

Environmental Assessment Legislation Review - What We Heard

Department of Municipal Affairs and Environment

May 2020

Introduction

The purpose of environmental assessment is to protect the environment and the quality of life of the people of the province, and to facilitate the wise management of the province's natural resources through the institution of environmental assessment procedures. Effective environmental assessment practice depends on a strong legislative foundation with clearly defined procedural steps that create certainty for both proponents and the public. Strong legislation enables oversight and compliance and ensures transparency where appropriate.

In 2019, the Department of Municipal Affairs and Environment, with support of the Newfoundland and Labrador Environmental Industries Association (NEIA), held public consultations as part of an ongoing review of the environmental assessment legislation, specifically Part 10 of the Environmental Protection Act and the Environmental Assessment Regulations.

The review is considering broad policy and operational issues associated with environmental assessment, with a focus on improving:

- Openness and Transparency (i.e. enhance public access to information);
- Certainty (i.e. updated project list);
- Efficiency and Effectiveness (i.e. clear process steps and timelines); and
- Flexibility (i.e. harmonization with other jurisdictions; ensuring the Minister has appropriate options to address matters such as gathering more information).

An advisory committee was established to support and guide the public consultation process. The committee membership includes representation from the Newfoundland and Labrador Environmental Industry Association (NEIA), the Public Engagement and Planning Division, and the Department of Municipal Affairs and Environment.

Public consultations included the provision of background information on the current process, copies of the legislation, and a discussion document on the engageNL website. Interested persons were encouraged to complete an online questionnaire on the engageNL website, or to email written submissions to the Department of Municipal Affairs and Environment.

A total of 40 questionnaires were completed through the online platform and the department received 20 written submissions directly through mail or email.

Thank you to each person and organization who participated!

Who replied?

Of the 40 participants who responded to the online questionnaire, 45 per cent of participants identified themselves as members of the public, 25 per cent identified as a government official, 15 per cent identified as from an environmental organization, and the remainder identified as members of Indigenous communities, community organizations, industry associations, business groups, and proponents of past and current projects (Figure 1).

The majority of respondents (60 per cent) identified themselves as residing within the Avalon Peninsula (Figure 2). The remaining participants were distributed throughout Newfoundland and Labrador. There were two submissions from outside the province. (Figure 2).

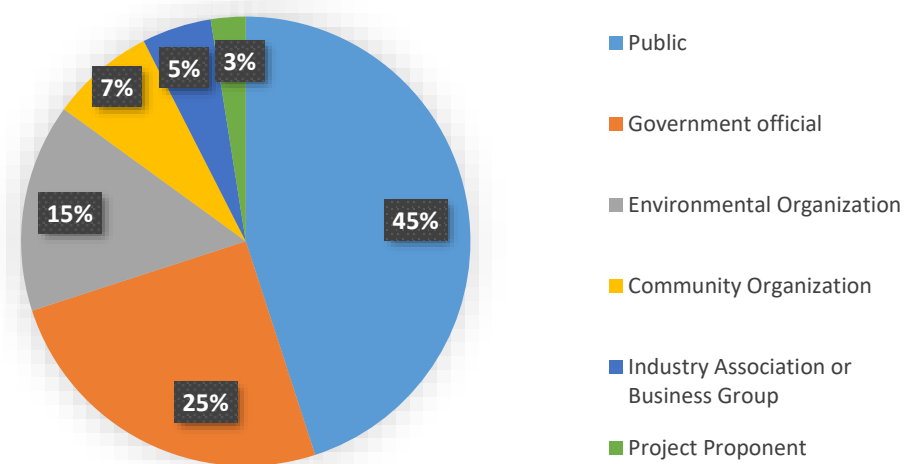


Figure 1. Distribution of respondents across participant categories.

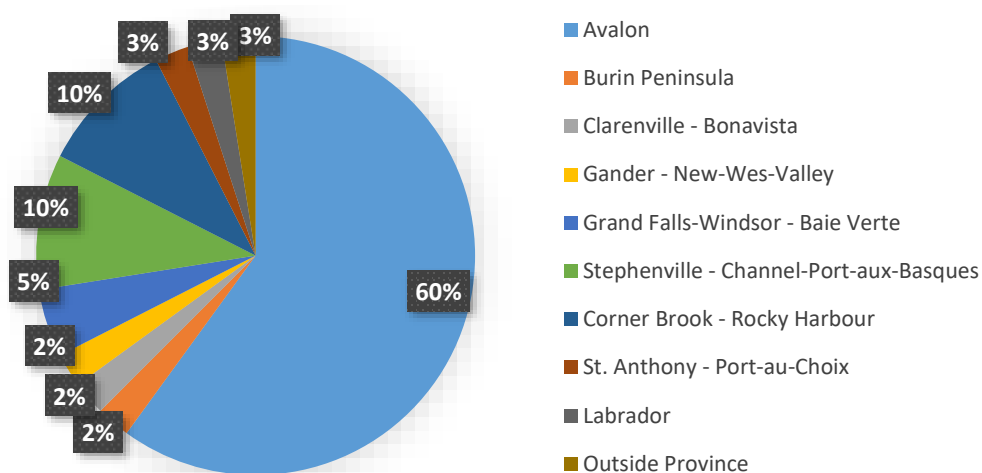


Figure 2. Distribution of respondents within and outside Newfoundland and Labrador.

Written submissions were received from an Indigenous Government, industry, environmental organizations, and individuals from all regions of Newfoundland and Labrador.

Most participants to the online questionnaire were interested in resource-based projects in the mining, aquaculture and forestry sectors (Figure 3). Many participants were interested in waste management, construction, and recreation projects, and there was interest in oil and gas, power generation, and energy transmission projects (Figure 3). Participants who provided written submissions were likewise interested in a broad range of projects including those noted below.

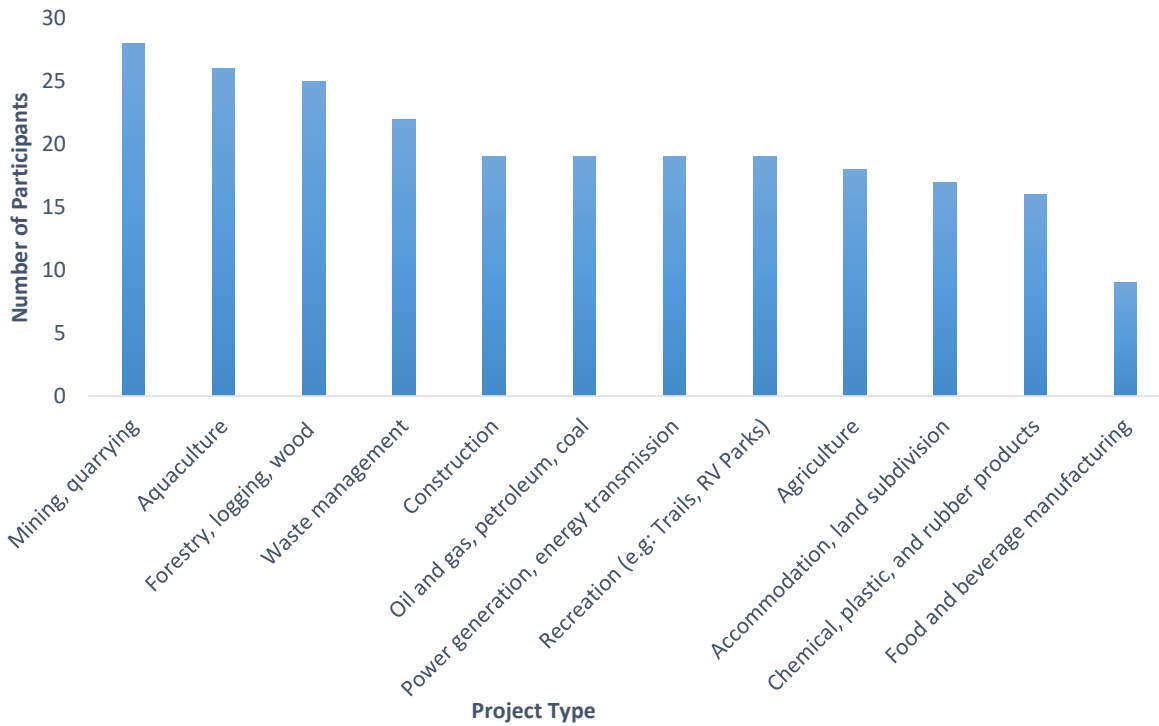


Figure 3. Participants interest level in project types.

Are changes to the legislation required?

The environmental assessment legislation is now over 15 years old and the legal, economic, and environmental landscape has changed. The current legislation needs to be updated to reflect developments in technological advances; engagement, and procedural steps; best practices in access to information; and emergent environmental issues such as climate change, sustainable development, and cumulative effects.

Over half (52 per cent) of the participants to the online questionnaire indicated that the legislation needs to be completely overhauled, while 35 per cent recommended updates without significant process changes. A few people who completed the online questionnaire are unsure (10 per cent) or feel that the legislation needs no change (3 per cent). These results were similar to the views of participants who responded by mail and email, whereby about half of the participants requested a complete overhaul of the legislation and the other half indicated that the legislation needs to be updated without any significant change to the process.

There were many suggestions from participants regarding the areas of the legislation and process they would like to see revised, including:

- Stronger application of the precautionary principle;
- Implementation of an early planning phase;
- Negotiation of project-specific public benefits plans and agreements, including public consultation;
- Funding for independent monitoring and compliance review programs;
- Mandatory public hearings for mega projects;
- Reduced fees;
- Regulations to define and prevent project splitting;
- Clearly defined and limited Ministerial discretion;
- Consideration of climate change targets in decision making;
- Cumulative effects assessment;
- Implementation of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP);
- Stringent alternatives analysis for all projects; and
- Independent analysis of financial surety estimates for site reclamation and rehabilitation.

Online participants were asked to indicate whether the benefits of the environmental assessment process outweigh the time and resources spent by industry and governments to complete the process. Respondents either strongly agree (52 per cent) or agree (22 per cent) that the benefits of the assessment process outweigh the required resources, with the remainder split between not having an opinion (13 per cent) or disagreeing with the statement somewhat or strongly (13 per cent).

Those agreeing with the statement, and those who provided written feedback on the benefits of the environmental assessment process, indicated that the process generates real benefits by:

- Facilitating collaboration, wise decision-making, and sustainable development for future generations;
- Protecting human life, communities, and the environment;
- Facilitating information sharing and collaboration;
- Providing oversight for comprehensive project planning, including informing government agencies of projects that may affect the environment, requiring proponents to think carefully about projects and potential impacts, and facilitating responsible, holistic environmental planning;
- Providing opportunities for government agencies to work with proponents to mitigate negative effects and boost positive effects of projects;
- Requiring proponents to conduct additional studies, consultations, and provide comprehensive information prior to beginning a project;
- Informing the public of projects that may affect them, and their environment, and providing opportunities for public engagement in the development of natural resources;
- Ensuring developers consider effects on watersheds and cumulative effects of projects;
- Providing good guidance for entrepreneurs and identifying required approvals, licenses and permits;
- Providing public confidence, support, and a social licence to operate; and
- Reducing long-term costs associated with damaging the environment.

Those disagreeing identified areas of the process that need improvement, including:

- Transparency and independence;
- Compliance monitoring;
- Decommissioning and rehabilitation requirements;
- Standards on studies and research to ensure objective results;
- Application of consistent standards to similar projects; and
- Evidence that environmental assessment generates benefits that would otherwise not have been achieved through the application of existing government regulations.

Review of the List of Undertakings Requiring Registration

The legislation defines projects (undertakings) as an enterprise, activity, structure, work, or proposal and a modification, abandonment, demolition, decommissioning, rehabilitation, and an extension of them that may, in the opinion of the Minister, have a significant environmental effect. The legislation describes 25 categories of projects that require environmental assessment.

In modernizing the legislation to protect the environment and quality of life for current and future generations, participants who completed the online questionnaire, and those who provided written submissions, suggested the following new and emerging projects should be added to and/or clarified on the project list:

- Fracking;
- Quarries of all sizes;
- Marine-based aquaculture, including open net pen finfish and shellfish production;
- Marine and near-shore developments including commercial and personal wharves, boat launches, dredging operations, and coastal in-fill sites in/or near beaches, shorelines, estuaries, coastal shelf, bays, harbours, coastal seascapes, and brooks running to the marine environment;
- Development in floodplains, waterbodies, wetlands, peat bogs, waterways or alterations of those features;
- Infilling of a natural waterbody where the area to be infilled will be more than five hectares or more than five per cent of the surface area of the water body;
- Draining of land where the area of land to be drained will be more than 50 hectares or more than five per cent of the surface area of the water body;
- Reclaiming or land filling of an underwater area where a portion is to be located within an estuary or the area to be reclaimed or filled is more than five hectares or more than five per cent of the surface area of the water body;
- Exporting water;
- Developments within 200 metres of all rivers, not just scheduled salmon rivers under the federal *Fisheries Act*;
- Clarify registration requirements for projects engaged in the wholesale of crude oil, liquefied petroleum gases, heating oil and other refined petroleum products;
- Clarify registration requirements for projects engaged in the assembling, breaking up, sorting or wholesale trading of scrap, junk or waste material of any type;
- Recreational plans (i.e. bike paths);
- Importation of honeybees and other bee species;
- Application of chemicals, such as herbicides;
- Cemeteries and crematoria;
- Dam decommissioning projects and electrical substations;
- Bridge replacements and bridge work;
- Hyperloop and future modes of transportation;
- Pilot projects where new technology is proposed; and
- Strategic assessments of legislative actions, policies, programs and plans, including wildlife management, tourism, land use, and marine use plans.

Participants who completed the online questionnaire, and those who provided written submissions, requested to have the following types of projects removed from the current project list:

- Remove or better describe Ministerial discretion;
- Golf courses;
- Camp grounds, travel trailer parks, and recreation or vacation camps;
- Cottage and subdivision developments;
- Hiking and skiing trails;
- Motorized vehicle trails such as all-terrain vehicle trails that do not in-fill or make permanent changes to wetlands;
- Marinas;
- Aquaculture activities, and new aquaculture net pens associated with an on-shore hatchery;
- Microbreweries;
- Roads;
- Quarries of all sizes;
- Commercial and residential development in established towns; and
- Water/sewer pipelines and sewage related projects.

Key Environmental Assessment Factors

Factors considered

Participants provided both positive and negative feedback on the factors that are considered when assessing the construction and operation of a project, and suggested additional or increased focus on factors, including:

- Cumulative effects;
- Climate change projections, greenhouse gases, and air emissions;
- Gender Based Plus analysis;
- Community effects such as safety, property values, tourism, cultural heritage, and recreational use;
- Local community knowledge and experience;
- Increased road traffic and transport of hazardous material;
- Ecological issues, such as vulnerable species, bird migratory/breeding periods, fish/marine life, species interbreeding, and wetland health;
- The rights of Indigenous peoples;
- Project benefits strategy, benefits assessment, and public consultation of benefits;
- Mental and physical health, social, and economic effects; and
- Application of existing municipal, provincial, and federal government regulations.

Guidance Material

Most of the participants (45 per cent) to the online questionnaire felt there is not enough guidance provided to proponents to ensure they submit high quality and complete documentation. While 30 per cent of participants felt there was enough and the remainder (25 per cent) were not sure.

Respondents to the online questionnaire, and those who submitted written comments, suggested the following ways to improve the guidance material:

- Clarify how to describe negative and positive effects and actions to mitigate the effects;
- Describe methods of public consultation and how to report results;
- Describe current best practices in mapping and provide a standard for maps that must be included;
- Provide information on how to access project related expert/consultants and professional advice;
- Describe waste management, including types and quantities of waste; methods of storage and transportation; and plans for disposal or re-use;
- Provide a plain language list of project types that require environmental assessment;
- Provide information regarding the jurisdiction for projects that involve near-shores, beaches, estuaries, and personal wharves;
- Establish deadlines for the submission of Environmental Preview Reports (EPRs) and Environmental Impact Statements (EISs); and
- Provide templates for Women's Employment Plans, Gender Equity Development Plans, Environmental Protection Plans, and Environmental Effects Monitoring Plans.

Regional and Strategic Environmental Assessments

Most participants (75 per cent) to the online questionnaire support legislation that will allow for completion of regional environmental assessments that will assess cumulative effects and key environmental considerations on a regional scale to inform individual project assessments (Figure 4). Similarly, most participants (87 per cent) to the online questionnaire support legislation that will allow for the completion of strategic environmental assessments, to provide the opportunity to examine the potential effects of decision-making at the policy/plan/program level (i.e. climate change, land use plans) prior to examining individual projects (Figure 5). Similarly, participants who submitted written comments support legislation that will allow for completion of regional and strategic environmental assessments.

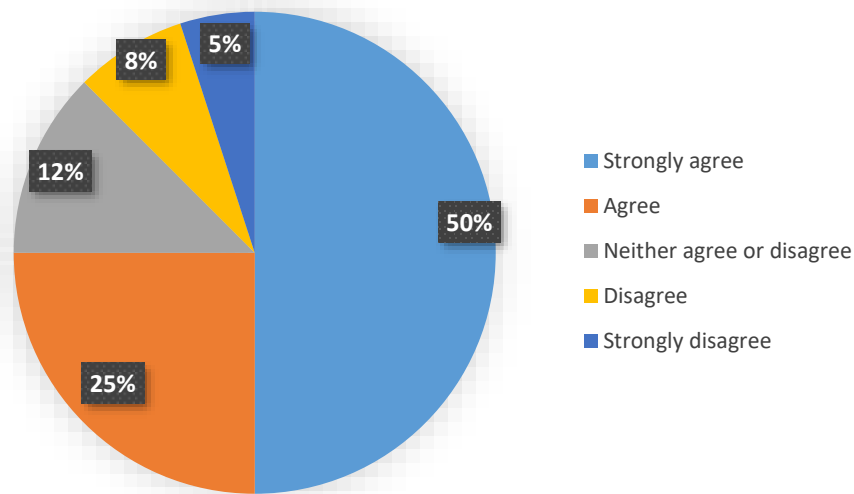


Figure 4. Support for the completion and application of regional assessments.

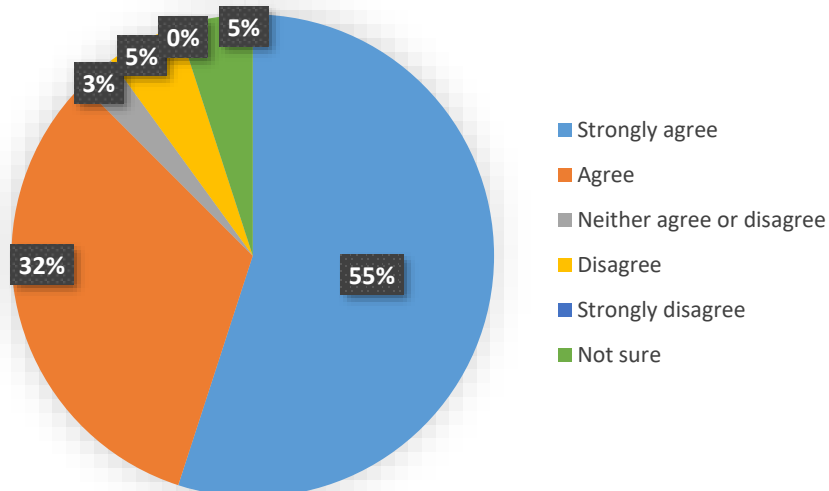


Figure 5. Support for the completion of strategic assessments.

Transparency and Communication

Participants to the online questionnaire support a variety of methods to inform them of when an assessment is being conducted, including subscribing to an email bulletin, government news releases, and social media (Figure 6). Other suggestions include Instagram and YouTube, interactive web based team, telephone, radio and television announcements, and newspaper ads. Participants also noted that public comments should be made available to proponents in a timely manner during the process for proponent consideration and project planning purpose. Nearly identical results (change of 1 per cent per category) were received, when participants were asked how they would like to be informed on the outcome of an assessment.

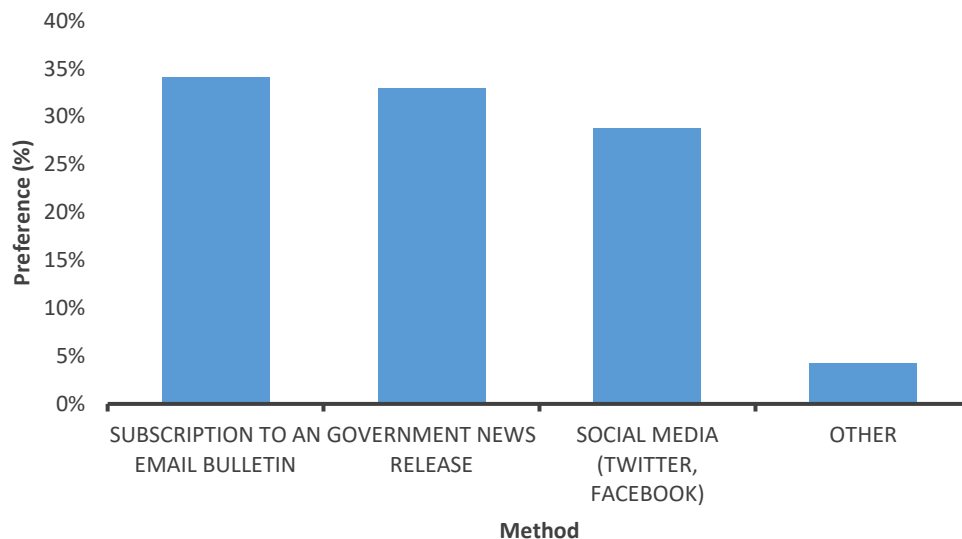


Figure 6. Preference of method to inform the public an assessment is being conducting.

Online participants, and those who submitted written comments, suggested many tools to assist in their participation in the environmental assessment process and help them access the information in a user-friendly way, including:

- Plain language summary/overview of project description and main considerations;
- Proponent history (i.e. past submissions, compliance with previous approvals);
- Known public concerns and data that show local effects;
- Paper copies of documents;
- Public gatherings to discuss projects under review;
- Improved mapping;
- More accessible/modern online portal to access information and online services for public meetings;
- Social media, video, photography, art, audio testimonials from local people describing what a project means to them;
- Public online database of environmental information from regional assessments;
- Required government official participation at public meetings to gauge public reaction and evaluate presentations by proponents;
- Provision of rationale for a Minister's decision;

- Public consultations organized, chaired, and conducted by an independent environmental assessment body;
- A guidebook for individuals and organizations concerned about proposed projects that describes the process in plain language;
- Participant funding; and,
- Elimination of government promotion, support, and/or funding of a project prior to an environmental assessment decision, as it undermines public trust and leads to a view that it is not worth participating.

Almost all (92 per cent) participants to the online questionnaire support, or strongly support, the public release of comments submitted during the environmental assessment of a project (Figure 7). Additionally most participants (92 per cent) state they would be just as likely to submit comments on an environmental assessment if they knew the comments would be publicly available. The remainder of participants stated they would either be less likely to (5 per cent) or would not (3 per cent) submit a comment if they knew it would be publically available. Most participants (46 per cent) suggest the comments should be made publicly available on a provincial government website, 32 per cent through email upon request, 16 per cent through the mail upon request, and the remainder (6 per cent) through another avenue (i.e. YouTube, Instagram).

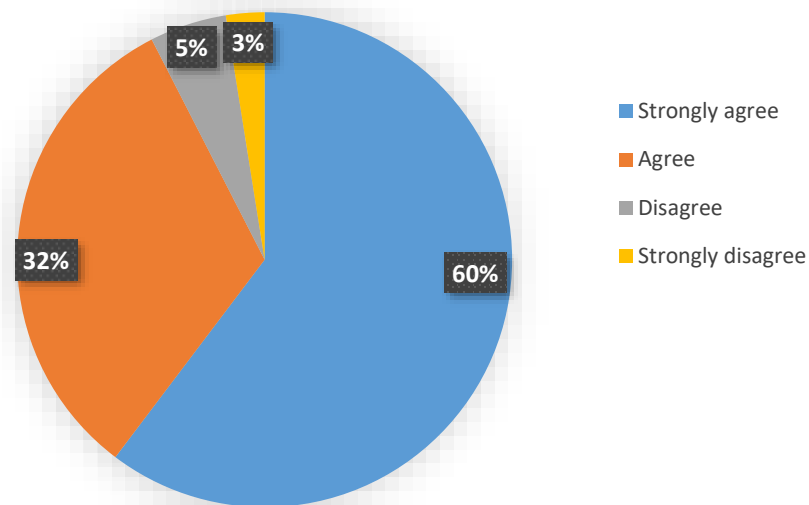


Figure 7. Support for the public release of comments submitted on an assessment.

Online participants, and those who submitted written comments, provided the following thoughts and recommendations regarding the public posting of comments:

- Publicly post comments but withhold names and personal identifiers;
- Organizations, including letters from municipalities and government officials, and proponent letters and responses, should be identified;
- Withhold posting comments if they might be harmful for the protection and preservation of important information (i.e. location of vulnerable species, historic resources, Indigenous knowledge);
- Consider how gender, ability, and other social factors may impact accessibility to information; and
- The lack of context for the consideration of public comments may be problematic.

Legislated Timelines

Comments on the length of time provided to complete an environmental assessment was variable, with participants suggesting that the timelines should be longer, shorter, more strictly upheld, and no allowance for extensions.

Specifically with regards to the timeframe provided for public input, the majority (60 per cent) of participants to the online questionnaire indicated that there is enough time provided for the public to consider and analyze environmental assessment documentation. The remaining respondents suggested a wide range of timelines that should be provided for public review of environmental assessment documents, including:

- No change;
- 45 days;
- 60 days;
- 60-70 business days;
- 90 days;
- Six to twelve months for large projects; and
- Project-specific timelines.

Online participants, and those who submitted written comments, provided suggestions for making the process more efficient, including:

- Develop comprehensive marine and land use plans to screen acceptable and unacceptable projects;
- Dedicate more resources and time to environmental assessments, such as a dedicated intergovernmental team responsible only to review and assess projects;
- Clearly define the process and timelines with charts and descriptions;
- Clearly define and/or provide guidance on terms, such as Indigenous knowledge, climate change, biodiversity, and public concern;
- Remove the requirement for the Minister/Deputy Minister sign-off for projects with limited potential impacts;
- Exempt projects if similar projects have been released;
- Resolve land use conflicts and conduct public consultations prior to the registration of the project (i.e. early planning phase);
- Mirror the provincial process closely with the federal process to improve understanding of the processes and achieve one project: one assessment;
- Instead of requiring further assessment, extend the registration phase, allow for the submission of more information, and require government agencies and proponents to work toward resolutions;
- Ensure the registration documents meet information requirements and provide more guidance/template;
- Provide for government and public education opportunities about the process;
- Seek external expertise and professional project-related advice;
- Identify projects that will likely require further assessment prior to approval (high risk) and exempt low risk projects;
- Engage an independent entity to review proposals; and
- Require proponents submit a project description, and engage an independent agency or consultant to describe environmental effects and mitigations, conduct studies, and compile documents.

Project Decisions and Appeals

The majority (50 per cent) of participants in the online questionnaire do not feel that the current process ensures that projects go through the appropriate phase of environmental assessment, while 12 per cent thought the current process does, and 38 per cent were unsure. Respondents provided a variety of reasons for this, including:

- Similar projects have gone through different phases;
- The number of projects requiring further assessment seems low compared to the number registered;
- The screening criteria for a Minister to release a project and require further assessment is unclear, lacks precision, and appears inconsistent;
- Existing language needs to be clarified to enable the Minister to decide, in the event of clear mitigations, whether further assessment is required; and
- Plain language description would improve understanding, as legislative language is complex.

Rejection of a Project

Currently, a project under assessment cannot proceed if: it is against law or a policy of the government; it is in the public interest to stop the assessment; or there is likely to be unacceptable environmental effects. Most (42 per cent) participants in the online questionnaire indicated that other factors should be considered in making a decision to halt a project, while 28 per cent thought the current list was satisfactory, and 30 per cent were unsure.

Online participants, and those who submitted written comments, suggested additional factors should be considered, such as:

- Whether the proponent is in compliance with the conditions of release for any previous projects released from assessment;
- Whether there is a more environmentally sustainable alternative;
- Whether best available technology is proposed;
- The longevity and proven record of proposed technology and infrastructure;
- Impact on cumulative effects, climate change, greenhouse gases, biodiversity, and threatened and endangered species;
- Economic feasibility of the project;
- Traditional and/or Indigenous land, knowledge, cultures, practices, way of life, and beliefs;
- Benefit of the project to the community; and
- Significant public concern.

Participants suggesting no change to the factors considered during an environmental assessment noted that if the assessment process is followed, other factors should not need to be considered.

Appeals

The legislation provides aggrieved persons with the right to appeal decisions or orders of the Minister. The Minister may dismiss the appeal, allow the appeal, or make another decision or order.

Online participants, and those who submitted written comments, noted the following benefits and challenges of the current appeal process:

- Errors and oversights are possible and having mechanisms for the review of decisions is essential to the credibility of the process and maintenance of trust with Indigenous groups and the public;
- Appealing a Minister's decision to that Minister is inherently flawed;
- Appeal decisions should include a vote of Cabinet, or a vote of the district MHA;
- Proponents may be required to provide more information to an appeal process;
- Projects should not be allowed to continue until the Minister's/Court's decision on an appeal is rendered;
- The appeal process should be more transparent and accessible to the public; and
- The appeal process may include political influence and should be conducted by an office at arm's length of government.

Monitoring and Enforcement

The department enforces various aspects of the process, including the conditions of release of a project and decision expiry dates. Most (63 per cent) participants in the online questionnaire are not confident in the current level of monitoring and enforcement during and following an assessment (Figure 8).

Online participants, and those who submitted written comments, identified ways to increase confidence in monitoring and enforcement, such as:

- Provide evidence of monitoring and enforcement initiatives;
- Mandatory reporting by proponents on the status of conditions of release;
- Annual reporting by proponents on the status of construction;
- Stronger penalties and clearly defined consequences for non-compliance and deviation from commitments;
- Routinely scheduled monitoring and enforcement activities accessible to the public;
- Allowance for third party and Indigenous group led monitoring;
- Legislated timelines for following up on reports of deviation from commitments;
- Dedicated staff to monitoring and enforcement;
- Proponents liable for rehabilitating sites and compensating for environmental damage; and
- Requirement for a follow up monitoring plan with submission of a registration document.

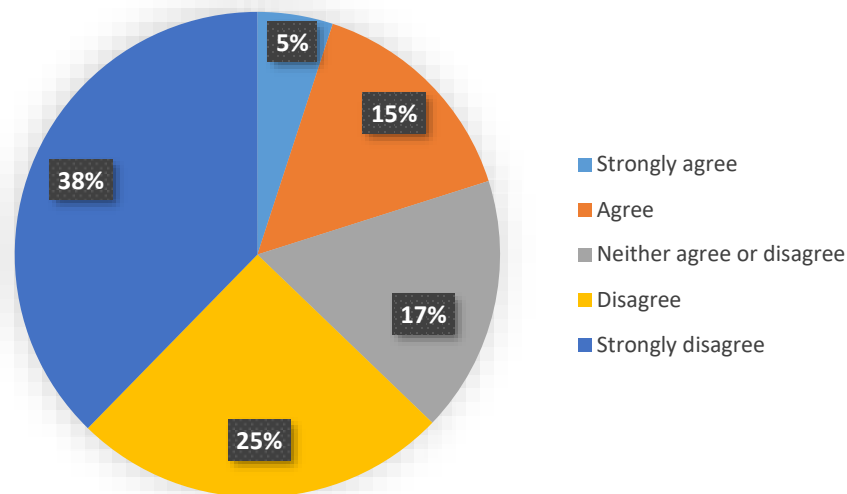


Figure 8. Support for current level of enforcement and monitoring.

Participants suggested additional measures that may be undertaken to address violations of the legislation, such as:

- Significant surety bonds;
- Revoking of permits and suspension of licences; and
- Stronger application of current legislation, including penalties.

The environmental assessment process consults with interested provincial and federal government agencies that inform project proponents of licences, permits, approvals, and other authorizations that may be required for projects. Most (53 per cent) participants in the online questionnaire indicate that they understand the level of permitting requirements subsequent to a project being released from environmental assessment (Figure 9).

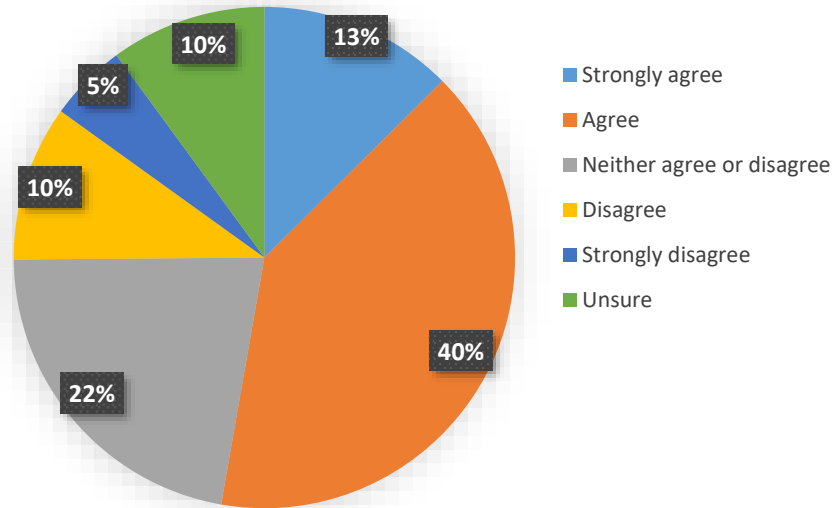


Figure 9. Understanding of the level of permitting requirements subsequent to a project released from environmental assessment.

The majority (88 per cent) of participants in the online questionnaire agree that project proponents should be required to produce annual performance reports to provide updates on the status of project construction and operation and compliance with permitting requirements and/or conditions of release (Figure 10).

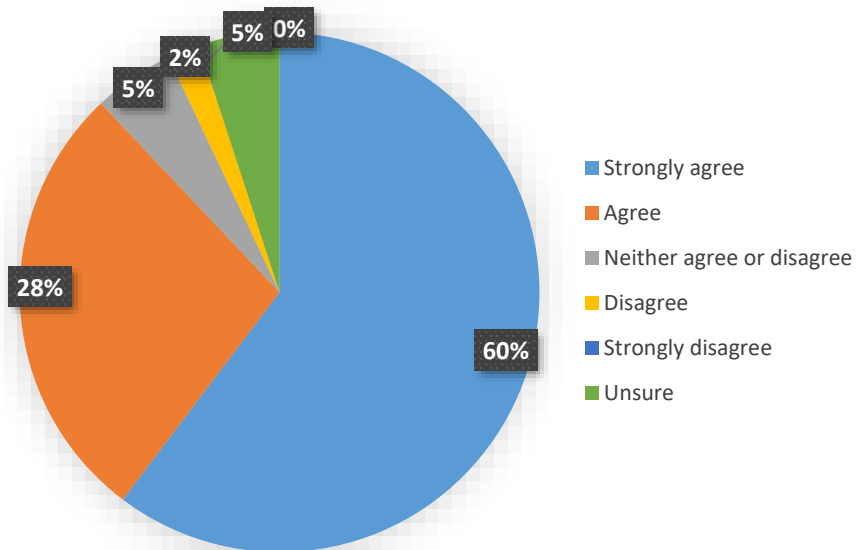


Figure 10. Support for an annual performance report upon release from assessment.

Harmonization with Other Jurisdictions

The majority of projects that register for the provincial process are not required to complete an assessment under the Labrador Inuit Land Claims Agreement, the Nunatsiavut Environmental Protection Act, the legislation of another provincial or territorial jurisdiction, or the federal government. However, at times projects are required to complete processes for multiple parties. Currently, the legislation allows the Minister to enter into an agreement with the government of another province, territory, or Canada, or with a combination of them, with respect to an assessment.

Most (65 per cent) participants in the online questionnaire agree that government should enter into an agreement that allows for a single, coordinated assessment of projects, while the remaining participants disagreed (13 per cent) or were unsure (23 per cent).

Online and written submissions noted that harmonizing processes would build trust, would be fair and cost-effective, may avoid duplication and assist with Indigenous and public consultation, would allow for a more holistic approach that provide local insight. Respondents were concerned that harmonization may result in Indigenous concerns not being adequately addressed, opening the door for political involvement, and would be challenging to achieve under differing legislative requirements and decision makers. Some respondents recommend improving the involvement of Indigenous groups in the assessment and approval of projects in and near their communities, and ensuring that Indigenous rights are recognized and respected.

Most (60 per cent) participants in the online questionnaire agree that government should have the ability to modify the process (i.e. timelines, process steps) in order to coordinate a single assessment when an assessment is required by another province, territory, land claim, or self-government agreement, while the remaining participants disagree (20 per cent) or are unsure (20 per cent). Similarly, most (63 per cent) participants agree that government should have the ability to modify the process in order to coordinate a single assessment with the federal government, while the remaining participants disagree (15 per cent) or are unsure (23 per cent).

Online and written submissions noted several approaches for harmonizing the provincial and federal assessment processes, including:

- Uphold the more stringent process and standards, and the broader legislation;
- Avoid elimination and substitution;
- Focus on cooperation, awareness, and transparency;
- Develop a harmonized assessment policy to eliminate duplication (i.e. in research, monitoring) and clearly define the process;
- Involve staff from both levels of government in the harmonized assessment;
- Have the same guidelines and the timelines;
- Have the province take the lead; and
- Establish a board with equal representation from both levels of government, and some representation from industry.

Additional Input

Participants provided the following additional comments at the end of the online questionnaire and in written submissions for government to consider in the Environmental Assessment Legislation Review:

- Re-establish a separate Department of Environment, with a dedicated Minister and expanded staffing to ensure compliance with environmental assessments;
- Municipal governments should be more formally involved in project proposals;
- Municipal governments should be less involved in project proposals;
- Provide a requirement for face to face public consultations in each region;
- Revise provincial process to ensure consistency with federal process;
- Projects released from assessment should explicitly require that all project-related construction be designed and certified by professional engineers, geoscientists and other design professionals, who will adhere to building codes, standards, and government regulations;
- Create a coordinator position to oversee conditions of release, particularly for megaprojects;
- Develop a centralized repository to document conditions of release of megaprojects and provide updates on compliance;
- Create an independent environmental officer to act in the primary interest of citizens and the environment to review legal challenges and appeals of decisions, and approve or reject projects;
- Proponents of large-scale projects should be required to negotiate Impact and Benefits Agreements; provide training, educational opportunities, and technical support to local businesses; enter into goods and services contracts with local businesses; and share project benefits with adjacent land users;
- Ensure decisions are evidence-based, unbiased, and free from political interference; and,
- Add flexibility to the legislation.

Next Steps

The results of public consultation are an essential element in ensuring any changes meet the needs of industry and residents of the province. The department will consider the results of the questionnaire, and all written submissions, to propose changes to the environmental assessment legislation and process that will improve openness and transparency, certainty, efficiency and effectiveness, and flexibility.

If you have any comments on the “What We Heard” document, please email them to EAReview@gov.nl.ca by June 30, 2020.

If you have questions, please email EAReview@gov.nl.ca or call (709) 729-0673.