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1 IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF  
2 THE NORTH AMERICAN FREE TRADE AGREEMENT  
3 AND THE UNCITRAL ARBITRATION RULES,

4 BETWEEN:

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

Claimants

7 - and -

8 GOVERNMENT OF CANADA

Respondent

9 ARBITRATION HELD BEFORE  
10 JUDGE BRUNO SIMMA (PRESIDING ARBITRATOR),  
11 PROFESSOR DONALD McRAE, and PROFESSOR BRYAN SCHWARTZ  
12 held at ASAP Reporting Services Inc.,  
13 Bay Adelaide Centre, 333 Bay St., Suite 900,  
14 Toronto, Ontario  
15 on Monday, October 28, 2013 at 9:32 a.m.

VOLUME 5

16 COUNSEL:

17 Barry Appleton For the Claimants

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19 Frank S Borowicz, Q.C.  
20 Kyle Dickson-Smith  
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27 Kathleen Claussen PCA

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1 Toronto, Ontario  
2 --- Upon resuming on Monday, October 28, 2013  
3 at 9:32 a.m.

4 PRESIDING ARBITRATOR: I think we  
5 can start. Let us resume the hearings. This is  
6 day five of the hearings. And before we start  
7 cross-examination, I note that there are two issues  
8 on the agenda.

9 One is the request by the  
10 claimants for a rebuttal at the end of the oral  
11 proceedings. The other one is a matter which was  
12 brought to our attention by Mr. Little. Can we  
13 deal with this first, maybe?

14 MR. LITTLE: Yes, we can deal with  
15 it first, and actually it is quite simple at this  
16 point because we're just discussing with my friends  
17 opposite on the issue and I think that was really  
18 it. I wanted to note to Mr. Pulkowski it might be  
19 the possibility that we would have something to  
20 raise right now, but we are still in discussions  
21 with the other side. Perhaps at the break or at  
22 lunch we can provide an update.

23 PRESIDING ARBITRATOR: Fine. And  
24 the rebuttal point, it has been brought to your  
25 attention? So may I suggest that you present your

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1 views on that in writing to us, maybe before the  
2 coffee break in the afternoon, and then we get  
3 together, talk about it very briefly at the end of  
4 today's hearing? Would that be acceptable?

5 MR. LITTLE: Sorry, yes. You  
6 wanted views in writing from both sides or from...

7 PRESIDING ARBITRATOR: I think we  
8 got your views in writing, so if you could just  
9 reply very briefly.

10 MR. LITTLE: Absolutely.

11 PRESIDING ARBITRATOR: Then we  
12 take it up orally at the end of the day. This  
13 seems to be everything. Any other household  
14 matters? Housekeeping? No. Okay. So we will  
15 start the examination of Mr. Hood.

16 PRESIDING ARBITRATOR: Good  
17 morning, Mr. Hood.

18 MR. HOOD: Good morning.

19 PRESIDING ARBITRATOR: Mr. Hood  
20 you should have in front of you a statement. Will  
21 you be so kind and read that out, please?

22 MR. HOOD: I solemnly declare upon  
23 my honour and conscience that I will speak the  
24 truth, the whole truth, and nothing but the truth.

25 AFFIRMED: BRUCE HOOD

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1                               PRESIDING ARBITRATOR: Thank you.  
2 Mr. Hood, may I also remind you that you signed an  
3 assurance that you would not follow the witness --  
4 let's say statements of last week on the video or  
5 in any other way. So you have done so?

6                               THE WITNESS: Yes, I did honour  
7 that, yes.

8                               PRESIDING ARBITRATOR: Thank you.  
9 Over to you.

10 EXAMINATION IN-CHIEF BY MR. SPELLISCY:

11                              Q. Good morning, Mr. Hood. Just  
12 to confirm, you submitted an affidavit in this  
13 proceeding so far?

14                              A. Yes.

15                              Q. Okay. Do you have any  
16 corrections to make to that affidavit?

17                              A. No, I don't.

18                              Q. Now, just so the tribunal  
19 recalls in terms of who you are, could you describe  
20 for the tribunal what your role was at DFO in the  
21 early 2000 period?

22                              A. I came to DFO in October  
23 2000. Initially I was the senior biologist in the  
24 habitat operations section at national  
25 headquarters, and in May 2002 I was successful in a

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1 competition and became a senior liaison officer,  
2 and I began that job in June 2002.

3                   There were four regions that I was  
4 attached to: the Gulf region, Maritimes, Quebec  
5 and Newfoundland regions. Essentially all of  
6 eastern Canada.

7                   And my role, myself, and two or  
8 three people -- depended on the time -- that worked  
9 for me, was to provide liaison with habitat  
10 officials in the four regions. We would provide  
11 them with advice on the ongoing environmental  
12 assessments, and these tended to be the larger,  
13 more complex files.

14                   We would also monitor their  
15 delivery of the environmental assessments to ensure  
16 that the department's mandate was being met, and  
17 that we were fulfilling legal environmental  
18 requirements, as well as aboriginal and public  
19 consultation requirements.

20                   Q. And for mine and the  
21 tribunal's assistance, could you give them the  
22 sense of the time frame in which you were involved  
23 in looking at the Whites Point project?

24                   A. I first became aware of the  
25 Whites Point project in 2002, via conversations

1 with regional habitat staff living in the Maritimes  
2 region.

3 At that time it started as a  
4 horizon-type project where they had a little bit of  
5 information on a proposal.

6 Over the months, information -- we  
7 acquired more information in the region and that  
8 occurred particularly in the spring of 2003.

9 So my greatest involvement was in  
10 the spring of 2003.

11 After the summer of 2003, I was on  
12 French training and medical training for a  
13 several-year period and I was back when the panel  
14 report was submitted and the response was written.  
15 But I wasn't the author of that.

16 Q. Great. Thank you.

17 PRESIDING ARBITRATOR: Thank you,  
18 Mr. Spelliscy. Oh, there you are. I'm sorry.  
19 Don't take that as a lack of impartiality that I  
20 tend to look to the right. I don't know what that  
21 is. Sorry.

22 CROSS-EXAMINATION BY MR. NASH:

23 Q. Good morning, Mr. Hood. My  
24 name is Greg Nash, and I am co-counsel for the  
25 claimants in this proceeding.



1 A. Good morning.

2 Q. I have a few questions for  
3 you on your affidavit which you swore on December  
4 5th, 2011; is that correct?

5 A. I believe so.

6 Q. And when you swore your  
7 affidavit, did you have a series of documents  
8 before you?

9 A. Yes, I did.

10 Q. What documents did you have  
11 for review prior to swearing your affidavit?

12 A. I had the affidavit and I had  
13 my notes and I was involved in the production of  
14 the affidavit.

15 Q. Did you have, did you review  
16 any documents, any correspondence, email  
17 correspondence, documents relating to the Whites  
18 Point project before you swore your affidavit?

19 A. Yes. Well, as I say, my  
20 notes. My main -- it was largely based on my  
21 recollection, and subsequently, I had a chance to  
22 review all of the documents from -- that were  
23 connected with the file.

24 Q. When you say all of the  
25 documents, what do you mean by that word? Did you

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1 review the entire Whites Point file at DFO before  
2 you swore your affidavit?

3 A. No. Could you please provide  
4 me, again, with the date of signing of the  
5 affidavit?

6 Q. December 5th, 2011?

7 A. Okay. I retired in July  
8 15th, 2011 and between the date of signing and my  
9 retirement, no, I did not review all of the  
10 documents associated with the file.

11 Q. So that is what I'm trying to  
12 get at. What documents did you review prior to  
13 swearing your affidavit?

14 A. At this point I would have a  
15 difficult time providing you with the titles of all  
16 of those documents because I had many documents  
17 before me, and the exact time frame that I reviewed  
18 them would not be clear in my mind.

19 Q. All right. What were your  
20 actual responsibilities and job functions as a  
21 senior liaison officer?

22 A. Well, I was primarily  
23 liaison. The regional office had its own -- was  
24 separate from headquarters. It had its own  
25 management structure there, and the staff that I

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1 dealt with in the habitat program responded through  
2 the director to the Regional Director General who  
3 was at the Assistant Deputy Minister level.

4 The dealings that I had were  
5 primarily following the file through regular  
6 contact with the regional staff, where they could  
7 give me updates on their involvement and any of the  
8 latest information that they had received.

9 When briefing notes were prepared,  
10 they originated in the region and they would come  
11 via the Regional Director General after his  
12 approval to the Assistant Deputy Minister, down to  
13 us for, for editing and then sending up to the  
14 assistant, right up to the Minister level.

15 Q. So you liaised with DFO  
16 headquarters officials in Ottawa?

17 A. Yes, I did.

18 Q. And you liaised with regional  
19 DFO officials in Halifax?

20 A. Yes.

21 Q. In respect to the Whites  
22 Point quarry?

23 A. Yes, I did. And to be  
24 clear --

25 Q. Yes?

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1                   A.    -- none of those staff  
2 reported to me.

3                   Q.    But you did liaise with them,  
4 and you were in frequent contact with those  
5 regional officials; correct?

6                   A.    Yes, sir.

7                   Q.    And you liaised as well with  
8 the Minister's office in Ottawa?

9                   A.    On a very occasional basis,  
10 when requested. With the reporting hierarchy that  
11 I was, my direct supervisor was the director of  
12 habitat operations and that is the person primarily  
13 that I got my direction from.

14                  Q.    And so did you, then, liaise  
15 with that official? Was that Mr. Richard Nadeau?

16                  A.    Yes, yes, Richard Nadeau,  
17 yes.

18                  Q.    Richard Nadeau. And he was  
19 the director of operations at the time?

20                  A.    Yes, sir.

21                  Q.    And did you also liaise with  
22 Stephanie Tan? Did you meet with her?

23                  A.    No.

24                  Q.    Stephanie Tan was a political  
25 staffer in the Minister's office; correct?

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1                   A.    Yes.  I had met her and she  
2 was in a call that I, I attended.

3                   Q.    And you also liaised from  
4 time to time with the Minister's constituency  
5 office in the constituency; correct?

6                   A.    Yes.  Under the same  
7 circumstances.

8                   Q.    And her name was Nadine  
9 Belliveau.  Do you recall that?

10                  A.    Yes.

11                  Q.    Did you meet with Nadine  
12 Belliveau at all?

13                  A.    No, I've never met her.

14                  Q.    Did you discuss matters over  
15 the phone with Nadine Belliveau?

16                  A.    Well, no.  Not personally,  
17 only in a meeting with Minister's office and  
18 constituency office staff which I believe was March  
19 6th.

20                  Q.    Was that a meeting or was  
21 that a telephone conference?

22                  A.    Telephone conference.

23                  Q.    Yes.  And that was a  
24 telephone conference on March 6th, 2003, wasn't it?

25                  A.    Yes.

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1                   Q.    And on that date there was a  
2 telephone conference of senior DFO officials  
3 yourself and then Ms. Tan and Ms. Belliveau;  
4 correct?

5                   A.    Correct.

6                   Q.    Did you become involved in  
7 the Whites Point quarry file in September of 2002?

8                   A.    In September 2002, I would  
9 have been aware of the file, yes.

10                  Q.    Did you - what was your  
11 introduction to the file? Were you provided with a  
12 briefing on the short history of the file at that  
13 time when you first became involved?

14                  A.    As I recall, my initial  
15 involvement with it was similar to that which I  
16 would have with any new file, where I would be  
17 talking to regional staff and they would be giving  
18 me an update on the files that they had been  
19 working on.

20                            At that time it was, it would have  
21 been very preliminary and they didn't have a lot of  
22 information on the file.

23                  Q.    And which regional staff did  
24 you liaise with at the very commencement of your  
25 involvement with the Whites Point quarry?

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1                   A.    At the very beginning, it  
2 would have been Phil Zamora and, as time went on,  
3 Jim Ross and -- well Jim Ross and occasionally Jim  
4 Leadbetter, and Brian Jollymore.

5                   Q.    What was Jim Leadbetter's  
6 position at that time?

7                   A.    He was in the habitat  
8 program. He was a section head in habitat  
9 operations. I don't remember his exact title.

10                  Q.    Did you liaise with Paul  
11 Boudreau?

12                  A.    Yes, sir.

13                  Q.    And Paul Boudreau was in what  
14 position at that time, in September of 2002?

15                  A.    I believe Paul was the chief  
16 of habitat, the habitat section in Maritimes in  
17 Dartmouth.

18                  Q.    Was he Jim Ross's immediate  
19 superior?

20                  A.    Yes sir.

21                  Q.    Jim Ross was a section head  
22 who was responsible for the Whites Point project in  
23 September of 2002; correct?

24                  A.    Yes.

25                  Q.    Did you receive any documents

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1 from regional staff with respect to the project  
2 when you first became involved in Whites Point?

3 A. I don't, I don't recall  
4 offhand when would have been the time that I  
5 received the first documents.

6 As I said, the majority of my  
7 knowledge of the file early on was based on phone  
8 updates, particularly from Phil Zamora.

9 Q. And when you say early on,  
10 was that commencing in September 2002 and then  
11 working through the months of October, November,  
12 December of 2002?

13 A. Yes.

14 Q. Were you kept apprised of  
15 reports that were coming from DFO scientists to  
16 Mr. Ross with respect to marine mammals around  
17 Whites Point?

18 A. Only vaguely. There was --  
19 the region is, the way we were set up with a  
20 headquarters and a separate, separate region that  
21 were basically autonomous from headquarters, is  
22 that the staff there had the complete suite of  
23 experts, including marine mammal specialists.

24 And so those scientists addressed  
25 the needs of the habitat program with respect to



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1 marine mammals, and we would just be made aware  
2 that, that regional staff had been working with  
3 scientists with questions that they had about  
4 things like the effects of blasting on marine  
5 mammals.

6 Q. Do you recall that one of  
7 those scientists in the region was a person named  
8 Jerry Conway? Do you recall that name?

9 A. I recall the name, but I  
10 never met Mr. Conway.

11 Q. Do you recall that name  
12 coming up early on in your involvement in the  
13 Whites Point file, or was it later on in 2003 when  
14 you first heard the name?

15 A. Well, I honestly couldn't  
16 say.

17 Q. Do you recall seeing any  
18 email correspondence from Mr. Conway to Mr. Ross?

19 A. No, I don't.

20 Q. Do you recall the name Dennis  
21 Wright coming up in any of your conversations?

22 A. Yes, I do. Dennis is an  
23 expert in blasting and based in Winnipeg, I  
24 believe.

25 Q. He's the DFO expert in

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1 blasting and its effect on fish and marine mammals;  
2 correct?

3 A. Yes.

4 Q. Do you recall his name coming  
5 up in the context of the Whites Point quarry in the  
6 fall of 2002?

7 A. I recall his name coming up,  
8 but not in the fall of 2002. I couldn't be  
9 specific about when it came up. I know it  
10 certainly came up in 2003, when the proponent had  
11 provided more detailed information on blasting.

12 Q. Do you recall his name coming  
13 up in 2003 in the context of the I-blast model?

14 A. Not specifically, no.

15 Q. Do you recall that there was  
16 an erroneous calculation made under the I-Blast  
17 model because the I-Blast model was for the  
18 application of in-water blasting as opposed to  
19 on-land blasting?

20 A. I, yes, I am vaguely aware of  
21 that. I don't have specific knowledge. I'm not an  
22 expert in blasting. We rely on our, our expert  
23 staff like Mr. Wright and scientists in the region  
24 to evaluate that type of question.

25 Q. I just want to turn to

1 briefing notes for a moment. And we will come to  
2 some of them.

3                   You, I think, indicated in your  
4 opening introductory remarks that briefing notes  
5 came from the region to Ottawa, and were then --  
6 were they refined and edited in Ottawa?

7                   A. Yes. They were refined in  
8 Ottawa.

9                   Q. And would there be  
10 consultation in the normal course between Ottawa  
11 DFO officials and regional officials to ensure that  
12 the briefing notes were complete and accurate?

13                   A. Yes, sir. In fact, if there  
14 were any significant changes that in any way  
15 changed the meaning, it would be sent to the region  
16 again for reapproval.

17                   We basically would look at them  
18 and make sure that they were clear and that they  
19 reflected DFO habitat policy.

20                   Q. So if a briefing note was  
21 going to the Deputy Minister from an Assistant  
22 Deputy Minister regarding an issue in the region,  
23 would that be briefing note originate with in this  
24 case Mr. Neil Bellefontaine, who was the Director  
25 General of the region?

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1 A. Yes.

2 Q. Then it would go to the  
3 Assistant Deputy Minister in Ottawa, who would then  
4 review it with his or her staff?

5 A. It would go from the region  
6 to the assistant's office and then down to the  
7 staff for review and then back up.

8 Q. So in this case, there would  
9 be a briefing note, then, originating -- just by  
10 way of illustration -- from Mr. Bellefontaine; it  
11 would go to the Assistant Deputy Minister down to  
12 you?

13 A. Yes.

14 Q. And then back up to the  
15 Assistant Deputy Minister, and then on to the  
16 Deputy Minister?

17 A. Yes.

18 Q. And that would be the same  
19 process for a briefing note from the Deputy  
20 Minister to the Minister?

21 A. Yes.

22 Q. You have sworn this affidavit  
23 on December 5th of 2011. Could you turn to -- and  
24 in front of you, you have two binders. One is a  
25 witness bundle. That is the big one. The other is

1 a statutes bundle. You can put that form in front  
2 of you to one side so it is not in your way.

3 If you go to tab A, you will see  
4 your affidavit there. At paragraph 6, on page 3,  
5 you refer to having read the affidavits or witness  
6 statements of Mr. Thibault and Mr. Bellefontaine,  
7 and then you say in your last sentence:

8 "I also agree with their  
9 conclusions that the  
10 proponents of the Whites  
11 Point project were provided  
12 with a fair and reasonable EA  
13 process that was consistent  
14 with Canadian laws and  
15 regulations."

16 Is that your position today at  
17 this time?

18 A. Yes, it is.

19 Q. Have you reviewed any  
20 documents in relation to Whites Point since you  
21 swore this affidavit?

22 A. Yes, I have.

23 Q. What documents have you  
24 reviewed?

25 A. Again, there's been many, and

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1 I -- right now I couldn't give you a list. If I  
2 saw them I could tell you.

3 Q. All right.

4 A. In fact, I did review the  
5 affidavits of Mr. Fontaine (sic) and Mr. Thibault  
6 and I just, the difficulty I have is actually  
7 situating the date. It was over, well it was two  
8 years ago now, but all of the documents that were  
9 produced in relation to this file, some of them go  
10 back ten years or more.

11 Q. Sure. When you first became  
12 involved in the Whites Point project, what did you  
13 understand the DFO in the region was doing at that  
14 stage?

15 A. Well, okay. At that time my  
16 understanding was that the staff were receiving  
17 information from the proponent -- not likely  
18 directly from the proponent, although I understand  
19 there was some direct contact, but also in liaison  
20 with other departments that we would typically  
21 liaise with and the province.

22 Q. Did you understand, when you  
23 became introduced to the Whites Point project in  
24 September of 2002, that at that time DFO was  
25 conducting an environmental assessment of the

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1 quarry at Whites Point?

2 A. Did I understand that they  
3 were?

4 Q. Yes.

5 A. Well, conducting an EA, at  
6 that time we had, we had very limited information.

7 The first thing the staff do is  
8 they review the information that they have. They  
9 look for potential DFO triggers. We're dealing  
10 with staff from other departments that may have a  
11 connection here, Environment Canada for example,  
12 and the Canadian Environmental Assessment Agency.

13 But you have to understand at that  
14 time that the amount of information that was  
15 available was very limited.

16 So as soon as the wharf was  
17 reviewed and a likely trigger based on the  
18 information that we had, Navigable Waters trigger  
19 was identified, yes an EA would be triggered but --

20 Q. On that point, the wharf was  
21 applied for in February of 2003; do you recall  
22 that?

23 A. Yes.

24 Q. And until the wharf marine  
25 terminal, or dock, whatever you want to call it,

1 was applied for there was actually no federal  
2 environmental assessment which was actually being  
3 conducted; that's correct?

4 A. Well, that's correct.

5 Q. Okay. Did you understand  
6 that what DFO was doing was actually looking for  
7 the potential adverse effects on marine mammals of  
8 blasting on the land in relation to a provincial  
9 approval that had been given?

10 A. Well, the region I believe  
11 sought Fisheries and Oceans advice on the impacts  
12 of blasting because we have, have expertise in that  
13 regard.

14 Q. And did you understand that  
15 the sole role of the DFO in 2002 was to look at the  
16 effects of blasting, potential effects of blasting  
17 on land on marine mammals? Did you understand that  
18 or was it broader than that?

19 A. Associated with the  
20 provincial quarry approval, yes.

21 Q. That approval is -- if you go  
22 to tab 3.

23 A. Okay.

24 Q. I'm sorry, I misspoke, tab 1.  
25 Exhibit R-87. Were you given a copy of this



1 approval at the time or about the time that you  
2 took over responsibilities in, on the Whites Point  
3 project?

4 A. Well, this actually predates  
5 when I started as senior liaison officer.

6 Q. That's right, exactly. So  
7 I'm asking you, did you receive a copy of this  
8 approval at the time or about the time that you  
9 started with DFO on the Whites Point project?

10 A. I don't know whether I  
11 received this or not, no.

12 Q. Could you turn, please, to  
13 page 10. You will see there are two conditions --  
14 well, there are four conditions listed, but I am  
15 focussing in on conditions (h) and (i). These are  
16 blasting conditions at tab 1, page 10, Exhibit  
17 R-87.

18 A. Tab?

19 Q. Tab 1.

20 A. Tab 1.

21 Q. If you go to page 10 of  
22 Exhibit R-87, you will see conditions (f), (g), (h)  
23 and (i). Do you see that?

24 A. Yes.

25 Q. And do you recall having your

1 attention brought to those conditions at the time  
2 you started work with the DFO as a liaison officer  
3 in the Whites Point project?

4 A. No, I don't recall that. And  
5 I'm actually -- because of our relationship in the  
6 region and the fact that they were, the people in  
7 contact with the proponent, the province and  
8 reviewing any material that came in, that they had  
9 the science staff in-house. It is not something  
10 that I would normally see.

11 Q. So you don't recall that, in  
12 fact, that DFO's only role in 2002 was to determine  
13 whether or not there were, there was a potential  
14 for adverse effects on marine mammals caused by  
15 blasting on land?

16 A. The first two things I recall  
17 is just an initial update from staff in the region  
18 on the file and the fact that a marine terminal and  
19 quarry were proposed, and the second one was that  
20 the province had approved a quarry and the  
21 department was asked for input on the blasting  
22 plan.

23 Q. And so do you recall that  
24 then in 2002, that that was DFO's only role in  
25 terms of reviewing the Whites Point project, which

1 was to consider whether, with respect to this  
2 approval, which is on 3.9 hectares, there would be  
3 an adverse impact or potential adverse impact on  
4 marine mammals caused by blasting on land?

5 A. I don't specifically recall  
6 that, but I would say that, yes, because we didn't  
7 get enough information to really begin a serious  
8 evaluation of the project until 2003.

9 Q. Was that your understanding  
10 at the time in 2002?

11 A. I don't remember.

12 Q. Okay. If you go to the next  
13 tab, which is Exhibit C-41, you will see there an  
14 email from Brian Jollymore to Mr. Petrie, dated the  
15 26th of April. And that is tab 2, Exhibit C-41.  
16 Do you see that?

17 A. Yes.

18 Q. And do you see that halfway  
19 down the page the paragraph "our marine mammal  
20 coordinator"?

21 A. Yes.

22 Q. Do you see that?

23 "Our marine mammal  
24 coordinator, Jerry Conway,  
25 has expressed significant

1 concerns about possible  
2 blasting impacts on marine  
3 mammals in the area. Jerry  
4 wanted documented proof the  
5 charges to be employed would  
6 not have any disruptive  
7 influence on the species."

8 Then he goes on to say:

9 "I am sure the local people  
10 who make their living  
11 charting vessels to tourist  
12 wishing to see the whales  
13 would be equally concerned."

14 He then says:

15 "I would appreciate the  
16 following two clauses be  
17 added to your permit."

18 And you will see number one and  
19 two which reflect the wording in the conditions (h)  
20 and (i) we have just been referring to. Do you see  
21 that?

22 A. Yes.

23 Q. Were you advised, when you  
24 took over your responsibilities with respect to the  
25 Whites Point project in September of 2002, that

00028

1 that was how those two conditions came to be in the  
2 approval?

3 A. No.

4 Q. Were you advised that the  
5 initiation of having those two conditions in the  
6 approval had come from a person named Jerry Conway,  
7 the marine mammal coordinator?

8 A. No. I don't recall that. I  
9 recall my initial introduction being via discussion  
10 with the habitat staff in the region.

11 Q. Now, seeing that name in that  
12 context, do you recall hearing about Jerry Conway's  
13 involvement on the Whites Point project in  
14 consideration of blasting plans during 2002 at any  
15 time?

16 A. No, not in 2002.

17 Q. Do you remember hearing about  
18 his name in 2003?

19 A. No. Dennis Wright was the  
20 person that I generally heard referred to.

21 Q. So it was Dennis Wright who  
22 was referred to as the blasting expert in relation  
23 to the Whites Point quarry; correct?

24 A. Yes. And this, this isn't  
25 surprising because Dennis was the expert in

1 Winnipeg who developed the blasting guidelines for  
2 DFO, and his input was sought on a number of files  
3 around the country.

4 Q. It was normal to get Dennis  
5 Wright's input on blasting matters with respect to  
6 the potential effect on fish?

7 A. Potential effects, yes.

8 Q. If you go to tab 3, which is  
9 Exhibit C 476. This is a letter dated September  
10 17th, 2002 from Mr. Buxton. And it appears to --  
11 it is dated what I take to be around the time you  
12 started liaising on the Whites Point file for the  
13 DFO. Is that correct?

14 A. Yes.

15 Q. And have you seen this  
16 document before?

17 A. It looks familiar. I don't  
18 believe I saw it at the time, but it looks familiar  
19 to a document that was in a binder that I was  
20 supplied with.

21 Q. For the preparation for this  
22 hearing?

23 A. For the preparation, yes.

24 Q. For the preparation of your  
25 affidavit in this hearing; correct?

1                   A.    The binder I am referring to  
2 I was just supplied with several months ago.

3                   Q.    Okay?

4                   A.    In preparation for the  
5 hearing, yes.

6                   Q.    You don't recall seeing this  
7 document, then, and we're talking about Exhibit  
8 C...

9                   A.    No.

10                  Q.    C-476; you did not see this  
11 document at the time?

12                  A.    No, I would not normally see  
13 a document like this between the province and area  
14 office.

15                  Q.    When you did receive the  
16 document several months ago, if you go to page, the  
17 last page of that document. Exhibit C-476, you  
18 will see that there is a diagram and there is what  
19 we know is the 3.9 hectare quarry site.

20                  A.    Yes.

21                  Q.    Did you understand, during  
22 the year 2002, that there was a 3.9 hectare quarry  
23 site which was part of a bigger parcel?

24                  A.    Yes.

25                  Q.    And did you have any sense at

00031

1 all of where that site was located on the property?

2 A. No.

3 Q. Do you remember when you  
4 first became aware that there was a 3.9 hectare  
5 quarry site?

6 A. Well, they got provincial  
7 approval in 2002 and I would have been advised of  
8 that in one of my regular updates by regional  
9 staff.

10 Q. At an early stage?

11 A. At an early stage, yes.

12 Q. Do you see the mean high  
13 water mark at the top there? Do you see that  
14 statement?

15 A. Yes.

16 Q. And you see where the other  
17 line is where that arrow goes to from the, what is  
18 the ocean back into the shore and you see, MIN  
19 35.6?

20 A. Yes.

21 Q. And then you see the  
22 cross-hatched area which is the site of the initial  
23 blast; do you see that?

24 A. Yes.

25 Q. And you will see that that



00032

1 cross-hatched area is about another -- looking at  
2 the measurements here, about another 35 metres in  
3 from the first 35 metres, for a total of 70 metres.

4 Did you understand that the  
5 initial test blast was going to be 70 metres away  
6 from the mean high water level?

7 A. I don't recall the details.  
8 The only details I recall is that the province or  
9 the regional habitat staff had asked for input from  
10 scientists in the region, and like myself, they're  
11 not themselves experts in blasting.

12 So we would require that type of  
13 advice.

14 Q. From Mr. Wright?

15 A. Well, from Mr. Wright, but  
16 Mr. Wright isn't a whale expert. And he's not at  
17 Maritimes region.

18 Q. Do you know that --

19 MR. SPELLISCY: I'm sorry,  
20 counsel, I think I missed that. Could you just  
21 show me where it shows another 35 metres on the  
22 diagram here?

23 BY MR. NASH:

24 Q. It is a rough estimation of  
25 the extra distance from the second line where the

00033

1 35.6 metres ends to the edge of the initial blast  
2 site.

3 MR. SPELLISCY: Is that just your  
4 estimation? It doesn't show it on the document.

5 MR. NASH: That's correct, yes.

6 Q. Mr. Hood, did you, do you  
7 remember recalling there being a change of that  
8 35.6 metre setback to a much higher figure, in  
9 particular 500 metres?

10 A. By the proponent? Or by --

11 Q. By anybody.

12 A. Yes. I recall the  
13 department -- after receiving input from Mr. Wright  
14 and others, Mr. Conway, who I understand from you  
15 is a whale expert --

16 Q. Yes.

17 A. -- that the setback was moved  
18 to 500 metres.

19 Q. Did you understand that that  
20 setback was moved on the advice -- and I'm saying  
21 the setback from 35.6 metres to 500 metres -- was  
22 moved on the advice and recommendation of  
23 Mr. Conway and Mr. Wright?

24 A. Sorry, could you repeat that?

25 Q. Did you understand -- you've

1 linked Mr. Wright and Mr. Conway to that change of  
2 the setback. Did you understand that the setback  
3 had anything to do with their recommendations?

4 A. Yes, that would be my  
5 understanding. Mr. Wright, in particular.

6 Q. He was the one that was  
7 arguing for the 500 metre setback, by your  
8 understanding; correct?

9 A. If I could clarify here. The  
10 name Mr. Conway has come up but I know the region  
11 dealt with a number of experts in their science  
12 department.

13 Q. Yes, but I'm just referring  
14 to Mr. Wright and Mr. Conway.

15 Was it your understanding -- in  
16 2003 -- that the setback was changed from 35.6  
17 metres to 500 metres on the recommendation of  
18 Mr. Wright and Mr. Conway or not?

19 A. No. I know that it was  
20 changed, but I couldn't at this point in time say  
21 based on whose recommendation.

22 Q. Okay. If you could go to,  
23 please, to your affidavit at paragraph 13 on page  
24 5. You state there:

25 "However our position was not

00035

1 shared by all officials  
2 through DFO (and certainly  
3 not by officials from the  
4 Canadian Environmental  
5 Assessment Agency)."

6 And you are describing your  
7 position on scoping-in. Do you recall that?

8 A. Yes.

9 Q.

10 "For the claimants to suggest  
11 it was established the DFO  
12 practice, as well as the only  
13 legal position that could be  
14 taken, is surprising."

15 Then you state, and this is what I  
16 would like you to focus on:

17 "For example in the case of  
18 the Whites Point quarry and  
19 marine terminal, DFO regional  
20 officials believed right from  
21 the beginning that the quarry  
22 should be included in the  
23 scope of the project, whether  
24 it engaged DFO triggers under  
25 the CEAA or not."

00036

1 Do you recall that?

2 A. Yes.

3 Q. And triggers established  
4 jurisdiction; isn't that fair?

5 A. Yes. Under legislation.

6 Q. Under legislation?

7 A. Triggers, yes.

8 Q. So that the way it works is  
9 if somebody wants to do something that will engage  
10 either the Navigable Waters Protection Act or the  
11 Fisheries Act they apply for an authorization or a  
12 permit; correct?

13 A. Correct.

14 Q. And that establishes a  
15 trigger for them to potentially do that activity  
16 for which they're applying; correct?

17 A. Yes. We need a project  
18 proposal and a trigger.

19 Q. Right. And once that  
20 application is received, then there is an  
21 environmental assessment under the Canadian  
22 Environmental Assessment Act; correct?

23 A. Correct.

24 Q. And if after that  
25 environmental assessment it's determined that an

00037

1 authorization can be given, then an authorization  
2 is issued or a permit is issued pursuant to one of  
3 those Acts in this case; correct?

4 A. Correct.

5 Q. Right. So unless there is a  
6 trigger, it is your understanding that the federal  
7 government would have no interest or jurisdiction  
8 over the area; correct?

9 A. Unless there's a trigger, no.  
10 That's not correct.

11 Under section 15, we can --  
12 provided we have some trigger on the project, we're  
13 able to also include in the scope of project other  
14 elements of the proposal where we feel there is a  
15 federal interest. Not necessarily our own, but one  
16 of another department; Environment Canada, for  
17 example.

18 And as I am sure you are aware  
19 there was a great deal of debate going on and a  
20 number of case law decisions around this time that,  
21 that were linked to that point.

22 Q. Section 15 comes into  
23 operation if one aspect of a project is within  
24 federal jurisdiction, and another aspect of a  
25 project is also within federal jurisdiction and is

1 engaged in the scope of the assessment; correct?

2 A. Yes.

3 Q. And so if -- however, if  
4 there is one aspect of a project within federal  
5 jurisdiction and another aspect is not, i.e., there  
6 is no trigger -- then there is no ability under the  
7 Canadian Environmental Assessment Act to do an  
8 environmental assessment of that other area under  
9 federal law. Correct?

10 A. That's not triggered?

11 Q. That is not triggered. If  
12 there is no trigger for that other aspect then  
13 there is no environmental assessment under the  
14 Canadian Environmental Assessment Act; correct?

15 A. That point wouldn't trigger  
16 an assessment, but can be brought in with  
17 components that are triggered.

18 Q. So is it your understanding  
19 or was it your understanding in 2003 that if the  
20 federal government had jurisdiction over one  
21 component of a project, but did not have  
22 jurisdiction over another -- i.e., did not have  
23 triggers -- then it could scope in that other  
24 aspect that was not within its jurisdiction?

25 A. Yes.

00039

1 Q. Okay.

2 A. If so desired, yes.

3 Q. If so desired the federal  
4 government could extend beyond its jurisdiction and  
5 bring in that other aspect without a trigger;  
6 correct?

7 A. Yes.

8 Q. That was your understanding?

9 A. Yes.

10 Q. And it is today?

11 A. Yes. At that time.

12 Q. So when you say that DFO  
13 regional officials believed right from the  
14 beginning that the quarry should be included in the  
15 scope of the project, whether it engaged DFO  
16 triggers under the CEAA or not, that was the basis  
17 upon which they felt that you could scope in a  
18 project that was not otherwise in federal  
19 jurisdiction; correct?

20 A. Yes.

21 Q. If you go back to that --  
22 which officials from the region were communicating  
23 that position to you?

24 A. Phil Zamora, Jim Ross, and  
25 Paul Boudreau.



1                   Q.    All three of them were of the  
2 opinion that the quarry should be scoped in,  
3 whether or not there was a trigger or jurisdiction  
4 under federal law?

5                   A.    Yes.  But at this particular  
6 point in time, the -- the region had not received  
7 enough information on the overall project to  
8 evaluate whether there were triggers on the quarry  
9 or not.  And there were several areas there where  
10 both they and I suspected there could be triggers  
11 possibly linked to blasting, but also possibly  
12 linked to a stream that was on the property that  
13 may have contained fish habitat.

14                  Q.    It is important to put that  
15 in the context of time.  What particular time was  
16 it that they were still considering that?

17                  A.    Well, because of the length  
18 of time that it took after the region initially  
19 found out about this project to get enough detail  
20 to make -- to have a clear picture of what the  
21 project entailed and what the potential effects  
22 might be and to bring in the experts, this  
23 uncertainty existed for quite some time and it  
24 wasn't until the spring of 2003 that we really -- I  
25 understand it and the region had enough information

00041

1 to better understand what the effects were going to  
2 be.

3 Q. If you go to paragraph 17 of  
4 your affidavit, please.

5 You state, at the top of page 7:

6 "Ultimately the whole debate  
7 over scope of project on the  
8 Whites Point EA never became  
9 anything more than academic  
10 because DFO scientists in the  
11 region concluded in May 2003  
12 that the proposed quarrying  
13 activity itself would trigger  
14 an EA by DFO."

15 Do I take it that you're saying  
16 that Mr. Ross, Mr. Boudreau and Mr. Zamora, all  
17 three or any one of those had advised you that the  
18 quarrying activity itself would trigger an EA by  
19 the DFO?

20 A. Yes.

21 Q. And you cite, for that  
22 proposition, you say:

23 "For example on May 15th,  
24 2003 I was informed that  
25 scientists in the Maritime

1 region had concluded that  
2 because the proposed quarry  
3 was 'very close to the shore'  
4 it could 'kill small fish  
5 through damage to their swim  
6 bladders.'"

7 And you cite for that Exhibit  
8 R-260 at page 801617.

9 In that regard could you turn to  
10 tab 42 of that bundle in front of you?

11 A. What was the exhibit number  
12 again?

13 Q. It is tab 42, and it is part  
14 of Exhibit R-260.

15 A. Okay.

16 Q. And it is page 801617. And  
17 you will see at the bottom -- first of all, let's  
18 just establish how these notes were taken, and so  
19 on. You produced many, many pages of notes.

20 A. Yes.

21 Q. And your notes are intended  
22 to reflect discussions with individuals that you're  
23 having at the time, either by phone or in office  
24 conference?

25 A. In part. I will just

00043

1 elaborate on that a bit. My notes, rather than  
2 being a journal where I have recorded every day and  
3 date of my work, also served the purpose of a  
4 notebook.

5                   As the senior liaison officer with  
6 four regions I had a lot of files and there was a  
7 lot occurring. We were dealing also with a number  
8 of specialists within the -- within headquarters in  
9 various sections and capacities.

10                   So these, what these represent on  
11 occasion is highlights of meetings I attended. In  
12 some cases they indicate comments that people made  
13 during that meeting, you know, any typical meeting  
14 or anywhere else, perhaps in my office, or on a  
15 phone call.

16                   And occasionally, to some extent  
17 they would also be just my comments, my thoughts on  
18 things.

19                   Q. Thank you. In this  
20 particular instance, this note is made to the best  
21 of your recollection, it says Friday, May 16th at  
22 the top.

23                   A. If you're referring to the  
24 top, yes.

25                   Q. Yes. And would it be that on

00044

1 or about that date -- well below, you've got a  
2 notation, May 15th, '03. About three-quarters of  
3 the way down, "Phil called." Do you see that?

4 A. Yes.

5 Q. That would be Phil Zamora?

6 A. Yes.

7 Q. It states -- well perhaps you  
8 can read it out for the record.

9 A.

10 "3.9 ha quarry very close to  
11 shore may kill small fish  
12 through damage to swim  
13 bladders. Had four science  
14 staff say this. Doesn't  
15 appear marine mammals will be  
16 affected".

17 Q. So what Mr. Zamora is  
18 communicating to you there, that is a fair summary  
19 of what he had communicated on that telephone call;  
20 correct?

21 A. Yes.

22 Q. And so he's communicating  
23 that there is a concern about blasting close to the  
24 shore and fish swim bladders, right?

25 A. Based on the knowledge that

00045

1 they had at the time, yes.

2 Q. And based on that knowledge  
3 that they had at the time, he's also advising you,  
4 it doesn't appear that marine mammals would be  
5 affected by the blasting, correct? That is what --

6 A. That is what I recorded, yes.

7 Q. And so that would be a fair  
8 reflection of what Mr. Zamora told you on that  
9 phone call?

10 A. I believe so. I will just  
11 clarify that. This could mean that they will not  
12 be affected in terms of physical harm.

13 Q. Well, do you recall that?

14 A. No, I don't.

15 Q. You have no recollection of  
16 that?

17 A. No.

18 Q. All you know is you made a  
19 note at that time on May 15th?

20 A. And I'm not sure what the  
21 scope of effect on marine mammals would be that  
22 he's referring to, whether it would be extend to  
23 their behaviour or just physical effects.

24 Q. To try and do so now would be  
25 entirely speculative?

1 A. Yes, it would.

2 Q. What you do know is you made  
3 a note "doesn't appear marine mammals will be  
4 affected"; correct?

5 A. Correct.

6 Q. And then if you go to a  
7 little further down that paragraph in your  
8 affidavit, going back to paragraph 17.

9 Mr. President, I might go going back and forth to  
10 the affidavit to documents for a while. It might  
11 be easier to take the affidavit out of your tab in  
12 order to prevent you from having to flip back and  
13 forth.

14 But in any event you go down and  
15 you say:

16 "Similarly, around May 20th,  
17 it was explained to me that  
18 scientists had concluded that  
19 there was 'likely a Sec 32  
20 trigger'..."

21 And you see that you've noted a  
22 footnote for that, Bates number 801624. That is in  
23 the same tab, tab 42. A little further along.

24 And you actually put a quote there  
25 "likely a section 32 trigger". Could you just

1 point to me on this page where it says "likely a  
2 section 32 trigger"? Page 801624.

3 A. Are you saying that there is  
4 one there and you want me to point it out? Or you  
5 are saying you want me to find where there is a  
6 reference there?

7 Q. You cited that page, "likely  
8 a section 32 trigger" in your affidavit. You said  
9 page 801624 and that is the page we're on now. So  
10 could you cite there where it says that?

11 A. Yes, I would refer you to the  
12 first four lines there. The need to issue a  
13 section 32 will mean it can't be issued until after  
14 the panel review, so company won't likely be able  
15 to do the test quarry.

16 Q. And you're saying that that  
17 means "likely a section 32 trigger"?

18 A. That would be, yes, what I'm  
19 saying.

20 MR. SPELLISCY: Excuse me, can I  
21 interject here, because to the extent we're asking  
22 about a quotation, I would ask everybody to look to  
23 the previous page, 801623, about half-way down.

24 PRESIDING ARBITRATOR: It is in  
25 the middle, right?



00048

1 MR. NASH: Middle of 623?

2 MR. SPELLISCY: About halfway

3 down.

4 BY MR. NASH:

5 Q. "Likely a section 32 trigger  
6 for fish although salmon juvenile and  
7 adults..." Do you see that?

8 A. Yes.

9 Q. And that is on or about May  
10 20th, 2003?

11 A. Yes.

12 Q. Right? And so that's the  
13 conclusion that you were being given at that time,  
14 "likely a section 32 trigger"?

15 A. Yes.

16 Q. Okay.

17 A. And as a department, when our  
18 trigger is an effect rather than a specific  
19 project, it can be a case that we don't know for  
20 sure that there is going to be an effect that would  
21 warrant an authorization, but just that we suspect  
22 that there would be and that it would be cleared up  
23 in the EA process.

24 Q. Right. Do you recall a  
25 letter that Mr. Zamora sent to Mr. -- sent on May

00049

1 29th, 2003?

2 A. Yes.

3 Q. Were you a party to drafting  
4 that letter?

5 A. No.

6 Q. Who drafted that letter, to  
7 your knowledge?

8 A. Well, to my knowledge it  
9 would have been Phil Zamora.

10 Q. Was it cleared in advance  
11 with head office or anyone in Ottawa DFO?

12 A. Not by me, as I recall.

13 Q. We will come back to that.

14 But just while we're on that page, you will see  
15 that from your affidavit, you see that you  
16 conclude:

17 "Further there was a stream  
18 on the quarry site which  
19 scientists concluded was  
20 'excellent nursery habitat'  
21 and which 'could constitute a  
22 S. 35' trigger."

23 Do you see that?

24 A. Yes.

25 Q. You will see at the bottom of

1 the page, those words appear in point form,  
2 "stream", "excellent nursery habitat, but adults  
3 probably don't stay there." Do you see that?

4 A. Referring to -

5 Q. I am back to page 801624.

6 A. 801624.

7 Q. At tab 42 which is Exhibit  
8 R-260, at the very bottom. Do you see that?

9 A. Yes.

10 Q. The last two lines? Yes?

11 A. Yes.

12 Q. And was it your  
13 understanding, then, that the region thought there  
14 was a basis for a section 35 trigger on the  
15 property?

16 A. My recollection at this  
17 particular time was that, in May they were able to  
18 go out to the site, regional habitat staff, and do  
19 some preliminary observation of the stream. They  
20 found things like watercress in there, gravel cold  
21 water that indicated cold water habitat, and  
22 nursery habitat for fish.

23 And their plan was to go back, in  
24 June. In May the access was poor, and in June it  
25 would be better. They were going to go back and do

00051

1 some further -- more detailed analysis with  
2 sampling gear.

3 Q. So you're saying from your  
4 perspective and your recollection they didn't know  
5 in June of 2003 whether there was a section 35  
6 trigger on the land or not?

7 A. Again, it was suspected. And  
8 having done many, many stream evaluations myself,  
9 you do it on the basis of looking to see whether  
10 the habitat is there and it is suitable for fish.

11 Q. Could you go to page 801625,  
12 please, the next page. What do the words on the  
13 top line say?

14 A. "Stream won't be directly  
15 impacted".

16 Q. That is the note that you  
17 made as a result of your -- is this a conversation  
18 with Mr. Zamora?

19 A. The last name of reference I  
20 have here would be Jim Ross, so I'm assuming that  
21 it would be Jim.

22 Q. So the words that you have  
23 written there is that "stream won't be directly  
24 impacted", and that would be to the best of your  
25 recollection what you were told by Mr. Ross?



1                   these discussions DFO  
2                   scientists from the regional  
3                   office had yet to be able to  
4                   visit the site of the quarry  
5                   and hence had not been able  
6                   to determine whether land  
7                   based activities would engage  
8                   a DFO trigger under the  
9                   CEAA."

10                   A.    They had not been able to  
11 visit the stream, yes.

12                   Q.    They had not been able to  
13 visit the site of the quarry, is what you state.

14                   A.    No.  They had visited --  
15 because of poor access, yes.  In particular they  
16 wanted to go and look at the stream.

17                   Q.    You said there "at the time  
18 we were having these discussions," which is in  
19 April/May of 2003; correct?

20                   A.    Yes.

21                   Q.    "DFO scientists from the  
22 regional office had yet to be able to visit the  
23 site of the quarry"; correct?

24                   A.    Correct.

25                   Q.    That was your understanding

00054

1 at the time; is that what you were being told?

2 A. That's what I was being told,  
3 yes.

4 Q. Could you turn to tab 6,  
5 please, of that bundle of documents. It is Exhibit  
6 C-477. And it is a letter from Thomas Wheaton.

7 You knew him to be a habitat  
8 coordinator with the department?

9 A. In the area office, yes.

10 Q. Yes. And he says:

11 "This letter is to advise  
12 that the Department of  
13 Fisheries and Oceans, habitat  
14 management division, has  
15 reviewed the plans for the  
16 above noted proposal as  
17 requested and visited the  
18 site. DFO-HMD has concluded  
19 that this water course cannot  
20 be categorized as 'fish  
21 habitat' therefore the  
22 Fisheries Act does not  
23 apply."

24 Were you aware of this letter at  
25 the time you swore your affidavit?

1 A. No, I wasn't.

2 Q. You hadn't seen this before?

3 A. No.

4 Q. Have you seen it before  
5 today?

6 A. I don't recall having seen  
7 this.

8 Q. In fact, were you aware that  
9 DFO officials had gone out to the site in 2002 and  
10 inspected the site?

11 A. Again, difficult for me to  
12 place in time, but Thomas is based in an office  
13 relatively close to the site. Yes, I would assume  
14 that Thomas would go out to the site.

15 Q. So why then did you say in  
16 your affidavit at paragraph 14, "at the time we  
17 were having these discussions", which you  
18 established is April/May, "DFO scientists from the  
19 regional office had yet to be able to visit the  
20 site"?

21 A. Because at that time what I  
22 was being told by Phil was, based on -- and  
23 remember, this, the information on what was going  
24 to be done at this quarry came in in bits and  
25 pieces. It wasn't received all at once. In 2002



00056

1 the region didn't have a complete idea of what was  
2 proposed to be conducted on the site.

3 I wasn't aware of this  
4 letter. But based on what they knew in the spring  
5 of 2003, Phil was going to be going back to the  
6 site, with Thomas, likely, and they were going to  
7 do some actual -- I have a close look at the stream  
8 and do some sampling for the presence of fish.

9 Q. Did you ever see the results  
10 of their scientific work?

11 A. No.

12 Q. Did you ever have it  
13 concluded that there was, in fact, a fish bearing  
14 stream on the property?

15 A. Sorry, could you repeat that?

16 Q. Was it concluded, did you  
17 ever see scientific evidence, that there was a  
18 conclusion that there was a fish bearing stream on  
19 the property?

20 A. No. With our relationship  
21 with the region and their role, I would not  
22 normally become aware of -- I would not normally  
23 see that type of documentations, because the region  
24 was in charge of conducting EA.

25 Q. Were you told, prior to

00057

1 August 7th, 2003 that there was no fish bearing  
2 stream on the property?

3 A. No.

4 Q. Were you told, prior to  
5 August 7th, 2003 that the proponent could blast on  
6 the property with a setback of 100 metres?

7 A. No. I don't recall.

8 Q. Okay. You don't recall that?

9 A. I don't recall that, no.

10 Q. Okay.

11 A. What I do recall is that the  
12 last thing I recall with respect to the blasting  
13 plan, was that as presented by the proponent, it  
14 was going to be a possible section 32 trigger and  
15 the proponent was given an opportunity to modify  
16 the project.

17 Q. But my question is more  
18 specific than that. You don't recall receiving  
19 information or evidence prior to August 7th, 2003,  
20 that the proponent could blast on the property  
21 within -- so long as it conformed to 100 metre  
22 setback from the shoreline? That's correct?

23 A. Correct.

24 Q. Okay. You didn't see the  
25 blasting plan that had been submitted by Mr. Buxton

1 in September of 2002? You didn't see that?

2 A. I did see blasting material  
3 during the course of the EA.

4 Whether I could say that it was  
5 that particular material, no, I couldn't.

6 Q. We know that -- and I'm  
7 speaking about the 2002 period -- we've established  
8 there was no federal environmental assessment going  
9 on on the Whites Point property in 2002. Correct?

10 A. Correct.

11 Q. And did you discuss -- your  
12 immediate superior was Mr. Richard Nadeau. His  
13 superior was Mr. Paul Cuillerier?

14 A. Cuillerier, yes.

15 Q. Do you know if there were  
16 discussions between Mr. Nadeau and Mr. Cuillerier  
17 in 2002 about blasting on the property?

18 A. No, I don't.

19 Q. When you assumed your  
20 responsibilities, were you familiar with a person  
21 named Tim Surette?

22 A. No, not at that time.

23 Q. Did you -- let's just go back  
24 and look structurally.

25 Is the normal practice for the

1 Minister's office on a particular file, to  
2 communicate with staff through the Deputy Minister?

3 A. I'm not sure what you  
4 mean. The communication I would receive would come  
5 most often through Richard Nadeau, the director,  
6 and occasionally Paul.

7 Q. I'm speaking really  
8 particularly. When the Minister's office is  
9 involved in a project, the normal routine practice  
10 would be for the Minister's office to communicate  
11 with departmental officials through the Deputy  
12 Minister; correct?

13 A. No. The normal practice that  
14 I recall was that the staff in the habitat program,  
15 most often Director or Director General, would  
16 speak to a person in the Minister's office.

17 Q. At the staff on the ground  
18 level would be communicating with the Minister's  
19 office?

20 A. You mean in the region?

21 Q. In the region.

22 A. No.

23 Q. So it would be unusual for  
24 staff on the ground in the region to be  
25 communicating with the Minister's office. Have I

00060

1 got that right?

2 A. Yes.

3 Q. And so how would those  
4 communications normally be conducted? Would those  
5 communications normally go from the staff on the  
6 ground in the region up through the Director  
7 General?

8 A. Yes.

9 Q. Through Mr., in this case  
10 Mr. Bellefontaine?

11 A. Yes.

12 Q. And then through to  
13 Ottawa? From Mr. Bellefontaine to Ottawa?

14 A. That was the protocol for  
15 things like briefing notes.

16 Q. And was that the protocol for  
17 communications between the Minister's office and  
18 the departmental staff on the ground? So we have  
19 the staff on the ground going to Mr. Bellefontaine  
20 who is the Regional Director General;  
21 correct? Yes?

22 A. Yes.

23 Q. And then Mr. Bellefontaine  
24 would communicate with a person, an Assistant  
25 Deputy Minister in Ottawa; correct?

00061

1 A. Yes.

2 Q. And take the views of the  
3 region through him to that Assistant Deputy  
4 Minister in Ottawa; correct?

5 A. Yes.

6 Q. And then responses to the  
7 receipt of that information would then come down  
8 from the Minister's office, if it got to that  
9 stage, back down through the deputy to the ADM, and  
10 back to Mr. Bellefontaine, back to regional staff;  
11 have I got that right?

12 A. If they had questions.

13 Q. Yes, if they had questions or  
14 responses.

15 A. What often happened was, the  
16 question would come down via my superiors to me,  
17 say, and I would then phone Phil, for example, to  
18 get some information and I would pass it up through  
19 my material -- superiors and it would go to the  
20 Minister's office.

21 Q. So it would be departmental  
22 staff dealing with departmental staff, then through  
23 the Deputy Minister to the Minister; correct?

24 A. Yes.

25 Q. Then back down through the

00062

1 Deputy Minister into the department; correct?

2 A. Yes.

3 Q. Did you recall that  
4 Mr. Thibault became the DFO Minister in January of  
5 2002?

6 A. I couldn't recall the date  
7 that he started there, no.

8 Q. If I was to tell you that he  
9 was the Minister of Fisheries and Oceans from  
10 January 2002 to December 2003 would that sound  
11 about right to you?

12 A. Yes.

13 Q. Do you recall that the Whites  
14 Point project was in Mr. Thibault's local  
15 constituency?

16 A. Yes.

17 Q. And do you remember that  
18 Minister Thibault had a very high degree of  
19 interest in this project?

20 A. Yes.

21 Q. And that his office wanted to  
22 be involved in communications directly with the  
23 officials? Do you recall that?

24 A. As I understand it, the --  
25 from my point of receiving information from that

1 office, was that the Minister, of course, was very  
2 interested in this project. It was in his riding.  
3 It was known to be quite contentious.

4 He wanted to be well informed, and  
5 we also got the word that we were to follow the  
6 proper process as it came to, would be all aspects,  
7 everything from communications through the EA  
8 process.

9 Q. And the proper processes were  
10 as you have described, up through Mr. Bellefontaine  
11 over to an Assistant Deputy Minister then up to the  
12 Minister's office; correct?

13 A. Yes.

14 Q. Yes.

15 A. But -- if I could just  
16 elaborate. The difficulty on a complex file like  
17 this, where there is a lot of things going on, that  
18 there's contentious, there's a lot of public  
19 concern, is you have a number of officials speaking  
20 with citizens and others say from the department or  
21 other departments.

22 So what we wanted to do is just  
23 make sure that people at the region, at  
24 headquarters, at the constituency office and the  
25 Minister's office, knew who was talking to who,



1 basically.

2 Q. And so it would be unusual,  
3 though, for the Minister's office to be actually  
4 discussing specifically with departmental staff  
5 matters about a project, correct? That would be --  
6 is that heard of?

7 A. Like a Minister's office  
8 assistant talking to a biologist in the region?

9 Q. Any Minister's office  
10 representative. Is that normal?

11 A. No, I wouldn't think it was  
12 normal.

13 Q. No, okay. Could you turn,  
14 please, to tab 4, Exhibit 963. You will see this  
15 is a fax from Nadine Belliveau and you will recall  
16 that she was Mr. Thibault's constituency assistant.

17 A. Yes.

18 Q. It is to Mr. Boudreau of DFO  
19 habitat management in Nova Scotia; correct?

20 A. Yes.

21 Q. And his position at that time  
22 was? Was he the manager of habitat?

23 A. Yes.

24 Q. Was he Mr. Ross's superior?

25 A. Yes.

1 Q. And this is a fax from  
2 Ms. Belliveau to Mr. Boudreau --

3 A. Mm-hm.

4 Q. You see it states:  
5 "As discussed, here is a copy  
6 of the permit. The Digby  
7 municipality faxed it to me.  
8 They are on side with the  
9 community and are desperately  
10 looking for a way to slow the  
11 process."

12 My first question is: Is this the  
13 first time you have seen this document?

14 A. It is not the first time, but  
15 the first time was actually yesterday.

16 Q. Okay. So you were not aware  
17 of communications by the Minister's constituency  
18 assistant directly with departmental, with a  
19 departmental official?

20 A. No.

21 Q. During the time you were  
22 working on the case?

23 A. That's correct, yes.

24 Q. If you then go to the next  
25 tab, which is tab 5, Exhibit C-256. You will see

00066

1 that the bottom of page 2, it is an email from Tim  
2 Surette to Neil Bellefontaine who is the regional  
3 Director General.

4 A. Excuse me, 526? Or --

5 Q. Tab 5?

6 A. Tab 5, yes.

7 Q. Exhibit C-256.

8 A. 256?

9 Q. 256. Tab 5.

10 A. I've got 526 here.

11 Q. There's been a mis-filing. I  
12 will come back to that and we will deal with that  
13 after the break.

14 A. Okay.

15 Q. And I take it that the  
16 Minister's office did not employ scientists in the  
17 Minister's office, they were political staffers;  
18 correct?

19 A. Correct.

20 Q. Aside from Ms. Tan, who was  
21 the -- who were the other political staffers that  
22 you dealt with, or that were in the Minister's  
23 office to your recollection?

24 A. At that particular time the  
25 only one I recall is Ms. Tan.

00067

1 Q. Would you agree with me that  
2 a professional and non-partisan public service is  
3 essential to the operation of the federal  
4 government?

5 A. Definitely.

6 Q. And would you agree with me  
7 that it is particularly true that public servants  
8 be non-partisan in a regulatory context such as an  
9 environmental assessment?

10 A. Yes.

11 Q. And would you agree that it  
12 is essential in this process that decisions of all  
13 public servants in Canada are made and duties are  
14 carried out fairly?

15 A. Yes.

16 Q. Honestly?

17 A. Yes.

18 Q. In good faith?

19 A. Yes.

20 Q. Without discrimination?

21 A. Yes.

22 Q. For a proper purpose?

23 A. Yes.

24 Q. Taking only relevant factors  
25 into consideration?

00068

1 A. Yes.

2 Q. With openness, fairness,  
3 transparency and impartiality, and respect for the  
4 rule of law?

5 A. Yes.

6 Q. And in accordance with the  
7 legislation, policies, and directives?

8 A. Yes.

9 Q. And would you agree with me  
10 that it is important to keep a clear demarcation  
11 between political interests of politicians and the  
12 interests that public servants have a duty to carry  
13 out?

14 A. Yes.

15 Q. And would you agree with me  
16 that it is therefore imperative to have proper  
17 communications channels within any department;  
18 correct?

19 A. Yes.

20 Q. So that public servants are  
21 able to perform their job with integrity?

22 A. Yes.

23 Q. And without political  
24 interference?

25 A. Yes.

1 Q. Of any kind?

2 A. Yes.

3 Q. And that was true in 2002,  
4 2003, and 2004?

5 A. Yes.

6 Q. Do you recall what  
7 communications protocols were in place with respect  
8 to Whites Point to ensure that all of those  
9 principles were maintained, as between the  
10 Minister's office and the public service?

11 A. With respect to  
12 communications?

13 Q. Yes.

14 A. Well, I can only speak to --  
15 for myself and those with which I had contact,  
16 which were the people in the habitat operation  
17 section, both at headquarters and in the region,  
18 and I believe that through the entire process those  
19 principles were honoured.

20 Q. Did you meet Ms. Belliveau?

21 A. No.

22 Q. You only spoke to her on the  
23 phone?

24 A. Yes.

25 Q. That once?

1                   A.     That is the time I can  
2 recall.  Actually, I can recall two times, I  
3 believe.  The one time was with Minister's office  
4 staff where she indicated that the Minister had a  
5 high interest in this case, that it was  
6 contentious.  That they needed to be well advised  
7 and that we were to follow proper process, which  
8 would, in my estimation, include all of those  
9 principles that you talked about.

10                   I may have talked to her again, I  
11 don't recall for sure, in another meeting related  
12 to -- with navigable waters staff, more with  
13 respect to the advertisements that went out on the  
14 application for the section 5(1) approval on the  
15 wharf.

16                   Q.     And you would take the  
17 intervention of the Minister's office to be  
18 about -- not about science, puts it that way;  
19 correct?

20                   A.     Well it is not clear to me  
21 what intervention you would be talking about from  
22 the Minister's office.

23                   Q.     Well, if the Minister's  
24 office is intervening or involved or participating  
25 in a file, that is not -- they aren't intervening

00071

1 because they have better science than the  
2 departmental officials; is that fair?

3 A. That's correct.

4 Q. They would rely upon the  
5 science of the department to make fair and  
6 reasonable determinations; is that correct?

7 A. Yes.

8 Q. Who was Greg Peacock?

9 A. I believe he was a  
10 communications officer, in Maritimes region.

11 Q. Was he located in Halifax or  
12 was he located in Ottawa?

13 A. I believe in the region,  
14 which was located in Dartmouth.

15 Q. I would like to return to  
16 Mr. Buxton's plan. That blasting plan. At tab 3.  
17 Exhibit C-476.

18 Are you aware that this plan went  
19 to Mr. Ross at the DFO regional office?

20 A. Aware, no; assume, yes,  
21 because this is information that staff at the  
22 region, who conducted the EA, would require.

23 Q. Well, in 2002, I will remind  
24 you, the federal department was not conducting an  
25 EA? That's correct?



1                   A.    Right.  But that is not to  
2 say that the staff at the region would not be  
3 keenly interested at that point.

4                   Q.    But they were keenly  
5 interested, weren't they?

6                   A.    Yes.

7                   Q.    Yes.  And that was your  
8 understanding?

9                   A.    Yes.

10                  Q.    And were you aware at or  
11 about the time you took over responsibilities in  
12 the Whites Point file of an email exchange between  
13 Mr. Ross and Mr. Wright in respect to this blasting  
14 plan?

15                  A.    Do you have a copy of that  
16 that I could look at?

17                  Q.    I could give that to you.  
18 Tab 7.

19                  A.    Okay.

20                  Q.    Exhibit C-299.

21                  A.    No, no I am not aware of  
22 this.

23                  Q.    Is this the first time you  
24 are seeing it, today?

25                  A.    Yes, I believe so.

1                   Q.    Were you aware that Mr. Ross  
2 was making determinations in the fall of 2002 as to  
3 whether or not the blasting plan or plans submitted  
4 by Mr. Buxton on behalf of the proponents were  
5 being evaluated for potential adverse effects on  
6 marine mammals?

7                   A.    I was aware they were looking  
8 into it at that time, because the test quarry  
9 required provincial approval and the province had  
10 asked for DFO input on the blasting plan.

11                  Q.    And the -- it wasn't just the  
12 DFO input. It was that a report, a blasting plan  
13 would not be approved without -- it would not be --  
14 blasting would not happen on that site without  
15 first receiving approval from the DFO to allow  
16 blasting to go on on the site. Were you aware of  
17 that?

18                  A.    No.

19                  Q.    You weren't?

20                  A.    I don't know. I can't -- I  
21 don't know.

22                  Q.    You can't recall that?

23                  A.    No.

24                  Q.    Okay.

25                  A.    Again, and it is because as

00074

1 liaison officer, in headquarters, it wasn't my job  
2 really to know things in that intimate degree of  
3 detail.

4 Q. You relied on regional  
5 officials to provide you with accurate information?

6 A. Yes.

7 Q. Which you were then to  
8 transmit up the chain?

9 A. Yes. In briefing my  
10 superiors, yes.

11 Q. Right. In the second page of  
12 this exhibit at tab 7, C-299, Exhibit C-299, it  
13 says:

14 "Dennis, as discussed with  
15 you this morning, you believe  
16 that the Whites Cove  
17 quarry-blasting plan dated  
18 September 17, 2002 seems to  
19 be within DFO's guidelines  
20 for the use of explosives in  
21 or near Canadian fisheries  
22 waters. However, there may  
23 be monitoring requirements  
24 that should be included, such  
25 as..."

1                                   As he goes on to say visual  
2 survey.

3                                   Then if you go back to the first  
4 page, Mr. Wright responds on that same date:

5                                   "Good morning/afternoon in  
6 Halifax, Jim. The explosives  
7 guidelines are designed  
8 chiefly to protect fish.  
9 When we use them for  
10 protection of marine mammals  
11 we are really flying by the  
12 seat of our pants. We have  
13 used the approach that if a  
14 blasting plan is within the  
15 guidelines, we add a few  
16 extra points to try to  
17 cover-off the marine mammal  
18 concerns. The easiest  
19 mitigation is, if whales are  
20 present within visual limits  
21 (about 1 km) the blast is to  
22 be delayed until the whales  
23 vacate the perimeter."

24                                   And he goes on to state:

25                                   "The one kilometre is

1 arbitrary and is based on  
2 what an observer can spot."

3 Did Mr. Ross tell you about any of  
4 that information, that he had received a blasting  
5 plan, that he had sent it to Mr. Wright, that  
6 Mr. Wright had evaluated it, and that the  
7 recommendation to mitigate was to allow -- not  
8 blast until the marine mammals were at least a  
9 kilometre offshore?

10 A. I did, through the process.  
11 I recall hearing similar information as this.

12 I don't recall whether it was at  
13 this particular time, or not.

14 Q. Do you recall whether it was  
15 before June 26th, 2003?

16 A. Oh, yes. It was definitely  
17 before then.

18 Q. That if, the easiest  
19 mitigation would be to wait until the marine  
20 mammals are a kilometre or more offshore and then  
21 do the blast? That is the information you  
22 received?

23 A. You're asking a very specific  
24 question there. In that particular area, the  
25 species at risk were of paramount concern.



1                   although the plan seems to be  
2                   within the guidelines for the  
3                   use of explosives in or near  
4                   Canadian fisheries waters,  
5                   there is insufficient detail  
6                   to make an assessment on its  
7                   effects on threatened or  
8                   endangered marine mammals."

9                   Do you see that?

10                  A.    Yes.

11                  Q.    And were you made aware that  
12                  Mr. Wright had given Mr. Ross information about the  
13                  easiest mitigation steps to take for the proponent  
14                  and that Mr. Ross had written this letter the same  
15                  day?

16                               MR. SPELLISCY:  Sorry, this  
17                  question has been asked about four times now.  I  
18                  think the witness has pretty clearly testified he  
19                  wasn't made aware of this information.

20                               We are now reading through  
21                  documents in the record again which is what we have  
22                  done before, when the witnesses have said they  
23                  aren't aware of it.  It's the same with Mr. Petrie.  
24                  With Mr. McLean apparently it was okay to point out  
25                  no personal knowledge, but with Mr. Petrie and now

1 with Mr. Hood we are going through this. The  
2 question has been asked and answered. I don't know  
3 why we're doing this.

4 Q. With respect to my honourable  
5 friend, this is the first time we have looked at  
6 this document. It is a critical point and I  
7 haven't asked him about this document before just  
8 now.

9 PRESIDING ARBITRATOR: Go ahead.

10 MR. SPELLISCY: I'm sorry your  
11 question was, "And you were made aware that  
12 Mr. Wright had given Mr. Ross information about the  
13 easiest mitigation steps to take for the proponent  
14 and that Mr. Ross had written this letter the same  
15 day." He just answered the question before that  
16 said he wasn't aware that, of this specific  
17 mitigation information given by Mr. Wright. So I  
18 think, with respect, this question has been asked  
19 and question.

20 MR. NASH: With respect, the  
21 question was whether he had seen this letter with  
22 respect to the transmission of that information  
23 from Mr. Wright on the same day that this letter  
24 was sent out to Mr. Petrie. And so it is really  
25 about this letter.



1 Q. Have you seen this letter  
2 before today?

3 A. I don't know. What I am  
4 aware of is, between 2002 and the region initially  
5 became aware that this project was going to be  
6 proposed, and May of 2003 they did require --

7 Q. Excuse me. I haven't asked  
8 you anything about the broader question. I am  
9 simply saying: Have you seen this letter before  
10 today?

11 A. I don't believe so.

12 Q. Okay. It wasn't provided to  
13 you by the region?

14 A. Not that I recall.

15 Q. Could you turn, please, to  
16 tab 9, which is Exhibit R-624. This is a briefing  
17 note, a memorandum for the Minister, and if we go  
18 to the last page, page 3, it has the name J.  
19 Crocker, your name, B. Hood, Mr. Nadeau, and  
20 Mr. Cuillerier.

21 Who was Mr. Crocker?

22 A. Joe Crocker was a fishery  
23 biologist who had a secondment at the time in the  
24 habitat operation section at headquarters.

25 Q. Who drafted this memorandum?

00081

1                   A.    It was drafted at the region  
2 and first edited by Joe Crocker.

3                   Q.    Would it have then come up in  
4 the normal channel through Mr. Bellefontaine?

5                   A.    Yes, unless he was absent and  
6 the person temporarily in his position there  
7 approved it.

8                   Q.    How do you know that it was  
9 drafted by the region and then refined by  
10 Mr. Crocker? Does it say that on the document  
11 anywhere?

12                  A.    No. But that was the normal  
13 process.

14                  Q.    So that was the normal  
15 process, but you don't know specifically whether  
16 this followed the normal process; is that fair?

17                  A.    Well, as far as I -- only on  
18 rare exceptions did we develop a briefing note at  
19 headquarters. And that would most often occur when  
20 the subject of the briefing note was on something  
21 related to national policy on a habitat matter. So  
22 on a particular file they would come from the  
23 region. That's normal process.

24                  Q.    It says in the box on the  
25 first page, stamp-dated October 9th, 2002, third

1 bullet:

2 "DFO recently commented on  
3 the preliminary blasting plan  
4 which the department found to  
5 be deficient. The proponent  
6 is currently revising it."

7 Would that deficiency be something  
8 that came from the region or was it a deficiency  
9 which came from head office?

10 A. That would have clearly come  
11 from the region.

12 Q. So there is nothing in there  
13 about Mr. Wright's comments about the easiest  
14 mitigation, monitoring, and so on. Can you offer  
15 anything from your own knowledge as to how it could  
16 be that on October 9th, ten days after the email  
17 exchange between Mr. Wright and Mr. Ross, it could  
18 be stated that the department found that to be  
19 deficient?

20 I am going to put that more  
21 particularly, in particular with respect to marine  
22 mammals. From your own knowledge.

23 A. Well, from my own knowledge,  
24 Dennis Wright is only one of the experts involved  
25 and he is not an expert in marine mammals. And at

00083

1 the time the region were dealing with a number of  
2 scientists, some of whom were experts in marine  
3 mammals.

4 Q. Do you have any idea whether  
5 that blasting plan was reviewed by marine mammals  
6 experts?

7 A. No, I don't know.

8 Q. No knowledge of that at all?

9 A. No.

10 Q. Do you know who in the  
11 department found that blasting plan to be  
12 deficient?

13 A. No.

14 Q. If you go to the next page  
15 under the second bullet on page 2 it states:

16 "DFO recently received the  
17 preliminary blasting plans  
18 for the terrestrial aspects  
19 of this proposal. DFO  
20 advised the proponents that  
21 the plans were deficient with  
22 respect to mitigating impacts  
23 to fish, and fish habitat."

24 Do you see that?

25 A. Yes.

1 Q. And could you go back to the  
2 letter at tab 8, Exhibit C-478. And can you see  
3 any reference to fish and fish habitat, in that  
4 letter?

5 A. No. It is with respect to  
6 marine mammals.

7 Q. Did you understand that at  
8 that time the only review that DFO was to be doing  
9 was with respect to the effects of blasting, the  
10 potential effects of blasting on marine mammals?

11 A. That is what the province had  
12 asked them to do, yes.

13 Q. Could you understand why, if  
14 the department was doing an assessment of blasting  
15 on fish and fish habitat, the proponent would not  
16 be so advised?

17 A. No. In my position, no.

18 Q. It states, "As of October  
19 5th, 2002", back on Page 2, fourth bullet:

20 "DFO has not received the  
21 revised plans for the quarry  
22 and blasting or the  
23 additional information  
24 requested in February."

25 And then below the title there,

1 "Analysis", on the third bullet:

2 "DFO is awaiting the revised  
3 land-based blasting plan.  
4 Upon receipt, departmental  
5 staff will evaluate its  
6 effectiveness at mitigating  
7 impacts to fish and fish  
8 habitat, particularly in  
9 regard to the marine  
10 environment."

11 That would be something, I would  
12 suggest to you, that it would be important for the  
13 proponent to know, that the DFO was actually  
14 evaluating the effectiveness of its blasting plans  
15 with respect to fish and fish habitat. Correct?

16 A. Yes. And I imagine that the  
17 regional staff --

18 Q. I don't need your  
19 imagination. I am just asking you --

20 A. Okay.

21 Q. -- and have you confirmed  
22 that it would be important for a proponent, on any  
23 project, to know what the purpose of an evaluation  
24 was by DFO? Correct?

25 A. Yes. And in those cases, the

1 logical next step was that the department habitat  
2 staff were asking for more information, either with  
3 questions they had or when it became available.

4 Q. You're just making a general  
5 comment now about how things should work. Not  
6 about how they might have worked in this case.  
7 Correct?

8 A. Correct.

9 Q. Yes.

10 MR. SPELLISCY: I'm sorry, but you  
11 have asked him a question about a letter that he  
12 hadn't seen. So I think, you know, and I did let  
13 you finish, but I think it is important when you're  
14 asking questions about things he doesn't have  
15 personal knowledge of, you cut him off when he said  
16 "I imagine". You're asking him to speculate, so I  
17 think we need to let him finish his answers just  
18 generally, going forward.

19 BY MR. NASH:

20 Q. I'm not asking him to  
21 speculate, with respect; I'm asking him to say  
22 whether or not it would be important in the normal  
23 case for a proponent to know what the fisheries  
24 department is evaluating with respect to a  
25 proponent's plans. Correct?

1 A. Yes.

2 Q. If you go then to the next  
3 tab, Tab 10 at Exhibit R-118. You will see that  
4 there is another letter from Mr. Buxton to  
5 Mr. Petrie. "Enclosing the blast design for an  
6 initial test blast"; it is supplementary to his  
7 earlier letter.

8 And then go to the next tab, which  
9 is a letter from Mr. Ross dated October 30th, back  
10 to Mr. Petrie of October 30th, 2002.

11 Let me ask you. Were you aware of  
12 this back and forth between Mr. Buxton to  
13 Mr. Petrie, to Mr. Ross and then back to Mr. Petrie  
14 and Mr. Buxton? Were you aware of all of that  
15 going on at the time?

16 A. No. Again, I wasn't involved  
17 with this.

18 Q. And you weren't informed of  
19 this by Mr. Ross or anyone else at DFO region?

20 A. I knew that it was an ongoing  
21 process and when I would be updated by Mr. Ross or  
22 Mr. Zamora they would mention aspects related to  
23 blasting, but not at the specific level like this.

24 Q. So you don't recall that to  
25 and fro between Mr. Buxton and Mr. Petrie and



1 Mr. Ross; correct?

2 A. No. Not in that degree of  
3 detail.

4 Q. Have you seen this letter  
5 before today?

6 A. No.

7 Q. Mr. Ross is writing to  
8 Mr. Petrie saying, halfway down the page:

9 "We expected the following  
10 information to accompany a  
11 complete blasting plan."

12 And then he's talking about  
13 conditions 10 (a) to (e). In fact and (f),  
14 "including blasting on Sundays."

15 Do you know what jurisdiction DFO  
16 would have with respect to blasting on Sundays or  
17 such other provincial matters?

18 A. I don't believe we would have  
19 any.

20 Q. Okay. If you go to the next  
21 tab, tab 12, Exhibit C-296. This is a letter from  
22 the Minister of Fisheries and Oceans Mr. Thibault  
23 to Ms. Hubbert.

24 Do you know who drafted this  
25 letter?

1 A. No.

2 Q. Do you know in the normal  
3 course who would draft a letter for the Minister to  
4 go out to a citizen? A letter of this nature  
5 advising the person about the status of a plan or a  
6 circumstance?

7 A. Well, this looks like one of  
8 probably hundreds of minister's letters that were  
9 received on this file. It was the most contentious  
10 file in my 11 years at DFO that I recall in eastern  
11 Canada.

12 The letters would -- well in most  
13 cases, be written by regional staff, edited by  
14 headquarters staff and then the Minister's office  
15 had a correspondence unit.

16 Q. As the senior liaison officer  
17 on this file, would it have been normal for you to  
18 have seen letters such as this?

19 A. Yes. It was normal for me,  
20 if I was there, to --

21 Q. When you say you were there,  
22 in the fall of 2002, you were there at DFO?

23 A. I was there, yes.

24 Q. So do you remember if you saw  
25 this letter?

1                           A.    No.  I don't remember this  
2 one in particular.

3                           Q.    It states:  
4                                 "DFO received a copy -- I'm  
5                                 on the second paragraph --  
6                                 "of this proposal from the  
7                                 province which is responsible  
8                                 for the permitting of  
9                                 land-based quarries."

10                          You would agree with that  
11 statement, that's correct, that the province is  
12 responsible for the permitting of land-based  
13 quarries?

14                          A.    Yes.

15                          Q.      
16                                 "Upon review of the proposal  
17                                 DFO concluded that there were  
18                                 no significant concerns with  
19                                 respect to the legislation  
20                                 administered by this  
21                                 department."

22                          That was true at the time?

23                          A.    At this time, based on the  
24 information that was available.

25                          Q.    As of October 30th, 2002,

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1 there was, there were no significant concerns with  
2 respect to the legislation administered by the  
3 department; correct? So far as you know?

4 A. Yes, there was concern.  
5 That's why the regional staff were continuing to  
6 look into it with experts as they received more  
7 information.

8 Q. So are you saying that this  
9 letter is incorrect?

10 A. Well, no. Not at that  
11 particular time.

12 Q. So at this particular time,  
13 that is what I'm asking you about. October 30th,  
14 2002, there were no significant concerns with  
15 respect to the legislation administered by the  
16 department?

17 A. That's what this letter is  
18 saying.

19 Q. And that was your  
20 understanding at the time?

21 A. Well, it's again, it is ten  
22 years ago. So for me to say clearly that on  
23 October 30th, that was my understanding, I'm sorry,  
24 I can't I can't recall that.

25 Q. You don't have any

1 recollection generally that as of October 30th or  
2 thereabouts, October of 2002, that there were any  
3 significant concerns arising from the Whites Point  
4 quarry site with respect to federal  
5 legislation? That's correct?

6 A. At that time, with the  
7 information available, yes.

8 PRESIDING ARBITRATOR: Mr. Nash,  
9 would that be a good point to have a coffee  
10 break? Would that fit?

11 MR. NASH: Yes, that would fit  
12 very well.

13 PRESIDING ARBITRATOR: Let's have  
14 our coffee break and we will resume at 11:20.  
15 Mr. Hood, you are not supposed to converse with  
16 anybody.

17 THE WITNESS: Okay.

18 PRESIDING ARBITRATOR: So I am  
19 sure somebody will get you coffee.

20 THE WITNESS: Okay, thank you.

21 --- Recess at 11:06 a.m.

22 --- Upon resuming at 11:25 a.m.

23 PRESIDING ARBITRATOR: Mr.  
24 Appleton will be back any second.

25 MR. NASH: We can go ahead.

1                               PRESIDING ARBITRATOR: Mr.  
2     Appleton said he would be back any second, but we  
3     can go.

4                               MR. NASH: Sure.

5                               PRESIDING ARBITRATOR: Mr. Nash,  
6     you have the floor.

7                               MR. NASH: Thank you.

8                               MR. SPELLISCY: Before we get  
9     started, I wanted to ask in terms of timing for  
10    this afternoon. Mr. Hood had been scheduled for  
11    the morning, Mr. Bellefontaine for the afternoon.

12                              I note we are about -- we've seen  
13    some of the later ones, but about 13 tabs or 14  
14    tabs through 83. I am wondering what we should be  
15    thinking about for Mr. Bellefontaine. He does  
16    leave tonight back to Sweden.

17                              MR. NASH: Yes, I can clarify,  
18    Mr. President. When we, on our side, first  
19    submitted our proposed schedule for the witnesses,  
20    I had scheduled Mr. Hood on one day, knowing he  
21    would be a longer witness, and either Mr. Daly or  
22    Mr. Chapman on that same date, knowing that they  
23    would be shorter witnesses.

24                              I had done the same for the other  
25    day, had Mr. Bellefontaine on one day, and then a

1 shorter witness on the same date.

2 Mr. Bellefontaine had a scheduling  
3 issue so that he has to be out today. He couldn't  
4 be here tomorrow. He would ordinarily have been  
5 tomorrow. So we ended up with two longer witnesses  
6 on the same day.

7 I am going as fast as I can and I  
8 guess we will see where we are at lunch time. I  
9 recognize the concern of my friend and I will try  
10 to address that.

11 PRESIDING ARBITRATOR: So let's  
12 see how it goes.

13 BY MR. NASH:

14 Q. Thank you. Could we go back  
15 to tab 4, please, in that bundle before you,  
16 Mr. Hood?

17 Exhibit C-963, if I heard you  
18 correctly, I understand that you said that you  
19 received this document or saw it for the first time  
20 yesterday.

21 A. Yes.

22 Q. How did you come to see this  
23 document yesterday?

24 A. I was shown it by a counsel  
25 for DFAIT.

1 Q. Were you given -- shown any  
2 other documents?

3 A. Not new ones. We primarily  
4 reviewed my notes.

5 Q. So you were briefed by  
6 counsel from DFAIT for the purpose of attending  
7 here at this hearing today?

8 A. Exactly. Yes.

9 Q. I had thought that that was  
10 not part of this process myself, because that is an  
11 indirect communication to a witness with respect to  
12 evidence that has been given over the course of the  
13 hearing, but, in any event, we will move on.

14 MR. SPELLISCY: I would like to  
15 respond. Mr. Hood has clarified that, of course,  
16 he did not hear of, read, review, was not told  
17 about any testimony or arguments.

18 We went over documents with him  
19 yesterday, as we have done numerous times before.  
20 I am not going to get into what we did, because  
21 that is solicitor-client privileged, but witnesses  
22 were not sequestered prior to this. We did not  
23 discuss testimony. We did not discuss argument.  
24 We did not discuss anything of that sort. That is  
25 as much as I am going to get into, in terms of what



1 our preparations were for this hearing.

2 If the insinuation is that we  
3 might have done something improper, I reject that  
4 entirely.

5 MR. NASH: I am not insinuating  
6 anything, Mr. President. I'm just saying our  
7 practice was not to talk to our witnesses at all  
8 before they gave testimony here.

9 BY MR. NASH:

10 Q. What other documents did you  
11 review? Were they all just documented that had  
12 been produced as part of the witness statements and  
13 affidavits as part of this case?

14 A. Yes. They are all documents  
15 that I had had for weeks, months, or several years.

16 Q. Could you go, please, to tab  
17 5, which should be now Exhibit C-256.

18 A. Okay.

19 Q. Which should be the Surette  
20 email. Oh, you're putting C-256 into tab 5 of your  
21 binder.

22 A. Yes.

23 Q. Yes. And do we all have that  
24 document? It should be three-hole punched, I hope.

25 PRESIDING ARBITRATOR: Counsel,

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1 could I just clarify? Are we getting rid of 526  
2 entirely?

3 MR. NASH: Yes. Get rid of tab  
4 526 out of tab 5.

5 PRESIDING ARBITRATOR: So C-526  
6 goes out?

7 MR. NASH: C-526 goes out and  
8 C-526 goes in.

9 PRESIDING ARBITRATOR: All right.

10 BY MR. NASH:

11 Q. Mr. Hood, if you could go to  
12 the bottom of page 2 of C-256, it is an email from  
13 Tim Surette to Neil Bellefontaine, who is the  
14 Regional Director-General; correct?

15 A. Yes.

16 Q. Faith Scattolon, who was she?

17 A. The director of habitat and  
18 oceans in the region.

19 Q. She would be Mr. Boudreau's  
20 boss?

21 A. Yes.

22 Q. And Mr. Boudreau, who was  
23 Mr. Ross's boss?

24 A. Right.

25 Q. And Mr. Boudreau is the same

1 Mr. Boudreau who the fax was sent to by Nadine  
2 Belliveau?

3 A. Yes.

4 Q. Yes. And there is Thomas  
5 Wheaton there, who is a local habitat officer;  
6 correct?

7 A. Yes. In Yarmouth, yes.

8 Q. And Greg Peacock you have  
9 identified as the communications person in the  
10 Halifax office?

11 A. Yes.

12 Q. If you go over to the next  
13 page, Mr. Surette writes:

14 "I have been advised by the  
15 Minister's office (Nadine)  
16 that we are not to accept a  
17 report on the effects of  
18 blasting on marine mammals as  
19 per section I of item 10 of  
20 the Nova Scotia approval  
21 issued April 30th until such  
22 time as the Minister's office  
23 has reviewed the  
24 application."

25 My first question is: You have

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1 seen this document before?

2 A. No.

3 Q. This is the first time you  
4 have seen this document?

5 A. Yes.

6 Q. This is, I would suggest to  
7 you, a highly unusual form of communication to have  
8 the Minister's constituency assistant directly  
9 contacting an official with the Department of  
10 Fisheries and Oceans; isn't that correct?

11 A. These are all regional staff  
12 that were contacted, and I am afraid I don't know  
13 what the protocol was in the region to know whether  
14 it was unusual or not, because Nadine is from the  
15 constituency office.

16 Q. Yes, of the Minister of  
17 Fisheries?

18 A. Yes.

19 Q. Have you seen that before or  
20 since --

21 A. No.

22 Q. -- in your experience, where  
23 a Minister's constituency assistant is writing to  
24 an official with the department for which the  
25 Minister is responsible?

00100

1                   A.    I don't recall.  There were  
2 probably up to six Ministers while I was in my  
3 position at headquarters.

4                   Q.    And you don't recall seeing  
5 that kind of a communication from a Minister's  
6 staffer in the riding to officials who are involved  
7 in a process with respect to that riding; correct?

8                   A.    Correct.

9                   Q.    And it is certainly not  
10 within the communications protocol we covered  
11 earlier on this morning, where regional officials  
12 send their communications up through  
13 Mr. Bellefontaine, the Regional Director-General,  
14 which then go on to Ottawa.

15                   This would be a clear departure  
16 from that practice; would you agree?

17                   A.    Yes, it would be a departure.  
18 However, the Minister was also the member of  
19 parliament and I don't think it would be unusual  
20 for a member of parliament, staff and constituency  
21 office to contact the region.

22                   Q.    There was a particular  
23 overlay here, though, wasn't there, in that this  
24 Minister, this member of parliament, was the  
25 Minister for that specific district?

00101

1 A. Yes.

2 Q. And that was his riding, and  
3 these are officials that the Minister's  
4 constituency assistant is contacting. That would  
5 be unusual?

6 A. Yes.

7 Q. What was Mr. Surette's  
8 position?

9 A. At that time, I believe he  
10 was the area -- I don't know if he was the area  
11 director of that office or the area habitat  
12 director. I think he was the area director of that  
13 office.

14 Q. In southwest Nova Scotia?

15 A. That area office, yes.

16 Q. Then if you go back to page  
17 2, Ms. Scattolon responds:

18 "The Minister's office is  
19 reviewing the application.  
20 Which application? Tim, do  
21 you know which application  
22 they are talking about? As  
23 for accepting the report on  
24 the effects of blasting,  
25 Paul..."

1 I take it she is referring to Paul  
2 Boudreau?

3 A. Yes.

4 Q. "... I sent you the  
5 Minister's draft letter on  
6 this quarry wherein the  
7 condition that requires the  
8 proponent to provide a  
9 blasting design report is  
10 referenced. My question was  
11 where is the expertise within  
12 DFO to assess whether the  
13 proposed blasting will effect  
14 whales? What do we know  
15 about sound propagation in  
16 this instance? Who will do  
17 this assessment?"

18 Then she says:

19 "I am going to give the ADM's  
20 office a heads up as they  
21 should be aware of Ministry's  
22 office involvement."

23 Do you see that?

24 A. Yes.

25 Q. And the ADM, was that Sue

1 Kirby?

2 A. Yes.

3 Q. And that would be the ADM to  
4 whom Neil Bellefontaine would have reported?

5 A. He was actually not reporting  
6 to -- well, he was at the same level as Sue, but,  
7 yes, he would communicate with Sue.

8 Q. Mr. Bellefontaine would  
9 communicate to Ottawa through Sue Kirby?

10 A. On habitat matters, but,  
11 also, I understand he would communicate with the  
12 Deputy Minister.

13 Q. Right. And do you read this  
14 as being a direct intervention by the Minister's  
15 office with respect to a report that a proponent is  
16 delivering in regards to a provincial approval?

17 A. I am not going to speculate  
18 on that.

19 Q. Were you told in the fall of  
20 2002 that the Minister's office in Weymouth in Nova  
21 Scotia was in active contact with the DFO officials  
22 regarding the Whites Point quarry?

23 A. That the Minister's office --

24 Q. Yes?

25 A. -- was in direct?



1 Q. Yes?

2 A. -- contact? No, I don't  
3 recall.

4 Q. You don't recall that. When  
5 I'm referring to the Minister's office, I guess  
6 there are two offices, aren't there?

7 A. Yes.

8 Q. There is an office in Ottawa  
9 and there is an office locally. Ms. Belliveau, if  
10 you go back to tab 4, is writing to Mr. Boudreau --  
11 I am looking at Exhibit C-963 -- as the "special  
12 assistant to the Minister".

13 A. Yes.

14 Q. So you were not aware, I  
15 gather, that in the fall of 2002, and in fact over  
16 into 2003, that the Minister's office, through  
17 Ms. Belliveau, was in active regular contact with  
18 DFO officials who were dealing with the Whites  
19 Point quarry?

20 A. No, I didn't have personal  
21 knowledge of that.

22 Q. Did you have any knowledge of  
23 that? Did anybody tell you that or express any  
24 concern about that?

25 A. No.



1 plan by tomorrow, as I would  
2 like to develop a coordinated  
3 response to the proponent for  
4 the first of the week."

5 If you go to the first email on  
6 the page, it is an email from Jerry Conway Monday  
7 December 2nd, 2002. And recall -- and I put this  
8 in context -- Mr. Conway's expression of concern  
9 had led to the insertion of those two clauses (h)  
10 and (i) into the provincial approval?

11 A. Would you remind me what (h)  
12 and (i) were?

13 Q. Yes.

14 A. It was on observation  
15 distance?

16 Q. If you go to tab 3.

17 A. Okay.

18 Q. Which is -- I'm sorry, tab 1,  
19 which is Exhibit R-87, page 10, you will see  
20 conditions (h) and (i). (h) is:

21 "Blasting shall be conducted  
22 in accordance with the  
23 Department of Fisheries and  
24 Oceans Guidelines for the Use  
25 of Explosives in or Near

1 Canadian Fisheries Waters."

2 Those are the guidelines, just for  
3 your recollection, that Mr. Wright had said the  
4 first blasting plan seemed to comply with, seemed  
5 to be in accordance with.

6 Are you with me?

7 A. No, I don't know where you're  
8 looking here.

9 Q. Oh, sorry. Tab 1.

10 A. Yes.

11 Q. Exhibit R-87?

12 A. Yes.

13 Q. Page 10?

14 A. Page 10.

15 Q. And we've got (h) and (i),  
16 and I just read out (h) for you. (i) is:

17 "A report shall be completed  
18 by the proponent in advance  
19 of any blasting activity  
20 verifying the intended charge  
21 size and blasting design will  
22 not have an adverse effect on  
23 marine mammals in the area.  
24 This report shall be  
25 submitted to the Department

1 of Fisheries and Oceans DFO  
2 Maritimes Aquatic Species at  
3 Risk Office, and written  
4 acceptance of the report  
5 shall be received from DFO  
6 and forwarded to the  
7 department before blasting  
8 commences."

9 A. Okay.

10 Q. And it was this clause,  
11 clause (i), that Mr. Surette had referred to in his  
12 email, if that helps you.

13 Do you recall that this clause was  
14 put in as a result of Mr. Conway's expression of  
15 concern about blasting on land in respect to its  
16 potential adverse impact on marine mammals?

17 A. No, I don't recall.

18 Q. You don't recall any of that?

19 Are you seeing Mr. -- going back  
20 to tab 14, are you seeing at Exhibit C-605  
21 Mr. Conway's response to Mr. Ross for the first  
22 time? I will read it out:

23 "Sorry, for not getting back  
24 to you on Friday. Another  
25 issue came up in respect to

1                   bottlenose whales that  
2                   required my immediate  
3                   attention.  Anyway, in  
4                   respect to the Whites Cove  
5                   blasting, based on the  
6                   information provided and the  
7                   undertakings that the  
8                   proponent is prepared to  
9                   take, I have no concerns in  
10                  respect to marine mammal  
11                  issues in respect to this  
12                  specific proposal."

13                   Is that coming to you for the  
14 first time?

15                   A.  Well, I am not copied on it  
16 and I don't recall ever having seen it.

17                   Q.  And you don't recall ever  
18 having been told about it by regional officials?

19                   A.  Perhaps there was something  
20 related to this in one of my weekly or biweekly  
21 updates, but, I'm sorry, I don't remember.

22                   Q.  You don't have any  
23 recollection of being told that the proponent on  
24 the 3.9 -- the approval holder of the 3.9 had  
25 submitted a blasting plan which the marine mammal

00110

1 coordinator, Jerry Conway, had no concerns about?

2 A. No, I don't recall.

3 Q. If you could go, please, to  
4 tab 15, Exhibit C-922, it is an email from you to  
5 Mr. Wheaton and Mr. Ross copying Stephanie Tan.

6 That is a Ministerial staffer in Ottawa; correct?

7 A. Yes.

8 Q. Joey Crocker, who is the  
9 biology assessment officer in Ottawa?

10 A. Yes.

11 Q. And Greg Peacock, who is the  
12 communications director with Mr. Bellefontaine's  
13 office?

14 A. I believe so, yes.

15 Q. "Thomas, Jim, please be  
16 advised that any Digby quarry  
17 or marine terminal related  
18 emails or other  
19 correspondence being sent by  
20 DFO staff to the local  
21 constituency office should be  
22 copied to Stephanie Tan and  
23 Greg Peacock so that the  
24 Minister is simultaneously  
25 aware of developments on this

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1 file."

2 Do you remember sending that  
3 email?

4 A. Not specifically, but I  
5 obviously did, yes.

6 Q. If you, just for context, go  
7 over to the next tab, tab 16, Exhibit C-43, it is  
8 an email from Mr. Ross to Mr. Boudreau, the middle  
9 of the page, second email down, copied to your  
10 attention:

11 "Paul, the Minister's office  
12 is concerned about  
13 information flow between the  
14 region and their office with  
15 respect to Digby quarry. The  
16 Minister's constituency  
17 office calls Thomas Wheaton  
18 on a regular basis and me  
19 from time to time seeking  
20 information on the quarry.  
21 The Minister's office would  
22 like to be informed of these  
23 transactions as well on a  
24 timely basis. They suggested  
25 that Stephanie Tan of the



1                                   Minister's office and Craig  
2                                   Peacock be cc'd also."

3                                   Now, I am going to suggest to you  
4 that that flow of communication falls far beyond  
5 what we describe -- what you described this morning  
6 as being the normal flow of information from region  
7 to Director-General, Mr. Bellefontaine, from  
8 Mr. Bellefontaine to Ottawa, up to the Minister; is  
9 that correct?

10                                  A.    Well, I acknowledge that that  
11 is unusual, but I think what this reflects is just  
12 that the Minister's office and the constituency  
13 office all need to be informed of what was  
14 occurring, because if the constituency office  
15 called the Minister's office in Ottawa and asked  
16 about the file, it would be probably embarrassing  
17 to them if they didn't have any answers for them.

18                                  Q.    But you would agree that that  
19 flow of communication is unusual; correct?

20                                  A.    I would say that it was not  
21 normal, but perhaps not unusual in this case  
22 because of the complexity of the file.

23                                  Q.    Had you ever seen such  
24 communication flow before between a Minister's  
25 office and DFO officials, before or since?

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1 A. No.

2 Q. And so it was because -- and  
3 in particular, because this project was in the  
4 Minister's riding that this information flow, this  
5 communication flow, was set up; correct?

6 A. I think it was because --  
7 well, yes, it was in the Minister's riding.

8 Q. Yes?

9 A. And the Minister and his  
10 staff personally were being questioned by numerous  
11 people. In fact, I mentioned earlier that it was  
12 the most contentious file I dealt with in the 11  
13 years that I was there.

14 Q. Yes. And would you not agree  
15 with me that where a project was in a Minister's  
16 riding -- and this is an unusual circumstance, for  
17 sure -- it is in the MP's riding, and then he is  
18 the Minister responsible for the regulatory process  
19 under which this environmental assessment or  
20 pending environmental assessment could be  
21 conducted. Do you agree that is an unusual  
22 situation?

23 A. Yes, yes, yes.

24 Q. Would you agree with me that  
25 in those unusual circumstances, it would be even

1 more important for a Minister to take a hands-off,  
2 none interfering approach so that not only could it  
3 be seen that there was no bias or prejudice to the  
4 proponent, but that there was actually no bias or  
5 prejudice to the proponent?

6 A. Yes, I would agree.

7 Q. And then you write to

8 Mr. Nadeau:

9 "Richard: Re flow of  
10 information on Digby quarry,  
11 I would be interested in your  
12 thoughts on this."

13 Did you ask Mr. Nadeau for his  
14 thoughts?

15 A. Yes. I met regularly with  
16 Mr. Nadeau on all of the files I worked on, as he  
17 was my superior and had years of experience with  
18 the department.

19 Q. If you go to the next tab,  
20 tab 17, it is a letter from Mr. Ross to Mr. Petrie,  
21 cc'd to Mr. Wheaton, and I put this in the context  
22 of that email that Mr. Conway has sent to Mr. Ross:

23 "I have no concerns with  
24 respect to marine mammals  
25 with respect to this blasting

00115

1 plan."

2 He's got that information nine  
3 days before. Now reading this letter, second  
4 paragraph:

5 "The information provided is  
6 inadequate to give DFO-HMD a  
7 sufficient level of  
8 confidence that fish, marine  
9 mammals, and fish habitat  
10 will be adequately protected  
11 from the effects of blasting  
12 operations at the Whites Cove  
13 quarry."

14 Now, did you understand at that  
15 time that Mr. Ross was conducting an assessment of  
16 the effect of blasting on fish and fish habitat?

17 A. My understanding at the time  
18 was that the habitat staff were collecting  
19 information from a number of scientists to respond  
20 to the province with respect to the effects, yes.

21 Q. Which scientists?

22 A. I couldn't name the  
23 scientists.

24 Q. Do you know what their areas  
25 of expertise were?

1                   A.     They were regional science  
2 staff.  There was hundreds of staff in the region,  
3 and, no, I don't know what their specific areas of  
4 expertise were.

5                   However, they would be the  
6 appropriate scientists to be speaking with on any  
7 aspect of the blast effects on fish, marine mammals  
8 that Habitat would need to know about.  I know that  
9 they had experts on marine mammals, as well as fish  
10 and specialists with knowledge of the inner Bay of  
11 Fundy, which was a particular concern.

12                  Q.     And you know that at this  
13 time, in December of 2002, that those experts on  
14 fish and fish habitat were being consulted with  
15 respect to this blasting plan?

16                  A.     Yes.

17                  Q.     And do you know that the only  
18 reason that DFO was involved at this stage at all  
19 was because Mr. Petrie had included, in his  
20 approval of April 30th, at the request of  
21 Mr. Jollymore, that (h) and (i) be put into that  
22 approval, and that is the only reason that DFO was  
23 involved?  Do you recall that?

24                  A.     Well, given that we didn't  
25 receive a full project description that triggered

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1 an EA until later, yes. Yes, I know that.

2 Q. I don't follow that. Could  
3 you explain that?

4 A. Well, you asked me to tell  
5 you that -- to agree "yes" or "no" that the only  
6 reason the region was reviewing the blasting plan  
7 and having conditions applied at that point were to  
8 provide input back to the province.

9 Q. And --

10 A. Yes, I agree.

11 Q. -- it would be a reasonable  
12 expectation that if a blasting expert on the one  
13 hand and the marine mammal expert on the other, who  
14 had expressed concern about marine mammals and  
15 blasting, if both of them had said, No particular  
16 concern about this blasting plan, here are  
17 reasonable mitigation steps to take, that that  
18 would be communicated to a proponent?

19 A. I would assume so.

20 Q. It would be unusual, would it  
21 not, not to have that critical information, the  
22 only information that was important in relation to  
23 that blasting plan for DFO, for that information to  
24 be delivered to the proponent?

25 A. Well, with this file and

00118

1 other complex files, when information is coming in  
2 on an ongoing basis, it would be -- there was a lot  
3 of back and forth between regional staff and  
4 proponents. So it would be normal.

5 Q. But it would be critically  
6 important that the two scientists who have  
7 something to say about a blasting plan and its  
8 effect on marine mammals, who say, "No particular  
9 concern about the blasting plan, here are the  
10 mitigation steps you can take, wait until they are  
11 a kilometre offshore", that that information would  
12 not be delivered to the proponent?

13 A. Perhaps not, if they were  
14 expecting more information or they still had  
15 outstanding questions.

16 Q. Do you think that it would be  
17 appropriate for that critical information to be  
18 withheld from a proponent?

19 A. Not if the timing was  
20 correct.

21 Q. I don't understand what  
22 you're saying.

23 A. Well, if the timing was  
24 correct in terms of the regional staff having all  
25 of the information to answer all of the questions

00119

1 they had back to them. For example, I don't know  
2 that these were the only two experts that they were  
3 dealing with, because there's --

4 Q. Just don't know?

5 A. No, I don't know.

6 MR. SPELLISCY: Are we going to  
7 let him finish his answers?

8 THE WITNESS: There was reference  
9 in my notes to them dealing with four scientists,  
10 and we've only referred to --

11 BY MR. NASH:

12 Q. That was much later, with  
13 respect --

14 MR. SPELLISCY: Again, can we let  
15 the witness finish his answers?

16 BY MR. NASH:

17 Q. Well, the four scientists  
18 reference is in May of 2003; correct?

19 A. Correct.

20 Q. That is after the application  
21 for the dock and terminal have been delivered;  
22 correct?

23 A. Yes.

24 Q. After the project description  
25 has been delivered; correct?



1 A. Right, mm-hm.

2 Q. This is in December of 2002.

3 And the two most critical facts that Mr. Ross needs  
4 to know and that the proponent needs to know is  
5 that mitigation measures are available with respect  
6 to blasting and the potential effect on whales,  
7 marine mammals, and that the marine mammal expert,  
8 whose concern has resulted in that condition being  
9 put into the provincial approval, has no remaining  
10 concerns.

11 You would agree with me that that  
12 would be critically important information for any  
13 proponent to receive; correct?

14 A. Yes. And as I don't know the  
15 reasons why the regional staff would have not  
16 provided it to the proponent at that point, I can't  
17 comment on that.

18 Q. On its face, from what you  
19 know looking at these documents, it is unusual,  
20 isn't it?

21 A. I don't know.

22 Q. All right. If you then go to  
23 tab 19, this is a briefing note which would have  
24 emanated -- sorry, memorandum from the Minister  
25 January 14th, 2003 signed by Peter Harrison. He

1 was the Deputy Minister of Department of Fisheries  
2 and Oceans?

3 A. Yes, yes.

4 Q. This would have emanated from  
5 the region from Mr. Bellefontaine's office;  
6 correct?

7 A. Yes.

8 Q. And gone over to Ms. Kirby?

9 A. Yes.

10 Q. And then up through the  
11 Deputy Minister to the Minister; correct?

12 A. Mm-hm.

13 Q. If you go to the second page,  
14 first of all, did you see this briefing note at the  
15 time?

16 A. Yes. I signed off on it at  
17 the bottom, and the approval -- my name is in the  
18 approval chain here.

19 Q. So if we go to page 3, there  
20 are four names again there. That is what you call  
21 the approval chain?

22 A. At headquarters, yes.

23 Q. So at headquarters. This has  
24 been delivered to headquarters, reviewed by  
25 headquarters staff, including yourself, reviewed by

1 Mr. Nadeau, Mr. Cuillerier?

2 A. Yes.

3 Q. Then gone up to the Deputy  
4 Minister, Mr. Harrison?

5 A. Yes.

6 Q. For transmission to the  
7 Minister; correct?

8 A. Yes.

9 Q. If you go back to page 2,  
10 first bullet, second full sentence:

11 "DFO received the revised  
12 plan on November 20th, 2002  
13 and following its review  
14 asked the proponent for  
15 further information. This  
16 information has yet to be  
17 provided."

18 There is no mention of Mr. Conway  
19 here and there is no mention of Mr. Wright. There  
20 is no mention that the information that has been  
21 received by Mr. Ross is to the effect that there  
22 are no remaining concerns with respect to blasting  
23 and marine mammals at the Whites Point site.

24 Would it not be reasonable, in  
25 order for the Minister to get a complete picture,

1 an accurate picture, for that information to have  
2 been referenced in this briefing note?

3 A. Well, in a briefing note  
4 format like this, we have specific instructions on  
5 the format that restricts the amount of detail that  
6 we would have. And this was the amount of detail  
7 that the region felt was appropriate and of  
8 interest to the Minister at the time.

9 Q. So the region, then, is  
10 making a judgment as to what the Minister might be  
11 interested in at the time; is that fair?

12 A. Yes.

13 Q. And if there is information  
14 that the region has that is not passed on, it is  
15 because they don't think the Minister is interested  
16 in it at the time; is that fair?

17 A. No. It is not to say the  
18 Minister wouldn't be interested, but just that  
19 their assessment was that these are the most  
20 important factors for the Minister to know.

21 Q. Under "Analysis, DFO  
22 Comment":

23 "Considerable media and  
24 public attention has been  
25 focussed on this project and

1 the potential impacts on  
2 marine mammals such as the  
3 endangered Right Whale."

4 I would have thought, based on the  
5 information that we have seen in this proceeding  
6 thus far, that there would be another bullet saying  
7 that, Our blasting expert, Mr. Wright -- or just  
8 our blasting expert, DFO blasting expert, has  
9 reviewed plan and has suggested reasonable measures  
10 for mitigation and that our DFO official, who is  
11 the marine mammal coordinator in the area, has no  
12 concerns.

13 A. No, because further on it  
14 says:

15 "A review of the revised  
16 blasting plan for the quarry  
17 is continuing pursuant to  
18 section 32 of the Fisheries  
19 Act."

20 Q. Of course at this point, in  
21 January of 2003, there is no application for  
22 anything to do with respect to the Whites Point  
23 quarry that engages a federal concern?

24 A. Correct.

25 Q. So a search for section 35 or

1 32 triggers is entirely premature. There is no  
2 project description. There is no application.  
3 There is no application for an authorization under  
4 section 35 or section 32, and there is no marine  
5 terminal application filed under Section 5 of the  
6 Navigable Waters Protection Act. That's correct?

7 A. That's correct.

8 Q. And so there is no  
9 application for authorization for anything that  
10 engages federal concern. That's correct?

11 A. Correct. However, it was  
12 practice within the habitat program nationally, as  
13 soon as the staff became aware of proposed  
14 projects, even at the earliest stages, to try to  
15 evaluate just generally who was going to be  
16 involved, what the nature of their involvement  
17 would be and what the effects would be.

18 Q. Do you know if the proponent  
19 here was told anything about the federal government  
20 in January of 2003, considering whether there were  
21 section 35, section 32 triggers, whether federal  
22 government was doing that kind of assessment that  
23 you're discussing?

24 A. No, I don't know what was  
25 said to the proponent.

1 Q. That would be something  
2 important for the proponent to know, wouldn't it?

3 A. Yes.

4 Q. Did you know at the time that  
5 the endangered Right Whales leave the Bay of Fundy  
6 in the late fall of the year, and they go down  
7 south and they come back in the late spring of the  
8 year?

9 A. Yes, sir. They are there  
10 through the summer.

11 Q. Yes. So that the engaged  
12 concern from Mr. Conway about certainly part of it,  
13 and it is referred to in this briefing note,  
14 mammals such as the endangered Right Whale would  
15 not be affected during the winter months, because  
16 those marine mammals are not even in the Bay of  
17 Fundy; correct?

18 A. Well, I can just say I'm not  
19 an expert in marine mammals.

20 Q. Okay.

21 A. I would rely on experts like  
22 Mr. Conway.

23 Q. Right. Fair enough. If we  
24 go to tab 20, Exhibit C-124, you will see a letter  
25 from Mr. Buxton dated January 28th, 2003, and

1 Mr. Buxton is responding to the letter of December  
2 11th, 2002 from Mr. Ross and making responses to  
3 general comments and specific comments. And it is  
4 a lengthy letter.

5 A. Mm-hm.

6 Q. It is about six pages, in  
7 that range, responding in great detail to the  
8 concerns raised in Mr. Ross's earlier letter.

9 Is this the first time you have  
10 seen this letter?

11 A. I don't recall having seen it  
12 before.

13 Q. Do you recall getting advice  
14 from Mr. Ross in your various conversations with  
15 him that he was receiving another -- or had  
16 received a further response from the proponent with  
17 respect to the concerns raised in the earlier  
18 correspondence?

19 A. No, I don't recall.

20 Q. I would like to turn you,  
21 then, to tab 21, Exhibit C-56.

22 This is an advertisement under the  
23 Navigable Waters Protection Act. It is Exhibit  
24 R-56. It states:

25 "Global Quarry Products



1 hereby gives notice that an  
2 application has been made to  
3 the Minister of Fisheries and  
4 Oceans under the Navigable  
5 Waters Protection Act for  
6 approval of the plans and  
7 site of the work described  
8 herein under section 5 of the  
9 said Act."

10 So this is one of those  
11 applications that we have spoken about that would  
12 engage federal concerns; right?

13 A. Yes.

14 Q. "The Global Quarry Products  
15 has deposited with the  
16 Minister of Fisheries and  
17 Oceans and in the office of  
18 the district registrar of the  
19 land registry district of  
20 Digby County at Weymouth  
21 under deposit number 2704 a  
22 description of the site and  
23 plans of a proposed marine  
24 terminal in Bay of Fundy at  
25 Whites Cove."

1                   Then it goes on to talk about  
2 written objections. Now, this is a very routine  
3 kind of advertisement, isn't it?

4                   A. Yes.

5                   Q. Under the statute, you have  
6 to publish in the newspapers and in the Canada  
7 Gazette; correct?

8                   A. Yes.

9                   Q. And I gather that it created  
10 a firestorm of activity in communication within the  
11 Department of Fisheries and Oceans and the  
12 Minister's office. Do you recall that?

13                   A. Yes, I do.

14                   Q. And if you go to tab C -- tab  
15 22. Exhibit -- I apologize, I am not sure if it is  
16 R-57 or C-57.

17                   MR. SPELLISCY: R.

18                   BY MR. NASH:

19                   Q. R-57. It is an email from  
20 Tim Surette to a number of people, including some  
21 of the players that we had seen earlier on in his  
22 June email. It is Monday, March 3rd, Neil  
23 Bellefontaine, Carol Ann Rose -- what was her  
24 position?

25                   A. Carol Ann Rose then was the

1 director of habitat and oceans in the region.

2 Q. Would she report to Neil  
3 Bellefontaine?

4 A. Yes.

5 Q. Larry Wilson, who was he?

6 A. I don't know.

7 Q. Melinda Donovan, who was she?

8 A. She was the supervisor in the  
9 navigable waters program in the region.

10 Q. And Mr. Boudreau and  
11 Mr. Peacock. And the subject line is: Digby  
12 quarry, public notice in Chronicle Herald:

13 "Just a heads up to all that  
14 today a public notice in the  
15 Chronicle Herald appeared to  
16 notify the public that Global  
17 Quarry Products has made  
18 application to the Minister  
19 of Fisheries and Oceans to  
20 approve plans for a marine  
21 terminal. The Minister's  
22 constituency staff had made a  
23 commitment to the residents  
24 they would be advised of any  
25 developments on this file, to

1 the extent possible. The  
2 Minister's staff, nor I, was  
3 not aware that the  
4 notification was being  
5 published.

6 "Given this file is extremely  
7 important to the Minister, we  
8 must ensure that good  
9 communication is maintain by  
10 all parties. The Minister  
11 may invoke an inquiry into  
12 this matter."

13 So the publication of a routine  
14 advertisement in the Halifax Chronicle Herald had  
15 resulted, I gather, in Ms. Belliveau calling up  
16 Mr. Surette and raising Cain and resulting in this  
17 email being sent to DFO officials saying that the  
18 Minister may invoke an inquiry into this matter.  
19 Do you recall hearing about that?

20 A. I do not recall hearing  
21 "inquiry", but I know that these ads generated a  
22 lot of public concern and that there was concern  
23 that not all of the staff were aware of the ad  
24 having gone out.

25 Q. And they weren't also aware

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1 of the protocol that had been set up with respect  
2 to the communication from constituency staff to DFO  
3 officials, to the Minister's office; right?

4 A. Correct.

5 Q. And if you go to the next  
6 tab, which is Exhibit R-60 --

7 A. R-260?

8 Q. R-260. I apologize, I  
9 misspoke.

10 A. Yes.

11 Q. At page 801588. You were  
12 involved in meetings about this ad, weren't you?

13 A. Not before the ad was placed.

14 Q. No, but after the ad and  
15 dealing with the aftermath of it?

16 A. Yes.

17 Q. And there is a reference at  
18 about ten lines from the bottom, "disconnect". Do  
19 you see that?

20 A. Yes.

21 Q. Can you read that out,  
22 please?

23 A. "Disconnect between Tim  
24 Surette and navigable waters.  
25 Navigable waters didn't

1 notify Tim Surette or habitat  
2 management when ad was going  
3 to go in paper."

4 Q. What was that note in  
5 relation to? Was it in relation to a discussion  
6 with others?

7 A. Yes. Just to inform them  
8 that the ad was going in. And that is navigable  
9 waters was a separate program from the programs  
10 that Tim was involved with. So not everybody was  
11 in the loop.

12 Q. Right. But my question -- I  
13 wasn't clear. Was that on March 7th, 2003 you  
14 inserted this note, and that is four days after the  
15 ad appeared?

16 A. Right.

17 Q. Is that in relation to a  
18 conversation that you are having with people in  
19 your office or in relation to a telephone call you  
20 had from somebody?

21 A. Well, there was a call I  
22 think on March 6th after the ads came out. And  
23 that's what I referred to earlier, was stressing  
24 the importance of keeping everybody informed and  
25 following the proper process.

1 Q. Mr. Ross went on leave at  
2 about this time, is that right, in March of 2003,  
3 and Mr. Zamora took over the file?

4 A. Jim retired. I'm not sure  
5 exactly when, when it was.

6 Q. Do you remember Mr. Zamora  
7 taking over principal responsibilities for the  
8 file?

9 A. I don't remember the  
10 transfer, exactly. I remember Jim retiring and my  
11 communications then being with Phil.

12 Q. And do you recall the issue  
13 of scoping coming up in your discussions with  
14 Mr. Zamora?

15 A. Yes, many times.

16 Q. Do you recall in your  
17 discussions with Mr. Zamora that he said it would  
18 likely be a comp study level of assessment for this  
19 project?

20 A. Over the many months from the  
21 time that the region became aware of the project  
22 and more information was provided, there was a lot  
23 of debate going on about the scope of the project  
24 and at times -- well, I'm sure you will have more  
25 questions about this.

1                   But at times -- and that was both  
2     telling us that, at the time, with the information  
3     they had, they would be looking at a particular  
4     level of EA and a particular scope. But, however,  
5     that was changing over the months and not everybody  
6     viewed the situation in exactly the same way,  
7     because the CEAA was very unclear on scope.

8                   And there was a debate going on  
9     within the public service at the time amongst  
10    various departments, and even within our own  
11    department, about scope at that time.

12                  Q.    We'll come to this, but the  
13    issue was that the Red Hill decision had been  
14    issued, and the Red Hill decision basically said  
15    that the federal government should scope only to  
16    its trigger or only within its jurisdiction; that's  
17    correct?

18                  A.    That it, yes, stepped outside  
19    its jurisdiction. However, that was just one of a  
20    number of Supreme Court decisions at the time.

21                  Q.    Well, the Red Hill decision  
22    was the most recent, and it was a federal court  
23    decision. And did you understand, up till the Red  
24    Hill case, that the universal practice at DFO had  
25    been to scope to trigger?



1                   A.    I cannot -- I can't speak to  
2 whether it was the universal process or not. In  
3 fact, I can say that it probably wasn't, because  
4 the EAs, the recommendations were conducted largely  
5 in the region. And at this particular time,  
6 however, based on --

7                   Q.    Which time is that?

8                   A.    2002-2003.

9                   Q.    Yes?

10                  A.    When I had started there, I  
11 was aware, largely based on discussion and  
12 direction from Richard Nadeau, that it was our  
13 preferred practice to scope to our regulatory  
14 authority. He cited cases in the past where -- and  
15 the reason for this, which I am explaining right  
16 now, is that where we did scope more broadly, we  
17 had to be cautious of becoming responsible for  
18 areas that were outside our mandate, including the  
19 costs and human resources implications on projects  
20 that might even include things like the monitoring  
21 of the impacts of a project on large mammals like  
22 grizzly bears and caribou.

23                  Q.    So Mr. Nadeau saying to you,  
24 if I've got this right, that the practice had been  
25 and was preferable to scope to the trigger, which

1 was within your head of jurisdiction; correct?

2 A. Yes. He is saying be  
3 cautious.

4 Q. And if you go just briefly to  
5 tab 33, which is an excerpt from Mr. Connelly's  
6 expert report, I'm going to suggest to you what  
7 Mr. Connelly's says is reflective of that approach.  
8 At paragraph 42 on page 15, Mr. Connelly states:

9 "Once it has been determined  
10 that the Act applies to at  
11 least part of a proposed  
12 project, a determination must  
13 be made about the scope of  
14 project to be assessed. The  
15 phrase 'scope of project'  
16 refers to the components of a  
17 project or projects that are  
18 to be included in the  
19 environmental assessment and  
20 can include components in  
21 addition to those that  
22 triggered by the Act.

23 "Doelle notes the importance  
24 of distinguishing between the  
25 determination of whether the

1 Act applies and the  
2 determination of 'scope of  
3 project'."

4 And he quotes:

5 "It is important to  
6 distinguish what physical  
7 work or Inclusion List  
8 physical activity triggered  
9 CEAA from what is the scope  
10 of the project for the  
11 purposes of environmental  
12 assessment..."

13 And I note the following sentence:

14 "The triggering process takes  
15 a minimalist approach. The  
16 focus is on what is required  
17 for the Act to apply."

18 Was that your understanding at  
19 this time, and I'm talking about 2003?

20 A. Yes. My understanding at the  
21 time is that while the triggering process takes a  
22 minimalist approach, that the Act allowed us to  
23 also include non-triggered components, if we so  
24 chose.

25 Q. So long as it was within

1 federal jurisdiction?

2 A. Yes.

3 Q. Could you go, please, to tab  
4 26, which is Exhibit C-460? The middle of the  
5 page, Mr. Zamora has written to you, with a copy to  
6 Jim Ross. It is about the Whites Point quarry and  
7 terminal. He states, "Hi, Bruce". This is on  
8 April 1st of 2003:

9 "I'm attaching a draft of the  
10 items discussed during  
11 Monday's meeting with CEAA  
12 and the RA's. Jim Ross is  
13 off on sick leave at least  
14 until Friday and Paul is  
15 away. Reg is acting for Paul  
16 so I was discussing the  
17 meeting notes with him. It  
18 appears that this project is  
19 taking the exact same track  
20 as Deep Panuke."

21 If you go up to the email from you  
22 back to Mr. Zamora on April 2nd, 2003:

23 "Phil, thanks for the  
24 information. It is really  
25 helpful, because we are

1 getting questions from the  
2 minister's office on a  
3 regular basis and need to be  
4 up to speed on this file."

5 When you're referring to "we"  
6 there, who is the "we"?

7 A. The habitat operations  
8 officials in the four eastern regions at  
9 headquarters. So those would come down to us via  
10 the minister's office and we would receive them  
11 usually from the secretarial staff that worked for  
12 the director and the regional -- sorry, the  
13 Director-General.

14 Q. Just so I have this right, is  
15 the Minister's office contacting Mr. Nadeau,  
16 Mr. Cuillerier? Is that the --

17 A. Well, perhaps. But we would  
18 get the question from the secretaries for  
19 Mr. Nadeau and Mr. Cuillerier.

20 Q. Right. And what you had  
21 understood was that "we", including you, were  
22 getting questions from the Minister's office on a  
23 regular basis?

24 A. Yes.

25 Q. And then if you go to tab 27,

00141

1 Exhibit C-461, it is an email from Mr. Zamora to  
2 you of April 3rd, 2003:

3 "Here are a few update  
4 points. On February 17,  
5 2003, NWP decided that the  
6 work will require an approval  
7 under Section 5(1) of the  
8 NWPA."

9 So that is the trigger in that  
10 case; right?

11 A. Yes.

12 Q. The work which the applicant  
13 wished to do would require an approval under  
14 Section 5(1) of the NWPA and that would trigger  
15 CEAA; correct?

16 A. Yes, yes.

17 Q. There had been no application  
18 up to that time for an authorization to do work on  
19 the land; correct?

20 A. Correct.

21 Q. And, in fact, there never was  
22 an application made by the proponent to do work on  
23 the land; correct?

24 A. You mean in terms of the  
25 whole quarry or the test quarry?

1 Q. In terms of any part of the  
2 quarry. There was never an application to federal  
3 authorities, DFO?

4 A. For an authorization?

5 Q. For an authorization to do  
6 anything on the land?

7 A. Correct.

8 Q. They did file an application  
9 under section 35 to do works in relation to the  
10 marine terminal; correct?

11 A. I'm sorry, I don't recall.

12 Q. You do recall, though, that  
13 they first filed an application to do work on the  
14 marine terminal; correct?

15 A. Yes.

16 Q. And that engaged federal  
17 concern?

18 A. Yes. The Navigable Waters  
19 Program, yes.

20 Q. You will see at the bottom of  
21 his email, April 3rd, 2003, "Comprehensive study  
22 will be the type of assessment." Do you see that?

23 A. Yes. And that is because a  
24 marine terminal of this size is on the  
25 Comprehensive Study List Regulation.

1 Q. And so Mr. Zamora is advising  
2 you that a comprehensive study will be the type of  
3 assessment used; correct? Isn't that how you take  
4 that?

5 A. Well, yes.

6 Q. And that was your  
7 understanding at the time; correct?

8 A. At that particular time. We  
9 couldn't do a screening on it. We had to at least  
10 do -- at a minimum, do a comprehensive study, yes.

11 Q. You drafted a memorandum to  
12 Ms. Kirby to be sent from Richard Nadeau. If you  
13 go to tab 67, please -- I'm sorry, R-67, tab 29,  
14 you drafted this memorandum?

15 A. No. What this drafting chain  
16 here represents is the people at headquarters who  
17 edited and perhaps modified the draft that came in  
18 from the region.

19 Q. Oh, I see. So this draft,  
20 like others, would have originated with  
21 Mr. Bellefontaine's office?

22 A. Yes.

23 Q. And then have been edited by  
24 DFO central staff?

25 A. Yes.



1                   Q.    Headquarters staff.  Is there  
2 any way of knowing what edits were made; in other  
3 words, what came from the region to headquarters,  
4 and then what finally went up to the Deputy  
5 Minister?

6                   A.    Well, perhaps there would be  
7 a -- it would be reflected in Word if it was  
8 examined, Microsoft Word.

9                   Q.    You can't tell from this  
10 document?

11                  A.    No.

12                  Q.    It says on the first page in  
13 the square, second bullet, "DFO has determined".  
14 See those words "has determined"?

15                  A.    Yes.

16                  Q.    "... that the quarry and  
17                        marine terminal will require  
18                        a comprehensive study level  
19                        environmental assessment..."

20                  And what is the date of this  
21 email?  Where do we find it -- sorry, this  
22 memorandum.  Where do we find it?

23                  A.    I don't see a date on it.

24                  Q.    Is there any way of  
25 determining the date, other than looking at the

1 text to see what are the last dates referred to?

2 A. I'm sorry, if there is, I  
3 don't know.

4 Q. It looks like on the second  
5 bullet on the first page --

6 MR. SPELLISCY: Maybe I could help  
7 out. If we look at the cover page down at the very  
8 bottom, there appears to be a line which has a date  
9 in it as to when the file was saved.

10 MR. NASH: Well, yes. It says  
11 April 16th, but under the last bullet on the page  
12 of the text, it refers to April 30th, 2002,  
13 something having happened on that date. So it has  
14 to be, it appears, in May of 2003.

15 MR. SPELLISCY: No. That second  
16 bullet is April 30th, 2002.

17 BY MR. NASH:

18 Q. Quite right. Quite right.

19 Mr. Hood, going back to that --  
20 well, the second bullet in the box summary on the  
21 first page, what scientific evidence did DFO have  
22 in April or May of 2003 to have determined that the  
23 quarry would require a comprehensive study level  
24 assessment?

25 A. I don't know. The regional

1 staff would be best placed to answer that as the  
2 people responsible for the EA.

3                   They certainly had a trigger for  
4 the marine terminal, and the review of the blasting  
5 plan was ongoing. They also had awareness that  
6 there was a stream on the property. So they  
7 weren't in a position, at that point, to fully  
8 assess the potential effects of the blasting, and,  
9 consequently, have included the quarry with the  
10 marine terminal.

11                   Q. So they hadn't determined, by  
12 whatever date this is, that the quarry would  
13 require an assessment, a comprehensive study?

14                   A. Well, based on their -- the  
15 information they had on hand and the fact that they  
16 were trying to find out if the effects of the  
17 quarry with that information were going to impact  
18 on fish, in particular marine mammals, they were  
19 including the quarry at the time.

20                   Q. So you actually -- have I got  
21 this right that you don't have any scientific  
22 evidence to offer to the Tribunal for the Tribunal  
23 to assess as to whether a section 35 or a section  
24 32 trigger existed?

25                   A. That's correct. I'm a

00147

1 liaison officer. The EA is being conducted in the  
2 region. I am transferring the information that is  
3 provided by the region to the ADM, the Deputy and  
4 the Minister.

5 Q. So it is only the scientists,  
6 including Mr. Boudreau and Mr. Zamora and  
7 Mr. Wheaton and other scientists in the region, who  
8 could comment on whether there was scientific  
9 evidence available?

10 A. Correct.

11 Q. If you go to tab 31, Exhibit  
12 C-284, this is a note from your journal, which I  
13 take to be April 25, 2003.

14 A. Yes.

15 Q. And it is a conference call  
16 on the Digby quarry involving Jim Leadbetter, who  
17 is out in the region; correct?

18 A. Mm-hm.

19 Q. Yes?

20 A. Yes.

21 Q. Jim Ross, who is also out in  
22 the region?

23 A. Yes.

24 Q. Richard, is that Richard  
25 Nadeau?

00148

1 A. Richard Nadeau.

2 Q. And you.

3 A. Yes.

4 Q. And you're saying that  
5 Richard got a call from the agency yesterday with  
6 respect to Phil's letter.

7 A. Right.

8 Q. And Mr. Zamora had sent a  
9 letter out with respect to fisheries concerns. Do  
10 you recall that?

11 A. Yes. He sent a letter in mid  
12 April.

13 Q. And could you read there  
14 below what that says, following?

15 A. Starting with "re MOU"?

16 Q. Yes.

17 A. "Re MOU and decision on scope  
18 of project. CEAA agency  
19 feels this will go to a  
20 panel."

21 Okay. That is an incomplete  
22 sentence, it appears.

23 Q. The words there, "Minister  
24 believed"?

25 A. Okay. This followed an

1 interview where the Minister was quoted in the  
2 Chronicle Herald, which happened before this and  
3 around the time of Phil's letter, where the  
4 Minister was believed to have said that with  
5 respect to the quarry and marine terminal proposal,  
6 that he favoured a public review, meaning adequate  
7 consultation for the many people who were  
8 concerned.

9 Q. And then it says, "Jim, never  
10 said panel review." Which Jim? Is that Jim Ross?

11 A. That would be Jim Ross, yes.

12 Q. And what does it say under  
13 that line? Oh, it is public review, meeting,  
14 consultations, and then 280 acre quarry. What does  
15 it say beyond that?

16 A. "No DFO trigger. Might  
17 eventually have to divert a  
18 creek, which would require an  
19 authorization 10 to 12 years  
20 away. Not certain."

21 Q. That is Mr. Ross saying that?

22 A. Yes.

23 Q. And then below, on the  
24 left-hand side it says "Jim". Is that Jim Ross  
25 again?

1 A. Yes.

2 Q. What does it say there?

3 A. "Re MOU Bill Coulter and  
4 Jean, two CEAA officials who  
5 were involved in the  
6 discussion, Bruce Young told  
7 Richard MOUs only for panel,  
8 never had MOU for CSR." [As  
9 read]

10 Q. Then below it says, "We  
11 should scope to terminal, our trigger." Do you see  
12 that about four lines down?

13 A. "We should scope to terminal,  
14 our trigger."

15 Q. Who was saying that?

16 A. Richard Nadeau.

17 Q. And then he says -- what is  
18 your note below?

19 A. "If we include the quarry in  
20 the assessment it implies  
21 that we, DFO, are approving  
22 the quarry after the  
23 assessment."

24 Q. And then over in the margin,  
25 what does that say?

1 A. "We have regulatory authority  
2 to do so."

3 Q. And then after that, it says  
4 below, "What does Richard..."

5 A. "What does Richard tell the  
6 agency this morning?"

7 Q. And then below that?

8 A. "Jim still confused about why  
9 not scope in terminal if we  
10 look at birds, et cetera."

11 Q. And then Richard says?

12 A. "Scope to our trigger re  
13 determining scope of  
14 project."

15 Q. And over the page, "we have"?

16 A. "We have Navigable Waters  
17 Protection Act, Fisheries Act  
18 section 35, probably section  
19 32 trigger for marine  
20 terminal, but no trigger for  
21 quarry."

22 Q. That was Mr. Nadeau's learned  
23 opinion at that time?

24 A. I can't say. It may have  
25 been Jim Ross's comment.



00152

1 Q. Except you were saying  
2 earlier that the region -- Jim Ross is in the  
3 region --

4 A. Yes.

5 Q. -- had been wanting to scope  
6 in the quarry, and Richard Nadeau, I take it, was  
7 expressing the opinion of headquarters, which was  
8 leave the quarry out of the scope.

9 A. Well, what Richard is doing,  
10 and this reflects the debate going on. I talked a  
11 bit about the on-scope of project, both within  
12 departments, as well as within -- well, between  
13 departments and within the Department of Fisheries  
14 and Oceans.

15 And Richard is providing caution  
16 there that we should look at this as scoping to  
17 those components that we have triggers for.

18 Q. Right. And then it says,  
19 "Ask question" there in the fourth line down.

20 A. Yes.

21 Q. And "ask question", again  
22 this is Richard speaking; correct?

23 A. Yes.

24 Q. And then what does that say  
25 after that?

1                   A.    "Could the project component  
2                            exist without DFO approval -  
3                            if 'no' then it is our  
4                            business and scope it in.  If  
5                            'yes' it is someone else's  
6                            business and don't scope it  
7                            in."

8                   Q.    And then below it, at the  
9 middle of the page, again, this is Richard still  
10 speaking, "This is like Red Hill."  Do you see  
11 that?

12                   A.    Yes.

13                   Q.    Could you read that  
14 paragraph, please?

15                   A.    "This is like Red Hill...",  
16 Richard is providing an example here:

17                            "... where DFO trigger was  
18                            section 35 for realignment of  
19                            a stream, but we scoped in  
20                            the highway, too, and were  
21                            making decision on effects on  
22                            birds of removing trees in  
23                            the highway corridor."

24                   Q.    What does it say after that?

25                   A.    "Judge ruled that we had no

1 regulatory authority over the  
2 highway and, therefore, were  
3 abusing the CEAA process."

4 Q. And then the next line?

5 A. "Shouldn't be scoping things  
6 in to satisfy public and  
7 other agency pressure."

8 Q. Mr. President, if it pleases  
9 the Tribunal, this would be, I think, an  
10 appropriate time to break for lunch, but I am  
11 prepared to go on as long as you wish.

12 PRESIDING ARBITRATOR: Do you have  
13 an idea of how long we will --

14 MR. NASH: I am hoping only  
15 another hour.

16 PRESIDING ARBITRATOR: Another  
17 hour?

18 MR. NASH: Another hour.

19 MR. SPELLISCY: Another hour?

20 MR. NASH: Hour.

21 MR. SPELLISCY: So that we can be  
22 clear in terms of -- Mr. Bellefontaine is not here  
23 and we need to bring him here. So we're telling  
24 him to come at 2:30.

25 MR. NASH: 2:30, 2:45.

1                   PRESIDING ARBITRATOR: Okay.  
2 Right. So we will have a lunch break until 1:30.

3                   MR. NASH: Yes. Thank you.

4                   PRESIDING ARBITRATOR: Thank you.

5                   MR. SPELLISCY: And, Bruce,  
6 because you are still under cross-exam, you are on  
7 your own till lunch.

8 --- Luncheon recess at 12:29 p.m.

9 --- Upon resuming at 1:32 p.m.

10                  PRESIDING ARBITRATOR: Good  
11 afternoon. We will resume the hearing, but before  
12 Mr. Nash returns to Mr. Hood, there is a procedural  
13 issue to be solved, hopefully. Mr. Appleton.

14                  MR. APPLETON: Thank you,  
15 Mr. President. And, yes, I like being able to  
16 solve problems rather than to present new ones.

17                  Earlier this morning, counsel for  
18 the Government of Canada spoke to us about adding a  
19 document to the record which had not been produced  
20 prior to today. It was a document, I don't know  
21 the reason why it wasn't produced, but it wasn't.

22                  We had a chance to look at this  
23 document and we agreed to come back to the Tribunal  
24 at the end of lunch time today to be able to  
25 report.

1                   We would not have an objection  
2 with respect to this item being added to the record  
3 and that we would ask that it be given the next  
4 sequential number of Canada's document production  
5 series.

6                   The number, I actually don't know  
7 what that would be, but I am sure that perhaps by  
8 the end of the day the Secretary could advise us  
9 what that number would be, if not earlier, and then  
10 we will simply add that document in, in that way,  
11 so that it could be referred to.

12                   I believe Canada intends to refer  
13 to it at some point.

14                   PRESIDING ARBITRATOR: I guess  
15 that meets your approval?

16                   MR. LITTLE: That meets my  
17 approval. I just want to make one clarification.  
18 The document indeed has been produced in the course  
19 of document production. It just doesn't form part  
20 of the record before the Tribunal as an exhibit,  
21 but it has been produced.

22                   PRESIDING ARBITRATOR: Okay, thank  
23 you. I think we will --

24                   MR. PULKOWSKI: According to my  
25 records, that should probably be an R exhibit, I

1 take it, and that would be R-575 if you have the  
2 same count.

3 MR. LITTLE: I am advised that's  
4 correct, thank you.

5 MR. PULKOWSKI: All right.

6 MR. APPLETON: I'm sorry, since I  
7 was not aware that it actually had been produced  
8 and since we could not find it when we searched the  
9 production record, I am going to just ask that  
10 Mr. Little can just advise us at some point during  
11 the day of what the production -- all of the  
12 documents produced by Canada have a number, you may  
13 have noticed, at the bottom.

14 So I will simply ask him if he  
15 could tell us what that is so that we can go back  
16 and correlate that with our records.

17 PRESIDING ARBITRATOR: Well, we  
18 all remember that was a very extensive document  
19 production exercise, so these things can happen,  
20 right, Mr. Little?

21 MR. LITTLE: Well, it was  
22 produced.

23 PRESIDING ARBITRATOR: Yes.

24 MR. LITTLE: So I don't think  
25 there was any question that it was produced, but

1 for whatever reason, neither party included it in  
2 one of their pleadings. But I can provide the  
3 information right now, as well, to Mr. Appleton.

4 PRESIDING ARBITRATOR: You have  
5 its number.

6 MR. LITTLE: Yes. I can provide  
7 that information right now. It was document  
8 request number 20, supplemental, and the Bates page  
9 is 801716, and the document identifier is 270-0039.

10 PRESIDING ARBITRATOR: So that's  
11 on record. May I enquire whether the issue that we  
12 have no idea what it is about this morning has  
13 progressed or been solved, or does it need further  
14 time? So not the issue of the rebuttals, but the  
15 other issue that you wanted --

16 MR. SPELLISCY: The other  
17 procedural issue I think was this issue.

18 PRESIDING ARBITRATOR: Oh, that  
19 was it. Fine, thank you. So we are only left with  
20 the issue that we are going to maybe raise again  
21 before we depart this afternoon.

22 So, Mr. Nash, I am happy to give  
23 you the floor again.

24 BY MR. NASH:

25 Q. Thank you, Mr. President.

1 Mr. Hood, could you turn, please, to tab 23, which  
2 I think we were on when we had the break.

3 A. Actually, we were on 31.

4 Q. Okay, go back to 23, if you  
5 will. Thank you. And go to page 801643.

6 A. 643?

7 Q. 643.

8 A. Okay.

9 Q. And go to the top at February  
10 13th?

11 A. Yes.

12 Q. It says: 12 o'clock, Paul  
13 called.

14 A. Mm-hm.

15 Q. Is that Paul Boudreau?

16 A. No, Paul Cuillerier.

17 Q. Cuillerier. That is

18 Mr. Nadeau's superior?

19 A. Yes.

20 Q. And then when it says, "Paul  
21 called re email from Nadine Belliveau", is that  
22 what that says?

23 A. Yes.

24 Q. "... going to minister's  
25 office.



00160

1 A. Mm-hm.

2 Q. Yes?

3 A. Um....

4 Q. "Mm-hm" doesn't come up one  
5 way or the other as a yes or no.

6 A. Sorry. Paul called...could  
7 you repeat your question, please?

8 Q. Is that what that says, "Paul  
9 called re" --

10 A. "... Belliveau going to  
11 minister's office."

12 Q. Right. And then go down to  
13 the fourth line from the bottom, "Tim sent".

14 A. "Message."

15 Q. Could you continue on reading  
16 that, please?

17 A. "... to Nadine Belliveau at  
18 the constituency office, to  
19 Nadine Belliveau. She sent  
20 to minister's office.  
21 Stephanie found out and  
22 contacted Paul C."

23 Q. Which is Paul Cuillerier?

24 A. Yes.

25 Q. And then it says?

1 A. "Tim panicked, didn't know  
2 what an FCR is."

3 Q. And up in the left-hand side,  
4 there is a margin entry.

5 A. "Tim saw it and thought there  
6 was something big and new and  
7 panicked."

8 Q. So this is Tim Surette now  
9 going -- sending a message to Nadine Belliveau, and  
10 Nadine Belliveau is then sending it up to the  
11 Minister's office; correct? And Stephanie found  
12 out and contacted Mr. Nadeau's superior; correct?

13 A. Yes.

14 Q. That is a new line of  
15 communication for the public service, where a DFO  
16 official in the area is contacting the Minister's  
17 office constituency office, and then sending that  
18 information straight up to the Minister's office in  
19 Ottawa; is that how this is working?

20 A. Tim sent a message to Nadine  
21 at the constituency office, who sent a message to  
22 the Minister's office in Ottawa.

23 Q. Right. So, again, that is  
24 not the normal procedure for communication within  
25 the public service, which would normally have

1 whatever Tim wanted to send up the chain go to  
2 Mr. Bellefontaine, and then over from  
3 Mr. Bellefontaine to Ottawa; is that fair?

4 A. Well, it was a regional  
5 matter and I don't know, but because it was a local  
6 occurrence, I would think that Mr. Surette speaking  
7 with Nadine Belliveau would be quite appropriate.

8 Q. So in order to get something  
9 to the Minister's office in Ottawa, you're saying  
10 that a DFO official going to a local constituency  
11 Ministerial assistant would be an appropriate  
12 channel of communication?

13 A. A DFO staff going to the  
14 Minister's office?

15 Q. DFO staff, Mr. Surette?

16 A. Well, he didn't. It was  
17 between him and Nadine Belliveau.

18 Q. Then she sent it up to the  
19 Ministerial office, I've got that?

20 A. Yes.

21 Q. Are you saying that is an  
22 appropriate line of communication and normal?

23 A. Well, I don't know.

24 Q. Can you go please to page  
25 801646? At the very top of that page, there is a

1 reference to a Cathy Gee?

2 A. Yes.

3 Q. On February 20th, '03.

4 A. Mm-hm.

5 Q. Yes?

6 A. Yes.

7 Q. And Cathy Gee is a senior  
8 fisheries biologist at the DFO; correct?

9 A. Yes.

10 Q. Do you know that she was on  
11 the Red Hill case, Red Hill matter?

12 A. No.

13 Q. What is Cathy -- is this a  
14 record of a call that you're having with Cathy Gee  
15 or a conference you're having with her?

16 A. It is a face-to-face meeting.  
17 Cathy was an expert on CEAA and its application,  
18 and at headquarters we would speak with her when we  
19 had questions that required clarification of CEAA.

20 Q. What follows in your note is  
21 her advice to you, is that it, if you could read it  
22 out?

23 A. Yes.

24 "Don't need to scope in the  
25 quarry. No DFO triggers. If

1                   it's scoped in, gets into  
2                   other concerns. No  
3                   harmonization agreement. So  
4                   scoping doesn't need to be  
5                   the same."

6                   Q.    And the next line?

7                   A.    "We need to find out if  
8   Minister said."

9                   Q.    And you don't recall now --

10                  A.    I don't know what that was  
11   attached to, no.

12                  Q.    And then go about seven lines  
13   down. It says, "scope to our trigger", and what  
14   does that line say?

15                  A.    "Scope to our trigger", that,  
16   at that time, would be the wharf and what they need  
17   to do to build it.

18                  Q.    And if you could go, please,  
19   to page 801651.

20                  A.    801561?

21                  Q.    801651, five pages along from  
22   that last page. There is a number of numbered  
23   points you will see that are made, one, two, three,  
24   four, five, six.

25                  A.    Yes.

1 Q. In the middle one, "Wharf  
2 relatively small", could you read that out, please?

3 A. "Wharf relatively small - 200  
4 metres long, going from shore  
5 to 16 metre depth) on dozen  
6 piles, loading platform on  
7 end, 10 to 20 metres wide  
8 with a 6 metre long end.  
9 Initial regional take, a  
10 fairly benign project on  
11 habitat."

12 Q. And below that, "region  
13 faxing drawings"?

14 A. Faxing drawings, March 6th.

15 Q. And what is this note  
16 recording?

17 A. I haven't noted here what it  
18 is noting. It's related to a description of the  
19 wharf, although it doesn't identify who this  
20 information came from.

21 Q. Do you know if it's coming  
22 from someone in the region? Is that your likely  
23 conclusion from what it says?

24 A. Likely, yes.

25 Q. If you go to the previous

1 page, 650, which is dated March 6th, 2003, what  
2 does it say at the very top, "Stephanie..."

3 A. Stephanie looks after the  
4 central and Arctic region files and Canadian Coast  
5 Guard files.

6 Q. Stephanie was Stephanie Tan  
7 within the Minister's office?

8 A. Yes.

9 Q. And could you read the three  
10 top lines after that, please?

11 A. Sue Kirby, Paul, Stephanie  
12 Tan, Kaye Love, Linda McMillan, Michele LeClerc,  
13 Nadine -- I have recorded Breveau, but it is  
14 probably Belliveau.

15 Q. Constituency office?

16 A. Constituency office.

17 Q. This was a conference call  
18 after Mr. Surette had sent his email saying that it  
19 the Minister may invoke an inquiry into the  
20 publication of that ad?

21 A. This meeting here?

22 Q. This conference call. Is  
23 this a conference call?

24 A. Yes. I don't know if it  
25 relates to that. The question about FCRs and Tim

1 Surette panicking, that is just simply that he  
2 wasn't familiar with the environmental assessment  
3 process under CEAA and wouldn't have known even  
4 what FCRs were. It is simply federal coordination  
5 of departments either involved or potentially  
6 involved with an environmental assessment.

7 Q. Isn't this conference call in  
8 response to the email exchange at tab 22, which is  
9 Tim Surette's email to Mr. Neil Bellefontaine, Ms.  
10 Rose, Mr. Wilson, Melinda Donovan, Mr. Boudreau and  
11 Mr. Peacock, and it says at the bottom, "The  
12 Minister may invoke an inquiry into this matter"?

13 A. Well, I don't know that it is  
14 related to an inquiry. what it is related to is  
15 just the ad that went in --

16 Q. Right?

17 A. --- on the NWPA.

18 Q. So we have the assistant  
19 deputy -- back to page 650 of tab 23, we have the  
20 Assistant Deputy Minister, Sue Kirby; correct?

21 A. Yes.

22 Q. Paul Boudreau, the manager of  
23 habitat?

24 A. No. That is Paul Cuillerier.

25 Q. Okay, his position again at



1 the time?

2 A. He was the Director-General.

3 Q. Director-General of all  
4 fisheries in Canada?

5 A. No. At headquarters of the  
6 habitat program.

7 Q. And then the Minister's  
8 ministerial assistant at the head office; correct?

9 A. Yes.

10 Q. Stephanie Tan. Kaye Love,  
11 who was he or she?

12 A. Kaye Love was a woman that  
13 worked at headquarters, and I'm afraid I don't know  
14 what office she is from.

15 Q. Linda McMillan?

16 A. The same, I don't know which  
17 office she is from.

18 Q. Michel LeClerc?

19 A. Michel LeClerc worked for the  
20 Navigable Waters Protection Program.

21 Q. Then Nadine Belliveau, the  
22 constituency assistant.

23 A. Yes.

24 Q. And I take this to be a  
25 conference call; is that right?

1 A. Conference call, yes.

2 Q. So all of these people are  
3 getting together to discuss the publication of this  
4 ad?

5 A. Yes.

6 Q. This routine ad?

7 A. Mm-hm.

8 Q. Yes? Yes?

9 A. Yes.

10 Q. Thank you. If you could go,  
11 please, to tab 32, I believe this follows on the  
12 last page of tab 31, but for reasons I don't know,  
13 it's been marked as a separate exhibit. Tab 32 is  
14 Exhibit C-366.

15 Could you tell us what that says  
16 on that page?

17 A. "Public will likely be mad if  
18 DFO doesn't scope in quarry,  
19 because they would want us to  
20 be assessing it. However, it  
21 is easier to explain why  
22 quarry isn't scoped in, i.e.,  
23 we don't have the legal  
24 mandate to scope it in - no  
25 trigger."

1 At that time.

2 Q. So as of September -- sorry  
3 April 25th, 2003, headquarters was pushing to  
4 narrow the scope of the environmental assessment to  
5 exclude the quarry because it had no legal mandate,  
6 no trigger to scope it in; correct?

7 A. No. That is not correct.

8 The --

9 Q. What does this note mean?

10 A. Well, the region supported  
11 the inclusion of the quarry along with the marine  
12 terminal from the very beginning, because in their  
13 opinion -- and this is reflected in Jim Ross's  
14 comments there where --

15 Q. I don't mean to interrupt  
16 you, but I asked you about headquarters' position.

17 A. Headquarters' position.

18 Q. Headquarters' position, not  
19 the region's position; headquarters'.

20 A. This is -- headquarters'  
21 position? Well, the position of the director,  
22 Richard Nadeau, was to scope to our mandate.

23 Q. Which would exclude the  
24 quarry?

25 A. At that time.

1 Q. Yes.

2 A. But that wasn't necessarily  
3 shared by all people within habitat.

4 Q. And this Exhibit 366, whose  
5 views are those that are being recorded in your  
6 note in that page in front of you, Exhibit 366?

7 A. Page 604?

8 Q. Yes.

9 A. I can't say for sure. When I  
10 look at the portion of the page on the left here  
11 that 604 is also on, it doesn't correspond to the  
12 previous page here.

13 MR. SPELLISCY: Perhaps, counsel,  
14 it would be easier if you took him to his actual  
15 full notebook instead of a page out of it, and then  
16 he can see what the context is.

17 BY MR. NASH:

18 Q. I don't want to spend too  
19 much time on this. If you can't identify it,  
20 that's fine.

21 A. Okay. I know who I think it  
22 is, but I don't know for sure.

23 Q. Who do you believe it to be?

24 A. Pardon?

25 Q. Who do you believe it to be?

1                                   A.    I believe it would be Richard  
2 Nadeau.

3                                   Q.    Right.  So I would say to  
4 you, again, as of April 25th, headquarters was  
5 pushing to narrow the scope of the environmental  
6 assessment of Whites Point to exclude the quarry  
7 because it had no legal mandate to conduct an  
8 environmental assessment of the quarry and no  
9 trigger?

10                                  A.    I don't know that "pushing"  
11 is the appropriate word.  Richard was definitely  
12 cautioning the region that it is not something to  
13 be included frivolously because of the potential  
14 implications of -- with respect to mitigation of  
15 other effects not related to our mandate.

16                                  Q.    If you could turn, please, to  
17 tab 34, which is Exhibit C-612, it's a journal  
18 entry from Mr. Derek McDonald.  Do you remember who  
19 he is?

20                                  A.    Yes.

21                                  Q.    He was the CEAA point person  
22 on this file in the Halifax office of CEAA?

23                                  A.    Yes.

24                                  Q.    And he says at the very  
25 bottom, under an entry Monday, April 28th, '03,

1 "Phone calls with Phil" --

2 A. Which page are you on now?

3 Q. Page 801517. At the very  
4 bottom, it states, under Monday, April, 28th '03:

5 "Phone calls with Phil - DFO  
6 HQ pushing to narrow scope to  
7 exclude quarry."

8 Do you have any reason to believe  
9 that Mr. Zamora didn't advise Mr. McDonald of that  
10 on that date?

11 A. No, I don't.

12 Q. And that was your  
13 understanding of the circumstances at that time;  
14 correct?

15 A. Of the outcome of the April  
16 25th call, yes.

17 Q. Right. If you could go,  
18 please, to paragraph -- sorry, tab 36 at Exhibit  
19 C-508.

20 A. Okay.

21 Q. Mr. McDonald is writing to  
22 Mr. Deslauriers with a copy to Steve Chapman and  
23 Bill Coulter:

24 "Hi, Robert: So far the  
25 questions are easy. There is

1 a potential issue brewing  
2 over scoping (isn't there  
3 always?) DFO initially  
4 indicated they would scope in  
5 the marine terminal and  
6 quarry, but I hear they are  
7 now leaping towards including  
8 only the marine terminal.  
9 This would likely anger the  
10 locally opposed citizens who  
11 have made clear their desire  
12 to stop the quarry and their  
13 willingness to use the media  
14 and politicians to crank up  
15 the pressure."

16 Q. My question is: Does that  
17 fairly reflect the atmosphere that you also  
18 perceived at that time?

19 A. That we were catering to the  
20 public?

21 Q. That there was pressure  
22 coming from the public from the citizens for DFO to  
23 scope in the quarry.

24 A. Well, there was certainly  
25 pressure. We were receiving a lot of Minister's

1 letters and they wanted the whole project reviewed.

2 Q. Scoped in; correct?

3 A. Well, reviewed.

4 Q. By the federal government;  
5 correct?

6 A. Yes. These were letters  
7 directed at the department.

8 Q. Right. That would require  
9 the federal government to scope in the quarry and,  
10 for that, you would need a trigger; right?

11 A. No, we wouldn't need a  
12 trigger. If we took the tact of scoping to our  
13 trigger, then we would just be doing the marine  
14 terminal, unless we had enough information to and  
15 an application from the proponent to establish that  
16 there were triggers on the quarry, and that is what  
17 eventually happened.

18 But we could scope in the quarry,  
19 if we so chose. The two were inextricably linked,  
20 and my understanding was that the proponent didn't  
21 want to proceed with a quarry, one or the other,  
22 that it was either both or nothing.

23 Q. So are you saying that it was  
24 your perception and understanding at the time that  
25 even if the quarry was wholly within provincial



1 jurisdiction and the federal government only had  
2 jurisdiction over the marine terminal, that the  
3 federal government could nonetheless scope in the  
4 quarry?

5 A. Yes, we could.

6 Q. Wholly within jurisdiction?

7 A. Yes.

8 Q. And is that what the Red Hill  
9 case said to you?

10 A. Well, I'm personally not  
11 familiar enough with the Red Hill case. It is not  
12 a case that occurred in my work area.

13 Q. In any event, that was your  
14 understanding, that you could scope in something  
15 wholly within provincial jurisdiction?

16 A. Well, but -- yes.

17 Q. Yes?

18 A. We didn't approve it.

19 However, there were federal interests in what would  
20 go on at the quarry.

21 Q. If you didn't have a trigger,  
22 you would have no federal engagement with the  
23 quarry; correct?

24 A. We wouldn't have a regulatory  
25 interest, but we could still have an interest in an

1 aspect of federal jurisdiction that didn't have a  
2 CEAA trigger.

3 Q. And the only three triggers  
4 that are referred to in any of this material of the  
5 quarry, potential triggers: Section 35 of the  
6 Fisheries Act, a HADD?

7 A. Yes.

8 Q. Section 32 of the Fisheries  
9 Act, destroying fish by means other than fishing,  
10 that is the second part; correct?

11 A. Yes.

12 Q. And the third was the trigger  
13 for the marine terminal, the NWPA marine terminal?

14 A. Correct.

15 Q. And if you only had triggers  
16 for the marine terminal and not triggers for the  
17 quarry, are you saying that you thought, and it was  
18 believed by headquarters, that you could scope in  
19 the quarry if it was wholly within -- otherwise  
20 within provincial jurisdiction?

21 A. If it was believed by  
22 headquarters that we could scope it in?

23 Q. That is my question. That  
24 was your understanding?

25 A. Yes. A lot of the notes

1 here, what I've captured -- like, for example, the  
2 April 25th meeting I believe was the date --  
3 capture Richard's comments, again, cautioning us on  
4 the implications of scoping more broadly, but it is  
5 certainly not the only approach that could be  
6 taken.

7                                   And there was a lot of debate  
8 going on at the time between departments, and it  
9 wasn't ultimately settled until the MiningWatch  
10 appeal, in which case --

11                                   Q. That is 2010. We are just --

12                                   MR. SPELLISCY: I think he has to  
13 be allowed to finish. You have asked the same  
14 question four or five times. I think the witness  
15 is trying to explain what his answer is. I think  
16 he should be allowed to explain it, and then we can  
17 move on?

18                                   BY MR. NASH:

19                                   Q. MiningWatch is 2010; correct?

20                                   A. I agree.

21                                   Q. I'm just speaking about 2002  
22 and 2003.

23                                   A. What I'm saying is that that  
24 validated the opinions of those people who felt  
25 that we should be scoping broadly back in 2002 and

1 2003.

2 Q. With respect, Mr. Hood,  
3 MiningWatch did not have do with whether or not  
4 there was a project which included a provincial  
5 trigger, but that is another debate.

6 MR. SPELLISCY: Sorry, is that  
7 testimony from Mr. Nash on that? Is there a  
8 question associated with that?

9 MR. NASH: Well, I was just having  
10 a discussion with the witness about the case, but  
11 we will move on.

12 MR. SPELLISCY: Discussions should  
13 end in a question, is my only point.

14 MR. NASH: I take my friend's  
15 point.

16 BY MR. NASH:

17 Q. Could you turn, please, to  
18 tab 37. This is referring to a call from Chris  
19 Daly to Jim Ross; is that right?

20 A. I don't know that this call  
21 was to Jim Ross.

22 Q. Perhaps you can just read the  
23 note starting at "Chris Daly"?

24 A. Chris Daly, Province of Nova  
25 Scotia. Province is

1 concerned that DFO might not  
2 scope in the quarry because  
3 it is a hot file, the  
4 agency..."

5 Stop there.

6 "If we scope in the quarry  
7 and it goes to court..."

8 Stop there.

9 Q. Then below, "Richard..."

10 A. "Richard - a seamless process  
11 21(b). Start as a comp study  
12 and refer to panel. Then the  
13 Minister of Environment  
14 determines the scope and  
15 Minister DFO is off hook."

16 Q. And then below that, it says  
17 "don't"?

18 A. "Don't have to give a reason.  
19 Memo to Minister with letter  
20 attached."

21 Q. So the idea here was to have  
22 a procedure which would allow the Minister of  
23 Fisheries and Oceans to alleviate his need to scope  
24 in or scope out the quarry, and simply refer it  
25 directly to the Minister of Environment and have

1 the Minister of Environment make the decision,  
2 thereby getting the Minister of Fisheries and  
3 Oceans off the hook; is that right?

4 A. That is an aspect of a 21(b)  
5 referral to a panel, but --

6 Q. And that is how it would get  
7 the Minister off the hook?

8 MR. SPELLISCY: Again, Mr. Nash, I  
9 have to ask you, Mr. Hood was not finished with his  
10 answer. I understand you want to press on, but you  
11 have to let him finish with his answers; otherwise,  
12 we will not get what his testimony is.

13 BY MR. NASH:

14 Q. I'm just concerned about the  
15 passage of time and we need to move on.

16 A. Well, you know, he's pointing  
17 out if it was a 21(b) referral the Ministry of  
18 Environment makes the decision, but it is nowhere  
19 it says that is the reason would he would refer it  
20 to a panel. That is a benefit.

21 Q. Your words, "Then Minister of  
22 Environment determines scope and Minister DFO is  
23 off hook."

24 A. Right.

25 Q. Who said that?

1 A. Yes.

2 Q. Who said that?

3 A. Um....

4 Q. Is that Richard Nadeau?

5 A. Well, it is ten years ago and  
6 I don't know whether it was his thought or my  
7 thought.

8 Q. It was either your thought or  
9 his thought?

10 A. Yes.

11 Q. And then if you go to the  
12 next page, page 801610. We are on Exhibit C-284 at  
13 the very top. What does that say?

14 A. That says, "Don't screw up on  
15 scope to please province. We will end up in  
16 court."

17 Q. Who is saying that? Is that  
18 Mr. Nadeau again or your thoughts?

19 A. That is Mr. Nadeau, yes.

20 Q. And then it says -- what is  
21 the next line, "shouldn't"?

22 A. "Shouldn't review blasting  
23 plan and..."

24 Q. Was that for the 3.9 acre --  
25 hectare quarry?

1                   A.    I don't know.  But I know the  
2 issue at the time was whether or not we should be  
3 reviewing the plan while the EA was going on.

4                   Q.    And who was saying that?

5                   A.    I don't know.

6                   Q.    And then a little bit below,  
7 it says, "Paul, what does the Minister".  Can you  
8 read that out, please?

9                   A.    "What does the Minister want?  
10 Richard, we should talk to Minister's staff."

11                   Q.    Is the "Paul" there referring  
12 to Paul Boudreau?

13                   A.    Yes.

14                   Q.    So Paul Boudreau is asking --  
15 Paul Boudreau and the region is asking someone,  
16 What does the Minister want; is that right?

17                   A.    Yes.  He's making a comment  
18 there, I think, in reference to the article that  
19 came out in mid-April where the Minister said that  
20 he wanted a full public review.

21                   Q.    And then what does it say  
22 below that?

23                   A.    "Richard, we should talk to  
24 Minister's staff."

25                   Q.    And below that, "every time"?



1                   A.    "Every time we scope broadly  
2 to accommodate someone else we get screwed."

3                   Q.    Is that also Richard Nadeau  
4 speaking, to the best of your recollection?

5                   A.    Well, it may well be me  
6 paraphrasing, but it's related to the point that  
7 Richard has made on the risk of scoping broadly.

8                   Q.    And then the next line after  
9 that?

10                  A.    "We want to get our Minister  
11 off this file."

12                  Q.    Is it fair to say to get him  
13 off the hook?

14                  A.    You could interpret it that  
15 way. The reason that -- my recollection of what  
16 this file means is that the Minister was in an  
17 awkward position. He's both responsible for  
18 sustainable development in the area as Minister  
19 DFO, and he's responsible for economic development,  
20 and these two can be in conflict.

21                         So we can get him out of that --  
22 what it is referring to is we better do something.  
23 The scoping process here is going on, well, for  
24 months. We're getting questions from the agency  
25 about what we're doing.

1                   And the Minister is in an awkward  
2 position. We're not making a decision on scope.  
3 So we need to get him out of this situation where  
4 he's constantly being bombarded by the public and  
5 do something with respect to getting the EA going  
6 so that it is going and there is no longer any  
7 wondering about, if it is going to an EA, what type  
8 of EA it is going to.

9                   Q.    And at this stage, this is  
10 still -- is this still in April and early May?

11                   A.    This is still in April, yes.

12                   Q.    In April. And at this stage,  
13 there's still no application on the table from the  
14 proponent, other than the application for the  
15 marine terminal; correct?

16                   A.    And the project description.

17                   Q.    And the project description.

18                   A.    At this time, yes.

19                   Q.    There is no other application  
20 other than the application for the marine terminal;  
21 correct?

22                   A.    Correct.

23                   Q.    And then it says "option, is  
24 that option 1, "OPT 1"?

25                   A.    Yes.

1 Q. Is this Richard laying out  
2 the options?

3 A. Well, this is me recording  
4 the options.

5 Q. Who is laying them out?

6 A. Well, if you want me to  
7 assume, I would --

8 Q. I don't want you to assume.  
9 I want you to recall if you can.

10 A. I can't recall.

11 Q. Okay. And in any event, the  
12 options are laid out. One --

13 A. Yes.

14 Q. -- what does that say?

15 A. "If we stick to a comp study,  
16 we need to determine if there is trigger for  
17 quarry."

18 Q. And two?

19 A. "Option two, refer to  
20 Ministry of Environment as a panel, preferred."

21 Q. And so the referral to a  
22 panel was to get around the problem of having to  
23 determine if you had a trigger for the quarry;  
24 right?

25 A. No. But given that at that

1 time we didn't know if we had a trigger for the  
2 quarry, if we initiated a comprehensive study and  
3 we scoped narrowly, then we wouldn't automatically  
4 bring in the quarry.

5 Q. If you didn't have a trigger  
6 for the quarry, you could go straight to a review  
7 panel, not even determine whether or not you had a  
8 trigger for the quarry and use the review panel  
9 process for that purpose; right?

10 A. Yes. That's -- that's an  
11 option that CEAA provides, and the proponent was  
12 made aware of that in a letter from Phil a number  
13 of months earlier.

14 Q. I haven't asked about the  
15 owner. I am just asking you about that procedure.

16 A. Okay.

17 Q. So that procedure would  
18 alleviate the need for the Minister of Fisheries to  
19 make a determination as to whether to scope in the  
20 quarry?

21 A. Yes, although he would have  
22 to -- it is him. The letter goes to the Minister  
23 of Environment under his signature, so he would  
24 have to agree that we were -- that of course we're  
25 referring it to panel.

1 Q. If you go to tab 38, another  
2 entry from Mr. McDonald's journal at page 801518.

3 A. Mm-hm.

4 Q. And that is Tuesday, April  
5 29th:

6 "Phone call with Phil Zamora.  
7 He's not sure if conference  
8 call is still on. 11  
9 o'clock, Whites Point  
10 conference call - ended up  
11 discussing scope.  
12 DFO-headquarters wants to  
13 'unscope' the quarry."

14 Again, does that fairly reflect  
15 and accurately reflect the status of the matter at  
16 that time?

17 A. Yes. After the April 25th  
18 call, the region was re-evaluating in their minds  
19 whether they should be just looking at the marine  
20 terminal at the time.

21 Q. And if you go to tab 39, you  
22 will see that reflected in an email from Derek  
23 McDonald to Phil Zamora and a number of other  
24 people. In the second paragraph of that email, he  
25 says, "Reason for the postponement", which is the

1 meeting?

2 A. Yes.

3 Q. "... is essentially that DFO  
4 is having internal  
5 discussions on scoping with  
6 respect to the quarry before  
7 preparing a draft scope."

8 Do you see that?

9 A. Yes.

10 Q. So going into May, DFO was  
11 pushing at that stage to unscope the quarry and to  
12 simply have the trigger for the marine terminal and  
13 do the assessment of the marine terminal only;  
14 correct?

15 A. Yes.

16 Q. And the province was very  
17 concerned about that, because they believed that  
18 from their perspective they needed a federal  
19 government to scope in the quarry so as to have an  
20 overlap, so as to allow a joint consideration of  
21 the assessment; correct?

22 A. Yes, for the sake of  
23 harmonization --

24 Q. Yes?

25 A. -- it was convenient if we

1 both had the same scope.

2 Q. So the province was putting a  
3 lot of pressure on the federal government to scope  
4 in the quarry so that the two jurisdictions had an  
5 overlap with the quarry; correct?

6 A. Well, this is the message  
7 being relayed to us by the region -- or by CEAA,  
8 rather.

9 Q. CEAA was telling you and  
10 other officials --

11 A. Yes.

12 Q. -- that that was their  
13 position, that if you didn't scope, the federal  
14 government didn't scope in the quarry, then the  
15 provincial legislation wouldn't allow a harmonized  
16 panel of the quarry and the terminal; correct?

17 A. Yes. But my understanding  
18 was, also, since we didn't have a harmonization  
19 agreement, we could collaborate on the EA and  
20 didn't necessarily have to have the same scope.

21 Q. You could collaborate, but it  
22 wouldn't be harmonized and it wouldn't be joint;  
23 correct?

24 A. Yes.

25 Q. In order to have a joint

1 review of the terminal and the quarry, the province  
2 was saying, you, the feds, have to scope in the  
3 quarry so that we have an overlap so that we can  
4 join the two procedures; correct?

5 A. That's what the province  
6 wanted, yes.

7 Q. If you could turn to tab 40,  
8 please, this is an entry from your journal, which I  
9 take to be May 12. It is part of Exhibit R-260,  
10 page 801612. You will see about two-thirds of the  
11 way down, it says, "Region still interested." Do  
12 you see that?

13 A. Okay. May 12, '03, yes:  
14 "Region still interested in  
15 knowing what the Minister's  
16 preference, if any, is  
17 between comp study or panel  
18 review."

19 Q. There is a number of entries  
20 in your journal that are like this, "region  
21 interested in knowing". The region wanted to know  
22 what the Minister wanted; isn't that right?

23 A. Yes.

24 Q. And that was a repeated  
25 question they have: What does the Minister want?



1 What does the Minister want; is that right?

2 A. Yes, in order to fulfil the  
3 public review and public involvement that the  
4 Minister, I guess, would envision in his role.

5 Q. And going over to tab 41,  
6 page 81615. It starts at the top, "Do note to  
7 Minister". Do you have any recollection of when in  
8 time this note is entered into your journal?

9 Q. We'll come back to that.  
10 What does it say under "express option"?

11 A. "Terminal, comp study. If no  
12 trigger to quarry, EA will  
13 examine terminal. Need for  
14 MIN..."

15 Minister:

16 "... decision on terminal..."

17 Q. Then under, "Re getting  
18 Minister's"?

19 A. "Re getting Minister's input  
20 on panel versus comprehensive  
21 study, Richard was in  
22 meeting..."

23 Now, this, I am not clear whether  
24 this was Richard Nadeau or Richard Wex, who was the  
25 Director-General that replaced Paul Cuillerier.

1 Q. Right. Mr. Wex, Richard Wex,  
2 replaced Mr. Cuillerier in early May of 2003;  
3 correct?

4 A. Correct:  
5 "... was in a meeting with  
6 Stephanie Tan, but was on  
7 another file - too many  
8 people. Not appropriate to  
9 ask."

10 Q. And then going down?

11 A. "Had meeting with Sue Kirby  
12 and asked re Sue is  
13 occasionally in meeting with  
14 Minister. Sue said need to  
15 involve DM offices and do a  
16 memo to the Minister.  
17 Richard had wanted to be more  
18 informal and avoid stuff in  
19 writing."

20 Q. Whichever Richard or Richard  
21 that was there, who was giving you this information  
22 at that time?

23 A. Well, I would normally get  
24 information such as this from Richard Nadeau.

25 Q. So this is most likely a

1 meeting between you and Richard Nadeau and you are  
2 just making a note of what he's telling you?

3 A. Yes.

4 Q. When it says "re getting  
5 Minister's input on panel versus CS", I take that  
6 to mean that the regional staff wanted to find out  
7 what the Minister wanted before making a  
8 recommendation; right?

9 A. Yes. This would be  
10 important. It was a big decision and we wanted to  
11 get some sense there, because we wanted to put  
12 something up there that made sense.

13 And I would add that this type of  
14 informal discussion was fairly typical.

15 Q. For regional staff to want to  
16 know what the Minister wants before making a  
17 recommendation?

18 A. No. You're --

19 Q. I have been asked not to  
20 interrupt you, so if you would not interrupt me.

21 It was fairly typical for regional  
22 staff to find out what the Minister wanted before  
23 making a recommendation to the Minister as to what  
24 he wanted?

25 A. Could you repeat that? Go

1 over that again.

2 Q. It was normal for regional  
3 staff to find out what the Minister wanted before  
4 making a recommendation to the Minister so as --

5 A. To get -- sorry.

6 Q. To make sure the Minister had  
7 the right recommendation?

8 A. The right information, yes,  
9 being that they were the people that were going to  
10 be responsible for the environmental assessment.

11 Q. So the information that they  
12 were going to be sending to the Minister should be  
13 based on what the Minister wanted to hear; fair  
14 enough?

15 A. No, but the Minister had  
16 expressed to the constituents that he wanted a full  
17 public review, and the staff were aware that there  
18 is differences in the public involvement between a  
19 comprehensive study and a panel review just by  
20 their nature; and, moreover, that if there was --  
21 if that -- the public was concerned about the whole  
22 package.

23 Q. If we go to tab 42, page  
24 801617, it is May 16th. Is that "Steve spoke  
25 to..."

1 A. Steve Chapman.

2 Q. Spoke to?

3 A. "Richard yesterday."

4 Q. And it says below that?

5 A. "Province is cranked because  
6 they want to share the grief  
7 with us. If we don't scope  
8 in the quarry contrary to the  
9 advice of the agency and EA  
10 practices across Canada, the  
11 agency will likely send a  
12 letter to DFO saying scoping  
13 decision..."

14 Not a complete thought there.

15 Q. So that is a reflection of  
16 your understanding of the situation where the  
17 province again is putting pressure on the federal  
18 government to scope in the quarry so that a joint  
19 harmonized review can take place; correct?

20 A. Well, two points here. Yes,  
21 it is my understanding that it's related to the  
22 region wanting the whole thing included, and it is  
23 also reflecting the fact that the agency feels it  
24 should examine the whole proposal.

25 Q. And the province is also

1 putting pressure on the government to scope in the  
2 quarry so that a joint harmonized review of the  
3 whole project can take place; correct?

4 A. Yes, yes.

5 Q. If you go to the next page,  
6 801618, this is again part of Exhibit R-260?

7 A. Okay.

8 Q. It says "BN to Minister"?

9 A. Briefing note, yes.

10 Q. What is this conversation  
11 reflecting?

12 A. "Asking for him to indicate  
13 if he has a preference for a  
14 comp study possibly on  
15 terminal only or panel  
16 review. Region looking for  
17 this info. Region returning  
18 to the quarry in one to two  
19 weeks to determine if there  
20 is fish habitat and potential  
21 HADD beyond the stream."

22 Q. Prior to June 26th, did you  
23 receive any advice from the region that scientists  
24 had established that there was fish habitat in a  
25 stream on the property?

1 A. Prior to June 26th?

2 Q. Yes.

3 A. Based on their visit to the  
4 site in May, they felt that it was quite likely  
5 that what they saw was fish habitat.

6 Q. My question is more specific.  
7 Prior to June 26th, 2003, did you receive advice  
8 from the region that DFO officials had established  
9 that there was a section 35 trigger for the  
10 property?

11 A. Not that they had  
12 established, no.

13 Q. No. If you would turn to the  
14 next page, page 801620, dated May 20th, 10:00 a.m.,  
15 do you see that?

16 A. 620?

17 Q. Yes.

18 A. Okay.

19 Q. At the top of the page.

20 A. Yes.

21 Q. And it says, "DFO is  
22 leaning".

23 A. Yes. I called Steve Chapman:  
24 "DFO is leaning to referring  
25 Digby quarry to panel under

1 21(b) regardless of scoping."

2 Q. So regardless of whether  
3 there was a trigger or within jurisdiction;  
4 correct?

5 A. Well, you keep using this  
6 "within our jurisdiction" and, yes, we may not have  
7 established that there were regulatory approvals  
8 here required, but there were definitely aspects  
9 that would be of interest to the federal  
10 government.

11 Q. So regardless of whether  
12 there was a trigger, you're saying this is  
13 reflecting a conversation between, whom?

14 A. Myself and Steve Chapman.

15 Q. And are you communicating  
16 what is there to Steve Chapman?

17 A. Yes.

18 Q. And you're saying that DFO is  
19 leaning to referring the Digby quarry to a panel  
20 under section 21(b)?

21 A. Yes.

22 Q. Regardless of scoping,  
23 meaning regardless of whether DFO had a trigger for  
24 the quarry; correct?

25 A. Yes.



1 Q. And then it says -- actually,  
2 I will just move on from there.

3 Was there a discussion, by your  
4 recollection, about a blasting plan at that  
5 time? We're talking middle of May of 2003.

6 A. Yes. What I recall is, yes,  
7 discussion about a blasting plan, and I believe the  
8 proponent was offered the possibility of modifying  
9 it so that it didn't create the necessity for them  
10 to apply for section 32 authorization.

11 Q. Do you remember a discussion  
12 about the I-Blast model?

13 A. No.

14 Q. Do you remember there being a  
15 discussion of there being a wrong calculation  
16 having been carried out?

17 A. Indirectly, yes. I don't  
18 believe I was part of that discussion, but I think  
19 I was informed that the setbacks -- the  
20 recommendation on setbacks may have changed.

21 Q. Do you remember knowing why  
22 that was, why the setbacks were changing?

23 A. No.

24 Q. Do you remember there being a  
25 conclusion within DFO that blasting on the

00201

1 shoreline would kill fish in the water?

2 A. Do I remember a decision to  
3 that effect?

4 Q. Yes.

5 A. No.

6 Q. Do you remember knowing that  
7 DFO had concluded that blasting on land was likely  
8 to kill fish in the water?

9 A. Yes. I believe, yes, I do  
10 remember that, that it was likely, and with an  
11 effect like that, it is difficult to be certain.

12 Q. And do you remember that it  
13 was concluded shortly thereafter that that  
14 conclusion that blasting on land was likely to kill  
15 fish in the water was based upon this erroneous  
16 calculation?

17 A. No, I don't recall that.

18 Q. Could you go to tab 46,  
19 please, which is the letter of May 29, 2003 that  
20 you referred to.

21 A. Okay.

22 Q. You will recall in this  
23 context the entry that we referred to earlier this  
24 morning that the effect on marine mammals was  
25 likely to be minimal, words to that effect?



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1 an application for the authorization to do the  
2 blasting on land, there was no DFO trigger;  
3 correct?

4 A. Well, my recollection was  
5 that that there was likely going to be a trigger.

6 Q. In that regard, if you could  
7 turn to page 001101, and it is page 1 of the  
8 addendum.

9 A. Okay.

10 Q. And it says, "Habitat  
11 management" at the very -- second to last paragraph  
12 at the bottom of the page:

13 "HMD have calculated that a  
14 horizontal setback distance  
15 from the shoreline of 500  
16 metres would be required to  
17 protect iBoF Atlantic salmon  
18 of the size that could be  
19 found at Whites Point."

20 Do you see that?

21 A. Yes.

22 Q. And do you then see over on  
23 page 2, under "marine mammals", middle of that  
24 page:

25 "The blasting proposal

1 reveals an active whale  
2 watching activity in the  
3 presence of Humpback and  
4 Right Whales at five miles  
5 from shore."

6 Now, you had been told in that  
7 phone call with Mr. Zamora that there was expected  
8 to be a minimal effect. In fact, he states  
9 "doesn't appear marine mammals will be affected"  
10 back in that phone call on May 16th. Do you recall  
11 that?

12 A. Yes. Well, I raised the  
13 point there, Does that mean physically or  
14 behaviourally?

15 Q. You don't recall whether  
16 Mr. Zamora's advice back on May 16th was whether it  
17 was physically or behaviourally?

18 A. No, because just looking at  
19 the material earlier today, it wasn't specified.

20 Q. And so the 500 metre setback  
21 was the setback that was defined as of May 29th;  
22 correct?

23 A. Yes, as indicated in this  
24 letter.

25 Q. And if you go to tab 53, this

1 is leaping ahead a year. There is an email from  
2 Mr. Zamora to Dean Stuart, that is Exhibit C-98,  
3 dated August 25th, 2004 and you are copied. Do you  
4 see that?

5 A. Yes.

6 Q. It says:

7 "Stuart: Given the agency's  
8 response, what does this mean  
9 in terms of our potential  
10 section 32 trigger as a  
11 result of the blasting plan  
12 for the 3.9 hectare quarry?"

13 I would ask you to focus on this  
14 next sentence:

15 "Also, we have been anxious  
16 to meet with the proponent  
17 (they have written us asking  
18 for a meeting) to exchange  
19 information regarding changes  
20 in mitigation and possible  
21 redesign of the blasting plan  
22 (information we have had  
23 since June of 2003) but were  
24 advised not to share with the  
25 proponent until the 3.9

1                   hectare quarry was certain to  
2                   be included in the overall  
3                   assessment."

4                   Taking you back to June of 2003,  
5 the information, as you understood it, that they  
6 had had -- which means he had had -- was that the  
7 I-Blast model was erroneous and that a 500 metre  
8 setback was a mistake; correct?

9                   A.    As reflected in that letter.

10                  Q.    Yes.

11                  A.    Yes.

12                  Q.    So the fact was that by June,  
13 very shortly after this May 29th of 2003 letter,  
14 DFO through Mr. Zamora knew that the I-Blast --  
15 that the model being used was wrong and that the  
16 setback need not be 500 metres.  It could be much  
17 less; correct

18                  MR. SPELLISCY:  I think I am going  
19 to object to the question.  June is a long month,  
20 and so I am not sure, unless counsel can show me  
21 where he is getting "shortly after", I don't think  
22 that is supported by the documents here.

23                  MR. NASH:  Within 31 days.

24                  BY MR. NASH:

25                  Q.    So the question is and the

1 proposition is that Mr. Zamora had, within the  
2 month of June 2003, information to the effect that  
3 the model that had been used was wrong. They had  
4 been sitting on that information for about 14  
5 months, and they had wanted to share it with the  
6 proponent. Do you recall that?

7 A. No, because in August 2004 I  
8 am reasonably sure that I was away on language  
9 training and, at that time, was not connected to or  
10 supposed to be looking at email.

11 Q. I'm confirming what happened  
12 in June of 2003.

13 A. Yes, but this is an email  
14 from that later period.

15 Q. Yes, but it is referring back  
16 to "information we have had since June of 2003".  
17 Do you see that?

18 A. Yes.

19 Q. "... but were advised not to  
20 share with the proponent." That information was  
21 the information that had determined and concluded  
22 that the setback of 500 metres was wrong; correct?

23 A. Okay. Well, all I can say is  
24 I am not aware of that.

25 Q. Are you aware of, though,



1 that 500 metre setback being concluded as of having  
2 been wrong in June of 2003?

3 A. Well...

4 Q. That is consistent with your  
5 recollection?

6 A. Yes. I am aware that it was  
7 thought to be overly conservative.

8 Q. So Mr. Zamora is writing to  
9 Mr. Buxton saying that DFO has concluded that a  
10 section 32 authorization will likely be necessary.

11 And if you go to tab 50, which is  
12 a letter from Mr. Zamora -- I'm sorry, Mr. Boudreau  
13 to Mr. Daly dated June 4th, five days or six days  
14 later, it says:

15 "Dear Mr. Daly: I am writing  
16 to update you on the  
17 Department of Fisheries and  
18 Oceans' review of the  
19 proposed Whites Point quarry  
20 and marine terminal."

21 Third paragraph down:

22 "DFO is presently reviewing  
23 the proponent's blasting plan  
24 for a 3.9 hectare test quarry  
25 and conducting discussions

1 and field work of the overall  
2 155 hectare quarry site to  
3 determine if approvals are  
4 required under the Fisheries  
5 Act, section 35(2) or section  
6 32."

7 Do you see that?

8 A. Yes.

9 Q. So he's telling Mr. Buxton  
10 that it's been concluded that a section 32  
11 authorization is likely necessary. And here he's  
12 saying that he's writing -- they are saying there  
13 is a study to determine whether or not a section 32  
14 trigger or authorization is required. Do you see  
15 that?

16 A. Yes.

17 Q. And were you aware of that  
18 exchange of correspondence at the time, both the  
19 May 29th and the June 4th letter?

20 A. Yes, I was aware of this  
21 letter.

22 Q. And then on the next tab you  
23 will see tab 51, Exhibit C-68. Mr. Buxton writes  
24 back to Mr. Zamora, "Thank you for your letter of  
25 May 29th", and he says in the third paragraph:

1 "At this time we request that  
2 you forward to us at your  
3 earliest convenience the  
4 calculations carried out by  
5 Habitat Management Division  
6 which led to the 500 metre  
7 horizontal distance from the  
8 shoreline."

9 Do you see that?

10 A. Yes.

11 Q. Were you aware that the  
12 proponent was asking for the information upon which  
13 the calculations were based?

14 A. No.

15 Q. If you then go to the next  
16 letter, tab 52, Exhibit C-113, a letter of June  
17 11th to Mr. Buxton from Mr. Zamora, last paragraph  
18 on the first page:

19 "You have asked for a meeting  
20 with Habitat Management  
21 Division, Nova Scotia  
22 Department of Environment and  
23 Labour and CEAA to discuss  
24 the overall status of the  
25 blasting plan. The CEAA

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1 office has offered to arrange  
2 a meeting at their Halifax  
3 location. You will be  
4 contacted in the near  
5 future."

6 On the next page, he asks -- he  
7 says:

8 "You have also asked about  
9 the calculations carried out  
10 by HMD which led to the 500  
11 metre horizontal distance  
12 from the shoreline to the  
13 blast location being  
14 determined. The calculations  
15 were performed using a  
16 computer simulation model  
17 supplied by the developer.  
18 The results of these  
19 calculations are available  
20 for your examination. Please  
21 call me to arrange a time."

22 [As read]

23 Q. Do you remember Mr. Zamora  
24 telling Mr. Buxton that he could have the  
25 calculations?

1 A. No.

2 Q. Were you involved in that  
3 process?

4 A. No, I wasn't involved in  
5 that.

6 Q. Do you know if that  
7 information was ever passed on to Mr. Buxton?

8 A. No, I don't.

9 Q. You knew in June of 2003 that  
10 the calculation of the 500 metre setback was wrong?

11 A. Based on that letter, yes.

12 Q. And the question of the 500  
13 meet setback being changed to 100 metres is dealt  
14 with in an email from Mr. Wright to Mr. Zamora. I  
15 will get you the reference. At tab 74, Exhibit  
16 C-671, at the bottom of that page, page 1, you  
17 should have a reference 760287 at the bottom  
18 right-hand side.

19 A. Yes.

20 Q. Mr. Wright says to  
21 Mr. Zamora, with a copy to Mr. Jollymore:

22 "Good afternoon, Phil:  
23 Further to our telephone  
24 conversation this morning, I  
25 have a few comments and

1 thoughts concerning the  
2 explosives issue."

3 He goes on there, but the  
4 important part is over on the top of the next page:

5 "I am not comfortable with  
6 using the I-Blast model for  
7 buried charges as the model  
8 was developed using  
9 relatively few data points.  
10 I have much more confidence  
11 in the equations used for the  
12 guidelines. Because of the  
13 presence of an endangered  
14 Atlantic Salmon population in  
15 the area, an endangered  
16 Atlantic Right Whale  
17 population and a spawning  
18 area for herring, I would  
19 recommend a setback distance  
20 of at least triple that  
21 determined by application of  
22 the equations in the  
23 guidelines. This would be  
24 approximately 100 metres or  
25 so. This is not as great a

1 setback as you had proposed  
2 using the I-Blast model, but  
3 I think it would be much  
4 easier to sell to the  
5 proponent."

6 Now, you told me that you were  
7 aware of that change in June of 2003. Was that  
8 discussed with DFO officials?

9 MR. SPELLISCY: I'm sorry, I think  
10 that is a bit of a mischaracterization of his  
11 testimony. He said -- his testimony was "yes, I  
12 was aware", based on the letter that you showed  
13 him, not that he had independent recollection of  
14 it, and it's been pretty clear throughout this that  
15 you're asking questions on which he said  
16 consistently he wasn't involved.

17 MR. NASH: Did you being --

18 MR. SPELLISCY: If you scroll back  
19 up through the transcript, that is what he said,  
20 based on the letter you showed him.

21 BY MR. NASH:

22 Q. We don't need to spend time  
23 with that clarification. I will just ask this  
24 question. Did you have discussions with DFO  
25 officials in Ottawa about the change in the setback

1 from 500 to 100?

2 A. I don't recall having  
3 discussions on that subject.

4 Q. That would be a very  
5 important thing for both you and for DFO officials  
6 to know?

7 A. Again, I honestly can't  
8 recall.

9 Q. But that would be an  
10 important thing to know, wouldn't it?

11 A. That there was a change?

12 Q. Yes.

13 A. No, I don't -- well, as I  
14 say, I'm not an expert in blasting, and this was  
15 between regional habitat officials and their  
16 scientists, and we were occasionally updated on the  
17 status of this discussion that was going on.

18 The thing that we were more  
19 concerned about is the scoping and EA level.

20 Q. But if blasting was known to  
21 be safe for fish in the water and marine mammals,  
22 so long as it was 100 metres back from the  
23 shoreline, then that would clearly mean that  
24 section 32 could not apply; isn't that right?

25 A. That section 32 wouldn't



1 apply if it was safe?

2 Q. If it was safe.

3 A. Yes, it wouldn't -- it  
4 wouldn't apply.

5 Q. If it was allowable as  
6 suggested by Mr. Wright, the blasting expert, that  
7 the setback distance be at least triple that  
8 determined by the application of the equations, the  
9 equation of 35.6 metres, that it be triple, that it  
10 would be very important to know for DFO officials  
11 both regionally and nationally that blasting on the  
12 land could be safe so long as it was 100 metres  
13 back from the high water mark on the shoreline?

14 A. I would say it would be of  
15 interest to us in Ottawa. But, no, it wouldn't be  
16 critically important. It is important to the  
17 regional people that are evaluating the proposal.

18 Q. Except that if you've got --  
19 if you are referring the matter to a review panel,  
20 which requires federal scoping in as Nova Scotia  
21 has suggested, so that there is an overlap in the  
22 jurisdiction, it would be very important for the  
23 people making that recommendation to the Minister  
24 who is making the decision to know and to absorb  
25 the fact that blasting on the property could be

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1 safe so long as it was 100 metres away from the  
2 shoreline; correct?

3 A. That would be of critical  
4 importance?

5 Q. Yes.

6 A. Well, the sort of -- it would  
7 be one factor of many associated with the project  
8 that would warrant scoping in the quarry.

9 There's a release of contaminants  
10 into the environment. There is effects on  
11 groundwater. And all of these collectively are  
12 part of -- would fall under the category of  
13 potential significant environmental effects. It is  
14 not just specifically related to the killing of  
15 fish and the setbacks.

16 Q. Are you aware of any specific  
17 scientific evidence in the region to the effect  
18 that the activities on the land would engage a  
19 federal jurisdiction before June 26th, 2003?

20 A. Well, you've asked me that  
21 and I've said "no".

22 Q. It would be important for the  
23 proponent to know that, wouldn't it?

24 A. That there was a change in  
25 the setbacks.

1 Q. Yes.

2 A. Yes. I believe so.

3 Q. It would be important for the  
4 proponent to know that at that time; correct?

5 A. Yes.

6 Q. And if you go to tab 63, it  
7 is the memorandum from the Minister.

8 PRESIDING ARBITRATOR: Fifty-  
9 three?

10 MR. NASH: Sorry, 63. Sorry,  
11 Mr. President.

12 BY MR. NASH:

13 Q. This is dated June 23rd, '03?

14 A. Yes.

15 Q. And it is a memorandum for a  
16 June 26th meeting with Cheryl Denton. Did you  
17 understand her to be one of the leaders of the  
18 partnership for sustainability in Digby?

19 A. If I knew that, I've  
20 forgotten. I don't know who she was.

21 Q. Did you at least contribute  
22 to the drafting of this memorandum?

23 A. Not to the drafting, but the  
24 review once it got to headquarters.

25 Q. So this would have emanated

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1 from Mr. Bellefontaine's office through to Ottawa  
2 headquarters?

3 A. Right.

4 A. Yes.

5 Q. If you go to the first page,  
6 "summary", under the second bullet:

7 "DFO has advised the  
8 proponent that blasting as  
9 proposed for a 3.9 hectare  
10 test quarry will require  
11 Fisheries Act section 32  
12 authorization."

13 So even now on June 23rd, DFO was  
14 maintaining that there is a Fisheries Act  
15 authorization required; correct.

16 A. That's what the region has  
17 stated, yes.

18 Q. "DFO is conducting  
19 discussions and field work  
20 with respect to the overall  
21 155 hectare quarry to  
22 determine if it requires  
23 authorization under the  
24 Fisheries Act section 35(2)  
25 or section 32."

1 A. Yes.

2 Q. Is there any record of any  
3 scientific evidence being brought to your attention  
4 between May 29th and June 23rd of 2003?

5 A. Between May 29th and June?

6 Q. Yes.

7 A. I don't recall.

8 Q. The only new information was  
9 this I-Blast model having been proved to be  
10 erroneous; correct?

11 A. Well, again, I don't know.

12 Q. Only the scientists would  
13 know what science they had back in 2003; correct?

14 A. The scientists and the  
15 regional staff, yes.

16 Q. Yes. And then it says:  
17 "Authorizations under any of  
18 these sections will  
19 necessitate a CEAA  
20 assessment."

21 Then below, in the third bullet,  
22 there is reference to the province having  
23 responsibility for the entire project. Leaving  
24 aside that, it says:

25 "The province has made

1                   representations to DFO for a  
2                   joint EA review, which  
3                   implies same scope of project  
4                   for both levels of  
5                   government."

6                   And that was correct?

7                   A.    Yes.

8                   Q.    "The proposed project has  
9                   been very controversial and  
10                  the province is therefore  
11                  anxious to have federal  
12                  involvement with assessment  
13                  of both the terminal and the  
14                  quarry."

15                  Correct?

16                  A.    Correct.

17                  Q.    So the province was still  
18                  pushing for the federal government to exercise  
19                  jurisdiction over the quarry; correct?

20                  A.    Yes.

21                  Q.    The events leading up to the  
22                  June 26th letter from Minister Anderson, it was on  
23                  the eve of a provincial election; correct? Do you  
24                  recall that?

25                  A.    The referral letter to

1 Minister Anderson?

2 Q. Yes, yes.

3 A. I believe there was a  
4 provincial election that summer.

5 Q. It was called on July 5th, if  
6 that assists. Do you recall that?

7 A. Yes, from the research  
8 leading unto to this hearing.

9 Q. And do you remember that  
10 because of the pending election, which was  
11 ultimately called on July 5th, there was an urgency  
12 to get this panel, the request for a referral or at  
13 least the referral to Minister Anderson from  
14 Minister Thibault done by the end of June?

15 A. Yes, there was an urgency.

16 Q. It was related to the  
17 provincial election; correct?

18 A. Well, I saw that stated, but  
19 the other factor that I think would be very  
20 significant here is that there's a summer recess.

21 And when that occurs, officials at  
22 both levels of government go off to their various  
23 jurisdictions over the summer.

24 Q. Yes?

25 A. So --

1 Q. It is not just it was  
2 referred to, though. If you go to tab 64, Exhibit  
3 C-458, it was referred to by you to Mr. Wex and  
4 Mr. Nadeau.

5 A. Yes.

6 Q. "It is urgent that the letter  
7 from Minister Thibault to  
8 Minister Anderson referring  
9 the Whites Point quarry and  
10 marine terminal to a panel  
11 review be signed and sent to  
12 Minister Anderson due to the  
13 following. It is a distinct  
14 possibility that the Province  
15 of Nova Scotia will be  
16 announcing an election before  
17 or on June 30th and will send  
18 out a media release preceding  
19 this, indicating that the  
20 Whites Point Project, which  
21 is very contentious, has been  
22 referred to a panel review."

23 A. Yes. And that --

24 Q. So the factor was that there  
25 was a provincial election coming and they wanted to



1 send out a media release before the election;  
2 correct?

3 A. Yes. And this was -- I  
4 didn't discover this on my own. It was brought to  
5 my attention and it was customary --

6 Q. By whom?

7 A. I don't know whether it was  
8 our communications people, or somebody else, but it  
9 would be customary for the federal and provincial  
10 governments to make an announcement at the same  
11 time.

12 Q. Yes. And the urgency was  
13 that the provincial election was being called;  
14 correct?

15 A. Well, that was indicated,  
16 yes, but --

17 Q. One of the reasons was to  
18 take the pressure off the Ministers; correct?

19 A. Well, it would certainly  
20 resolve the question as to what's going to happen  
21 with this review before going into an election.

22 Q. And thereby taking the  
23 pressure off the Ministers; correct?

24 A. It would serve that effect.

25 Q. And that was driving the

1 agenda; correct?

2 A. It may have been a factor,  
3 but, again, I think that another factor was making  
4 an announcement before people left for summer  
5 recess and getting a review underway, because it  
6 had dragged on for many months.

7 Q. Could you turn, please, to  
8 tab 65, Exhibit C-459? The first email is from  
9 Mr. Nadeau to Kaye Love, who is an official in  
10 Ottawa; correct?

11 A. Yes.

12 Q. Who was involved in getting  
13 the letter together for Minister Thibault; right?

14 A. I don't know whether it was  
15 her specifically.

16 Q. You are copied; do you see  
17 that?

18 A. This is the Minister's letter  
19 you're referring to?

20 Q. I am referring to this email  
21 at tab 65, Exhibit C-459.

22 A. Okay.

23 Q. Do you see that?

24 A. Yes.

25 Q. "It is urgent that the letter

1 from Minister Thibault to  
2 Minister Anderson referring  
3 the Whites Point quarry and  
4 marine terminal to a panel  
5 review be signed and sent to  
6 Minister Anderson due to the  
7 following reasons (among  
8 others)..."

9 The first is:

10 "CEAA is in the process of  
11 negotiating an MOU for a  
12 joint federal-provincial  
13 panel review process for this  
14 project and they cannot  
15 complete the process until  
16 Minister Thibault has  
17 officially referred the  
18 project to Minister  
19 Anderson."

20 A. Yes.

21 Q. "The province has very  
22 serious reasons for issuing a  
23 press release by the end of  
24 this week announcing the  
25 joint federal-provincial

1 panel review process."

2 And:

3 "The project is located in  
4 our Minister's riding, as  
5 well as in the electoral  
6 circumscription of the  
7 provincial minister  
8 responsible for making  
9 decisions on this project,  
10 and the announcement of a  
11 joint panel review is of the  
12 nature to take a lot of  
13 public pressure off the  
14 Minister's shoulders for the  
15 summer months."

16 So that was the reason, wasn't it?

17 A. Yes. That's what Mr. Nadeau  
18 is saying.

19 Q. And in your experience with  
20 environmental assessments, do you recall, have any  
21 understanding, of what the "getting the public  
22 pressure off the Minister's shoulders for the  
23 summer months" has to do with the scientific  
24 objective environmental assessment of a project?

25 A. Well, no. All I will say is

1 that from the region's point of view, their  
2 position was, right from the beginning and it was  
3 stated as early as 2002, that they would prefer a  
4 panel.

5 Now that it is potentially going  
6 to a panel, since the Minister of Fisheries and  
7 Oceans would not be the one making the decision on  
8 scope, it would take the pressure of that scoping  
9 decision off the department and it would have also  
10 resolved the question of what's going to happen to  
11 this project, in terms of a review, and answer that  
12 for the public.

13 Q. And it was done before the  
14 election so as to take the public pressure off the  
15 Minister's shoulders for that period of time and  
16 flip it over to Minister Anderson to make a  
17 decision on the scope; correct?

18 A. Well, that is what is stated.

19 Q. And that was your  
20 recollection and understanding; correct?

21 A. Well, it's clearly here in  
22 this email, yes.

23 Q. If you turn then, please, to  
24 tab 67, Exhibit C-466.

25 A. C-67?

1 Q. C-466, tab 67.

2 A. C... Sorry, I think I am in  
3 the wrong -- tab C-466?

4 Q. Sorry, tab 67.

5 A. Yes.

6 Q. Exhibit C-466 at the top.

7 A. Yes.

8 Q. Yes. This is the letter to  
9 Minister Anderson from Minister Thibeau?

10 A. Yes.

11 Q. Did you draft this letter?

12 A. I did, based on other  
13 referral to panel letters, yes.

14 Q. Did you have information from  
15 the region in order to draft this letter?

16 A. Well, just the information  
17 that I had received to date, but it wouldn't be the  
18 region referring the panel. So, no, I didn't get  
19 this draft from the region, if that's what you're  
20 asking.

21 Q. I am asking: The  
22 information, leaving aside the template and the  
23 draft, the information in the letter, did it come  
24 from you?

25 A. It came from the region and

1 was discussed between myself and Mr. Nadeau.

2 Q. I don't see any reference to  
3 public concern at all in this letter. There's a  
4 decision to leave that out; correct?

5 A. Well, it was well known by  
6 our department and others that there was a lot of  
7 public concern here, but the main concern of the  
8 Department of Fisheries and Oceans is the impact on  
9 fish and fish habitat. So we have highlighted here  
10 the potentially significant environmental effects,  
11 and we didn't mention public concern, although it  
12 is a reason equally as valid as potential  
13 significant environmental effects.

14 Q. Isn't it an either/or,  
15 significant adverse environmental effects which  
16 cannot be mitigated or public concern, as the basis  
17 for sending it to a panel?

18 A. Well, yes. It could be  
19 either or it could be both.

20 Q. Was that your understanding?

21 A. That's my understanding.

22 Q. And did you consult with  
23 anyone to arrive at that understanding?

24 A. Yes. I had talked during my  
25 tenure at DFO both with Mr. Nadeau and with Cathy

1 Gee.

2 Q. And so you referred in this  
3 letter only to environmental effects, not  
4 significant adverse environmental effects?

5 A. Well, the words we used is --  
6 and we provided some examples, that:

7 "In light of the information  
8 provided by the proponent,  
9 DFO believes that the Whites  
10 Point quarry and marine  
11 terminal as proposed are  
12 likely to cause environmental  
13 effects over a large area of  
14 both the marine and  
15 terrestrial environments."

16 And that could be characterized as  
17 significant.

18 Q. Did you have scientific  
19 reports in your hands from the region indicating  
20 what the significant adverse environmental effects  
21 might be?

22 A. Report in my hands?

23 Q. Yes.

24 A. No.

25 Q. And only the scientists I



1 gather would know what those studies were; correct?

2 A. No. No. That's not correct.

3 The regional habitat staff and the staff right up  
4 to the Regional Director-General would be aware of  
5 those.

6 Q. Would know what exact -- what  
7 the science was upon which this conclusion was  
8 reached?

9 A. Yes.

10 Q. You wrote an email, if you go  
11 to tab 68, to a number of people, including Paul  
12 Boudreau. There is an email to you from Ann  
13 Henhoefffer.

14 A. Yes.

15 Q. What was her position?

16 A. She was in the communications  
17 branch at headquarters.

18 Q. She says:

19 "Hi, all: At this time there  
20 are many unconfirmed pieces  
21 of information flying around.  
22 We should get guidance at the  
23 third line from MO..."

24 Minister's office?

25 A. Minister's office, yes.

1 Q. "... and other senior  
2 managers as to next step. It  
3 would also be prudent to use  
4 our communications wisely."

5 What did you take that to mean?

6 A. Well, the last sentence or  
7 two last sentences?

8 Q. "It would also be prudent to  
9 use our communications wisely"?

10 A. I don't know what that means.

11 Q. And then you wrote back to  
12 her and others:

13 "Agreed, Ann. I talked  
14 yesterday with Phil Zamora  
15 and Thomas Wheaton, the DFO  
16 regional staff handling the  
17 file, and Derek McDonald, the  
18 original CEAA agency contact.  
19 The proponent does not know  
20 the project is being referred  
21 to panel. He knows that a  
22 comprehensive study is  
23 required on the terminal and  
24 that the DFO review of the  
25 quarry isn't complete..."

1 "So we don't know yet if  
2 there are DFO triggers for a  
3 CEAA assessment of the  
4 quarry."

5 And that was true as of June 27th?

6 A. Yes, as I recall.

7 Q. Do you recall seeing the  
8 letter, if you go to tab 69, from Mr. Buxton to  
9 Mr. Petrie dated July 23rd?

10 A. No.

11 Q. He says, second to last  
12 paragraph:

13 "We acknowledge that the  
14 report has been completed,  
15 submitted to DFO and includes  
16 mitigation measures to  
17 prevent adverse effects to  
18 marine mammals."

19 He's talking about a blasting  
20 report?

21 A. Right.

22 Q. "Many of DFO's subsequent  
23 comments relate to species  
24 other than marine mammals.  
25 We recognize that while these

1 are important issues, these  
2 are outside the scope of  
3 condition 10(i) and are  
4 therefore not considered when  
5 considering whether condition  
6 10(i) has been met."

7 Then he goes over on the next page  
8 and speaks to the seal colony and blasting within  
9 500 metres of a marine mammal. "Based on the  
10 above", he says, the first full paragraph:

11 "... we are currently unable  
12 to conclude that condition  
13 10(i) has been met."

14 Were you aware that the provincial  
15 government was still taking the position that  
16 because the DFO did not have enough information on  
17 whales, on marine mammals, that they couldn't get  
18 the 10(i) condition --

19 A. No. I wasn't aware of that.

20 Q. -- fulfilled? Do you recall  
21 the letter of June 26th being leaked during the  
22 election campaign or just before?

23 A. No.

24 Q. Do you recall the Minister  
25 making an announcement about the establishment of a

1 panel and getting some press out of it?

2 A. No.

3 Q. If you could go to tab 72,  
4 there is an email at the very bottom from Tim Smith  
5 to Steve Chapman:

6 "Steve, I understand you are  
7 looking at Whites Point. In  
8 case you haven't yet seen,  
9 attached is a letter from a  
10 local citizen's group. I  
11 know the group's legal  
12 counsel, Lisa Mitchell, who  
13 copied me on the letter.  
14 Unable to access the public  
15 registry through DFO. She  
16 had called me earlier looking  
17 for context. I suggested she  
18 best speak with Bill or Derek  
19 in Halifax or yourself."

20 Then above that, an email from  
21 Steve Chapman to Tim Smith:

22 "Thanks, Tim. I also know  
23 Lisa from my days at  
24 Environment Canada. As this  
25 project is now at a review

1 panel, Lisa should contact me  
2 and not our regional office."

3 Then above that from Tim Smith to

4 Steve Chapman:

5 "I had tipped her off that  
6 DFO might make a  
7 recommendation to refer to  
8 panel and that, in such a  
9 case, you would be the  
10 contact. She had seen  
11 Thibault's letter before  
12 sensing the petition."

13 That was a secret cabinet  
14 conference letter, wasn't it?

15 A. Yes. I am not aware of any  
16 of this, though.

17 Q. This is coming as news to  
18 you?

19 A. Yes.

20 Q. Was the June 26th, 2003  
21 letter from Thibault to Anderson reviewed by DFO  
22 legal counsel before being finalized?

23 A. It would be done as a matter  
24 of course. I don't specifically recall that it  
25 was, but, as I say, it is a matter of course.

1 Q. Who else would have reviewed  
2 and approved the letter, besides you drafting it?

3 A. It would have gone through  
4 Richard Nadeau, and then Richard Wex through Sue  
5 Kirby's office to the deputy's office.

6 Q. If you go to the next tab,  
7 tab 73, Exhibit -- Buxton witness Exhibit 30, he's  
8 writing to Mr. Zamora:

9 "Further to your letter of  
10 June 11th and my response of  
11 June 16th, we are still  
12 awaiting details of the  
13 calculations with respect to  
14 setback distances to protect  
15 iBoF salmon. We have engaged  
16 consultants who are located  
17 out of the province to review  
18 the blasting plan, and it is  
19 essential that we have your  
20 data to examine."

21 Were you aware that the proponent  
22 was still asking for production of this information  
23 and apparently wasn't being provided with it?

24 A. No. Only that it had been  
25 referred to Minister of Environment.

1                   Q.    That would have been  
2 important information for the Minister of  
3 Environment to have before making a decision,  
4 wouldn't it?

5                   A.    I don't want to speculate on  
6 that. I am not even sure that I was still at the  
7 office at that time or whether I was on language  
8 training by mid-July.

9                   Q.    But in terms of your  
10 understanding of a request by the Minister of  
11 Fisheries and Oceans to the Minister of Environment  
12 to make a referral to the panel, you would have  
13 understood that having the correct information  
14 would be an important determination -- would be  
15 important information for the Minister of  
16 Environment to have in order to make the correct  
17 determination; correct?

18                  A.    Well, again, I can't speak  
19 for the Minister or Department of Environment. But  
20 there were a number of factors involved in the  
21 referral to panel, not just things related to the  
22 blasting plan.

23                  Q.    Would you not think simply --  
24 I know you can't speak for the Minister of  
25 Environment, but as a matter of proper process, it



1 would be important for the Minister of Environment  
2 to have the correct information regarding potential  
3 environmental effects on that site before he made  
4 his determination?

5 A. No. I wouldn't agree that  
6 that would be absolutely necessary.

7 Q. So it would be, in your -- do  
8 I have this right, then -- in your understanding,  
9 proper and appropriate for the Minister of  
10 Environment to have information regarding  
11 environmental effects on that site that was  
12 inaccurate and known to be inaccurate at the time?

13 A. Well, I would just say that  
14 if this letter went to Mr. Zamora, then by  
15 practice, because of the interaction on an ongoing  
16 basis between federal officials, that his  
17 counterpart at Environment Canada was probably  
18 aware of this, and what they did with that  
19 information, as far as briefing their headquarters,  
20 I have no knowledge of that. But they may well  
21 have done it.

22 Q. As you understood the way the  
23 process worked, you understand that the Ministry of  
24 Environment contact from -- with the Ministry of  
25 Fisheries and Oceans would have actually had the

1 information?

2 A. Yes. Well, I can't say for  
3 certain, but because of the collaboration that went  
4 on between federal officials, and there were -- on  
5 files, there was a lot of collaboration between DFO  
6 and Environment Canada. I could -- I'm just  
7 speculating.

8 Q. Well, let's not have your  
9 speculation.

10 A. No.

11 Q. But in terms of the  
12 appropriateness, you would think, believe that it  
13 would be appropriate for the Minister of  
14 Environment to have the accurate information as to  
15 what the potential significant adverse  
16 environmental effects were of a project?

17 A. It would be upon for his  
18 staff to have it, his staff who were advising him.  
19 They were probably advising via briefing notes, as  
20 well. I'm not certain that it would be appropriate  
21 that the Minister himself would see this, but it is  
22 quite feasible or likely that the Environment  
23 Canada officials in the region were aware of this  
24 and that it would maintain briefing material at  
25 least up through their regional office.

1 Q. It would be important for the  
2 Ministry of Environment to have the information so  
3 the Minister could make the decision based upon all  
4 of the correct information; correct?

5 A. Yes.

6 Q. Yes?

7 A. And that is their  
8 department's business, yes.

9 Q. Thank you. Were you --  
10 PRESIDING ARBITRATOR: Mr. Nash,  
11 how much more?

12 MR. NASH: Two more minutes.

13 MR. NASH: Perhaps two-and-a half.

14 PRESIDING ARBITRATOR: Go ahead.

15 BY MR. NASH:

16 Q. At paragraph, tab 76 there is  
17 a draft letter from Mr. Zamora to Mr. Buxton  
18 basically -- and I am paraphrasing in the interests  
19 of time -- advising him of the mistake made in the  
20 calculation for blasting and advising him of the  
21 change from the 500 metre setback laid out in his  
22 letter of May 29th of 2003 to 100 metres.

23 Did you see a draft of this  
24 letter?

25 A. I don't recall having seen a

1 draft, no.

2 Q. And then Mr. Zamora writes to  
3 you at tab 77, Exhibit C-673. He says to you:

4 "Hi, Bruce: As a follow-up  
5 to Brian Jollymore's call to  
6 you last week, I'm attaching  
7 a draft letter to Paul  
8 Buxton."

9 Which I take to be this letter we  
10 just looked at?

11 A. Right.

12 Q. "He has been asking for the  
13 calculations we used to  
14 determine the setback  
15 distance for his charges.  
16 When we contacted Dennis  
17 Wright in Winnipeg for the  
18 calculations, he was not  
19 comfortable with using the  
20 I-Blast model and suggested  
21 an alternative. CEAA office  
22 is uneasy with us dealing  
23 with the proponent at this  
24 point where a panel is being  
25 set up, but we feel that we

1 cannot sit for very long on  
2 this new information that the  
3 proponent could use to adjust  
4 the blasting plan."

5 Did you deal with that issue at  
6 the time?

7 A. I don't recall. I don't  
8 recall.

9 Q. And do you recall in one of  
10 your notes you say that the Minister is identified  
11 as having said the process should be dragged out as  
12 long as possible? Do you recall that?

13 A. No. The Minister didn't say  
14 that. Those are my words.

15 Q. You put those words down?

16 A. Yes, I did.

17 Q. And they were in a conference  
18 or a telephone call?

19 A. No, no. The circumstances  
20 was that I was in my office. I was approached by  
21 Richard Nadeau, and he said it looked like we were  
22 going to panel. The Minister wanted the most  
23 thorough level of review possible, with lots of  
24 opportunity for public engagement.

25 And at that particular time, I was

1 feeling a lot of frustration because, in this whole  
2 debate, I personally had been of the view that we  
3 could have dealt with this with a comprehensive  
4 study, and given the time, we would have found  
5 triggers to include the quarry.

6                   And my perception was at that time  
7 that a panel was going to take a long period of  
8 time. It was going to drag things out.

9                   What I learned after that is that  
10 certainly wasn't the case. I was basing that on my  
11 only -- the closest experience I had at the time  
12 with a panel, which was the Voisey's Bay panel, and  
13 because of the ongoing debate about scoping and  
14 whether we should scope narrow or broadly, I saw in  
15 subsequent years periods of 18, 24 months where  
16 this debate continued and an EA -- before an EA  
17 really got started.

18                   So my assumption at the time that  
19 the panel was going to be a long, drawn-out process  
20 was not correct, based on my observations over the  
21 subsequent years, until we got clear direction on  
22 scoping.

23                   So it is my comment. I never  
24 spoke to anybody in the Minister's office. I was  
25 never told by any of my superiors that the Minister

1 wanted to drag this out.

2 It is simply my frustration and  
3 that if the Minister wants a full public review,  
4 that is going to mean we're going to panel, that is  
5 going to be a long, drawn-out process.

6 Q. Could you turn to tab 23,  
7 please, which is your journal notes of Exhibit  
8 R-260, at page 801619.

9 A. 801869?

10 Q. Yes.

11 A. 801 --

12 Q. Sorry, 619; 801619.

13 A. 619. Half way down the page  
14 it says "A" in the left-hand margin. Do you see  
15 that?

16 A. Yes.

17 Q. What does that excerpt say  
18 from there on in?

19 A. "Richard talked to Bruce  
20 Young", in the margin:

21 "Call Steve Chapman and get  
22 the ball rolling whatever the  
23 scope is."

24 We can't say what the scope is,  
25 because the Minister of Environment would determine

1 the scope, but he means get the ball rolling on  
2 providing the things we need to do, the briefing  
3 note and the draft letter for the Minister with  
4 respect to a panel referral.

5 Q. Is that reflecting  
6 Mr. Chapman's comments or your thoughts?

7 A. No. It's reflecting  
8 direction from Richard Nadeau, as I recall.

9 Q. And then the next line says?

10 A. "Minister talked to  
11 Anderson."

12 Q. Yes?

13 A. "Leaning on 21(b) referral to  
14 panel. Don't mention  
15 scoping. Don't send up  
16 note."

17 Q. What was that in reference  
18 to?

19 A. Well, don't mention scoping,  
20 because we don't determine scope, would be my  
21 assumption. And I'm just being told not to send up  
22 a briefing note at that time. I don't know the  
23 reason.

24 Q. And then below it says there?

25 A. And then this is my personal



1 comment that I wrote upon learning that it was --  
2 that we were going to referring it to panel.

3 Q. And it says?

4 A. "Thibault wants process  
5 dragged out as long as possible."

6 Q. And you're saying today that  
7 that is not what that means?

8 A. Exactly.

9 Q. That was just words that you  
10 chose at the time?

11 A. That I was frustrated at the  
12 time and that I never spoke to anyone in the  
13 Minister's office about this and I never received  
14 any direction or any comments from my superiors  
15 that the Minister wanted this dragged out.

16 Q. Thank you, Mr. Hood. Those  
17 are my questions.

18 PRESIDING ARBITRATOR: Thank you  
19 very much. Our court reporter has indicated a  
20 while ago that she needs a break, so we have two  
21 possibilities. So the re-examination after the  
22 break, but I have also heard -- I don't know  
23 whether this -- you can stop me at any moment.

24 One idea was that the re of  
25 Mr. Hood could take place after Mr. Bellefontaine

1 would be examined and more or less  
2 Mr. Bellefontaine's examination would be finished,  
3 because he has to leave and he won't be available  
4 tomorrow.

5 So what is the idea?

6 MR. SPELLISCY: Mr. Hood is also  
7 leaving tonight. Both witnesses were scheduled to  
8 come in today. Mr. Hood was supposed to be for the  
9 morning, and obviously we are halfway through the  
10 afternoon. We have real concerns about time here,  
11 but both witnesses leave tonight.

12 Certainly we don't think, because  
13 the claimants took so long on the cross, we should  
14 be prejudiced in doing our re-direct.

15 I would think that if we do have  
16 anything to do on re-direct, then we should do it  
17 right now and have that testimony, but I think  
18 we're going to be very concerned about making sure  
19 we're not prejudiced with respect to  
20 Mr. Bellefontaine either, because the claimants  
21 are, once again, way over what was allotted in the  
22 schedule for this.

23 PRESIDING ARBITRATOR: Well, over  
24 the lunch break I had a word with the court  
25 reporter and she would be in a position to go on

1 longer, if we have another break. So, Dirk, do you  
2 have anything else to say?

3 MR. PULKOWSKI: I just wanted to  
4 ask if you wanted me to give an update on the time  
5 accounts since this is moving towards the more  
6 advanced stage of the hearing.

7 PRESIDING ARBITRATOR: Yes.

8 MR. PULKOWSKI: So I suppose we  
9 mostly have heard from the claimants as opposed to  
10 from the respondents, where we have two minutes of  
11 direct exam, introduction of Mr. Hood today. On  
12 the claimants' side, we have another 240 minutes  
13 used today from the 1170 minutes that were  
14 allocated.

15 So that would only leave a  
16 remainder of 420 minutes for the remaining four  
17 witnesses, meaning 105 minutes numerically of  
18 cross-examination per witness.

19 MR. NASH: I'm sorry. How many  
20 minutes left, sorry?

21 MR. PULKOWSKI: 420.

22 MR. NASH: Thank you.

23 PRESIDING ARBITRATOR: So why  
24 don't we have our coffee break and recreation break  
25 for the court reporter and start at 3:25.



1                   PRESIDING ARBITRATOR: So we can,  
2 without any delay, continue with Mr. Bellefontaine.

3                   MR. LITTLE: Yes, we will be  
4 getting Mr. Bellefontaine now.

5                   I will add that further to your  
6 request of earlier today, Judge Simma, we will be  
7 filing a written response to the request that was  
8 made last night by the claimants.

9                   We will hand that up right now.  
10 What we will do is, tonight we will circulate it  
11 electronically as well.

12                  PRESIDING ARBITRATOR: Thank you  
13 very much. Please have a seat. Good afternoon,  
14 Mr. Bellefontaine.

15                  MR. BELLEFONTAINE: Good  
16 afternoon.

17                  PRESIDING ARBITRATOR: Please take  
18 a seat. You should have in front of you a  
19 statement. If you could read that out, please.

20                  MR. BELLEFONTAINE: I solemnly  
21 declare upon my honour and conscience that I will  
22 speak the truth, the whole truth, and nothing but  
23 the truth.

24 AFFIRMED: NEIL BELLEFONTAINE

25                  PRESIDING ARBITRATOR: Thank you.

1 May I also remind you of the assurance that you  
2 gave with regard to your not hearing or reading any  
3 of the preceding witnesses' statements.

4 THE WITNESS: No, I have not.

5 PRESIDING ARBITRATOR: That you  
6 have given that assurance.

7 THE WITNESS: Yes.

8 PRESIDING ARBITRATOR: Thank you.  
9 Okay. Mr. Little, would you please introduce the  
10 witness?

11 EXAMINATION-IN-CHIEF BY MR. LITTLE:

12 Q. Yes. Good afternoon,  
13 Mr. Bellefontaine.

14 A. Good afternoon.

15 Q. Mr. Bellefontaine, you filed  
16 an affidavit in this arbitration dated November  
17 22nd, 2011?

18 A. That's correct.

19 Q. And you are a professor of  
20 marine environmental protection at the World  
21 Maritime University in Malmö, Sweden?

22 A. I am.

23 Q. Can you tell me what your  
24 responsibilities are in this post?

25 A. It's basically a typical



1 operational head of all of the program and policy  
2 activities of the Department of Fisheries and  
3 Oceans that reside within the geographic boundaries  
4 of the three Maritime provinces of Atlantic Canada,  
5 which includes fisheries management, aquaculture  
6 management, the science programs, the hydrographic  
7 programs, the coast guard programs including  
8 habitat management, as well; and a number of other  
9 programs relating to small craft harbours,  
10 infrastructure, development, and so on. I think it  
11 is all pretty much laid out in my affidavit.

12 Q. And during your time as  
13 Regional Director General, you had involvement in  
14 the Whites Point environmental assessment?

15 A. Yes, I did, yes.

16 Q. Okay. Thank you very much,  
17 Mr. Bellefontaine.

18 PRESIDING ARBITRATOR: Thank you,  
19 Mr. Little. Mr. Nash.

20 CROSS-EXAMINATION BY MR. NASH:

21 Q. Thank you, Mr. President.  
22 Mr. Bellefontaine, my name is Greg Nash and I will  
23 have a few questions for you today. I am counsel  
24 for the claimants in this matter.

25 Am I correct that you first became



1 aware of the Whites Point project in early 2002?

2 A. That's correct.

3 Q. And did you deal with an  
4 application for a marine terminal early in 2002?

5 A. I did not personally deal  
6 with it. Staff of the Habitat Management Branch  
7 that reported to me did, yes.

8 Q. And that would have been your  
9 first dealings with the Whites Point project?

10 A. I believe so, yes.

11 Q. If you go to tab 2, there is  
12 a binder in front of you called witness bundle, and  
13 there is a number of documents in there.

14 If you go to tab 2 which is  
15 Exhibit R-61, am I correct that this is a briefing  
16 note or a memorandum with respect to that early  
17 application for a marine terminal?

18 A. That is correct.

19 Q. And essentially what happened  
20 there is, as I understand it, is that there was an  
21 application made; the applicant was required to  
22 produce more information. The information wasn't  
23 forthcoming at that time, so that file was closed  
24 pending receipt of further information or a further  
25 application in the future. Is that correct?

1                   A.    As I recall, the application  
2 was a very sketchy, one-page proposal.

3                   Q.    And that file remained closed  
4 through all of 2002; correct?

5                   A.    I think there were  
6 discussions between my department and the  
7 proponents later in 2002, but in terms of the  
8 application, yes.

9                   Q.    The application for a marine  
10 terminal at Whites Point was actually made, if I  
11 can assist your recollection, in February of 2003.  
12 Does that sound right to you?

13                  A.    About right, yes.

14                  Q.    And until that application  
15 was made, there was actually no federal  
16 environmental assessment of the Whites Point,  
17 either the quarry or the terminal during 2002.  
18 Correct?

19                  A.    Not that I'm aware of, no.

20                  Q.    Right.  So the only role of  
21 the federal Department of Fisheries and Oceans in  
22 2002 was to assess the effect of blasting or  
23 potential effect of blasting on a 3.9 hectare site  
24 at Whites Point on marine mammals; correct?

25                  A.    That's correct.

1                   Q.    If you go to tab 3 which is  
2 Exhibit R-87, you will see a letter dated April  
3 30th, 2002 from Mr. Petrie to Mr. Buxton.

4                   And there are two conditions in  
5 this approval. The letter attaches an approval to  
6 conduct, to operate a quarry of 3.9 hectares at the  
7 Whites Point site. Do you generally recall that?

8                   A.    Yes, I do.

9                   Q.    And go to page 9 of the  
10 approval, you will see that there is a section  
11 called "blasting", and there is a whole lot of  
12 conditions under number 10 from (a) to (e).

13                   If you go over a page, you will  
14 see that there are two conditions at the bottom, or  
15 at least the middle of the page, (h) and (i).

16                   And those conditions, if you  
17 recall, were put into this approval at the request  
18 of officials within your department; correct?

19                   A.    I don't know exactly how the  
20 conditions were put in place, other than that there  
21 were discussions between the province, who was the  
22 regulatory authority at this point, and our  
23 departmental officials at the regional level. And  
24 these conditions were put in to these, to this  
25 authorization.

1 Q. Were you consulted at all  
2 with respect to the insertion of those conditions?

3 A. Not at this point, no.

4 Q. If you go to the next page --  
5 well, actually just before we go over there, (h) is  
6 about blasting being conducted in accordance with  
7 the Department of Fisheries and Oceans guidelines  
8 for the use of explosives.

9 Do you see that?

10 A. Yes.

11 Q. And do you recall that  
12 Mr. Dennis Wright was one of the co-authors of  
13 those guidelines?

14 A. He was, yes.

15 Q. He was an expert in blasting  
16 in the department?

17 A. Yes, he was.

18 Q. He was called upon regularly  
19 for his opinions on the effects of blasting from a  
20 particular blasting plan or the potential effects?

21 A. Yes.

22 Q. And then the second  
23 condition, condition (i), is, it's stated:

24 A report shall be completed by the  
25 proponent in advance of any blasting activity



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1 main centre of the DFO in the Halifax-Dartmouth  
2 area?

3 A. It is now. It was not at  
4 that time.

5 Q. Okay. Were most of the  
6 habitat personnel that worked in your branch in  
7 Nova Scotia, were they most of them located there  
8 at the Bedford Institute?

9 A. The core branch was, but  
10 there were field officers located in the area  
11 offices throughout the region.

12 Q. Mr. Wheaton was one of those  
13 local --

14 A. He was.

15 Q. -- officers?

16 A. Yes.

17 Q. And Mr. Surette was an area  
18 director for southwest Nova Scotia; correct?

19 A. Yes. For all programs, not  
20 just habitat.

21 Q. He was located in, was he  
22 located in Yarmouth?

23 A. He was.

24 Q. All right. And where was  
25 Mr. Jollymore located?

1 A. In Bedford Institute.

2 Q. If you go to tab 4, Exhibit  
3 C-41, there is an email from Mr. Jollymore to  
4 Mr. Petrie, who was the issuer of that approval  
5 that we just looked, and he is writing on April  
6 26 , four days before the approval was issued.

7 He states halfway down the email,  
8 "Our marine mammal coordinator, Jerry Conway".  
9 Just stopping there, Jerry Conway was a marine  
10 mammal coordinator at the Bedford Institute?

11 A. Yes he was -- no, actually.  
12 He was not at Bedford Institute.

13 Q. Oh? Where was he?

14 A. He was at the Halifax head  
15 office in Portland Street in Dartmouth.

16 Q. Right. Did he have  
17 scientists working under him?

18 A. No.

19 Q. He was the marine mammal  
20 coordinator, but he worked --

21 A. For the fisheries resource  
22 management branch.

23 Q. Right. It says:  
24 "Jerry Conway has expressed  
25 significant concerns about

1 possible blasting impacts on  
2 marine mammals in the area.  
3 Jerry wanted documented proof  
4 the charges to be employed  
5 would not have any disruptive  
6 influence on the species."

7 He goes on and sets out the two  
8 conditions that are requested.

9 When did you become aware of how  
10 those conditions (h) and (i) became a part of the  
11 April 30th approval from the provincial government?

12 A. I can't particularly say  
13 exactly when. But as I said, I am in frequent  
14 contact, or I was in frequent contact with my  
15 director of oceans and habitat and habitat  
16 management, director of the branch, and they would  
17 have informed me of these conditions.

18 Q. It is important that politics  
19 not play a role in environmental assessment; are we  
20 on common ground there?

21 A. Yes, we are.

22 Q. And that there should not be  
23 any political interference in that process?

24 A. Hmm-hmm. Yes.

25 Q. Correct? And there should



1 not be any partisanship of one kind or another  
2 involved in the environmental assessment process?

3 A. It should not, no.

4 Q. It should be a scientific,  
5 objective, if I can put it this way, search for the  
6 scientific truth; is that a fair assessment?

7 A. It even goes beyond the  
8 scientific truth. It has to look at other factors  
9 as well as science.

10 Q. Right. But it is essentially  
11 a scientific objective exercise, as opposed to a  
12 subjective exercise?

13 A. To a large extent, yes.

14 Q. If you go to the next tab,  
15 tab 5, Exhibit C-963. You will see that that is a  
16 fax from Nadine Belliveau, special assistant to the  
17 Minister, to Mr. Paul Boudreau.

18 Just so I understand the reporting  
19 relationship, did Mr. Boudreau report to  
20 Ms. Rose? Is that how that worked?

21 A. Yes.

22 Q. And then Ms. Rose reported to  
23 you?

24 A. That's correct.

25 Q. When did you first see this

1 fax?

2 A. This fax?

3 Q. Yes.

4 A. Sometime a couple of years  
5 ago, I guess.

6 Q. So you were not aware of the  
7 existence of this fax at the time in 2002 when it  
8 was sent?

9 A. I was aware of the issues  
10 around it, yes. Not the specific facts.

11 Q. And the issues being the  
12 issues of the sending of the fax or the issues of  
13 the -- or beyond that?

14 A. The issues of the fact that  
15 the Minister's constituency office, represented by  
16 Nadine Belliveau, were constantly asking and  
17 enquiring about issues that resided within the  
18 Minister's riding.

19 Q. Was this a first for you, in  
20 terms of having a Minister of Fisheries and Oceans  
21 who represented a riding that an environmental  
22 assessment had to be carried out on for a project?

23 A. No.

24 Q. How many ministers had you  
25 served under by this point?

1 A. About 17.

2 Q. Did you have ministers from  
3 the Maritimes who had environmental assessment  
4 issues ongoing in their ridings?

5 A. Yes.

6 Q. And would you agree with me  
7 that those circumstances require special, prudent  
8 care in handling?

9 A. Yes. Indeed.

10 Q. To ensure that the local  
11 political conditions do not find their way into the  
12 non-partisan, non-political environmental  
13 assessment process?

14 A. We try our best to avoid  
15 that, yes.

16 Q. Yes. And the best way for  
17 that to be avoided is to ensure that the Minister  
18 him or herself, and their staff, remain hands off,  
19 in terms of the workings of the environmental  
20 assessment process?

21 A. It is practically impossible  
22 to stop the staff of any ministerial office to ask  
23 questions and be informed about the status of  
24 activities within their own riding.

25 We have to draw a line as to

1 what's information and information that they're  
2 requesting versus policy influence or the influence  
3 of the decision-making process in an EA process.

4 Q. Would you agree with me that  
5 that is a very difficult line, in practice, to  
6 draw?

7 A. Of course it is.

8 Q. And that the potential exists  
9 for officials to perceive that they're being asked  
10 by -- a question by someone who is in a very  
11 powerful position? Is that fair?

12 A. Yes, it is fair.

13 Q. And were you aware as this  
14 file unfolded that the minister's office through  
15 the local constituency office, and in particular  
16 Ms. Belliveau, was in frequent contact with  
17 officials within your department?

18 A. Oh, absolutely.

19 Q. And the normal reporting  
20 relationship, in terms of the science and in terms  
21 of a particular project, would be from local  
22 officials through the department regionally up to  
23 you, regionally, and then from you to Ottawa?

24 A. That's correct.

25 Q. And that was the normal and

1 routine and appropriate way for information to be  
2 conveyed both to departmental headquarters and then  
3 back down the chain through to local officials;  
4 correct?

5 A. In any kind of issue that  
6 relates to decision making, that is the process  
7 that had to be followed.

8 Q. And you mentioned decision  
9 making. Officials are making decisions in the  
10 environmental process, assessment process on  
11 sometimes a daily basis. They're making  
12 assessments of whether there's a fisheries-related  
13 habitat on a property, whether there is an  
14 oceans-related habitat, whether there might be  
15 triggers involved and so on. Those decisions are  
16 happening all the time; correct?

17 A. In any file, yes.

18 Q. And they shouldn't be  
19 subjected to political influence; would you agree  
20 with that?

21 A. Yes.

22 Q. If you go to this tab 5, did  
23 Mr. Boudreau, to your knowledge, report to anyone  
24 that he had received this direct fax from Nadine  
25 Belliveau, the special assistant to the Minister

1 stating that the community was "desperately looking  
2 for a way to slow down the process"?

3 A. I'm sure he would have told  
4 his director, yes.

5 Q. But it did not --

6 A. He also had the  
7 responsibility to inform my office, so I assigned  
8 an executive officer in my office, Mr. Greg  
9 Peacock, to be the contact with the Minister's  
10 constituency offices.

11 Q. Did it raise a concern for  
12 you at the time that the Minister's constituency  
13 office was taking an active, such an active  
14 interest in this project that it could be perceived  
15 by some as being potentially political  
16 interference?

17 A. No. I never at any time  
18 during that process felt there was political  
19 interference from the local staff. One, they were  
20 no experts, scientific or otherwise, in the EA  
21 process, and were just trying to feed information  
22 and get information from the department for their  
23 own interests.

24 Q. Well, let's, on that note,  
25 turn to tab 6 which is Exhibit C-256.

1                                   And turning, in particular to the  
2 bottom of page 2. Mr. Surette is writing an email  
3 to yourself, Ms. Scattolon, Mr. Boudreau, with a CC  
4 to Mr. Wheaton and Mr. Peacock. You have just  
5 identified Mr. Peacock as being I understand it  
6 communications person within your office; correct?

7                                   A. That's correct.

8                                   Q. Right? And he says at the top  
9 of page 3:

10                                   "I have been advised by the  
11 minister's office, Nadine,  
12 that we are not to accept a  
13 report on the effects of  
14 blasting on marine mammals as  
15 per section I of item 10 of  
16 the Nova Scotia approval  
17 issued April 30th until such  
18 time as the minister's office  
19 has reviewed the  
20 application."

21                                   Now, that is more than just an  
22 enquiry to get a bit of information, isn't it?

23                                   A. Yes. He's been advised that,  
24 according to this note, that the minister's office  
25 had an interest in seeing the report.

1                   Q.    Well, it was more than that,  
2 with respect, Mr. Bellefontaine. It was that we  
3 are not to accept a report on the effects of  
4 blasting on marine mammals as per section I. We  
5 are not to accept a report.

6                   A.    Okay. You have to look at  
7 the chain of emails.

8                   Q.    Well, this is the chain --

9                   A.    And the response by Faith  
10 Scattolon and then the further clarification by  
11 Mr. Surette a day later, as to what he actually  
12 meant by that statement.

13                  Q.    Yes, but this is what he  
14 wrote that very day; correct?

15                  A.    And he corrected it the next  
16 morning.

17                  Q.    And so there had been, did  
18 you understand -- did you make an inquiry of  
19 Mr. Surette as to how this had all unfolded?

20                  A.    Oh, yes, yes.

21                  Q.    And you made that inquiry to  
22 find out how this had happened that Ms. Belliveau  
23 was sending directions to Mr. Surette?

24                  A.    In the end he explained that  
25 it was not directions.



1 Q. That he was just mistaken  
2 here? That he had --

3 A. There is another email  
4 explaining this.

5 Q. Yes.

6 A. Whereby he said that the  
7 minister's office just wanted to be informed of  
8 when the report came in and what it contained.

9 Q. And did you --

10 A. That was in response to Faith  
11 Scattolon's questions that were raised.

12 Q. And Faith Scattolon writes on  
13 June 26th:

14 "The minister's office is  
15 reviewing the application.  
16 Which application? Tim, do  
17 you know which application  
18 they are talking about?"

19 And she goes on:

20 "As for accepting a report on  
21 the effects of blasting,  
22 Paul, I sent you the  
23 Minister's draft letter on  
24 this quarry."

25 And she continues on. She says

1 she is going to give the ADM's office a heads up on  
2 this as they should be aware of the Minister's  
3 office involvement."

4 Correct.

5 A. Hmm-hmm, yes.

6 Q. The ADM was Ms. Kirby in  
7 Ottawa?

8 A. I believe at that time, yes.

9 Q. And would Ms. Kirby be your  
10 counterpart in Ottawa, in terms of the structure  
11 and the way the department worked?

12 A. No. She was one of several  
13 Assistant Deputy Ministers that had a portfolio of  
14 responsibilities that reported to the Deputy  
15 Minister. I was a line manager reporting directly  
16 to the Deputy Minister myself.

17 Q. Did you take any particular  
18 steps at this time, in June of 2002, to inform all  
19 officials who were working on this project that  
20 they were to conduct the environment, any matters  
21 involving any review of any blasting report or any  
22 other environmental assessment matters, that they  
23 were to remain immune from any political  
24 interference?

25 A. They were informed that if

1 they had inquiries from the minister's office, that  
2 they inform my office of them and that they only  
3 provide factual information to the minister's  
4 office.

5 Q. Who did you inform to that  
6 effect?

7 A. I informed all of my  
8 directors of this, because this was an issue not  
9 just of concern with respect to environmental  
10 assessment, but fisheries management and science  
11 and aquaculture, harbour development, and so on.

12 When you have a minister who has  
13 the riding in Nova Scotia for the first time in  
14 sixty years, you will have this kind of inquiry  
15 going on and the staff not really -- the junior  
16 staff, the operational staff, not really sure of  
17 what they should be doing when they're called from  
18 the minister's office.

19 Q. That is the concern, isn't  
20 it? That they really don't know how to respond to  
21 these inquiries, because it is unusual and out of  
22 the ordinary. Correct?

23 A. Well as I would say, the  
24 Minister is God, is he not?

25 Q. Yes, yes. That is an apropos

1 term.

2 Now, were you kept informed along  
3 the way, after this exchange of emails, about the  
4 Minister's -- the participation at the minister's  
5 office? After that email exchange, were you kept  
6 apprised of the developments on the file?

7 A. Yes.

8 Q. And did you know that  
9 Mr. Buxton -- if you go to tab 7, Exhibit C-298,  
10 Mr. Buxton had sent a letter to Mr. Petrie with a  
11 blasting plan on it. Do you recall that?

12 A. I believe so, yes. I  
13 recognize that he -- he was in another department  
14 in Dartmouth government.

15 Q. Mr. Petrie was with NSDEL?

16 A. Yes.

17 Q. He was the issuer of the  
18 approval?

19 A. Yes.

20 Q. So the approval had these two  
21 conditions that had to be fulfilled and Mr. Buxton  
22 was providing this blasting design in response to  
23 the request to fulfil conditions 10(h) and (i).  
24 Does that all ring a bell to you?

25 A. Yes.

1 Q. Yes. If you go to the next  
2 tab, Exhibit C-477, tab 8 --

3 A. Just before we go there?

4 Q. Yes?

5 A. This is not really a plan for  
6 blasting.

7 Q. Are you an expert on  
8 blasting?

9 A. No. But I have seen blasting  
10 plans before.

11 Q. Yes.

12 A. And it is pretty sketchy  
13 plan.

14 Q. Yes.

15 A. It doesn't tell you when and  
16 where they're going to do their blasting, and so  
17 on. It is very --

18 Q. Well, on that note -- go  
19 ahead?

20 A. There is one page and there  
21 is a description of where.

22 Q. Yes?

23 A. This would not be an  
24 acceptable plan to the department.

25 Q. Well, let's go to the second

1 page, just given that you have raised that. At the  
2 second page it says Blasting design.

3 Location, Whites Point quarry.

4 Blast number, it says. That is a  
5 test. So I gather you didn't actually review this  
6 plan at the time; that's correct?

7 A. No. But there is no  
8 description in here, and I recall this very  
9 vividly, that described in fact what were the  
10 potential impacts of these blasts on fish, marine  
11 fish in the local environment.

12 Q. And a blasting expert?

13 A. And that was the request  
14 under the conditions of the plan.

15 Q. And that was, of course,  
16 something that a blasting expert such as Mr. Wright  
17 would be able to assess?

18 A. Or other experts, yes.

19 Q. Or other experts. But  
20 Mr. Wright would be certainly one of the leading  
21 experts in the department?

22 A. Yes.

23 Q. Who would be in a position to  
24 assess the potential effect of a test blast under  
25 this plan on marine mammals or on fish; correct?

1 A. That's correct.

2 Q. Had you reviewed the blasting  
3 guidelines at or about this time?

4 A. Well, at this particular  
5 time? I can't say when. I certainly had looked at  
6 them over the years but I can't say I looked at  
7 them at this particular time in September of 2002.

8 Q. That wasn't my question. I  
9 was -- you were familiar with the blasting  
10 guidelines, generally?

11 A. Yes.

12 Q. Did this blasting plan come  
13 across your desk at the time?

14 A. No.

15 Q. Did you learn about the fact  
16 that it had been submitted?

17 A. Yes.

18 Q. And did you follow the  
19 departmental analysis of the plan?

20 A. I know there was a very large  
21 amount of dialogue with respect to the adequacy of  
22 the plans that were discussed with the proponents,  
23 and certainly it took some time before an adequate  
24 plan came forward.

25 Q. Do you recall there being

1 dialogue within the department in this period of  
2 September to the end of September? Do you have any  
3 recollection of that?

4 A. Oh, I'm sure there was. I  
5 don't recall the dialogue.

6 Q. Do you recall having any  
7 discussions with Mr. Ross about the plan at the  
8 time?

9 A. Jim Ross?

10 Q. Yes.

11 A. Perhaps, not specifically,  
12 no.

13 Q. Would the natural course of  
14 the reporting relationship prevent you from having  
15 a discussion with Mr. Ross about that?

16 A. Not at all. I knew most of  
17 these people for many years as experts in their  
18 fields.

19 Q. Did you work -- did Mr. Ross  
20 work in the same building as you?

21 A. No.

22 Q. He worked at -- in Dartmouth?

23 A. Yes.

24 Q. Just while we're in that time  
25 period if you go to tab 8, Exhibit C-477, this is a



1 letter from Mr. Wheaton to NSDEL. He states:

2 "This letter is to advise  
3 that DFO habitat management  
4 has reviewed the plans for  
5 the above-noted proposal as  
6 requested and visited the  
7 site."

8 And this is for a request for a  
9 stream diversion; do you see that?

10 A. Hmm-hmm.

11 Q. Yes?

12 A. Yes, I do.

13 Q. Yes.

14 "DFO HMD has concluded that  
15 this water course cannot be  
16 categorized as fish habitat.  
17 Therefore the Fisheries Act  
18 does not apply. If you have  
19 any questions concerning the  
20 conclusion, please do not  
21 hesitate to contact the  
22 undersigned."

23 Were you aware in September of  
24 2002 that an analysis had been done of a stream on  
25 the property and it had been determined that it was

1 not fish habitat?

2 A. I believe I was, but I know  
3 at that time the entire property was not surveyed  
4 with respect to fish habitat. But this particular  
5 stream, yes.

6 Q. Were you aware at that time  
7 of any other stream on the property that may have  
8 been fish habitat?

9 A. Not at that time.

10 Q. No. If you then go to the  
11 next tab, Exhibit C-478.

12 It is a letter from Mr. Ross to  
13 Bob Petrie and he states in the second paragraph:

14 "It is our opinion that,  
15 although the plan seems to be  
16 within the guidelines for use  
17 of explosives in or near  
18 Canadian fisheries waters,  
19 there is insufficient detail  
20 to make an assessment on its  
21 effects on threatened or  
22 endangered marine mammals  
23 that may be present at  
24 various times of the year."

25 Do you see that?

1 A. Yes.

2 Q. Now, just I would like to  
3 focus for a moment on "endangered marine mammals".

4 The concern was that had been  
5 expressed as you understood it was about the North  
6 Atlantic Right Whale; correct?

7 A. And Inner Bay of Fundy  
8 Salmon, Atlantic Salmon.

9 Q. I'm going to say that, with  
10 respect, Inner Bay of Fundy Salmon were not at all  
11 expressed as a concern, in fact, at any time until  
12 May of 2003.

13 A. I don't know exactly when it  
14 became a concern, but it certainly became a serious  
15 concern.

16 Q. It became a concern, at least  
17 an expressed concern, on May 29th, 2003, in a  
18 letter. I can take you to the letter, if you wish.

19 A. I think I've seen  
20 correspondence where it was discussed before that.

21 Q. With the proponent or just  
22 internally?

23 A. Internally and perhaps with  
24 the proponent, because there were meetings  
25 undertaken with the proponent throughout the entire



1 between our habitat branch and Mr. Petrie and the  
2 environment, obviously this relates to Right  
3 Whales. But I'm sure there were many public  
4 concerns with respect to the issues of other fish  
5 and fish species in the area.

6 Q. Yes. I'm focussing not on  
7 public concerns, but on what the proponent was  
8 dealing with in 2002.

9 And what I'm suggesting to you is  
10 that all the proponent was asked to deal with, all  
11 the proponent was required to deal with was in  
12 respect to potential effects on marine mammals of  
13 blasting on land; correct?

14 A. I can't recall exactly when  
15 the other issues came up, but they clearly did. I  
16 will leave it at that.

17 Q. You can't recall whether they  
18 came up in the fall of 2002 or later; is that fair?

19 A. Or early in the winter, yes.

20 Q. Okay. Were you made aware of  
21 this letter to Mr. Petrie from Mr. Ross?

22 A. I believe so, yes.

23 Q. Were you made aware of  
24 comments that were made by Mr. Dennis Wright with  
25 respect to the adequacy of the blasting plan?

1 A. I think so, yes.

2 Q. I would like to turn you,  
3 please, to tab 10. Exhibit C-299. Do you  
4 recall -- without reviewing this document yet --  
5 what Mr. Wright told Mr. Ross about the adequacy of  
6 the blasting plan with respect to potential adverse  
7 effects on marine mammals?

8 A. I'm not sure exactly at this  
9 point what Dennis Wright would have said  
10 specifically in his correspondence, but I know at  
11 one point there were discussions that the blasting  
12 model, design model that the local region was using  
13 was, in fact, not the correct one.

14 Q. That was much later in May,  
15 June of 2003.

16 But at this point, in 2002, on  
17 September 30th, 2002, if you go to the second page  
18 of Exhibit C-299 you will see that Mr. Ross sends  
19 an email to Mr. Wright.

20 A. Where are you again?

21 Q. The second page of that  
22 document you've got in front of you. It's the  
23 originating email from Mr. Ross. Here we are.

24 And he sends this off at 10:03  
25 a.m., Digby quarry blasting plan.

1 "As discussed with you this  
2 morning, you believe that the  
3 Whites Cove quarry blasting  
4 plan dated September 17, 2002  
5 seems to be within DFO's  
6 guidelines for the use of  
7 explosives in or near  
8 Canadian fisheries waters.  
9 However, there may be  
10 monitoring requirements that  
11 should be included such as:  
12 Visual survey of the area up  
13 to one kilometre radius for  
14 whales. Sightings near or  
15 within the radius would delay  
16 the blast until the whales  
17 had cleared the area. The  
18 use of hydrophones suspended  
19 500 metres offshore to record  
20 data on the blast to prove  
21 compliance with the  
22 guidelines."

23 Does that ring a bell to you as to  
24 what you knew at the time with respect to the  
25 adequacy of the blasting plan and its potential

1 effect on marine mammals?

2 A. Well, what I recall at the  
3 time was that there was serious concern about the  
4 proximity of the blasting to the shoreline, which  
5 was very close, and the impact on whales for  
6 which -- there was no single expert that had the  
7 expertise on blasting and whales within the  
8 department. So it had to come from various people  
9 in terms of what the impacts might be.

10 And Mr. Ross is basically in his  
11 email raising this concern and proposing some ways  
12 that monitoring requirements should be included in  
13 the blasting plan.

14 Q. Yes. There are concerns, and  
15 then there is science and whether science will  
16 address those concerns.

17 And Mr. Wright was the blasting  
18 expert and its potential effects on both fish and  
19 marine mammals in regards to that.

20 A. Not necessarily marine  
21 mammals. He was from central Atlantic region, did  
22 not have a lot of experience with marine mammals,  
23 certainly large whales.

24 Q. So Mr. Conway was the other  
25 person?



1 A. No.

2 Q. It was Mr. Conway's expertise  
3 that, actually as you saw, had the -- was the basis  
4 for the insertion of conditions 10(h) and (i) into  
5 the approval. Correct?

6 A. Mr. Conway would have  
7 consulted other whale scientists.

8 Q. And so?

9 A. Dr. Stobo, Dr. Lee Harris,  
10 and so on.

11 Q. So one would expect naturally  
12 that if Mr. Conway's expertise or expression of  
13 concern was enough to have conditions 10(h) and (i)  
14 inserted into the approval, his satisfaction with  
15 the blasting plan and its potential effect on  
16 marine mammals would be enough to have conditions  
17 10(h) and (i) satisfied. Is that fair?

18 A. I think generally, yes.

19 Q. If we go then, back to the  
20 first page of Exhibit C-299. The explosives  
21 guidelines, Mr. Wright is writing to Mr. Ross:

22 "The explosives guidelines  
23 are designed chiefly to  
24 protect fish. When we use  
25 them for protection of marine

1 mammals, we are really flying  
2 by the seat of our pants. We  
3 have used the approach that  
4 if a blasting plan is within  
5 the guidelines, we add a few  
6 extra points to try to cover  
7 off the marine mammal  
8 concerns.

9 "The easiest mitigation is -  
10 if whales are present within  
11 visual limits, about one  
12 kilometre, the blast is to be  
13 delayed until the whales  
14 vacate that perimeter. The  
15 one kilometre is arbitrary  
16 and is based on what an  
17 observer can spot. If the  
18 whales are sounding and  
19 blowing, it is easier to spot  
20 them at greater distances."

21 They also ask blasts be monitored.

22 Now is that a fair description of what you  
23 understood the main mitigation features were with  
24 respect to blasting and its potential effects on  
25 marine mammals?

1                   A.    Well, this was Dennis  
2 Wright's views of what should be done.

3                   Q.    And he was the expert?

4                   A.    You have to recall at that  
5 time, if you realize, the Bay of Fundy, the Inner  
6 Bay of Fundy where these whales frequent, quite  
7 often it is covered with fog cover and cloud cover  
8 and the whales aren't that visible to anybody.

9                   So it is a very difficult  
10 environment, in fact, to apply this kind of  
11 condition and say that it would be a sound  
12 condition to protect the whales.

13                  Q.    Are you aware that in the  
14 proponent's application for this approval that the  
15 proponent itself actually raised the issue of  
16 marine mammals and wanted to have it addressed and  
17 have it addressed up front, and that in fact there  
18 was an officer with NSDEL's environmental  
19 assessment branch who was impressed that the  
20 proponent had taken the steps to address marine  
21 mammal concerns? Are you aware of that?

22                  A.    That doesn't surprise me. I  
23 mean, the area we're talking about was a  
24 considerable amount of ecotourism and  
25 whale-watching area. And so obviously the

1 proponent would know about these concerns coming  
2 from the whale-watching industry, and others, and  
3 certainly would raise that concern, yes.

4 Q. If, as Mr. Wright seems to be  
5 suggesting, the department was a little short on  
6 expertise with respect to the effects of blasting  
7 on marine mammals, would you have thought that that  
8 would be a fair thing to share with the proponent  
9 and say, we aren't sure. The best mitigation is to  
10 wait until they're a kilometre off, we want you to  
11 watch it very closely. We want you to monitor it  
12 so we can have data?

13 And, oh by the way, North Atlantic  
14 Right Whales aren't actually in the Bay of Fundy in  
15 December, January, February, March, and April and  
16 possibly into May, so that there is no chance of  
17 harming them when they aren't there, they go down  
18 south? Wouldn't that be a fair thing to share with  
19 the proponent?

20 A. One would say so, but  
21 remember, this process was still going on and the  
22 habitat branch were trying to sort out what would  
23 be the best advice to put into these conditions.

24 So you know, the Right Whales  
25 migrate south to north and back to south, but

1 exactly how long they were in these areas few  
2 people know. So there were some investigations to  
3 try to determine that, I'm sure.

4                               However, you know, the application  
5 for the Whites Point quarry at this point was a  
6 year-round one. So conditions to limit the  
7 blasting to a small seasonal period I don't think  
8 were considered at that point.

9                               Q. You don't think that was  
10 considered?

11                              A. Not at this particular point,  
12 in 2002.

13                              Q. You didn't think that was  
14 considered in the fall of 2002 that it would be  
15 reasonable to go back to the proponent, whose  
16 blasting plan had provided for a test blast -- that  
17 is all it had provided for -- to say: This is the  
18 best way to do it. We would appreciate your data.  
19 We would appreciate you setting up hydrophones 500  
20 metres offshore and providing us with this data so  
21 that we can, ourselves learn more about the effects  
22 of blasting on these mammals?

23                              A. I can't give you an answer  
24 with respect to how Jim Ross responded to the  
25 advice he got from Dennis Wright and whether or not

1 he considered that it was important enough to put  
2 back to the proponent at that time.

3                   Maybe he felt he wanted further  
4 information and probably did, to clarify exactly  
5 how are these conditions sound or not.

6                   Anybody that knows the Bay of  
7 Fundy knows that there are large periods of the  
8 year in which there is cloud cover and fog cover.  
9 And that you cannot visually see whales until you  
10 are on top of them. So seeing them from the shore,  
11 unless you had spotter boats out there within the  
12 coastal area, would be very difficult.

13                   Q. Yes. But in the meantime  
14 when the whales weren't there and there is evidence  
15 from the Tiverton, for example, that your  
16 officials, your officials were saying that the  
17 Right Whales are not in the region during the fall  
18 period and the spring period.

19                   A. I recall a discussion about  
20 that, yes.

21                   Q. Yes. And so that they're not  
22 even in the region and, therefore, there is no  
23 potential for harm. In the meantime, if you  
24 conduct a blast, you could do sound tests, you  
25 could do vibration tests both on land and in the

1 sea bed, and you could do sound tests through the  
2 water. Correct? Would it not be reasonable, then,  
3 to allow the proponent to go ahead and conduct a  
4 test blast to try and gather some of that data?

5 A. I can only assume at the time  
6 that the Habitat Management Branch staff felt, in  
7 fact, that they wanted more information before they  
8 provided that guidance to the proponents.

9 Q. Yes. But from your  
10 perspective, isn't that a reasonable approach to a  
11 situation like this?

12 A. My, if you want my  
13 perspective on it, I would have said, this is, you  
14 know, one of the most high energy areas in the  
15 Atlantic coast region. One of the highest value  
16 fisheries in the world. One of the highest areas  
17 in terms of exchange of whales and other marine  
18 mammals.

19 And it probably would not be a  
20 very good place to put a quarry to start with.  
21 That would be my opinion.

22 Q. That would be your personal  
23 opinion. But, of course, the issuance of an  
24 approval for a 3.9 hectare quarry was entirely  
25 within provincial jurisdiction; correct?

1                   A.    Subject to the conditions  
2   that they put in the --

3                   Q.    Yes.

4                   A.    -- in the approval that  
5   required the proponent to meet those blasting  
6   conditions that you showed me earlier.

7                   Q.    Yes.  And we would agree, I  
8   would think, that those conditions should be  
9   evaluated on reasonable and fair grounds and that  
10  on scientific grounds and not for any other  
11  purpose; correct?

12                  A.    And I believe they were.

13                  Q.    If you go, then, to -- just a  
14  little bit below in the exhibit, C-299 Tab 10.

15                                "We have had success in  
16                                monitoring blasting pressures  
17                                using a system available from  
18                                an outfit called InstanTel.  
19                                They are a Canadian company  
20                                located in Ottawa and are  
21                                more or less the world  
22                                standard."

23                  Is that the kind of information  
24  that you would expect to be passed on to a  
25  proponent when the department has it and can



1 usefully be shared?

2 A. I can't really speak about  
3 the company, what experience they had --

4 Q. I am just asking you to speak  
5 to --

6 A. -- with respect to marine  
7 mammals.

8 Q. I am asking you to speak to  
9 Mr. Wright's suggestion.

10 A. I mean, he was a blasting  
11 expert, but he was not a whale expert. I will  
12 leave it at that.

13 Q. And of course you were aware  
14 at that time that there are about 800 to 900 ships  
15 that go through the Bay of Fundy every year?

16 A. I am well aware, yes.

17 Q. And they go, in fact, through  
18 the conservation area for the Right Whale and the  
19 Grand Manan Basin?

20 A. That's correct.

21 Q. Have you seen the maps  
22 showing the frequency of sightings of Right Whales  
23 in the Bay of Fundy?

24 A. I have seen a number of them,  
25 yes.

1 Q. And are you aware that the  
2 shipping lanes were changed on July 1st, 2003 from  
3 going more straight through the Grand Manan Basin  
4 Conservation Area, more to the south of it in order  
5 to try and avoid it?

6 A. There clearly was, I  
7 initiated a Canada-US agreement.

8 Q. Right.

9 A. -- to develop a conservation  
10 plan for the North Atlantic Right Whales, and part  
11 of the commitment we made was to look at minimizing  
12 the impacts of ship strikes on whales.

13 Q. Right.

14 A. Part of that process was in  
15 fact to change the Canadian shipping lanes to  
16 minimize the impacts of ships being close to  
17 whales.

18 Q. Right.

19 A. And --

20 Q. Yes?

21 A. -- the process also went to  
22 the International Maritime Organization.

23 Q. Yes?

24 A. By the time I left the  
25 department, in fact, these lanes were formally

1 changed internationally as well as domestically.

2 Q. Right. That was on July 1st,  
3 2003; is that right?

4 A. That was the first step, yes.

5 Q. Right. And the shipping  
6 lanes were actually shifted south, closer towards  
7 Digby Neck?

8 A. In one area, yes.

9 Q. In one area?

10 A. Yes.

11 Q. And instead of going up the  
12 Bay of Fundy and then turning left, they went a  
13 little bit further south and turned left around  
14 the --

15 A. Portrayed to be kind of east,  
16 or west and south of the Whites Point quarry  
17 location.

18 Q. Yes. And so the shipping  
19 lanes were shifted closer to the Whites Point  
20 quarry location, weren't they?

21 A. Not specifically, no.

22 Q. You don't recall that?

23 A. No.

24 Q. Are we on common ground that  
25 federal officials both generally and specifically

1 working on environmental assessments were required  
2 to conduct themselves fairly, reasonably,  
3 objectively?

4 A. Yes.

5 Q. And transparently?

6 A. Yes.

7 Q. And to share information when  
8 it was available to them?

9 A. Yes. You have to have a  
10 degree of certainty of what you share.

11 Q. Yes. But generally speaking,  
12 there was a principle that if operations of the  
13 federal government back in 2002 and 2003 should be  
14 conducted transparently and openly; correct?

15 A. I would say at all times, not  
16 just in 2002 and 2003.

17 Q. And to share information that  
18 was relevant to a proponent's interest in an  
19 environmental assessment; is that fair?

20 A. If it was felt that the  
21 advice was the best advice available at the time,  
22 yes.

23 Q. If the advice was internal  
24 advice from experts within the department?

25 A. You have to realize that this

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1 was the first time in a long time a major quarry  
2 terminal had been proposed and terminal had been  
3 proposed in this area of the Bay of Fundy. In  
4 fact --

5 Q. I am just asking generally  
6 speaking.

7 A. So, no. What I'm saying  
8 is --

9 Q. Yes.

10 A. -- there was a large  
11 explosion of inquiries between the scientists and  
12 habitat management with respect to what would be  
13 the impacts of this quarry and the terminal. And  
14 so there were many discussions and dialogues to  
15 gather information at that time.

16 Q. In --

17 A. I saw a lot of it.

18 Q. In 2002, all of -- the only  
19 thing that your department was dealing with was the  
20 question of conditions 10(h) and (i).

21 A. Yes.

22 Q. And the question of whether,  
23 in particular, the blasting on the property, on a  
24 3.9 hectare fully approved quarry could be  
25 conducted, and whether that blasting on land would

1 have an adverse impact on marine mammals in the  
2 water. That's correct?

3 A. At that time, yes.

4 Q. And in 2002, then, if that  
5 question could be answered to the satisfaction of  
6 departmental experts in the areas of blasting and  
7 marine mammals, that information you would have  
8 expected to be shared transparently and openly with  
9 the proponent; correct?

10 A. Yes.

11 Q. You wouldn't expect that  
12 information to be concealed or hidden in any way;  
13 is that correct?

14 A. No. But I would expect --

15 Q. That's correct?

16 A. -- the information to be as  
17 complete as possible to ensure that, in fact, the  
18 proponent got the right information.

19 Q. You would not expect that  
20 expertise and information from experts within the  
21 department would not be shared openly and  
22 transparently with the proponent; correct?

23 A. You have to realize that  
24 there were open discussions and debates about this  
25 information. And what was good and what was bad,

1 and what was a good condition and perhaps a weak  
2 condition.

3                               So this dialogue went on for  
4 months.

5                               Q. I am sure it did. My sense,  
6 from what you're saying, is that the approach to  
7 the question of compliance with condition 10(i) in  
8 particular, the report regarding blasting and its  
9 effect on marine mammals, was viewed through the  
10 lens that it could provide information which may be  
11 helpful, or not, on the question of operating a  
12 larger marine terminal and quarry. Is that fair?

13                              A. It was certainly a subject  
14 of -- an issue at the time, because it was around  
15 that time there was discussions and development  
16 with respect to expanding the quarry project to a  
17 larger project.

18                              Q. Yes. And so the department  
19 was approaching that question of whether blasting  
20 on land would affect marine mammals with a view to  
21 how that data might be used for the purpose of  
22 expanding that 3.9 into a larger quarry. Is that  
23 right?

24                              A. Absolutely, because at that  
25 point we, we had heard that this quarry was going

1 to be somewhere's in the range of 300 acres of land  
2 and an ongoing quarry for some 50 years.

3 Q. Yes?

4 A. Producing 2 million tonnes of  
5 rock aggregate a year. And that's a large  
6 industrial project.

7 Q. And so in terms of allowing  
8 the proponent, then, to gain access to data that  
9 might help it in pursuing that objective, that was  
10 something which the department viewed as being part  
11 of a larger project as opposed to simply the  
12 operation of a 3.9 hectare quarry; is that right?

13 A. Well.

14 Q. Is that right? Yes or no?

15 A. I would say it is partially  
16 right.

17 Q. Okay.

18 A. You extended the question a  
19 bit longer than I would have answered.

20 Q. Okay. The partial right  
21 part, then.

22 A. Well, in fact, whatever  
23 happened in the 3.9 hectare quarry would have  
24 happened with respect to blasting would have  
25 continued to happen in the larger quarry, would it



1 not?

2 Q. And is that the basis upon  
3 which, then, the department was considering the  
4 question of blasting on this 3.9?

5 A. This was a major quarry,  
6 right on the coastline of Nova Scotia and very high  
7 energy area, where major fishery resources and  
8 whale resources resided.

9 So obviously our staff were very  
10 cautious about ensuring that any blasting plan that  
11 was approved did not affect fish or fish habitat.

12 Q. Did anybody tell Mr. Buxton,  
13 who was the proponent's representative, that your  
14 test blasting is being reviewed with a view to what  
15 the impact that might have on your ability to build  
16 a larger quarry?

17 A. I do not know the answer to  
18 that.

19 Q. Were you aware of that  
20 yourself, in 2002, that the question of blasting on  
21 the 3.9 and how that was being dealt with by the  
22 department was being considered in the context of  
23 how that data could be used to expand that to the  
24 larger quarry?

25 A. Not specifically.

1 Q. No?

2 A. No.

3 Q. So is that speculation on  
4 your part? Or is it --

5 A. Well --

6 Q. -- based upon real evidence?

7 A. I think the proposal for the  
8 larger quarry came much later, in the next year.

9 Q. Yes, yes.

10 A. So at that time they were  
11 dealing with the 3.9 hectare quarry. But publicly  
12 it was well known that the proponents had bought up  
13 and were buying up property and were looking at  
14 expanding this project.

15 Q. And so in terms of simply  
16 operating a 3.9 hectare quarry -- which you know  
17 under provincial law required no environmental  
18 assessment; correct?

19 A. Correct.

20 Q. And they had the right to  
21 operate that 3.9 hectare quarry subject to only to  
22 the conditions in the approval; correct?

23 A. Provided it did not have a  
24 trigger under the Fisheries Act or CEAA.

25 Q. And with the benefit of

1 Mr. Wright's advice, setbacks seemed to be fine.  
2 It seems to be within the guidelines of the  
3 blasting guidelines, that he's the author of. Am I  
4 taking it from your comments that that information  
5 from Mr. Wright would have been viewed differently  
6 than if otherwise the claimant was simply going to  
7 operate a 3.9 hectare quarry which, aside from  
8 these conditions, it was entitled to do?

9 A. I cannot determine how it was  
10 viewed by Mr. Ross. Mr. Ross can only tell you  
11 that. What I can say is --

12 Q. Yes. That's right.

13 A. -- by the fact that the  
14 blasting plan was not approved at that time, that  
15 there were obviously concerns that it was not  
16 sufficient to satisfy the risk concerns the habitat  
17 officer had with respect to Right Whales.

18 Q. But of course only Mr. Ross  
19 can explain as to whether those concerns were  
20 justified; correct?

21 A. Well, I'm sure there is other  
22 documentation to the effect. He wouldn't just keep  
23 this to himself.

24 Q. You're simply not in a  
25 position to say scientifically what the position

1 would have been. It is only Mr. Ross who could  
2 explain that; correct?

3 A. Or other habitat staff that  
4 were involved at the time.

5 Q. Other science staff?

6 A. Yes.

7 Q. Could you go then to tab 11,  
8 Exhibit R-64? This is a memorandum for the  
9 Minister. Would that be Mr. Thibault?

10 A. Yes.

11 Q. And did you have a hand in  
12 drafting this memorandum?

13 A. No, but I reviewed it.

14 Q. Who would have drafted it?

15 A. It probably was put together  
16 as a draft by someone in the region and transmitted  
17 to Mr. Joey Crocker and then he developed it, and  
18 as you can see, it was reviewed and finalized by  
19 several people up to, including Mr. Paul Cuillerier  
20 who was the Director General of habitat management  
21 at the time.

22 Q. When you say it was probably  
23 developed by regional people, was it developed  
24 under your supervision? People under your  
25 supervision?

1 A. Not always, no.

2 Q. Would it go up a chain to you  
3 first, and then to Ottawa, to Mr. Crocker?

4 A. Not always. If there are  
5 factual information put together that would be sent  
6 to headquarters, I would in fact only see it  
7 sometimes when it came back as a draft memo such as  
8 this.

9 Q. This is actually a signed  
10 memo, not a draft memo. Would you see it as a  
11 draft memo normally?

12 A. Normally, yes, I would.

13 Q. So sometimes a draft  
14 memorandum to the Minister or Deputy Minister could  
15 go straight from an official to Ottawa and then  
16 come back to you as a draft? Is that how it would  
17 work?

18 A. Yes.

19 Q. Do you have any recollection  
20 at all of that in this case?

21 A. I don't know in this  
22 particular case but I have seen this memo, for  
23 sure.

24 Q. Okay. If you go to the  
25 second -- well, on the first, the bottom of the

1 first page outlines something which is common  
2 ground:

th

3 "On April 30 , 2002 the  
4 proponent received provincial  
5 approval to operate a 3.9  
6 hectare quarry at the site."

7 And on page 2, the second bullet:

8 "DFO recently received the  
9 preliminary blasting plans  
10 for the terrestrial aspects  
11 of this proposal."

12 And:

13 "DFO advised the proponent  
14 that the plans were deficient  
15 with respect to mitigating  
16 impacts to fish and fish  
17 habitat."

18 Now, I have reviewed Mr. Ross's  
19 letter more than one time -- we have already  
20 covered it, September 30th, Exhibit C-478 -- and I  
21 have seen nothing there about fish and fish  
22 habitat.

23 Can you explain that?

24 A. Well, as I said, this is you  
25 know, a week or so later or ten days or so later.

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1 Q. Yes.

2 A. The dialogue within the  
3 Habitat Management Branch would be bringing other  
4 issues into the discussion at that time.

5 Q. Really?

6 A. So it doesn't surprise me  
7 that other issues besides whales were coming  
8 forward. And in fact this statement says that.

9 Q. It states that "DFO advised  
10 the proponent", and Mr. Buxton was the  
11 representative of the proponent, "that the plans  
12 were deficient with respect to mitigating impacts  
13 to fish and fish habitat."

14 And with the greatest of possible  
15 respect, if you look at Mr. Ross's letter of  
16 September 30th, tab 9, if you need to, there is  
17 nothing mentioned about fish and fish habitat. You  
18 will recall it is about endangered marine mammals.

19 A. Yes. But I don't know how it  
20 was transmitted to him. It could have been through  
21 another avenue.

22 Q. Are you aware of any  
23 information going to the proponent that there was  
24 an assessment ongoing in the DFO at that time of  
25 fish and fish habitat?

1                   A.    Not specifically at that  
2 time, but certainly issues around fish came up.

3                   Q.    They did, much later.

4                   A.    I can't know exactly when.

5                   Q.    Yes.  You would expect the  
6 proponent to be advised if there was an assessment  
7 of fish and fish habitat; correct?

8                   A.    I would say.

9                   Q.    Yes.  It would only be fair  
10 for the proponent to know what was being assessed  
11 within the department which might affect the  
12 proponent's rights to exercise its rights under the  
13 approval already given by the provincial  
14 government; correct?

15                  A.    That's correct.

16                  Q.    It says at the third bullet  
17 under the title "Analysis":

18                               "DFO was awaiting the revised  
19                               land-based blasting plan.  
20                               Upon receipt, departmental  
21                               staff will evaluate its  
22                               effectiveness at mitigating  
23                               impacts to fish and fish  
24                               habitat, particularly in  
25                               regards to the marine



1 environment."

2 Now, I'm going to tell you that in  
3 all of the correspondence that I have reviewed from  
4 now until -- from then until the end of the year  
5 that there is nothing going to the proponent about  
6 fish or fish habitat. It is about marine mammals.

7 MR. SPELLISCY: Sorry, is that  
8 testimony from Mr. Nash?

9 BY MR. NASH:

10 Q. Well I am helping, trying to  
11 help the witness's recollection and if you have  
12 seen any correspondence going back and forth from  
13 the proponent about fish and fish habitat, in 2002.

14 A. I can only recollect that it  
15 would be reasonable to expect that many fisheries  
16 issues would have come up with respect to concerns  
17 about the impact on fish.

18 Q. From the proponent's  
19 standpoint, it would be reasonable to expect that  
20 the proponent would be advised of that; correct?

21 A. I am sure he was.

22 Q. Whether he was or wasn't is a  
23 matter for others to speak to, isn't it? And if he  
24 wasn't, that would be a deficiency in the processes  
25 of the department. Isn't that fair?

1                   A.    Well, this issue was -- this  
2 proposal was a very public proposal, so there was  
3 lots of issues raised within the public forum about  
4 the concerns with respect to fish and fish  
5 fisheries, as well as marine mammals.

6                   Q.    I am speaking about --

7                   A.    I'm sure --

8                   Q.    -- the analysis being  
9 conducted by the DFO, not about concerns at large  
10 being expressed by the public.

11                  A.    At this --

12                  Q.    Analysis being conducted by  
13 the DFO.

14                  A.    At this point, all I can say  
15 is DFO, I'm sure the Habitat Management Branch were  
16 reviewing impacts on fish.

17                  Q.    And you are sure they were  
18 reviewing the impacts on fish for the purpose of  
19 their analysis of conditions 10(h) and (i)?

20                  A.    Well, that is what this  
21 section says that you just read to me.

22                  Q.    Yes.  And it would be  
23 surprising to you if the department did not inform  
24 the proponent of that assessment in that analysis;  
25 correct?

1 A. Yes, it would be a surprise.

2 Q. And it would be a deficiency  
3 in the procedures and processes of the department  
4 for the proponent not to know that that was going  
5 on; correct?

6 A. I would be very surprised if  
7 he did not know.

8 Q. It would be a deficiency in  
9 the processes and procedures of the department if  
10 the proponent were not advised as to what  
11 assessment the DFO was doing; is that fair?

12 A. Yes.

13 Q. Correct?

14 A. Yes.

15 Q. If you go to tab 12, Exhibit  
16 R-118, only for context, you will see a letter from  
17 Mr. Buxton to NSDEL dated October 8th attaching the  
18 one-page blasting design.

19 And then over to tab 13, Exhibit  
20 C-296, is a letter from the Minister of Fisheries  
21 and Oceans to Ms. Hubbert, the senior program  
22 officer at the Canada Research Chairs Program in  
23 Ottawa.

24 Minister Thibault is responding to  
25 concerns that have been raised in her email of

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1 October 7th.

2 I will read a couple of sentences  
3 and then ask you a question about how a letter like  
4 this gets drafted.

5 "On April 30th, 2002 the  
6 proponent received provincial  
7 approval to operate the 3.9  
8 hectare quarry. DFO received  
9 a copy of proposal from the  
10 province, which is  
11 responsible for the  
12 permitting of land based  
13 quarries."

14 Just stopping there: That was  
15 correct?

16 A. Yes.

17 Q.

18 "Upon review of the proposal,  
19 DFO concluded that there were  
20 no significant concerns with  
21 respect to the legislation  
22 administered by the  
23 department."

24 I will pause there.

25 I am interested in knowing how a

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1 letter like this gets drafted and who decides what  
2 information goes into it.

3 A. Well, as I said earlier,  
4 similar to briefing notes, it could have been  
5 drafted at the regional level and submitted to the  
6 head office through, normally through the ADM  
7 motions in habitat or it could have been drafted in  
8 that office and provided to the Deputy Minister and  
9 on to the Minister for signing.

10 Q. So it could have been drafted  
11 in Ottawa and then kind of --

12 A. Either/or.

13 Q. Okay. Were you aware in  
14 October of 2003 that upon review of the April 30th  
15 approval, DFO had concluded that there were no  
16 significant concerns with respect to the  
17 legislation administered by the DFO?

18 A. You said 2002.

19 Q. Did I say 2003? I  
20 mis-spoke. 2002.

21 A. 2002.

22 Q. Were you aware of that?

23 A. Not of this specific  
24 statement, no.

25 Q. Were you aware that the DFO

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1 had concluded generally --leaving aside this  
2 specific statement -- that it had no significant  
3 concerns with respect to the legislation  
4 administered by the DFO?

5 A. I guess, you know, as I said  
6 earlier, this is very much an iterative process.  
7 Whoever drafted the letter at that time and had the  
8 Minister sign it, felt that. But certainly I  
9 didn't at the regional level and my officials.

10 Q. Well it may be iterative, but  
11 it's not frivolous. And when a Minister signs a  
12 letter I would have thought that a lot of work goes  
13 into ensuring that that letter is accurate; isn't  
14 that fair?

15 A. Well, I'm just reading the  
16 rest of the letter here, and he raises other  
17 concerns with respect to the blasting plan.

18 Q. I am just asking you about  
19 the process of putting together a letter like  
20 this. It's not frivolous. It is serious when a  
21 Minister signs a letter; isn't that right?

22 A. Yes, of course.

23 Q. A lot of filtering goes  
24 through that information and a lot of hands and  
25 eyes look at that information before the Minister

1 signs off on a letter such as this. That's  
2 correct?

3 A. That's correct.

4 Q. So going on, then.

5 "Notwithstanding this, it was  
6 determined that blasting on  
7 the proposed quarry lands  
8 would pose a minimal risk to  
9 marine mammals."

10 To your knowledge, was that the  
11 conclusion that the Department of Fisheries and  
12 Oceans at that time?

13 A. No. Not entirely, no.

14 Q. You had a different opinion?

15 A. Well, the process continued  
16 for several more months before, you know, the  
17 blasting plan was proposed that was satisfactory.

18 So my view at that time, there was  
19 just not enough information to give that security.

20 Q. So your view was different  
21 than the Minister's view, apparently?

22 A. Yes.

23 Q. Yes. And you mentioned that  
24 the process went on for a number of months until  
25 the plan was satisfactory.

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1 A. Hmm-hmm.

2 Q. When do you recall that  
3 being?

4 A. I can't say exactly. I can't  
5 recall.

6 Q. Was it in the spring of  
7 2003? In that region?

8 A. Yes, I think sometime around  
9 May, sometime. I'm not sure exactly.

10 Q. So there was an internal  
11 assessment within the department that the blasting  
12 plan was satisfactory to the department, is that  
13 fair, around that time?

14 A. I don't know exactly what the  
15 final blasting -- comments on the blasting plan  
16 were. But I recall it went on that period and --

17 Q. It was found ultimately to be  
18 satisfactory; correct? That's correct?

19 A. I believe so, yes.

20 Q. Okay. The letter goes on to  
21 state:

22 "Recently DFO commented on  
23 the blasting plan submitted  
24 to the province by the  
25 proponent. DFO advised the



1 province and the proponent  
2 that the plan was deficient  
3 with respect to the  
4 mitigation of impacts to fish  
5 and fish habitat in the  
6 marine environment."

7 Now, do you understand that to be  
8 correct or incorrect?

9 A. Well, I would say it's  
10 probably correct. I mean, under the strictest  
11 interpretation, you know, fish were a concern at  
12 that time.

13 Q. It doesn't say that the DFO  
14 advised the province and the proponent that the  
15 plan was deficient with respect to the mitigation  
16 of impacts on marine mammals.

17 A. It doesn't say that  
18 specifically in that paragraph.

19 Q. Well, it doesn't say that at  
20 all, does it?

21 A. I haven't read the entire  
22 letter.

23 Q. "Due to the fact", it says in  
24 the second paragraph on the second page:

25 "Due to the fact that no

1 review or environmental  
2 assessment can be initiated  
3 without a full project  
4 proposal, a letter was sent  
5 to the proponent indicating  
6 that the file would be closed  
7 until a revised proposal is  
8 received."

9 Now, that was in relation to, as I  
10 understand it, the marine terminal. And I think  
11 what the Minister is doing is confirming your  
12 understanding, is that the marine terminal  
13 application was closed for the time being until a  
14 new application came in.

15 Would that ring true, to your  
16 understanding?

17 A. Yes, I think so.

18 Q. Okay. So then go to the tab  
19 14, Exhibit C-300 the letter states, "Dear Bob,"  
20 this is from Mr. Ross to Mr. Petrie.

21 "I received the additional  
22 information you faxed us  
23 today on the Whites Cove  
24 quarry blasting plan. The  
25 individual I rely on to

1 provide advice on mammals is  
2 not available this week."

3 Did you understand that the best  
4 person to go to for advice on mammals in the Nova  
5 Scotia region was Mr. Conway?

6 A. He's not a scientist. He  
7 would have coordinated any information, normally he  
8 would do that, coming from scientists, Dr. Stobo or  
9 Dr. Harris or others.

10 Q. If he expressed an opinion or  
11 a concern, that would not be his personal opinion  
12 or concern?

13 A. No. He was not a scientist.

14 Q. He would be gathering the  
15 information from others before he expressed that  
16 opinion; correct?

17 A. That's correct.

18 Q. It states:

19 "However, I don't wish to  
20 approach him with the  
21 additional information as it  
22 still has not addressed the  
23 proponent's responsibilities  
24 adequately. Specifically,  
25 there is no indication of

1                   what the bottom is made up  
2                   of."

3                   And then:

4                   "According to clause 10 of  
5                   the approval to construct and  
6                   operate the quarry, we expect  
7                   the following information to  
8                   accompany a complete blasting  
9                   plan."

10                   Mr. Ross then goes on to cite six  
11                   conditions, 10(a) to (f), which are wholly within,  
12                   I'm going to suggest to you, within provincial  
13                   jurisdiction and were part of the blasting  
14                   conditions in the blasting plan; have nothing to do  
15                   with conditions 10(h) and (i), have had nothing to  
16                   do with fish and marine mammals, one of them being  
17                   no blasting on Sundays. That was clearly a  
18                   provincial concern, wasn't it?

19                   A.    I would think so.

20                   Q.    Yes. Did you see this letter  
21                   at or about that time?

22                   A.    No.

23                   Q.    Were you being kept apprised  
24                   of the information flow between your department and  
25                   NSDEL, and collaterally, Mr. Buxton?

1                   A.    I would have been briefed on  
2 the general discussions, but not always seeing  
3 every piece of paper, no. I had other duties.

4                   Q.    Yes. I understand. This  
5 was, though, an important file; correct?

6                   A.    There were many environmental  
7 files at the time.

8                   Q.    Okay. If you go, then, to  
9 tab 15, Exhibit C-301. If you go to that document.  
10 It is a letter from Mr. Buxton to NSDEL and it  
11 attaches an extensive blasting plan. It has a  
12 section on page 5, at the bottom 002705, about  
13 marine mammals and it presents evidence on  
14 potential effect of blasting on marine mammals.

15                           And then over in the top of page  
16 6, it states:

17                                    "To address potential  
18 concerns regarding noise and  
19 marine mammals in relation to  
20 the proposed blasting  
21 activities, a 500 metre  
22 observation zone, 500 metre  
23 safety radius from the  
24 detonation area, shall be  
25 established as suggested in

1 fact sheet-blasting," et  
2 cetera.

3 Then it says:

4 "An onshore observer shall be  
5 in place at least one hour  
6 prior to the start of the  
7 scheduled blasting to  
8 identify the possible  
9 presence of marine mammals  
10 within this zone."

11 And that document goes to  
12 Mr. Ross.

13 Were you aware of that? Well, it  
14 is copied to him on the letter.

15 A. It is copied to him as you  
16 can see.

17 Q. Yes. Mr. Ross, if you go to  
18 tab 16, distributes that document to three people,  
19 Don Bowan, Jerry Conway, Robert Stephenson, on  
20 November 28th. Do you see that?

21 A. Yes.

22 Q. Yes?

23 A. Yes.

24 Q.

25 "Hi Folks, Just a reminder

1 that I would like to have  
2 your comments on the blasting  
3 plan by tomorrow, November  
4 th  
5 29 , as I would like to  
6 develop a coordinated  
7 response to the proponent for  
8 the first of the week."

8 Above there is an email from Jerry  
9 Conway to Mr. Ross.

10 "Sorry for not getting back  
11 to you on Friday. Another  
12 issue came up in respect to  
13 Bottlenose whales that  
14 required my immediate  
15 attention. Anyway, in  
16 respect to the Whites Cove  
17 blasting, based on the  
18 information provided and the  
19 undertakings that the  
20 proponent is prepared to  
21 take, I have no concerns in  
22 respect to marine mammal  
23 issues in respect to this  
24 specific proposal."

25 Were you aware of Mr. Conway's

1 opinion at that time?

2 A. No. Not specifically at that  
3 time.

4 Q. That opinion of Mr. Conway  
5 was not communicated to you?

6 A. No. Not at that time.

7 Q. Were you being regularly  
8 briefed on the file by Mr. Greg Peacock?

9 A. Yes.

10 Q. When did you become aware of  
11 Mr. Conway maintaining the position that he had no  
12 concerns in respect to marine mammals?

13 A. It was some time later. I am  
14 not sure exactly when.

15 Q. In the period 2002-2003 or  
16 much later?

17 A. Some time in probably in  
18 early 2003.

19 Q. And how did you become aware  
20 that Mr. Conway had no concerns about the blasting  
21 plan?

22 A. Because there were other  
23 concerns raised at the time from others --

24 Q. I am just asking how you  
25 became aware.



1                   A.    It would have been either  
2 Paul Boudreau or Carol Ann Rose informing me.

3                   Q.    And you would agree with me  
4 that in a transparent and open and fair process,  
5 that that would be information, particularly when  
6 combined with Mr. Wright's information transmitted  
7 on September 30th, that it would be fair for at  
8 least the proponent to know that? Is that fair?

9                   A.    No. Not necessarily.  
10 Because at the time Mr. Ross was collecting  
11 information from a number of people. He's not  
12 going to provide information from one source until  
13 he makes a judgment from a number of sources of  
14 information.

15                  Q.    So the three sources of  
16 information that he was requesting input from were  
17 Mr. Bowen, Mr. Stephenson, and Mr. Conway?

18                  A.    Yes.

19                  Q.    If you go to the next tab,  
20 tab 17, there is an email from Norm Cochrane who  
21 was an official at DFO; correct?

22                  A.    That's correct.

23                  Q.    And Mr. Cochrane, I gather,  
24 Mr. Ross was gathering information from him as  
25 well; do you see that?

1 A. Obviously, yes.

2 Q. If you go to the next page,  
3 he says on his attached memo:

4 "I have read the Whites Point  
5 quarry blasting plan by Nova  
6 Stone Exporters dated

th

7 November 18 . I have also  
8 read guidelines for the use  
9 of explosives in or near  
10 Canadian waters."

11 Authored by Mr. Wright and  
12 Mr. Hopky.

13 "One presumes DFO is  
14 primarily interested in  
15 blasting effects on  
16 fish/marine mammals and their  
17 habitat rather than the  
18 projected effects on nearby  
19 structures reported in the  
20 blasting plan. I have no  
21 major problems with the  
22 blasting plan as submitted.  
23 However, there are some areas  
24 of concern, which you may or  
25 may not have already



1 of low water would help  
2 alleviate problems of ground  
3 acceleration at least for  
4 ecosystem components confined  
5 to the water column. Not  
6 sure about the intertile  
7 community. The modified  
8 blast sequence would also  
9 seem to help in preventing  
10 strong beaming of energy  
11 toward the water. One should  
12 ensure similar care be  
13 exercised in all subsequent  
14 blasts."

15 Then if you go over to the second  
16 page, he lays out a number of general comments and  
17 then a number of specific comments.

18 And I am going to paraphrase, but  
19 essentially, he appears to be satisfied with all of  
20 the comments --

21 MR. LITTLE: Excuse me. I don't  
22 think it is fair to paraphrase, Mr. Nash.

23 MR. NASH: Okay, that's fair  
24 enough. I understand Mr. Little's objection I was  
25 thinking in the interests of time but let's just go

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1 through them.

2 "Comment 1. It would appear  
3 that if blasting is indeed  
4 conducted within three hours  
5 of low water the separation  
6 of detonation point from  
7 significant spawning habitat  
8 should be met.

9 "This of course does not take  
10 into account beaming effects  
11 from near simultaneous shot  
12 hole detonations. One  
13 assumes the contractor will  
14 be bound to detonating within  
15 three hours of low tide."

16 And then it goes on. I won't read  
17 it all out. But the second specific comment:

18 "It is advantageous that  
19 blasts will be infrequent -  
20 one per week."

21 MR. LITTLE: Excuse me, again.  
22 You are starting to read selectively now. I think  
23 if you are going to read a part of the document you  
24 should read the whole document. We're going to be  
25 here all day, though, if you do, Mr. Nash.

1 BY MR. NASH:

2 Q. Perhaps you could take a  
3 moment, Mr. Bellefontaine, and read it to yourself  
4 and see if you can find that any of Mr. Cochrane's  
5 originally expressed concerns have not been  
6 satisfied by this point.

7 A. I don't think I could make a  
8 judgment on that. I mean --

9 Q. You would rely on  
10 Mr. Cochrane's concerns?

11 A. Yes.

12 Q. Having been satisfied --

13 A. And he was just one of the  
14 experts providing that to Habitat Management  
15 Branch.

16 Q. Yes?

17 A. He did so in a couple of  
18 occasions as you have shown me. I can't give you  
19 specific answer-response as to whether the  
20 responses were adequate, or he was fully satisfied,  
21 because there were other people that were also  
22 contributing to the file.

23 Q. So really only the scientists  
24 can explain their positions and bring information  
25 that would be helpful to them?

1                   A.    And normally when you have a  
2 scientific review, a collective approach or a final  
3 approach would come from all of this dialogue  
4 between scientists.

5                   Q.    If you -- one of the other  
6 scientists was Mr. Stephenson.  And he writes at  
7 tab 19, Exhibit R-121.

8                   MR. LITTLE:  Before you start,  
9 Mr. Nash, are you going to read the whole document?

10                  MR. NASH:  No.  I am going to read  
11 a part of it to give the essential character of it.

12                  Q.    He says:

13                        "Jim, I apologize that it  
14                        took me a while to get to  
15                        this proposal.  The following  
16                        are my comments.

17                        "I am not an expert in the  
18                        impact of blasting or indeed  
19                        of noise.

20                        "I note that the proposal  
21                        admits to fisheries in the  
22                        area, to small whales and  
23                        seals within one mile of  
24                        shore, and to an active whale  
25                        watching activity and the

1 presence of hump back and  
2 Right Whales at five miles  
3 from shore. The presence of  
4 an endangered species within  
5 a few miles of the site  
6 require special consideration  
7 - and the recommendations of  
8 the Right Whale recovery plan  
9 must be considered  
10 explicitly. Jerry Conway can  
11 provide this context."

12 Now, we know that Jerry Conway has  
13 already provided his comment from the email from  
14 him dated December 2nd that he has delivered  
15 earlier; right? Correct?

16 A. Yes. But I don't think  
17 Mr. Conway had consulted the Right Whale recovery  
18 team at that point.

19 Q. Did you ask Mr. Conway who he  
20 had consulted at that point before he gave his  
21 opinion?

22 A. No.

23 Q. Do you know anything about  
24 what consultations Mr. Conway had at that point?

25 A. I know that he was leading



1 that recovery team and there were a number of  
2 scientists and managers involved in that team. And  
3 he, if he was going to, as this suggests, consult  
4 them, he would be bringing forward their views as  
5 well.

6 Q. Well, if you go back to his  
7 nd  
8 email of December 2 , tab 16 where he says "I have  
9 no concerns in respect to marine mammal issues, in  
10 respect to this specific proposal", do you know  
11 from your personal knowledge of what consultations  
12 he had with anybody in respect to that?

13 A. Not at that specific time but  
14 again --

15 Q. That is what he's expecting?

16 A. -- Time has passed. Time has  
17 passed and you're getting different views from  
18 scientists that are specifically involved in the  
19 Bay of Fundy. So...

20 Q. And ultimately the science  
21 came together and the scientists came of the  
22 collective view that blasting could occur at Whites  
23 Point safely, without risk of adverse effects on  
24 marine mammals and fish; correct?

25 A. I'm not sure if that is  
exactly correct.

1 Q. Generally speaking, it is  
2 correct, that there was a consensus of opinion that  
3 was positive as opposed to negative, is that fair?

4 A. I can't specifically say.

5 Q. You don't know?

6 A. No.

7 Q. Only the scientists could  
8 tell us?

9 A. Well --

10 Q. Correct?

11 A. -- and the records.

12 Q. Yes. There was an issue  
13 about -- actually, let me go to tab 18, Exhibit  
14 C-127. It is the letter from Mr. Ross to  
15 Mr. Petrie, nine days after he receives the email  
16 from Mr. Conway.

17 He says:

18 "The information provided is  
19 inadequate to give DFO-HMD a  
20 sufficient level of  
21 confidence that fish, marine  
22 mammals, and fish habitat  
23 will..."

24 Just stop there.

25 Well, I will go on in that



1 what is in 10(i), which is about marine mammals?

2 A. I don't believe so. Because  
3 10(i) said that the plan had to be satisfactory,  
4 with respect to the impacts on fish and fish  
5 habitat and marine mammals.

6 Q. Okay. Well let's just go  
7 back to that so I can refresh your memory on that.  
8 If you go to tab 3 and go to page 10, I will bring  
9 you to 10(i) but I gather from your comment you're  
10 saying it was your understanding then and it is  
11 your understanding now that 10(i) was about fish as  
12 well as marine mammals?

13 A. Certainly.

14 Q. Could you closely read that?

15 A. Certainly. If areas with  
16 respect to, issues with respect to fish came up in  
17 the blasting plan, was it reasonable not to assume  
18 that they would be concerned about them? I guess.

19 Q. That is not a question for me  
20 to answer.

21 A. I would say that our  
22 scientists would. In fact, there is evidence to  
23 show that in fact in this correspondence that fish  
24 became an issue with respect to the blasting plan.

25 Q. But fish had nothing to do

1 with 10(i), did it?

2 A. Well, I don't see where it  
3 says specifically what 10(i) was applying to, other  
4 than it says, the adverse effects on marine mammals  
5 in the area.

6 Q. Well that is what it was all  
7 about, wasn't it. Mr. Conway was concerned about  
8 marine mammals?

9 A. At this time, yes.

10 Q. At that time, in April of  
11 2002, it was all about marine mammals. And now  
12 you're saying that there was actually a whole  
13 examination and gathering of information about fish  
14 in respect to 10(i)?

15 A. The evidence came forward  
16 that said fish were affected by the blasting as  
17 well. I think it is incumbent upon those officers  
18 to provide that information. Because that would  
19 have an impact on those fish and would be contrary  
20 to the conditions or the Fisheries Act itself.

21 Q. But it has nothing to do with  
22 10(i); wouldn't you agree with me?

23 A. I can see 10(i) was designed  
24 for whales.

25 Q. Right.

1 A. Or marine mammals.

2 Q. Correct.

3 A. More generally.

4 Q. And Mr. Wright has already  
5 told Mr. Ross that the plan, the original plan  
6 seems to comply with the blasting guidelines that  
7 Mr. Wright has authored.

8 A. Well, in this letter you  
9 showed me, he's now saying fish, marine mammals,  
10 and fish habitat.

11 Q. Yes. That is what he's  
12 saying --

13 A. Yes.

14 Q. -- but Mr. Ross -- Mr. Wright  
15 had already told Mr. Ross that the plan seems to  
16 comply with the federal blasting guidelines.

17 A. At one point in time, but  
18 information obviously changed that.

19 Q. From Mr. Wright?

20 A. No. I'm saying the  
21 information that Mr. Ross collected in drafting  
22 this letter of December 11, 2002, he's saying the  
23 information provided is inadequate.

24 PRESIDING ARBITRATOR: Mr. Nash,  
25 would that be maybe a good moment to have a break.

1 I have seen --

2 MR. NASH: You read my mind.

3 PRESIDING ARBITRATOR: Okay, good.

4 So we have a break until 5:15. Let's try to start  
5 again at 5:15 sharp. Thank you. And you have to  
6 be -- just stay on your own.

7 THE WITNESS: No problem.

8 --- Recess at 4:58 p.m.

9 --- Upon resuming at 5:17 p.m.

10 PRESIDING ARBITRATOR: I think  
11 we're all set to continue.

12 Mr. Nash, go ahead.

13 MR. NASH: Thank you, Mr.  
14 President.

15 BY MR. NASH:

16 Q. Thank you, Mr. President.

17 Mr. Bellefontaine, you should have  
18 a document, a loose copy of Exhibit C-039. And my  
19 understanding is that this is a map of the US  
20 Geological Services.

21 Is this a shipping lane map, or  
22 something like it, that you were referring to  
23 earlier?

24 A. Yes, it is.

25 Q. And if you go to the next --

1 well, you see on the first page it goes through the  
2 Grand Manan Conservation Area, and dark blue is the  
3 area of the highest intensity of sightings of North  
4 Atlantic Right Whales in the Grand Manan area in  
5 the Bay of Fundy?

6 A. In the Bay of Fundy.

7 Q. You will see the shipping  
8 lane has actually been changed on the second page  
9 to go closer towards Digby Neck and away from the  
10 centre of that most intense area of sightings.

11 Do you see that?

12 A. Yes.

13 Q. And you will see that the  
14 area the concentration of Right Whale sightings in  
15 this map from 1978 to 2004, it shows in yellows  
16 sightings 1 to 6, and then all the way up to dark  
17 blue is 166.

18 Did you have information available  
19 to you of this nature in your department in 2002  
20 and 2003?

21 A. We would have had some of  
22 this information, maybe not compiled in a  
23 consolidated way like you are showing here, but  
24 certainly evidence of reporting of Right Whales was  
25 collected by the department and also provided by



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1 the US Fisheries and Marine Services.

2 Q. Right. You will see that  
3 there is -- is that Long Island, the second island  
4 up?

5 A. Yes, that's correct.

6 Q. Just south of Digby Neck  
7 there?

8 A. Mm-hm.

9 Q. And Tiverton is right on the  
10 tip of that island, Long Island; correct?

11 A. It's actually on the corner  
12 there.

13 Q. Right? Have I got that  
14 right?

15 A. Mm-hm.

16 Q. Right beside the yellow dot  
17 there?

18 A. Mm-hm.

19 Q. You have to say yes or no for  
20 the record.

21 A. I don't see any specific  
22 yellow dots there, but there is a yellow along much  
23 of that area.

24 Q. There is some yellow at the  
25 tip there, and actually it might be better -- I'm

1 not sure if it is easier to see on the screen that  
2 is up there, but there are some yellow dots down  
3 Long Island; do you see that?

4 A. Yes.

5 Q. Whites Cove was about ten  
6 kilometres further up on Digby Neck from that  
7 location; correct?

8 A. Mm-hm.

9 Q. Yes?

10 A. Yes.

11 Q. I would like to have you  
12 turn, please, to tab 30, which is Exhibit  
13 C-129. It's a letter from Mr. Zamora to Mr. Buxton  
14 of May 29th, 2003.

15 A. Which tab?

16 Q. Tab 30.

17 A. Thirty?

18 Q. And it states in the first  
19 paragraph:

20 "DFO has concluded the  
21 proposed work is likely to  
22 cause destruction of fish,  
23 contrary to section 32."

24 And I will take you from there.

25 It would take too long to go through the whole

1 thing, but if you go to the addendum at page 1,  
2 second paragraph from the bottom:

3 "Habitat Management Division  
4 have calculated that  
5 horizontal setback distance  
6 from the shoreline of 500  
7 metres would be required to  
8 protect iBoF Atlantic Salmon  
9 of the size that could be  
10 found at Whites Point from  
11 May to October."

12 Do you see that?

13 A. Yes.

14 Q. Did you become aware shortly  
15 after this that the model which had been used to  
16 form the calculation of that 500 metre setback was  
17 the wrong model?

18 A. I can't say it was shortly  
19 after this, but I was made aware, yes, it was.

20 Q. Do you recall whether you  
21 were made aware of that in June of 2003?

22 A. I don't know specifically  
23 when. I cannot remember.

24 Q. If you turn to tab 40 -- no,  
25 I perhaps I don't have it in here.

1                   Do you recall that there was email  
2 correspondence from Mr. Wright to Mr. Zamora at the  
3 end of July of 2003 explaining that a reasonable  
4 setback would be to triple the guidelines setback,  
5 approximately, and provide for a 100 metre setback  
6 from the shoreline for blasting?

7                   A.    I can't say I recall it  
8 specifically, no.

9                   Q.    Do you recall that general  
10 topic coming up around the end of July, though?

11                  A.    I remember the discussion  
12 about the setbacks and as to how far it should be  
13 set back, but I don't recall any specific numbers  
14 at that time.

15                  Q.    So you don't recall it going  
16 from 35.6 to 500, and then back down to 100?

17                  A.    I recall it did change.

18                  Q.    Yes?

19                  A.    But I can't say --

20                  Q.    Okay.

21                  A.    -- how it happened.

22                  Q.    That information regarding  
23 setback requirements is something that you would  
24 consider would be fair and proper to advise the  
25 proponent of?

1                   A.    I think, you know, as I said  
2 earlier, our habitat officers collecting this  
3 information may have made an error in terms of the  
4 estimations --

5                   Q.    Yes?

6                   A.    -- of the impacts and would  
7 have changed this later at someday. I mean, that  
8 is their job, is to try to find the best  
9 information available to make a reasonable response  
10 to a proponent. I was not directly involved in all  
11 of that day-to-day discussion. I was kind of  
12 flying above it.

13                  Q.    Yes.

14                  A.    And information would come to  
15 me that might trigger a concern from time to time.  
16 I do recall that the setbacks changed. I can't say  
17 specifically when it occurred and the scientific  
18 reasons why.

19                  Q.    The question of whether a  
20 setback was 35.6 metres or 500 metres would be, I  
21 take it, a fundamentally important question for a  
22 proponent to know about?

23                  A.    Of course, but knowing the  
24 area where the blasting was to occur, I think 35 or  
25 36 metres from the shore would certainly increase

1 the risk. So I suspect that our scientists would  
2 have moved it back a lot further, yes.

3 Q. And knowing that it had been  
4 changed from 500 to 100 metres would be also  
5 information that would be critically important for  
6 the proponent to know; isn't that correct?

7 A. I am not aware that that  
8 actually occurred and the proponents were informed  
9 of that.

10 Q. You just can't comment on  
11 that at all?

12 A. No.

13 Q. Again --

14 A. As I said, there would have  
15 been discussions back and forth as to where to set  
16 it and a final determination made, and then the  
17 proponent informed of that.

18 Q. That wasn't an issue that  
19 came across your desk?

20 A. No. Not at that time, no.

21 Q. No.

22 A. No.

23 Q. Did it come across your desk  
24 later, or do you recall?

25 A. As I said, I was informed

1 that there was an issue about the setbacks because  
2 of the relativity of this to other quarry proposals  
3 in the region.

4 Q. All right. If you could  
5 turn, please, to tab 1, which is the federal Values  
6 and Ethics Code of the Government of Canada. I  
7 would just like to take you through some of the  
8 values and ethics that are set out there and  
9 confirm your understanding of whether they were in  
10 effect in 2002-2003?

11 On page 2, at the bottom 025113,  
12 under the "Role of Federal Public Servants":

13 "Federal public servants have  
14 a fundamental role to play in  
15 serving Canadians, their  
16 communities and the public  
17 interest under the direction  
18 of the elected government and  
19 in accordance with the law.  
20 As professionals whose work  
21 is essential to Canada's  
22 well-being and the enduring  
23 strength of the Canadian  
24 democracy, public servants  
25 uphold the public trust."

1                   That was a value -- all of those  
2 values were in effect in 2002-2003; correct?

3                   A.    I would say, to the best of  
4 my knowledge, my staff were operating appropriately  
5 within those values, yes.

6                   Q.    Leaving aside whether they  
7 were or were not, those were values that were to be  
8 followed and would guide behaviour of public  
9 servants in Canada?

10                  A.    Yes.

11                  Q.    In 2002-2003; correct?  Going  
12 on:

13                               "The Constitution of Canada  
14                               and the principles of..."

15                  A.    I can't say it was exactly  
16 the same quote.  This is from 2011.

17                  Q.    Yes, it is, but the general  
18 principles that are being elucidated upon there --

19                  A.    Absolutely.

20                  Q.    -- are principles that have  
21 been in effect at that time?

22                  A.    Mm-hm.

23                  Q.    Correct?

24                  A.    Of course, yes.

25                  Q.    "The Constitution of Canada



1 and the principles of  
2 responsible government  
3 provide the foundation for  
4 the role, responsibilities  
5 and values of the federal  
6 public sector.  
7 Constitutional conventions of  
8 Ministerial responsibility  
9 prescribe the appropriate  
10 relationships amongst  
11 Ministers, parliamentarians,  
12 public servants and the  
13 public. A professional and  
14 non-partisan federal public  
15 sector is integral to our  
16 democracy."

17 You would agree with that?

18 A. Yes, absolutely.

19 Q. And the role of ministers:  
20 "Ministers are also  
21 responsible for preserving  
22 public trust and confidence  
23 in the integrity of public  
24 sector organizations and for  
25 upholding the tradition and

1 practice of a professional  
2 non-partisan federal public  
3 sector. Furthermore,  
4 Ministers play a critical  
5 role in supporting public  
6 servants' responsibility to  
7 provide professional and  
8 frank advice."

9 And that was all the case in  
10 2002-2003?

11 A. I would think so, yes.

12 Q. Over to the next page,

13 "Objectives":

14 "This code outlines the  
15 values and expected  
16 behaviours that guide public  
17 servants in all activities  
18 related to their professional  
19 duties. By committing to  
20 these values and adhering to  
21 the expected behaviours,  
22 public servants strengthen  
23 the ethical culture of the  
24 public sector and contribute  
25 to the public confidence in

1 the integrity of all public  
2 institutions."

3 Then below, under "Respect for  
4 Democracy":

5 "The system of Canadian  
6 parliamentary democracy and  
7 its institutions are  
8 fundamental to serving the  
9 public interest. Public  
10 servants recognize that  
11 elected officials are  
12 accountable to parliament and  
13 ultimately to the Canadian  
14 people, and that a  
15 non-partisan public sector is  
16 essential to our democratic  
17 system."

18 Under "Respect for People":

19 "Treating all people with  
20 respect, dignity and fairness  
21 is fundamental to our  
22 relationship with the  
23 Canadian public and  
24 contributes to a safe and  
25 healthy work environmental



1 expected to conduct  
2 themselves in accordance with  
3 the values of the public  
4 sector and these expected  
5 behaviours.

6 "1. Respect for Democracy:  
7 Public servants shall uphold  
8 the Canadian parliamentary  
9 democracy and its  
10 institutions by:

11 "1.1 Respecting the rule of  
12 law and carrying out their  
13 duties in accordance with  
14 legislation, policies and  
15 directives in a non-partisan  
16 and impartial manner."

17 Under 1.3:

18 "Providing decision makers  
19 with all the information,  
20 analysis and advice they  
21 need, always striving to be  
22 open, candid and impartial."

23 And you would agree that all of  
24 those values and ethics were intended to guide  
25 public servants in their duties and obligations in

1 2002-2003?

2 A. I would say so, yes.

3 Q. And over on page 5, under

4 "Respect for People":

5 "Public servants shall  
6 respect human dignity and the  
7 value of every person by:

8 "2.1. Treating every person  
9 with respect and fairness."

10 Under number 3, "Integrity":

11 "Public servants shall serve  
12 the public interest by:

13 "3.1 Acting at all times with  
14 integrity and in a manner  
15 that will bear the closest  
16 public scrutiny, an  
17 obligation that may not be  
18 fully satisfied by simply  
19 acting within the law."

20 Under 3.2:

21 "Never using their official  
22 roles to inappropriately  
23 obtain an advantage for  
24 themselves or to advantage or  
25 disadvantage others."

1                   And, again, those were values and  
2 ethics and conducts that should guide public  
3 servants in 2002-2003?

4                   A.    Mm-hm.

5                   Q.    Correct?  Yes?

6                   A.    Yes.

7                   Q.    Thank you for your time,  
8 Mr. Bellefontaine.  Those are my questions.

9                   PRESIDING ARBITRATOR:  Thank you  
10 very much, Mr. Nash.

11                   MR. SPELLISCY:  Perhaps we could  
12 just have one minute to confer?

13                   PRESIDING ARBITRATOR:  Certainly.  
14 --- Government counsel confer.

15                   MR. LITTLE:  We have no questions  
16 on re-direct.  Thanks.

17                   PRESIDING ARBITRATOR:  Thank you  
18 very much.  Mr. Bellefontaine, this brings to an  
19 end your examination.  Thank you very much for your  
20 presence.  You are relieved, and have a good flight  
21 home to Malmo and say hello to all of the ships  
22 there from me.

23                   --- Laughter

24                   PRESIDING ARBITRATOR:  I'm a great  
25 ship lover.

1                   THE WITNESS: I will be there  
2 tomorrow. Thank you.

3                   PRESIDING ARBITRATOR: Is there  
4 anything -- no, you are fine. You are fine.

5                   Is there anything with regard to  
6 the issues that are on the table, like rebuttal  
7 time or availability of time in more general that  
8 we could still discuss since we are kind of geared  
9 to slightly longer, let's say, get together to...

10                  MR. LITTLE: We have made our  
11 position clear in the correspondence that we sent  
12 to the Tribunal today. We obviously oppose the  
13 request for rebuttal time for the reasons that we  
14 have set out in that letter.

15                  MR. APPLETON: Mr. President, you  
16 saw in our letter that we had recommended that  
17 perhaps it would be best handled as an  
18 off-the-record discussion of procedural matters.

19                  So that would be our suggestion.  
20 If you would like to do it on the record, that's  
21 fine, but I think the court reporter has done an  
22 admirable job today, and I would like to be able to  
23 let her leave, if that is at all possible, because  
24 it is a procedural issue that you can then make a  
25 decision on and we don't need to have a transcript.



1                   But if you would like it on the  
2 record, you will need to tell us what you would  
3 like. We're ready to proceed whenever you like.

4                   PRESIDING ARBITRATOR:  
5 Mr. Appleton, I think you would be the ideal public  
6 servant, because that sounds very much like what we  
7 just heard in all of the human, let's say,  
8 concerns.

9                   You wouldn't have a problem with  
10 eventually discussing a bit of that issue off the  
11 record?

12                   MR. LITTLE: No, not at all.

13                   PRESIDING ARBITRATOR: Okay. So  
14 we can let you go. Thank you very much.

15                   MR. LITTLE: I do have one more  
16 question just with respect to how tomorrow might  
17 run, given that we appear to be running out of time  
18 for examination.

19                   PRESIDING ARBITRATOR: I think  
20 9 o'clock would be -- we have to return to an  
21 earlier beginning at 9 o'clock. Is that a problem  
22 for everybody?

23                   MR. LITTLE: My question was more  
24 just with respect to Mr. Pulkowski --

25                   PRESIDING ARBITRATOR: Let's go

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1 off the record. We can go off the record.  
2 --- (Off record discussion re scheduling issues)  
3 --- Whereupon the hearing adjourned at 5:35 p.m.,  
4 to be resumed on Tuesday, October 29, 2013 at  
5 9:30 a.m.

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