

**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 STEPHEN CHAPMAN**

I, STEPHEN CHAPMAN of the City of Ottawa, MAKE OATH AND SAY AS  
FOLLOWS:

**A. PERSONAL BACKGROUND**

1. I am currently the Associate Director, Regional Operations Sector, with the Canadian Environmental Assessment Agency (the "Agency"). In this role, I provide expert advice, guidance and training in order to promote Canada's national environmental assessment ("EA") objectives.

2. I was a Panel Manager at the Agency from June 2000 to June 2007. In my capacity as Panel Manager, the proposal to develop a quarry and marine terminal at

Whites Point, Nova Scotia was one of my files from February 2003<sup>1</sup> to October 2003 and from October 2004 to November 2005.

3. Prior to the appointment of the Joint Review Panel (“JRP”), my role as Panel Manager for this project consisted of providing advice, guidance and assistance to government officials, the project proponents and other parties on topics ranging from the conduct of the EA, to the preparation of the draft Environmental Impact Statement (“EIS”) Guidelines. Subsequent to the appointment of the JRP, my role as Panel Manager consisted of providing administrative and technical support to the JRP and assisting with the preparation of the panel report.

#### **B. THE AGENCY AND ENVIRONMENTAL ASSESSMENT IN CANADA**

4. The Agency, a federal body reporting directly to the Minister of the Environment, was created by the *Canadian Environmental Assessment Act* (the “CEAA”) to, among other things, administer the EA process established by the CEAA. As a national body, the Agency seeks to promote uniformity and harmonization in the EA of projects across Canada at all levels of government. It does so not only through training, but also by facilitating communication and cooperation between the Government of Canada and other jurisdictions, such as provincial governments, and in particular, negotiating agreements to harmonize EAs.

5. As the administrator of the EA process established by the CEAA, the Agency works with proponents and the public in addition to facilitating interactions amongst the relevant government authorities. It does so based on the belief that such interactions contribute to the quality of EAs by ensuring that the information that is submitted is as complete and technically accurate as possible.

6. However, the bulk of the Agency’s work is with federal authorities who are either

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<sup>1</sup> The Whites Point Quarry and Marine Terminal was referred to the Minister of the Environment for referral to a review panel in June 2003. However, in February 2003, the Department of Fisheries and Oceans, which, as explained below, was initially responsible for the conduct of the EA, contacted the Agency and informed us of its intention, based on what it knew at that time, to seek a review panel. See email from Bill Coulter to Bruce Young, February 17, 2003, **Exhibit R-222**. This is the point at which I became involved in the Whites Point EA.

responsible authorities (“RAs”)<sup>2</sup> or in the possession of specialist or expert knowledge with respect to a proposed project. We assist, advise and guide these federal authorities in making the determinations required under the *CEAA*, including, among others, determinations with respect to: (1) whether they will be RAs; (2) the scope of the project to be assessed; and (3) the type of assessment that is most appropriate.

## **C. THE EA OF THE WHITES POINT QUARRY AND MARINE TERMINAL**

### **1. The Agency’s Involvement in Meetings of Government Officials Over the Proposed Project**

7. The Agency became involved with the EA of the Whites Point Quarry and Marine Terminal project on October 1<sup>st</sup>, 2002, when my colleague, Bill Coulter, who was then the Regional Director of the Atlantic Regional Office,<sup>3</sup> received from Helen MacPhail, an EA Officer working for the Department of Environment and Labour of the government of Nova Scotia (“NSDEL”), a copy of a draft project description submitted by Global Quarry Products (“GQP”).<sup>4</sup> Ms. McPhail requested a meeting with officials from the Agency and other involved federal authorities to discuss the scope of the project and possible options for the coordination of the EA process.<sup>5</sup>

8. The Agency helped arrange this meeting,<sup>6</sup> inviting representatives of Fisheries and Oceans Canada (“DFO”) (including the Canadian Coast Guard), Environment Canada and Natural Resources Canada to a December 3, 2002 meeting with representatives of Nova Scotia to discuss the coordination of the EAs that would likely be

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<sup>2</sup> Section 2(1) of the *Canadian Environmental Assessment Act*, S.C. 1992 defines “Responsible Authority” as: “a federal authority that is required pursuant to subsection 11(1) to ensure that an environmental assessment of the project is conducted.” See **Exhibit R-1**.

<sup>3</sup> The Agency is headquartered in Ottawa, Ontario, but maintains regional offices throughout Canada. The Atlantic Regional Office, located in Halifax, Nova Scotia, services the region comprising of Canada’s four Atlantic provinces: Nova Scotia, New Brunswick, Newfoundland and Labrador, and Prince Edward Island. It acts as a point of contact with other federal agencies and consults with provincial and territorial governments to ensure an efficient and timely environmental assessment process.

<sup>4</sup> Draft Project Description for Whites Point Quarry and Marine Terminal, September 30, 2002, **Exhibit R-129**.

<sup>5</sup> Email from Helen MacPhail to Bill Coulter, October 1, 2002, **Exhibit R-173**.

<sup>6</sup> Memorandum by Bill Coulter to various federal and provincial officials, November 25, 2002, **Exhibit R-174**.

required both at the federal and provincial level.<sup>7</sup>

9. Based on its review of the draft project description that had been submitted by GQP, the Agency believed that a federal EA of the project would be required by DFO because the proposed marine terminal would likely interfere with navigation in the Bay of Fundy and would thus require an authorization under subs. 5(1) of the *Navigable Waters Protection Act* (“NWPA”). The Agency so informed the relevant federal authorities in a November 25, 2002 letter, and reiterated this view at the December 3, 2002 meeting.<sup>8</sup>

10. Over the next few months, the Agency acted as a conduit for the federal authorities to communicate both with the proponent and with Nova Scotia in further consideration of the project being proposed.<sup>9</sup> On March 10, 2003, the proponent’s representative, Paul Buxton, submitted a revised project description to the Agency, which described the project as the construction, operation and decommissioning of a “basalt quarry with a marine terminal located on Digby Neck” and identified the proponent as “Global Quarry Products, the operating arm of Nova Stone Exporters Inc.”<sup>10</sup>

## **2. The Determinations that an EA is Required and that DFO is the Responsible Authority**

11. This submission officially started the federal coordination process pursuant to the *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*.<sup>11</sup> Pursuant to these Regulations, the federal authorities that would potentially be involved in an EA — DFO, Environment Canada, Industry Canada, Transport Canada, and Natural Resources Canada — reviewed the

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<sup>7</sup> Email from Reg Sweeney to Jim Ross and Thomas Wheaton, December 4, 2002, **Exhibit R-130**; Email from Barry Jeffrey to Ian Travers, December 4, 2002, **Exhibit R-176**.

<sup>8</sup> Memorandum by Bill Coulter to various federal and provincial officials, November 25, 2002, **Exhibit R-174**; Email from Reg Sweeney to Jim Ross and Thomas Wheaton, December 4, 2002, **Exhibit R-130**; Email from Barry Jeffrey to Ian Travers, December 4, 2002, **Exhibit R-176**.

<sup>9</sup> Letter from Helen MacPhail to Paul Buxton, December 10, 2002, **Exhibit R-131**; Letter from Paul Buxton to Derek McDonald attaching draft Project Description, January 28, 2003, **Exhibit R-180**; Memorandum from Derek McDonald, February 5, 2003, **Exhibit R-137**; Letter from Derek McDonald to Paul Buxton, February 17, 2003, **Exhibit R-140**.

<sup>10</sup> Letter from Paul Buxton to Derek McDonald attaching Project Description, March 10, 2003, **Exhibit R-181**.

<sup>11</sup> *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*, SOR/97-181, **Exhibit R-12**.

project description to determine if in fact they required an EA of this project.<sup>12</sup>

12. DFO's Habitat Management Division determined on April 7, 2003 that, consistent with our view, it would have to conduct an EA due to the fact that the proposed project would engage multiple *Fisheries Act* triggers. DFO also determined that it would accordingly be an RA for the assessment.<sup>13</sup> At the end of the federal coordination process it was determined that DFO was the only federal authority that would have to conduct an EA.<sup>14</sup> DFO formally informed GQP of the fact that it was required to conduct an EA of the proposed project on April 14, 2003.<sup>15</sup> As far as I am aware, GQP did not object to or in any way dispute this determination.

### **3. The Determination that the EA Will be Harmonized Between the Federal and Provincial Governments**

13. With submission of the revised project description and DFO's determination that it would be an RA, the Agency was able to make further progress on coordinating the EA processes that would be required under both provincial and federal law. In particular, at Nova Scotia's request, the Agency organized a meeting on March 31, 2003 with federal authorities to once again discuss harmonization of the EA between the provincial and federal governments.<sup>16</sup> I attended this meeting.

14. I recall that at this meeting there was general agreement that harmonization would benefit the proponent and the public in that it would result in a more complete review and would avoid the inefficiencies inherent in requiring GQP to submit to two parallel but independent EAs for the same project. The Agency was pleased that the responsible federal and provincial officials agreed at the meeting to harmonize their respective EA processes. After this meeting, the Agency began to work with both DFO and Nova Scotia officials to formalize a harmonized EA process for GQP's project.<sup>17</sup>

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<sup>12</sup> See letter from Phil Zamora to John Janes, March 26, 2003, **Exhibit R-213**.

<sup>13</sup> Letter from Thomas Wheaton to Phil Zamora, April 7, 2003, **Exhibit R-147**.

<sup>14</sup> Memorandum, Federal Coordination Request-Whites Point Quarry and Marine Terminal, **Exhibit R-214**.

<sup>15</sup> Letter from Phil Zamora to Paul Buxton, April 14, 2003, **Exhibit R-54**.

<sup>16</sup> Email from Christopher Daly to Derek McDonald, March 20, 2003, **Exhibit R-306**.

<sup>17</sup> See email correspondence between Derek McDonald and Mark McLean, April 3, 2003, **Exhibit R-215**.

#### 4. The Determination Regarding the Scope of Project for the Purposes of the EA

15. With respect to the scope of the project to be assessed, during the March 31, 2003 meeting, DFO agreed to prepare a draft document describing the scope of the project to be assessed.<sup>18</sup> The Agency assisted DFO in this task by providing it with copies of similar documents prepared for other EAs that DFO could use as examples.<sup>19</sup>

16. Many of the early discussions that we had with DFO on the question of the scope of this project were based on the hypothetical scenario in which DFO determined that it had a regulatory trigger to conduct an EA for the marine terminal but no trigger in connection with the proposed quarrying activity.<sup>20</sup> At the time, we were aware of the internal debate within DFO on this question. However, I have characterized the scenario above as “hypothetical” because at the time, DFO had neither performed the necessary scientific review to determine whether the blasting on the quarry would have an effect on the marine environment, nor had it been able to ascertain whether there were fish-bearing streams on the quarry site that would be affected by the quarrying. While officials at the Agency believed that it was clear from the project description that there were potential federal regulatory triggers in relation to the quarry itself, we provided guidance to DFO as to whether, if there were not, the quarry should be included within the scope of the project for EA purposes.<sup>21</sup>

17. The Agency’s advice to DFO was based on the position of the Agency set out in its *Operational Policy Statement on Scoping*.<sup>22</sup> In our view, a scoping decision under s. 15 of the *CEAA* is more likely to be made on a reasonable basis if it considers the principles of proximity, linkage and interdependence in determining whether or not a non-triggering aspect of a project should be included within the scope of the project being assessed.<sup>23</sup> Using these criteria, it was our opinion that there was only one project proposed for Whites Point, and it included a quarry and marine terminal. This is how the

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<sup>18</sup> Highlights and Action Items Whites Point Inter-Agency EA Meeting, March 31, 2003, **Exhibit R-145**.

<sup>19</sup> *Ibid.*

<sup>20</sup> Email from Derek McDonald to Phil Zamora, April 3, 2003, **Exhibit R-216**.

<sup>21</sup> *Ibid.*

<sup>22</sup> Canadian Environmental Assessment Agency, *Establishing the Scope of the Environmental Assessment*, OPS-EPO/1, **Exhibit R-14**.

<sup>23</sup> Email from Derek McDonald to Phil Zamora, April 3, 2003, **Exhibit R-216**.

project had been explained to federal officials by GQP,<sup>24</sup> how it had been described in the various project descriptions that they had submitted,<sup>25</sup> and it was really the only logical conclusion in light of the way the quarry and marine terminal were designed to function solely in concert with each other. Thus, we advised DFO that we believed that the only way to scope the proposed Whites Point Quarry and Marine Terminal consistently with the *CEAA* was to include both the quarry and marine terminal.<sup>26</sup> We also discussed with DFO how “[p]roject splitting is an oft-raised criticism in environmental assessment and has been the root of several legal challenges.”<sup>27</sup> In fact, DFO was, at the time, facing such a challenge in another EA where they had scoped a project narrowly to include only the physical work that required a DFO authorization.<sup>28</sup>

18. DFO took our advice, and in its April 14, 2003 letter to GQP, advised that the scope of the project would include “the construction, installation, operation, maintenance, modification, decommissioning and abandonment of the quarry and marine terminal.”<sup>29</sup> I am not aware of GQP registering any objection to this determination.

19. On or around April 30, 2003, I became aware that officials at DFO were again internally discussing whether to exclude the quarry from the scope of the project being assessed if they determined that they had no regulatory triggers with respect to its construction or operation.<sup>30</sup> Again, these discussions were still hypothetical because DFO officials had not completed the necessary scientific work to determine whether the

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<sup>24</sup> Meeting notes of Derek McDonald, January 6, 2003, **Exhibit R-217**; Meeting notes of Lorilee Langille, January 6, 2003, **Exhibit R-132**.

<sup>25</sup> Draft Project Description for Whites Point Quarry and Marine Terminal, September 30, 2002, **Exhibit R-129**; Letter from Paul Buxton to Derek McDonald attaching draft Project Description, January 28, 2003, **Exhibit R-180**; Letter from Paul Buxton to Derek McDonald attaching Project Description, March 10, 2003, **Exhibit R-181**.

<sup>26</sup> Email from Derek McDonald to Phil Zamora, April 3, 2003, **Exhibit R-216**.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, [2004] F.C.J. No.1518 (F.C.) **Exhibit R-218**. Note that in 2010 the Supreme Court of Canada clarified the proper interpretation of *CEAA* s. 15 in determining the scope of project for the purposes of a federal environmental assessment. In *MiningWatch Canada v. Red Chris Development Company Ltd.* [2010] 1 S.C.R. 6, **Exhibit R-15** the Supreme Court held that RAs do not have the discretion under the *CEAA* and its regulations to reduce the scope of a project to less than that which has been proposed by a proponent. However, the Supreme Court of Canada also confirmed that the RAs may enlarge the scope of a project beyond that which is proposed by a proponent, in accordance with s.15(2) and (3) of the *CEAA*.

<sup>29</sup> Letter from Phil Zamora to Paul Buxton, April 14, 2003, **Exhibit R-54**.

<sup>30</sup> Email from Derek McDonald to Phil Zamora & al., April 30, 2003, **Exhibit R-220**.

proposed quarrying activity engaged a *Fisheries Act* trigger that would require an EA. Nevertheless, I discussed the issue with a number of DFO officials, and provided them with further guidance on the Agency's interpretation of the *CEAA* and the grounds for including the quarry in the scope of the project being assessed, regardless of whether or not they had a specific regulatory trigger.

20. Ultimately, this debate became a moot issue. First, DFO determined that the quarrying activity engaged an EA trigger for DFO.<sup>31</sup> Second, as explained below, the EA of the project was referred to a JRP, and as such, the scope of the project was ultimately determined in the Terms of Reference signed by the federal Minister of the Environment and the Nova Scotia Minister of Environment and Labour.<sup>32</sup> As discussed more fully below, these Terms of Reference were required to ensure that the assessment performed by the JRP complied with both federal and provincial EA requirements, and since Nova Scotia required an assessment of the quarry, it had to be included in the scope of the project for the purposes of the EA.

##### **5. The Determination that a Review Panel Was the Most Appropriate Type of Assessment for the Whites Point Quarry and Marine Terminal**

21. After reviewing the basic project description submitted by GQP in September 2002, the Agency determined that, based on the tonnage of the selected ship for transportation of the aggregate, a comprehensive study "may be required" under the applicable federal legislation.<sup>33</sup> The Agency so informed DFO, and other federal departments in the November 25, 2002 memorandum described above.<sup>34</sup>

22. However, the Agency did not discount the idea that a referral to a review panel might be the most appropriate type of assessment for this project. For example, my colleague, Bill Coulter, participated in the December 3, 2002 intergovernmental meeting on the project and contributed to the general agreement reached at the meeting that due to

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<sup>31</sup> Letter from Phil Zamora to Paul Buxton, May 29, 2003, **Exhibit R-55**.

<sup>32</sup> Agreement Concerning the Establishment of a Joint Review Panel for the Whites Point Quarry and Marine Terminal Project, November 3, 2004, **Exhibit R-27**.

<sup>33</sup> Memorandum by Bill Coulter to various federal and provincial officials, November 25, 2002, **Exhibit R-174**.

<sup>34</sup> *Ibid.*



its size, extent, duration, environmental issues and extensive public concern, referral of the project to a JRP was a possibility.<sup>35</sup> Similarly, in an Early Warning System Memorandum, the Agency's Derek McDonald, one of the Agency's staff in the Atlantic Regional Office, noted under the heading "Potential Type of Federal Assessment" that "Public review is not out of the question – there is public opposition in the project area. Project regularly makes the local news."<sup>36</sup>

23. The Agency provided its views and offered guidance to DFO, as needed, throughout the winter and spring of 2003 on this issue. On February 17, DFO advised us that if it required an EA of the project, it intended to request that the Environment Minister refer the EA of GQP's project to a review panel.<sup>37</sup> We certainly had no issues with this potential approach and, in order to assist DFO, we began to "to start the thinking process concerning whether the province will also be leaning towards a public review and whether it will be interested in consideration of a joint public review."<sup>38</sup> Then at the March 31, 2003 intergovernmental meeting, I provided advice and guidance to DFO on the mechanisms for the project to be referred to a review panel.<sup>39</sup>

24. On June 3, 2003 I was advised by DFO that it was considering referral of the project to the Minister of Environment for a Panel Review and that it intended to write to Nova Scotia to confirm the province's interest in participating in a JRP.<sup>40</sup> I understand that Nova Scotia confirmed its interest later that month.<sup>41</sup> On June 26, 2003, the Minister of Fisheries and Oceans, the Honourable Robert Thibault referred the project to the Minister of the Environment, the Honourable David Anderson, for a referral to a review

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<sup>35</sup> Email from Reg Sweeney to Jim Ross and Thomas Wheaton, December 4, 2002, **Exhibit R-130**; Email from Barry Jeffrey to Ian Travers, December 4, 2002, **Exhibit R-176**.

<sup>36</sup> Early Warning System Memorandum, January 21, 2003, **Exhibit R-221**; An Early Warning System Memorandum is a tool used by the Agency to identify major projects that will likely require significant internal resources

<sup>37</sup> Email from Bill Coulter to Bruce Young, February 17, 2003, **Exhibit R-222**.

<sup>38</sup> *Ibid.*

<sup>39</sup> Notes of Mark McLean, March 31, 2003, **Exhibit R-144**; Highlights and Action Items Whites Point Inter-Agency EA Meeting, March 31, 2003, **Exhibit R-145**; Notes of Christopher Daly, March 31, 2003, **Exhibit R-185**.

<sup>40</sup> Email from Bruce Hood to Bruce Young, June 3, 2003, **Exhibit R-223**.

<sup>41</sup> Letter from Paul Boudreau to Christopher Daly, June 20, 2003, **Exhibit R-70**; Letter from Christopher Daly to Paul Boudreau, June 20, 2003, **Exhibit R-71**.

panel.<sup>42</sup>

**6. The Establishment of a JRP for the Whites Point Quarry and Marine Terminal**

**a) The Drafts of the JRP Agreement and the Terms of Reference**

25. As I have noted above, the Agency was supportive of the recommendation of DFO to establish a JRP. From our perspective, a JRP would ensure the most efficient and complete EA as it would entail a single harmonized assessment of the entire project while at the same time ensuring an adequate opportunity for public participation. Also, given that the project proposal had generated such a high level of public concern, an EA by way of panel review would be far more appropriate than a comprehensive study, which at the time offered only limited opportunities for public participation.

26. Immediately after we received notice of the referral from the DFO Minister, we began working with Nova Scotia officials to draft a JRP Agreement and Terms of Reference for the panel. Our work was broadly based on similar documents prepared in the context of prior EAs that had been referred to a JRP as well as on the *1997 Ministerial Guidelines for the Procedures for an Assessment by a Review Panel*.<sup>43</sup> We were also cognizant of the need to ensure that the harmonized EA satisfied the legislative requirements of both the federal and Nova Scotia EA processes.

27. By July 2003, we had an agreement on the content of these documents. The draft JRP Agreement covered matters such as panel selection, procedures for the conduct of the assessment, the establishment of a secretariat and public registry, and the content of the final report. The draft Terms of Reference detailed the scope of the project to be assessed, the applicable procedure for the assessment, as well as the scope of the assessment (*i.e.* the factors to be considered in the course of the EA).

28. With the agreement reached between officials, we then moved to secure the needed approval from the relevant federal and provincial Ministers. On July 18, 2003, I

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<sup>42</sup> Letter from Minister Robert Thibault to Honourable David Anderson, June 26, 2003, **Exhibit R-73**.

<sup>43</sup> Canadian Environmental Assessment Agency, *Procedures for an Assessment by a Review Panel*, A Guideline issued by the Honourable Christine S. Stewart, November 1997, **Exhibit R-26**.

prepared a briefing note to the federal Minister of the Environment recommending that he approve both the referral of the project to a JRP and the release for public comment of the draft JRP Agreement and draft Terms of Reference.<sup>44</sup> I understand that Nova Scotia did the same.<sup>45</sup>

29. On July 28, 2003, we were informed that the Nova Scotia Minister of Environment and Labour had approved the documents for public release.<sup>46</sup> On August 7, 2003, Minister Anderson did the same, and also wrote to Minister Thibault to inform him that he had referred the project to a JRP with the province of Nova Scotia pursuant to s.40 of the *CEAA*.<sup>47</sup> The Agency and NSDEL jointly issued the draft JRP Agreement and draft Terms of Reference on August 11, 2003, inviting the public to comment by September 18, 2003.<sup>48</sup> The deadline was subsequently extended to October 22, 2003.<sup>49</sup>

30. I met with GQP's Paul Buxton, along with Mr. McLean from DFO and Ms. Benjamin from NSDEL on August 29, 2003 to discuss the EA process by a JRP and the proponent's involvement in the process. I also invited GQP to comment on the draft JRP Agreement and draft Terms of Reference that had been released to the public. On September 10, 2003, I confirmed our discussion in writing, requesting again that GQP comment on the draft JRP Agreement and draft Terms of Reference.<sup>50</sup>

31. However, we did not receive any comments from GQP on either. This is highly unusual as these documents are fundamental to the course of an EA of a proposed project. On November 11, 2003, GQP only wrote to NSDEL and explained their lack of comment, saying: "We regarded the Draft Memorandum of Understanding as a

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<sup>44</sup> Memorandum to Minister, Referral of the Whites Point Quarry Project to a Joint Review Panel, July 18, 2003, **Exhibit R-197**.

<sup>45</sup> Email from Cheryl Benjamin to Bruce Young, July 21, 2003, **Exhibit R-224**.

<sup>46</sup> Email from Peter Harris to John Perkins, July 28, 2003, **Exhibit R-225**.

<sup>47</sup> Letter from Minister David Anderson to Minister Robert Thibault, August 7, 2003, **Exhibit R-195**.

<sup>48</sup> 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 R-226**. *See also* Draft Agreement, Establishment of a Joint Review Panel for the Whites Point Quarry Project, **Exhibit R-278**.

<sup>49</sup> Public Notice, Whites Point Quarry and Marine Terminal Proposal: Comment Period on Draft Agreement Extended, October 2, 2003, **Exhibit R-227**.

<sup>50</sup> Letter from Steve Chapman to Paul Buxton, September 10, 2003, **Exhibit R-228**.

reasonable document and hence did not feel the need for comment.” (*sic*)<sup>51</sup>

32. In contrast to the silence of the proponent, the local community provided the Agency and NSDEL with close to a hundred comments and suggestions on the draft JRP Agreement and Terms of Reference. Over the course of the next several months, we worked with NSDEL to review these comments and, where appropriate incorporate them.

33. In the end, a little over three months after the close of the public comment period, we were ready with a final draft of the JRP Agreement and Terms of Reference for Ministerial approval and signature.<sup>52</sup> However, in a phone conversation on February 27, 2004 and in a follow-up email sent on March 1, 2004, GQP asked us to stay the issuance of these documents and to delay the constitution of the JRP pending the resolution of certain issues relating to GQP’s corporate structure.<sup>53</sup>

34. Oddly, the partner of Bilcon of Nova Scotia, Corporation (“Bilcon”) in GQP, Nova Stone Exporters Inc. (“Nova Stone”), seemed to be unaware of the request to delay the constitution of the JRP. It wrote to the Agency on March 5, 2004 to request an update “on the status of the memorandum of understanding”(sic).<sup>54</sup> When the Agency advised Nova Stone of Bilcon’s postponement request on March 10, 2004, Nova Stone’s representative, Mark Lowe, responded that his company was not opposed to postponing the finalization of the JRP Agreement and Terms of Reference.<sup>55</sup>

35. We agreed to the request to delay the constitution of the JRP, and informed GQP that we would use this time to make progress on the selection of panel members and the preparation of the a draft of the guidelines for the EIS that it would be required to complete.<sup>56</sup>

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<sup>51</sup> Letter from Paul Buxton to Christopher Daly, November 11, 2003, **Exhibit R-229**.

<sup>52</sup> Draft Memorandum to Minister, Whites Point Quarry Project Joint Panel Review, February 11, 2004, **Exhibit R-202**.

<sup>53</sup> Email from Jean Crépault to Brian Torrie, February 27, 2004, **Exhibit R-230**; Email from Boris de Jonge to Jean Crépault, March 1, 2004, **Exhibit R-203**.

<sup>54</sup> Email from Nova Stone to Steve Chapman, March 5, 2004, **Exhibit R-231**.

<sup>55</sup> Email from Jean Crépault to Christopher Daly, March 10, 2004, **Exhibit R-232**.

<sup>56</sup> Email from Jean Crépault to Brian Torrie, March 3, 2004, **Exhibit R-204**.

**b) The Finalization of the JRP Agreement and Terms of Reference**

36. Although Bilcon had indicated that the ownership issues related to the project would be resolved in “two to four weeks”<sup>57</sup> it was not until five months later, on August 13, 2004, that Bilcon finally confirmed that GQP has been dissolved and that Nova Stone had assigned its entire interest in the partnership and the Whites Point quarry and marine terminal project to Bilcon.<sup>58</sup> On August 17, 2004, Mr. Buxton, acting on behalf of Bilcon, formally requested that the draft JRP Agreement be amended to reflect this change of ownership and submitted an updated project description.<sup>59</sup>

37. With the proponents finally ready to proceed, we were in a position to move forward in getting the required Ministerial approvals for the constitution of the JRP. The Minister of the Environment, the Honourable Stéphane Dion, signed the JRP Agreement on October 29, 2004 and his provincial counterpart, the Honourable Kerry Morash, signed it a couple of days later, on November 3, 2004.<sup>60</sup> Both governments jointly announced the establishment of the JRP on November 5, 2004.<sup>61</sup>

**c) The Selection of the Members of the JRP**

38. Also on November 5, 2004, both governments jointly announced the appointment of Dr. Robert Fournier, Dr. Gunter Muecke and Dr. Jill Grant to the JRP.<sup>62</sup> These three panellists had been selected jointly by the Agency and Nova Scotia after, as described below, much consideration.

39. The *CEAA* requires that the members of a review panel be “unbiased and free from any conflict of interest relative to the project and [...] have knowledge or

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<sup>57</sup> *Ibid.*

<sup>58</sup> Letter from Paul Buxton to Jean Crépault, August 13, 2004, **Exhibit R-93**.

<sup>59</sup> Letter from Paul Buxton to Jean Crépault, August, 17, 2004, **Exhibit R-94**. In addition to updating the information on the proponents, other areas of the project description were also changed.

<sup>60</sup> Email from Gordon Harris to Jean Crépault, October 29, 2004, **Exhibit R-233**; Email from Helen MacPhail to Steve Chapman, November 3rd, 2004, **Exhibit R-234**.

<sup>61</sup> 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**.

<sup>62</sup> *Ibid.*

experience relative to the anticipated environmental effects of the project.”<sup>63</sup> In light of the project descriptions submitted by GQP and Bilcon, and based on an assessment of the anticipated environmental effects of the proposed quarry and marine terminal, the Agency and NSDEL sought to identify individuals with expertise or knowledge in marine sciences, geology, mining operations, mineral engineering, and socio-economic studies.

40. Pursuant to the Terms of Reference, and in consultation with NSDEL, the Agency prepared a short list of suitable candidates for panel appointment.<sup>64</sup> Together with NSDEL, we interviewed potential panellists on August 26 and 27, 2004, inquiring into their familiarity with the panel review process, their relevant expertise and any issues that could be perceived as a source of bias in respect of the proposed project.

41. After a careful best fit analysis, during which we considered the expertise and knowledge of each candidate, their complementarity, and their ability to work collaboratively, the Agency and NSDEL decided to recommend the appointment of Drs. Fournier, Muecke and Grant to the JRP.<sup>65</sup> In our assessment, these individuals had outstanding credentials and no real or perceived bias or conflicts of interest in respect of the Whites Point Quarry and Marine Terminal project.<sup>66</sup>

42. In particular, Dr. Fournier is a Professor of Oceanography at Dalhousie University and thus had expertise in marine sciences. He had also chaired the JRP that, several years earlier, recommended the approval of the Sable Gas project in Nova Scotia.<sup>67</sup> Dr. Muecke

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<sup>63</sup> The *CEAA* par.41(b). The JRP Agreement, which was being negotiated between the Agency and NSDEL at the same time as the panel selection process, contains an identical requirement at Article 3.3.

<sup>64</sup> The short list also included Lesley Griffiths and Anne Fouillard. In addition, we considered but did not include on our short list because of potential conflicts of interest, John Amirault, a Mining engineer and former Nova Scotia civil servant who had worked for a proponent on a similar proposal on the Digby Neck, (Email from Bill Coulter to Jean Crépault, January 19, 2004, **Exhibit R-236**); and Jim Ross, a retired DFO official who had been involved with the assessment of the Whites Point Project. (See email from Blane Jean to Steve Chapman and Bill Coulter, August 18, 2003, **Exhibit R-237**).

<sup>65</sup> Email from Helen MacPhail to Jean Crépault, September 8, 2004, **Exhibit R-238**.

<sup>66</sup> We were aware that Professors Fournier and Muecke had been board members of the Ecology Action Center, a non-governmental organization based in Halifax, that later announced its opposition to the project. However, they had resigned as board members of the NGO respectively more than 20 and 13 years earlier, and as such, the Agency had no concerns regarding this past involvement. We were also aware that Dr. Grant had in 2002 moderated a conference jointly organized by Dalhousie University and the Ecology Action Centre in 2002. Again, Dr. Grant's involvement in this conference caused us no concern whatsoever.

<sup>67</sup> *Curriculum Vitae* of Dr. Robert Fournier, **Exhibit R-380**.

is a geologist and geochemist and a retired Professor in the Department of Geology and Earth Sciences and at the School of Resource and Environmental Studies at Dalhousie University. As such, he had relevant expertise in issues involving geology and mining.<sup>68</sup> He had also been a member of the JRP in the 1991 EA of a quarry project at Kelly's Mountain in Cape Breton, Nova Scotia. Finally, Dr. Grant, whom Nova Scotia had recommended, was a Professor of Planning Studies at Dalhousie University, and thus had relevant expertise in evaluating socio-economic effects as well as community issues.<sup>69</sup>

## **7. The JRP's Review of the Proposed Whites Point Quarry and Marine Terminal**

### **a) The Environmental Impact Statement Guidelines**

43. Pursuant to the JRP Agreement, the assessment of the project by the JRP was to be based on an EIS prepared by Bilcon. In the spring and summer of 2004, while Nova Stone and Bilcon were in the process of dissolving their partnership, the Agency worked with DFO, Transport Canada (which had assumed regulatory authority over the *NWPA*) and NSDEL to prepare a draft of the guidelines for this EIS (the "EIS Guidelines"). The draft EIS Guidelines that we prepared were based on those used in prior EAs. They contained instructions to Bilcon on the content required to be included in its EIS, including a particular requirement that it assess the effects of the project on both the biophysical environment and socio-economic conditions of the region.<sup>70</sup> The incorporation of the requirement that the socio-economic effects of the project be assessed reflected a factor that must be considered in EAs conducted under the Nova Scotia *Environment Act*.

44. The draft of the EIS Guidelines was opened to public comment from November 10, 2004 until January 21, 2005.<sup>71</sup> Overall, close to 150 submissions were received addressing matters relating to transportation, international shipping, invasive species, species at risk, tourism, economic impacts, values on healthy environments and

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<sup>68</sup> *Curriculum Vitae* of Dr. Gunter Muecke, **Exhibit R-379**.

<sup>69</sup> *Curriculum Vitae* of Dr. Jill Grant, **Exhibit R-381**.

<sup>70</sup> Draft EIS Guidelines, November 10, 2004, **Exhibit R-209**.

<sup>71</sup> News Release, Whites Point Quarry and Marine Terminal Project – Joint Review Panel, The Public is invited to Comment on the Draft Guidelines, November 10, 2004, **Exhibit R-239**.

communities, international protocols and regulations, sustainable development, enhancement and mitigation measures.

45. In addition to the written comment period, pursuant to the Terms of Reference, the JRP also held public scoping meetings on the draft EIS Guidelines from January 6 to January 9, 2004.<sup>72</sup> The scoping meetings were attended by approximately 320 people with 28 making presentations to the panel.<sup>73</sup>

46. Throughout the process of finalizing the EIS Guidelines, the JRP made efforts to involve Bilcon. In particular, on December 15, 2004, it specifically invited Bilcon's views on the draft EIS Guidelines.<sup>74</sup> However, Bilcon chose not to make an oral presentation at the scoping meetings and its written submission on the draft EIS Guidelines, filed with the panel on January 16, 2005, primarily addressed streamlining the EIS Guidelines and including references to adaptive management, rather than issues of substance.<sup>75</sup>

47. After fully taking into account the public comments on the draft EIS Guidelines, including the comments of Bilcon, the JRP issued the final EIS Guidelines on March 31, 2005.<sup>76</sup> The EIS Guidelines broadly conformed to the draft EIS Guidelines that had been issued for public comment. They were also comparable in terms of the level of detail required in other EIS Guidelines issued at the time. As far as I am aware, Bilcon never objected to or even raised any concerns regarding the content of the EIS Guidelines or the issues that it was required to address in its EIS.

#### **b) Bilcon's Environmental Impact Statement**

48. Despite several promises to complete it earlier,<sup>77</sup> it took Bilcon until April 26, 2006 – more than a year after the release of the EIS Guidelines – to submit its EIS. On

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<sup>72</sup> News Release, Whites Point Quarry and Marine Terminal Project – Joint Review Panel Announce Public Meetings and Publish Operational Procedures, December 2, 2004, **Exhibit R-240**.

<sup>73</sup> Email from Phil Zamora to Derek McDonald, January 12, 2005, **Exhibit R-241**.

<sup>74</sup> Letter from Dr. Fournier to Paul Buxton, December 15, 2004, **Exhibit R-242**.

<sup>75</sup> Letter from Paul Buxton to Steve Chapman, January 16, 2005, **Exhibit R-243**.

<sup>76</sup> Letter from Dr. Fournier to Paul Buxton, March 31, 2005, **Exhibit R-210**.

<sup>77</sup> Letter from Paul Buxton to Dr. Fournier, April 24, 2005, **Exhibit R-244**; Letter from Paul Buxton to Dr. Fournier, August 30, 2005, **Exhibit R-245**; Letter from Paul Buxton to Steve Chapman, December 8<sup>th</sup>, 2005, **Exhibit R-246**.



receipt of the EIS, the JRP immediately opened it for public comment, ultimately setting a deadline of August, 11, 2006.<sup>78</sup>

49. At Bilcon's request, federal authorities reviewed and commented on certain sections of its draft EIS.<sup>79</sup> However, federal authorities made clear that in providing the comments, they were not endorsing the EIS or confirming its adequacy.<sup>80</sup>

50. Over the course of the next several months, the JRP made numerous requests to Bilcon for additional information.<sup>81</sup> In addition, the JRP received and forwarded to Bilcon for response, approximately 250 submissions from the public expressing concerns about the potential adverse effects of the project on the marine environment, groundwater, tourism and community well-being.

51. Despite once again undertaking to complete its responses to the requests of the JRP and the comments of the public earlier,<sup>82</sup> it took Bilcon until April 13, 2007, to complete its responses.<sup>83</sup> On May 1, 2007 the JRP concluded that it had obtained what information it could in the written phase, and that it would now hold public hearings.<sup>84</sup>

### c) The JRP Hearings

52. The JRP hearings were held in Digby, Nova Scotia from June 16 until June 30, 2007. The panel sat every day during this period, except for Sundays, and proceedings often lasted late into the evening. I am not aware of any objection raised by Bilcon during the hearing to the Agency, DFO or any other federal authority that it was in any way being treated unfairly. Further, representatives from the Agency attended the

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<sup>78</sup> News Release, Whites Point Quarry and Marine Terminal Project Public Consultation on the Environmental Impact Statement is Extended, August 4, 2006, **Exhibit R-247**.

<sup>79</sup> Letter from Paul Buxton to Derek McDonald, July 27, 2005, **Exhibit R-248**.

<sup>80</sup> Email from Derek McDonald to Phil Zamora & al., August 4, 2005, **Exhibit R-249**.

<sup>81</sup> Letter from Dr. Fournier to Paul Buxton, June 28, 2006, **Exhibit R-250**; Letter from Dr. Fournier to Paul Buxton, July 28, 2006, **Exhibit R-219**; Letter from Dr. Fournier to Paul Buxton, December 18, 2006, **Exhibit R-251**; Letter from Dr. Fournier to Mr. Buxton, February 27, 2007, **Exhibit R-252**.

<sup>82</sup> Email from Paul Buxton to Debra Myles, August 30, 2006, **Exhibit R-253**; Letter from Paul Buxton to Dr. Fournier, November 3, 2006, **Exhibit R-254**; Email from Josephine Lowry to Debra Myles, November 28, 2006, **Exhibit R-255**; Email from Josephine Lowry to Debra Myles, February 12, 2007, **Exhibit R-256**.

<sup>83</sup> Email from Josephine Lowry to Debra Myles, April 13, 2007, **Exhibit R-257**.

<sup>84</sup> News Release Whites Point Quarry and Marine Terminal Joint Review Panel Announces Public Hearings, May 1, 2007, **Exhibit R-258**.

meetings, and I have never heard any concerns that the meetings were in any way unfair or biased, or that Bilcon was not given the opportunity to adequately present its case for the project. In fact, after the hearings were concluded, Mr. Buxton wrote a letter to the JRP thanking the panel for its assistance during the hearings and stating that “[t]he process ran smoothly and efficiently in large part due to your efforts.”<sup>85</sup>

53. The JRP received more than two hundred oral and written submissions from Bilcon, government representatives, interest groups and individuals during two weeks of public hearings.<sup>86</sup> The federal government departments that offered information to the Panel, with the assistance of the Agency, included Environment Canada, Health Canada, Transport Canada, DFO, Foreign Affairs and International Trade Canada, and Natural Resources Canada. In addition, a number of provincial departments, including NSDEL, also participated in the hearings.

54. At the hearings, a number of questions were asked by the Panel which the various participants could not answer immediately, but which they undertook to respond to shortly.<sup>87</sup> After all undertakings had been fulfilled, on October 13, 2007, the JRP determined that the information gathering phase of the EA of the Whites Point Quarry and Marine Terminal was complete. It submitted its report to the federal Minister of the Environment and the Nova Scotia Minister of Environment and Labour on October 22nd, 2007.

#### **D. THE FEDERAL GOVERNMENT RESPONSE TO THE JRP REPORT**

55. As required by the JRP Agreement and the Terms of Reference, in its report the JRP described the information it had received regarding the environmental effects of the project, drew conclusions and made recommendations relevant to the decisions that both the federal and provincial governments were required to make. From the federal perspective, the JRP’s relevant conclusion was that the Whites Point Quarry and Marine Terminal was “likely to cause significant adverse environmental effects that, in the

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<sup>85</sup> Letter from Paul Buxton to Debra Myles, July 9, 2007, **Exhibit R-259**.

<sup>86</sup> Whites Point Quarry and Marine Terminal, Joint Review Panel Report, p.17, **Exhibit R-212**.

<sup>87</sup> Whites Point Quarry and Marine Terminal, Public Hearings from June 16 to June 30, 2007, Listing of Undertakings, **Exhibit R-277**.

opinion of the Panel, cannot be justified in the circumstances.”<sup>88</sup> As a result, the JRP recommended to DFO and Transport Canada that they refuse to issue the requested permits and authorizations for the project. They also recommended “that the Canadian Environmental Agency develop a guidance document on the application of adaptive management in EAs and in environmental management following approvals.”<sup>89</sup>

56. The federal response to the JRP’s report was led by DFO and Transport Canada, in consultation with other expert federal authorities and with input from the Agency. In accordance with subs. 37(1.1) of the *CEAA*, the RAs sought the approval of the Governor in Council and, after carefully considering the report, the Government of Canada agreed with the JRP, and concluded that Bilcon’s project was likely to cause significant adverse environmental effects that could not be justified in the circumstances. As a result, under paragraphs 37(1)(b) and (1.1)(c) of the *CEAA*, DFO and Transport Canada could not issue the permits and authorizations requested by Bilcon.

57. Before this decision was reached, the Government of Nova Scotia had already announced that, pursuant to the Nova Scotia *Environment Act*, it was rejecting the project. This decision by Nova Scotia meant that the project could not move forward, regardless of the decision of the federal authorities. Nevertheless, the federal government released its decision on December 17, 2007, accepting all of the recommendations of the JRP.

58. As a Panel Manager for seven years, and an employee of the Agency for 12 years, I have been involved in numerous EAs including many assessments by review panels. In my experience, it is rare that all involved in the EA of a contentious project such as this will be satisfied in terms of the result. However, in providing Canadians with high-quality EAs that contribute to informed decision making, the Agency has to be ultimately faithful to the process.

59. While I understand that Bilcon was and is frustrated with being unable to develop its quarry and marine terminal, I believed at the time, and I believe now, that there is

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<sup>88</sup> Whites Point Quarry and Marine Terminal, Joint Review Panel Report, p.4, **Exhibit R-212**.

<sup>89</sup> *Ibid.* p.5.

nothing about the process through which the Whites Point Quarry and Marine Terminal was assessed that was either unreasonable or unfair.

SWORN BEFORE ME at Ottawa )  
This 2<sup>nd</sup> DAY of December, 2011 )

  
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Stephen Chapman



A Commissioner for taking Affidavits  
in and for Ottawa, Ontario, Canada