



**Yukon  
Water Board**

*Office des eaux  
du Yukon*

## **COMPENSATION GUIDELINES**

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## INTRODUCTION

These guidelines address most compensation issues to be considered during the licence application process, including licence renewals and amendments. Both the *Waters Act* (Act) and Chapter 14 of Yukon First Nation Final Agreements (Final Agreements) address compensation issues that may arise in circumstances outside the licence application process. For consideration of compensation outside the licence application process, the reader is directed to consult the Act and Chapter 14 of the relevant Final Agreement, as appropriate.

The guidelines are comprised of three parts: Part 1 is an overview of compensation under the Act and the Final Agreements; Part 2 addresses compensation under s. 12(4) of the Act; and Part 3 addresses compensation under certain provisions of Chapter 14 of the Final Agreements.

### Part 1 - Overview

The primary legislation for managing the use<sup>1</sup> of water in Yukon is the Act. Under the Act, water uses are divided into three categories:

- uses that require a licence;
- uses authorized under the *Waters Regulation* (regulation), that do not require a licence; and
- uses that do not require a licence or an authorization under the Act or the regulation.

Generally speaking, all significant uses of water in Yukon require a licence issued under the Act. The Yukon Water Board (Board) is established under the Act and is responsible for issuing water licences.

Section 10 of the Act states the objects of the Board are to:

*“...provide for the conservation, development, and utilization of waters in a manner that will provide the optimum benefit from them for all Canadians and for the residents of the Yukon in particular.”*

There are fourteen Yukon First Nations. Eleven of these First Nations have entered into land claims Final Agreements with the governments of Canada and Yukon. These Final Agreements provide certain water related rights to Yukon First Nations and to Yukon First Nation people. These rights are recognized and protected under s. 35 of the Constitution Act, 1982.

The Final Agreements have the force of law and if there is any inconsistency or conflict between the Final Agreements and other Yukon laws, including the Act, the agreements prevail. (See e.g. *Act Approving Yukon Land Claim Final Agreements* (Yukon), ss. 2 and 3(1).)

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<sup>1</sup> In these guidelines “use” includes the deposit of waste into water.

Chapter 14 of each Final Agreement states,

*14.1.1 The objective of this chapter is to maintain the Water of the Yukon in a natural condition while providing for its sustainable use.*

The Act and the Final Agreements recognize that granting a licence to use water may adversely affect others. Both the Act and the Final Agreements require the Board to ensure compensation is addressed in the circumstances and as provided for in the Act and in the Final Agreements, respectively.

## **1.1 Compensation under the *Waters Act***

Subsection 12(4) of the Act sets out requirements for addressing compensation during the licence application process. The Act establishes two categories of potential compensation claimants:

- s. 12(4)(a) claimants (existing licensees and applicants with precedence); and
- s. 12(4)(b) claimants (includes other water users, owners and occupiers of property, holders of outfitting and trapping concessions).

While there are similarities in the compensation provisions applicable to each category, there are several important differences. As a result, each of these categories is discussed separately below.

## **1.2 Compensation under s. 12(4)(a) of the *Waters Act***

Subsection 12(4)(a) addresses compensation for “existing licensees” and “applicants with precedence”<sup>2</sup>. The Act states the Board must not issue a licence unless the applicant satisfies the Board that either:

- a) the use of waters proposed by the applicant will not adversely affect, in a significant way, the use of waters by any existing licensee or applicant with precedence; or
- b) the applicant has entered into a compensation agreement with every licensee or applicant with precedence whose use of waters will be adversely affected in a significant way.

Eligibility and requirements for compensation under s. 12(4)(a) are discussed in more detail below in Part 2.

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<sup>2</sup> Paragraph 12(4)(a)(i)(B) of the Act refers to the use of waters proposed by certain “other applicants” having precedence over an applicant’s proposed use. The “rule” for determining precedence is set out in s. 27 of the Act which states, where two licensees have licences permitting the use of waters, the licensee who filed their application first is entitled to the use of waters in precedence to any use of the waters by the other licensee. The precedence established by s. 27 Act continues to apply to renewals and assignments of the original licence (s. 27(3)).

### **1.3 Compensation under s. 12(4)(b) of the *Waters Act***

Subsection 12(4)(b) addresses compensation requirements and eligibility in relation to several listed potential claimants, including:

- licensees and applicants to whom s. 12(4)(a) does not apply
- certain unlicensed water users
- authorized waste depositors
- owners or occupiers of property
- outfitting and trapline concession holders, and holders of rights of a similar nature.

To be considered for compensation under s. 12(4)(b), a claimant must:

- file a notice with the Board within the time specified in the notice of application published by the Board; and
- satisfy the Board they:
  - were a licensee, applicant, water user, waste depositor, property owner or occupier, concession holder, etc., at the time the applicant filed their application with the Board; and,
  - would be adversely affected by the use of waters proposed by the applicant.

The Act states the Board must not issue a licence unless the applicant satisfies the Board that persons entitled to compensation under s. 12(4)(b) have been or will be paid compensation the Board considers appropriate.

Eligibility and requirements for compensation under s. 12(4)(b) are discussed in more detail below in Part 2.

### **1.4 Yukon First Nation Final Agreements – Chapter 14**

Section 14.8.1 of each Final Agreement is worded identically and provides,

*...a Yukon First Nation has the right to have Water which is on or flowing through or adjacent to its Settlement Land remain substantially unaltered as to quantity, quality and rate of flow, including seasonal rate of flow.*

This right is subject to the rights of water users authorized in accordance with Chapter 14 and laws of general application, including the Act.

Chapter 14 provides in 14.8.5 and 14.12.4 that if the Board grants a licence that interferes with a Yukon First Nation's right under s. 14.8.1, the Board shall order the licensee to pay the First Nation compensation for provable loss or damage to the First Nation, and compensation for certain losses or damages suffered by persons enrolled under that First Nation's Final Agreement.

Eligibility and requirements for compensation under Chapter 14 of the Final Agreements are discussed in more detail below in Part 3.

## **Part 2 – Compensation under the *Waters Act***

### **2.1 Compensation under s. 12(4)(a) of the *Waters Act***

The compensation regime under s. 12(4)(a) of the Act is set out below in Figure 1.

The compensation provisions in s. 12(4)(a) apply to an application for a licence, and to an application to renew or amend a licence (ss. 12(4) and 16(2)).

The first consideration under s. 12(4)(a) is whether there are existing licensees or applicants with precedence whose use of waters would be affected by an applicant's proposed use of waters. To identify whether there are existing licensees or applicants with precedence, an applicant should consult the Board's on-line water licence registry, Waterline: <http://yukonwaterboard.ca/index.htm>. An applicant who requires assistance in identifying existing licensees or applicants with precedence is encouraged to contact the Board office.

The registry lists water licences that are in effect and their location. In assessing whether a proposed use of waters would affect the use of waters by existing licensees or applicants with precedence, an applicant should consider:

- the geographic proximity of their proposed water use in relation to existing licensees;
- the magnitude and duration of the proposed use of waters;
- the geographic extent of downstream effects from the proposed use; and,
- any other factors that may helpful in determining the effects of the proposed use.

If there are no existing licensees or applicants with precedence whose use of waters would be affected by the proposed use of water, no compensation is required under s. 12(4)(a).

If there are existing licensees or applicants with precedence whose use of waters would be affected, the applicant must satisfy the Board that either:

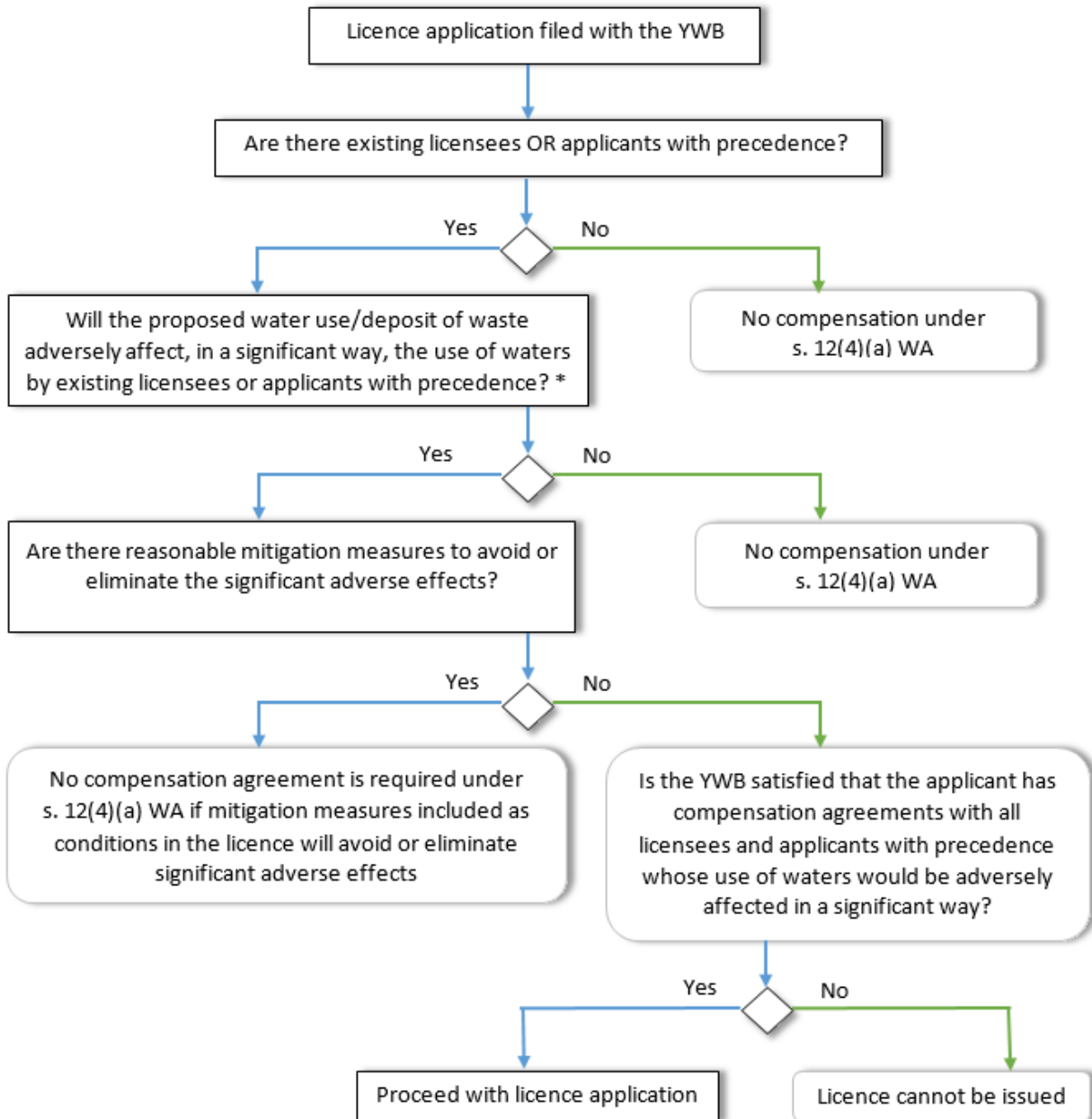
- a) the proposed use will not adversely affect, in a significant way, the use of waters by those licensees or applicants; or,
- b) the applicant has entered into compensation agreements with every existing licensee and applicant with precedence whose use of waters would be adversely affected in a significant way.

An applicant is responsible for ensuring that every licensee and applicant with precedence whose use of waters would be affected is notified of the application.

In assessing whether a proposed use would adversely affect, in a significant way, the use of waters by existing licensees or applicants with precedence, an applicant should consider:

- the nature, extent and duration of adverse effects, including incremental adverse effects;
- effects on the rate of flow, water quantity and quality; and,
- any other factors that may be helpful in determining the significance of adverse effects from the proposed use.

**Figure 1 – Compensation under s.12(4)(a) Waters Act (WA)**



\*Onus is on the licence applicant to satisfy the YWB that either:  
 (a) the proposed use/deposit of waste will not adversely affect, in a significant way, the use of waters by existing licensees and applicants with precedence;  
 OR  
 (b) the licence applicant has entered into a compensation agreement with every existing licensee and applicant with precedence whose use of waters would be adversely affected in a significant way.



The Board will also consider these factors when deciding under s.12(4)(a) whether an applicant's proposed water use will adversely affect, in a significant way, the use of waters by other licensees and applicants with precedence.

It is recommended that when preparing a licence application, an applicant carefully consider options to avoid, eliminate or minimize adverse effects on the use of waters by existing licensees and applicants with precedence and, where reasonable, incorporate measures that will avoid, eliminate or minimize significant adverse effects.

Most activities requiring a waters licence will require an assessment under the *Yukon Environmental and Socio-economic Assessment Act* (YESAA). It is anticipated that reasonable mitigation measures will be identified during the assessment under YESAA and be reflected in the decision document issued under YESAA.

If a proposed use of water will adversely affect, in a significant way, the use of waters by existing licensees or applicants with precedence, the applicant must either:

- a) modify their undertaking or incorporate mitigation measures to avoid or eliminate the significant adverse effects; or
- b) satisfy the Board that they have entered a compensation agreement with every existing licensee and applicant with precedence whose use of waters would be adversely affected in a significant way.

An applicant relying on a compensation agreement to meet the requirements of 12(4)(a) is not required to submit the agreement itself to the Board. However, the applicant is responsible for satisfying the Board that it has entered a compensation agreement. If the agreement is not provided to the Board, it is recommended that the applicant submit proof in writing signed by the affected party, confirming the affected party:

- is an existing licensee or applicant with precedence;
- is aware of the provisions in s. 12(4)(a) of the Act; and,
- has entered into a compensation agreement with the applicant.

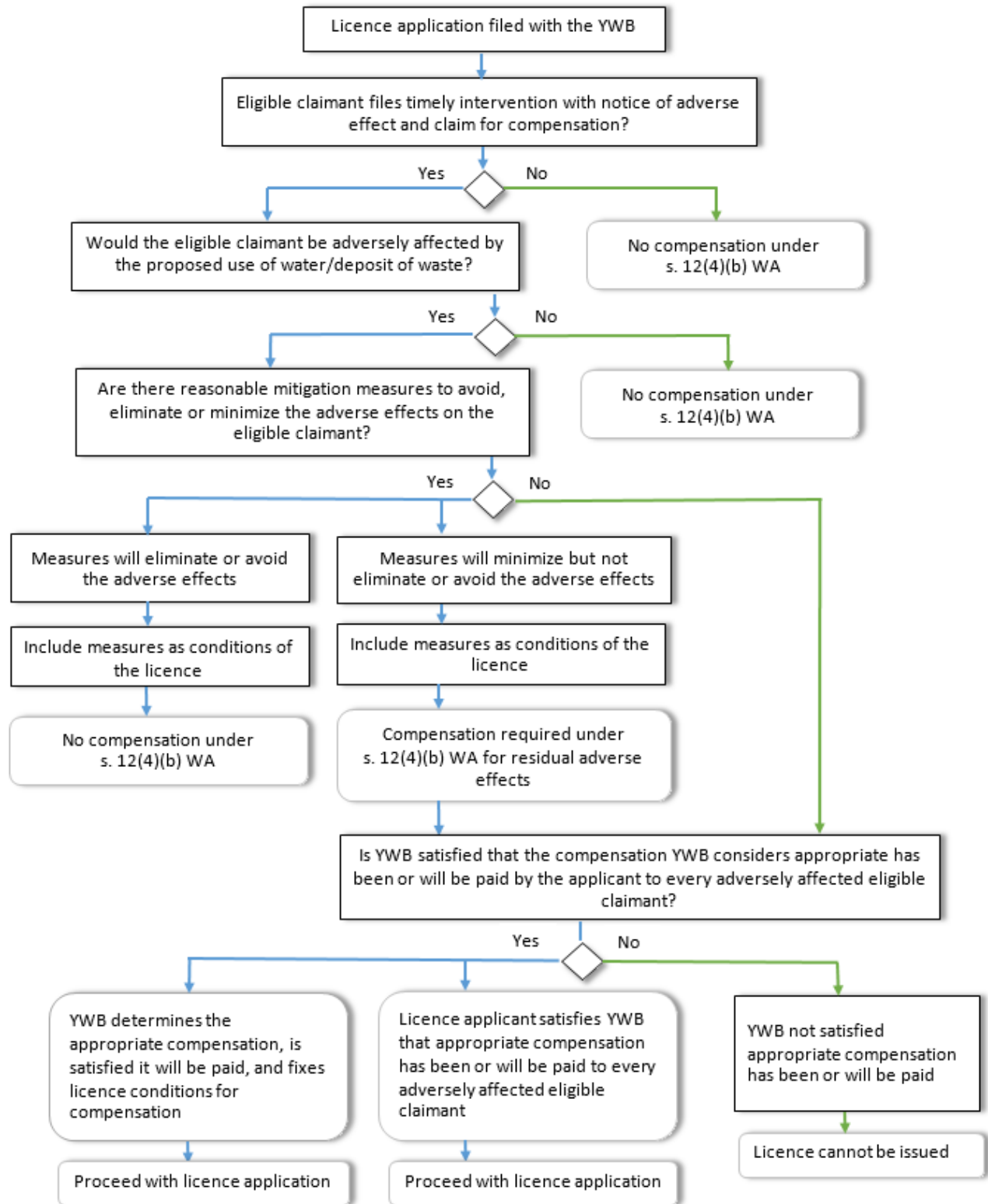
## **2.2 Compensation under s. 12(4)(b) of the *Waters Act***

The compensation regime under s. 12(4)(b) of the Act is set out below in Figure 2.

Subsection 12(4)(b) of the Act sets out a list of potential compensation claimants, including:

- licensees and applicants to whom s. 12(4)(a) does not apply
- certain unlicensed water users
- authorized waste depositors
- owners or occupiers of property
- outfitting and trapline concession holders, and holders of rights of a similar nature.

**Figure 2 – Compensation under s.12(4)(b) Waters Act (WA)**



These guidelines refer to the persons listed in s. 12(4)(b) collectively as “potential eligible claimants”.

Subsection 21(1) of the Act requires the Board to publish a notice of each licence application. The notice specifies the timeframe for persons to submit comments in writing regarding the proposed use of waters. Where a potential eligible claimant under s. 12(4)(b) considers they would be adversely affected by the proposed use, they may seek compensation under Act.

A potential eligible claimant intending to claim compensation under s. 12(4)(b) must submit a request for compensation in writing to the Board within the period specified in the published notice for submitting comments. A claim for compensation under s. 12(4)(b) submitted after the period for submitting comments has expired will not be considered by the Board.

A request for compensation under s. 12(4)(b) must include particulars of the adverse effects. In describing the effects, the claimant should address, where applicable:

- provable loss or damage;
- potential loss or damage;
- the extent and duration of the adverse effect, including the incremental adverse effect;
- the extent of the claimant’s use of water;
- the magnitude and duration of any nuisance, inconvenience, or noise; and,
- any other particulars relevant to understanding the adverse effects.

When setting the conditions of a licence, s. 13(2) of the Act requires the Board to make all reasonable efforts to minimize the adverse effects from issuing the licence. A claimant requesting compensation under s. 12(4)(b) should identify any reasonable mitigation measures that, in their opinion, would avoid, eliminate or minimize the adverse effects.

When considering an application, if the Board identifies reasonable measures that will avoid or eliminate the adverse effects, those measures will be incorporated into the conditions of the licence and no compensation will be required. If the measures identified and fixed as conditions of a licence will minimize but not fully avoid or eliminate adverse effects, the Board will determine appropriate compensation to be paid by the applicant for the residual adverse effects.

## **Part 2 – Compensation under Chapter 14 of Yukon First Nation Final Agreements**

As noted above in Part 1, eleven of the fourteen Yukon First Nations have entered into Final Agreements with the governments of Canada and Yukon. Chapter 14 of these agreements provide Yukon First Nations and Yukon First Nation people with certain water related rights that are recognized and protected under s. 35 of the *Constitution Act, 1982*.

### **3.1 Yukon First Nation Final Agreements**

Section 14.8.1 of each Final Agreement is worded identically and provides,

*...a Yukon First Nation has the right to have Water which is on or flowing through or adjacent to its Settlement Land remain substantially unaltered as to quantity, quality and rate of flow, including seasonal rate of flow.*

The right in 14.8.1 is subject to the rights of water users authorized in accordance with Chapter 14 and laws of general application, including the Act.

The compensation regime under Chapter 14 that applies during the water licence application process is set out below in Figure 3.

Chapter 14 provides in 14.8.5 and 14.12.4, if the Board grants a licence that interferes with a Yukon First Nation's right under 14.8.1 to have water remain substantially unaltered as to quantity, quality and rate of flow, the Board must order the licensee to pay the First Nation compensation for provable loss or damage to the First Nation, and for certain losses or damages suffered by persons enrolled under that First Nation's Final Agreement.

When the Board receives a water licence application it notifies the affected Yukon First Nation(s) in writing. The notice will advise the First Nation how to obtain a copy of the licence application and may contain other information about the application or the proposed use of water. The notice will also invite the First Nation to submit comments to the Board on the licence application, including comments relating to:

- effects of the proposed water use on the First Nation and Yukon First Nation people enrolled under that First Nation's Final Agreement;
- effects of the proposed water use on fish, wildlife and their habitats;
- reasonable mitigation measures to avoid adverse effects;
- alternatives that could reasonably satisfy the requirements of the licence applicant; and,
- compensation under Chapter 14 for provable loss or damage.

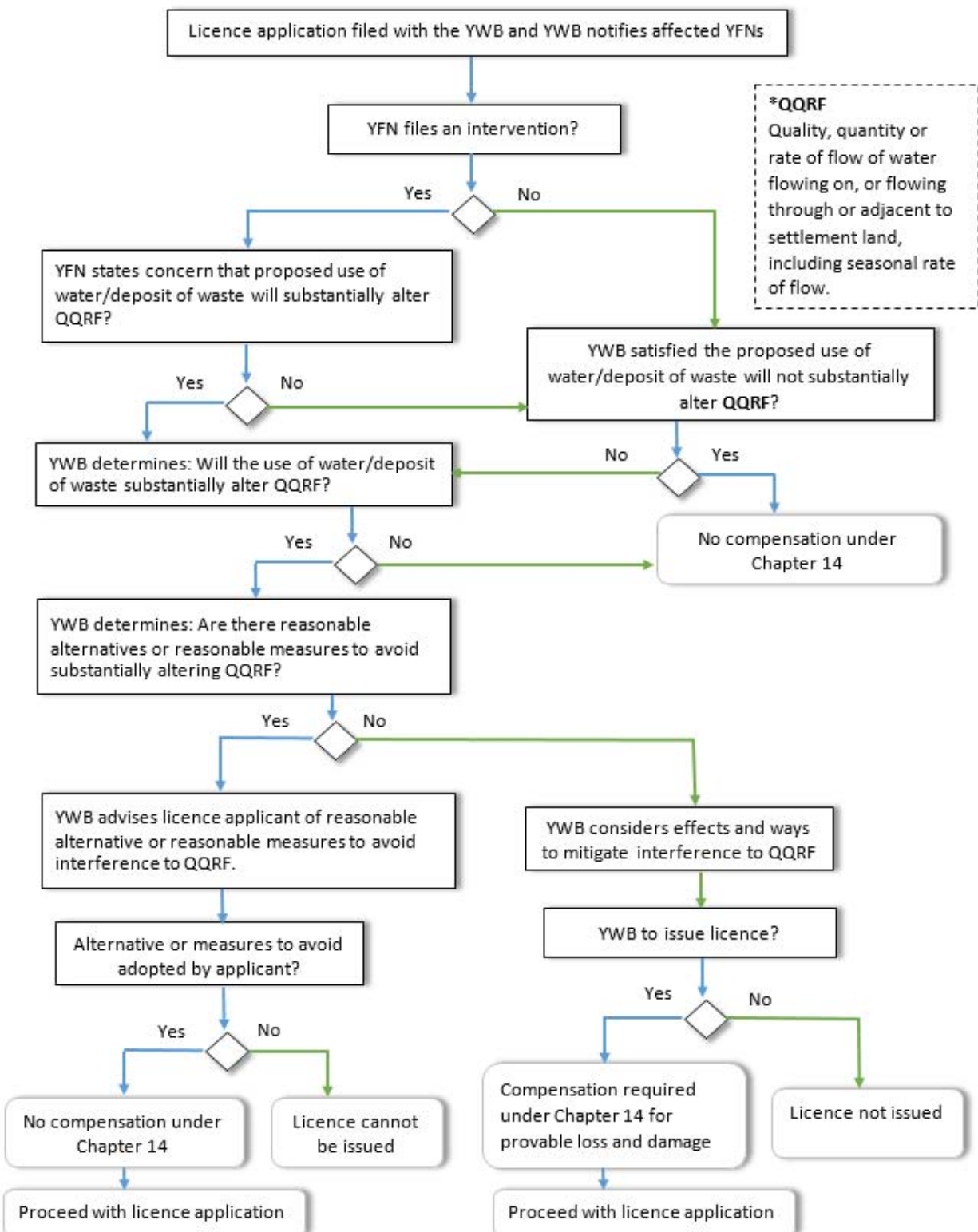
In deciding whether to grant a licence that would cause a substantial alteration in quantity, quality or rate of flow, the Board must consider:

- effects of the water use on fish, wildlife and their habitats;
- effects of the water use on the Yukon First Nation and persons enrolled under that First Nation's Final Agreement; and
- means of mitigating the interference.

If granting a licence for the proposed use of waters would cause a substantial alteration to quantity, quality or rate of flow that would adversely affect a traditional use by a Yukon First Nation person in that person's traditional territory, the Board must, on request of the affected Yukon First Nation, consider

- whether there is an alternative that would reasonably satisfy the licence applicant's requirements while avoiding the adverse effect on traditional use; and
- whether there are reasonable measures for the applicant to avoid, eliminate or minimize the adverse effect.

**Figure 3 – Compensation under Chapter 14 of Yukon First Nations (YFN) Final Agreements**



If the Board decides to grant a licence that will cause a substantial alteration to the quantity, quality or rate of flow of water on, flowing through, or adjacent to settlement land, the Board will order the licensee to pay compensation for provable loss or damage to the affected First Nation.

The amount and terms of compensation for provable loss and damage will be determined in accordance with the provisions of Chapter 14. In the context of a licence application, 14.12.4 provides that the compensation payable to a First Nation may also include provable loss or damage suffered by persons enrolled under the affected First Nation's Final Agreement.

In determining the amount and terms of compensation to be paid to a Yukon First Nation under Chapter 14 the Board is required to consider several factors, including:

- the effect of the water use on the First Nation's use of water on or adjacent to its settlement land;
- the effect of the water use on the First Nation's settlement land, taking into account any cultural or special value of the land to the First Nation;
- the nuisance, inconvenience and noise caused by the water use to the First Nation on settlement land;
- the increment of the water alteration caused by the water use;
- the cost of mitigation and restoration of settlement land;
- the duration of any of the above; and
- any factors set out in the Act.

In determining the compensation payable to a Yukon First Nation for loss or damage suffered by a person enrolled under that First Nation's Final Agreement, the Board will consider:

- the effect of the water use on the person's use of water on or adjacent to the First Nation's settlement land;
- the effect of the water use on fish and wildlife harvesting by the person;
- the increment of the water alteration caused by the water use;
- the duration of any of the above; and
- any factors set out in the Act.

The Board may order periodic or lump sum compensation, or both.

A Yukon First Nation or licensee may apply to the Board to request a compensation order be amended to take into account changing circumstances.

The Board may request additional information from the First Nation, including information regarding provable loss or damage, to take into account alternatives or mitigation measures adopted by the applicant or proposed to be included as licence conditions.