serious risks on the citizens of another municipality, that better guidelines be generated for panels in order to assess these tradeoffs of benefits and burdens. The Rabaska Panel did not, however, make its decision based on the social acceptability enjoyed by the project – nor could it have done so, given the statutory mandate set out in CEAA.

501. In the case of WPQ, the Panel did not simply flag issues such as the allocation of benefits and burdens for the RAs. Instead, the WPQ Panel took the view that local burdens should be balanced by local benefits, and if they did not, the Project would not merit approval. The shorthand for this view is the concept of net community sustainability, a criterion which the WPQ Panel imposed upon the environmental process of its own initiative, and without statutory authority.

502. In addition to constituting an excess of jurisdiction and a legal error, this filter of net community sustainability also provided a useful subterfuge for a less palatable undercurrent of anti-Americanism, which appears to have run just below the surface throughout the Panel hearings.

503. The WPQ Panel sets out a chart of benefits and burdens at pages 97 and 98 of its Report. A few things are striking. First, the list of benefits is very short, and the list of burdens is very long. Second, the list of burdens is described almost uniformly as "local" or "regional". The Panel observes that "Nova Scotia laws do

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[324] Rabaska Joint Review Panel Report at pp. 173-174.

not require any royalty payments, taxation or fees to be paid for the commercial extraction of basalt".[325] The correlated "benefit" is noted to be *"international",* namely "Corporate access to a reliable resource base that is accessible to ships, thereby helping to keep transportation costs low". Economic benefits from direct annual expenditures are also noted to be "international", with "66% of direct annual expenditures ($13.0 million) will accrue to the international shipping community".[326]

504. It is clear that the "international" benefit is considered a negative for the Project. As the Panel explains, in the section of its report titled "Balancing Benefits and Burdens":

> … only a select number of local recipients would benefit from the Project. Local communities would receive some short-term construction jobs, up to 34 long-term operational jobs, some local expenditures, and municipal property taxes.
>
> The greatest benefits would fall to the Proponent, who could acquire reliable 50-year access to 100 million tonnes of high-quality basalt aggregate that could be moved cheaply and easily to market by ship….
>
> The Panel believes the burdens associated with the proposed Project would be principally local and regional in their focus. …This appears to be an uneven arrangement for local communities, who would experience most of the burdens associated with the proposed project but few of the benefits.
>
> The Panel believes that the sum of these burdens represents a substantial cost for those unlikely to benefit from the Project."[327]

505. The very strong theme conveyed by the WPQ Panel is that the Project is not worthy of approval because it will benefit U.S. corporations and consumers, rather than the local citizens of Digby Neck. It is because the aggregate being extracted is *for export* that it appears so very objectionable, not because aggregate is being extracted in the first place.

506. Under CEAA, "balancing" benefits and burdens is a task that is conferred by law to the Responsible Authority – *not* to the Panel. It is only where a Panel identifies "significant adverse environmental effects" which cannot be mitigated that an exercise of balancing by an RA can be undertaken, namely, can these impacts nonetheless be "justified in the circumstances"? The Panel is not tasked with "balancing" socio-economic or political "tradeoffs". It is tasked with identifying environmental effects, determining their significance on a scientific basis, and assessing whether they can be appropriately mitigated. The WPQ Panel

[325] Panel Report at p. 98.

[326] Panel Report at p. 97.

[327] Panel Report at p. 95-96.

overstepped its mandate and fundamentally misunderstood its role. In so doing, it committed a jurisdictional error.

507. In fairness to the proponent, any discussion of "net community sustainability" must also note that had the quarry been destined to help build Nova Scotia's own roads, *it would not have merited a provincial environmental assessment at all,* let alone a panel review. Nova Scotia's environmental assessment regulation specifically exempts quarries intended to supply aggregate for regional roads from EA altogether.[328] The WPQ Panel does not mention this exemption during its discussion of "net sustainability" or regional equity.

508. Apart from the extraction of aggregate the WPQ Project involved shipping – an average of fewer than one ship per week – and shipping is hardly a controversial or unusual undertaking in Nova Scotia, and hardly one to merit a joint review panel.

509. An objective reader of the WPQ Panel Report would therefore be forgiven for concluding that it was not the nature of the activity – extraction of aggregate – or the potential environmental effects of this activity that came under the microscope during this panel review. Rather, it was the location of the economic benefit.

510. What the Panel appears to have found objectionable was not that this aggregate was being extracted, but that U.S. consumers or corporations were poised to benefit. What is particularly ironic about the Panel's focus on "net community sustainability" is that, if the WPQ aggregate had been destined to help build local roads (and not involved the construction of a dock for shipping the aggregate that triggered the federal CEAA process), "community concern" over an altered landscape or the incongruity of an extractive use in a historically rural setting would not have been considered. Neither would questions of "net community sustainability" have been considered – because the Project would have been exempt from environmental assessment altogether.

2.9 Concerns regarding the selection of Review Panel members

511. Prior to the establishment of a Joint Review Panel, both governments had clearly been sensitive to and anxious about vocal public opposition to this project. While this may have been an overriding concern to these governments, a fair and objective process was still required as this EA was being carried out pursuant to statutes of both CEAA and Nova Scotia *Environment Act* and because the

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[328]The Environmental Assessment Regulations provide that "a pit or quarry established solely to provide fill or aggregate for road building or maintenance contracts with the Nova Scotia Department of Transportation and Infrastructure Renewal" are exempt from environmental assessment. See *supra*, note 27.

proponent had a significant financial interest both in carrying out the EA and its outcome.

512. In order to ensure a transparent and objective process, it was in my opinion incumbent on these governments in the circumstances of this case to:

(a) have ensured that Review Panel members would not be allowed, as they were by these governments, to write open-ended environmental impact statement ("EIS") requirements which both ignored or misused statutory criteria and which were difficult if not impossible for the proponent to satisfy (and which were not satisfied, in the view of the WPQ JRP); and

(b) have ensured that persons appointed as members of the Review Panel had practical regulatory experience and insights as to how EA processes work in the context of other regulatory programs.

513. Unfortunately both for the proponent and the integrity of the EA process, the two governments allowed the WPQ panel members to establish novel EIS requirements which ignored or misconstrued applicable statutory criteria so that the Panel's criteria was essentially tailored to ensure a facility of this nature could not be approved in this community. These issues are elaborated earlier in this Part of my Expert Report.

514. Further, these governments appointed panel members who were apparently not experienced, and in any event clearly not prepared to be comfortable with standard EA evaluation methods or standard EA approaches and who therefore failed to apply appropriate considerations accepted in other EA cases by Nova Scotia and Canada in their approach to the project's evaluation.

515. In my view, when the particular background of this matter is considered, the federal and provincial governments' choice of panel members raises concerns. For example, had the WPQ project been evaluated by a panel comprised of persons with regulatory experience in relation to industrial facility operations, as well as environmental expertise, as would have been appropriate, such a panel could reasonably be expected to appreciate that an EA is done in the early stage of project planning, and therefore not criticize the proponent, as the WPQ panel repeatedly did, for not having "all the answers" at that stage; and as a corollary, to accept, rather than reject, as the WPQ panel did, that it was appropriate to impose requirements for further studies, mitigation measures and follow-up programs as a condition of approval, as has been the case in all other quarry applications undergoing EA approval in Nova Scotia at this time (and currently).

516. To the extent governments appointed two panel members (Robert Fournier and Gunter Muecke) who had some previous involvement with a key Nova Scotia

environmental advocacy group, the Ecology Action Centre,[329] and also appointed a third panel member (Jill Grant) who had developed arguments for greater community participation in decision-making as part of her academic expertise,[330] it was reasonably foreseeable that governments were expecting the Bilcon application would be evaluated with particular empathy to a position advocated by the Ecology Action Centre and/or a position advocating community control regarding new development.

517. In fact, the Ecology Action Centre did advocate a position that the WPQ was inconsistent with the community's values,[331] and this position became central to the Panel's decision.

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[329]Both Mr. Fournier and Mr. Muecke had served on the Board of the Ecology Action Centre (CP04914, p. 015022 and CP04915, p. 015030).

[330]See, for example, Jill Grant, "From 'Human Values' to 'Human Resources': Planners' Perceptions of Public Role and Public Interest", *Plan Canada* 29(6): 11-18 (1989).

[331]For example, Jennifer Graham of the Ecology Action Centre told the Panel: "based on the many traditional values, and the visions for the future, which include eco-tourism, quality of life, ongoing traditional fishery, we think the quarry is an incompatible use": Transcript at p. 2480.

PART III: THE DUTY OF GOVERNMENTS UPON RECEIPT OF THE PANEL REPORT

3.1 Summary of Part III

518. **Government actions following the release of the Panel Report appear to be contrary to law in several respects.**

519. **First, Canada should have informed the Panel it had no legal authority to reach conclusions about whether the impacts of the project could not be "justified". Under CEAA this was a matter that only the Responsible Authorities for the project had the authority to determine. Rather than asking the Panel to reconsider its recommendation, Canada not only accepted but acted on that recommendation.**

520. **Canada should also have recognized that the Panel's recommendation to reject the project turned on the finding that the project's effects on community core values would be a significant adverse "environmental effect", a finding which was legally wrong. This is another reason why Canada should have sent the report back to the Panel.**

521. **Further, there is no evidence the RAs carried out their required statutory duty to conduct an independent analysis of whether there were significant adverse environmental effects that could not be justified. Rather, the RAs appear to have relied on the Panel's conclusion – which it had no jurisdiction to reach – that the effects of the project could not be "justified".**

522. **Moreover, both Canada and Nova Scotia acted unfairly towards the proponent in carrying out their respective statutory decision-making following the WPQ report, in particular:**

    (a) **Although federal officials presented evidence to the Panel, they never stated it was their opinion that the project would cause "significant adverse environmental effects" after mitigation was applied, or that these could not be justified. While they raised issues, none of these were expressed in terms that indicated they had their own basis to conclude the project should not be approved;**

    (b) **Nova Scotia officials testified that a number of matters of concern to the Panel could be and were normally taken care of in Nova Scotia by the application of terms and conditions;**

    (c) **However, following the hearing, the project was rejected as being unacceptable by both governments. The RAs, the federal Cabinet**

and the Nova Scotia Minister failed to disclose to the proponent following the hearing that they had reached conclusions contrary to those their officials had previously provided publicly to the JRP and also provided to Bilcon. The RAs and Minister further refused to provide Bilcon the opportunity to be heard by them in respect of their changed position rejecting the Bilcon project;

(d) **Canada failed to comply with its legal duty to provide reasons for rejecting the WPQ project. It said merely, without explanation, that it accepted the WPQ Panel's recommendations.**

3.2 The decisions of the federal and provincial governments to accept the Panel recommendations were based on the flawed Panel Report

523. For the reasons outlined in Part II of my report, the Panel Report was fundamentally problematic and flawed. In particular, the Panel's recommendation to reject the project turned on the finding that the project's effects on community core values would be a significant adverse environmental effect, a finding which was legally irrelevant and unsupported by the evidence.

524. It should be reiterated that this was the *only* significant adverse effect that the Panel determined would be likely. Although the Panel raised other concerns, such as the effects of blasting on marine mammals, it ultimately did not conclude that, taking into account mitigation measures, any of those concerns amounted to a likely significant adverse environmental effect.

525. The case law is clear that where the government relies on a Panel Report which itself was flawed, the government's decision cannot stand. As the Federal Court of Appeal held in *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans)*:

> … the federal response does not supersede the panel report, nor can it, as the respondents suggest, potentially cure any deficiencies in the panel report. The two are separate statutory steps with distinct purposes and functions.[332]

526. The Federal Court further explained in *Pembina* that the government's decision will take place "in a vacuum" unless the Panel has done its job properly:

> … tasked with conducting a science and fact-based assessment of the potential adverse environmental effects of a proposed project. In the

[332] *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans* [1998] F.C.J. No. 1746 at para. 19.

absence of this fact-based approach, the political determinations made by final decision-makers are left to occur in a vacuum.[333]

527. The Panel's recommendation to reject the WPQ project was not based on a "science and fact-based assessment of the potential environmental effects" – it was based on the Panel's view that the project would conflict with community core values. By accepting the Panel's recommendation at face value, the federal government merely endorsed a legally flawed process.

528. The Panel's conclusion was also fundamentally flawed in that it had no jurisdiction to reach a conclusion that such effect could not be "justified". In accordance with CEAA s. 37 this was a conclusion only the RA is entitled to make.

3.3 The federal government did not conduct an independent analysis of the proposal

529. Once the Panel released its Report, the federal government was required to formulate a response to the Report in accordance with the Canada-Nova Scotia Agreement establishing the Joint Panel[334] and s. 37 of CEAA as it operated at the relevant time (early 2003), which read:

> 37. (1) Subject to subsection (1.1), the responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the report submitted by a mediator or a review panel or, in the case of a project referred back to the responsible authority pursuant to paragraph 23(a), the comprehensive study report:
>
> (a) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate,
>
> (i) the project is <u>not likely to cause significant adverse environmental effects</u>, or
>
> (ii) the project is <u>likely to cause significant adverse environmental effects that can be justified in the circumstances,</u>
>
> the responsible authority <u>may exercise any power or perform any duty or function that would permit the project to be carried out</u> in whole or in part and shall ensure that those mitigation measures are implemented; or

[333] At para. 72.

[334] Article 6.6 of the Agreement states:

The Responsible Authority shall take into consideration the Report submitted by the Panel and, with the approval of the Governor in Council, respond to the Report. Then, the Responsible Authority shall take one of the courses of action provided for in subsection 37(1) of the *Canadian Environmental Assessment Act* that is in conformity with the approval of the Governor in Council.

(b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part.

Approval of Governor in Council

(1.1) Where a report is submitted by a mediator or review panel,

(a) the responsible authority shall take into consideration the report and, with the approval of the Governor in Council, respond to the report;

(b) the Governor in Council may, for the purpose of giving the approval referred to in paragraph (a), require the mediator or review panel to clarify any of the recommendations set out in the report; and

(c) the responsible authority shall take a course of action under subsection (1) that is in conformity with the approval of the Governor in Council referred to in paragraph (a).

530. In summary, this meant that the Responsible Authorities for the WPQ project (namely, DFO and Transport Canada) could, after taking into consideration the Panel Report, exercise their authority to permit the project to be carried out if they determined that:

(i) The project is not likely to cause significant adverse environmental effects (with or without mitigation); or

(ii) The project is likely to cause significant adverse environmental effects that can be justified in the circumstances.

531. However, if the RAs determined that the project was likely to cause significant adverse environmental effects that *cannot be justified in the circumstances*, they were prohibited from issuing any approvals or exercising any other statutory power to enable the project to proceed.

532. The three-page Federal Response was issued on December 17, 2007. It said:

The Joint Review Panel's recommendations to the Government of Canada are addressed through this federal response, as approved by the Governor in Council, and in consultation with other federal agencies, pursuant to subsection 37(1.1) of CEAA.

In preparation of this Government of Canada Response, DFO and TC, as the RAs under CEAA, carefully considered the report submitted by the Joint Review Panel. The Government of Canada accepts the conclusion

> of the Joint Review Panel that the Project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances.
>
> Under subsection 37(1) of CEAA, DFO and TC shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the Project to be carried out in whole or in part.
>
> Paragraph 37(1.1)(c) indicates that the RAs shall take a course of action that is in conformity with the approval of the Governor in Council. With regards to the course of action decision, following Governor in Council approval of this response, DFO and TC will not be issuing any subsection 35(2) Fisheries Act authorizations.[335]

533. In respect of the Panel's key recommendation to the federal government, the Federal Response said, without any further elaboration:

> The Government of Canada supports the recommendation of the Panel "that the Project is likely to cause significant adverse environmental effects that, in the opinion of the Panel, cannot be justified in the circumstances."

534. The Federal Response did not specify whether the federal government supported the Panel's finding that the project's impact on community core values was a relevant and indeed sufficient ground for rejecting the project. Nor did it specify why the federal government agreed that the project could not be justified in the circumstances.

535. As required by s. 37(1.1), the RAs obtained the approval of the Governor in Council (i.e. the federal Cabinet) for the Government Response. On December 13, 2007, the federal Cabinet issued Order in Council PC 2007-1965, which read in full:

> Her Excellency the Governor General in Council, on the recommendation of the Minister of Fisheries and Oceans and the Minister of Transport, Infrastructure and Communities, pursuant to paragraph 37(1.1)(a) of the *Canadian Environmental Assessment Act*, hereby approves the response of the Government of Canada to the Environmental Assessment Report of the Joint Review Panel on the Whites Point Quarry and Marine Terminal Project.[336]

536. In my opinion there are fundamental irregularities in the manner in which the Federal Response was formulated.

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[335] CP13155-57, pp. 040585- 040587 (emphasis added).

[336] Order in Council PC 2007-1965, December 13, 2007.

537. First, Canada should have informed the Panel it had no legal authority to reach conclusions about whether the impacts of the project could not be "justified". Under CEAA this was a matter that only the responsible authorities for the project had the authority to determine. Rather than asking the Panel to reconsider its recommendation, Canada not only accepted but acted on that recommendation.

538. Second, it is critical to note that, pursuant to s. 37(1)(b) of CEAA, before determining that it cannot exercise any power to allow the project to proceed, the RA – entirely independently of the Panel – must, "taking into account the implementation of any mitigation measures that <u>the responsible authority considers appropriate</u>", arrive at the conclusion that "the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances".

539. The Federal Response is not meant to be simply a rubber stamp of whatever the Panel has recommended. Rather, the RA must conduct its own independent analysis, taking into consideration the Panel's views but not beholden to them. In particular, the RA must take into account mitigation measures that the RA itself – not the Panel – considers appropriate. This is crucial, because as we have seen, the Panel in this case took the position that there were *no* sufficient mitigation measures in respect of what the Panel termed the critical "VEC", namely community core values.

540. I would have expected to find in Canada's productions evidence of an independent analysis performed by DFO and/or Transport Canada which demonstrates that they carried out their statutory duties under s. 37(1)(b). In particular, I would have expected to see:

- DFO and Transport Canada records of the "mitigation measures" they considered could be implemented
- records showing that, after identifying such mitigation measures, they determined what the "significant adverse environmental effects" would be
- records regarding the criteria they applied to arrive at the decisions that such "significant adverse environmental effects" could not be "justified in the circumstances"
- briefing notes to the Fisheries Minister and Transport Minister on these issues

541. I have reviewed the records produced by Canada but have not seen any such records. I understand that yet more records may be produced by Canada. I may need to revisit my analysis of the government response if any relevant records are included.

542. The lack of any actual analysis would confirm that the RAs did not do the independent thinking that they ought to have done, and suggests that it was their intention from the beginning to use the Panel for political cover, i.e. as a way to make the rejection of the project seem neutral and apolitical (and that the Panel also knew this, insofar as the Panel decided to go beyond their jurisdiction and conclude impacts could not be "justified").

543. Examining the provincial response to the Panel Report brings the deficiencies in the federal response into greater focus. Following the release of the report, the Nova Scotia Minister of Environment by letter dated November 20, 2007 considered the recommendation of the Panel that he reject the WPQ proposal because the project was likely to cause significant adverse environmental effects that cannot be justified. The Minister stated:

> Ultimately, under s. 40 of the *Environment Act* and under the terms of the Joint Agreement signed November 3, 2004, it is for the Minister of Environment and Labour to make the final decision of whether or not to approve the project.[337]

544. The Nova Scotia Minister went on to state what he considered to be the purpose of the environmental assessment and after stating that he considered certain factors he indicates that he is not approving the project in accordance with s. 40 of the *Environment Act*:

> I have arrived at my decision following careful consideration of the Panel's report. I have determined that the proposed project poses a threat of unacceptable and significant adverse effects to the existing and future environmental, social and cultural conditions influencing the lives of individuals and families in the adjacent communities.

545. At least in that statement and in the Nova Scotia Minister's letter there is an inference of some independent decision making with respect to whether or not the recommendations of the Panel should be accepted or not, and some articulation of the Minister's independent judgment and rationale for making his separate decision.

546. This is to be contrasted with the federal process wherein the Government of Canada response to the Panel Report was simply to parrot the words of the Panel Report. In other words, the federal approach did not expressly consider any further mitigation measures, did not say what would be or would not be "justifiable" impacts and contained no separate degree of analysis. This is a concern from an administrative law perspective.

547. Still, I would have expected the Nova Scotia Minister to grant Bilcon's request for a meeting following the release of the Panel's report. Bilcon wrote to the Minister

[337] Letter from Minister Mark Parent to Paul Buxton, November 20, 2007 (CP30613, p. 711181).

no less than three times to express its concerns with the report and for an opportunity to provide further information to the Minister.[338] In a letter dated November 8, 2007, Bilcon stated that:

> The Joint Review Panel Report is fundamentally flawed and is not based on sound science and facts. The Report does not apply the analytical framework established by the applicable legislation and guidelines, and makes far reaching recommendations that are well beyond the Panel's mandate. The Report ignores important information provided by Bilcon and adopts new rules and standards without providing any opportunity for Bilcon to respond.

548. The Minister, however, refused to discuss the Panel's recommendations with Bilcon, or to allow his officials to do so. Likewise the federal Minister of the Environment refused to grant Bilcon a meeting.[339]

3.4 The federal government did not provide reasons for rejecting the WPQ project

549. As a matter of administrative law, it was an error for the RAs not to provide any analysis or reasons of their own, and simply to parrot the words of the Panel in the Federal Response. The RAs had a duty to provide reasons for rejecting the WPQ project. As the Federal Court stated in *Schwarz Hospitality Group Ltd. v. Canada (Minister of Canadian Heritage*), "[i]f the responsible authority rejects the environmental assessment pursuant to section 20 of the Act, he or she will be required to provide to the leaseholder reasons justifying such a rejection."[340]

550. In *VIA Rail Canada Inc. v. National Transportation Agency (C.A.)*, the Federal Court of Appeal highlighted the importance of giving reasons and set out minimum requirements as to what should be included. The Court explained that:

> The duty to provide reasons is a salutary one. Reasons serve a number of beneficial purposes including that of focusing the decision maker on the relevant factors and evidence.[341]

551. The Court added that "[r]easons also provide the parties with the assurance that their representations have been considered" and they "…allow the parties to effectuate any right of appeal or judicial review that they might have."[342] The Court emphasized that reasons are particularly important in regulated industries because "the regulator's reasons for making a particular decision provide

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[338] Letters from Paul Buxton to the Honourable Mark Parent, October 29, 2007 (CP12158, p. 037330), November 8, 2007 (CP12159, p. 037331) and November 16, 2007 (CP12160, p. 037333).

[339] Bilcon wrote to the federal Minister on November 21, 2007 to request a meeting (CP10644, p. 033539).

[340] 2001 FCT 112 at para. 45.

[341] [2001] F.C.J. No. 1685 at para. 17.

[342] *Ibid.* at paras. 18-19.

guidance to others who are subject to the regulator's jurisdiction. They provide a standard by which future activities of those affected by the decision can be measured."[343]

552. Regarding the adequacy of reasons, the Court held:

> The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors.[344]

553. Although it is arguable whether the Nova Scotia Environment Minister's letter met this standard, in my view the Federal Response clearly failed to do so. As discussed above, the reader of the Federal Response is left wondering what exactly the federal government determined would be the significant adverse environmental effects of the WPQ project, why these could not be mitigated and why those effects were not justifiable. It is no answer to say that the Federal Response adopted the Panel's reasons: first, because the Panel's reasons were themselves based on irrelevant factors and arrived at only in exceedance of the Panel's lawful jurisdiction, and second, because the RA has a duty under CEAA to conduct an independent analysis of its own, and in particular to consider any mitigation measures, whether or not those measures were considered by the Panel.

3.5 <u>Government decisions to reject the project were not consistent with their officials' position before the Panel – neither Government told the Panel that the WPQ project was unacceptable</u>

554. The acceptance of the Panel recommendations by the RAs was surprising and in essence a conflicting position to that expressed by them to the Panel. These RAs did not make any submissions to the Review Panel or provide any evidence to them which concluded that the project would result in significant adverse environmental effects after taking into account mitigation measures. Each of the RAs prepared PowerPoint presentations, made oral submissions and provided the Panel with responses to specific undertakings. Neither of the RAs stated that the project would result in significant adverse environmental effects. Neither of the RAs told the Panel the WPQ project should be rejected.

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[343] *Ibid.* at para. 20.

[344] *Ibid.* at para. 22 (footnotes omitted).

555. Similarly, no one from the Nova Scotia government told the Panel that the WPQ must be stopped, and yet the Nova Scotia government refused to allow the project to proceed.

556. This fundamental disconnect between the political decisions after the hearing and the evidence of government officials at the hearing is a prime example of how the EA process was misused in this case to the clear disadvantage of Bilcon.

PART IV: CONCLUDING REMARKS

557. In this report I have identified what I regard as serious irregularities in the environmental assessment process for the WPQ project, including instances where the Joint Review Panel exceeded its mandate.

558. To summarize very briefly, in my view the WPQ project should not have been referred to a panel hearing in the first place. No similar project has ever been subjected to a CEAA panel hearing or a joint review panel hearing. It would appear that the referral to a panel was motivated at least in part by political considerations. Other quarry and marine terminal projects which enjoyed government support, such as Belleoram and Aguathuna, did not have to undergo a panel review.

559. Once the WPQ project was referred to the Panel, the Panel disregarded its mandate, which was circumscribed by statute and by its Terms of Reference. The Panel fundamentally misconstrued its role, and insisted on a level of detail and certainty that is normally left for the licensing stage. Rather than recommend terms and conditions and follow-up programs to address any uncertainties surrounding the project, which is the norm in environmental assessment, the Panel simply recommended the outright rejection of the project. This recommendation was premised on the Panel's erroneous view of its own mandate – it ought to have left the question of whether the project was justifiable (or in the public interest) to government decision makers.

560. Perhaps most concerning of all is that the Panel's recommendation was ultimately based on one key finding: that the project would result in unacceptable impacts to "community core values". The community's values were simply not a factor that should have been taken into account in the Panel's assessment of the *environmental* effects of the project.

561. The Panel's errors were compounded by the failure of government decision makers to undertake an independent analysis of the environmental effects of the project after the implementation of mitigation measures – and whether these effects were justified.

562. Finally, the fundamental disconnect between the political decisions after the hearing and the evidence of government officials at the hearing is a prime example of how the EA process was misused in this case to the clear disadvantage of Bilcon.

563. Overall, my opinion is that this is a process that went off the rails. Bilcon was not treated in a manner that I would have expected, or that it could have predicted at the outset.

gowlings

Signed at Toronto, July 8, 2011

David Estrin