

# **Mowachaht/Muchalaht First Nation**



## **REFERRALS POLICY**

**Approved:**

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**Mowachaht Muchalaht First Nation**  
**Referrals Policy**

**1. Adoption**

1.1 This Referrals Policy (RP) was adopted by the Council of Chiefs of the Mowachaht Muchalaht First Nation (“MMFN”) on May 9, 2016.

**2. Purpose**

2.1 The purpose of this Referrals Policy is to set out the principles that MMFN expects to govern consultations with the Crown and engagement with private proponent or industries concerning decisions or actions that carry the potential to affect MMFN’s proven or asserted Aboriginal rights and title.

2.2 This Referrals Policy clarifies and supplements the Crown’s common law consultation obligations and does not eliminate any of the Crown’s common law consultation obligations or any of its obligations in any Crown-MMFN agreements.

**3. Reference Map**

3.1 For ease of reference, a map showing MMFN’s traditional territory (“MMFN Territory”) is included with this Referrals Policy as **Appendix “A”**. MMFN claims Aboriginal title to the lands and waters of its Territory, and it holds a range of proven and asserted Aboriginal rights in this Territory (collectively referred to as “Section 35 Rights or interests”).

**4. Application of Policy**

4.1 This Referrals Policy applies wherever the Crown and/or a private proponent or industry contemplates making a decision or taking an action that may adversely impact MMFN’s Section 35 Rights or interests. This includes all decisions or actions that may adversely affect MMFN Territory, including but not limited to decisions or actions relating to:

- a) resource exploration activities;
- b) resource exploitation activities;
- c) aquaculture activities;
- d) tourism activities;
- e) housing, commercial or industrial development activities;
- f) removal of land from tree farm licenses;
- g) leases, and licenses of occupation, over Crown lands and waters;
- h) sale of Crown lands;
- i) acquisition of Crown lands;

- j) regulation of hunting, trapping, fishing, gathering or other traditional activities;
- k) development of land use plans; and
- l) strategic planning for land and resource use;

where the proposed activity would occur within MMFN Territory or have impacts that could extend into MMFN Territory.

## **5. Who to Engage**

5.1 Wherever possible, MMFN should have the opportunity to consult directly with the Crown decision-maker.

5.2 Where it is not reasonably possible for the Crown decision-maker to consult directly with MMFN, MMFN expects the delegate responsible for Crown consultation to

- a) share with MMFN the entire record that is put before the decision-maker to enable him or her to make the decision (save for privileged documents); and
- b) give MMFN a reasonable opportunity to provide the decision-maker with any comments on that record.

5.3 All consultation and engagement, whether with the Crown or a proponent, must be with the Council of Chiefs, who form the government of the MMFN. Although MMFN understands that proponents will occasionally communicate one-on-one with a Chief, decision-making authority for MMFN rests with the Council of Chiefs as a whole. Therefore, it is expected that consultation will be with the Council as a whole rather than with individual chiefs and only commitments made by the Council of Chiefs as a whole are binding on MMFN. The Council of Chiefs may delegate consultation duties to MMFN employees, but final decisions will be made by the Council of Chiefs.

## **6. Timing of Referral**

6.1 MMFN has limited resources and receives a high volume of referrals from government and private proponent or industries. It is very difficult and potentially impossible for MMFN to respond to referrals on short notice. In recognition of this fact, MMFN should be contacted about referrals as early as possible so as to avoid situations where MMFN's response is urgently required.

6.2 MMFN should be allowed at least 60 days from the date of receipt of the referral to respond to a referral unless a commitment to respond more quickly has been secured from MMFN.

6.3 Proponents are expected to consult with MMFN early on in their planning process, before becoming committed to or heavily invested in specific plans, so as to be in a better position to engage with MMFN with flexibility and an open mind as to outcomes.

## **7. Notification of Proposed Activities**

7.1 MMFN expects to be provided with a written notification of the proposed activity, decision or action.

7.2 This written notification should be provided to the Council of Chiefs via the Lands Office of the MMFN.

7.3 Crown notification should provide full disclosure and should contain sufficient information to allow MMFN to understand:

- a) the nature and scope of the proposed decision or activity and any anticipated related activities;
- b) the proposed timing of the decision or activity;
- c) the geographical area likely to be affected;
- d) the identities of any private proponent or industries involved;
- e) any statutory decision-making powers that will be exercised;
- f) who the Crown decision-makers are, and which Crown officials are responsible for discharging the Crown's duty to consult;
- g) whether the Crown possesses any documentation relevant to understanding the proposal, including but not limited to a proponent application, and any governmental or external studies or assessments relating to the potential impacts of the proposal.

7.4 Proponent notification should also provide full disclosure and should contain sufficient information to allow MMFN to understand:

- h) the nature and scope of the proposed activity and any anticipated related activities;
- i) the proposed timing of the activity;
- j) the location of the proposed activity, and the geographical area likely to be affected;
- k) all of the parties involved in the proposed activity;
- l) what Crown approvals, if any, are required for the activity, whether the proponent has applied for those approvals or when it intends to do so, and the names of any Crown contacts that the proponent is dealing with to secure these approvals; and
- m) whether the proponent possesses any documentation relevant to understanding the proposal, including but not limited to any studies or assessments relating to the potential impacts of the activity.

## **8. Referral Processing Fees**

8.1 The Crown shall ensure that MMFN receives adequate funding either from the Crown or the proponent/applicant so that MMFN has the opportunity to consult meaningfully. MMFN shall therefore apply an administrative fees to cover basic disbursements associated with responding to referrals. The Referral processing fees shall vary depending on the type of business, applicant or industry and may increase if additional work is needed or if the project entails large areas or lands, forests, waters or air impacts or usage.

The Referral Processing Fees are set out in Appendix B and are subject to change at MMFN's discretion. Each project applicant referral that is received by MMFN shall be invoiced accordingly and that applicant will be required to pay MMFN those processing fees. Payment of the Referral Processing Fees is not considered an accommodation of MMFN.

## **8. Referral Processing Requirements**

8.2 Where a proposed activity carries the potential for major adverse impacts on MMFN's Section 35 Rights or interests, MMFN may need to take a number of steps in order to consult meaningfully on the proposal, such as the following:

- review technical information about a proposed activity;
- obtain independent technical advice to understand a proposed activity, its environmental impacts, and potential mitigation measures;
- assess whether the Crown has adequate information to accurately assess the potential impacts of a proposed activity or decision;
- interview community members about their traditional knowledge and land uses that relate to the proposed activity or decision;
- prepare written submissions for the Crown regarding the strength of MMFN's Section 35 Rights claims, the potential impacts of the decision or activity, and proposals for accommodating MMFN's Section 35 Rights or interests;
- participate in face-to-face meetings with the Crown and/or proponent;
- provide community updates on the consultation process and solicit input or seek agreement from the community on proposed accommodation measures;
- participate in a public project review process.

## **9. Obligations of the Parties**

### **Crown/Proponent Obligations**

9.1 When the Crown notifies MMFN of a proposed action or decision, the precise manner in which consultations unfold will vary with the circumstances. MMFN expects the Crown to follow the following principles in every case:

- a) consult with MMFN in good faith;
- b) consult with an open mind as to outcomes, including whether a proposed activity should be approved;
- c) where a decision or activity relates to a larger project, ensure that MMFN has the opportunity to consult about the project as a whole rather than stage consultation in a manner that precludes the discussion of the overall impacts of that project;
- d) provide MMFN with all of the information that MMFN reasonably requires to understand the nature, scope, and environmental impacts of a proposed decision or activity;
- e) provide MMFN with separate written referral letters, with supporting documents and maps, for each and every application, permit, renewal or other requests. Referral letters from the Crown that contain more than one application, permit, renewal or other request on the same letter shall be treated as separate referrals and will be processed as such and associated Referral Processing fees applied to each item.
- f) provide information in a comprehensible and not overly technical format, and provide MMFN with any technical assistance that it requires to understand the information;
- g) update MMFN with new information and the Crown's opinions on relevant matters in a timely fashion;
- h) ensure that the Crown itself has a full understanding of the potential environmental impacts of a potential decision or action, including cumulative impacts, so that the Crown is able to make an informed decision about the decision/activity and any appropriate mitigation measures;
- i) make appropriate representatives available to meet with MMFN in person, should MMFN be willing and able to schedule meetings;
- j) give MMFN a reasonable opportunity to take in information about the proposal and respond to it;
- k) take MMFN's concerns and proposals under serious consideration and provide responses to MMFN on the issues that MMFN has raised; and
- l) work with MMFN to find ways of accommodating any MMFN Section 35 Rights or interests that MMFN reasonably believes may be adversely affected by the proposed activity (see s. 12 below on accommodation).

9.2 Where a proposed decision or activity stands to have major impacts on MMFN's Section 35 Rights or interests, MMFN expects the Crown to follow these additional principles:

- a) consult about the process that the Crown intends to use to consult with MMFN and, in the case of major projects, the process that it intends to use to review the project;
- b) ensure that MMFN has adequate funding and resources to consult meaningfully; and
- c) provide MMFN with written reasons to explain the Crown's ultimate course of action and in particular, to explain any decision not to adopt accommodation measures that MMFN has proposed.

9.3 Where the Crown intends to delegate some aspects of consultation to a private proponent or industry, MMFN expects the Crown to

- a) inform MMFN of this fact and specify to what extent the Crown intends to delegate its consultation obligations to the proponent;
- b) confirm whether MMFN is comfortable with this delegation or whether MMFN considers that there are circumstances which make it inappropriate for the Crown to be delegating some or all of its consultation obligations to a proponent; and
- c) obtain directly from MMFN MMFN's account of any engagement with a proponent, rather than simply relying on the proponent's accounts of its engagement efforts.

9.1 When a proponent engages with MMFN, it is expected that all proponents will follow these principles in every case:

- a) engage with MMFN in good faith;
- b) provide MMFN with all of the information that MMFN reasonably requires to understand the nature, scope and impacts of the proposed activity;
- c) provide information in a comprehensible and not overly technical format, and provide MMFN with any technical assistance that it requires to understand the information;
- d) provide information updates to MMFN in a timely fashion;
- e) make appropriate representatives available to meet with MMFN in person, should MMFN be willing and able to schedule meetings;
- f) give MMFN a reasonable opportunity to take in information about the proposal and respond to it;
- g) take MMFN's concerns and proposals under serious consideration and provide responses to MMFN on the issues that MMFN has raised;
- h) work with MMFN to find ways of accommodating any Section 35 rights or interests that MMFN reasonably believes may be adversely affected by the proposed activity (see s. 12 below on accommodation);
- i) share with MMFN any written reports that it provides to the Crown regarding its engagement efforts with MMFN.



## **MMFN Obligations**

9.4 MMFN will follow the following principles in consultation:

- a) consult in good faith;
- b) consult in as timely a fashion as it is reasonably able to, taking into account MMFN's capacity (including any funding that MMFN has received to facilitate meaningful consultation);
- c) to the extent that its capacity reasonably permits, provide its views about the proposed activity or decision and its potential impacts on MMFN's Section 35 Rights or interests, relevant information in support of those views, and any proposals for accommodating MMFN's rights;
- d) share with the proponent any written reports that MMFN provides to the Crown regarding its consultation efforts with the proponent;
- e) to the extent that its capacity reasonably permits, seriously consider proposed accommodation measures and respond to those proposals; and
- f) where a proposed decision or activity stands to have serious impacts on MMFN or where the Council of Chiefs contemplates signing an agreement with the Crown or a proponent regarding a proposed decision or activity, the Council of Chiefs will consult with its community members about the matter prior to taking any firm positions.

9.5 There may be special situations where MMFN chooses to engage only with the Crown in respect of the proposal, in which case MMFN will inform the proponent of this fact.

9.5 The MMFN Lands Office will schedule every 2<sup>nd</sup> Tuesday of each month to meet with Chief and Council to review referrals, obtain feedback and to provide direction for each referral. When necessary, the MMFN Lands Office will request extensions to the deadlines.

## **10. Confidential Information**

10.1 MMFN expects the Crown and/or proponent to maintain the confidentiality of any confidential MMFN information and understands that it must do the same for the Crown and/or the proponent.

10.2 Where MMFN intends to share confidential information with the Crown and/or the proponent, it will notify the Crown and/or the proponent of this fact and require the Crown and/or proponent to commit to maintaining confidentiality before sharing the information.

## **11. Archeological Impact Studies**

11.1 Where a proponent is having any type of archeological assessment completed for a site within MMFN's Territory where the site is potentially of archeological or cultural significance to MMFN, MMFN expects the person or company hired to do the archeological assessment to

- a) be qualified to do this work; and
- b) have a good track record for including Aboriginal groups in their assessments.

11.2 MMFN expects to be involved in archeological assessments for sites lying within MMFN Territory in the following manner:

- a) The party conducting the assessment should give MMFN a reasonable opportunity to review and comment upon the proposed scope of the assessment, and in particular the scope of any field work, to help ensure that the assessment will be reliable and adequately informative in the circumstances.
- b) The party conducting the assessment should offer MMFN a paid position to observe and participate in any field work.
- c) The party conducting the assessment should provide MMFN with a draft of any report and give MMFN a reasonable opportunity to comment on the report before it is finalized.

## **12. Accommodation**

12.1 Where a proposed activity stands to adversely affect MMFN's Section 35 Rights or interests, MMFN will normally expect a proponent to find ways of accommodating MMFN. Accommodation measures by proponents may include, and are not limited to:

- a) mitigation measures to avoid or reduce the likely impacts of a proposed activity on MMFN's Section 35 Rights or interests;
- b) compensation for negative impacts on MMFN Section 35 Rights or interests;
- c) revenue-sharing with MMFN;
- d) employment or contract opportunities for MMFN, including facilitating meetings with contractors that will be carrying out work on the project;
- e) environmental monitoring of the impacts of the activity and a process for reviewing findings and taking steps to address any negative impacts;
- f) a process to ensure that MMFN remains up to date on the activity and its impacts and has an opportunity to raise concerns and seek the adoption of measures to address any negative impacts that may arise once the activity is underway.

12.2 MMFN recognizes, and proponents should understand, that depending on the potential impacts of an activity on MMFN's Section 35 Rights or interests, a proponent may not be able to provide all or any of the appropriate accommodation and that the ability to do so may lie solely with government.

12.3 Reasonable accommodation measures on the part of the Crown may include, but are not limited to:

- a) mitigation measures to avoid or reduce the likely impacts of a proposed activity on MMFN's Section 35 Rights or interests;
- b) compensation for negative impacts on MMFN Section 35 Rights or interests;
- c) revenue-sharing with MMFN;
- d) where the proposed activity or decision stands to have serious adverse impacts on MMFN's rights, rejection of the proposed activity or decision;
- e) environmental monitoring of the impacts of the activity and a process for reviewing findings and taking steps to mitigate any negative impacts;
- f) joint-decision making process that gives MMFN a role in the approval of a particular activity or its ongoing monitoring and regulation;
- g) establishment of protected areas to help maintain MMFN's ability to exercise its Section 35 Rights or interests in certain areas of its Territory; and
- h) provision of other economic opportunities to MMFN to compensate for those that the Crown is providing to a third party, including incentives and conditions that the third party contract with the MMFN and band-controlled companies, and employ MMFN members.

### **13. General**

13.1 The legal obligation to consult with MMFN rests with the Crown, not private proponent or industries. Where MMFN consults with a private proponent or industry about a proposed activity, MMFN does not give up any of its consultation or accommodation entitlements vis-à-vis the Crown in respect of that activity unless MMFN expressly confirms in writing that it is doing so.

13.2 MMFN expects that once a proponent is engaging in an activity that might affect or is affecting MMFN's Section 35 Rights or interests, the proponent will remain in communication with MMFN and periodically update MMFN on its activities, at least to the extent that these are or may be affecting MMFN's Section 35 Rights or interests.

# Appendix A: Map of Mowachaht Muchalaht Territory

