
TO: CITY MANAGER **DATE:** 2006 March 22

FROM: DIRECTOR ENGINEERING **FILE:** PL 31000-01
DIRECTOR PLANNING AND BUILDING

SUBJECT: UPDATE ON RIPARIAN AREAS REGULATION

PURPOSE: To provide an update on the Riparian Area Regulation and City compliance with the regulation.

RECOMMENDATIONS:

1. **THAT** Council request the UBCM not to sign off on the draft “Protocol Agreement Respecting the Implementation of BC’s Riparian Area Regulation” for the reasons outlined in Section 5 of this report.
2. **THAT** a copy of this report be forwarded to UBCM, the Provincial Minister of Environment, the Federal Department of Fisheries and Oceans, and other BC municipalities affected by the Riparian Area Regulation.

REPORT**1.0 INTRODUCTION**

The purpose of this report is to update Council on the status of the Provincial Riparian Areas Regulation (RAR) and provide an overview of recent discussions between representatives from the Provincial Ministry of Environment (MOE), the Federal Department of Fisheries and Oceans (DFO), the Union of British Columbia Municipalities (UBCM) and various local governments concerning implementation of the RAR. This report also reviews the draft tripartite “Protocol Agreement Respecting the Implementation of British Columbia’s Riparian Areas Regulation” being considered by UBCM, MOE and DFO.

2.0 BACKGROUND

On July 27, 2004, the Province enacted the Riparian Area Regulation (RAR) to come into effect March 31, 2005, replacing the previously adopted Streamside Protection Regulation. The RAR and its parent legislation, the Fish Protection Act allowed municipalities to use an alternative approach to the RAR, so long as it was enacted prior to March 31, 2005, and the approach

provided “a level of protection that, in the opinion of the local government, is comparable to or exceeds that established by the directive [i.e. the RAR]”.

As discussed in several past Council reports and in UBCM resolutions, there have been several significant local government concerns with the RAR related to liability, resourcing, and implementation. As these issues had not been addressed, in February 2005, Council approved continuance of the existing proven practices related to streamside protection and directed staff to evaluate both the RAR and the City’s existing process once all the issues relating to RAR are addressed. This approach met the requirements of the Fish Protection Act and RAR, and the Provincial Ministry of Environment (MOE), the Federal Department of Fisheries and Oceans (DFO), and the Union of BC Municipalities (UBCM) were advised of the same.

In March 2005, the Province recognized that due to an overwhelming number of outstanding issues, municipalities were not sufficiently ready to implement the RAR, so they extended the timing for implementation from March 31, 2005 to March 31 2006. Over the past year, a number of new documents have been released, attempting to address issues of concern. In January 2006, MOE held a half-day workshop with local government staff. The status of all RAR issues is described in Section 3 below.

Presently, MOE, DFO, and UBCM are preparing to sign a tripartite protocol agreement for implementation of the RAR. UBCM is seeking feedback from member municipalities on the draft agreement by March 28th 2006. MOE has surveyed some municipalities to confirm if they are in compliance with the RAR as of April 1, 2006.

3.0 STATUS OF RAR IMPLEMENTATION TOOLS

At the 2004 UBCM Conference, UBCM membership passed a resolution that UBCM not endorse a tripartite protocol agreement for implementing a Riparian Areas Regulation unless the following measures have been satisfied:

- A comprehensive legal and logistical review of the Regulation by a third party to identify, assess and address the implications of the Regulation to local governments;
- Full liability protection for local governments;
- Assurance of open involvement of local governments in the development of the compliance, enforcement and implementation strategies; and
- Assurance of open involvement of local governments in development of the guidebook for implementation of the Regulation;

Over the past year, MOE, DFO and UBCM have been working to address these and other issues. Nonetheless, some issues remain unresolved and several key documents are still in draft or unreleased formats. Remaining implementation issues include the following:

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- **Liability issues and amendments to the Regulation.** On October 4, 2005 the legal firm Staples, McDannold and Stewart released a legal review of the RAR entitled *Riparian Area Regulation Assessment of Risk of Liability and Other Related Issues*. The legal firm had been retained by the Province. The legal opinion raised a number of issues relating to local government's potential liability and also identified several "grey areas" concerning the interpretation of the regulation and its application to certain types of land uses and development. In January 10, 2006 MOE issued a response to the opinion noting that there will be several regulatory amendments that they will be putting forward for Cabinet consideration. This has not yet occurred. In relation to liability, the Ministry's response was primarily to amend the RAR to remove the necessity for local governments to review assessment reports prepared by Qualified Environmental Professionals (QEP). However, if a local government does review the report, for due diligence purposes, this may raise liability issues to the local government. UBCM have not responded to the Staples, McDonnold and Stewart opinion or the MOE response.
- **Open documentation and DFO sign-off of the science and detailed assessment methods behind the Riparian Area Regulation.** Municipalities have been awaiting the availability of the science used in the development of the detailed RAR assessment methodology, and also an update on the changes made to the assessment methodology. This information is still in discussion between MOE and DFO and has not been made available to UBCM and its member municipalities. At the time of preparing this report, it is staffs' understanding that DFO have not yet fully reviewed the science nor signed off on the assessment methods, and are unlikely to complete this task by March 31, 2006 (the RAR implementation date). Until DFO signs-off on the assessment methods, the RAR does not address Fisheries Act issues, leaving a regulatory void and confusion. To date, municipalities have not been provided with the science used in development of the detailed RAR assessment methodology. In addition, municipalities are unable to assess the implications of the revised assessment methods, because the Province will not openly provide them to municipalities until after Cabinet review.
- **Provision of adequate provincial and federal resources for implementation, enforcement and monitoring for RAR assessments.** The working draft "Protocol of Interaction Between Provincial, Federal and Local Governments for Responding to Non-Compliance" establishes that local governments would play a role in monitoring for compliance with the RAR and would, in some cases, be expected to take enforcement actions such as issuing stop work orders or suspending permits. There are no details about the costs and resources that would be necessary to undertake these functions.

Notwithstanding the incomplete status of some of the implementation tools, staff have no indication that the Province is prepared to consider a further extension order. At this time it is understood that the all municipalities affected by RAR will be required to comply with the regulation as of April 1, 2006.

In the February 14, 2005 Council Report, staff committed to provide a full evaluation on the RAR compared with existing City processes in Spring 2006. As discussed above, there is not

sufficient resolution of issues to allow this evaluation to occur. Staff propose undertaking this report-back, once all issues have been resolved and there has been sufficient time to evaluate the successes and challenges of implementing the RAR. Until this time, staff will continue to implement the City's existing, proven approach to streamside protection.

4.0 BURNABY'S READINESS TO COMPLY WITH RAR

In February 2005 the City adopted a strategy to amend the City zoning bylaw to establish a means of identifying and protecting streamside protection and enhancement areas in accordance with the former SPR and we are therefore deemed to have met the requirements of the Fish Protection Act Section 12.4b and RAR Section 8(2).

The zoning bylaw requires that any new development along a stream be reviewed in the context of guidelines for streamside protection and enhancement, and may also consider physical conditions, existing parcel sizes, and existing and proposed roads, trails, works and services. These reviews are undertaken with input from and sign-off by DFO as part of our long-established Environmental Review Committee (ERC) process. Burnaby has been using this process since 1998, and DFO have noted that they support the process, consider it to be an effective means of protecting fish habitat, and intend to continue to resource the process in the future. Burnaby informed the Province of this approach in its forwarded Council Report of February 14, 2005.

In February 2006, the Province raised a new issue related to the ten municipalities (including Burnaby) that have chosen to pursue an alternative process from RAR for streamside protection¹. In a phone call and email to City staff, MOE has challenged the ability of ERC's to make certain determinations regarding development proposals in riparian areas because the RAR requires, among other things, that a QEP prepare and submit an assessment report for the site before a local government may allow the development to proceed.

On March 10, 2006, the ten municipalities affected by this Provincial opinion met with Provincial, Federal and UBCM staff to seek a formal resolution to this issue. At the meeting, DFO offered support to the ten affected municipalities and proposed an alternative approach that would allow municipalities to maintain the ERC process, without devolving to an RAR approach. DFO and UBCM offered to take this approach forward to the RAR Coordinating Committee on March 22, 2006 to request that the Province formally acknowledge the method as an appropriate approach for meeting regulatory requirements. At that meeting the Province took the information under advisement, but made no commitments on how it would be addressed. Staff request that UBCM and DFO continue to seek a resolution as part of the Tripartite Protocol Agreement (see Section 5).

¹ Local governments that rely on ERC processes include City of Abbotsford, City of Burnaby, Corporation of Delta, District of Maple Ridge, City of North Vancouver, District of North Vancouver, City of Port Coquitlam, City of Port Moody, District of Squamish, and District of West Vancouver.

In the meantime, staff continue to assert the City's original position that the process, including ERC is compliant with the RAR by nature of our having adopted a bylaw and implementation protocols under the former regulation prior to March 31, 2005. This process offers a level of protection that, in the opinion of the local government, is comparable to or exceeds that established by the RAR.

5.0 DRAFT PROTOCOL AGREEMENT

MOE, DFO and UBCM are the intended signatories of the agreement. The agreement was released on March 7, 2006 and local governments are asked to provide comments to UBCM by March 28, 2006. UBCM staff has advised that the document will be brought forward to the UBCM president in early April for signature assuming no major concerns are raised by member municipalities. At time of writing, DFO has not yet signed the agreement.

Staff have reviewed the document and suggest that it is premature to sign because of the following reasons:

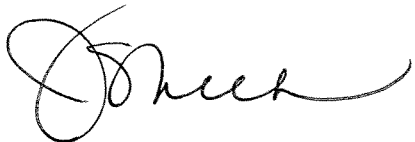
- Councils of affected municipalities have not been advised by the UBCM Executive that all of the items contained within the member's resolution of September 2004 concerning the RAR have been satisfactorily addressed;
- The legal review of the RAR identified numerous issues of concern to local government and the Province's response to the legal review did not provide sufficient clarity or resolution to these issues and, further, the UBCM has not provided a response to either document;
- New issues have arisen concerning the Province's opinion regarding local governments that rely on Environmental Review Committees may not be in compliance with the RAR even in cases where bylaws and inter-governmental agreements were established prior to the RAR effective date;
- The role of local government in relation to monitoring and enforcement requires further clarification including potential implications related to resources needed to undertake this new function.; and
- Documentation on the science behind the RAR, distribution of the revised assessment methods, provision of adequate training for local government staff, and provision of adequate resources for implementation, enforcement and monitoring.

6.0 CONCLUSION

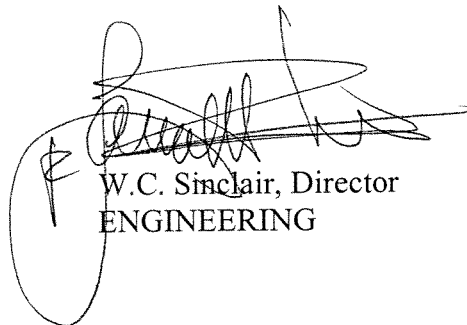
Municipalities are expected to be in compliance with the RAR by April 1, 2006. It is the opinion of staff that through our existing processes confirmed in February 2005, we are in compliance with the regulation at this time. Notwithstanding, this report describes several implementation issues that should be resolved before the regulation is fully endorsed by UBCM on behalf of its member municipalities including resolution of outstanding liability concern and a clear

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commitment to the City's existing ERC process. In the meantime, staff will continue with our existing, proven approach to streamside protection as outlined in the February 2005 report. Staff will continue to monitor the RAR and its implementation. Once all RAR issues have been resolved and there has been sufficient time to evaluate the successes and challenges of implementing the RAR, staff will report back to Council.



J.S. Belhouse, Director
PLANNING AND BUILDING



W.C. Sinclair, Director
ENGINEERING

RW:sa/tn

cc: City Solicitor
Director Parks, Recreation & Cultural Services

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