

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN 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

AFFIDAVIT OF CHRISTOPHER DALY

I, CHRISTOPHER DALY, residing at 45 Roxham Close in the City of Halifax, in the province of Nova Scotia, Canada, MAKE OATH AND SAY AS FOLLOWS:

1. I am the Acting Associate Deputy Minister at the Department of Economic and Rural Development and Tourism in the Province of Nova Scotia. I have a Bachelor of Science Degree in Biology (Honours) and a Masters Degree in Environmental Studies from Dalhousie University in Halifax, Nova Scotia.¹
2. From May 1999 until November 2004, I was the Manager of the Environmental Assessment Branch ("EAB") at the Department of Environment and Labour ("NSDEL").² The EAB is responsible for the promotion of good project planning and

¹ My underlying position is Executive Director, Policy & Corporate Services Division at the Department of Environment (formerly, the Department of Environment and Labour) in the Province of Nova Scotia. See *Curriculum Vitae* of Christopher Daly, **Exhibit R-162**.

² Pursuant to section 21 of the Nova Scotia *Environment Act*, the EAB Manager is the environmental assessment "Administrator". The EAB Manager is also responsible for preparing recommendations for the

sustainable development through the coordination and administration of environmental assessment (“EA”) in the province. To fulfil this responsibility, the EAB provides advice and consults regularly with proponents, industry and other interest groups, First Nations, government officials from other departments, and the general public, to ensure that EAs are open, transparent, accountable and effective. We also seek to avoid the unnecessary duplication that can result when a project requires an EA in multiple jurisdictions (*e.g.*, at both the federal and provincial levels). In such cases, we work to harmonize our EA with that of the other jurisdictions.³

A. Nova Scotia’s Regulatory Framework for Environmental Assessment and Protection

1. The Application of the Nova Scotia *Environment Act*

3. In Nova Scotia, the regulatory framework for the protection of the environment is provided by the Nova Scotia *Environment Act* (“*NSEA*”).⁴ The purpose of the *NSEA* is “...to support and promote the protection, enhancement and prudent use of the environment.”⁵ It does so by, among other things, (1) recognizing that “environmental protection [is] essential to the integrity of ecosystems, human health and the socio-economic well-being of society;” (2) “maintaining the principles of sustainable development,” including the “precautionary principle,” the “linkage between economic and environmental issues” and the integration of “sustainable development principles in public policy making;” (3) providing access to information and facilitating effective public participation in the EA process; and (4) providing a “responsive, effective, fair, timely and efficient administrative and regulatory system.”⁶

Minister of the Environment on the acceptability of projects based on their potential environmental or adverse effects. See Nova Scotia *Environment Act*, S.N.S.1994-95, c.1, s.21 (“*NSEA*”), Exhibit R-5.

³ Nova Scotia Environment and Labour, *A Proponent’s Guide to Environmental Assessment*, February 2001, at 1-5, Exhibit R-163.

⁴ *NSEA*, Exhibit R-5. In this Affidavit I refer to the version of the *NSEA* and its applicable regulations that were in force as of November 3, 2004 when the Government of Nova Scotia and the federal Government of Canada formally agreed to harmonize their EAs through the JRP Agreement and Terms of Reference. My statement does not include reference to any amendments made to the Act or its regulations thereafter.

⁵ *NSEA*, s.2, Exhibit R-5.

⁶ *NSEA*, s.2, Exhibit R-5.

4. The primary tool contained in Part IV of the *NSEA*, and in the associated Nova Scotia *Environmental Assessment Regulations* (the “*EA Regulations*”),⁷ to meet the purposes and goals of the Act is that of environmental assessment. Under the *NSEA*, an EA of a proposed project is required prior to a proponent beginning any work, if the project is an “undertaking.”⁸ An undertaking is defined to include “...an enterprise, activity, project, structure, work or proposal and may include, in the opinion of the Minister, a policy, plan or program that has an adverse effect or an environmental effect and may include, in the opinion of the Minister, a modification, extension, abandonment, demolition or rehabilitation, as the case may be, of an undertaking.”⁹

5. In Nova Scotia, an EA must evaluate the adverse effects and significant environmental effects of a proposed undertaking on the environment. Under the *NSEA*, the “environment” is defined to include not just biophysical components but also socio-economic and cultural, that is, human, components.¹⁰ For this reason, the *NSEA* mandates that in considering the environmental effects of a proposed undertaking we consider “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.”¹¹ Likewise in considering whether an undertaking will result in an “adverse effect” it must be determined whether the undertaking will result in “an effect that impairs or damages the environment, including an adverse effect respecting the health of humans or the reasonable enjoyment of life or property.”¹²

6. In sum, an undertaking assessed under the *NSEA* must account not only for the effects on the natural environment, but also on the socio-economic effects of the communities affected. Moreover, the *NSEA* requires that the socio-economic well-being of the people of Nova Scotia is an element that must be assessed separately and

⁷ N.S. Reg. 44/2003 (“*EA Regulations*”), Exhibit R-6.

⁸ *NSEA*, ss.31-32, Exhibit R-5.

⁹ *NSEA*, s.3, Exhibit R-5.

¹⁰ *NSEA*, s.3, Exhibit R-5.

¹¹ *NSEA*, s.3, Exhibit R-5.

¹² *NSEA*, s.3, Exhibit R-5.

independently from any impact that an undertaking may have on the bio-physical environment. In other words, all socio-economic effects of an undertaking must be assessed, not only those that are caused by a change in the bio-physical environment. As such, environmental protection and the socio-economic well-being of the people of Nova Scotia are inextricably linked.

2. The Operation of the Nova Scotia *Environment Act*

7. The *EA Regulations* divide undertakings into two types for the purposes of EA: Class I and Class II.¹³ Under the *EA Regulations*, “a pit or quarry in excess of 4 ha in area primarily engaged in the extraction of ordinary stone, building or construction stone, sand, gravel or ordinary soil” is a Class I undertaking.¹⁴ The EA of a Class I undertaking begins with the submission by the proponent of a registration document. This registration document must, among other things, describe the nature and purpose and location of the undertaking and all approvals which will be required and other forms of authorization.¹⁵

8. Because a registration document can be quite complex, and require detailed information, it is typical for a proponent to consult with NSDEL prior to its submission to discuss the proposed project and regulatory requirements. At this time we would – as a general rule – advise a proponent to contact the Canadian Environmental Assessment Agency (the “Agency”) early in the planning stages of the undertaking to determine whether or not, in addition to the Nova Scotia EA, a federal EA is required.

9. We would also make sure that the proponent has a number of publicly available guides designed to assist in the preparation of the EA registration document, including *A*

¹³ I note that Mr. Buxton’s Witness Statement refers to “Phase I” and “Phase II” (para.5). I am not aware to what Mr. Buxton is referring under Nova Scotia legislation. Class I and II Undertakings are listed in the appendix to the EA Regulations.

¹⁴ *EA Regulations*, Schedule ‘A’, (B)(2)(1), Exhibit R-6. If a proposed quarry is less than 4 hectares, then it is not subject to an EA; rather, it is subject to an “industrial approval” under Part V of the NSEA. I understand that Bob Petrie, the former District Manager of the Yarmouth Office of the Environmental Monitoring and Compliance (“EMC”) Division at NSDEL, has described the process for the granting of industrial approvals.

¹⁵ *EA Regulations* ss. 9(1), Exhibit R-6. The registration document is formally called an “environmental assessment registration document”.

Proponent's Guide to Environmental Assessment (2001),¹⁶ and if the proposed project is a quarry, the *Guide to Preparing an EA Registration Document for Pit and Quarry Developments in Nova Scotia* (2002) (the "Pit & Quarry Guide").¹⁷

10. These guides highlight the need for proponents to address in their Class I registration documents the "Valued Environmental Components" ("VECs"), that is, environmental, socio-economic, human health, reasonable enjoyment of life and property, and cultural, historical, archaeological, paleontological and architectural features, that may be affected, whether positively or negatively, inside or outside the Province, by the proposed undertaking.¹⁸ Again, in Nova Scotia, a proponent must address not only the impact of the proposed undertaking on the natural environment, but also its human impact such as the socio-economic impact on the local community and any adverse effects on the community's reasonable enjoyment of life or property.

11. Once the Registration Document is submitted, it is made available for comment by EAB staff and relevant government departments. It is also made available to the public.¹⁹ In fact, the Government of Nova Scotia regards public participation as vital to the success of EA.²⁰ We believe that involvement from local residents and the general public provides valuable knowledge of local conditions and information, and affords an opportunity to the proponent to address any public concerns during the assessment process. Accordingly, the *NSEA* and the *EA Regulations* provide for several opportunities for public participation in the EA process.²¹

¹⁶ Nova Scotia Environment and Labour, *A Proponent's Guide to Environmental Assessment*, February 2001, **Exhibit R-163**.

¹⁷ Nova Scotia Environment and Labour, *Guide to Preparing an EA Registration Document for Pit and Quarry Developments in Nova Scotia* (2002) (*Pit & Quarry Guide*), **Exhibit R-81**. It is worth noting that these guides were provided to Global Quarry Products at the June 14, 2002 meeting referred to below.

¹⁸ *Pit & Quarry Guide*, at 15, **Exhibit R-81**; see also Nova Scotia Environment and Labour, *A Proponent's Guide to Environmental Assessment*, February 2001, ss.4.1 ("Preparing the Registration Document for a Class I Undertaking"), at 11-13, **Exhibit R-163**.

¹⁹ *EA Regulations*, ss.10(1), **Exhibit R-6**.

²⁰ Nova Scotia Environment and Labour, *A Citizen's Guide to Environmental Assessment*, February 2001, at 4, **Exhibit R-164**.

²¹ Examples of opportunities for public participation include: the requirement of a proponent to submit a public notice of Class I undertakings (s.10 of the *EA Regulations*, **Exhibit R-6**); public comments required in the event of a focus report (s.16 of the *EA Regulations*, **Exhibit R-6**); comments on terms of reference (*NSEA*, s.19, **Exhibit R-5**); and, public consultation on EA reports pursuant to s.23 of the *EA Regulations*, **Exhibit R-6**.

12. After this review period, the EAB carefully considers all of the information and provides the Minister with a report summarizing the issues and comments, and making a recommendation for the Minister's consideration.²²

13. In coming to his decision, the Minister is required to consider a number of factors, including: the location, size, scope and schedule of the proposed undertaking; any concerns expressed by the public and the steps taken by the proponent to address these concerns; the potential and known adverse effects or environmental effects of the technology to be used in the proposed undertaking; and, any planned or existing land use in the area of the undertaking.²³

14. After considering these factors, the Minister has five options. First, he may request additional information to be submitted if he finds that the registration document is insufficient to allow for an informed decision.²⁴ Second, he can approve the undertaking subject to specified terms and conditions.²⁵ Third, he can reject the undertaking if he finds that the undertaking will likely cause "unacceptable" significant environmental effects or adverse effects.²⁶ Fourth, he can require the submission of a "focus report" if he finds that a specific aspect of the proposed project is unresolved, and may cause significant environmental effects or adverse effects.²⁷ Fifth, he can require a more detailed "Environmental Assessment Report," if he finds that several aspects of the

²² *EA Regulations*, s.25, **Exhibit R-6**.

²³ *EA Regulations*, s.12, **Exhibit R-6**. It is important to underline that concerns expressed by the public about adverse effects or environmental effects of a project, and any steps outlined by the proponent to address these concerns are required to be submitted in a Class I registration statement and are required to be considered by the Minister when making a decision.

²⁴ *EA Regulations*, ss.13(1)(a) and 13(2), **Exhibit R-6**. Upon review of the additional information provided, the Minister may elect conditional approval, rejection, or require the proponent to submit a Focus Report, or the more involved Environmental Assessment Report

²⁵ *EA Regulations*, ss.13(1)(b), **Exhibit R-6**. The Minister will approve when it is determined that the undertaking will cause no adverse effects or significant environmental effects or that any such effects are able to be mitigated.

²⁶ *EA Regulations*, ss.13(1)(e), **Exhibit R-6**.

²⁷ *EA Regulations*, ss.13(1)(c), and 15, **Exhibit R-6**. In this scenario, the EAB provides the proponent with terms of reference for the focus report, the requirements of which are set out in the EA Regulations. The proponent then has one year to submit the required report, which will be subject to public review, and analysis by EAB staff who will, in turn, provide a recommendation to the Minister.

proposed project are unresolved, and that those aspects may cause significant environmental effects or adverse effects.²⁸

15. If the Minister determines that an Environmental Assessment Report is required, a more complex process ensues, including the possibility of a public hearing. Terms of reference are prepared by EAB staff and released for public review. The proponent is then given the opportunity to reply to any comments submitted before receiving final terms of reference from the EAB. Following receipt of the terms of reference, the proponent has up to two years to prepare and submit the Environmental Assessment Report.²⁹ On receipt of the Report, the Minister may either decide to approve or reject the undertaking, or to refer it to the Environmental Assessment Board for review.³⁰ If he refers it to the Environmental Assessment Board, the Board will notify the public and conduct a public review. The Board may also elect to conduct public hearings following the written comment period. Following its review, the Environmental Assessment Board must submit a report and recommendation to the Minister for consideration. The Minister must decide to: (a) approve the undertaking with conditions; (b) approve the undertaking without conditions; or (c) reject the undertaking.

16. There are several examples where the assessment of a Class I undertaking has ended up before the Environmental Assessment Board and been subject to a public hearing.

17. For example, the Blue Mountain Resources Rock Extraction and Processing Development was registered as a Class I undertaking in December of 1989 pursuant to the *NSEA* predecessor legislation, the *Environmental Assessment Act*, R.S.N.S., c.149. On receipt of the registration document for this project, the Minister determined that an Environmental Assessment Report and public hearings were required. The hearings were conducted by a panel of the Environmental Control Council (the Environmental Assessment Board's predecessor). Strong concerns regarding the socio-economic effects of the proposed quarry were voiced by the local community. In March 1992, the Council

²⁸ *EA Regulations*, ss.13(1)(d), Exhibit R-6.

²⁹ *EA Regulations*, ss.19 and 20, Exhibit R-6.

³⁰ *EA Regulations*, s.24, Exhibit R-6.

recommended that the Minister not approve the project on the basis that it would pose "significant and unacceptable risks to the natural and social environments of the nearby surrounding community." In April of 1992 the Minister accepted the panel recommendation and informed the proponent the project was not approved.³¹

18. Similarly, the Stellarton Open Pit Coal Mine was registered by Westray Coal as a Class I undertaking on April 21, 1992, but was referred by the Minister to hearings before the Environmental Assessment Board in May 1995. 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. The Minister accepted the Board's recommendation in November 1995 and the project went ahead with the required modifications.³²

19. These examples and others indicate that it is certainly possible in Nova Scotia for a Class I EA to result in a public hearing before a panel.

B. Harmonization of Nova Scotia and Federal Environmental Assessments

20. In our experience, it is not uncommon for an undertaking to require both a provincial and federal EA. In this regard, Nova Scotia has been a party to the Canada-Wide Accord on Environmental Harmonization and the Sub-Agreement on Environmental Assessment since the beginning.³³

³¹ Letter of Hon. Terence Donahue, Minister of Environment to Blue Mountain Resources, April 8, 1992, **Exhibit R-47**; see also Nova Scotia Environmental Control Council, Report and Recommendation to the Minister Regarding the Environmental Assessment Report for the Proposed Rock Extraction and Processing Development by Blue Mountain Resources, March 27, 1992, at 32, **Exhibit R-46**; Letter of W.A. Coulter to Minister of Environment, January 14, 1992, **Exhibit R-165**; Report and Recommendations on the Blue Mountain Resources Limited Rock Extraction and Processing Development, January 14, 1992, **Exhibit R-166**.

³² Nova Scotia Department of Environment, Report and Recommendations on the Stellarton Pit Mine, October 14, 1995, **Exhibit R-167**; Nova Scotia Department of Environment, Stellarton Pit Mine Project, Conditions of Approval, November 1, 1995, **Exhibit R-168**; Environmental Registration Document (April 21, 1992); Minister of Environment's Referral to Environmental Assessment Board, May 9, 1995, **Exhibit R-169**.

³³ Canadian Council of Ministers of the Environment, *Canada Wide Accord on Environmental Harmonization*, 1998, **Exhibit R-24**; Canadian Council of Ministers of the Environment, *Sub-agreement on Environmental Assessment*, 1998, **Exhibit R-25**. The *Canada Wide Accord* outlines the principles governing environmental management and mechanisms to guide the development of sub-agreements

21. Moreover, subsection 19(2) of the *NSEA* allows the Minister to enter into an agreement with the federal government with respect to the administration of the *NSEA* and any federal statute for the purpose of the protection of the environment, and section 47 specifically provides for a harmonized EA process with the federal government for the whole or a part of the assessment. A harmonized assessment process can take many different forms, and the Minister is afforded considerable flexibility in coming to an agreement. However, whatever form the assessment takes, it must meet the purposes and requirements of the *NSEA*.

22. The EAB communicates regularly with the Agency on forthcoming projects. 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”³⁴ approach. We find that harmonized assessments simplify the process for proponents by requiring them to undertake only one EA that scopes in all issues of federal and provincial interest, including having to complete only one environmental impact statement (“EIS”), and where applicable, participating in only a single hearing. Further, we find that the “one project-one assessment” approach makes it easier for the proponent, government, non-governmental stakeholders and the public to understand and to follow the process.

23. It is important to note that when the province of Nova Scotia contemplates harmonizing an EA with the federal government by way of agreement, the purposes and requirements of the *NSEA* are incorporated into the agreement with the federal government, and in the case of a joint review panel (“JRP”), the panel’s terms of reference.

amongst jurisdictions. The *Sub-agreement* enables a single environmental assessment process to be applied that meets the legal requirements of each jurisdiction. It also allows for the development of bilateral agreements for harmonization between the federal government and each province and territory in recognition of the legislative differences that exist in the various regimes.

³⁴ Nova Scotia Environment and Labour, *A Proponent’s Guide to Environmental Assessment*, February 2001, at 5, Exhibit R-163.

C. NSDEL's Role in the Environmental Assessment of the Whites Point Project

1. The Submission of the Whites Point Quarry and Marine Terminal for Environmental Assessment

24. My staff at the EAB first met with Global Quarry Products ("GQP") concerning its plans for a 152ha quarry and marine terminal at Whites Point on June 14, 2002.³⁵ This was not the first time, however, that we had heard about the proposed project. We had been made aware of it in relation to a separate application made by Nova Stone Exporters, Inc. for an industrial approval for a small quarry at the same location.³⁶

25. After GQP explained its plans for the 152ha quarry and marine terminal, it is my understanding that my staff explained that it was likely that an EA would be required under the *NSEA*, but that we would require a detailed description of the project to be certain. My staff also informed GQP representatives that there might need to be a federal EA under *Canadian Environmental Assessment Act* (the "*CEAA*").³⁷ In addition, my staff informed GQP that Nova Scotia would work with our federal counterparts to harmonize the process, if appropriate. To my knowledge, GQP raised no concerns regarding the potential that the proposed project could trigger a federal EA.

26. On September 30, 2002, approximately three months after this first meeting, we received a draft project description from GQP, a document pertaining to the federal (not the provincial) EA process.³⁸

³⁵ Notes of Helen MacPhail, June 14, 2002, **Exhibit R-171**. Attendees included Paul Buxton and David Kern from Nova Stone. Helen MacPhail, Bob Petrie, Robert Balcom, and Brad Langille from NSDEL.

³⁶ In his report regarding Nova Stone's application for a 3.9ha quarry, Bob Petrie's Regional Engineer, Robert Balcom noted: "It is planned that the project will expand beyond 10 acres. Total leased areas is about 350 acres. Approximately one million tonnes per year of crushed rock will be shipped from the quarry." (See Robert Balcom Engineer's Report on the Nova Stone Exporter's Quarry, March 21, 2002, **Exhibit R-79**). These plans for a larger project were brought to the attention of our Deputy Minister on April 16, 2002. Mark McLean, who was then a project officer at NSDEL prepared a briefing note indicating that Nova Stone "has indicated that they eventually plan to quarry an area of approximately 80 ha but are only registering the initial phase of the project." See Mark Mclean, Briefing Note "Nova Stone Exporters Quarry on Digby Neck", April 16, 2002, **Exhibit R-172**.

³⁷ Notes of Helen MacPhail, June 14, 2002, at 2 ("federal side-federal trigger..."), **Exhibit R-171**.

³⁸ Facsimile from Paul Buxton to Helen MacPhail, "Draft Project Description", September 30, 2002 [Draft Project Description], **Exhibit R-129**. From our point of view, as the project was over 4ha and fit the Class I criteria, we knew there was a provincial requirement for an EA.

27. The draft project description that GQP provided to us explained that their proposed undertaking was to consist of the construction of a 380 acre site for the quarry (the “land based construction”) and a marine terminal (the “marine based construction”) designed to accommodate a very large bulk carrier.³⁹ In light of the size of the proposed marine terminal, we were fairly certain at this time that our federal colleagues would determine that a federal EA would be required. As such, consistent with our approach, right from the beginning, we expressed an interest in discussing the possible harmonization of our assessment with the federal one. To meet this objective, we forwarded the description to the regional office of the Agency the day after we received it, requesting a meeting to discuss the scope of the project and possible options for the coordination of the environmental review process.⁴⁰

28. Pursuant to our request, which we reiterated in November,⁴¹ we met with federal officials on December 3, 2002 to discuss our observations on the draft project description. Federal officials observed that there would likely be at least one federal trigger associated with the marine terminal, and that there may well be others.⁴² As such, we discussed harmonizing the federal and provincial assessments. However, these discussions were preliminary because both we and our federal colleagues recognized that the information provided in the project description was inadequate and that more detail was required in order to determine how the EA should be conducted.

29. We contacted GQP to inform them of this and to recommend that they meet with both us and the involved federal departments to further understand the process and the requirements.⁴³ This meeting took place on January 6, 2003.⁴⁴ As we explained to GQP, the purpose of this meeting was to explain the EA process and to obtain further information on GQP’s proposed project.

³⁹ Draft Project description, at 1, **Exhibit R-129**.

⁴⁰ Email from Helen MacPhail to Bill Coulter, October 1, 2002, **Exhibit R-173**.

⁴¹ In fact, Nova Scotia approached our federal colleagues in November 2002 to discuss possible coordination of EA processes. See Memorandum from Bill Coulter to various federal departments, November 25, 2002, and attached distribution list, **Exhibit R-174**.

⁴² Report of meeting by Reg Sweeney, December 4, 2002, **Exhibit R-175**; Report of meeting by Barry Jeffrey, December 4, 2002, **Exhibit R-176**.

⁴³ Letter from Helen MacPhail to Paul Buxton, December 10, 2002, **Exhibit R-131**.

⁴⁴ Notice of Meeting and Agenda, January 6, 2003, **Exhibit R-177**, and attached notes from meeting of Transport Canada’s Regional office, **Exhibit R-132**.

30. At this meeting, GQP confirmed that their proposed project was a quarry and a marine terminal.⁴⁵ They further confirmed that the size of the quarry was “370 acres” and that the marine terminal would be able to accommodate “45,000 tonnes for ships into New Jersey.”⁴⁶ In response, together with federal officials, we informed GQP that both a federal and a provincial EA would likely be required. Indeed, Bill Coulter (who was, at the time, the Agency’ Regional Director) informed GQP of the possibility of an assessment by a panel review.⁴⁷ I do not recall GQP ever objecting to an EA being required by both levels of government, or to the suggestion that the project could be referred to a review panel.

31. After this meeting, we continued to emphasize our desire for a joint EA, writing in a briefing note to our Minister a week later that:

A provincial EA is required if the company proposed to expand its currently approved quarry operation. A federal EA will also likely be required. Our position is that a joint federal/provincial EA should be pursued....⁴⁸

32. After receiving a further draft federal project description in late January 2003,⁴⁹ and providing further comments to GQP,⁵⁰ we received the final project description on March 10, 2003.⁵¹

2. The Decision of Federal and Provincial Officials to Harmonize their Respective Environmental Assessment Processes

33. On behalf of NSDEL, I requested an inter-governmental meeting on March 20, 2003 to discuss harmonization of the respective federal and provincial EA processes. I

⁴⁵ Notes of Chris Daly, January 6, 2003 meeting, **Exhibit R-178**.

⁴⁶ Notes of Chris Daly, January 6, 2003 meeting, **Exhibit R-178**.

⁴⁷ Notes of Chris Daly, January 6, 2003 meeting, **Exhibit R-178**. Mr. Coulter’s reasons for informing GQP that there could be a panel were that there were “likely significant [adverse] effects” and “public concerns”.

⁴⁸ NSDEL Briefing Note, “Environmental Assessment – Nova Stone Exporter Inc.’s Proposed Expansion of Whites Point Quarry at Little River, Digby County”, January 14, 2003, **Exhibit R-179**.

⁴⁹ Letter from Paul Buxton to Derek McDonald, copied to Chris Daly, January 28, 2003, attaching draft project description **Exhibit R-180**.

⁵⁰ Facsimile from Derek McDonald to various, February 18, 2003, attaching Letter from Derek McDonald to Paul Buxton, February 17, 2003, and comments from government agencies, **Exhibit R-140**.

⁵¹ Letter from Paul Buxton to Derek McDonald copied to Chris Daly, March 10, 2003, attaching final project description, **Exhibit R-181**. CEEA’s Derek McDonald circulated the revised project description on March 20, 2003 (see Letter from Derek McDonald to Joy Dubé, March 20, 2003, **Exhibit R-182**).

wanted to move quickly because of our interest in harmonization and also because I was aware that regulatory coordination between federal and provincial jurisdictions can take time.⁵² The second inter-governmental meeting took place on March 31, 2003.⁵³

34. One of the key messages that we brought to this meeting was our interest in harmonization, given the benefits to both the proponent and governments.⁵⁴ In NSDEL's view, a harmonized assessment of the Whites Point Quarry and Marine Terminal would avoid the duplication of two separate and distinct processes, both of which could involve hearings, and would facilitate the coordination of information and timelines, while providing GQP with certainty as to the process. I would note that at the meeting federal and provincial officials agreed that a harmonized process made sense and that further discussion was appropriate.

35. At the meeting we specifically discussed entering into a Memorandum of Understanding to harmonize a federal comprehensive study with a Class I Nova Scotia assessment. However, we were aware that federal officials were still unsure as to the appropriate type of EA that the project should undergo pursuant to the *CEAA*. In particular, we understood that they were still very much considering the possibility of recommending that the project be referred to an independent review panel.

36. We were also aware that the federal officials had yet to determine whether or not the construction of the quarry itself would trigger an EA, and, in addition, whether or not the quarry should be part of any federal component to the harmonized assessment. These were determinations that had to be made by federal officials before we, at the province, could move forward with harmonization.

37. On April 14, 2003, the Department of Fisheries and Oceans ("DFO") forwarded to us a letter to GQP stating that DFO had determined that the proposed Whites Point

⁵² Email from Derek McDonald to Steve Chapman, March 20, 2003, attaching email chain containing message from Chris Daly to Jim Ross and others, March 20, 2003, and email from Derek McDonald to Jim Ross, March 19, 2003, **Exhibit R-183**.

⁵³ Email from Derek McDonald to federal and provincial agencies, March 26, 2003, setting up the March 31st meeting, **Exhibit R-184**.

⁵⁴ Notes of Chris Daly, March 31, 2003, **Exhibit R-185**; see also NSDEL Notes of Cheryl Benjamin, March 31, 2003: "want to harmonize with [the] federal [process]", **Exhibit R-186**; Notes of Mark McLean, March 31, 2003, **Exhibit R-144**.

Quarry and Marine Terminal had triggered an EA and that the scope of the project under federal EA would be both the quarry and marine terminal.⁵⁵ The letter also indicated that at least a comprehensive study would be required at the federal level because of the size of the planned marine terminal and that the review could be elevated to an assessment by a review panel. As a result of this letter, we began to prepare the Memorandum of Understanding to harmonize the federal comprehensive study process with our own Class I EA process that we had earlier discussed. We sent a draft of this document to the Agency and DFO on April 23, 2003.⁵⁶ However, we still understood that DFO had not decided on the type of assessment that was most appropriate for the project and, in particular, that they were still considering the possibility of an assessment by a review panel.

38. On May 26, 2003, we were informed that DFO was looking to recommend the establishment of a review panel for this assessment and that they wanted to know if we were also interested in harmonizing our process with this type of federal review.⁵⁷ As I have explained above, from the outset Nova Scotia was interested in harmonization. However, harmonization at the level of an assessment by a review panel is a decision that cannot be made by NSDEL officials, but rather only by the Minister.⁵⁸ As such, on May 26th, 2003 my Executive Director, Bob Langdon, wrote to Ronald L'Esperance, the Deputy Minister, laying out the options of either harmonizing with a federal comprehensive study or a federal assessment by a review panel.⁵⁹ On May 28, 2003 the Deputy Minister informed Mr. Langdon that he had discussed it with the Minister⁶⁰ and that the Minister favoured a harmonized assessment by review panel due to "local concerns, the magnitude of the proposed future operation and the intersecting jurisdiction

⁵⁵ Facsimile from Phil Zamora to Chris Daly attaching Letter from Phil Zamora to Paul Buxton, April 14, 2003, **Exhibit R-187**.

⁵⁶ Email from Cheryl Benjamin to CEAA and DFO, attaching draft Memorandum of Understanding, April 23, 2003, **Exhibit R-188**.

⁵⁷ Email from Ronald L'Esperance (Deputy Minister, NSDEL) to Bob Langdon (Executive Director, NSDEL), May 28, 2003, **Exhibit R-189**, containing email from Bob Langdon of May 26, 2003: "DFO (Ottawa) indicated today that they are considering establishing a panel They want to know if we will consider a joint review."

⁵⁸ *NSEA*, s. 47, **Exhibit R-5**.

⁵⁹ Email from Ronald L'Esperance to Bob Langdon, May 28, 2003, containing email from Bob Langdon of May 26, 2003, **Exhibit R-189**.

⁶⁰ As far as I am aware, our Minister never spoke with DFO or any other federal official about the process. Instead, he relied solely on briefings from Nova Scotia officials.

with the Fed.”, and that therefore, we had authorization to move forward with harmonizing our assessment with a federal assessment by a review panel.⁶¹

39. With this approval to proceed, I had a conference call with the Agency on May 30, 2003 to discuss next steps, including an exchange of letters regarding harmonization in a JRP; the conclusion of agreements on the process for the appointment of panel members, cost-sharing, and the drafting of the panel’s Terms of Reference and Environment Impact Study Guidelines, and the coordination of communication with the public.⁶²

40. On June 20, 2003, DFO’s Acting Manager of Habitat Management, Paul Boudreau, wrote to me describing DFO’s reasons for referring the project for a referral to a review panel, and formally inquiring, as we had discussed, whether we would be willing to participate in an assessment by a JRP for this project.⁶³ The same day, I responded confirming that Nova Scotia too had an EA requirement for the project and that we were willing to participate in an assessment by a JRP.⁶⁴

41. I understand that the next week, on June 26, 2003, the Honourable Robert Thibault, wrote to the federal Minister of the Environment, the Honourable David Anderson, referring the EA of the Whites Point Quarry and Marine Terminal to him for a referral to a review panel.⁶⁵

⁶¹ Email from Ronald L’Esperance to Bob Langdon, May 28, 2003, **Exhibit R-189**.

⁶² Email from Chris Daly to Bob Langdon, June 2, 2003, **Exhibit R-190**.

⁶³ Letter from Paul Boudreau to Chris Daly, June 20, 2003, **Exhibit R-70**. An earlier draft of June 4, 2003 was prepared before DFO had finalized their decision to go to a panel review, **Exhibit R-191**. To my knowledge, NSDEL never received it.

⁶⁴ Letter of Chris Daly to Paul Boudreau, June 20, 2003, **Exhibit R-71**. On the same day, I briefed my Deputy Minister on this course of action and the next steps in the process. Email from Chris Daly to Ronald L’Esperance, June 20, 2003 attaching draft letter to DFO, **Exhibit R-192**; see also email from Chris Daly to Bruce Hood confirming my signature of the letter and that it has been sent to Paul Boudreau, and attaching the letter, June 20, 2003, **Exhibit R-193**.

⁶⁵ Letter of Hon. Robert Thibault, Minister of Fisheries & Oceans to Hon. David Anderson, Minister of Environment, June 26, 2003, **Exhibit R-73**. Mr. Anderson replied on August 7, 2003 noting that he had referred the project to a joint panel review pursuant to CEAA, section 40. See Letter from Hon. David Anderson, Minister of Environment to Hon. Robert Thibault, Minister of Fisheries & Oceans, August 7, 2003, **Exhibit R-195**.

3. The Establishment of the Joint Review Panel

a) The Joint Review Panel Agreement (the “JRP Agreement”) and the Terms of Reference

42. During the month of July 2003, we exchanged drafts of an agreement to constitute the JRP with federal officials. By July 18, 2003, we had concluded the terms of a draft JRP Agreement as well as the Terms of Reference.⁶⁶ I understand that the Agency briefed the Minister of the Environment, David Anderson, and prepared a letter to respond to Minister Thibault’s correspondence referring the project to Minister Anderson for a referral to a panel review.⁶⁷ Minister Anderson then informed Minister Thibault of the referral two weeks later on Thursday, August 7, 2003.⁶⁸ We were informed of the referral on Friday, August 8, 2003⁶⁹ and sent out the draft JRP Agreement and the Terms of Reference for public comment on Monday, August 11, 2003.⁷⁰ The deadline that we set for such comments was September 18, 2003.⁷¹

43. NSDEL and the Agency received a substantial number of comments from the public on the draft JRP Agreement and Terms of Reference, and we worked with the Agency to ensure that they were revised as appropriate. After this was done, most of the remaining issues that needed to be addressed were procedural in nature, such as the

⁶⁶ Email from Bruce Young to Chris Daly, July 18, 2003 attaching Draft Joint Review Panel Agreement and Terms of Reference, **Exhibit R-196**.

⁶⁷ Email from Bruce Young to Nathalie Bastien and Steve Chapman, August 8, 2003 attaching Memorandum to Minister “Referral of the Whites Point Quarry Project to a Joint Review Panel”, July 18, 2003, Letter from Hon. David Anderson to Hon. Robert Thibault, August 7, 2003, and Backgrounder, August 8, 2003, **Exhibit R-197**.

⁶⁸ Letter from Minister of Environment (Hon. David Anderson) to Minister of Fisheries and Oceans (Hon. Robert Thibault), August 7, 2003, **Exhibit R-197**.

⁶⁹ Email from Bruce Young to Steve Chapman, August 8, 2003, **Exhibit R-198**: noting that he had contacted Chris Daly regarding the federal Minister of the Environment’s letter to the federal Minister of Fisheries.

⁷⁰ NSDEL Press Release, “Draft Agreement Released for Public Comment”, August 11, 2003, **Exhibit R-199**; see also Draft Joint Review Panel Agreement and Terms of Reference, August 11, 2003, **Exhibit R-278**.

⁷¹ Deputy Minister of Environment and Labour, Ronald L’Esperance sent a letter to his counterpart at the Nova Scotia Treasury and Policy Board providing an update on the agreement to harmonize and explaining the public comment on the draft MOU. See Letter from Ronald L’Esperance to Gordon Gillis, July 10, 2003, **Exhibit R-200**.

timing of the appointment of the members of the JRP, and the need for scoping meetings.⁷²

44. A final draft of the JRP Agreement and Terms of Reference were prepared for signature in February 2004. The draft JRP Agreement formally recognized the provincial government's capacity to enter into an agreement for a joint assessment pursuant to section 47 of the *NSEA* and that the joint assessment could include a single hearing process pursuant to section 48 of the *NSEA*. The draft JRP Agreement also provided for the establishment of the JRP and contained detailed rules on a number of factors, including panel selection; the conduct of review; the establishment of a secretariat to provide support to the Panel; and, the content of the final report to be submitted to both provincial and federal Ministers, including that it was required to provide information sufficient to allow both levels of government to reach their respective decisions.⁷³

45. Appended to the draft JRP Agreement were the Terms of Reference for the JRP. The Terms of Reference provided direction for the panel on the components of the review and the scope of the assessment and factors to be considered. In this regard, they also made clear that the Panel was required to develop sufficient information to allow both the provincial and federal governments to make the conclusions and decisions required of them under their respective statutes.

46. In light of the legislated requirement to consider environmental impacts including socio-economic impacts we had an interest in making sure that the JRP provided us with sufficient information on the socio-economic impacts of the project in its recommendation to allow us to make a decision on whether such impacts could be mitigated or were grounds for rejection of the project. As such, in order to conform to the legislative requirements of the *NSEA* the joint assessment would have to address not only the effects of the project on the natural environment, but also its effects on socio-economic conditions that are not directly caused by changes in the bio-physical environment.

⁷² See e.g. Email from Jean Crepault to Chris Daly and Cheryl Benjamin, October 31, 2003, Exhibit R-201.

⁷³ Email from Jean Crepault to Derek McDonald, February 11, 2004 attaching Memorandum to Minister and Draft Agreement and Terms of Reference, Exhibit R-202.

47. I understand that when the Agency discussed with GQP the pending release of the final JRP Agreement and Terms of Reference, GQP requested a delay pending a corporate re-organization.⁷⁴ This resulted in an approximately six-month delay, until August 2004.⁷⁵ During this period, we continued to work with officials from the Agency on the selection of members for the JRP and on the preparation of a draft of the Guidelines for the EIS.⁷⁶

b) The Selection of the JRP Members

48. As set out in the Term of Reference, the panel members were required to be unbiased and free from any conflict of interest relative to the Project. They were also required to have knowledge or experience relevant to the anticipated environmental effects of the Project.

49. In accordance with these general criteria, we used the federal panel selection process. The Agency took the lead in identifying a short list of suitable candidates, and indeed coordinated the selection process. On March 10, 2004, they requested that we identify a candidate with “some type of marine expertise, socio-economic background along with administrative skills.”⁷⁷ In response, we suggested Dr. Jill Grant, the Director of the School of Planning at Dalhousie University. We suggested Dr. Grant because her areas of expertise included the cultural context of community planning, social planning, social impact assessment, public participation in the planning process, and site planning for sustainable development.⁷⁸ Thus, from our perspective, her expertise was very relevant to, among other things, the potential socio-economic effects which would be required to be addressed in accordance with the *NSEA*.

50. Agency officials, Bob Langdon and I interviewed panel candidates on August 26-27, 2004. In making our decision as to who the most appropriate members would be, we took into account each candidate’s expertise and knowledge in addition to our impressions as to whether their skill-sets and personalities would result in effective

⁷⁴ Email from Boris de Jonge to Jean Crepault, March 1, 2004, Exhibit R-203.

⁷⁵ Letter from Paul Buxton to Jean Crepault, August 13, 2004, Exhibit R-93.

⁷⁶ Email from Jean Crepault to Brian Torrie, March 3, 2004, Exhibit R-204.

⁷⁷ Email of Francine Richard to Chris Daly, March 10, 2004, Exhibit R-205.

⁷⁸ Curriculum Vitae of Professor Jill Grant, August 2004, Exhibit R-381.

collaboration.⁷⁹ In this light, we agreed on Robert Fournier as the Chair and Gunter Muecke and Jill Grant as panellists. We believed that this panel provided the most appropriate coverage of all areas of substantive expertise required, and also had the procedural and administrative experience to run the hearings fairly and efficiently.

51. In particular, Dr. Fournier was a Professor of Oceanography at Dalhousie University and thus was well suited to deal with issues of fish and fish habitat. Moreover, he had recent experience chairing a very complex JRP process in Nova Scotia — the Sable Gas JRP — which held almost 60 days of hearings several years earlier, and he could bring that expertise to bear here. Dr. Muecke was a former Professor at Dalhousie University in the School of Resource and Environmental Studies, with expertise in geology, geochemistry and mineralogy. He had also served on the joint federal-Nova Scotia review panel assessing the proposed Kelly's Mountain Coastal Quarry Project in 1991. This experience would allow him to contribute expertise on issues such as quarrying and its overall effects on the local environment in Nova Scotia. Finally, as explained above, Dr. Grant had experience that was vital for assessing, amongst other things, the effects of the proposed project on the human environment on the Digby Neck, a factor required to be considered by the *NSEA*.

52. The JRP Agreement and Terms of Reference were signed by our Minister on November 3, 2004,⁸⁰ and the JRP was appointed that same day.⁸¹

c) The Draft of the EIS Guidelines

53. The JRP Agreement contemplated that Bilcon would prepare an EIS based on guidelines prepared by the provincial and federal governments. As such, while we were awaiting the completion of the corporate restructuring of GQP over the summer of 2004, we worked with our federal colleagues to prepare draft EIS Guidelines to identify the issues that Bilcon would be required to address in the EA of the Whites Point project.

⁷⁹ A list of questions for panel candidates prepared by the Agency may be found at **Exhibit R-206**.

⁸⁰ Final Agreement concerning the Establishment of a Joint Review Panel for Whites Point Quarry and Marine Terminal Project, November 3, 2004, **Exhibit R-27**. In a meeting with the proponent in October 26, 2004, the Claimants were informed of the plan to announce the panel the following week. See Notes of Helen MacPhail, October 26, 2004, **Exhibit R-207**.

⁸¹ Letters from Minister of the Environment, Stephane Dion to the panelists, November 3, 2004, **Exhibit R-208**.

The EIS Guidelines would also provide direction to Bilcon on how to describe and assess these issues and how to structure the EIS that would be submitted to the JRP. The Draft EIS Guidelines were made available for public comment from November 10, 2004 until January 21, 2005.

54. Given the mandate of the panel under the JRP Agreement, which required it to “discharge the requirements set out in the Nova Scotia *Environment Act*”⁸² it was essential that these Draft Guidelines incorporated our legislative requirements. For example, Bilcon had to address the effect of their project on both the biophysical environment and socio-economic conditions of the region.⁸³

55. As part of the public comment period there were public meetings from January 6-9, 2005 (the “scoping meetings”). These scoping meetings provided an opportunity for the public to comment on the draft EIS Guidelines. I understand that several issues were prominent, including traditional knowledge, the precautionary principle and the relevance of the North American Free Trade Agreement. The scoping meetings led to requests for the proponent to address some of these issues in the EIS and or later during the panel hearings. I also understand that Bilcon elected not to make a presentation at the scoping hearings.

56. The final EIS Guidelines were issued on March 31, 2005.⁸⁴ I understand that the Claimants made no objection to the content of these Guidelines. Over a year later, on April 26, 2006, the Claimants filed their EIS on which both Nova Scotia and our federal colleagues provided comments. In turn, there followed submissions from the public concerning the EIS⁸⁵ and information requests from the Panel in advance of the hearings.

D. The Joint Review Panel Hearings and Report

57. The JRP hearings took place from June 16 to June 30, 2007. NSDEL was requested to make a presentation and did so on June 21 and 22, 2007.

⁸² JRP Agreement, **Exhibit R-27**.

⁸³ Draft Environmental Impact Study Guidelines, November 10, 2004, **Exhibit R-209**.

⁸⁴ Final Environmental Impact Study Guidelines, March 2005 and attached letter from Joint Review Panel to Paul Buxton, March 31, 2005, **Exhibit R-210**.

⁸⁵ The Nova Scotia process for public comment is described in an NSDEL Briefing Note, “Whites Point Quarry and Marine Terminal, Digby County,” July 27, 2006, **Exhibit R-211**.

58. From Nova Scotia's perspective, the JRP was responsible for making a recommendation to the Minister, pursuant to Part IV of the *NSEA*, recommending either approval, including mitigation measures, or rejection of the project. The Panel Report was required to address both "adverse effects" and "environmental effects" as defined under the *NSEA*. The Panel was also required to consider all issues identified in the terms of reference, EIS Guidelines, and EIS.

59. In turn, the Minister was required to consider the recommendation of the JRP and either approve the project with conditions or reject it. In doing so, the Minister refers to the factors identified in section 12 of the Nova Scotia *EA Regulations*, as previously noted. These include, but are not limited to, the location of the proposed undertaking and the nature and sensitivity of the surrounding area; the size and scope of the proposed undertaking, concerns expressed by the public about the adverse effects or environmental effects of the proposed undertaking; and steps taken by the proponent to address environmental concerns expressed by the public.

E. The Decision of the Government of Nova Scotia

60. On October 23, 2007 the JRP issued its Report and Recommendations.⁸⁶ The JRP's review of core community values was consistent with the consideration of environmental effects under the *NSEA*, which includes socio-economic effects.

61. As is common practice, I understand that the EAB immediately reviewed the report and undertook a detailed analysis in order brief our Deputy Minister and Minister.

62. On November 20, 2007, the Government of Nova Scotia announced that it would accept the JRP's recommendation to reject the project. As a result, the Whites Point Quarry and Marine Terminal did not go forward.

63. Looking back, both the approach we took to harmonizing the assessments and the outcome were entirely reasonable. In my view, there was nothing unusual about the process through which we reached an agreement with federal officials to harmonize the

⁸⁶ Whites Point Quarry and Marine Terminal, Joint Review Panel Report, October 23, 2007, Exhibit R-212.


two required assessments of the Whites Point Quarry and Marine Terminal into a single assessment to be conducted by a JRP. The EA of the Whites Point Quarry and Marine Terminal generally conformed to the overall process that I have explained above.

64. There were a number of factors that made this particular project itself unique. First, there was its size and duration. The proposed quarry would perhaps have been the largest quarry, in the province, and the marine terminal would have dwarfed anything in the surrounding area. Second, there was significant public concern with respect to the project. At the EAB, we are certainly familiar with projects being opposed by segments of a community. However, in this case, the public concern was pronounced and indeed many people in the surrounding community, and many Nova Scotians, were opposed to the very idea of the project, let alone the methods of its execution.⁸⁷ I believe that much of the public concern was due to the project's location. The plan was to situate the project in a rural area known for eco-tourism and which was not at all industrialized, near what I understand is one of Canada's most productive fisheries.

65. The size and duration of the project, the public concerns and, of course, the intersecting jurisdiction with the federal government led us to the conclusion that harmonizing the EA of the White Point project was appropriate.⁸⁸ The factors referred to above were required to be considered by the Minister in his final decision, pursuant to section 12 of the *EA Regulations*.

SWORN BEFORE ME IN THE)
CITY OF HALIFAX IN THE)
PROVINCE OF NOVA SCOTIA)
THIS 6th DAY OF DECEMBER,)
2011.


CHRISTOPHER DALY


A Commissioner for taking Affidavits
in and for the Province of Nova Scotia

DAVID J. BARTOL
A Barrister of the Supreme
Court of Nova Scotia

⁸⁷ See Letters of Public Concern, April 2002 to August 2003, **Exhibit R-170**.

⁸⁸ Email from Ronald L'Esperance to Bob Langdon, May 28, 2003, **Exhibit R-189**.