

ACCOMMODATION

DEFINITION:

Accommodation refers to measures that mitigate or compensate for consequences resulting from the consultative process.

PURPOSE/IMPORTANCE:

Accommodation is required when a proposed action will infringe upon a First Nation's rights. In these cases the legal duty to consult will necessitate concrete steps to accommodate Aboriginal interests.

DESCRIPTION:

Some First Nations have set out their expectations with respect to accommodation. In some cases they have set out accommodation principles. Guidelines may also spell out the acceptable means of accommodation.

For example, accommodation may include modifying the original project, profit-sharing with First Nations, compensating First Nations, providing for ongoing collaboration and/or giving First Nations a continued role in decision-making

Accommodation Options Identified in FN Guidelines				
	Hupacasath	Simpcw	WIFN	AFNQL
Amendments to the Project	+	+		+
Project Cancellation		+		+
Joint Decision Making		+	+	+
Conservation Measures		+		
Revenue Sharing	+	+	+	+
Heritage fund arrangements	+	+		
Economic Development Opportunities	+	+	+	+
Training and Capacity Building	+	+	+	+
Use of the FN Land Use Plan	+	+		
Joint Ventures and partnerships		+		+

One important development is the emphasis that more and more First Nations are placing on cancelling a proposed activity if they feel that is the only option.

EXAMPLES:

**Example
Hupacasath Guidance on Accommodation**

Accommodation is required when a proposed action will infringe upon Hupacasath's aboriginal rights.

Principles in regards to Accommodation:

- When determining appropriate accommodation, the priority interests of the Hupacasath over other users, based on Hupacasath's constitutional status, will be reflected (*Gladstone, Mikisew*).
- Accommodation will include both the cultural and economic interests of the First Nation (*Haida*).
- The substance of Hupacasath's concerns will be addressed (e.g. conditions of development).
- The form of accommodation will be mutually acceptable.

Means of accommodation

Possible means of accommodation include, but are not limited to:

- Alternative courses of action or amendments to the terms of development to address aboriginal interests.
- Revenue sharing
- Heritage fund arrangements
- Economic development opportunities (e.g. harvesting, employment, contracts)
- Providing access to resources for community needs
- Capacity building
- Acknowledgment and use of the Hupacasath Land Use Plan

Example

WIFN: Development of a Memorandum of Understanding or Impacts and Benefits Agreement

WIFN believes that MOUs and IBAs are useful mechanisms to accommodate our interests arising out of our aboriginal title, and for providing benefits to and creating a positive working environment for the conduct of business by proponents.

Some or all of the following items may be included in the MOU or IBA, depending on the complexity of the project and its potential impact on the environment and the WIFN community:

1. Recognition of WIFN's land claims, and its interest in self government.
2. Definition of an on-going role (e.g., liaison committee or a joint committee made up of WIFN and company appointees) for the community in jointly implementing, managing, and monitoring the project.
3. Definition of the make-up of the committee which would include representatives from the First Nation and possibly one or more consultants retained by the First Nation.
4. Preparing a schedule of meetings for the committee, and other proponent/First Nation meetings.
5. Agreement on the combination of national, provincial, or international environmental standards that will be used in the monitoring of the project.
6. Definition of the direct advisory role that WIFN would provide into the design, implementation, and evaluation of monitoring studies.
7. Description of what effective compliance monitoring, and environmental effects monitoring¹, would consist of for the project, and what the forms and records would be that are used to document the monitoring system.
8. Development of monitoring threshold levels that would trigger action and the notification protocols in that situation.
9. Establishing an annual schedule for the reporting and interpretation of monitoring results and for reporting to the committee, the community, and other interested Aboriginal communities in the local area.
10. Development of Notification Protocols to the First Nation for specific project construction or operation activities.
11. Establishment of annual budgets and disbursement mechanisms for on-going project related activities (for example, monitoring and database management activities), and for other environmental programs addressing broader regional objectives for which mutual benefit could be established.
12. Identification of all the potential costs and benefits for the community in the project, not only environmental but also social and economic. Identification of opportunities to develop business partnerships, and the definition of specific First Nation employment and training opportunities. Also opportunities for the provision of any other additional services to the community that the project provides potential for, should be identified.
13. Development of an Aboriginal relations policy by the project proponent, if not already in place.

14. Agreement on joint positions that may be required in any regulatory processes. For example, joint submissions to governmental bodies or regulatory agencies on draft Certificates of Approval may be possible after effective consultation has taken place. These submissions may include, for example, such issues as contingency plans, financial assurances, monitoring programs, or emergency response planning. Statements on meeting federal and provincial and other legal requirements for timely Aboriginal consultation and on the thoroughness of evaluation of Aboriginal impacts could also be included in the submissions.
15. Payments in lieu of tax payments.
16. Technical and financial support in enhancing research, monitoring and training capacities in all areas of environmental protection within the traditional territory, and in sharing information concerning environmental protection as it affects the traditional territory.
17. Agreement to participate in the Circle on Environment and Development which brings together governments, organizations, individuals, and private business to promote an integrated local perspective on environmental and development issues in the St. Clair watershed.
18. Maintaining the confidentiality of the agreement between the proponent and the First Nation.

It is intended that the MOU or IBA would be developed cooperatively and in a timely manner between the First Nation and the project proponent

The MOU or IBA should also anticipate the possibility that it is not possible for the First Nation and the project proponent to come to agreement on specific issues, in which case it may be necessary that the services of a skilled mediator will need to be retained to assist in defining a mutually agreeable plan of action or mitigation measures for both parties.

The final acceptance by WIFN of any draft MOU or IBA will require that the community will be consulted for its opinion and decision on the acceptability of the project.

Example Simpcw Accommodation Measures

Crown and Third parties must accommodate the Simpcw Signatories in relation to any Activity that may infringe on Aboriginal Title, Aboriginal Rights or interests of the Simpcw Signatories, by measures agreed to by the Simpcw Signatories, which may include but are not limited to:

- modifying or cancelling a proposed Activity to avoid or minimize the infringement of Simpcw Signatories Aboriginal Title and/or Rights;
- conducting joint land use planning, or reconciliation of Crown and Simpcw land use plans where available;
- co-management involving at least equally shared decision making authority;

- participation in future joint decision-making;
- undertaking up-front conservation measures and where necessary, restoration;
- revenue sharing;
- resource allocations to the Simpcw Signatories
- compensating the Simpcw Signatories for the infringement;
- providing economic development opportunities or other economic measures to the Simpcw People;
- limiting resource harvesting and extraction;
- providing training;
- Agreements or partnerships with industry or proponents;
- Contracts for Simpcw individuals and businesses;
- Participation in future joint decision-making;
- Joint ventures;
- Compensatory damages for past infringements;
- Other arrangements.

Example
AFNQL: Means of Accommodation

Consultation should include the identification of possible means of addressing First Nations interests and of options for accommodation,

The ways in which First Nation interests may be accommodated, could include:

1. abandoning the action being contemplated,
2. 2 alternatives to the contemplated action that adequately address the interests on all sides,
3. minor or major changes to the action being contemplated,
4. modifying a proposed project,
5. providing for First Nation participation in an action or project,
6. compensating the First Nation,
7. providing for ongoing consultation and accommodation of the First Nation with respect to an action or project and notably follow-up, mitigation and compliance monitoring activities,
8. First Nation economic benefits such as compensation, royalties, profit-sharing, equity interest, joint ventures, contracting, employment, and
9. consent and agreement to a new action, modified to accommodate First Nation interests.

SOURCES:

Consultation Protocol of First Nations of Quebec and Labrador 2005

Bkejwanong Territory Environmental Policies, Guidelines and Information for External Project Proponents, February 2006

Hupacasath First Nation TERRITORY LAND USE PLAN – PHASE 2, 2004

Simpcw First Nation Consultation and Accommodation Guidelines 2006