



Achieving Certainty Through Clarity and Consistency

Reforming Environmental Assessment, Permitting, and Guidance Documents in Newfoundland and Labrador

October, 2018

Recommendations emerging from member
and partner consultations

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1.0 Background

In March of 2017, the Provincial Government – through the release of its *Way Forward: Realizing Our Potential* document – committed to reviewing the environmental assessment process and municipal and environmental permitting processes in Newfoundland and Labrador.

On September 25, 2017, private sector environmental professionals from multiple industries participated in a workshop organized by the Newfoundland and Labrador Environmental Industry Association (NEIA) to discuss the state of environmental regulations and processes in the province and began identifying opportunities for refinement. This workshop was supplemented by a more public engagement at NEIA's *Newleaf* conference on October 11th – which featured an interactive session and open conversation between almost 200 environmental sector stakeholders – and one-on-one consultation with key contributors.

A first draft of recommendations was completed in November 2017. This document was shared with the Minister of Municipal Affairs and Environment, and was the centrepiece of a discussion between NEIA, the Minister, and department officials on December 5, 2017. NEIA worked throughout 2018 with its membership internally, external stakeholders, and representatives from key Newfoundland and Labrador industries to validate and refine its recommendations.

This document summarizes the ideas, perspectives, concerns, and issues that came to light as a result of NEIA's engagements. The recommendations relate to the government's commitment to review environmental assessment and permitting processes – and also touch on aspects of public service that are directly related and could be addressed simultaneously: guidance documents, emerging interests, and capacity.

The predominant theme that emerged throughout the engagement, which is reflected in these recommendations, is a need to achieve improved *certainty* – through greater consistency and more clarity in the design and application of processes.

2.0 Executive Summary

In many cases, economic growth has the potential to impact the natural environment. As such, it is critical to have an *effective* regulatory framework to protect that environment. But of equal importance is to have an *efficient* regulatory framework to ensure that environmental protection takes place through processes that public and private stakeholders can rely on and navigate with confidence.

NEIA believes that ‘certainty’ is the key component for environmental regulatory processes that are both effective and efficient. In this regard, following an intensive engagement process with its membership and industry partners through 2017-18, NEIA is providing a series of detailed recommendations with the intent to help increase the clarity of the processes and the consistency with which they are applied.

The pursuit of certainty in environmental assessment and permitting processes is in the interest of reducing ‘risk’ – a prospect attractive to both government and industry. When processes are not clearly defined or standard in their application, both the public and private sectors carry risk: legal risk, financial risk, environmental risk, and political risk. A refined environmental regulatory framework can reduce risk for all stakeholders.

Key recommendations include: implementing reliable timelines; increasing efficiency and reducing uncertainty in processes; updating regulations, permitting practices, and guidance documents; proactively developing regulations for emerging interests such as renewable energy systems and innovative new technologies; and preventing the framework from becoming outdated by implementing a continuous reform mechanism.

NEIA is pleased to have the opportunity to engage with the Department of Municipal Affairs and Environment and contribute the expertise and perspectives of its membership. These recommendations are submitted in the interest of stimulating discussion with all stakeholders and the intent to achieve more certainty in the environmental regulatory framework through increased clarity and consistency of processes.

3.0 Introduction: The Importance of an Efficient Environmental Regulatory Framework

Growing Newfoundland and Labrador's economy is important in maintaining the quality of life enjoyed by its people and in contributing to a more sustainable future for the province.

In many cases, economic growth has the potential to impact the natural environment. As such, it is critical to have an *effective* regulatory framework to protect that environment. But of equal importance is to have an *efficient* regulatory framework to ensure that environmental protection takes place through processes that public and private stakeholders can rely on and navigate with confidence.

Inefficient processes can cost both the regulator and proponent in terms of time and money. They can create uncertain conditions that introduce risks without achieving additional environmental protection. This is particularly important to consider within the context of specific industries or economic activities that are being encouraged or attracted within the province. A great deal of effort is spent stimulating economic development, but sometimes forgotten is how regulatory frameworks can impact and even threaten those efforts. Processes and guidelines must match the environmental and business outcomes hoped to be realized.

To achieve this balance a continuous review of the environmental regulatory framework is required, and NEIA is pleased to have the opportunity to work with the Department of Municipal Affairs and Environment by contributing the expertise and perspectives of its membership in this current reform cycle. The association and its members are looking forward to the discussion this submission stimulates with all stakeholders.

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3.1 A Note on Risk

The pursuit of certainty in EA and permitting processes is in the interest of reducing ‘risk’ – a prospect attractive to both government and industry. When processes are not clearly defined or standard in their application, both the public and private sectors carry risk: legal risk, financial risk, environmental risk, and political risk. In making these recommendations it is industry’s hope that the environmental regulatory framework can be refined to reduce risk for all stakeholders.

4.0 Environmental Assessment

It is felt that the structure of the provincial environmental assessment (EA) process is sound. But the private sector is experiencing challenges, and it is believed that opportunities exist to increase the clarity and consistency of the process.

4.1 Implementing Reliable Timelines

The turnaround time associated with the province’s EAs is too long and unpredictable. EA timeline uncertainty has been identified as one of the biggest risk factors by the private sector; the uncertainty means that projects cannot be effectively planned or managed, resulting in significant costs both in terms of time and finances.

There are legislated timelines concerning actions and decisions within the EA process, however these are not adhered to. In some cases, information and consultation requirements have changed significantly since the legislation was originally enacted. As such, these timelines should be updated to be more realistic – and then be adhered to in order to provide all parties with a greater degree of certainty.

4.1.1 On Timelines and Public Sector Capacity

A reliable timeline may mean an elongated timeline, which is acceptable to industry in exchange for certainty. However, increases should be justifiable.

It is clear there are capacity issues within the areas of the Department of Municipal Affairs and Environment and ServiceNL that deal with EA, regulatory permitting, and industry relations. If current timelines could be achieved with the addition of resources, this should not be viewed as strictly a 'cost'. Rather, measured against the impact of elongating timelines for economic development, it may be an investment.

Communication between government and proponents of projects is a public service that plays a critical role in not just environmental protection and sustainability, but also in economic development. In this regard, the private sector requires ready access to EA professionals and appropriate technical individuals within government to facilitate a more reliable and timely regulatory framework.

4.2 Increasing Efficiency in Provincial EA Processes

Industry feels that there are opportunities to increase process efficiencies without impacting environmental outcomes.

4.2.1 Updating the Project List

The EA Regulations (Part 3) lists the projects that require EA registration and review; it is felt this is a good concept and approach. However, the list needs to be reviewed, updated, and refined with certain triggers removed, added, or revised. Efficiencies may be achieved by removing some types or scales of projects, where others can be considered for addition. Since last updated, some types of projects on the list have become irrelevant, commonplace, or more comprehensive. Project lists in other Canadian provinces, some featuring multiple

tiers and classes, can be reviewed which are considered by practitioners working in multiple jurisdictions to be more straight forward. Project lists should be reviewed and revised at regular time intervals to ensure they do not become outdated.

4.2.2 Taking a Different Approach to EA Guidelines

The EA Guidelines provided to proponents can serve as ‘scoping documents’ for subsequent environmental and impact assessment work. This work on the front end of the process will help focus the interaction between the regulator and the proponent. The current practice often sees generic documents provided, some which reflect outdated EA principles and methods. Without filtering out environmental components and issues at the outset, possibly irrelevant factors are considered on both sides through the life of the entire process – adding significant costs for both. More carefully constructed EA Guidelines may increase workloads at the outset of a process, but will pay dividends before its completion.

4.2.3 Simplifying EA Methods and Documentation

The presentation of EA information and analyses has become overly comprehensive, and could be clearer and more concise. Emphasizing quality over quantity and focusing on the truly material environmental considerations in an EA will make the document more accessible and more meaningful for participants in the process. More concise EA documentation will also contribute to the relevance of feedback in EIS reviews and EA decisions, helping the regulator meet its timelines.

4.2.4 Enabling Strategic Environmental Assessment

Strategic Environmental Assessment (SEA) allows for more comprehensive and proactive management of the regional and sectoral issues that project EA cannot address. Ideally, the existence of an SEA can inform and increase the efficiency of related project EAs. Key

questions would need to be answered around the practical application of SEA – e.g. how and when should they be triggered, and who absorbs the cost? Nonetheless, legislation could be amended to at least *allow* for the introduction of SEA if the regulator deemed it to be appropriate and/or beneficial at a future time.

4.3 Reducing Uncertainty in Provincial EA Processes

Building more certainty in to the EA process is one of industry’s greatest expressed needs in the reform of EA. Outside of the challenges experienced with timelines, the following areas could be considered in EA reform:

4.3.1 Defining Ministerial Discretion for EA Registration

Section 26 of EA Regulations gives the appropriate Minister the ability to require registration and review for projects not listed specifically on the project list. The requirement for such a provision is understandable and accepted, however there is uncertainty within industry on when it is likely to apply. Legislation could provide guidance clarifying the Minister’s discretion in this area, including a list of factors to be considered when it is exercised.

4.3.2 Delineating EA Jurisdiction

Specific to marine projects, or undertakings in and around oceanic bodies, there is a degree of uncertainty on behalf of both the regulator and the proponent in terms of EA jurisdiction (e.g. provincial versus federal). More clearly defined boundaries of jurisdiction could reduce uncertainty in the EA process.

4.3.3 Outlining Aboriginal Consultation Requirements

Though there are clear requirements to engage and consult Aboriginal groups in certain EA processes, no substantive or specific direction is given to proponents on how this should be accomplished. Inconsistency has also been experienced by proponents on how Aboriginal consultation is triggered, the process by which it is triggered, and who is the lead on the consultation. Industry recognizes a shortage of available staff resources exists within the former Labrador and Aboriginal Affairs Office to assist with these processes. More clearly defined requirements around Aboriginal consultation would be to the benefit of all stakeholders.

4.3.4 Coordination with Federal Processes

The coordination of provincial and federal EA requirements is less clear under CEAA 2012 and there has been limited experience in application. It is felt that harmonization may not be the best approach as this has complicated processes in the past; practitioners would prefer to coordinate provincial and federal processes themselves and feel this is the most efficient way forward. However, provincial legislation that allows greater flexibility when and if a federal EA is called could help streamline processes on a case-by-case basis. The province could consider EA substitution (e.g. applying provincial EA instead of federal EA) where appropriate. Increased communications between the regulator and industry practitioners could help alleviate some of the issues in coordinating provincial and federal EAs.

4.3.5 Providing Practical Guidance on 'Cumulative Effects Analysis'

The notion of 'cumulative effects' is absent from current legislation; it should be added and defined with appropriate guidance provided. Cumulative environmental effects should be a key consideration in decision-making, however the tools do not exist to properly assess or address them. An improved registry is required that will allow access to all EA

documentation – including public submissions, government submissions, public comments, etc. – and could potentially be made available to the public on a geospatial database. This will not only improve the transparency of undertakings and decisions, but will also provide interested parties with valuable information that can assist in surmising what environmental impacts have taken place and should be considered in a cumulative context. In addition, this ‘open data’ approach could help increase the competitiveness of the jurisdiction as it provides industry with valuable information up front.

4.3.6 Ensuring Objectivity: Balancing Public Comments and Evidence

Private sector investors have experienced setbacks in circumstances where they feel that the EA process had put inordinate weighting on subjective public sentiment that was subjective and not based on fact. All can agree that decisions should be guided by the available evidence, and not be disproportionately influenced by vocal minorities. A process that is perceived to lack absolute objectivity is an uncertain and risky one for the private sector to engage in. Exploration on how this perception can be changed may be worthwhile.

5.0 Regulations & Permitting

Industry has identified a series of specific recommendations, around regulations and permitting processes, that it believes could contribute to an environmental regulatory framework that provided greater certainty.

5.1 Applying Regulations and Permits Consistently

Environmental practitioners are experiencing inconsistency in the application of regulations and permitting processes.

5.1.1 Applying Permits Consistently: Location

Some regulatory permits differ depending on geographic location (e.g. process and associated permits for sewage systems/holding tanks, permit to construct, and completions reports are different on the Avalon Peninsula versus Labrador). In addition, different charges for infractions have been experienced.

5.1.2 Applying Permits Consistently: Project and Proponent Types

There are some regulatory permits that are only applicable to mega projects (e.g. BAE/FLS for temporary trailers / washcars; sewage notification for temporary washcars). Also, smaller or 'new' proponents feel that they are held to a higher regulatory standard than larger projects or repeat proponents. Whether or not this is the case, a framework that provides greater clarity in expectations and outcomes will help ensure consistent approaches are applied to all types of proponents.

5.2 Ensuring Permits Provide Specificity

Some regulatory permits contain overly generic conditions that proponents feel are not possible to meet based on the activity outlined in the permit application.

5.3 Applying Sequential Permitting

No sequential permitting exists; proponents start from 'scratch' through each stage even though activities are cumulative. Sequential processes could decrease time and costs for both the proponent and the regulator.

5.4 Addressing Issues Identified Within Specific Regulations and Permits

Practitioners have identified a number of issues they have experienced with environmental permitting processes relating to accuracy and currency. Addressing these specific issues will help create a more reliable framework:

5.4.1 *Environmental Control Water and Sewage Regulations*

- Chlorine guideline is 1 mg/L, which is deemed a deleterious substance at that concentration; does not match CCME
- Oil guideline is 15 mg/L, however, it does not break up into BTEX and F1-F4. Also 15 mg/L appears to be high for discharging to a body of water
- TSS guideline is 30 mg/L, however, it should be 30 mg/L above background. This only comes into effect if water is extracted from a water body, used and discharged back to the water body
- Section 6 (C) of the Environmental Control and Sewerage Regulations, 2003 identifies that effluent with a pH value greater than 9.0 is prohibited from being discharged into a body of water. Meanwhile, Section 4 (1)(b) of the Metal Mining Effluent Regulations (MMER) sets the limit for discharge of an effluent at a pH value of 9.5. This discrepancy adds a great level of complexity to effluent treatment and monitoring processes to ensure that a pH value of 9.0 is achieved prior to discharge. Additional treatment and monitoring of effluent would otherwise be unnecessary should the pH value of 9.0, as identified in the Environmental Control and Sewerage Regulations be adjusted to 9.5

5.4.2 *GAP Regulations*

- Not fit for purpose for tanks in remote locations
- No mention of a minimum volume
- No mention of double walled tanks being adequate for secondary containment

- Many struggle with completing weekly dips/reconciliations; creation of a *Guidance Document* for this activity is recommended

5.4.3 *Approval of Diesel Generators*

- Document is dated, limited in guidance, and does not provide provisions for temporary generators (e.g. operating for <6 months) aside from stating that their use may be approved by the Minister upon request
- Also does not identify a definitive distinction among generator classifications (Tier 2 vs. Tier 4), or their use in remote/isolated regions where the use of Tier 4 engines are not practical
- Federal department (Environment Canada and Climate Change) have proposed *Regulations for Air Pollutants Emission Standards for New Stationary Diesel Engines* which they intend to publish in the Canada Gazette in late 2018. Rather than establish new regulations, the province may consider adopting these standards when published

5.4.4 *Certificate of Approval for Used Oil Tanks*

- The certificate of approval provided is more applicable for a used oil storage or treatment facility as opposed to the often-used stand alone tanks

6.0 Guidance Documents

Codes of practice or guidance documents are in place to aid practitioners in both the public and private sector through routine processes. Unfortunately, several guidance documents have become outdated or inaccurate. In some cases guidance documents are not in line with regulations, meaning to follow them to the letter would put a project in non-compliance. In other cases guidance documents are non-existent; proponents are instead instructed to obtain guidance from best

practices in another leading jurisdiction, but it is up to the proponent to self-identify the jurisdiction and the associated guidance.

All of these scenarios create uncertainty for proponents who rely on such documentation to conduct routine operations. This means significant risk for proponents who are left to their own devices to determine an appropriate course of action. Where guidance documents are unclear or incorrect, projects must still continue. As such, informal rules have been established, ad hoc decisions are made, and unofficial exemptions are commonplace. This subjectivity does not provide adequate transparency, increases risk on behalf of all parties, and sows confusion and frustration for new practitioners or proponents who are unfamiliar with the 'rules'.

The outdated or inaccurate nature of the province's guidance documents forces back-and-forth communications between the proponent and the regulator where routine and straightforward processes could exist. This creates unnecessary work for public servants and impacts project timelines for the proponent.

There is an opportunity for the public and private sector to work together to strengthen the province's environmental regulatory environment, and update these guidance documents where necessary, and create new ones where appropriate. Specific recommendations in this regard are below.

6.1 Opportunities for Updating of Specific Guidance Documents

6.1.1 Approval of Diesel Generators

- Does not adequately cover temporary generators >100kW

6.1.2 Abrasive Blasting

- Methods have improved/changed since 1996, particularly from a safety perspective

- Leachate Quality Criteria is outdated and there are some parameters that certified laboratories no longer test for (e.g. cyanide)

6.1.3 *Watercourse Crossings*

- Makes reference to a non-existent Chapter 14: "Restoration and Stabilization"

6.1.4 *General Construction Practices*

- Makes reference to a non-existent Chapter 14: "Restoration and Stabilization"

6.1.5 *Ambiguity in Determining the need to Remediate Hazardous Substances*

- There is no specific regulatory threshold to determine the need to remediate certain often-encountered hazardous compounds e.g. in dealing with PAHs, the only focus is on Benzo(a)pyrene, of all the PAH compounds
- Most of the individual compounds have no regulatory limits; proponents have to consult the department officials for clarification on individual compounds/parameters; a process which is time consuming and often does not provide any specificity

6.1.6 *Concrete Batch Plants and Rock Washing Operations*

- Does not adequately cover requirements regarding temporary batch plants on construction sites, as well as concrete deliveries to construction sites
- The list of legislation is not up to date (e.g. missing Quarry Materials Act/Regulations, Water Resources Act, etc.)

- Set backs from roads do not match regulatory requirements from Transportation and Works, DNR, etc.
- States that fuel tanks have to be dyked, however, double walled tanks are acceptable
- States that ALL spills are required to be reported to the appropriate department, which is not accurate
- States that the appropriate department has to grant approval for liners used for wash ponds
- No mention of EA process and the possibility of additional requirements
- No mention on sedimentation/erosion

6.1.7 *Leachable Toxic Waste Testing and Disposal*

- Refers to pending documentation; is outdated

6.1.8 *Construction and Operation of Facilities Using Ex-situ Bioremediation for Treatment of Petroleum Contaminated Soil*

- States a requirement to have monitoring wells around a soil remediation facility, but does not provide guidance on how the well should be dug, to what depth etc.
- Proponents seeking clarification are referred to Federal regulatory documents which in turn have no specific details

7.0 Emerging Interests

Economies evolve, environmental responsibilities evolve, and the inter-relationship between the two is a moving target. As such, the environmental regulatory framework must recognize emerging ‘interests’ (or be nimble enough to do so), whether they be public or private in nature. Below are examples of interests industry suggests should be considered in the reformation of EA and permitting processes.

7.1 Recognizing Emerging Renewable Energy Trends/Factors

As (1) the Department of Natural Resources develops a new renewable energy plan for the province, (2) off-grid communities move to reduce their dependency on diesel, and (3) industrial facilities look to reduce their energy costs, the interest and activity in and around renewable energy in Newfoundland and Labrador is set to increase substantially. From a regulatory perspective, some of the implications are predictable and easily adapted from other jurisdictions (e.g. wind turbines and expectations for avian protective plans). In other areas, activity is predictable but the pathway to regulation is not clear due to the newness of the technology or jurisdictional overlap (e.g. small and large scale marine renewable energies). In both cases, with activity and investment expected, Newfoundland and Labrador could be proactive in establishing the regulatory environment. Engaging in this work prior to investment will ensure that projects (when they emerge) are not needlessly delayed.

7.2 Enabling Innovation – Consider New Technologies

New products, services, and processes are often viewed with skepticism, and quite naturally so. However, this tendency is problematic for Newfoundland and Labrador firms who have developed or are applying innovative technologies. The experience from proponents has been that unless a technology has been previously reviewed, approved, and certified to be efficient and effective in other provinces, it can't be (easily) approved for use in this province. This is an unfortunate barrier for the clean technology and environmental industry; instead, provincial authorities could be looking for ways to actively support local firms. The perception that the use of innovative technologies complicates regulatory processes in Newfoundland and Labrador forces local firms to take their products and services out of the province, and discourages investment in to the province. The EA and permitting processes could to be more flexible to entertain innovative technologies.

7.3 Recognizing Regulation as a Tool in Demand-Side Innovation

Globally, the clean technology and environmental industry is more reliant on government intervention for growth than other traditional sectors. Regulators can play a critical role in demand-side intervention (focusing on innovation or economic growth) by using frameworks to ‘pull’ research and development or the procurement of products and services. Such action can propel the industry towards growth by requiring certain processes be undertaken, or standards be met. What areas can Newfoundland and Labrador demand clean technology and environmental innovation through regulation? Industry recommends the establishment of a working group including the private sector, the Department of Municipal Affairs and Environment, and the Department of Tourism, Culture, Industry and Innovation to discuss these opportunities.

7.4 Engaging in Comprehensive Land-Use Planning

Limited land creates competing priorities between the public, industry, and even between industries. Though not necessarily related to EA or permitting, the private sector is experiencing increasing uncertainty as different industries – be it mining, tourism, aquaculture, forestry, etc. – look to the same land resources for their growth. Engaging in a comprehensive land-use planning exercise, as seen in other jurisdictions, can help create better awareness and expectations of where industries are expected to grow.

7.5 Establish a Provincial Wetland Policy

Related to 7.5, Newfoundland and Labrador is the only remaining province in Eastern Canada that does not have a comprehensive policy addressing activities impacting wetlands. As developmental pressures continue, particularly in populated areas; regulators, developers, environmental consultants, and other stakeholders do not have a consistent framework to address potential impacts. Municipalities are being forced to develop their own policies. This is fine for those municipalities with the planning capacity to develop regulations, but most do not. Projects are being undertaken in and around wetlands on an ad hoc basis, creating stresses between

municipalities (activities in one area can easily affect the hydrology of neighbouring areas) and negative competition (e.g. the lack of regulation being an advantage in investment attraction). Given the prevalence of wetland topography in the province, the stringency of regulation can be debated, however the requirement for guidance is clear.

7.6 Continuous Reform

Economic and environmental circumstances change over time. The needs of the regulator and the needs of the proponent follow suit. To avoid a situation where the reforms to EA and permitting processes that take place in 2018-19 are outdated in a few years time, a new regulatory environment should include a commitment to continuous review and refinement.

8.0 Compliance, Enforcement, and Capacity

The value of regulation is contingent on adequate enforcement. There is very little inspection ongoing in Newfoundland and Labrador to ensure compliance with environmental legislation and conditions in permits, approvals, licenses, etc. As a result there is negligible incentive for firms to invest in environmental staff or environmental management systems to ensure conditions are satisfied. This limits the growth of aggregate environmental expertise in the province, and ultimately slows the adoption of environmental practices that are needed to compete internationally or even nationally. From an environmental perspective, it also increases the likelihood that conditions are not being met and that environmental damage is taking place. The province needs to invest in enforcement activities; in a period of budgetary constraints and pressures, the Department of Municipal Affairs and Environment could work with industry, other departments (e.g. Tourism, Culture, Industry and Innovation), and partners/stakeholders to identify opportunities for innovative and local solutions, and funding mechanisms to facilitate their deployment.