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 AND DANIEL CLAYTON AND BILCON OF DELAWARE INC.

Claimants

AND:

GOVERNMENT OF CANADA

Respondent

EXPERT REPORT OF LAWRENCE E. SMITH, Q.C.

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Glossary of Terms

"Bilcon" or the "Proponent"	Bilcon of Nova Scotia Inc.
"CNSOPB"	Canada-Nova Scotia Offshore Petroleum Board
"*CEAA*"	*Canadian Environmental Assessment Act*, S.C. 1992, c. 37
"CEA Agency"	Canadian Environmental Assessment Agency
"CSLR"	*Comprehensive Study List Regulations*, SOR/94-638
"Draft JRP Agreement"	Draft Agreement to Establish a Joint Environmental Assessment Panel to review the proposal for the Whites Point Quarry and Marine Terminal Project
"DWT"	Dead weight tonnes
"DFO"	Department of Fisheries and Oceans
"DFO *Blasting Guidelines*"	DFO's *Guidelines for the Use of Explosives in or near Canadian Fisheries Waters*
"EIS"	Environmental Impact Statement
"FEARO"	Federal Environmental Assessment Review Office
"GQP"	Global Quarry Products
"HADD"	Harmful alteration, disruption, or destruction
"IR"	Information Requests
"JRP"	Joint Review Panel
"JRP Agreement"	Agreement and Terms of Reference concerning The Establishment of a Joint Review Panel for the Whites Point Quarry and Marine Terminal Project
"NEB"	National Energy Board
"NWPA"	*Navigable Waters Protection Act*, R.S.C. 1985, c. 29
"NSDEL"	Nova Scotia Department of Environment and Labour
"Nova Stone"	Nova Stone Exporters, Inc.
"Project"	Whites Point Quarry and Marine Terminal development
"UNESCO"	United Nations Educational, Scientific and Cultural Organization
"Whites Point Project"	Whites Point Quarry and Marine Terminal development

1. My name is Lawrence Edward Smith and I reside at 1216 Beverley Blvd. SW, Calgary, Alberta. I have no past or present involvement with the disputing parties, counsel or the Tribunal as it relates to the matter in dispute.

2. I have reviewed the Claimants' Memorial, its Witness Statements, the Expert Report of David Estrin, the Whites Point Project Joint Review Panel Report, hearing transcripts and other related materials for purposes of preparing this Expert Report.

A. PURPOSE OF THIS REPORT

3. I have been asked by the Government of Canada for my opinion, based on my experience, as to the reasonableness of the treatment afforded Bilcon in the context of the environmental assessment of its proposed Whites Point Project; and whether it was discriminatory or lacked fairness as compared to the environmental assessments of other similar developments in Canada, and in particular in Nova Scotia.

4. In that regard, I have also been asked to review and comment on the expert opinion filed on behalf of Bilcon by Mr. David Estrin.

B. MY RELATED PROFESSIONAL BACKGROUND

5. I am a partner with the law firm of Bennett Jones LLP based in Calgary, Alberta. I practice exclusively in the Regulatory and Environmental area. I was called to the bar in Ontario in 1981 and joined the law branch at the National Energy Board ("NEB") where I acted as counsel until early May 1984 when I moved to Calgary and joined Bennett Jones. I am a member in good standing of the Law Society of Alberta and the Law Society of Upper Canada. My detailed curriculum vitae is attached as Appendix "1".

6. Over my 27 years in private practice I have been retained by project proponents as legal counsel to secure approvals for energy and pipeline projects, including offshore and marine terminal developments in the Canadian Maritime Provinces. A number of those mandates were performed in the same approximate time period as the assessment of the Whites Point Project.

7. In the course of representing the proponents of these projects, I have had to deal with the *Canadian Environmental Assessment Act* ("*CEAA*")[1], federal approvals, provincial environmental assessment processes and provincial approvals, including those involving the Province of Nova Scotia. These have included joint review panels, review panels, comprehensive studies and screenings under the *CEAA*. Several of the proponents I represented were owned indirectly by U.S. concerns.

8. Amongst others, those projects include:

- the Sable Offshore Energy Project (1996 to 1998) ("Sable") and the Maritimes & Northeast Pipeline ("M&NP") Project (1996 to 1998) (collectively "Sable/M&NP Projects");
    - the Sable Project involved the exploration and development drilling for natural gas and associated gas liquids in the Sable Island area offshore Nova Scotia, and included the construction and operation of a number of offshore production and processing plants and associated gathering lines; a large diameter raw gas transmission line between the production platforms and a gas processing plant to be built onshore near Goldboro, Nova Scotia; and a smaller diameter natural gas liquids pipelines from Goldboro to a fractionation facility to be built near Port Hawkesbury, Nova Scotia. The lead proponent was the Canadian subsidiary of U.S.-based Mobil Oil and other owners were Imperial Oil (the Canadian affiliate of U.S.-based Exxon Limited), Shell Canada Limited and Nova Scotia Resources Inc.
    - the M&NP Project involved the construction and operation of a long, large diameter natural gas transmission pipeline from Goldboro, Nova Scotia to the international border near St. Stephen, New Brunswick ("M&NP Mainline"). From the U.S. border, a separately owned pipeline extended to Dracut, Massachusetts where it accessed the

[1] S.C. 1992, c. 37. **Exhibit R-1**. Unless otherwise noted, I have referenced the provisions of *CEAA* in force at the time of consideration of the Whites Point Project.

Boston market. The M&NP Mainline in Canada was owned by subsidiaries or affiliates of U.S.-based Duke Energy (now Spectra Energy), U.S.-based Exxon Limited, Nova Scotia Power and Westcoast Energy.

- the M&NP Project proposed blasting activities near the pipeline landfill and the Department of Fisheries and Oceans ("DFO") was a responsible authority.

- the Joint Review Panel for the Sable/M&NP Projects was designed to satisfy the regulatory requirement for the federal authorities such as Transport Canada, Environment Canada, the DFO, as well as the NEB, the Canada-Nova Scotia Offshore Petroleum Board ("CNSOPB") and the Government of Nova Scotia. The five person hearing panel was chaired by Dr. Robert Fournier. Public scoping meetings were held and the formal hearing process to review the project environmental impact statement and other application materials extended over 56 days.

- the M&NP Point Tupper Lateral Pipeline Project (1999);
  - an environmental screening of a pipeline lateral from the M&NP Mainline to the southern part of Cape Breton Island.
  - the DFO was a responsible authority for this project.
  - this pipeline was to be built at the same time and in the same trench as the Sable Natural Gas Liquids Pipeline.
  - this lateral, and the others discussed below, were all owned in the same proportions as the ownership interests in the M&NP Mainline.
- the M&NP Halifax Lateral Pipeline Project (1999);
  - a comprehensive study of a pipeline from the M&NP Mainline to Halifax, Nova Scotia.

    - the DFO was also a responsible authority on this project.

- the M&NP Saint John Lateral Pipeline Project (1999);
    - a comprehensive study of a pipeline from the M&NP Mainline to Saint John, New Brunswick.
    - the DFO was also a responsible authority for this project.
- the Deep Panuke Offshore Gas Development Project (2002);
    - a harmonized comprehensive study process for the development of an offshore natural gas reservoir and subsea pipeline to Goldboro, Nova Scotia, involving the CNSOPB, the NEB, Fisheries and Oceans Canada, Industry Canada, and Environment Canada as responsible authorities, which also satisfied the environmental assessment requirements of the Nova Scotia *Environment Act.*
    - the DFO was a responsible authority for this project and the project proposed blasting activities in the nearshore at the pipeline landfall location.
    - the project was later withdrawn due to economic conditions.
    - a smaller version of this project was applied for, approved and is now under construction.
- the Millennium West Pipeline Project (1999 to 2001);
    - a joint review panel was established for a pipeline project from Dawn, Ontario to the shoreline of Lake Erie near Point Patrick, Ontario, where it would have connected with the separately owned Millennium Pipeline which extended across Lake Erie to the United States).
    - the project was withdrawn by the proponent.

- the Bear Head LNG Project in Port Hawkesbury, Nova Scotia (2004-2005);
    - the project involved LNG storage tanks, regasification facilities and a marine loading terminal to be located on industrially zoned land near Bear Head Land Reserve near the Strait of Canso.
    - the DFO was a responsible authority.
    - the project was approved, and partially constructed, though it has been suspended due to economic conditions.
- the Kitimat LNG Project (2006);
    - a re-gas facility (later changed to liquefaction plant).
    - the project involved LNG storage tanks, regasification facilities and a marine loading terminal to be located near Kitimat, B.C.
    - both Transport Canada and the DFO were responsible authorities for the project due to required *NWPA* and *Fisheries Act* authorizations. The project also involved blasting activities in proximity to the marine environment.
    - this re-gas project was later converted into an LNG export project including liquefaction facilities located at Bish Cove, B.C., which are now under construction.
- the Brunswick Pipeline Project (2007);
    - a large diameter pipeline connecting the Canaport LNG facility near Saint John, N.B. and extending to the U.S. border where it interconnected with a pipeline owned by the M&NP Pipeline LLC, which carried the gas to markets in the Boston and New England market region.
    - both DFO and Transport Canada were responsible authorities. The project involved blasting in proximity to water courses.

- the review panel process adopted for this project was the first substitute authority under s. 43 of the *CEAA* where the NEB process was enhanced to ensure it met all the *CEAA* requirements.

- the Mackenzie Valley Pipeline Project (2009);
  - a large diameter pipeline extending from the Mackenzie Delta to Northern Alberta on behalf of one of the owners, the Aboriginal Pipeline Group.
  - a joint review panel was used to assess the environmental and socio-economic effects of that pipeline project.
  - both Transport Canada and DFO were responsible authorities for the project.

9. I have also been involved in judicial reviews arising out of these projects.

C. EXECUTIVE SUMMARY

10. The conclusions of my Report are as follows:

1. The Environmental Assessment Process for the Whites Point Project Was Well Within Reasonable Expectation

11. In Part I of my report, I respond to the opinions set out in Part I of Mr. Estrin's report. In so doing, I have divided my response into four sections. In Sections 1, 2 and 3, I address Mr. Estrin's opinions regarding scope of project and type of assessment for the Whites Point Project.

12. Mr. Estrin is wrong to conclude that the Whites Point Project received "exceptional treatment under CEAA" or that there was no reasonable basis for a proponent of a quarry to be subjected to a review panel or a joint review panel.[2] Any proponent should expect a project with the potential for significant adverse environmental effects, and which has attracted widespread public controversy, to have a high likelihood of being reviewed in a

[2] Expert Report, D. Estrin, July 8, 2011 ("Estrin"), p. 1.

public hearing process. The federal and provincial legislation which govern environmental assessments clearly contemplate such treatment. Contentious projects, for example, stand a good chance of being aired in an open, public forum. The process adopted in this case seems even-handed relative to other contentious projects, and seems reasonable in the circumstances. Indeed, there were certain advantages to the process selected in terms of mitigating appeal risk and the risk of subsequent elevation to a panel review. Had the Proponent not agreed, they should have and could have voiced their opinion at the time.

13. Each of Mr. Estrin's comparator projects,[3] to which he points to support his contention that Whites Point Project received exceptional treatment, were significantly different than the Whites Point Project. None were publicly contentious. Further, of the three comparator projects discussed, one did not even involve a marine terminal and ship loading facility. The circumstances of each project are different. This accounts for differences in how specific matters may be handled. That is a normal occurrence in the environmental assessment and project approval process. The fact there may be differences amongst the various environmental reviews does not impugn the Whites Point Project environmental assessment itself. It is for this reason that a principle like *stare decisis* does not apply to environmental assessments.

14. There was a solid legal basis for considering all closely related components of the Whites Point Project – the quarry, processing facilities and the marine terminal – as a single project for the purposes of the environmental assessment. Mr. Estrin's description of the Whites Point Project as simply a "quarry" is misleading. It completely ignores the construction and operation of a marine terminal and ship loading facility. Rather, the Whites Point Project Proponent consistently described the Project as a quarrying and marine loading operation extending over 50 years; with blasting averaging once every two weeks during operations,[4] followed by crushing, screening, washing and stockpiling crushed stone loadings over a marine terminal; and ship movements in and out of the

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[3] Comprehensive Study Report: Belleoram Marine Terminal Project (August 23, 2007), **Exhibit R-357**; Environmental Impact Comprehensive Study Report: Mid Atlantic Minerals Inc. Aguathuna Quarry Development (July 1999), **Exhibit R-418**; Tiverton Harbour Project in Tiverton, Nova Scotia (CEAA Screening, 2003/04), **Exhibit R-352**.

[4] Whites Point JRP Report, p. 28, **Exhibit R-212**.

Digby Neck to and from markets abroad 44 to 50 times per year.[5] Given the manner in which the Project was described by the Proponent, it was certainly within reasonable expectations that the scope of the Project would include all of the related components.

15. In Part I, Section 4 of my Report, I address Mr. Estrin's view that the "procedure prior to the referral"[6] of the Whites Point Project to a Joint Review Panel was "unusual and unfair".[7] Here Mr. Estrin singles out several steps taken by the DFO, including:

(i) the DFO's review of Nova Stone's blasting plans in relation to its proposed 3.9 ha quarry;

(ii) the DFO's ultimate determination that the 3.9 ha quarry required a *Fisheries Act*[8] authorization and an environmental assessment under the *CEAA*; and

(iii) the DFO's determination that, at minimum, the Whites Point Project would be subject to a comprehensive study.

16. Contrary to Mr. Estrin's characterization of these events, it is my opinion that there was nothing irregular or unfair about the steps taken by federal or provincial authorities, and certainly no evidence of a lack of even-handedness toward Bilcon, prior to the referral of the Whites Point Project to a joint review panel. In particular:

(i) the DFO had a clear statutory mandate to review Nova Stone's blasting plans in relation to its proposed 3.9 ha quarry;

(ii) the DFO reasonably determined that Nova Stone's blasting plans for the 3.9 ha quarry required authorization under s. 32 of the *Fisheries Act* and an environmental assessment under the *CEAA*, and due to the timing of and manner in which the environmental assessment process for the Whites Point Project was initiated, the DFO had little choice but to combine the

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[5] For example, Whites Point Project, Draft Project Descriptions: September 30, 2002, **Exhibit R-129**; January 28, 2003, **Exhibit R-180**; and March 10, 2003, **Exhibit R-181**.
[6] Estrin, p. 34, Heading 1.6.
[7] Estrin, p. 34, para. 109.
[8] R.S.C., 1985, c. F-14, **Exhibit R-82**.

environmental assessment of the 3.9 ha quarry with the Whites Point Project, pursuant to ss. 5(1)(d) of the *CEAA*;

(iii) the DFO's determination that the marine terminal component of the Whites Point Project was required to undergo, at minimum, a comprehensive study level of environmental assessment was consistent with past and present practice and applicable legislation and was not an error of law.

17. To ascribe a "political agenda" of anti-American discrimination to these activities, or to characterize them as being outside of a proponent's reasonable expectations, systematically strains credulity.[9] As noted above, that a publicly contentious project would be subject to public hearings in the local community is certainly a foreseeable event. The governing legislation requires members of the public potentially affected by a project to have an opportunity to participate in its review.[10] Holding a hearing nearby is an obvious and logical means by which to do so. A review of DFO's conduct throughout its handling of the Proponent's applications reveals a careful, objective review which was in keeping with the spirit and letter of the governing legislation. While Mr. Estrin may construct various counter-factual theories today to impugn their conduct of many years ago, the Proponent did not do so at the time. Moreover, the record is devoid of any reference to anti-Americanism or xenophobia as a basis for any of the DFO actions of which Mr. Estrin now complains.

2. The Whites Point Project Panel's Approach And Recommendations Were Reasonable

18. Mr. Estrin is simply wrong to assert that the Whites Point Joint Review Panel's ("JRP" or "Panel") "… approach did not provide the legally requisite, usual or fair consideration of the … Project" in the course of the assessment.

19. An objective review of the Panel's conduct discloses a rigorous adherence to the requirements of governing federal and provincial legislation as well as the JRP Agreement for the Whites Point Project ("JRP Agreement") and the Environmental Impact Statement

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[9] Estrin, p. 2.
[10] *CEAA*, s. 4(d), **Exhibit R-1**.

Guidelines ("EIS Guidelines"). With respect to both the JRP Agreement and the EIS Guidelines, the Proponent was specifically invited to comment on drafts and to respond to comments of others received, for example, over the course of the scoping meetings. While Mr. Estrin now identifies a host of asserted jurisdictional errors, the Proponent failed to do so at the time.

20. Contrary to Mr. Estrin's assertions[11], the Panel properly applied the legislation, the Agreement and the EIS Guidelines as well as the general interpretative guides provided by the *CEAA* in areas such as the cumulative effects assessment and adaptive management. Moreover, the Panel's application of these concepts accorded with their application by other Panels which undermines Mr. Estrin's allegations that the Whites Point Project Panel was not "… an impartial forum for the objective evaluation of the project."[12]

21. In particular, Mr. Estrin's assertion that the Panel's reliance on "community core values was not a proper consideration for the Panel to take into account"[13] is rebutted by the fact that other Panels have rejected other projects based on the same notion and by the specific statutory and administrative mandate conferred by the JRP Agreement upon the Whites Point Project Panel.

22. In the same vein, for example, Mr. Estrin's assertion that "[i]n particular, the Panel failed to recommend any mitigation measures, any terms and conditions for the WPQ approval, or any follow-up and monitoring programs"[14] is contradicted by the direction contained in Article 6.3 of the JRP Agreement which only directed the Panel to identify such measures in the event it approved the Project – which it did not.[15]

23. In fact, if Mr. Estrin were correct that "[t]he WPQ Panel's approach effectively gave the local community a veto …",[16] the Panel would not have needed to dwell at length

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[11] Estrin, p. 4.
[12] Estrin, p. 3.
[13] Estrin, p. 3.
[14] Estrin, p. 4.
[15] Agreement concerning the Establishment of a JRP for the Whites Point Quarry and Marine Terminal Project between The Minister of the Environment, Canada and The Minister of the Environment and Labour, Nova Scotia, November 3 2004 ("Final Whites Point Quarry JRP Agreement") Article 6.3, **Exhibit R-27**.
[16] Estrin, p. 4.

on the information requests or at the hearing with detailed issues about how the local community and members of the public would be affected by the Project. The fact that it did assemble and test that very evidence belies any suggestion that it had effectively conferred a veto right upon the local community.

24. The fact that the Bilcon project failed to receive the approvals it sought does not impugn the Whites Point Project environmental assessment process itself. Proponents do not enjoy a presumption that their projects are in the public interest. It is not up to members of the public or review panels to prove otherwise. Rather, a proponent must persuade the federal and provincial authorities that its project satisfies the relevant statutory criteria.

25. The Panel also was called upon by both the Nova Scotia and Canadian governments to recommend approval or rejection of the Project. It did so when it stated the Project could not be justified in the circumstances. There is no prohibition in the Nova Scotia legislation or the federal legislation nor in the JRP Agreement against expressing its rejection in those terms. Mr. Estrin's assertion that "the Panel exceeded its jurisdiction by determining that the Project was not justified in the circumstances"[17] is, in my opinion, unsupportable.

3. Government Response to Joint Review Panel Report was not Improper or Contrary to Law

26. Mr. Estrin's assertions that the federal and provincial governments acted illegally following release of the Report[18] assumes first that the Panel had exceeded its jurisdiction by rejecting the Project on the basis of the Project's effects on community core values; and secondly that there was a prohibition against describing the Project as not justified in the circumstances. As noted above, neither assertion is correct, and the governments' actions were not illegal.

27. Further, Mr. Estrin's assertion that because none of the government witnesses said at the hearing that the project should not be approved, the governments were prevented

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[17] Estrin, p. 4.
[18] Estrin, p. 5.

from so finding is unsupportable.[19] The government witnesses took no position on the Project; rather they offered specialized expertise to be of assistance to the Panel in understanding the Project's effects. Moreover, there would be no purpose to the legislated public hearing requirement if governments were required to approve every project their officials did not actively oppose at a hearing.

28. Likewise unsupportable is Mr. Estrin's assertion that the two federal departments, Transport Canada and the DFO, were required to conduct a duplicative independent assessment of the Project following the issuance of the Joint Panel Report.[20] No such requirement exists anywhere on the face of the federal legislation and, even if it did, the Nova Scotia Government's rejection of the Project rendered the federal government's rejection moot in any event.

4. A Comment on Bilcon's Failure to Pursue Remedies Commonly Sought in Conjunction with Canadian Environmental Assessments

29. Mr. Estrin asserts that the Panel or the governments committed many jurisdictional errors[21]. Curiously, the Proponent itself failed to identify, much less assert, those same allegations at any time during the review process.

30. Bilcon failed to make use of well-established domestic dispute resolution procedures which enable any participant to correct alleged procedural errors or alleged excesses of jurisdiction. Recourse to the Canadian courts is in common use as the many case citations in Mr. Estrin's analysis reveal. Bilcon chose not to pursue the corrective action which any proponent would be required to take where they take issue with any aspect of their review process or the decisions relating thereto. Failure to do so is not a fault of the process; nor is it a fault of the Canadian authorities. The process available to Bilcon was the same as that available to parties in the review of other similar projects. There was no lack of even-handedness or unfairness in that regard.

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[19] Estrin, s. 3.5, pp. 143-144, paras. 554-556.
[20] Estrin, p. 5.
[21] See, for example, Estrin, p. 46, para. 162; p. 50, para. 182; p. 68, paras. 266-267; p. 108, para. 423; pp. 123-128; p. 140, paras. 537-539.

31. Mr. Estrin thereby places this Arbitral Tribunal in the untenable position of performing the role of an appellate Canadian court in order to determine the validity of his jurisdictional submissions.

D. RELEVANT CONSIDERATIONS

32. For clarity in the balance of my Report, some factual background is necessary. In addition, as experienced project counsel, several key facts would affect my expectations for and my approach to an environmental assessment of a project like the Whites Point Project.

33. First, as I discussed in Part I of the my Report, decisions made by project proponents early in the regulatory process can affect matters such as the scope of environmental assessment and the timing of and process by which needed regulatory approvals are issued. In this case, the Whites Point Project was initiated several years prior to the commencement of the Joint Review Panel proceedings under the *CEAA* and involved business partners of and predecessors to Bilcon. Nova Stone was the original lessee of the proposed site of the Whites Point Project and filed the initial 3.9 ha quarry application for the Project. Nova Stone later partnered with Bilcon to form Global Quarry Products ("GQP").[22] It was GQP that initiated the environmental assessment and other regulatory applications for the Whites Point Project.[23] Subsequently, in August 2004, Bilcon advised the Canadian Environmental Assessment Agency ("CEA Agency") that the GQP partnership had dissolved and the leases to the property were assigned to Bilcon.[24] As a result, Bilcon became the sole Proponent of the Whites Point Project and so the initial permit for the 3.9 ha quarry became null and void.[25]

34. A second consideration was the physical and social setting of the Project. The Digby Neck is a relatively pristine area adjacent to the Bay of Fundy. It is not

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[22] Whites Point Project EIS, Plain Language Summary, p. 8, **Exhibit R-287**.
[23] Navigable Waters Protection Application: Whites Point Quarry Marine Terminal, January 8, 2003, **Exhibit R-133**; Letter from P. Buxton to D. McDonald, CEA Agency, January 28, 2003, enclosing Whites Point Quarry and Marine Terminal – Draft Project Description, **Exhibit R-137**; Letter from P. Buxton to D. McDonald, CEA Agency, March 10, 2003, enclosing Whites Point Quarry and Marine Terminal – Project Description, **Exhibit R-141**.
[24] Letter from P. Buxton, Bilcon, to J. Crepault, CEA Agency, August 17, 2004, **Exhibit R-94**.
[25] Letter from P. Buxton, Bilcon, to J. Crepault, CEA Agency, August 17, 2004, **Exhibit R-94**.

industrialized. Rather, the two dominant industries are fisheries and tourism, including activities such as whale watching; a very lucrative lobster fishery, as well as other fishery activity.[26] In September 2001, the United Nations Educational, Scientific and Cultural Organization ("UNESCO") recognized the area of southwest Nova Scotia, including Digby County, as a Biosphere Reserve pursuant to its Man and the Biosphere program.[27] A nearby area in the Bay of Fundy has also been recognized as a Right Whale Conservation Area,[28] and the Northern Atlantic Right Whale is an endangered species under federal legislation.[29] The fact that industrial activity like that proposed by the Whites Point Project would contrast sharply with the local community setting is an important consideration since it was likely to prompt greater public concern than for projects proposed in already industrialized areas. As noted in Part I of my Report, public concern can have an influence on the type of environmental assessment required under the *CEAA*. Also, a setting with unique environmental features may require special attention in completing an environment impact statement.

35. A third factor is the nature and sheer magnitude of the proposed "project" itself – in this case a combined quarry, processing plant and marine terminal with regular large ship loadings and major blasting activities. 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.[30] The aggregate was proposed to be extracted by drilling and blasting, followed by crushing, screening, washing and stockpiling at a processing plant on site, producing approximately 2 million tonnes of aggregate per year.[31] These operations were expected to take place year-round, with the aggregate then to be loaded by means of the marine terminal onto large bulk carrier ships and exported.[32] Thus, the proposed Project also included extensive marine terminal facilities, sufficient to handle 70,000 tonne bulk carrier ships, 230 metres in length.[33] The

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[26] Whites Point Project EIS, Volume VII, Chap. 9.3, pp. 69, 85, 102, **Exhibit R-488**.
[27] UNESCO, Biosphere Reserve Information, Canada Southwest Nova, **Exhibit R-460**.
[28] Whites Point JRP Report, Fig. 2, p. 56, **Exhibit R-212**.
[29] An endangered species under the federal *Species at Risk Act*, SC 2002, c. 29, at Schedule 1, Part 2, **Exhibit R-438**.
[30] Whites Point JRP Report, p. 1, **Exhibit R-212**.
[31] Whites Point JRP Report, p. 1, **Exhibit R-212**.
[32] Whites Point JRP Report, p. 1, **Exhibit R-212**.
[33] Whites Point JRP Report, p. 1, **Exhibit R-212**.

Project proposed to ship approximately 40,000 tonnes of aggregate weekly, 44 to 50 times per year, with each ship loading proposed to take approximately 12 hours.[34] The scale of this industrial activity and particularly the long term continuous nature of that activity amounts to something far more significant than a short term or small scale disruption of the local setting.

36. Fourth, there was vigorous local opposition to the Project. That fact alone could be expected to complicate and likely delay the approval process since the impact on the local community would be a significant factor in a government's decision whether or not to grant the requested approvals. Obtaining regulatory approvals in the face of public opposition can be challenging to any project proponent. Short term or limited scale disruptions to a community can be more manageable than permanent, large scale changes like the Whites Point Project. For instance, with projects such as pipelines, the most significant disturbance is during construction. After the pipeline is laid and buried, there is little ongoing disruption to the local community.

37. Fifth, approvals were required from both federal and provincial governments in order to carry out the Project. This fact was not adequately accounted for by Mr. Estrin, who appears so preoccupied with the *CEAA* and other federal requirements, that he fails to pay sufficient regard to the provincial approval requirements. The requirement for both federal and provincial approvals could be expected to affect the nature of the approval process and timelines as well as the scope of the subject matter to be examined in the course of the assessment. A closely coordinated or joint review process would be more efficient since the Project could not proceed without both the federal and provincial approvals.

E. MY DETAILED RESPONSE TO THE EXPERT OPINION OF MR. ESTRIN

38. In this Report, I have generally followed the outline of Mr. Estrin's Report. However, as many of Mr. Estrin's assertions appear in different parts of his Report, my responses similarly sometimes appear in more than one section of my Report.

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[34] Whites Point JRP Report, p. 1, **Exhibit R-212**.

39. Part I of my Report responds to the section of Mr. Estrin's Report entitled "Part I: What are a Quarry Proponents Reasonable Expectations for the Environmental Assessment Process?"

40. Part II of my Report responds to the section of Mr. Estrin's Report entitled "Part II: Comments on the WPQ Panel's Approach and Recommendations".

41. Part III of my Report responds to the section of Mr. Estrin's Report entitled "Part III: The Duty of the Governments Upon Receipt of the Panel Report".

42. Part IV of my Report responds to Bilcon's failure at the time of the assessment to seek remedies to any of the jurisdictional issues Mr. Estrin raises now, many years later, for the first time.

43. I will now deal with each in turn.

PART I: THE ENVIRONMENTAL ASSESSMENT PROCESS FOR THE WHITES POINT PROJECT WAS REASONABLE

44. The scope of project (including both the quarry and the marine terminal) and type of assessment (joint review panel) for the Whites Point Project were both reasonable and consistent with the relevant *CEAA* provisions. Mr. Estrin asserts that the process adopted for Whites Point Project was politically motivated[35] and inconsistent with that applied to similar projects.[36] He implies that no quarry project should be subjected to a review panel or a joint review panel process.[37] He also asserts that, in several respects, in the period prior to the Project's referral to the JRP, the federal government's exercise of statutory powers reflected choices which were "often made … that were least advantageous to the proponent,"[38] the implication being that the federal and Nova Scotia governments were prejudiced against Bilcon and were singling it out for discriminatory treatment. In so doing he specifically claims:

(i) there was "no reasonable basis"[39] to expect that a project such as the Whites Point Project could be subject to public hearings;

(ii) that the Whites Point Project should not have been reviewed as integrated, closely related physical works and undertakings (i.e., as a quarry and marine terminal);

(iii) that, prior to the referral of the Whites Point Project to a joint review panel, anti-American political motivations led government officials to make regulatory decisions in a manner that was least advantageous to the Proponent.

45. On a fair reading of what transpired in the Whites Point Project review process, I am unable to agree with Mr. Estrin. Based on my experience with environmental assessments and related project approvals, there was nothing irregular about the approach

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[35] Estrin, p. 11, para. 5.
[36] Estrin, p. 11, para. 5.
[37] Estrin, p. 11, paras. 1-4 and pp. 17-25, paras. 29-72.
[38] Estrin, p. 34, para. 108.
[39] Estrin, p. 11, para. 2.

adopted by federal and provincial authorities. There was a solid legal basis for subjecting any controversial project, including a quarry, to a public hearing. There was also a solid legal basis for considering all closely related components of the Whites Point Project – the quarry, processing facilities and the marine terminal – as a single project for the purposes of the environmental assessment. In sum, both the scope of project (including both the quarry and the marine terminal) and type of assessment (joint review panel) for the Whites Point Project were reasonable and in compliance with the relevant *CEAA* provisions. Finally, there was also a solid legal basis for the exercise of the other statutory powers prior to the referral of the Project to a review panel. In my view, there was no evidence of any anti-American bias on the part of the federal and provincial officials involved.

46. In this Part of my Report, I respond to all of the opinions set out in Part I of Mr. Estrin's Report. In so doing, I have divided my response into four sections.

47. In Sections 1, 2 and 3, I address Mr. Estrin's opinions regarding scope of project and type of assessment determinations in the Whites Point review as follows:[40]

(i) public concern is a legislated ground for referral to a review panel and contentious, "divisive"[41] projects are more likely to be assessed by way of a review panel or joint review panel, requiring public hearings;

(ii) the scope of the Whites Point Project for the purposes of the environmental assessment, which included both the quarry operations and the marine terminal, was reasonable and supported by legislative authority;

(iii) the referral of the Whites Point Project to a joint review panel was reasonable and indeed offered certain benefits to the Proponent.

48. In Section 4 of my Report, I address Mr. Estrin's view that the "procedure prior to the referral"[42] of the Whites Point Project to a joint review panel was "unusual and

[40] This section deals with sections 1.2, 1.3, 1.4, 1.5, 1.6(c) and 1.7 of Mr. Estrin's Report.
[41] Estrin, p. 32, para. 97.
[42] Estrin, p. 34, Heading 1.6.

unfair."[43] Here Mr. Estrin singles out several steps taken by the DFO, including: (a) the DFO's review of Nova Stone's blasting plans in relation to its proposed 3.9 ha quarry; (b) the DFO's ultimate determination that the 3.9 ha quarry required a *Fisheries Act*[44] authorization and consequently, an environmental assessment under the *CEAA* prior to the DFO being able to issue that authorization; and (c) the DFO's determination that, at minimum, the Whites Point Project would be subject to a comprehensive study level of assessment due to the fact that the marine terminal component fell within a class of projects set out in the *Comprehensive Study List Regulations* ("*CSLR*").[45]

49. I respond to Mr. Estrin's opinions as follows:[46]

(i) the DFO had a clear statutory mandate to review Nova Stone's blasting plans in relation to its proposed 3.9 ha quarry;

(ii) the DFO reasonably determined that Nova Stone's blasting plans for the 3.9 ha quarry required authorization under s. 32 of the *Fisheries Act*, and as a result, the 3.9 ha quarry in and of itself required an environmental assessment under the *CEAA*; further, the timing of and manner in which GQP (Bilcon's predecessor) initiated the environmental assessment process for the Whites Point Project left the DFO with no choice but to combine the environmental assessment of the 3.9 ha quarry with the Whites Point Project, pursuant to s. 5(1)(d) of the *CEAA*; and

(iii) the DFO's determination that the marine terminal component of the Whites Point Project was within the class of projects described in the *CSLR* and, therefore, was required to undergo, at minimum, a comprehensive study level of environmental assessment was consistent with past and present practice and applicable legislation and was not an error of law.

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[43] Estrin, p. 34, para. 109.
[44] R.S.C., 1985, c. F-14, **Exhibit R-82**.
[45] SOR/94-638, **Exhibit R-10**.
[46] This section deals with sections 1.6(a) and 1.6 (b) of Mr. Estrin's Report.

50. In brief, it is my opinion that there was nothing irregular or unfair about the steps taken by federal and provincial authorities, and certainly no evidence of a lack of even-handedness toward Bilcon, or its predecessors, prior to the referral of the Whites Point Project to a joint review panel.

1. "Public Concerns" and "Significant Adverse Environmental Effects" are a basis for referral to a Review Panel, resulting in Contentious Projects likely Requiring Hearings

(a) The Statutory Framework Makes Public Concern and the Potential for Significant Adverse Environmental Effects Relevant Considerations in Determining the Type of Environmental Assessment

51. Mr. Estrin is wrong to imply that a quarry can never be referred to a review panel and undergo a public hearing.[47] Rather, in determining the appropriate type of environmental assessment, the statute focuses upon whether the industrial activity in question might result in significant adverse environmental effects or whether public concerns exist in respect of that particular project.[48]

52. Mr. Estrin does not take sufficient account of the clear wording of the statute regarding the significance of public concern. For instance, both ss. 4(d) and 16(1)(c) of the *CEAA* makes it clear that public participation is a mandatory element of every environmental assessment under the *Act*, regardless of the type of assessment. Section 4 of the *CEAA* sets out the purposes of the *Act* and ss. 4(d) invokes ensuring opportunities for public participation in the environmental assessment process as one of those purposes:

> 4. The purposes of this Act are
>
> . . .
>
> (d) to ensure that there be an opportunity for public participation in the environmental assessment process.

53. Further, ss. 16(1)(c), which establishes the minimum information requirements for the *CEAA* environmental assessments, makes the consideration of public comments a mandatory requirement:

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[47] Estrin, p. 11, paras. 1-6.
[48] *CEAA*, ss. 20(1)(c), 23(b), 25, **Exhibit R-1**.

> 16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:
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> …
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> (c) comments from the public that are received in accordance with this Act and the regulations;

54. At the time of the Whites Point Project environmental assessment, even where a responsible authority initially may have believed public hearings were not necessary and proceeded to assess a project by way of screening or comprehensive study, the Act allowed the responsible authority to refer the project to a panel review after receiving a screening (*per* ss. 20(1)(c)) or a comprehensive study report (*per* ss. 23(b)) if it is apparent that "public concerns" or the risk of significant adverse environmental effects warranted a public review. I will refer to this elevation of the type of assessment to a panel or joint panel review as "bumping".

55. Section 25 of the *CEAA* also expressly allows a responsible authority to "… at any time …" request that the federal Minister of Environment "refer" a project up to a review panel where it believes "public concerns warrant" it or where significant adverse environmental effects may result. For example, a project involving large-scale quarrying, bi-weekly blasting, weekly marine shipments of aggregate for over 50 years would potentially affect species at risk, fishers, the local community, and eco-tourism to a far greater extent than would small-scale quarrying, and marine jetty construction that was completed within only a few months.[49]

56. Subsection 34(b) of the *CEAA* requires that a review panel "… hold hearings in a manner that offers the public an opportunity to participate in the assessment." In the case of a bump up to a joint review panel, the screening or comprehensive study process would have to be terminated and a review panel process would have to be initiated from the beginning.

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[49] Similarly, other projects such as LNG terminals do not have the same environmental impact due to the absence of features that are present in a quarry such as ongoing blasting, continuous rock crushing, heavy equipment loading and transport, airborne dust, noise and associated surface and subsurface disturbances.

57. From a review of the federal legislation alone, therefore, it is clear that the existence of public concerns and the potential for significant adverse effects are critical factors in determining whether a review panel and a public hearing are required.

58. An example of a project being "bumped" up to a review panel in the middle of a comprehensive study was the GSX Canada Pipeline Project (also known as the Georgia Strait Pipeline), a gas pipeline from the United States to the southern tip of British Columbia (near Victoria). This project was assessed a few years prior to the Whites Point Project. On March 7, 2000, Georgia Strait Crossing Pipeline Limited filed preliminary submissions with the NEB to initiate the environmental assessment process under the *CEAA*.[50] The responsible authorities for the project, the NEB and the federal DFO, initially contemplated that the environmental assessment would proceed as a comprehensive study.[51]

59. The NEB held public meetings between June 26, 2000 and July 29, 2000 for the benefit of those persons interested in learning about the environmental assessment and regulatory review. Separate meetings with First Nations were also held in early August 2000.[52] Due to growing public opposition to the project, however, the comprehensive study was aborted after seven months, and the assessment was bumped to a joint review panel on October 4, 2000 in response to a request from the NEB as responsible authority.[53]

60. Considerable disruption in the process occurred thereafter since the comprehensive study assessment had to be suspended until all procedural aspects of a panel review were put in place. For instance, the agreement for the establishment of the review panel for the

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[50] Memorandum of Understanding on Assessment Process for the Georgia Strait Pipeline Project between National Energy Board, Department of Fisheries and Oceans and Environmental Assessment Office of British Columbia, signed April 14, May 3, and May 18, 2000, **Exhibit R-409**.

[51] Memorandum of Understanding on Assessment process for the Georgia Strait Pipeline Project between National Energy Board, Department of Fisheries and Oceans and Environmental Assessment Office of British Columbia, signed April 14, May 3, and May 18, 2000, **Exhibit R-409**.

[52] CEA Agency, News Release: Georgia Strait Crossing Pipeline Project Referred to Environmental Assessment Panel, October 4, 2000, available at: http://www.ceaa.gc.ca/default.asp?lang=En&xml=1EEA9D4F-B15B-4C3C-838E-75132EC7865B, **Exhibit R-424**.

[53] CEA Agency, News Release: Georgia Strait Crossing Pipeline Project Referred to Environmental Assessment Panel, October 4, 2000, available at: http://www.ceaa.gc.ca/default.asp?lang=En&xml=1EEA9D4F-B15B-4C3C-838E-75132EC7865B, **Exhibit R-424**.

GSX pipeline project was not finalized until September 20, 2001.[54] The Panel subsequently held 11 public consultation sessions to seek public input on the hearing process alone.[55] As a result of those sessions, the Panel significantly revised its issues list for the hearing and initiated a further comment process on the newly proposed issues, again delaying the environmental assessment process.[56] The public hearing for the project was not commenced until late February 2003, and the joint review panel did not release its report until July 3, 2003. Acknowledging the public outcry at the outset could have avoided the disruption and lost time due to the aborted comprehensive study process.

61. Contentious projects can be subject to a different level of assessment than non-contentious projects. In this respect, the federal legislation is not inconsistent with the Nova Scotia *Environment Act*.[57] The type of project or the type of industrial activity *per se*, therefore, is not determinative of whether a public hearing will be required. The presence or absence of public concerns or the likelihood of significant adverse environmental effects is what makes the difference.

62. In fact, it is common that the same types of project are subjected to different types of review under the *CEAA*. In my experience, LNG plants have been subjected to screenings (Bear Head LNG[58]); comprehensive studies (Kitimat LNG[59]; Canaport LNG[60]); and joint panel reviews (Rabaska LNG[61]; Gros Cacouna LNG[62]). In my experience, pipelines have been subjected to screenings (M&NP Point Tupper Lateral); comprehensive studies (M&NP Halifax and Saint John laterals); panel reviews (Brunswick Pipeline); and joint panel reviews (Sable/M&NP Mainline; Mackenzie Valley Gas Pipeline). For

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[54] GSX Canada Pipeline Project, Joint Review Panel Report, July 2003, p. 9, **Exhibit R-407**.
[55] GSX Pipeline JRP letter to all parties, January 31, 2002, **Exhibit R-408**.
[56] GSX Pipeline JRP letter to all parties, January 31, 2002, **Exhibit R-408**.
[57] S.N.S. 1994-95, c. 1 (see sections 34, 38 and 44), **Exhibit R-5**.
[58] Strait of Canso Liquefied Natural Gas Marine Wharf, Screening Environmental Assessment Report, July 12, 2004, **Exhibit R-335**.
[59] Kitimat LNG Terminal Project Assessment Report and Comprehensive Study Report, April 13, 2006, **Exhibit R-412**.
[60] Irving Oil Limited, Liquefied Natural Gas Marine Terminal and Multi-Purpose Pier Comprehensive Study Report, March 23, 2004, **Exhibit R-410**.
[61] Rabaska Project – Implementation of an LNG Terminal and Related Infrastructure: Joint Review Panel Report, May 2007, **Exhibit R-432**.
[62] Cacouna Energy LNG Terminal Project: JRP Report, November 2006, **Exhibit R-400**.

quarries, therefore, it is not reasonable to conclude that only screenings or comprehensive studies will apply as Mr. Estrin appears to suggest at section 1.3 of his Report.

63. One of the principal distinctions between the Whites Point Project and the Aguathuna, Belleoram and Tiverton projects cited by Mr. Estrin[63] as comparator projects, is the absence of public concern. For example, in the case of Belleoram, no letters of concern were received from the public for the project during the 34-day public consultation period, and most public participants interviewed during the public consultation process said they felt the project would be beneficial for the area's economy.[64] A conclusion in the Aguathuna comprehensive study report was that there was no indication that public concern warranted further assessment through a review panel.[65] Finally, in the case of Tiverton, the proposed work did not raise local opposition. In addition, there were multiple other factors which affected the potential for significant adverse effects that differentiate Tiverton from the Whites Point Project.[66] For the sake of completeness, and to rebut Appendices E, F, and G of Mr. Estrin's Report, I attach to my own Report (Appendices "2", "3" and "4") which detail why these projects are not appropriate comparators to the Whites Point Project.

(b) Regulatory Practice Confirms the Significance of Public Concern in Determining the Level of Environmental Assessment

64. Mr. Estrin asserts that public opposition to a project is "usually given no regard by the Environment Minister"[67] in the decision to establish a review panel.

65. I cannot agree. That assertion is contradicted not only by the *CEAA* itself but also by the cases relied upon by Mr. Estrin at page 18 of his report. While in the circumstances of those particular cases, "public concerns" in isolation were not considered to be a sufficient reason to adopt a review panel, those decisions nonetheless clearly indicate that

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[63] Estrin, pp. 17-25, paras. 29-72.
[64] Belleoram Marine Terminal Project Comprehensive Study Report, August 23, 2007, p. IV, **Exhibit R-357**; Estrin, Appendix E, p. 19.
[65] Mid Atlantic Minerals Inc. Aguathuna Quarry Development Environmental Impact Comprehensive Study Report, Executive Summary, **Exhibit R-418**.
[66] This lack of local opposition to the Tiverton project was acknowledged by Bilcon at page 144 (Volume VII) of the Whites Point Project EIS, **Exhibit R-489**.
[67] Estrin, p. 17, para. 30.

"public concerns" are very much a matter which is and must be considered by the Minister. Circumstances certainly can warrant a responsible authority recommending that a Minister refer a project to a review panel. As previously noted, Mr. Estrin's assertion is difficult to reconcile with the *CEAA*'s emphasis on the significance of a project's impact on the public and the fact that Parliament specifically provided for a public hearing process in the event "public concerns" were found to exist.

66. For example, in *Cantwell v. Canada (Minister of the Environment)*[68], the Court stated:

> The concerns of the public regarding a proposal and its potential adverse environmental effects are important matters to be considered in assessing the proposal.

67. The Court further stated:

> I do agree that the level and extent of public concern ought to be an important factor considered by the Minister in his deliberations under s. 13 to determine whether a public review by a panel 'is desirable'. From the record it seems clear that this was an identified consideration, both in the assessment itself and in the covering memorandum and other documents before the Minister at the meeting on September 18. [69]

68. These passages illustrate both that public concern is an important factor in deciding whether a review panel should be established, and that the Minister in that case did consider the level of public concerns in his decision-making process. Accordingly, I cannot agree with Mr. Estrin that public concern is "… usually given no regard by the Environment Minister in making this decision."[70]

69. A further illustration of the importance of public concerns is provided by the Rabaska LNG Project. Here, the breadth of public concerns warranted a panel review. The responsible authorities for that project stated the following in the Environmental Assessment Track Decision Report for the Minister of Environment, dated October 8, 2004:

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[68] (1991), 41 F.T.R. 18 (T.D.), at para. 48, **Exhibit R-401**.
[69] *Cantwell v. Canada (Minister of the Environment), supra*, at para. 49, **Exhibit R-401**.
[70] Estrin, p. 17, para. 30.

> **8.0 Ability of the Comprehensive Study to Consider the Issues Raised in Relation to the Project**
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> The responsible authorities have considered the results of the public consultation on the environmental assessment scoping document for the Rabaska Project, and the comments made about the possibility of adverse environmental effects. The public was divided on whether a comprehensive study or a panel review was the best means of conducting the environmental assessment. In the specific circumstances of this project, given the extent and breadth of public concerns expressed during the consultations on the scoping document, the responsible authorities recommend jointly that a panel review be held for the environmental assessment of the Rabaska Project.[71]

70. The Minister of Environment, Stéphane Dion, accepted the responsible authorities' recommendation and referred the Rabaska Project to a review panel on January 20, 2005.

71. Further, in two additional cases relied upon by Mr. Estrin, *Vancouver Island Peace Society v. Canada*[72], and *Pippy Park Conservation Society Inc. v. Canada (Minister of Environment),*[73] the Federal Courts both stated that it was not for the Court to substitute its own assessment of the weight and nature of public concern and determine that a public review is or is not "desirable".

72. Canadian law, therefore, accords deference to responsible authorities and Ministers as to what level of "public concerns" warrants a public review. These cases illustrate the fallacy of Mr. Estrin's assertion that public concern is usually given no regard by the Minister in making this decision.

(c) There Was Substantial Evidence of Public Concern Regarding the Whites Point Project

73. There is no question that the White Point Project proposal generated significant public concern. There were hundreds of letters of opposition registered. As an indication of the intensity of local opposition to the Project, Bilcon or its predecessor initiated

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[71] Letter from K. Vollman, National Energy Board, to S. Dion, Minister of Environment, October 27, 2004, enclosing "Rabaska Project: Environmental Assessment Track Decision Report for the Minister of Environment" prepared by the National Energy Board, Fisheries and Oceans Canada, Transport Canada, The Canadian Transportation Agency, October 8, 2004, p. 7, **Exhibit R-431**.

[72] *Vancouver Island Peace Society v. Canada*, [1992] 3 F.C. 42 (T.D), at para. 7, **Exhibit R-442**.

[73] *Pippy Park Conservation Society Inc. v. Canada (Minister of Environment)* (1994), 86 F.T.R. 255 (T.D.), at para. 17, **Exhibit R-427**.

lawsuits against two members of the public who were vocal opponents of the Project.[74] These public concerns and the media attention relating to them were discussed in a number of DFO briefing memoranda to the Minister.[75] Accordingly, the DFO did consider public concerns when deciding to recommend to the Minister of Environment the referral of the Whites Point Project to a review panel.

74. In the case of the Whites Point Project, the Minister of Fisheries and Oceans was clearly briefed as to the nature and extent of public concern. Accordingly, he determined that a public review was desirable.[76] That was a fair and reasonable thing to do in the circumstances.

75. On the basis of the foregoing, it appears that the decision to refer the Whites Point Project to a review panel was soundly based in law and was reasonable in the circumstances. An experienced practitioner should not have been surprised that a contentious project would be subjected to a public hearing panel review.

2. The Decision to Refer the Whites Point Project to a Joint Review Panel was Reasonable and Offered Benefits to the Proponent

76. Mr. Estrin describes the decision to refer the Whites Point Project to a Joint Review Panel as "unusual"[77] and implies that the process adopted was part of an "agenda by Canada and/or Nova Scotia to hinder or stop the WPQ project."[78] He appears to be of the opinion that referring the Project to a joint review panel put the Proponent at a clear disadvantage, that government officials perceived that disadvantage and that this was the primary motivating factor in making the referral.[79]

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[74] See, for example, *Chronicle Herald*, "Quarry Backers sue prof, 83", G. Delaney, January 18, 2008, **Exhibit R-430**; Email from B. Hood, DFO, to P. Zamora, DFO, October 27, 2003 attaching newspaper article: "Mining Company suing grandmother", **Exhibit R-406**.

[75] See, for example, Memorandum for the Minister – Proposed Rock Quarry and Shipping Terminal, from P. Harrison, DFO, to R. Thibault, Minister of Fisheries and Oceans, January 14, 2003, **Exhibit R-65**; Memorandum for the Minister – Proposed Rock Quarry and Shipping Terminal, from P. Harrison, DFO, to R. Thibault, Minister of Fisheries and Oceans, March 13, 2003, **Exhibit R-66**.

[76] Memorandum for the Minister – Referral of Proposed Whites Point Quarry and Shipping Terminal to the Minister of the Environmental for a Panel Review, from L. Murray, DFO, to R. Thibault, Minister of Fisheries and Oceans, June 25, 2003, **Exhibit R-72**.

[77] Estrin, pp. 51-57, paras. 185-210.

[78] Estrin, p. 2.

[79] Estrin, p. 2.

77. In my view, there is nothing either in the provisions of the *CEAA*, the Nova Scotia *Environment Act*, or the actual decision to refer the Whites Point Project to a joint review panel that lends credence to Mr. Estrin's claims. The decision to refer the Whites Point Project to a joint review panel was, in my view, lawful, logical and even resulted in certain procedural benefits to the Proponent.

78. First, the statutory bases for referral to review panel – the potential for significant adverse environmental effects and significant public concerns – were clearly engaged by this Project.

79. In addition, from the outset the Proponent was put on notice that the Project could be referred to a review panel:

> It is strongly advised that GQP engage a consultant with extensive experience in conducting environmental assessments under *CEAA* as early in the process as possible. Experience has proven this to be more efficient and timely approach with projects of this size, especially when conducting a CS and preparing a CSR. Also, please be advised that, although the type of assessment being used for this project is a CS, *CEAA* (s. 23) includes the provision that the project could be referred to a mediator or review panel.[80] (emphasis supplied)

80. In these circumstances, the Proponent was aware throughout that its Project could be referred to a panel review. The fact that a component of the Project may have been on the comprehensive study list was no guarantee that public hearings would not be required. As noted above, the project could be "bumped" up to a panel review at any time.[81] The public concern surrounding the Whites Point Project and the potential for significant adverse environmental effects had been amply demonstrated, providing a solid legal foundation for the referral.

81. The fact the referral was made to a joint review panel[82] as opposed to a review panel[83] also cannot be construed as unfair or prejudicial to the Proponent. A review panel performs the environmental assessment function required under federal law. A joint

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[80] Letter from P. Zamora, DFO, to P. Buxton, April 14, 2003, **Exhibit R-54**.
[81] See *CEAA*, s. 25, **Exhibit R-1**.
[82] *CEAA*, s. 40, **Exhibit R-1**.
[83] *CEAA*, s. 29, **Exhibit R-1**.

review panel can simultaneously perform both the federal and provincial environmental assessment functions as well as the same functions required by certain other listed authorities. The Whites Point Project Joint Review Panel discharged the environmental assessment requirements under federal law as well as the requirements under the Nova Scotia *Environment Act*. As I will discuss later in my Report, this latter aspect of the Whites Point Project Joint Review Panel is not fully taken into account by Mr. Estrin.

82. The reality is that for most projects, proponents will have to obtain both provincial and federal approvals.

83. Referral to a joint review panel involves combining two separate environmental assessment processes into one; in effect, a one-stop-shopping approach. Section 40 of the *CEAA* and s. 47 of the Nova Scotia *Environment Act* clearly authorize that approach.

84. In Bilcon's case, approval of the marine terminal but not the quarry, or approval of the quarry but not the marine terminal, would not allow the Project to proceed. Before federal and provincial approvals for the Whites Point Project could issue, however, separate federal and provincial environmental assessments were first required.[84] This situation entails the risk of duplication, something the *CEAA* is expressly intended to avoid:

> *Purposes*
>
> 4. The purposes of this Act area
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> . . .
>
> (b.1) to ensure that responsible authorities carry out their responsibilities in a coordinated manner with a view to eliminating unnecessary duplication in the environmental assessment process; …[85]

85. Mr. Estrin appears to be of the opinion that two separate assessments of the Whites Point Project – one under the *CEAA* and another the Nova Scotia *Environment Act* or perhaps some coordinated, but not joint process, would have been advantageous to Bilcon.

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[84] *CEAA*, s. 5, **Exhibit R-1**; Nova Scotia *Environment Act*, ss. 32 and 50, **Exhibit R-5**.
[85] *CEAA*, s. 4, **Exhibit R-1**.

86. Problems can arise with separate, concurrent assessments. There is a risk of duplication; there is the risk that the two jurisdictions might be provided different or inconsistent information; there is the risk of information gaps as amongst the two jurisdictions; there is the risk of attendant delays and inconsistent approvals; as well as the time and expense of managing (and possibly reconciling) the two separate processes.

87. The recent Prosperity Federal Review Panel Report devoted an entire section of its Report to ". . . the challenges resulting from the application of two separate, but coordinated processes, …".[86] Amongst them were divergent timing; incomplete record and review of both processes since the provincial and federal impacts respectively were absent from the other's review; inconsistent application of principles or factors; public consultation inconsistencies; inconsistent records for federal or provincial authorities to base a decision on whether to enable the project to proceed.

88. An experienced practitioner, therefore, would be aware of the real benefit of a single one-stop-shopping process designed to assemble the facts necessary on which both the federal and provincial regulators could base their decisions.

89. At the time of the Whites Point Project environmental assessment, both the Nova Scotia and federal governments had recent experience with such a coordinated one-stop-shopping approach. Only a few years prior to the Whites Point Project both governments had agreed to conduct a joint panel review for the Sable/M&NP Projects, which satisfied the federal and provincial aspects of those two projects as well as the regulatory requirements of the NEB and CNSOPB. I acted as lead regulatory counsel for the proponents of those projects. Dr. Robert Fournier acted as Chair of the five-person panel appointed to conduct the related environmental assessment.

90. As indicated in Part B of my Report, the Sable Project consisted of the drilling, construction and operation of offshore wells and production platforms, subsea gathering lines, a long gas transmission pipeline to shore and a large onshore gas processing plant near Goldboro, Nova Scotia. The M&NP Project was a gas pipeline from the Goldboro

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[86] Prosperity Gold-Copper Mine Project, Taseko Mines Ltd. British Columbia, Report of the Federal Review Panel, July 2, 2010, s. 4.5, p. 30, **Exhibit R-429**.

processing plant to the U.S. border, where it connected with U.S. facilities to deliver gas to the heart of the New England market. The proponents of these projects were owned by a combination of U.S. and Canadian interests.

91. The Sable/M&NP Projects required a myriad of environmental assessments and regulatory approvals. Given that each jurisdiction required a public review of both projects, an opportunity emerged to conduct a joint public review as a means of streamlining the regulatory process. The joint review panel assessment of the Sable/M&NP Projects met the requirements of the *CEAA*, the Nova Scotia *Environment Act,* and the *National Energy Board Act*,[87] and the requirements of the CNSOPB and their appointed Commissioner under the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*[88] and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act.*[89] Rather than conducting multiple hearings and assessments, there was real benefit to having a single joint review panel undertake a single assessment that met all of these environmental assessment and regulatory process requirements.

92. Given their recent experience with the joint review panel process, it was not unreasonable for the federal and Nova Scotia governments to select that process option for the Whites Point Project. In doing so, neither level of government abdicated their regulatory jurisdiction. Rather, they simply combined the fact gathering and analysis into a single process upon which that regulatory jurisdiction later would be exercised.

93. From a proponent's perspective, the joint review panel process eliminated duplication, avoided an uncoordinated review, and eliminated the late referral risk associated with public concerns arising in the course of a screening or comprehensive study as had occurred in the GSX Pipeline Project, which I discussed above at Part I, Section 1(a) of my Report.

94. As proponents' counsel, I have sought out a similar one-stop-shopping process for other projects such as the closely related Millennium West and Millennium pipelines. The

[87] R.S.C. 1985, c. N-7.
[88] S.C. 1988, c. 28.
[89] S.N.S. 1987, c. 3.

Millennium West Pipeline was owned by an affiliate of Westcoast Energy, St. Clair Pipelines (1996) Ltd. It was to be constructed to extend from Dawn, Ontario to the shore of Lake Erie near Point Patrick, Ontario, where it would connect to the Millennium Pipeline. The Millennium Pipeline proponent was TransCanada PipeLines Limited. It was to be constructed underwater across Lake Erie to the United States. The proponents here requested a panel review from the outset to avoid the risk of the project later being bumped from a comprehensive study to a panel review.[90] The NEB accepted the proponents' request and referred the matter to the Minister for a panel review.[91] The joint review panel approach offered a degree of scheduling certainty by avoiding the risk of a comprehensive study being later derailed by public concern and re-started as a review panel. In the Millennium Pipelines Project situation, it also avoided a project splitting challenge by having both interconnected, but separately owned, pipelines reviewed in the same process in much the same way as the Sable/M&NP Projects were assessed. All components of the Whites Point Project, it should be remembered, would have been commonly owned and commonly operated.

95. Mr. Estrin's allegation that referral was the "product of political expediency"[92] which was "primarily motivated by subjective political criteria, rather than by requirements of sound environmental decision-making"[93] therefore, is difficult to sustain. Law, logic and convenience strongly recommended a one-stop-shopping approach facilitated by a joint panel review.

3. The Scope of the Project Was Reasonable

96. Mr. Estrin has taken issue with the project scoping for Whites Point Project[94] because it included all components of the Whites Point Project, not just the marine terminal.

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[90] Millennium Pipelines, Letter from TransCanada Energy to NEB, November 27, 1998, **Exhibit R-421**; Millennium Pipelines, Letter from Westcoast Energy to NEB, November 27, 1998, **Exhibit R-422**; Millennium Pipelines, Letter from TransCanada Energy to NEB, December 10, 1998, **Exhibit R-420**.
[91] Millennium Pipelines, Letter from NEB to the parties, December 15, 1998, **Exhibit R-419**.
[92] Estrin, p. 30, para. 93.
[93] Estrin, p. 11, para. 5.
[94] Estrin, pp. 48-51, paras. 170-184.

97. As discussed in more detail below, GQP submitted an application on January 6, 2003 for a ss. 5(1) authorization under the *NWPA*[95] to construct the marine terminal for the Whites Point Project.[96] An application for a ss. 5(1) *NWPA* approval triggers the need for an environmental assessment under the *CEAA* – that is, prior to issuing a ss. 5(1) *NWPA* approval, the DFO, as responsible authority, was required to conduct an environmental assessment under the *CEAA*. Based on the Project Descriptions filed by GQP in January and March 2003,[97] the DFO also concluded that the Whites Point Project was likely to result in the HADD of fish habitat, another *CEAA* trigger.[98] Based on the information provided by GQP, DFO made the initial conclusion that the "scope of the project" for the purpose of the environmental assessment of the Whites Point Project would "include the construction, installation, operation, maintenance, modification, decommissioning and abandonment of the quarry and marine terminal." [99]

98. Mr. Estrin characterizes the DFO's initial determination to include the quarry in the scope of the Whites Point Project, as opposed to only including the marine terminal, as "highly unusual."[100] He further states that ". . . [t]he regulation of the quarry, including its environmental impacts, was a matter of exclusive provincial jurisdiction. . . ."[101]. I cannot agree.

99. In my opinion, the exercise of the discretion respecting project scope in the case of the Whites Point Project was in full accord with the law and, in fact, was of some assistance to the Proponent in terms of shielding it against potential appeal risks.

100. There are several factors relevant to these aspects of Mr. Estrin's allegations:

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[95] R.S.C. 1985, c. N-22, **Exhibit R-297**.
[96] Navigable Waters Protection Application: Whites Point Quarry Marine Terminal, January 8, 2003, **Exhibit R-133**.
[97] Letter from P. Buxton to D. McDonald, CEA Agency, January 28, 2003, enclosing Whites Point Quarry and Marine Terminal – Draft Project Description, **Exhibit R-180**; Letter from P. Buxton to D. McDonald, CEA Agency, March 10, 2003, enclosing Whites Point Quarry and Marine Terminal – Project Description, **Exhibit R-181**.
[98] Letter from P. Zamora, DFO, to P. Buxton, April 14, 2003, p. 3, **Exhibit R-54**.
[99] Letter from P. Zamora, DFO, to P. Buxton, April 14, 2003, p. 2, **Exhibit R-54**.
[100] Estrin, p. 50, para. 184.
[101] Estrin, p. 50, para. 182.

(i) First, clear statutory authority existed to justify including the entire Project in the scope of project for the purpose of the environmental assessment, rather than scoping as the Project just one of its individual components. Indeed, the Proponent itself considered all components of the Project to be interrelated and integral to each other, and consistently described the Project as being comprised of both the quarry and marine terminal.

(ii) Second, decisions on project scoping were prone to appeal, especially at the time of the scoping decisions on the Whites Point Project. From a practitioner's perspective it would have been important to minimize this appeal risk. Given the controversy surrounding the Whites Point Project, there was a greater risk that an unreasonably narrow scope decision would be challenged in court than would be the case for a non-contentious project.

(iii) Third, the final determination on the "scope of the project" for the Whites Point Project was not made by DFO. Rather, the Terms of Reference signed by the Federal Minister of Environment and the Nova Scotia Minister of Environment and Labour determined the scope of the Project for the purposes of the joint review panel process. Mr. Estrin's complaints regarding the DFO in this regard, therefore, are misplaced. The decision to refer the project to a joint review panel meant that all components of the Project were now reviewed at the same time by the same panel satisfying the requirements of both federal and provincial legislation. Therefore, any complaints regarding the DFO's initial scoping determinations were rendered academic by the Project's referral to a joint review panel.

101. I discuss each of these aspects of the scoping issue, in turn, below.

(a) Mr. Estrin's Failure to Acknowledge Clear Statutory Authority to Scope the Entire Project for Review

102. I am of the view that the DFO's initial scoping determination to include both the marine terminal and quarry components was reasonable and in accordance with the governing legislation. Mr. Estrin fails to acknowledge the broad discretion vested in the

responsible authority and the Minister to scope the project. Section 15 of the *CEAA* provides:

> *Scope of project*
>
> (1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by
>
> (a) the responsible authority, or
>
> (b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority.
>
> *Same Assessment for related projects*
>
> (2) For the purposes of conducting an environmental assessment in respect of two or more projects,
>
> (a) the responsible authority, or
>
> (b) where at least one of the projects is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority,
>
> may determine that the projects are so closely related that they can be considered to form a single project.
>
> *All proposed undertakings to be considered*
>
> (3) Where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work that is proposed by the proponent or that is, in the opinion of
>
> (a) the responsible authority, or
>
> (b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority,
>
> likely to be carried out in relation to that physical work.

103. It is the responsible authority, or the Minister of Environment on the responsible authority's advice, that determines the scope of the project; not the proponent. The statute clearly provides that related projects can be included in the same assessment if they are so closely related as to be considered to form a single project.

104. Mr. Estrin asserts that there were no "triggers" for an environmental assessment under the *CEAA* for the quarry component of the Whites Point Project. Rather, he asserts that the need for an assessment under the *CEAA* arose solely from the construction of the marine terminal components.[102] He further asserts that "[h]ad the proposal been to build only a quarry, with no dock, … *there would have been no need for a federal EA at all*." In my view of the facts, this statement is not correct.

105. Mr. Estrin characterizes DFO and CEA Agency correspondence[103] as "dithering"[104] over the scope of the Whites Point Project. In my opinion, the related correspondence and documents identified in Mr. Estrin's Report illustrates a genuine attempt by government officials to objectively analyze whether their regulatory responsibilities were triggered by the Project.

106. It is logical to expect that a responsible authority's perspective about project scope could evolve as more information, including field studies, became available about a proposed project.

107. It is clear from correspondence between the federal and provincial departments that an effort was underway to determine the nature and extent of their regulatory responsibilities.[105] 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.*[106]

108. In the case of the Whites Point Project, there was clearly a reasonable basis for DFO to consider the existence of other federal triggers. The potential for storm run-off washing blasting residue, silt and debris into the near-shore contaminating or destroying fish habitat was not merely a speculative concern. In late May 2003 (about one month prior to the date it sent the referenced letter to NSDEL), DFO responded to complaints regarding a sediment spill from the area of the Whites Point Project into the Bay of Fundy. DFO issued verbal directives to Nova Stone and Mr. Buxton to prevent recurrence of such

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[102] Estrin, p. 50, para. 181.
[103] Estrin, pp. 48-50, paras. 170-179.
[104] Estrin, p. 48, Heading 1.6(c).
[105] See for example, Letter from P. Boudreau, DFO, to C. Daly, NSDEL, June 20, 2003, **Exhibit R-70**.
[106] Letter from P. Boudreau, DFO, to C. Daly, NSDEL, June 20, 2003, p. 1, para. 3, **Exhibit R-70**.

events.[107] Clearly, such impacts would be relevant to DFO's perspective on potential significant adverse project effects, possible regulatory approvals required and how such impacts might affect a future environmental assessment as well.

109. In his letter to the federal Minister of Environment asking that the Project be referred to a joint review panel, the Minister of Fisheries and Oceans confirmed that DFO was of the opinion that it likely did have a *CEAA* trigger in relation to the quarry components of the Project:

> On March 24, 2003, the Maritimes regional office of Fisheries and Oceans Canada (DFO) received a project description from Global Quarry Products for a project proposal at Whites Point, Digby County, Nova Scotia. The proposal consists of a 155 ha basalt quarry and associated deepwater marine terminal.
>
> . . .
>
> On the basis of an analysis of the information received from the proponent, DFO has concluded that various components of the proposed project will likely require authorizations under subsection 35(2) of the *Fisheries Act* to harmfully alter, disrupt or destroy fish habitat, and section 32 to destroy fish by means other than fishing. Our analysis has also determined that the marine terminal portion of the project will interfere substantially with navigation, thereby requiring formal approval under subsection 5(1) of the *Navigable Waters Protection Act*.[108]

110. As is discussed in more detail below, the DFO had concluded that the blasting activities associated with the Project would require *Fisheries Act* authorizations.[109] Given that the land-based quarry activities of the Project did require *Fisheries Act* authorizations, and consequently an environmental assessment under the *CEAA*, even if one accepts that Mr. Estrin's characterization that the quarry was a separate project from the marine terminal (which I do not), there was clear jurisdiction pursuant to s. 15 of the *CEAA* for DFO to combine the assessments of the quarry and its associated blasting activities with that of the marine terminal.

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[107] NSDEL, Whites Point Project Hearing Undertaking #40 – Siltation Complaints, **Exhibit R-490**; Complaints to Minister Thibault's office regarding siltation incident of May 25, 2003, **Exhibit R-58**; Inspector's Direction issued by T. Wheaton, DFO, to Nova Stone, P. Buxton and B. Lowe, May 28, 2003, **Exhibit R-59**.

[108] Letter from R. Thibault, Minister of Fisheries and Oceans, to D. Anderson, Minister of the Environment, June 26, 2003, p. 1, **Exhibit R-73**.

[109] Letter from P. Zamora, DFO, to P. Buxton, May 29, 2003, **Exhibit R-55**; Letter from P. Zamora, DFO, to P. Buxton, April 14, 2003, **Exhibit R-54**.

111. Regardless, even if there is a question as to whether *Fisheries Act* authorizations were required for the land-based blasting activities of the Whites Point Project, in my opinion, the DFO's decision that the scope of the Whites Point Project included both the quarry and marine terminal components was entirely reasonable under s. 15 of the *CEAA*. Even if GQP, or later Bilcon as Project Proponent, had described the components of the Whites Point Project as discrete from one another, and the evidence indicates that clearly it did not,[110] the responsible authority and the Minister were authorized, and it would have been reasonable for them to have included the other components within the scope of the project under assessment.

112. In fact, the very actions of GQP, the Project Proponent at the time, contradict Mr. Estrin's proposition. GQP consistently described all components of the Whites Point Project as a single project. In these circumstances, the responsible authority and the Ministers were fully justified in considering the components to form a single project.

113. From the outset, it was clear that the Proponent intended the marine terminal and quarry components of the project to operate as a single project rather than discrete, standalone works and undertakings and that the economic viability of the quarry was dependent on being able to ship the produced aggregate to American markets.[111] Further, the Proponent's own Project Descriptions described the Whites Point Project as a single enterprise consisting of on land quarrying components and a marine terminal for shipping the aggregate to market.[112] Selected excerpts from those documents appear below:

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[110] For example, see Letter from P. Buxton to D. McDonald, CEA Agency, January 28, 2003, enclosing Whites Point Quarry and Marine Terminal – Draft Project Description, **Exhibit R-180**; Letter from P. Buxton to D. McDonald, CEA Agency, March 10, 2003, enclosing Whites Point Quarry and Marine Terminal –Project Description, **Exhibit R-181**.

[111] Minutes of Meeting of Community Liaison Committee, July 18, 2002, **Exhibit R-299**; Minutes of Meeting of Community Liaison Committee, January 9, 2003, **Exhibit R-299**.

[112] Letter from P. Buxton to D. McDonald, CEA Agency, January 28, 2003, enclosing Whites Point Quarry and Marine Terminal – Draft Project Description, **Exhibit R-180**; Letter from P. Buxton to D. McDonald, CEA Agency, March 10, 2003, enclosing Whites Point Quarry and Marine Terminal – Project Description, **Exhibit R-181**.

Whites Point Quarry & Marine Terminal

1. General Information

General

The project is a proposed basalt quarry with a marine terminal located on Digby Neck in Digby County, Nova Scotia. The name of the project is the Whites Point Quarry and is located as shown on Maps 1, 2, and 3.

. . .

2. Project Information

Project Components/Structures

The main components of the project include the physical plant for construction aggregate processing and a marine terminal for ship loading of the aggregate.

. . .

The quarry property comprises approximately 380 acres. Land based infrastructure would occupy approximately 27 acres while marine based infrastructure would occupy approximately 10 acres. Quarrying could potentially take place on 300 acres. Quarry production would be approximately 2 million tons of processed aggregate per year. Approximately 10 acres of new quarry would be opened each year with restoration of previously quarried areas every five years.

The life of the quarry is projected to be 50 years.

Project Activities

Land based and marine based construction is expected to take one year and take place simultaneously. Quarry operation is expected to extend over 50 years and decommissioning to take one year. Site restoration will be continuous throughout the 50-year life of the project.

The land based quarry operations are expected to be year round with aggregate stockpiled for ship loading once per week. Approximately 40,000 tons of aggregate would be produced for loading each week. Ship loading is expected to take 10 hours into ships similar to the CSL Spirit with a length of approximately 625 feet.

. . .

Resource / Material Requirements

Drilling and blasting of basalt rock, loading, hauling, crushing, screening, washing and stockpiling of rock aggregate will be done on-site.

. . .

Stockpiled aggregate materials will be transported by conveyor systems to the ship loader and loaded into the holds of the vessel.

. . .

As mentioned previously, on-site excavation will involve approximately 2 million tons of basalt rock per year, which will then be transported by

> water to markets: The quantity of "fill" removed over the life of the project could reach 100 million tons.
>
> Explosives will be used during quarry operations with blasting approximately once every two weeks when the quarry is in full production. … (emphasis supplied)

114. The *Responsible Authorities Guide: The Manager's Guide*[113] provided guidance to responsible authorities conducting environment assessments with respect to establishing the scope of a project under the *CEAA* at the time of the DFO's consideration of the scope of the Whites Point Project. It suggested the use of the principal project/accessory test to ensure consistency in scope of project determinations. According to the principal project/accessory test, the scope of a project should include other physical works or physical activities that are "accessory" to the principal project. The *Responsible Authority's Guide* suggested two criteria to determine what constitutes an accessory to the principal project: interdependence and linkage. 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. Furthermore, if the decision to undertake the principal project makes a decision to undertake another physical work or activity inevitable, then that other physical work or activity may also be considered as a component of the scoped project. This is also consistent with the Operational Policy Statement on The Scope of Environmental Assessment dated September 25, 1998.[114]

115. In my view, the Whites Point Project satisfied those criteria. The aggregate was intended to be shipped by sea to Bilcon's U.S. markets. Roads were not to be used to transport aggregate to local markets.[115] In fact, as early as its September 2002 Project Description, the Proponent specifically states "[a]ll the aggregate produced at the quarry will be shipped by water, thus eliminating truck traffic on local roads and through local

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[113] November 1994, **Exhibit R-434**. This Guide applied to environmental assessments under *CEAA* prior to the 2003 amendment by Bill C-9.

[114] CEA Agency, *Establishing the Scope of the Environmental Assessment*, OPS-EPO/1, September 25, 1998, **Exhibit R-14**.

[115] Minutes of Meeting of Community Liaison Committee, July 18, 2002, **Exhibit R-299**; Minutes of Meeting of Community Liaison Committee, January 9, 2003, **Exhibit R-299**; Whites Point JRP Hearing Transcripts, June 16, 2007, 1T58:18-20 and 1T59:1-2, **Exhibit R-457**.

communities".[116] The production and marketing of all quarry supply, therefore, depended on the construction and operation of the processing and marine terminal and loading facilities and *vice versa*.

116. Based on the foregoing, in my opinion, the scope of the Whites Point Project for the purposes of the environmental assessment, which included both the quarry operations and the marine terminal, was reasonable and supported by legislative authority.

(b) Project Scoping Decisions were often subject to Challenge

117. As noted above, the determination of the scope of a project for the purposes of an environmental assessment under the *CEAA* was, at the time of the Whites Point Project, an uncertain legal issue. The fact that all components of the Whites Point Project were included within project scope, therefore, in my view, eliminated project splitting as ground for challenge.

118. More specifically, whether to scope a project narrowly or broadly under the *CEAA* was an issue rife with litigation in the late 1990s and early 2000s, including the period in which the project scope for the Whites Point Project was finalized. In the four years leading up to the scoping decision for the Bilcon project, at least six major court decisions were issued, setting out different perspectives and refinements on project scoping under the *CEAA*.

119. At the time of the Whites Point Project scoping decision, projects that were scoped more narrowly were under attack by public interest groups. For example, on February 6, 2003, prior to the Whites Point Project scoping decision, an environmental public interest group, Prairie Acid Rain Coalition ("PARC") applied for judicial review of a decision by the DFO, as the responsible authority, to narrowly scope an oil sands mining project proposed by TrueNorth Energy for the purposes of an environmental assessment under the *CEAA*. At issue was whether the "project" under review was the destruction of a single creek (Fort Creek) on the site of the proposed oil sands mine or the entire oil sands mine itself. The DFO chose to limit the scope of the "project" for the purposes of its review to

[116] Fax from H. MacPhail, NSDEL, to B. Coulter, DFO, November 20, 2002 attaching Whites Point Quarry – Draft Project Description, at p. 5 **Exhibit R-305**.

the destruction of Fort Creek because this was the undertaking and activity that required authorization under s. 35(2) of the *Fisheries Act*.

120. PARC's judicial review application argued that the DFO had erroneously interpreted the term "project" as it is defined in the *CEAA*. PARC maintained that the destruction of the Creek was an activity related to the physical work of constructing the oil sands mine and processing facilities, which meant that the entire physical works of the oil sands mine and processing facilities were the "project" subject to assessment under the *CEAA*.[117]

121. Accordingly, caution was warranted for project scoping decisions under the *CEAA* during this timeframe. Understandably, the DFO was mindful of the risk of challenge to its scoping determinations, particularly on contentious projects.[118]

122. For the proponent, the risk was that the entire assessment might be completed, but the project scope decision would later be upset by the courts, requiring the entire process to be started all over again on the basis of the broader scope.

123. To assist in this Tribunal's understanding of the extent of the evolving judicial landscape surrounding "scope of project" determinations at the time of the Whites Point Project environmental assessment, a more complete discussion of the case law appears in Appendix "5" (Case Law Discussion on Scope of Project Determination Under *CEAA* Section 15) to my Report.

124. The project scoping issue was only recently resolved by the Supreme Court of Canada in *MiningWatch v. Canada (Fisheries and Oceans)*.[119] The outcome of that case favours broader rather than narrower project scoping, and indeed indicates the approach taken in determining the scope of project in the Whites Point Project environmental

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[117] On September 16, 2004, after the Whites Point Quarry scoping decision was made, the Federal Court (Trial Division) upheld the DFO's scoping decision: *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, (2004), 257 F.T.R. 212 (T.D.), **Exhibit R-218**, aff'd [2006] 3 F.C.R. 610 (CA). **Exhibit R-428**.

[118] Memorandum for the Minister, Referral of Proposed Whites Point Quarry and Shipping Terminal to the Minister of the Environment for a Panel Review, from L. Murray, DFO, R. Thibault, Minister of Fisheries and Oceans, June 25, 2003, **Exhibit R-72**.

[119] [2010] 1 S.C.R. 6 ("*MiningWatch*"), **Exhibit R-15**.

assessment was correct. In *MiningWatch*, the Supreme Court of Canada held that the minimum scope for the purposes of an environmental assessment under the *CEAA* is the project as proposed by the proponent.[120] The project as proposed by the proponent in this case was a gold and copper mine; the DFO therefore did not have jurisdiction to limit the scope of the project for the purposes of its review to only those components of the mine that specifically required a *Fisheries Act* authorization. Rather, the *CEAA* required the DFO to include the entire mine in the scope of the "project" for the purposes of the assessment. The Court further held that it is not open to a responsible authority to scope a project in a more limited way if the project as proposed appears in the *CSLR*.[121] The Court also noted that there is further discretion granted under ss. 15(2) of the *CEAA* for responsible authorities, when considering all matters in relation to the project as proposed, to combine related proposed projects into a single project for the purpose of assessment.[122]

125. The DFO's, and later the Minister of Environment's, decision to scope the Whites Point Project to include both the marine terminal and quarry components (while made several years before) was indeed consistent with the Supreme Court of Canada's direction on project scoping in *MiningWatch*. Had the two components of the Whites Point Project been "split", as suggested by Mr. Estrin, there would have been definite risk of litigation associated with such a decision. The risk to the Whites Point Project Proponent in that case would have been that the scoping decision was subject to judicial review and a reviewing court determining the scope of project way too narrow. The environmental assessment process would then have to be re-done to include the broader scope of project, including both the marine terminal and quarry.

(c) Scope of the Project was Determined in the Joint Review Panel Agreement to Satisfy both Provincial and Federal Requirements

126. Regardless of the DFO's determination of the "scope of the project" for the Whites Point Project, the responsibility for determining project scope actually rested with the federal Minister of Environment. Under ss. 15(1) of the *CEAA*, where a project is referred to a review panel, the scope of the project for the purpose of an environmental assessment

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[120] *MiningWatch*, para. 34, **Exhibit R-15**.
[121] *MiningWatch*, para. 34, **Exhibit R-15**.
[122] *MiningWatch*, paras. 39-40, **Exhibit R-15**.

is to be determined by the federal Minister of Environment, after consulting with the responsible authority:

> 15. (1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by
>
> (a) the responsible authority; or
>
> (b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority.

127. Pursuant to ss. 40(2) of the *CEAA*, the Federal Minister of Environment may enter into an agreement with another jurisdiction respecting the joint establishment of a review panel with that jurisdiction. In the case of the Whites Point Project, on August 11, 2003, the Federal Minister of Environment and Nova Scotia Minister of Environment and Labour announced a Draft Agreement to Establish a Joint Environmental Assessment Panel to review the proposal for the Whites Point Quarry and Marine Terminal Project (the "Draft JRP Agreement") and invited public comment on the same. [123] GQP was likewise encouraged by the CEA Agency to comment on the Draft JRP Agreement. [124]

128. The Draft JRP Agreement[125] established the scope of the project for the purposes of the *CEAA* environmental assessment. In the Draft JRP Agreement, "project" was defined as follows:

> "Project"
>
> means the Whites Point Quarry and Marine Terminal project, located near Digby, Nova Scotia, as described in Part I of the Appendix attached hereto.

129. Part I of the Appendix in the Draft JRP Agreement provided a "Project Description", which included all components of the Whites Point Project, including the

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[123] News Release: Whites Point Quarry and Marine Terminal: Draft Agreement Released for Public Comment on Joint Environmental Assessment Review Panel Process, August 11, 2003, **Exhibit R199**.
[124] Letter from S. Chapman, CEA Agency, to P. Buxton, September 10, 2003, **Exhibit R-228**.
[125] Draft Agreement concerning the Establishment of a Joint Review Panel for the Whites Point Quarry and Marine Terminal Project between The Minister of the Environment, Canada and the Minister of Environment and Labour, Nova Scotia, **Exhibit R-278**.

quarrying operations, processing facilities (such as crushers, washing and loading facilities, environmental controls), and the marine terminal facilities.

130. On November 11, 2003, after the close of the comment period, Mr. Buxton, on behalf of GQP, wrote to NSDEL and explained: "[w]e regarded the Draft Memorandum of Understanding as a reasonable document and hence did not feel the need for comment".[126] He also added: "[t]he fact that we did not comment should not be construed as a blanket endorsement of the document or of the fact that a Panel Review is required for this project."[127] However, Mr. Buxton did not at that time raise any concerns regarding the scope of the Project as described in the Draft JRP Agreement.

131. The "Agreement concerning The Establishment of a Joint Review Panel for the Whites Point Quarry and Marine Terminal Project" (the "JRP Agreement") was not finalized until November 4, 2004,[128] in part due to a request by the proponent, GQP, to delay the release of the Agreement.[129]

132. Therefore, the scope of the Whites Point Project could not be finalized until the JRP Agreement was finalized. In this regard, it is important to recognize that as the review process was a *joint* process, it necessarily included all aspects of the Whites Point Project that required review under both the Nova Scotia *Environment Act* and the *CEAA*. Therefore, the establishment of the joint review panel process and the establishment of the "scope of the project" in the context of that multi-jurisdictional process, in effect, render moot Mr. Estrin's complaints about the DFO's initial determinations as to "scope of the project". The scope of project selected for the joint panel review, which encompassed all aspects of Nova Scotia and federal jurisdiction, superseded any discussion or determinations made earlier by the DFO regarding the scope of the Project.

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[126] Letter from P. Buxton to C. Daly, NSDEL, November 11, 2003, **Exhibit R-229**.
[127] Letter from P. Buxton to C. Daly, NSDEL, November 11, 2003, **Exhibit R-229**.
[128] News Release: Canada and Nova Scotia Establish Joint Review Panel for the Whites Point Quarry and Marine Terminal Project, November 5, 2004, **Exhibit R-235**.
[129] In March 2004, when it appears that the JRP Agreement was ready for signature, counsel for GQP emailed the CEA Agency, requesting that finalization of the Agreement be postponed, pending discussions between GQP and Nova Stone which could affect the Project Proponent. Email from B. deJong, McInnes Cooper, to J. Crepault, CEA Agency, March 1, 2004, **Exhibit R-203**.

(d) Summary

133. In sum, in light of the federal and provincial legislation, the *CEAA* guidance documents, and the Proponent's own Project Descriptions, the Whites Point Project scoping decision was, in my opinion, reasonable. In terms of limiting appeal risk based on "project splitting" or "improper segmentation", the project scope determination also seems reasonable. Indeed, it would appear to have been helpful to the proponent in that litigation risk was reduced. The exchanges of correspondence between the federal and provincial authorities demonstrate that the considerations which influenced those authorities were fact-based and objective. There appeared to be nothing in that correspondence that indicated any prejudice towards the Proponent or any anti-America bias as Mr. Estrin alleges.[130]

4. Reply to the Balance of Mr. Estrin's Allegations of Bad Faith on the Part of Government Officials in the Procedures Prior to the Referral

134. To this point in my Report, I have discussed why the decision to review the Whites Point Project – scoped to include both the quarry and marine terminal components by means of a joint review panel, involving a public hearing – was solidly based in law and was reasonable in the circumstances. This analysis, in my view, fully rebuts any notion that the Project should have been reviewed piecemeal by the respective federal and provincial authorities without a public hearing or that it was inappropriate for it to have been referred to a joint review panel.

135. However, Mr. Estrin also casts aspersions upon the provincial and federal officials' motives and good faith in the discharge of their statutory responsibilities. Mr. Estrin asserts that there was a pattern by government officials of "making life difficult"[131] for the Proponent and in particular that several decisions prior to the establishment of the joint review panel were "unusual and unfair".[132]

136. In this section of my Report, I will address DFO's conduct singled out by Mr. Estrin in this regard:

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[130] Estrin, pp. 33-34, paras. 106-108.
[131] Estrin, p. 34, para 108.
[132] Estrin, p. 34, para. 109.

(i) the DFO's review of Nova Stone's blasting plans in relation to its proposed 3.9 ha quarry;

(ii) the DFO's ultimate determination that the 3.9 ha quarry required a *Fisheries Act* authorization and consequently, an environmental assessment under the *CEAA* prior to the DFO being able to issue that authorization; and

(iii) the DFO's determination that, at minimum, the Whites Point Project would be subject to a comprehensive study level of assessment due to the fact that the marine terminal component fell within a class of projects set out in the *CSLR.*

137. In short, I am unable to agree with Mr. Estrin that the conduct of and decisions made by DFO officials was improper or in any way inappropriate. Rather, the facts reveal an honest, conscientious handling of the Whites Point Project rather than an orchestrated conspiracy to prejudice the interests of a foreign investor. I will deal with each situation in turn.

(a) DFO had a clear statutory mandate to review Nova Stone's blasting plans in relation to the proposed 3.9 ha quarry

138. On April 23, 2002, Nova Stone applied for a permit to operate a 3.9 ha quarry on the Whites Point Project site under Part V of the Nova Scotia *Environment Act*. On April 30, 2002, NSDEL issued a conditional permit to Nova Stone for the 3.9 ha quarry, which included the following clauses, as requested by DFO:

> 10 h) Blasting shall be conducted in accordance with the Department of Fisheries and Oceans *Guidelines for the use of explosives in or near Canadian fisheries waters* – 1998.
>
> 10 i) A report shall be completed by the Proponent in advance of any blasting activity verifying the intended charge size and blast design will not have an adverse effect on marine mammals in the area. This report shall be submitted to the Department of Fisheries and Oceans (DFO), Maritime's Aquatic Species at Risk office, and written acceptance of the report shall be received from DFO and forwarded to the department before blasting commences.

139. Mr. Estrin has characterized the inclusion of these conditions as DFO "insinuating" itself into a provincial process in which it had "no regulatory role" and further states that condition 10 i) was an "appropriation" by DFO of Nova Scotia's power to determine the 3.9 ha quarry could proceed. [133]

140. Mr. Estrin's characterization of DFO's involvement in the Nova Stone 3.9 ha quarry ignores the DFO's clear legislated mandate under the *Fisheries Act*, the Canadian *Constitution* and is otherwise without basis.

141. As is typical in the context of projects involving the use of explosives in proximity to marine environments, upon receipt of the application, NSDEL contacted DFO for comment on Nova Stone's proposed 3.9 ha quarry application.

142. As a result of its review of Nova Stone's proposal for the 3.9 ha quarry and given its location, DFO officials expressed concern about the potential effects of blasting so close to the habitat of whales in the area. DFO requested documented proof that the charges would not have a disruptive influence on whales[134] and requested that NSDEL include terms similar to conditions 10 h) and 10 i) in any permit issued by NSDEL to Nova Stone for the quarry.[135]

143. DFO did not overstep its jurisdiction in requesting that such conditions be included in the NSDEL permit for the 3.9 ha quarry. Further, the Nova Scotia Minister of Environment and Labour has broad discretion under ss. 56(2) of the Nova Scotia *Environment Act* to impose "any terms and conditions … appropriate to prevent an adverse effect"[136] on an approval sought under Part V of that *Act*. Therefore, NSDEL likewise had the legislative authority to include the requested conditions in Nova Stone's permit.

144. Canada operates under a federal system, whereby federal departments routinely and within the jurisdiction afforded to the federal government under the Canadian *Constitution*, exercise legislative and regulatory oversight over various subject classes, including "sea

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[133] Estrin, s. 1.6(a), pp. 35-44, paras. 110-152; Also see para. 117: "… the DFO effectively appropriate from the province the power to decide whether the test quarry could proceed or not."
[134] Email from B. Jollymore, DFO, to B. Langille, NSDEL, April 22, 2002, **Exhibit R-499**.
[135] Email from B. Jollymore, DFO, to B. Petrie, NSDEL, April 26, 2002, **Exhibit R-86**.
[136] Nova Scotia *Environment Act*, s. 56(2), **Exhibit R-5**.

coast and inland fisheries".[137] Mr. Estrin fails to acknowledge the fact that, due to the nature of Canadian federalism, where a proposed project has the potential to impact fish-bearing waters, there is no such thing as a purely provincial assessment process. Whether inland or offshore, the DFO has jurisdiction to regulate the project, regardless of concurrent provincial jurisdiction.

145. The requested conditions were squarely within the jurisdiction of DFO and fundamental to its discharge of its statutory obligations under the *Fisheries Act*. Under the *Fisheries Act*, the DFO has jurisdiction regarding the protection of "fish", which includes marine mammals, such as whales.[138]

146. As noted in the DFO *Blasting Guidelines,*[139] blasting in proximity to fisheries waters can result in the harmful alteration, disruption and destruction ("HADD") of fish habitat:

> The federal *Fisheries Act* includes provisions for the protection of fish, shellfish, crustaceans, marine mammals and their habitats. The detonation of explosives in or adjacent to fish habitat has been demonstrated to cause disturbance, injury and/or death to fish and marine mammals, and/or the harmful alteration, disruption or destruction of their habitats, sometimes at a considerable distance from the point of detonation.[140]

147. Therefore, regardless of any provincial approvals obtained for a project, if a project contemplates the use of explosives in or near fish-bearing waters, the DFO's jurisdiction under the *Fisheries Act* to protect fish and fish habitat is potentially engaged. The project proponent ought to investigate the need for *Fisheries Act* authorizations, as described in the DFO *Blasting Guidelines*:

> Proponents planning to use an explosive that is likely to destroy fish and/or cause a HADD of fish habitat are subject to certain legal obligations under the *Fisheries Act*, as identified in the preceding 'Applicable Legislation and Policy' section. This section discusses these obligations with respect to

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[137] *Constitution Act, 1867*, (UK), 30 and 31 Victoria, c. 3, s. 91 (12), **Exhibit R-440**.
[138] *Fisheries Act*, R.S.C. 1985, c. F-14, s. 2 and 28, **Exhibit R-82**.
[139] Wright, D.G., and G.E. Hopky, 1998, Guidelines for the Use of Explosives In or Near Canadian Fisheries Waters, 1998, Canadian Technical Report of Fisheries and Aquatic Sciences 2107 ("DFO *Blasting Guidelines*"), **Exhibit R-115**.
[140] DFO *Blasting Guidelines*, Abstract, p. iv., **Exhibit R-115**.

> the proposed use of explosives, and suggests to proponents how to fulfil them.
>
> Proponents should contact the DFO Regional/Area authorities (Appendix I) as early as possible in their planning process. The purpose is to find out whether the proposed use of explosives is likely to affect a Canadian fisheries water and whether its use is likely to destroy fish and/or cause a HADD of fish habitat. Depending on the outcome, DFO may also discuss potential issues, specific information requirements, or the next steps and possible outcomes in a further review of the proposal. For example, as summarized in the subsequent 'Review and Decision-making Process' section, possible next steps could include a request for further information, or a recommendation that the proponent seek an authorization pursuant to Section 32 and/or Subsection 35(2).[141] (emphasis supplied)

148. The DFO's mandate to protect fish under the *Fisheries Act* gives it comprehensive powers. It is important to recognize that these powers include the ability to request additional information in furtherance of its mandate of fish and fish habitat protection, as recognized in the DFO *Blasting Guidelines*. For instance, ss. 37(1) of the *Fisheries Act* permits the DFO to impose information gathering obligations on project proponents so that the DFO can assess the potential impact of existing or proposed works and undertakings on fisheries resources.[142] More specifically, ss. 37(1) allows the DFO to require that project proponents proposing to carry on any work or undertaking that is likely to result in the HADD of fish habitat to provide DFO with such plans, specifications, studies, procedures, schedules, analyses, samples or other information as will enable the DFO to determine whether the proposed work or undertaking is likely to result in any HADD.

149. In my experience, it is not unusual for DFO to require that project proponents furnish evidence that their activities will not result in HADD of fish habitat. For instance, project proponents are often required to conduct studies, such as environmental assessments of fish habitat and fish surveys in water bodies potentially affected by proposed projects, in order to satisfy DFO that project activities will not affect fish-bearing waters.

150. Given DFO's jurisdiction over whales and whale habitat and its other powers of the *Fisheries Act*, DFO was within its jurisdiction and acted reasonably in requesting that

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[141] DFO *Blasting Guidelines*, p. 6-7, **Exhibit R-115**.
[142] DFO, *Policy for the Management of Fish Habitat*, 1986-2001, p. 13, **Exhibit R-405**.

Nova Stone be required to complete a report in advance of blasting activity verifying that the intended charge would not have an impact on marine mammals in the area.[143] In light of the foregoing, DFO had ample statutory authority to consider potential blasting impacts on the marine environment and to request that Nova Stone provide it with information to establish that its blasting operations would not, in fact, result in disturbance. Mr. Estrin's assertion that this is outside of the DFO's jurisdiction is simply incorrect.

(b) The DFO reasonably determined that Nova Stone's blasting plans for the 3.9 ha quarry required authorization under s. 32 of the *Fisheries Act* and an environmental assessment under the *CEAA*

151. Mr. Estrin also takes issue with the DFO's subsequent review of materials provided by Nova Stone to satisfy condition 10. i) of the conditional NSDEL permit for the 3.9 ha quarry because, ultimately, after having reviewed the information provided by Nova Stone, DFO concluded that a s. 32 *Fisheries Act* authorization (to destroy fish by means other than fishing) would be required for the blasting associated with the 3.9 ha quarry. [144]

152. A s. 32 authorization under the *Fisheries Act* triggered the need for an environmental assessment under the *CEAA*. Subsection 5(1)(d) of the *CEAA* requires that an environmental assessment of a project must be carried out before a responsible authority may issue any form of approval enabling a project to be carried out "*in whole or in part*". By the time DFO concluded that the 3.9 ha quarry also required an environmental assessment under the *CEAA*, GQP had already initiated the environmental assessment process for the entire Whites Point Project. Given that the 3.9 ha quarry was "a part"[145] of the Whites Point Project, DFO determined that any activities relating to the 3.9 ha quarry had to be assessed in the environmental assessment for the Whites Point Project.

153. Nova Stone therefore found itself in the situation of not being able to obtain required authorizations for the 3.9 ha quarry until the assessment process for the entire Whites Point Project was concluded. Mr. Estrin alleges that this was a "bureaucratic trap

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[143] Email from B. Jollymore, DFO to B. Petrie, NSDEL, April 26, 2002, **Exhibit R-86**.
[144] Letter from P. Zamora, DFO, to P. Buxton, May 29, 2003, **Exhibit R-55**.
[145] Estrin, p. 40, para. 135.

created by federal officials".[146] The contemporaneous documents, however, indicate otherwise. The "bureaucratic trap" referenced by Mr. Estrin was not "created by federal officials",[147] but actually results from requirements of the *CEAA* and the fact that GQP was advancing the Whites Point Project at the same time as Nova Stone was seeking regulatory approval for the 3.9 ha quarry.

154. Nonetheless, Mr. Estrin implies that the problem Nova Stone and GQP found themselves in could have easily been avoided had DFO simply conducted its review of the blasting plan differently. In particular, Mr. Estrin asserts that:

(i) Had DFO decided not to require a s. 32 authorization, there would have been no problem;

(ii) If the DFO had reviewed the blasting plan in a timely manner, it could have approved the plan before the *CEAA* process for the larger quarry was initiated; and

(iii) Had the DFO decided not to scope in the test quarry, it would have been able to issue a s. 32 authorization for the test quarry even though the environmental assessment for the larger quarry had begun.[148]

155. I am unable to agree and address each of these points in turn.

i) The DFO could not ignore the requirement for a s. 32 authorization

156. I am puzzled by Mr. Estrin's assertion that the DFO could have simply "decided" not to require a s. 32 authorization for the 3.9 ha quarry. That is tantamount to arguing that DFO should have been deliberately derelict in its statutory duties. The DFO concluded, on the basis of scientific opinion within the department at that time, that the blasting activities for the 3.9 ha quarry would result in the destruction of fish by means other than fishing.[149] DFO therefore required an authorization pursuant to s. 32 of the *Fisheries Act* for blasting

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[146] Estrin, p. 43, para. 147.
[147] Estrin, p. 43, para. 147.
[148] Estrin, p. 43, para. 147.
[149] Email from Peter Amiro to Phil Zamora, May 27, 2003, **Exhibit R-150**.

to proceed. There is no discretion on the part of DFO to ignore the prohibition in the *Fisheries Act* against destroying fish by means other than fishing. DFO does not exhibit bad faith when it complies with its statutory mandate.

157. The possibility that it could be required to obtain a *Fisheries Act* authorization for the 3.9 ha quarry should have come as no surprise to Nova Stone. Indeed, the cover letter accompanying the NSDEL permit for the 3.9 ha quarry expressly cautioned Nova Stone that other approvals, including federal approvals, could be required for the 3.9 ha quarry and that Nova Stone was responsible for ensuring that any other required authorizations were obtained. That was an important restriction on the permit:

> Despite the issuance of this Approval, the Approval Holder is still responsible for obtaining any other authorization which may be required to carry out the activity, including those which may be necessary under provincial, federal or municipal law.[150]

158. The DFO *Blasting Guidelines*, with which Nova Stone was expected to comply pursuant to clause 10. h) of its NSDEL permit for the 3.9 ha quarry, expressly contemplate that a project proponent may be required to apply for such authorizations in relation to use of blasting activities.[151]

159. Surprisingly, Mr. Estrin suggests that it "should have been up to the proponent to take the risk of proceeding with the blasting plan. If it was confident that there would be no HADD and no destruction of fish – *as it was* – it should have been able to conduct the blasts"[152] (emphasis supplied).

160. There are two problems with Mr. Estrin's statement. First, Bilcon's own documents indicated that its consultants were <u>not</u> confident that there would be no risk to fish or fish habitat from the proposed blasting activities. In a memorandum dated June 19, 2002,[153] Dr. Paul Brodie, a Research Scientist engaged by Mr. Buxton to assess how quarry

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[150] Letter from B. Petrie, NSDEL to P. Buxton, April 30, 2002, **Exhibit R-87**.
[151] DFO *Blasting Guidelines*, p. 4, **Exhibit R-115**.
[152] Estrin, p. 37, para. 123.
[153] Memorandum from P. Brodie, Research Scientist, Marine Mammals to P. Buxton, June 19, 2002, **Exhibit R-301**.

operations would impact marine mammals, indicated that there was in fact a significant risk to marine mammals from the proposed blasting activities:

> This is in relation to the initial 4 hctr quarry site and potential blasting of the basalt, planned major expansion of the quarry, and the construction of a docking and loading facility for planned ship transport.
>
> . . .
>
> There is a growing body of research regarding marine mammal hearing, and the potential for trauma from various frequencies, amplitudes and pressure rises (characteristic of modern explosives). Temporary effects on hearing and orientation can have serious consequences in an area of extreme tides and complex coastlines, where there is fishing gear and commercial shipping.
>
> . . .
>
> Temporary hearing damage may compromise orientation in an already, busy area, and animals are less able to detect above ambient noise levels. With such a confined scale of activity by whales, fisheries and shipping, even short-term disorientation could have serious consequences. The seriousness of this possibility is further underscored by the presence of Right whale concentrations. In this risk assessment, the worst-case-scenario is used as the bottom line. The worst-case-scenario at this site would be the presence of an adult female right whale and calf in the immediate vicinity of the quarry when blasting is being conducted. An adult female right whale, capable of reproduction, represents the most critical parameter in the recovery of the population. 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 (as illustrated in Mate et al, 1992; NOAA/NEC Aerial Survey, Aug. 11/2000).
>
> . . .
>
> I do not wish to mislead the proponents of the quarry project into assuming that there are measures to mitigate the environmental consequences of blasting and ship-loading activity, sufficient to satisfy an informed review board. The example of a worst-case-scenario is not far from the reality, based on verified movements of Right whales alone. (emphasis supplied)

161. In light of the foregoing, Mr. Estrin's statement that the Proponent was confident that that there would be no HADD and no destruction of fish appears to be without basis.

162. Second, with respect, Mr. Estrin's "catch-me-if-you-can" approach is unlikely to instil confidence in the regulators responsible for the protection of the fisheries resource and habitat, particularly where there was no evidence to substantiate the view that the proposed blasting would not have a harmful effect.

163. Mr. Estrin asserts that, because DFO only has the legal authority to prosecute after-the-fact under sections 32 and 35(2) of the *Fisheries Act* for destruction of fish or fish habitat, those provisions are not a precondition to approval of the plans and that the Proponent should have been permitted to take the risk of prosecution.[154]

164. Mr. Estrin is correct when he points out that a project proponent such as Nova Stone was not *compelled* by the *Fisheries Act* to apply for any s. 32 authorization for the 3.9 ha quarry. However, a project proponent faces significant liability if it chooses to proceed without such an authorization. The fact that a proponent can deliberately contravene a federal statute, does not invalidate the DFO's determination that a *Fisheries Act* authorization was required due to the potential of HADD of fish habitat, release of deleterious substances into the nearshore and the potential destruction of fish.[155] Nor does it relieve a proponent from demonstrating that there are not likely to be significant adverse environmental effects occurring from the activity in question in the course of an environmental assessment under the *CEAA*.

165. Speaking as project counsel, in my view, a project proponent would be ill-advised to proceed with a project where DFO has expressed its concern regarding the likelihood of HADD of fish habitat or the destruction of fish, without an appropriate authorization in place or without having satisfied DFO that its concerns were misplaced. It is unreasonable to expect that the government would allow a project to proceed where the proponent knew fish may be harmed or its habitat may be damaged and that there was no mitigation in place to avoid that result. Wantonly flouting legislation designed to protect fish and fish habitat does not re-assure a responsible authority that the proponent is likely to avoid causing significant adverse environment effects.

166. Even suggesting such an approach also would likely cause the regulators to seriously call into question the credibility of the proponent's environmental stewardship. While Mr. Estrin now advances this argument in his report it does not appear that the Proponent did so prior to or during the assessment.

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[154] Estrin, p. 37, para. 123.
[155] *Fisheries Act*, R.S.C. 1985, c. F-14, sections 35 and 36, **Exhibit R-82**.

ii) The timing of the 3.9 ha quarry application and the initiation of the Whites Point Project environmental assessment overlapped in time

167. Mr. Estrin's implication that DFO was somehow at fault in terms of delaying its review of the blasting plan, such that its review was not concluded prior to the commencement of the environmental assessment for the Whites Point Project, is not supported by the chain of events.

168. A review of the events surrounding the blasting plan for the 3.9 ha quarry and the entire Whites Point Project indicates that discussions between GQP and government officials regarding all of these components of the Project were ongoing throughout 2002 and 2003. On April 14, 2003, DFO formally notified GQP that the Whites Point Project would require an environmental assessment under the *CEAA*, although steps were taken well in advance of April 2003 to initiate this process. A summary of the events leading up to the DFO's formal notification that the Whites Point Project would require an environmental assessment under the *CEAA* is as follows:

- Meetings regarding the assessment for the larger Whites Point Project began in July of 2002.[156]

- In September 2002, GQP sent NSDEL a draft project description for the Whites Point Project.[157]

- On September 17, 2002, Nova Stone submitted a one page document to NSDEL to satisfy condition 10 i) of the permit for the 3.9 ha quarry.[158]

- DFO reviewed that document and on September 30, 2002 advised NSDEL that there was insufficient detail provided to make an assessment of the plan's impact on threatened or endangered marine mammals.[159]

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[156] Attendance list of meeting between DFO and representatives of the GQP, July 25, 2002, **Exhibit R-126**; Meeting notes of T. Wheaton, July 25, 2002, **Exhibit R-127**.
[157] Whites Point Project, Draft Project Description, September 30, 2002, **Exhibit R-129**.
[158] Letter from P. Buxton to B. Petrie, NSDEL, September 17, 2002, **Exhibit R-116**.
[159] Letter from J. Ross, DFO, to B. Petrie, NSDEL, September 30, 2002, **Exhibit R-117**.

- Nova Stone provided an additional one page document regarding its blast design on October 15, 2002.[160] At this time, Nova Stone had also not provided a report demonstrating the blasting would not have an adverse effect on marine mammals.

- In response to DFO questions, Nova Stone provided a more detailed blasting plan on November 20, 2002.[161]

- Further detailed information regarding the blasting plan was provided in January 2003 in response to a December 11, 2002 request.[162]

- GQP submitted the draft Project Description for the Whites Point Project in January 2003 and revised Project Description in March 2003.[163]

- On March 27, 2003, DFO requested additional blasting information from Mr. Buxton.[164]

- Mr. Buxton was advised on April 14, 2003, that the Whites Point Project (including both the marine terminal and quarry components) would require an environmental assessment under the *CEAA*.[165]

- Mr. Buxton was advised on May 29, 2003 that the 3.9 ha quarry blasting activities would require a s. 32 *Fisheries Act* authorization and an environmental assessment under the *CEAA*.[166]

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[160] Letter from P. Buxton to B. Petrie, NSDEL, October 8, 2002, received by NSDEL October 15, 2002, **Exhibit R-118**.
[161] Letter from P. Buxton to B. Petrie, NSDEL, November 20, 2002, attaching "Whites Point Quarry Blasting Plan" dated November 18, 2002, **Exhibit R-80**.
[162] Letter from P. Buxton to B. Petrie, NSDEL, January 28, 2003, **Exhibit R-123**.
[163] Letter from P. Buxton to D. McDonald, CEA Agency, January 28, 2003, enclosing Whites Point Quarry and Marine Terminal – Draft Project Description, **Exhibit R-180**; Letter from P. Buxton to D. McDonald, CEA Agency, March 10, 2003, enclosing Whites Point Quarry and Marine Terminal – Project Description, **Exhibit R-181**.
[164] Fax from P. Zamora, DFO, to P. Buxton, March 27, 2003, **Exhibit R-310**.
[165] Letter from P. Zamora, DFO, to P. Buxton, April 14, 2003, **Exhibit R-54**.
[166] Letter from P. Zamora, DFO, to P. Buxton, May 29, 2003, **Exhibit R-55**.

169. As is evident from the foregoing, the Proponent itself had initiated the environmental assessment process for the entire Whites Point Project, including the entire 155 ha quarry site, before Nova Stone had supplied the blasting information for the 3.9 ha quarry required under condition 10. i) of its NSDEL permit. The failure to supply the blasting information earlier when requested was the Proponent's fault, not the DFO's, as was the Proponent's decision to initiate the environmental assessment process for the entire quarry and marine terminal area prior to receipt of approvals to blast on the 3.9 ha portion of that quarry.

170. Regardless, since DFO concluded that a s. 32 *Fisheries Act* authorization was required,[167] which triggered the need for an environmental assessment under the *CEAA*, it is difficult to imagine that it could have approved blasting activities for the 3.9 ha quarry before the environmental assessment for the entire Whites Point Project was initiated. Nova Stone first provided the blasting information required under conditions 10. i) of the NSDEL permit to DFO in September 2002. Even if DFO had not required further information but instead had made its determination that a s. 32 authorization was required at that time, it takes time to complete an environmental assessment under the *CEAA* to permit the issuance of such an approval. This is something that Mr. Estrin fails to take into account. It is clear that DFO could not have just approved the blasting activities without a s. 32 authorization and a corresponding environmental assessment. It is also clear that the Proponent initiated the environmental assessment for the larger Whites Point Project prior to even completing the filing of the requested blasting information.

171. In sum, if anyone created a trap, it would appear to have been the Proponent.

iii) Including the 3.9 ha quarry within the scope of the Whites Point Project was reasonable and authorized by the *CEAA*

172. Finally, Mr. Estrin's assertion that the DFO could have issued a s. 32 authorization for the 3.9 ha quarry, even though the environmental assessment for the larger quarry had begun, is likewise flawed.[168] Again, an environmental assessment under the *CEAA* was

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[167] Letter from P. Zamora, DFO, to P. Buxton, May 29, 2003, **Exhibit R-55**.
[168] Estrin, p. 43, para. 147.

required prior to DFO issuing a s. 32 authorization for the 3.9 ha quarry. Mr. Estrin apparently thinks that it would have been reasonable to undertake two separate environmental assessments – one for the 3.9 ha quarry and one for the Whites Point Project.

173. As acknowledged by Mr. Estrin, the 3.9 ha quarry "was part" of the Whites Point Project.[169]

174. Indeed, throughout the same period that the 3.9 ha quarry blasting activities were being considered, the Proponent consistently described its Project as the "Whites Point Quarry and Marine Terminal" which included the 3.9 ha quarry as part of the 155 ha (380 acres) described therein. The revised Project Description from GQP in March 2003 stated:

> A review of the effects of blasting on the tidal and nearshore marine environment is ongoing. A Blasting Plan was prepared and submitted to the Department of Fisheries and Oceans for the approved four-hectare quarry site located within the proposed Whites Point Quarry … A primary objective of the four-hectare quarry Blasting Plan is to gather specific on-site data for further assessment of potential impact on the marine environment from blasting operations.[170]

175. In response to DFO requests to clarify the purpose of the 3.9 ha quarry and its relationship to the overall Whites Point Project,[171] GQP responded:

> Nova Stone's intentions for the 3.9 hectare quarry are to open it in accordance with the Approval and crush rock. This rock will be used for the construction of the various environmental controls as set out in the application for the 3.9 hectare quarry and to construct a new access road to the 3.9 hectare quarry. It was Nova Stone's intention to acquire the section of Whites Cove Road on the property but, this has not been possible and a new road is required to provide better grades and for security. . . .
>
> While we are gaining sufficient rock for the environmental controls, it is our intent to monitor early blasts to ensure compliance with the terms and conditions set out in the approval and also the parameters set out in DFO's guidelines. The information gathered from the monitoring is seen by Global Quarry Products as a significant part of its CSR [comprehensive

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[169] Estrin, p. 40, para. 135.
[170] Letter from P. Buxton, to D. McDonald, CEA Agency, March 10, 2003 enclosing Whites Point Quarry and Marine Terminal – Project Description, p. 10, **Exhibit R-181**.
[171] Letter from P. Zamora, DFO, to P. Buxton, April 14, 2003, **Exhibit R-54**; Email from D. McDonald, CEA Agency, to P. Buxton, April 17, 2003, **Exhibit R-491**.

> study report] i.e.; a clear demonstration that blasting can be carried out without creating problems.
>
> When permits are issued for the larger quarry and the marine terminal, the 3.9 hectare site will simply be enlarged to the NE in order to provide sufficient rock for shipment over an extended period of time.[172] (emphasis supplied)

176. From the foregoing, it is clear that the 3.9 ha quarry was in no way a "separate" undertaking from the overall Whites Point Project that could have been approved in isolation, as suggested by Mr. Estrin. It was GQP's stated intention that the rock crushed from the 3.9 ha site would be transported from the site via ship and thus required the marine terminal to be constructed and operated as proposed. It is clear that the 3.9 ha site was intended to establish infrastructure for the overall Whites Point Project and represented the initial blasting area for the overall Whites Point Project. It was not a separate, stand-alone enterprise; it was always part of the overall Whites Point Project.

177. Therefore, had the DFO issued a s. 32 authorization for the 3.9 ha quarry prior to the conclusion of the environmental assessment of the Whites Point Project, DFO would have been in contravention of ss. 5(1)(d) of the *CEAA*, which requires that an environmental assessment of project must be carried out before a responsible authority may issue any form of approval enabling a project to be carried out "*in whole or in part*".

178. On May 29, 2003, DFO advised GQP[173] that DFO had reviewed the blasting information supplied by Nova Stone and GQP in relation to the 3.9 ha quarry and concluded that a s. 32 *Fisheries Act* authorization would be required, and that the Whites Point Project environment assessment be complete prior to the issuance of that authorization, pursuant to ss. 5(1)(d) of the *CEAA*:

> Also, the 3.9-hectare quarry is within the larger area of the proposed **Whites Point Quarry and Marine Terminal, Digby County, Nova Scotia**, which is currently undergoing an environmental assessment (EA) under the Canadian Environmental Assessment Act (CEAA). DFO is the federal authority conducting this EA and is subject to laws governing this

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[172] Letter from P. Buxton, to D. McDonald, CEA Agency, April 20, 2003, **Exhibit R-151**.
[173] Letter from P. Zamora, DFO, to P. Buxton, May 29, 2003, **Exhibit R-55**.

> CEAA assessment including Section [5(1)(d)][174] which requires that an EA of a project be completed before a federal authority "*under a provision prescribed pursuant to paragraph 59(f), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole **or in part**.*"
>
> A Fisheries Act Section 32 Authorization is in the Law List Regulations of CEAA and therefore DFO would not be able to issue a Section 32 Authorization for the four-hectare blasting plan until the CEAA assessment for the **Whites Point Quarry and Marine Terminal, Digby County, Nova Scotia** has been completed. (emphasis in original)

179. Given the chain of events, the Proponent appears to have been unaware of the significance of ss. 5(1)(d) of the *CEAA* and the implications of commencing the environmental assessment process for the Whites Point Project on regulatory approvals for the 3.9 ha quarry. Regardless, it certainly does not appear that the government officials were engaged in any bad faith at the Proponent's expense in applying ss. 5(1)(d) in this manner.

180. Those experienced with project scoping under the *CEAA* would have been alive to the potential for the small quarry to be considered to form part of the Project under assessment pursuant to ss. 5(1)(d). That should have been obvious where the Proponent had consistently referred to the Project as including the full quarry area plus the processing and marine terminal facilities. For example, the Proponent's own versions of the Project Descriptions filed in January 2003 and March 2003 described the Project as consisting of the larger quarry area (which included the 3.9 ha quarry area) as well as the processing plant and marine terminal facilities.[175]

181. In these circumstances the environmental assessment for the Project had to be completed before any part of that Project was carried out. This is a common issue with project development under the *CEAA*. The responsible authorities require the project environmental assessment to be completed beforehand. Stated differently, a proponent can

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[174] The letter references ss. 5(2)(d) of *CEAA*, but the text is quoted from ss. 5(1)(d) of *CEAA*. Therefore, it appears that the reference to ss. 5(2)(d) in the letter was a typo as the context is a clear reference to ss. 5(1)(d) of *CEAA*.

[175] Letter from P. Buxton, to D. McDonald, CEA Agency, January 28, 2003, enclosing Whites Point Quarry and Marine Terminal – Draft Project Description, **Exhibit R-180;** Letter from P. Buxton, to D. McDonald, CEA Agency, March 10, 2003, enclosing Whites Point Quarry and Marine Terminal – Project Description, **Exhibit R-181**.

no more split its project up before an environmental assessment of the entire project commences than it can do so after the environmental assessment is underway. DFO did not treat the Proponent unfairly in requiring the environmental assessment for the Whites Point Project be completed before issuing any authorizations for the 3.9 ha quarry.

(c) The DFO's determination that the marine terminal component of the Whites Point Project was on the *CSLR* was correct and nondiscriminatory

182. Mr. Estrin alleges that the DFO made an error of law in determining the "marine terminal" component of the Whites Point Project was on the *CSLR*. GQP had submitted an application for an authorization under ss. 5(1) of the *NWPA* to construct the marine terminal portion of the Whites Point Project.[176] Prior to the issuance of a *NWPA* authorization, an environmental assessment of the proposed project must be completed under the *CEAA*. DFO as responsible authority advised GQP that as the marine terminal was designed to handle vessels larger than 25,000 DWT, the type of environmental assessment required would be a comprehensive study.[177] Mr. Estrin asserts that the marine terminal for the Whites Point Project did not fall within the class of "marine terminals" described in ss. 28(c) of the *CSLR* because it was to be used exclusively in respect of the Whites Point Project quarry operations.[178] Mr. Estrin asserts that the DFO's determination is further evidence of bad faith on the part of government officials.

183. There does not appear to be anything irregular about the responsible authorities' determination that the "marine terminal" proposed for the Whites Point Project warranted a comprehensive study. This is particularly true in light of the fact that this determination was consistent with the practice followed in many other cases referred to below. Further, I am unable to agree with Mr. Estrin's interpretation of "marine terminal". However, even if DFO's interpretation of "marine terminal" was incorrect, this "incorrect" interpretation was applied equally to many other proponents. This fact contradicts any claim of anti-American bias, and in my view, fully rebuts any implication of bad faith or discrimination.

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[176] Navigable Waters Protection Application, Whites Point Quarry Marine Terminal, January 8, 2003, **Exhibit R-133**.
[177] Letter from P. Zamora, DFO, to P. Buxton, April 14, 2003, p. 1, **Exhibit R-54**.
[178] Estrin, p. 46, para. 164.

184. Further, regardless of whether the marine terminal (as it was described by GQP and Bilcon) was a "dock" as asserted by Mr. Estrin or a "marine terminal" within the meaning of the *CSLR* (as seems evident from a review of the description of the Whites Point Project), the marine structure could have been required to undergo an environmental assessment under the *CEAA*. Any structure proposed in the nearshore marine environment has the potential to interfere navigation or result in HADD of fish habitat requires authorizations under ss. 5(1) of the *NWPA* and ss. 35(2) of the *Fisheries Act*, respectively. The need for these authorizations triggers an environmental assessment under the *CEAA*. It must be emphasized that, in this regard, Mr. Estrin's purported distinction between a "dock" and a "marine terminal" is irrelevant.

185. I will deal with each aspect of my response to Mr. Estrin's allegations in turn.

i) CEAA Practice Regarding Marine Terminals

186. Bilcon and its predecessor cannot claim to be unjustly discriminated against by the DFO's initial decision that a comprehensive study was required. Responsible authorities under the *CEAA* have consistently applied the definition of "marine terminal" to include facilities similar to that of the Whites Point Project's marine terminal.

187. Many projects have been required to undergo a comprehensive study on the basis that associated marine terminal facilities were designed to handle vessels larger than 25,000 DWT, even though the marine terminals were to be used exclusively for a single production, processing or manufacturing project. Projects required to undergo comprehensive studies on this basis include the following:

(a) Belleoram Marine Terminal: This project involved the construction, operation, decommissioning and/or abandonment of a marine terminal to be used exclusively for a 900 ha crushed granite stone quarry. In determining that the project was subject to a comprehensive study, the responsible authorities relied on ss. 28(c) of the *CSLR*.[179] Both the Whites Point Project marine terminal and the Belleoram marine terminal were proposed to

[179] See p. 38 of the Belleoram Marine Terminal Project Comprehensive Study Report, August 23, 2007, **Exhibit R-357**.

consist of a terminal and a ship loader.[180] The Whites Point Project marine terminal was planned to restrain a 230 m (70,000 tonne ship) and to ship 40,000 tonnes of aggregate 44 to 50 times per year.[181] The Belleoram Marine Terminal was designed to handle vessels larger than 25,000 DWT and it was anticipated that 60,000 tonne capacity carriers would be required to service the site every 5 to 7 days (with the quarry producing between 40,000 to 80,000 tonnes per week).[182]

(b) Orca Sand and Gravel Project: This project entailed the construction, operation and decommissioning of a sand and gravel quarry and a ship loading facility to be used exclusively for the sand and gravel quarry. The responsible authorities found the project was required to be assessed by way of a comprehensive study as the ship loading facilitates qualified as a "marine terminal" pursuant to ss. 28(c) of the *CSLR*.[183]

(c) Irving Oil Ltd. LNG Marine Terminal/Multi-Purpose Pier Project: The Irving Oil Liquefied Natural Gas (LNG) Project involved the development of a LNG marine terminal and pier project at the Irving Canaport facility near Saint John, New Brunswick. The marine terminal was determined by the responsible authorities to be a "marine terminal" pursuant to ss. 28(c) of the *CSLR*, even though the marine terminal would be exclusively for the LNG processing facilities at the Canaport facility.[184]

(d) Eider Rock Project, Marine Terminal: This project involved the construction and operation of a new petroleum refinery and associated marine terminal, designed exclusively to transfer crude and products to and from the refinery. The responsible authorities determined that the marine

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[180] Whites Point JRP Report, pp. 1, 59-61, **Exhibit R-212**; Belleoram Comprehensive Study Report, pp. 1, 14-21, **Exhibit R-357**.
[181] Whites Point JRP Report, pp. 1, 22, **Exhibit R-212**.
[182] Belleoram Marine Terminal Project Comprehensive Study Report, August 23, 2007, pp. 1, 22, **Exhibit R-357**.
[183] See p. 5 of the Orca Sand and Gravel Project Comprehensive Study Report, June 30, 2005, **Exhibit R-426**.
[184] See p. 5 of the Irving Oil Ltd. LNG Marine Terminal Comprehensive Study Report, March 23, 2004, **Exhibit R-410**.

terminal was required to undergo a comprehensive study pursuant to ss. 28(c) of the *CSLR*.[185]

(e) Southern Head Marine Terminal and Associated Works: This project involved the construction and operation of a crude oil refinery and a purpose-built marine terminal to be used for the import and export of the petroleum processed at the refinery. The marine terminal was required to undergo a comprehensive study because the responsible authorities determined the project as scoped met the definition of "*marine terminal*" as set out in ss. 28(c) of the *CSLR*.[186]

(f) Project Rabaska: Project Rabaska involved the proposed construction and operation of a LNG terminal, which included marine terminal facilities to be used exclusively to receive LNG tankers. Project Rabaska was subject to a comprehensive study under the *CEAA* because among other factors it included a marine terminal designed to accommodate tankers over 25,000 DWT.[187] Due to public concerns, Project Rabaska was ultimately assessed by a joint review panel.

(g) Keltic Petrochemical and LNG Facility: The proposed project included a LNG regasification facility, a petrochemical complex, a marginal wharf, and a marine LNG terminal to be used exclusively for the project and to allow for the delivery of LNG to the facility. The Minister of Environment required the project to undergo a comprehensive study because the project involved a marine terminal as defined in ss. 28(c) of the *CSLR*.[188]

188. Overall, federal departments have consistently applied the definition of marine terminal in the *CSLR*, interpreting it so as to include docking facilities that are associated

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[185] See p. 8 of the Eider Rock Project, Marine Terminal Comprehensive Study Report, September 10, 2009, **Exhibit R-364**.
[186] See p. 33 of the Southern Head Marine Terminal and Associated Works Comprehensive Study Report, December 2007, **Exhibit R-361**.
[187] See Notice of Commencement of an Environmental Assessment, June 23, 2004, **Exhibit R-425**.
[188] See pp. 1-5 of the Keltic Petrochemical Inc. LNG Facilities and Marginal Wharf Comprehensive Study Report, October 2007, **Exhibit R-348**.

exclusively with stand-alone, individual processing, production and manufacturing facilities. As such, there is no case to be made that DFO discriminated against Bilcon in its application of the *CSLR*.

ii) Proponent Described it as a Marine Terminal

189. Mr. Estrin describes the marine terminal and associated facilities for the Whites Point Project as a "dock". However, at no time during the review process did the Proponent itself describe the proposed conveyor, ship loader, berthing dolphins and mooring buoys as a "dock". Rather, from the outset, in all communications with regulatory authorities, including its initial Project Description dated January 28, 2003, the Proponent described these facilities as a "marine terminal".[189]

190. To ensure clarity of the record, I will describe these facilities in the terms employed by the Proponent at the time – as a "marine terminal" – rather than using the description Mr. Estrin now uses in his Report.

191. Both draft Project Descriptions (January 2003 and March 2003) do not use the term "dock" when referring to the marine facilities:

> **2. Project Information**
>
> **<u>Project Components/Structures</u>**
>
> . . .
>
> Marine facilities would include a conveyor, ship loader, berthing dolphins and mooring buoys.
>
> . . .
>
> Construction processes for the marine terminal infrastructure would include the anchoring of pile support structures to the basalt rock extending off shore and the construction of concrete caps as dolphins.

192. The attached diagram entitled "Quarry Infrastructure Plan" (Appendix "6" to my Report) shows the proposed marine terminal for the Whites Point Project.[190] The diagram

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[189] Letter from P. Buxton, to D. McDonald, CEA Agency, January 28, 2003, enclosing Whites Point Quarry and Marine Terminal –Draft Project Description, **Exhibit R-180**.
[190] Whites Point Project EIS, Volume III, p. 45 (attached as **Appendix** "**6**").

shows the marine terminal for the Whites Point Project separated from the physical quarry facilities by at least 150 metres. The production, processing and manufacturing areas of the Whites Point Project were clearly proposed to be separated from the Project's marine facilities by, among other things, the Project's proposed environment buffer zone.

193. The controversy which Mr. Estrin now seeks to create does not appear to have arisen at the time of the assessment. On April 14, 2003, following submission of the Project Description, DFO provided Global Quarry Products a sense of the likely environmental assessment track for the Whites Point Project. The DFO's communication in this regard indicated that a comprehensive study would be required, but that the Project could also be referred to review panel:

> It is our understanding that this project includes a marine terminal designed to handle vessels larger than 25,000 DWT which falls under the CEAA Comprehensive Study List Regulations. The type of screening used for the EA will therefore be a Comprehensive Study (CS).
>
> …
>
> It is strongly advised that GQP engage a consultant with extensive experience in conducting environmental assessments under CEAA as early in the process as possible. Experience has proven this to be a more efficient and timely approach with projects of this size, especially when conducting a CS and preparing the CSR. Also please be advised that, although the type of assessment being used for this project is a CS, CEAA (Section 23) includes the provision that the project could be referred to a mediator or review panel.[191]

194. The DFO and the Minister can hardly be accused of bad faith when they accepted the Proponent's own description of the ship loading facilities in its Project Description. The proponent knew it was submitting a project description to the CEA Agency. It knew or should have known what the potential significance was of using the term "marine terminal" in that regard. The government's interpretation of "marine terminal", therefore, cannot be viewed as unreasonable.

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[191] Letter from P. Zamora, DFO, to P. Buxton, April 14, 2003, **Exhibit R-54**.

iii) Whites Point Project "Marine Terminal" was on the *CSLR*

195. I also cannot agree with Mr. Estrin that the treatment of Whites Point "marine terminal" was inconsistent with the legislation. His argument is somewhat academic, however, for two reasons. First, the Project was lawfully elevated to a joint panel review; and second, the Whites Point Project could have been referred to a joint review panel whether initially tracked as a comprehensive study or a screening.[192] However, in light of the bad faith implication Mr. Estrin's allegations may create, I will provide my own interpretation below.

196. The *CSLR* includes a Schedule entitled the "*Comprehensive Study List*" that prescribes projects and classes of projects for which a comprehensive study is required.[193] The Comprehensive Study List, Part XI – Transportation, section 28(c) prescribes that a marine terminal designed to handle vessels larger than 25,000 DWT is required to undergo a comprehensive study:

> 28. The proposed construction, decommissioning or abandonment of . . .
>
> (*c*) a marine terminal designed to handle vessels larger than 25 000 DWT unless the terminal is located on lands that are routinely and have been historically used as a marine terminal or that are designated for such use in a land-use plan that has been the subject of public consultation.

197. Section 2 of the *CSLR* defines "marine terminal" as follows:

> "marine terminal" means
>
> (a) an area normally used for berthing ships and includes wharves, bulkheads, quays, piers, docks, submerged lands, and areas, structures and equipment that are
>
> (i) connected with the movement of goods between ships and shore and their associated storage areas, including areas, structures and equipment used for the receiving, handling, holding, consolidating, loading or delivery of waterborne shipments, or

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[192] *CEAA*, ss. 20(1)(c), 23(b), 25, **Exhibit R-1**.
[193] *CSLR*, s. 3, **Exhibit R-10**.

(ii) used for the receiving, holding, regrouping, embarkation or landing of waterborne passengers; and

(b) any area adjacent to the areas, structures and equipment referred to in paragraph (a) that is used for their maintenance.

It does not include

(c) production, processing or manufacturing areas that include docking facilities used exclusively in respect of those areas; or

(d) the storage facilities related to the areas referred to in paragraph (c); (emphasis supplied)

198. Mr. Estrin asserts that the Whites Point Project marine terminal did not meet the definition of "marine terminal" found in s. 2 of the *CSLR* because the Whites Point Project qualified as "production, processing or manufacturing areas that include docking facilities used exclusively in respect of those areas".

199. Based on a plain reading of the *CSLR*, Mr. Estrin's interpretation of the definition of "marine terminal" to exclude the Whites Point Project marine terminal is not persuasive. Mr. Estrin's interpretation fails to adhere to the principle of statutory interpretation that the words of an Act are to be read in their entire context.[194]

200. Clauses (a) and (b) of the "marine terminal" definition give a fairly expansive description of the "areas" that constitute a marine terminal. Clauses (c) and (d) serve to tailor that expansive description and limit what areas are included in a "marine terminal" but they do not exclude the docking facilities associated with those excluded areas from the need to undergo a comprehensive study.

201. When read in concert with the rest of the section, one discerns the importance of the word 'area' throughout the provision as a means of grouping what is and what is not included in the definition of marine terminal. Mr. Estrin claims that paragraph (c) exempts certain types of marine terminals "that are built exclusively for 'production, processing or

[194] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, **Exhibit R-435**.

manufacturing areas' "[195] from comprehensive studies, where in fact the provision does no such thing. Rather, paragraph (c) excludes production, processing or manufacturing areas from the definition of marine terminal. In other words, even though docking facilities (which according to paragraph (a) fall within the meaning of 'marine terminal') that are used exclusively in respect of the production, processing or manufacturing areas do fall within the definition of "marine terminal", the production, processing or manufacturing areas associated with them are not because these areas do not form a part of the definition of marine terminal.

202. The logic behind this interpretation becomes apparent when one considers paragraph (d) of the definition of "marine terminal". Paragraph (d) excludes from the definition of "marine terminal" the storage facilities related to the areas referred to in paragraph (c), i.e., storage facilities related production, processing or manufacturing areas. If the intent was, as Mr. Estrin argues, to exclude docking facilities associated with production, processing or manufacturing areas from the definition of marine terminal, paragraph (d) would be unnecessary.

203. In light of the foregoing, the DFO's treatment of the Whites Point marine terminal appears reasonable in light of past practice and is consistent with the legislation. Despite what Mr. Estrin may argue now, Bilcon did not appeal on this basis. Had Bilcon done so, Canadian courts could have rectified any jurisdictional errors, which, in my view, they did not. I discuss the dichotomy between what Bilcon did at the time of the assessment and what Mr. Estrin now alleges as jurisdictional errors, many years after the fact, in Part IV of my Report.

[195] Estrin, p. 46, para. 162.

PART II: THE WHITES POINT PROJECT PANEL'S APPROACH AND RECOMMENDATIONS WERE REASONABLE

204. Part II of Mr. Estrin's Report deals with a wide variety of issues. For the purposes of my reply, I have grouped my response as follows:

(i) the selection of the Panel Members;[196]

(ii) the Panel's Recommendations relating to community core values and its mandate to assess socio-economic effects;[197]

(iii) the Panel's approach to the Assessment of the Whites Point Project including the onus on a proponent (or reverse onus as Mr. Estrin argues); the application of a precautionary approach relative to "perfect certainty"; the consideration of mitigative measures; the proper use of adaptive management; the proper interpretation of cumulative effect and the Panel's mandate to recommend whether it was justified in the circumstances to reject the Project and to assess its impact on the public.[198]

205. I will deal with Mr. Estrin's ss. 2.3(e) and 2.6 regarding the Panel's consideration of Bilcon's and the government's expert evidence in Part III of my Report.

206. For the reasons more fully detailed in the balance of this Part II of my Report, I am of the opinion that:

(i) The Panel selection process appeared to accord with standard practice and the panellists' qualifications seemed appropriate for the task at hand. There was no evidence of bias and no allegation of bias was registered by Bilcon during the environmental assessment process.

(ii) The Panel had a clear mandate to assess the socio-economic effects of the Whites Point Project, including the impacts on community core values,

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[196] Estrin, pp. 132-134, paras. 511-517.
[197] Estrin, pp. 60-76, paras. 228-306; pp. 82-84, paras. 334-345.
[198] Estrin, pp. 76-83, paras. 307-339; pp. 84-108, paras. 346-421; pp. 108-114, paras. 422-442; pp. 119-123, paras. 461-475; pp. 123-132, paras. 476-510.

which Bilcon knew throughout the process. This Panel is not the only joint review panel to reject a project on the basis of such socio-economic factors. Accordingly, Bilcon cannot now claim to have been treated unlawfully, unfairly or in a discriminatory manner and certainly not on the basis of an anti-American bias.

(iii) The Panel's approach to the Whites Point Project assessment was reasonable given the specific mandate conferred upon it by the JRP Agreement and the Terms of Reference. Accordingly, Bilcon cannot now claim to have been treated unlawfully, unfairly or in an unduly discriminatory manner and certainly not on the basis of an anti-American bias.

207. I will now deal with each issue in turn.

1. The Selection of Joint Panel Members was Reasonable

208. In s. 2.9 Mr. Estrin asserts:

> … these governments appointed panel members who were apparently not experienced, and in any event clearly not prepared to be comfortable with standard EA evaluation methods or standard EA approaches and who therefore failed to apply appropriate considerations accepted in other EA cases by Nova Scotia and Canada in their approach to the project's evaluation.[199]

209. Mr. Estrin also suggests at least two of the Panelists were biased.[200] I cannot agree with either of Mr. Estrin's objections.

210. Dr. Fournier has a Ph.D. in Biological Oceanography. A review of his curriculum vitae indicates that in addition to his professorship at Dalhousie University, Dr. Fournier has held a number of public appointments and advisory roles in the public sector at both the provincial and federal government levels. For instance, he was a Co-Chair and Facilitator for the Nova Scotia Provincial Energy Strategy Public Meetings, as well as the Chair of the Joint Review Panel for the Sable/M&NP Projects. Therefore, in my view, Dr. Fournier not only possessed background qualifications in a subject of particular

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[199] Estrin, p. 133, para. 514.
[200] Estrin, pp. 133-134, paras. 516 and 517.

relevance to the issues of significance in the Whites Point Project environmental assessment, he also had experience in public hearing processes.

211. Dr. Fournier chaired the Whites Point Project joint review process in a manner very similar to the Sable/M&NP Projects joint review process which he also chaired from roughly 1996 to 1998. I appeared as counsel before Dr. Fournier over the full 56 days of that public hearing (not including the scoping meetings which he also chaired). At the end of the Sable/M&NP hearing, Dr. Fournier complemented the process as ordered, structured, fair and efficient.[201] My review of the materials in this case indicates to me that the approach employed for the Whites Point Project process was also designed to be ordered, structured, fair and efficient. Dr. Fournier, therefore, appeared to be a uniquely well-qualified candidate.

212. Dr. Muecke's background is in the field of geology and geochemistry and at the time of the hearing, he was an Associate Professor at the University of Dalhousie. In addition to having a technical background of relevance to the Whites Point Project issues, Dr. Muecke also had previous panel experience, having served as a member of the federal-provincial review panel for the Kelly's Mountain Coastal Superquarry Project in 1991. His other qualifications include being a field geologist for Shell Canada (1960-1963). Again, Dr. Muecke appeared to have a background well-suited to the assessment before him.

213. The third panel member, Dr. Grant, has a Ph.D. in Regional Planning and Resource Development, which would also appear to assist her in assessing the issues at play in the Whites Point Project given the extent to which local communities were opposed to the Project and raised the compatibility of the Project with the area. Dr. Grant was also a Professor at Dalhousie University in the School of Planning. Dr. Grant held numerous positions on various committees at Dalhousie University and with other institutions.

214. Based on my review of the backgrounds of the three Panelists and my personal experience with Dr. Fournier, all three appear to have suitable academic and professional credentials to serve as panel members.

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[201] Transcript of Sable Gas Projects JRP, July 14, 1997, Volume 56, pp. 256-261, **Exhibit R-441**.

215. In my experience, project proponents are not asked or consulted beforehand about who may serve as panel members. It is unlike an arbitral process, for example, where the litigants may appoint individual arbitrators who, in turn, may jointly appoint a chair.

216. I would also note that Mr. Buxton publically endorsed the Panelists credentials as well. At page 235 of the November 24, 2004 Community Liaison Committee meeting minutes, it discloses the following:

> Mr. Buxton noted that if they had the option to chose they may well have chosen these professionals.[202]

217. Nonetheless, Mr. Estrin now seeks to impute some "expectation" on the part of the provincial and federal governments that the panel members would be biased.[203] In particular, he points to the involvement of Dr. Fournier and Dr. Muecke in an organization called the Ecology Action Center as evidence of the governments "expectation" in this regard.

218. As counsel for the proponent on the Sable/M&NP Projects' joint panel review, I was certainly aware of Dr. Fournier's past involvement with the Ecology Action Centre. But given the passage of time between Dr. Fournier's involvement and his appointment as the Chair of that panel, and in light of his professional reputation, there was no objection registered to his participation on the joint review panel. This conclusion was reinforced by the fair and thorough manner through which he discharged his duties in the Sable/M&NP review. Dr. Fournier never displayed any indication of a bias or predisposition in favour of groups such as the Ecology Action Center at the Sable hearings. From my review of the transcripts of the Whites Point hearings, I draw the same conclusion. Dr. Fournier, in my experience, was careful, thorough, inquisitive and objective throughout.

219. Contrary to Mr. Estrin's assertions, therefore, the process regarding the selection of panel members was fair and even-handed to Bilcon.[204] In this regard, it is important to emphasize that Bilcon was not treated differently in the panel selection process than any

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[202] Minutes of Meeting of Community Liaison Committee, November 24, 2004, p. 235, **Exhibit R-299**.
[203] Estrin, pp. 132-135, paras. 511-517.
[204] Estrin, pp. 133-134, paras. 516 and 517.

other proponent. Moreover, if Bilcon had a problem with the panellists, they could have so stated at the time. Given its expression of support for those panellists, it is not surprising that they did not. What is surprising is that Mr. Estrin only raises a bias issue now, many years after the fact. Any claims of bias would have had to be made immediately upon the facts in question coming to light.[205]

2. The Recommendations of the Whites Point Joint Review Panel -- "Community Core Values" and its Mandate to Assess Socio-Economic Effects

220. In recommending to the Nova Scotia Minister of Environment and Labour that the Whites Point Project proposal should be rejected, and to the Government of Canada that the project was likely to cause significant adverse environmental effects that could not be justified in the circumstances, a primary consideration for the JRP was "the adverse impact on a Valued Environmental Component: the people, communities and economy of Digby Neck and Islands."[206] The term "Valued Environmental Component" and the importance of such concepts is explained in the NSDEL publication *A Proponent's Guide to Environmental Assessment*:

> The proponent should identify the current conditions of the existing environment and distinguish those aspects that have value to all stakeholders. These environmental features are commonly called the Valued Environmental Components (VECs).
>
> …
>
> A discussion of the effects to the socio-economic conditions of the area should be detailed in the document. Examples of these could include employment, transportation, recreation and tourism.
>
> …
>
> Addressing adverse effects will entail evaluating any effects that impairs or damages the environment, including an adverse effect respecting the health of humans or the reasonable enjoyment of life or property. [207]

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[205] Sara Blake in *Administrative Law in Canada*, 3rd ed. (Toronto: Butterworths, 2001) similarly articulates the requirement for timely notice of bias claims as follows (page 107): "if a party was aware of bias during the proceeding but failed to object, it may not complain later when the decision goes against it … [a]n objection should be stated when the bias first comes to the party's attention", **Exhibit R-481**. See also, R. Macaulay and Sprague, J. in *Practice and Procedure Before Administrative Tribunals*, Vol. 4 (Toronto: Carswell, 2004), pp. 39-47, **Exhibit R-480**.

[206] Whites Point JRP Report, p. 103, **Exhibit R-212**.

[207] NSDEL, *A Proponent's Guide to Environmental Assessment*, February 2001, p. 12, **Exhibit R-163**.

221. The JRP encapsulated this consideration in the Executive Summary of its report as follows:

> Based on its comprehensive synthesis and analysis of all the information provided, the Panel found that the Project would have a significant adverse effect on a Valued Environmental Component represented by the "core values" of the affected communities. The Panel's review of core values advocated by the communities along Digby Neck and Islands, as well as community and government policy expectations, led the Panel to the conviction that community has an exceptionally strong and well-defined vision of its future. The proposed injection of an industrial project into the region would undermine and jeopardize community visions and expectations, and lead to irrevocable and undesired changes of quality of life. In addition, the Project would make little or no net contribution to sustainability.[208]

222. Mr. Estrin challenges the Joint Review Panel's recommendations based on community core values on several grounds: it constituted a jurisdictional error; it was beyond the scope of the assessment; it was a factor Bilcon did not have an opportunity to address; it was a concept previously unknown in Canadian Law; and it gave the local community a "*veto*" over the project.[209]

223. I am unable to agree with Mr. Estrin's assertions. I will deal with each in turn.

(a) The Panel's Mandate Clearly Allowed for Consideration of Broader Socio-Economic Effects

224. The essence of Mr. Estrin's opinion in respect of the Panel's recommendation is that impact on core community values is not an environmental effect within the meaning of the *CEAA.*[210] He further claims it was legally irrelevant to the Panel's recommendation.

225. I disagree with Mr. Estrin's interpretation of the *CEAA*, which I discuss later in Part II, Section 2(e) of my Report. In this section, however, I will explain that his conclusions are flawed since Mr. Estrin fails to take into account the provincial aspect of the mandate which included an express obligation to assess the Project's socio-economic effects as well as its effects upon the public and their communities.

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[208] Whites Point JRP Report, p. 4, **Exhibit R-212**.
[209] Estrin, pp. 58-59, paras. 211-223; pp. 60-76, paras. 228-306; pp. 83-84, paras. 340-345.
[210] *CEAA*, s. 2.1 "environmental effect", **Exhibit R-1**.

226. Mr. Estrin's mistake is that he only deals with the federal half of the joint federal and provincial mandate. As Dr. Fournier emphasized at the outset of the hearing:

> That's the reason why this is called a joint panel because it has two masters, one master in Ottawa, one master in Halifax.[211]

227. To be crystal clear about the mandate conferred upon the Panel regarding socio-economic effects and other Project effects upon communities and members of the public generally, I will trace that mandate from the enabling federal and provincial legislation; to the mandate specifically conferred upon the Panel; and to the draft and final EIS Guidelines, which put Bilcon on notice that these issues were clearly relevant to the Panel's assessment.

228. In Part II, Section 2(e), I also demonstrate that adverse impacts upon community core values and other adverse impacts upon members of the public and their communities have been used to reject other, domestically sponsored, projects.

229. Before I do, however, it is important to recognize that Mr. Estrin acknowledges that "inconsistency with community core values … is a pure socio-economic effect."[212] If consideration of socio-economic effects was within the Panel's mandate, then it follows that consideration of community core values was also within its mandate. In my view, consideration of socio-economic effects was within the Panel's mandate, which includes community core values.

(b) A Joint Review Panel Reflects both Federal and Provincial Legislative Requirements

230. Section 40(2)(a) of the *CEAA* stipulates that where a review panel is being conducted under the *Act*, the federal Minister of the Environment can enter into an agreement with a provincial government "having powers, duties or functions in relation to an assessment of the environmental effects of a project"[213] "… respecting the joint

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[211] Whites Point JRP Hearing Transcripts, June 16, 2007, 1T2:2-4, **Exhibit R-457**.
[212] Estrin, pp. 60-61, paras. 230-233 and p. 84, paras. 243-245.
[213] *CEAA*, ss. 40(1)(c), **Exhibit R-1**.

establishment of a review panel and the manner in which an assessment of the environmental effects of the project is to be conducted …".[214]

231. Section 41 of the *CEAA* stipulates that such an agreement must ensure that the assessment considers all the factors in ss. 16(1) and (2), and must "… be conducted in accordance with any additional requirements and procedures set out in the agreement …" (emphasis supplied). Subsection 16(1)(e) of the *CEAA* requires a review panel to consider any other matter relevant to an assessment by a review panel as a responsible authority, or the Minister after consulting with the responsible authority, may require to be considered.[215]

232. Section 41 of the *CEAA* clearly provides that in the context of a joint review panel, additional requirements may be included in the scope of assessment by a joint review panel, beyond those factors that are specifically listed in subsections 16(1) and (2) regarding the "scope of assessment" – that is, the components of the environment and other matters that are to be considered in an assessment under the *CEAA*. A joint review panel agreement must necessarily have the flexibility to include other substantive requirements to be considered in the assessment of environmental effects and to include additional procedures beyond those contemplated under the *CEAA* in order to accommodate the legislative requirement of both jurisdictions.

233. Section 42 of the *CEAA* deems a joint review panel to satisfy the requirements of the *CEAA* respecting review panel assessments.

234. The Nova Scotia *Environment Act* contains counterpart provisions authorizing joint federal provincial reviews. Subsection 47(1) of the Nova Scotia *Environment Act* states that the provincial Minister of the Environment may enter into an agreement with another government or Government agency for a joint environmental assessment. Pursuant to ss. 47(1), the agreement may determine which aspects of the project are governed by the laws of the respective governments; provide for the carrying out of the environmental

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[214] *CEAA*, ss. 40(2)(a), **Exhibit R-1**.
[215] *CEAA*, ss. 16(1)(e), **Exhibit R-1**.

assessment; adopt procedures for the purposes of the assessment; and determine what issues are to be addressed in the assessment.

235. For the Whites Point Project, both the federal and provincial governments proceeded as contemplated by their respective enabling statutes. They negotiated a JRP Agreement and Terms of Reference which expressly required the Joint Review Panel to discharge not just the *CEAA* and Nova Scotia *Environment Act* requirements but also the requirements of the draft Terms of Reference as well. Article 4 of the Agreement empowered the Panel to:

> 4.1 … 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. (emphasis supplied)

236. While Mr. Estrin discusses what he believes to be limitations on the interpretation of "*socio-economic effect*" under the *CEAA* (with which I disagree), he ignores the breadth of the socio-economic considerations, which are mandated by the Nova Scotia legislation. Those requirements also governed the assessment. The Nova Scotia legislation makes clear that the environmental effects to be considered in an assessment are not limited to impacts on biophysical components (such as vegetation, air, water and wildlife) but include broader socio-economic effects. Subsection 2(r)(v) of the Nova Scotia *Environment Act* defines "environment" broadly to include for "the purpose of Part IV [Environmental Assessment Process], the socio-economic, environmental health, cultural and other items referred to in the definition of environmental effect". This broad definition of "environment" for the purposes of an environmental assessment under the Nova Scotia *Environment Act* is explicitly carried through to the definition of "environmental effect". Subsection 2(v)(i) defines "environmental effect" as "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 …". The definition of "environmental effects" is non-exhaustive and may include other changes that a project may cause on the environment that are not expressly included in the definition. Therefore, the factors to be considered in an environmental assessment under Part IV of the Nova Scotia *Environment*

Act expressly include socio-economic effects of the kind at issue for the Whites Point Project.[216]

237. In sum, the Nova Scotia legislation, by itself, clearly mandated an examination of the broader socio-economic effects to which Mr. Estrin objects.

238. The requirements of the Nova Scotia legislation are reflected in Part III (i) of the Panel's Terms of Reference, which listed "the socio-economic effects of the Project" as a factor to be considered. There can be no doubt, therefore, that socio-economic effects of the Whites Point Project, even those that are unrelated to any biophysical change in the environment, were within the mandate of the Joint Review Panel and expressly within the scope of the Project's assessment.

239. Part III of the Terms of Reference provided, in part, as follows:

> **Part III - Scope of the Environmental Assessment and Factors to be considered in the Review**
>
> The Minister of Environment and Labour, Nova Scotia, and the Minister of the Environment, Canada, have determined that the Panel shall include in its review of the Project, consideration of the following factors:
>
> . . .
>
> e) the location of the proposed undertaking and the nature and sensitivity of the surrounding area;
>
> . . .
>
> i) the socio-economic effects of the Project;
>
> . . .
>
> k) comments from the public that are received during the review;
>
> . . .
>
> p) residual adverse effects and their significance. (emphasis supplied)[217]

240. The Terms of Reference for the Panel, included in the Final JRP Agreement were clear that the "socio-economic effects" to be considered by the Panel were an additional

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[216] See also, *Environmental Assessment Regulations*, N.S. Reg 44/2003, at ss. 19(1), **Exhibit R-6**. A more detailed analysis of the proper scope of socio-economic effects in the context of the joint Nova Scotia and federal Whites Point Quarry assessment appears in **Appendix** "**7**" (Analysis of Nova Scotia Legislation – Socio-economic and Public Interest Impacts) attached.

[217] Whites Point JRP Report, Appendix I, p. 114, **Exhibit R-212**.

category of effect, separate and apart from "environmental effects". The Scope of Environmental Assessment found in Part III of the Appendix lists "the environmental effects of the Project" (Part III, h) as a separate component of review from the "the socio-economic effects of the Project" (Part III, i).

241. The socio-economic effects that the Panel was required to consider were not circumscribed as suggested by Mr. Estrin. Mr. Estrin opines that the only socio-economic impacts the Panel was permitted to consider were limited: "[s]ocio-economic impacts are considered only to the extent that they are caused by a change in the natural environment."[218] However, Mr. Estrin's limited interpretation relates only to the *CEAA* consideration of socio-economic impacts.

242. The JRP Agreement's treatment of socio-economic effects was not limited to the definition of "environmental effect".[219] Rather, the JRP Agreement also required the Panel to consider "socio-economic effects" as a separate matter from "environmental effects". Those socio-economic effects were *in addition* to the "socio-economic effects caused by a change in the natural environment" included in "environmental effects".

243. The "socio-economic effects" referred to in the Terms of Reference of the JRP Agreement (Part III, i) were not circumscribed. In my opinion, that term must be read to be something in addition to "socio-economic effects caused by a change in the natural environment", as those effects were already included in the concept of environmental effect. Therefore, the socio-economic effects to be considered by the Panel pursuant to the Panel's Terms of Reference[220] must be read as being "pure socio-economic effects".

244. It is important to recognize that Bilcon was provided an opportunity to comment on the draft JRP Agreement and the Terms of Reference when they were still in draft form. On September 10, 2003, Mr. Chapman from the CEA Agency specifically wrote to Mr. Buxton to "… encourage you to review this draft agreement and submit any comments

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[218] Estrin, p. 67, para. 260.
[219] Final Whites Point JRP Agreement, 1. Definitions, "Environmental Effect", **Exhibit R-27**.
[220] Final Whites Point JRP Agreement, Appendix "Terms of Reference for the Joint Review Panel", Part III, item i) , **Exhibit R-27**.

you have by September 18, 2003".[221] If Bilcon had found the scope of the assessment too broad, as Mr. Estrin now contends, this was the opportunity to state that objection.

245. In his response dated November 11, 2003, Mr. Buxton did not take issue with the inclusion of socio-economic effects or any of the other factors relating to Project impacts on members of the public or their communities which were proposed to be included in the scope of the assessment.[222]

246. Moreover, the foregoing demonstrates that from the outset, Bilcon was on clear notice that the socio-economic effects of the Whites Point Project were at issue.

(c) The Draft and Final EIS Guidelines Provided Bilcon with Further Notice about the Scope of Socio-Economic Effects under Review and an Opportunity to Object

247. Part II of the Terms of Reference provided that the two governments would "… prepare draft guidelines regarding the scope of the Environmental Impact Statement".[223] The Proponent, public and stakeholders were invited to comment and these comments were to be provided to the Panel. As I have noted, the Panel was also directed to hold scoping meetings in the locale of the proposed Project at which to obtain further input on those draft Guidelines.[224] After considering all comments, including those of the Proponent Bilcon, the Panel was to finalize the Guidelines and to "… require the Proponent to prepare the Environment Impact Statement in accordance with the guidelines issued by the Panel".[225]

248. The Panel acted in accordance with these steps. The draft Guidelines were issued on November 10, 2004, the Panel held scoping meetings on January 6, 7, 8 and 9, 2005 and the Panel issued final Guidelines on March 3, 2005.

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[221] Letter from S. Chapman, CEA Agency, to P. Buxton, September 10, 2003, p. 1, **Exhibit R-228**.
[222] Letter from P. Buxton, to C. Daly, NSDEL, November 11, 2003, **Exhibit R-229**.
[223] Final Whites Point JRP Agreement, Appendix "Terms of Reference for the Joint Review Panel", Part II, para. 1, **Exhibit R-27**.
[224] Final Whites Point JRP Agreement, Appendix "Terms of Reference for the Joint Review Panel", Part II, para. 2, **Exhibit R-27**.
[225] Final Whites Point JRP Agreement, Appendix "Terms of Reference for the Joint Review Panel", Part II, para. 4, **Exhibit R-27**.

249. I discuss below both the draft Guidelines ("Draft Guidelines") and the final EIS Guidelines ("Guidelines") because both provided Bilcon ample advance notice of the importance of socio-economic considerations in the review process. Mr. Estrin is simply wrong to now assert that Bilcon was caught unawares regarding the inclusion of this factor in the Panel review.[226]

250. This Tribunal may wish to carefully reflect upon the very detailed subject matter respecting community core values and socio-cultural patterns which were laid out in those Guidelines. When doing so, it is important to bear in mind that the Guidelines were intended to be the framework for the completion of the EIS by the proponent and that detailed evidence in respect of each point in the Guidelines was required in order to determine the likelihood of significant adverse effects and the efficacy of the measures proposed to mitigate those effects, if any. The Guidelines outlined the information that the Panel expected to see in the EIS and upon which the Panel ultimately would assess the Project.

251. The Whites Point Project Panel was not alone in being provided with the ability to hold scoping meetings. For instance, the Joint Review Panel for the Voisey's Bay Mine and Mill held scoping sessions in April and May of 1997 to hear comments and suggestions from the public, following which that panel prepared the final EIS guidelines for the Voisey's Bay Mine and Mill project.[227] Indeed, the Agency's guideline *Procedures for an Assessment by a Review Panel*, November 1997, expressly contemplated that review panels may conduct scoping meetings prior to the issuance of final EIS guidelines:

> 4.8.1 Scoping is an exercise of identifying the environmental and related issues that will be examined in the environmental assessment. Scoping is intended to ensure that the issues to be studied in the review represent fairly the concerns of the interested parties. Scoping is also intended to ensure that all issues considered in the review warrant study and presentation in the EIS.

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[226] Estrin, pp. 83-84, paras. 340-345.
[227] Environmental Impact Statement Guidelines for the Review of the Voisey's Bay Mine and Mill Undertaking, s. 1.1, June 20, 1997, **Exhibit R-444**.

> 4.8.2 Scoping should commence as early as practicable in an environmental assessment. Scoping consists of the following stages:
>
> a) agency prepares draft project-specific guidelines, circulates them to identified interested parties and announces their availability for public comment;
>
> b) review panel receives written comments and may conduct scoping meetings; and
>
> c) review panel prepares final project-specific guidelines.[228]

252. Notwithstanding Mr. Estrin's assertion that review panels did not revise EIS guidelines after receiving comments,[229] the procedures which governed the conduct of the Whites Point Project clearly contemplated such revisions which was consistent with past practice.[230]

253. Therefore, any suggestion by Mr. Estrin that the process followed by the Whites Point Panel in finalizing the EIS Guidelines was unusual or unprecedented is without merit.

254. The Draft Guidelines, issued on November 10, 2004, were extensive and detailed; again a fairly common occurrence in my experience. They laid out the background of the review process, and listed the *CEAA* legislative requirements. The Draft Guidelines specifically directed the Proponent to provide information on the socio-economic effects of the Project, providing:

> To adequately describe the potential adverse environmental effects of the Project, the EIS must provide the following information:
>
> . . .
>
> i. the socio-economic effects of the Project;[231]

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[228] CEA Agency, *Procedures for an Assessment by a Review Panel*, A Guideline issued by the Honourable Christine Stewart, November 1997, p. 14 **Exhibit R-26**.
[229] Estrin, pp. 84-85, para. 350.
[230] CEA Agency, *Procedures for an Assessment by a Review Panel*, A Guideline issued by the Honourable Christine Stewart, November 1997, sections 4.8.3, 4.8.4, 4.8.5 at pages 14 and 15, **Exhibit R-26**.
[231] Draft Guidelines for the Preparation of the Environmental Impact Statement for the Whites Point Quarry and Marine Terminal Project, November 2004 ("EIS Draft Guidelines"), p. 3, **Exhibit R-209**.

255. The Draft Guidelines further proposed that as part of its description of baseline conditions[232] in the EIS, Bilcon was to include an extensive discussion of socio-economic conditions, including economy; land use and value; commercial and recreational fisheries; recreation and tourism; human health; and aboriginal land and resource use.[233] Apropos community core values, the Draft Guidelines, further stated:

> In describing the socio-economic environment, the Proponent must provide information on the functioning and health of the socio-economic environment, encompassing a broad range of matters that affect the people and communities in the study area.[234]

256. By way of further example, the Draft Guidelines description of the baseline information to be collected with respect to socio-economic human health, was likewise broad:

> Provide current information on the health status of the communities in the Project study area. Human health considerations must include physical, social, cultural, and economic aspects.[235] (emphasis supplied)

257. Similarly, the Draft Guidelines required a broad consideration of project socio-economic human health effects on local communities:

> Discuss the potential effects (with rationale) that the undertaking could have on the physical, mental, and cultural health of affected communities and the employees in the surrounding area.[236] (emphasis supplied)

258. The Draft Guidelines were clear throughout that Bilcon was to prepare an EIS for the Panel's review and consideration that addressed the socio-economic effects of the Project. Bilcon had ample advance notice of the importance of socio-economic considerations such as impacts to the "social and cultural health" of local communities, which in my view, certainly included matters such as "core community values". As described by the Panel, the "community core values" identified by the panel were the "shared beliefs by individuals within groups, and constitute defining features of

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[232] EIS Draft Guidelines, pp. 14-15, s. 8; pp. 18-20, s. 8.2, **Exhibit R-209**.
[233] EIS Draft Guidelines, p. ii-iii, **Exhibit R-209**.
[234] EIS Draft Guidelines, p. 15, **Exhibit R-209**.
[235] EIS Draft Guidelines, p. 20, **Exhibit R-209**.
[236] EIS Draft Guidelines, p. 28, **Exhibit R-209**.

communities … [including] the importance of a strong sense of place, a living connection with traditional lifestyles, harmony with the environment, combined with a strong sense of stewardship as a way of life."[237] In my view, the core community values considered by the Panel therefore fit within the concept of cultural health of affected communities. Mr. Estrin is simply wrong to now assert that Bilcon was caught unaware of this factor in the Panel's review.[238]

259. Moreover, Bilcon was well aware of the broad interpretation of socio-economic effects being urged upon the Panel by members of the public at the public scoping meetings. For instance, as noted above, the importance of both fisheries and tourism was raised in the Draft Guidelines, as well as in numerous public presentations made during the scoping meetings. Members of the public spoke of the distinct way of life and traditions of the community and urged the Panel to consider the impacts of the Project on these factors.[239] While the Draft Guidelines did not refer specifically to socio-cultural patterns, the Panel was also urged by several participants at the scoping sessions to consider factors such as sense of place, spiritual values and community identity.[240] Accordingly, evidence respecting project impacts on socio-cultural patterns was specifically required by the Panel in the Guidelines. The scope of that particular subject is reviewed later in my Report.

260. At this juncture, it bears emphasizing that Bilcon was provided the opportunity to comment on the Draft Guidelines. In a letter dated December 15, 2004, Dr. Fournier requested that Bilcon review the Draft Guidelines and provide comments to Mr. Chapman no later than January 21, 2005.[241] Dr. Fournier also indicated that Bilcon may wish to make a presentation at one of the scoping meetings.[242] Representatives of Bilcon attended these meetings, at which numerous members of the public suggested a number of amendments to the Draft Guidelines.

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[237] Whites Point JRP Report, p. 14, **Exhibit R-212**.
[238] Estrin, pp. 83-84, paras. 340-345.
[239] See, for example, Transcript of Whites Point JRP, Scoping Meeting #1, January 6, 2005, 74:11-20, **Exhibit R-479**.
[240] Transcript of Whites Point JRP, Scoping Meeting #1, January 6, 2005, 22:1-4, **Exhibit R-479**; Transcript of Whites Point JRP, Scoping Meeting #3, January 8, 2005, 17:1-15; 83:19-25, **Exhibit R-478**.
[241] Letter from R. Fournier, JRP, to P. Buxton, Bilcon, December 15, 2004, **Exhibit R-242**.
[242] Letter from R. Fournier, JRP, to P. Buxton, Bilcon, December 15, 2004, **Exhibit R-242**.

261. I have reviewed the transcripts from the scoping meetings. No Bilcon representative appears to have made any submission at any of these meetings. In a letter dated January 16, 2005, which followed the scoping meetings, Bilcon did provide some comments on the Draft Guidelines; however, Bilcon did not address any of the extensive discussion which took place over the four days of scoping meetings.[243] The limited comments in the letter, among other things, indicated that the evaluation of the potential adverse environmental effects of the Project should rest solely with the Panel, not the public and stakeholders. Bilcon also indicated in the letter that the Guidelines should be expanded to include the concept of adaptive management.[244] Given Mr. Estrin's objections to community core values as a relevant consideration in the Whites Point Project assessment, it is strange that, at the time, Bilcon did not object or comment in any way on the breadth of the socio-cultural factors that were clearly under consideration by the Panel for inclusion in the final Guidelines.

262. Ultimately, the final Guidelines that set out the requirements for preparation of the EIS by Bilcon were issued on March 31, 2005. The final Guidelines were lengthy and detailed; however, that is not unusual in the case of contentious projects that are assessed by joint review panels.[245] At the end of the public comment process, there could be no doubt about the significance of the evidence to be filed detailing how the Whites Point Project would affect community core values and members of the public in the region. The final EIS Guidelines reflected the comments of the public in this regard. Rather than reproducing the entire text of the Guidelines, the Tribunal may wish to simply review the headings found in the Table of Contents requiring baseline information for the "Existing Human Environment". These headings are illustrative of the depth and breadth of the

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[243] Letter from P. Buxton, Bilcon, to S. Chapman, CEA Agency, January 16, 2005, **Exhibit R-243**.
[244] Letter from P. Buxton, Bilcon, to S. Chapman, CEA Agency, January 16, 2005, **Exhibit R-243**.
[245] See for example, the *Environmental Impact Statement Guidelines, Lower Churchill Hydroelectric Generation Project*, July 2008, **Exhibit R-413;** *Marathon Platinum Group Metals and Copper Mine Project Final Environmental Impact Statement Guidelines*, August 2011, **Exhibit R-417**. It should be noted that it is difficult to directly compare the substantive requirements in EIS Guidelines. While all EIS guidelines must include the factors listed in ss. 16(1) and 16(2) of *CEAA*, given the differences between the various provincial legislative regimes, there can be and are often significant variations in respect of other requirements.

evidence required relating to community-related values, interests, concerns and knowledge that Bilcon was to provide and assess as part of the EIS.[246]

263. Several other sections of the Guidelines also bear emphasizing to demonstrate that Bilcon was on clear notice of the breadth of the community core value issues within the scope of the Panel's intended review.

264. First, the final Guidelines listed the principles which would govern the review. Several of these principles clearly identified the Panel's interest in core community values, such as s. 3.1 "Use and Respect for Traditional and Community Environment Knowledge".[247]

265. The final Guidelines also made clear that traditional community knowledge, interests and concerns were separate and distinct from science-based knowledge:

> Although traditional and science-based knowledge have different bases, both can, independently or collectively, contribute to the understanding of issues.[248]

266. The breadth of the review beyond purely physical environmental impacts was made clear. Socio-cultural values and traditional issues were to be addressed as part of the scope of the assessment. The concept of including traditional knowledge, and specifically traditional ecological knowledge, for example, appeared in both the draft and final Guidelines.[249] While this wording was revised somewhat in the final Guidelines, Bilcon was clearly put on notice that community ecological knowledge could be included.

267. Further, in the final Guidelines, the principle of sustainable development was identified as a guiding principle and was described as both "… protecting the environment

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[246] Final Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project, March 2005 ("EIS Final Guidelines"), p. 3, **Exhibit R-210**.
[247] EIS Final Guidelines, pp. 8 and 9, **Exhibit R-210**.
[248] EIS Final Guidelines, p. 9, **Exhibit R-210**.
[249] EIS Draft Guidelines, p. 17, "traditional ecological knowledge from local fishermen and fishermen's associations", **Exhibit R-209**; Final EIS Guidelines, p. 8-9, **Exhibit R-210**.

from significant adverse impacts of proposed developments; and protecting the social, cultural and economic well being of residents, Aboriginal people and communities."[250]

268. Section 9 of the final Guidelines "Description of Existing Environments"[251] emphasized not just physical and biological baseline information, but human or socio-economic baseline information "… that acknowledges any distinctiveness in economy, life style, social traditions or quality of life, along with any criteria requirements for their maintenance and enhancement". For example, in connection with the description required of the geographic area, the regional environment and economy were highlighted including "… the economic dependence of the region on the fisheries and tourism",[252] and the following:

> Provide historical, current and projected information as to the health and importance of social and economic issues which broadly encompass and affect people and communities in the study area. Use a comprehensive and holistic approach that acknowledges any distinctiveness in economy, life style, social traditions or quality of life, along with any criteria requirements for their maintenance and enhancement. Consider the status, health, persistence, vulnerability and resilience of the local economy, especially in relation to the physical and biological environments. Provide context-sensitive information in sufficient detail to address a range of public interests and concerns, as well as to assist in recognition of the varying significance of the potential impacts on communities throughout the region.[253] (emphasis supplied)

269. The requirements for baseline information found in s. 9 of the final Guidelines make patently clear that region-wide community values, interests and concerns were central to the entire review process. They also make clear that the review was not limited to science-based effects such as biological, terrestrial or oceanographic effects but included traditional, socio-cultural community-based information as well.[254]

270. These factors are equally apparent in s. 10 of the Final Guidelines "Environment Impact Analysis". This section of the EIS was intended to assess Project impact on socio-

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[250] EIS Final Guidelines, p. 10, **Exhibit R-210**.
[251] EIS Final Guidelines, s. 9, p. 25, **Exhibit R-210**.
[252] EIS Final Guidelines, p. 25, **Exhibit R-210**.
[253] EIS Final Guidelines, pp. 25-26, **Exhibit R-210**.
[254] EIS Final Guidelines, pp. 33-36, **Exhibit R-210**, especially sections 9.3.1 Community Profile and 9.3.8 Socio-Cultural Patterns.

cultural and community factors. Specifically, s. 10.3 "Human Environment Impact Analysis" detailed over five pages of analysis required regarding impacts on the components identified in the baseline information requirements of s. 9.3 "Existing Human Environment".

271. In terms of describing the Project effects on the "Existing Human Environment", several points warrant emphasis and it is important to read the baseline requirements found in s. 9.3 in conjunction with the impact assessment requirements found in s. 10.3. For example:

(i) Reading the above requirement for baseline "Community Profile" information in s. 9.3.1, in conjunction with s. 10.3.1 "Community Profile" in the impact analysis section of the Final Guidelines, clearly identifies the need an assessment of Project impacts on community values to be considered:

> Identify and take into account the particular needs, interests, and values of various segments of the local populations (e.g., youth, seniors, fishers), and consider how the Project may affect them. In assessing the effects of the Project on fishing and tourism activities, give particular attention to the comparative adverse and beneficial effects on social and economic systems and determinants of human health.[255] (emphasis supplied)

(ii) Similarly, reading the requirement for baseline "Socio-Cultural Patterns" in s. 9.3.8 above, for example, in conjunction with the actual analysis required for impact on the human environment impact for the same "Social and Cultural Patterns" in s. 10.3.8 puts beyond doubt the fact that impacts on core community values and perspectives were central to the review:

> **10.3.8 Social and Cultural Patterns**
>
> Describe and evaluate the potential impacts of the Project or social and cultural patterns and social organization. Consider effects on traditional lifestyles, values and culture. Consider any effects on patterns of family and community life (such as household and community organization, including the organization of work).

[255] EIS Final Guidelines, p. 45, **Exhibit R-210**.

> Consider implications of the Project on residents' perceptions of quality of life and sense of place. Describe and evaluate potential impacts on social relations between residents, among generations, and between seasonal and full-time residents, among those who are employed and unemployed, and among those who support and oppose the Project.
>
> Describe and evaluate how Project-related impacts on harvested resources or economic activities such as tourism may affect social and cultural patterns.[256] (emphasis supplied)

272. In light of the foregoing, Mr. Estrin's objections to the "community core values" aspects of the review are impossible to sustain.[257] His assertion that the "community core values" was "… a factor Bilcon did not have an opportunity to address"[258] is clearly unsupportable. Bilcon was put on notice about the breadth of the review from the outset; was specifically asked to comment on the draft Guidelines; declined to comment on any of the socio-economic factors listed in the draft Guidelines; and did not object or respond to any of the community core values, socio-economic or socio-cultural factors raised by members of the public at the scoping meetings as factors to be added to the final Guidelines.

273. In these circumstances, any proponent would be bound to prepare an EIS which satisfied the required balancing of benefits and burdens on community interests and values. Bilcon's onus of proof respecting community core values was clear and detailed. The process for Bilcon with respect to the EIS was the same as for other domestic proponents. The fact is that Bilcon had clear and detailed instructions from the Panel about what would be required to fulfil the requirements of the Final EIS Guidelines.

274. Mr. Estrin's objection to the Panel's consideration of the core community values factor as part of the review process and its rejection of the Project on that basis[259] is also difficult to sustain. Any proponent in a joint, multi-jurisdictional review process would know that the factors, criteria and matters under review are broader than the *CEAA* mandate alone. That is inherent in any joint review process. Here the draft agreement and draft Terms of Reference made that clear. Bilcon did not take issue with them at the time

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[256] EIS Final Guidelines, p. 49, **Exhibit R-210**.
[257] Estrin, pp. 58-84, paras. 211-345.
[258] Estrin, pp. 83-84, paras. 340-345.
[259] Estrin, pp. 58-59, paras. 211-227, pp. 60-83, paras. 228-339.

despite Mr. Chapman's specific invitation to do so,[260] and despite Dr. Fournier's specific invitation to Mr. Buxton to state its concerns about the draft EIS Guidelines, after the scoping meetings were completed.[261] It is somewhat remarkable that, if these issues were of such concern, why were they not raised with the Panel when Bilcon was expressly invited to do so.

275. In light of the foregoing, Mr. Estrin is wrong to suggest that because "[c]ore values have never been used to reject a project",[262] the Whites Point Project process was somehow flawed.

(d) Mr. Estrin is Wrong to Assert Socio-Economic Effects have Never Been used to Reject a Project – Kemess North Mine Joint Panel Review

276. Further, Mr. Estrin's statement that no other *CEAA* Joint Review Panel has recommended the rejection of a project "on the basis of 'community core values' or any similar concept"[263] is incorrect. For example, the Kemess North Mine ("Kemess") Joint Review Panel recommendation issued on September 17, 2007, just over a month prior to the Whites Point Project Panel recommendation, founded its recommendation to reject a proposed mining development on socio-economic and socio-cultural effects.

277. The Kemess North Mine was proposed by Northgate Mineral Corporation, a Canadian corporation, as a copper and gold mine project located approximately 250 km northeast of Smithers, B.C., and 450 km northwest of Prince George, B.C. The project was subject to the requirements of the British Columbia *Environmental Assessment Act*[264] and the *CEAA.* The Kemess Joint Review Panel was established in 2005. The Panel's terms of reference required it to consider factors specified under the *CEAA* and also "economic, social, heritage and health effects" of the project, including such effects on

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[260] Letter from S. Chapman, CEA Agency, to P. Buxton, September 10, 2003, **Exhibit R-228**.
[261] Letter from R. Fournier, JRP, to P. Buxton, Bilcon, December 15, 2004, **Exhibit R-242**.
[262] Estrin, pp. 82-83, paras. 334-339.
[263] Estrin, p. 82, para. 334.
[264] S.B.C. 2002, c. 43, **Exhibit R-30**.

Aboriginal people, which are factors to be considered under the British Columbia *Environmental Assessment Act.* [265]

278. The Kemess Joint Review Panel concluded that the project was not in the public interest and recommended that it not be approved:

> … the economic and social benefits provided by the Project, on balance, are outweighed by the risks of significant adverse environmental, social and cultural effects, some of which may not emerge until many years after mining operations cease. The Panel recommends to the federal and provincial Ministers of the Environment that the Project not be approved as proposed.
>
> The Panel's main finding is based on a comprehensive synthesis and analysis of the information provided to the Panel regarding adverse and beneficial Project effects. These effects were used as the basis for the assessment of the pros and cons of Project development from a range of perspectives. One of the most important components of a panel review is to integrate public values, as well as government policy expectations, into the review process. In order to weigh the Project development pros and cons in the context of public values and policy expectations, the Panel chose to adopt what it considered to be an appropriate sustainability assessment framework.[266] (emphasis supplied)

279. The Kemess Joint Review Panel Report and its conclusions are another clear example of a joint panel under the *CEAA* embracing both the provincial and federal elements of its mandate in reaching its recommendation. In so doing, the Kemess Joint Review Panel considered that an overall assessment of socio-economic aspects was an important part of its assessment. Like the Whites Point Project Panel, socio-economic effects and the values of the local communities (in the case of Kemess area Aboriginal groups) were the foremost consideration for the Kemess Panel. The panel explicitly recognized the importance of community values, noting that one of the most important components was "to integrate public values, as well as government policy expectations,

[265] Kemess North Mine JRP Report, p. 274, **Exhibit R-411**.
[266] Kemess North Mine JRP Report, p. xi, **Exhibit R-411**.

into the review process."[267] Both the provincial and federal governments accepted the Kemess Panel's recommendation not to approve that project.[268]

280. In my view, the Panel's recognition of community core values is also implicit in its assessment of the Kemess project on local Aboriginal groups. For instance, in balancing the "Social and Cultural Benefits and Costs" of the Project, the panel emphasized the importance of the values of local Aboriginal communities:

> The Panel agrees that the Project would continue to make a significant contribution to social wellbeing and community stability in communities where workers live and service suppliers operate. … However, the Panel considers the socio-cultural implications of the Project for Aboriginal people, and the obstacles to their participation in Project benefits, to be a significant drawback. The Aboriginal proportion of mine employees at the existing mine, although growing in response to Proponent recruitment and training initiatives, remains relatively small, and is likely to stay small. Aboriginal communities appear unlikely to embrace either the Project or the financial compensation and other potential benefits offered to them by the Proponent. To do so would entail accepting the loss of the spiritual values of Duncan (Amazay) Lake, and Aboriginal groups have said that these values are beyond price.[269] (emphasis supplied)

281. In my opinion, the Kemess Joint Review Panel recommendation is an example of another environmental assessment where the broader notion of socio-economic effects, including community values, were indeed relied upon by the Panel as the determining factor in its recommendation as to why the proposed project should be rejected.

(e) Mr. Estrin's Interpretation of Significant Adverse Socio-Economic Effects under the *CEAA* is Also Unduly Restrictive

282. While the Nova Scotia legislation and the Terms of Reference did not limit the consideration of the socio-economic effects in the manner suggested by Mr. Estrin, it is also debatable whether his restrictive interpretation of the scope of socio-economic effects under the *CEAA* is reasonable.

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[267] Kemess North Mine JRP Report, p. xi, **Exhibit R-411**.
[268] Letter from B. Penner, BC Minister of Environment, to K. Stowe, Northgate Minerals, March 7, 2008, **Exhibit R-465**; The Government of Canada's Response to the Environmental Assessment Report of the Joint Review Panel on the Kemess North Copper-Gold Mine Project, March 7, 2008, **Exhibit R-466**.
[269] Kemess North Mine JRP Report, p. 243-242, **Exhibit R-411**.

283. The correct interpretation to be given to the socio-economic effects in the context of the *CEAA* has not been judicially considered by Canadian courts. However, in *Bowen v. Canada (Attorney General),*[270] the Federal Court stated at paragraph 80 that "a liberal interpretation should be given to the 'health and socio-economic conditions' aspects of the definition of environmental effects to be investigated under s. 16(1)(a) [of *CEAA*]."

284. Given the direction of the Court in *Bowen, supra,* the specific factors listed in s. 16(1)(a) of the *Act* should be given a broad interpretation. Those factors include socio-economic effects by virtue of the definition of "environmental effect":

> *Definitions*
>
> **2**. (1) In this Act, . . .
>
> "environmental effect" means, in respect of a project,
>
> (a) any change that the project may cause in the environment, including, …
>
> (b) any effect of any change referred to in paragraph (a) on
>
> (i) health and socio-economic conditions,
>
> (ii) physical and cultural heritage,
>
> . . .
>
> (c) any change to the project that may be caused by the environment.[271]

285. It is plausible, for example, that pile driving, blasting and shipping activities could have disruptive effects upon commercial and recreational fisheries and eco-tourism activities such as whale watching. It is also plausible that surface run-off from the quarry into the nearshore could have similar effects. In fact, just such an event had occurred in the same timeframe as Project scoping occurred.[272]

286. It is plausible as well that construction and operation onshore could lead to noise, traffic, dust and potential accidents that might have an adverse effect upon nearby residents

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[270] *Bowen v. Canada (Attorney General),* [1998] 2 F.C. 395 at para. 80 (T.D.), **Exhibit R-399**.
[271] *CEAA,* s. 2(1) , **Exhibit R-1**.
[272] NSDEL, Whites Point Project Hearing Undertaking #40 – Siltation Complaints, **Exhibit R-490**.

and businesses, for example, a bed and breakfast or other local tourist business. In my view, noise, dust, vibration, surface run-off (with or without blasting residue) due to altered topography as a result of quarrying activities can reasonably be construed as environmental effects of the project which have an impact on the socio-economic and socio-cultural setting.

287. In these circumstances, the socio-economic impacts would clearly be caused by "environmental effects" in the nature of changes caused by the Whites Point Project in the environment. The fact that the Joint Review Panel considered these effects and their potential socio-economic impacts would not appear unreasonable even if the assessment had been convened only under the *CEAA*, which it was not.

288. Mr. Estrin states that because the panel did not find any impact on the "*natural environment* to be both adverse and significant", the panel had no basis to conclude that Project impacts on community core values were a significant adverse environmental effect.[273] I am unable to agree. Mr. Estrin states that a "significant adverse environmental effect" under the *CEAA* must be an effect on the *natural environment*.[274] That is not correct. Under the *CEAA*, an "environmental effect" includes "any change in the environment, including any effect of any such change on health and socio-economic conditions".[275] Rather, the appropriate analysis in assessing whether there is an environmental effect under the *CEAA* is to first consider whether there is a *change* in the environment. If so, the next inquiry is whether that *change* in the environment affects socio-economic conditions. If the answer to both those inquiries is "yes", then an "environmental effect" under the *CEAA* has been identified. Once this environmental effect has been identified, then one must consider whether it is "significant and adverse". There is no need, as suggested by Mr. Estrin, to <u>first</u> find a "significant and adverse effect" on the *natural environment* before one can consider the socio-economic effects of a project.[276] Rather, *any change* on the natural environment that in turn affects socio-

[273] Estrin, p. 68, para. 266.
[274] Estrin, p. 67, para. 261.
[275] *CEAA*, s. 2, **Exhibit R-1**.
[276] Estrin, p. 68, para. 266.

economic conditions will be an environmental effect that should be considered and rated as significant or not significant under the *CEAA*.

289. Second, in my opinion, Mr. Estrin is wrong to say that the Panel's finding of significant adverse environmental effects on community core values is a "pure socio-economic impact" with "no necessary connection to environmental impact". [277] Indeed, if one reads the Panel's determination regarding the Project, at s. 4.1 of the JRP Report, it is apparent that the impacts to "the people, communities and economy of Digby Neck and Islands" that concerned the Panel were grounded in potential changes to the surrounding environment:

> A primary consideration influencing the Panel's decision to recommend rejection of this Project is the adverse impact on a Valued Environmental Component: the people, communities and economy of Digby Neck and Islands. This region of Nova Scotia is unique in its history and in its community development activities and trajectory. Its core values, defined by the people and their governments, support the principles of sustainable development based on the quality of the local environment. Local residents are deeply embedded within and dependent on the terrestrial and marine ecosystems of this region: human health and well-being is intrinsically linked with the viability of the ecosystem. The Panel believes that the Project as proposed would undermine community-driven economic development planning and threaten an area recognized and celebrated as a model of sustainability by local, regional, national and international authorities. The Project is inconsistent with many government policies and principles at local, provincial and national levels. The Project does not make a net contribution to sustainability and is likely to have a significant adverse environmental effect on the people and communities that comprise Digby Neck and Islands, which are without doubt integral, essential and valued components of that environment.[278] (emphasis supplied)

290. The foregoing demonstrates that the Panel's concern was impacts to the local environment, including terrestrial and marine ecosystems, which in turn would affect the people, communities and economy of Digby Neck and Islands. As such, in my view, the Panel's determination was in fact based on a significant adverse environmental effect within the meaning of the *CEAA*.

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[277] Estrin, p. 68, para. 262.
[278] Whites Point JRP Report, p. 103, **Exhibit R-212**.

291. Indeed, it is somewhat remarkable to suggest that the Project's impacts upon people and their communities are not relevant to a determination about whether or not the Whites Point Project should be approved or rejected.[279] As noted earlier in my Report, the *CEAA* contains many provisions which seek to ensure meaningful and timely public input into the environmental assessment process. Why would the legislation require such public input if the impacts of a project upon the public and their communities is an irrelevant basis upon which to reject a Project? In my opinion, such a conclusion is not supportable.

(f) The Joint Review Panel did not Accord the Community a "Veto" of the Project

292. Mr. Estrin suggests that a "veto" was granted by the Joint Review Panel to the opponents of the project.[280] I am in agreement with Mr. Estrin that the *CEAA* does not grant a community "veto" over proposed development. The Panel, however, did not confer such a veto upon the local community.

293. Mr. Estrin's comments regarding community "veto" appears to be another attempt to argue that the Panel's decision was not an environmental effect within the meaning of the *CEAA*.[281] Mr. Estrin attempts to cast the Panel's assessment process and recommendations as tantamount to requiring community consensus.[282] That position is simply not supportable. The Panel's discussion of those community impacts in its report and the considerable discussion that surrounded them over the course of the proceeding would not have been necessary if the community had been granted a "veto".

294. Once again, this issue highlights Mr. Estrin's failure to acknowledge the importance of public participation in the *CEAA* process and the importance that was placed on project impacts on socio-cultural factors and local communities in the EIS Guidelines. As has been discussed above, it would not appear to me that the Panel was acting outside its legal

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[279] Estrin, p. 68, para. 266.
[280] Estrin, p. 69-76, paras. 269-306; p. 61, para. 235.
[281] Estrin, p. 72, para. 286, p. 69, para. 273.
[282] Estrin, p. 72, para. 286, p. 69, para. 274.

mandate in the manner it considered the effects of the Project on "the people, communities and economy of Digby Neck and Islands".[283]

(g) Conclusion

295. In conclusion, the Joint Review Panel's rejection of the Whites Point Project based on the significant adverse impact on community core values appears reasonable and fair in light of the Panel's mandate, the legislation and the process which preceded the Panel's recommendation Those impacts were debated, and on balance, Bilcon failed to persuade the Panel that the Project's benefits outweighed its burdens. The process appears similar to the panel review of the Kemess Mine Project, where a balancing of competing interests or adverse and beneficial impacts was conducted. I will revisit the issue of balancing of burdens and benefits in the public under the "Justification and the Public Interest" section of my Report (Part II, Section 3(g)).

3. The Joint Review Panel's Approach to the Whites Point Project Assessment was Reasonable

296. In addition to challenging the Panel's recommendation to reject the Whites Point Project based on significant adverse impact on community core values, Mr. Estrin also takes issue with several elements of the Panel's approach to conducting the EA. In this section of my Report, I respond to each of Mr. Estrin's detailed allegations respecting: the application of a precautionary approach and the alleged reverse onus; the alleged requirement for "perfect certainty"; the Panel's alleged failure to consider and recommend mitigative measures; the proper application of adaptive management; the proper assessment of cumulative effects; and the Panel's alleged errors respecting whether rejection of the Project was justified in the circumstances or whether the project was in the public interest. I will deal with each of these points in turn, but as a preliminary matter, I address the onus incumbent on every environmental assessment proponent as I believe this issue to be of primary importance in any review of the Whites Point Project Panel review.

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[283] Whites Point JRP Report, p. 103, **Exhibit R-212**.

(a) The Onus is on the Proponent -- Bilcon's Approach Appeared Deficient

297. Governments do not guarantee that projects will be approved. They simply provide criteria which a proponent must satisfy and they provide a process in which the proponent's application can be considered. It was up to the Proponent to satisfy the regulators that, in this instance, carrying out the Whites Point Project was not likely to result in significant adverse environmental effects. This is the normal burden of proof which proponents must discharge in every case.

298. The Proponent of the Whites Point Project did not appear to appreciate that it bore the onus of proof in the environmental assessment. As discussed below, the Proponent was deficient in many respects in the information it provided to the panel. In my opinion, this affected the Panel members' assessment of Bilcon's credibility and the confidence the Panel could place in Bilcon to carry out the Whites Point Project in a manner which would not be likely to result in significant adverse environmental effects.

299. The Joint Review Panel and the federal and provincial governments can hardly be blamed for Bilcon's deficiencies in approach. A proponent's failure to provide evidence in key areas which the Panel specifically, and in some cases repeatedly, requested it to provide, may put approval of its project at risk. Bilcon appeared to underestimate the level of scrutiny that a highly contentious project would attract to the entire assessment process. As a practical matter, contentious projects will make that onus more difficult to discharge since objectors can be expected to challenge most everything the proponent asserts. In this respect, Bilcon was not treated any differently than other proponents.

300. Bilcon, and its predecessors, appear to have exhibited a lack of understanding of regulatory requirements and filed deficient applications on a number of occasions during the regulatory approval process for the Whites Point Project. This directly affects the discharge of any applicant's onus. For example:

- On February 7, 2002, Nova Stone filed a NWPA application for a proposed marine terminal. This application was not processed because it was not accompanied by the appropriate engineering plans.[284]

- On April 15, 2002, Nova Stone's first application to construct and operate a 3.9 ha quarry at Whites Point was rejected because of errors in its calculation of the area covered by the quarry.[285]

- On September 17, 2002, Nova Stone submitted a one page document to NSDEL regarding blasting conditions. DFO reviewed this document and advised NSDEL on September 30, 2002 that the Proponent had provided insufficient detail.[286]

- On October 15, 2002, Nova Stone submitted an additional one page document to NSDEL regarding its blasting design. October 30, 2002, DFO indicated to NSDEL that it continued to be uncomfortable with the level of information provided.[287]

- On November 20, 2002, Nova Stone provided a more detailed blasting plan to NSDEL.[288]

- On December 11, 2002, DFO wrote to NSDEL setting out further concerns regarding blasting activities.[289]

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[284] Facsimile from Mark Lowe to Jon Prentiss, February 7, 2002, attaching NWP application and related maps and diagrams, **Exhibit R-134**; Note to file prepared by Oz Smith, Navigable Waters Protection Officer, March 20, 2002, **Exhibit R-135**.

[285] See email from M. Maclean, NSDEL to B. Langille and B. Petrie, NSDEL, April 11, 2002 wherein Mr. McLean advises that if all associated elements of the project were taken into account, the quarry's footprint would exceed 4 ha and require an environmental assessment, **Exhibit R-76**; Letter from B. Petrie to P. Buxton, April 15, 2002, **Exhibit R-77**.

[286] Letter from P. Buxton to B. Petrie, NSDEL, September 17, 2002, **Exhibit R-116**; Letter from J. Ross, DFO, to B. Petrie, NSDEL, September 30, 2002, **Exhibit R-117**.

[287] Letter from P. Buxton to B. Petrie, NSDEL October 8, 2002, received by NSDEL October 15, 2002, **Exhibit R-118**; Letter from J. Ross, DFO, to B. Petrie, NSDEL, October 30, 2002, **Exhibit R-119**.

[288] Letter from P. Buxton to B. Petrie, NSDEL, November 20, 2002, **Exhibit R-80**.

[289] Correspondence from J. Ross, DFO, to B. Petrie, NSDEL, attaching DFO concerns on Whites Point Quarry Blasting Plan, December 11, 2002, **Exhibit R-122**.

While none of these deficiencies were fatal, the foregoing is perhaps indicative of a lack of familiarity with the regulatory process and expected information requirements.

301. In addition, Bilcon appeared to not be well-equipped in handling of the other aspects of the environmental assessment process, including the preparation of the Project Description; the preparation of the EIS Report; and the responses to the deficiencies in the EIS Report identified by the Joint Review Panel both in writing and at the hearing.

302. For instance, GQP initially struggled with its Project Description for the Whites Point Project. It submitted an initial Project Description to NSDEL on September 30, 2002.[290] Federal and provincial officials met to discuss the draft Project Description in December 2002, at which it was determined that "a more detailed project description" was required to determine the appropriate level of assessment and coordination. [291]

303. GQP filed a revised Project Description in January 2003[292] and another revised Project Description in March 2003,[293] following requests for further information from the CEA Agency.[294] As noted earlier, both documents described the Project as part of the integrated quarry, processing and marine terminal loading project, yet with respect to other aspects of the Project such as the construction of environmental controls and conducting test blasting, Mr. Buxton nevertheless persisted in arguing that the small 3.9 hectare portion of the quarry was somehow discrete and could be approved separate from the larger quarry.[295] This is puzzling when one considers that development of the 3.9 hectares appears to have been described by Nova Stone as only the initial part of a larger project including a larger quarry and a shiploading facility.

304. As discussed elsewhere in my Report (Part I, Section 4(b)) the Proponent ought to have recognized that the 3.9 ha quarry activities, as it described them, would be caught up

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[290] Whites Point Quarry, Draft Project Description, September 30, 2002, **Exhibit R-129**.
[291] Letter from H. MacPhail, NSDEL, to P. Buxton, December 10, 2002, **Exhibit R-131**.
[292] Letter from P. Buxton, to D. McDonald, CEA Agency, January 28, 2003, enclosing Draft Project Description, **Exhibit R-180**.
[293] Letter from P. Buxton, to D. McDonald, CEA Agency, March 10, 2003, enclosing Project Description, Whites Point Quarry and Marine Terminal, Digby County, Nova Scotia, March 2003, **Exhibit R-181**.
[294] Bilcon submitted another updated Project description to reflect the change in ownership from GQP to Bilcon in August 2004, **Exhibit R-492**.
[295] Letter from P. Buxton, to D. McDonald, CEA Agency, April 20, 2003, p. 1 **Exhibit R-151**; Letter from P. Buxton, to P. Zamora, DFO, June 16, 2003, p. 1, **Exhibit R-493**.

in the environmental assessment process for the overall Whites Point Project. However, the manner in which the Proponent approached the 3.9 ha quarry and describing its connection to the overall Whites Point Project foreshadowed later problems Bilcon had in clearly defining its Project and responding to Panel questions for additional information and clarification of its Project, which I discuss below.

305. While Mr. Estrin complains about excessive detail or "certainty" required by the panel,[296] an experienced practitioner would know that the regulator cannot assess effects or the efficacy of the measures proposed to mitigate those effects without having a Project Description in sufficient detail to describe how the project would be constructed and operated.

306. Indeed, Bilcon appeared to have problems providing sufficient detail or clarity of information throughout the environmental assessment process. Bilcon completed the EIS for the Whites Point Project and filed it with the Joint Review Panel on April 26, 2006. In its first round of IRs on July 28, 2006, the Panel stated: "the level of detail for most Project components described in the EIS is not adequate for the Panel to properly understand the Project and assess its potential effects or to judge the effectiveness of the proposed mitigation measures".[297] If I was project counsel, I would be very concerned to receive a letter like that from the Panel, and I would ensure that my client made every effort to provide the information sought by the Panel.

307. Bilcon submitted a Revised Project Description with its November 2006[298] IR responses, but again this response did not include the details requested by the Panel. The Panel posed further IRs on the Project Description on December 17, 2006 and reminded Bilcon "that a complete Project Description realized in an appropriate level of detail is required by the [Panel] at the earliest possible date".[299] Following Bilcon's February 9, 2007 IR response, the Panel issued additional IRs in late February regarding Bilcon's Project Description and complained that "several important changes to the proposed

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[296] Estrin, p. 84, para. 346.
[297] Whites Point Quarry and Marine Terminal Project Joint Review Panel Information Requests, ("Panel IRs") July 28, 2006, p. 3, **Exhibit R-219**.
[298] Bilcon IR Response, November 28, 2006 **Exhibit R-255**.
[299] Panel IRs, December 19, 2006, cover letter, **Exhibit R-485**.

Project have appeared for the first time"[300] and "several new elements have recently been added to the Project Description".[301] These information requests are particularly significant in that the Panel cannot start to address the likelihood of significant adverse environmental effects resulting from the Project or the efficacy of proposed mitigation unless the Project itself is sufficiently defined so that its effects can be determined.

308. In some instances, Bilcon simply chose not to provide information requested by the Panel. Totally non-responsive IR responses can seriously undermine a proponent's credibility. They certainly do not contribute to discharging the practical onus borne by all proponents. The following are examples of Bilcon refusing to answer the Panel's IRs:

(i) In its January 8, 2006 IRs, the Panel asked Bilcon to "identify the extremes of wind, waves, tides and storm surges that the terminal will be required to accommodate".[302] In its response to that Panel IR, Bilcon provided information on such extremes "for locations at some distance from Whites Cove" and indicated that "[f]urther studies will be required to extrapolate this data to set the parameters for extremes at the Whites Point location".[303] Again, in its February 27, 2007 IRs the Panel requested additional information on the possible impacts of these "extreme" environmental conditions. The Panel clearly stated that "such data must be available prior to the engineering phase" and was "vital at this stage".[304] However, in its April 3, 2007 IR Response, Bilcon did not provide the requested additional information claiming that "the additional information requested by the Panel is typically generated as part of a project's design phase, not the planning phase".[305] Bilcon further indicated that "the contractual course of design development would have the requested analyses done by the engineering team undertaking the design of the maritime structures. Realizing that

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[300] Panel IRs, February 27, 2007, cover letter, **Exhibit R-252**.
[301] Panel IRs, February 27, 2007, p. 1, **Exhibit R-252**.
[302] Panel IRs, January 8, 2006, at IR 22, **Exhibit R-483**.
[303] Bilcon, Whites Point Quarry and Marine Terminal Responses, Volume II, s. 7.0, p. 28, February 2007, **Exhibit R-486**.
[304] Panel IRs, February 27, 2007, p. 2, **Exhibit R-252**.
[305] Bilcon IR Response, April 3, 2007, p. 6, **Exhibit R-487**.

design and construction contracts for the facility will not be awarded until the project receives approvals from environmental authorities, the specific analyses requested are not deliverable at this time".[306]

(ii) In relation to the groundwater divide, the Panel posed two IRs and requested, among other things, Bilcon to "delineate the groundwater divide".[307] In response, Bilcon refused to do so stating that it believed "the precise location of the groundwater divided is of academic interest only."[308] Given that only two drilled wells yield any water table data, the Panel also requested "more reliable and relevant hydrogeologic data … to evaluate the impact of the quarrying and the effectiveness of proposed mitigation measures".[309] Bilcon again avoided answering the question instead making reference to the "high degree of vandalism to which Bilcon has been subjected by its opponents during the past five years".[310]

309. Without sufficient information describing and identifying baseline conditions – that is, the environmental conditions that exist prior to the construction of a proposed development – it is difficult for a panel to assess the potential impacts of that project on the environment, as the interaction of the project with the existing environment is not clear. Based on my experience, it is not unusual for reviewing agencies to request additional information or seek clarification regarding baseline conditions. I do not believe that the Panel's IRs were exceptional in this regard.

310. While in my experience proponents often question whether the information sought by IRs is truly necessary for the purposes of conducting an environmental assessment, the prudent course is to provide the information sought by reviewing agencies. Ultimately, it is the Panel members that will render a recommendation on a project. As discussed in more detail below (Part II, Section 3(b)(ii)), the proponent has an onus to discharge in convincing the Panel members that the project is not likely to have significant adverse

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[306] Bilcon IR Response, April 3, 2007, at p. 6, **Exhibit R-487**.
[307] Panel IRs, February 27, 2007, p. 3, **Exhibit R-252**.
[308] Bilcon IR Response, April 3, 2007, p. 19, **Exhibit R-487**.
[309] Panel IRs, February 27, 2007, p. 3, **Exhibit R-252**.
[310] Bilcon IR Response, April 3, 2007, p. 19, **Exhibit R-487**.

environmental effects. This onus includes providing the Panel members with the information they require to undertake this task. In responding to requests for further information, the proponent must either present a convincing argument as to why the information is not required and why the Panel *does* have sufficient information on the record to discharge its mandate *or* the proponent must provide the information requested. Responses that indicate the information sought is of "academic interest only" or is not available at this time, without more meaningful explanation, will typically not be considered sufficient answers. Where a Panel is placed in the position of having to repeatedly request information which continues not to be forthcoming or fully responsive, that proponent may well be putting its project approval at risk.

311. Indeed, the Panel members' questions appeared to reflect a level of frustration with the Proponent. For instance, in its February 27, 2007 IRs (the fifth round of IRs), the Panel referred to some of Bilcon's February 9, 2007 IR Response as "confusing"[311] and indicated that "some inconsistencies have been discovered" in relation to the information on blasting.[312] The Panel also stated that the role of the Community Liaison Committee "remains unclear".[313] Basic information gaps and other deficiencies, for example, cannot be cured by simply invoking the principle of adaptive management.

312. At the hearing too, Bilcon appeared to struggle in discharging its burden of proof.[314] For example, on Day 6 of the hearing (June 22, 2007) there was a fairly pointed exchange between the Proponent and Dr. Muecke regarding differences between a hydrogeology presentation Bilcon had just made which was different than materials provided to the Panel just a few days earlier. Dr. Fournier summarized the issue as follows:

> Mr. Buxton, I think what Dr. Muecke is saying is that the purpose of the hearings is to assess your Environment Impact Statement. The normal procedure is to provide us and others with information to allow us to process it, to reflect on it, to check it, and thereby to reach some kind of conclusion. The purpose of the hearing is to bring experts together so that we can do this. If you present us with information five minutes before the discussion begins, it's a disadvantage to us. It's an unfair disadvantage. It's

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[311] Panel IRs, February 27, 2007, cover page, **Exhibit R-252**.
[312] Panel IRs, February 27, 2007, p. 3, **Exhibit R-252**.
[313] Panel IRs, February 27, 2007, p. 4, **Exhibit R-252**.
[314] In the context of my Report, I use the terms "onus" and "burden of proof" synonymously.

> not providing us with the information in a timely manner. I think that's the issue. Some of these diagrams you've presented to us are different, and the implications of the differences are important. So, in a sense, we can continue the discussion as we planned, but I think it's inappropriate. It should have been forwarded to us and to others so that they could reflect on it. That's the issue.[315]

313. Clearly, the Panel was frustrated with the reliability of the information that Bilcon was providing and the constantly changing case the Panel was being asked to assess.

314. In my experience, panels and interveners impose significant information requests on proponents. Refusing to provide the requested information is a calculated risk. The fact that Bilcon failed to discharge its onus is not unique, as other joint review panel assessments, such as the recent Lower Churchill Hydroelectric Generation Project Joint Review Panel Report, have found a likelihood of significant adverse effects in part on the basis of deficient information. For instance, in s. 4.2.3 at page 34 of that report, the panel indicates "there are many outstanding issues and these remain despite the considerable attention given to this subject through the relevant information requests …". The Lower Churchill Panel then goes on to conclude that "Nalcor's analysis that showed Muskrat Falls to be the best and least cost way to meet domestic demand requirements is inadequate and an independent analysis … of alternatives is required."[316]

315. Similar issues appeared to affect the Whites Point Project Panel's concern over the likelihood that Bilcon could be relied upon to carry out its development in a manner that avoided significant adverse environmental effects. The Panel summarized its concerns in this regard as follows:

> Ambiguity about what the Proponent proposed raised significant problems for the Panel. The project description drifted in response to questions being asked, but not always in ways that resolved the Panel's concerns about adverse environmental effects. … Without certainty about what is proposed, parties cannot establish the trust and openness needed for cooperation to minimize the effects of a project through its operation. The Panel concluded that the Proponent did not adequately specify details about elements of the Project Description required for the assessment process.

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[315] Whites Point JRP Hearing Transcripts, June 22, 2007, 6T1180:14-1181:7, **Exhibit R-458**.
[316] Lower Churchill Hydroelectric Generation Project JRP Report, August 2011, p. 34, **Exhibit R-414**.

> The Panel found the Proponent's EIS inadequate in several respects. Although the EIS and other material provided to the Panel through various submissions offered sufficient information for the Panel to identify potential effects of concern, the Panel concluded that in some cases the EIS suffered from ambiguity, a lack of transparency, incomplete or incorrect information, and limited consideration of community sustainability. The Panel itemized its findings regarding its analysis of the adequacy of the EIS in chapter 2. The Panel concluded that the Proponent failed to meet the onus of proof that it could proceed with the Project with no risk of a significant adverse environmental effect.[317] (emphasis supplied)

316. Panels take their responsibilities seriously. Whether a proponent prevails at the end of the day, however, depends on its credibility and its ability to address the Panel's concerns. That burden of persuasion rests with the proponent. Not all proponents successfully discharge that practical onus. From my review of the EIS, Bilcon's IR responses and transcripts of the public hearing, it appears that Bilcon had significant difficulty in providing clarity and the level of detail in the information it provided that would allow it to ultimately satisfy its burden in a public review process.

(b) The Panel did not Err in Adopting a Precautionary Approach

317. Mr. Estrin also suggests the Joint Review Panel misapplied or misunderstood key statutory criteria and that the *CEAA* did not mandate a precautionary approach.[318] In particular, Mr. Estrin points to the Panel's comment that *CEAA* advocates a precautionary principle[319] as "indicative of [the Panel's] lack of regard for its statutory obligations and constraints".[320] Mr. Estrin further argues that the Panel "invented its own interpretation of the precautionary principle",[321] which erroneously required project proponents to meet a reverse onus.[322]

318. In brief, I cannot agree with Mr. Estrin. First, the Panel's application of the precautionary principle was authorized under both the *CEAA* and the Nova Scotia *Environment Act* and therefore, clearly within the scope of the Panel's assessment.

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[317] Whites Point JRP Report, pp. 101-102, **Exhibit R-212**.
[318] Estrin, pp. 80-83, para. 325-339.
[319] Whites Point JRP Report, p. 19, **Exhibit R-212**.
[320] Estrin, p. 81, para. 332.
[321] Estrin, p. 77, para. 311.
[322] Estrin, p. 77, para. 311.

Secondly, with respect to the alleged "reverse onus", Mr. Estrin appears to confuse the burden of proof faced by a proponent, with the creation of a "reverse onus". In my view, the Panel did not look to Bilcon to prove an absence of harm,[323] as suggested by Mr. Estrin. Rather, the Panel simply applied the principle that as a Proponent, Bilcon was required to satisfy the Panel that carrying out the Whites Point Project was not likely to result in significant adverse environmental effects. That burden of proof applies to all proponents in joint review panel proceedings.

319. I deal with each of these points in turn.

i) The Precautionary Principle Clearly was Included within the Scope of the Assessment

320. First, Mr. Estrin acknowledges that the Nova Scotia legislation required the application of the precautionary principle to the Whites Point Project assessment.[324] As noted earlier, since the Joint Review Panel had "two masters, one in Ottawa, one in Halifax", the review had to satisfy both provincial and federal statutory requirements.[325] For that reason alone, I cannot see anything unreasonable about the panel's reliance upon the precautionary principle which was specifically required by s. 2(b)(ii) of the Nova Scotia *Environment Act*:

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

321. Second, Mr. Estrin appears to contradict himself. In section 2.2(g) of his Report he states that "The Panel was incorrect to state that *CEAA* mandates a precautionary principle" (emphasis supplied). He contradicts that assertion, however, when he acknowledges that the Panel simply stated that the Act "advocates the precautionary principle (Panel Report at p. 19)" (footnote number omitted; emphasis supplied).[326]

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[323] Estrin, p. 77, para. 312.
[324] Estrin, p. 77, para. 308.
[325] Final Whites Point JRP Agreement, Article 4.1, **Exhibit R-27**.
[326] Estrin, p. 81, para. 331.

322. I see nothing incorrect in the Panel's statement. Even prior to the 2003 amendments, one of the stated purposes of the *CEAA* was "to ensure that the environmental effects of projects receive careful consideration before responsible authorities take actions in connection with them".[327] In my view, therefore, the *CEAA* always mandated a precautionary approach to assessments in that it advocated taking a "cautious approach, or to err on the side of caution, …".[328] That is consistent with s. 2(b)(ii) of the Nova Scotia *Environment Act*[329] as well as with s. 3.5 "The Precautionary Approach" of the EIS Guidelines.

323. In the description of the impact statement methodology in the Final Guidelines, the role of the precautionary principle was emphasized. While the precautionary principle was not mentioned in the Draft Guidelines, it was advocated for by members of the public in the scoping meetings.[330] Bilcon did not take issue with the proposed application of this principle.[331]

324. I note as well that previous joint review panels have made reference to the precautionary principle: the Sable/M&NP Joint Review Panel (1997) and the Voisey's Bay Mine and Mill Project Joint Review Panel (1999). The Sable/M&NP Projects (also chaired by Dr. Fournier) were reviewed several years prior to the Whites Point Project; both were situated in Nova Scotia. An excerpt from the 1997 Sable Gas Projects Joint Panel Report describing the precautionary approach and the related principle appears below:

> **Precautionary Principle**
>
> Recognition of the gap in scientific information and data has led to the development and increased acceptance of the "precautionary approach" as

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[327] *CEAA*, s. 4(a), **Exhibit R-1**.
[328] Whites Point JRP Report, p. 92, **Exhibit R-212**.
[329] Nova Scotia *Environment Act* , s. 2:"2 The purpose of this Act is to support and promote the protection, enhancement and prudent use of the environment while recognizing the following goals: … (b) maintaining the principles of sustainable development, including … (ii) the precautionary principle will be used in decision-making so that where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation, …" (emphasis supplied), **Exhibit R-5**.
[330] Transcript of Whites Point JRP, Scoping Meeting #1, January 6, 2005, 1T38:13, 1T39:10-16; 1T112:24, 1T121:16-17, **Exhibit R-479**.
[331] Letter from P. Buxton to S. Chapman, January 16, 2005, **Exhibit R-243**.

> a decision-making principle in situations involving environmental effects. This principle states that where there are threats of serious or irreversible damage to the environment, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. …
>
> The precautionary principle is referred to in the *Nova Scotia Environment Act*, and in the *Oceans Act*. This principle is also one of the guiding principles in the federal Department of Fisheries and Oceans revised policy on Underutilized Species (or Emerging Fisheries):
>
> The precautionary approach has also been recommended for inclusion into the revision of the *Canadian Environmental Protection Act* by the House of Commons Standing Committee on Environment and Sustainable Development.[332]

325. The application of the precautionary approach was common to both the Sable/M&NP Project and the Whites Point Project. I am unable to agree, therefore, that Bilcon was treated unfairly or was discriminated against.

326. In light of the foregoing, Mr. Estrin cannot reasonably conclude that the Joint Review Panel was wrong to apply the precautionary principle. Nor could he assert that, under the *CEAA*, a panel was prohibited from applying the precautionary principle in the pre-Bill C-9 period. The Joint Review Panel was obliged to apply the precautionary principle under the Nova Scotia legislation; which it did. The Nova Scotia *Environment Act*, specifically ss. 2(b)(ii), required the use of the precautionary principle in decision-making.

ii) There is No "Reverse Onus"

327. I agree with Mr. Estrin's interpretation of the precautionary principle, insofar as it means that a lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. I do not agree, however, with Mr. Estrin's assertion that the panel misunderstood and misapplied the concept and in so doing, imposed an improper reverse onus on Bilcon.

328. The single passage relied upon by Mr. Estrin to support his contention: "the onus of proof rests with the Proponent to show that a proposed action will not lead to serious or

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[332] Sable/M&NP Projects, JRP Report, October 1997, p. 31, **Exhibit R-436**.

irreversible environmental damage"[333] does not in my view indicate that the Panel applied a reverse onus.

329. As the context to the Panel's discussion is important, I have reproduced a more complete excerpt of the Panel Report below:

> Environmental decision-making must address the reality of scientific uncertainty and incomplete knowledge. The precautionary principle instructs the decision-maker to take a cautious approach, or to err on the side of caution, especially where there is a large degree of uncertainty or high risk. Further, it is widely understood that when threats are serious or might be potentially irreversible, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation. The application of the precautionary principle requires: that the onus of proof rest with the Proponent to show that a proposed action will not lead to serious or irreversible environmental damage; verifiable scientific research and high-quality information; and access to information, public participation, and open and transparent decision-making.[334] (emphasis supplied)

330. As is evident from the foregoing, the Panel had a clear understanding of the precautionary principle. The Panel recognized that principle as dictating that "the lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation", which is consistent with interpretation of this principle as directed by the Supreme Court of Canada.[335] It is also consistent with ss. 2(b)(ii) of the Nova Scotia *Environment Act* (cited above).

331. For Mr. Estrin to assert the "reversal" of an onus, however, requires him to demonstrate that the onus lay elsewhere in the first place. Thus Mr. Estrin appears to contend that there is an onus which rests on the governments and the public to demonstrate the project is likely to result in significant adverse effects. In effect, he contends that the Proponent was entitled to some presumption that its project was not likely to result in significant adverse environmental effects.

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[333] Estrin, p. 77, para. 311.
[334] Whites Point JRP Report, p. 92, **Exhibit R-212**.
[335] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Ville)*, [2011] 2 S.C.R. 241, **Exhibit R-439**.

332. No presumption, however, exists in favour of any proponent; and no onus has been assigned by legislation or case law to regulators and the public. Rather, as stated earlier, a proponent bears a practical burden or onus of demonstrating that its project is not likely to result in significant adverse environmental effects. In the context of the Whites Point Project, the Proponent's burden expressly included demonstrating that the Project was unlikely to result in significant adverse socio-economic effects such as impacts on community core values.

333. The proponent's burden has been considered in case law. For instance, in *Athabasca Chipewyan First Nation v British Columbia Hydro & Power Authority*,[336] the Federal Court of Appeal considered whether an applicant for an electricity export permits from the NEB under the *National Energy Board Electricity Regulations*[337] had provided sufficient information regarding "the adverse environmental effects resulting from the proposed exportation of electricity, and the measures to be taken to mitigate any of those environmental effects."[338] The Federal Court of Appeal concluded that the applicant had not provided information regarding potential changes to the operation of those facilities as a result of the proposed undertaking or whether the operational changes would result in adverse environmental effects, and as such, that the NEB had unreasonably concluded that there would be no significant adverse environment effects. With respect to who bears the onus in such circumstances, the Court was clear that it was not up to interveners to demonstrate the existence of an adverse effect. Rather, it was up to the applicant, BC Hydro, to provide sufficient information to permit the NEB to reach a decision on whether there would or would not be significant adverse environmental effects:

> One interpretation of this finding is that the Board placed the burden on the interveners to demonstrate adverse environmental impacts. If the Board purported to do so, it was wrong. The applicant for the permit must provide the Board with sufficient information to enable the Board to make its decisions.[339]

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[336] *Athabasca Chipewyan First Nation v British Columbia Hydro & Power Authority*, [2001] 3 FC 412 (CA), **Exhibit R-397**.
[337] *National Energy Board Electricity Regulations*, SOR/97-130, **Exhibit R-423**.
[338] *National Energy Board Electricity Regulations*, SOR/97-130, s. 9(o), **Exhibit R-423**.
[339] *Athabasca Chipewyan First Nation v British Columbia Hydro & Power Authority*, [2001] 3 FC 412 (CA) at paras. 23 and 26, **Exhibit R-397**.

334. The lack of perfect certainty in environmental assessment means that where the risks and the adverse effects are significant though uncertain, as a precaution, measures should be adopted to deal with them. As a precaution, where there is a lack of confidence in the efficacy of proposed mitigative measures or in the ability or willingness of the proponent to employ them, then a project may not receive a favourable recommendation.

335. If a Panel and the public encounter a proponent that consistently refuses or consistently fails to provide the requested information, there is a distinct possibility, if not a likelihood that a Panel will not recommend approval. 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. Discharging a practical burden of persuasion with sufficient evidence to satisfy a Panel is a normal component of the process faced by all proponents.

336. If Mr. Estrin were correct, a proponent could file a skeletal EIS that did not fully describe the project, its impacts and how the project could be expected to affect the environment, the public and the related communities. The proponent also would not have to respond to any of the information requests customarily received since Mr. Estrin's theory places the evidentiary burden on the Panel and the public to prove the likelihood of significant adverse environmental effects. That theory is obviously flawed. Proponents always bear the burden of persuasion; nothing in the legislation or regulatory scheme relieves them of that obligation.

337. There was nothing novel or unique about the Panel's articulation of the precautionary principle. In fact, here the Whites Point Project Panel adopted the exact same formulation used by the Voisey's Bay Joint Review Panel several years earlier:

> Further, the Panel understands the application of the precautionary principle to require:
>
> - that the onus of proof shall lie with the Proponent to show that a proposed action will not lead to serious or irreversible environmental

> damage, especially with respect to overall environmental function and integrity, considering system tolerance and resilience;[340]

338. Indeed, the Voisey's Bay Panel Report includes a statement nearly identical to the passage relied upon by Mr. Estrin:[341] "The Panel considers that the precautionary principle or approach requires a proponent to demonstrate that its actions will not result in serious or irreversible damage."[342]

339. The fact that the burden of persuasion or onus of proof was to be borne by Bilcon, therefore, was neither remarkable nor was it discriminatory.

(c) The Issue was not "Perfect Certainty" but Sufficient Evidence

340. Mr. Estrin, claims that the Whites Point Project Panel "[c]ontrary to well-established principle … insisted on perfect certainty".[343] I do not agree. What the Panel consistently pressed the Proponent to provide was sufficient evidence in order for it to fulfil its mandate.

341. The nature of the environmental assessment process (which includes the scientific method) requires sufficient detail about the project to predict the "likelihood" that there will or will not be "significant, adverse" environmental effects. It also requires sufficiently detailed information to assess whether or not, or to what extent, the mitigative measures the proponent proposes will work. This exercise requires actual baseline information about the existing environment in sufficient detail to know how it will be affected by the project and by what "pathways" those effects will be caused in order to assess mitigation. In my opinion, the absence of sufficient reliable baseline information was a serious issue in the Whites Point Project environmental assessment.

342. The following statement from the Chairman on the first day of the Whites Point Project public hearing reveals what lay at the heart of the Panel's difficulty with Bilcon:

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[340] Environment Impact Statement Guidelines for the Review of the Voisey's Bay Mine and Mill Undertaking, June 20, 1997, s. 3.4, **Exhibit R-444**.
[341] Estrin, p. 77, para. 311.
[342] Voisey's Bay JRP Report, s. 2.4, **Exhibit R-443**.
[343] Estrin, p. 89, para. 360; see also p. 84, para. 346.

> The reason I bring this up is that we have, as a Panel, enumerated at least 50 places where we have requested specific information and that information has either been partially returned to us or not returned to us.
>
> So in our mind, your EIS has many gaps in it, and the relationship between the guidelines and these hearings is that we will, over the next two weeks, return to all of those places within the EIS where there are deficiencies, and we will be asking for elaboration on them.
>
> Now some of them, various reasons have been offered for not providing information, and in some cases the information is just not sufficient.[344]

343. The Panel repeatedly tried to get the requisite details from Bilcon but that information was not forthcoming or was not responsive:

> Between June of 2006 and January 2007, four sets of information requests were sent to the Proponent. Once we had received the EIS, we reviewed it and found that there were shortcomings. Those shortcomings were put together in what is called an information request which went to the Proponent and we said to the Proponent: "Correct these", and then responses were received.
>
> The complete response was offered to the Panel on February 2007, and then in February 2007 one more set of information request was then forwarded to the Proponent, so five in all.[345]

344. In sum, the Panel was not insisting on perfect certainty; rather it sought sufficiently detailed information to do its job. This level of assessment was not unique to the Whites Point environmental assessment.

(d) The Panel Did Consider Mitigation Measures

345. In section 2.3(b) of his Report, Mr. Estrin criticizes the Panel for not recommending mitigation measures, follow-up programmes or terms and conditions.[346] In the course of doing so he points to the Kemess Mine Project, the Sable/M&NP Projects, the Sydney Tar Ponds and Coke Oven Sites Remediation Project, the Sovereign Resources Quarry Expansion Project, the Elmsdale Quarry Expansion Project, the Rhodena Rock Quarry Expansion Project and in section 2.3(c) of his Report, the Keltic Petrochemical/LNG Project, as examples of assessments where reviewing bodies made

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[344] Whites Point JRP Hearing Transcripts, June 16, 2007, 1T71:24 to 72:12, **Exhibit R-457**.
[345] Whites Point JRP Hearing Transcripts, June 16, 2007, 1T7:14-25, **Exhibit R-457**.
[346] Estrin, p. 90, paras. 364-385.

recommendations as to terms and conditions that could be applied if the project at issue was approved.

346. There are several reasons why I believe Mr. Estrin's criticisms to be ill-founded.

347. First, the Whites Point Project Panel carefully recited the fact that in assessing the significance of the environmental effects of the Whites Point Project, it did in fact consider mitigation measures:

> When determining the nature and significance of environmental effects, the Panel analyzed and evaluated the information provided, along with the monitoring and mitigation proposed, in order to draw conclusions about the adequacy of the proposed measures and predicted effects on valued environmental components.[347] (emphasis supplied)

348. The Panel concluded that notwithstanding Bilcon's proposed follow-up monitoring and mitigation measures, there was a likelihood of significant environmental effects. Accordingly, the Panel recommended that the project should not proceed. Logically, therefore, no amount of follow-up monitoring[348] or mitigation would alter the Panel's conclusion since those mitigation measures had already been taken into account. On the basis of the evidence before it, the Panel had concluded that the only way to avoid those significant adverse environmental effects was to recommend against approval of the Project, which it did.

349. Though its conclusion may have differed from other projects such as Sable/M&NP which were ultimately approved, on the evidence, it appears that the Panel concluded that there was no way to mitigate the significant adverse environment effects of the Whites Point Project "on the people and communities that comprise Digby Neck and Islands".[349] The Panel was fully entitled to arrive at that conclusion; after all, the Panel was requested to recommend either the approval or the rejection of the Project.

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[347] Whites Point JRP Report, p. 20, **Exhibit R-212**.
[348] *CEAA*, s. 2(1), defines "follow-up program" as "a 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", **Exhibit R-1**.
[349] Whites Point JRP Report, p. 103, **Exhibit R-212**.

350. Second, every project is different and the mandate of each joint panel assessment can differ. The mandate for a joint British Columbia/Canada review panel, for example, can differ from a Nova Scotia/Canada review panel due to, amongst other things, a different legislative regime or different terms of reference established by the respective federal and provincial ministers. Even within the same jurisdiction the respective Ministers can stipulate different ". . . additional requirements and procedures . . ." best suited to the circumstances of that particular project.[350] For that reason, the comparison to other assessments referenced by Mr. Estrin are of little relevance to whether the Whites Point Project Panel acted appropriately. What is relevant here is whether the Whites Point Project Panel acted in accordance with its mandate.

351. In my view it did. The Whites Point Project Joint Panel Agreement and Terms of Reference were quite specific about what the federal and provincial governments were to do about the Project after the environmental assessment was complete. Article 6.3 of the JRP Agreement directed the Panel to include in its report:

> 6.3 … 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.[351] (emphasis supplied)

352. The Panel discharged the obligation assigned to it. No mitigation measures were recommended because the Panel did not recommend approval. Its recommendation complied with the literal requirement of Article 6.3 as it was specifically directed to include mitigation measures only if it approved the Project which it did not. This fact is a complete answer to Mr. Estrin's criticism of the Panel's failure to include alleged mitigation recommendations in its report.[352]

353. The authority of the Panel is quite clear from Article 6.3 alone. It is reinforced, however, by s. 40(1) of the Nova Scotia *Environment Act*, which, by virtue of Article 4.1 of the Agreement, also governed the Panel's review process:

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[350] See *CEAA*, s. 41, **Exhibit R-1**.
[351] Final Whites Point JRP Agreement, November 3, 2004, p. 5, **Exhibit R-27**.
[352] Estrin, pp. 90-98, paras. 364-385.

> 40 (1) Upon receiving information under Section 34, a focus report under Section 35, an environmental-assessment report under Section 38, a recommendation from the Board under Section 39 or from a referral to alternate dispute resolution, the Minister may
>
> (a) approve the undertaking;
>
> (b) approve the undertaking, subject to any conditions the Minister deems appropriate; or
>
> (c) reject the undertaking. (emphasis supplied)

354. Once again, it bears noting that Bilcon did not take issue with this aspect of the draft agreement and draft terms of reference when it was provided the opportunity to do so. If Bilcon had wanted mitigation measures included in the Report in the event of rejection (assuming the Panel believed there could be any), Bilcon could have said so when invited to comment.

(e) "Adaptive Management"

355. In paragraphs 319-324 and again in ss. 2.3(d),[353] Mr. Estrin again alleges a misapplication of an assessment principle and combines that allegation in aid of the "*reverse onus*" assertion discussed above. Mr. Estrin's linkage to his "reverse onus" argument is telling as is his suggestion that the Panel's misunderstanding of the precautionary principle led it to misunderstand the role of adaptive management.[354] Although Mr. Estrin's point in this regard is not entirely clear, he appears to suggest that the Panel's imposition of a reverse onus on Bilcon (which is incorrect as noted earlier) led the Panel to reject Bilcon's use of adaptive management, in effect, imposing too high of a burden on Bilcon.

356. Adaptive management assumes a proponent has already fully assessed the effects of its project against baseline environmental and socio-economic data and proposed mitigation measures in order to ensure that the effects are not adverse, or if adverse, at least not significant. Adaptive management only comes into play where the mitigative measures already identified did not work as expected or if unforeseen effects require new mitigation

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[353] Estrin, s. 2.3(d) "The Panel dismissed Bilcon's approach to 'adaptive management'", pp. 103-106.
[354] Estrin, p. 80, para. 324.

measures to deal with them. A definition from the CEA Agency's 2009 Operational Policy Statement on Adaptive Management Measures appears below:

> … adaptive management is a planned and systematic process for continuously improving environmental management practices by learning about their outcomes. Adaptive management provides flexibility to identify and implement new mitigation measures or to modify existing ones during the life of a project.[355]

357. 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'. However, that approach is flawed as it is inconsistent with the Panel's obligation to arrive at a conclusion as to whether there is a "*likelihood*" of "*significant*" adverse environmental effects, and whether the proposed mitigative measures will be effective, before project activities can commence.

358. As explained earlier in my Report, the precautionary principle means that mitigation or avoidance of uncertain effects is necessary rather than ignoring those potential effects simply because they are uncertain. That is the essence of precaution.

359. What Mr. Estrin has missed in his analysis is that adaptive management does not eliminate the need for the provision of sufficient information about the environmental effects of the project at the outset of the assessment process. In that regard, it is interesting that Mr. Estrin fails to acknowledge the following excerpt from the *CEAA* Operational Policy Statement:

> ***Uncertainty about Significant Adverse Environmental Effects***
>
> If, taking into account the implementation of mitigation measures, there is uncertainty about whether the project is likely to cause significant adverse environmental effects, a commitment to monitor project effects and to manage adaptively is not sufficient.
>
> A commitment to implementing adaptive management measures does not eliminate the need for sufficient information regarding the environmental

[355] CEA Agency "Operational Policy Statement: Adaptive Management Measures under the *Canadian Environmental Assessment Act*", March 2009, **Exhibit R-402**.

> effects of the project, the significance of those effects and the appropriate mitigation measures required to eliminate, reduce or control those effects.
>
> Where additional information collection or studies are needed over the life-cycle of the project, such studies in themselves should not be considered "mitigation measures".[356] (emphasis supplied)

360. 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.

361. As Dr. Fournier observed on the first day of the hearing, Bilcon's approach to adaptive management ". . . sounds like trial and error . . .".[357] He earlier noted that the phrase appeared 140 times in the EIS and that "(s)o it strikes us as it is absolutely central to what you are planning to do. Every time there is uncertainty, it seems that adaptive management has been invoked".[358] The exchanges between Dr. Fournier and Dr. Muecke with the Bilcon witnesses reflects the Panel's concern about the inconsistency of Bilcon's approach and its pervasive but misplaced reliance upon adaptive management.[359]

362. An illustration of the problem can be seen in the following exchange between Dr. Muecke and the Bilcon witnesses regarding the likelihood of significant adverse Project effects upon rare plants:

> Mr. GUNTER MUECKE: Now what you' have just outlined is very good in theory. That is the theory behind it.
>
> Mr. UWE WITTKUGEL: Yes.
>
> Mr. GUNTER MUECKE: What I find missing, and correct me, but you said to take a rare plant species as an example. It is the application of these principles, of defining the pathways and so on, in the Environmental Impact Statement. I look at your rare plants for example and I could not find any reference to how the change in hydrology for instance would affect those plants, how the change in air quality may affect those plants.

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[356] CEA Agency, "Operational Policy Statement: Adaptive Management Measures under the *Canadian Environmental Assessment Act*", March 2009, **Exhibit R-402**.
[357] Whites Point JRP Hearing Transcripts, June 16, 2007, 1T119 to 120, **Exhibit R-457**.
[358] Whites Point JRP Hearing Transcripts, June 16, 2007, 1T118, **Exhibit R-457**.
[359] Whites Point JRP Hearing Transcripts, June 16, 2007, 1T117 to 126, **Exhibit R-457**.

> You just told us: These are pathways. These are the linkages we are looking for. We are looking for that. Can you elaborate on that?
>
> Mr. PAUL BUXTON: Mr. Chair, I would like to ask Mr. Kern to respond to that question if I may.
>
> Mr. DAVID KERN: The rare plant, glaucous rattlesnake plant is in a habitat of a coastal headland. The premise for conserving that particular glaucous rattlesnake plant was to preserve the headland or the habitat or ecosystem which that plant exists in.
>
> So in that case, we have taken an ecosystems approach in preserving the habitat for that rare plant.
>
> The coastal bog is another example of an approach to habitat or ecosystem preservation. We have expanded our environmental preservation zones around the coastal bog.
>
> We have done the run off studies for the contribution of the watershed going into that coastal bog and we will be determining how much low from the watershed is required to sustain the coastal bog.[360]

363. Dr. Muecke, however, continued to question Mr. Kern about how the Proponent would ensure that Project induced changes to hydrology and air quality would not harm the rare plants:

> Mr. GUNTER MUECKE: Yes, I understand what you're saying, but simply isolating areas by not working them or having no traffic across them, it's only part of the solution because as we have just heard, the pathways are ... [sic] The hydrology of the property is going to affect these isolated areas. The air quality in these areas will be affected. In an ecosystem approach, how is that taken into account? That is basically where I am puzzled here.[361]

364. 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.[362]

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[360] Whites Point JRP Hearing Transcripts, June 16, 2007, 1T114:16 to 116:1, **Exhibit R-457**.
[361] Whites Point JRP Hearing Transcripts, June 16, 2007, 1T116:2-12, **Exhibit R-457**.
[362] Whites Point JRP Hearing Transcripts, June 16, 2007, 1T116:21-25, **Exhibit R-457**.

365. It was not long after that statement that the Chairman, Dr. Fournier, commented that Bilcon's approach sounded like "trial and error … or you could argue that that's passive adaptive management".[363]

366. The problem with Mr. Kern's approach is obvious. There was no assessment of the likelihood or significance of any adverse affects upon rare plants due to project-induced changes in hydrology or air quality. There was no discussion of pathways and how simple isolation would avoid project effects. There was no mitigation proposed since isolating the habitat alone could not ensure changes in hydrology or air quality would not affect them. Rather, Mr. Kern's statement "[i]f we detect a case that is going in the wrong direction, we will then be taking adaptive management measures …" sounds like a non-specific proxy for mitigation.

367. The Chairman's comment that this constituted "passive adaptive management" was, in my view, apt. By the time Bilcon detected "… a case that is going in the wrong direction" – that is, if Bilcon detected it – the rare plants may have already been destroyed. Environmental protection, after-the-fact, in the circumstances of Bilcon's passive version of adaptive management, would be meaningless.

368. It is risky indeed to simply fall back on a commitment to "adaptive management" to resolve future issues which simply had not been properly identified in advance, including an assess of the likelihood and significance of the potential adverse effects and the demonstration of how meaningful specific mitigation measures would lessen or eliminate the likelihood and significance of those adverse effects.

(f) Assessment of Cumulative Effects Can Include Hypothetical Projects and Induced Development

369. Mr. Estrin also takes issue with the Panel's "interpretation of the concept of 'cumulative effects'"[364] and states that the Panel applied an inappropriate and illegal concept of "cumulative effects". Mr. Estrin suggests that the Panel's opinion that additional quarry development should have been considered in the cumulative effects

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[363] Whites Point JRP Hearing Transcripts, June 16, 2007, 1T120:1-4, **Exhibit R-457**.
[364] Estrin, pp. 108-114, paras. 422-442.

analysis for the Project to be motivated by an "undercurrent of xenophobia or anti-Americanism".[365] The essence of his contention is that only projects with a "high degree of certainty" can be considered for the purposes of a cumulative effects assessment and that hypothetical projects or induced effects of the Project should be excluded from consideration.[366]

370. I disagree with Mr. Estrin. His analysis is based on outdated reference materials which unduly narrow the kinds of projects and development that may be considered for the purposes of cumulative effects assessment.

371. Cumulative environmental effects are changes to the environment that are caused by an action in combination with other past, present and future human actions.[367] Under Part III of its Terms of Reference the Panel was required to consider the environmental effects of the Project, including any cumulative environmental effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out.

372. Mr. Estrin suggests that his "ordinary, common sense interpretation" of the restrictive interpretation of cumulative effects is supported by the *Bow Valley Naturalists Society*[368] case.[369] Mr. Estrin neglects to point out, however, that the environmental screening in question in that case was governed by the earlier 1994 version of *The Reference Guide: Addressing Cumulative Environmental Effects*.[370] This guidance document was updated prior to the Whites Point Project assessment. Mr. Estrin fails to acknowledge the fact that the 1994 *Reference Guide* had a more restrictive interpretation of "future projects" as follows:

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[365] Estrin, p. 111, para. 436.
[366] Estrin, pp. 108-110, paras. 425, 427, 429 and 430.
[367] Cumulative Effects Assessment Practitioners' Guide, February 1999, ("1999 Practitioners' Guide"), s. 2.1, **Exhibit R-403**.
[368] *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 F.C. 461 (C.A.), **Exhibit R-398**.
[369] Estrin, pp. 108-109, para. 426.
[370] *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 F.C. 461 (CA), para. 43, **Exhibit R-398**; FEARO, *Reference Guide: Addressing Cumulative Environmental Effects*, November 1994, p. 138, **Exhibit R-484**.

> It should be noted that this interpretation of future projects and activities will, in most cases, preclude consideration of a project's growth inducing potential.
>
> When there is insufficient information on future projects or activities to assess their cumulative environmental effects with the project being proposed, best professional judgment should be used.[371] (emphasis supplied)

373. While Mr. Estrin correctly quotes from the March 1999 *Operational Policy Statement: Addressing Cumulative Environmental Effects under the Canadian Environmental Assessment Act*[372] ("1999 Policy Statement"[373]), he fails to acknowledge the significance of two other relevant points made regarding the Policy Statement. These sections confirm that hypothetical projects can be considered in a cumulative effects assessment, contrary to what Mr. Estrin asserts at paragraphs 429 and 430 of his Report.

374. The first of these two points is the described purpose of the 1999 Policy Statement:

> **PURPOSE**
>
> This Operational Policy Statement provides background on the development of the Cumulative Effects Assessment Practitioners Guide (the Guide) and highlights certain differences between the Guide, the Act and previous Agency guidance on this subject. It offers advice to RAs wishing to consult the Guide in addressing these requirements under the federal environmental assessment process. It also updates the Agency's position on the assessment of cumulative environmental effects as described in the 1994 Reference Guide.[374] (emphasis supplied)

375. Second, the 1999 Policy Statement stipulates that:

> … Accordingly, in identifying future projects to include in the CEA, RAs should consider projects that are "certain" and "reasonably foreseeable", as recommended by the [1999 Practitioners] Guide. The Act does not require consideration of hypothetical projects**,** but RAs may chose to do so at their discretion. Information concerning the cumulative effects of the project under assessment combined with hypothetical projects may contribute to future environmental planning. However, it should not be the determining

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[371] FEARO, *Reference Guide: Addressing Cumulative Environmental Effects*, November 1994, p. 138, **Exhibit R-484**.
[372] Estrin, p. 109, para. 427.
[373] Operational Policy Statement: Addressing Cumulative Effects under the *Canadian Environmental Assessment Act*, March 1999, **Exhibit R-482**.
[374] Operational Policy Statement: Addressing Cumulative Effects under the *Canadian Environmental Assessment Act*, March 1999, pp. 1-2 **Exhibit R-482**.

> factor in the environmental assessment decision under the Act.[375] (emphasis supplied)

376. Contrary to Mr. Estrin's assertions, therefore, hypothetical projects may be taken into account by the environmental assessor. It is not "illegal" to do so as Mr. Estrin contends.[376] Mr. Estrin further claims that the EIS Guidelines for the Project only required Bilcon to address "reasonably foreseeable" projects, not hypothetical projects, and so it was inappropriate for the Panel to consider in particular additional quarrying activities.[377] However, Mr. Estrin appears to have overlooked the requirement in the EIS Guidelines that Bilcon's cumulative environmental affects assessment:

> 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.[378]

377. It is puzzling that Mr. Estrin complains that Bilcon was somehow justified in not addressing additional quarry activities,[379] and the Panel should not have considered such activities,[380] when there was a clear requirement to do so in the EIS Guidelines.

378. The Whites Point Project Panel Report observed that "the … Canadian regulatory climate may induce further development of quarries",[381] due to the difficulty of siting a new quarry in the United States. As a result the Panel concluded that "the Project is likely to induce further aggregate extraction activities in the region".[382] On the facts, including the location of the Project (which provided economical marine shipping to transport the processed aggregate in proximity to Eastern seaboard markets) and the availability of high quality North Mountain basalts as feedstock, that conclusion does seem reasonable.[383]

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[375] Operational Policy Statement: Addressing Cumulative Effects under the *Canadian Environmental Assessment Act*, March 1999, s. 3, **Exhibit R-482**.
[376] Estrin, p. 108, para. 423.
[377] Estrin, p. 110, para. 432.
[378] EIS Guidelines, p. 51, **Exhibit R-210**.
[379] Estrin, p. 110, paras. 429 and 430.
[380] Estrin, p. 110-111, para. 432.
[381] Whites Point JRP Report, p. 83, **Exhibit R-212**.
[382] Whites Point JRP Report, p. 83, **Exhibit R-212**.
[383] Whites Point JRP Report, p. 21, **Exhibit R-212**.

379. Moreover, it is conceivable that the quarry itself could be extended beyond its initial project life. Equally, the marine terminal could eventually have other uses in conjunction with other development made more attractive by the very fact that new, distinct markets are now made available by the very existence of the marine terminal and loading facilities. In the circumstances, the Panel's conclusion appears to be a reasonable inference based on those facts.

380. Further, the Whites Point Panel was not the only panel review which has considered induced effects in a cumulative effects assessment. There are at least two others: the Lower Churchill Hydroelectric Generation Joint Review Panel Report ("Lower Churchill") and the Mackenzie Valley Gas Projects Joint Panel Report. Each are discussed in turn.

381. In the recent Lower Churchill Joint Review Panel Report (August 2011), the Panel considered hypothetical projects in its cumulative effects analysis. That Panel did not confine itself the kind of projects Mr. Estrin claims qualify for consideration, i.e., those already approved or close to approval and, therefore, likely to be carried out.

382. The Lower Churchill Panel referred to the narrow range of projects that Mr. Estrin asserts can only be considered in a cumulative effects analysis as the "project-specific" approach. The Panel referred to the inclusion of what Mr. Estrin calls hypothetical projects as "induced development". In the course of that assessment, the Proponent Nalcor (a Newfoundland Crown-owned utility) had dismissed several potential projects as hypothetical:[384]

> Nalcor did not address the potential for cumulative effects resulting from induced development. It stated that induced development could not be predicted with any certainty and that any new projects would be subject to government approval and environmental assessment, including assessment of cumulative effects.[385]

383. The Lower Churchill Panel disagreed with Nalcor concluding that it's approach was too narrow:

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[384] Lower Churchill Hydroelectric Generation Project, JRP Report, August 2011, p. 265, **Exhibit R-414**.
[385] Lower Churchill Hydroelectric Generation Project, JRP Report, August 2011, p. 266, **Exhibit R-414**.

> 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.[386]

384. Accordingly, the Lower Churchill Panel recommended "[r]egionally integrated cumulative effects assessment such as a Northern Strategic Plan or a Strategic Environmental Assessment of hydroelectric and other industry development" on the basis "that resource development is likely to continue in Labrador".[387] The Lower Churchill Panel's outright rejection of the project-specific approach to cumulative effects assessment in favour of consideration of induced development or hypothetical projects is consistent with the approach taken by the Whites Point Project Joint Review Panel.

385. Similarly, the Joint Review Panel for the Mackenzie Gas Project (December 2009) interpreted cumulative impacts to include induced development as well. That Joint Review Panel also described the Mackenzie Gas Project proponents' restrictive approach as "Project-specific":

> The Panel notes that the Proponents' focus on Project-specific cumulative effects resulted in a narrow scoping in regard to the spatial extent of the analysis and the identification of reasonably foreseeable future developments. … The Proponents' criteria for identifying "reasonably foreseeable" developments likewise served to limit the scope of its cumulative impact assessment.[388]

386. The Mackenzie Joint Review Panel confirmed that the 1994 Guidelines do not consider induced development. It then relied, however, upon the more recent guidance provided, *inter alia*, in the 1999 Policy Statement and the 1999 Practitioners Guide. That guidance, it said, ". . . advocates the consideration of induced developments in a cumulative impact assessment . . ."[389] That led the Mackenzie Valley Joint Review Panel to reject the proponent's interpretation on the basis that "the Proponents' focus on Project-specific cumulative effects unduly narrows the spatial and temporal scope of the

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[386] Lower Churchill Hydroelectric Generation Project, JRP Report, August 2011, p. 267, **Exhibit R-414**.
[387] Lower Churchill Hydroelectric Generation Project, JRP Report, August 2011, p. 268, **Exhibit R-414**.
[388] Mackenzie Gas Project JRP Report, December 2009, Volume 1, chapter 5, p. 98, **Exhibit R-415**.
[389] Mackenzie Gas Project JRP Report, December 2009, Volume 1, chapter 5, p. 98, **Exhibit R-415**.

assessment. This approach serves to justify the proponent's view that future developments to support the Expansion Capacity Scenario are a 'hypothetical land use'".[390]

387. Ultimately, in light of its consideration of induced developments, the Mackenzie Joint Review Panel recommended a "scenario-based cumulative effects" assessment in the context of a Cumulative Impact Monitoring Program,[391] including "plausible scenarios of development that could be induced by the Mackenzie Gas Project".[392]

388. With respect to Mr. Estrin's allegations of anti-Americanism or xenophobia,[393] the Panel's only reference to the United States related to future US demand for aggregate. I saw no evidence of anti-American sentiment on the part of the Joint Panel in its Report or in the hearing transcripts. Indeed, the excerpt cited by Mr. Estrin appears to be simply the Panel recording the fact that Bilcon itself had stipulated the following fact:

> . . . the Proponent commented that there is an "order of magnitude difference" in the difficulty of obtaining a quarry permit in the United States as compared to in Nova Scotia. If this statement is accurate, the Canadian regulatory climate may induce further development of quarries.[394]

389. On the basis of the foregoing, the cumulative effects approach taken by the Whites Point Project Joint Review Panel was not inconsistent with the approach taken by other joint review panels and is in accord with the policies and guidance documents extant at the time of the assessment.

(g) The Panel's Mandate Included a Recommendation of Whether it was Justified in the Circumstances to Reject the Project and Assess its Impact on the Public

390. Mr. Estrin takes issue with the jurisdiction of the Panel to consider whether the project was "justified in the circumstances";[395] asserting it was conducted in excess of the

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[390] Mackenzie Gas Project JRP Report, December 2009, Volume 1, chapter 5, p. 99, **Exhibit R-415**.
[391] Mackenzie Gas Project JRP Report, December 2009, Volume 2, Recommendation 18-12, p. 5, **Exhibit R-416**.
[392] Mackenzie Gas Project JRP Report, December 2009, Volume 2, Recommendation 18-19, p. 580; See also, pp. 576-581, **Exhibit R-416**.
[393] Estrin, p. 111-114, paras. 436-439.
[394] Whites Point JRP Report, p. 83, **Exhibit R-212**; Estrin, p. 111, para. 436.
[395] Estrin, p. 123, para. 476.

Panel's jurisdiction;[396] asserting the Panel acted in excess of its jurisdiction by considering the "public interest";[397] and asserting that the Panel's weighing of the benefits and burdens of the project contravened its statutory authority.[398] Mr. Estrin also asserts that whether the project was justified or in the public interest ". . . is a matter for the government to determine".[399]

391. With respect to the last point, Mr. Estrin ignores the fact that, in the end, it was both the provincial and federal governments that ultimately did decide whether the Whites Point Project was justified. This fact is discussed in greater detail in Part III of my Report and is evidenced by each of the federal responsible authorities' and the provincial and federal Minister's decisions in relation to the Project.[400]

392. With respect to his other points, Mr. Estrin ignores the plain wording of the mandate conferred on the Joint Review panel which was to recommend whether to approve the project, with recommended mitigative conditions, or to reject the project. That is exactly what the Panel did in "Recommendation #1"; it recommended rejection. In my opinion, in concluding that the Project "… cannot be justified in the circumstances,"[401] the Panel simply explained why it recommended that the project be rejected. Further, the Panel's Recommendation #1 did not bind either the provincial Minister of Environment or the Government of Canada. Each government separately rejected the Project recognizing neither was bound by the Panel's recommendation, *per se*.

393. I discuss in detail the mandate conferred upon the Panel to determine whether or not there was justification for the project to be approved below.

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[396] Estrin, p. 126, para. 484.
[397] Estrin, p. 129, para. 490 and p. 123, para. 476.
[398] Estrin, p. 128, para. 492.
[399] Estrin, p. 123, para. 476.
[400] Letter from M. Parent, Minister of the Environment and Labour, to P. Buxton, Bilcon, November 20, 2007, **Exhibit R-331**; Department of Fisheries and Oceans, *The Government of Canada's Response to the Environmental Assessment Report of the Joint Review Panel on the Whites Point Quarry and Marine Terminal Project*, December 17, 2007, **Exhibit R-383**; Fisheries and Oceans Canada Press Release, December 18, 2007, **Exhibit R-161**; per Estrin, p. 137, para 535, Order in Council, PC 2007-1965, December 13, 2007.
[401] Whites Point JRP Report, p. 4, **Exhibit R-212**.

i) The Panel had a Clear Mandate to Justify Whether or Not to Recommend that the Project should be Approved or Rejected

394. Article 4.1 of the Agreement concerning the Establishment of a Joint Review Panel[402] required the Panel to discharge the requirements of the *CEAA* as well as Part IV of the Nova Scotia *Environment Act*. Both of those directions were expressly made in addition to the Terms of Reference:

> **4.1.** 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.

395. Moreover, Article 6.3 of the Agreement specifically directed the Panel to include in its Report:

> 6.3 … 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.[403] (emphasis supplied)

396. The Agreement requests the Panel to recommend either approval or rejection of the Project. That is what the Panel did. The language used by the Panel to do that was up to the Panel. The fact that the Panel said the Project was not justified in the circumstances and recommended its rejection does not appear to lie beyond its mandate.[404] In my view, it was merely a question of word choice or semantics in how it expressed that recommendation.

397. I would add that Mr. Estrin's argument as to whether or not the Panel had jurisdiction to consider whether the Project was in the "public interest" is really a matter of semantics.[405] First, the Panel's Recommendation #1 does not contain the words "public interest" as Mr. Estrin seems to imply.[406] Rather, the Panel simply recommended rejection

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[402] Final Whites Point JRP Agreement, p. 5, **Exhibit R-27**.
[403] Final Whites Point JRP Agreement, p. 5, **Exhibit R-27**.
[404] Estrin, p. 123, para. 476.
[405] Estrin, p. 123, para. 476 and p. 129, para. 490.
[406] Estrin, p. 126, para. 483.

of the Project because it "is likely to cause significant adverse environmental effects that, … cannot be justified in the circumstances."[407]

398. Second, in my view, project justification is inherent in what the Panel was asked to consider in arriving at its recommendation. Factors such as the need for the project, alternatives to the project, and alternative means of carrying it out, for example, were specifically included in Part III of the Terms of Reference. In the draft Guidelines, for example, these factors were grouped under the heading "Project Justification".[408] Though the subheading was revised in the final version of the Guidelines, the components of project justification remained.

399. Third, the entire exercise of assessing project effects – good and bad – upon members of the public, the community, their values, culture and way of life is inherently an exercise in assessing the public interest as to whether there is justification to recommend the Project's approval. In his section 2.8(d), Mr. Estrin simply ignores the fact the Panel was required to recommend the approval or rejection of the Project.[409]

400. Fourth, the federal and provincial Ministers were free to disregard the Panel's recommendation. Instead, they each, separately, chose to reject the Project.

401. In any event, the Nova Scotia rejection of the Project stands undiminished by Mr. Estrin's remarks. There is nothing in the Nova Scotia *Environment Act* that is incompatible with the fact the Panel chose to express its recommended rejection of the Project on the basis that it was not justified in the circumstances. Bilcon's project could not have proceeded without the Provincial Minister's approval, regardless of what the federal Minister might have done or whether the federal Minister acted correctly.

ii) Bilcon was Not Uniquely Treated by the Panel's Recommendation that the Project be Rejected

402. It is also apparent that other Joint Review Panels have taken the position that findings relative to project justification were within their mandate whether or not they were

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[407] Whites Point JRP Report, p. 4, **Exhibit R-212**.
[408] Draft EIS Guidelines, p. 10, **Exhibit R-209**.
[409] Estrin, pp. 129-132, paras. 494-510.

explicitly requested to address project justification on the face of their respective Agreements, their Terms of Reference or in their enabling legislation.

403. Again, the recent Lower Churchill Joint Review Panel Report is a case in point. The proponent, a Canadian provincial Crown-owned utility – Nalcor – sought approval for two hydro projects and related transmission and other developments.

404. The Terms of Reference and Joint Panel Agreement for that assessment did not ask that Panel to recommend whether or not to approve or reject that project and did not ask it to indicate whether that Project was justified in the circumstances.[410] Nevertheless, that Panel interpreted its mandate to include advice about justification.[411]

405. The Lower Churchill Joint Review Panel concluded that because "… the purpose of environmental assessment is to ensure that projects contribute to sustainable development" (a goal set out explicitly in the *CEAA*), where significant adverse environmental effects are identified, the sustainability goal is met, in part, by the Panel's recommendation that the project not proceed unless it is justified in the circumstances.

406. One of the stated purposes of the *CEAA* – s. 4(1)(b) "to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy"[412] – was viewed by the Lower Churchill Joint Panel as standalone authority to make project justification findings independent from the identification of significant adverse environmental effects authorized elsewhere in the *CEAA*. This same language regarding the purpose of the *CEAA* appeared in the version of the *Act* which governed the Whites Point Project review.

407. The Lower Churchill Panel adopted a sustainability framework for assessment and emphasized that the "broad range of social, cultural, economic and biophysical adverse effects and benefits of the Project … and the need and purpose of the Project and potential alternatives …" were "… all issues that go beyond the identification of significant adverse

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[410] Lower Churchill Hydroelectric Generation Project JRP Report, August 2011, Appendix 2, JRP Agreement and Terms of Reference, **Exhibit R-414**.
[411] Lower Churchill Hydroelectric Generation Project JRP Report, August 2011, s. 17, pp. 269-278, **Exhibit R-414**.
[412] *CEAA*, ss. 4(1)(b), **Exhibit R-1**; the section at the time of the Whites Point Project assessment was 4(b).

environmental effects"[413] (emphasis supplied). This sustainability assessment, therefore, focussed on "… whether and how the Project could deliver net benefits."[414]

408. The new sustainability framework adopted and applied by the Lower Churchill Joint Review panel was attached to its Report as Appendix 8, *Framework for Determining Whether Significant Adverse Environment Effects are Justified and Whether the Project Should be Approved*.[415]

409. In practice, therefore, joint review panels have interpreted the existing *CEAA* legislative framework as mandating the provision of advice on project need and justification, whether or not specific advice on the approval, rejection or justification of a project is required explicitly in the Joint Panel Agreement, the Terms of Reference or the legislation of the host jurisdictions.

410. Bilcon, therefore, cannot claim to be discriminated against on the basis of the Panel's use of the term "justified in the circumstances". The Lower Churchill Joint Review Panel concluded that the project would have significant adverse environmental effects and likewise interpreted its mandate to speak to whether the project could be justified in the circumstances.[416]

411. In fact, the Whites Point Project Panel was in my view on more solid ground than the Lower Churchill Panel in making its recommendation. This is because its Terms of Reference expressly required the Whites Point Project Panel to recommend whether the project should proceed or be rejected. In these circumstances there should be no issue surrounding the terms employed by the Panel in making that recommendation.

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[413] Lower Churchill Hydroelectric Generation Project JRP Report, August 2011, s. 17, p. 270, **Exhibit R-414**.
[414] Lower Churchill Hydroelectric Generation Project JRP Report, August 2011, s. 17, p. 270, **Exhibit R-414**.
[415] Lower Churchill Hydroelectric Generation Project JRP Report, August 2011, Appendix 8, pp. 352-355, **Exhibit R-414**.
[416] Lower Churchill Hydroelectric Generation Project JRP Report, August 2011, p. xii, **Exhibit R-414**.

iii) Recommendations Respecting the Public Interest are Inherent in Every Environmental Assessment

412. Mr. Estrin also asserts that the Whites Point Panel acted in excess of its jurisdiction by considering the "public interest".[417] Similar to the Panel's use of the word "justified", I am also of the view that it is again a matter of semantics to argue whether or not the Panel had jurisdiction to consider whether the Project was in the "public interest".[418]

413. As with the use of the word "justified" by the Panel, it first bears noting that other joint review panels have also interpreted their mandate to include a public interest finding. The language employed by the Lower Churchill Joint Review Panel above is apposite. In addition, the Kemess Joint Review Panel actually concluded that, despite the fact both the federal and provincial governments had advised the Panel that the project could be implemented in a manner compatible with all their requirements, the project would not be in the public interest.

414. The Kemess Joint Review Panel summarized its public interest mandate as follows:

> In this report, the Panel has documented its conclusions on the adequacy of the measures proposed to mitigate or compensate for the Project's potential adverse effects, and has also suggested some ways to enhance Project benefits. In this final chapter, the Panel weighs the question of whether or not, in its view, proceeding with the Project would be in the public interest.
>
> One of the most important benefits of a panel review is the integration of public values into the review process. The Panel heard strong views both for and against the Project, and there is no broad public consensus on the Project to help guide the Panel. … By the time that the hearing record closed in May 2007, federal and provincial government agencies had advised the Panel that, in almost all important respects, the Project could be implemented in a manner consistent with their respective programming and regulatory objectives. While this is an important consideration, the Panel recognizes that most agencies examine the question of Project acceptability primarily from the perspective of their own well-defined mandates. The Panel believes that it is also necessary to evaluate the Project effects holistically, and to incorporate values expressed by the public. In the Panel's view, compatibility with government requirements does not necessarily mean that the Project would not cause adverse effects,

[417] Estrin, p. 123, para. 476 and p. 129, para. 490.
[418] Estrin, p. 123, para. 476 and p. 129, para. 490.

> at least in the view of some interested parties, or would necessarily be in the public interest. [419] (emphasis supplied)

415. Of particular relevance to the Whites Point Project is the Kemess Panel's conclusion that " … it is … necessary to evaluate the Project effects holistically, and to incorporate values expressed by the public". As noted in my earlier discussion of the relevance of community core values, the federal and Nova Scotia legislation, the Joint Review Panel Agreement and Terms of Reference, and the EIS Guidelines contain many references to ensuring meaningful public input to and participation in the review process. Logically, that requirement is designed to ensure that the consideration of the Project's effects upon members of the public and their communities is included as part of the environmental assessment. In my view, the requirement to consider the impacts of the Project on the public and local communities *is* an assessment of the public interest.

416. Inherently, therefore, when formulating its recommendation, any joint review panel, and certainly the Whites Point Project Panel, has an obligation to assess the public interest in terms of the Project's effects upon people, their communities, their culture and their traditional way of life.

417. For Mr. Estrin to argue that "[t]he 'public interest' was not a factor for the Panel to consider"[420] would require the Panel to ignore all the public input about socio-economic and socio-cultural effects of the Project. That would be contrary to the terms of the mandate which governed the Whites Point Project review.

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[419] Kemess North Mines JRP Report, p. 232, **Exhibit R-411**.
[420] Estrin, p. 128, paras. 490-493.

PART III: GOVERNMENT RESPONSE TO JOINT REVIEW PANEL REPORT WAS NOT IMPROPER OR CONTRARY TO LAW

418. In Part III of his Report, Mr. Estrin concludes that the "[g]overnment actions following release of the Panel Report appear to be contrary to law …"[421] because the decisions of the federal and provincial governments to accept the recommendations of the Panel were based on a flawed Panel Report;[422] and because the federal government did not conduct an independent analysis.[423] He also asserts that as a matter of administrative law, it was an error for the responsible authorities to simply parrot the words of the Panel in the Federal Response.[424] He further contends that both governments acted unfairly towards Bilcon because their actions were allegedly inconsistent with the evidence of their officials at the hearing.[425] I do not agree that either government acted improperly following receipt of the Panel Report.

1. Government Action Following Release of the Panel Report was Lawful

419. The Joint Review Panel performed the tasks assigned to it by the federal and provincial authorities. Because the Panel was not recommending approval of the Project, as stipulated in Article 6.3 of the Joint Panel Agreement, the Panel did not include recommended mitigation measures.[426] Its conclusion was set out in its Recommendation #1.[427] The Panel clearly understood its report was advisory and was not binding on the federal and provincial authorities:

> I would like to stress to you that we are not a decision-making body. We are an advisory body. We provide advice to the two Ministers and the Ministers make the decision.[428]

420. The federal and provincial governments considered the Panel Report and its Recommendations and issued separate decisions which stand on their own. They could have reached different conclusions. For example, they could have decided that,

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[421] Estrin, p. 135, para. 518.
[422] Estrin, p. 135, paras. 518-519; pp. 136-137, paras. 523-528.
[423] Estrin, p. 135, para. 521 and p. 137-142, paras. 529-548.
[424] Estrin, p. 135, para. 522(d) and pp. 142-143, paras. 549-553.
[425] Estrin, p. 135, para. 522; pp. 143-144, paras. 554-556.
[426] Whites Point JRP Report, pp. 101-103, **Exhibit R-212**.
[427] Whites Point JRP Report, p. 103, **Exhibit R-212**.
[428] Whites Point JRP Hearing Transcripts, June 16, 2007, 1T2:19-22, **Exhibit R-457**.

notwithstanding the likelihood of significant adverse environmental effects, the project should be approved since it was justified in the circumstances or because it would serve the public interest to do so. That is not what the governments chose to do.

421. The actual decisions of which Bilcon now complains were decisions of the federal and the provincial governments. Each government made its own decision after considering the Joint Review Panel Report.[429] Furthermore, the Panel Report was not flawed so any reliance placed upon it by the governments in their final decision-making was not contrary to law.

422. The Panel and the respective government authorities, therefore, appeared to appreciate their proper roles in the process. Again, this aspect of the process appears to have operated as contemplated in the JRP Agreement. In particular, the JRP Agreement contemplated that after receipt of the Report, the federal government would respond and the responsible authorities would take appropriate action under ss. 37(1) of the *CEAA*, and Nova Scotia Minister of Environment and Labour would likewise consider the Panel recommendations and make a decision on the Project:

> 6.4. Once completed, the Panel will submit the Report, in both official languages, to the Minister of Environment and Labour, Nova Scotia, and the Minister of the Environment, Canada, and will make it public.
>
> 6.6. The Responsible Authority shall take into consideration the Report submitted by the Panel and, with the approval of the Governor in Council, respond to the Report. Then, the Responsible Authority shall take one of the courses of action provided for in subsection 37(1) of the Canadian Environmental Assessment Act that is in conformity with the approval of the Governor in Council.
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> 6.7. The Minister of Environment and Labour, Nova Scotia, shall consider the recommendation of the Panel, and either approve with conditions, or reject the Project.[430]

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[429] Letter from M. Parent, Minister of the Environment and Labour, to P. Buxton, Bilcon, November 20, 2007, **Exhibit R-331**; Department of Fisheries and Oceans, *The Government of Canada's Response to the Environmental Assessment Report of the Joint Review Panel on the Whites Point Quarry and Marine Terminal Project*, December 17, 2007, **Exhibit R-383**.

[430] Final Whites Point JRP Agreement, ss. 6.4, 6.6, 6.7, **Exhibit R-27**.

423. Therefore, in my view, the actions of both governments upon receipt of the Joint Panel Report were not contrary to law. Rather, they were authorized by both their governing legislation and by the JRP Agreement.

2. The Federal and Provincial Governments were not Obliged to Conduct a Duplicative Analysis

424. Mr. Estrin contends that "there is no evidence the RAs carried out their required statutory duty to conduct an independent analysis of whether there were significant adverse environmental effects that could not be justified." He criticizes those federal responsible authorities for relying on the Panel's "conclusion" on the basis that the Panel had no jurisdiction to reach that conclusion. [431]

425. In this regard, Mr. Estrin focuses on an alleged error of the federal government, stating "[t]he federal government did not conduct an independent analysis of the proposal".[432] Whether or not that may be true, it should be noted that the Nova Scotia government issued its decision rejecting the Whites Point Project on November 20, 2007,[433] almost one month prior to the federal government's rejection of the Project on December 18, 2007.[434] 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.

426. The process which applied after the issuance of the Joint Review Panel Report does not appear to have been unusual. Each of the federal and provincial governments stated that they considered the report and separately decided not to issue the approvals required for the Project to proceed. Indeed, the decision of the Nova Scotia Minister of Environment and Labour regarding the Whites Point Project indicates a clear understanding of his statutory mandate:

> Ultimately, under Section 40 of the *Environment Act* and under the terms of the Joint Agreement signed November 3, 2004, it is for the Minister of

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[431] Estrin, p. 135, para. 521.
[432] Estrin, p. 137, para. 529.
[433] Letter of M. Parent, Minister of the Environment and Labour to P. Buxton, Bilcon, November 20, 2007, **Exhibit R-331**.
[434] Department of Fisheries and Oceans, *The Government of Canada's Response to the Environmental Assessment Report of the Joint Review Panel on the Whites Point Quarry and Marine Terminal Project,* December 17, 2007, **Exhibit R-383**.

> Environment and Labour to make the final decision on whether or not to approve this Project
>
> The purpose of the environmental assessment is to provide a process whereby the environmental effects of a project can be predicted and evaluated and a decision made regarding the acceptability of the project. The definition of environmental effect in the *Environment Act* is broad in nature and includes any change that the project may have on the environment, including socio-economic conditions, environmental health, physical and cultural heritage.
>
> I have arrived at my decision following careful consideration of the Panel's Report. I have determined that the proposed Project poses the threat of unacceptable and significant adverse effects to the existing and future environmental, social and cultural conditions influencing the lives of individuals and families in the adjacent communities.
>
> Therefore, in accordance with the authority provided by Section 40 of the *Environment Act*, the proposed Whites Point Quarry and Marine Terminal is not approved.[435]

427. Likewise, the federal government response to the Joint Review Panel Report shows a careful consideration of the Report's recommendations and an understanding of the federal government's and responsible authorities' roles in the process. The federal government's response states:

> The Joint Panel report contains seven (7) recommendations. The first recommendation from the Panel is directed at the provincial Minister of Environment and Labour to reject the proposal and at the Government of Canada recommending that the Project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances. Of the remaining six recommendations, four were directed at Nova Scotia to improve its planning processes, consultation and quarry regulations. One was directed at the Canadian Environmental Assessment Agency with respect to developing guidance on adaptive management in environmental assessment. The last recommendation was directed at TC regarding the need to revise its ballast water regulations.[436]

428. The federal government accepted the Panel's Recommendation 6, to develop guidance on adaptive management, and indicated that the CEA Agency would by December 2008, develop such guidance in collaboration with other federal authorities.

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[435] Letter of M. Parent, Minister of the Environment and Labour to P. Buxton, Bilcon, November 20, 2007, **Exhibit R-331**.

[436] Department of Fisheries and Oceans, *The Government of Canada's Response to the Environmental Assessment Report of the Joint Review Panel on the Whites Point Quarry and Marine Terminal Project,* December 17, 2007, **Exhibit R-383**.

With respect to Recommendation 7, which recommended further revisions to the ballast water regulations under the *Canada Shipping Act*, the federal government likewise accepted the recommendation, and indicated that the current regulations had been adopted after consultation with various groups but that Transport Canada would "continue to consult with the appropriate federal authorities and work with the industry, scientific community and environmental groups, and will consider any recommendations made with respect to improving" the recommendations.[437]

429. In my view, the foregoing illustrates that both levels of government gave a considered response to the Panel's recommendations. As required under their governing legislation, each reached their own conclusions and did not abdicate any responsibility for the ultimate approval or rejection of the Project. There were no "irregularities"[438] in the response of either government.

430. The fact that the federal government arrived at its own conclusion to accept the Panel's recommendation "that the Project is likely to cause significant adverse environmental effects that, in the opinion of the Panel, cannot be justified in the circumstances"[439] demonstrates that it understood that the licensing decision was the federal government's responsibility, not that of the Joint Review Panel. The federal government, therefore, appeared to properly appreciate its responsibility.

431. Mr. Estrin's suggestion that the federal government was mandated to "conduct an independent analysis" is certainly not supported by ss. 37(1.1) of the *CEAA*. While ss. 37(1.1) does require the responsible authority to respond to the Report and to take the course of action indicated therein, there is no statutory requirement for it to conduct an independent analysis of the project nor is there any requirement to prescribe mitigation measures. There is also no authority for the proposition that the responsible authority must

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[437] Department of Fisheries and Oceans, *The Government of Canada's Response to the Environmental Assessment Report of the Joint Review Panel on the Whites Point Quarry and Marine Terminal Project,* December 17, 2007, **Exhibit R-383**.
[438] Estrin, p. 139, para. 536.
[439] Whites Point JRP Report, p. 4, **Exhibit R-212**.

comment on any particular part of a joint review panel report. Nor does Mr. Estrin cite one in the context of his opinion,[440] because there is none.

432. I am not aware of the federal government ever having launched the type of further "independent" analysis of a project suggested by Mr. Estrin. It is not surprising that Mr. Estrin has failed to furnish any precedents since they would be inconsistent with: (i) the joint nature of the assessment, which requires both levels of government to consider the "joint" assessment, not conduct "independent analyses"; (ii) the *CEAA*'s stated purpose of avoiding duplication;[441] and (iii) the entire notion of an independent, transparent assessment of the Project afforded by the Joint Review Panel.

433. In particular, Mr. Estrin suggests that DFO and Transport Canada should have embarked on an independent investigation of mitigation measures; the selection of "criteria" to assess the significant of environmental affects after the application of the mitigation measures so identified; and based on those criteria and mitigation measures, what amounts to a re-evaluation of the Project's environmental effects after identifying further mitigation measures.[442] With respect, it appears that Mr. Estrin is opining that DFO and Transport Canada should have, in effect, conducted a separate assessment of the Project behind closed doors after the conclusion of the Joint Review Panel hearings and the fact-finding process undertaken by the Panel. Whether public or not, it would be duplicative. Mr. Estrin also fails to provide any authority under the Nova Scotia legislation for the provincial government to conduct this separate independent analysis.

434. It is also not the responsibility of the federal and provincial governments to act as a reviewing court of the Panel's recommendations. Mr. Estrin suggests the governments should have informed "… the Panel it had no legal authority to reach conclusions about whether the impacts of the project could not be 'justified'."[443] To the contrary, the Panel had committed no error that was in need of correction. In fact, both the federal and provincial governments drafted the Joint Review Panel Agreement and the Terms of Reference with a specific direction to the Joint Review Panel to do just that – recommend

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[440] Estrin, pp. 139-149, paras. 534, 538-539.
[441] *CEAA*, s. 4(b.1), **Exhibit R-1**.
[442] Estrin, p. 140, para. 540.
[443] Estrin, p. 140, para. 537.

the approval or rejection of the project. That is what the Panel did by making a recommendation to reject; which the two governments considered; and which the two governments separately accepted.

435. When it comes to policing whether Panels have exceeded their jurisdiction, in my experience, Governments leave it to the proponents and participants to initiate proceedings before the Courts to correct those errors. I am not aware of the provincial or federal government ever appealing or seeking judicial review of a panel report; nor has Mr. Estrin identified any. In any event, Bilcon never asserted any jurisdictional errors at the time, a matter which is discussed further under Part IV of my Report.

3. The Federal and Provincial Governments Complied with Their Statutory Mandate With Respect to the Provision of Reasons

436. Mr. Estrin believes that there were errors committed "[a]s a matter of administrative law" respecting, amongst other things, failures by the federal government to provide reasons for accepting the Joint Review Panel's recommendations.[444]

437. Mr. Estrin's second objection to the government relying upon the Panel's recommendations relates to his allegation that "… the RA has a duty under *CEAA* to conduct an independent analysis of its own, and in particular to consider any mitigation measures, whether or not those measures were considered by the Panel"[445] (emphasis supplied).

438. With respect to Mr. Estrin's opinion regarding the alleged failure of the federal government to provide reasons for accepting the Panel's recommendation, the authority he cites does not support his position. Mr. Estrin cites *The Schwarz Hospitality Group*[446] case as authority for the proposition that "[t]he RAs had a duty to provide reasons for rejecting the WPQ project"[447] (emphasis supplied). In fact, the quotation referenced makes clear that any such duty only arose "[i]f the responsible authority rejects the environmental

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[444] Estrin, pp. 142-143, paras. 549-553.
[445] Estrin, p. 143, para. 553.
[446] *Schwarz Hospitality Group Ltd. v. Canada (Minister of Canadian Heritage)* (2001), 32 Admin. L.R. (3d) 113 (F.C.T.D.), **Exhibit R-437**.
[447] Estrin, p. 142, para. 549.

assessment …"[448] (emphasis supplied). In this case, the federal government accepted the Panel's assessment; it did not reject the assessment.

439. The fact the Court in *Schwarz* insisted on the issuance of reasons to overturn an environmental assessment is instructive. 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. If the governments *reject* a Panel Report, however, the basis for so doing will not be apparent on the face of the Panel Report absent reasons. Hence, a requirement for a government to provide separate reasons for rejection of an environmental assessment makes sense but cannot be construed, as Mr. Estrin suggests, to require separate reasons to be issued for an approval of an environmental assessment report as well.

440. Mr. Estrin asserts that as a result of the federal government not providing reasons for rejecting the project, a reader "… is left wondering what exactly the federal government determined would be the significant adverse environmental effects, why they could not be mitigated and why those effects were not justifiable".[449]

441. Implicitly, Mr. Estrin appears to acknowledge that the federal government did rely on the Panel's reasons since the reader is in full view of the reasoning employed to reject the Project. The fact that the federal government did base its decision on the Panel Report, in my view, is illustrated in the following excerpt from the federal response dated December 17, 2007:

> In preparation of this Government of Canada Response, DFO and TC, as the RAs under CEAA, carefully considered the report submitted by the Joint Review Panel. The Government of Canada accepts the conclusion of the Joint Review Panel that the Project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances.[450]

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[448] *Schwarz Hospitality Group Ltd. v. Canada (Minister of Canadian Heritage)* (2001), 32 Admin. L.R. (3d) 113 (F.C.T.D.) at para. 45, **Exhibit R-437**.
[449] Estrin, p. 143, para. 553.
[450] Estrin, pp. 138-139, para. 532.

442. The reasoning set out in the Panel's Report was "carefully considered" in the federal government's decision to accept the Panel's conclusion. It is not necessary to re-state all the reasons why the Panel arrived at that conclusion. Those reasons are obvious on the face of the Panel's Report.

443. Mr. Estrin's second point is that an "RA has a duty under *CEAA* to conduct an independent analysis of its own, and in particular to consider any mitigation measures, whether or not those measures were considered by the Panel."[451] The governments set up the Panel to assist them in their own decision-making by conducting an independent, transparent assessment of the Whites Point Project and recommending approval or rejection of it. It is logical, therefore, that the governments should have been at liberty to rely upon the Panel's reasons without conducting an analysis of their own. Moreover, the Panel carefully recites in its Report the fact that it did consider the proposed mitigation measures before arriving at its recommendations.[452] The fact that the Panel did not itself recommend mitigation measures was specifically contemplated in the Joint Panel Agreement, Article 6.3 as more fully discussed in Part II, Section 3(d) of my Report.

444. Mr. Estrin's thesis in this regard seems strained. Even if he is right regarding the conduct of the federal responsible authorities, Mr. Estrin fails to impugn the Nova Scotia post-Panel Report decision-making process, which also rejected the Project. With the provincial decision having been made, the Project could not proceed. As noted, the Nova Scotia government rejected the Project prior to the federal government's decision rejecting the project.[453] Accordingly, the federal government decision, whether flawed or not (and I am of the opinion that it was not), was somewhat of an academic point.

4. Government Officials' Evidence Before the Review Panel was Appropriate

445. Mr. Estrin appears to suggest that because the federal and provincial officials who appeared before the Panel did not tell the Panel that the Whites Point Project should be

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[451] Estrin, p. 143, para. 553.
[452] Whites Point JRP Report, p. 20, **Exhibit R-212**.
[453] Letter of M. Parent, Minister of the Environment and Labour to P. Buxton, Bilcon, November 20, 2007, **Exhibit R-331**.

rejected,[454] the respective responsible authorities were later prevented from accepting the Joint Review Panel's recommendation to that same effect. He states:

> 554. The acceptance of the Panel recommendations by the RAs was surprising and in essence a conflicting position to that expressed by them to the Panel. These RAs did not make any submissions to the Review Panel or provide any evidence to them which concluded that the project would result in significant adverse environmental effects after taking into account mitigation measures. … Neither of the RAs stated that the project would result in significant adverse environmental effects. Neither of the RAs told the Panel the WPQ project should be rejected.[455]

446. In this regard, it bears noting that the responsible authorities did not testify that the project should be approved, nor, for that matter did they testify that the project should be rejected. They left those matters for the Panel to consider in arriving at its recommendations.

447. In particular, Transport Canada's presentation before the Bilcon panel was informative and fact-based and did not advocate a position on the Project. Indeed, during the course of its oral presentation and in its power point presentation, Transport Canada indicated that it was looking forward "to the Joint Review Panel's report and we, along with Fisheries and Oceans, as a responsible authority for the EA, will respond to the Panel's report once it is released."[456] The five Transport Canada witnesses, who sat on a panel with one Atlantic Pilotage Authority witness, provided factual information regarding Transport Canada's mission and core activities,[457] and its historical involvement with the Bilcon Project.[458] In addition, Transport Canada provided information about marine safety, including ballast water management programs, as well as security and emergency

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[454] Estrin, pp. 143-144, paras. 554-556.
[455] Estrin, p. 144, para. 554.
[456] Whites Point JRP Hearing Transcripts, June 20, 2007, 4T709:20-23, **Exhibit R-477**; Transport Canada, Presentation on the Proposed Whites Point Rock Quarry Project, Whites Point JRP Hearing, p. 13, **Exhibit R-497**.
[457] Whites Point JRP Hearing Transcripts, June 20, 2007, 4T702:2-17, **Exhibit R-477**; Transport Canada's Presentation on the Proposed Whites Point Rock Quarry Project, Whites Point JRP Hearing, pp. 2-3, **Exhibit R-497**.
[458] Whites Point JRP Hearing Transcripts, June 20, 2007, 4T702: to 703:7; 4T703:22 to 704:4, **Exhibit R-477**; Transport Canada's Presentation on the Proposed Whites Point Rock Quarry Project, Whites Point JRP Hearing, pp. 4, 7, **Exhibit R-497**.

preparedness, including the expected regulatory and legal requirements applicable to the Proponent in this regard.[459]

448. Similarly, the presentation of the eleven DFO witnesses was informative and fact-based and did not advocate a position on the Project. In that regard, during the course of its oral presentation and in its power point presentation, DFO also indicated that it was looking forward "to the recommendations from the Joint Review Panel."[460] The eleven DFO witnesses presentation provided factual information regarding DFO's core activities and historical involvement with the Project.[461] In addition, DFO provided information about the following key areas of interest with respect to DFO's involvement with the Bilcon Project: marine mammals and blasting; marine mammals and shipping; fish and blasting; lobster and blasting; invasive species; and fish habitat.[462] The DFO witness panel also provided recommendations for mitigation and monitoring in the event the Project proceeded.[463]

449. The Panel and the public posed questions of the Transport Canada and DFO witness panels and all responses provided were fact-based and did not purport to advocate for a decision one way or the other with respect to approval or rejection of the Project.[464]

450. Mr. Estrin's position is not consistent with the way the environmental assessment process works. Individual submissions from government officials are typically particular to their specific areas of expertise. They are intended as but one input to an assessment

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[459] Whites Point JRP Hearing Transcripts, June 20, 2007, 4T704:5 to 709:10, **Exhibit R-477**; Transport Canada's Presentation on the Proposed Whites Point Rock Quarry Project, Whites Point JRP Hearing, pp. 8, 10-11, **Exhibit R-497**.

[460] Whites Point JRP Hearing Transcripts, June 20, 2007, 4T780:25, **Exhibit R-477**; Fisheries and Oceans Canada Presentation on the Whites Point Quarry and Marine Terminal Project, Whites Point JRP Hearing, p. 26, **Exhibit R-498**.

[461] Fisheries and Oceans Canada Presentation on the Whites Point Quarry and Marine Terminal Project, pp. 2-7, **Exhibit R-498**.

[462] Whites Point JRP Hearing Transcripts, June 20, 2007, 4T768:16 to 779:20, **Exhibit R-477**; Fisheries and Oceans Canada Presentation on the Whites Point Quarry and Marine Terminal Project, Whites Point JRP Hearing, pp. 8-23, **Exhibit R-498**.

[463] Whites Point JRP Hearing Transcripts, June 20, 2007, 4T779:21 to 780:23; 4T770:22-25; 4T771:10 to 772:10; 4T775:12-13; 4T776:16-19; 4T777:23-24; 4T779:4-20, **Exhibit R-477**; Fisheries and Oceans Canada Presentation on the Whites Point Quarry and Marine Terminal Project, Whites Point JRP Hearing, pp. 12, 14, 16, 18, 20, 23-25, **Exhibit R-498**.

[464] Whites Point JRP Hearing Transcripts, June 20. 2007, 4T716:15 to 751:4; 4T781:5 to 881:10, **Exhibit R-477**.

which involves a broad array of factors including input from the public. Moreover, joint review panels do not automatically agree with the positions of government officials. The Panel also must take into account all the evidence presented by every party, not just the government officials.

451. It would make little sense to hold a public hearing if the responsible authorities were able to simply announce their position and make it binding upon the Panel. That is contrary to the way in which the legislation is drafted and contrary to the manner in which the JRP Agreement is written.

452. The fact that the government officials appearing at the hearing did not offer a position on whether the project should be approved or not also is not surprising. Their departments typically would not make that decision until after they considered the Joint Review Panel Report. After all, the governments themselves had directed the Joint Review Panel to gather all the facts and to test that evidence in the course of carrying out an environmental assessment of the Project; and to make related recommendations prior to the same governments deciding whether or not to issue project-related approvals. As I have noted previously, the legislation actually forbids the responsible authorities from making any regulatory decision until after the assessment process has been completed.[465]

453. After careful consideration of the Joint Panel's Report, it also was not surprising, nor is it uncommon, that those government departments accepted the Joint Review Panel's recommendations.

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[465] *CEAA*, s. 37, **Exhibit R-1**.; NS*EA*, s. 40, **Exhibit R-5**.

PART IV: A COMMENT ON BILCON'S FAILURE TO PURSUE REMEDIES COMMONLY SOUGHT IN CONJUNCTION WITH CANADIAN ENVIRONMENTAL ASSESSMENTS

454. 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.

455. None of the jurisdictional errors Mr. Estrin cites were ever presented to the judicial courts by Bilcon at the time that they are alleged to have occurred. While Mr. Estrin now alleges many errors of law, excesses of jurisdiction and instances of procedural unfairness, none of those allegations have ever been made before a Canadian court much less proven. For example:

(i) Bilcon did not assert, or seek review of, the DFO's determination that the Whites Point Project would be required to undergo a comprehensive study, despite Mr. Estrin's assertion now that this was an error of law.

(ii) Further, Bilcon did not at the time object to the inclusion of the quarry operations within the scope of the Whites Point Project.

(iii) Likewise, Bilcon did not seek judicial review of the decision to refer the Whites Point Project to a joint review panel.

(iv) Though Mr. Estrin many years after the fact takes exception to the inclusion of socio-economic effects in the panel's review, Bilcon failed to do so at the time, despite express invitations to do so.[466]

(v) Bilcon did not object to the detail and breadth of the draft guidelines even after the public and other stakeholders debated them in the public scoping

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[466] For instance, in his letter dated November 11, 2003 regarding the draft JRP Agreement, Mr. Buxton did not take issue with the inclusion of socio-economic effects or any of the other factors relating to Project impacts on members of the public or their communities which were proposed to be included in the scope of the assessment. Letter from P. Buxton, to C. Daly, NSDEL, November 11, 2003, **Exhibit R-229**.

meetings, and after a specific invitation to do so by the Chairman, Dr. Fournier.

(vi) Moreover, Bilcon did not appeal or seek judicial review of the Joint Panel Report or either the federal or provincial Ministers' rejection of the requested approvals.

456. As noted previously, all proponents and participants to Canadian environmental assessment processes, including Bilcon, have the ability to seek redress in respect of jurisdictional and fairness issues before the Canadian courts. Indeed, the many case citations Mr. Estrin provides in his Report demonstrate the frequency with which such issues are litigated.

457. There have been instances in which Canadian courts have corrected jurisdictional errors or mistakes arising in the environmental assessment process. Those cases include instances where the alleged jurisdictional errors were litigated in the middle of the review process itself. For the Tribunal's benefit, I have described two such cases below.

458. In the *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.* ("*Cheviot Mines*") case,[467] for instance, the Federal Court corrected a joint review panel's breaches of duty and errors in due process. In that case, the project proponent, Cardinal River Coals Ltd., proposed to construct an open pit coal mine in Alberta. At issue was, *inter alia*, whether the Panel breached its duty under the joint panel agreement to obtain all available cumulative effects information about likely forestry and mining in the vicinity of the project; and whether the Panel failed to meet the requirements of ss. 16(2)(b) of the *CEAA* because the Panel's report failed to consider the environmental effects of alternative means of mining. While the report generally considered alternative means of underground mining, the Court agreed that the effects had not been meaningfully considered.

459. The Court concluded that, as a result of the Panel's breaches of duty and error in due process, the environmental assessment was not conducted in compliance with the requirements of the *CEAA*. The Minister's authorization, therefore, was issued without

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[467] *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.*, [1999] 3 F.C. 425 (T.D.), **Exhibit R-396**.

jurisdiction. The Court accordingly quashed the authorization. The Court ordered the Minister to direct the Panel to reconvene the environmental assessment process and to do what was necessary to make adjustments to the Panel Report so that the assessment would comply with the *CEAA*.

460. As an illustration of the specific remedies available from the Canadian courts in these types of situations, the Court's specific recommendations in the *Cheviot* case are instructive. The Court specifically directed the Minister to direct the joint review panel to:

- Consider additional information with respect to cumulative environmental effects, and, accordingly, reconsider the cumulative effect assessment for the project; [468]

- Perform a comparative analysis of alternative means of carrying out the project as between open pit mining and underground mining;[469] and

- Consider additional information regarding the potential effect of mining.[470]

461. The *Cheviot Mines* case illustrates the fact that substantive jurisdictional errors can be corrected by Canadian courts; and that the Canadian legislative scheme provided the same avenues of redress to Bilcon as it did to all other domestic and non-NAFTA proponents.

462. The Federal Court decision in *Dene Tha' First Nation v. Canada (Minister of Environment)*,[471] further illustrates how such corrective action can be obtained even in the middle of the hearing process rather than waiting until after a final decision is issued.

463. In that case, the Court actually amended the scope of the Mackenzie Gas Project assessment in the middle of the assessment and hearing process. Specifically, the Court

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[468] *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.*, [1999] 3 F.C. 425 (T.D.), at para. 91, **Exhibit R-396**.
[469] *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.*, [1999] 3 F.C. 425 (T.D.), at para. 91, **Exhibit R-396**.
[470] *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.*, [1999] 3 F.C. 425 (T.D.), at para. 91, **Exhibit R-396**.
[471] *Dene Tha' First Nation v. Canada (Minister of Environment)* (2006), 303 F.T.R. 106 (T.D.), **Exhibit R-404**.

enjoined the joint review panel from considering any aspect of the pipeline that affected either the treaty lands of the Dene Tha' or the aboriginal rights claimed by the Dene Tha'. The Panel was also further enjoined from issuing any report of its proceedings to the NEB (the responsible authority in that case) until an effective remedy was worked out to correct flaws in the regulatory and environmental review process established for that project.

464. Bilcon had full opportunity to seek corrective action in Canadian courts if it thought the assessment process was flawed by errors in law or that it was being treated in a procedurally unfair manner. It is significant that Bilcon did not do so.

465. As an environmental assessment practitioner, therefore, I cannot conclude that Bilcon was treated unfairly or with a lack of even-handedness relative to other project proponents on the basis of alleged jurisdictional errors that it failed to pursue in a timely manner.

F. CONCLUSIONS

466. Based on my review of the environmental assessment of the Whites Point Project, I do not agree that the process was marred by serious irregularities or jurisdictional excess, as claimed by Mr. Estrin. [472] None of the alleged errors that Mr. Estrin identifies were either asserted or proven by the proponent at the time.

467. In my opinion, the authorities treated the Whites Point Project Proponent and conducted the environmental assessment in a fair and even handed manner.

468. The process undertaken prior to and including the referral of the Whites Point Project to a joint review panel was unexceptional. Any project with the potential for significant adverse environmental effects, and which has attracted widespread public controversy, can reasonably be expected to be referred to a review panel. The responsible authorities identified the scope of the Project under review in the same terms as did the proponent – as an integrated, large scale, quarrying, crushing, loading and shipping operation, including a marine terminal and a quarry, expected to operate over a 50-year period. Given the potential for significant adverse effects as well as the significant public

[472] Estrin, p. 145, para. 557.

concern over the project, the reasonable expectation for the assessment of such a project was a public review. That type of review process was soundly based in the governing federal and Nova Scotia legislation. The fact that other projects were assessed under different processes reflects their significant differences rather than anti-American motivations on the part of the Whites Point Project Panel.

469. Further, there was nothing remarkable in the processes that the led up to the referral of the Project to a joint review panel. The DFO's handling of the permitting for the 3.9 ha quarry, and its conclusion that it required a *Fisheries Act* authorization and environmental impact assessment was reasonable. The DFO correctly concluded that the Whites Point Project, at minimum, required a comprehensive study under the *CEAA*, and it was reasonable to conclude that all closely related components of the Whites Point Project – the quarry (including the 3.9 ha quarry), processing facilities and the marine terminal – were considered as a single project for the purposes of the environmental assessment, especially considering the joint nature of the review.

470. I am likewise of the view that the conduct of the Joint Review Panel itself was legally proper and unremarkable. An objective review of the manner in which the Panel conducted its assessment reveals a close adherence to the mandate conferred by federal and provincial statutes and by the specific Terms of Reference outlined in the JRP Agreement.

471. The Panel's application of its governing assessment criteria – such as the precautionary principle, cumulative effects assessment and adaptive management – to the Whites Point Project was soundly based on a combination of the relevant guidance documents and past practice as evidence by the approach taken by other joint review projects. The Panel acted in accordance with the JRP Agreement, its Terms of Reference and the governing legislation in its consideration of socio-economic effects, including "community core values". As discussed in my Report, Mr. Estrin's objections to the Panel's recommendations respecting "community core values" is further rebutted by the fact the Whites Point Project Panel is not the only panel to have rejected a project on such grounds.

472. Ultimately, Bilcon had full notice and ample opportunity to persuade the Panel that the Project should be approved. Proponents do not enjoy a presumption that their projects

are in the public interest, subject to members of the public or review panels proving otherwise. Rather, the proponent must persuade the federal and provincial authorities that their projects satisfy the relevant statutory criteria. Bilcon failed to do so.

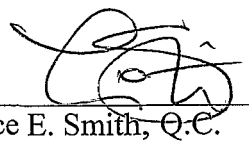
473. The Whites Point Project Panel also was called upon by both the Nova Scotia and Canadian governments to decide whether they should approve or reject the project. It did so when it stated the Project could not be justified in the circumstances. There was no prohibition in the Nova Scotia legislation or the federal legislation nor in the JRP Agreement against expressing its rejection in those terms. Mr. Estrin's assertion that "the Panel exceeded its jurisdiction by determining that the Project was not justified in the circumstances"[473] is, in my opinion, unsupportable.

474. The conduct of the governments following release of the Panel Report similarly was unexceptional. While much of Mr. Estrin's criticisms centered on the conduct of the federal authorities, the fact is that Nova Scotia rejected the project almost a month prior to the federal Minister's decision to reject it. The Whites Point Project could not proceed, therefore, whether or not the federal authorities properly discharged their responsibilities. In my view, however, there was no defect in what the federal authorities did or in how they arrived at their decision to recommend rejection of the Whites Point Project.

475. In sum, the process followed in the environmental assessment of the Whites Point Project does not reveal any procedural irregularities or jurisdictional excesses. The environmental assessment process was conducted in accordance with the applicable laws and was otherwise unexceptional based on my experience as a practitioner in the area.

SIGNED at Calgary, Alberta

December 7, 2011



Lawrence E. Smith, Q.C.

[473] Estrin, p. 4.

APPENDIX 1

Curriculum Vitae
of
Lawrence Edward Smith, Q.C.

EMPLOYMENT:

Partner and Associate, Bennett Jones LLP (1984 – present)

- Former Vice Chairman of Bennett Jones LLP and former Head of Regulatory/Environment Department.
- Member of Executive Committee (1993 - 1995, 1999 - 2003).
- Appointed Queen's Counsel (January 2000).
- Former Managing Partner of Ottawa Office.
- Admitted to partnership (March 1987).
- Practice restricted to regulatory/environmental and related commercial/corporate, litigation and arbitration matters.
- Lead regulatory counsel to ATCO Gas and Pipelines Limited (largest Alberta gas utility).
- Representative projects include the following major international pipeline, power and LNG projects:
    - Emera Brunswick Pipeline Project;
    - Bear Head LNG Project;
    - Kitimat LNG Project;
    - PanCanadian Petroleum Limited Deep Panuke Offshore Project;
    - Sable Offshore Energy Project;
    - Maritimes & Northeast Pipeline Project;
    - West Millenium Pipeline Project;
    - Alberta Northeast Gas/Iroquois Pipeline Project;
    - Pacific Gas Transmission Project (per San Diego Gas and Electric; Southern California Edison);
    - Portland Gas Pipeline Project;
    - Alliance Pipeline Project;
    - Empire State Pipeline (per Sithe Energies/Enron Independence Power Projects);
    - Hermiston Generating Partners Power Project;
    - Brooklyn Navy Yard Partners Power Project;
    - Selkirk Power Project;
    - MassPower Project;
    - Ocean State Power Project;
    - Midland Cogeneration Joint Venture Power Project;
    - Ohio Interstate Pipeline Proposal
    - Dawn-Gateway Pipeline; and
    - Provident Beatton River Pipeline Replacement.

- Extensive involvement in Canadian deregulation with direct natural gas sales at federal and provincial level (J.R. Simplot, Northridge, restructuring of Northwest Pipeline Company/Westcoast Transmission Fourth Service Agreement).
- Extensive involvement in Alberta Core Market restructuring and inaugural Nova Gas Transmission rate review (Canadian Western Natural Gas/Northwestern Utilities).
- Written or personal appearances before the National Energy Board, Ontario Energy Board, Manitoba Public Utilities Board, Supreme Court of Canada, Alberta Court of Appeal, Alberta Energy and Utilities Board (and predecessor boards), Federal Court of Appeal, Federal Energy Regulatory Commission, Connecticut Department of Public Utilities and National Transportation Agency and various arbitrations.

Counsel, National Energy Board (1981 – 1984)

- Responsible for ongoing legal advice to the Board and participation at public hearings.
- Hearings included TransCanada Pipelines Limited 1981 Rate case, Domestic Gas Pricing Inquiry (1981), TNPL Inc. Rate case (1981), New Brunswick Electric Power Export Application (1981), Gas Export Omnibus Hearing (1982), Dome LNG Facilities Hearing (1983-1984).
- Other appearances include representing the NEB before the Restrictive Trade Practices Commission (Petroleum Industry Inquiry) and testifying before the House of Commons and Senate Standing Committees dealing with amendments to the *National Energy Board Act* (1982).

Policy and Management Consultant (1977 – 1981)

- Development of strategic and operational planning framework for the federal Solicitor General (1981).
- Identification of corporate models for Public Works Canada land development projects (1980).
- Engaged by Public Works Canada to investigate certain management systems employed by the Property Services Agency, Department of Environment in London, England. Responsibilities included the coordination of a series of briefings between the Canadian Minister of Public Works and his senior officials and British Cabinet Ministers, their senior officials and officials from the British Cabinet Office (1979 - 1980).
- Development and coordination of Departmental responses to the Canadian Royal Commission on Financial Management and Accountability (1977).

Special Policy Adviser to Federal Minister of Public Works (1979)

- Review of federal real property programs, coordinated Cabinet proposals for implementation of a revenue dependent mode of operations and for the rationalization of federal real property services.

Policy Analyst, Policy Research Group, Public Works Canada (1977 – 1978)

- Coordination of departmental priorities, development of departmental planning systems and instruments.

Student-at-Law, Herridge Tolmie, Barristers and Solicitors (Ottawa) (1977 – 1978)

- Analysis of various pieces of legislation, policies and the report of the Royal Commission on Corporate Concentration as well as an active participation in all stages of the passage of the *Northern Gas Pipeline Act* and the *Petroleum Corporations Monitoring Act.*

PUBLICATIONS and SPEAKING ENGAGEMENTS:

- Authored or recognized contributor to the following publications:
  - L. E. Smith, Q.C., Marie H. Buchinski and Deirdre A. Sheehan, *Recent Regulatory and Legislative Developments of Interest to Energy Lawyers*, (December 2010) 48, Issue 2, Alta. Law Rev. 417
  - Lawrence E. Smith, Loyola G. Keough and Karen N. Beattie, "Alberta Abandons 2004 ROE Formula", *Bennett Jones Regulatory Update*, November 20, 2009
  - Lawrence E. Smith, Loyola G. Keough and Karen N. Beattie, "NEB Drops 1994 Return on Equity Formula", *Bennett Jones Regulatory Update*, November 5, 2009
  - Lawrence E. Smith and Duncan McPherson, "Who does What, Where and When? Navigating Environmental Law Jurisdiction in the North", Toronto: Canadian Institute, 2007
  - Laurie E. Smith and Loyola G. Keough, *Recent Legislative and Regulatory Developments of Interest to Oil and Gas Lawyers* (1995), 33 Alta. Law Rev. 422
  - Lawrence E. Smith and Loyola G. Keough, "National Energy Board of Canada and the Canada-United States Free Trade Agreement" in *Energy Law and Transactions*, vol. 5, edited by David J. Muchow and William A. Mogel (New York: Matthew Bender, 1995) c. 162
  - Robert P. Desbarats, Lorne W. Carson and Donald E. Greenfield, *Recent Developments in the Law of Interest to Oil and Gas Lawyers*, (1985) 24 Alta. Law Rev. 143 (Contributor to Article)

- Speeches or papers presented, conference panels moderated and courses taught:
  - March 2011: 2011 Canadian Gas Association Regulatory Course (Calgary, AB); "Regulatory Process"
  - June 2010: Canadian Petroleum Law Foundation – 49th Annual Research Seminar (Jasper, AB); "Recent Regulatory and Legislative Developments of Interest to Energy Lawyers"
  - May 2010: Energy Regulatory Forum (Calgary, AB); Panel Discussion "Role of the Courts in the Administrative Process"
  - July 2008: Alberta Northeast Gas Ltd./Northeast Gas Markets Inc. Conference; "Canadian Regulatory Developments – Tightening Gas Supply/Demand Balance"
  - October 2007: Queen's Business Law Symposium (Kingston, ON); Panel Moderator, Power Regulation – The Electric Challenge
  - June 2005: California Energy Commission (Sacramento, CA); "Deliverability of Supply Considerations for Imports of LNG Through Canada or Mexico"

- November 2004: New England-Canada Business Council – North American Energy: A Changing Landscape (Boston, MA); Moderator, "Market Outlook and Supply Challenges"
- May 2004: GasFair Power Summit – 13th Annual Natural Gas & Electricity Market Conference & Trade Show (Toronto, ON); "East Coast Offshore Update – 2004"
- March 2004: Maritimes Awards Society of Canada, Lawyers Workshop - B.C. Offshore Resources (Victoria, BC); Session C: "Movement of Extracted Product"; Session D: "Models for Governance – Gulf of St. Lawrence and Lessons for British Columbia Offshore"
- October 2002: Tenth Annual U.S.-Canada Energy Trade & Technology Conference – Canada and the Northeast – Managing Change (Boston, MA); "Paradise Lost? Can We Regain Confident & Harmony in the Marketplace?"
- October 2001: The Canadian Institute, Advanced Forum on Oil and Gas Law & Practice (Calgary, AB)
- May 2000: Canadian Association of Petroleum Landman, (Calgary, AB); "East Coast Development: It Is Happening Faster Than You Think"
- May 1999: 1999 Eastern Canadian Natural Gas Conference (Halifax, N.S.); Moderator: "Pipeline Update: Keeping a New Pipeline at Capacity"
- April 1999: Quebec Pipeline Association Conference (Montreal, Quebec); 1999 Symposium on Cross-Border Energy Projects "Projet de gazoduc de Goldboro a Portland" "Environmental Assessment – A Review of Comprehensive Studies and Pipeline Projects"
- October 1998: East Coast Energy Exposition (Halifax, N.S.); Chair: "The Birth of a New Natural Gas Market"
- May 1998: Intenco Energy Consultants (Calgary, AB); "New Developments in NEB Pipeline Project Approvals"
- April 1998: Newfoundland Ocean Industries Association (NOIA) Calgary Trade Mission (Calgary, AB); "SOEP/Maritimes & Northeast Pipeline – A Regulatory Case Study"
- April 1998: 1998 Canadian Energy Research Institute, Eastern Canadian Natural Gas Conference (Halifax, NS); Moderator: "Transportation Projects – from Pipe Dream to Reality"
- April 1998: GasFair '98 (Toronto, ON); Moderator: "New Pipeline and Pipeline Expansion Project – Roundtable"
- November 1997: 1997 New England/Canada Business Council Conference, Brandeis University Graduate School of International Economics and Finance; Babson College Graduate School of Business (Boston, MA); "U.S. Energy Trade & Technology – Public Interest Dimensions" (The Market & Project Certification – a Federal Update)
- November 1996: 1996 New England/Canada Business Council Conference, Brandeis University Graduate School of International Economics and Finance; Babson College Graduate School of Business (Boston, MA); "Regulatory Perspectives on Competitive Markets"

- October 1996: 1996 Exporting & Importing Pipeline Conference (Calgary, AB); Conference Moderator – Series of major gas pipeline expansion overviews regarding projects planned across North American over 1998-2001
- May 1996: GasFair '96 (Toronto, ON); Moderator: "Pipeline Expansion/ Bypass/Rate Issues"
- March 1996: PowerFair '96 (New Orleans, LA); Co-Chair
- November 1995: 1995 New England/Canada Business Council Conference, Brandeis University Graduate School of International Economics and Finance; Babson College Graduate School of Business (Boston, MA); "Canada/U.S. Energy Regulatory Trends – Post-Referendum"
- December 1994: Crossborder Seminar – "Environmental Debate Impacting Federal and Provincial Gas Export Policies"
- October 1994: The Economics Society of Calgary; "Gas Exports and the Environment: New Directions"
- June 1994: The Canadian Petroleum Law Foundation – 33rd Annual Research Seminar in Oil and Gas Law; "Recent Legislative and Regulatory Developments of Interest to Oil and Gas Lawyers"
- May 1994: Canadian Gas Association Regulatory Affairs Lecture; "Resolving Regulatory Issues"
- March 1994: The Canadian Petroleum Law Foundation – Annual Mid-Winter Conference; "Canadian and U.S. Regulatory Issues Update"
- May 1993: GasFair '93 (Toronto, ON); Moderator: "Role of Cogeneration in Electric Utility Power Supply"
- July 1992: American Gas Association Legal Forum; "Issues Encountered by U.S. LDC's in Negotiating Direct Purchases of Canadian Gas"
- January 1992: Canadian Bar Association Mid-Winter Meeting; "Sovereign Risk – The Problems with Major Energy Project Approval in Multiple Jurisdictions"
- January 1992: Executive Enterprises U.S./Canada Crossborder Natural Gas Regulation Conference; Federal Energy Policy Update – December 1991
- September 1991: Canadian Gas Association; Regulation: "A Look at the Future of Canada/U.S. Regulatory Issues"
- June 1991: International Bar Association; "Market Responses and Project Innovations – Changes in the Regulatory Process Affecting Canada/U.S. Gas Pipeline Projects"
- January 1991: Executive Enterprises NEB/FERC Conference on Crossborder Regulation of Oil and Gas; "Rolled-In vs. Incremental Pricing: Is It Really a Dead Issue?"
- November 1989: Federal Energy Bar Association (U.S.); "Can Natural Gas Meet the Challenge?"
- October 1989: International Bar Association; "Changing Perceptions in the Canada-United States Natural Gas Trade"
- September 1988: American Gas Association; "Understanding the Free Trade Agreement – The Canadian Perspective"

- June 1988: Northern Plains Management Conference; "Canadian Natural Gas – Canadian Regulatory Requirements Facing Canadian Marketers in the U.S."
- May 1988: American Bar Association Third Annual Conference on Canada/U.S. Trade in Energy; Natural Gas Supplies & Markets; "A Specific Case – The Iroquois Gas Transmission System"
- April 1988: Insight Conference; "The Impact of Free Trade and Access to the Northeast Market"

RECOGNITION:

- Consistently identified as a leading lawyer by numerous international lawyers directors over the past 6 years, including:
  - Who's Who Legal:
    - The International Who's Who of Oil & Gas Lawyers [recognized as a leading oil and gas lawyer] 2011, 2010, 2008, 2007, 2006, 2005
    - Canada [recognized in Oil & Gas category] 2011, 2010
    - Oil & Gas [recognized as a leading oil and gas lawyer] 2009, 2008
  - Canadian Legal Lexpert Directory [recognized as most frequently recommended, Energy (Oil & Gas) and repeatedly recommended, Energy (Electricity) 2011, 2010, 2009, 2008, 2007, 2006, 2005
  - Chambers Global: The World's Leading Lawyers for Business [recognized in Energy: Oil & Gas (Regulatory)] 2011, 2010, 2009, 2007, 2006, 2005
  - Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada [recognized as a leading Energy (Oil & Gas) lawyer] 2011, 2010, 2008, 2007, 2006, 2005, 2004
  - Lexpert Guide to the 100 Most Creative Lawyers in Canada [rated Top 100 Creative Lawyers in Canada] 2006 (ranking only published once)
  - Lexpert Guide to the Leading U.S./Canada Cross-border Corporate Lawyers [recognized as a leading lawyer in the area of energy] 2011
  - Expert Guides, [recognized in the World's Leading Energy & Natural Resource Lawyers, Canada category] 2011
  - Best Lawyers in Canada [recognized in three categories as one of Canada's leading energy regulatory lawyers, one of Canada's leading environmental lawyers and one of Canada's leading natural resources lawyers] 2011, 2010, 2009, 2008
  - Legal Media Group's Guide to the World's Leading Energy and Natural Resource Lawyers [recognized as a leading lawyer in Energy and Natural Resources] 2008
  - LexisNexis Martindale-Hubbell [received a BV Peer Review Rating for high to very high legal ability and very high ethical standards]
  - Woodward White's The Best Lawyers in Canada [recognized as a leading lawyer in the area of natural resources law, as well as a leading lawyer in the area of energy regulatory law] 2006
  - Euromoney Legal Media Group's Guide to the World's Leading Energy and Natural Resources Lawyers [recognized as a leading lawyer in the area of Energy and Natural Resources] 2005

EDUCATION:

University of Oxford (England)

- Master of Arts, Honours School of Philosophy, Politics and Economics, St. Peter's College (1991).
- Graduated from St. Peter's College with a Bachelor of Arts (1980).
- Oxford University Half-Blue (Ice Hockey) (1979 - 1980) and elected Co-captain, Oxford University Ice Hockey Club (1980).

University of Ottawa (Canada)

- Graduated from the Faculty of Common Law with an LL.B. (Spring 1977).
- Member of Student Legal Aid Society and the Preventive Law Programme.

Carleton University/St. Patrick's College (Canada)

- Graduated "with distinction" from St. Patrick's College with a Bachelor of Arts majoring in Political Science (1974).
- David Vice Trophy for the graduate who over the three years had made the greatest contribution to athletics both as an organizer and participant.
- C.V. Hotson Memorial Scholarship for excellence in studies and student activities.
- St. Pat's College Student Association Merit Award.
- Runner up for Alumni Award for the Silvio Tiezzi Memorial Trophy (given to the senior student who has combined excellence in scholarship, leadership and association activities, by a vote of his fellow students).

DIRECTORSHIPS:

- Alberta Northeast Gas Limited (Chairman).
- Genivar Inc. (Chairman, Governance and Compensation Committee).
- WBI Canadian Pipeline Ltd.

MEMBERSHIPS:

- Law Society of Upper Canada (since April 1981).
- Law Society of Alberta (since June 1984).
- Former Member of Advisory Board to the Montreal Neurological Institute (1998-2010).
- Federal Energy Bar Association (U.S.).
- Calgary Petroleum Club.
- Gatineau Fish and Game Club.
- Calgary Golf and Country Club (soc.).

APPENDIX 2

THE BELLEORAM QUARRY ENVIRONMENTAL ASSESSMENT

A. Belleoram Basics

1. On April 5, 2006, Continental Stone registered with the Newfoundland and Labrador Department of Environment and Conservation a proposal to construct, operate, and eventually decommission a crushed granite stone quarry north of the town of Belleoram (population 450) on the south coast of Newfoundland.[1] The project included a rock crusher, a conveyor system, administrative buildings, and a marine terminal designed to handle vessels larger than 25,000 Dead Weight Tonnes.[2]

2. The original project proposal was for a 900 hectare quarry; however, due to the large volume of granite available in proximity to the shoreline, the first phase of the operation (20-25 years) was reduced to 80 ha.[3]

3. The Belleoram project was to be located in Belle Bay[4] where the local economy is based on commercial fishing[5] and developing aquaculture operations.[6] The responsible authorities concluded that the potential adverse effects to species at risk and their habitat were non-significant.[7]

B. The Regulatory Regime of the Belleoram EA

4. Because the Belleoram project was assessed in Newfoundland and Labrador, it was subject to a different regulatory regime than the Whites Point Project was in Nova Scotia.

5. Federally, the responsible authorities (RAs) for this EA were Transport Canada (TC), the Department of Fisheries and Oceans (DFO), and the Atlantic Canada Opportunities Agency (ACOA).[8] TC determined that it had a s. 5 *Navigable Waters Protection Act* trigger as a result of the proposed marine terminal, which was designed to berth ships over 25,000 dead weight tons[9] and acted as the principal RA.[10]

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[1] See pp. 3-4 of the November 30, 2006 Track Report and the Fig. 1.1 and 2.11 maps in the Belleoram Marine Terminal Project Comprehensive Study Report (August 23, 2007) at http://www.ceaa.gc.ca/050/documents_staticpost/pdfs/23263E.pdf, **Exhibit R-357**.

[2] See p. 1 of the Belleoram Marine Terminal Project Comprehensive Study Report, **Exhibit R-357**.

[3] See p. 6 and Figs. 2.1 and 2.2 maps in the Belleoram Marine Terminal Project Comprehensive Study Report, **Exhibit R-357**.

[4] Belleoram Marine Terminal Project Comprehensive Study Report, p. 6, Fig. 2.11 map on p. 23, **Exhibit R-357**.

[5] See p. 3 of Continental Stone's Provincial Registration Document, April 3, 2006, **Exhibit R-476**.

[6] See p. II and Fig. 2.12 of the Belleoram Marine Terminal Comprehensive Study Report, **Exhibit R-357**.

[7] See p. 106 of the Belleoram Marine Terminal Project Comprehensive Study Report, **Exhibit R-357**.

[8] Belleoram Marine Terminal Project Comprehensive Study Report, p. 35, **Exhibit R-357**.

[9] Belleoram Marine Terminal Project Comprehensive Study Report, p. 38, **Exhibit R-357**; See pp. 13-14 of the Belleoram Scoping Document, **Exhibit R-358**.

[10] Belleoram Marine Terminal Project Comprehensive Study Report, p. 42, **Exhibit R-357**.

6. Provincially, the Belleoram project was subject to an Environmental Preview Report (EPR) under Newfoundland and Labrador's *Environmental Protection Act*.[11] The EPR provides additional information about the impacts of a proposed project so that the provincial Environment and Conservation Minister can determine if the project can be released from further assessment, or if it requires an environmental impact assessment.[12]

7. Given that the project was not subject to a provincial EIS, there was no opportunity to coordinate the federal and provincial EAs.[13] However, both TC and DFO had representatives on a joint federal / provincial environmental review committee that helped to guide the provincial assessment.[14]

C. The Scope of the Belleoram EA

8. The three federal RAs ultimately determined that the scope of the project for the purposes of the EA was the construction, operation, maintenance, modification and decommissioning of the marine terminal.[15]

9. The DFO determined in the Project Scoping Document that the scope of project would be limited to the marine terminal and potential authorizations for water control structures, stream crossings and infilling and/or dewatering of aquatic habits associated with the operation of the quarry, road construction and washing station.[16] While the Draft Comprehensive Study Report stated that the "construction and operation of the quarry has the potential to affect fish and fish habitat by changing the productive capacity of aquatic systems or through the loss of habitat",[17] the final Comprehensive Study Report indicates that the DFO's only regulatory trigger was the issuance of an authorization under s. 35(2) of the *Fisheries Act* for the harmful alteration of fish habitat pertaining to the construction of the marine terminal.[18]

10. As a result of the evolution of DFO's position on this issue, Mr. Estrin says that there is an "utter inconsistency" between DFO's 2006 internal correspondence on components of the quarrying operations that would require HADD authorizations under s. 35(2), and DFO's later conclusion in the final version of the Comprehensive Study Report that the proposed quarrying operations did not engage HADD issues.[19] What Mr. Estrin omits from his analysis, however, is the fact that DFO's on-site field research allowed it to conclude that its initial HADD concerns on the quarry were unfounded. As DFO's regional manager, Marvin Barnes, noted in May of 2007,

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[11] Belleoram Marine Terminal Project Comprehensive Study Report, p. 41, **Exhibit R-357**.
[12] See p. 15 of the Belleoram Scoping Document, September 19, 2006, **Exhibit R-358**.
[13] See p. 15 of the Belleoram Scoping Document, **Exhibit R-358**.
[14] See the June 22, 2006 letter from Clyde Jackman, Minister of Environment and Conservation, **Exhibit R-454**.
[15] Belleoram Marine Terminal Project Comprehensive Study Report, pp. 36-37, **Exhibit R-357**.
[16] Belleoram Scoping Document, September 19, 2006, pp. 16-17, **Exhibit R-358**.
[17] See p. 66 of the Draft Belleoram Marine Terminal Project Comprehensive Study Report (March 2007), **Exhibit R-475**.
[18] See p. 35 of the Belleoram Marine Terminal Project Comprehensive Study Report (August 27, 2007), **Exhibit R-357**.
[19] See pp. 7-8 of Appendix E of Mr. Estrin's Report.

> … DFO's EA scope for this project involved the construction of the marine terminal in Phase 1. Screening level assessments in Phase 1 were initially slated to be undertaken for any freshwater HADD but as information was received, it was determined that no HADD would be incurred in freshwater in Phase 1, therefore only the marine terminal was included in the DFO scope.[20]

11. The scope of the project from ACOA's perspective also changed during the course of the EA. In the early stages, after being advised by the proponent that it would be seeking project funding (without specifying for which portions of the project), ACOA employed the "in until out" approach to scoping which meant that, until it confirmed that the proponent would not need financial assistance, it would remain as an RA in the EA process and tentatively scope in the entire project to allow for funding of any portion of it.[21] On May 30, 2007, the proponent did finally apply to ACOA for funding but only for its proposed marine terminal, rather than for the entire project. As a result, the scope of the project for ACOA included only the marine terminal.[22]

12. In paragraph 560 of their Memorial, the Claimants allege that ACOA narrowed the scope of project for the purposes of the EA after the Belleoram proponent expressed concerns about delays associated with the assessment of the quarry. In footnote 809 of the Memorial, the Claimants attempt to ground that allegation in a May 31, 2007 email from TC to DFO, CEAA, ACOA, and others discussing how the proponent's funding application impacted the scope of the project from ACOA's perspective. Contrary to what the Claimants allege, however, I am unable to locate anything in that email indicating that ACOA's decision to narrow the scope of the project had anything to do with concerns expressed by the proponent. To the contrary, the email simply explains ACOA's "in until out" policy regarding scoping, and nothing more.[23]

D. The Type of Assessment in the Belleoram EA

13. TC and the other RAs on this project recommended a comprehensive study track, rather than a panel review. TC's preliminary investigations led it to conclude that a comprehensive study would sufficiently address the scientific and technical issues that had been identified as Valued Ecosystem Components.[24]

14. Indeed, it appears that the surrounding community were overwhelmingly supportive of the project due to its potential economic benefits.[25] This is to be contrasted

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[20] See May 22, 2007 email from Marvin Barnes to Randy Decker, **Exhibit R-450**. Again, the map at Fig. 2.1 of the Comprehensive Study Report indicates that Phase 1 of the project was only going to be 80 ha., **Exhibit R-357**.

[21] See the May 31, 2007 email from Randy Decker to V. Rodrigues and others, **Exhibit R-446**.

[22] See pp. II, 36-37 of the Belleoram Marine Terminal Project Comprehensive Study Report, **Exhibit R-357**.

[23] See the May 31, 2007 email from Randy Decker to V. Rodrigues and others, **Exhibit R-446**. See also Randy Decker's November 6, 2009 Email to Mr. Estrin explaining the same, **Exhibit R-452**.

[24] See p. 12 of the November 30, 2006 Track Report, **Exhibit R-359**.

[25] See p. IV and p. 46 of the Belleoram Marine Terminal Project Comprehensive Study Report, **Exhibit R-357**.

with the Whites Point Project where public concerns were a relevant factor in the referral of that Project to a review panel.

15. No letters of concern or opposition were received from the public or non-government organizations during 34-day public consultation period.[26] To the contrary, as a result of the expected economic benefits from the project (approximately 100 jobs for 50 years),[27] the local community, including the town of Belleoram itself, supported the project.[28] Moreover, it is telling that not a single person or organization applied for the $10,000 grant that was available for public participation in the assessment.[29] In short, it appears that the public support for the Belleoram project proposal contrasts sharply with the Digby Neck community's opposition to the Whites Point Project.

E. The Outcome and Aftermath of the Belleoram EA

16. On November 22, 2007, the Minister of Environment issued a decision statement which determined that the proposed quarry was not likely to cause significant adverse environmental effects and therefore could proceed.[30]

17. As a postscript, on November 3, 2008, the proponent advised TC that, due to a downturn in the global economy, it would have to delay its construction of the project.[31]

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[26] Belleoram Marine Terminal Project Comprehensive Study Report, p. IV, **Exhibit R-357**.
[27] See p. I of the Belleoram Marine Terminal Project Comprehensive Study Report, **Exhibit R-357**.
[28] See p. IV and p. 46 of the Belleoram Marine Terminal Project Comprehensive Study Report, **Exhibit R-357**.
[29] See p. 9 of the November 30, 2006 Track Report, **Exhibit R-359**.
[30] See News Release announcing project approval decision on November 22, 2007, **Exhibit R-455**.
[31] See November 3, 2008 email from Robert Rose of Continental Stone to Randy Decker, **Exhibit R-360**.

APPENDIX 3

THE AGUATHUNA QUARRY ENVIRONMENTAL ASSESSMENT

A. Aguathuna Basics

1. On January 19, 1998, Mosher Limestone Limited and Mid-Atlantic Minerals Inc. jointly submitted a project description to Newfoundland and Labrador Environment and Labour to reactivate an abandoned open-pit limestone quarry and shipping facility located at Aguathuna, Newfoundland. Aguathuna is located on the west coast of Newfoundland on the Port au Port Peninsula in an area that is well removed from major population centres.[1]

2. Significantly, the proposed project site had operated as a limestone quarry and shipping facility for over fifty years, from 1913 to 1964. That facility produced over 12 million tonnes of limestone that was shipped to a steel mill in Sydney, Nova Scotia from a dock constructed at the site.[2] The faces of the abandoned quarry were described by the proponent as the "major physical features of the area".[3] In its project registration document, the proponent noted that "[t]his project is in essence a re-development or replacement of the previous facilities and operations".[4]

3. The main components of the new Aguathuna project included the establishment of a crushing and screening plant, a marine terminal, and loading conveyors.[5] The project was expected to generate 150,000 tonnes of multi-grade crushed stone in the first year of operation and up to 500,000 tonnes annually thereafter.[6] The quarry was scheduled to operate between April and December of each year for 20 years.[7]

B. The Regulatory Regime for the Aguathuna EA

4. Because the Aguathuna project was environmentally assessed in Newfoundland, it was subject to a different regulatory regime than the Whites Point Project. In addition to being subject to a federal environmental assessment process under *CEAA*, the Aguathuna project was also subject to a screening assessment under Newfoundland and Labrador's *Environmental Protection Act*.[8]

5. Federally, the Department of Fisheries and Oceans (DFO) determined that it would not be a responsible authority (RA) on the EA since the project would not require

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[1] Project Registration for Aguathuna Quarry Development, January 28, 1998, pp. 1-2, **Exhibit R-354** and p. 1 of the Aguathuna Quarry Development Environmental Impact Comprehensive Study Report, **Exhibit R-353**. See also the four maps between pages 1 and 2 of the Aguathuna Comprehensive Study Report, **Exhibit R-353**.
[2] See p. 2 of the Aguathuna Comprehensive Study Report, **Exhibit R-353**.
[3] Project Registration for Aguathuna Quarry Development, January 28, 1998, p. 2, **Exhibit R-354**.
[4] Project Registration for Aguathuna Quarry Development, January 28, 1998, p. 4, **Exhibit R-354**.
[5] Aguathuna Comprehensive Study Report, p. 1, **Exhibit R-353**.
[6] Aguathuna Comprehensive Study Report, p. 1, **Exhibit R-353**.
[7] See p. 2 of the Aguathuna Comprehensive Study Report, **Exhibit R-353**.
[8] See p. 3 of the Aguathuna Comprehensive Study Report, **Exhibit R-353**.

any *Fisheries Act* authorizations.[9] Similarly, the Coast Guard reviewed the project proposal and determined that it would not require approval under the *Navigable Waters Protection Act*.[10] DFO and Environment Canada did, however, provide input on the assessment as expert authorities.[11] ACOA emerged as the only RA on the project due to the proponent's request for funding.[12]

C. The Scope of the Aguathuna EA

6. Contrary to what the Claimants allege in their Memorial – that "the quarry aspect of the project was assessed solely through the provincial assessment process; while the marine aspect of the project was assessed under the *CEAA*"[13] – both the quarry and marine terminal of the Aguathuna project were scoped into the federal EA process.[14] The scope included "all phases of construction, operation, maintenance and decommissioning" of the project, in addition to its related shipping activities.[15]

7. ACOA turned out to be the only RA because the other federal departments determined that they did not have regulatory triggers arising out of the project. For example, subsequent project "redesign/relocation" led DFO to conclude that there was no need for it to issue authorizations for the destruction of fish habitat.[16] Specifically, local fishers said that their major concern about the project was the preservation of the rubble associated with the old quarry wharf as a lobster habitat (since the new marine terminal was originally going to be built at the site of the old wharf).[17] The proponent addressed this concern by shifting the proposed marine terminal site 600 metres to the east, to an area that was not frequently fished for lobsters.[18] Further, it was determined that the water bodies on the site (3 brooks and one pond) provided no viable fish habitat.[19] Further, there were no concerns regarding blasting impacts on the marine environment.[20]

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[9] See the July 6, 1998 letter from DFO to Public Works and Government Services Canada; Aguathuna Comprehensive Study Report, pp. 3-4, **Exhibit R-355**.
[10] See the August 17, 1998 *Navigable Waters Protection Act* assessment document, **Exhibit R-445**. See also the July 2, 1998 email from Gerald Soper to Annette Power, **Exhibit R-449**.
[11] See p. 4 of the Aguathuna Comprehensive Study Report, **Exhibit R-353**.
[12] See p. 3 of the Aguathuna Comprehensive Study Report, **Exhibit R-353**.
[13] See paragraph 556 c) of the Claimants' Memorial.
[14] Aguathuna Comprehensive Study Report, p. 12, **Exhibit R-353**.
[15] See pp. 12 and 30 of the Aguathuna Comprehensive Study Report, **Exhibit R-353**.
[16] See the June 9, 1998 email from Annette Power to Michelle Gosse, **Exhibit R-448**.
[17] See pp. 20, 21, and 28 of the Aguathuna Comprehensive Study Report, **Exhibit R-353**.
[18] See pp. 28 of the Aguathuna Comprehensive Study Report, **Exhibit R-353**. See also p. 41 of the Aguathuna Comprehensive Study Report wherein it is noted that the "proposed infill area [for the marine terminal] does not contain any unique or highly concentrated marine species", **Exhibit R-353**.
[19] See p. 22 of the Aguathuna Comprehensive Study Report, **Exhibit R-353**.
[20] Aguathuna Comprehensive Study Report, pp. 28-29, **Exhibit R-353**.

This is perhaps understandable in light of the fact that the blasting would be separated from the coast by Highway 460.[21]

8. As noted above, for its own part, Newfoundland and Labrador launched a screening of the quarry under its own legislation. On April 1, 1998, Newfoundland announced that an environmental impact statement would not be required for the project.[22]

D. The Type of Assessment Used for the Aguathuna EA

9. The Aguathuna project (both the quarry and marine terminal) was subject to a comprehensive study level of assessment under *CEAA* because the proposed marine terminal was designed to handle vessels larger than 25,000 DWT and was hence captured by s. 28(c) of the *Comprehensive Study List Regulations.*[23]

10. It does not appear that there was any potential for significant adverse environmental effects (SAEE) that might warrant a referral to a panel review. The assessment in the Comprehensive Study Report is divided into four main categories: saltwater/marine habitat; freshwater habitat; terrestrial effects; and air quality. In none of those areas did the assessment find the potential for SAEE.[24]

11. For instance, with respect to marine habitat, after the proponent moved the wharf away from the lobster habitat,[25] ACOA concluded that the impacts would be non-significant.[26] ACOA came to similar conclusions with respect to the project's expected impacts on the area's freshwater habitat,[27] terrestrial resources,[28] and air quality.[29] The only endangered species within 20 kms of the area were various flora.[30]

12. Further, ACOA determined that there was no indication of serious or pronounced public concern regarding the project and therefore, public concern did not warrant

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[21] The location of the dolomite quarry can be seen on the map provided at Fig. 2.1 (between pages 12 and 13) of the Aguathuna Comprehensive Study Report, **Exhibit R-353**. See also p. 17 of the Aguathuna Comprehensive Study Report: "In the first year of operation, quarried material will be transported via trucks to the plant for crushing and screening. Ultimately, the site will be developed such that materials will be transported via conveyor belts directly from the dolomite quarry, over Highway 460, to the crushing and screening plant.", **Exhibit R-353**.

[22] See April 1, 1998 News Release at http://www.releases.gov.nl.ca/releases/1998/envlab/0401n06.htm, **Exhibit R-356**.

[23] Aguathuna Comprehensive Study Report, p. 3, **Exhibit R-353**.

[24] Aguathuna Comprehensive Study Report, pp. 49-51; 60-65; 73-77; 86, **Exhibit R-353**.

[25] Contrary to Mr. Estrin's suggestion in paragraphs 53 and 54 of his report, there is nothing suspicious or untoward about DFO's role in the proponent's decision to change its project description of the marine terminal in order to avoid a nearby lobster habitat. Such changes are frequently made by proponents after they consult with stakeholders and then tailor their projects to minimize expected environmental impacts.

[26] See Table 8.2 on pp. 49-51 of the Aguathuna Comprehensive Study Report, **Exhibit R-353**.

[27] See Table 9.2 on pp. 60-65 of the Aguathuna Comprehensive Study Report, **Exhibit R-353**.

[28] See Table 10.2 on pp. 73-77 of the Aguathuna Comprehensive Study Report, **Exhibit R-353**.

[29] See Table 11.4 on p. 86 of the Aguathuna Comprehensive Study Report, **Exhibit R-353**.

[30] See Appendix C of the Aguathuna Comprehensive Study Report, **Exhibit R-353**.

referral of the project to a review panel.[31] Following public consultations held on April 14, September 21, and November 3, 1998 to address any concerns arising out of the proposed project, the town of Aguathuna decided to support the project due to its expected economic benefits.[32] The project was slated to bring in 24 full time jobs over a 20 year period which, in a small community, would amount to a significant contribution to the local economy.[33] As noted in the public consultation section of the Comprehensive Study Report:

> Overall, there were no concerns on behalf of the fishers in the area related to the shipping routes or marine loading facility, and most people indicated they were looking forward to the employment opportunities that the project would offer in the area …
>
> No indication of serious or pronounced public concern regarding the potential adverse impacts of the project on the environment or human health and safety has been noted. Public concern did not warrant a referral of the Project to the Minister of the Environment for a Mediation or Public review by Panel.[34]

E. The Outcome and Aftermath of the Aguathuna EA

13. On March 31, 1998, Newfoundland's Department of Environment and Labour issued its screening decision advising that an environmental impact statement would not be required in this case.[35] On November 10, 1999, after reviewing public comments and the Aguathuna Comprehensive Study Report, the federal Minister of the Environment concluded that the project was unlikely to cause significant adverse environmental effects and so referred the project back to ACOA for the next appropriate regulatory actions.[36]

14. Despite receiving government approval to proceed with the project, however, the proponent later decided not to proceed with the project.

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[31] Aguathuna Comprehensive Study Report, p. 29, **Exhibit R-353**.
[32] See pp. 28-29 of the Aguathuna Comprehensive Study Report, **Exhibit R-353**.
[33] Aguathuna Comprehensive Study Report, p. 88, **Exhibit R-353**.
[34] See p. 29 of the Aguathuna Comprehensive Study Report, **Exhibit R-353**.
[35] See March 31, 1998 letter from Newfoundland Department of Environment and Labour to Environment Canada, **Exhibit R-451**.
[36] See November 10, 1999 News Release entitled "Proposed Aguathuna Quarry Development Project Clears Environmental Assessment Phase" at http://www.ceaa.gc.ca/default.asp?lang=En&xml=B813179A-F083-4431-A114-9FCEDE70ECAB, **Exhibit R-453**.

APPENDIX 4

THE TIVERTON HARBOUR ENVIRONMENTAL ASSESSMENT

1. Tiverton, Nova Scotia, is located on the Petit Passage, which is a narrow channel of water that connects the Bay of Fundy and St. Mary's Bay.[1] In 2004, the Tiverton Harbour development project (the "Tiverton Harbour project"), created a harbour to support approximately 15 local small craft vessels.[2] The harbour was needed as existing facilities were deteriorating. Had the project not been complete, local boat owners would have had to be relocated to private wharves or discontinue operations at Tiverton.[3]

2. The proposed development was likely to result in a HADD to fish habitat[4] and thus underwent an environmental assessment under *CEAA*. There were no Comprehensive Study triggers associated with the Tiverton Harbour project, nor did there appear to be any public concern or opposition. To the contrary, the proposed harbour development was to provide improved access and facilities for local users and so it was supported.[5] Given the limited potential environmental effects from such a small, short-term project and the apparent low level of public concern, it is reasonable that the type of environmental assessment undertaken was a screening .

3. At the time of the initial environmental assessment, it is indicated that the source of the rock needed for the harbour project had not yet been identified. [6] After the environmental assessment was completed, it appears that a contract to build the breakwater for the harbour was awarded to Spicer Construction Limited and that Spicer Construction then approached the proponent of the Tiverton Quarry to obtain rock for the Tiverton Harbour project.[7]

4. Given that rock 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.

5. Blasting in the water at the Tiverton Harbor was not related to any quarrying but was required in order to dredge the harbor area. The proposed blasting activity associated with the Tiverton Harbor was reviewed by DFO Habitat Management[8] and

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[1] Environmental Screening for Harbour Development (Breakwater, Floating Docks, Dredging and Service Area), at Tiverton, Nova Scotia ("Tiverton Harbour Screening Report"), p. 8, **Exhibit R-342**.
[2] Tiverton Harbour Screening Report, p. 3, **Exhibit R-342**.
[3] .Tiverton Harbour Screening Report, p. 3, **Exhibit R-342**.
[4] Tiverton Harbour Screening Report, p. 14, **Exhibit R-342**.
[5] Tiverton Harbour Screening Report, p. 29, **Exhibit R-342** ("There are no known public concerns or opposition to the project. The proposed harbour development (breakwater, floating dock, dredging and service area) will provide improved access and facilities for local users.").
[6] Tiverton Harbour Screening Report, p. 5, ("The breakwater will be constructed of clean rock obtained from an approved quarry."), **Exhibit R-342**.
[7] Letter from Parker Mountain Aggregates to Bob Petrie, March 15, 2004, **Exhibit R-456**.
[8] Tiverton Harbour Screening Report, p. 17, **Exhibit R-342**.

required several mitigation measures to address potential impacts to inner Bay of Fundy Atlantic salmon and North Atlantic Right whales.[9] The primary mitigation measure was that no blasting would take place between July and late December, which is the period when these species could be present in the area.[10] Moreover, blasting comprised only a small part of the total harbor development project, entailing only a limited number of blasts and taking place over a period of no more than two months.[11]

6. The restriction on blasting between July and late December could not be applied to the Whites Point Project as that quarry would require regular blasting throughout the year in order to maintain a steady supply of rock for a project that was scheduled to operate over 50 years.

[9] Tiverton Harbour Screening Report, p. 17, **Exhibit R-342**.

[10] Tiverton Harbour Screening Report, p. 17, **Exhibit R-342** ("Blasting will not be permitted from July until late December when Atlantic Right Whale and other species at risk [including iBoF Atlantic salmon] are present in the Tiverton area. Blasting will only be conducted from January through to the end of June.").

[11] Tiverton Harbour Screening Report, p. 6, Appendix G, **Exhibit R-342** ("Dredging of the basin (including blasting of Class A material within the basin) will likely require 1.5 – 2 months to complete.").

APPENDIX 5

CASE LAW DISCUSSION ON SCOPE OF PROJECT DETERMINATION UNDER *CEAA* SECTION 15

Scope of Project Litigation Pre- and Post- the Whites Point Scope of Project Determination

1. The issue of how to properly scope a project under *CEAA* was rife with litigation in the late 1990s and early 2000s, up to and including 2003. The Federal Court fluctuated somewhat on whether projects should be scoped broadly or narrowly under *CEAA*, and there was no clear direction on this key issue. Accordingly, caution by the federal RAs was warranted for scope of project decisions under *CEAA* during this timeframe.

A. Section 15 of the Canadian Environmental Assessment Act

2. *CEAA* s. 15 sets out the statutory provisions relevant to determining the scope of project for the purposes of conducting an environmental assessment. Section 15 provides:

> **Scope of project**
>
> **15**(1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by
>
> (*a*) the responsible authority; or
>
> (*b*) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority.
>
> (2) For the purposes of conducting an environmental assessment in respect of two or more projects,
>
> (*a*) the responsible authority, or
>
> (*b*) where at least one of the projects is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority,
>
> may determine that the projects are so closely related that they can be considered to form a single project.
>
> (3) Where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work that is proposed by the proponent or that is, in the opinion of
>
> (*a*) the responsible authority, or

(*b*) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority,

likely to be carried out in relation to that physical work.

B. Case Law Interpreting Section 15

3. In 1999, three key scoping decisions were issued by the Federal Court. In *Citizens' Mining Council of Newfoundland & Labrador Inc. v. Canada (Minister of the Environment)*, [1999] F.C.J. No. 273 (T.D.) ("*Voisey's Bay*") released March 8, 1999, the Court determined that s. 15(3) of *CEAA* requires that the scope of a project that is a physical work must include works related to every phase of the lifespan of the work, whether or not they are included by the project proponent. However, the Court noted that a determination to combine two, somewhat related projects into a single environmental assessment under s. 15(2) was "clearly discretionary, not bound by statute." Specifically, the Court upheld the Minister's decision that an environmental assessment of a proposed mine/mill development and smelter/refinery development at a distant location was not a single project but was subject to separate environmental assessments.

4. Then, in *Manitoba's Future Forest Alliance v. Canada (Minister of the Environment)* (1999), 170 F.T.R. 161 (T.D.) ("*Tolko*"), released June 18, 1999, the Court found that when determining the scope of a project under s. 15(1) of *CEAA*, the responsible authority is required under s. 15(3) to assess not just those undertakings proposed by the proponent but also those likely to be carried out in relation to the project. The project at issue was the construction of a bridge, and the Court concluded that the project included the bridge itself (i.e. the physical work) and "any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to the bridge." The word "project" could only mean undertakings related to the lifecycle of the bridge. The RA was not required to include in the scope of the project the forestry operations, pulp mills or construction of new roads, as they were not undertakings related to the bridge, nor were they likely to be carried out in relation to the project.

5. In *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [1999] F.C.J. No. 1515 (C.A.), upholding [1998] 4 F.C. 340 (T.D.) ("*Sunpine*"), the Federal Court of Appeal stated in its October 12, 1999 decision that in determining whether undertakings are "in relation to" a project, those undertakings must pertain to the life cycle of the physical work in question or be "subsidiary or ancillary to" the work. An environmental assessment is not required to include construction, operation, modification, de-commissioning, abandonment or any other undertaking outside the scope of the project. The project at issue in *Sunpine* was the construction of two bridges that were part of a proposed mainline road to bring logs to a mill. The Court said that s. 15(3) of *CEAA* did not require assessment of other physical works such as roads and forestry operations.

6. The Federal Court of Appeal followed *Sunpine* in *Bow Valley Naturalists Society* v. *Canada (Minister of Canadian Heritage)*, [2001] 2 F.C. 461 (C.A.), issued January 1, 2001, concluding that the "scope" of a project under s. 15 is normally limited to

undertakings directly related to the proposed physical work, such as its construction and operation, and ancillary or subsidiary undertakings.

7. On October 16, 2001, the Federal Court continued with the narrow scoping trend established by *Sunpine* when it issued its decision in *Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage)*, [2001] F.C.J. No. 1543 (T.D.). In that decision, the Court upheld the Minister's decision that a proposed winter road and any future proposal to build all-season roads in the same corridor through a national park should be considered two separate projects and not scoped as a single project. The Court found that the "life cycle" of the physical work itself, i.e. the winter road, was the life cycle of the winter road and not that of a road that, through some evolution, may convert itself to an all-season road.

8. On June 20, 2002, the Federal Court of Appeal in *Lavoie v. Canada (Minister of the Environment)*, [2002] F.C.J. No. 946, affirmed the trial court's decision ([2000] F.C.J. No. 1238), holding that it was within the discretion of the responsible authority to decide which other projects or activities to include and which to exclude for purposes of an environmental assessment. The Court concluded that the responsible authorities had a reasonable factual basis to conclude it was not necessary to conduct an assessment of particular water levels surrounding the proposed hydraulic power generating station project because regulation of the subject water bodies and water flows were not part of project as scoped.

9. On February 6, 2003, just prior to the Whites Point Project scope of project determination, a coalition of environmental groups launched a judicial review application of the scope of project determination in the environmental assessment of an oil sands project proposed by TrueNorth Energy (*Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2004 FC 1265 (T.D.) ("*TrueNorth*")). TrueNorth proposed to construct an oil sands mine, which comprised a surface mining and bitumen extraction operation near Fort McMurray, AB. The project proposal entailed de-watering and diverting Fort Creek (a tributary of the Athabasca River). The Department of Fisheries and Oceans ("DFO") narrowly scoped the project as a river destruction project rather than an oil sands mine based on the wording of s. 35(2) of the *Fisheries Act*. Environment Canada had indicated in a letter to DFO that the project should be scoped to include the entire project as defined by TrueNorth. This challenge was before the Federal Court of Canada at the time that officials responsible for the Whites Point Project EA process were considering the issue of scope of project.

10. On April 30, 2003, also around the time at which the scope of project was being determined the Whites Point Project EA, the Federal Court of Appeal upheld the trial court decision in *Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage)*, [2003] F.C.J. No. 703 (C.A.).

C. Analysis

11. Overall, in the four years leading up to the scope of project decision for the Whites Point Project, at least six major decisions were issued, setting out various perspectives and refinements on scoping under *CEAA*.

12. Around the time of the Whites Point Project scope of project determination, the general trend, in the somewhat unsettled case law, was that responsible authorities had the discretion to scope projects more narrowly, and often did so. However, this trend was clearly under attack by environmental groups in early 2003 in light of the review of DFO's scope of project determination in the TrueNorth oil sands project. On September 16, 2004, after the Whites Point Project scope of project determination, the Federal Court issued its decision in *TrueNorth*. The Court held that DFO's decision to scope the oil sands project as a river destruction project was not unreasonable. The Court further held that DFO did not err in assuming that the project subject to a federal environmental assessment under *CEAA* had to correspond to a federally regulated undertaking involved in the application.

13. The Federal Court of Appeal upheld *TrueNorth* in 2006 FCA 31, released on January 27, 2006. The Court found that nothing in *CEAA* supports the view that project scoping under s. 15(1) must always include the entirety of the proposed physical work and further held that the *Comprehensive Study List Regulations* do not impose a requirement to scope a work or activity as a project merely because it is listed in the regulations.

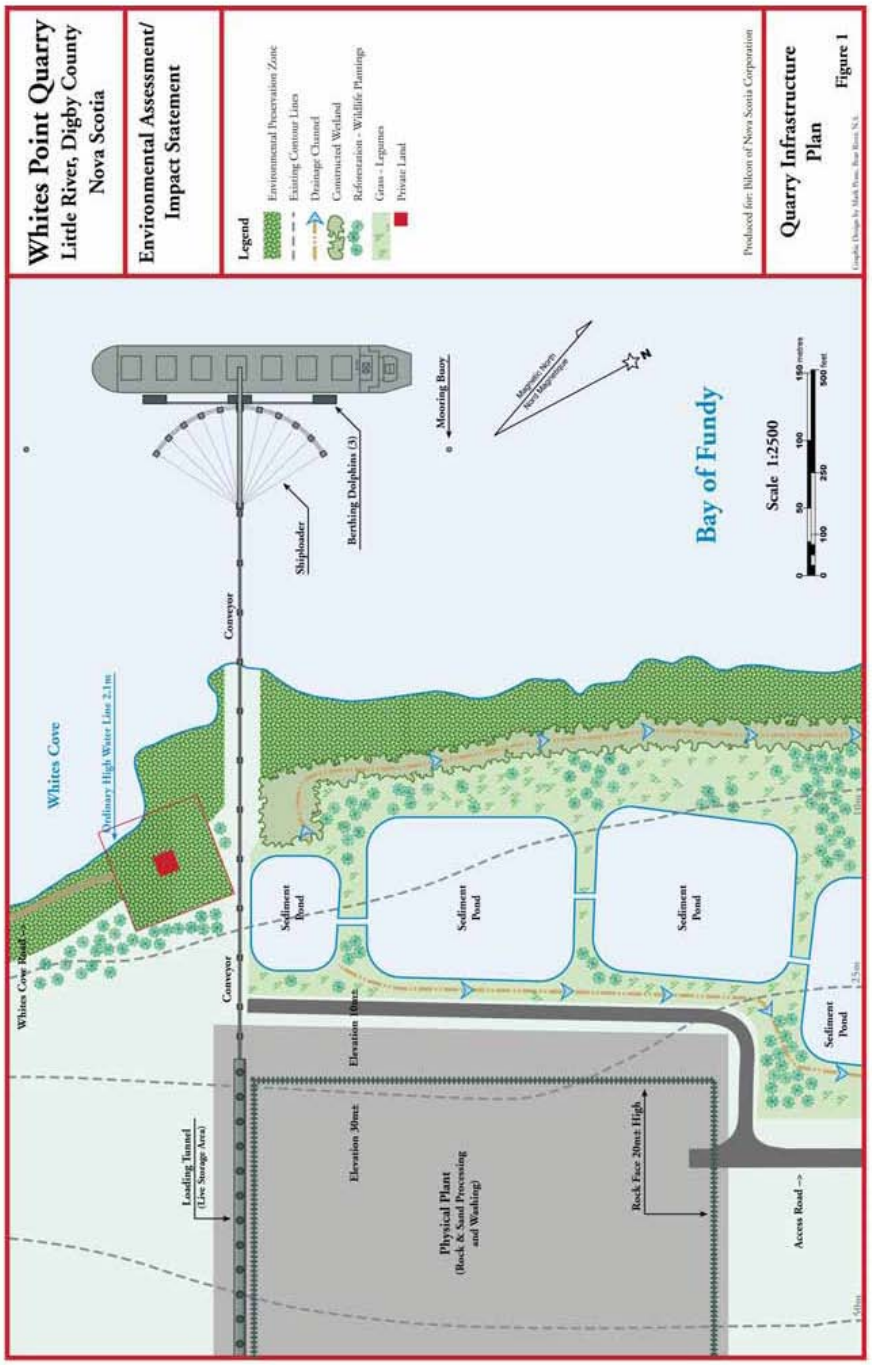
14. For several years, the Courts appeared to be on the track of advocating the discretion that responsible authorities had to scope a project narrowly under *CEAA*, but scope of project determinations continued to be subject to challenge. The Supreme Court of Canada settled the issue of broad versus narrow scoping once and for all in *MiningWatch v. Canada (Fisheries and Oceans)*, 2010 SCC 2 ("*MiningWatch*"). *MiningWatch* stands as the Supreme Court of Canada's definitive interpretation of the same version of *CEAA* s. 15 that was in force at the time of the scope of project determination in the Whites Point Project.

15. In *MiningWatch*, the Supreme Court held that broad scoping was the correct methodology to be applied. In addition, the Court held that the word "project" means the "project as proposed" by the proponent, rather than the "project as scoped" by the responsible authority. The Court held (at para. 39):

> … the minimum scope is the project as proposed by the proponent, and the RA or Minister has the discretion to enlarge the scope when required by the facts and circumstances of the project. The RA or Minister is also granted further discretion by s. 15(2) to combine related proposed projects into a single project for the purposes of assessment. In sum, while the presumed scope of the project to be assessed is the project as proposed by the proponent, under s. 15(2) or (3), the RA or Minister may enlarge the scope in the appropriate circumstances.

16. In short, under s. 15 of *CEAA*, the responsible authority or the Minister has no discretion to reduce the scope of the project to something less than was proposed by the proponent, but they can expand the scope of project under ss. 15(2) or (3).

APPENDIX 6


Whites Point Quarry
Little River, Digby County
Nova Scotia
Environmental Assessment/
Impact Statement
Legend
Environmental Preservation Zone
Existing Contour Lines
Drainage Channel
Constructed Wetland
Reforestation - Wildlife Plantings
Grass - Legumes
Private Land
Produced for: Bilcon of Nova Scotia Corporation
Quarry Infrastructure
Plan
Figure 1
Whites Cove
Ordinary High Water Line 2.1m
Whites Cove Road
Conveyor
Shiploader
Berthing Dolphins (3)
Mooring Buoy
Magnetic North
Nova Magnetique
N
Bay of Fundy
Scale 1:2500
0
50
100
150 metres
0
100
250
500 feet
Sediment Pond
Sediment Pond
Sediment Pond
Sediment Pond
Elevation 10mst
Elevation 30mst
Loading Tunnel
(Live Storage Area)
Physical Plant
(Rock & Sand Processing
and Washing)
Rock Face 20mst High
Access Road -->

APPENDIX 7

ANALYSIS OF NOVA SCOTIA LEGISLATION -- SOCIO-ECONOMIC AND PUBLIC INTEREST IMPACTS

A. Environment vs. Environmental Effect

1. The Nova Scotia Environment Act (the "NSEA") incorporates socio-economic considerations in the definitions of both "environment" and "environmental effect". These terms are defined as follows in s. 3 of the NSEA:

> **3(r)** "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 [Environmental-Assessment Process], the socio-economic, environmental health, cultural and other items referred to in the definition of environmental effect;
>
> …
>
> **(v)** "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; (emphasis supplied)

2. While the definition of "environmental effects" is substantially the same in the NS*EA* as it is in *CEAA*, the *CEAA* definition of "environment" does not refer to socio-economic conditions as it does in the NS*EA*. Accordingly, the definition of "environment" in the NS*EA* is broader than its *CEAA* counterpart.

3. By incorporating socio-economic conditions directly into the definition of "environment", the NS*EA* permits examination of changes that an undertaking may cause in socio-economic conditions. On the other hand, under *CEAA*, socio-economic conditions come into play in the definition of "environmental effect" and so are only evaluated if the project causes a change in the environment which correspondingly has effects on socio-economic conditions. Unlike *CEAA*, under the NS*EA*, any changes to

socio-economic conditions that result directly from the project, and not only those that arise from a change the project causes in the environment, may be considered as part of the environmental assessment process. As such, the NS*EA* permits a broader examination of socio-economic effects of a project than occurs under *CEAA*.

4. Accordingly, under the NS*EA*, the decision on what level of environmental assessment is required for an undertaking, and ultimately on whether an approval for an undertaking should be granted, depends in part on the likelihood and significance of the undertaking's effects on socio-economic conditions.

B. Adverse Effects: More than just Environmental

5. In addition, the NS*EA* (as well as the EIS Guidelines for the proposed Whites Point Project) includes a consideration of "adverse effects", which are defined more broadly than "environmental effects." "Adverse effects" are defined as follows in s. 3 of the NS*EA*.[1]

> **3(c)** "adverse effect" means 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. (emphasis supplied)

6. The consideration of adverse effects in the NS*EA* stands in contrast to its treatment under *CEAA*, which does not require consideration of any effects beyond environmental effects and refers only to the term "adverse" in the context of "adverse environmental effects." Therefore, again, the NS*EA* permits a consideration of broader impacts of a project on human health, enjoyment of life and property and other potential impairments or damages resulting from a project than *CEAA*.

C. Environmental Assessment Process under the NS*EA*

7. Section 34(1) of the NS*EA* requires the Minister to examine an undertaking once it is registered and to reject the undertaking if there is a likelihood it will cause adverse effects or environmental effects, including changes to socio-economic conditions, that cannot be mitigated. Section 34(1) states:

> **Examination of information**
>
> **34(1)** After an undertaking is registered pursuant to Section 33, the Minister shall examine or cause to be examined the information that is provided respecting an undertaking and shall determine that
>
> (a) additional information is required;
>
> (b) a focus report is required;
>
> (c) an environmental-assessment report is required;
>
> (d) all or part of the undertaking may be referred to alternate dispute resolution;

[1] This same definition is adopted at p. 7 of the EIS Guidelines for the Project, **Exhibit R-210**.

(e) a focus report or an environmental-assessment report is not required, and the undertaking may proceed; or

(f) the undertaking is rejected because of the likelihood that it will cause adverse effects or environmental effects that cannot be mitigated. (emphasis supplied)

8. Sections 12 and 13 of the Nova Scotia *Environmental Assessment Regulations* (the "Regulations") provide more detail as to the factors the Minister is required to consider in determining the appropriate environmental assessment method for an undertaking upon registration of an undertaking.

9. Section 12 sets out factors relevant to the Minister's decision and includes consideration of concerns expressed regarding adverse effects and environmental effects. Section 12 states:

Factors relevant to the Minister's decision

12 The following information shall be considered by the Minister in formulating a decision following review of the registration documents for a Class I undertaking:

(a) the location of the proposed undertaking and the nature and sensitivity of the surrounding area;

(b) the size, scope and complexity of the proposed undertaking;

(c) concerns expressed by the public and aboriginal people about the adverse effects or the environmental effects of the proposed undertaking;

(d) steps taken by the proponent to address environmental concerns expressed by the public and aboriginal people;

(e) potential and known adverse effects or environmental effects of the technology to be used in the proposed undertaking;

(f) project schedules where applicable;

(g) planned or existing land use in the area of the undertaking;

(h) other undertakings in the area;

(i) such other information as the Minister may require. (emphasis supplied)

10. Section 13 of the Regulations provides more detail as to the content and timing of the Minister's decision following the registration of an undertaking. This provision again makes clear that consideration of adverse effects and environmental effects, including effects on socio-economic conditions, plays a central role in the appropriate environmental assessment method to be applied.

11. Section 13 of the Regulations states:

Minister's decision upon registration of Class I undertaking

13(1) No later than 25 days following the date of registration, the Minister shall advise the proponent in writing of the decision of the Minister

(a) that the registration information is insufficient to allow the Minister to make a decision and additional information is required;

(b) that a review of the information indicates that there are no adverse effects or significant environmental effects which may be caused by the undertaking or that such effects are mitigable and the undertaking is approved subject to specified terms and conditions and any other approvals required by statute or regulation;

(c) that a review of the information indicates that the adverse effects or significant environmental effects which may be caused by the undertaking are limited and that a focus report is required;

(d) that a review of the information indicates that there may be adverse effects or significant environmental effects caused by the undertaking and an environmental-assessment report is required; or

(e) that a review of the information indicates that there is a likelihood that the undertaking will cause adverse effects or significant environmental effects which are unacceptable and the undertaking is rejected. (emphasis supplied)

D. Environmental Assessment Report Terms of Reference

12. Following the decision-making process set out in s. 34 of the NS*EA*, if the Minister determines that an undertaking must be the subject of an environmental assessment report, the Minister shall appoint an administrator to prepare the terms of reference for the report under s. 36 of the NS*EA*. The terms of reference for the environmental assessment report specify all required elements to be contained in the report. Section 19 of the Regulations sets out what information must be included in the terms of reference and states in part:

Terms of reference

19(1) Where an environmental-assessment report is required, the Administrator shall prepare terms of reference for the preparation of the environmental-assessment report which shall include, but not be limited to, the following information:

(a) a description of the proposed undertaking;

(b) the reason for the undertaking;

(c) other methods of carrying out the undertaking;

(d) a description of alternatives to the undertaking;

(e) a description of the environment that might reasonably be affected by the undertaking;

(f) the environmental effects of the undertaking;

(g) an evaluation of advantages and disadvantages to the environment of the undertaking;

(h) measures that may be taken to prevent, mitigate or remedy negative environmental effects and maximize the positive environmental effects on the environment;

(i) a discussion of adverse effects or significant environmental effects which cannot or will not be avoided or mitigated through the application of environmental control technology;

(j) a program to monitor environmental effects produced by the undertaking during its construction, operation and abandonment stages;

(k) a program of public information to explain the undertaking;

(l) information obtained under subsection (2) which the Administrator considers relevant.

(2) The terms of reference specified under subsection (1) shall be prepared taking into consideration comments from

(a) the public;

(b) departments of Government;

(c) the Government of Canada and its agencies;

(d) municipalities in the vicinity of the undertaking or in which the undertaking is located;

(e) any affected cultural community; and

(f) neighbouring jurisdictions to Nova Scotia in the vicinity of the undertaking.

… (emphasis supplied)

13. This provision states that the environmental assessment report must include a consideration of the factors enumerated above, including the adverse and environmental effects of a project, but that the report is "not limited to" those factors. Similarly, the specific Terms of Reference for the Whites Point Project Panel state in Part III that the Panel "shall include" in its review the enumerated factors. Specifically, Part III of the Terms of Reference states:

Part III – Scope of the Environmental Assessment and Factors to be considered in the Review

The Minister of Environment and Labour, Nova Scotia, and the Minister of the Environment, Canada, have determined that the Panel shall include in its review of the Project, consideration of the following factors:

a) purpose of the Project;

b) need for the Project;

> c) alternative means of carrying out the Project that are technically and economically feasible and the environmental effects of any such alternative means;
>
> d) alternatives to the Project;
>
> e) the location of the proposed undertaking and the nature and sensitivity of the surrounding area;
>
> f) planned or existing land use in the area of the undertaking;
>
> g) other undertakings in the area;
>
> h) the environmental effects of the Project, including the environmental effects of malfunctions or accidents that may occur in connection with the Project and any cumulative environmental effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out;
>
> i) the socio-economic effects of the Project;
>
> j) the temporal and spatial boundaries of the study area(s);
>
> k) comments from the public that are received during the review;
>
> l) steps taken by the Proponent to address environmental concerns expressed by the public;
>
> m) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the Project;
>
> n) follow-up and monitoring programs including the need for such programs;
>
> o) the capacity of renewable resources that are likely to be significantly affected by the Project to meet the needs of the present and those of the future; and
>
> p) residual adverse effects and their significance. (emphasis supplied)

14. It is noteworthy that socio-economic effects are included in Part III, s. (i) of the Terms of Reference as a factor to be considered in the Panel's review of the Project. By using the word "include", the Terms of Reference provide that the Panel may consider factors beyond those enumerated. This discretion is further enhanced as a result of the wording of s. 19(1) of the Regulation.

E. Ministerial Decision following Environmental Assessment

15. Section 38 of the NS*EA* sets out the process for the Minister to follow once the Minister receives a completed environmental assessment report. It states:

> **Duties and powers of Minister**
>
> **38(1)** Upon receiving an environmental-assessment report, and before approving or rejecting an undertaking pursuant to Section 40, the Minister

(a) shall release the environmental-assessment report to interested persons and the public generally;

(b) shall refer the environmental-assessment report to the Board on Class II undertakings as defined in the regulations;

(c) may refer the environmental-assessment report to the Board on Class I undertakings as defined in the regulations;

(d) may refer all or part of an undertaking to alternate dispute resolution;

(e) may give directions regarding the scope of a review to be conducted by the Board or by alternate dispute resolution.

(2) On Class I undertakings not referred to the Board or to alternate dispute resolution, the Minister may approve the undertaking, reject the undertaking or approve the undertaking with conditions.

(3) The Minister shall notify the proponent, in writing, of the decision pursuant to subsection (2), together with reasons for the decision, within the time period prescribed by the regulations.

16. The "Board" referred to in s. 38 is the Nova Scotia Environmental Assessment Board, which is responsible for reviewing environmental assessment reports referred to it by the Minister, consulting with the public in respect of same, and recommending to the Minister approval or rejection of an undertaking based on the Board's review of the environmental assessment report.

17. If the Minister refers an environmental assessment report to the Board, the Board must conduct a public hearing or review and submit a report to the Minister under s. 39 of the NS*EA* and then recommend to the Minister whether to approve the undertaking, reject the undertaking or approve the undertaking with conditions.

18. Upon the Minister's receipt of an environmental assessment report under s. 38 or a recommendation from the Board under s. 39, the Minister may approve the undertaking or reject the undertaking pursuant to s. 40 of the NS*EA*, which states:

Powers of Minister

40 (1) Upon receiving information under Section 34, a focus report under Section 35, an environmental-assessment report under Section 38, a recommendation from the Board under Section 39 or from a referral to alternate dispute resolution, the Minister may

(a) approve the undertaking;

(b) approve the undertaking, subject to any conditions the Minister deems appropriate; or

(c) reject the undertaking.

(2) The Minister shall notify the proponent, in writing, of the decision pursuant to subsection (1), together with reasons for the decision, within the time period prescribed by the regulations.

19. Although the factors to be considered in the Minister's decision to reject a project following environmental assessment are not clearly established in the NS*EA* or the Regulations, this decision-making process would likely be the same as that set out in s. 34(1)(f) of the NS*EA*, which states that the Minister may determine that:

> the undertaking is rejected because of the likelihood that it will cause adverse effects or environmental effects that cannot be mitigated.

20. Overall, given that the central focus of the environmental assessment process is the determination of the adverse effects and the environmental effects of an undertaking and whether those effects may be mitigated, and given that the terms "environment" includes socio-economic conditions and "environmental effects" include effects on socio-economic conditions, adverse socio-economic effects play a significant role in the assessment and approval of a particular undertaking under the NS*EA*.

F. Public Interest

21. When it comes to the approval granting stage for an activity that requires Ministerial approval, which stage would follow the environmental assessment stage, Section 52 of the NS*EA* grants the Minister broad discretion to deny granting an approval for an activity if the Minister determines the activity is not in the public interest. Section 52 states:

> **Decision not to approve proposed activity**
>
> **52(1)** Where the Minister is of the opinion that a proposed activity should not proceed because it is not in the public interest having regard to the purpose of this Act, the Minister may, at any time, decide that no approval be issued in respect of the proposed activity if notice is given to the proponent, together with reasons.
>
> **(2)** When deciding, pursuant to subsection (1), whether a proposed activity should proceed, the Minister shall take into consideration such matters as whether the proposed activity contravenes a policy of the Government or the Department, whether the location of the proposed activity is unacceptable or whether adverse effects from the proposed activity are unacceptable. *1994-95, c. 1, s. 52.* (emphasis supplied)

22. In determining whether an activity should proceed, the Minister must take into account whether the adverse effects of the proposed activity are unacceptable. The Minister is given broader discretion at the activity approval stage than at the environmental assessment stage. At the environmental assessment stage, if the adverse effects of a proposed undertaking are unable to be mitigated, the Minister must reject the project.