

**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

AFFIDAVIT OF NEIL BELLEFONTAINE

I, Neil Bellefontaine, residing at Vastra Varvsgatan 5F in the City of Malmö, in the Country of Sweden, MAKE OATH AND SAY AS FOLLOWS:

A. PERSONAL BACKGROUND

1. I am the former Regional Director-General (“RDG”) of the Department of Fisheries and Oceans (“DFO”) in the Maritimes Region, a position I held from April 1995 to May 2006.
2. I hold a Bachelor of Commerce degree (1972) and Honours degree in Resource Economics (1973) from St. Mary’s University, Halifax, and a Masters of Marine Management from Dalhousie University, Halifax (1998).

3. I have over thirty-five years of experience in the areas of fisheries, aquaculture and environmental management in the public and university sectors. I started my employment with DFO in September 1974 and served in a number of portfolios in both Ottawa and Halifax over the next twelve years. I was appointed as a Regional Director in 1986 and as the RDG of the Scotia-Fundy Region in 1991. In this role, I was responsible for the planning, coordination and implementation of DFO programs throughout the Atlantic coast of Nova Scotia, the Bay of Fundy and southwestern New Brunswick.

4. I was appointed as RDG of the Maritimes Region in April 1995. This was an Assistant Deputy Minister level position in which I was responsible for 2,200 full time employees, an operating budget of \$180 million and delivery of DFO programs in Nova Scotia, New Brunswick, and Prince Edward Island. The programs included Oceans and Habitat Protection, Fisheries and Aquaculture Management, Science, Coast Guard, Policy and Economics, Small Craft Harbours and Corporate Support. I served as RDG for over a decade. In May 2006 I was appointed Special Advisor to the Deputy Minister of DFO on specific issues such as the Wild Atlantic Salmon Conservation Policy. I retired in October 2006.

5. Throughout my career, I was afforded several honours and awards for my work. For example, in 1992 I was awarded the Commonwealth Medal by the Governor-General in recognition of my commitment to public service, community and Canadians. Then, in October 1998 I was awarded the Outstanding Public Service Award by the Prime Minister of Canada, the highest service recognition award for federal public executives.

6. Since retiring from DFO, I have been employed as a Professor of Marine Environmental Protection at the World Maritime University¹ in Malmö, Sweden. I conduct research and teach courses at the Masters and post-graduate levels in Marine Law and Policy, Maritime Safety and Environmental Administration, Marine Environment and Ocean Management, and Shipping and Ports Management. In April

¹ The World Maritime University was established by the International Maritime Organization as an institution of the United Nations in 1983.

2011, I was appointed Vice President Academic, a management position in which I sit on the University's Board and report to the President.

B. ROLES AND RESPONSIBILITIES OF THE RDG IN THE ENVIRONMENTAL ASSESSMENT PROCESS

7. As RDG, I was the senior executive for DFO in the Maritimes Region. I was responsible for ensuring that regional staff acted consistently with the department's mandate to develop and implement policies and programs in support of Canada's scientific, ecological, social and economic interests in oceans and fresh waters. This mandate entails balancing the often competing interests of economic development and the protection of natural resources that contribute to ecological diversity and the local economy. In particular, the department manages Canada's marine resources not just for the environment, but for the people who live and work in Canada's coastal communities. Our guiding legislation at the time of the Whites Point project included the *Fisheries Act*, the *Oceans Act*, the *Fisheries Development Act*, the *Navigable Waters Protection Act*, the *Small Craft Harbours Act* and the *Canadian Environmental Assessment Act*.

8. Pursuant to its mandate, DFO is often called upon to manage or provide expertise in both federal and provincial environmental assessments. In my role as RDG, I was ultimately responsible for any environmental assessment (or "EA") in the Region in which DFO was the responsible authority ("RA"). In fact, I was the Minister's delegated regional representative under both the *Fisheries Act* and the *Navigable Waters Protection Act*,² and I had direct responsibility for the over 35 officials in DFO's Habitat Management Division³ who were charged with conducting EAs.

9. In terms of reporting on EAs, I served as the link between the Maritimes Region and the Deputy Minister of DFO. In particular, I reviewed information and advice flowing from the Maritimes Region through DFO Headquarters in Ottawa and ultimately

² The Navigable Waters Protection Program was transferred from DFO to Transport Canada in April of 2004.

³ HMD officials reported to me from their headquarters at the Bedford Institute of Oceanography in Dartmouth, Nova Scotia, and from three Area Offices in the Maritimes region. The Area Office responsible for the Digby Neck was based in Yarmouth, Nova Scotia.

to the Deputy Minister. I also routinely participated in discussions on EAs while serving on DFO's Departmental Management Committee and executive team. I also authorized decisions taken by the Region and Headquarters for the purpose of advising the Minister of DFO on EAs in the Region. I would do so through staff briefings, discussions with ADM level counterparts in Ottawa⁴ and review of briefing notes prepared for the Deputy Minister and Minister on the EA process.

10. During the time of the Whites Point project I also frequently interacted with the Ministers of DFO, first, the Honourable Robert Thibault, and then, the Honourable Geoff Regan, as both hailed from Nova Scotia and were often in the province on government business.⁵ When the Ministers visited the Region I would brief them personally on fisheries issues. These briefings were for informational purposes. During these visits, I would also accompany the Minister to regional meetings of fisheries stakeholder groups (e.g. associations of fisherman).

11. As RDG I also participated as the senior DFO witness in public hearings and consultations related to the EA process in the Maritimes. For example, I presented on fisheries issues before the Nova Scotia Offshore Petroleum Board in the Sable Offshore Platform and Pipeline hearings in June 1997.

C. QUARRY PROJECTS -- ENVIRONMENTAL EFFECTS AND PUBLIC CONCERN

12. During my time at DFO in the Maritimes, I was involved in or familiar with the EAs of several quarries, and in this sense, I am familiar with how they can impact upon the environment. As a result, I was struck by the simplistic characterization of the impact of quarrying on the environment in the Claimants' submissions in this arbitration. A quarry is not "simply a hole in the ground, with minimal environmental impact."⁶ A "hole in the ground" is what remains once quarrying activity is complete. The act of

⁴ The two ADM level counterparts I worked with on the Whites Point project were Matthew King and Sue Kirby.

⁵ The Honourable Robert Thibault served as Minister of DFO from January 15, 2002 to December 11, 2003. The Honourable Geoff Regan served as Minister of DFO from December 12, 2003 to February 5, 2006.

⁶ Claimants' Memorial, ¶14.

quarrying, which often involves removing rock with explosives, is what has the potential to cause an array of environmental impacts and public concerns, which can be all the more pronounced when quarrying is conducted close to rivers, lakes or the marine environment. Similarly, the Claimants' assertion that quarry permits are routinely granted "with either no environmental assessment or with the minimal environmental assessment,"⁷ shows, to my mind, a lack of understanding of the Canadian regulatory environment.

13. It may well be possible to operate a quarry without causing adverse impacts or engaging public concerns in some locales, or if appropriate mitigation is taken, but quarrying is often simply inconsistent with the biophysical and human environment for which it is proposed. As I explain below, in my experience, when this has been the case, quarry proposals have been subject to strong public opposition, higher levels of EA and outright rejection. In the end, my experience is that some quarry projects are not a good fit for the location and environment for which they are proposed.

1. Kelly's Mountain Quarry

14. The proposed aggregate quarry at Kelly's Mountain on the north shore of Cape Breton Island, Nova Scotia, was extraordinarily similar to the Whites Point project in many ways, and I was surprised that it was not mentioned at all by the Claimants. The proponent there, Kelly Rock Ltd., was a local Nova Scotia company entirely owned by Municipal Capital, another Nova Scotia company. Kelly Rock's project, proposed in 1989 under the predecessor legislation to the *CEAA*, aimed to blast, crush and export rock from a marine terminal that was to be built at the quarry site.⁸ The proposal raised immediate opposition given its potential impacts on the inshore fishery and residential, recreational and traditional values in the area, including impacts on the tourist industry.⁹

⁷ Claimants' Memorial, ¶14.

⁸ See Proposed Aggregate Quarry at Kelly's Mountain, Phase 1, Conceptual Plans and Environmental Overview, February 1989, **Exhibit R-33**, and Proposed Aggregate Quarry at Kelly's Mountain, Phase 2, Executive Summary, November 1989, **Exhibit R-34**.

⁹ See Baddeck Meeting with Regulatory Agencies and Committee of Concern – A Partial List of Questions and Concerns About the Proposed Tidewater Gravel Quarry on Kelly's Mountain, **Exhibit R-35**. See also letter from Aaron Schneider for the Save Kelly's Mountain Society to Nova Scotia Minister of Environment John Leefe, September 18, 1991, **Exhibit R-36**.

There was significant media coverage of the public opposition¹⁰ and, given that the proposal engaged the jurisdiction of Nova Scotia and at least three federal government departments (including DFO), it was determined that a joint federal-provincial review panel was the most effective means of assessing the project while addressing public concern.¹¹

15. The Canada-Nova Scotia Agreement establishing the federal-provincial EA Panel for the review of the Kelly Rock project notes that the scope of project included all of its components, including the construction and operation of the quarry and marine terminal.¹² The panel's mandate was to address, through a public review and hearing process, both the environmental and socio-economic effects of the project and to submit a report that would allow Ministerial decisions to be made at both the federal and provincial level in respect of the project.¹³ The joint review panel was established and the process was well underway by 1993. However, the panel was never able to fulfill its mandate as the proponent chose not to proceed "due to unsatisfactory market conditions and a generally poor economic climate."¹⁴

2. Beaver Harbour Aggregate Export Project

16. More recently, in 2002-2003, the J.D. Irving Company of New Brunswick approached DFO in connection with a proposed gravel pit and marine terminal for the export of aggregate from Beaver Harbour, New Brunswick. Beaver Harbour is directly across the Bay of Fundy from Whites Point and, like the communities of the Digby Neck,

¹⁰ See various news articles contained in the Kelly's Mountain Media Package prepared for the Affidavit of Neil Bellefontaine, **Exhibit R-37**.

¹¹ French and English versions of letter from Minister of Industry, Science and Technology Benoit Bouchard to Minister of Environment Robert R. de Cotret, December 5, 1990, p. 2, **Exhibit R-38**. As the *CEAA* was not yet in force, the Kelly's Rock project was referred to a panel review in accordance with the federal *Environmental Assessment and Review Process Guidelines Order* ("*EARPGO*"). I understand that Robert Connelly has provided background on *EARPGO* in his Expert Report, and that the *EARPGO* has been produced in this arbitration as **Exhibit R-8**.

¹² Canada-Nova Scotia Agreement for the Establishment of a Federal-Provincial Review Panel to Conduct a Public Environmental Assessment Review of the Proposed Kelly Rock Limited Granite Quarry Project, March 5, 1991, Attachment 2 – Mandate of the Kelly Rock EA Panel, **Exhibit R-39**.

¹³ *ibid.*, Attachment 2 – Mandate of the Kelly Rock EA Panel and Attachment 3 – Kelly's Mountain Aggregate Quarry EA Review Procedures, **Exhibit R-39**.

¹⁴ Letter from Kelly Rock to the Nova Scotia Department of Environment, March 8, 1993, **Exhibit R-40**.

it is a small fishing village with no large-scale industrial development. The Irving proposal raised immediate public concern over impacts on fisheries, groundwater, aquaculture, and endangered species such as right whales.

17. Two briefing notes were done on Beaver Harbour – one prepared by my staff for my review and a subsequent note from myself to the Deputy Minister and Minister.¹⁵ I recall requesting the preparation of these notes as I wanted to brief the Minister on the project given its similarity with Whites Point and the public concern both projects had engaged. While the J.D. Irving Company had not yet furnished a project description to DFO, we noted the likely capacity of the quarry and design of the marine terminal would require a federal comprehensive study. We also noted a public meeting on the project held on April 22, 2003 and attended by over 300 local citizens. Notes taken by a member of my staff at the meeting recorded a long list of concerns, including the impact of the project on the community, local business, water quality and the environment, and the transformation of a rural economy into an industrial economy.¹⁶

18. I am of the view that this project would have been referred to a review panel had it proceeded. However, it did not advance any further as it would have required an amendment to a municipal planning statement that prohibited quarrying in Beaver Harbour. J.D. Irving applied for the amendment but the New Brunswick Environment Minister rejected the application outright, even before any studies were conducted on its potential environmental effects, as the proposal was inconsistent with the community's vision for development.¹⁷ This put an end to the Beaver Harbour proposal.

3. Blue Mountain Quarry

19. The Blue Mountain Quarry proposal is another example of the incompatibility of quarrying with some environments. Here, Blue Mountain Resources Limited, a Nova

¹⁵ Briefing Note for the Regional Director-General, April 22, 2003, **Exhibit R-41**; Memorandum for the Minister, April 30, 2003, **Exhibit R-42**.

¹⁶ Note to file of Ted Currie re: Proposed Irving Gravel Pit and Wharf, Beaver Harbour, April 23, 2003, **Exhibit R-43**.

¹⁷ "Jardine crushes gravel pit plan," May 16, 2003, www.aggregateresearch.com/article.aspx?ID=2290, **Exhibit R-44**. See also email from Chris Daly to Bob Langdon, May 9, 2003, **Exhibit R-45**.

Scotia company, proposed a quarry and processing facility on 81 ha of land in the Kearney Lake area of Halifax County. Like Whites Point, the Blue Mountain project involved blasting and rock crushing, but the aggregate was to be shipped by truck for sale to the Halifax construction industry. The project was to operate near a Halifax suburb whose residents were of the “deep-rooted conviction that quarry operations do not fit in the long-term plans for their community.”¹⁸ Given these public concerns, a Nova Scotia Environmental Control Council panel conducted hearings into the project’s potential environmental impacts. I testified at this provincial hearing on behalf of DFO.

20. The panel ultimately recommended that the Blue Mountain project should not be permitted to proceed. In doing so it considered “[t]he scale, complexity and longevity of the project, [which] when combined with the close proximity of existing and future residential housing and prime recreational resources, represents an incompatible clash of land uses.” The panel was also “concerned about the ability of the proponent to control surface runoff and thereby protect Kearney Lake from unacceptable levels of sedimentation.” Finally, the “Report submitted by the proponent lacked clarity and detail on a number of important issues” and “[i]n some cases, information was missing, conclusions were not supported with data or information was presented in confusing manner.”¹⁹ On April 8, 1992, the Nova Scotia Minister of Environment rejected the project because it “poses the threat of unacceptable and significant adverse effects on the existing and future social, environmental, and cultural conditions influencing the lives of individuals and families in the adjacent communities.”²⁰

¹⁸ Report and Recommendations to the Minister Regarding the Environmental Assessment Report for the Proposed Rock Extraction and Processing Development by Blue Mountain Resources Limited, Nova Scotia Environmental Control Council, March 27, 1992, p. 30, **Exhibit R-46**.

¹⁹ *ibid.*, pp. 30-32, **Exhibit R-46**.

²⁰ Letter from Terence Donahoe, Minister of Nova Scotia Department of Environment, to Blue Mountain Resources, April 8, 1992, **Exhibit R-47**.

D. THE ENVIRONMENTAL ASSESSMENT OF THE WHITES POINT QUARRY AND MARINE TERMINAL

1. Initial Knowledge of and Concerns Regarding the Proposed Whites Point Quarry and Marine Terminal

21. I first became aware of the Whites Point proposal in or around May 2002. Personally, I had immediate concerns regarding the potential scope and duration of the project and the fact that it was to be right on the Bay of Fundy. I understood at the time that the project would eventually be of a magnitude greater than any development on the Digby Neck, which has neither a major quarry nor a significant marine terminal.

22. With respect to the quarry itself, as I have explained above, my experience with the assessment of quarries had given me cause to be concerned about their environmental impacts. In this case, my understanding was that the proposed Whites Point quarry would rival the Porcupine Mountain quarry as the largest coastal quarry in Nova Scotia. The Porcupine Mountain Quarry had been operating on Nova Scotia's Strait of Canso since the 1950s and my staff and I were often approached by people with concerns about it, particularly the impact of blasting, dust and siltation on the coastal environment, fish migration and groundwater.

23. With respect to the marine terminal, the presence of large ships can lead to many environmental impacts, beyond the obvious risk of ship strikes involving whales. In fact, the introduction of foreign invasive species as a result of the discharge of ballast water by large ships and fouling from ship hulls (i.e. the living animals that are attached to ship hulls) are some of the most significant impacts of shipping on the marine environment. In particular, ballast water discharge is particularly problematic when, as was contemplated with the Whites Point proposal, the ship in question has travelled to distant ports through an industrialized area with a highly active global shipping industry where it can pick up foreign species from around the world.

24. This risk had been particularly driven home in the Maritimes Region in 2002 when oyster populations in the Bras D'Or Lakes area of Cape Breton, Nova Scotia were virtually wiped out as a result of the introduction of a parasite called MSX. This resulted in the prolonged closure of the oyster fishery in the area. Given the financial losses being

suffered by oyster growers as a result of MSX, I recall this to be a significant issue of concern for both my staff and Minister Thibault during this time period. In a 2003 briefing note to Minister Thibault, prepared in advance of his meeting with Cape Breton Oyster Fishery interests, my staff noted that the likely cause of the parasite was shipping traffic: “[s]hipping traffic is the suspected, but unproven, source of the introduction to Bras d’Or Lakes. If the case, fresh infectious material will be repeatedly introduced into Cape Breton waters, as such shipping activities continue.”²¹

25. Along the Digby Neck, which is part of a UNESCO Biosphere Reserve, these types of concerns would be amplified. As RDG, I was familiar with the environmental assets of the Neck. In this time period, I had recently spearheaded the formation of the Canada-U.S. committee that would be developing a recovery program for the endangered North Atlantic Right Whale which frequents the Bay of Fundy during summer months. At the time, the shipping lanes that ran through the Bay of Fundy came very close to the Digby Neck, an area where the whales congregated to feed. While we were working to have the lanes moved out to deeper water further from the feeding grounds, in 2002 and 2003 we had yet to be successful.

26. There are also significant lobster, herring, scallop, clam, mussel and bloodworm fisheries in the area, and young inner Bay of Fundy Atlantic Salmon (also an endangered species) migrate along the Neck after leaving rivers in the upper reaches of the Bay. All of these fish populations could be affected by the noise, sedimentation and other impacts associated with a coastal quarry, and also by the ballast water discharge associated with a marine terminal. In fact, because of the hydrodynamic cycle of the Bay of Fundy,²² impacts on the marine environment around the Neck can have impacts all over the Bay. Further, because of the channels that run through the Digby Neck at Long Island and

²¹ Briefing Note for the Minister – Meeting with Cape Breton Oyster Fishery Interests to Discuss Concerns About the Fishery and MSX Management, October 14, 2003, **Exhibit R-48**. Another Briefing Note for the ADM Science provides that “Although unproven, shipping traffic (industrial and recreational) that dumps ballast collected from MSX positive waters in the eastern United States, may be implicated.” See Briefing Note for the ADM, Science – Provincial Concerns About Proposed MSX Control Options May be Raised at CCFAM Deputy Ministers’ Meeting in Ottawa, June 5, 2003, **Exhibit R-49**.

²² The tidal flows in the Bay of Fundy enter at the southeast side of the mouth of the Bay, close to the Digby Neck, flow north and around the top of the Bay, and then exit coming down the western side of the Bay.

Brier Island, impacts on the marine environment around the Neck can also impact St. Mary's Bay.

27. I was also familiar with the coastal communities on the Digby Neck, and I knew that their economy was heavily tied to these environmental assets and was based on fishing and ecotourism, including a growing whale watching industry. In fact, the Neck encompasses Lobster Fishery Area No. 34, one of the world's most productive lobster fisheries²³ and the backbone of the southwest Nova Scotia economy.²⁴ As a result, I knew that any degradation of the environmental assets of the Neck and its local marine environment could have been devastating to a lot of people.

28. Looking back, from my perspective, a more problematic site probably could not have been chosen anywhere else in the province for such a large quarry and marine terminal. Nor can I think of another proposal in my time as RDG that engaged as many public concerns and environmental issues as the Whites Point project. These concerns were voiced not only to my staff, but in letters to DFO Minister Thibault, many of which demanded an open EA of any proposal and argued that such a large operation was at odds with the way of life on the Digby Neck.²⁵

2. DFO's Determination Regarding the Scope of the Project

29. On the basis of information gleaned through initial meetings with the proponent before we even received a project description,²⁶ my staff advised me that the planned project would likely engage an EA under *CEAA*, in part because a marine terminal of the scale being contemplated would require a Navigable Waters Protection permit. They also

²³ See Map of Lobster Fishing Areas in Nova Scotia, **Exhibit R-50**. See also DFO Science Stock Status Report C3-62 (2001) – Lobster Fishing Area 34, August 2001, **Exhibit R-51**.

²⁴ Memo from Neil Bellefontaine to Pat S. Chamut re: Lobster conservation Strategy Update –LFA's 33 to 38, October 9, 2001, attaching Conservation Harvesting Plan for LFA 34, **Exhibit R-52**. In 2001-2002 LFA 34 included almost 1,000 license holders and employed about 2,500 people.

²⁵ See Sample Letters of Concern to Minister Robert Thibault on Whites Point Project, April – September 2002, Compiled for Affidavit of Neil Bellefontaine, **Exhibit R-53**.

²⁶ Members of my staff met with representatives of the proponent on July 25, 2002 to discuss the proponents' plans to construct and operate a quarry and marine terminal at Whites Point.

advised me that “the project scope would likely include the entire terrestrial and marine components.”²⁷

30. My staff maintained these initial views after reviewing the project description filed by the proponents in March, 2003, and they so informed the proponents in an April 14, 2003 letter.²⁸

31. At all times, I was comfortable with the idea that the scope of the project for the purposes of an EA should be both the quarry and the marine terminal. First, in light of my concerns about coastal quarries, I believed that at the outset of the EA process it was both reasonable and prudent to assume that long term quarrying adjacent to the Bay of Fundy would require authorizations under the *Fisheries Act*. Second, regardless of whether such authorizations were required, DFO was acting fully within its legislative authority to include both the quarry and marine terminal in the scope of project. In particular, it was my understanding the quarry was dependent on the existence of the marine terminal (and vice versa) and thus, it was appropriate to include them both in any federal EA. Third, that is how the project was presented in the Project Description and I was aware of no logical reason for my staff to disaggregate the two project components. Nor am I aware of the proponent objecting at any time to the approach taken on scope of project for the purposes of the EA.

32. There were certainly some officials who, at the time, appear to have been arguing that unless DFO had a regulatory trigger for the quarry, we should not include it in the scope of a project subject to a federal EA. In this regard, I have carefully reviewed the personal notes of Bruce Hood from April and May of 2003.²⁹ Mr. Hood was an official at DFO Headquarters, rather than in the Maritimes Region. Mr. Hood’s notes reflect the “scope of project” debate within DFO that marked so many EAs during this time period.³⁰

²⁷ Briefing Note for Neil A. Bellefontaine – Update to August 13, 2002 on the Proposed Deep Water Piers Whites Cove, Digby County, Nova Scotia, August 13, 2002, **Exhibit R-62**.

²⁸ Letter from Phil Zamora to Paul Buxton, April 14, 2003, **Exhibit R-54**.

²⁹ Notes of Bruce Hood, **Exhibit R-260**.

³⁰ *ibid.*, pp. 801602-801604, **Exhibit R-260**.

33. However, equating the existence of such a debate with some impropriety by DFO is wrong. Moreover, it suggests that the Claimants' view is that government officials must always walk in lockstep at all times, and that discussions among regulators with varying viewpoints are inappropriate. From my 32 years of experience in the federal Canadian government, I can say that officials frequently have different opinions, that they share these different opinions and that a rather undesirable and unfortunate autocracy would result if this was not the case.

34. Moreover, the references in Mr. Hood's notes to there being no trigger for the quarry and the ensuing discussion on scope were both merely academic in my view as they were made before my staff biologists conducted an onsite evaluation of whether the proposed activity on the larger quarry might require *Fisheries Act* authorizations from DFO.³¹ As such, to the extent the notes reflect the conclusion of one individual in DFO Headquarters as to whether there was a trigger for the quarry, the conclusion was uninformed and certainly premature. It also turned out to be wrong, as my staff ultimately concluded that the blasting activity would require a *Fisheries Act* authorization.³² In the end there was an EA trigger for the proposed quarrying activity.

3. DFO's Recommendation Regarding the Type of Assessment

35. At the very beginning of DFO's review of this project, my staff had noted that "given the level of public concern, potential for numerous federal *CEAA* triggers and environmental issues as well as the size, extent and duration of the overall project a Panel Review may be warranted."³³ Public concern and a likely risk of adverse environmental effects – and there were many here – are both statutory bases for the Minister to refer a project to a review panel under *CEAA*. While I do not recall our being "hawkish" on recommending a panel review at the outset, given our understanding of the project and

³¹ The Claimants cite to discussions on trigger and scope of project taking place on April 25, 2003 (*see* notes of Bruce Hood, (pp. 801602-801604), **Exhibit R-260**). However, it appears a site visit by my staff biologists only occurred on May 8, 2003, and that the biologists noted that even this was too early in the season to assess whether fish habitat on the site would be affected by the project (*see* notes of Bruce Hood, (p. 801614), **Exhibit R-260**).

³² Letter from Phil Zamora to Paul Buxton, May 29, 2003, **Exhibit R-55**.

³³ Memorandum for the Minister -- Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, January 14, 2003, **Exhibit R-65**.

public concern, this possibility had to be kept on the table. Further, as the project progressed, I became more convinced that a review panel was in fact the best option, at the very least to ensure public trust that a proper EA would be conducted.

36. In this regard, I recall a dramatic spike in public concern over the project in early March 2003 as a result the proponent's publication of a notice regarding the marine terminal application in the *Halifax Chronicle Herald*, a requirement of the NWP process.³⁴ At the time, the proponent had filed a draft Project Description with the Canadian Environmental Assessment Agency, but I do not believe it had made this draft available to the public. As a result of the publication, the NWP office, which was under my supervision at the time, and the Minister's constituency office, were flooded with phone calls and letters from concerned citizens, many of whom thought DFO had placed the notice.

37. This event revealed how engaged and opposed the local community was to the project. As the senior DFO executive in the Region I was always wary of the situation in which the public started to question or mistrust the regulatory process itself. At the time, I certainly felt we were approaching this point with the Whites Point project. To ensure the credibility of the process we needed to ensure that any EA "included an appropriate level of public consultation" and we so advised the Minister.³⁵

38. I recall another spike in public concern in connection with a silt plume from the quarry site out into the Bay of Fundy that, from my review of documents produced in the arbitration, I see occurred on May 25, 2003. The silt plume appeared in the Bay along the shore of the quarry site after a prolonged rain. It resulted from inadequate sedimentation controls that had been put in place by the proponent on a portion of the site that had been cleared of trees and vegetation. A number of complaints were made to the Minister's

³⁴ Public notice pursuant to Navigable Waters Protection Act, R.S.C. 1985, Chapter M-22, *Halifax Chronicle Herald*, March 3, 2003, **Exhibit R-56**. See also email from Melinda Donovan to Tim Surette, Neil Bellefontaine and others, March 4, 2003, **Exhibit R-57**.

³⁵ Memorandum for the Minister – Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, March 13, 2003, **Exhibit R-66**.

office as a result of the incident³⁶ and Thomas Wheaton, of our Yarmouth Area Office, conducted an onsite investigation on May 27, 2003. On determining that the proponent's sedimentation controls were indeed inadequate, Mr. Wheaton issued an Inspector's Direction requiring the immediate implementation of corrective measures, failing which sanctions would be imposed under the *Fisheries Act*.³⁷

39. I also recall that between April and May 2003, DFO scientists in the Maritimes Regional Office were completing their work and becoming increasingly concerned about the project's potential effects on North Atlantic right whales and inner Bay of Fundy Atlantic salmon – both of which were endangered species. At the time, we employed some of the world's experts on these species, and I was absolutely confident that their concerns were justified.

40. In this context, in late May of 2003, I recall discussions with my Acting Regional Director of Oceans and Habitat in the Region, Carol Anne Rose, and the ADM of Oceans and Habitat in DFO Headquarters, Sue Kirby, regarding a recommendation to the Minister that the Whites Point project be referred to a review panel. I had no hesitation such a recommendation was legitimate given the many questions over the potential significant adverse environmental effects of the project and the persistent public concerns.

4. The Referral of the Whites Point Quarry and Marine Terminal to a Review Panel

41. Throughout DFO's review of the proposal to develop the quarry and marine terminal at Whites Point, we had been keeping the Minister's office up to date on developments through a series of briefing notes prepared by my staff. I reviewed and

³⁶ See complaints to Minister Thibault's office regarding siltation incident of May 25, 2003, **Exhibit R-58**.

³⁷ See Inspector's Direction issued by DFO's Thomas Wheaton to Nova Stone Exporters, Paul Buxton and Brian Lowe, May 28, 2003 requiring the taking of corrective measures, **Exhibit R-59**. In fairness to the proponent, I note the siltation appeared to have also entered into the Bay of Fundy from a public road maintained by the Nova Scotia Department of Transport and that DFO also directed the Nova Scotia Department of Transport to take immediate corrective measures failing which it could also be prosecuted under the *Fisheries Act* – see email from Thomas Wheaton to Paul Stone, May 28, 2003, **Exhibit R-60**.

authorized each of these notes.³⁸ The notes were intended to provide information to Minister Thibault on an issue in which he was keenly interested — as the Member of Parliament for West Nova (which includes the Digby Neck) the proposal presented an opportunity for economic development in his riding, but as the Minister of DFO he had to ensure such development was sustainable, and from many quarters he was hearing the project would do more harm than good to the local environment and economy.

42. The information provided in these notes, and the recommendations made, were always the product of DFO staff. At no time did Minister Thibault ever provide me, or members of my staff, with any instruction as to how the Whites Point project should be scoped or whether the project should be referred to a panel review. Nor did Minister Thibault ever state or suggest that he wanted the EA process to be delayed or dragged out. Any such interference in the work of my staff would have been unacceptable to me.

43. In the relatively few discussions I had with Minister Thibault about the project, the only thing he expressed was that the EA process used to review the Whites Point project would need to ensure public concerns over the project were adequately heard and addressed. This is understandable; as the proposed project was in Minister Thibault's riding he was hearing these concerns most every day.

³⁸ Memorandum for the ADM Oceans – Proposed Deep Water Piers Whites Cove, Digby County, Nova Scotia, May 14, 2002, **Exhibit R-61**; Briefing Note for Neil A. Bellefontaine – Update to August 13, 2002 on the Proposed Deep Water Piers Whites Cove, Digby County, Nova Scotia, August 13, 2002, **Exhibit R-62**; Memorandum for the Minister -- Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, September 24, 2003, **Exhibit R-63**; Memorandum for the Minister -- Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, October 9, 2002, **Exhibit R-64**; Memorandum for the Minister -- Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, January 14, 2003, **Exhibit R-65**; Memorandum for the Minister – Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, March 13, 2003, **Exhibit R-66**; Briefing Note for the Deputy Minister – Proposed Rock Quarry and Shipping Terminal Whites Cove, Digby County, Nova Scotia, April 16, 2003, **Exhibit R-67**; Memorandum for the Minister – Proposed Rock Quarry and Shipping Terminal Whites Cove, Digby County, Nova Scotia, April 28, 2003, **Exhibit R-68**.

44. When it was time to recommend to Minister Thibault that he refer the project to the Minister of the Environment for referral to a review panel, my staff and Headquarters staff prepared a briefing note for the Assistant Deputy Minister, Ms. Kirby, in advance of a meeting she was to have with the Associate Deputy Minister of DFO.³⁹ The briefing note outlined why we believed a referral to panel review was warranted.⁴⁰ My staff also took steps to determine whether Nova Scotia was interested in participating in a joint panel review, given the province's expressed interest in harmonization up to that point.⁴¹ Once Nova Scotia confirmed its interest,⁴² my staff and Headquarters staff prepared a briefing note for decision, recommending that Minister Thibault decide to refer the project to the Minister of the Environment for referral to a review panel.⁴³ Minister Thibault did so on June 26, 2003.⁴⁴

45. I had limited involvement in the Whites Point project after the referral to a review panel. I also left my post as RDG just weeks after the release of the proponent's Environmental Impact Statement in April 2006, so I was not involved in DFO's review of the EIS or in the panel proceedings. But I stand by my opinion today that the EA of this project by way of joint review panel was the correct approach, not just for all involved stakeholders but also for the integrity of the EA process itself and for the local marine environment that, in my opinion, would have been degraded by this long term industrial project.

³⁹ The Associate Deputy Minister holds the rank of Deputy Minister and can act for or on behalf of the Deputy Minister in briefing the Minister if the Deputy Minister is not available. At this point in time the Associate Deputy Minister of DFO was Jean-Claude Bouchard and the Deputy Minister was Larry Murray.

⁴⁰ Memorandum for the Assistant Deputy Minister, Oceans – Environmental Assessment of Proposed Quarry and Shipping Terminal, Whites Cove Digby County, Nova Scotia Pre-Meeting for Meeting with Associate Deputy Minister, May 26, 2003, **Exhibit R-69**.

⁴¹ Letter from Paul Boudreau to Chris Daly, June 20, 2003, **Exhibit R-70**.

⁴² Letter from Chris Daly to Paul Boudreau, June 20, 2003, **Exhibit R-71**.

⁴³ Memorandum for the Minister – Referral of Proposed Whites Point Quarry and Shipping Terminal to the Minister of the Environment for a Panel Review, June 25, 2003, **Exhibit R-72**.

⁴⁴ Letter from Minister of DFO Robert Thibault to Minister of Environment David Anderson, June 26, 2003, **Exhibit R-73**.

SWORN BEFORE ME at Copenhagen,)
Denmark, this 22nd day of November, 2011)


NEIL BELLEFONTAINE



A Commissioner for taking Affidavits

L. BECKER, CONSULAR OFFICER
EMBASSY OF CANADA
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