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West Coast Environmental Law
DEREGULATION BACKGROUNDER

RIPARIAN AREAS REGULATION
(ENACTED UNDER THE *FISH PROTECTION ACT*)

On March 31, 2005 the province's new *Riparian Areas Regulation* (the "RAR") will come into force. The RAR, designed to protect fish and fish habitat from inappropriate development, significantly weakens an earlier regulation, the *Streamside Protection Regulation* ("SPR").

While, the SPR set minimum standards for how close a new building could be to a fish-bearing stream, the RAR gives a developer a choice in standards. A professional hired by the developer must determine appropriate set-backs, on the basis of either the same formula used in the SPR, or a more complicated calculation which, for many streams, will automatically result in a reduced set-back requirement. Even more troubling is the lack of clarity in the regulation as to whether developers are legally required to implement set-backs.

Despite the shortcomings of the RAR, local governments still have the power to pass bylaws that provide greater protection than the measures set out in the RAR. Local governments should be encouraged to enact more stringent riparian protection requirements.

The RAR and Streamside Protection Assessments

Both the RAR and the SPR speak about Streamside Protection and Enhancement Areas, or SPEAs. A SPEA is a required set-back from fish-bearing streams (as well as lakes, wetlands, etc), or from water-bodies that provide support for fish-bearing streams.

The SPR set out rules by which a SPEA could be calculated, based on the existing or potential vegetation along a stream.[1] The RAR, instead of setting out a single formula to identify SPEAs, states that before a local government can approve a development, a "qualified environmental professional" must prepare a report identifying the appropriate SPEA. The report is prepared in accordance with an "assessment methodology", which will be discussed in more detail below.

Unfortunately, once the report is finished – identifying the SPEA and any measures necessary to protect it – the legal protection actually available for a SPEA under the RAR is unclear. Unlike the old SPR, which required local governments to establish SPEAs by regulation,[2] the RAR only requires local governments to establish rules that an assessment report, identifying the SPEAs, be *prepared* before any development proceeds.[3] Local governments may create legal requirements for developers to implement SPEAs, but are not explicitly required to do so.[4]

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1 For example, where a significant amount of actual vegetation, or the potential for vegetation, existed along a fish-bearing stream, any development was supposed to be set at least 30 m back from the edge of the stream.

2 SPR, s. 5.

3 RAR, s. 4.

4 When WLAP staff were asked about this, they indicated that section 5(a) of the RAR created a requirement that SPEAs be implemented. Section 5(a) requires local governments to "cooperate [with WLAP and Fisheries and

Moreover, once the Qualified Professional's report is before Council, Council may allow the development to proceed without any SPEA, as long as the professional "provides their professional opinion that if the development is implemented as proposed there will be no harmful alteration, disruption or destruction of … [fish habitat]." Alternatively, the professional may choose to certify that damage to fish habitat will not occur if the SPEA is protected and/or other measures are taken.

According to staff at the Ministry of Water, Land and Air Protection ("WLAP"), the intention behind allowing a professional to certify that a development will not harm fish habitat even without implementation of the SPEA is to accommodate types of low impact or positive development in the SPEA. The definition of development under the RAR is not limited to building roads or buildings, but also includes removing non-native vegetation, fish habitat enhancement activities or other low impact activities. However, there is nothing in the RAR preventing a professional from certifying that more disruptive activities do not require a SPEA.[5]

Whether or not the professional feels that a SPEA is necessary for a particular development, the professional is required to certify that the development will not negatively harm fish habitat. Unfortunately, neither the assessment methodology (dealing with the determination of set-backs) nor the RAR provide a professional with direction on how to make this key determination.[6]

In our opinion, the language of the RAR does not clearly require local governments to give legal effect to SPEAs, beyond having the results of an assessment before it when authorizing a development. We hope that the provincial government will take immediate steps to amend this regulation, restoring the legal effect of SPEAs.

Oceans Canada] in developing strategies" to have a professional certify that the measures in assessment reports have been implemented. With respect, this section does not require local governments to implement bylaws or other measures to put a legal obligation on the developer to implement the SPEA. Absent such a legal requirement, a developer cannot be held responsible for not implementing a SPEA. A promised government guidebook will apparently suggest model bylaws, which may encourage local governments to develop rules that do create a legally enforceable requirement to protect SPEAs, but the RAR itself contains no such requirement. Moreover, section 5(a) does not even require that a reporting strategy be in place, but only that local government cooperate to develop some form of strategy at some point in the future.

[5] WLAP staff indicate that the government is preparing a "guidebook" which will give direction to professionals on what types of low-impact development will not require implementation of SPEAs. Such a policy document, while useful, is not legally enforceable in itself. A failure to comply with a guidebook might in some circumstances be evidence of a breach of a professional's ethical duties and/or might prevent a developer or professional from claiming that they exercised due diligence if they are subsequently charged with a violation of the *Fisheries Act*. However, in many circumstances it will be difficult or impossible to hold a professional responsible if they decided to depart from the recommendations of a "guidebook" which is merely a government policy document.

[6] WLAP Staff have confirmed their assumption that compliance with the assessment methodology (and presumably the not-yet-released guidebook) will automatically mean that the development will not harm fish habitat. This is problematic. First, the RAR explicitly contemplates that approval from Fisheries and Oceans Canada will be required in cases where a development will cause harm notwithstanding that a SPEA has been identified. It is unclear how and when this would occur if Mr. Witt's assumption is correct. Second, as neither the RAR or methodology state that SPEAs will automatically protect fish habitat, the unstated assumption leads to confusion about the role of the professional. Third, since the assessment methodology, discussed below, contains maximum set-backs as well as minimums, a professional may be required to prescribe a SPEA below what he or she feels is appropriate to protect fish habitat, particularly in those cases where the methodology prescribes a low maximum set-back (ie. 5 metres in many cases). Fourth, the assessment methodology, while informed by considerable scientific knowledge, cannot anticipate every situation. There may be circumstances (ie. where the consequences of harm to fish habitat are particularly grave, where the watercourse has a history of moving over time, etc.) which a professional cannot in good conscience ignore.

The Assessment Methodology and the SPEA

A professional preparing an assessment report, and determining a SPEA, must use either:

(a) a "simple assessment", applying rules based on the requirements of the SPR; or

(b) a "detailed assessment", undertaking a more complicated calculation based on a new assessment methodology included in the schedule to the regulation.

If everyone used the simple assessment, and implemented the sets backs, then the protection for streams would be basically the same as under the SPR. The detailed assessment gives developers wriggle room under the RAR.

We are not scientists and will not review the technical aspects of the detailed assessment methodology. Broadly, however, the assessment raises the following concerns:

- *What constitutes harm to fish unclear.* As noted, it provides no direction to the professional for what constitutes harm to fish habitat, even though he or she is required to express an opinion on this key issue.[7]
- *Less Stringent Standards.* For many stream types, the detailed assessment methodology will require the professional to set SPEAs that are well below the protection contained in the SPR.[8] Although WLAP believes that fish habitat will still receive adequate protection, this represent a significant weakening of environmental standards.
- *One Way Street to Lower Standards.* Conceptually, a "detailed" assessment makes sense if it allows venvironmentally sensitive areas to receive greater protection. However, the "detailed" assessment procedure can only result in the same or lower level of protection as the "simple" default standards. Moreover, as noted, in many cases the detailed assessment requires the reduction of set-backs, even in cases where the professional may believe that other factors, not included in the assessment, suggest that the ecological, economic or cultural significance of the fish habitat is great and/or vulnerable.
- *Key Issues Ignored.* The assessment methodology acknowledges that it does not provide for the assessment of several features related to fish habitat, including areas for channel migration, seasonally wetted contiguous areas and a source of stream substrates (which are said to be "partly addressed" through the assessment of other indicators) and the management of permeable surfaces. The SPR took a more precautionary approach to these indicators, by ensuring set-backs are adequate to address most of these indicators most of the time. The RAR assumes that they will be addressed indirectly.[9]

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[7] See footnote 6, above.

[8] Although the expertise of the professional is useful in applying the technical aspects of the rules, the RAR does not rely on professional discretion *per se*. While we approve of setting minimum standards, we note that it is ironic that a regulation which purports to rely on professionals in many cases imposes a *maximum* set-back that the professional can recommend, and not merely a minimum.

[9] One of the most significant of these features, run-off from impermeable surfaces, is to be addressed through "best management practices" that modify the design of the development, rather than through set-back requirements: Assessment Methodology, paras. 2.3.1 and 2.3.2.6. The more stringent SPR set-backs would have most often been sufficient to deal with run-off.

Privatizing Public Decisions

The RAR assumes that qualified environmental professionals preparing an assessment report will be retained by the developer, and will be making judgments on issues of public importance. Inevitably, these professionals will find themselves under pressure from their employers to approve inadequate SPEAs. While guidelines on the completion of detailed assessments limit the potential for abuse, there is always judgment involved in assessments, and environmental professionals have an incentive to exercise their judgment in a way that favour their client's interests over the interests of fish protection. In addition, developers have an incentive to hire professionals with a history of prescribing minimal SPEAs.

At the same time, it is not clear how professionals will be held responsible should they certify a development that ultimately causes harm to fish habitat. Unlike other areas where private sector professionals are used to certify matters of public interest (e.g. auditing of financial reports, architect's certification of buildings' conformity with building codes) environmental professionals are less likely to be sued and held accountable in court for poor judgment.

It should be noted that there is nothing in the RAR requiring local government to allow assessment reports to be prepared by environmental professionals hired by the developer. While this is the presumption behind the RAR, a local government could choose to have its staff prepare assessment reports, and could even require the developer to pay for the expense of having publicly employed experts prepare such a report.

The RAR and the *Fish Protection Act*

The RAR is a regulation under section 12 of the *Fish Protection Act*, which allows the province to issue policy directives setting out measures to be taken for the protection of riparian areas in the province. The Act requires local governments to amend their zoning bylaws to either incorporate the provincial directives or to *provide an equivalent or greater level of protection for riparian areas*.

While the RAR is significantly weaker than the SPR, a local government may enact more stringent protection for riparian habitat.[10] For example, local government bylaws could adopt the standards of the SPR (or even more stringent standards) over the "detailed assessment" methodology, or could require assessment reports to be prepared by the local government's staff. We encourage members of the public to push for stringent streamside protection regulations possible and local governments to enact such bylaws.

[10] There are two sections of the RAR, ss. 6 and 8, which at first glance could be read as restricting the ability of local governments to adopt more stringent standards. We do not believe that this is the legal effect of these sections and Mr. Witt has confirmed that it is not WLAPs interpretation of these sections. To the extent that it is, those provisions would be beyond the authority of the provincial government under the *Fish Protection Act*. We interpret sections 6 and 8, respectively, to confirm the general obligation of local governments to meet or beat the measures set out in the RAR and to clarify that agreements with local governments signed under the SPR that allowed reduced SPEA zones will cease to have legal effect if the local government amends its SPEAs.