

February 28, 2005
BY

URGENT
COURIER

Gordon Macatee
Deputy Minister
Ministry of Water, Land and Air Protection
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Dear Mr. Macatee:

RE: RIPARIAN AREAS REGULATION: MEETING WITH MINISTER

UBCM will meet with the Minister, for the third time since the July decision to discuss the implementation of the riparian areas regulation, on March 31, 2005 to discuss the status of the implementation and readiness of local government.

We will be asking the Minister to consider an extension to the effective date on application of those local governments that indicate that they are not yet prepared to deal with the new regulatory process.

This request is based on considerable examination of the issue that we have undertaken with respect to:

- the readiness of local governments;
- status of the ministry's implementation activities; and
- an independent legal opinion on the consequences.

In summary our analysis shows:

- most local governments don't feel that they are ready to implement the Riparian Areas Regulation on March 31, 2005;
- even if the ministry meets its (reduced) implementation plan targets on March 31, 2005 the materials will not be in the hands of local government to actually use;
- legal concerns remain outstanding (above and beyond those to be addressed in the liability review).

The clear risk the ministry must weigh is what will happen to development activity in British Columbia: Will it be slowed down or stymied because of the uncertainty?; Is this a risk that the government wish to take at this time?

Or is a more prudent route to allow those local governments that wish to proceed under the new Riparian Areas Regulation to do so, and allow others to delay the implementation until they see the results of the implementation activities and modify their current process.

The consequences for both local government and the development industry are clear in the analysis that follows. A summary of the findings are outlined below:

- local governments lack the information needed to address developer and public concerns;
- local governments are not ready to implement the new regulation do to a large number of uncertainties;
- local governments need to develop bylaws and educate staff and the public about the new system;
- uncertainties in implementing the new regulation may create major costs for the development industry;
- the new regulation could potentially capture development agriculture, mining and forestry uses;
- lack of transition measures will create delays in both existing development proposals and new development proposals .

Given these introductory comments, I would like to turn to our three part analysis.

1. READINESS OF LOCAL GOVERNMENT

We have conducted a survey of affected local governments. While our staff have been cooperative, their reports on the state of local government preparedness have been seen by some officials as obstructionist. A decision was made to survey the affected members directly. A copy of the survey and the preliminary results are appended (Appendix 1 and 2).

The key results are:

- 89% indicated that they would require further information in order to implement the Riparian Areas Regulation;
- 75% stated that they would not be ready to implement the Riparian Areas Regulation on March 31, 2005;
- 90% stated that they would like an extension – 30% requested 1 year, 30% requested 9 months; and
- 54% stated that they currently are not using a SPEA process.

What this tells us is that the majority of local governments do not feel that they have the information required to move forward on this issue and they will not be ready to implement the new regulation on March 31, 2005. Overall, local

government would need an extension of 9 to 12 months in order to be ready to implement the new regulation and that the majority of local governments would not be able to use the existing process.

More importantly we wish to draw your attention to the concerns raised by local government and why they see not being ready to go on March 31, 2005. These comments include:

Information Needs

- *local governments require more information, especially on the implementation tools, and an opportunity to review the guidebook and the future monitoring and enforcement tools that will be provided.*
- *series of outstanding questions that need to be addressed prior to the municipality being in a position to ascertain whether to proceed with the RAR or implement another streamside protection approach.*
- *the 31st is an unrealistic date even if additional information is provided – there has not been complete information provided to date and too many uncertainties remain.*

Readiness

- *we have limited staff resources to evaluate RAR information;*
- *we do not have the budget or expertise to undertake necessary mapping and site identification.*
- *there is insufficient information on the key aspects of the RAR at this time and we cannot advance until the information is provided.*
- *the city has received no response to questions previously submitted and it is unclear how the regulations will be integrated into existing city processes;*
- *not ready to implement under the RAR framework due to a number of uncertainties and we need additional information to address council, developer and public concerns.*

Extension Needs

- *December 31, 2005 would be reasonable if the Province delivers what was promised – if they don't additional time would be required.*
- *bylaw amendments in regional districts often require more extensive preparation, consultation and education to achieve success than one might normally encounter in a more geographically confined municipality.*
- *following the delivery of all the provincial tools, we will need 6 months for bylaw preparation and public consultation.*
- *we will require 9 to 12 months to be able to integrate the RAR, educate staff and developers, and create bylaws.*

- *small cities do not have the manpower and resources of the larger cities and districts to implement the required tools (e.g. bylaws).*

2. READINESS OF IMPLEMENTATION MATERIALS

Attached is our assessment of readiness in terms of the Ministry's implementation plan (Appendix 3). It appears that even if the scaled back and reduced level of activities may be completed by March 31, 2005, the results of these activities will not be distributed to local government in time for them to review them and incorporate this information into their existing development approval process.

Again you are presenting a threat to development approvals that we don't feel the ministry has adequately considered.

3. LEGAL ADVICE

We obtained independent legal advice to determine what the possible consequences of implementing the Riparian Areas Regulation might be for local government before they are prepared and ready.

That opinion is attached (Appendix 4). We undertook this initiative because we are concerned about the negative impacts on development activity.

It is a lengthy opinion and some of the conclusions are:

General

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.

Determining Compliance with SPR

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

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.

"Development"

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 website 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 "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.

Non-Discretionary Approvals

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.

There are also problems in exercising partly discretionary actions.

Monitoring

It is not clear whether the drafter of the Schedule was assuming that the QEP or some other person or some other person would be doing the monitoring.

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.

There are further complications depending on the type of approval.

The opinion concludes that:

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.*

CONCLUSION

Confronted with this body of analysis and opinion we cannot understand why the government would continue on its course and risk the consequences to the development process and the economy.

The upcoming meeting is our last scheduled opportunity to deal with this matter before the implementation date. Our efforts in this is not to defend any local government interest or authority, but the broader interest of effective, timely development approvals – an intent both governments share.

For these reasons we will be asking the Minister to recommend to Cabinet an extension to the effective date on application of those local governments that indicate that they are not yet prepared to deal with the new regulatory process and to deal with the other issues identified by our legal advisors.

Yours truly,

Richard Taylor
Executive Director

cc. Gerry Armstrong, Deputy Minister, Ministry of Community, Aboriginal and Women's Services