

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

BETWEEN:

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

Claimants

and

GOVERNMENT OF CANADA

Respondent

**STATEMENT OF DEFENCE OF THE
GOVERNMENT OF CANADA**

May 4, 2009

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Pursuant to Article 19 of the UNCITRAL Arbitration Rules, the Government of Canada (“Respondent” or “Canada”) respectfully submits this Statement of Defence in response to the Statement of Claim submitted by William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. (“the Claimants”) on February 2, 2009.

I. PRELIMINARY STATEMENT

1. Canada and Nova Scotia have rules and regulations for the environmental assessment of projects such as quarries and marine terminals: the *Canadian Environmental Assessment Act* at the federal level, and the *Nova Scotia Environment Act* at the provincial level. When an environmental assessment of such projects is required at both levels, the federal and provincial governments may enter into an agreement to conduct a single joint environmental assessment.

2. Environmental assessments in Canada are carried out without regard to the nationality of a project proponent. They provide for a fair and impartial process for assessing the environmental impact of proposed projects.

3. The Claimants in this case may be disappointed with the outcome of the environmental assessment of their proposed project. However, an investor is not entitled to bring a NAFTA claim simply because it disagrees with or is disappointed by the decisions of governmental authorities made in the course of such an assessment. The Claimants’ proposed project was subject to Canadian and Nova Scotia environmental assessment rules and regulations. They were entitled to be treated like other project proponents under NAFTA Articles 1102 and 1103 and to be subject to an environmental assessment process that did not fall below the minimum standard of treatment under NAFTA Article 1105. This treatment must be afforded to all project proponents subject to an environmental assessment in Canada, and *was* afforded to the Claimants.

4. In Part II of this Statement of Defence, Canada briefly outlines the facts relevant to the Claimants’ allegations. This part includes: (a) a description of the Claimants’ proposed quarry and marine terminal and of the region and community in which it was to operate—Digby Neck, Nova Scotia; (b) a summary of the rules and regulations governing the environmental assessment of projects in Canada; and, (c) an overview of the environmental assessment of the Claimants’ project.

5. In Part III, Canada identifies the Claimants' allegations that are beyond the jurisdiction of this Tribunal. In particular, Canada identifies those allegations that: (a) do not relate to a measure of the Government of Canada; (b) the Claimants do not have standing to bring; and (c) are time-barred.

6. In Part IV, Canada demonstrates that there is no merit to the Claimants' claims based on NAFTA Articles 1102, 1103 and 1105. The environmental assessment of the proposed quarry and marine terminal did not provide the Claimants with treatment less favourable than that accorded to Canadian investors, or investors of other nationalities, in like circumstances (NAFTA Articles 1102 and 1103). Nor have the Claimants identified treatment by Canada of the investment that falls below the minimum standard of treatment required by customary international law (NAFTA Article 1105).

7. In Part V, Canada outlines its position on the damages sought by the Claimants and puts the Claimants to the strict proof of their alleged losses.

II. FACTUAL BACKGROUND

A. Digby Neck, Nova Scotia and the Claimants' Proposal for a 152 Hectare Quarry and Marine Terminal

1. Digby Neck – Environment, Community and Economy

8. Digby Neck is located on the southwest coast of the province of Nova Scotia. It is a narrow, 58 km-long peninsula extending between the Bay of Fundy and St. Mary's Bay. Geologically, it is the spine of the North Mountain range. At the top end of the peninsula is the town of Digby. At the bottom are two small islands, Long Island and Brier Island. Maps of Nova Scotia and Digby Neck are attached at Appendix I.

9. The Bay of Fundy is a 270 km long bay that is 80 km wide at its mouth. It is approximately 150 m deep at its deepest point, but is generally less than 100 m deep. The Bay is recognized worldwide as an extremely productive ecosystem with diverse plant and marine life. Its waters are an important breeding and feeding ground for five types of whales, including the

world's most endangered large whale, the North Atlantic right whale. Other endangered species in the Bay of Fundy include the inner Bay of Fundy population of Atlantic salmon, blue whales and leatherback turtles. Species of concern in the Bay include fin whales, harbour porpoises, harlequin ducks and the common loon. The Bay is home to many other marine mammals including harbour seals and dolphins, and is an important migratory staging area for millions of birds.

10. The Government of Canada has recognized areas of the Bay of Fundy as a Right Whale Conservation Area, a National Wildlife Area, and a Migratory Bird Area. In 2001, the United Nations Educational, Scientific and Cultural Organization ("UNESCO") designated the five counties comprising southwest Nova Scotia, including Digby Neck, as a Biosphere Reserve. In 2007, the New Brunswick portion of the upper Bay of Fundy was also designated as a Biosphere Reserve. A Biosphere Reserve is an area of terrestrial and coastal ecosystems that promotes biodiversity, conservation, and sustainable resources.

11. Digby Neck is characterized by its primarily rural and residential character and is sparsely populated, with the 2006 census estimating the entire population of the Municipal District of Digby to be slightly more than 8,000. Most of the residents of Digby Neck live in small coastal communities

12. Digby Neck has important fisheries resources and is world-renowned for its lobster and scallops. As such, the primary commercial activity on Digby Neck is—and always has been—fishing. More recently, the quaint seaside towns and fishing villages along the peninsula and the ecological splendour of the Bay of Fundy have transformed Digby Neck into a centre for eco-tourism. Whale watching, birding, hiking, beachcombing, photography, kayaking, canoeing and exploring towns and villages have become popular tourist attractions and important economic activities in the area.

13. There are no major industrial activities on Digby Neck. The region is, however, rich in basalt, a common extrusive volcanic rock widely used in the making of aggregate. Aggregate is a common ingredient in construction materials such as concrete and asphalt.

2. The Claimants' Proposal for a 152 Hectare Quarry and Marine Terminal

14. In or around 2001 the individual Claimants and Nova Stone Exporters Inc. ("Nova Stone"), a company incorporated in Nova Scotia, took steps to establish an aggregate quarry at Whites Point on Digby Neck. Whites Point is located approximately 37 kilometres south of the town of Digby and one kilometre west of the town of Little River and is on the Bay of Fundy side of the peninsula. Digby Neck is approximately 2.5 kilometres wide at Whites Point. A map showing the location of the proposed quarry on Digby Neck is attached at Appendix II.

15. The quarry was to operate on a 152 hectare parcel of land, making it the largest aggregate quarry in all of southwest Nova Scotia. The aggregate from the quarry was to be used for the business ventures of the individual Claimants in the northeast United States and was to be shipped to its destination through the Bay of Fundy. As such, the individual Claimants and Nova Stone intended to construct a deepwater marine terminal at the quarry site. They disclosed their intentions and the scope of the project in their very first meetings with governmental authorities in early 2002.

B. Environmental Assessment in Canada

16. Canada and Nova Scotia's environmental assessment laws and regulations are designed to promote sustainable development in the context of the conservation, protection and enhancement of the environment. In light of the substantial public interest in the development of natural resources, including the impact that such development can have on local communities, Canada's and Nova Scotia's laws also provide opportunities for public participation in all aspects of the environmental assessment process. Federally, the applicable legislation is the *Canadian Environmental Assessment Act* ("CEAA").¹ In Nova Scotia, the applicable legislation is the *Environment Act* ("NSEA").²

¹ *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (**Tab 1**).

² *Nova Scotia Environment Act*, S.N.S. 1994-95, c. 1 (**Tab 2**).

1. The Canadian Environmental Assessment Act

17. The *CEAA* was enacted by Canada in 1992 “to establish a federal environmental assessment process” which would allow Canada to “achieve sustainable development by conserving and enhancing environmental quality and by encouraging and promoting economic development that conserves and enhances environmental quality.”³

18. The *CEAA* requires an environmental assessment of any project that requires a federal government authority, known as the “responsible authority”, to issue a permit or licence, grant an approval or take any other action for the purpose of enabling the project to be carried out in whole or in part.⁴

19. A federal environmental assessment can be triggered, for example, by an application to build a deepwater marine terminal which requires the issuance of a permit under the *Navigable Waters Protection Act*.⁵ Likewise, an environmental assessment can be triggered should a project require specific permits under the *Fisheries Act*,⁶ which requires an authorization by the federal Minister of the Department of Fisheries and Oceans for the destruction of fish by means other than fishing⁷ or for the harmful alteration, disruption or destruction of fish habitat.⁸

20. In conducting an environmental assessment, the *CEAA* requires the responsible authority to “ensure that the environmental effects of projects receive careful consideration” before taking action in connection with them.⁹ “Environmental effects” are defined under the *CEAA* to include:

³ *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, preamble. The *CEAA* was revised in October 2003, but the revised statute only applies to projects submitted for assessment after October 2003. As the Claimants’ project was submitted for environmental assessment prior to October 2003, this overview summarizes the relevant features of the *CEAA* as it existed prior to October 2003 (**Tab 1**).

⁴ *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, s. 5(1)(d) (**Tab 1**).

⁵ *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22, s. 5(1).

⁶ *Fisheries Act*, R.S.C. 1985, c. F-14.

⁷ *Fisheries Act*, R.S.C. 1985, c. F-14, s. 32.

⁸ *Fisheries Act*, R.S.C. 1985, c. F-14, s. 35(2).

⁹ *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, s. 4(a) (**Tab 1**).

(a) any change that the project may cause in the environment, including any change it may cause to a listed wildlife species, its critical habitat or the residences of individuals of that species, as those terms are defined in subsection 2(1) of the *Species at Risk Act*,

(b) any effect of any change referred to in paragraph (a) on

(i) health and socio-economic conditions,

(ii) physical and cultural heritage,

(iii) the current use of lands and resources for traditional purposes by aboriginal persons, or

(iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, or

(c) any change to the project that may be caused by the environment,

whether any such change or effect occurs within or outside Canada...¹⁰

21. Other purposes of the *CEAA* include encouraging “responsible authorities to take actions that promote sustainable development,” and ensuring “that there be an opportunity for public participation in the environmental assessment process.”¹¹ Administrative assistance for environmental assessments is provided to the responsible authority by the Canadian Environmental Assessment Agency (the “Agency”).¹² The *CEAA* specifically tasks the Agency with ensuring an opportunity for public participation in the environmental assessment process.¹³

22. The *CEAA* prescribes four types of environmental assessment. These are environmental assessment by way of: (1) screening; (2) comprehensive study; (3) mediation; (4) assessment by a review panel.¹⁴

23. A project, as scoped by the responsible authority, is required to undergo a comprehensive study if it is listed in the *Regulations Prescribing Those Projects and Classes of Projects for which a Comprehensive Study is Required* (“*Comprehensive Study List Regulations*”). The list of

¹⁰ *Ibid.*, s. 2(1), “environmental effect” (Tab 1).

¹¹ *Ibid.*, s. 4(b), (d) (Tab 1).

¹² *Ibid.*, s. 62(a) (Tab 1).

¹³ *Ibid.*, ss. 4(d), 62(e) (Tab 1).

¹⁴ *Ibid.*, s. 14(a)-(b) (Tab 1).

projects includes the “construction . . . of a marine terminal designed to handle vessels larger than 25 000 DWT [Deadweight Tonnes].”¹⁵

24. Either following the completion of a comprehensive study, or at an earlier point in the process, a project may be required to be assessed by a review panel. In this regard, the *CEAA* confers the following power on the responsible authority:

where at any time a responsible authority is of the opinion that

(a) a project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, may cause significant adverse environment effects, or

(b) public concerns warrant a reference to a mediator or a review panel,

the responsible authority may request the Minister [of the Environment] to refer the project to a mediator or a review panel in accordance with section 29.¹⁶

25. In addition, the *CEAA* also confers authority on the federal Minister of the Environment to refer any environmental assessment or a part thereof to a review panel, if he or she is of the opinion that:

(a) a project for which an environmental assessment may be required . . . , taking into account the implementation of any appropriate mitigation measures, may cause significant adverse environment effects, or

(b) public concerns warrant a reference to a mediator or a review panel.¹⁷

26. Where a project is referred to a review panel, the *CEAA* requires the panel to gather the necessary information, hold public hearings, prepare a report which states its conclusions, rationale and recommendations, and submit that report to the Minister of the Environment and the responsible authority.¹⁸

27. A panel report must give consideration to the purpose of the project, alternative means

¹⁵ *Comprehensive Study List Regulations*, S.O.R./94-638, s. 28(c).

¹⁶ *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, s. 25 (**Tab 1**).

¹⁷ *Ibid.*, ss. 28, 29 (**Tab 1**).

¹⁸ *Ibid.*, s. 34(a)-(d) (**Tab 1**).

for carrying out the project, the project's potential environmental effects, the significance of the environmental effects, comments from the public, the measures available to mitigate any significant adverse environmental effects, the need for and requirements of any follow-up program, and the capacity of any renewable resources to meet present and future needs.¹⁹

28. After receiving the report of a panel, the *CEAA* requires the responsible authority to refuse to exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part if, taking into account potential mitigation measures, the responsible authority considers that the "project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances."²⁰ In making its decision, the responsible authority is required to "take into consideration" a report submitted by a review panel.²¹ Furthermore, responsible authorities shall take a course of action that is in conformity with the approval of the Governor in Council.²²

2. The Nova Scotia Environment Act

29. The *NSEA* was enacted in 1994 in order to "support and promote the protection, enhancement and prudent use of the environment" while recognizing goals such as "maintaining environmental protection," "maintaining the principles of sustainable development," "providing access to information and facilitating effective public participation in the formulation of decisions affecting the environment," and "providing a responsible, effective, fair, timely and efficient administrative and regulatory system...."²³

30. Part IV of the *NSEA* establishes an environmental assessment process for any

¹⁹ *Ibid.*, s. 16(1), (2) (Tab 1).

²⁰ *Ibid.*, s. 37(1)(b) (Tab 1).

²¹ *Ibid.*, s. 37(1.1)(a) (Tab 1).

²² *Ibid.*, s. 37(1.1)(c) (Tab 1).

²³ *Nova Scotia Environment Act*, S.N.S. 1994-95, c. 1, s. 2 (Tab 2). All references to the *Nova Scotia Environment Act* ("*NSEA*") are made to the legislation in force at the time of the events giving rise to the Claimants' claim.

“undertaking as determined by the Minister [of Environment and Labour]²⁴ or as prescribed in the regulations.”²⁵ Where the environmental assessment process of Part IV is engaged, the *NSEA* makes clear that “no person shall commence work on the undertaking” until “the Minister has notified the proponent in writing that [the] undertaking is approved.”²⁶

31. The Nova Scotia *Environmental Assessment Regulations* (“*NSEAR*”), enacted pursuant to Section 49 of the *NSEA*, classify undertakings or classes of undertakings into two types: Class I and Class II.²⁷ Pursuant to the *NSEAR*, “a pit or quarry in excess of 4 ha in area primarily engaged in the extraction of ordinary stone, building or construction stone, sand, gravel or ordinary soil” is within the scope of the definition of a Class I undertaking.²⁸

32. If a proponent wishes to engage in a Class I undertaking, it must first register the project with the Nova Scotia Minister of Environment and Labour. On the review of such a registration, the Minister may request additional information, approve subject to conditions, reject the proposed undertaking, require a focus report, or require an environmental assessment report. The Minister may also refer an environmental assessment to the Nova Scotia Environmental Assessment Review Board (the “Nova Scotia Board”).²⁹

33. The Minister is required to advise the proponent in writing of his or her decision to reject the project if he or she determines there is a likelihood that the undertaking will cause adverse

²⁴ On April 1, 2008, the Nova Scotia Department of Environment and Labour (“NSEL”) was split into two separate Ministries (Nova Scotia Environment and Labour and Workforce Development). However, at the time of the events giving rise to the Claimants’ claim, the responsible Ministry was the NSEL.

²⁵ *Nova Scotia Environment Act*, S.N.S. 1994-95, c. 1, s. 31(1) (Tab 2).

²⁶ *Ibid.*, s. 32(1) (Tab 2).

²⁷ *Nova Scotia Environmental Assessment Regulations*, N.S. Reg. 26/95 (Tab 3). All references to the *Nova Scotia Environmental Assessment Regulations* (“*NSEAR*”) are made to the regulations in force at the time of the events giving rise to the Claimants’ claim.

²⁸ *Nova Scotia Environmental Assessment Regulations*, N.S. Reg. 26/95, Schedule A, s. B.2(1) (Tab 3).

²⁹ *Nova Scotia Environment Act*, S.N.S. 1994-95, c. 1, s. 38(1) (Tab 2).

effects or significant environmental effects which are unacceptable.³⁰

34. The *NSEAR* define an “adverse effect” as “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.”³¹ They define an “environmental effect” as “any change, whether positive or negative, 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.”³² Finally, with respect to an environmental effect, “significant” means “an adverse impact in the context of its magnitude, geographic extent, duration, frequency, degree of reversibility, possibility of occurrence or any combination of the foregoing.”³³

3. The Joint Review Panel Process

35. Canada’s constitutional division of powers between the federal and provincial governments frequently result in projects being subject to environmental assessments at both the federal and the provincial level.

36. For example, the authority to legislate with respect to the “sea coast and inland fisheries” and with respect to “navigation and shipping” is the exclusive jurisdiction of the federal government, while the authority to legislate regarding the exploration, development, conservation, and management of non-renewable natural resources is reserved to provincial governments. Thus, a project involving the exploration, development and marine shipment of non-renewable natural resources, that impacts fisheries, engages both federal and provincial jurisdiction.

37. The *CEAA* and the *NSEA* seek to achieve harmonization in such instances by providing

³⁰ *Nova Scotia Environmental Assessment Regulations*, N.S. Reg. 26/95, s. 13(1)(e) (**Tab 3**).

³¹ *Ibid.*, s. 2(c) (**Tab 3**).

³² *Ibid.*, s. 2(l) (**Tab 3**).

³³ *Ibid.*, s. 2(u) (**Tab 3**).

for a joint environmental assessment process. The joint environmental assessment process prevents unnecessary duplication of effort by governments and proponents and maximizes efficiency and cost-savings.

38. Specifically, the *CEAA* provides:

where the referral of a project to a review panel is required or permitted by this Act and [the government of a province] has a responsibility or an authority to conduct an assessment of the environmental effects of the project or any part of it, the Minister [of the Environment]

(a) may enter into an agreement or arrangement with that [province] respecting the joint establishment of a review panel and the manner in which an assessment of the environmental effects of the project is to be conducted by the review panel; and

(b) shall . . . offer to consult and cooperate with that [province] respecting the assessment of the environmental effects of the project.³⁴

39. The *NSEA* likewise provides:

(1) Where an undertaking is also subject to the environmental assessment or other review requirements of . . . Her Majesty in right of Canada [the federal government] . . . the Minister may enter into an agreement with the other government . . . in order to

(a) determine what aspects of the undertaking are governed by the laws of the respective governments;

(b) provide for the carrying out of

(i) the environmental assessment in whole or in part for the purpose of this Part, or

(ii) the review of the undertaking under any enactment . . .

(2) . . . the Minister, when negotiating an agreement pursuant to subsection (1), may vary the environmental assessment administrative requirements of this Part.³⁵

40. When a project requires an environmental assessment by both the federal and provincial governments, the federal Minister of the Environment and the Nova Scotia Minister of

³⁴ *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, s. 40(2) (Tab 1).

³⁵ *Nova Scotia Environment Act*, S.N.S. 1994-95, c. 1, s. 47 (Tab 2).

Environment and Labour may enter into an agreement to establish a joint review panel. When such an agreement is concluded, the joint review panel is governed by Terms of Reference negotiated by both governments and the environmental assessment conducted by the joint review panel is deemed by both the *CEAA* and the *NSEA* as sufficient to meet the requirements of both Acts.³⁶

41. On receipt of the recommendation of a joint review panel, the federal responsible authority, in accordance with the approval of the Governor in Council, must decide whether or not to exercise any power or perform any duty or function that would permit the project to be carried out. At the provincial level, the Nova Scotia Minister must decide whether or not to approve the project, reject the project, or approve the project with conditions. Further, each government is entitled to exercise its own decision making authority and to accept in whole or in part, or reject entirely, the recommendations of the joint review panel.

C. The Environmental Assessment of the Proposed 152 Hectare Quarry and Marine Terminal

1. Overview of the Claimants' Proposal

42. This overview refers to the following legal entities involved in the Claimants' project:

- Nova Stone Exporters Inc. ("Nova Stone"), a Nova Scotia limited liability company unrelated to the Claimants. As described below, Nova Stone obtained a permit to construct and operate a 3.9 hectare quarry on the parcel of land ultimately designated for the proposed 152 hectare quarry and marine terminal.
- Bilcon of Nova Scotia, Corporation ("Bilcon"), a Nova Scotia limited liability company incorporated on April 24, 2002 and allegedly owned and operated by the Claimants.

³⁶ *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, s. 42 (**Tab 1**); *Nova Scotia Environment Act*, S.N.S. 1994-95, c. 1, s. 47 (**Tab 2**).

- Global Quarry Products (“GQP”), a Nova Scotia partnership registered on April 25, 2002 and consisting of Nova Stone and Bilcon. GQP was the initial proponent of the 152 hectare quarry and marine terminal but in or around November of 2004 GQP was dissolved, leaving Bilcon as the sole proponent of the project.

a) Nova Stone’s Initial Application for a 3.9 Hectare Quarry on the 152 Hectare Quarry Site

43. On April 23, 2002, Nova Stone filed an application with the Nova Scotia Department of Environment and Labour (“NSEL”) for industrial approval to construct and operate a 3.9 hectare quarry on the parcel of land ultimately designated for the 152 hectare quarry. The 3.9 hectare quarry was to be used to drill, blast, crush, screen, wash and stockpile rock for use in the facilities that would service the larger 152 hectare quarry. GQP also later disclosed to government authorities that a primary objective of blasting on the 3.9 hectare quarry was to gather on-site data for further assessment of the potential impact of blasting on the marine environment, and that this data would be used during the anticipated environmental assessment of the 152 hectare quarry and marine terminal.

44. A quarry of less than 4 hectares is not required to undergo a provincial environmental assessment under Nova Scotia legislation. On April 30, 2002, NSEL therefore issued a conditional permit to Nova Stone to construct and operate the 3.9 hectare quarry (“the 3.9 hectare quarry permit”).³⁷ In accordance with applicable legislation, the permit was valid for ten years, from April 30, 2002 until April 30, 2012.

45. While a quarry of less than 4 hectares does not require a provincial environmental assessment under Nova Scotia legislation, the blasting activity on such a quarry could still engage concerns under the jurisdiction of the federal Department of Fisheries and Oceans (“DFO”). DFO is responsible for considering whether such concerns could also require the

³⁷ Government of Nova Scotia, Approval to Construct and Operate Quarry, Approval No. 2002-026397, PID: 30161160 (30 April 2002) (Tab 4). The 3.9 hectare quarry permit was issued only to Nova Stone and not to Bilcon or to Global Quarry Products.

issuance of authorizations under the *Fisheries Act* and therefore an environmental assessment under the *CEAA*. Thus, prior to issuing the April 30, 2002 permit to Nova Stone, NSEL consulted with DFO on the proximity of the proposed 3.9 hectare quarry to the Bay of Fundy and its potential impact on the marine ecosystem.

46. As a result of its consultations with DFO, NSEL included a condition in the 3.9 hectare quarry permit that any blasting on the site shall be conducted in accordance with DFO's *Guidelines for the Use of Explosives in or Near Canadian Fisheries Waters* – 1998.³⁸ The permit also required Nova Stone to submit a report to DFO, prior to commencing any blasting activity, verifying the intended charge and blast design would not have an adverse effect on marine mammals in the area.³⁹

47. In or around the time of issuance of the 3.9 hectare quarry permit, the Claimants' intention to construct and operate the larger 152 hectare quarry and marine terminal had been made known to the federal and provincial government authorities.

b) GQP's Proposal to Construct the 152 Hectare Quarry and Marine Terminal

48. After the issuance of the 3.9 hectare quarry permit, GQP consulted with NSEL and several federal departments on a draft project description for the proposed 152 hectare quarry and marine terminal. As the proposal would trigger an environmental assessment, the Canadian Environmental Assessment Agency's Halifax Regional Office coordinated consultations and the provision of comments on the draft project description.

49. In March 2003, GQP submitted a final version of its project description for the 152 hectare quarry and marine terminal to the Agency. The proposed quarry was to have an active life of 50 years. Approximately 120 hectares of the 152 hectare property were to be quarried, with the remaining lands to be set aside as buffer zones. Basalt was to be extracted through

³⁸ *Ibid.*, ¶ 10(h) (Tab 4).

³⁹ *Ibid.*, ¶ 10(i) (Tab 4).

drilling and blasting and was to be crushed into aggregate on the quarry site, at a production rate of approximately 2 million tonnes per year. The marine terminal was to be large enough to accommodate ships in excess of 25,000 dead weight tonnes (“DWT”). The aggregate was to be shipped from the marine terminal, down through the Bay of Fundy, to New Jersey at a rate of approximately 40,000 tonnes per week, forty to fifty times a year.

2. Determinations by the Department of Fisheries and Oceans

50. Given the scope and potential impact of GQP’s proposed 152 hectare quarry and marine terminal, DFO determined that the project would require a federal environmental assessment under *CEAA*. DFO informed GQP of this on April 14, 2003. As the proposed quarry was over 4 hectares in area it would also require a provincial environmental assessment under the *NSEA* and *NSEAR*.

51. With respect to the 3.9 hectare quarry, DFO advised Nova Stone on May 29, 2003 that the blasting activity proposed for this site was likely to cause the destruction of fish, including the endangered inner Bay of Fundy population of Atlantic salmon, and would therefore require an authorization under the *Fisheries Act*. DFO also expressed concern about the potential impact of the proposed blasting activity on marine mammals in the vicinity of the 3.9 hectare quarry site. Finally, DFO advised Nova Stone that as the 3.9 hectare quarry was within the larger area of the proposed 152 hectare quarry and marine terminal, it would not be able to issue an authorization for the blasting plan relating to the 3.9 hectare quarry until the environmental assessment of the larger project had been completed.

3. Applicable Environmental Assessment Regime

52. GQP’s proposal for the 152 hectare quarry and marine terminal involved the exploitation of non-renewable resources (a matter under provincial jurisdiction), and the construction of a work in navigable waters, marine shipping, and the potential destruction of fish and fish habitat (all areas of federal jurisdiction). Thus, an environmental assessment of the project was required at both the provincial and federal levels.

53. Given its scope, location, and potential impact, the project raised considerable public attention and concern. The project was also likely to result in significant adverse environmental effects. As such, in May of 2003, DFO officials recommended to the Minister of Fisheries and Oceans that the project should be referred to a review panel. Subsequently, in or around June and July of 2003 the federal Ministers of the Environment and of Fisheries and Oceans, and the provincial Minister of Environment and Labour, agreed that an assessment by way of review panel was the most appropriate level of assessment, and that the assessment would be harmonized between the federal and provincial governments. On August 11, 2003, Canada and Nova Scotia solicited public comments on a draft agreement to establish such a joint review panel.

4. Bilcon's Request to Delay the Constitution of the Joint Review Panel

54. On March 1, 2004, legal counsel for Bilcon requested that the Agency delay the finalization of the federal-provincial agreement establishing the joint review panel until further notice. This request was made because GQP (the partnership between Nova Stone and Bilcon and the proponent of the 152 hectare quarry and marine terminal) was to be potentially restructured, resulting in a change in the proponent of the project.

55. On August 17, 2004, Bilcon informed the Agency that GQP had been dissolved and that Bilcon was the sole proponent of the 152 hectare quarry and marine terminal. Bilcon requested that the federal-provincial agreement, which was being held in abeyance at Bilcon's request, be amended to reflect this change.

5. The Establishment of the Joint Review Panel

56. On November 3, 2004, the federal Minister of Environment and the Nova Scotia Minister of the Environment and Labour entered into the *Agreement Concerning the Establishment of a Joint Review Panel for the Whites Point Quarry and Marine Terminal Project* (the "Joint Review

Panel Agreement”).⁴⁰

57. The mandate of the Joint Review Panel (the “Panel”) was to “conduct its review in a manner that discharges the requirements set out in the *Canadian Environmental Assessment Act*, Part IV of the *Nova Scotia Environment Act* and the Terms of Reference” attached to the Agreement.⁴¹

58. The Panel’s Terms of Reference identified sixteen specific factors that were to be considered in its assessment. These included, among others: the location of the proposed quarry and marine terminal and the nature and sensitivity of the surrounding area, the socio-economic effects of the proposed project, any cumulative environmental effects that are likely to result from the project and public comments.⁴²

59. The Government of Canada and the Government of Nova Scotia appointed three professors from Dalhousie University, based in Halifax, Nova Scotia, as the Panel Members. These individuals were: Dr. Robert Fournier (Chair), a Dalhousie professor of Oceanography, Dr. Jill Grant, a professor in Dalhousie’s School of Planning, and Dr. Gunter Muecke, a professor emeritus at Dalhousie’s School of Resource and Environmental Studies and the Faculty of Science.

6. The Joint Review Panel Process

60. As required by its Terms of Reference, the Panel collected all relevant information needed for its consideration of the proposed quarry and marine terminal. This included the process of soliciting public comment on the Environment Impact Statement (“EIS”) that was to be prepared by Bilcon for the environmental assessment.⁴³

⁴⁰ *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 (3 November 2004) (Tab 5).

⁴¹ *Ibid.*, s. 4.1 (Tab 5).

⁴² *Ibid.*, Terms of Reference, Part III, at 9 (Tab 5).

⁴³ *Ibid.*, Terms of Reference, Part II, at 7-8 (Tab 5).

61. The Panel issued the draft EIS Guidelines for public comment on November 10, 2004. Following this consultation period, the Panel issued the final EIS Guidelines on March 31, 2005. Bilcon completed its EIS one year later, on March 31, 2006 and provided copies of the EIS to the Panel on April 24, 2006.

62. In accordance with its Terms of Reference, the Panel was mandated to identify deficiencies in the EIS. It also had the discretion to require additional information from Bilcon on consideration of comments received from the public.⁴⁴ The Panel was also responsible for ensuring that the information required for an assessment by a review panel was obtained and made available to the public.⁴⁵ In advance of Bilcon's submission of the EIS, the Panel Chair wrote to Bilcon to outline the process to be followed for the comment period on the EIS.

63. On review of the EIS, the Panel determined that specific information was either missing or incomplete. It requested, on several occasions, further information from Bilcon in order to clarify certain aspects of the proposal. Bilcon submitted its final response to the Panel's requests for information and to the public comments in April 2007.

64. The Panel held 13 days of public hearings from June 16 through June 30, 2007. It heard testimony from 78 individuals, and received 126 written submissions. The transcripts of the oral hearings run over 3200 pages and transcript of sessions on the draft EIS Guidelines exceed 500 pages. As contained in the project file and posted on the Public Registry, the Panel likewise received over 600 public comments prior to commencement of hearings including a petition of a residents group of 114 citizens.

65. The Panel completed its report in accordance with the time requirements of its Terms of Reference and submitted it to Canada and Nova Scotia in October 2007.⁴⁶ The federal Minister of Environment and provincial Minister of Environment and Labour released the report to the public on October 23, 2007.

⁴⁴ *Ibid.*, Terms of Reference, Part II, at 8, s. 7 (Tab 5).

⁴⁵ *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, s. 34(a) (Tab 1).

66. The Panel's ultimate recommendation was to reject the proposed project in its entirety. In its report, the Panel explained that its recommendation was based on the significant adverse environmental effects that the project would cause to the physical, biological and human environment on Digby Neck and in the Bay of Fundy, including on the "core community values" of the affected communities. It also found that Bilcon had not established that these adverse environmental effects could be effectively and economically mitigated. The Panel concluded that the significant adverse environmental effects could not be justified in the circumstances.

D. The Decisions of Nova Scotia and Canada Not to Approve the Quarry and Marine Terminal

67. Immediately after the Panel report was made public, Bilcon lobbied the governments of Canada and Nova Scotia to reject the Panel's recommendation. Throughout its campaign Bilcon recognized the ultimate decision regarding its project would be made by governmental authorities, and that the Panel report was solely a recommendation.

68. Pursuant to section 6.7 of the Joint Review Panel Agreement, the Nova Scotia Minister of the Environment and Labour was to "consider the recommendation of the Panel, and either approve with conditions, or reject the Project."⁴⁷ On November 20, 2007, the Minister wrote to Bilcon advising of his determination that the proposed quarry and marine terminal posed a threat of unacceptable and significant adverse effects to the existing and future environmental, social and cultural conditions. In accordance with Section 40 of the *NSEA*, he decided to reject the project.

69. On December 17, 2007, the Government of Canada notified Bilcon that it accepted the conclusions and recommendations of the Panel. In accordance with section 37 of the *CEAA*, DFO, in accordance with the approval of the Governor in Council, decided that the project was likely to cause significant adverse environmental effects that could not be justified in the

⁴⁶ *Environmental Assessment of the Whites Point Quarry and Marine Terminal Project*, Joint Review Panel Report (October 2007) (**Tab 6**).

⁴⁷ *Agreement Concerning the Establishment of a Joint Review Panel for the Whites Point Quarry and Marine Terminal Project*, s. 6.7 (**Tab 5**).

circumstances. Accordingly, DFO was required to refuse to exercise any power or perform any duty or function that would permit the project to be carried out.

70. Neither Bilcon nor the individual Claimants sought judicial review of these decisions, or of *any* of the other measures of which they complain, in either the Federal Court of Canada or the courts of Nova Scotia.

III. THE TRIBUNAL HAS NO JURISDICTION TO HEAR CERTAIN ASPECTS OF THE CLAIM

71. The Claimants have brought their claim against Canada pursuant to Article 1116 of NAFTA. Article 1116(1) provides:

An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

72. A claim can only be brought pursuant to Article 1116 in respect of a measure of Canada that is alleged to have breached Section A of Chapter 11, and if the alleged investors⁴⁸ incurred loss or damage by reason of, or arising out of, that alleged breach.

⁴⁸ The Claimants allege that William Ralph Clayton, William Richard Clayton, Douglas Clayton and Daniel Clayton are U.S. citizens. See *Statement of Claim*, ¶ 11. Canada reserves the right to object to the standing of the individual Claimants if proof of citizenship is not provided. Further, the Claimants allege that Bilcon of Delaware, Inc. is a limited liability company incorporated under the laws of Delaware. While they attach its certificate of incorporation, they have not attached proof that it was in fact still a Delaware corporation on the date that this arbitration was submitted. Canada reserves its right to object to the standing of Bilcon of Delaware, Inc. if such proof is not furnished.

1. The Tribunal Does Not Have Jurisdiction over the Actions and Recommendations of the Joint Review Panel

73. The Claimants allege that the “process by which the governmental authorities conducted the environmental assessment” violated Article 1105 of NAFTA.⁴⁹ They further allege that Canada breached Article 1105 because the “Joint Panel completely disregarded the analytical decision-making framework that environmental review panels of this nature are required to follow” and based its decision on criteria that “are not properly included as part of environmental assessments” and of which the Claimants “were given no prior notice.”⁵⁰

74. The Claimants allege that these “measures” (in respect of which they did not seek judicial review) are attributable to the Government of Canada and the Government of Nova Scotia because the Panel is an “organ” of both governments.⁵¹ This allegation is false. The Panel is not an organ of either Canada or Nova Scotia. Nor is there any other justification for holding Canada responsible for the acts of the Panel at international law. The Claimants are not entitled to bring a claim for breach of Article 1105 on the basis of any alleged actions of the Panel.

2. The Claimants Do Not Have Standing to Bring a Claim with Respect to the 3.9 Hectare Quarry Permit Issued to Nova Stone

75. The Claimants allege that Canada has breached Article 1102 because the “initial permit granted by [the Nova Scotia Department of Environment and Labour] for a 3.9 hectare quarry came with terms and conditions unlike those that were granted to similar quarries in the immediate area.”⁵² The Claimants also allege that DFO “unilaterally expanded the terms and conditions of the quarry permit” in breach of NAFTA Article 1105.⁵³

76. The 3.9 hectare quarry permit was applied for and granted to Nova Stone, a Canadian corporation unrelated to the Claimants. Bilcon later partnered with Nova Stone to form GQP.

⁴⁹ *Statement of Claim*, ¶ 36(c).

⁵⁰ *Ibid.*, ¶ 36(d).

⁵¹ *Ibid.*, ¶¶ 26(g), 27(e).

⁵² *Ibid.*, ¶ 33(a).

⁵³ *Ibid.*, ¶ 36(a).

However, the Claimants provide no evidence that Bilcon acquired an interest in the permit to operate the 3.9 hectare quarry. Even if it did, Nova Stone could not assign more rights than it had under the permit. The assignment of the permit cannot give rise to a breach of the NAFTA where no breach could have existed before the assignment. Furthermore, the Claimants have not established that they suffered any loss or damage arising out of this alleged breach. Consequently, the Claimants have not shown that they have standing to pursue this claim.

3. The Tribunal Does Not Have Jurisdiction to Consider Measures Prior to June 17, 2005

77. NAFTA Article 1116(2) provides:

An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

78. The effective date for the Claimants' submission of this matter to arbitration is June 17, 2008. The Claimants are prohibited from making a claim if they acquired, or should have acquired, knowledge of the alleged breach and that they had incurred loss or damage arising out of that breach prior to June 17, 2005.

79. The Claimants admit in their Statement of Claim that many of the alleged measures that caused them losses occurred significantly prior to this date.⁵⁴ They further admit that the measures of which they complain "may seem discrete and unconnected."⁵⁵ The Claimants' plea that otherwise time-barred measures are part of a contiguous whole is wrong as a matter of fact and law. The following alleged measures are beyond the jurisdiction of this Tribunal by virtue of Article 1116(2):

a) Measures Alleged in Connection with 3.9 Hectare Quarry Permit

80. The Claimants allege that Canada breached Article 1102 by imposing certain terms and

⁵⁴ *Ibid.*, ¶ 29.

conditions on the 3.9 hectare quarry permit issued to Nova Stone.⁵⁶ Even if the Claimants had standing to pursue such a claim it is beyond the jurisdiction of the Tribunal.

81. Nova Stone applied for the 3.9 hectare quarry permit in April 2002. That permit, with all of the terms and conditions of which the Claimants now complain, was granted on April 30, 2002—more than six years prior to the filing of the Notice of Arbitration. The Claimants also knew of the alleged additional costs that such allegedly improper terms and conditions imposed as early as 2003. Moreover, the Claimants admitted in August 2004 that the 3.9 hectare quarry permit had been rendered invalid as a result of Nova Stone’s withdrawal from the project.

82. The Claimants are not permitted to launch a NAFTA claim on the basis of allegations concerning a permit that they admit was rendered void by the actions of their former partner more than three years prior to the submission of the arbitration. This Tribunal does not have jurisdiction to consider the Claimants’ allegation that the terms and conditions attached to the permit violated NAFTA Article 1102.

**b) Measures Alleged in Connection with Referral of
Environmental Assessment to a Joint Review Panel**

83. The Claimants allege that Canada breached Article 1102 because “the type of environmental assessment that the proposed larger quarry and marine terminal were required to undergo was more onerous than the types of environmental assessments other Canadian investors with applications for large industrial projects have had to undergo.”⁵⁷

84. The decision to refer the environmental assessment to the Panel was made in June 2003 and finalized in the form of the agreement between Canada and Nova Scotia in November 2004. All of these events occurred before the relevant date of June 17, 2005. The Claimants knew or should have known of the alleged additional costs associated with a panel review as opposed to other forms of review at the time of the referral. The Tribunal does not have jurisdiction to

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, ¶ 33(a).

⁵⁷ *Ibid.*, ¶ 33(b).

consider the Claimants' allegations that the referral of their project to the Panel in 2003 constituted a breach of Article 1102.

c) Measures Alleged in Connection with Department of Fisheries and Oceans

85. The Claimants allege that Canada violated Article 1105 because DFO “unilaterally expanded the terms and conditions of the [3.9 hectare] quarry permit, unduly stalled test blasts on the initial quarry site after the application had been expanded and put under environmental review, established unreasonable criteria for fish habitat compensation, and set arbitrary and unfounded criteria for the approval of test blasts for the purposes of the environmental assessment.”⁵⁸ Each of these alleged breaches occurred before June 17, 2005. Bilcon knew or should have known of any alleged losses caused as a result of these alleged actions at the time they occurred. The Tribunal does not have jurisdiction to consider these allegations.

d) Measures Alleged in Connection with Offer to Purchase Public Road

86. The Claimants allege that Canada breached Article 1105 because the Nova Scotia Department of Transportation and Public Works (“NSDTPW”) failed to act reasonably in tendering offers from the Claimants to purchase a public road.⁵⁹ The NSDTPW issued its denial to the Claimants on February 14, 2005, four months before the cut off date of June 17, 2005. Bilcon knew or ought to have known of any alleged losses caused as a result of this decision at that time. This element of its claim is beyond the jurisdiction of the Tribunal by virtue of NAFTA Article 1116(2).

IV. CANADA HAS NOT BREACHED CHAPTER 11 OF NAFTA

87. In this section Canada provides its response to each of the violations of NAFTA Chapter 11 alleged by the Claimants.

⁵⁸ *Ibid.*, ¶ 36(a).

⁵⁹ *Ibid.*, ¶ 36(b).

A. Canada has Not Breached NAFTA Article 1102

88. NAFTA Article 1102 states in relevant part:

- (1) Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
- (2) Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

89. In order to establish a breach of Article 1102, the Claimants must establish that:

- Canada accorded treatment to the Claimants and to domestic investors.
- Canada accorded such treatment to the Claimants and to domestic investors “in like circumstances”.
- The treatment accorded to the Claimants was “less favourable” than that accorded to the domestic investors.

90. The Claimants have failed to plead any facts in support of their allegation that Canada breached Article 1102. They allege that other small quarries in Nova Scotia “in the immediate area” of the 3.9 hectare quarry for which Nova Stone received a permit, received more favourable treatment,⁶⁰ but ignore the fact that Bilcon *never* intended to operate a 3.9 hectare quarry as anything other than a part of the larger 152 hectare quarry operation. Similarly, they vaguely allege that applications by “large Canadian owned quarries with marine terminals” have had to undergo less onerous environmental assessments than did Bilcon.⁶¹ The Claimants provide no facts to support these bald allegations.

B. Canada has Not Breached NAFTA Article 1105

91. NAFTA Article 1105(1) provides:

⁶⁰ *Ibid.*, ¶ 33(a).

⁶¹ *Ibid.*, ¶ 33(b).

Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

92. NAFTA Article 1105 governs the treatment accorded to investments. The NAFTA Free Trade Commission's ("FTC's") binding Note of Interpretation confirms that Article 1105(1) is properly interpreted as referring to the minimum standard of treatment under customary international law.⁶² A claimant alleging a breach of Article 1105(1) must first demonstrate the existence of a rule of customary international law and that it forms part of the minimum standard of treatment of aliens. The claimant must then demonstrate that the measure has breached this rule of customary international law.

93. With respect to each of the alleged breaches of Article 1105, the Claimants have failed to even attempt to meet their burden. They are unable to do so because the alleged measures of Canada and Nova Scotia provided the Claimants' alleged investment with a fair and impartial process that more than met the requirements of customary international law.

1. The Alleged Actions of the Department of Fisheries and Oceans did not Violate Article 1105

94. The Claimants advance a number of unsubstantiated allegations relating to measures taken by DFO in connection with the 3.9 hectare quarry permit issued by NSEL and the Claimants' blasting plan.⁶³ In addition to not being capable of constituting a breach of Article 1105, the allegations are not factually correct.

95. DFO did not "unilaterally expand" the terms and conditions of the 3.9 hectare quarry permit. Any measures taken by DFO in connection with its review of Nova Stone's report on blasting activity fell within its jurisdiction governing activities that impact on fisheries. DFO had the responsibility to consider the impact of the proposed blasting activity on matters under

⁶² NAFTA Free Trade Commission, "Note of Interpretation of Certain Chapter 11 Provisions", (31 July 2001), online: <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp>; see also NAFTA Article 1131(2) which provides the Note of Interpretation is binding on tribunals constituted under NAFTA Chapter 11.

⁶³ *Statement of Claim*, ¶ 36(a).

its jurisdiction, and to take appropriate measures in accordance with its legislation.

96. DFO did not unduly stall test blasts on the 3.9 hectare quarry site. The time taken to reach a decision on the acceptability of the blasting activity on the 3.9 hectare quarry site was reasonable and reflective of the consultations necessitated by the Claimants' proposal, and the specific circumstances of the project.

97. DFO did not impose unreasonable conditions for fish habitat compensation. The fish habitat compensation plan provided by the Claimants was typical of plans applied to other projects in the region requiring a *Fisheries Act* authorization. DFO supported the proposed compensation plan and stated so in a letter to the Claimants in November 2005.

98. DFO did not impose arbitrary or unfounded criteria for the approval of test blasts. DFO recommended the redesign of the Claimants' blasting plan to increase set back distances from the shoreline and to reduce the size of individual charges on the basis of established criteria. It made these recommendations in light of the specific circumstances and fishery resource conditions engaged by the project. DFO was responsible for taking such measures under the *Fisheries Act*.

2. The Refusal to Sell the Road Did Not Violate Article 1105

99. The Claimants make several allegations concerning the Nova Scotia Department of Transportation and Public Works' ("NSDTPW") refusal to sell a right of way to the Claimants.⁶⁴ These allegations do not disclose measures capable of constituting a violation of Article 1105.

100. The issue of whether or not the Whites Cove Road was sold to the Claimants was irrelevant to the project "moving forward". The project had to first undergo an environmental assessment in order to move forward.

101. Further, the Claimants' application to purchase the Whites Cove Road was assessed by the NSDTPW in accordance with procedures set out in *Disposal of Surplus Highway Right-of-Way* PR5002. The conditions for final approval of any request to purchase this road were

⁶⁴ *Ibid.*, ¶ 36(b).

contained in PR5002. NSDTPW provided PR5002 to the Claimants, along with an application form, in July of 2002. The decision to refuse the Claimants' offer was based on PR5002, which was applied in the same manner as any other similar request to purchase surplus property. The Claimants have provided no factual foundation to suggest otherwise.

102. The Claimants also allege that their failure to purchase the road was motivated by "political bias" against the project. The Claimants provide no factual foundation for this allegation which is without merit.

3. The Environmental Assessment Process Did Not Violate Article 1105

103. The Claimants advance numerous allegations regarding the process by which governmental authorities conducted the environmental assessment, complaining that it was irregular, time-consuming and exceeded the maximum time limit allowed for such environmental assessments.⁶⁵ No element of the environmental assessment process breached a rule of customary international law relating to the minimum standard of treatment of aliens.

104. Further, the environmental assessment process was conducted in a manner consistent with applicable provincial and federal legislation, regulations and policies. Given the size and potential impact of the Claimants' project, and the public interest that it attracted, there was nothing irregular or unduly time-consuming about the process, which was administered rationally and in keeping with the purposes underlying environmental assessment. The process did not exceed a maximum time limit allowed for environmental assessments because no such maximum exists under applicable legislation or policy.

105. Much of the time that was taken to complete the environmental assessment can be attributed to the inaction and delay of the Claimants. For example, the Claimants requested that the finalization of the Agreement establishing the Panel be delayed for a period of five months, from March 1st, 2004 until August 17, 2004. The Claimants also took a full year from the publication of the EIS Guidelines on March 31st, 2005 to complete and submit the EIS.

⁶⁵ *Ibid.*, ¶ 36(c).

106. There is no rule of customary international law that establishes time limits for environmental assessment processes, and no rule that limits what a government can require in terms of the environmental sustainability of a project under environmental assessment. The Claimants' unsubstantiated allegations regarding the environmental assessment process do not demonstrate the existence of an Article 1105 claim.

4. The Decision of the Joint Review Panel Did Not Violate Article 1105

107. The Claimants allege that the Joint Review Panel disregarded the decision-making framework panels are required to follow, that its decision was based on criteria not properly included as part of environmental assessments, and that they were given no prior notice the Panel would be relying on such criteria.⁶⁶ The Claimants mischaracterize the nature and mandate of the Joint Review Panel. Further, in addition to not being attributable to Canada at international law, the Panel's application of the criteria that it was required to apply in making its recommendations regarding the Claimants' project does not constitute a breach of NAFTA Article 1105.

108. The Panel did not issue a "decision" as alleged by the Claimants. Nor was it required to follow any "decision-making framework." The Panel made recommendations to provincial and federal authorities, who subsequently issued decisions regarding the Claimants' project. In making its recommendations the Panel followed the framework set out in the Terms of Reference attached to the Joint Panel Review Agreement. The Panel's recommendation that the Claimants' project should be rejected was based on criteria prescribed by the Terms of Reference. These criteria reflected the requirements of both the *CEAA* and the *NSEA* and were well known to the Claimants, who acknowledged them as being applicable to the Panel review, and who were given every opportunity to address them over the course of the review.

C. Canada Has Not Breached Article 1103

109. The Claimants' allegations with respect to Canada's alleged breach of Article 1103

⁶⁶ *Ibid.*, ¶ 36(d).

consist of a restatement of the article and seven words—“Canada has failed to meet this obligation.”⁶⁷ The Claimants have admitted that they have no basis for this claim. In their submission on the Timing of Information Requests, dated March 27, 2009, the Claimants state that they have no evidence to support their assertion that Canada failed to meet its obligations under Article 1103.⁶⁸ Canada should not be required to respond to this allegation in light of the Claimants’ admission. Canada also asserts that it has met all of its obligations under Article 1103 with respect to the treatment accorded to the Claimants.

V. THE CLAIMANTS ARE NOT ENTITLED TO DAMAGES

110. A claimant must establish a sufficient causal link between the alleged breaches of NAFTA and the damages that it claims. The Claimants have not even attempted to meet their burden or establish the facts necessary to prove the damages they claim. The Claimants provide no foundation for the assertion that the alleged breaches of NAFTA caused them damages of US\$ 101 million.

111. Further, the Claimants ignore the fact that until mid-2004 Bilcon held its interest in the proposed 152 hectare quarry and marine terminal in a partnership with a Canadian enterprise, Nova Stone. Bilcon is not permitted to claim any damages suffered by its partner as a result of measures that were allegedly undertaken prior to the dissolution of that partnership.

112. Canada denies that any measure of Canada or Nova Scotia caused the Claimants losses, and puts the Claimants to strict proof of their entitlement to damages and the amounts of any such alleged damages suffered by the Claimants.

⁶⁷ *Ibid.*, ¶ 38.

⁶⁸ Claimants’ Submission on the Timing of Information Requests, ¶ 19(a).

VI. AWARD SOUGHT BY CANADA

113. For the reasons outlined above, Canada respectfully requests that:

- (a) The Tribunal dismiss Claimants' claims in their entirety; and
- (b) Pursuant to NAFTA Article 1135(1) and Article 40 of the UNCITRAL Arbitration Rules, the Tribunal require the Claimants to bear all costs of the arbitration, including Canada's costs of legal assistance and representation; and
- (c) The Tribunal grant any other relief it deems appropriate.

DATE: May 4, 2009

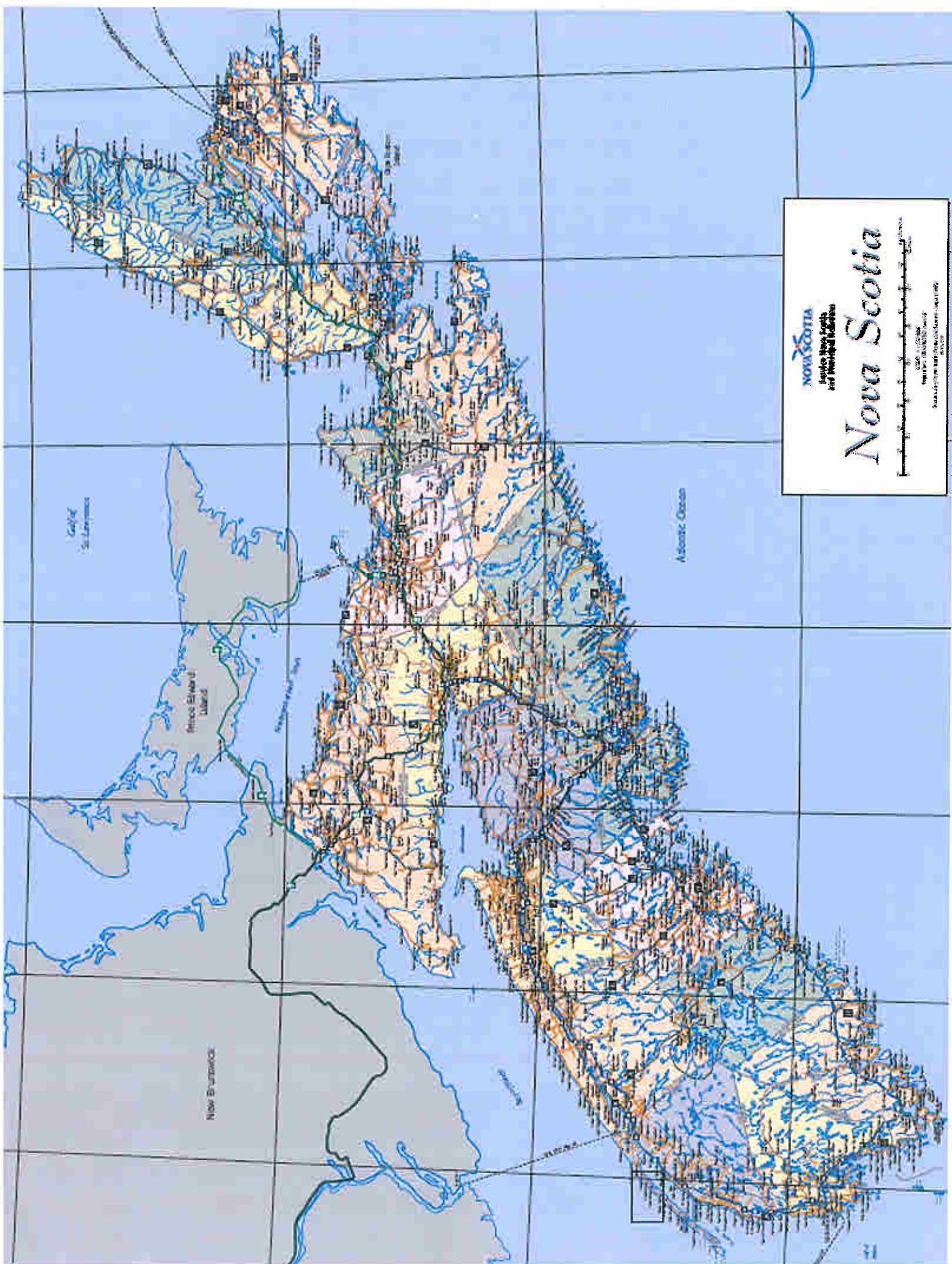
*Respectfully submitted
on behalf of the Government of Canada,*



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APPENDIX I

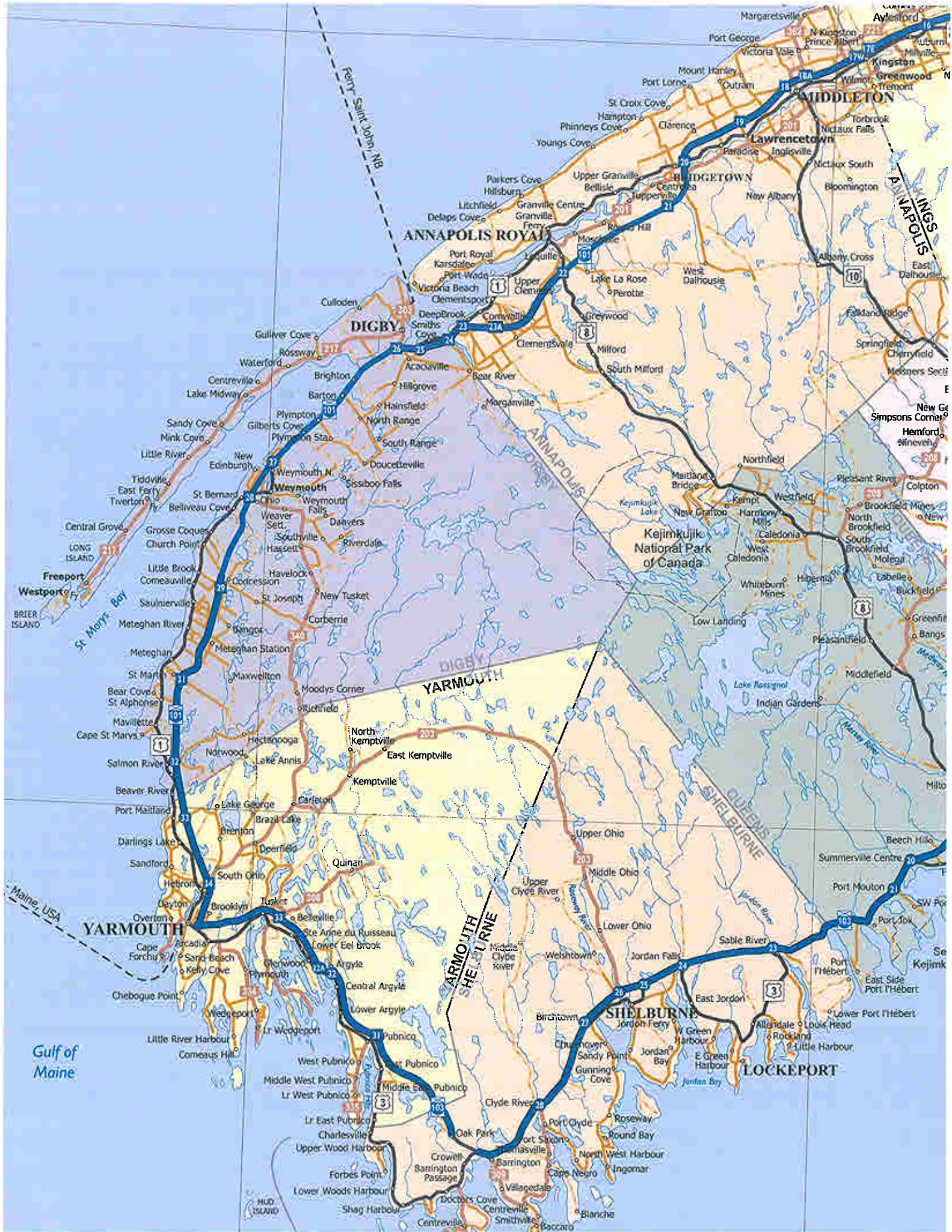


NOVA SCOTIA
Islands, New South
and West of Halifax

Nova Scotia



Scale 1:500,000
1:500,000
Scale 1:500,000
Scale 1:500,000



Ferry - Saint John NB

St Marys Bay

DIGBY YARMOUTH

YARMOUTH SHELBURNE

QUEENS SHELBURNE

ANAPOLIS

Kejimikujik National Park of Canada

Gulf of Maine

Maine, USA

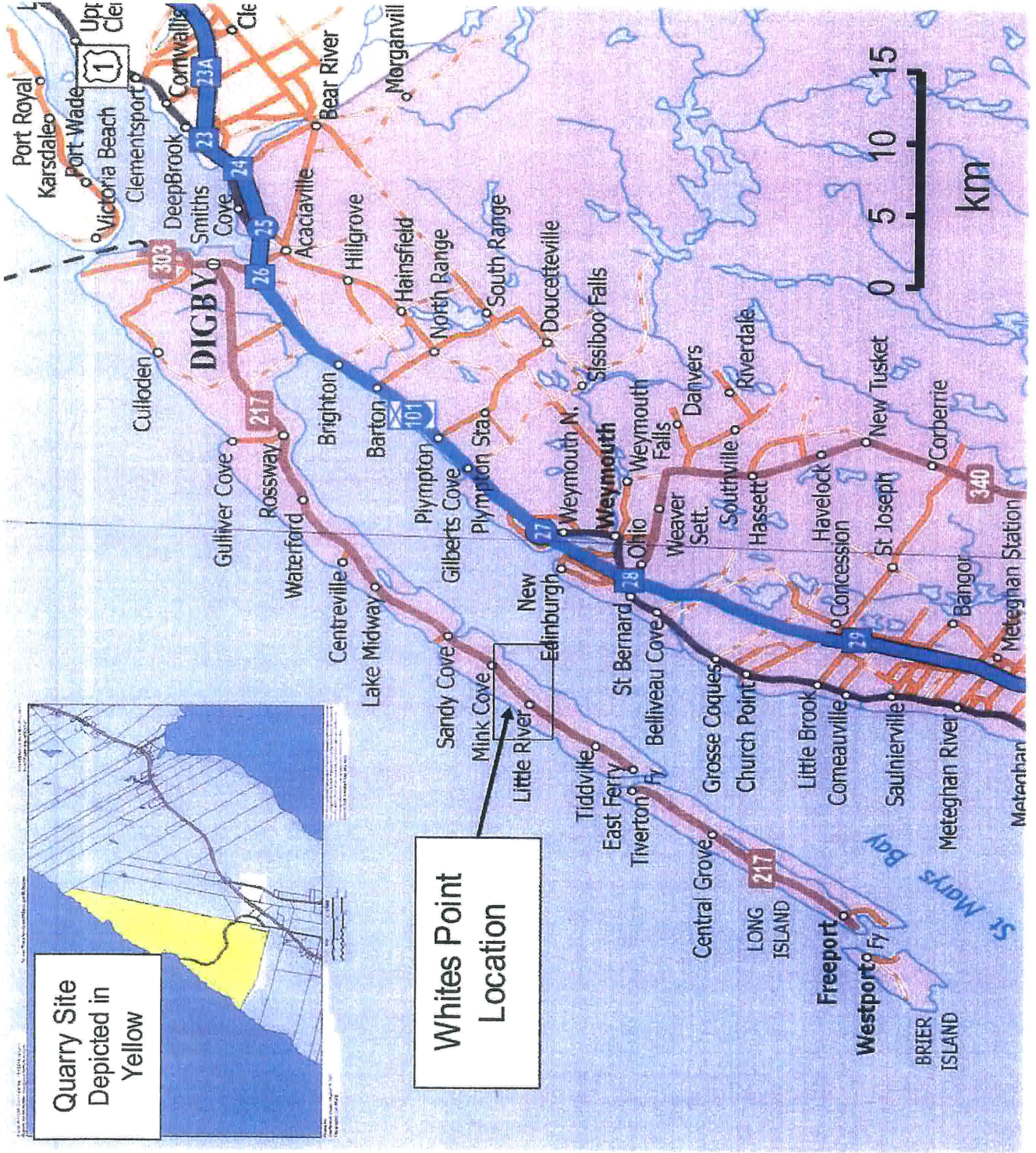
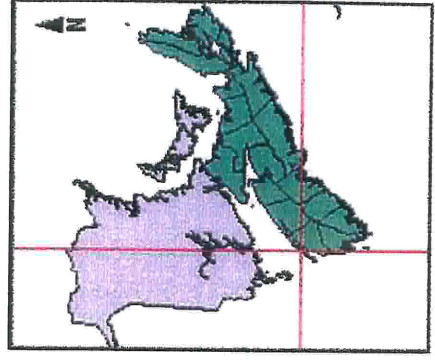
MUD ISLAND

APPENDIX II

Whites Point Quarry and Marine Terminal Project Locator Map

Digby County, NS

Compiled by: Lynda Russell
Sooriyakumaran, Map Librarian LIC- Halifax
Service Nova Scotia
October 2007



Quarry Site
Depicted in
Yellow

Whites Point
Location