gowlings

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

BETWEEN:

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

Claimants

- and -

GOVERNMENT OF CANADA

Respondent

# REPLY EXPERT REPORT OF

# DAVID ESTRIN

***Certified Environmental Law Specialist***

December 2012

## TABLE OF CONTENTS

**Page**

PURPOSE OF THIS REPORT .......... 1

EXECUTIVE SUMMARY .......... 2

MATERIALS REVIEWED IN PREPARING THIS REPORT .......... 4

PART I: TREATMENT LEADING UP TO AND INCLUDING DECISION TO REFER TO PANEL REVIEW .......... 5

- 1.1 Summary of Part I .......... 5
- 1.2 DFO involvement in the 3.9 ha test quarry .......... 6
- 1.3 Comparison with Tiverton Harbour and Tiverton Quarry .......... 7
  - (a) Introduction .......... 7
  - (b) The Tiverton Quarry .......... 8
  - (c) The Tiverton Harbour .......... 10
- 1.4 The decision to scope in the quarry .......... 12
  - (a) Introduction .......... 12
  - (b) DFO knew there was no valid CEAA trigger for the quarry component .......... 13
  - (c) DFO's decision to scope in the quarry was unusual .......... 20
  - (d) DFO's decision to include the quarry was not "academic" .......... 33
  - (e) The decision to scope in the quarry was based on irrelevant considerations .......... 36
- 1.5 The decision to refer the project to a panel review .......... 42
  - (a) Similar projects have not been referred to a panel review .......... 42
  - (b) There was nothing about the size and location of the WPQ that warranted a panel review .......... 45
  - (c) The WPQ is the only quarry/mine project to undergo a public hearing under the Nova Scotia EA legislation since 2000 .......... 48
- 1.6 Comments on other quarries mentioned in Canada's materials .......... 51
- 1.7 Reply to Mr. Smith's argument that the process was for Bilcon's own good .......... 54

PART II: THE JOINT REVIEW PANEL HEARING AND DECISION .......... 58

- 2.1 Summary of Part II .......... 58
- 2.2 Community core values was not a valid ground for recommending against the project .......... 58
  - (a) The Kemess North Mine project is not an appropriate comparator .......... 58
  - (b) Community core values and the community veto .......... 60
  - (c) Response to Mr. Smith's assertion that my comments on community core values focused too much on the federal aspect of the joint environmental assessment .......... 63
  - (d) Comparison with Sable Gas panel .......... 66
  - (e) Community core values and procedural fairness .......... 67

2.3 The Panel's approach to the precautionary principle ....... 69
(a) Introduction ....... 69
(b) The precautionary principle goes hand in hand with the concept of adaptive management, and is compatible with the specific adaptive management measures proposed by Bilcon ....... 73
(c) The precautionary principle does not require perfect certainty ....... 76
(d) The precautionary principle does not absolve the panel of its own duty to gather information and make determinations on the issues before it – the panel is not merely a passive observer ....... 81
2.4 The Panel's approach to the concept of cumulative effects ....... 85
2.5 The Panel's approach to mitigation measures ....... 87

PART III: THE GOVERNMENT RESPONSE TO THE JRP REPORT ....... 92
3.1 Summary of Part III ....... 92
3.2 It was improper and indeed unconstitutional for the federal government to base its decision on community core values ....... 92
3.3 Concerns about the adequacy of the responses of Canada and Nova Scotia to the JRP Report ....... 97
3.4 Reply to Mr. Smith's argument that the federal response was moot because Nova Scotia had already decided to reject the WPQ ....... 99

PART IV: REPLY TO MR. SMITH'S ARGUMENT THAT BILCON NEVER COMPLAINED ABOUT THE ISSUES I RAISE ....... 108

PART V: CONCLUDING REMARKS ....... 112

APPENDIX A: MAP SHOWING LOCATION OF WHITES POINT AND TIVERTON
APPENDIX B: AERIAL PHOTO SHOWING TIVERTON PROJECTS
APPENDIX C: MAPS SHOWING PHASES OF WHITES POINT QUARRY
APPENDIX D: MAP OF SHIPPING LANES NEAR WHITES POINT
APPENDIX E: MAP OF LABRADOR-ISLAND TRANSMISSION LINK PROJECT
APPENDIX F: RECOMMENDATIONS OF THE VOISEY'S BAY PANEL
APPENDIX G: RECOMMENDATION 1 OF THE SABLE GAS PANEL

## PURPOSE OF THIS REPORT

The primary purpose of this report is to reply to specific aspects of the December 7, 2011 Expert Report of Lawrence E. Smith, Q.C. (the **"Smith Report"**). The Smith Report provided comments on the treatment received by Bilcon in the environmental assessment (**"EA"**) of the proposed Whites Point Quarry (**"WPQ"**) project and also addressed in detail many of the points I raised in my July 8, 2011 Expert Report (the **"First Report"**).

My First Report speaks for itself and I do not wish to repeat myself here. Nor do I think it would be helpful to reply to each and every point made by Mr. Smith in his lengthy report. However, certain items merit a reply.

In addition, this Reply Report addresses certain portions of Canada's affidavits and counter-memorial (filed after my First Report was completed), and documents produced by Canada that were made available to me after I filed my First Report, where these bear on specific matters or opinions I raised in my First Report.

# EXECUTIVE SUMMARY

This report, like my First Report, is organized into three main parts. Part I deals with the treatment of Bilcon leading up to and including the decision to refer the WPQ to a joint review panel (**"JRP"**). Part II deals with the JRP hearing and report. Part III deals with the response of the Canadian and Nova Scotia governments to the Panel's report.

In Part I, I defend the opinion I expressed in my First Report that during this period government officials – especially those at the federal Department of Fisheries and Oceans – made several decisions that a proponent would not reasonably have expected.

In particular, the actions taken by the department to delay and ultimately thwart the approval of the Investors' plans for an initial 3.9 ha test quarry were, despite Mr. Smith's rationalizations, inappropriate and unusual, especially when contrasted with the same department's approach to the Tiverton Harbour and Tiverton Quarry proposals, which it was evaluating around the same time as the Investors' proposal.

Moreover, I reply to certain attempts made by Mr. Smith to defend governmental decisions that I criticized in my First Report, namely the decision to include both the quarry and the dock in the scope of the federal EA, and the decision to refer the EA to a JRP. In this regard I note that the usual practice at the time was to scope narrowly, and that several quarry and mining projects that were larger than the WPQ were assessed without being sent to a panel. Finally, I reply to Mr. Smith's suggestion that the referral to a JRP was ultimately for the Investors' own good. In particular, I point out that a JRP is not the only way to harmonize federal and provincial EAs.

In Part II, I reply to certain comments made by Mr. Smith about the JRP hearing and the JRP report. I reiterate the view expressed in my First Report that the Panel should not have assessed the WPQ's impact on "community core values", a notion invented by this JRP which has no basis under federal or Nova Scotia EA legislation. I also reply to Mr. Smith's comments about the JRP's application – or rather misapplication – of the

precautionary principle and the concept of cumulative effects. Mr. Smith has not convinced me that the Panel got these right.

In Part III, I reply to Mr. Smith's contention that there was nothing improper about how the Canadian and Nova Scotia governments responded to the JRP's recommendations. I explain that, because the concept of community core values is not recognized under the *Canadian Environmental Assessment Act* (**"CEAA"**)[1] and indeed lies outside federal jurisdiction, the federal government should have refused to accept the JRP's recommendations or at least provided some other rationale for rejecting the project. I also point to the detailed and well-reasoned government responses to the panel reports on the Lower Churchill Generation project and the Mackenzie Gas project to draw a contrast to the "rubber stamp" response to the WPQ Panel Report.

Part IV is a brief reply to Mr. Smith's comment that Bilcon did not complain about some of the issues I identified in my First Report at the time of the EA. Part V contains closing observations.

---

[1] As I explain in Part V of this report, CEAA was repealed on July 6, 2012 and replaced with a new and radically different law, the *Canadian Environmental Assessment Act, 2012*. All references to CEAA in this report are to the former legislation, which governed the assessment of the WPQ.

## MATERIALS REVIEWED IN PREPARING THIS REPORT

In preparing this report, I have mostly focused on the Smith Report itself. I have also read the various submissions and evidence filed by both parties in this matter after my First Report was completed, namely:

(a) The Investors' memorial and attached affidavits

(b) Canada's counter-memorial and attached affidavits

(c) The expert report of Robert G. Connelly.

In addition, I have examined the documents produced by Canada in late 2011, after my First Report was completed.

In reviewing these I was surprised that certain types of documents still have not, to my knowledge, been produced. These include emails, other communications and memos between the key Ministers and their personal staff and between Ministers' staff.

As indicated in my First Report, my observations and conclusions are qualified to the extent that I have not had access to all the documents that I suspect were generated in the course of the WPQ approval process.[2]

In preparing this report, I have also reviewed certain documents regarding the Tiverton Harbour and Tiverton Quarry projects which were not produced by Canada but were provided to me by the office of counsel for the Investors.

[2] First Report at p. 10.

## PART I: TREATMENT LEADING UP TO AND INCLUDING DECISION TO REFER TO PANEL REVIEW

### 1.1 Summary of Part I

1. In my First Report I observed that in the period leading up to and including the decision to refer the WPQ to a joint panel review, there was a “pattern by officials of making life difficult for the proponent”.[3] I pointed in particular to the following decisions made by the federal government’s Department of Fisheries and Oceans (**“DFO”**):

   (a) DFO’s decision to impose 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 (before ultimately referring the project to a joint review panel)

   (d) DFO’s decision to “scope in” the quarry in the environmental assessment

   (e) DFO’s decision to ask the federal Environment Minister to establish a joint review panel – and the subsequent decision of the Environment Minister and his provincial counterpart to do so.[4]

2. I stand by my view that the process during this early period was beyond what a proponent would reasonably have expected. I wish to reply to certain arguments raised in the Smith Report in this regard.

3. At the outset I must respond to one spurious charge made by Mr. Smith. He writes that I attribute DFO’s decisions to “anti-Americanism or xenophobia”.[5] Nowhere in my First Report did I assert or even imply that DFO’s decisions were driven by anti-Americanism or xenophobia. What I said is that the WPQ was a political “hot potato”, and that it seemed from my review of the materials that DFO’s decisions were

[3] First Report at p. 2.
[4] First Report at pp. 2-3, and generally Part I.
[5] Smith Report at para. 17.

influenced by irrelevant political concerns.[6] In particular I suggested that these decisions would have provided political cover to elected officials including especially the Minister of Fisheries, who represented the electoral district in which the WPQ was to be sited. I did not say DFO officials were anti-American or xenophobic.

### 1.2 DFO involvement in the 3.9 ha test quarry

4. In my First Report I reviewed how Bilcon's plans for an initial 3.9 ha test quarry at Whites Point were delayed and ultimately thwarted by DFO.[7]

5. DFO convinced the Nova Scotia Department of Environment and Labour (**"NSDEL"**) to make the provincial permit for the test quarry conditional on DFO approval of Bilcon's blasting plan. But DFO never approved the blasting plan. Instead, DFO kept expanding the scope of its concerns,[8] while acknowledging that it was "flying by the seat of [its] pants".[9]

6. Bilcon's inability to proceed with the test quarry significantly prejudiced its ability to persuade the WPQ Panel that blasting at the larger quarry would not have significant adverse environmental effects. The Panel refers repeatedly in its Report to the lack of hard evidence concerning the amount of explosives needed to operate WPQ[10] and specifically states that the impacts of blasting are difficult to characterize "without the benefit of a test blast".[11]

7. Mr. Smith argues that there was nothing unusual about DFO intervening in the Nova Scotia licensing process, but he does not provide a single example of another Nova Scotia quarry permit (aside from the WPQ) that included a condition requiring the proponent to obtain DFO sign-off on its blasting plan. As I mentioned in my First

---

[6] First Report at p. 2.
[7] First Report at paras. 110-152.
[8] First Report at paras. 129-140.
[9] First Report at para. 133, citing an email from D. Wright (DFO) to J. Ross (DFO), September 30, 2002 (CP02863, p. 005552: Investors' Schedule of Documents at Tab C-299).
[10] Panel Report at pp. 5, 29 and 42 (Investors' Schedule of Documents at Tab C-34).
[11] *Ibid.* at p. 64.

Report, no such condition was imposed in the permit for the Tiverton Quarry located only about 10 km away.[12]

8. Mr. Smith refers to other Nova Scotia quarries where NSDEL sought the advice of DFO on fisheries related issues. Mark McLean (who has worked at both NSDEL and DFO) does the same in his affidavit.[13] In my view, that is unobjectionable. There is nothing unusual about a provincial regulator consulting with a federal regulator. What is unusual, however, is for the federal regulator to co-opt the provincial process so as to give itself the final say on whether or not the project can go ahead.

9. DFO had no authority under its parent statute, the *Fisheries Act*, to prohibit the blasting at the test quarry. As I noted in my First Report, DFO officials acknowledged this fact.[14] Mr. Smith too concedes that the proponent was not legally required to apply for an authorization for the destruction of fish by means other than fishing under s. 32 of the *Fisheries Act* for the test quarry.[15] It seems that DFO inserted itself into the provincial process in order to accomplish what it could not accomplish under the *Fisheries Act*, namely to have the final say on whether blasting could occur at the test quarry.[16] Neither Mr. Smith nor Mr. McLean has provided any other examples of this happening at any other proposed quarries.

### 1.3 Comparison with Tiverton Harbour and Tiverton Quarry

#### *(a) Introduction*

10. In my First Report I compared the Tiverton Harbour project to the WPQ.[17] Since my First Report was completed, counsel for the Investors has provided me with additional documentation concerning the Tiverton Harbour and the associated 1.8 ha quarry proposed by Parker Mountain Aggregates (the **"Tiverton Quarry"**). I

---

[12] First Report at p. 118. The proponent of the test quarry at Whites Point complained to the Nova Scotia Environment Minister that the Tiverton Quarry did not include the same blasting conditions that had been imposed in the Whites Point permit, but afterwards NSDEL neither added such conditions to the Tiverton Quarry permit nor removed them from the Whites Point permit: Letter from P. Buxton to the Minister, October 14, 2003 (CP01809; Investors' Schedule of Documents at Tab C-736).

[13] Affidavit of Mark McLean at paras. 8-10.

[14] First Report at para. 120.

[15] Smith Report at para. 164 (emphasis in original).

[16] First Report at para. 120.

[17] First Report at pp. 23-25 and Appendix G.

therefore would like to discuss further the comparison between the Tiverton projects and the WPQ – in particular, how the potential effects of blasting on aquatic life were dealt with – in light of the new information I have received and the comments made by Mr. Smith.

11. Mr. Smith suggests that the Tiverton Quarry and the Tiverton Harbour are not appropriate comparators. I disagree.

12. The proposed 3.9 hectare test quarry at Whites Point, which was not allowed to proceed, was of similar scale to both the Tiverton Quarry and the Tiverton Harbour project. Comparison to these two projects reveals significant inconsistencies in terms of how the potential impacts on fish and marine mammals were handled. These three projects were all being evaluated during 2002 to 2004 and were within 10 km of each other. **Appendix A** to this report is a map showing the locations of Whites Point and Tiverton.

13. Furthermore, all three projects were located on or near the Bay of Fundy in areas proximate to locations where marine mammals, including whales, and Inner Bay of Fundy salmon were believed to be present at times.[18]

14. Based on these facts the projects would all be expected to generate similar concerns for fish and marine life; therefore the similarity or difference in treatment of these projects by Canada and Nova Scotia regarding such concerns is of relevance.

### *(b) The Tiverton Quarry*

15. NSDEL initially processed both the application for approval of the Tiverton Quarry and the 3.9 ha test quarry at Whites Point by forwarding each to DFO for review. DFO's letter of April 25, 2003 to NSDEL regarding the Tiverton Quarry concluded there would be not likely be any harmful alteration, disruption or destruction of fish

[18] Letter from DFO to NSDEL, March 15, 2004 (PH00182; Investors' Schedule of Documents at Tab C-737); "DFO Science Response to Habitat Request RE: Environmental Screening for Harbour Development (Breakwater, Floating Docks, Dredging and Service Area) at Tiverton, Digby County, Nova Scotia, June 4, 2004 (PH00725; Investors' Schedule of Documents at Tab C-738); Panel Report, pp. 7-8.

habitat (**"HADD"**) requiring a s. 35(2) *Fisheries Act* authorization, and did not assert that a *Fisheries Act* s. 32 authorization was required to conduct blasting.[19]

16. At this time DFO was provided with information from NSDEL that blasting at the Tiverton Quarry would occur within 160 m of the ocean. This information came from a Nova Scotia official, Doug Petrie and is also contained in a NSDEL engineering report.[20] The fact that DFO expressed no concern regarding the potential effect of blasting at the Tiverton Quarry within 160 m of the ocean contrasts with DFO's concern about blasting effects from the proposed 3.9 ha test quarry at Whites Point. In a May 29, 2003 letter to Paul Buxton, DFO advised that a 500 m setback was required between blasting and the ocean in order to protect iBoF Atlantic salmon that could be in the Whites Point area between May to October.[21]

17. Interestingly, for the purpose of preparing his 2011 affidavit in support of Canada's position in this arbitration proceeding, Doug Petrie sent someone out to the Tiverton Quarry site with a GPS device to check the setbacks. In contrast to his belief in 2003 that the blasting would be within 160 m of the ocean Mr. Petrie states that blasting at the Tiverton Quarry "was conducted approximately 400 meters from the Bay of Fundy and 313 meters from the Petit Passage (which connects the Bay of Fundy to St. Mary's Bay)".[22] These setback distances from the sea for the Tiverton Quarry now said to be correct are shown in aerial photos marked as Canada Exhibit R-100.

18. Even if Mr. Petrie's new numbers are correct – and I have no reason to doubt that – the blasting at the Tiverton Quarry was, nevertheless, well within 500 m of the sea that DFO had decided in 2003 should be the required setback for the Whites Point 3.9 ha quarry. There would still be apparent inconsistency in DFO's approach to the Tiverton Quarry and the 3.9 ha Whites Point test quarry. Indeed, the belief by both NSDEL and DFO in 2003 that blasting at Tiverton Quarry was to be only 160 m from

---

[19] DFO letter April 25, 2003, Canada Exhibit R-104.
[20] Tiverton Quarry Engineering Report, March 7, 2003 (PH00158; Canada Exhibit R-101), at p. 2; Petrie Notes (Canada Exhibit R-103).
[21] Letter from P. Zamora (DFO) to Paul Buxton, May 29, 2003 (CP33956, p. 738367; Investors' Schedule of Documents at Tab C-485). The 500 m setback is specified in the addendum to this letter (CP00396; Investors' Schedule of Documents at Tab C-740).
[22] Affidavit of B. Petrie at para. 21.

the ocean is striking given the 500 m set back DFO applied to the WPQ in about the same time period.

19. As a further contrast, the NSDEL permit for the Tiverton Quarry imposed a blasting setback distance of only 30 m from "any watercourse or high watermark".[23]

20. Blasting at the Tiverton Quarry commenced in March 2003.[24] However, it was not until one full year later, in March 2004, that DFO provided a letter stating that no *Fisheries Act* s. 32 authorization was required for the blasting.[25] DFO only turned its mind to this issue at the Tiverton Quarry when the Investors pointed out that the 3.9 ha test quarry was receiving inconsistent treatment regarding the potential effects of blasting near the Bay of Fundy coast.[26] A December 2003 email from Phil Zamora (DFO) to Bruce Hood (DFO) and Laurie Wood (DFO) states:

> The potential effects from blasting near the shore line on inner Bay of Fundy Atlantic salmon came to light during the review of the Blasting Plan for the proposed 3.9 hectare quarry at White's Cove, Digby Co., after the Tiverton Quarry approval was issued.[27]

21. It would appear that in 2003, a double standard was in effect. While at virtually the same time DFO went to extraordinary lengths to control blasting at the 3.9 ha test quarry at Whites Point, DFO chose not to take any measures to control the blasting proposed at Tiverton Quarry. This despite the fact that blasting at the Tiverton Quarry would occur within the 500 m cordon DFO said was necessary to protect fish at Whites Point.

### *(c) The Tiverton Harbour*

22. The Tiverton Harbour project included blasting directly in the water, dredging of the ocean floor, and the deposition of large quantities of rock on the ocean floor, in an

---

[23] Terms and Conditions for Parker Mountain (Tiverton) Quarry approval, s. 9(b) (PH00008-18; Investors' Schedule of Documents at Tab C-868).

[24] Tiverton Quarry Blast Reports (PH00275 to PH00283; Investors' Schedule of Documents at Tab C-741 to 749).

[25] Letter from DFO to NSDEL, March 15, 2004 (PH00182; Investors' Schedule of Documents at Tab C-737).

[26] First Report at paras. 118-119.

[27] Email from P. Zamora (DFO) to B. Hood (DFO), December 16, 2003 (CP43732; Investors' Schedule of Documents at Tab C-475).

area of fish habitat.[28] The project proponent was DFO itself (specifically, the DFO Small Craft Harbours Branch); the project received federal funding and was announced by the Fisheries Minister, Robert Thibault.[29]

23. Despite the obvious potential for destroying fish by blasting in water, no *Fisheries Act* s. 32 authorization for the destruction of fish was required for any phase of the Tiverton Harbour project. (An authorization under s. 35(2) for HADD of fish habitat was required.) The CEAA screening report recommended several mitigation measures to address the impacts caused by the blasting, including:

    (1) Predictive analysis of the blasting zone of influence;

    (2) The use of pre-blasting caps to scare fish and mammals from the blasting area;

    (3) Installation of shock wave padding, such as a bubble curtain; and

    (4) Blasting activities were only to occur from January until the end of June.[30]

24. The Screening Report for Tiverton Harbour concluded that if the above noted mitigative measures were implemented, "there are no predicted negative environmental effects related to this project".[31] DFO's own guidance document on blasting and fish habitat protection recognized these mitigative/preventative measures as being appropriate where blasting was to occur in areas closer to the sea than the DFO setback guideline.[32]

---

[28] Tiverton Harbour CEAA Screening Report (Canada Exhibit R-342).
[29] DFO Briefing Note for Neil Bellefontaine, February 4, 2004 (PH00700; Investors' Schedule of Documents at Tab C-750) at p. 2.
[30] Tiverton Harbour CEAA Screening Report (Canada Exhibit R-342) at p. 17.
[31] *Ibid.* at p. 31.
[32] The DFO publication, "Factsheet: Blasting – Fish and Fish Habitat Protection" (PH00697; Investors' Schedule of Documents at Tab C-752), states:
"If on-land blasts are required nearer to the waterbody than indicated on Table 1 [the setback distance], then additional mitigative measures should be put in place. Mitigative measures for blasting in or near a waterbody may include, but are not limited to; installation of bubble/air curtains (i.e. a column of bubbled water extending from the substrate to the water surface as generated by forcing large volumes of air through a perforated pipe/hose) to disrupt the shock wave, blasting during less sensitive fishery periods, isolation of the work area from fish movement, detonation of small scaring charges (i.e: detonator caps or short lengths of detonating cord) set off one minute prior to the main charge to scare fish away from the site or the use of noise generators

25. There is nothing in the available documents explaining why DFO could not have imposed the use of any or all of these mitigative measures– or any of the others set out in DFO's guidance documents - at the 3.9 ha test quarry. If these mitigative measures could be used to prevent the destruction of fish at Tiverton Harbour, where blasting was occurring directly in the water, why would such measures not have been effective in the context of blasting conducted 73 m from the shore? It seems DFO was inconsistent in its approach to these two projects.

26. Mr. Smith says that seasonal restrictions on blasting could not have been applied to the WPQ project because the project required regular blasting throughout the year over its 50 year lifespan.[33] But he is referring to the larger 152 ha quarry. I do not see why it would have been impractical to impose seasonal restrictions on the 3.9 ha test quarry.

27. Moreover, there appears to be no reason why it would have been impractical to use such measures even at the 152 ha quarry. After all, quarrying was to take place there in phases, not on the entire 152 ha all at once; Bilcon's plan indicated that the rate of quarrying was to be 2.5 ha per year.[34] Bilcon may well have been able to plan its phasing so as to accommodate seasonal restrictions, if such restrictions had been proposed by DFO or by the WPQ Panel.

### 1.4 The decision to scope in the quarry

#### *(a) Introduction*

28. As I explained in my First Report, DFO determined early on, in April 2003, that the quarry and dock components of Bilcon's proposal would be assessed together under CEAA as one project, even though DFO's regulatory trigger related only to the dock.[35] In other words, even though the quarry itself did not require any authorizations from DFO that would engage an EA under CEAA, DFO decided that

---

to move fish out of the area. When a bubble curtain is used, it should surround the blast site and be started-up only after fish have been moved outside of the surrounded area."

[33] Smith Report at para. 6 of Appendix 4.

[34] See *infra*, para. 138.

[35] First Report at paras. 165-184.

the EA would look at both the dock (for which a DFO permit under the *Navigable Waters Protection Act* was required) and the quarry.

29. Mr. Smith argues that, first of all, a DFO authorization was required for the quarry component, and even if it was not, it was quite proper for DFO to scope its assessment of the dock to include the quarry, as the two were so closely related. In this section I will reply to both points.

### *(b) DFO knew there was no valid CEAA trigger for the quarry component*

30. Mr. Smith says that, "By May 29, 2003, a determination had been made that the blasting activity on the quarry would require a s. 32 authorization under the *Fisheries Act*."[36] As evidence, Mr. Smith cites a DFO letter from June 20, 2003. That letter included the following statement:

> On May 29, 2003, DFO advised GQP [Global Quarry Products, the partnership between Bilcon and Nova Stone] in writing that blasting as described in the blasting plan for the 3.9 ha. test quarry submitted November 18, 2002, by Nova Stone Exporters would require a *Fisheries Act* S. 32 authorization to destroy fish by means other than fishing. DFO is conducting discussions and field work of the overall 155 ha. quarry proposal to determine if it requires approvals under Ss. 35(2) or S. 32 of the *Fisheries Act*. Authorizations under either of these sections of the *Fisheries Act* necessitate an environmental assessment under *CEAA*.[37]

31. Although the DFO letter cited by Mr. Smith states that the blasting plan for the 3.9 ha test quarry would require a s. 32 authorization, it also shows that in DFO's own mind, it was still unclear whether any authorizations would be needed for the larger quarry. By this time, the 3.9 ha test quarry was virtually a moot issue. DFO had refused to sign off on the blasting plan and insisted that it would not be able to do so until the EA for the entire WPQ proposal was complete.[38]

32. What this excerpt actually shows is that DFO had in fact not determined whether the central quarry component of the WPQ proposal would require a *Fisheries Act* authorization. The relevant portion of the statement is clearly to that effect: "DFO is conducting discussions and field work of the overall 155 ha. quarry proposal to

[36] Smith Report at para. 107.
[37] Letter from P. Boudreau (DFO) to C. Daly (NSDEL), June 20, 2003 (Canada Exhibit R-70).
[38] First Report at paras. 134-136.

determine if it requires approvals under ss. 35(2) or s. 32 of the *Fisheries Act*" (emphasis added; note the actual area to be quarried was 120 ha).

33. This is consistent with a May 26, 2003 DFO memo for the Assistant Deputy Minister which stated "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" (emphasis added).[39]

34. In fact, that situation had not changed as of June 25, 2003, the date on which the DFO Deputy Minister signed a Memorandum to Fisheries Minister Thibault recommending that the Minister refer both the quarry and marine terminal to a panel review. The June 25 memo did not contain any new information to make it certain, or indeed even likely that DFO had a CEAA *Fisheries Act* trigger for the quarry. To the contrary, the June 25 Memorandum to the Minister said that "DFO may not have a legislative trigger to include the quarry" (emphasis added).[40] And yet, the very next day, the Minister of Fisheries asked his colleague the Environment Minister to refer the matter to a joint review panel.

35. Thus, as of June 26, 2003, the date of Fisheries Minister Thibault's letter to David Anderson, the federal Environment Minister, requesting a panel review, what DFO knew was that "it may not have a legislative trigger to include the quarry."

36. Minister Thibault's June 26, 2003 letter said that the marine terminal would require a *Navigable Waters Protection Act* approval and added vaguely, "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" (emphasis added).[41]

37. I cannot credit "likely" in the Minister's letter to mean DFO was any more certain on June 26 than it was on June 25 on this issue, i.e., that "it may not have a legislative

[39] Memorandum for the Assistant Deputy Minister, Oceans, May 26, 2003 (Canada Exhibit R-69); I referred to this Memorandum at para. 179 of my First Report.
[40] Memorandum for the Minister, June 25, 2003 (Canada Exhibit R-72).
[41] Letter from Minister Thibault to Minister Anderson, June 26, 2003 (Canada Exhibit R-73).

trigger to include the quarry". There is nothing in Canada's records which demonstrates any new scientific analysis occurred or was revealed in the 24 hours between the June 26 letter and the Deputy Minister's June 25, 2003 Memorandum to the Minister that DFO "may not have a legislative trigger to include the quarry".

38. I note that some of the affidavits submitted by Canada in this arbitration proceeding assert or suggest that DFO concluded that the quarry component of the WPQ proposal would require a *Fisheries Act* authorization.[42] However, I have reviewed the documents cited by the affiants and in my view they do not indicate that anyone at DFO had actually determined that fish would be destroyed by the quarrying operations at the WPQ.[43] Indeed, a 2007 DFO Memorandum for the Assistant Deputy Minister, Oceans and Habitat, informed the ADM that DFO could not provide the Joint Panel with any definite predictions of harm to marine life from quarry blasting. To the contrary, in DFO's own words, "it is expected that any impacts would be minimal". DFO recommended that "additional monitoring for noise and impacts of noise was required if this project were to proceed."[44]

39. I also note that Canada says in its counter-memorial that "Mr. Buxton applied to DFO for a s. 35(2) HADD authorization in connection with the proposed blasting activities on the quarry."[45] In my view that is inaccurate. Rather, it would appear that Mr. Buxton applied for a HADD authorization in connection with the installation of the

---

[42] Affidavit of Bruce Hood at para. 17; affidavit of Mark McLean at para. 40; and affidavit of Neil Bellefontaine at para. 34.

[43] For example, Bruce Hood says in his affidavit at para. 17 that DFO scientists concluded that quarrying would trigger an EA, but the evidence he cites is equivocal, e.g. "likely a Sec 32 trigger"; "could constitute a S. 35 trigger". Mark McLean says in his affidavit at para. 40 that a DFO scientist, Peter Amiro, concluded that iBoF salmon frequented the area, but in fact Mr. Amiro did not say the iBoF salmon would be destroyed or impacted by blasting (*infra* note 49). Neil Bellefontaine says in his affidavit at para. 34 that the scoping debate within DFO was "merely academic" as it took place before DFO biologists conducted an onsite evaluation of whether the quarry component required a *Fisheries Act* authorization. But it does not appear that the biologists determined that an authorization was required. When they conducted their site visit in early May 2003, they observed a steam on the quarry site but found it was too early to tell whether fish habitat would be affected, as noted in footnote 31 in Mr. Bellefontaine's affidavit. The handwritten notes cited in that footnote indicate that DFO observed a stream that seemed to contain fish habitat but that the quarrying would take place "nowhere near the stream".

[44] Memorandum for the ADM, Oceans and Habitat, at pp. 2 and 3 (CP35633; Investors' Schedule of Documents at Tab C-869).

[45] Canada counter-memorial at para. 115.

marine terminal.[46] The description of the proposed activities attached to the application form is entitled “Whites Point Quarry Marine Terminal”. It explains that the displacement of fish habitat was to occur as a result of the installation of the pipe piles to support the marine terminal. It does not mention any effect on fish habitat from blasting.

40. Now, it is true that the application submitted by Mr. Buxton did include information about the explosives that were to be used on the quarry component of the project. It would appear that when Mr. Buxton got to the part of the application form saying “Complete Only If Use of Explosives is Intended”, he dutifully completed it. In my experience this form is confusing for proponents in respect of project components that do not need a s. 35(2) authorization but which may yet involve explosives. The argument on this point in Canada’s counter-memorial does not recognize that problem. Nor does it seem that DFO actually interpreted the application as covering the quarry component – otherwise, the Minister’s June 26, 2003 referral request letter (mentioned above) would surely have said that there was a *Fisheries Act* trigger in respect of the quarry itself, not that that “various components of the proposed project will likely require authorizations” under the *Fisheries Act*.

41. In summary on this point, it appears from the record that DFO never conclusively determined that it had a regulatory trigger for applying CEAA to the quarry component of the WPQ proposal.

42. I find it surprising that DFO determined that the 3.9 ha test quarry required a s. 32 authorization in the first place. Section 32 prohibits the destruction of fish by means other than fishing. As I noted in my First Report, DFO did not specify what fish would be destroyed by the blasting at the test quarry.[47]

43. Mr. Smith points to an internal DFO email from May 27, 2003 as evidence that DFO’s conclusion on the need for a s. 32 authorization was, in his words, based on

---

[46] HADD Application submitted by Paul Buxton on behalf of Global Quarry Products, May 14, 2003 (Canada Exhibit R-148).
[47] First Report at para. 134.

"scientific opinion within the department at that time".[48] The email, however, says nothing about the risk of fish being destroyed. It says that "it is likely that Atlantic salmon of iBoF could be found in close proximity to the shore line of White Point [sic] from May to October", but does not say that such iBoF salmon would be destroyed or even impacted at all if the proposed blasting at the 3.9 ha test quarry were to proceed.[49]

44. Of course I am not a fish biologist and so I cannot purport to opine on the actual impacts that blasting at the 3.9 ha test quarry – or the larger quarry – would have had on fish. But it seems quite clear that DFO's determination that a s. 32 authorization was required for the test quarry was inconsistent with its approach to other comparable projects in the region.

45. In particular, DFO did not insist on a s. 32 authorization for the following projects:

- Tiverton Harbour, which was only 10 km away from Whites Point, on waters frequented by iBoF salmon – where blasting was to take place in the water. For this government project (DFO itself was the proponent), DFO rationalized that mitigation measures could be used to prevent destroying fish. Canada appears not to have considered applying similar measures to the WPQ;

- The Tiverton Quarry, where blasting would occur farther from the water than at Whites Point, but still within the 500 m setback that DFO initially imposed on the Whites Point test quarry;

- The Belleoram project, where blasting would occur even closer to fish and fish habitat than at the Whites Point test quarry – as close as 10 m from the shoreline during road construction and 25 m from the shoreline during the operation of the quarry[50] – and which at 900 ha was 230 times larger than the test quarry and six times larger than the entire WPQ.

---

[48] Smith Report at para. 156.
[49] Email from P. Amiro (DFO) to P. Zamora (DFO), May 27, 2003 (Canada Exhibit R-150).
[50] First Report at p. 4 of Appendix E.

46. Mr. Smith also points to a 2002 letter from Bilcon's own consultant, Paul Brodie, which described the risks of the proposed blasting on marine life, particularly whales.[51] However, the letter did not conclude that there would be any "destruction" of whales or other marine life, which is the trigger for a s. 32 authorization. The letter said, "With known concentrations of right whales 20-30 km from the proposed quarry site, the possibility that groups or individuals could visit the area, is not that remote" (emphasis added).[52] Ultimately, Bilcon's Environmental Impact Statement (**"EIS"**), which relied on the input of many experts, determined there would be no significant adverse effect from blasting on whales.[53]

47. Indeed, by no later than August 13, 2003, seven weeks after the Fisheries Minister had requested the Environment Minister to refer both the quarry and the marine terminal to a review panel, and only one week after the Environment Minister had agreed to do so, DFO had apparently determined that there was, after all, no *Fisheries Act* trigger for the quarry. As noted in an internal CEA Agency email from August 13, 2003:

> In fact, DFO has since revised its blasting calculations and determined that it does not have a s. 32 trigger. But it still has a HADD for the terminal. [Emphasis added.][54]

48. This email is contradictory to Mr. Smith's assertion that a *Fisheries Act* authorization was required for the quarry component of the WPQ. It also shows that DFO continued to steer the entire WPQ project towards a panel review even though DFO officials knew they had no authority over the quarry component.

49. Indeed, Bruce Hood (formerly Senior Liaison Officer, Habitat Operations with DFO Headquarters in Ottawa) acknowledges in his affidavit that "DFO regional officials believed right from the beginning that the quarry should be included in the scope of

---

[51] Smith Report at para. 160.
[52] Letter from P. Brodie to P. Buxton, June 19, 2002 (Canada Exhibit R-301).
[53] Environmental Impact Statement, Volume IV, Table 2 – Impact Summary Table (Investors' Schedule of Documents at Tab C-1).
[54] Email from D. McDonald to N. Bastien, August 13, 2003 (CP33448; Investors' Schedule of Documents at Tab C-657).

the project, whether it engaged DFO triggers under the *CEAA* or not" (emphasis added).[55]

50. Although Mr. Hood suggests that this aggressive view was not initially shared by DFO headquarters,[56] it evidently prevailed. By mid-April 2003, although no determination had been made about whether there was a trigger for the quarry, DFO headquarters was recommending that both the quarry and terminal components be included in the EA.[57]

51. In summary on this aspect, the important facts I have considered are:

    (a) the federal Fisheries Minister requested a joint panel review on June 26, 2003 for both the quarry and terminal, despite being advised one day earlier by his Deputy Minister that DFO "may not have a legislative trigger to include the quarry";

    (b) within six weeks thereafter DFO apparently concluded it did not have a CEAA trigger for the quarry and, despite that conclusion, DFO did nothing to stop the panel review of the quarry from proceeding.

52. These facts, together with those discussed in the next sub-section as to why scoping in the quarry was not consistent with DFO scoping practices, raise a concern that for DFO and the Fisheries Minister, jurisdictional constraints and adherence to DFO scoping practices that would have ordinarily prevented scoping in of such a quarry into a CEAA EA took second place to the Fisheries Minister using CEAA in the way his electors opposed to the WPQ were expecting and demanding.

---

[55] Affidavit of Bruce Hood at para. 13.

[56] *Ibid.* at para. 13.

[57] Briefing Note for the Deputy Minister, apparently April 2003 (CP05090; Investors' Schedule of Documents at Tab C-753). This Briefing Note says that DFO "has determined that the quarry and the marine terminal will require a Comprehensive Study level environmental assessment". An earlier draft of that paragraph indicated that DFO was reviewing "the marine shipping terminal component of the proposal to ensure it meets the requirements of the *Fisheries Act* and the *Navigable Waters Protection Act*" (emphasis added) (CP05096; Investors' Schedule of Documents at Tab C-754).

### *(c) DFO's decision to scope in the quarry was unusual*

53. Mr. Smith defends DFO's decision to include both the quarry and dock components of the WPQ proposal in the environmental assessment.[58] I stand by the position I expressed in my First Report that the decision was contrary to DFO practice and unusual.[59]

54. Mr. Smith says the 2010 decision by the Supreme Court of Canada in *MiningWatch v. Canada (Fisheries and Oceans)* confirms that DFO's scoping decision was correct.[60] The *Mining Watch* decision was delivered approximately seven years after DFO's 2003 decision to scope the quarry into a CEAA review. As such it is not relevant to what DFO should or could have done at that time. The more salient issue is whether the decision to scope in the quarry accorded with the law and practice at the time it was made.

55. Mr. Smith argues that the decision to scope in the quarry was justified by the "principal project/accessory test" set forth by the Canadian Environmental Assessment Agency in its "Responsible Authorities Guide: The Manager's Guide".[61] The Guide suggested that where the principal project triggers an EA, other physical works or activities that are accessory to the principal project may be scoped in, particularly where (a) the principal project could not proceed without the other work or activity and (b) the decision to undertake the principal project makes the decision to undertake the other work or activity inevitable.[62] Mr. Smith says the WPQ met those criteria.[63]

56. In my view Mr. Smith has it backwards. The dock was accessory to the quarry, not the other way around. Bilcon came to Nova Scotia to extract rock, not to build a dock. It was not a proper application of the principal project/accessory test to include the quarry in the assessment of the dock, which was subsidiary and ancillary to the quarry.

---

[58] Smith Report at paras. 96-99 and 111-125.
[59] First Report at para. 184.
[60] [2010] 1 S.C.R. 6 (Canada Exhibit R-15). See Smith Report at para. 124.
[61] Smith Report at para. 114.
[62] CEA Agency, "Responsible Authorities Guide: The Manager's Guide", 1994 (Canada Exhibit R-434).
[63] Smith Report at para. 115.

57. Equally important, DFO's normal practice was to scope CEAA EAs to the "trigger" during the time period relevant to considering DFO's scoping of WPQ under CEAA compared to its scoping of other projects. In other words, it was DFO's practice from 1999 through 2004 that the project component included in the CEAA assessment would be only the immediate activity for which a DFO permit was required, and would not include other related activities for which DFO had no direct regulatory authority. As noted in a 2004 email, "DFO has made it clear that their policy is always to scope to the trigger."[64] This DFO practice is elaborated below.

58. In support of the way in which DFO scoped WPQ, Mr. Smith's report refers to provisions of CEAA which provide discretion to the RA as to how wide or narrow their project scoping might be, and also to the Agency's Responsible Authorities Guide.[65] He opines, based on these general provisions, that wide scoping of the WPQ to include the quarry component was therefore not improper or unusual.

59. However, what Mr. Smith does not clearly acknowledge in his report is that DFO's scoping of WPQ was contrary to how it carried out "scoping in practice" during the period 1999-2004. Mr. Smith does not make clear a very significant fact in the text of his report – that the scoping practice of the RAs coming within the aegis of the Fisheries Minister during the period 1999-2004 was to scope to the trigger. Nor does

---

[64] Email from C. Benjamin (CEA Agency) to M. MacLean (DFO) re the Keltic LNG project, November 26, 2004 (Investors' Schedule of Documents at Tab C 438). I am mindful of an early guidance DFO document that, although not cited by Mr. Smith, might be interpreted as being supportive of his argument on scoping, in that it urges that activities closely linked to the "principal project" should be scoped in: "A Guide to the Implementation of CEAA by DFO's Marine Environment and Habitat Directorate", January 1995 (CP15841; Investors' Schedule of Documents at Tab C-755). This guide noted that "there is uncertainty and disagreement over how to define the scope of a project…. Therefore, the preceeding [sic] guidelines should be treated as being tentative." Indeed it appears a draft revision to the guide was circulated in April 1996 (CP15836; Investors' Schedule of Documents at Tab C-756). In any event, the guide represents DFO's very early thinking on scoping and was prepared before the Federal Court endorsed the practice of scoping narrowly, as discussed below. Moreover, DFO later signed a Memorandum of Understanding with the CEA Agency and other key agencies which stipulated that, for major projects (i.e. "proposals that may be subject to comprehensive study and those large scale projects subject to screening that trigger the EA requirements of more than one jurisdiction"), scoping should be restricted to components directly related to the regulatory trigger where, as in the case of the WPQ project, a provincial EA would examine the non-trigger components (i.e. the quarry): "Non-trigger components would not be included in the scope of project if they will be considered through provincial or other mechanisms or if consideration of the component is not warranted." (Memorandum of Understanding for the Cabinet Directive on Implementing the *Canadian Environmental Assessment Act* [see Step 5], available at: http://www.ceaa-acee.gc.ca/default.asp?lang=En&xml=9C9299E6-52FC-4DBA-963D-DE91F2B8998F (Investors' Schedule of Documents at Tab C-873); the Cabinet Directive was issued in 2005 and I understand, based on communications with the CEA Agency, that the related MOU took effect in 2008.)

[65] Smith Report, para.102 and 114.

he say that if that usual practice had been applied to the WPQ, only the marine terminal would have been scoped into the CEAA assessment, as there was only a DFO trigger for the marine terminal.

60. Rather than making this practice clear, Mr. Smith states that scoping decisions often gave rise to litigation,[66] raising an inference that there was no clear practice at the relevant time. However, that is not the case. What he did not articulate is that the Fisheries Minister's policy was not only to scope to the trigger at this time, but also to defend scoping to the trigger when environmental groups challenged such scoping decisions in Federal Court. Further, Mr. Smith does not make clear that, during this relevant period, the Fisheries Minister's position as to the propriety of scoping to the trigger was upheld by the Federal Court.

61. For example, the Federal Court upheld the following CEAA scoping decisions made by officials on behalf of the Minister of Fisheries:

- to scope in only a bridge that required approval under the *Navigable Waters Protection Act*, not the proponent's access road and forestry operations ***("Tolko")***;[67]
- to scope in only the two bridges that required approval under the *Navigable Waters Protection Act*, not the proponent's access road and mill ***("Sunpine")***;[68] and
- to scope in only the destruction of a stream that required an authorization under s. 35 of the *Fisheries Act*, not the wider oil sands mine to which the stream destruction was related ***("Prairie Acid Rain")***.[69]

---

[66] Smith Report, para. 1 of Appendix 5.
[67] *Manitoba's Future Forest Alliance v. Canada (Minister of the Environment and Minister of Fisheries and Ocean, et al),* [1999] F.C.J. No. 903; 1999 CanLII 8362 (FC) (Investors' Schedule of Documents at Tab C-757). I note that at the time this case was decided, the Coast Guard was responsible for issuing *Navigable Waters Protection Act* permits on behalf of the Minister of Fisheries (see para. 17 of the decision).
[68] *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans),* [1998] 4 F.C. 340 (Investors' Schedule of Documents at Tab C-908), aff'd [1999] F.C.J. No. 1515 (Federal Court of Appeal) (Investors' Schedule of Documents at Tab C-758). The trial judge upheld the decision to narrowly define the scope of the project as only the two bridges. The scope of the project was not directly at issue in the Federal Court of Appeal.

62. In the *Tolko* case, the Federal Court summarized the parties' positions as follows:

> The Applicants (Manitoba Future Forest Alliance) submit that the CCG (Canadian Coast Guard, which was under the aegis of the Fisheries Minister) interpreted (CEAA) subsection 15(3) too narrowly and should have included within its environmental assessment various former and present plans, proposals and applications related to Repap and Tolko's forestry operations such as the proposed logging road from the bridge, the application for the 1997-2009 Forest Management Plan ("13 year FMP") pursuant to which Repap could harvest in the aggregate two million cubic metres annually of hardwood and would construct 859 kms. of all-weather roads and the new 500 tonnes per day bleached chemo-thermomechanical pulp ("BCTMP") mill.
>
> The Respondents (Minister of Environment and Minister of Fisheries and Oceans) submit that the CCG correctly applied subsection 15(3) of the CEAA.

63. In other words, in this case, the Fisheries Minister argued that it was appropriate for the Canadian Coast Guard to "scope to the trigger" and include in the scope of the CEAA EA only the bridge crossing for which the *Navigable Waters Protection Act* permit was issued by the Fisheries Minister. The Fisheries Minister submitted that the Federal Court should reject the need for including the other project components.

64. In agreeing with the Fisheries Minister's position that the CEAA EA was appropriately scoped only to the trigger, i.e., the bridge crossing, Federal Court Justice Nadon made a finding that is particularly apt to the rationale for scoping to trigger – the practice DFO applied generally to other projects, except WPQ, until at least 2004:

> …the respondent Tolko makes the following submission with which I am in entire agreement:
>
>> This Court should also consider what the practical effects would be if it were to accept the arguments the Applicants advance. What happens if a city within Canada, or a province for that matter, decides to build a bridge? When they seek approval under Section 5 of the NWPA, does everything that city or province does become one big "project" which must be environmentally assessed under the CEAA? Surely not, but this might well be the result if the Applicants" arguments are accepted. <u>Unless the environmental assessment is connected with the regulatory authority which triggers the CEAA, there is simply no reasonable limit placed on what the</u>

---

[69] *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans),* 2004 FC 1265 (Canada Exhibit R-218), affirmed by Federal Court of Appeal, 2006 FCA 31 (Canada Exhibit R-428). The court's ruling was issued after the WPQ project had been referred to a panel, but is illustrative of DFO's scoping practice around that time. The scoping decision at issue was made in December 2002, mere months before DFO's scoping decision on the WPQ.

responsible authority in any given case would have to consider. [Emphasis added.][70]

65. Further, Mr. Smith's assertion that there was clear statutory authority for scoping in the quarry is difficult to reconcile with his own interpretation of the Comprehensive Study List Regulations under CEAA. In my First Report I suggested that the dock component of the WPQ was not a "marine terminal" within the meaning of the Comprehensive Study List Regulations, because the definition excludes docks that are used exclusively to serve production, processing or manufacturing areas.[71] Mr. Smith interprets the definition to capture such docks but to exclude the production, processing or manufacturing areas associated with them.[72] Thus, whereas on my reading, neither the WPQ dock nor the quarry itself were captured by the definition of marine terminal, Mr. Smith reads it to capture the dock but not the quarry.

66. Although I continue to believe that my interpretation of "marine terminal" accords better with the text of the regulations than Mr. Smith's, I concede that the wording is somewhat ambiguous, and that in some cases the responsible authorities appear to have implicitly adopted Mr. Smith's reading. However, even if Mr. Smith is correct, the logical conclusion would be that only the WPQ dock should have been assessed by way of a comprehensive study. The responsible authorities would have had no discretion to scope the quarry component into the marine terminal project undergoing the comprehensive study, as the regulations expressly say that the production, processing or manufacturing areas (i.e. the quarry) associated with the marine terminal are excluded.

67. Indeed there are several cases where a marine terminal required a comprehensive study, but the associated processing or production areas were not included in the scope of the comprehensive study, such as the Belleoram, Eider Rock, Southern Head and Keltic projects.[73]

---

[70] *Manitoba's Future Forestry Alliance, supra* note 67 at para. 86.
[71] First Report at para. 164.
[72] Smith Report at para. 201.
[73] There have been projects where the associated production or processing areas were included in the scope of the project subjected to a CEAA Comprehensive Study EA, such that those areas were assessed together

68. For example, the Rabaska project involved a liquid natural gas terminal and an associated marine terminal, which were both assessed together by way of a comprehensive study, because both LNG terminals and marine terminals are listed on the Comprehensive Study List Regulations, and both components required federal permits that triggered a federal EA.[74] (The Rabaska project was later referred to a joint review panel.)

69. Mr. Smith also argues that it was only reasonable to scope in the quarry, since from the beginning the proponent itself described the project as comprising both a quarry and a marine terminal.[75] But this argument fails to account for the fact that the Belleoram proponent, Continental Stone Limited, also described its project as comprising both a quarry and a marine terminal, yet the federal government managed to narrow the scope to the marine terminal only. In my First Report I included a letter from Continental Stone Limited to Transport Canada in which it refers to the project that was about to undergo a comprehensive study level EA under CEAA as the "Proposed Rock Quarry and Marine Facility".[76] Not only that, the letter actually urged Transport Canada to examine "the whole area" in the comprehensive study. It is telling that at Belleoram, where the federal government supported the project, federal officials found a way to scope out (i.e. exclude) the quarry even though the proponent was asking it to scope it in.

70. Similarly, for the Bear Head Liquefied Natural Gas Terminal project in Nova Scotia, which underwent a CEAA screening in 2003-04 (in harmony with a provincial EA), DFO scoped to the trigger. That is, DFO defined the project narrowly as the marine wharf which required a permit under the *Navigable Waters Protection Act*, and left out the land based LNG storage and gasification facility. As noted in a DFO email, "Since no trigger has been identified for the land based portion of the project, the

---

with the marine terminal, but generally in those cases the land based component was independently included in the Comprehensive Study List Regulations and had an independent EA trigger.

[74] "Notice of Commencement of an Environmental Assessment: Project Rabaska – Implementation of an LNG Terminal", June 23, 2004 (Canada Exhibit R-425). Similar examples of projects involving two separate components on the Comprehensive Study List, each triggering a federal EA, include the Orca Sand and Gravel Project, the Grassy Point LNG Transshipment and Storage Terminal, and the Kitimat LNG Terminal.

[75] Smith Report at paras. 111-113.

[76] Letter from Continental Stone to Regional Superintendent, Navigable Waters Protection (Transport Canada), June 14, 2006, included at the end of Appendix E to my First Report.

DFO has determined the scope of the project will include only the marine based portion of the project".[77] DFO's screening report for Bear Head explained:

> The overall development proposal is undergoing a joint federal-provincial environmental assessment. The portion of the proposal that is undergoing a federal environmental assessment has been scoped to include all undertakings which will take place in relation to the marine wharf, and does not include the LNG storage and gasification facility. This decision is based on the fact that the only physical work requiring a federal approval, contained in the Law List Regulations, is the marine wharf. Therefore, this Screening Report deals only with the marine portion of the LNG proposal. [Emphasis added.][78]

71. Another example of a contemporaneous project that was scoped to the trigger is the Tiverton Harbour. In respect of this project, which was proposed by DFO, the CEAA EA examined only the activities within the harbour itself that required a HADD authorization under the a *Fisheries Act*, not the quarry that would supply rock for the project, though according to Mr. Smith's reasoning the Tiverton Quarry (operated by Parker Mountain Aggregates and sometimes called the Parker Mountain quarry) should have been seen as being "accessory" to the Tiverton Harbour project.

72. The Tiverton Quarry was just up the hill from the Tiverton Harbour, not much more than 300 metres away. This can be seen from the aerial photo at **Appendix B.**

73. Mr. Smith tries to distinguish the Tiverton Quarry from the WPQ in the following way:

> Given that rock [for the Tiverton Harbour project] could have been obtained from any number of sources, it is reasonable that the Tiverton Quarry was not included in the Tiverton Harbour project scope. Unlike the Whites Point Project, where the quarry and marine terminal were interdependent, the Tiverton Harbour and Tiverton Quarry were not interdependent.[79]

74. Mr. Smith ignores the fact that the Tiverton Quarry was developed for the very purpose of supplying rock for the Tiverton Harbour project as well as a nearby wharf rebuilding project, both of which were being developed by DFO. The Tiverton Quarry proponent's application to NSDEL for a quarry approval made that clear: "This

---

[77] Email from R. Sweeney to M. Bevan and others, December 15, 2003 (CP22996; Investors' Schedule of Documents at Tab C-760).

[78] DFO, Screening Environmental Assessment Report for Bear Head, July 12, 2004 (Canada Exhibit R-335).

[79] Smith Report at Appendix 4, para. 4.

quarry is being developed exclusively for two very specific projects" … "the rebuilding of the Fisherman's Wharf and the construction of a new harbour facility".[80]

75. Because of those facts, it was inaccurate for Mr. Smith to say "the source of the rock needed for the harbour project had not yet been identified" at the time the Tiverton Harbour screening report was assessed under CEAA.[81] In fact, the May 2004 screening report referenced the fact that the rock would be "obtained from an approved quarry",[82] which was the Tiverton Quarry. The Tiverton Quarry had been specifically approved as the exclusive source of rock for the Harbour project (and the DFO Tiverton wharf repair) about one year earlier, on March 24, 2003.[83]

76. Although the screening report did not say that, DFO knew it, as DFO was both the proponent of the Tiverton Harbour project and the RA in charge of the CEAA screening for the project. In a December 16, 2003 email to other DFO colleagues, a DFO official noted that "Small Craft Harbours [a division of DFO] have proposed a project at Tiverton Harbour which will require large amounts of quarried rock <u>from the Tiverton Quarry</u>" (emphasis added).[84] He added that DFO had "reviewed and provided advice to NSDEL for this project [i.e. the Tiverton Quarry] and no CEAA trigger was identified."[85] This was several months before DFO prepared the screening report for Tiverton Harbour in May 2004.

77. It is therefore clear that, at the time DFO was conducting the EA of Tiverton Harbour, it was well aware that the source of the rock for the project would be the Tiverton Quarry, and for Mr. Smith to suggest otherwise was incorrect.

78. A further illustration of how closely interrelated the Tiverton Harbour and Tiverton Quarry projects were is found in an NSDEL memo explaining that the Tiverton Quarry was being developed to supply rock to the two projects at Tiverton: the wharf

---

[80] Application by Parker Mountain Aggregates Limited for the Tiverton Quarry permit (Canada Exhibit R-96), see cover letter and "Process Description for the Activity".
[81] Smith Report at Appendix 4, para. 3.
[82] Screening Report for Tiverton Harbour, May 2004 (Canada Exhibit R-342) at p. 5.
[83] Tiverton Quarry approval, March 24, 2003 (Canada Exhibit R-105).
[84] Email from P. Zamora to B. Hood and L. Wood, December 16, 2003 (PH00666; Investors' Schedule of Documents at Tab C-807).
[85] *Ibid.*

rebuilding project and Tiverton Harbour. The memo notes that "due to pending road weight restrictions, the rock must be acquired locally."[86] This refutes Mr. Smith's assertion, quoted above, that "rock could have been obtained from any number of sources".

79. Indeed the Tiverton Quarry was approved by NSDEL to provide rock only for the wharf and harbour projects, and not any other projects. When the wharf and harbour projects no longer needed the rock, NSDEL advised the Tiverton Quarry proponent that the approval was no longer valid.[87] Thus, contrary to Mr. Smith's assertion, the Tiverton Quarry and the Tiverton Harbour were interdependent.

80. Mr. Smith cites CEA Agency guidance materials and argues, "If the principal project cannot proceed without the undertaking of another physical work or activity, then that other physical work or activity may be considered as a component of the scoped project."[88] Clearly the Tiverton Harbour could not proceed without the Tiverton Quarry. So why was the quarry not scoped in?

81. In fact, some DFO officials concluded that the Tiverton Quarry must be scoped into the Tiverton wharf rebuilding project, which was assessed under CEAA in early 2003, shortly before the Tiverton Harbour screening.

82. In a March 26, 2003 letter from DFO Habitat Management Division (which was overseeing the CEAA EA of the proposed wharf repair project at Tiverton) to DFO Small Craft Harbours Branch (which was the proponent of the wharf project), the DFO Habitat Management Division, after referencing that the January 2003 screening for this project stated that "clean rock fill will be obtained from existing approved quarries", continued:

> Due to the fact that rock is not being obtained from an existing quarry, but from a new quarry for which a permit was issued on March 24, 2003, this constitutes a significant change in the project from the time the assessment was conducted…. To comply with the regulations of the CEAA, and because of changes to the project, we require additional information regarding the new quarry. The

[86] NSDEL Briefing Note, March 4, 2003 (PH0001; Investors' Schedule of Documents at Tab C-761).
[87] Letter from B. Arthur to M. Lowe, December 15, 2004 (Canada Exhibit R-340); see also letter from Bob Petrie, December 8, 2004 (PH00184; Investors' Schedule of Documents at Tab C-762).
[88] Smith Report at para. 114.

environmental assessment of the project will not be completed until the quarry has been scoped into the environmental assessment of the project and all the potential environmental effects associated with that component of the project have been addressed. [Emphasis added.][89]

83. Very shortly after this, an undated "Memorandum for the [Fisheries] Minister" was prepared, with a copy to Neil Bellefontaine and Susan Kirby who were, respectively, the DFO Regional Director General for the Maritimes Region and the DFO Assistant Deputy Minister.

84. This Memorandum, subsequently dated April 2, 2003,[90] referred to the fact that on March 26, 2003 DFO received a call from Mark Lowe of Nova Stone (Bilcon's partner in the WPQ project), "questioning whether or not the Parker Mountain quarry [Tiverton Quarry] had undergone an environmental assessment. Nova Stone are extremely upset because they had to scope the White's Point quarry with the marine component (marine terminal) of their project. They felt that the two companies were not being dealt with in an equitable manner."

85. The Memorandum to the Minister recommended that because the Tiverton Quarry had not been scoped in to the Tiverton wharf repair project, the completed screening for the wharf repair project be reopened:

- "SCH [Small Craft Harbours], to comply with the CEAA, should cease work on the wharf until the requirements under the CEAA are satisfied"; and
- "Any permits issued under the *Fisheries Act* or the *Navigable Waters Protection Act* are considered invalid." (Emphasis added.) [91]

86. The Memorandum was transmitted by Mr. Bellefontaine's office to the office of the DFO Assistant Deputy Minister on April 3, 2003 for "approval and sign-off by the ADM Oceans, and forwarding to the DM's office for signature".[92]

---

[89] DFO letter, March 26, 2003 (CP42127; Investors' Schedule of Documents at Tab C-763).
[90] PH00642; Investors' Schedule of Documents at Tab C-719 (see also Tab C-729).
[91] DFO, Memorandum to the Minister, undated (apparently April 2, 2003) (CP42120; Investors' Schedule of Documents at Tab C-729).
[92] Email from Lee Geddes on behalf of Neil Bellefontaine, April 3, 2003 (PH00642; Investors' Schedule of Documents at Tab C-719).

87. However, the recommendation in that Memorandum, which would have required the Tiverton Quarry to be scoped into the CEAA screening of the Tiverton wharf repair project, was rejected by senior DFO officials in Ottawa, apparently after the direct involvement of the Fisheries Minister, as described below.

88. On April 3, 2003, the same day this Memorandum was transmitted to DFO Ottawa for the Fisheries Minister's signature, Bruce Hood of DFO headquarters in Ottawa, who was Senior Liaison Officer, Habitat Operations, directed his staff: "Please check with region to find out why they felt it necessary to scope the quarry into the project if there are no fisheries/navigation concerns associated with the quarry".[93]

89. The recommendation to stop work on the Tiverton wharf repairs until the CEAA screening for that project was scoped to include the Tiverton Quarry was apparently of such concern to the quarry proponent and to the Fisheries Minister that, according to an April 17, 2003 DFO email, the Minister met with Parker Aggregates, after which DFO headquarters asked "whether or not the Memo should still go forward".[94]

90. The April 17, 2003 email ("Subject: Parker Mtn Aggregates"), copied to Andrew Stewart, the DFO Maritimes Region official who wrote the March 26, 2003 letter concluding the two projects must be scoped together and who most likely would have been a principal author of the Memorandum recommending that the Minister sign off on that said:

> Recently a Memorandum for the Minister was drafted in your shop (copy attached). <u>The Minister has met with the proponent</u>; HQs is asking whether or not the Memo should still go forward" (emphasis added).[95]

The same email notes that the Tiverton Quarry "is in the Minister's riding".

91. A handwritten annotation on the April 17, 2003 email indicates that the original briefing note (BN) has been "cancelled".

---

[93] Email from Bruce Hood to Laurie Wood, April 3, 2003 (PH00642; Investors' Schedule of Documents at Tab C-719).
[94] Email from Lee Geddes to Carol Ann Rose, April 17, 2003 (PH00617; Investors' Schedule of Documents at Tab C-706).
[95] *Ibid.*

92. Instead of a Memorandum to Minister, a revised version of the information contained in the previous draft Memorandum for the Minister was placed in a Briefing Note for the Minister on April 16, 2003 approved by DFO Deputy Minister Larry Murray. This Briefing Note for the Minister stated that, although the proponent of the Whites Point Quarry had raised the "apparent difference" in scoping between Whites Point (where the quarry and terminal were being scoped together) and the Tiverton wharf repair project (which excluded the quarry), it was not necessary to reopen the screening of the Tiverton wharf repair project so as to scope in the Tiverton Quarry.

93. This complete change in and rejection of the recommendation from the DFO region in its draft Memorandum to Minister was attributed to a "secondary assessment": "Based on the secondary assessment of the Tiverton quarry operation, DFO determined that the project had essentially remained unchanged and therefore, no further assessment under *CEAA* was required."[96]

94. The "secondary assessment" appears to have focussed on DFO ascertaining that the Tiverton Quarry was "independently owned, and would also be supplying aggregate materials for other projects in the area". The Briefing Note also references that DFO reviewed the Parker Mountain Aggregates proposal and that it determined there were no concerns with respect to fisheries resources.[97]

95. What this "secondary assessment" did not however specifically state was that the Parker Mountain (Tiverton) quarry was opened and licensed only to supply aggregate to the two DFO projects at Tiverton. Therefore, the rationale used in the Briefing Note that the quarry would be supplying aggregate to "other projects" was clearly disingenuous – DFO knew the Tiverton Parker Mountain quarry was supplying rock only to DFO's Tiverton projects, and therefore, according to the rationale then being used by DFO to scope the quarry component of the Whites Point project into a CEAA EA, the CEAA screening of one or both of these DFO projects should have included the assessment of the effects of the Tiverton Quarry. The fact that it was "independently owned" was also irrelevant in the circumstances.

---

[96] Briefing Note for the Minister at p. 2 (Investors' Schedule of Documents at Tab C-731; see also Tabs C-730, 732 and 733).
[97] Briefing Note for the Minister, *ibid.*, at p. 2.

The Tiverton Quarry was opened and licensed only to supply rock for the two DFO Tiverton projects. Ownership was irrelevant to whether there may be impacts caused by the quarry; any impacts from the quarry would have been caused by, or resulted from the operation of the quarry to supply rock for DFO's projects. Therefore, using DFO's approach at Whites Point, scoping the Tiverton Quarry into the screening of the Tiverton wharf repair project should have also been required.

96. The further rationale used in the Deputy Minister's Briefing Note to eliminate scoping in of the Tiverton Quarry was that DFO was not able to conclude there were concerns from the Tiverton Quarry with respect to fisheries resources. Again, this rationale was inconsistent from DFO's approach at Whites Point, where DFO indicated it was scoping in the quarry because it could not determine if the quarry would cause impacts sufficient to trigger the *Fisheries Act*.

97. In the result, DFO acted inconsistently in excluding the Tiverton Quarry from the scoping of the Tiverton DFO projects and including the White Point quarry in the scoping of the WPQ project.

98. To be clear, in contrasting the treatment afforded to WPQ and the Tiverton DFO projects, I do not mean to imply that DFO's scoping approach to the Tiverton Quarry was wrong and its approach to WPQ was right. In fact, DFO's scoping approach to Tiverton Quarry was consistent with its usual practice at the time, of scoping to the trigger (e.g. Belleoram and Bear Head), as explained above. However, the discrepancy in DFO's rationalization of scoping the quarry into the Whites Point project EA and not scoping the Tiverton Quarry into the wharf repair project EA, demonstrates that DFO's scoping decisions in the Federal Minister of Fisheries riding were not made in a principled, predictable and consistent manner. Rather, based on these examples, when there was a choice to be made as to the scope of the projects to be included in a CEAA EA in his riding, statutorily irrelevant political considerations (i.e. whether the project enjoyed the DFO Minister's support) appear to have been a determining factor.

99. I should take this opportunity to correct something I said in my First Report. My statement that the CEAA assessment of the Aguathuna Quarry and Marine Terminal

project was completed "without considering the impact of the quarry"[98] was inaccurate – actually the impacts of both the marine terminal and the quarry were considered. Nevertheless, the Aguathuna project did not raise the same type of scoping issue as the WPQ. The CEAA trigger for Aguathuna was the provision of government funding for the entire project, rather than the requirement for a federal approval under the *Fisheries Act* or the *Navigable Waters Protection Act*. The responsible authority in the Aguathuna case had no real choice but to scope in both the marine terminal and the quarry. For Aguathuna, "scoping to the trigger" meant scoping in both components of the federally funded project.

***(d) DFO's decision to include the quarry was not "academic"***

100. Mr. Smith says my concerns about DFO's decision to scope in the quarry are "academic" because the scoping issue was ultimately determined not by DFO but by the federal Minister of the Environment and the Nova Scotia Minister of Environment and Labour.[99] However, while Mr. Smith is technically correct that once the WPQ was referred to a JRP process, the final say on scoping lay with the ministers, what DFO and Nova Scotia did in the period April – June 2003 was to make the *de facto* decision that there would be a panel review scoped to include the quarry. Everything after that was a matter of legal formalities, as elaborated below.

101. The fundamental fact is that the federal Environment Minister would not have referred anything to a review panel without a request from the Fisheries Minister. And the Fisheries Minister did not make the request in a vacuum. He made it in June 2003 after his staff had direct discussions with the Nova Scotia Minister's staff where they both indicated that they wanted a review panel scoped to include the quarry.

102. In reality, during the period March 31 to June 25, 2003 the die was cast determining there would be a harmonized Canada-Nova Scotia review through a number of steps taken jointly by DFO and Nova Scotia. It was in that period that an agreement in principle was reached by Canada and Nova Scotia leading to the June 26, 2003 letter from the federal Fisheries Minister to the federal Environment Minister

[98] First Report, Appendix F at p. 10.
[99] Smith Report at para. 100; he elaborates on this at paras. 126-132.

requesting a joint review panel with Nova Scotia be established. It was the discussions and determination by DFO in that period of 2003 that also drove the scope of the review panel to include the quarry. The subsequent Joint Panel Review Agreement of 2004 was, in the result, the formal packaging of what had been earlier determined in 2003. From this perspective it is clear that, rather than DFO's 2003 discussions and steps being "moot",[100] as so labelled by Mr. Smith, they were the essence of the formal agreement which simply confirmed those actions and decisions.

103. Canada's counter-memorial helpfully describes how in the spring and early summer of 2003 DFO and Nova Scotia officials acted together to make these basic decisions. The following excerpts from Canada's counter-memorial summarize how, in spring and early summer of 2003, well prior to the drafting of the Joint Panel Review Agreement, officials from both governments worked out an understanding for a harmonized EA process that featured the early identification of a panel review assessment of both the quarry and marine terminal as being appropriate:

> **Provincial and Federal Officials Determine that the Whites Point EA Process will be Harmonized**
>
> 109. The harmonized approach was officially adopted and formalized at a March 31, 2003 intergovernmental meeting, convened at NSDEL's request, to discuss roles and coordination between the two levels of government.
>
> 110. At this meeting, federal and provincial officials agreed in principle to enter into a Memorandum of Understanding ("MOU") harmonizing their respective EAs in order to avoid the inherent inefficiencies in running two separate parallel processes for the same project. This type of coordinated approach had recently been taken in the EA of a project engaging Nova Scotia and federal jurisdiction and so a draft MOU for the Whites Point project was prepared.
>
> ...
>
> **DFO Determines GQP's Project Should be Assessed by a Review Panel**
>
> **a) Early Identification of a Panel Review as Appropriate for the Assessment of a Quarry and Marine Terminal at Whites Point**
>
> 136. Discussion regarding the potential for an assessment by a review panel continued after GQP's submission of its March 2003 project description. At the March 31, 2003 intergovernmental meeting for example, both a comprehensive

[100] Smith Report at para. 132.

study and panel review were discussed. In particular, a "Highlights and Action Items" summary prepared after the meeting acknowledged the possibility that the project could be referred to a review panel, indicating that "Comprehensive Study is the most likely federal EA track" but that "[p]ublic reaction to Scope and MOU may influence EA track decision."

....

**d) The Referral to a Review Panel**

…

147. DFO officials also worked to confirm with provincial officials that they would be willing to participate in an assessment by a JRP, given Nova Scotia had expressed a willingness to coordinate the federal and provincial processes. On being briefed on the matter, Nova Scotia's Minister of Environment and Labour, Ronald Russell, agreed to the appointment of a JRP. In conveying Minister Russell's decision to NSDEL officials, Deputy Minister Ronald L'Esperance noted that, "[g]iven the local concerns, the magnitude of the proposed future operation (it would have been required to go thru EA beyond the existing 3.9h) and the intersecting jurisdiction with the Fed, we think it is appropriate to proceed with a joint assessment. We favor the panel approach."

148. To confirm the agreement in principle between the federal and provincial governments, DFO's Acting Manager of Habitat Management, Paul Boudreau, wrote to NSDEL's Christopher Daly on June 20, 2003, advising that "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" and that "[i]n the context of harmonizing the provincial and federal environmental assessment processes for this project […] I am interested to know if your Department would be interested in participating in a joint review panel of this project." On the same day, Mr. Daly responded, confirming that Nova Scotia was "willing to participate in a joint environmental assessment review panel".

149. Once Nova Scotia confirmed its interest, DFO officials prepared a briefing note for decision to DFO Minister Thibault, recommending that he refer the project to the Minister of the Environment for referral to a review panel.

...

**Harmonization of Federal and Provincial EA Processes Through the Establishment of a JRP**

**1. Preparation of the Draft JRP Agreement and Its Terms of Reference**

152. In order to harmonize the federal and provincial processes into a single JRP process, Nova Scotia and the federal government were required to enter into a Joint Review Panel Agreement ("JRP Agreement"), and to draft Terms of Reference for the JRP that would ensure that the statutory requirements of both jurisdictions were satisfied. NSDEL and Agency officials finalized a draft JRP Agreement and Terms of Reference by July 18, 2003, and after receiving approvals from both the Nova Scotia and federal Minister to proceed, on August

11, 2003 they issued a joint news release inviting the public to comment on the documents by September 18, 2003.

104. These excerpts from Canada's counter-memorial well summarize why the formal Joint Panel Agreement of 2004 was but the formalization of the understanding and agreement reached between Canada and Nova Scotia in spring and summer, 2003. The meetings and discussions referenced in the text and footnotes to these paragraphs of Canada's counter-memorial demonstrate, in my opinion, that DFO's decision as of late spring 2003 to scope in the quarry to the CEAA EA, in contrast with its normal practice at the time of scoping to the trigger, was fundamental to a joint panel review with Nova Scotia being established.

105. Another reason why DFO's determination to scope the quarry into the CEAA EA was not academic or moot relates to the fact that under CEAA the only basis for a review panel referral was either significant adverse environmental effects or public concerns. But in the case of WPQ, neither of these criteria existed vis-à-vis the marine terminal.

106. DFO knew there were no significant adverse environmental effects to fish or navigation arising from the marine terminal, and that public concerns related to the quarry, not the marine terminal. Therefore, unless the quarry was scoped into the project to be reviewed, there was no basis for a CEAA referral.

107. Therefore, DFO's internal decision to scope in the quarry made in the period March 31-June 26, 2003 was essential to DFO and Nova Scotia being able to achieve a joint review panel.

### *(e) The decision to scope in the quarry was based on irrelevant considerations*

108. In my First Report I suggested that DFO's decision to scope in the quarry appears to have been influenced by political considerations (i.e. protecting the Minister of Fisheries, Robert Thibault, who was also the Member of Parliament for the electoral district in which Whites Point was located) rather than by a purely neutral analysis of

the facts and law. I referred in my First Report to the notes of a DFO official, Bruce Hood that recorded, "Thibault wants process dragged out as long as possible."[101]

109. I have read Mr. Hood's affidavit where he acknowledges that his "word choice was poor" but contends that he was merely recording his own personal thoughts, not the actual directions of the Minister.[102] Even if one were to accept Mr. Hood's explanation, it seems at the very least that the front-line officials understood that the Minister was opposed to the project.[103]

110. Mr. Hood's notes also record a conversation he had with other federal and provincial officials, apparently in the spring of 2003:

> What does the Minister want? … we should talk to Ministers [sic] staff.
> Every time we scope broadly to accomodate [sic] someone else we get screwed.
> We want to get our Minister off this file.[104]

111. This observation helps to substantiate my concern that irrelevant, political considerations played a part in DFO's scoping decision. Mr. Hood's affidavit does not explain how it could have been proper for officials to consider what the Minister "wanted" in terms of scoping.

112. Mr. Hood's understanding that the Minister wanted the WPQ process dragged out as long as possible is in any event a dramatic contrast to what the Minister said about the Tiverton Quarry project. According to the notes of a Nova Scotia Department of Environment and Labour official working on the Tiverton Quarry file, the Minister "asked if there was anything he can do to speed up [the] process" for Tiverton

[101] First Report at para. 100, citing notes of Bruce Hood, March to June 2003 (Canada Exhibit R-260).
[102] Affidavit of Bruce Hood at para. 22.
[103] Although Minister Thibault appears not to have publicly expressed his opposition while he was still Fisheries Minister, he did so once he was no longer in that office (but still a Member of Parliament). As noted in my First Report, he wrote a piece in the local newspaper in May 2004 where he said, "I do not think it is an acceptable project" (First Report at para. 183). Later, during the JRP hearings on the WPQ, he told the Panel, "I ask you to consider seriously rejecting this Application", and that "I would support those who oppose it" (Transcript, June 28, 2007, at pp. 2666 and 2667: Investors' Schedule of Documents at Tab C-163).
[104] Notes of Bruce Hood, apparently from April 2003 (Investors' Schedule of Documents at Tab C-284) at Bates p. 801610.

Quarry.[105] Of course the Tiverton Quarry was needed in order for the DFO-led harbour and wharf replacement projects at Tiverton to proceed.

113. Mr. Hood mentions in his affidavit an April 25, 2003 phone call that he and his boss, Richard Nadeau (Director of Operations at DFO headquarters), had with two officials with the DFO regional office.[106] Mr. Hood suggests that this call was indicative of the debate between the DFO region (which urged that the quarry be scoped in) and DFO headquarters (which felt that only the terminal should be included). While Mr. Hood may be correct that there was no consensus within DFO as to the proper scope, his notes of that same call reveal that senior DFO officials in Ottawa headquarters raised serious questions about DFO's jurisdiction to scope in the quarry.

114. According to Mr. Hood's notes, Mr. Nadeau explained that DFO had a trigger for the terminal "but no trigger for quarry", therefore DFO should "limit scope of project to terminal".[107] Mr. Nadeau elaborated:

> - ask question – could project component exist without DFO approval – if "No" then its [sic] our business + scope it in. If "Yes" its [sic] someone else's business + don't scope it in.[108]

115. Mr. Hood's notes of the call also reveal that one of the participants (apparently Mr. Nadeau) reminded everyone of the Federal Court's decision in the Red Hill Creek Expressway case just two years earlier: "This is like Red Hill where DFO trigger was s. 35 for realignment of a stream but we scoped in Hwy [highway] too + were making decisions on effects on birds of removing trees in Hwy corridor… Judge ruled that we had no regulatory authority over the highway and therefore were abusing the CEAA process."[109]

116. It is important that these officials were aware of the 2001 Federal Court Red Hill Creek Expressway decision arising from a controversial expressway project in

---

[105] Notes of J. Cook, NSDEL, March 3, 2003 (PH00143; Investors' Schedule of Documents at Tab C-614).
[106] Affidavit of Bruce Hood at para. 13.
[107] Notes of Bruce Hood (Investors' Schedule of Documents at Tab C-284), at Bates p. 801603.
[108] *Ibid.* at Bates p. 801603.
[109] *Ibid.* at Bates p. 801603.

Hamilton.[110] In that case the Federal Court found it was constitutionally colourable and *ultra vires* federal jurisdiction to establish a CEAA review panel to review a municipal expressway, where the trigger for the CEAA EA was a *Fisheries Act* s. 35(2) authorization required for a creek relocation.

117. There were many direct parallels in the Red Hill Expressway case to the Whites Point situation, which is no doubt why those on the call were being reminded of its relevance:

- In both cases there were two physical project components to be undertaken, but in each case CEAA was triggered by only one of these components, as only one was clearly within federal jurisdiction:
    - In the case of WPQ, the only certain CEAA trigger arose from a *Navigable Waters Protection Act* approval required for the marine terminal;
    - In the Red Hill matter, the only CEAA trigger arose from the need for a *Fisheries Act* authorization to relocate Red Hill Creek, required to accommodate the completion of the Expressway.
- In both cases there was significant public opposition to the component of the project that did NOT trigger CEAA:
    - In the case of WPQ, that component was the quarry;
    - In the Red Hill matter, that component was the completion of the Expressway in the Red Hill valley.
- In both cases, federal officials were well aware that the controversial components were matters of provincial jurisdiction:
    - In the case of WPQ, that component was the quarry

[110] The Red Hill case is formally known as *Hamilton-Wentworth (Regional Municipality) v. Canada (Minister of the Environment)* 2001 FCT 381 (Investors' Schedule of Documents at Tab C-764).

- In Red Hill, that component was the highway

- In Red Hill, federal officials were aware of serious legal questions about scoping the panel review to include the Expressway, but they nevertheless chose to do so based, in part, on considering how a decision not to include the Expressway would reflect on the reputation of the responsible federal ministers in the face of significant public opposition to the Expressway.

118. During the conversation about Red Hill referred to in Mr. Hood's notes, the point was made that DFO "shouldn't be scoping things in to satisfy public or other agency pressure."[111] It was observed that the "Public will likely be mad if DFO doesn't scope in Quarry because they would want us to be assessing it".[112]

119. This latter statement reflects the very same political consideration that led federal officials to scope the much-opposed Expressway project into a CEAA EA triggered by a creek relocation, and eventually to the terms of reference for a review panel EA focussing on the need for the Expressway to be completed. It was that scoping in of the Expressway that led the Federal Court in its Red Hill decision to find CEAA had been used in an improper and unconstitutional way.

120. Importantly, the very next sentence in the notes states:

> However, it is easier to explain why quarry isn't scoped in if we don't have the legal mandate to scope it in – no trigger.

121. These notes clearly show the demands of a significant number of the Fisheries Minister's constituency (to have DFO initiate a panel review of the quarry) were being weighed against carrying out DFO's usual practice and clear legal mandate, of scoping to the trigger and therefore not including the quarry.

---

[111] Notes of Bruce Hood (Investors' Schedule of Documents at Tab C-284), at Bates p. 801603.
[112] *Ibid.* at Bates p. 801604.

122. These political considerations were carried through to the June 25, 2003 Memorandum for the Minister recommending "Referral of the White Points Quarry and Shipping Terminal to the Minister of Environment for a Panel Review".[113]

123. Even as of that late date, the day before the Fisheries Minister formally requested a review panel be established, DFO had still not reached the conclusion there was a CEAA trigger for the quarry:

- "DFO is presently determining if the quarry will require *Fisheries Act* authorization and a CEAA assessment."
- "The province…has expressed concern regarding to the extent to which a joint EA could be harmonized as DFO may not have a legislative trigger to include the quarry."

124. Despite this clear recognition that there may not be any basis for CEAA to be applied to the quarry (i.e. no requirement for a *Fisheries Act* authorization for the quarry), the memo then continued:

- "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."
- "It is likely, due to public opposition of the proposal that there will be a court challenge if the scope of the project for the CEAA assessment does not include both the quarry and marine terminal".

The Memorandum concluded by recommending that Minister Thibault refer the project to the Environment Minister for referral to a review panel.

125. These aspects of the June 25 Memo to Minister Thibault and the notes of DFO officials' conversations as to their awareness of the Red Hill Creek Expressway case are further indications that senior DFO officials, the Deputy Minister who authored the June 25, 2003 memo, and DFO Minister Thibault himself, were likely aware that

[113] Memorandum for the Minister, June 25, 2003 (Canada Exhibit R-72).

scoping in the quarry could be legally tenuous, if not wrong, without a clear federal trigger for it being identified; but also illustrate their sensitivity to public pressure to do so regardless of DFO's usual scoping practice and jurisdictional concerns. It also appears they understood making these choices would placate the public opposed to the project thus upholding the Minister's reputation within a large segment of his constituency.

126. The reference in the last quoted excerpt from the Deputy Minister's June 25, 2003 Memorandum to a likely court challenge by project opponents if the scope for the CEAA assessment did not include both the quarry and marine terminal indicates that the Minister was being advised he should consider whether it was preferable for him to be legally challenged by his electors for not scoping in the quarry, rather than being criticized by the proponent for scoping it into the EA.

127. Although DFO clearly knew scoping in the quarry to a CEAA EA without a quarry trigger was contrary to DFO practice of scoping to the trigger, and contrary to how DFO Ministers had successfully defended the validity of scoping only to the trigger in previous litigation, Fisheries Minister Thibault's June 26, 2003 letter indicates that he apparently decided to depart from the previous DFO practice, and cast his lot with his electors, the WPQ opponents. In effect, it appears that in abandoning past DFO scoping to the trigger practice, Minister Thibault had decided he would rather be legally challenged by the proponent, rather than his constituents.

128. It would seem that ultimately these political considerations outweighed maintaining consistency in DFO's scoping to the trigger practice, and also outweighed the precedent established by the Federal Court in its 2001 decision finding that scoping in an expressway to a review panel EA triggered by a *Fisheries Act* s. 35(2) creek relocation authorization was constitutionally improper.

### 1.5 The decision to refer the project to a panel review

#### *(a) Similar projects have not been referred to a panel review*

129. I stand by the view I expressed in my First Report that the decision to refer the WPQ to a panel was unusual. I pointed out that two similar quarry-marine terminal

projects, the Aguathuna and Belleoram projects, were assessed without a panel review.[114] I also noted that the Tiverton Harbour project, only a few kilometres away from the WPQ, did not include a panel referral.

130. Mr. Smith says that "One of the principal distinctions between the Whites Point Project and the Aguathuna, Belleoram and Tiverton projects cited by Mr. Estrin as comparator projects, is the absence of public concern."[115] I agree that Aguathuna, Belleoram and Tiverton appear to have been uncontroversial. However, public concern was not the basis used by the DFO for sending the WPQ to a panel review.

131. As I explained in my First Report, CEAA provides for two grounds for referring a project to a panel. In order to request the Environment Minister to refer a project, the responsible authority must be of the opinion:

(a) the project "may cause significant adverse environmental effects" or that

(b) "public concerns warrant a reference".[116]

132. In the case of the WPQ, it was factor (a), environmental effects, not public concerns, that was DFO's official reason for requesting the referral.

133. DFO set out its recommendation for a panel review in the June 25, 2003 Memorandum for the Minister from the Deputy Minister. The memo said "DFO believes that the project as proposed is likely to cause environmental effects over a large area of both the land and marine environments and on fisheries and tourism".[117] It went on, "<u>For the reason of environmental effects</u>, 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" (emphasis added).[118]

---

[114] First Report at page 1.
[115] Smith Report at para. 63.
[116] First Report at paras. 20-24 and CEAA s. 25.
[117] Memorandum for the Minister, June 25, 2003 (Canada Exhibit R-72). I note that the transmission slip is stamped June 20, but the actual memo is stamped June 25. Nothing turns on this discrepancy.
[118] *Ibid.*

134. The next day, June 26, 2003, the Minister of Fisheries sent a formal request for a panel review to the Minister of the Environment. The request letter made no mention of public concerns, but noted that the project was "likely to cause environmental effects over a large area of both the marine and terrestrial environments".[119]

135. This rationale for the panel review is equally consistent with a DFO letter sent on June 20, 2003 to update NSDEL on DFO's position and asking Nova Scotia to confirm its interest in a joint review panel. The letter stated, "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*" (emphasis added).[120]

136. In summary, DFO formally based its rationale for a review panel referral of WPQ based on its conclusion there were likely to be environmental effects, and the Environment Minister agreed. This raises the question of why federal officials did not make the same determination in respect of Aguathuna, Belleoram and Tiverton Harbour. Aguathuna and Belleoram in particular were conceptually similar to the WPQ – all were large coastal quarries in eastern Canada, and all involved shipping of the extracted materials by large ships using specially built docking facilities. I find it puzzling that officials could have concluded at WPQ that the potential environmental concerns were so worrisome that they justified a panel review but reached the opposite conclusion at Aguathuna and Belleoram.

---

[119] Letter from Minister Thibault to Minister Anderson, June 26, 2003 (Investors' Schedule of Documents at Tab C-61).

[120] Letter from P. Boudreau (DFO) to C. Daly (NSDEL), June 20, 2003 (CP04668; Investors' Schedule of Documents at Tab C-735).

### *(b) There was nothing about the size and location of the WPQ that warranted a panel review*

137. Mr. Smith does not dispute the statistics I included in my First Report showing that panels are struck only rarely.[121] However, he suggests that the size and location of the WPQ warranted a panel review. I disagree.

138. In particular, it is inaccurate to say that "The land-based undertaking involved quarrying approximately 120 hectares of land (approximately 297 acres), or the size of approximately 224 football fields, continuously over a period of 50 years."[122] In fact, the quarry was to be developed in phases over the course of its 50 year lifespan. Attached to this report as **Appendix C** are several maps taken from Bilcon's EIS that show where quarrying would take place during each phase.[123] At any given time, only a small portion of the 120 hectares would be undergoing quarrying: the rate of quarrying would be only 2.5 hectares per year.[124] As each new portion was opened to quarrying, the portion that had already been quarried would undergo reclamation.

139. Besides, although 224 football fields certainly sounds big, several even bigger quarry/mine projects have undergone only a screening level review or a comprehensive study under CEAA (see the table below). And at least one larger quarry has undergone an EA under the Nova Scotia *Environment Act* without being sent to a hearing.[125]

---

[121] First Report at paras. 7-8 and 75.

[122] Smith Report at para. 35.

[123] Bilcon Environmental Impact Statement ("EIS"), Plans OP1-8 (Investors' Schedule of Documents at Tab C-1).

[124] Bilcon EIS, Chapter 9.3, at p. 27 (Investors' Schedule of Documents at Tab C-1). As one of Bilcon's experts, Uwe Wittkugel, put it in the hearing, "the actual quarry will slowly move its way through the overall area": Transcript, June 18, 2007, at p. 219 (Investors' Schedule of Documents at Tab C-155).

[125] The Sovereign Resources Quarry Expansion Project was approved by the Nova Scotia Minister of Environment and Labour on August 29, 2005: http://www.gov.ns.ca/nse/ea/sovereignquarry.asp (Investors' Schedule of Documents at Tab C-881). No public hearing was held. The project involved a 180 ha expansion of an existing quarry (from 19 ha to 199 ha). In addition, on April 1, 2010 the Minister approved the expansion of the Mulgrave Quarry from 123 ha to 213 ha without a hearing (the new area was to be used for storing fines produced during the washing of aggregate, not for actual rock extraction): http://www.gov.ns.ca/nse/ea/martin.marietta.mulgrave.quarry.asp (Investors' Schedule of Documents at Tab C-882).

## Large Quarry/Mine Projects Not Sent to a CEAA Panel

| Project | Location | Year | Level | Footprint | Duration | Volume | Result |
|---|---|---|---|---|---|---|---|
| Hammerstone Quarry (expansion)[126] | Alberta | 2007 | Screening | 1,500 ha | 50+ years | 5-20,000,000 t/year | EA terminated[127] |
| Fording River Coal Mine (expansion)[128] | BC | 2012 | Screening | 1,200 ha | 25 years | 7,000,000 t/year | EA terminated[129] |
| Line Creek Coal Mine Phase II (expansion)[130] | BC | 2010 | Screening | 1,100 ha | 20 years | 2,600,000 t/year | EA terminated[131] |
| Belleoram Quarry and Marine Terminal[132] | NL | 2007 | Comp. study | 900 ha | 50 years | 6,000,000 t/year | Approved |
| Ruby Creek Open-Pit Molybdenum Mine (tailings)[133] | BC | 2006 | Screening | 830 ha | 20+ years | 20,000 t/day | Approved |
| Parsons Creek Limestone Quarry[134] | Alberta | 2007 | Screening | 391 ha | 40+ years | 250,000-2,000,000 t/year | EA terminated[135] |
| Black Point Quarry[136] | NS | 2011 | Comp. study | 280 ha | 50 years | 6,500,000 t/year | Withdrawn |

---

[126] CEA Agency project summary, http://www.ceaa.gc.ca/050/details-eng.cfm?evaluation=25921&ForceNOC=Y (Investors' Schedule of Documents at Tab C-884). See also http://www.nrcb.gov.ab.ca/nrp/Currentapplications.aspx?id=3484 (Investors' Schedule of Documents at Tab C-883).

[127] DFO terminated the EA "because the project as proposed by the proponent no longer triggered the *Canadian Environmental Assessment Act*" (project summary, *ibid.*).

[128] Project summary, http://www.ceaa-acee.gc.ca/052/details-eng.cfm?pid=67115 (Investors' Schedule of Documents at Tab C-885).

[129] The project summary, *ibid.*, states that, as a result of the coming into force of the new *Canadian Environmental Assessment Act, 2012*, which replaces CEAA, "there is no longer a requirement to complete the environmental assessment of this project".

[130] Project summary, http://www.ceaa.gc.ca/052/details-eng.cfm?pid=52126 (Investors' Schedule of Documents at Tab C-886).

[131] The project summary, *ibid.*, states that, as a result of the coming into force of the new *Canadian Environmental Assessment Act, 2012*, which replaces CEAA, "there is no longer a requirement to complete the environmental assessment of this project".

[132] Only the marine terminal component was assessed under CEAA. See First Report, Appendix E.

[133] Project summary, http://www.ceaa.gc.ca/052/details-eng.cfm?pid=23875 (Investors' Schedule of Documents at Tab C-887). See also http://www.ecoweek.ca/issues/ISarticle.asp?aid=1000202167 (Investors' Schedule of Documents at Tab C-888).

[134] Project summary, http://www.ceaa-acee.gc.ca/052/details-eng.cfm?pid=29050 (Investors' Schedule of Documents at Tab C-889).

[135] DFO terminated the EA "because the project as proposed by the proponent no longer triggered the *Canadian Environmental Assessment Act*" (project summary, *ibid.*).

[136] Project Description (November 2011), available at http://www2.mpmo-bggp.gc.ca/MPTracker/project-projet-05.aspx?pid=204 (Investors' Schedule of Documents at Tab C-890); see also the Major Projects Management Office website: http://www2.mpmo-bggp.gc.ca/MPTracker/project-projet-01.aspx?pid=204 (Investors' Schedule of Documents at Tab C-891).

| Orca Sand and Gravel[137] | BC | 2005 | Comp. study | 200+ ha | 30 years | 4-6,000,000 t/year | Approved |
|---|---|---|---|---|---|---|---|
| *Whites Point Quarry* | *NS* | *2007* | *Panel* | *120 ha*[138] | *50 years* | *2,000,000 t/year* | *Rejected* |

140. Mr. Smith also notes that the WPQ was to be sited in "a relatively pristine area".[139] I am not sure that "pristine" is the most apt description. It certainly was a rural area but it was hardly untouched by industry. Quarrying had actually taken place at the very same site back in the late 1940s and 1950s.[140] Indeed the site had been identified as suitable for quarrying as early as 1801.[141] More recently there had been clear-cutting of the forest on parts of the Bilcon property and adjacent lands.[142] There was also a disused road, the Whites Point Road, that ran through the property. And it was closer than just about any other part of Digby Neck to the busy shipping lanes in the Bay of Fundy. (See **Appendix D** to this report, which is a map of the shipping lanes taken from the Panel Report.[143])

141. In a similar vein, Christopher Daly asserts in his affidavit that the WPQ was "unique", and that the quarry "would perhaps have been the largest quarry" in Nova Scotia.[144] Actually, the Porcupine Mountain quarry, located near the Canso Causeway between mainland Nova Scotia and Cape Breton island, is much larger. It has operated for decades (it opened before the federal or provincial EA regimes were in place), and has reserves for another 50 years. The Porcupine Mountain quarry covers approximately 765 acres (more than twice as large as WPQ's 297 acres), and its annual capacity is 4 million tonnes or more (at least twice as much as

---

[137] Comprehensive Study, see http://www.ceaa.gc.ca/050/document-eng.cfm?document=9320 (Investors' Schedule of Documents at Tab C-892). The comprehensive study included both the marine terminal and the on-land component, as each component was determined to be captured by the Comprehensive Study List Regulations.
[138] Quarrying would take place on 120 ha of the 152 ha property.
[139] Smith Report at para. 34.
[140] Bilcon EIS, Chapter 9.3, at p. 131 (Investors' Schedule of Documents at Tab C-1).
[141] According to a historical study prepared for Bilcon and included in its EIS, one of the conditions attached to the ownership of the land was that if it was not suitable for farming, it was to be used for a stone quarry: Barry Moody, "Whites Point Quarry Property: Historical Background", July 2002, at p. 4 (Investors' Schedule of Documents at Tab C-430).
[142] Bilcon EIS, Chapter 9.3, at p. 131 (Investors' Schedule of Documents at Tab C-1).
[143] Panel Report at p. 56.
[144] Affidavit of Christopher Daly at para. 64.

WPQ's). Its docking facility, like the one proposed for WPQ, can accommodate ships of 70,000 tonnes.[145]

142. In summary on this point, WPQ was hardly unique or unprecedented in terms of its scope. There was in my view no compelling reason to refer it to a panel.

### *(c) The WPQ is the only quarry/mine project to undergo a public hearing under the Nova Scotia EA legislation since 2000*

143. I said in my First Report that the WPQ is the only quarry/mine proposal since 2000 to have been subjected to a public hearing under the Nova Scotia *Environment Act*, and the only one that was rejected.[146] I included as Appendix H to my First Report a list of those proposals.

144. Since my First Report was prepared, three more quarry/mine projects have been approved in Nova Scotia without a hearing.[147]

145. Below is an updated list of the 33 quarry/mine proposals that have been assessed under the *Environment Act* since 2000. This shows that the WPQ remains the only one to have been sent to a hearing, and the only one to have been rejected.[148]

---

[145] See "Martin Marietta Materials", http://www.novascotialife.com/chartermembers/martin-marietta-materials (Investors' Schedule of Documents at Tab C-893), and Martin Marietta's website, http://www.martinmariettans.ca/en/index.html (Investors' Schedule of Documents at Tab C-894) (both accessed November 2012).

[146] First Report at para. 75.

[147] The Torbrook Gravel Pit Expansion, the Northumberland Rock Quarry Extension, and the ScoZinc Operations Southwest Expansion.

[148] As the list shows, the Troy Quarry Expansion was initially rejected in 2001, but then approved less than a year and a half later.

**EAs for Nova Scotia Quarries, Mines, Aggregate & Sand Pits Completed 2000 – 2012[149]**

| Project | Hearing | Outcome | Decision Date |
|---|---|---|---|
| Torbrook Gravel Pit Expansion | No | Approved | Apr. 20, 2012 |
| Northumberland Rock Quarry Extension | No | Approved | Jan. 9, 2012 |
| ScoZinc Operations Southwest Expansion | No | Approved | Oct. 7, 2011 |
| Hants County Aggregate Quarry Extension Project | No | Approved | Aug. 12, 2010 |
| Duncan Gillis Quarry Extension Project | No | Approved | Sep. 14, 2010 |
| Hardscratch Quarry Extension Project | No | Approved | Aug. 25, 2010 |
| Whycocomagh Quarry Extension Project | No | Approved | May 06, 2010 |
| Miller's Creek Gypsum Mine Extension | No | Approved | Feb. 04, 2010 |
| Donkin Underground Exploration Project | No | Approved | Dec. 18, 2008 |
| Panuke Road Quarry Expansion | No | Approved | Apr. 07, 2008 |
| Surface Gold Mine at Moose River Gold Mines, Halifax County | No | Approved | Feb. 01, 2008 |
| *Whites Point Quarry* | *Yes (JRP)* | *Rejected* | *Nov. 20, 2007* |
| MacLeod's Settlement Pit Development | No | Approved | Sep. 14, 2007 |
| Lovett Road Aggregate Pit Expansion | No | Approved | Aug. 20, 2007 |
| Glenholme Gravel Pit Expansion | No | Approved | Aug. 03, 2007 |
| Elmsdale Quarry Expansion, Hants County | No | Approved | Jul. 24, 2007 |
| Marshall Road Sand Pit Expansion | No | Approved | May 30, 2006 |
| Leitches Creek Quarry Expansion | No | Approved | Apr. 28, 2006 |
| Rhodena Rock Quarry Expansion | No | Approved | Apr. 18, 2006 |
| Surface Coal Mine and Reclamation Project – Prince Mine Site | No | Approved | Dec. 28, 2005 |
| Nictaux Pit and Quarry | No | Approved | Oct. 28, 2005 |

[149] Source: Government of Nova Scotia website, http://www.gov.ns.ca/nse/ea/projects.asp?display=complete&x=31&y=26 (accessed December 2012; Investors' Schedule of Documents at Tab C-895). The website does not include information about projects reviewed before 2000.

My list does not include any quarry/mining projects that are currently under review, namely the Donkin Export Coking Coal Project (which is undergoing a joint federal-provincial EA without a hearing), and the South Bishop Road Soil/Peat and Aggregate Operations Project (which was assessed without a hearing in 2004, with the Minister of Environment and Labour determining that more information was required): http://www.gov.ns.ca/nse/ea/projects.asp?display=review&x=49&y=18 (accessed December 2012; Investors' Schedule of Documents at Tab C-896).

My list also omits the expansion of the Mulgrave Quarry, which was approved by the Minister in 2010 without a hearing (the new area was to be used for storing fines produced during the washing of aggregate, not for actual rock extraction); see *supra,* note 125.

| | | | |
|---|---|---|---|
| Sovereign Resources Quarry Expansion | No | Approved | Aug 29, 2005 |
| Point Aconi Phase 3 Surface Coal Mine | No | Minister demanded more information from proponent | Jan. 04, 2005 |
| Kemptown Road Quarry Expansion Project | No | Approved | Dec. 29, 2004 |
| Bond Road Sand Pit Operations | No | Approved | Dec. 20, 2004 |
| East Uniacke Quarry Expansion | No | Approved | Jun. 21, 2004 |
| Stellarton Surface Coal Mine Extension | No | Approved | Feb. 03, 2004 |
| Cambridge Aggregate Pit Expansion | No | Approved | Sep. 19, 2003 |
| Troy Quarry Expansion | No | Approved | Mar. 07, 2003 |
| White Rock Quartz Mine | No | Approved | Sep. 06, 2002 |
| Kennedys Big Brook Red Marble Mine | No | Approved | Sep. 03, 2002 |
| White Rock Quartz, Kaolin and Mica Mine | No | Minister determined that environmental assessment report was required; proponent then withdrew proposal; a new proposal was later approved (see above) | Feb. 18, 2002 |
| Troy Quarry Expansion | No | Initially rejected; later approved (see above) | Dec. 21, 2001 |

### 1.6 Comments on other quarries mentioned in Canada's materials

146. I wish to comment very briefly on three quarry proposals that, although not discussed by Mr. Smith, are mentioned elsewhere in Canada's materials: the Kelly's Mountain Quarry, the Blue Mountain Quarry, and the Beaver Harbour Quarry.

147. The Kelly's Mountain Quarry was a proposal for a quarry and related marine terminal in Cape Breton, Nova Scotia. Canada notes in its counter-memorial that this project was referred to a Canada-Nova Scotia joint review panel.[150] Although that is correct, it must be noted that this project was proposed in 1989, before CEAA and the Nova Scotia *Environment Act* were in force. Because it was governed by a different EA regime than the WPQ, it is of little comparative value.[151]

148. In any case I note that the Kelly's Mountain Quarry was more than twice as large as the WPQ: it was proposed to produce 5.4 million tonnes of aggregate per year, requiring one or two bulk carrier shipments per week.[152]

149. Although a panel was established, it did not complete its work, as the proponent decided not to proceed due to unfavourable market conditions.[153]

150. The Blue Mountain Quarry project is not discussed in the Smith Report or in Canada's counter-memorial, but is mentioned in the affidavits of Neil Bellefontaine and Christopher Daly.[154]

151. Blue Mountain was a proposal for an 81 ha quarry in suburban Halifax, Nova Scotia. It was rejected in 1992 after a provincial hearing by a panel of the Nova Scotia Environmental Control Council under the former *Environmental Assessment Act*.

[150] Canada counter-memorial at para. 418. The Kelly's Mountain project is also discussed in the affidavit of Neil Bellefontaine at paras. 14-15.

[151] Panels for some types of projects appear to have been more commonly struck under the predecessor federal legislation than under CEAA. For example, a CEA Agency presentation dated May 26, 2003 notes that "There were twelve review panels established under the environmental legislation preceding the Act for nuclear-related projects including nuclear generation and uranium mining activities", but "Since the promulgation of the Act, there have been no panels, but there have been four nuclear-related projects assessed through the comprehensive study process" (CP04871; Investors' Schedule of Documents at Tab C-870).

[152] "Environmental Impact Assessment: Proposed Aggregate Quarry at Kelly's Mountain, Phase 2", November 1989, at pp. 9 and 45 (Canada Exhibit R-34).

[153] Affidavit of Neil Bellefontaine at para. 15.

[154] Affidavit of Neil Bellefointaine at paras. 19-20; affidavit of Christopher Daly at para. 17.

The panel found an "incompatible clash of land uses" due to the project's proximity to residential and prime recreational uses, and "significant and unacceptable risks to the natural and social environments of the nearby surrounding community".[155] The panel also concluded that there was no need for the project, as "existing quarries serving the area are operating well below capacity and would be able to meet local demand for crushed rock in the foreseeable future".[156]

152. Like the Kelly's Mountain project, Blue Mountain can be distinguished from the WPQ because it was governed by the old EA regime – neither the Nova Scotia *Environment Act* nor CEAA had come into force. I note that there are differences between the Nova Scotia *Environmental Assessment Act*, which applied to Kelly's Mountain and Blue Mountain, and the *Environment Act*, which applied to the WPQ. For example, the definition of "environment" under the former legislation was different and apparently broader. It specifically included "the social, economic, recreational, cultural and aesthetic conditions and factors that influence the life of humans or a community".[157] This language is not used in the *Environment Act*, and there is no reference at all to "aesthetic conditions".[158]

153. The Beaver Harbour Quarry was a proposed aggregate quarry on the Bay of Fundy in New Brunswick. It is mentioned in Neil Bellefontaine's affidavit but not in the Smith Report or Canada's counter-memorial. Mr. Bellefontaine says that "the New Brunswick Environment Minister rejected the application outright, even before any

---

[155] Nova Scotia Environmental Control Council, "Report and Recommendations to the Minister Regarding the Environmental Assessment Report for the Proposed Rock Extraction and Processing Development by Blue Mountain Resources Limited", March 27, 1992, at p. 30 and p. 32 (Canada Exhibit R-46).
[156] *Ibid.* at p. 31.
[157] *Environmental Assessment Act,* 1988, c. 11, s. 3(d) (Investors' Schedule of Documents at Tab C-769).
[158] The *Environment Act*, as it read at the relevant time (and today), defines "environment" in s. 3(r) as follows:

> 'environment' means the components of the earth and includes
> (i) air, land and water,
> (ii) the layers of the atmosphere,
> (iii) organic and inorganic matter and living organisms,
> (iv) the interacting natural systems that include components referred to in subclauses (i) to (iii), and
> (v) for the purpose of Part IV, the socio-economic, environmental health, cultural and other items referred to in the definition of environmental effect.

Section 3(v) defines "environmental effect" as follows:

> "environmental effect" means, in respect of an undertaking,
> (i) any change, whether negative or positive, that the undertaking may cause in the environment, including any effect on socio-economic conditions, on environmental health, physical and cultural heritage or on any structure, site or thing including those of historical, archaeological, paleontological or architectural significance, and
> (ii) any change to the undertaking that may be caused by the environment,
> whether the change occurs inside or outside the Province. (Canada Exhibit R-5.)

studies were conducted on its potential environmental effects, as the proposal was inconsistent with the community's vision for development".[159]

154. Two things are noteworthy about this aspect of Mr. Bellefontaine's affidavit. First, Mr. Bellefontaine refers to "the community's vision for development". This is a concept used by the WPQ Panel[160] but does not appear in any of the Beaver Harbour documents referenced by Mr. Bellefontaine. The only documents he cites regarding the Environment Minister's decision on Beaver Harbour indicate that 10 years previously a land use plan for the area had been approved that specifically prohibited gravel pits. In rejecting the proponent's application to rezone the land the Environment Minister is quoted as saying, "I would respect that decision."[161] In effect the Minister's decision upheld a legally binding land use plan that had for 10 years prohibited such land uses. This is in contrast to the area proposed for the Bilcon quarry at Whites Point, which had no legally binding land use plan or zoning in place, which meant there was no legally applicable land use prohibition on such activities.

155. Second, as indicated in the materials cited by Mr. Bellefontaine, the Minister's decision in the Beaver Harbour case was made in the context of planning law, not an EA – the proponent applied for an amendment to a municipal planning statement that specifically prohibited gravel extraction in the area, and the Minister refused it.[162] This case therefore sheds no light at all on what constitutes fair and usual treatment under EA legislation.

156. There is one more project that is mentioned in Mr. Daly's affidavit that I wish to comment on, though it is not a quarry. The Stellarton Open Pit Coal Mine is proffered by Mr. Daly as an example of a "Class I undertaking" that was sent to a public hearing under the Nova Scotia EA legislation.[163] However, as Mr. Daly notes, this project was registered as a Class I undertaking in 1992. It was therefore

[159] Affidavit of Neil Bellefontaine at para. 18.

[160] See, for example, the Panel Report at p. 4 (discussing the community's "vision of its future") and generally the Panel's emphasis on community core values.

[161] "Jardine crushes gravel pit plan", May 16, 2003 (Canada Exhibit R-44).

[162] Affidavit of Neil Bellefontaine at para. 18; email from C. Daly to B. Langdon, May 9, 2003 (Canada Exhibit R-45).

[163] Affidavit of Christopher Daly at para. 18.

governed by the old *Environmental Assessment Act*, not the *Environment Act* which applied to the WPQ.[164] As such it is of limited usefulness as a comparator.[165]

### 1.7 Reply to Mr. Smith's argument that the process was for Bilcon's own good

157. Mr. Smith argues that there were benefits to Bilcon of having its project reviewed by way of a joint review panel. He states that the panel provided "one-stop-shopping" and therefore reduced duplication.[166]

158. It must be remembered that there is no legal requirement under CEAA or the Nova Scotia legislation that any specific project must undergo a panel review. The decision to impose a panel review is discretionary. From a proponent's perspective, panel reviews are inevitably more complex, time-consuming, expensive and risky as to a favourable result than a screening or other non-panel review EA.

159. Assuming two levels of government legitimately each have jurisdiction over aspects of a project, there are other formats for them to harmonize the EA process which do not involve a panel review.

160. An example of a harmonized process that did not involve a panel review is the ongoing EA of the Labrador-Island Transmission Link project. This project, proposed by the provincial government-owned electricity utility, consists of a 1,100 km transmission line beginning at electricity generation facilities in central Labrador and running to the south-eastern corner of Newfoundland (including an underwater cable

---

[164] A transitional provision in the new legislation provided that undertakings that had been registered before March 17, 1995 continued to be governed by the former act and regulations: *Environmental Assessment Regulations*, s. 30 (Canada Exhibit R-6).
[165] In any event, there is one aspect of Mr. Daly's brief discussion of the Stellarton project that I find puzzling. Mr. Daly states that, "During the hearings, several members of the local community noted their concerns over the effects of blasting. The Board recommended approval, on the condition that the proponent agreed to modify its footprint and its blasting plan significantly" (at para. 18 of his affidavit). The Board's report has not been produced by Canada and I have been unable to locate it. Curiously, the materials that have been produced suggest that actually the proponent did not propose to conduct blasting in the first place. The Report and Recommendations on the Stellarton Pit Mine prepared by the Nova Scotia Department of Environment on October 14, 1995 say at p. 4 that "Mining will be conducted by conventional earth moving equipment; blasting is not contemplated" (Canada Exhibit R-167).
[166] Smith Report at para. 88.

between Labrador and the island of Newfoundland).[167] A map showing the project is attached as **Appendix E** to this report.

161. Despite the huge scale of the project, the government of Canada determined that a panel review was not necessary. Instead, the project is being assessed federally by way of comprehensive study. The comprehensive study process is being harmonized with the EA process under Newfoundland law. For example, Canada and Newfoundland agreed to prepare a joint Environmental Impact Statement Guidelines and Scoping Document.[168]

162. Although this harmonized process will not involve panel hearings, there have been significant opportunities for public involvement, which are summarized on the Canadian Environmental Assessment Agency (**"CEA Agency"**) website for the project.[169] The public was invited to comment at the outset on the project and the EA process. The public was later invited to comment on the draft EIS Guidelines and Scoping Document. When the EIS was released (in April 2012), the public was invited to comment on that. Throughout the process, funding has been available through the federal Participant Funding Program. A total amount of $388,417 has been recommended for allocation to several participants, including environmental groups and Aboriginal groups.[170]

163. A harmonized process similar to the one for the Labrador-Island Transmission Link project could have been adopted for the WPQ matter. As noted in the affidavit of Christopher Daly (formerly of NSDEL), which was filed by Canada in this arbitration, Canada and Nova Scotia agreed to harmonize EAs under the 1998 Sub-Agreement

---

[167] CEA Agency, "Background Information: Comprehensive Study pursuant to the *Canadian Environmental Assessment Act* of the Labrador-Island Transmission Link" (July 2010), at p. 1 (Investors' Schedule of Documents at Tab C-779).
[168] *Ibid.* at p. 3. Despite the recent introduction of the *Canadian Environmental Assessment Act, 2012* (see Part V of my report), comprehensive studies that were already in progress will continue under the former CEAA.
[169] CEA Agency Registry, Labrador-Island Transmission Link Project, http://www.ceaa.gc.ca/050/documents-eng.cfm?evaluation=51746 (Investors' Schedule of Documents at Tab C-897).
[170] $250,000 has been recommended for allocation to Aboriginal groups, and $138,417 has been allocated to other participants: "Participant Funding Program – Aboriginal Funding Envelope Funding Review Committee's Report" and May 17, 2011 "News Release" (both available on the CEA Agency Registry, *ibid.,* accessed December 2012).

on Environmental Assessment.[171] Mr. Daly states, "Where there is a need for a federal EA, we work towards harmonizing our review with federal authorities as much as both possible and practicable so as to achieve a 'one project – one assessment' approach."[172] Mr. Daly further explains that, in the case of the WPQ, there were discussions between provincial and federal officials about harmonizing the process early on, when it was believed that the federal track would be a comprehensive study rather than a panel.[173]

164. Moreover, Mark McLean (who is currently with DFO and was formerly with NSDEL and the CEA Agency) refers in his affidavit to the harmonized Canada-Nova Scotia EA process that was initiated in 2001 for the Deep Panuke offshore gas project.[174] But there was no panel review for Deep Panuke; it was assessed by way of a comprehensive study.[175]

165. In summary, there was no need for a WPQ panel review in order to harmonize the EA between Canada and Nova Scotia.

166. From a proponent's point of view, where governments from two jurisdictions have legitimately determined that each would hold a public hearing, I can agree with Mr. Smith that at that point a joint hearing would likely be preferable for the proponent rather than two separate hearings.

167. However, what Mr. Smith puts aside is the better question, why any hearing should have been held at all for the WPQ. As I observed in my First Report, panels are very rare under both CEAA and the Nova Scotia *Environment Act*. I would never

---

[171] Affidavit of Christopher Daly at para. 20.

[172] Affidavit of Christopher Daly at para. 22 (footnote omitted). Section 47 of the Nova Scotia *Environment Act* (Canada Exhibit R-5) enables the Environment Minister to enter an agreement with the government of Canada for a joint EA – but that need not entail a joint hearing. I also note that NSDEL's official guide for proponents states that NSDEL "will coordinate or harmonize its review with that jurisdiction, where possible and practical": "A Proponent's Guide to Environmental Assessment" (February 2001) at p. 5 (Canada Exhibit R-163).

[173] Affidavit of Christopher Daly at paras. 34-35.

[174] Affidavit of Mark McLean at para. 32.

[175] After the completion of the comprehensive study of the Deep Panuke project, the federal Environment Minister determined there were not likely to be significant adverse environmental effects. However, the proponent decided not to proceed with the project at that time. It later submitted a revised proposal, which was also assessed by way of a comprehensive study. See the second comprehensive study report, June 2007 (available at http://www.ceaa-acee.gc.ca/052/document-eng.cfm?did=21680; Investors' Schedule of Documents at Tab C-898) at p. ii, and the Smith Report at p. 4.

advise a client facing federal and provincial EAs to ask for a joint review panel – which is time consuming, expensive and more risky as to the result – merely to achieve a joint process.

168. In my view, a process similar to what occurred at Belleoram would have been more usual. It also would have been much less burdensome for the Investors and much less risky in terms of time, cost and result. That is, there should have been a federal EA for the dock (a screening – or a comprehensive study if the dock was determined to be a marine terminal, which I do not think it should have been), and a provincial EA (with no hearing) for the quarry component.

169. Mr. Smith also contends that panel reviews can eliminate risks for proponents who commence a screening or comprehensive study process and subsequently find they have to restart the process because of political decisions based on public or environmental concerns to elevate the process to a review panel. He argues that in the case of the WPQ, the decision to convene a panel "eliminated the late referral risk associated with public concerns arising in the course of a screening or comprehensive study".[176]

170. What Mr. Smith however fails to mention is that the decision by Canada and Nova Scotia to elevate the WPQ to a panel review did no favours to the Investors. It certainly did not save them time. In the result, the Investors were entwined with a panel review process that was entirely unexpected, uncharted, uncertain, lengthy, risky and which foreseeably provided a forum for focusing and magnifying public opposition to the project. The decision to have the matter go to a panel created orders of magnitude more work and delay than if it had proceeded as a screening or comprehensive study.

[176] Smith Report at para. 93.

## PART II: THE JOINT REVIEW PANEL HEARING AND DECISION

### 2.1 Summary of Part II

171. In this part of my report I reply to certain comments made by Mr. Smith about the Joint Review Panel hearing and the Panel Report.

172. One area of reply relates to Mr. Smith's comments on "community core values", a concept apparently invented by the Panel, and in my view inappropriately used to reject the WPQ.

173. I also reply regarding the Panel's application – or rather misapplication – of the precautionary principle and the concept of cumulative effects. Mr. Smith has not convinced me that the Panel got either of these right.

174. Finally, I reply to Mr. Smith's assertion that the Panel was not required to report on appropriate mitigation measures. In my view, the Panel did have such a duty under its Terms of Reference and CEAA. Even the Panel chairperson, Robert Fournier, acknowledged after the hearing that the Panel's approach was unprecedented, i.e. its recommendation to reject the project outright, without suggesting any mitigation measures in case the governments disagreed, because "We were so certain that [the project] was a bad thing".[177]

### 2.2 Community core values was not a valid ground for recommending against the project

#### *(a) The Kemess North Mine project is not an appropriate comparator*

175. I stand by my assertion in my First Report that the WPQ Panel was the first and only panel established under CEAA ever to have based its recommendation to reject a project on the concept of community core values or any similar concept.[178]

176. Mr. Smith says I am "incorrect", but he only references one project which, he says, exemplifies a similar use of this concept: the Kemess North Mine.[179]

---

[177] *Infra* at para. 296.

[178] First Report at para. 334.

177. However, the Kemess project is clearly distinguishable. Although “values” figured prominently in the Kemess panel’s report, these were Aboriginal values closely linked to constitutionally protected Aboriginal rights.

178. The Kemess North Mine was to be sited in a remote part of British Columbia, 230 km from the closest community by road and about 70 km from the closest community by air.[180] The mine would rely on a “fly-in, fly-out” workforce. It was in or adjacent to the traditional territories of four Aboriginal groups.[181]

179. The Aboriginal groups claimed Aboriginal rights in connection with their traditional territories around the mine.[182] They also deeply valued the lake that the proponents planned to use for waste disposal. The panel noted that it “was told repeatedly that there was no price that Aboriginal people would agree to place on the loss of the Lake and its spiritual values and that, in order to embrace this Project, they would have to make an unacceptable trade-off which cannot be readily costed in dollar terms.”[183] The panel concluded that the impact on Aboriginal values would be a significant adverse effect that could not be mitigated, and explained:

> Both the Gitxsan and the Tse Keh Nay have stated that water is sacred to them, and that the destruction of a natural lake goes against their values as Aboriginal people. The loss of the natural lake would be viewed as culturally and socially detrimental by Aboriginal people, and the Panel considers this effect to be significant.[184]

180. As a matter of Canadian constitutional law, Aboriginal peoples’ distinctive interests have an entirely different status than the general public’s concerns in respect of any particular project. The Supreme Court of Canada has described the communally-held rights of Aboriginal peoples as *sui generis* (“of their own kind”), which reflects the unique relationship between Aboriginal peoples and the Canadian Crown.[185] The

---

[179] Smith Report at para. 276.
[180] Kemess North Mine Joint Review Panel Report, September 17, 2007, at p. xiii (Canada Exhibit R-411).
[181] Kemess Panel Report, at p. xiii.
[182] Kemess Panel Report, at p. 204.
[183] Kemess Panel Report at p. 239.
[184] Kemess Panel Report at p. xxi.
[185] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (Investors’ Schedule of Documents at Tab C-765). See also *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (Investors’ Schedule of Documents at Tab C-766).

Crown is also honour-bound to consult and accommodate with the Aboriginal peoples of Canada in circumstances where Aboriginal rights may be infringed.[186]

181. One of the Aboriginal groups that opposed the Kemess project was a certain Gitxsan community. Coincidentally, the Supreme Court's seminal decision in respect of Aboriginal title was a claim involving Gitxsan communities. The Supreme Court noted the "sacred" and "spiritual" nature of their connection with the land.[187]

182. The Kemess panel's recommendation that the project be rejected turned mainly on the project's impacts on constitutionally recognized Aboriginal rights and values. This is, in my view, quite different from the WPQ Panel's approach to community core values, where the Panel purported to ascertain the vision for development held by people living near Whites Point.

183. Aboriginal rights and values are grounded in the Canadian Constitution and Supreme Court of Canada jurisprudence. The community core values concept as applied by the WPQ Panel has no basis in law whatsoever. Mr. Smith is mistaken to say that "other Panels have rejected other projects based on the same notion [of community core values]". [188]

### *(b) Community core values and the community veto*

184. As explained by the WPQ Panel, which apparently invented the term, community core values seem to boil down to what the Panel found to be the community's "vision" for the future. If a quarry does not fit with the community's vision of a rural and traditional way of life, then it is inconsistent with community core values.

---

[186] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511 (Investors' Schedule of Documents at Tab C-767). See also *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 (Investors' Schedule of Documents at Tab C-768) and *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103 (Investors' Schedule of Documents at Tab C-770) .

[187] *Delgamuukw v. British Columbia*, *supra* note 185, at paras 13-14.

[188] Smith Report at para. 21.

185. I observed in my First Report that the Panel's approach to assessing the WPQ's effects on core community values amounted to a "referendum" or a "community veto".[189]

186. Mr. Smith accepts that CEAA does not grant a veto to the community over a proposed project, but denies that the WPQ Panel's approach amounted to a veto. He writes, "Mr. Estrin attempts to cast the Panel's assessment process and recommendations as tantamount to requiring community consensus. That position is simply not supportable."[190]

187. I would invite the Tribunal to read the section of the Panel's Report entitled "Core Values" and then determine whether my position is "simply not supportable".[191] The Panel indicates that "community unity" is a core value that has "characterized Digby Neck and Islands for generations".[192] The Panel also speaks of the community's belief in the value of "self-determination of communities to choose their own path rather than having it imposed on them".[193] The Panel opines that the community has, through "deliberative processes of visioning and planning", chosen its own developmental path, and that the "imposition" of the WPQ "could transform the community with a randomness that communities seek to avoid".[194]

188. The Panel concluded, "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" (emphasis added).[195]

189. The message from the Panel Report is clear: the project has divided the community, and does not fit with what the Panel characterizes as the majority's vision for development, therefore the project must be stopped.

---

[189] First Report at paras. 269-287.
[190] Smith Report at paras. 292-293 (footnotes omitted).
[191] Panel Report, beginning at p. 96.
[192] Panel Report at p. 99.
[193] Panel Report at p. 99.
[194] Panel Report at p. 100.
[195] Panel Report at p. 70.

190. I note too that during the hearing, the chairperson of the panel, Robert Fournier, had this to say:

> THE CHAIRPERSON: Mr. Thibault, in some small way this is a kind of referendum, isn't it, in that, on one hand, you have people arguing for a traditional way of life that goes back more than a century, and you have others arguing that the future rests with industrialization or commercialization and so forth.[196]

191. Although public participation is an important part of the joint panel review process, that process is not meant to be "a kind of referendum".

192. In this regard, I must object to what Mr. Smith characterizes as my "failure to acknowledge the importance of public participation in the *CEAA* process".[197] In fact I have long been an advocate of public participation in environmental assessments. But there is a difference between a panel seeking and considering public comments, on the one hand, and the referendum-style approach used by the WPQ Panel on the other hand.

193. An EA panel is not a forum that is meant to (or equipped to) ascertain the will of the majority. In my view, the main purpose of hearings under CEAA and provincial EA legislation is to ensure that the public's concerns about a proposal can be heard and considered by the proponent and the government decision-makers. A secondary, related purpose is to legitimize government decisions about proposals. Opponents of a project that gets approved – and supporters of a project that gets rejected – are more likely to accept the outcome if they have been given a chance to have their say. But the legal test for approving a proposal is not whether supporters outnumber opponents. And even if it were, a panel could not possibly tally up the supporters and opponents. The people who choose to speak up at a hearing are not necessarily representative of the community, the province or the country. In fact the WPQ Panel heard evidence that some supporters of the project were afraid to appear before the Panel, while others were at work and unable to appear.[198]

---

[196] Transcript, June 28, 2007, at p. 2669 (Investors' Schedule of Documents at Tab C-163).
[197] Smith Report at para. 294.
[198] For example, a resident who supported the project, Linda Graham, told the Panel:

194. In making these comments, I do not wish to gloss over the fact that there was significant opposition to the WPQ project. I have reviewed the hearing transcripts and seen many letters written by concerned individuals and groups to the federal and provincial governments. The project was very controversial – but controversy is not in itself a ground for rejecting a project.

195. Moreover, as I pointed out earlier, a panel is not the only way to integrate public participation in an EA process, even one which has both federal and provincial interests. And, as Mr. Smith notes, "public participation is a mandatory element of every environmental assessment under [CEAA], regardless of the type of assessment."[199]

### *(c) Response to Mr. Smith's assertion that my comments on community core values focused too much on the federal aspect of the joint environmental assessment*

196. In my First Report I observed that the notion of community core values has no place under CEAA, as any impact on community core values is not an "environmental effect" within the meaning of CEAA.[200] "The Panel appears to have fundamentally

---

> The young family people who would like to be here, can't, because they work either at low-paying jobs or are on fishing boats and are out fishing, so we speak for this large, silent group of people who want to see this quarry start up.
>
> Speaking of the silent people, up until a few weeks ago, there were very few people who would speak up in favour of the quarry.
>
> The intimidation, threats and property damage to anyone who dared speak in favour of the quarry was very real. (Transcript, June 26, 2007, at p. 1985: Investor's Schedule of Documents Tab C-162.)

Another supporter of the project, Cindy Nesbitt, answered Mr. Fournier's question about why the "pro side" had not been more visible at the hearings:

> They've been working; they've been raising their families; they've been trying to exist. They are also afraid of being ostracized. There has been a lot of that. People not talking to other people, cars being keyed, tires being slashed, boycotts to businesses, all kinds of things. (Transcript, June 26, 2007, at p. 2114: Investor's Schedule of Documents Tab C-162.)

[199] Smith Report at para. 52. To be clear, for screenings, s. 18(3) of CEAA as it read at the relevant time required the responsible authority to give the public notice and an opportunity to comment where "the responsible authority is of the opinion that public participation in the screening of a project is appropriate in the circumstances, or where required by regulation".
[200] First Report, beginning at para. 228.

misunderstood the legal requirements of CEAA", I wrote.[201] Mr. Smith argues that my discussion of community core values ignored the provincial aspect of the joint EA.[202]

197. Mr. Smith is of course correct that the Panel's process was governed not only by CEAA but by the Nova Scotia *Environment Act*, which provides for a consideration of socio-economic effects.[203] But I do not agree with Mr. Smith that community core values as used by the WPQ Panel are a legitimate factor to consider under the Nova Scotia *Environment Act*.

198. The Nova Scotia *Environment Act* refers to effects on "socio-economic conditions".[204] Mr. Smith is correct that under the Nova Scotia act these socio-economic effects need not be tied directly to impacts on the natural environment. In this sense, the *Environment Act* is broader than CEAA, which is only concerned with socio-economic impacts that result directly from the project's effects on the natural environment (e.g. the loss of fishermen's jobs resulting from damage to fish habitat), rather than "pure" socio-economic impacts.[205]

199. Nevertheless, I am not persuaded by Mr. Smith that the *Environment Act* encompasses the notion of community core values. In particular, I do not interpret the *Environment Act* as endorsing the community veto approach adopted by the WPQ Panel. Although the Act speaks of socio-economic impacts, the intent is not to turn an EA into a referendum or to replace local planning legislation.

200. Like Mr. Smith, Christopher Daly (who was an NSDEL official when the WPQ was proposed) suggests in his affidavit that the concept of community core values is a proper basis under the Nova Scotia *Environment Act* for rejecting a project.

201. Interestingly, Mr. Daly refers to two guidance documents on the Nova Scotia EA process that he says are normally provided to quarry proponents: the "Guide to Preparing an EA Registration Document for Pit and Quarry Developments in Nova

[201] First Report at para. 235.
[202] Smith Report at para. 226.
[203] Smith Report at para. 236.
[204] *Environment Act*, s. 2(v)(i) (Canada Exhibit R-5).
[205] First Report at para. 231.

Scotia" (2002), and "A Proponent's Guide to Environmental Assessment" (2001).[206] The Pit and Quarry Guide includes an explanation of what a quarry proponent's EA should cover. Under the heading "Socio-Economic Conditions", the guide discusses the following socio-economic conditions that should be addressed in the EA:

(1) Economy

(2) Land Use and Value

(3) Transportation

(4) Recreation and Tourism, and

(5) Human Health.[207]

There is no reference to "community core values" in this part of the guide, nor anywhere else in the guide for that matter.

202. The Proponent's Guide is also devoid of any mention of community core values. It states that "A discussion of the effects to the socio-economic conditions of the area should be detailed in the [registration] document. Examples of these could include, employment, transportation, recreation and tourism."[208]

203. In my view it is not reasonable to suggest that community core values, as that term was defined by the WPQ Panel, falls under the umbrella of socio-economic conditions. While it is quite proper for a Nova Scotia EA to consider socio-economic impacts on a community such as the creation or loss of jobs, property devaluation, increased traffic, or impacts on recreational uses like hunting and fishing – all of which are covered in the Pit and Quarry Guide and the Proponent's Guide, it is another matter to consider whether a majority of the community may be opposed to the project. Mr. Daly's affidavit does not point to any other project in Nova Scotia that was rejected on the basis of community core values.

---

[206] Affidavit of Christopher Daly at para. 9. The Pit and Quarry Guide was filed as Canada's Exhibit R-81; the Proponent's Guide is Exhibit R-163.
[207] Pit and Quarry Guide at pp. 12-14 (Canada Exhibit R-81).
[208] Proponent's Guide at p. 12 (Canada Exhibit R-163).

204. Even if Mr. Smith and Mr. Daly were correct that community core values are captured by the Nova Scotia legislation (which I do not accept), I would still disagree with the implication in Mr. Smith's analysis that this rendered irrelevant any errors the Panel committed under CEAA.

205. Under the Canada-Nova Scotia agreement establishing the Panel, the Panel was mandated to conduct its review "in a manner that discharges the requirements set out in the *Canadian Environmental Assessment Act*, Part IV of the Nova Scotia *Environment Act* and the Terms of Reference attached hereto as an Appendix."[209] The Panel had to abide by <u>both</u> statutes.

206. In this respect, I can do no better than to quote what Canada wrote in its counter-memorial:

> But while two processes can be harmonized, the criteria ultimately applied, and the decisions ultimately made, remain the unique domain of each involved government, based on their own respective legislation.[210]

207. Whatever the Nova Scotia legislation said, the Panel was still required under CEAA to determine whether there was a likelihood of significant adverse environmental effects, even after mitigation, and the federal government was required to make a final decision about the project. This is not what happened. Instead, the Panel identified only one likely significant adverse effect: the impact on community core values. As I explained in my First Report, it was an error to treat community core values as an environmental effect under CEAA. Accordingly there was no basis under CEAA for the federal government to reject the project. I will return to this point in Part III of this report.

### *(d) Comparison with Sable Gas panel*

208. It is instructive to compare how the joint review panel for the Sable Gas projects, which involved the development of offshore gas resources and a related pipeline in Nova Scotia, dealt with the community's concerns about the pipeline's interference

---

[209] Joint Panel Agreement, Article 4.1 (Appendix 1 to the Panel Report) (Investors' Schedule of Documents at Tab C-34).

[210] Counter-memorial at para. 44.

with the "rural quality of life" and how the WPQ Panel dealt with community core values. For the Sable Gas panel (which was chaired by Robert Fournier, who also chaired the WPQ JRP), it was not enough for members of the community to voice their disapproval of the project; rather, the panel insisted on evidence of an adverse impact on the community:

> The Panel appreciates the high value that rural residents place on their lifestyle, and the fear that the pipeline could undermine this lifestyle. However, the Panel is not convinced that a properly designed, constructed and maintained pipeline would have the significant adverse effects that some intervenors fear.[211]

209. The Sable Gas panel seems to be saying to the community that mere NIMBY-ism ("not in my backyard") is not a relevant consideration. Rather, what matters is whether the evidence indicates that there are likely to be significant adverse effects on the rural way of life. Some local residents may have fears about "safety, adverse wildlife impacts, intrusions by outsiders, and the physical appearance of the right-of-way" – but those fears are not in themselves enough to ground the rejection of the project. The panel quite properly scrutinized those fears and measured them against the evidence about likely effects, and also took into account the proposed mitigation measures as well as the available rights of recourse if any of those fears were to result in actual damage.[212]

210. In my view, Mr. Fournier's approach in Sable Gas was appropriate. His approach in WPQ was inconsistent, in that the concerns heard were accepted at face value. The WPQ Panel considered the project to be a "mega quarry" despite the evidence it would proceed only in phases. It also refused to consider mitigation measures and rights of recourse if there was actual damage.

### *(e) Community core values and procedural fairness*

211. Mr. Smith says that my "assertion that the 'community core values' was '… a factor Bilcon did not have an opportunity to address' is clearly unsupportable."[213] He

[211] "The Joint Public Review Panel Report: Sable Gas Projects", October 1997, at p. 91 (Canada Exhibit R-436).
[212] *Ibid* at p. 91.
[213] Smith Report at para. 272 (footnote omitted).

reviews at length the EIS Guidelines and argues that they provided sufficient notice to Bilcon that community core values would be an important issue.

212. Mr. Smith points to certain vague terms that were included in the Guidelines, such as the "social and cultural health" of local communities. But he does not refute my essential point, which is that the Guidelines did not speak of "community core values" *per se*, and did not "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."[214] I disagree with Mr. Smith's assertion that Bilcon had "clear and detailed instructions from the Panel about what would be required to fulfil the requirements of the Final EIS Guidelines."[215]

213. Bilcon clearly felt blindsided by the Panel's reliance on this notion. In a letter to the Nova Scotia Minister of Environment and Labour shortly after the Panel Report was released, Bilcon wrote:

> The Panel made up the notion it called the "core values" of the community…. We had no indication the Panel was going to do this. We have had no opportunity to respond.[216]

214. In his affidavit, Mr. Buxton states:

> Never, during the entire environmental assessment process, was I or any of Bilcon's experts required to address the concept of "core values". "Core Values" was never mentioned in the EIS Guidelines or the Terms of Reference.[217]

215. I stand by the view I expressed in my First Report that Bilcon's frustration was reasonable, and that the Panel's reliance on the novel concept of community core values was a breach of the duty of fairness.[218]

---

[214] First Report at para. 340.
[215] Smith Report at para. 273.
[216] Letter from P. Buxton to M. Parent, November 16, 2007 (Investors' Schedule of Documents at Tab C-2).
[217] Affidavit of P. Buxton at para. 76.
[218] First Report at paras. 340-345.

## 2.3 The Panel's approach to the precautionary principle

### *(a) Introduction*

216. In my First Report I said that the WPQ Panel misapplied the precautionary principle.[219] The result was that the Panel 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.[220]

217. Mr. Smith disagrees with me, and spends a good part of his report explaining why. I do not think it would be helpful to engage here in a lengthy debate on the finer points of the precautionary principle. My concern is not that the WPQ Panel considered the principle, but rather the manner in which it seems to have misinterpreted the principle and used it as a basis for unfairly maligning Bilcon's inability to predict project effects with complete certainty.

218. The points I want to emphasize are:

    (1) The precautionary principle goes hand in hand with the concept of adaptive management, and is compatible with the specific adaptive management measures proposed by Bilcon;

    (2) As recognized by other panels, including the Sable Gas panel, the precautionary principle does not require perfect certainty; and

    (3) The precautionary principle does not absolve the panel of its own duty to gather information and make determinations on the issues before it.

219. The WPQ Panel failed to appreciate these fundamentals.

220. Mr. Smith notes that the WPQ Panel was not the first panel to discuss the precautionary principle.[221] I agree.

---

[219] First Report at para. 307.
[220] First Report at para. 224.
[221] Smith Report at para. 324.

221. One of the panels that Mr. Smith identifies as having looked at the precautionary principle is the panel for the Voisey's Bay Mine and Mill project in a remote corner of northern Labrador.[222] But in my view this example actually demonstrates that the precautionary principle, properly interpreted, is not incompatible with uncertainty at the EA stage for which the WPQ Panel criticized Bilcon.

222. The Voisey's Bay panel recommended that the project be allowed to proceed, subject to no less than 106 terms and conditions.[223] Many of these terms and conditions were directed at the proponent; others were directed at the federal or provincial governments or local Aboriginal groups. They included:

- That no permits be issued until impact benefit agreements have been concluded with Aboriginal groups (Recommendation 5)
- The development of blasting procedures that incorporate DFO's guidelines (Recommendation 22)
- Requiring foreign vessels to carry a pilot with local knowledge (Recommendation 38)
- The development of a ballast water management program in consultation with DFO (Recommendation 41)
- Further studies on marine mammals (Recommendation 47)
- Providing compensation to Aboriginal and traditional harvesters (Recommendations 71 and 72)
- The development of a community economic development process (Recommendation 90)

223. A copy of the Voisey's Bay panel's full suite of recommendations is attached to my report as **Appendix F**.

---

[222] Smith Report at para. 324.
[223] Voisey's Bay Mine and Mill Environmental Assessment Panel Report,1999 (Canada Exhibit R-443).

224. The other example cited by Mr. Smith of a pre-WPQ panel that referred to the precautionary principle was the Sable Gas Projects joint review panel.[224] In my view, however, this example only helps make my point that the precautionary principle does not mean that any project with uncertain effects must be rejected. Indeed in my First Report, I observed that the Sable Gas panel recommended the approval of the projects subject to very detailed terms and conditions (which I attached to my First Report as Appendix J).[225]

225. Indeed it is striking just how differently the WPQ Panel and the Sable Gas panel approached the precautionary principle and the uncertainty regarding any environmental effects, even though both panels were chaired by Robert Fournier.

226. In contrast to the WPQ Panel, the Sable Gas panel was willing to accept a significant degree of uncertainty. Ultimately the Sable Gas panel concluded that the project was not likely to cause significant adverse environmental effects, as long as mitigation measures and the panel's recommendations were implemented. It must be recalled that the Sable Gas proposal was much larger in scale than the WPQ proposal, consisting of both the Sable Offshore Energy Project to develop, extract and process natural gas from six offshore fields, and the Maritimes and Northeast Pipeline Project to transport via pipeline the processed natural gas from a new processing facility to be located on the coast of Nova Scotia all the way to the US border.

227. In the "Summary and Conclusions" section of the report, the Sable Gas panel explained:

> Planning for the SOEP and M&NPP is still evolving. The Panel in making its recommendations is aware that in some instances it has assessed principles rather than details. This is the nature of the offshore development process. Inspection, monitoring and enforcement are tools that guarantee that a project will be built and operated according to plan. The Panel has recommended a number of safeguards to ensure that any modifications to plans result in greater safety, less environmental impact and more benefits.[226] [Emphasis added.]

[224] Smith Report at para. 324.
[225] First Report at para. 370.
[226] Sable Gas Panel Report, *supra* note 211, at p. 9 (Investors' Schedule of Documents at Tab C-568).

228. For an illustration of the level of uncertainty the Sable Gas panel was prepared to accept, consider the panel's discussion of the 208 kilometre offshore pipeline that would bring gas to the processing facility. The panel noted that "Although the Proponents have provided the Panel with options for the final design of the subsea pipeline, they did not commit to final design parameters."[227] The panel also noted "the absence of a specific list of standards, codes and specifications" that would be applied to the pipeline, and that the final route of the pipeline had not been selected.[228] To deal with these and other uncertainties surrounding the offshore pipeline, the panel's Recommendation 1 set out detailed conditions. This recommendation is reproduced as **Appendix G** of my report. It includes, *inter alia*, a requirement for the proponents to submit to the National Energy Board:

(a) the pipeline design data and the final pipeline design;

(b) a list of the regulations, standards, codes and specifications used in the design, construction and operation of the pipeline;

(c) reports providing results and supporting data from any geotechnical field investigations; and

(d) the pipeline route.

229. The Sable Gas panel thus recognized that it was appropriate to defer decisions about project details, and the completion of detailed studies, until after the panel process. In other words, such details were left to the permitting stage. And Recommendation 1 is just the first of the Sable Gas panel's 46 recommendations. There are many other examples of the panel's adherence to this approach.[229]

230. In sum, both the Voisey's Bay and Sable Gas panels, despite expressly endorsing the precautionary principle, were able to address their concerns about the lack of

[227] *Ibid.* at p. 19.
[228] *Ibid.* at p. 19.
[229] Indeed for some issues, the Panel recommended that investigations be done after commencement of operations. For example, on the question of the environmental effect of drill cuttings, the Panel recommended a monitoring program "to confirm predicted environmental effects with respect to discharges of drilling wastes…" (*ibid.* at p. 33).

certainty through the imposition of terms and conditions. It is the WPQ Panel's failure to even consider such terms and conditions – or even to explain why no terms and conditions would be sufficient – that I find troubling and highly inconsistent. The precautionary principle was no excuse.

***(b) The precautionary principle goes hand in hand with the concept of adaptive management, and is compatible with the specific adaptive management measures proposed by Bilcon***

231. In my First Report, I noted that "adaptive management" is a commonly used tool to address uncertainty in the environmental assessment process.[230] I cited Bilcon's expression of the concept in its 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."[231] I said the Panel's criticism of Bilcon's approach was unfounded, as Bilcon's approach was consistent with the principles of adaptive management.

232. Mr. Smith appears to agree with the Panel that Bilcon's approach was merely "trial and error".[232] He states that "Bilcon appeared to have a preference for proposing 'adaptive management' in place of providing specific baseline data identifying Project effects, identifying pathways, assessing Project effects on it, and then assessing the efficacy of specific mitigation measures on those Project effects."[233]

233. Mr. Smith mistakenly puts words in my mouth where he says, "Rather than demonstrating up front how significant adverse effects can be avoided or mitigated, Mr. Estrin appears to believe that a proponent can simply say 'it doesn't matter whether or not they are likely to occur because, if they arise in the future, we will apply adaptive management to fix them.'"[234] Actually, my view is that the proponent has a duty to identify possible adverse effects and to propose ways to avoid or mitigate them. Adaptive management is not a way of getting around that duty. It

[230] First Report at para. 407.
[231] Bilcon EIS, cited in First Report at para. 411.
[232] Smith Report at para. 365.
[233] Smith Report at para. 360.
[234] Smith Report at para. 357.

simply acknowledges that the real world effects may turn out to be different from what the proponent predicted. In that case, the proponent will modify its mitigation measures or introduce new ones.

234. It would therefore appear that my definition of adaptive management is essentially the same as Mr. Smith's, and for that matter, Bilcon's. In response to a question from the Panel about how it would describe adaptive management, Bilcon's consultant Uwe Wittkugel had this to say:

> Adaptive management is a term that is closely related to [the] precautionary principle. In situations where there is a certain degree of uncertainty about the effectiveness of mitigation measures, you should… As a measure of precaution, you should have a system in place that can respond to monitoring results very quickly.
>
> So those three components are all very interrelated, the precautionary principle, monitoring, and adaptive management.
>
> It is very simple. Basically what it means is if monitoring identifies inefficiencies or dysfunctions of the mitigation measures or non-compliance perhaps, there should be a mechanism in place that allows to correct the situation, and it should be in place before this occurs so that there's a quick response.[235]

235. If I understand Mr. Smith correctly, I doubt he would take issue with the above conception of adaptive management. It certainly accords with the case law. In my First Report, I quoted the case of *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, where the Federal Court held that adaptive management developed as a response to the impossibility of predicting all the environmental effects of a project, and "counters the potentially paralyzing effects of the precautionary principle".[236] That case also confirmed that adaptive management and the precautionary are both "guiding tenets" of the panel review process.[237]

236. Because there is no real disjoint between Bilcon's definition of adaptive management and Mr. Smith's own definition, it would appear that the real source of contention centres on how Bilcon <u>applied</u> the concept.

---

[235] Transcript, June 16, 2007, at p. 117 (Investors' Schedule of Documents at Tab C-154).
[236] [2008] F.C.J. No. 324, cited in First Report at para. 323.
[237] *Ibid.* at para. 33.

237. Mr. Smith supports his view that Bilcon adopted an insufficient "trial and error" approach with a lengthy excerpt from the hearing transcript regarding the project's effects on rare plants. I am not a botanist (neither is Mr. Smith) so I cannot comment on the technical adequacy of the information Bilcon supplied in respect of rare plants. However, I do note that Mr. Smith has quoted selectively from the transcript. This is his account of a Bilcon witness's response to a question from the Panel about rare plants:

> Mr. Kern responded by saying that adaptive management measures would be undertaken to address any problems:
>
> > If we detect a case that is going into the wrong direction, we will then be taking adaptive management measures in order to create a situation for the healthy continuous life of these species at-risk plants.[238]

238. In fact, Mr. Kern's full response was:

> We have done a series of baseline studies in these various ecosystems from soils to water quality, items like this. So we have established the baseline for these particular areas.
>
> We will then be monitoring over time any potential effects that may be affecting whether it's air quality, water supply, water quality to these particular areas.
>
> If we detect a case that is going into the wrong direction, we will then be taking adaptive management measures in order to create a situation for the healthy continuous life of these species at-risk plants.[239]

239. Full regard for what was said by this witness demonstrates that, in this matter, Bilcon was not proposing a "trial and error" approach; it did not propose to use adaptive management as a substitute for gathering baseline data or identifying pathways.

240. Furthermore, Bilcon's approach was not as passive as Mr. Smith suggests. Bilcon did not propose simply to wait and see what happens, and implement mitigation measures if necessary. Actually it retained an expert botanist who conducted a survey of rare plants, and proposed specific mitigation measures, in particular the

---

[238] Smith Report at para. 364 (internal footnote omitted).
[239] Transcript, June 16, 2007, at p. 116 (Investors' Schedule of Documents at Tab C-154).

establishment of an environmental conservation zone along the perimeter of the site. All plant species at risk would be located within this zone.[240]

241. It was quite proper for the Panel to ask questions about whether the proposed mitigation strategy would be sufficient, and about whether Bilcon had considered all conceivable pathways and impacts – that is part of the Panel's job. If it was dissatisfied with Bilcon's proposed mitigation strategy, or uncertain about it, it could have asked Bilcon for more information, retained its own expert, demanded post-EA follow-up studies, or concluded that there was a likelihood of significant adverse effects. (Ultimately the Panel concluded that the effects on rare plants would be adverse, but did not find that these effects would be "significant".[241]) Unfortunately, the Panel's harsh words about Bilcon's "flawed misunderstanding" of adaptive management were gratuitous and unfounded, thereby providing further *indicia* of the Panel's dislike of both the project and the proponent.[242]

### *(c) The precautionary principle does not require perfect certainty*

242. Mr. Smith states the following regarding the nature of the precautionary principle in the context of a panel review:

> In light of the precautionary principle, a Panel cannot recommend approval of a project where there is an absence of basic information that the Panel needs to assess the likelihood of the project's effects, the significance of those effects, and the effectiveness of the proposed mitigation measures.[243]

243. The proposition being suggested by Mr. Smith is that the precautionary principle operates to restrict the ability of government to approve a project where there is uncertainty regarding the likelihood of effects and the significance of those effects. This proposition mischaracterizes the nature of the principle and does not reflect how Canadian courts have interpreted its function. Moreover, as explained above, Mr. Smith's interpretation of the precautionary principle is inconsistent with the way it has been applied by other EA panels such as the Sable Gas panel, which recognized that

---

[240] Bilcon presentation to the Panel, "Whites Point Quarry and Marine Terminal: Environmental Effects", June 2007; see also Transcript, June 18, 2007, at p. 200 (Investors' Schedule of Documents at Tab C-155).
[241] Panel Report at p. 46.
[242] Panel Report at p. 93.
[243] Smith Report at para. 335.

studies and detailed designs could be deferred until after the conclusion of the panel process.

244. The widely accepted definition of the precautionary principle is stated in the Supreme Court of Canada case of *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Ville)*[244] where the Court adopted the definition found in the *Bergen Ministerial Declaration on Sustainable Development (1990)*:

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. 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. [Emphasis added.][245]

245. As I emphasized above, the principle states that absolute certainty regarding whether environmental harm will occur is not a condition precedent to taking preventative measures to avoid that harm. This is wholly different than suggesting that no actions can be taken until the scientific uncertainty of environmental harm is eliminated. The former is focused on taking preventative measures and the latter concerns the taking of any action at all. It is the latter misconception that is adopted by both Mr. Smith and the WPQ Panel.

246. This misconception has been expressly rejected by Canadian courts and tribunals. For example, in the British Columbia case of *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food & Fisheries*)[246] the applicant applied for judicial review of a fish farm licence amendment which expanded the licence to include the farming of Atlantic salmon. One argument advanced by the applicant was that the licence could not legally be issued because there was scientific uncertainty concerning the environmental risk to wild salmon stock. In rejecting the applicant's argument the Court stated as follows:

> The Homalco take the position that there should be no amendment to allow the aquaculture of Atlantic salmon until the Ministry and Marine Harvest can prove that there is no risk to wild salmon stock. They argue, that the gaps in scientific

[244] [2001] 2 S.C.R. 241 (Canada Exhibit R-439).
[245] *Ibid.* at para. 31.
[246] 2005 BCSC 283 (Investors' Schedule of Documents at Tab C-872).

> knowledge and research make it impossible to prove that there is no risk to wild salmon stock. Therefore, they argue that no amendment should be allowed.
>
> The respondents argue that the Homalco have misunderstood the precautionary principle. They argue that the principle really means that lack of scientific knowledge is not a basis for failing to pass regulations or controls to avoid potential serious or irreversible damage to the environment. They argue that it does not mean, nor are governments bound, to prevent all activities which might cause such harm however low the risk might be, or however speculative the risk might be, until it is proven as a certainty that there is no risk.
>
> I agree with the respondents that the precautionary principle does not require governments to halt all activity which may pose some risk to the environment until that can be proven otherwise. The decisions on what activity to allow and how to control it often require a balancing of interests and concerns and a weighing of risks. This is exactly the kind of situation which requires consultation, discussion, exchange of information, and perhaps accommodation.[247] [Emphasis added.]

247. The courts have also acknowledged that, absent express statutory wording to the contrary, "the Precautionary Principle is a guiding principle not a statutory or regulatory requirement" and "does not impose an overarching requirement that approval be granted only where uncertainty is resolved".[248]

248. Furthermore, the Federal Court has ruled that eliminating all environmental risk is not a precondition to the approval of a project under CEAA. Rather the Court has suggested that adaptive management, being one form of preventative measure, is to be employed in the face of scientific uncertainty. As was said in *Pembina Institute for Appropriate Development v. Canada*:

> An approach that has developed in conjunction with the precautionary principle is that of "adaptive management". In *Canadian Parks & Wilderness Society v. Canada* (Minister of Canadian Heritage), 2003 FCA 197, [2003] F.C.J. No. 703 (Fed. C.A.), at para. 24, Evans J.A. stated 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" 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 regarding adverse environmental impacts where sufficient information regarding

[247] *Ibid.* at paras 43-45.
[248] *Sierra Club Canada v. Ontario (Ministry of Natural Resources),* 2011 ONSC 4655 at paras. 53 and 55 (Investors' Schedule of Documents at Tab C-771).

those impacts and potential mitigation measures already exists. [Emphasis added.][249]

249. With respect to the level of certainty regarding specific mitigative measures, the Federal Court held in *Canadian Transit Co. v. Canada (Minister of Transport)* that "The jurisprudence establishes that a Screening Report and decisions under CEAA can describe general mitigation measures which will be detailed and resolved in the future when the exact project design is determined. This is consistent with the preliminary and predictive nature of an environmental assessment." (Emphasis added.)[250] In that case, the Court specifically held that the responsible authorities did not breach the precautionary principle by relying upon the promise of future studies on migratory birds in determining that the proposed bridge would not result in significant adverse environmental effects.

250. As I noted in my First Report, CEAA expressly endorses the practice of conducting post-EA studies and monitoring through its inclusion of "follow-up programs" which are defined in the Act as:

> "follow-up program" means program for
>
> (a) verifying the accuracy of the environmental assessment of a project, and
>
> (b) determining the effectiveness of any measures taken to mitigate the adverse environmental effects of the project.[251]

251. Based on the foregoing, it is clear that the precautionary principle does not suggest scientific certainty is required for any particular action to be approved. Rather, the principle suggests that when faced with scientific uncertainty, proactive measures should be taken to mitigate against harmful effects. In the context of an EA, the proposed mitigative measures do not have to be defined in detail prior to approval much less be scientifically certain to be effective.

---

[249] *Pembina Institute for Appropriate Development v. Canada (Attorney General),* 2008 FC 302 at para. 32 (Investors' Schedule of Documents at Tab C-260).

[250] *Canadian Transit Co. v. Canada (Minister of Transport),* 2011 FC 515 at para. 214 (Investors' Schedule of Documents at Tab C-773).

[251] First Report at para. 381. The Joint Panel Agreement establishing the WPQ Panel included the same definition of "follow-up program" as the one found in CEAA.

252. I should add that my analysis above is consistent with Canada's official policy on applying the precautionary principle. In 2003, the federal government issued "A Framework for the Application of Precaution in Science-Based Decision Making about Risk", which established guiding principles for government decision makers in areas of federal regulatory activity for the protection of health and safety and the environment and the conservation of natural resources.

253. The document acknowledged that "Governments can rarely act on the basis of full scientific certainty and cannot guarantee zero risk."[252] It further explained that, "Given the significant scientific uncertainty implicit in the application of precaution, follow-up activities such as research and scientific monitoring are usually a key part of the application of precaution."[253]

254. In my view, these statements from the Framework accurately capture the essence of the precautionary principle as it is generally understood at law. They not only reflect what the government believes should happen, but also what actually tends to happen in practice. I have already provided examples of this approach being adopted by other environmental assessment review panels, such as the Voisey's Bay and Sable Gas panels. Another example is the panel for the Kearl Oil Sands Project, which in the absence of specific baseline data on the yellow rail (an endangered bird), recommended post-EA studies rather than specific mitigation measures. The Federal Court upheld the panel's approach:

> The Panel adopted an approach that was consistent with the dynamic nature of the assessment process; it highlighted concerns and made recommendations consistent with the information before it. I find the approach employed to manage the existing uncertainty to be reasonable.[254]

255. I also note that the Framework specifically cautions against discriminatory implementation of the precautionary principle: "Similar situations should not be

---

[252] "A Framework for the Application of Precaution in Science-Based Decision Making about Risk", http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=precaution/precaution_e.htm, at p. 3 (Investors' Schedule of Documents at Tab C-774).

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

[254] *Pembina Institute for Appropriate Development v. Canada (Attorney General), supra* note 249, at para. 69.

treated substantially differently and decision makers should consider using processes used in comparable situations to ensure consistency."[255]

256. Unfortunately, as I have described, the application of the precautionary principle in the case of the WPQ was inconsistent with its application in other cases, especially Sable Gas (chaired by Robert Fournier), where follow-up measures and other tools were used as a way to address uncertainty.

### *(d) The precautionary principle does not absolve the panel of its own duty to gather information and make determinations on the issues before it – the panel is not merely a passive observer*

257. Mr. Smith says that "a proponent bears a practical burden or onus of demonstrating that its project is not likely to result in significant adverse environmental effects."[256] The implication is that Panels are intended to act as passive arbitrators who make decisions purely on the basis of the information provided to them by the proponent or other interested parties. That is not how the statutory scheme works.

258. Firstly, CEAA provides that Panels have a positive obligation to obtain the information necessary to make a determination regarding significant adverse environmental effects. Specifically, s. 34(a) provides:

> 34. A review panel shall, in accordance with any regulations made for that purpose and with its term of reference,
>
> (a) ensure that the information required for an assessment by a review panel is obtained and made available to the public.

259. This obligation to "ensure that the information required for an assessment… is obtained…" is fundamental to the review process and serves as the impetus behind the various information gathering powers granted to panels. Section 35 of CEAA grants panels the authority to summon any person to give evidence orally or in writing and produce such documents as the panel "considers necessary for conducting its assessment of the project".

---

[255] "A Framework for the Application of Precaution in Science-Based Decision Making about Risk", *supra* note 252, at p. 11.
[256] Smith Report at para. 332.

260. The Federal Court has confirmed that these specific provisions place a statutory obligation on panels to actively seek out the information needed to complete an assessment. In *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.,*[257] the applicants applied for judicial review to challenge the authorization and environmental assessment of an open pit coal mine. In granting the application and quashing the authorization, the Court considered the Joint Review Panel's obligation to gather information. The Court concluded that the Panel's obligation, which was rooted in CEAA and its terms of reference, was entirely independent of the information gathering efforts of the proponent and other interested parties:

> I also find that the information gathering duty of the Joint Review Panel does not depend on the Project proponent CRC's information gathering success, nor does it depend on that of any intervenor or interested party. The duty is the Joint Review Panel's to meet.[258]

261. Further support for the panel's independent information gathering obligation under CEAA can be found in *Pembina Institute for Appropriate Development v. Canada* where the Court stated:

> As an early planning tool, environmental assessment is tasked with the management of future risk, thus a review panel has a duty to gather the information required to fulfill this charge.[259]

262. As stated in the Canadian Environment Minister's official guideline for panel reviews, the panel:

> is empowered [s. 12(3)], throughout the review, to obtain specialist or expert information or knowledge with respect to a project from federal authorities in possession of such information or knowledge. In addition to this, the need may arise for the review panel to retain the services of independent non-government experts or legal counsel at any time during the review but prior to the completion of hearings, to provide advice on certain subjects within the review panel's terms of reference.[260]

263. The same guideline makes it clear that the panel should not proceed to the hearing until it is satisfied that it has adequate information from the proponent. If it remains of

---

[257] [1999] 3 F.C. 425; [1998] F.C.J. No. 441 (Investors' Schedule of Documents at Tab C-453), at para. 41.
[258] *Ibid.* at para 41.
[259] *Supra* note 249, at para. 30.
[260] "Procedures for an Assessment by a Review Panel: A Guideline Issued by the Honourable Christine S. Stewart, Minister of the Environment pursuant to s. 58(1)(a) of the Canadian Environmental Assessment Act", November 1997, at p. 13 (Investors' Schedule of Documents at Tab C-579).

the view that there are information deficiencies, even after receiving the proponent's responses to the panel's requests for further information, it should seek an extension of the timetable for the review and "shall inform the proponent of outstanding information requirements, and indicate that the hearings will not be scheduled until that information is submitted."[261] This rule was also incorporated into the Terms of Reference for the WPQ Panel, which provided that the Panel should schedule the hearing "once the Panel is satisfied that sufficient information has been provided."[262] The Panel therefore quite properly did not schedule the hearing until it determined that it had sufficient information.[263] Having made that determination, it seems unreasonable for the Panel to then criticize Bilcon for not providing enough information.[264]

264. Based on all of the foregoing, it is apparent that CEAA does not establish a regime for environmental assessments where panels are to listen passively and then distil what they have been told. Rather, CEAA creates a system where panels are intended to act as inquisitorial finders of fact tasked with procuring additional information where it is needed in order to fulfil their mandate. There is no provision in CEAA that allows the panel to assign its information gathering obligations to another party, including the proponent.

265. Secondly, the decision that Mr. Smith cites in support of his proposition, that under CEAA the proponent commonly bears the burden of providing sufficient information to allow a panel to make its determination, is misleading and irrelevant to the WPQ matter. The decision, *Athabasca Chipewyan First Nation v. British Columbia Hydro & Power Authority*,[265] does not concern an environmental assessment under CEAA. The decision concerns only the *National Energy Board Act* and its associated regulations. The aforementioned information gathering obligations found in CEAA did not apply to the Board responsible for the review in this case. Additionally, the *National Energy Board Act* does not contain an analogous provision to CEAA's s. 34.

---

[261] *Ibid.* at p. 20.
[262] Terms of Reference for the Joint Review Panel (which are found at Appendix 1 to the Panel Report).
[263] Panel Report at p. 17.
[264] First Report at para. 353.
[265] 2001 FCA 62 (Canada Exhibit R-397). See Smith Report at para. 333.

Therefore this case is of no relevance to environmental assessments conducted under CEAA by Joint Review Panels, particularly in respect of who has the burden of collecting the required information.

266. In the case of the WPQ, the information gathering obligations under CEAA were incorporated by reference into the Joint Review Panel Agreement. Section 4.1 of the Agreement said:

> The Panel shall conduct its review in a manner that discharges the requirements set out in the *Canadian Environmental Assessment Act*, Part IV of the Nova Scotia *Environment Act* and the Terms of Reference attached hereto as an Appendix.

267. Section 4.3 of the Agreement said:

> The Panel shall have all the powers and duties of a panel set out in section 35 of the *Canadian Environmental Assessment Act*.

268. Therefore, in the case of the WPQ, the Panel had a statutory obligation to obtain the information necessary to make a determination about whether the project was likely to result in significant adverse environmental, including a consideration of what measures would be appropriate to minimize or eliminate those effects.

269. Instead, the Panel complained about the information provided by Bilcon, and obfuscated on whether any particular effect was likely and significant. The Panel used the word "potential" 135 times. For instance it discussed the "potential" for blasting to cause noise and dust, and the "potential" loss of rare plants[266] – but failed to determine whether those effects were both likely and significant.

270. It is noteworthy that the WPQ Panel retained its own expert on international trade law to advise it on the implications of NAFTA on the EA.[267] I see no reason why the Panel did not also retain other technical experts (e.g. an expert on blasting) to help it resolve any questions it had about the information provided by Bilcon. By way of contrast, the Joint Review Panel for the Mackenzie Gas Project engaged a number of "specialist advisors" to assist it with its review.[268] These advisers collectively

[266] Panel Report at pp. 28 and 45.
[267] Panel Report at p. 128.
[268] Report of the Joint Review Panel for the Mackenzie Gas Project, December 2009, at p. iv (Canada Exhibit R-415).

prepared no fewer than five reports for the panel, including a report commenting on the adequacy of the proponent's geotechnical modeling.[269]

271. In summary on this point, Mr. Smith's arguments as to the burden on Bilcon to provide sufficient certainty, and the Panel's criticism of Bilcon in that regard, are not supported by the legislation nor by the official government guidance materials, nor are they consistent with the approach of the joint review panel chaired by Mr. Fournier in the Sable Gas matter.

### 2.4 The Panel's approach to the concept of cumulative effects

272. Mr. Smith suggests that I mischaracterized the proper application of "cumulative effects" in the context of an EA. In particular, he suggests that it was proper for the WPQ Panel to consider the effects of future projects that were entirely hypothetical. His argument is largely premised upon permissive language in the CEA Agency's Operational Policy Statement: Addressing Cumulative Effects under the *Canadian Environmental Assessment Act*, March 1999.[270]

273. Despite Mr. Smith's comments, in my view the Panel applied the concept of cumulative effects inappropriately.

274. The Panel based almost all of its conclusions regarding cumulative effects on projects that were clearly hypothetical in nature, such as the entirely speculative future expansion of the WPQ and "induced" nearby quarrying activities.[271] As mentioned in my First Report, Bilcon told the Panel that the quarry "will not expand", and the Panel cited no evidence that any nearby quarries were being proposed or seriously contemplated.[272] This emphasis on the potential effects of hypothetical future projects was not warranted. The 1999 Operational Policy Statement issued by the CEA Agency provides that:

---

[269] Dr. J. Gale and Dr. J.-M. Konrad, "Uncertainty Related to Gas Field Subsidence Predictions and Associated Environmental Impacts of the Proposed Mackenzie Gas Project", September 20, 2006 (Investors' Schedule of Documents at Tab C-775). This report, as well as the others prepared for the panel, are available at: http://www.ceaa.gc.ca/default.asp?lang=En&n=155701CE-1.
[270] Smith Report, beginning at para. 369.
[271] Panel Report at p. 83.
[272] First Report at paras. 433 and 441.

> …the selection of future actions to consider in a cumulative environmental effects assessment should reflect "the most likely future scenario." Emphasis is given to projects with greater certainty of occurring; however, hypothetical projects might be discussed on a conceptual basis in some cases. [Emphasis added.][273]

275. Mr. Smith quotes the EIS Guidelines, which required Bilcon's cumulative effects analysis to:

> Evaluate the likelihood of development of other quarry or aggregate operations, by the Proponent or others, that may appear feasible because of the proximity of the Project's infrastructure.[274]

276. But Mr. Smith ignores the stipulation that follows just two paragraphs later in the EIS Guidelines:

> 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. In either case, provide a rationale for inclusion or exclusion. [Emphasis added.][275]

277. The Panel told Bilcon – through the EIS Guidelines which the Panel itself issued – to examine only projects where there was a "reasonable degree of certainty" that they would be built. It therefore seems illogical and unfair for the Panel to fault Bilcon for not considering purely hypothetical projects in its EIS.

278. Furthermore, Mr. Smith's discussion of other panels that have considered hypothetical projects is misleading.

279. Mr. Smith suggests that the JRP for the Lower Churchill Hydroelectric Generation project faulted the proponent for not considering hypothetical projects in its cumulative effects assessment. But in fact the JRP did no such thing. Mr. Smith misleadingly quotes only part of a paragraph from the Lower Churchill JRP Report.[276] The full paragraph reads:

> Participant input regarding the residual effects of the Churchill Falls development highlighted the limitations of Nalcor's approach of including the effects of past projects in baseline conditions, without clearly acknowledging these effects.

[273] 1999 Operational Policy Statement at p. 2 (Canada Exhibit R-482).
[274] Smith Report at para. 376.
[275] EIS Guidelines at pp. 50 to 51 (Canada Exhibit R-210).
[276] Smith Report at para. 383..

> Generally, Nalcor's approach illustrates the limitation of project-specific cumulative effects assessment, namely that the end result is the potential for incremental decline in the biophysical and socio-economic environments with each successive development. [Emphasis added.][277]

280. It is only the last sentence of the above paragraph that is quoted in the Smith Report. As can be seen, the panel is not commenting on the proponent's failure to consider hypothetical future projects. Rather, the panel is commenting on the proponent's treatment of "past projects". The Lower Churchill JRP Report does not state that purely hypothetical projects must be considered.

281. Additionally, Mr. Smith refers to the Mackenzie Valley Gas Projects EA for the proposition that cumulative effects assessments have incorporated the consideration of hypothetical or induced projects. What Mr. Smith fails to mention is that that project was from the outset "designed with the potential to expand the initial capacity of 1.2 Bcf/d to an expansion capacity of 1.8 Bcf/d".[278] This additional expansion "would require the installation of 11 additional compressor stations and other facilities beyond those required for the Project as Filed".[279] Therefore, unlike the WPQ, the Mackenzie Valley Gas project expressly envisioned expansion and additional facilities not included in the project as filed. It therefore does not provide any insight as to the application of cumulative effects to a discrete, stand-alone project like the WPQ.

### 2.5 The Panel's approach to mitigation measures

282. In my First Report I wrote that the Panel failed to carry out its responsibility under CEAA and its Terms of Reference to report on appropriate mitigation measures.[280] Instead, the Panel concluded that the WPQ's impact on community core values simply could not be mitigated, and therefore recommended the outright rejection of the WPQ.

---

[277] Lower Churchill Hydroelectric Generation Project, Joint Review Panel Report, August 2011, at p. 267 (Canada Exhibit R-414).
[278] Report of the Joint Review Panel for the Mackenzie Gas Project, December 2009, at p. 53 (Canada Exhibit R-415).
[279] *Ibid.*
[280] First Report at paras. 364-5.

283. Mr. Smith points to the Canada-Nova Scotia agreement establishing the Panel and argues that the Panel "was specifically directed to include mitigation measures only if it approved the Project which it did not."[281] I do not agree. The specific clause in the agreement on which Mr. Smith relies reads as follows:

> 6.3 The Report shall include recommendations on all factors set out in section 16 of the *Canadian Environmental Assessment Act* and, pursuant to Part IV of the Nova Scotia *Environment Act*, recommend either the approval, including mitigation measures, or rejection of the Project.[282]

284. Mr. Smith interprets this clause to mean that if the Panel recommends the rejection of the project, it need not make any recommendations on mitigation. In my view the correct interpretation is that this clause sets out the Panel's two distinct purposes – one federal and one provincial. That is, it means that the Panel's two tasks are: (1) to make recommendations to the federal government on all CEAA s. 16 factors; and (2) to make a recommendation to the Nova Scotia government on whether to approve or reject the project.

285. If this had been a provincial-only EA process, it might have been appropriate for the Panel to recommend the rejection of the project without making any recommendations about mitigation. But this was a joint process, and the federal aspect of the Panel's mandate required it to make recommendations on all factors set out in s. 16 of CEAA. These factors included:

> (d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project.[283]

286. CEAA s. 16 required the Panel to make recommendations about mitigation measures even if the Panel concluded that the project should not proceed. This approach to s. 16 recognizes that under CEAA, it is not the Panel who determines whether any significant adverse environmental effects are justified, but the federal government. If the Panel finds there will be significant adverse environmental effects but does not recommend potential mitigation measures, it effectively ties the hands of federal

---

[281] Smith Report at para. 352.
[282] Joint Panel Agreement, section 6.3 (the agreement is included in the WPQ Panel Report as Appendix 1).
[283] The requirement to consider such mitigation measures was repeated in the Terms of Reference for the Panel (see p. 114 of the Panel Report).

officials who must ultimately make a decision pursuant to CEAA s. 37. In other words, it constrains the ability of the government to decide whether those effects are justifiable.

287. Mr. Smith argues that the Panel "did in fact consider mitigation measures", but concluded that despite the mitigation measures proposed by Bilcon, there was a likelihood of significant adverse environmental effects.[284] In fact, the Panel stated categorically that the project's impact on community core values "cannot be mitigated".[285] The Panel offered no rationale for this conclusion. It did not identify potential mitigation measures and then reject each one for being unfeasible or ineffective – it simply did not discuss any potential mitigation measures at all.

288. It would be no answer to say that Bilcon did not propose any such measures, because as I have explained in my First Report and in this report, Bilcon was not given any warning that community core values would be treated as an environmental component to be examined in the EA.[286]

289. It should be noted that the JRP Agreement used the broad definition of "mitigation" found in CEAA:

> **"Mitigation"** means, in respect of the Project, the elimination, reduction or control of the adverse environmental effects of the Project, and includes restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means. [Underlining added.][287]

290. Thus for the Panel to say that the impact on community core values "cannot be mitigated" is to say that the impact cannot be reduced in any way, and that there is no way to compensate the community for any impact that does occur. The Panel Report fails to provide a transparent explanation for that rather stark conclusion.

291. In my view it was unusual for the Panel not to have discussed measures to potentially mitigate the project's impact on core values, even though, in the Panel's own view, those measures would not have been sufficient. It is critical to recall that it is not the

---

[284] Smith Report at paras. 347-348.
[285] Panel Report at p. 100.
[286] First Report at paras. 340-345.
[287] Joint Panel Agreement, s. 1 (see Panel Report at p. 109).

Panel who decides on whether the project will be approved or not – rather the Panel's mandate is simply to make recommendations to the governments of Canada and Nova Scotia, and those governments may decide to accept or reject those recommendations. The standard practice appears to be that, where a panel determines that there is a likelihood of significant adverse effects, it will nonetheless outline potential mitigation measures in the event that the government(s) decide to approve the project.

292. An example which I mentioned in my First Report is the Kemess mining project, where the JRP recommended that the project be rejected, but added: "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."[288]

293. Another example is the Prosperity mining project, where the federal Panel recommended against the project but added 24 recommendations about how to mitigate its environmental effects in case the government decided to approve it.[289]

294. A third example is the Lower Churchill Hydroelectric Generation project, where the JRP found that there would be several significant adverse environmental effects, but nonetheless provided dozens of recommendations on mitigation in case the project were to proceed (the JRP expressly withheld judgment on whether the project should proceed, and left that decision to government).[290]

295. In contrast to these three examples, the WPQ Panel was, as far as I can tell, the only panel under CEAA or a joint review process to have recommended the outright rejection of a project, without providing recommendations regarding mitigation should the government decision makers decide to approve it. Indeed the WPQ Panel chair, Robert Fournier, acknowledged to the press that this was unprecedented:

---

[288] Cited in my First Report at para. 367.
[289] Report of the Federal Prosperity Review Panel, July 2, 2010, at pp. 246-8 (Canada Exhibit R-429).
[290] Lower Churchill Hydroelectric Generation Project, Joint Review Panel Report, August 2011, at pp. xii and 281-297 (Canada Exhibit R-414).

> What we built into the process is an out-and-out rejection that says this is not any good for this environment, under any circumstances. And that hasn't been done before. [Emphasis added.][291]

296. Mr. Fournier explained this further in a radio interview:

> In the past, almost always, Panels that, well, if you changed your mind or you overrule us this is what you have to do in order to let this go forward. We were so certain that this was a bad thing that it was inappropriate for that for that [sic] particular environment that we did not provide any of those mitigating recommendations at all. And I think many people pointed to that and that was a very conscious effort on our part. [Emphasis added.][292]

297. This statement is of particular concern. It demonstrates not only that the Panel considered the WPQ a "bad thing" but also indicates that the Panel refused to address possible mitigation measures in a deliberate effort to tie the hands of the governments whose statutory role was to decide whether to approve the project or not. In other words, the Panel structured its Report so that, even if Canada or Nova Scotia disagreed with the Panel's analysis of the environmental effects, it would be exceedingly difficult for either government to approve the project. This in my view was improper.

---

[291] "Digby quarry rejection on environmental grounds could set precedent: panel chair", CBC News, December 19, 2007 (CP26570; Investors' Schedule of Documents at Tab C-652).
[292] Transcript of Mr. Fournier's interview with CBC Radio, December 20, 2007 (Investors' Schedule of Documents at Tab C-180).

## PART III: THE GOVERNMENT RESPONSE TO THE JRP REPORT

### 3.1 Summary of Part III

298. In this Part of the report I make some brief comments in reply to Mr. Smith's contention that there was nothing improper about how the Canadian and Nova Scotia governments responded to the Panel's recommendations.[293]

299. I make two main points. First, the Panel's finding of a significant adverse effect on "community core values" was not a sufficient basis for the federal government's rejection of the WPQ project. Because community core values are not recognized under CEAA and indeed lie outside federal jurisdiction, the federal government should have refused to accept the Panel's recommendations.

300. Second, despite Mr. Smith's assertion that governments need not engage in an independent analysis of a project following a review panel report, the government responses to the Lower Churchill Generation project and Mackenzie Gas projects are recent precedents for doing just that. The Lower Churchill Generation and Mackenzie Gas examples show that, properly construed, the purpose of the government response is not to be a mere rubber stamp of the panel report.

### 3.2 It was improper and indeed unconstitutional for the federal government to base its decision on community core values

301. As I explained in my First Report and reiterated in Part II of this report, the Panel did not provide the federal government with a proper basis for rejecting the WPQ. The only significant adverse environmental effect that the Panel found to be likely was the impact on community core values. But that is not an environmental effect at all under CEAA.

302. Moreover, it was beyond the federal government's constitutional jurisdiction to base its decision on community core values. Under the Canadian Constitution of 1867, which assigns some legislative powers exclusively to the federal government and others exclusively to the provincial governments, there is no mention of "the

[293] Smith Report, beginning at para. 418.

environment" *per se*.[294] Accordingly neither level of government has jurisdiction over the environment in a general sense. The federal government may only regulate environmental matters that are linked to an enumerated area of federal responsibility, such as "fisheries" or "navigable waters". Likewise the provincial governments must confine their environmental regulation to matters falling under provincial jurisdiction, such as "property and civil rights", "local works and undertakings", and "all matters of a merely local or private nature in the province".[295]

303. As the Federal Court observed in the Red Hill Creek case previously referenced, formally cited as *Hamilton-Wentworth (Regional Municipality) v. Canada (Minister of the Environment)*, "the federal government may not use 'the pretext of some narrow ground of federal jurisdiction, to conduct a far ranging inquiry into matters that are exclusively within provincial jurisdiction".[296] The Federal Court held in this case that it was constitutionally improper for Canada to establish a CEAA review panel to question the need for and alternatives to a municipal expressway (matters of purely provincial jurisdiction) based on CEAA being triggered by a *Fisheries Act* s. 35 authorization application.

304. In *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)* the Federal Court affirmed that the federal government cannot consider environmental effects that are linked to a provincial area of jurisdiction; rather, "The effects in question have to be relevant to the decision it has to make."[297] The Court added, "it could not have been Parliament's intent to authorize a Responsible Authority to environmentally assess aspects of a project unrelated to those heads of federal jurisdiction called into play by the project in question."[298]

305. Similarly, in the Regulatory Impact Analysis Statement for the core regulations under CEAA, the government explained that "if the EA is triggered by federal regulatory involvement in a project – that is, whenever a project requires a federal licence,

---

[294] *Constitution Act, 1867* (Canada Exhibit R-440).
[295] *Ibid.,* s. 91 and 92.
[296] *Supra* note 110, at para. 157 (quoting from the Supreme Court of Canada decision, *Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3 [Canada Exhibit R-3]).
[297] 2004 FC 1265 at para. 241 (Canada Exhibit R-218), aff'd 2006 FCA 31 (Canada Exhibit R-428), *supra* note 69.
[298] *Ibid.* at para. 243.

permit, or other authorization for it to proceed – the EA must be restricted to areas of federal jurisdiction."[299]

306. It is beyond debate that questions of whether or not the local community was in favour of the WPQ, or whether the WPQ would offend the community's core values, are purely local matters falling under the exclusive jurisdiction of the provincial government.[300] Even Robert Thibault, the former federal Fisheries Minister (and then still the local Member of Parliament), acknowledged as much in his appearance before the JRP:

> The Federal Government's responsibility is on the environmental side and protection of the water and protection of marine habitat.
>
> When you get to the quality of life side, what do you want in your community, then that's a provincial responsibility. And in most areas within that, it's delegated to the municipalities where you can have zoning by-laws and you can regulate what is happening in your communities. [Emphasis added.][301]

307. The federal government simply had no jurisdiction to consider such purely local questions in making its decision about whether or not to allow the project to proceed.

308. After receiving the Panel's report, the federal government had to make a decision under s. 37 of CEAA about whether to allow the project to proceed or not. In making that decision, the federal government was required to consider only the project's impacts on areas of federal jurisdiction, such as fisheries and navigable waters. However, there is nothing in the documents made available to me through government productions in this file which informed the federal Cabinet that the Panel had made findings that the project would likely cause "significant adverse environment effects" within the jurisdiction of Canada, which is the key to Canada having jurisdiction under CEAA to approve or reject a project.

309. Importantly, there is no statement to that effect in the Memorandum to Cabinet (provided to me after I prepared my First Report) which provided recommendations to Cabinet on responding to the JRP report. Rather, in providing advice on the "pros"

---

[299] Regulatory Impact Analysis Statement for the Comprehensive Study List Regulations and related regulations, *Canada Gazette, Part I,* September 18, 1993, at pp. 2849-50 (Investors' Schedule of Documents at Tab C-776).
[300] *Constitution Act, 1867,* s. 92, *supra* note 294.
[301] Transcript, June 28, 2007, at pp. 2679-2680 (Investors' Schedule of Documents at Tab C-163).

and “cons” of Canada accepting the Panel Report, the memo advises the Cabinet that a federal decision to accept the Panel Report “supports and is consistent with Nova Scotia’s decision to reject the proposal recognizing Nova Scotia’s right to decision making over its natural resources” and ”supports the majority of local stakeholders who opposed this proposal.” It also advised that rejecting the Panel Report “would negatively impact relations with Nova Scotia and federal-provincial environmental assessment harmonization.”[302]

310. As Mr. Smith notes, “The Panel Report will provide ample analysis and reasoning for its recommendation. If accepted by the governments, the reasons for doing so are manifest on the face of the Panel Report.”[303]

311. The federal government response stated that “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.”[304] The only significant adverse environmental effects cited by the Panel were on community core values, matters of provincial jurisdiction. It is therefore “manifest” that Canada’s rationale for not allowing the project to proceed was the Panel’s “analysis and reasoning”, i.e. that impacts on community core values, matters of provincial jurisdiction, were not justified under CEAA s. 37.

312. This demonstrates a fundamental problem for Canada in this process: either (a) Canada made its decision solely on the basis of impacts it was constitutionally not entitled to consider, or (b) Canada made its decision on the basis of some other factor that it failed to identify and explain in its response to the Panel Report.

313. In the absence of any further materials provided by Canada, it must be presumed, in the words of Mr. Smith, that Canada’s rationale for accepting the Panel’s recommendation is “manifest on the face of the Panel Report”. This however made Canada’s decision clearly constitutionally improper.

---

[302] Memorandum to Cabinet (Investors’ Schedule of Documents at Tab C-871) at p. 19. The memo earlier on refers to the federal departments providing expert information to the panel and that this covered “key environmental effects of the Project within federal jurisdiction.” However, the memo did not conclude that any of these environmental effects were or were likely to be significant or adverse.
[303] Smith Report at para. 439.
[304] The Federal Response is quoted in my First Report at paras. 532 and 533.

314. If Canada legally and fairly wanted to concur with the recommendation of the Panel that the WPQ should not proceed, Canada was required to provide reasoning for doing so that was based on matters within its jurisdiction. Canada did not do so.

315. In summary, given the absence of any clear and objective determination either by the Panel or the Cabinet as to the project likely resulting in significant adverse environment effects on matters within federal jurisdiction, the federal Cabinet acceptance of the Panel's rejection of the project allowed Canada to use the CEAA process as a constitutional "Trojan horse" to invade an area of purely local concern.[305]

316. Alternatively, Canada could have asked the Panel to reconvene and revise its report pursuant to its ability to do so under CEAA, so as to clarify, if it could, that the Panel also found significant adverse environmental effects on matters relevant to federal jurisdiction. Section 37(1.1) of CEAA allows the Governor in Council (i.e. the federal Cabinet) to require the panel to "clarify any recommendations set out in the report" before approving the report.

317. Indeed the Federal Court has held that where a panel report does not comply with CEAA, the government should ask it to try again: "the Minister has authority and responsibility to direct the Joint Review Panel to reconvene and, having regard to my findings, direct that it do what is necessary to make adjustments to the Joint Review Panel's report so that the environmental assessment conducted can be found in compliance with CEAA."[306]

318. However, I am not aware that Canada asked the Panel to clarify its findings or to make any adjustments to its report. Instead, despite the findings of at least two prior Federal Court decisions referenced above – *Hamilton-Wentworth* (2001) and *Prairie Acid Rain* (2004) – which held Canada cannot use CEAA to regulate matters under provincial jurisdiction, Canada rejected the WPQ on the basis of a provincial factor.

---

[305] The phrase is from *Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3 (Canada Exhibit R-3).

[306] *Alberta Wilderness Assn v. Cardinal River Coals Ltd., supra* note 257, at para. 91.

### 3.3 Concerns about the adequacy of the responses of Canada and Nova Scotia to the JRP Report

319. I stand by the view I expressed in my First Report that the Federal Response to the WPQ Panel Report should not have simply amounted a rubber stamp acceptance of the panel's recommendations, given the Panel's reliance on community core values, a concept that is alien to CEAA and outside federal jurisdiction.[307] Particularly in such instance Canada was required to conduct an independent analysis and to explain clearly its final decision on whether or not to allow the project to proceed based on criteria relevant to its constitutional jurisdiction.

320. Mr. Smith responds that such an independent analysis is neither required by statute nor usual. He says, "I am not aware of the federal government ever having launched the type of further 'independent' analysis of a project suggested by Mr. Estrin."[308]

321. However, the joint response of Canada and the Northwest Territories to the JRP report for the Mackenzie Gas project, issued in November 2010, about one year prior to Mr. Smiths Expert Report, demonstrates that Canada is aware of its statutory obligation to conduct the required review of JRP reports before making its decision.[309] This response was issued after the project proponents and interveners who had participated in the hearings were provided with an opportunity to comment on the JRP report .[310]

322. The government response to the Mackenzie Gas JRP report was 127 pages long. The governments accepted some of the JRP's recommendations to mitigate the potential adverse impacts of the project, rejected others, and "accepted the intent" of some others. In each case, the governments provided reasons. Twenty of the recommendations were rejected on the basis that they were "outside the scope of the Joint Review Panel's mandate as per the Joint Review Panel's Agreement and the

---

[307] First Report at para. 539.
[308] Smith Report at para. 432.
[309] Governments of Canada & of the Northwest Territories Final Response to the Joint Review Panel Report for the Proposed Mackenzie Gas Project", November 2010, available at: www.ceaa.gc.ca/Content/1/5/5/...6B5C.../MGP_Final_Response.pdf (Investors' Schedule of Documents at Tab C-777).
[310] *Ibid.* at p. 7.

Environmental Impact Statement Terms of Reference for the Mackenzie Gas Project".[311] This indicates that the governments carefully considered whether each of the panel's recommendations was properly grounded in the panel's mandate.

323. Another example of a thorough and critical government response is the Federal Response to the Lower Churchill Project joint review panel (which was released a few months after the Smith Report was prepared). In the Lower Churchill case the panel determined that there was a likelihood of significant adverse environmental effects and made a number of recommendations. The Federal Response was 41 pages long.[312] Canada accepted some of the panel's recommendations and rejected others, and also provided reasons. The response of the Province of Newfoundland and Labrador was 37 pages long and similarly accepted some recommendations and rejected others.[313]

324. In the course of preparing their own analysis, the Canadian and Newfoundland governments heard from the proponent, and likely from other parties to the panel process, and in the result the governments cast a critical eye on the panel's report, including the panel's comments on mitigation measures.

325. I acknowledge that there have been other instances where government has endorsed the recommendations of a panel with only brief written reasons. In Prosperity and Kemess the federal government response was quite brief, and accepted the panel's recommendation that the project would likely result in significant adverse environmental effects.[314]

---

[311] *Ibid.* at p. 6.
[312] Government of Canada Response to the Report of the Joint Federal-Provincial Review Panel for Nalcor's Lower Churchill Generation Project in Newfoundland and Labrador, March 15, 2012, available at: http://www.ceaa.gc.ca/050/document-eng.cfm?document=54772 (Investors' Schedule of Documents at Tab C-900).
[313] Government of Newfoundland and Labrador's Response to the Report of the Joint Review Panel for Nalcor Energy's Lower Churchill Hydroelectric Generation Project, March 15, 2012, available at: www.env.gov.nl.ca/env/Response_to_Panel_Report.pdf (Investors' Schedule of Documents at Tab C-901).
[314] Response to the Report of the Federal Review Panel for the Taseko Mines Limited's Prosperity Gold-Copper Mine Project in British Columbia, available at: http://www.ceaa.gc.ca/050/document-eng.cfm?document=46183 (Investors' Schedule of Documents at Tab C-902); and Response to the Environmental Assessment Report of the Joint Review Panel on the Kemess North Copper-Gold Mine Project (Canada Exhibit R-466).

326. Whether or not the government response in those cases was legally sufficient, I would have expected much more from Canada in the case of the WPQ, because of the novelty of the Panel's approach; as explained above, it should have been apparent to the federal government that the Panel's recommendations hinged on the concept of community core values, which is alien to CEAA and outside federal jurisdiction.

### 3.4 Reply to Mr. Smith's argument that the federal response was moot because Nova Scotia had already decided to reject the WPQ

327. Mr. Smith notes that the government of Nova Scotia made its decision to reject the project almost a month before the government of Canada reached the same decision. He asserts that, "As a practical matter, therefore, the Whites Point Project could not proceed regardless of what the federal government did or did not do, or how it did it."[315] In Mr. Smith's view, "the Nova Scotia Government's rejection of the Project rendered the federal government's rejection moot".[316]

328. I cannot agree that, because Nova Scotia issued its response to the Panel Report first, the federal response was irrelevant. In my view, it would be unseemly for different levels of government to reach opposite conclusions on the same project following a joint panel review, and in fact that has never happened. To avoid such an outcome, efforts are normally made to harmonize not only the timing but also the content of the response.

329. Indeed it is clear from a review of further documents, made available to me following completion of my First Report, that Canada and Nova Scotia worked behind the scenes to ensure that their responses would be consistent, and that each knew in advance what the other's response would be.

330. As described below, within two days after the public release of the Panel Report, federal officials learned Nova Scotia officials were likely to recommend rejection of the project by the Nova Scotia Environment Minister (NSDEL), and the same federal

[315] Smith Report at para. 425.
[316] Smith Report at para. 28. Mr. Smith makes essentially the same point at para. 444 and 474.

officials were agreeable to recommending Canada take the same position. However, Canada's official decision had to await Governor in Council approval, whereas Nova Scotia's decision was the Environment Minister's alone to make, and he wanted to make it quickly.

331. Thus, while there was about a 23 day difference in timing between Nova Scotia's formal decision announced on November 20, 2007 and Canada's December 13, 2007 formal decision,[317] in reality both governments were in close communication and internally agreed in late October-early November their decisions would be to reject approval of the WPQ.

332. Indeed, several weeks before the October 23, 2007 public release of the WPQ Panel Report, the two governments began discussing how to coordinate the "nature and timing" of the respective decisions that they would need to make following its delivery.[318]

333. There was immediate federal government internal action upon the report's release. On October 23, 2007, the same day the Panel Report was publicly released, there was a meeting of DFO and CEA Agency/Environment Canada ministerial staff and staff of the PMO (Prime Minister's Office) to discuss next steps to be taken by the Federal government. Also on the same day a teleconference was held between the RAs (DFO and Transport Canada) and other advisory federal authorities, such as Environment Canada, the Department of Foreign Affairs and International Trade, and Health Canada. Bruce Young, a senior CEA Agency official, attended the ministerial officials briefing and chaired the teleconference. He reported in an email sent October 24, 2007 to senior CEA Agency executives that the Fisheries Minister's office had given direction to DFO staff to move quickly on the next steps in the process, and "link our decision making process with the province." He also stated he would be chairing a meeting on October 25, 2007:

---

[317] OIC PC 2007-1965 (CP49935; Investors' Schedule of Documents at Tab C-874).

[318] Email from P. Geddes (NSDEL) to S. Chapman (CEA Agency), September 13, 2007 (CP34276; Investors' Schedule of Documents at Tab C-781). Indeed discussions between Canada and Nova Scotia about co-ordinating their responses to the Panel Report took place as early as 2003: email from P. Bernier (CEA Agency) to N. Gagnier (CEA Agency) (CP05013; Investors' Schedule of Documents at Tab C-782).

with representatives of NS (Lorrie Roberts, in person, Peter Geddes on the phone) and the RAs (Ginny Flood from DFO and Margie Whyte, TC from Moncton by phone) to confirm provincial timing for their decision on the project (Lorrie Roberts indicated to me by phone that with the provincial legislature returning November 22nd, Minister Parent [Nova Scotia] had directed staff at NSDEL to have the decision ready in advance) and how we can link federal decision making (MC and Cabinet approval of the Government Response) to a provincial decision which is expected no later than mid-November.[319]

334. One of the attendees at the October 25, 2007 meeting between federal and Nova Scotia officials was Carolyn Dunn of Health Canada. In an email summary of that meeting, she reported that:

> I attended a meeting at the CEAA Office here in Ottawa here this morning, to discuss the government response to the Whites Point Quarry Panel Report. Lorrie Roberts, from Nova Scotia Environment & Labour was at the meeting. She indicated that her department's recommendation to their Minister will probably be to recommend he deny the project (a no go). Of course, the final decision is up to the Minister. The GoC response to the first recommendation will mirror the response of the province. [Emphasis added.][320]

335. These notes of this attendee confirm that within 48 hours of the release of the Panel Report, not only had senior officials from Ottawa and Nova Scotia met to discuss next steps; but that Nova Scotia's officials had indicated the recommendation to the Nova Scotia Minister "will probably be" to deny the project, i.e. a no-go; and that in the same meeting federal officials had indicated that it was their view the federal government's response to the Panel's first recommendation (that the project not proceed) "will mirror the response of the province".

336. On October 26, 2007 a Memorandum for the Fisheries Minister was prepared and sent to the Deputy Minister for prior approval. This memo reflected both the understanding of senior DFO staff at this time as to Nova Scotia's intentions and provided the following advice for the Fisheries Minister:

> Provincial officials anticipate that the recommendation to the Minister of Environment and Labour (Nova Scotia) will be to accept the Panel's conclusion to reject the proposal. The provincial decision process is simply a decision made by the provincial Minister of Environment and Labour.

---

[319] October 24, 2007 email from Bruce Young to Peter Sylvester, c.c. Yves Leboeuf (CEA Agency VP) (CP29254; Investors' Schedule of Documents at Tab C-875).
[320] October 25, 2007 email from Carolyn Dunn to Deborah Clements (CP49802; Investors' Schedule of Documents at Tab C-876).

…

> Since the Province of Nova Scotia has ultimate jurisdiction over the development of its natural resources, a decision announcement first by Nova Scotia, followed later by a supporting decision announcement by the federal government would be considered appropriate in this case. Cabinet approval of the GoC's response could be forthcoming within a reasonable timeframe following the provincial decision announcement. [Emphasis added.][321]

337. This version of the October 26, 2007 Memorandum to the Minister was transmitted on October 30, 2007 to DFO official Mark McLean.[322] Mr. McLean had previously been a Nova Scotia civil servant within NSDEL from February 1999 to January 2004 and had been involved in the environmental assessment for Nova Scotia of the Whites Point project.[323]

338. The internal Government of Canada process to formally confirm the recommendations already internally made by senior staff is further evidenced in an email of November 5, 2007 which states that it attached a draft MC (Memo to Cabinet) as prepared by DFO on Whites Point Quarry. The email transmitting the draft Memo to Cabinet, written by Transport Canada official Margie Whyte, who participated in the October 25 meeting of federal and Nova Scotia officials referenced above, states:

> As you are aware, the Joint Review Panel recommended not allow the project to proceed. The draft MC is a federal response to this decision. In general:
>
> > -The Province of NS supports the EA decision to reject the project
> >
> > -The Government of Canada is prepared to support the EA decision to reject the project….[324]

339. Also on November 5, 2007 the Deputy DFO Minister approved the Memorandum for the Minister originally drafted on October 26. The final relevant wording underlined below is essentially the same as in the equivalent portion of the October 26th form of that same memo:

---

[321] CP49805B; Investors' Schedule of Documents at Tab C-877. The quoted material appears at p. 3 of the memo.
[322] Email from Stuart Dean to Mark McLean (CP35621; Investors' Schedule of Documents at Tab C-878).
[323] Affidavit of Mark McLean at paras. 3 and 4.
[324] November 5, 2007 email from Margie Whyte (CP22860; Investors' Schedule of Documents at Tab C-783).

> DFO, as a Responsible Authority under CEAA, along with TC, are required to lead the federal response to the Panel Report. Provincial officials have indicated that an announcement would be desirable prior to November 22, 2007 (the start date of the provincial legislature) and possibly as early as November 15, 2007. Provincial officials anticipate that the recommendation to the Minister of Environment and Labour will be to accept the Panel's conclusion to reject the proposal. The provincial decision process is simply a decision made by the provincial Minister of Environment & Labour.
>
> …
>
> The Province of Nova Scotia has ultimate jurisdiction over the development of its natural resources. Therefore a decision announcement first by Nova Scotia, followed later by a supporting decision announcement by the federal government would be considered appropriate. Cabinet approval of the federal response could be forthcoming within a reasonable timeframe following the provincial decision announcement. [Emphasis added.][325]

340. Nova Scotia officials were equally aware at this time that DFO and other involved federal senior officials were likely to recommend that Canada officially "reject the project". A November 13, 2007 NSDEL briefing package entitled "Response to Panel Report on Whites Point Quarry and Marine Terminal", stated that their Ministers must respond to the Panel recommendation to reject the project, and noted

> Federal Ministers of Fisheries & Oceans and Transport Canada are also required to make a decision – indication is that they will also reject the project.

341. And a week before Nova Scotia made its official announcement on November 20, 2007 that it would reject the project, Nancy Vanstone, the acting Deputy Minister for NSDEL, confirmed to Canada that the province was planning to reject it and sought reassurance that Canada would do the same. As recounted in an email from Mike Murphy of DFO to his colleagues:

> They will be announcing shortly, probably early next week, and they are concerned about our timing and our decision. They would like a sense of what we will be saying, with the hope that our message will be that we accept the general finding of the panel (ie reject the quarry), but that we have some issues with the panel going beyond its scope.[326]

---

[325] November 5, 2007 Memorandum for the Minister, at p. 3 (CP49801, Investors' Schedule of Documents at Tab C-879).

[326] Email from M. Murphy to M. McLean and G. Flood, November 14, 2007 (CP35505; Investors' Schedule of Documents at Tab C-784).

342. Mr. Murphy added, "Nancy is just looking for some reassurance that we will have a similar message".[327] DFO was in fact able to provide that reassurance. Mr. Murphy was advised that either Ginny Flood (a DFO official) or the DFO Deputy Minister "will call Nancy and confirm our agreement with the province on the decision on the Panel Report".[328]

343. By this time, even though the federal response had not yet gone to Cabinet for approval, federal officials seemed confident that the response would be to accept the JRP's recommendation to reject the WPQ. In fact, a draft news release was prepared on November 15, 2007 entitled "The Government of Canada Accepts the Conclusions of the Joint Environmental Assessment Panel for the Proposed Whites Point Project".[329] This was five days before the Nova Scotia announcement on November 20 and almost a month before the federal response was formally approved on December 13.

344. It is relevant to note that the draft News Release was transmitted to Mark McLean by Mike Murphy who stated that he was not sure what to say about it, "it depends on what the suggested response by Cabinet is. Have you and Ginny discussed?" Mr. McLean responded that he had spoken with Ginny Flood and they had "No concerns" with the News Release.[330]

345. In summary, it is clear that well before Nova Scotia made the official announcement on November 20, 2007 accepting the Panel's recommendation and rejecting approval of the WPQ, Canada knew that Nova Scotia would reject the project, and Nova Scotia knew that Canada was taking steps to formally reject it too. It seems that both sides would have preferred to release their responses simultaneously,[331] but it

---

[327] Email from M. Murphy to M. McLean and G. Flood, November 15, 2007 (CP35504; Investors' Schedule of Documents at Tab C-785).
[328] Email from M. McLean to M. Murphy, November 15, 2007 (CP35612; Investors' Schedule of Documents at Tab C-786).
[329] *Ibid.*
[330] Email exchange between M. McLean and M. Murphy, *ibid.*
[331] Email from B. Petrie (NSDEL) to N. Vanstone (NSDEL), October 5, 2007 (CP14150; Investors' Schedule of Documents at Tab C-787): "it would be our objective to coordinate the timing and content of our decision with the federal gov't, so as to present a clear message to the public & proponent"; email from G. Flood (DFO) to S. Dean (DFO) and B. Hood (DFO), October 24, 2007 (CP35515; Investors' Schedule of Documents at Tab C-

was simply not possible for Canada to move as quickly as the province, because Canada was required under CEAA to obtain Cabinet authorization, while Nova Scotia's decision was the Environment Minister's alone to make.[332]

346. These documents demonstrate that Canada and Nova Scotia did not formulate their respective responses in isolation. Nova Scotia decided quickly to accept the JRP's recommendation to reject the WPQ and sought and received early assurance from Canada that Canada would do the same.

347. In my opinion, Canadian officials' quick readiness to support and acquiesce in Nova Scotia's rejection of the project helps to explain why there was no apparent consideration by Canada that the Panel's conclusions did not provide a valid basis for Canada to also reject the project.

348. Canada's response to the Panel Report recites that "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 same response by Canada states that the first recommendation of the Panel was that Nova Scotia reject the project and that the Panel's recommendation to Canada was that "the Project is likely to cause significant adverse environmental effects that, in the opinion of the Panel, cannot be justified in the circumstances."[333]

349. As Federal officials knew, almost immediately after the release of the Panel Report, where Nova Scotia was headed in its response to the report, federal officials had the opportunity to advise Nova Scotia that Canada may have issues in using the Panel Report as a basis for Canada concurring in rejection of the project. There is no evidence in the produced documents that Canada carried out a careful, appropriate and required analysis of the Panel Report in terms of whether it provided a statutory or constitutional basis for Canada to reject the project.

---

788): "The Minister's Office, through Communications, has indicated that they would like to announce the same time as the Province".

[332] Nova Scotia apparently wanted to make the announcement before the legislature resumed sitting on November 22, 2007: email from C. Dunn (Health Canada) to D. Clements (Health Canada), October 24, 2007 (CP29949; Investors' Schedule of Documents at Tab C-789); email from B. Young (CEA Agency) to P. Sylvester (CEA Agency), October 24, 2007 (CP13042; Investors' Schedule of Documents at Tab C-790).

[333] Canada Exhibit R-383

350. Had Canada carried out such an analysis, it would have reasonably led to the realization that the basis for the Panel's rejection of the project, and its recommendation that Canada agree it would likely cause significant adverse environmental effects that could not be justified, was fundamentally based on the notion of community core values, and to the further appreciation that such a concept was neither a valid statutory nor constitutional basis for Canada to make a decision under CEAA. As I have noted in an earlier part of this report, there is nothing in the available government productions in this file which informed the federal Cabinet that the Panel had made findings that the project would likely cause "significant adverse environment effects" within the jurisdiction of Canada, which is the key to Canada having jurisdiction under CEAA to reject a project.

351. As I also noted earlier in this report, there is no analysis to that effect in the Memorandum to Cabinet (provided to me after I prepared my First Report) which provided recommendations to Cabinet on responding to the Panel Report. Rather, in providing advice on the "pros" and "cons" of Canada accepting the Panel Report, the memo advises the Cabinet that a federal decision to accept the Panel Report "supports and is consistent with Nova Scotia's decision to reject the proposal recognizing Nova Scotia's right to decision making over its natural resources" and "supports the majority of local stakeholders who opposed this proposal." It also advised that rejecting the panel's report "would negatively impact relations with Nova Scotia and federal-provincial environmental assessment harmonization."[334] Again, these are not explicit CEAA decision-making criteria.

352. Canada knew within two days of the public release of the Panel Report that Nova Scotia was likely going to reject the project based on the Panel's central findings in respect of core community values. Had Canada indicated concern about "core community values" being a valid basis for Canada to reach the same conclusion, it could have informed Nova Scotia of that. Canada could also have indicated its concern about that and that it would use s. 37(1.1)(b) of CEAA to ask that the Panel

[334] Memorandum to Cabinet (CP49834; Investors' Schedule of Documents at Tab C-871) at p. 19. The memo earlier on refers to the federal departments providing expert information to the panel and that this covered "key environmental effects of the Project within federal jurisdiction." However, the memo did not conclude that any of these environmental effects were or were likely to be significant or adverse.

clarify or reconsider its findings. Given Nova Scotia's clearly expressed wish to ensure its response to the Panel Report would align with Canada's, any expression of concern by Canada as to the need for Canada to more carefully consider "core community values" as a valid basis for Canada to reject the project would likely have delayed Nova Scotia from proceeding to make an early announcement to reject the project based on the original Panel Report conclusion. Nova Scotia's early internal inclination to reject the project did not render moot Canada's opportunity to respond in a more considered and appropriate way. The results could have been entirely different.

## PART IV: REPLY TO MR. SMITH'S ARGUMENT THAT BILCON NEVER COMPLAINED ABOUT THE ISSUES I RAISE

353. A recurring theme in Mr. Smith's report is that some of the concerns about the EA process that I raise in my First Report were not raised by Bilcon at the time the process was underway. Mr. Smith states that Bilcon never complained about the selection of the JRP panellists, for example, and did not object to DFO's decision to scope in the quarry.[335] Mr. Smith summarizes this argument in Part IV of his report, entitled "A Comment on Bilcon's Failure to Pursue Remedies Commonly Sought in Conjunction with Canadian Environmental Assessments", where he writes:

> There appear to be two cases at work here: the case Bilcon advanced at the time of the environmental assessment and the case Mr. Estrin now pleads in his Report many years after the Whites Point Project JRP Report was issued and the governments' decisions were rendered.[336]

354. Before addressing the substance of Mr. Smith's argument, to avoid any confusion, I should clarify that I had no involvement in the Bilcon EA. I did not advise Bilcon during or after that process, and I am not now "pleading" any case. Rather, I was engaged as an expert by counsel for the Investors subsequent to the final government decisions, in order to provide expert opinion evidence regarding the use of EA in Canada and related administrative law matters. I am not attempting to do more than point out that in my review of the application of federal and provincial EA legislation to the WPQ project some significant Canadian domestic law administrative and/or jurisdictional process issues became apparent. How relevant such issues are to a NAFTA process is a matter I leave to counsel for the parties and the Tribunal.

355. My summary reply to Mr. Smith on this issue is as follows. Mr. Smith suggests that the Tribunal should conclude that if Bilcon did not take up certain matters in the domestic courts it should be assumed Bilcon was not treated unfairly. As indicated above, whether or not the Tribunal finds these matters relevant under its mandate is for the Tribunal. In making that determination, there are some considerations that may provide perspective, which the Tribunal may or may not find relevant, as set out below.

[335] Smith Report at para. 219 and para. 455.
[336] Smith Report at para. 454.

356. First, EA in Canada is meant to be a self-assessment process whereby a proponent is required to consider environmental aspects of a project during the planning stages in order to infuse its decision-making with environmental considerations and not just those of profit. EA is meant to be a scientific and technical analysis process, not a legalistic process.

357. For example, a proponent's Environmental Impact Statement is typically drafted internally by the proponent or by a technical consultant, rather than by a lawyer. The proponent has no onus to "lawyer up" and monitor the legality of each step in the preparation and presentation of its EA, and a proponent should not be faulted for not obtaining legal advice in that process.

358. Even where an EA is sent to a panel, it is often the proponent or its technical advisers who will take the lead in making submissions and questioning witnesses. Indeed in his affidavit, Mr. Buxton says he was encouraged by the Joint Review Panel not to have legal counsel.[337] In my view, the proponent should be able to expect to be treated fairly by the government and the review panel.

359. Second, as a matter of law, one cannot expressly or implicitly consent to the exercise of jurisdiction where that jurisdiction does not exist. Just because Bilcon did not challenge or even object to decisions made during the EA process does not make those decisions correct. As the Federal Court noted in *Hamilton-Wentworth (Regional Municipality) v. Canada (Minister of the Environment)*, "Neither consent nor delay can confer any power to act beyond limits imposed by legislation".[338] In that case, the fact that the proponent at first assumed that CEAA applied to the project did not preclude it from later challenging the government's decision to require an EA: "The Region's apparent assumption that the CEAA applied and the Region's failure to challenge the May 4 of May 6 decisions could not confer jurisdiction on the referring Minister."[339]

360. Third, in respect of one of the most critical jurisdictional errors identified in my First Report, the reliance on the novel concept of community core values, it appears from

[337] Affidavit of Paul Buxton at para. 65.
[338] *Hamilton-Wentworth (Regional Municipality) v. Canada (Minister of the Environment), supra* note 110, at para. 65.
[339] *Ibid.* at para. 65.

my review of the record that Bilcon simply could not have seen it coming, and therefore did not have an opportunity to complain. As I explained above in section 2.2, although Bilcon did not object to the inclusion of socio-economic factors in the EIS Guidelines, it could not have predicted that those factors would open the door to the rejection of the project on the basis of community core values, which were nowhere mentioned in the Guidelines.

361. Fourth, although Mr. Smith is correct that a proponent has the right to go to court to challenge the decisions made by the government or the review panel, even before the final decision is issued, doing so would certainly result in delays. Mr. Smith cites *Dene Tha' First Nation v. Canada (Minister of Environment)* as an example of a case where the court corrected jurisdictional errors in the middle of the EA process, but that case was brought by opponents of the project, not the proponents.[340] It would appear that the very reason the case was launched was to thwart or at least delay the project. Cases where the proponent of a project sought judicial review of decision in the middle of the process are much rarer.[341]

362. A final, related point is that in my experience proponents are more concerned about the final result of the process (i.e. approval of the project) than the process itself. Sometimes the proponent will go along with the decisions and demands of the government or the review panel, even if it feels they are unusual or unfair, so long as it believes that doing so will help it advance towards the ultimate approval of the project. The proponent may, for example, see the decision to refer a project to a review panel as unjustified, but still go through the panel process in the expectation that the government will ultimately approve the project. It appears that Bilcon may reasonably have held out hope that, despite each unusual decision made in the course of its EA, the Joint Review Panel would ultimately make its recommendation on the basis of factors that were within its jurisdiction. In particular, Bilcon could not have foreseen that the project would be rejected on the basis of community core

---

[340] Smith Report at para. 462, referring to *Dene Tha' First Nation v. Canada (Minister of Environment),* (2006), 303 F.T.R. 106.

[341] A rare example is *Hamilton-Wentworth (Regional Municipality) v. Canada (Minister of the Environment), supra* note 110, where I was counsel to the proponent. In that case, the proponent challenged the decision that CEAA applied at all, after a review panel was struck but before it held any hearings. The Federal Court agreed that the project was excluded from CEAA.

values, a concept that was hitherto unknown to EA law and was never raised expressly in the Panel hearing.

## PART V: CONCLUDING REMARKS

363. On June 29, 2012, Parliament enacted legislation to repeal CEAA and replace it with a new act, the *Canadian Environmental Assessment Act, 2012*.[342] Among other things, the new act, which came into force on July 6, 2012, requires the Minister to make a decision about whether to refer a project to a panel within 60 days of the commencement of the EA process, establishes a two-year deadline for completing panel reviews, and enables the federal government to exempt from the act a project that undergoes a provincial EA.

364. The government explained the need for the overhaul as follows:

> To maximize the value that Canada draws from our natural resources, we need a regulatory system that reviews projects in a timely and transparent manner, while effectively protecting the environment. The Government recognizes that the existing system needs comprehensive reform.
>
> […]
>
> Currently, companies undertaking major economic projects must navigate a complex maze of regulatory requirements and processes. Approval processes can be long and unpredictable.[343]

365. Similarly, the Minister of Natural Resources told Parliament:

> Unfortunately, our inefficient, duplicative and unpredictable regulatory system is an impediment. It is complex, slow-moving and wasteful. It subjects major projects to unpredictable and potentially endless delays.[344]

366. What happened to Bilcon shows that under the old CEAA, the nature, timing and outcome of EAs could be influenced by concerns other than the environmental effects of the project.[345] In my view Bilcon was a victim of non-transparent and misused discretion, and the WPQ saga makes the case for reforming CEAA.

---

[342] The new *Canadian Environmental Assessment Act, 2012* is available at: http://laws-lois.justice.gc.ca/eng/acts/C-15.21/index.html (Investors' Schedule of Documents at Tab C-903).

[343] "Jobs, Growth and Long-Term Prosperity: Economic Action Plan 2012", tabled in the House of Commons on March 29, 2012, at chapter 3.2, available at: http://www.budget.gc.ca/2012/plan/toc-tdm-eng.html (Investors' Schedule of Documents at Tab C-904).

[344] Minister Joe Oliver, House of Commons Debates, May 2, 2012, available at: http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5543442&Language=E&Mode=1 Investors' Schedule of Documents at Tab C-905).

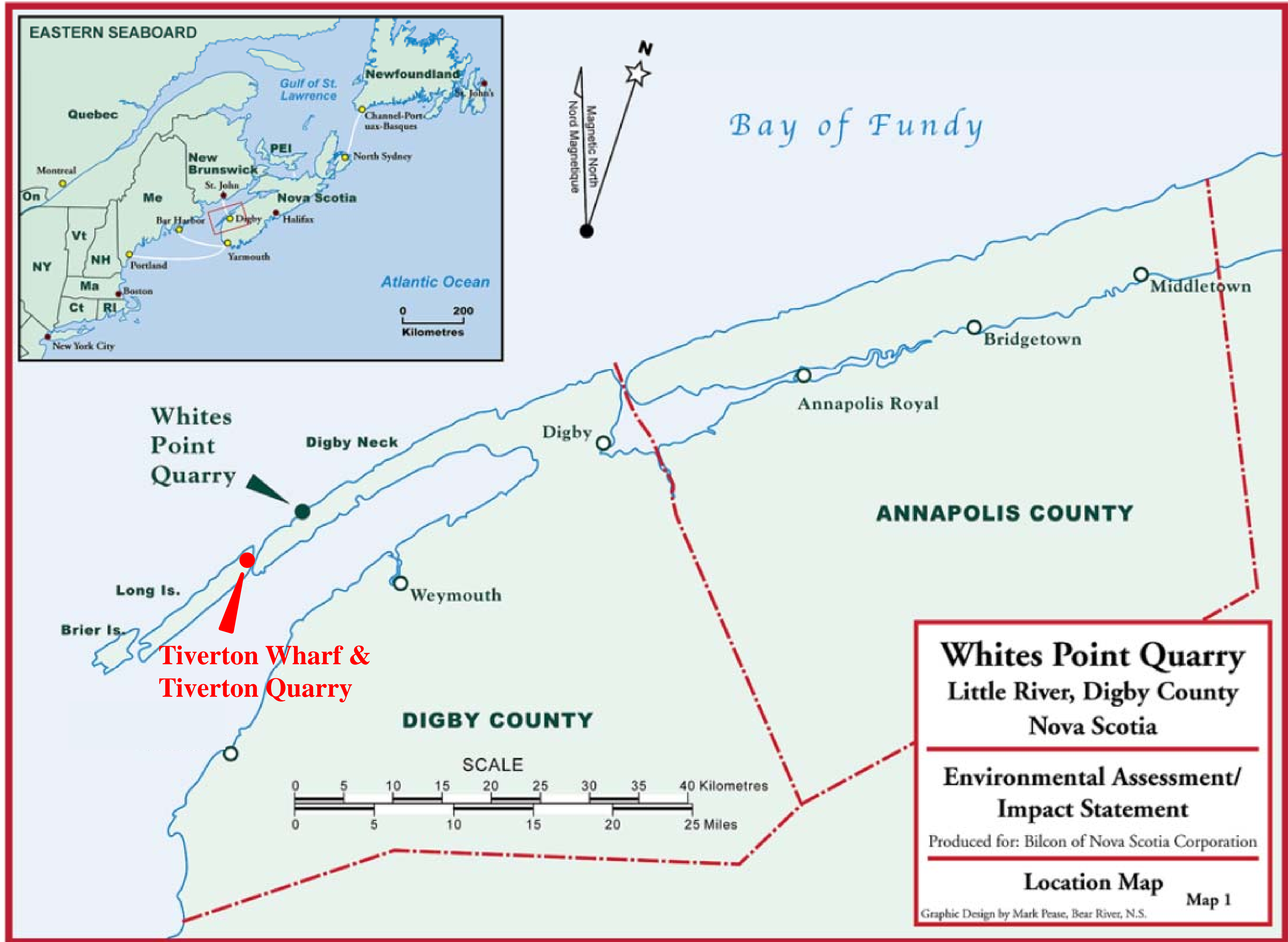
[345] First Report at p. 2 and para. 72.

367. I do not think any proponent in Bilcon's shoes could reasonably have anticipated just how far off the rails this particular process would go. In particular, a proponent could not have reasonably anticipated that there would be a panel review, nor that the panel would recommend the rejection of the project on the basis of the novel concept of "community core values", nor that the federal and Nova Scotia governments would unquestioningly accept this recommendation. That is the opinion I expressed in my First Report, and despite Mr. Smith's lengthy rebuttal, I stand by it.

Signed at Toronto, December 19, 2012

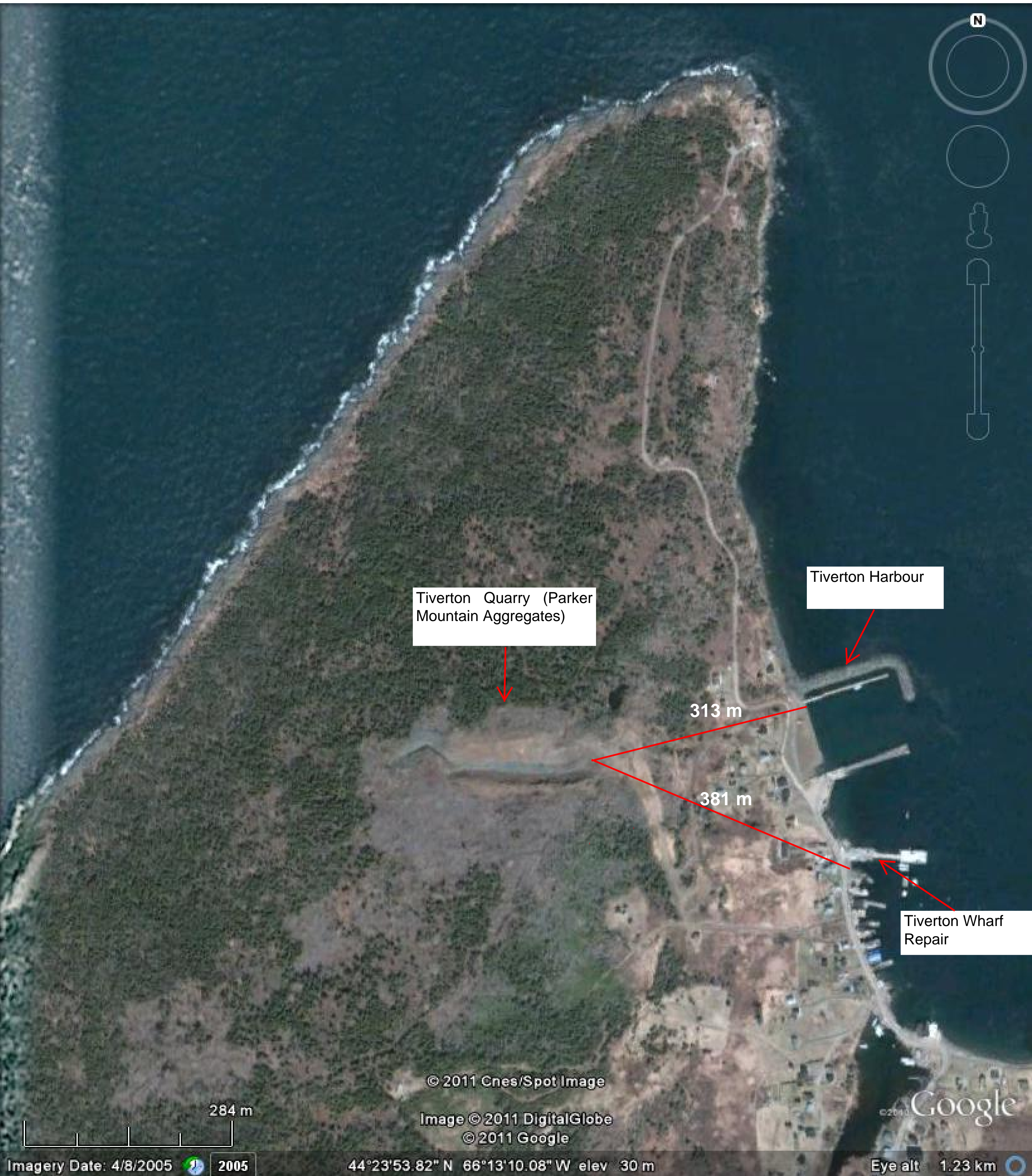
David Estrin

# APPENDIX A: MAP SHOWING LOCATION OF WHITES POINT AND TIVERTON



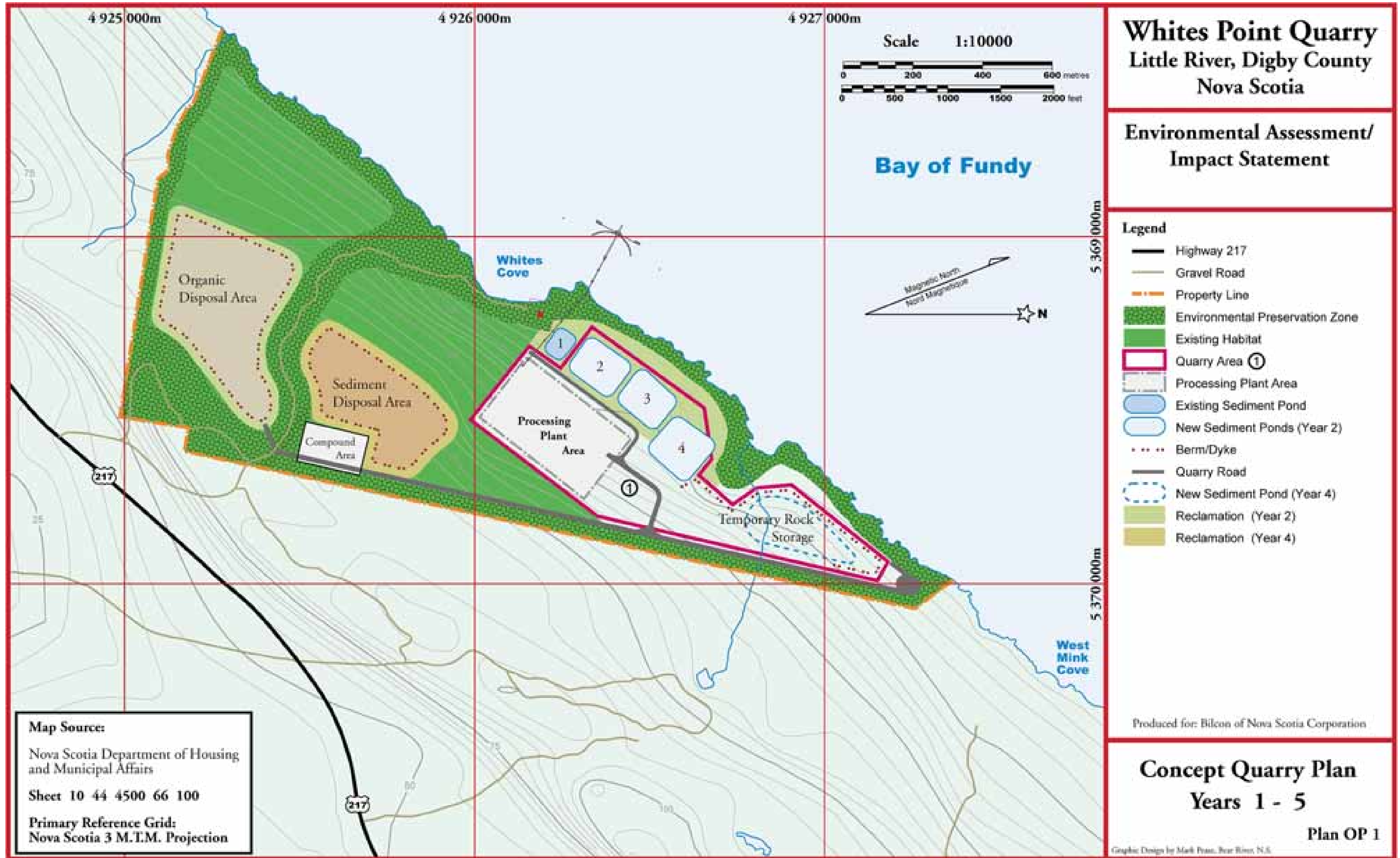

Adapted from Bilcon's Environmental Impact Statement

**APPENDIX B: AERIAL PHOTO SHOWING TIVERTON PROJECTS**

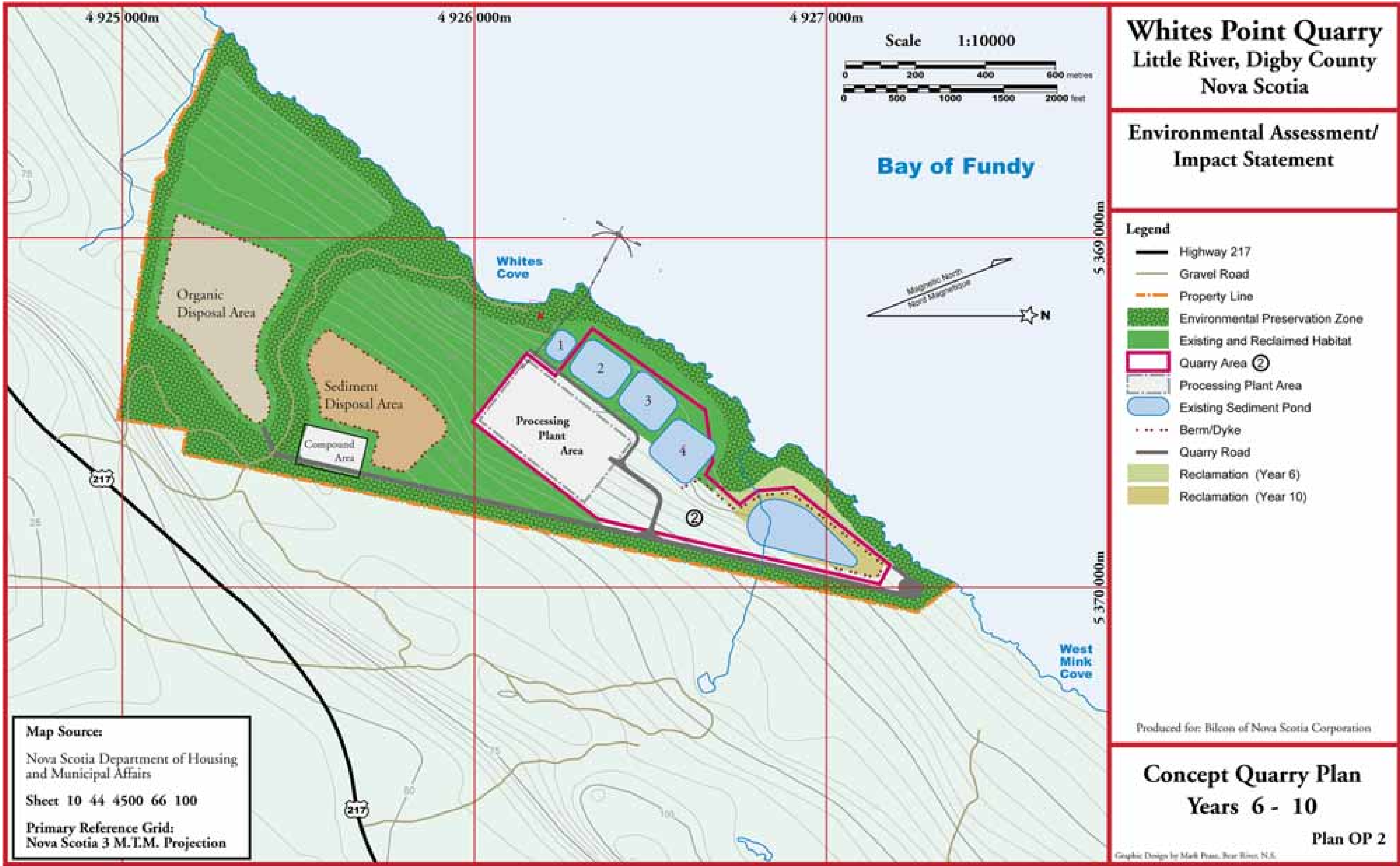


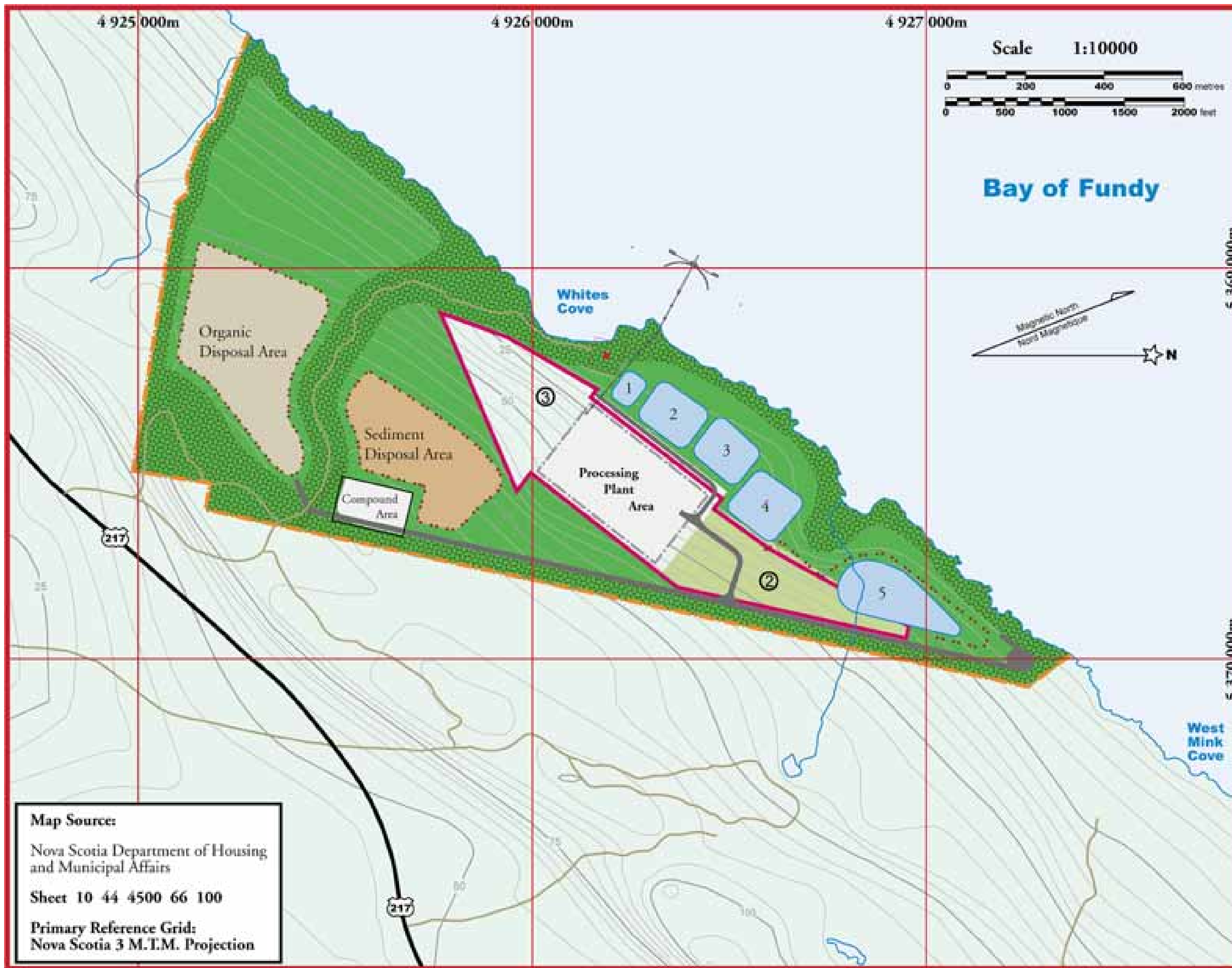

**Adapted from Canada Exhibit R-100**

**APPENDIX C: MAPS SHOWING PHASES OF WHITES POINT QUARRY***




*From Bilcon's Environmental Impact Study


Whites Point Quarry
Little River, Digby County
Nova Scotia
Environmental Assessment/
Impact Statement
Legend
Highway 217
Gravel Road
Property Line
Environmental Preservation Zone
Existing and Reclaimed Habitat
Quarry Area ②
Processing Plant Area
Existing Sediment Pond
Berm/Dyke
Quarry Road
Reclamation (Year 6)
Reclamation (Year 10)
Produced for: Bilcon of Nova Scotia Corporation
Concept Quarry Plan
Years 6 - 10
Plan OP 2
Scale 1:10000
Bay of Fundy
Whites Cove
West Mink Cove
Organic Disposal Area
Sediment Disposal Area
Processing Plant Area
Compound Area
4 925 000m
4 926 000m
4 927 000m
5 369 000m
5 370 000m
Map Source:
Nova Scotia Department of Housing and Municipal Affairs
Sheet 10 44 4500 66 100
Primary Reference Grid:
Nova Scotia 3 M.T.M. Projection




# Whites Point Quarry

**Little River, Digby County**
**Nova Scotia**

**Environmental Assessment/ Impact Statement**

**Legend**

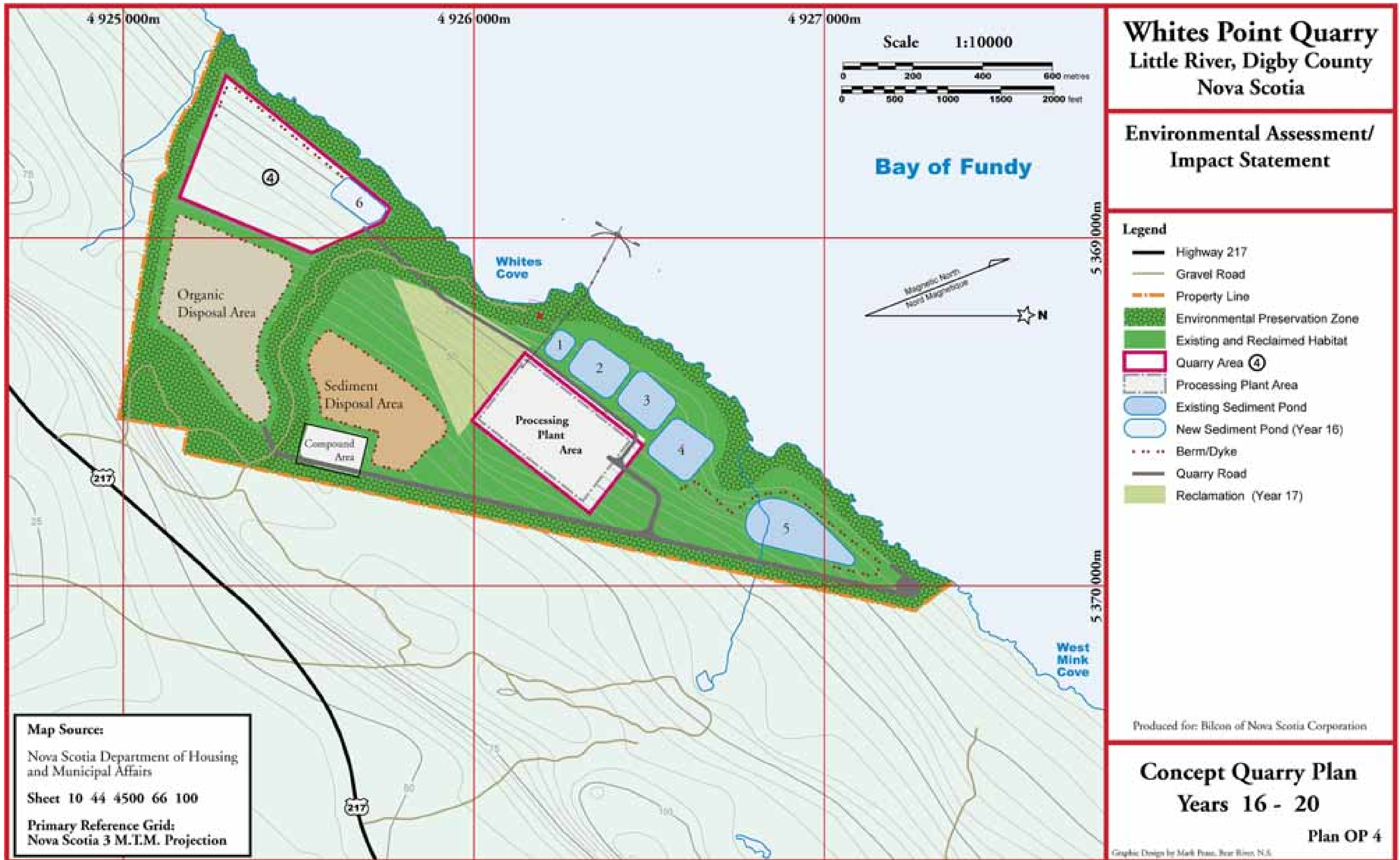
- Highway 217
- Gravel Road
- Property Line
- Environmental Preservation Zone
- Existing and Reclaimed Habitat
- Quarry Area ② and ③
- Processing Plant Area
- Existing Sediment Pond
- Berm/Dyke
- Quarry Road
- Reclamation (Year 14)

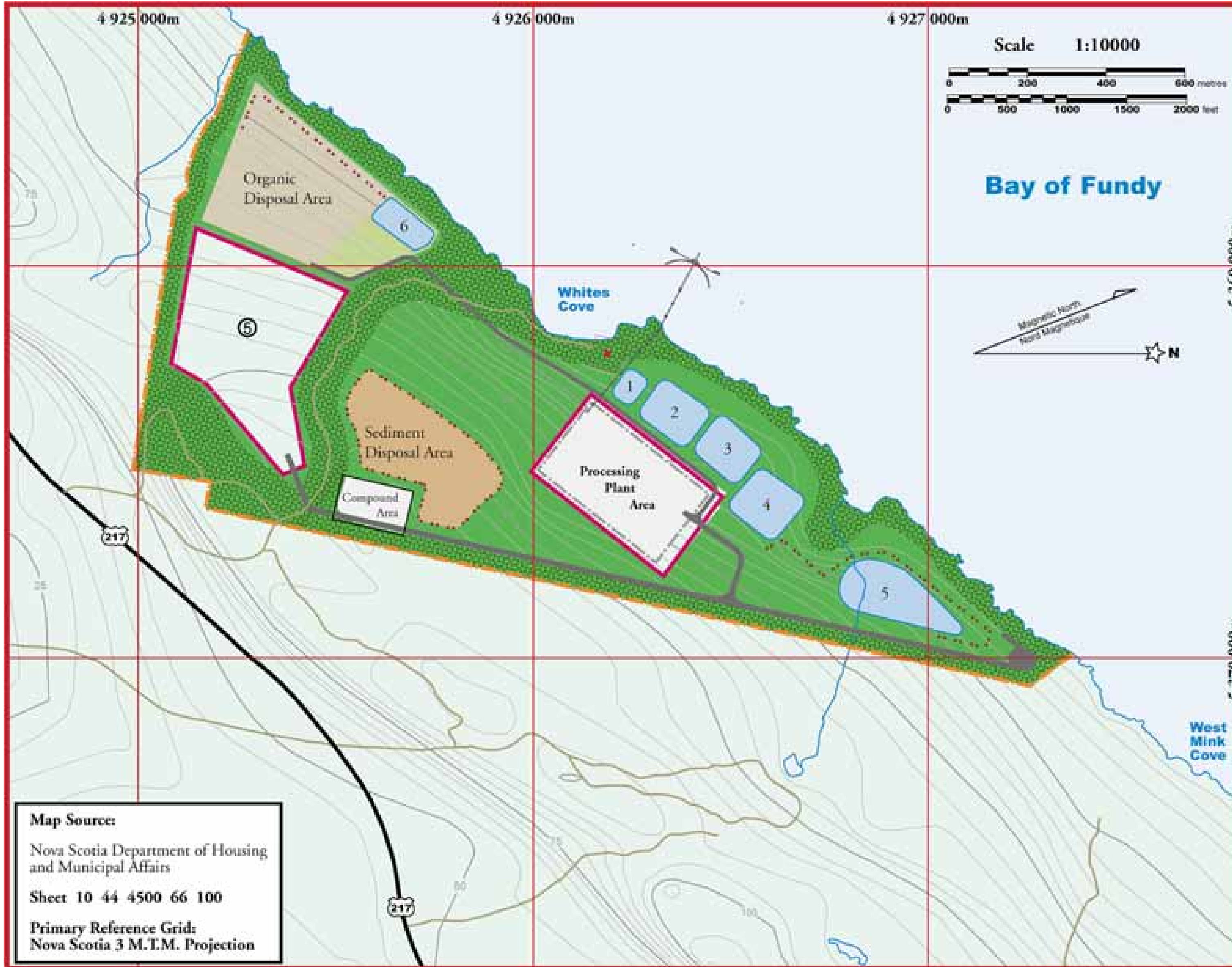
Produced for: Bilcon of Nova Scotia Corporation

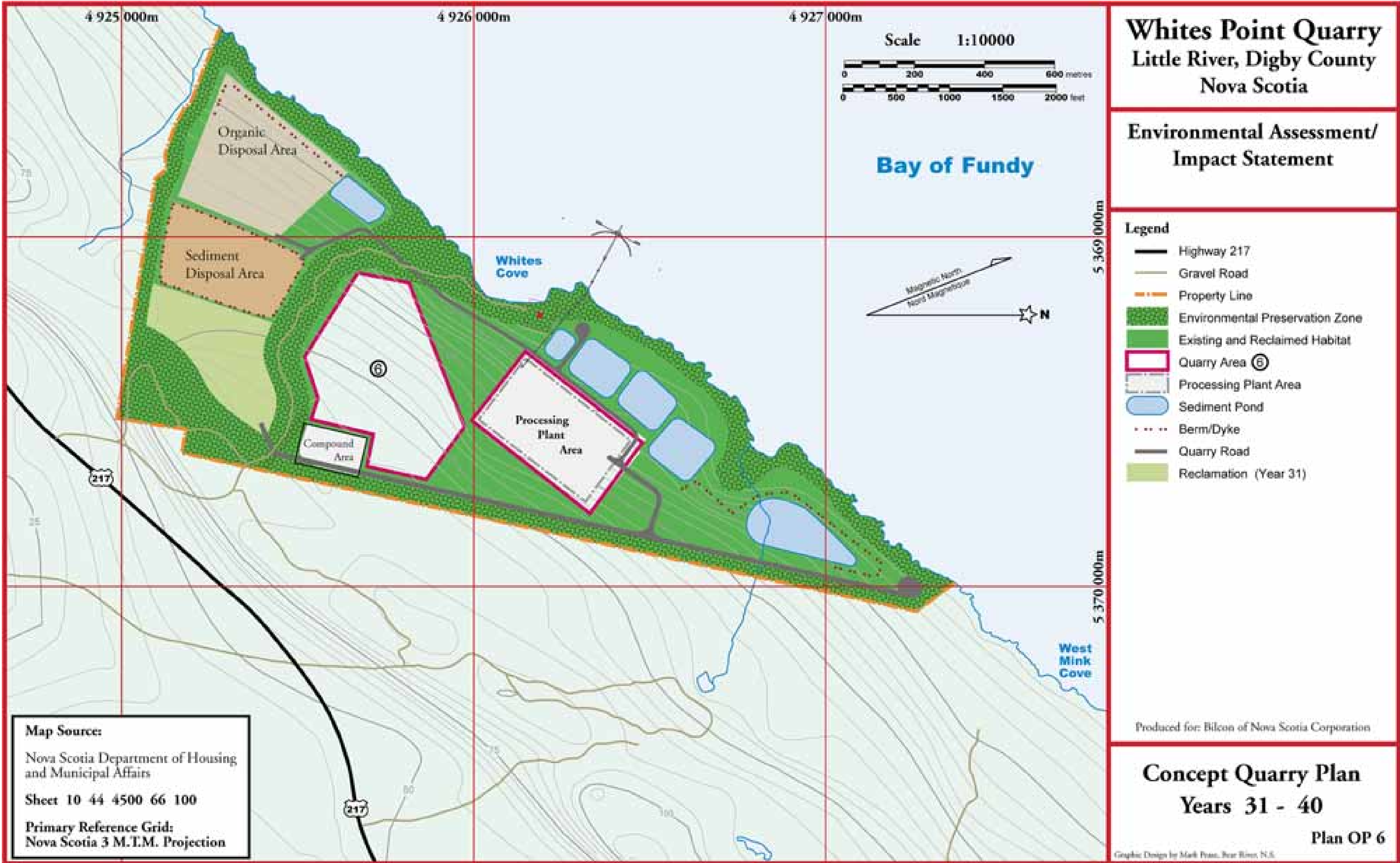
## Concept Quarry Plan
## Years 11 - 15

**Plan OP 3**

Graphic Design by Mark Pease, Bear River, N.S.


4 925 000m
4 926 000m
4 927 000m
Scale 1:10000
0 200 400 600 metres
0 500 1000 1500 2000 feet
Bay of Fundy
Whites Cove
West Mink Cove
5 369 000m
5 370 000m
Magnetic North
Nord Magnétique
N
Organic Disposal Area
Sediment Disposal Area
Compound Area
Processing Plant Area
Map Source:
Nova Scotia Department of Housing and Municipal Affairs
Sheet 10 44 4500 66 100
Primary Reference Grid:
Nova Scotia 3 M.T.M. Projection
Whites Point Quarry
Little River, Digby County
Nova Scotia
Environmental Assessment/
Impact Statement
Legend
Highway 217
Gravel Road
Property Line
Environmental Preservation Zone
Existing and Reclaimed Habitat
Quarry Area ④
Processing Plant Area
Existing Sediment Pond
New Sediment Pond (Year 16)
Berm/Dyke
Quarry Road
Reclamation (Year 17)
Produced for: Bilcon of Nova Scotia Corporation
Concept Quarry Plan
Years 16 - 20
Plan OP 4
Graphic Design by Mark Pease, Bear River, N.S.


Whites Point Quarry
Little River, Digby County
Nova Scotia
Environmental Assessment/
Impact Statement
Legend
Highway 217
Gravel Road
Property Line
Environmental Preservation Zone
Existing and Reclaimed Habitat
Quarry Area ⑤
Processing Plant Area
Existing Sediment Pond
Berm/Dyke
Quarry Road
Reclamation (Year 21)
Produced for: Bilcon of Nova Scotia Corporation
Concept Quarry Plan
Years 21 - 30
Plan OP 5
Scale 1:10000
Bay of Fundy
Whites Cove
West Mink Cove
Organic Disposal Area
Sediment Disposal Area
Processing Plant Area
Compound Area
4 925 000m
4 926 000m
4 927 000m
5 369 000m
5 370 000m
N
Map Source:
Nova Scotia Department of Housing and Municipal Affairs
Sheet 10 44 4500 66 100
Primary Reference Grid:
Nova Scotia 3 M.T.M. Projection


4 925 000m
4 926 000m
4 927 000m
Scale 1:10000
0 200 400 600 metres
0 500 1000 1500 2000 feet
Bay of Fundy
Whites Cove
West Mink Cove
Magnetic North
Nord Magnetique
N
5 369 000m
5 370 000m
Organic Disposal Area
Sediment Disposal Area
6
Processing Plant Area
Compound Area
217
Map Source:
Nova Scotia Department of Housing and Municipal Affairs
Sheet 10 44 4500 66 100
Primary Reference Grid:
Nova Scotia 3 M.T.M. Projection
Whites Point Quarry
Little River, Digby County
Nova Scotia
Environmental Assessment/
Impact Statement
Legend
Highway 217
Gravel Road
Property Line
Environmental Preservation Zone
Existing and Reclaimed Habitat
Quarry Area 6
Processing Plant Area
Sediment Pond
Berm/Dyke
Quarry Road
Reclamation (Year 31)
Produced for: Bilcon of Nova Scotia Corporation
Concept Quarry Plan
Years 31 - 40
Plan OP 6
Graphic Design by Mark Pease, Bear River, N.S.

# Whites Point Quarry
Little River, Digby County
Nova Scotia

## Environmental Assessment/ Impact Statement

Scale 1:10000

4 925 000m
4 926 000m
4 927 000m
5 369 000m
5 370 000m

Bay of Fundy

Whites Cove

West Mink Cove

Magnetic North
Nord Magnétique
N

Organic Disposal Area

Sediment Disposal Area

Compound Area

Processing Plant Area (years 41-48)

7

217

**Legend**

- Highway 217
- Gravel Road
- Property Line
- Environmental Preservation Zone
- Existing and Reclaimed Habitat
- Quarry Area 7
- Processing Plant Area
- Sediment Pond
- Berm/Dyke
- Quarry Road
- Reclamation (Year 41)

Produced for: Bilcon of Nova Scotia Corporation

**Map Source:**

Nova Scotia Department of Housing and Municipal Affairs

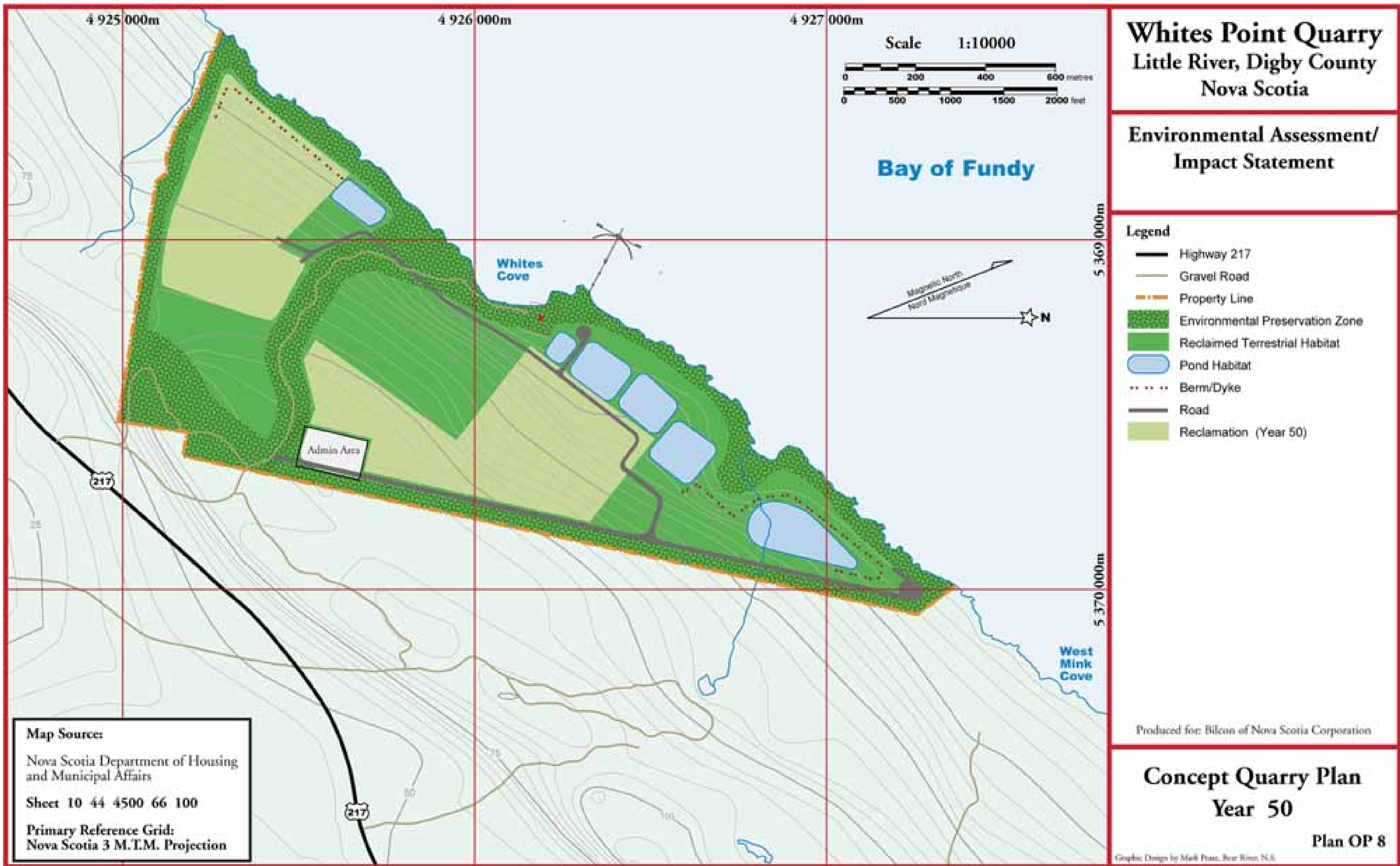
**Sheet 10 44 4500 66 100**

**Primary Reference Grid:**
**Nova Scotia 3 M.T.M. Projection**

## Concept Quarry Plan
## Years 41 - 49

**Plan OP 7**

Graphic Design by Mark Peass, Bear River, N.S.


Whites Point Quarry
Little River, Digby County
Nova Scotia
Environmental Assessment/
Impact Statement
Legend
Highway 217
Gravel Road
Property Line
Environmental Preservation Zone
Reclaimed Terrestrial Habitat
Pond Habitat
Berm/Dyke
Road
Reclamation (Year 50)
Produced for: Bilcon of Nova Scotia Corporation
Concept Quarry Plan
Year 50
Plan OP 8
Scale 1:10000
0 200 400 600 metres
0 500 1000 1500 2000 feet
4 925 000m
4 926 000m
4 927 000m
5 369 000m
5 370 000m
Bay of Fundy
Whites Cove
West Mink Cove
Magnetic North
Nord Magnétique
N
Admin Area
217
Map Source:
Nova Scotia Department of Housing and Municipal Affairs
Sheet 10 44 4500 66 100
Primary Reference Grid:
Nova Scotia 3 M.T.M. Projection

# APPENDIX D: MAP OF SHIPPING LANES NEAR WHITES POINT*

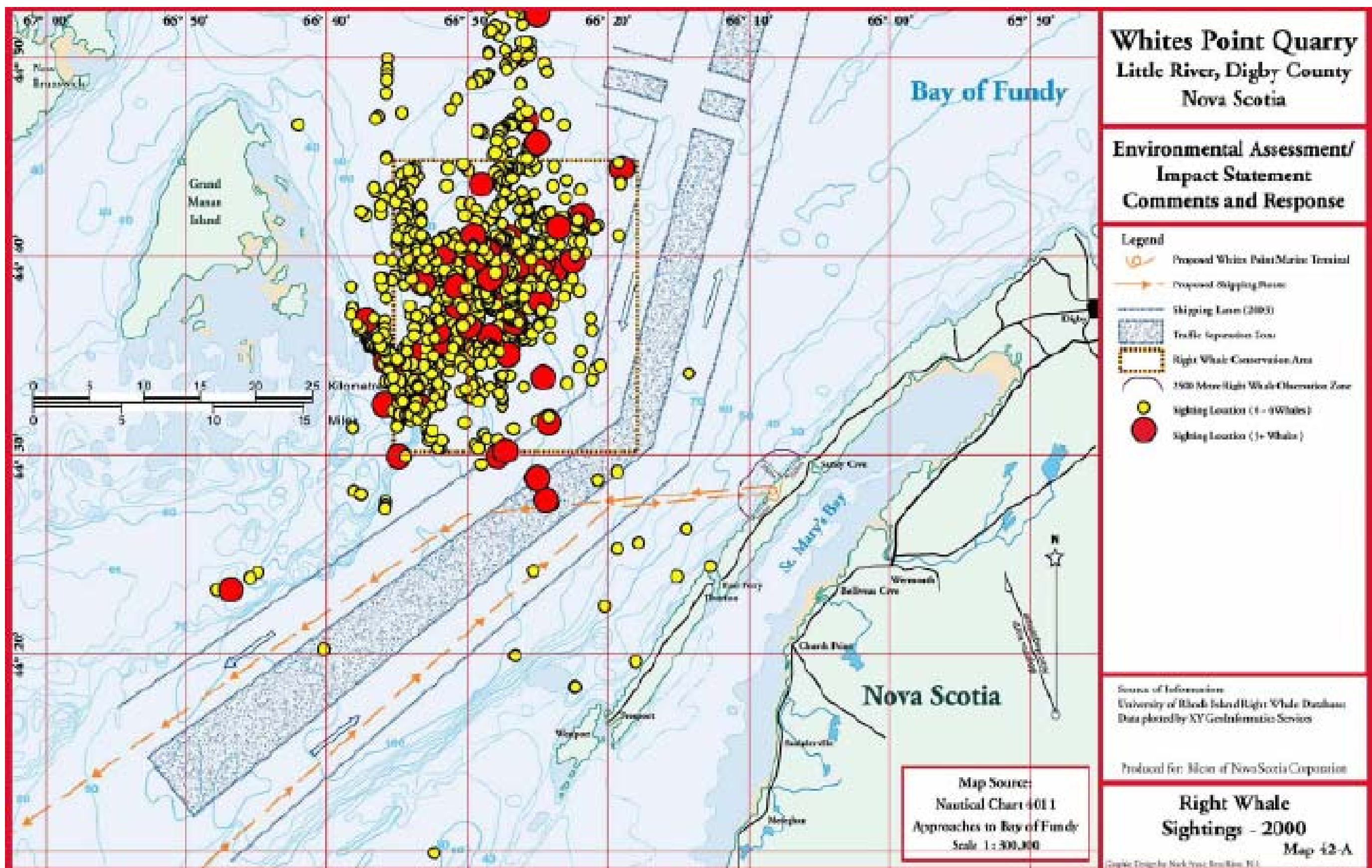
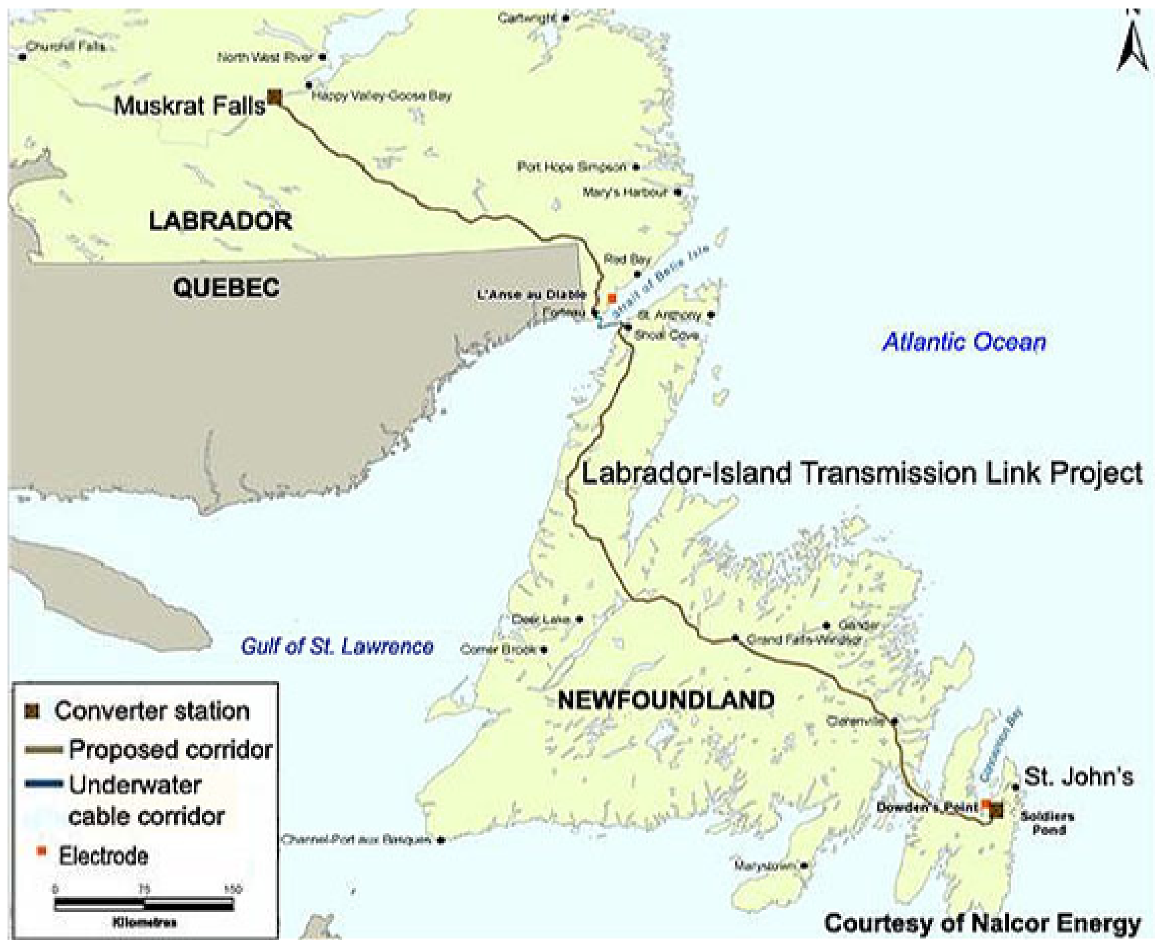



**Fig. 2-10** *The EIS illustrated the shipping lanes, the Northern right whale conservation zone, and the ship route to the terminal.*



***From WPQ Panel Report**

# APPENDIX E - MAP OF LABRADOR-ISLAND TRANSMISSION LINK PROJECT*




***From CEA Agency website:**
**http://www.ceaa.gc.ca/050/document-eng.cfm?document=55161**

Canadian Environmental Assessment Agency | Agence canadienne d'évaluation environnementale | Canada

Home

# Voisey's Bay Mine and Mill Environmental Assessment Panel Report

## 18 Recommendations

### Recommendation 1

The Panel recommends that the Voisey's Bay Mine and Mill Project be authorized to proceed, subject to the terms and conditions identified in the rest of the Panel's recommendations.

### Recommendation 2

The Panel recommends that the Province and VBNC negotiate a mining lease that promotes the attainment of durable and equitable social and economic benefits to the people of Labrador and of the Province through resource stewardship. The following conditions should be attached to that lease:

- VBNC must proceed as soon as possible with an underground exploration program and, if reserves are proven, commit to early development to blend underground output with the late stages of open pit production; and
- if initial underground exploration does not confirm current reserve projections, VBNC must extend the life of the open pit by reducing the annual production rate to ensure that the Project can continue to operate for at least 20 to 25 years.

### Recommendation 3

The Panel recommends that Canada and the Province conclude and ratify land claims agreements in principle with the Inuit of Labrador, represented by LIA, and with the Innu of Labrador, represented by the Innu Nation, before issuing any project authorizations. The agreements in principle should include binding and enforceable interim measures for co-management to provide a bridge between the end of this environmental assessment and the full operation of the co-management elements of the agreements. This will require Canada and the Province to amend their approaches to claims negotiations to ensure that the required interim measures are put in place as an integral part of an agreement in principle.

Failing that, the Panel recommends that, before issuing any project authorizations, Canada and the Province negotiate equivalent alternative measures with LIA and the Innu Nation, as outlined in Chapter 17. Such measures must provide for Inuit and Innu participation, consultation and compensation in respect of the Project, in keeping with the fiduciary obligations of Canada and the Province.

### Recommendation 4

The Panel recommends that, whichever option in Recommendation 3 is adopted, as long as the arrangements are legally binding and enforceable, conditional authorization be given that would provide VBNC with satisfactory assurance to plan the Project and apply for permits while negotiations continue. This would allow both processes to occur concurrently rather than consecutively. However, actual construction should not be authorized to proceed until the conditions of Recommendation 3 have been fulfilled.

### Recommendation 5

The Panel recommends that Canada and the Province issue no Project authorizations until LIA and the Innu Nation have each concluded Impact Benefit Agreements (IBAs) with VBNC.

Whether these occur inside or outside the context of a settled land claims agreement, IBA negotiations should be concluded within an agreed time frame, or, if necessary, the Minister authorizing the Project should impose a time frame. The negotiating framework should also include provision for dispute resolution, including the use of compulsory arbitration if required.

### Recommendation 6

The Panel recommends that VBNC, as part of its environmental protection plan, do the following.

- VBNC should develop a dust management plan that incorporates best management practices derived from other mining and related operations, to minimize the creation and mobilization of dust. This plan should include preventive measures, such as appropriate speed limits for truck traffic on haul roads and dust suppression techniques.
- VBNC should develop a comprehensive energy conservation program, to prevent air pollution effects by reducing the combustion of fossil fuels. The program should include an energy review of the planned Project design before construction starts.

### Recommendation 7

The Panel recommends that VBNC

- ensure the final design of all dams includes provision for the worst possible seismic event;
- evaluate best environmental management practices in Canada and elsewhere for dam design and construction in order to identify provisions for seepage collection and treatment; and
- prepare and implement a dam safety inspection and maintenance program for all Project phases.

### Recommendation 8

The Panel recommends that, before deciding to commission the North Tailings Basin, VBNC should evaluate the potential for using the mined-out Ovoid as a disposal site for either tailings or waste rock. It should also investigate, when adequate samples are available, the adequacy of both acid-generating waste rock and tailings as underground backfill material. During this environmental evaluation, the company should consider the best currently available technology for disposing of tailings and the results of the harlequin duck monitoring program (see Recommendation 65). This evaluation should be subject to review and recommendations by the proposed Environmental Advisory Board.

### Recommendation 9

The Panel recommends that VBNC

- prepare and implement a program, which can be carried out throughout the life of the Project, to verify and monitor open pit and underground waste rock that is disposed of on the surface;
- develop procedures to segregate all waste that originates from potentially acid-generating zones but is sorted as non acid-generating, and to assign this waste to a specific dump site so that the company can take mitigative measures if monitoring reveals a problem;
- outline contingency plans for dealing with reactive material encountered in the non-mineralized piles, particularly for managing runoff; and
- ensure that the waste handling system designed for the underground operation allows separate handling and disposal of acid-generating material.

**Recommendation 10**

The Panel recommends that VBNC further develop its water recycling plans, in consultation with Environment Canada, incorporating

- procedures to maximize the volume of recycled water of acceptable quality, taking into account factors that could limit the use of recycled water in the mill process; and
- contingency plans to deal with potential requirements for additional raw water withdrawals and wastewater treatment.

**Recommendation 11**

The Panel recommends that VBNC integrate into its environmental protection plan, in consultation with Environment Canada,

- pollution prevention procedures that apply the best management practices for minimizing thiosalt production;
- pollution prevention procedures that reconcile pH levels and ammonia concentrations in ponds and effluents, taking into account the potential accumulation of ammonia under ice; and
- a sludge management plan that takes into account alternative sludge disposal options, the long-term potential for metal dissolution from sludge co-disposed with tailings, and the implications of mill shutdowns and decommissioning.

**Recommendation 12**

The Panel recommends that VBNC develop a long-term management and rehabilitation plan for the open pit. The plan should be subject to review and recommendations by the Environmental Advisory Board, and should include

- ongoing modelling and laboratory testing of evolving water quality in the flooded pit, of discharge rates and of the type and length of treatment required;
- a strategy to reduce the time that the open pit walls will be exposed before the pit is flooded, developed by evaluating best environmental management practices; and
- measures to reclaim the surrounding area to promote wildlife safety and the development of appropriate shoreline habitat.

**Recommendation 13**

The Panel recommends that VBNC establish monitoring wells between the open pit and Reid Brook, and develop suitable threshold levels for contaminants and a contingency plan to take corrective action if contaminants are found in groundwater flowing towards Reid Brook.

**Recommendation 14**

The Panel recommends that VBNC develop an appropriate effects monitoring program for metals and other contaminants, in cooperation with DFO, Environment Canada, LIA and the Innu Nation. The program should include a protocol for interpreting results and for taking remedial action. The program should be in place before construction starts and should be subject to ongoing modification, as appropriate.

**Recommendation 15**

The Panel recommends that a program be established to monitor contaminant levels in country foods on a continuing basis in northern Labrador. This general program should be a cooperative one involving primarily governments, LIA, and Innu Nation, although VBNC should contribute some technical and material support. The lead agency for this program should be designated by

DFO, in its capacity as the Responsible Authority. This lead agency should be the primary funder of the program, and provide scientific resources to it, but the program should be under the direction of the Environmental Advisory Board (EAB). The objective of the program should be to address public concerns, and to minimize misunderstandings about the actual effects of the Project on the regional environment. The program should address the cumulative and synergistic effects of contaminants from all sources, and should include provisions for interpreting and communicating the results to the regional public on a continuing basis. It should fully incorporate the knowledge and experience of the federal Northern Contaminants Program and also develop cooperative links with it. The program should, at the outset, ensure that adequate baseline data are obtained on contaminant levels (not restricted to metals) in a broad spectrum of biota and locations in the region. It should assemble all existing contaminants data for the region from all relevant public and private agencies, and then add to them as required. These baseline data should be available prior to construction, subject to review and recommendations of the EAB.

### Recommendation 16

The Panel recommends that DFO and Environment Canada jointly develop a problem statement and research design to identify the means by which mercury could become mobilized in the environment, within the parameters of this Project. If this exercise results in a clear hypothesis linking the Project to mercury mobilization at levels potentially hazardous to fish, wildlife, or humans, then DFO, Environment Canada, and VBNC should develop and fund a cooperative research program leading to prevention or mitigation.

### Recommendation 17

The Panel recommends that, before DFO provides authorizations under subsection 35(2) of the Fisheries Act, VBNC prepare a fish habitat protection report on the proposed prevention and mitigation elements of both the Project design and the environmental protection plan. This report should address

- mitigation of effects arising from flow alterations during construction, pump down periods, operation and decommissioning;
- minimum (and, where appropriate, maximum) flows to be maintained, including information on how these flows were determined;
- the sources of water to maintain flows and control mechanisms required to deliver this mitigation;
- the extent to which char use habitat in Camp Pond Brook;
- ways that the Project could affect this use and, if necessary, details of any additional mitigation measures proposed to ensure that no significant effects will occur; and
- an appropriate environmental effects monitoring program.

### Recommendation 18

The Panel recommends that DFO provide LIA, the Innu Nation and the general public with adequate opportunity to review and comment on the draft fish habitat compensation agreement.

### Recommendation 19

The Panel recommends that DFO indicate to VBNC that the Department will not accept subsequent requests for HADD authorizations for the proposed Project. In the overall environmental effects monitoring program outlined in its fish habitat protection report (see Recommendation 18), VBNC should include a monitoring component designed to validate the predicted effects of the Project on fish habitat and to assess the effectiveness of mitigation measures. If, at some later date, monitoring results indicate that flow alterations have destroyed or harmfully altered additional habitat, the onus should be placed on VBNC to restore that habitat as quickly as possible.

### Recommendation 20

The Panel recommends that DFO develop a proponent's guide to HADD identification and the development of fish habitat compensation options that clearly lays out the steps a proponent should take, the methods to be used and the criteria by which the proponent's work will be judged. DFO should complete the criteria for standing water and marine habitat as soon as possible and include them in the guide.

### Recommendation 21

The Panel recommends that VBNC and DFO jointly review all potential sources and pathways of sedimentation, and currently proposed mitigation with respect to Camp Pond, to avoid or minimize sediment transport into the pond wherever possible, so that fish habitat loss does not occur.

### Recommendation 22

The Panel recommends that, as part of the environmental protection plan, VBNC develop blasting procedures that incorporate DFO's guidelines with respect to protecting fish and fish habitat.

### Recommendation 23

The Panel recommends that VBNC develop, as part of the Environmental Management System, an environmental protection plan for Reid Brook that incorporates the following, as required:

- adjustments to the main access road route and design to minimize potential impacts on Reid Brook;
- design and construction of appropriate stream crossings on tributaries;
- specific traffic management procedures at key locations along the road;
- seepage collection at the toe of Dam H2; and
- additional mitigation measures to improve the quality of water leaving Camp Pond, if necessary (for example, additional water retention or development of an engineered wetland).

### Recommendation 24

The Panel recommends that VBNC develop monitoring studies for contaminant effects in freshwater with input from DFO, Environment Canada and other stakeholders, and consider the findings of the Aquatic Effects Technology Evaluation (AETE) program. To provide early warning of effects, serious consideration should be given to monitoring at least at the benthic macroinvertebrate level, if not at a lower trophic level, provided there is reasonable assurance that the program will be able to deliver clear cause and effect information that is scientifically valid. Additional baseline information need only be collected if required to support the selected monitoring component. VBNC should also offer to collaborate with any research carried out as a follow-up to the AETE program by providing monitoring information from the Project to be used as a case study.

### Recommendation 25

The Panel recommends that VBNC carry out hydrometrical, water quality and fish population monitoring in the Reid Brook system; that DFO initiate appropriate studies to increase understanding of fish and fish habitat in the wider Kogluktokoluk-Ikadlivik-Reid system, involving LIA and the Innu Nation in this process; and that VBNC contribute significantly to these studies by providing information and other resources.

### Recommendation 26

The Panel recommends that, if the North Tailings Basin is required during the underground phase, before approvals are given for its construction, VBNC prepare a report to review the environmental advantages and disadvantages of consolidating effluent discharge into Edward's Cove instead of constructing a second diffuser in Kangeklualuk Bay. The report should examine the results of the compliance and effects monitoring carried out for the existing Edward's Cove diffuser, and should be subject to review and recommendations by the Environmental Advisory Board.

### Recommendation 27

The Panel recommends that DFO, Environment Canada, the Canada Centre for Mineral and Energy Technology and VBNC, in consultation with LIA and the Innu Nation through monitoring partnerships, should develop a research program using the Voisey's Bay Mine and Mill Project as the central case study, to increase the level of knowledge about the effects of nickel-copper-cobalt effluents in the marine environment, particularly with respect to effluent discharge standards, mitigation measures, and monitoring methods and procedures.

### Recommendation 28

The Panel recommends that VBNC commit, through its environmental protection plan, to reducing total marine pollutant loadings on a continuous improvement basis, and work with Environment Canada to develop policies and procedures that would

- improve mill processes to reduce pollutants at source;
- ensure, through a preventive maintenance program and other approaches, that treatment facilities operate at the highest standards of effectiveness; and
- upgrade treatment technology as needed.

VBNC should report regularly to the Environmental Advisory Board on the results of this pollution prevention program.

### Recommendation 29

The Panel recommends that VBNC be required to include the following in its follow-up program:

- a marine water and sediment quality monitoring program that includes threshold criteria related to existing water and sediment quality guidelines (threshold levels should be set at a point that gives suitable early warning);
- mandatory mitigative action if these thresholds were exceeded; and
- research studies designed to identify any adverse health effects in marine biota, followed by revision of the threshold criteria if necessary.

### Recommendation 30

The Panel recommends that VBNC monitor shellfish for metals, bacterial contamination and hydrocarbon tainting to identify the extent of the area affected by the Project.

### Recommendation 31

The Panel recommends that vessels built or contracted by VBNC to ship nickel-copper-cobalt concentrates be designed or tested for equivalency to CAC3 standards to ensure such vessels can travel safely through the worst potential ice conditions.

### Recommendation 32

The Panel recommends that VBNC incorporate Arctic Ice Regime Shipping System procedures into the Marine Transportation Management Plan to ensure the safe passage of both dedicated and contracted concentrate vessels. VBNC should implement these procedures in consultation with the regulators and with the LIA as part of a bilateral shipping agreement (see Recommendation 97).

### Recommendation 33

The Panel recommends that VBNC implement a program, in conjunction with LIA and regulators, to explore the requirement for and viability of winter shipping through landfast ice, which should include the following:

- additional research into concentrate behaviour and measures to lengthen storage time as operating volumes of concentrate become available;
- additional study of the behaviour of ship tracks in ice, based on experience from the Raglan operation; and
- trial voyages by concentrate carriers during initial operating years, under differing winter conditions, to examine the actual behaviour of landfast ice and to assess the safety of such an operation.

### Recommendation 34

The Panel recommends that VBNC undertake further modelling studies of the performance limitations of candidate vessels for navigating in ice, and further evaluate their ice navigation performance limitations, including shaft horsepower, hull strengthening, ice-ingestion hazards and ability to operate in ballast condition close to load displacement draft.

### Recommendation 35

The Panel recommends that VBNC incorporate the following elements into the Marine Transportation Management Plan to ensure the safety of vessels while shipping in landfast or pack ice:

- establish a dedicated coordination centre for all shipping to and from the Project area and for all phases of the project;
- review and adjust shipping plans before the ice season starts to reflect the availability of icebreaker resources and ice conditions;
- before allowing ships to enter pack ice, ensure that they have sufficient strength and power to operate in ice, that crews are competent in ice and that icebreaker support is readily available, so that such ships are not beset in ice and forced into an uncharted area;
- provide an ice information system that extends to the limits of pack ice along the route planned for the vessel; and
- establish protocols to ensure that the icebreaker commander and bulk carrier master reach consensus about procedures to be adhered to during escort, before the ship enters the ice.

### Recommendation 36

The Panel recommends that Canadian Hydrographic Service survey additional areas adjoining the proposed route in the interests of ship safety, environmental response, search and rescue operations, and icebreaker operations.

### Recommendation 37

The Panel recommends that VBNC, in consultation with DFO and LIA, review one or more alternate shipping route(s) into Anaktalak Bay, and that hydrographic surveys and subsequent charting of these route(s) to modern Canadian Hydrographic Service hydrographic standards be carried out within the next three years.

### Recommendation 38

The Panel recommends that the Atlantic Pilotage Authority declare Edward's Cove a compulsory pilotage area to ensure that non-Canadian vessels chartered on the spot market are required to carry a pilot with local knowledge.

### Recommendation 39

The Panel recommends that, before shipping begins, VBNC install the best available electronic and fixed navigational aids, including a fixed tide gauge, to ensure precise vessel locating along the shipping route.

### Recommendation 40

The Panel recommends that VBNC integrate concentrate loading procedures and controls into the Marine Transportation Management Plan in consultation with Transport Canada. VBNC must provide the services of a port warden when required, especially when loading copper concentrate on non-Canadian vessels. VBNC should also monitor dockside concentrate handling operations, and take corrective action if it observes chronic concentrate losses.

### Recommendation 41

The Panel recommends that, before any Project-related shipping begins, VBNC be required to develop a ballast water management program in consultation with DFO. This program should give a high degree of ecological protection to marine waters near the Project. Requirements of the program should be made part of all shipping contracts, which should include a financial penalty for non-compliance.

### Recommendation 42

The Panel recommends that VBNC implement its proposed safety and emergency preparedness measures with respect to oil spills.

### Recommendation 43

The Panel recommends that VBNC and DFO reach agreement on a credible worst case scenario for oil spills, and that all responsible parties then base their oil spill response planning on this scenario. Response equipment should be positioned, response plans reviewed and updated, and emergency preparedness maintained and tested accordingly, throughout the shipping component of the Project. VBNC and LIA should also include response planning in their proposed bilateral shipping agreement. VBNC should continue to develop oil spill scenarios and fate modelling and should incorporate DFO and public concerns, as appropriate, in its ongoing emergency response planning. Emergency response plans should include specific provisions for effects monitoring, and evaluation of the effectiveness of response measures, that would begin immediately if a major spill occurred. VBNC should ensure that its shippers are fully aware of and prepared to implement this requirement.

### Recommendation 44

The Panel recommends that VBNC require ships carrying fuel to the site to carry oil spill response equipment on board, including booms, skimmers, sorbents and storage.

### Recommendation 45

The Panel recommends that VBNC provide a support vessel at Edward's Cove to respond to minor incidents, provide docking support, maintain navigational aids and serve as a first line of response to a major oil spill along the shipping route.

### Recommendation 46

The Panel recommends that the Canadian Coast Guard, with the cooperation and assistance of VBNC, and in consultation with LIA, update and complete existing sensitivity mapping of shoreline types, critical coastal habitat, key harvesting areas and other areas of local importance, as a basis for cooperative planning of response strategies and priorities.

### Recommendation 47

The Panel recommends that DFO fund, conduct or sponsor additional marine mammal studies that contribute to the understanding of cumulative and Project effects, and that Canada provide DFO with the resources necessary to do so. These studies should include regional research, and general studies of noise and ice effects.

LIA should be involved in the design and conduct of these studies, which should be subject to the review and recommendations of the Environmental Advisory Board.

### Recommendation 48

The Panel recommends that VBNC determine, in cooperation with LIA, ringed seal whelping times near the shipping route, before beginning winter shipping.

### Recommendation 49

The Panel recommends that VBNC develop contingency plans for dealing with the effects of oil spills or chronic pollution on polar bears, and for encounters between humans and bears. These should be developed in cooperation with LIA in the context of the proposed shipping agreement, and LIA should advise VBNC in a timely manner of any polar bear denning activity near the shipping route.

### Recommendation 50

The Panel recommends that Canada and the Province act to clarify jurisdiction over polar bears off the Labrador coast. The responsible party should enhance its enforcement capability. It should also establish an effective reporting system for problem kills, such as the system that exists in the Northwest Territories, to ensure conservation and to use as a basis for the compensation recommended in Chapter 14.

### Recommendation 51

The Panel recommends that VBNC develop an environmental protection plan with respect to plant community and terrain disturbance that would

- identify sensitive land types and avoid them to the greatest extent possible; and
- restrict off-road vehicle traffic to designated routes as much as possible when the ground is not frozen, limit such traffic to essential monitoring functions, favour the use of helicopters for exploration and isolated construction activities, and restrict off-road use of heavy vehicles to winter.

### Recommendation 52

The Panel recommends that VBNC maintain adequate on-site equipment and emergency preparedness to respond to forest fires as early as possible, to minimize damage. These plans

should be subject to review and approval by the Forestry and Wildlife Branch of the provincial Department of Forest Resources and Agrifoods.

### Recommendation 53

The Panel recommends that the Province review the effectiveness of the revised Mineral Act regulations, and of its monitoring activities, with respect to the cumulative effects of mineral exploration on terrestrial and aquatic habitat in northern Labrador, in consultation with the Innu Nation and LIA.

### Recommendation 54

The Panel recommends that the Province, LIA and the Innu Nation ensure that future environmental assessments of major developments in the range of the George River caribou herd (whether in Labrador or Quebec) pay particular attention to the cumulative effects of range fragmentation.

### Recommendation 55

The Panel recommends that VBNC establish appropriate mitigative measures, as it has proposed to do, with respect to roads, pipelines and other linear facilities. These should facilitate unimpeded travel by caribou and ensure that caribou are kept away from the airstrip, by using fencing if necessary. These measures should also conform to best practices existing at the time they are implemented.

### Recommendation 56

The Panel recommends that VBNC develop an environmental protection plan for caribou that would

- provide for regular monitoring of caribou in the Claim Block, and in adjacent areas when caribou may be congregating or migrating, as appropriate;
- establish a graduated set of responses to caribou presence and movements near the Project, beginning with limits on traffic speed and volume, up to and including complete cessation of traffic during migration events; and
- provide for monitoring of and reporting on the effectiveness of VBNC's caribou mitigation measures, and their modification, as appropriate.

### Recommendation 57

The Panel recommends that VBNC, and its contractors and subcontractors, clean up and remove all equipment immediately after any exploration or other activities occurring anywhere outside fenced-in Project operations, whether within the Claim Block or elsewhere in northern Labrador.

### Recommendation 58

The Panel recommends that VBNC and LIA, as part of the shipping agreement, develop a program to monitor and minimize the effects of winter shipping on caribou.

### Recommendation 59

The Panel recommends that the Province, LIA and the Innu Nation enter into co-management arrangements for the George River caribou herd with the Government of Quebec and Quebec Aboriginal users.

### Recommendation 60

The Panel recommends that the Province undertake or sponsor further research to establish black bear population definition, abundance, structure, dynamics and critical life history

requirements, to ensure the appropriateness and effectiveness of adaptive management strategies for black bears. The Innu Nation and LIA should be involved in the design and conduct of this research, and the research should be subject to the review and recommendations of the Environmental Advisory Board.

### Recommendation 61

The Panel recommends that VBNC develop an environmental protection plan with respect to black bears that would

- continue to implement and refine measures to improve food storage and waste management, restrict on- and off-road traffic, and train personnel;
- provide for the use of electric fencing in Project areas, as appropriate;
- regularly monitor black bear presence and denning activities; and
- establish a protocol for avoiding bears and dens during Project activities, by relocating, reducing or temporarily stopping activities, as appropriate.

### Recommendation 62

The Panel recommends that VBNC, in consultation with Environment Canada, LIA, the Innu Nation and other interested parties, develop and implement an environmental protection and emergency response plan for seabirds and waterfowl that clearly identifies all sensitive areas and time periods for seabirds and sea ducks, identifies all potential Project interactions and ensures adequate protection of these areas. These plans should include consideration of all sea ducks and seabirds that migrate through the area and that come into contact with the shipping route.

### Recommendation 63

The Panel recommends that VBNC, in consultation with Environment Canada and LIA, develop a vessel oily waste management plan that includes

- procedures for identifying all potential sources of chronic, relatively small discharges of oil, both accidental and deliberate, as well as large oil spills;
- an explicit zero-discharge goal for chronic oil pollution originating from Project vessels;
- best management practices designed to achieve zero discharge, to be reviewed regularly; and
- provisions for adequate, land-based reception facilities for oily wastes from Project vessels, at both Edward's Cove and at the reception port, including a disposal plan for such wastes.

### Recommendation 64

The Panel recommends that VBNC, in consultation with Environment Canada and LIA, develop a monitoring program to evaluate the effects of noise and disturbance from passing vessels on breeding colonies. Based on the results of this program, VBNC should, if necessary, develop and implement additional mitigation measures that may involve alternate shipping routes (these are addressed in Recommendation 37).

### Recommendation 65

The Panel recommends that VBNC develop an ongoing research and monitoring program for harlequin ducks in the Project area, in consultation with the Canadian Wildlife Service and other interested parties, to better understand the physical, biological and chemical attributes of harlequin duck habitat and to refine an effective mitigation and monitoring strategy.

### Recommendation 66

The Panel recommends that VBNC incorporate the following measures into its environmental protection plan in order to protect harlequin ducks and their habitat:

- construction standards and procedures that require bridges instead of culverts for crossings of waters frequented by harlequin ducks (harlequin duck nest surveys should be carried out 100 m upstream and 100 m downstream of each potential stream crossing site to ensure a minimum separation zone);
- design standards that ensure appropriate buffer zones between roads and streams that provide harlequin duck habitat, where physically achievable; and
- procedures to control dust and noise in critical habitat areas.

### Recommendation 67

The Panel recommends that VBNC collaborate with Environment Canada, the Department of National Defence, the Province of Newfoundland and Labrador, and other relevant parties to integrate the methodologies and results of VBNC's on-site harlequin duck monitoring program with those of other monitoring programs or studies related to present, proposed or future developments in Labrador, to ensure valid assessment of the cumulative effects of the Project, including shipping activities.

### Recommendation 68

The Panel recommends that, in view of risks to waterfowl habitat and populations, and to the success of Aboriginal harvesting efforts, VBNC should pursue one of the following strategies to develop the airport in its proposed location.

- It should realign the runway so that aircraft would not fly directly over the Gooselands, and operate the airport as a non-precision approach facility until new landing technology permits it to operate it as a Category 1 facility; or
- Before constructing and operating the proposed Category 1 airport, it should develop an air traffic management plan, which would include measures - up to and including temporary restriction of flights during critical migratory waterfowl staging periods - to ensure that flights would not unduly disturb waterfowl using the Gooselands or disrupt Aboriginal harvesting. The Plan should include effects monitoring provisions, and VBNC should remove air traffic restrictions only if the results of this monitoring justify doing so. The air traffic management plan should be subject to the review and recommendations of the Environmental Advisory Board.

### Recommendation 69

The Panel recommends that VBNC continue its current no-hunting and no-fishing policy on site, and ensure that it is strictly enforced. The policy should be expanded to include a ban on egging. The policy should also provide for termination of employment in the case of unlawful trafficking in fish and wildlife, and ensure that employees are made aware of these consequences.

### Recommendation 70

The Panel recommends that VBNC implement its proposed policy of returning employees to their point of pick-up, to ensure that they cannot use the site as a base for hunting and fishing during their time off.

### Recommendation 71

The Panel recommends that VBNC reach agreement with LIA and the Innu Nation about harvesting compensation regimes before the Project is authorized. These compensation regimes

should be negotiated in the context of Impact Benefit Agreements and be in place before construction begins. They should include protocols for compensating Aboriginal people for

- increased harvesting costs incurred by displacement or impaired access;
- benefits they might have realized from commercial opportunities that they will not be able to exploit because of the Project;
- damage to equipment or property; and
- subsistence and commercial harvests that do not happen because the Project has reduced the abundance or impaired the quality of wildlife.

Liability should be sufficient to cover catastrophic events, and the harvesting compensation regime should apply to VBNC's contractors and subcontractors, including their shippers.

### Recommendation 72

The Panel recommends that VBNC commit to providing compensation on a case by case basis for traditional harvesters, other than LIA or Innu Nation members, who may be adversely affected by, for example, disruption of travel on the sea ice in winter.

### Recommendation 73

The Panel recommends that VBNC, as part of its environmental protection plan, reach agreement with LIA and the Innu Nation on the provisions of an historical resources protection and management plan, based on a revision of the existing historical resources contingency plan, before the Project is authorized. This plan should be negotiated in the context of Impact Benefit Agreements and be in place before construction begins.

### Recommendation 74

The Panel recommends that, to improve access to appropriate training opportunities for as many North Coast residents as possible, the parties involved in the Multi-Party Training Program (the federal and provincial governments, the Innu Nation, LIA, the College of the North Atlantic and VBNC) collaborate to identify new or reallocate existing resources to ensure that Aboriginal participants who do not meet the Employment Insurance eligibility requirements could still qualify for training assistance.

### Recommendation 75

The Panel recommends that the Province, in cooperation with VBNC, LIA, the Innu Nation and the College of the North Atlantic, coordinate the development of a skills inventory to help parties develop both appropriate training programs and individual career planning.

### Recommendation 76

The Panel recommends that VBNC, in consultation with LIA and the Innu Nation and prior to Project approval, establish a quota for apprenticeships during the construction phase, with emphasis on skills that would be transferable to the operations phases. Through the tendering process, VBNC should require contractors to establish these apprenticeship positions.

### Recommendation 77

The Panel recommends that, upon Project approval, the parties to the Multi-Party Training Plan develop a strategy for doing the following:

- locating some training programs, beyond adult basic education, in appropriate North Coast communities;
- developing formal and informal support programs, such as support groups, counselling or mentoring,for Aboriginal students who have to leave their home communities for training;

- providing extra supports, such as child care, to give women, especially single-parent women, equal access to training;
- developing a monitoring program to track training outcomes - including trainees' participation in, completion of or failure to complete the program, and their ability to obtain employment - to help the parties improve the program, as necessary.

### Recommendation 78

The Panel recommends that VBNC, to build on the search and recognition process, work in partnership with LIA and the Innu Nation to further develop and implement the process. LIA and the Innu Nation should play the major role in workshop delivery. This partnership should involve the Tongamiut Inuit Annait and Innu women designated by the Innu Nation, to ensure that the search and recognition workshops for women respond effectively to the concerns and requirements of Aboriginal women.

### Recommendation 79

The Panel recommends that VBNC designate Cartwright as a pick-up point for Project employment, and consider the possibility of a pick-up point in an additional community south of Cartwright, if circumstances warrant.

### Recommendation 80

The Panel recommends that, before hiring Aboriginal employment coordinators, VBNC set up a joint committee with LIA and the Innu Nation to finalize job descriptions and requirements for these coordinators. This committee should also work with the coordinators to establish guidelines for the anti-racism and cross-cultural programs to be delivered on site.

### Recommendation 81

The Panel recommends that VBNC develop a policy to establish the process and criteria to be used to determine if and when an employee who leaves voluntarily or is dismissed for just cause can re-apply for employment on the Project. Through its Aboriginal employment coordinators, VBNC should be prepared to work with prospective employees to discuss ways VBNC can personally support them in a second employment attempt, and ways in which VBNC can address specific workplace problems.

### Recommendation 82

The Panel recommends that VBNC, through the Aboriginal employment coordinators, monitor Aboriginal employee satisfaction with language and cultural aspects of the workplace, including reasons why Aboriginal employees leave, and use this information to maintain and improve the Aboriginal employee retention rate.

### Recommendation 83

The Panel recommends that VBNC, prior to Project authorization, revise existing VBNC employment assistance programs - including, but not limited to, the women's employment plan and the harassment policy - to address women's concerns. In developing the revised programs VBNC should

- hold consultations with Innu Women chosen by the Innu Nation and with representatives from Tongamiut Inuit Annait, Women's Resource Development Committee, the Provincial Advisory Council on the Status of Women and the Women's Policy Office of the provincial government;
- use gender-based analysis; and
- include measurable goals and procedures to monitor compliance with federal employment equity legislation and the provincial government's harassment policy.

### Recommendation 84

The Panel recommends that, during bilateral negotiations related to impact and benefit agreements, VBNC, LIA and the Innu Nation address resource requirements that would permit LIA and the Innu Nation to develop a comprehensive program of community child care for families with a parent or parents at the work site.

### Recommendation 85

The Panel recommends that VBNC develop a policy to provide for family leave for employees with child care or elder care responsibilities who face an emergency situation.

### Recommendation 86

The Panel recommends that, as soon as possible and before construction, VBNC, in consultation with representatives of Aboriginal and other Labrador businesses and relevant federal and provincial agencies, establish an explicit supplier development strategy that includes contract procurement procedures and supplier development initiatives. The strategy should include objectives for Aboriginal and Labrador procurement that the company could monitor and evaluate. All provisions of this strategy should conform to commitments made in Impact Benefit Agreements.

### Recommendation 87

The Panel recommends that VBNC pay a grant-in-lieu of taxes to the Town of Nain to offset some of the increased costs incurred by the Town as a result of the construction and operation of the Project. The formula used to calculate the grant-in-lieu should be negotiated by the Newfoundland and Labrador Department of Municipal and Provincial Affairs, the Town of Nain and VBNC. It should reflect expected Project-related uses of community infrastructure and services, projected municipal costs attributable to Project-related in-migration and any Project-related revenues accruing to the community.

### Recommendation 88

The Panel recommends that the Town of Nain, LIA, the Newfoundland and Labrador Department of Municipal and Provincial Affairs, and Indian and Northern Affairs Canada jointly develop a five -year housing strategy for Nain, including funding sources, to meet the housing needs of existing and potential residents.

### Recommendation 89

The Panel recommends that VBNC and the Town of Nain develop a communications protocol to keep each party regularly informed about issues and activities of mutual interest. The protocol should include arrangements for representatives to meet when necessary to discuss concerns. The purpose of the communications protocol would be to provide opportunities to address problems at the earliest stages and to promote initiatives that might be of mutual benefit.

### Recommendation 90

The Panel recommends that LIA, the Town of Nain, and the Newfoundland and Labrador Department of Development and Rural Renewal collaborate in a community economic development planning process for Nain. The overall goal should be to achieve a diverse and sustainable local economy that can maximize participation in Project-related enterprises, while strengthening existing businesses and seeking out new community-based possibilities. The process should encourage the involvement of the various interest groups, including VBNC, as appropriate.

### Recommendation 91

The Panel recommends that the Province, in consultation with the Labrador Inuit Association, initiate discussions with Transport Canada to develop a five-year strategy to upgrade air transportation facilities on the North Coast to meet Category 1 requirements. Because of the limitations of the existing strip at Nain, and increased levels of air traffic, the Panel recommends that Nain receive top priority.

### Recommendation 92

The Panel recommends that the Province, through Health Labrador Corporation and in consultation with the Labrador Inuit Health Commission and the Innu Health Commission, assess future preventive and community-based health care needs, set priorities for new or enhanced programs and services, and establish those programs and services, as required.

### Recommendation 93

The Panel recommends that VBNC negotiate the proposed monitoring partnerships with both LIA and the Innu Nation through their respective Impact Benefit Agreements. The monitoring partnerships should ensure Inuit and Innu participation in the design, implementation and evaluation of the monitoring program. They should also provide opportunities for Inuit and Innu to obtain necessary training and to collect and analyze data, using both scientific methods and Aboriginal knowledge and observation.

### Recommendation 94

The Panel recommends that, before construction begins, Canada, Newfoundland and Labrador, LIA and the Innu Nation negotiate an environmental co-management agreement to address both biophysical and socio-economic aspects of mineral resources development in northern Labrador. The agreement should establish an appropriate mechanism for ongoing four-party involvement in associated regulatory processes, the review of future related Project developments and the administration of the follow-up program.

### Recommendation 95

The Panel recommends that, under the terms of the environmental co-management agreement, the four parties to the Memorandum of Understanding should establish an Environmental Advisory Board (EAB) for northern Labrador. Its mandate would be to review the results of compliance monitoring and of the follow-up program established under the Canadian Environmental Assessment Act; to review permit applications and future Project development proposals; and to address ongoing environmental management issues and concerns. Canada and the Province should fund the Board's operations, which should include a secretariat to coordinate administrative and scientific functions. The EAB should publish an annual report.

### Recommendation 96

The Panel recommends that, before construction starts, VBNC prepare an environmental performance document that clearly lays out all key terms and conditions under which the Project would operate and all commitments made by VBNC, including all performance standards, financial assurances, targets, quotas and reporting procedures. The document should indicate in each case the appropriate legal basis (for example, attached as a condition to a Navigable Waters Protection Act approval, included in an impact and benefit agreement or voluntary agreement). This document would be designed to help VBNC report its environmental performance and to help governments, Aboriginal organizations and the public evaluate it.

### Recommendation 97

The Panel recommends that VBNC negotiate a shipping agreement with LIA before Project construction starts. Initially, this agreement should address protocols for shipping during the open water period, as well as the processes to be followed to address outstanding issues of

concern around winter shipping. The Panel also recommends that DFO play a role in this process as an advisor on matters of marine safety and environmental protection.

### Recommendation 98

The Panel recommends that DFO and LIA start talks to identify areas of interest, priorities, resources and opportunities related to marine management planning, to determine which elements of an integrated resource management planning process can proceed. These talks should be designed to produce a memorandum of understanding on these issues in a timely fashion. This planning process should preferably take place under the terms of section 31 of the Oceans Act; if they do not, DFO should identify an alternative approach.

### Recommendation 99

The Panel recommends that VBNC prepare its environmental protection plans, emergency response and contingency plans, and occupational health and safety plans in consultation with appropriate regulatory agencies, before construction begins, and that these plans be subject to review and recommendations by the Environmental Advisory Board. The environmental protection plans and emergency response and contingency plans should be developed as field-usable documents, and be reviewed and updated regularly.

### Recommendation 100

The Panel recommends that VBNC, LIA and the Innu Nation, through the monitoring partnerships, negotiate an agreement to include significant levels of Aboriginal participation in the research, planning, implementation and monitoring of the reclamation plan through the post -decommissioning phase. This agreement should include appropriate transfers of Aboriginal knowledge and technical reclamation knowledge and skills. Through this agreement, VBNC and its Innu and Inuit partners should collaboratively develop reasonable and achievable objectives for the reclamation process.

### Recommendation 101

The Panel recommends that VBNC, as soon as possible and before construction starts, develop policies and reporting and accountability systems to ensure that reclamation objectives are built into all aspects of the Project's design, construction and operations, particularly with respect to minimizing the extent of disturbance. VBNC should

- continue to develop the reclamation plan in partnership with LIA and the Innu Nation;
- review all construction and operating plans from the perspective of reclamation;
- conduct appropriate employee and contractor training and awareness sessions;
- monitor compliance with the reclamation plan; and
- report progress, both internally and externally.

### Recommendation 102

The Panel recommends that the Department of Mines and Energy consult with the Environmental Advisory Board before deciding on appropriate requirements for financial assurances to be attached to the mining lease. Such assurances should be phased in to cover estimated reclamation and post-decommissioning monitoring costs at any given point in the life of the Project, and should include an appropriate cash component. These assurances may also include bonds, dedicated assets or irrevocable guarantees.

### Recommendation 103

The Panel recommends that VBNC develop the biophysical monitoring framework collaboratively. The framework should be based on sound scientific principles, the need for practical environmental management feedback, and the concerns of northern Labrador residents and

resource users. The monitoring framework should include a data access policy, reporting protocols and monitoring benchmarks to be used to trigger action. It should also emphasize the need for process transparency and public access to information.

### Recommendation 104

The Panel recommends that the Province designate a provincial department or agency to develop and oversee a counterpart to the follow-up program under the Canadian Environmental Assessment Act, which would focus on the socio-economic effects of the Project. The purpose of this program would be to verify the predictions of the Environmental Impact Statement, to ensure that VBNC is keeping its socio-economic commitments, to evaluate the effectiveness of mitigative measures, and to guide provincial resource allocations for services and infrastructure. This socio-economic follow-up program should be developed in collaboration with the Environmental Advisory Board.

### Recommendation 105

The Panel recommends that VBNC be required to submit an annual report to the provincial department designated as holding responsibility for the socio-economic follow-up program (see Recommendation 104), and to the Environmental Advisory Board. This report would describe the Project's performance in delivering socio-economic benefits to Labrador Inuit Association and Innu Nation members and to Labrador residents and businesses. If necessary, the Environmental Advisory Board should provide recommendations on mitigation or enhancement measures to appropriate provincial and regional economic agencies and to VBNC.

### Recommendation 106

The Panel recommends VBNC provide a gender breakdown for all employment figures submitted in its quarterly reports to the Province.

### Recommendation 107

The Panel recommends that both Canada and the Province should incorporate into their respective environmental assessment processes the principle of full consideration of traditional ecological knowledge. The Panel further recommends that this consideration be expanded to include all Aboriginal knowledge. Governments should provide guidance to proponents on their basic obligations and options with respect to using Aboriginal knowledge in an Environmental Impact Statement or ensuring its presentation in the public review process. More specific guidance on using Aboriginal knowledge in future reviews should be provided by the responsible panels on a case by case basis.



Panel Report
Summary
1 Introduction
2 The Project and Sustainable Development
3 Project Need and Resource Stewardship
4 Land Claims and Impact and Benefit Agreements
5 Air Quality
6 Tailings, Mine Rock and Site Water Management
7 Contaminants in the Environment
8 Freshwater Fish and Fish Habitat
9 Marine Environment: Land-Based Effects
10 Marine Environment: Shipping

11 Marine Mammals
12 Terrestrial Environment and Wildlife
13 Birds
14 Aboriginal Land Use and Historical Resources
15 Employment and Business
16 Family and Community Life, and Public Services
17 Environmental Management
**18 Recommendations**
Appendix A: Panel Members
Appendix B: List of Abbreviations and Acronyms
Appendix C: Memorandum of Understanding
Appendix D: Transcript of Proceedings
Appendix E: Acknowledgements

Date Modified: 2010-03-12

# APPENDIX D: MAP OF SHIPPING LANES NEAR WHITES POINT*

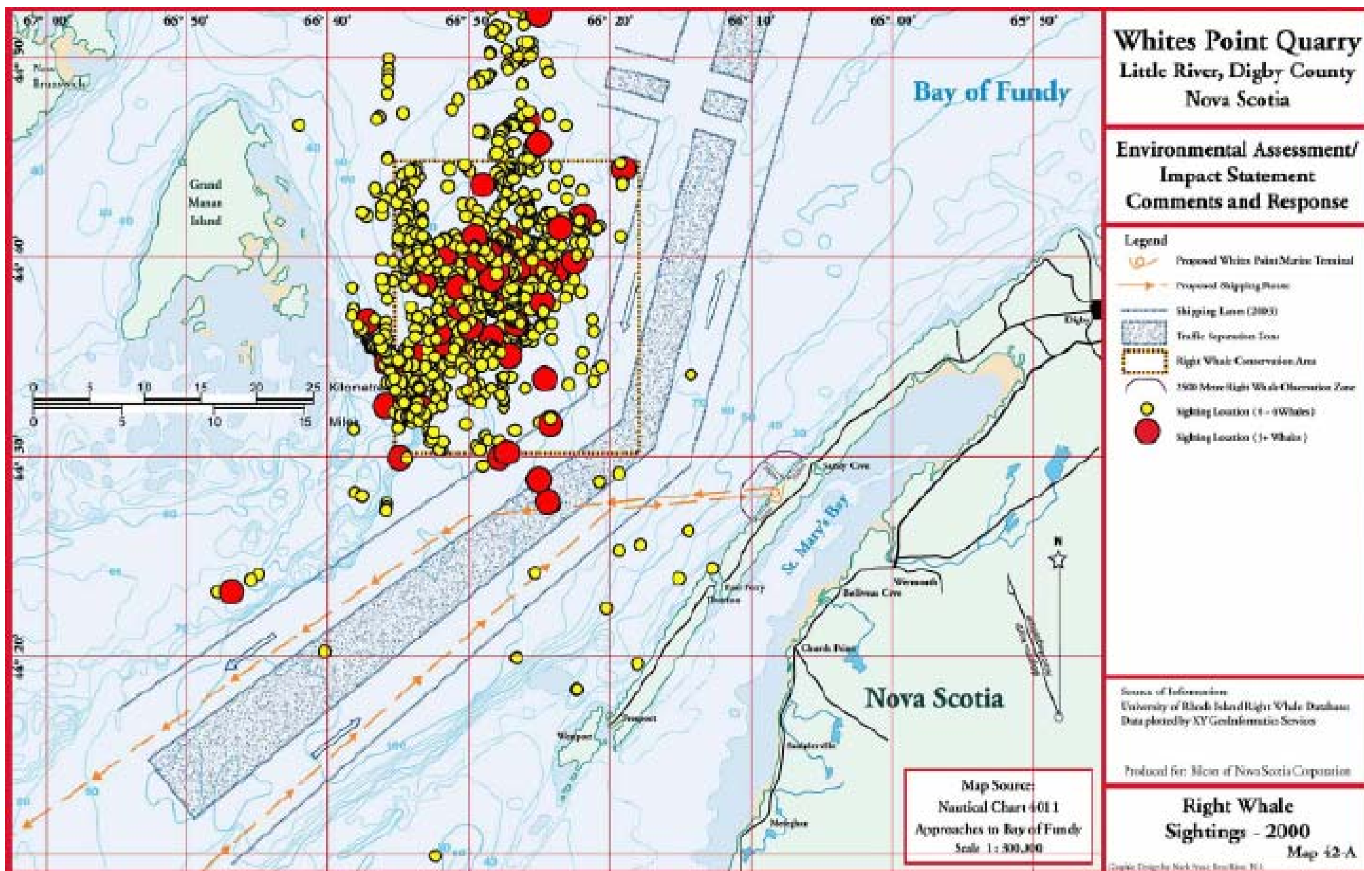



**Fig. 2-10** *The EIS illustrated the shipping lanes, the Northern right whale conservation zone, and the ship route to the terminal.*



***From WPQ Panel Report**

# THE JOINT PUBLIC REVIEW PANEL REPORT

## SABLE GAS PROJECTS

**Canadian Environmental Assessment Agency**

**Nova Scotia Department of Environment**

**National Energy Board**

**Natural Resources Canada**

**Nova Scotia Department of Natural Resources**

**Canada-Nova Scotia Offshore Petroleum Board**

**OCTOBER, 1997**

# Recommendations

## 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.

RECOMMENDATION 2

The Panel recommends the following conditions for any approval of the gas plant that may be granted.

The Proponents shall cause the gas plant facilities to be designed, manufactured, located, constructed and installed in accordance with those specifications, drawings, and other information set forth in the application, or as otherwise adduced in evidence by the Proponents before the Panel, except as varied in accordance with paragraph 1(b) hereof.

At least thirty (30) days prior to the commencement of any relevant construction activities, the Proponents shall submit to the National Energy Board, for review, an abbreviated design information package of the gas plant containing:

(a) process flow diagrams, with temperatures, pressures, mass balances and capacity, as well as the energy requirements of compressors, heaters and turbo-expanders;

(b) piping and instrumentation diagrams for all plant systems; and

(c) the codes, standards, and material specifications, to be used for all major equipment and piping;

Design and specification changes shall be tabled for review and consideration by the National Energy Board at least 30 days prior to implementation.

The Proponents shall design, fabricate and install all components of the gas plant in accordance with applicable codes and standards in the Province of Nova Scotia.

The Proponents shall, at least ninety (90) days prior to the proposed date for the commencement of construction of the gas plant authorized by any order issued, file with the National Energy Board for its review: