

APPENDIX 4

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REPLY TO: VANCOUVER OFFICE

February 23, 2005

Mr. Richard Taylor
Executive Director
Union of British Columbia Municipalities
Suite 60 - 10551 Shellbridge Way
Richmond, B.C. V6X 2W9

Dear Mr. Taylor:

**Re: Riparian Areas Regulation
Our File No. 00043-0154**

You have requested our comments and opinion on implementation issues for local governments arising from the scheduled coming into force on March 31, 2005 of the Riparian Areas Regulation (RAR) pursuant to the *Fish Protection Act* (FPA) and B.C. Reg. 376/2004. The Regulation also repeals the Streamside Protection Regulation (SPR), which required local governments subject to the regulation to establish streamside protection and enhancement areas (SPEAs) by January 2006.

Differences Between SPR and RAR

Before commenting on specific implementation issues that will likely arise, we would note that the RAR differs significantly from the predecessor SPR, and therefore raises significantly different implementation issues for local governments. In a nutshell, the approach of the government under the SPR was to establish specific standards for the content of local bylaws regulating development in riparian areas, and thereby accomplish provincial riparian area protection objectives indirectly via the normal operation of local bylaw administration procedures. The RAR does not, by contrast, establish standards for the content of local bylaws; rather, it imposes a senior government “sign-off” requirement on a range of local government development permitting and approval processes, in relation to a mandatory impact assessment and certification by a “qualified environmental professional” (QEP).¹ The assessment methods in

¹ The Province has indicated in material it has circulated about the RAR that the change in approach is intended to reduce both expense and liability exposure for local governments involved in riparian area protection. Cost savings

the Schedule to the RAR that QEPs must follow in carrying out this work require the professional to determine that the project will result in no harmful alteration, disruption or destruction (HADD) of fish habitat.

In a narrow sense, it is accurate to say that the implementation of the RAR raises no significant implementation issues for local governments, beyond an adjustment in their permitting and approval processes to accommodate the senior government sign-off on the QEP report. Unfortunately in our opinion, the RAR ignores some important implementation issues which many local governments, in an attempt to be responsible stewards of the riparian areas within their jurisdiction, will likely attempt to address without having been provided appropriate tools via the FPA, the RAR or amendments to Part 26 of the *Local Government Act*.

Implementation Options under the RAR

Section 8(2) of the RAR provides that, if a local government had before March 31, 2005 established SPEAs in accordance with the SPR, the local government is deemed to have met the requirements of the RAR in respect of those areas. This appears to mean that the RAR requirement for senior government sign-off on a QEP report in respect of individual projects that are within the scope of the RAR, does not apply to projects within the jurisdiction of these local governments. The inference is that, if a local government had not established such areas before March 31, 2005, the local government must henceforth meet the requirements of the RAR and in particular the sign-off requirement.

Option 1: Deemed Compliance with the RAR

Determining Compliance with SPR

What does it mean for a local government to have “established SPEAs in accordance with the SPR”? Section 5 of the SPR requires local governments to establish SPEAs in accordance with s.6 of the SPR, and s.6 sets out a detailed methodology for defining the extent of such areas in various conditions of topography, vegetation and other natural phenomena. The context for the SPR is s.12(4) of the *Fish Protection Act*, which requires local governments to do one of the following:

1. include riparian area protection provisions in accordance with the SPR in their zoning bylaws.

are presumably related to the fact that local governments will not have to do the research and data collection on riparian areas within their jurisdiction that is involved in the identification of SPEAs under the SPR; this work will, under the RAR, be done by a QEP at the expense of a development applicant in the context of a specific development application, and reviewed for completeness by the senior governments. The reasons for the Province’s references to liability exposure in this material are obscure; no liability consequences could flow from an incorrect identification of an SPEA, as such identification would ordinarily be effected by means of a local government policy decision encompassed in a bylaw: *Just v. British Columbia* [1989] 2 S.C.R. 1228 (Supreme Court of Canada).

2. ensure that their bylaws and permits under Part 26 provide a level of protection for riparian areas that is, in the local government's opinion, comparable to or in excess of that established by the SPR.

The first approach has inherent limitations given the scope of the SPR; zoning bylaws deal principally with the regulation of permitted uses of land and densities of land use and the siting and size of buildings and structures, while the SPR applies to a defined class of "development" that includes the disturbance of soils or vegetation, matters that are beyond the reach of the zoning power. Accordingly, most local governments attempting to meet the January 2006 deadline for complying with the SPR have focussed on the second approach, and specifically the use of development permit (DP) area designations under s.919.1(1)(a) of the *Local Government Act* (protection of the natural environment, its ecosystems and biological diversity) and the imposition of DP conditions under s.920(7) of the Act. This approach is potentially more effective because s.920(1)(d) of the *Local Government Act* provides that land within such an area "must not be altered" until a development permit has been obtained; this likely catches the disturbance of soils and vegetation. In any event, the DP approach in general allows for a more fine-grained approach to land use control than an approach based entirely on the zoning power, and is therefore more suitable for achieving land use objectives in the very diverse local circumstances that exist in riparian areas. However, because DP areas must be designated in official community plans and the amendment of OCPs is subject to detailed consultation and other procedural requirements, the process is cumbersome.

The wording of s.12(4) of the FPA, and in particular the subjective nature of this compliance option (resting as it does on the local government's own opinion) is giving and will continue to give rise to uncertainty as to whether the RAR process actually applies in particular local government jurisdictions. The Province did not under the SPR, and does not under the RAR, provide any objective certification or confirmation that a local government has in fact established SPEAs, or has done so in accordance with s.6 of the SPR. Thus, both the local government and developers whose projects might be subject to the RAR are obliged to proceed on the basis that the local government is deemed to be in compliance with the RAR, in an atmosphere of uncertainty. For developers, the uncertainty may be very serious in that, if the RAR assessment and certification requirement does in fact apply to them contrary to the position of the local government, it may become necessary at a later date to engage a QEP to assess and certify the project after the fact, and compliance with the QEP's recommendations ensuring that no HADD will occur may be very expensive, and may be impossible. In cases where the SPEAs are being established on the eve of the coming into force of the RAR, the permitting procedures associated with them may have been used only a few times or not at all by March 31, 2005, with the result that it might be difficult for the local government to form a proper opinion as to whether its system of bylaws and permits does "meet or beat" the protection provisions established by the SPR.

Amending SPEAs After March 31, 2005

Finally, we note that s.8 of the RAR also provides that, if SPEAs established before March 31, 2005 are “amended”² such amendment must be in accordance with the RAR. We noted at the outset that the RAR differs from the SPR in that it does not contain a methodology for, or even a requirement for, establishing SPEAs; it is concerned instead with the process by which local governments issue development approvals that might affect such areas. Since B.C. Reg. 376/2004 repeals the SPR, provincial law will no longer provide any guidance for local governments wishing to modify their SPEA designations. The practical effect may be that SPEAs established before March 31, 2005 will be unalterable after that date.

Option 2: Compliance with the RAR

“Development”

Section 4 of the RAR prohibits a local government from approving or allowing “development” to proceed in a riparian assessment area unless the requirements of the RAR for senior government approval of the development have been met.³ The term “development” is defined to mean “any of the following associated with local government regulation or approval of residential, commercial or industrial activities or ancillary activities to the extent that they are subject to local government powers under Part 26 of the *Local Government Act*:

- (a) removal, alteration, disruption or destruction of vegetation;
- (b) disturbance of soils;
- (c) construction or erection of buildings and structures;
- (d) creation of nonstructural impervious or semi-impervious surfaces;
- (e) flood protection works;
- (f) construction of roads, trails, docks, wharves and bridges;
- (g) provision and maintenance of sewer and water services;
- (h) development of drainage systems;
- (i) development of utility corridors;

² Presumably it is the bylaw establishing the SPEA that is amended, and not the SPEA itself. Such amendment would usually be undertaken to alter the boundaries of the SPEA, since s.6 of the SPR is concerned mainly with determining the spatial extent of these areas.

³ Like the SPR, the RAR applies only to the Capital, Central Okanagan, Columbia-Shuswap, Comox-Strathcona, Cowichan Valley, Fraser Valley, Greater Vancouver, Nanaimo, North Okanagan, Okanagan-Similkameen, Powell River, Squamish-Lillooet, Sunshine Coast and Thompson-Nicola Regional Districts and the trust area under the *Islands Trust Act*.

(j) subdivision as defined in section 872 of the *Local Government Act*.”

Clearly there are local government development approval decisions that are unaffected by the RAR, apart from the express exemption for a DP or development variance permit enabling reconstruction or repair of a permanent structure containing a non-conforming use (s.3(2) of the RAR). These include:

- the issuance of **building permits** pursuant to bylaws adopted under s.8 of the *Community Charter* in municipalities, and Part 21 of the *Local Government Act* in regional districts
- the issuance of **soil removal and deposit permits** pursuant to bylaws adopted under s.8(3)(m) of the *Community Charter*
- the issuance of **tree cutting permits** pursuant to bylaws adopted under s.8(3)(c) of the *Community Charter* (tree cutting permits issued under Part 26 bylaws are subject to the RAR)
- the issuance of **siting and use permits** and *ad hoc* development approvals under the *Islands Trust Act*
- the approval of **subdivisions** under the *Land Title Act* and the *Strata Property Act*⁴
- the approval of **strata conversions** under the *Strata Property Act*
- all Part 26 approvals related to **institutional development** containing no residential, commercial or industrial aspect
- **all development** outside a riparian assessment area as defined in the RAR
- **all development** in the City of Vancouver, which exercises no powers under Part 26 of the *Local Government Act*
- **Board of Variance** decisions, which are not made by a “local government” as defined in the *Fish Protection Act* (that is, a council or regional board)

There is some uncertainty as to whether the RAR is intended to apply to development in agricultural areas including the Agricultural Land Reserve. Information on the MWLAP website⁵ states that “the regulation does not apply to agriculture, mining or forestry-related land uses”. The basis of this statement is not at all clear from the Regulation, which expressly applies to

⁴ The express inclusion of “subdivision as defined in s.872 of the Local Government Act” in the definition of “development” is inconsistent with the opening words of the definition, which includes the listed items within the definition to “development” only to the extent that they are subject to local government powers under Part 26. While local governments do exercise some powers with respect to subdivision under Part 26, such as the imposition of servicing standards and the specification of minimum parcel areas, the subdivision approval power itself is in other legislation (the *Land Title Act* and the *Strata Property Act*) and is exercised by the approving officer and not by the “local government”, which is defined in the *Fish Protection Act* to mean the local elected officials.

⁵ http://wlapwww.gov.bc.ca/habitat/fish_protection_act/riparian/riparian_areas.html

“industrial activities”, which in its ordinary meaning includes at least some aspects of mining and forestry, and to “residential and commercial activities” which would probably include the construction of a dwelling in the ALR as well as farm-based commercial activities such as wineries and markets.

Implementing the Requirement for QEP Reports or DFO Authorizations

The following regulatory actions of local governments undertaken under Part 26 of the *Local Government Act* in relation to a “riparian assessment area” are likely subject to s.4 of the RAR:

- adoption of site-specific **OCP amendments**
- adoption of site-specific **zoning amendments**
- any authorization issued under a s.907 **runoff control** bylaw
- any authorization issued under a s.908 **sign** bylaw
- any authorization issued under a s.909 **screening or landscaping** bylaw
- any exemption from a **flood plain requirement** under s.910(5)
- any authorization issued under a s.917 farm bylaw
- any **development permit** except those mentioned in s.3(2) of the RAR
- any **temporary commercial or industrial use permit**
- any **development variance permit** except those mentioned in s.3(2) of the RAR
- any authorization to cut trees pursuant to a s.923 **tree cutting** bylaw
- the approval of construction of subdivision and development **works and services** (usually in the context of a servicing agreement, but sometimes a highway use permit)
- any **land use contract modification** under s.930

Section 4 of the RAR prohibits local governments from approving or allowing development to proceed unless it has been notified that Fisheries and Oceans Canada and the Ministry of Water, Land and Air Protection (MWLAP) have been provided with a copy of a QEP report in respect of the development, or the Minister of Fisheries and Oceans has authorized a HADD resulting from the development under s.35 of the *Fisheries Act* (Canada). It is expected that the latter type of authorization will be relatively rare and we will therefore focus on the first alternative, to which we have been referring as a senior government “sign-off” on the project.

On the face of things, compliance with the RAR on the part of local governments will involve the following initial steps in relation to one of the foregoing listed approvals or authorizations:

1. determining whether the action is being taken in relation to a “development” as defined in the RAR, which includes
2. determining whether the development is in a “riparian assessment area” defined in the RAR to mean the area within 30 meters of the high water mark of a stream; within 30 meters of the top of the ravine bank in the case of a ravine less than 60 meters wide; and within 10 meters of the top of the ravine bank in the case of a wider ravine;
3. advising the development applicant that the local government approval is subject to s.4 of the RAR so that the applicant can engage a QEP to prepare a report and submit it to the senior governments; and
4. suspending the usual approval process until the local government has been notified that the matters covered in s.4 of the RAR have been dealt with to the satisfaction of the senior governments.

It is our opinion that no particular regulatory adjustments or amendments are required for local governments to be able to implement this aspect of the RAR. The authority and indeed the duty to suspend the ordinary development approval procedures to make room for senior government “sign-off” of a QEP report arises directly from s.4 of the RAR, and no local bylaw amendments are necessary. Some local governments might amend their development application procedures bylaw enacted under s.895 of the *Local Government Act* to require applicants to indicate whether they propose to undertake activities within the RAR definition of “development” and within a riparian assessment area, to assist the local government in determining whether the RAR applies to the development.

Are New Bylaws Required to Protect Riparian Areas?

One additional issue that arises from the wording of the RAR is whether local governments that do not have regulatory bylaws in place that would trigger the application of the RAR must enact such bylaws in order to comply with the RAR. Take, for example, the case of a local government that has not adopted an OCP with natural environment DP areas, in whose jurisdiction buildings and structures may be placed in riparian assessment areas and soil and vegetation removed from them without any local government authorization except a building permit (not issued pursuant to a Part 26 power).

Section 4 of the RAR provides that a local government must not “approve or allow” development in a riparian assessment area without complying with the Regulation. The term “approve” implies an active role in authorizing the development, such as the issuance of a permit; where there is no permit requirement, no “approval” is involved. The term “allow” is broader, and could arguably include refraining from exercising powers (such as the DP area designation power in s.919.1) that, if exercised, could give the local government an approval function. However, the term “development” is defined to mean listed activities associated with or resulting from the local government “regulation or approval” of residential, commercial or industrial development. This wording again implies an active role on the part of the local government in authorizing development, and does not seem to us to address situations in which

the local government is not regulating and not approving under Part 26. It therefore seems that not having a DP areas designation is not “allowing development” in a riparian assessment area and is not contrary to the RAR.

It should also be noted that s.6 of the RAR states that, “*when exercising its powers* with respect to development, a local government must protect its riparian areas in accordance with this regulation” (emphasis added). This wording does not suggest any compulsion to exercise powers with respect to development; it merely addresses how powers must be exercised when they are exercised. We therefore conclude that the RAR does not require local governments to enact bylaws.⁶

Implementing QEP or DFO Conditions of Approval

Section 4 of the RAR permits a local government to allow development to proceed if a QEP certifies that there will be no HADD if the development is implemented as proposed, or alternatively certifies that there will be no HADD if the measures identified in the QEP report to protect the integrity of the SPEAs identified in the report are implemented by the developer. Section 7 of the RAR requires an assessment report to include “the measures necessary to protect the integrity of the streamside protection and enhancement area”. This gives rise to the issue of how such measures are going to be enforced and monitored for compliance.

The term “enforcement” appears only in two places in the RAR: s.2(b)(vi), which deals with the scope of intergovernmental cooperation agreements, the facilitation of which is one of the purposes of the RAR, and s.5(b) which requires local governments to “cooperate” with MWLAP and DFO in developing strategies for monitoring and enforcement to ensure that assessment reports have been properly implemented. The RAR does not place any specific enforcement or monitoring obligations on local governments and does not grant them any powers to enforce or monitor compliance with QEP recommendations; rather, s.6 of the Regulation merely requires a local government to “protect its riparian areas in accordance with this regulation” when exercising its powers with respect to development.

1. Discretionary Approvals

Implementation of QEP recommendations will be relatively straightforward in the case of truly discretionary local government decisions including the following:

- adoption of site-specific **OCP amendments**
- adoption of site-specific **zoning amendments**

⁶ It must be recalled that the *Fish Protection Act* itself requires local governments to include riparian area protection provisions in their zoning bylaws, or ensure that their Part 26 bylaws and permits “meet or beat” (after March 31, 2005) the RAR. Thus there is an argument that new bylaws may be required. The problem is, however, that the new directive with which such bylaws must comply, the RAR, sets out no standards for local bylaws; indeed, the RAR and s.12 of the FPA do not seem to be part of the same legislative scheme.

- any exemption from a **flood plain requirement** under s.910(5)⁷
- any **temporary commercial or industrial use permit**
- any **development variance permit**
- any **land use contract modification** under s.930

Local governments may comply with the requirement in s.6 of the RAR to protect riparian areas when exercising their powers with respect to development, by imposing *ad hoc* development approval conditions when granting truly discretionary approvals.

2. Non-Discretionary Approvals

Many development authorizations issued under Part 26 are issued in the context of regulatory bylaws that do not, and under the applicable legal principles cannot, retain in the local government a residual discretion to refuse the authorization or attach conditions to the authorization in relation to matters not contained within the bylaw. The example usually used is the building bylaw, though many Part 26 bylaws have a similar legal character. If a local government refuses to issue a permit or other authorization after the applicant has established eligibility to receive the approval under the terms of the applicable bylaw, the applicant can obtain from the B.C. Supreme Court an order of *mandamus* forcing the local government to grant the approval. Non-discretionary approvals issued under Part 26 include the following:

- any authorization issued under a s.907 **runoff control** bylaw
- any authorization issued under a s.908 **sign** bylaw
- any authorization issued under a s.909 **screening or landscaping** bylaw
- any authorization issued under a s.917 farm bylaw
- any authorization to cut trees pursuant to a s.923 **tree cutting** bylaw
- the approval of construction of subdivision and development **works and services**

In issuing authorizations under existing regulatory bylaws, local governments are simply unable to attach *ad hoc* conditions related to QEP assessments. An amendment to Part 26, to the *Fish Protection Act*, or to some other provincial legislation would be required to equip local governments with this power.

3. Partly Discretionary Approvals: Development Permits

⁷ These decisions are also subject to provincial guidelines established under the *Environmental Management Act* (see s.910(5), *Local Government Act*).

The most commonly used riparian area regulatory tool is the **development permit**, and the use of this tool to implement QEP recommendations presents special problems which can be illustrated with a couple of examples. Assume that the local government has imposed a development permit requirement to regulate the form and character of development under s.919.1(1)(f) of the *Local Government Act* in an area that happens to also be a “riparian assessment area” under the RAR. Under s.4, it cannot issue a development permit until there is a DFO authorization or a QEP report has been prepared and accepted by MWLAP. Assume that the QEP recommends development conditions that could be imposed under s.920(7) of the *Local Government Act* if the area had been designated under s.919(1)(a). It would appear to be impossible for the local government to impose those conditions in the development permit because they have nothing to do with the form and character of the development.

Even if the area had been designated under s.919.1(1)(a) and the local government was therefore clearly “exercising its powers with respect to development” in the area for the purpose of the protection of the natural environment, problems might arise in the implementation of particular QEP-recommended development conditions from s.920(3), which specifically requires that development permit conditions and requirements be imposed only in accordance with the applicable guidelines specified in the OCP or zoning bylaw. In many cases, the particular conditions recommended by a QEP will not have been anticipated in the local government’s guidelines. It is not a viable solution to this problem to add a general development permit guideline that permits the local government to specify any development permit condition recommended by a QEP, as this would likely be an improper delegation of the local government’s powers to establish guidelines.⁸

4. Monitoring

The monitoring development for compliance with QEP recommendations, or to ensure that it is carried out in accordance with a design that the QEP has certified will result in no HADD, is also omitted from the RAR except to the extent that it is contemplated as within the scope of the agreements discussed below. The Assessment Methods in the Schedule to the RAR also state that a monitoring component must be included in an assessment report, and “should identify actions to be taken to ensure all proposed activities are completed as described” and “should detail the proposed monitoring schedule”. It is not clear whether the drafter of the Schedule was assuming that the QEP or some other person would be doing the monitoring. If monitoring is not within the scope of work that the QEP has been retained to do, some QEPs may be reluctant to certify the projects will result in no HADD unless they are confident that some person other than their client will be monitoring the project.

5. Intergovernmental Cooperation Agreements

⁸ Section 920(11) of the *Local Government Act* expressly permits this type of approach to establishing DP conditions for DP areas designated under s.919.1(1)(b) (protection of development from hazardous conditions). The fact that it is not expressly permitted in relation to areas designated under s.919.1(1)(a) would be considered significant under the usual principles of statutory interpretation.

As noted above, one of the purposes of the RAR is to facilitate an intergovernmental cooperation agreement between MWLAP, DFO and the UBCM “including the ability for individual intergovernmental cooperation agreements with local governments” for, among other things, the implementation of the RAR, describing roles and responsibilities regarding use of authority and program mandates, and a compliance strategy, including enforcement and monitoring. It may have been the Province’s intention that enforcement and implementation matters would be dealt with in such agreements; however, no such agreements appear to be in prospect by the in force date of the RAR. In any event, it appears that additional local government powers will be required to implement and enforce the RAR approach to riparian area protection, and it is not possible for such additional power to be granted to local governments, either individually or as a group, through an intergovernmental agreement. At the least, a Regulation would be required.

Developments “In Stream” on March 31, 2005

Section 4 of the RAR prohibits a local government from “approving or allowing” development to proceed in riparian assessment areas until the conditions set out in that section have been met. In our opinion, the point at which this prohibition operates is the point at which the local government adopts a bylaw or resolves to issue a permit or other authorization. Because the RAR contains no special provisions dealing with in-stream development applications, such as s.943 of the *Local Government Act*, s.4 must be interpreted in accordance with the usual principle that legislation applies prospectively from the date it comes into force, and retrospectively with respect to substantive matters that are engaged by the legislation. This seems to us to require compliance with the RAR if the decision in question is made after March 31, 2005 notwithstanding that the development application may have been made prior to that date. Clearly, adding an additional approval step once a development project is in-stream will be perceived as unfair and will create friction at the local government applications counter. Complying with QEP recommendations may require developments to be redesigned, with the result that some completed local government approvals may have to be re-done, with additional expense to the applicant and further delay.

Where the approval in question is the adoption of a site-specific OCP or zoning bylaw amendment, the preparation of a QEP assessment and certification would give rise to a requirement for a further public hearing if the QEP report is going to be made available to the members of Council or the regional board, which would be necessary if the QEP recommendations are going to be made a part of the local government’s approval of the development.

In cases where the development approval takes the form of a development variance permit or temporary use permit, each of which is subject to a statutory notice requirement, altering the form of the permit to take into account the QEP’s recommendations may require that public and individual notifications be repeated so that persons notified may examine the altered form of the permit before the Council or board makes its decision.

Summary

In our view, the following matters would have to be dealt with by the Province before the RAR comes into effect, in order that a relatively smooth transition to the RAR regime can be made.

1. The Province should confirm in writing, at the request of individual local governments, whether the Province considers the local government to have established SPEAs in accordance with the SPR as of March 31, 2005, to give assurance to the local government and development applicants that QEP reports are not required in that jurisdiction.
2. The Province should amend the RAR to provide objective criteria for the establishment of SPEAs, similar in concept to those contained in the SPR, so that local governments that have complied with the SPR before March 31, 2005, will be able to amend the bylaws that establish these areas.
3. The Province should review the definition of “development” in the RAR to ensure that it actually exempts the activities that the Province is asserting that it exempts, and to clarify the effect of the regulation on subdivision and on agriculture, mining and forestry uses.
4. The Province should build provincial enforcement and monitoring provisions into the RAR or, if the intention is that local governments be responsible for enforcement and monitoring, amend either the RAR or Part 26 of the *Local Government Act* to provide both authority for such enforcement and monitoring by local governments, and a means to recover the cost from development applicants. An example of an enforcement power would be a power like that in s.910(11) for DP areas designated under s.919.1(1)(a), but referring instead to the recommendations of a QEP.
5. The Province should amend the RAR to exempt in-stream developments from the Regulation.

Sincerely,

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BB/pd