

STRIKING A BALANCE:

THE CHALLENGES OF USING A PROFESSIONAL
RELIANCE MODEL IN ENVIRONMENTAL PROTECTION
– BRITISH COLUMBIA'S *RIPARIAN AREAS REGULATION*



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mbudsperson

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One of the important and recurring roles of government in modern society is to find an appropriate balance between two sometimes competing public interests such as development and environmental protection. In Canada, finding that balance can be particularly challenging when many levels of government — federal, provincial and local — have a role to play in protecting the same environment. As well, in recent years achieving this balance has become more complex. Many governments have moved towards a less prescriptive model of environmental protection that relies on proponents of a development hiring or having their own professionals conduct assessments of the environmental effects of certain activities. This change is based on the expectation that such professionals will apply the correct methodology, produce consistent results and provide the best advice available for protecting the environment. The role of public servants in this professional reliance model is to monitor compliance by these professionals with statutory or regulatory requirements.

Those challenges and complexities are reflected in the subject matter of this report which focuses on the *Riparian Areas Regulation (RAR)*. The *RAR* is part of the legislative and regulatory framework which protects the natural environment in British Columbia. The *RAR* is provincial legislation that was enacted in 2005 and which provides protection to areas surrounding streams, lakes and inland waters in the most populated areas of our province from development that will damage the habitat of the fish in those waters.

While fish are a federal responsibility, inland waterways are a provincial responsibility, and development is often the responsibility of local governments. This interconnection was recognized in the formation of a *RAR* Steering Committee which has members representing the federal government, the provincial government and local governments. The story of the *RAR* is an example of what can occur when there is shared federal, provincial and local government responsibility for environmental protection.

The *RAR* also highlights the complexities of administering a program that relies on professionals hired by proponents of a development being monitored by ministry staff and having deficiencies dealt with by their own professional associations. Even with good intentions and a dedicated, but small ministry staff, over several years the promise of a program can remain unfulfilled and gaps in information, training, oversight and reporting can develop.

The Ministry of Forests, Lands and Natural Resource Operations has accepted 24 of the 25 recommendations made to it to ensure this environmental protection program functions in an administratively fair manner. In the case of the one recommendation it did not accept, Recommendation 10, which was to have all submitted reports reviewed by ministry staff, the ministry has made it clear that in its view this is not necessary in a professional reliance model. The ministry has, however, agreed to review all reports for a period of at least two years before looking at moving to a sample audit program.

I hope that this investigation into the operation of the *Riparian Areas Regulation* highlights a number of useful lessons that may assist any other environmental protection programs in British Columbia facing similar challenges.



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This investigation was initiated to examine how the provincial government has administered the *Riparian Areas Regulation (RAR)* since it was enacted in 2005.¹ This report illustrates how a gap between commitment and action can lead to administrative unfairness.

Riparian areas include the trees and other vegetation that line the banks of streams. These areas are essential to maintaining the health of streams, and, in turn, the fish that live in them, such as salmon. The *RAR*, enacted under the *Fish Protection Act*, ensures that in the 15 regional districts where it applies, riparian areas are considered and protected in the development process.

Before a landowner or proponent can begin a development project within a riparian assessment area, they must hire a qualified environmental professional (QEP) to assess the site and determine the size of the streamside protection and enhancement area (SPEA). The SPEA is the area bordering the stream within which development is prohibited. The QEP must then provide the ministry with a written report containing an opinion that the development will not harm fish or their habitat. The ministry, in turn, notifies the local government and Fisheries and Oceans Canada (DFO) that it has received the report. The *RAR* prohibits local government from approving or allowing development until notification has been received from the ministry.

The *RAR* uses a “professional reliance” model to meet its objectives. Under this model, the ministry relies on the judgment and expertise of professionals to ensure that riparian areas are adequate to protect fish habitat. The underlying philosophy is that with QEPs doing the work on the ground, government resources focus on oversight activities – monitoring, reporting and enforcement. The *RAR* is one of many environmental protection and resource management programs in British Columbia that use the professional reliance model. Our investigation highlights the challenges of implementing this model in the *RAR* context. We found that environmental protection programs such as the *RAR* must strike an appropriate balance between professional reliance and effective governmental oversight to work effectively.

Investigative Process

The public agency involved in this investigation is the Ministry of Forests, Lands and Natural Resource Operations, which took over responsibility for administering the *RAR* from the Ministry of Environment in 2010.

Our investigation included a review of provincial and federal legislation and regulations, as well as meetings with staff at the ministries. We obtained and reviewed extensive information provided by both ministries involved in the investigation. We also met with and obtained input from the public, local governments, professional associations, environmental organizations and other interested stakeholders.

¹ Throughout this report, unless otherwise specified, the term “ministry” refers to the provincial government ministry having responsibility for the administration of the *RAR*. Until October 2010, this was the Ministry of Environment. From October 2010 to March 2011, it was the Ministry of Natural Resource Operations, and since March 2011, it has been the Ministry of Forests, Lands and Natural Resource Operations.



Findings and Recommendations

This report includes 21 findings and 25 recommendations directed at the Ministry of Forests, Lands and Natural Resource Operations. This summary groups our conclusions and recommendations into four broad categories: Regulatory Authority, Oversight of the Professional Reliance Model, Oversight of Reports and Development, and Public Information, Access and Complaints. Those who are interested in the information leading to these conclusions and recommendations are invited to read the relevant sections of the full report which provide a more complete understanding of the context in which the recommendations have been made.

Regulatory Authority

In the course of our investigation, it became clear that in order to ensure that the ministry is able to effectively carry out its oversight role, regulatory change to the *RAR* was necessary.

Local Government Compliance

The *RAR* can only be administered effectively if the Ministry of Forests, Lands and Natural Resource Operations has the ability to ensure that local governments are effectively protecting riparian areas. The ministry has indicated that it is committed to supporting local governments in implementing the *RAR*. Although the ministry has also taken steps to ensure local government compliance, some local governments have not yet fully implemented the *RAR*.

Currently, the ministry cannot ensure local governments implement the *RAR*, or that local governments implement the *RAR* in a way that allows the ministry to conduct compliance monitoring.

- I recommended that the Ministry of Forests, Lands and Natural Resource Operations review, by October 1, 2014, local government implementation of and compliance with the *Riparian Areas Regulation* and report publicly on the results of that review. **(R1)**
- I also recommended that the Ministry of Forests, Lands and Natural Resource Operations work with local governments to bring them into compliance with the *Riparian Areas Regulation (RAR)*. If the ministry is not able to achieve full compliance of local governments with the *RAR*, the ministry should, by October 1, 2015, develop a mechanism to allow the ministry to require local government compliance with the *RAR*. **(R2)**

The Ministry of Forests, Lands and Natural Resource Operations has accepted these recommendations.

Local Government Authority

Before 2011, the ministry and DFO allowed local governments to make minor variations to the streamside protection and enhancement areas (SPEAs) defined in an assessment report prepared by qualified environmental professionals (QEPs).² The British Columbia Court of Appeal found in its 2011 decision in *Yanke v. Salmon Arm (City)* that there was no legal foundation in the *RAR* for local governments to vary SPEAs established by QEPs.³

² Assessment reports are discussed further in the Monitoring QEP Compliance section of this report.

³ *Yanke v. Salmon Arm (City)*, 2011 BCCA 309.

The ministry has not updated the *Riparian Areas Regulation Implementation Guidebook* to accurately reflect the scope of local government power to vary streamside protection and enhancement areas following the Court of Appeal's decision in *Yanke v. Salmon Arm (City)*.

- I recommended that the Ministry of Forests, Lands and Natural Resource Operations clarify the scope of the authority of local governments to vary streamside protection and enhancement areas in accordance with the *Riparian Areas Regulation* and, once it has done so, update the *Riparian Areas Regulation Implementation Guidebook*. **(R3)**

The Ministry of Forests, Lands and Natural Resource Operations has accepted this recommendation.

Authority to Review Reports

The Ministry of Forests, Lands and Natural Resource Operations, with a staff that includes biologists and other resource professionals, is in the best position to review reports and determine whether a QEP has acted within his or her area of expertise and has followed the assessment methods. However, in its 2011 decision in *Yanke v. Salmon Arm (City)*, the British Columbia Court of Appeal found that, contrary to previous practice, the ministry does not have discretion to withhold or delay notification to local government that it has received a report from a QEP concerning a particular development.⁴ This decision raises serious questions about what the ministry can do if it determines that a report is non-compliant with the *RAR*.

The ministry itself identified the problem arising from the *Yanke* decision, the potential solution, and the negative consequences of doing nothing at all. However, the ministry has not taken reasonable steps to amend the *RAR* to allow it to postpone notification to local governments until its reviews of assessment reports are complete, or to require QEPs to amend their reports to ensure compliance with *RAR* assessment methods.

- I recommended that the Ministry of Forests, Lands and Natural Resource Operations take steps, on or before October 1, 2014, to have the *Riparian Areas Regulation (RAR)* amended to allow the ministry to postpone notification to local governments until its reviews of assessment reports are complete and any required amendments to reports to ensure compliance with the *RAR* assessment methods have been made. **(R12)**

The Ministry of Forests, Lands and Natural Resource Operations has accepted this recommendation.

Oversight of the Professional Reliance Model

The use of professionals to prepare reports is the distinguishing feature of a professional reliance model such as the *RAR*. Under the *RAR*, a qualified environmental professional (QEP) must prepare an assessment report to determine the size of and prescribe protective measures for the streamside protection and enhancement area (SPEA).

An individual conducting an assessment under the *RAR* should be properly qualified, trained and follow appropriate professional guidelines.

⁴ *Yanke v. Salmon Arm (City)*, 2011 BCCA 309, paras 30–31. For a summary of the facts of the case, see the Administration of the Riparian Areas Regulation section of this report.

Membership in a Professional Association

Under the *RAR*, an individual conducting an assessment must be a member in good standing of a professional association. The ministry, however, has not taken adequate steps to confirm that all persons acting as QEPs and submitting reports to the ministry are registered and in good standing with an appropriate professional association.

- I recommended that the Ministry of Forests, Lands and Natural Resource Operations develop a reliable process for confirming that, at the time an assessment report is submitted, all QEPs involved in its preparation are registered and in good standing with one of the appropriate professional associations. **(R4)**

The Ministry of Forests, Lands and Natural Resource Operations has accepted this recommendation.

Training and Professional Development

QEP knowledge of the *RAR* and its proper application is central to preparing a *RAR* assessment. The ministry has not taken steps to ensure that individuals who are eligible to conduct assessments under the *RAR* have successfully completed the *RAR* training course.

- I recommended that the Ministry of Forests, Lands and Natural Resource Operations take steps to amend the *Riparian Areas Regulation (RAR)* to ensure that successful completion of a training course is mandatory for all individuals who are eligible to conduct assessments under the *RAR* and that a list of individuals who have successfully completed the course is publicly available. **(R5)**
- I also recommended that the Ministry of Forests, Lands and Natural Resource Operations establish a process for regularly providing all individuals who conduct assessments under the *RAR* with updates about changes to the *RAR* or its administration. **(R6)**

The Ministry of Forests, Lands and Natural Resource Operations has accepted these recommendations.

Development of Professional Guidelines

Although the assessment methods explain the steps involved in conducting an assessment under the *RAR*, they do not address how QEPs are expected to exercise their professional judgment when doing so. The assessment methods set out in the *RAR* provide insufficient guidance on conducting assessments and do not hold individuals who are authorized to conduct assessments to an enforceable standard of professional conduct.

- I recommended that the Ministry of Forests, Lands and Natural Resource Operations work with professional associations to draft professional guidelines for use by individuals who conduct assessments under the *Riparian Areas Regulation* that are designed to constitute an enforceable standard of professional conduct. **(R7)**

The Ministry of Forests, Lands and Natural Resource Operations has accepted this recommendation.

Assessment Report Expiry Dates

Once a report is submitted, it remains on the ministry's system indefinitely and cannot be removed by the QEP or proponent. Assessment reports may be completed without a clearly defined development plan many years in advance of any development actually occurring. This means that the conditions at the site may change in the time between the report being completed and the development commencing. The ministry has not established any expiry date for assessment reports.

- I recommended that the Ministry of Forests, Lands and Natural Resource Operations establish an expiry date for assessment reports. **(R8)**
- I also recommended that the Ministry of Forests, Lands and Natural Resource Operations establish a process to ensure that ministry staff, Fisheries and Oceans Canada (DFO) and local governments, qualified environmental professionals (QEPs) and proponents involved in a project that requires an assessment report are automatically notified when that assessment report has expired. **(R9)**

The Ministry of Forests, Lands and Natural Resource Operations has accepted these recommendations.

Initial Review of Reports

Part of the ministry's compliance monitoring process is to review assessment reports. The ministry told us its goal is to gather information on QEP compliance and identify issues of concern. This allows the ministry to better administer the *RAR*.

Until July 2009, the ministry reviewed every assessment report it received. In 2009, the ministry determined that reviewing 20 per cent of reports submitted in each region would be an appropriate rate of review. The ministry did not provide us with a clear rationale for this decision. The ministry did not have information to determine whether reviewing 20 per cent of assessment reports in each region was adequate or appropriate. Having established this audit goal, though, the ministry did not meet it.

The ministry has not ensured that each region meets the ministry's goal of reviewing 20 per cent of the *RAR* assessment reports submitted each year. The ministry has also failed to establish that even if complied with, this goal would reliably identify an acceptable level of compliance by QEPs.

- I recommended that the Ministry of Forests, Lands and Natural Resource Operations review all of the *Riparian Areas Regulation* assessment reports submitted to the ministry each year. **(R10)**

The Ministry of Forests, Lands and Natural Resource Operations has not accepted this recommendation.

Monitoring QEP Compliance

Under the professional reliance model, government allocates resources to monitor the work done by professionals. The importance of ongoing monitoring of QEPs is recognized in the ministry's own documents. However, this monitoring is not a priority in most regions. The monitoring that has been done has identified levels of non-compliance that need follow-up to ensure that QEPs are working within the requirements of the *RAR*.

Since few assessment reports are being reviewed in most regions, the ministry is missing opportunities to identify and respond to non-compliance. The ministry has not ensured that processes are in place across all its regions to identify and address non-compliance by QEPs.

- I recommended that the Ministry of Forests, Lands and Natural Resource Operations ensure adequate processes are in place and utilized in each region to detect and follow up on concerns about non-compliance with the *Riparian Areas Regulation* by a QEP identified through compliance monitoring and, where necessary, to make a complaint to the QEP's professional association. **(R11)**

The Ministry of Forests, Lands and Natural Resource Operations has accepted this recommendation.

In addition, the ministry needs to record and track its own responses to any non-compliance, as well as those of a local government and DFO. Information about non-compliance gathered through monitoring is of little use if the ministry does not know whether the non-compliance was ever adequately addressed. The ministry does not record or track, in a centralized and accessible way, the information that it does collect through compliance monitoring, including information on whether non-compliance is referred to another public agency and, if it was, how the other agency responded.

- I recommended that the Ministry of Forests, Lands and Natural Resource Operations develop a system that:
 - (A) tracks, in a centralized and accessible way, the results of compliance monitoring
 - (B) records whether non-compliance is referred to another agency and, if it is, how that agency responds to the non-compliance. **(R15)**

The Ministry of Forests, Lands and Natural Resource Operations has accepted this recommendation.

Site Visits

Site visits are an essential part of the ministry's oversight of the *RAR*. Site visits allow the ministry to determine whether riparian areas are being protected. The ministry developed a statistical framework for determining the number of sites to visit each year. The ministry is not conducting the minimum number of site visits required by its monitoring framework, and is therefore unable to meet its goal of being 90 per cent confident that non-compliance is no greater than 10 per cent.

- I recommended that the Ministry of Forests, Lands and Natural Resource Operations ensure all regional offices conduct a number of site visits each year that is consistent with the ministry's site visit framework, and if the goal of 90 per cent confidence that non-compliance is no greater than 10 per cent is not met, take further steps to ensure compliance. **(R13)**

The Ministry of Forests, Lands and Natural Resource Operations has accepted this recommendation.

Furthermore, some sites may never be subject to a visit by the ministry. The ministry creates a list of potential sites to visit based on the reports submitted in the previous calendar year. If development has not yet occurred at a site, however, it is removed from the site visit list and is not considered for any future visits. The current process used by the ministry for selecting sites to visit exempts sites where development has not commenced at the time a site visit is scheduled.

- I recommended that the Ministry of Forests, Lands and Natural Resource Operations develop a system of site monitoring that ensures all development sites that have not yet been subject to a site visit remain eligible for selection for a site visit. **(R14)**

The Ministry of Forests, Lands and Natural Resource Operations has accepted this recommendation.

Monitoring Proponent Compliance

Post-development reports are an effective and efficient way of both mitigating the need for enforcement (by providing proponents with motivation to follow the QEP's recommendations) and providing local governments, DFO and the ministry with the information necessary to take enforcement measures in cases of non-compliance.

During our investigation, we reviewed assessment reports submitted to the ministry. QEPs had, in some cases, submitted a "post-development report," certifying that the development was complete and that the measures identified to protect the SPEA had been followed. Unfortunately, this does not occur regularly. There is conflicting information about whether post-development reports are required under the *RAR*, and who might be responsible for doing them.

The ministry has not established adequate and consistent requirements for monitoring proponent compliance with the *RAR* after an assessment report has been accepted by the ministry.

- I recommended that the Ministry of Forests, Lands and Natural Resource Operations develop a process, under section 5(a) of the *Riparian Areas Regulation (RAR)* for every development that triggers a *RAR* assessment, that:
 - (A) requires a post-development report be prepared by a QEP to show that the measures set out in the assessment report have been properly implemented
 - (B) tracks whether a local government has given initial approval to the development, whether development has started, and whether a post-development report has been submitted
 - (C) alerts the ministry when a post-development report has not been submitted within a reasonable time after development is complete
 - (D) requires the ministry to take appropriate action if no post-development report is submitted
 - (E) requires the ministry to review post-development reports that have been submitted and take appropriate action where the post-development report identifies non-compliance with the *RAR*. **(R16)**

The Ministry of Forests, Lands and Natural Resource Operations has accepted this recommendation.

Evaluating the Effectiveness of the *Riparian Areas Regulation*

Effectiveness monitoring is essential to determining the value of the *RAR* program in protecting riparian areas, as it is used to determine whether the goals of a program have been met. In the case of the *RAR*, this could mean examining whether the SPEAs are sufficient to protect the ecology of a riparian area or whether the *RAR*'s protections have led to revegetation of previously disturbed areas. The ministry does not currently have a process in place for monitoring the effectiveness of the *RAR* in protecting riparian areas.

- I recommended that the Ministry of Forests, Lands and Natural Resource Operations take steps to implement a program of regular effectiveness monitoring in all regions subject to the *Riparian Areas Regulation*. **(R25)**

The Ministry of Forests, Lands and Natural Resource Operations has accepted this recommendation.

Public Information, Access and Complaints

Provision of Information

The provision of adequate public information is central to the democratic principles of openness and transparency. Information is a cornerstone of administrative fairness as it allows the public to know and understand whether programs are being operated in a fair and reasonable manner. Making information about environmental protection programs available allows the public to have confidence that the government is meeting its obligations as a steward of the environment and British Columbia's natural resources.

The public should be able to easily find out who is responsible for the *RAR*, and have access to information about how the program is functioning.

The ministry did not adequately communicate the transfer of responsibility for administration of the *RAR* in October 2010 and has still not ensured that public information accurately reflects its responsibility for the *RAR*.

- I recommended that the Ministry of Forests, Lands and Natural Resource Operations, by June 30, 2014, update all its publicly available information to accurately reflect the ministry's responsibility for the *Fish Protection Act* and the *Riparian Areas Regulation*. **(R17)**

The Ministry of Forests, Lands and Natural Resource Operations has accepted this recommendation.

The ministry also has not ensured that public information about the *RAR* is up to date.

- I recommended that the Ministry of Forests, Lands and Natural Resource Operations review, on an annual basis, all programs it is responsible for to ensure that publicly available information is up to date and accurate. **(R18)**

The Ministry of Forests, Lands and Natural Resource Operations has accepted this recommendation.

The ministry has not reported on the implementation or administration of the *RAR* since it became responsible for administering the *RAR* in October 2010, and has not made any reports public since that date.

- I recommended that the Ministry of Forests, Lands and Natural Resource Operations report publicly on an annual basis about its administration of the *Riparian Areas Regulation (RAR)*, including reporting on the activities related to the *RAR* set out in the Intergovernmental Cooperation Agreement. The 2014 annual report be accompanied by annual reports for each of the years 2010, 2011, 2012 and 2013. **(R19)**
- I further recommended that, beginning in 2014, the Ministry of Forests, Lands and Natural Resource Operations, in addition to reporting on the activities set out in the Intergovernmental Cooperation Agreement, report publicly on an annual basis about its administration of the *Riparian Areas Regulation (RAR)*, including:
 - (A) the number of notifications received and the number of assessments reviewed by each region, the issues identified in those reviews and measures taken to address any issues
 - (B) steps taken by the ministry to monitor the compliance of qualified environmental professionals (QEPs), proponents and local governments with the *RAR*, the results of that monitoring, and measures taken to improve compliance

(C) steps taken by the ministry to monitor the effectiveness of the *RAR*, the results of that monitoring, and measures taken to improve the effectiveness of the *RAR*

(D) any regulatory or administrative changes affecting the *RAR*. **(R20)**

The Ministry of Forests, Lands and Natural Resource Operations has accepted these recommendations.

As part of the Intergovernmental Cooperation Agreement, the ministry also committed to making assessment reports publicly available, searchable and accessible. While the ministry has considered making its electronic notification system accessible to the public it has not yet done so. Currently, the notification system is accessible only by QEPs (with access limited to their own reports), local governments and ministry employees. This is the case even though there is a model provided by the Ministry of Environment's EcoCat, a publicly accessible ecological reports catalogue which contains similar reports.⁵

As the public does not have access to the reports, this limits the ministry's ability to rely on complaints from the public to learn about and respond to areas of concern. Members of the public can find it difficult to raise concerns if they do not know what is contained in a report.

- I recommended that the Ministry of Forests, Lands and Natural Resource Operations work with the Ministry of Environment to make *Riparian Areas Regulation* assessment reports and their associated electronic mapping files available to the public through EcoCat or a similar publicly accessible, searchable electronic database by October 1, 2014. **(R21)**

The Ministry of Forests, Lands and Natural Resource Operations has accepted this recommendation.

Concerns and Complaints

Complaints from the public can draw the ministry's attention to issues or concerns that may impact the effective administration of the *RAR*. While the ministry cannot rely solely on complaints to trigger monitoring and enforcement, complaints can make the ministry aware of a problem and the need to resolve it. An effective complaints process requires clear procedures for receiving, responding to and tracking complaints.

The ministry has not taken steps to develop a clearly documented and accessible process that allows people to raise concerns or make complaints about the operation of the *RAR*.

- I recommended that the Ministry of Forests, Lands and Natural Resource Operations establish a clearly documented and accessible process that allows people to raise concerns or make complaints about the operation of the *Riparian Areas Regulation*. **(R22)**

The Ministry of Forests, Lands and Natural Resource Operations has accepted this recommendation.

The ministry also does not have consistent and reliable data about the number of *RAR*-related concerns or complaints it receives or how it has responded to those complaints. Tracking, analyzing and reporting on *RAR* complaints are essential parts of the fair administration of the *RAR* program, and are consistent with the ministry's

⁵ Ministry of Environment, "EcoCat: The Ecological Reports Catalogue" <<http://www.env.gov.bc.ca/ecocat/>>.

existing protocol and its commitments under the Intergovernmental Cooperation Agreement.

- I recommended that the Ministry of Forests, Lands and Natural Resource Operations establish an electronic complaint tracking process that allows the ministry to accurately track, analyze and respond to concerns and complaints it receives about the *Riparian Areas Regulation*. (R23)
- I also recommended that the Ministry of Forests, Lands and Natural Resource Operations publicly report regional data about concerns and complaints on an annual basis. (R24)

The Ministry of Forests, Lands and Natural Resource Operations has accepted these recommendations.

Conclusion

When the *RAR* was originally enacted, the ministry and other stakeholders worked hard to effectively implement the Regulation. These efforts show a genuine willingness to create a program that protects and maintains fish habitat. In the Intergovernmental Cooperation Agreement signed in 2008, the ministry committed to take actions that, if carried out, would have enhanced the administration of the *RAR*. Unfortunately, the initial activity that accompanied the development of the *RAR* did not lead to an adequate and reasonable level of oversight by the ministry.

This report has resulted in 21 findings and 25 recommendations to improve the ministry's administration of the *RAR*. It will hopefully serve as an example for other areas where professional reliance models are already in place or are contemplated. The ministry has accepted and committed to implementing 24 of the 25 recommendations.

In March 2014, Bill 18, the *Water Sustainability Act* was introduced. Bill 18 updates and renames the *Fish Protection Act* to the *Riparian Areas Protection Act*. This reflects the continued importance of protecting riparian areas.



What Are Riparian Areas?

Fish, and in particular salmon, are an essential part of British Columbia's history, culture and economy. Salmon begin and end their lives in the many streams, rivers and lakes that flow through the province. The health of these waters is sustained by the trees and other vegetation that line their banks.

The lands surrounding rivers, lakes and streams are called riparian areas. Riparian areas introduce large woody debris, leaf litter and insects to streams, which enhance the quality of fish habitat. Riparian areas also help moderate water temperature and quality by providing shade and protecting stream banks from erosion and reducing the amount of sediment entering a stream. Riparian areas are essential to maintaining vital fish habitat. Witnesses at the Cohen Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River testified that if a riparian area is in poor condition, the condition of the stream deteriorates and in turn, the fish habitat suffers.⁶

Protection of Riparian Areas under the *Riparian Areas Regulation*

The health of riparian areas can be affected by many kinds of human activities, including industry, urban development, agriculture, forestry and mining. The *Riparian Areas Regulation (RAR)* is aimed at industrial, commercial and residential development in riparian areas that are located within the boundaries of certain municipalities and regional districts in British Columbia.⁷ This report focuses on the administration of this important environmental protection program by the Ministry of Forests, Lands and Natural Resource Operations.

The *RAR*, enacted under the *Fish Protection Act*,⁸ has been in effect since March 31, 2005.⁹ It defines a riparian area as the area "adjacent to a stream that links aquatic to terrestrial ecosystems and includes both existing and potential adjacent upland vegetation that exerts an influence on the stream. . . ."¹⁰ The *RAR* aims to protect the features of riparian areas that help to support and maintain healthy fish populations. The *Fish Protection Act* and the *RAR* do not directly restrict development in those areas and do not regulate landowners or developers (proponents). Rather, they regulate the development approval process of local governments subject to the *RAR*.

⁶ Public Hearings, Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River, June 7, 2011, Panel No. 42, 89–90.

⁷ *Riparian Areas Regulation*, B.C. Reg. 376/2004.

⁸ *Fish Protection Act*, S.B.C. 1997, c. 21.

⁹ Local governments were, by ministerial order, given an extension (first until June 30, 2005, and then until March 31, 2006) to comply with its requirements. Not all local governments required this additional time to implement the *RAR*.

¹⁰ *Riparian Areas Regulation*, B.C. Reg. 376/2004, s.1(1). The term "riparian area" is defined as a "streamside protection and enhancement area," which is that area "adjacent to a stream that links aquatic to terrestrial ecosystems and includes both existing and potential adjacent upland vegetation that exerts an influence on the stream, the size of which is determined according to this regulation on the basis of an assessment report provided by a qualified environmental professional in respect of a development proposal."



The *Fish Protection Act* requires local governments to ensure that their bylaws are consistent with, comparable to or exceed the *RAR*'s standard of riparian protection. The *RAR* prohibits local governments from approving or allowing development in a riparian area until the ministry has notified local government that it has received a report from a qualified environmental professional (QEP), paid for by the project's proponent.¹¹ The QEP determines what protections should apply to a particular riparian area.

Professional Reliance

A key part of the *RAR* program is its use of QEPs to make decisions about riparian protection. Under this "professional reliance" model, government delegates responsibility for aspects of a regulatory process, including some decision making, to registered professionals who are not government employees but are employed by a development project's proponents. The government relies on the decisions made by these professionals in administering a program.

The *RAR* is part of a broader shift by the provincial government toward the professional reliance model of environmental regulation.¹² A professional reliance model can be described as results-based, meaning the regulations in question specify a desired outcome but permit the regulated entity discretion as to how to achieve that outcome. In the case of the *RAR*, a QEP who follows the process set out in the assessment methods uses his or her own expertise and judgment to determine the extent of the riparian area that must be protected. The results of the QEP's assessment must meet certain standards, but the Regulation does not establish what the QEP's conclusions must be in respect of any particular site. This is left up to the judgment of the QEP.

Before this shift to professional reliance, civil servants were primarily responsible for overseeing development projects to ensure that proper consideration was given to protecting the environment as required by law.¹³ Since the change to the professional reliance model, the provincial government relies on professional associations to regulate the practices of their members when acting as QEPs. As part of the move to professional reliance, the enabling act for the College of Applied Biology was introduced in 2002,¹⁴ at the same time as the *Foresters Act*¹⁵ and the *Agrologists Act*¹⁶ were changed to provide greater self-regulation for those professions. These pieces of legislation supported the development of the professional reliance model by providing the legal framework for the professional associations to be self-governing.

¹¹ Throughout this report, unless otherwise specified, the term "ministry" refers to the provincial government ministry having responsibility for the administration of the *RAR*. Until October 2010, this was the Ministry of Environment. From October 2010 to March 2011, it was the Ministry of Natural Resource Operations, and since March 2011, it has been the Ministry of Forests, Lands and Natural Resource Operations.

¹² For examples of other uses of professional reliance in British Columbia, see Mark Haddock, *Reliance on Registered Professionals*, University of Victoria, Faculty of Law Environmental Law Centre, November 2008 <<http://www.elc.uvic.ca/associates/documents/Reliance-on-Registered-Professionals-Backgrounder-Nov29.10.pdf>>.

¹³ Mark Haddock, *Reliance on Registered Professionals*, University of Victoria, Faculty of Law Environmental Law Centre, November 2008, note 7, 1 <<http://www.elc.uvic.ca/associates/documents/Reliance-on-Registered-Professionals-Backgrounder-Nov29.10.pdf>>.

¹⁴ *College of Applied Biology Act*, S.B.C. 2002, c. 68.

¹⁵ *Foresters Act*, S.B.C. 2003, c.19.

¹⁶ *Agrologists Act*, S.B.C. 2003, c. 13.

In 2011, the provincial government established a Professional Reliance Cross-Ministry Working Group with the aim of creating a common framework for professional reliance across the natural resources sectors in British Columbia. Members of the working group come from several natural resources ministries, including the Ministry of Forests, Lands and Natural Resource Operations and the Ministry of Environment. The working group has produced several documents, including a Draft Framework for the Use of Qualified Persons, which informed our investigation of the *RAR* as it relates to the role of QEPs.

Under the professional reliance model, government depends on private, accredited professionals to do the work while the cost of hiring these professionals is borne by a project's proponents. The potential for administrative unfairness arises when there is inadequate government oversight of private professionals and project proponents or the level of public accountability for their actions and decisions falls below acceptable standards.

Administrative Fairness

The role of the Ombudsperson is to uphold the democratic principles of openness, transparency and accountability, to ensure that every person in British Columbia is treated fairly in the provision of public services, and to promote and foster fairness in public administration. The Ombudsperson does this by receiving and investigating individual complaints and conducting systemic investigations to consider issues from a broad perspective.

Whether a program or a process is administratively fair depends on the context in which it operates. Considerations such as the nature and purpose of the program, the consequences to those affected and the actions taken in the course of the program's administration all influence what is required for administrative fairness.

Even if a program, such as that created under the *RAR*, is designed to minimize the cost of implementation, the government remains responsible for ensuring both that the program meets its intended objectives and that it does so in accordance with the principles of administrative fairness. While it may be reasonable for a ministry to assign professionals some of the work necessary to achieve policy objectives, the ministry is ultimately responsible for overseeing the program and ensuring it is functioning effectively and meeting its stated goals. The ministry must receive and respond to any concerns the public may raise about a program. It must also ensure that the public has access to adequate information about the program and how it operates, develop monitoring and enforcement mechanisms, and conduct periodic reviews to ensure that the program's goals are being met. Additionally, the ministry must ensure that monitoring and compliance efforts are applied consistently in all areas of the province subject to the program. Any differences that do exist should not be arbitrary but rather, be based on a clear and justifiable rationale.

The Ombudsperson has produced an Administrative Fairness Checklist as a guide to assess whether a public agency such as a ministry meets general standards of fairness in providing services and making decisions that affect people. The checklist includes aspects of administrative fairness required in both service delivery and decision making. The following is a list of questions from the checklist we considered during this investigation.¹⁷

"We support the RAR because water and fish habitat are vital. If it is not monitored and enforced, it is useless."

Source:
Ombudsperson questionnaire.

¹⁷ For the Ombudsperson's Administrative Fairness Checklist, see our website: <<http://www.bcombudsperson.ca>>.

Exercise of Power/Legal Framework

Are the existing statutory and regulatory powers, including the formal policies and procedures developed from them, sufficient to achieve the agency's mandate effectively and fairly?

Is the agency's legislation, regulation and policy consistent with the letter and intent of other legislation, federal and provincial, to which it is subject?

Organization/Management Issues

Are training programs and supervision adequate to meet performance expectations of management and the public?

Do agencies cooperate with one another to provide better service to the public?

Agency Review and Planning

Is statistical information needed to evaluate and improve performance recorded and maintained?

Information/Communication

Is public information available and understandable?

Are clients given all the information they need?

Complaint Procedures

Are there clearly defined complaint procedures at all levels in the organization for considering and responding to individuals' concerns about policy, procedural and service quality issues?

Investigative Process

Origins of Investigation

The Ombudsperson receives and investigates complaints from individuals with concerns about the process through which the *RAR* is administered. Complaints may come from landowners who are proposing a development, or from members of the public concerned about the protection of riparian areas.

Since the *RAR* was enacted in March 2005, the Office of the Ombudsperson has received complaints regarding the protection of riparian areas through the *RAR*. The complaints raised questions about the Regulation's reliance on qualified environmental professionals (QEPs), the role of the ministry in reviewing QEP reports, and how the ministry monitors and enforces compliance. When we investigated these complaints, we learned of the Court of Appeal's July 2011 decision *Yanke v. Salmon Arm (City)*.¹⁸ In that decision, the Court of Appeal confirmed limits on the ministry's authority to reject a QEP's assessment report, and found that the ministry's policies and procedures were not consistent with the Regulation. It was not initially apparent what steps, if any, the ministry had taken to adjust its practices or propose amendments to the Regulation in response to the Court of Appeal's decision.

¹⁸ *Yanke v. Salmon Arm (City)*, 2011 BCCA 309.

The Ombudsperson decided to initiate a systemic investigation into the administration of the *RAR* to further consider the concerns that had arisen in the complaints to our office. When the investigation started it had been over eight years since the *RAR* was enacted, and more than two years since the decision in *Yanke v. Salmon Arm (City)*. Given the length of time this Regulation has been in force and the significant effect of *Yanke* on its operation, it was an appropriate time to evaluate the effectiveness of the processes established by the *RAR*.

In addition, the *RAR* provides an excellent example of the ongoing shift to professional reliance in environmental protection legislation. The professional reliance model is different from the approach government took to meeting regulatory requirements in the past, and it presents its own challenges and opportunities. Our systemic investigation of the *RAR* has identified areas of administrative unfairness. These challenges can inform the design and operation of other legislative schemes that rely on professionals, particularly in the field of environmental protection.

Issues Considered

The Office of the Ombudsperson considered the fairness and reasonableness of the ministry's administration of the *RAR*. We considered the following aspects of the *RAR* program:

- intergovernmental cooperation
- role of qualified environmental professionals
- compliance monitoring and enforcement
- public information and access
- complaints
- effectiveness monitoring

Public Agencies Involved

The public agencies involved in this investigation are:

- Ministry of Forests, Lands and Natural Resource Operations
- Ministry of Environment

Document Review

Our investigation included a review of past and existing legislation, including:

- *Fish Protection Act*
- *Local Government Act*
- *Riparian Areas Regulation*
- *Streamside Protection Regulation*

As the management and protection of fish habitat is also a federal responsibility, we reviewed the federal *Fisheries Act* and its regulations, including recent changes to that Act.¹⁹

We examined policies, procedures, guidelines and job descriptions related to the process under the *RAR*, as well as extensive information provided by the Ministry of Forests, Lands and Natural Resource Operations and the Ministry of Environment. We met with ministry staff at the branch level and in each of the regions covered by the *RAR*.

¹⁹ *Fisheries Act*, R.S.C. 1985, c. F-14.

This investigation also included a literature review relating to the professional reliance model, and we spoke with and obtained information from members of the Professional Reliance Cross-Ministry Working Group.

Information Received from Other Sources

During our investigation, Ombudsperson staff consulted with groups with an interest in the administration of the *RAR*.²⁰

Local Government

- Union of British Columbia Municipalities and its subcommittee, the Municipal Environmental Managers Committee (MEMC). The MEMC includes staff from local governments in the Lower Mainland. We also consulted with or received written input from local governments in other areas of the province.

Professional Associations

- College of Applied Biology of British Columbia
- Association of Professional Engineers and Geoscientists of British Columbia
- Association of British Columbia Forest Professionals

Environmental Organizations

- University of Victoria Environmental Law Clinic
- Pacific Streamkeepers Federation
- Wetland Alliance: The Ecological Response

Other

- The Natural Resources Extension Program at Vancouver Island University

We also received written input on our investigation from interested individuals, community and industry groups.

File Reviews

During our investigation, we examined the ministry's database of *RAR* assessment reports and monitoring checklists. We also reviewed, where available, compliance analyses completed by staff in regional offices and by professionals contracted by the ministry.

Roles and Responsibilities

Although the *RAR* is a provincial regulation, it works in conjunction with the federal *Fisheries Act* and the *Local Government Act*. Therefore, the implementation and administration of the *RAR* engages all three levels of government (federal, provincial and local), in addition to the Union of British Columbia Municipalities (UBCM). The roles of each of these levels of government and the UBCM are described below.

²⁰ We also provided an opportunity for individual members of the public to provide comments online or to contact us by phone or meet with us in person. This was useful as many of the responses we received were consistent with the issues we were investigating.

Constitutional Responsibilities

The Government of Canada's authority over fish and fish habitat stems from the *Constitution Act, 1867*, which establishes the respective law-making powers of the federal and provincial governments. The federal government has the authority to manage "sea coast and inland fisheries," but the use of inland waters, beds of watercourses or shorelines, and the use of private property fall under provincial jurisdiction.²¹

Fisheries Act

The *Fisheries Act* and its regulations provide "legislative authority for the conservation of fisheries resources and habitat, for the establishment and enforcement of standards for conservation, and for the determination of access to and allocation of the resource."²² Fisheries and Oceans Canada (DFO) has the lead federal role in managing Canada's fisheries and safeguarding its waters.²³ Although DFO has existed in some form since 1868, the government enacted the *Department of Fisheries and Oceans Act*, which establishes the role and responsibilities of DFO, in 1978.²⁴

DFO has the authority and responsibility to ensure the protection of fish under sections 35, 36 and 37 of the *Fisheries Act*. Before November 25, 2013, section 35(1) of the *Fisheries Act* prohibited "harmful alteration, disruption or destruction of fish habitat" – known as a HADD – unless a person had obtained the minister's authorization.²⁵ The Act defined "fish habitat" as marine and freshwater "spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes."²⁶ DFO's guiding principle in management of fish habitat was "no net loss" of the productive capacity of fish habitat.²⁷

In 2012, the federal government proposed changes to these sections of the *Fisheries Act*, including to section 35. These changes took effect on November 25, 2013.²⁸ Although the full impact of these changes is beyond the scope of this report, we discuss briefly the effect they may have on the *RAR*.²⁹

²¹ *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, ss. 91(12) and 92, reprinted in R.S.C. 1985, App. II, No. 5.

²² Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River, *The Uncertain Future of Fraser River Sockeye* (Ottawa: Public Works and Government Services Canada, 2012), Vol. 1, 8.

²³ Department of Fisheries and Oceans, "Mandate, Vision, Mission Values" <<http://www.dfo-mpo.gc.ca/us-nous/vision-eng.htm>>.

²⁴ *Department of Fisheries and Oceans Act*, R.S.C. 1985, c. F-15.

²⁵ *Fisheries Act*, R.S.C. 1985, c. F-14, s. 35(2)(b), before amendment by *Jobs, Growth and Long-Term Prosperity Act*, S.C. 2012, c. 19, s. 142(2)-(4).

²⁶ *Fisheries Act*, R.S.C. 1985, c. F-14, s. 34(1), before amendment by *Jobs, Growth and Long-Term Prosperity Act*, S.C. 2012, c. 19, s. 141.

²⁷ Department of Fisheries and Oceans, *Policy for the Management of Fish Habitat*, 1988, 7. This has been replaced by a new Fisheries Protection Policy Statement that establishes the following as guiding principles in management of fisheries: avoid harm; promote sound decision-making; enable best-placed delivery; employ a standards-based approach; and consider the ecosystem context. See Department of Fisheries and Oceans, *Fisheries Protection Policy Statement*, October 2013 <<http://www.dfo-mpo.gc.ca/habitat/cg2/pol/index-eng.html#ch52>>.

²⁸ Order Fixing November 25, 2013 as the Day on which Certain Provisions of the Act Come into Force, SI/2013-116, (2013) C Gaz II, Vol. 47, No. 23 (*Jobs, Growth and Long-Term Prosperity Act*).

²⁹ See the Administration of the *Riparian Areas Regulation* section in this report.

Role of DFO in Protecting Riparian Areas

The *RAR* was developed in consultation with DFO to complement its approval process for proposed developments in and around fish habitat. Damage to a riparian area could cause a HADD as it was defined in the *Fisheries Act*. Proponents developing property near fish habitat could have been subject to prosecution under the *Fisheries Act* if, in the course of the work, they caused a HADD. DFO published guidelines that proponents could follow to help them avoid a HADD.³⁰ DFO also conducted assessments of proposed projects to identify measures to mitigate unavoidable impacts to fish habitat. If a HADD could not be avoided, DFO considered whether to authorize the project under section 35(2) of the *Fisheries Act*.

Similarly, DFO has developed guidelines under the recently amended *Fisheries Act* to assist proponents in avoiding “serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.”³¹ Under the regulations, a proponent can apply for an exception to the prohibition against causing serious harm, but the goal of the guidelines is to minimize the need for DFO to be involved in reviewing a project. DFO described its operational approach under the amended Act as recognizing that “resources exist to avoid impacts to fish and fish habitat, and that by following established best practices and applying professional advice, project proponents can ensure compliance with the law” without DFO becoming involved.³² These resources can include provincial guidelines and advice from qualified professionals.³³

The *RAR* allows commercial, industrial or residential developments to avoid engaging DFO’s approval process if they are within the boundaries of a local government subject to the Regulation. The QEP who conducts an assessment may provide an opinion that a proposed development will not cause a HADD (as defined in the *RAR*). Alternatively, the QEP may provide an opinion that there will be no HADD if the area identified in the QEP’s report is protected from the effects of development by the proponent. This is done by following the measures set out in the assessment report. DFO is notified when a QEP submits a report and considers that the proponent has done “due diligence” if the report contains one of the above opinions, even if a HADD later occurs on the site and is attributed to the development.

Provincial Government

Constitutional Responsibilities

The *Constitution Act, 1867* grants the provinces jurisdiction over inland waters, beds of watercourses or shorelines, the use of private property and municipal institutions.³⁴ Consequently, British Columbia’s provincial government plays an essential role in environmental management. Decisions made by the provincial government have an important impact on fish and fish habitat.

³⁰ DFO’s most recent guidelines were published in 2006, but some guidelines were issued as early as 1992. See Fisheries and Oceans Canada, “Best Management Practices and Guidelines.”

³¹ *Applications for Authorization under Paragraph 35(2)(b) of the Fisheries Act Regulations*, SOR/2013-191.

³² Fisheries and Oceans Canada, *Fisheries Protection Program Operational Approach*, November 2013, 4.

³³ Fisheries and Oceans Canada, *Fisheries Protection Program Operational Approach*, November 2013, 4.

³⁴ *Constitution Act, 1867*, ss. 92(8), (13) and (16).

The *Fish Protection Act* is part of the legislative framework through which the provincial government protects fish habitat. The Act came into force in 1997, and provides what the government of the day described as “powerful tools” to protect fish habitat, especially in urban areas. The legislation focuses on streams where fish populations are considered threatened.³⁵ When the *Fish Protection Act* was debated in the Legislature, the then minister described it as having three main goals: to ensure sufficient water for fish; to protect and restore fish habitat; and to allow for a renewed focus on protection and enhancement of riparian areas.³⁶ As a result of the importance of riparian areas to fish habitat, protecting these areas is a key part of an overall fish protection strategy.

Section 12 of the *Fish Protection Act* is the primary provincial regulatory tool for the protection of fish habitat in urban areas. Section 12 gives Cabinet the authority to create, by regulation, policy directives to protect and enhance riparian areas that may be subject to residential, commercial or industrial development. The policy directives do not have to apply uniformly to all areas of British Columbia or to all local governments.³⁷ However, if a directive does apply to a local government, that government must either include riparian area protection provisions that are consistent with the directive in its zoning and rural land use bylaws, or ensure that its planning and land use management bylaws and permits issued under these bylaws provide a level of protection that, in the local government’s view, is comparable to or exceeds the requirements of the directive.³⁸

In recognition of the important role of local government in the legislation, the minister responsible for the *Fish Protection Act*³⁹ must consult with the UBCM before creating policy directives under section 12.⁴⁰ Government introduced the *Streamside Protection Regulation* in 2001, and then the *RAR* in 2005 under section 12 of the *Fish Protection Act* to establish legally binding requirements where previously only guidelines existed.⁴¹

On March 11, 2014, Bill 18, the *Water Sustainability Act* was introduced. Bill 18 proposes to rename the *Fish Protection Act* to the *Riparian Areas Protection Act*, and repeals and amends several sections of the Act. Most notably, Bill 18 amends Cabinet’s regulation-making authority.

Streamside Protection Regulation

The *RAR* is not the first attempt by government to protect riparian areas. Its predecessor, the *Streamside Protection Regulation (SPR)*⁴² was also enacted under section 12 of the *Fish Protection Act* and came into force in January 2001,

³⁵ Hon. C. McGregor, British Columbia Legislative Assembly, Hansard, 15 May 1997, 3440 <www.leg.bc.ca/hansard/36th2nd/h0515pm.htm>.

³⁶ Hon. C. McGregor, British Columbia Legislative Assembly, Hansard, 17 July 1997, 5965 <www.leg.bc.ca/hansard/36th2nd/h0717pm2.htm>.

³⁷ *Fish Protection Act*, S.B.C. 1997, c. 21, s. 12(3).

³⁸ *Fish Protection Act*, S.B.C. 1997, c. 21, s. 12(4).

³⁹ Since 2011, the Minister of Forests, Lands and Natural Resource Operations.

⁴⁰ *Fish Protection Act*, S.B.C. 1997, c. 21, s. 12(2).

⁴¹ Cross-Examination of Michael Crowe, Public Hearings, Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River, June 8, 2011, Panel No. 42, Transcript p. 83.

⁴² *Streamside Protection Regulation*, B.C. Reg. 10/2001.

at a time when fish habitat was being lost to rapid urbanization. Similar concerns about the loss of habitat were raised in 1997 when the *Fish Protection Act* was first introduced.⁴³ The *SPR* applied only to those regions of the province with higher rates of population growth and development, including eastern and southern Vancouver Island, the Islands Trust, the Sunshine Coast, most of the Lower Mainland, the Thompson-Okanagan and part of the Kootenays.⁴⁴

The *SPR* was intended to complement the 1978 federal *Fisheries Act* by protecting “streamside protection and enhancement areas,” or SPEAs, from development.⁴⁵ SPEAs were defined as the areas next to a stream that link aquatic to terrestrial ecosystems.⁴⁶ They were protected from residential, commercial and industrial development to ensure they remained capable of supporting “fish life processes.”⁴⁷ The term “stream” was broadly defined to include “a watercourse or source of water supply, whether usually containing water or not,” such as a pond, lake, creek, brook, ditch, spring or wetland integral to a stream that provides fish habitat.⁴⁸ The provincial government, DFO and the UBCM were all involved in the development of the *SPR*.

Under the *SPR*, local governments were required to establish SPEAs within five years from the date the Regulation was enacted.⁴⁹ The *SPR* detailed how these areas would be determined, based on two main criteria: the width of existing or potential vegetation next to a stream, and the type of stream (permanent or non-permanent, fish bearing or non-fish bearing). In some cases, the setback prescribed under the *SPR* was greater than that required by existing DFO guidelines.⁵⁰ The *SPR* was intended to be supported by intergovernmental cooperation agreements. However, none were signed during the approximately four years that the *SPR* was in effect.

Critics of the *SPR* were concerned that it automatically prohibited development on certain lands without considering whether development could be carried out in a way that protected fish habitat.⁵¹ Some commentators questioned the legality of compelling local governments to enter into the intergovernmental cooperation agreements. In particular, they suggested that if a local government council contracted away its legislative or discretionary authority, public consultation regarding streamside protection areas could become “meaningless exercises.”⁵² Groups such as the Urban Development Institute lobbied the government to repeal the *SPR*.⁵³

⁴³ Ministry of Water, Land and Air Protection, *Guide to the Streamside Protection Regulation*, July 2001, 1.

⁴⁴ Order-in-Council 34, 19 January 2001. This order-in-council defined the local governments to which the *SPR* applied as the following regional districts and the municipalities within them: Capital, Central Okanagan, Columbia-Shuswap, Comox-Strathcona, Cowichan Valley, Fraser Valley, Greater Vancouver, Nanaimo, North Okanagan, Okanagan-Similkameen, Powell River, Squamish-Lillooet, Sunshine Coast, Thompson-Nicola, and the Trust Area under the *Islands Trust Act*.

⁴⁵ *Streamside Protection Regulation*, B.C. Reg. 10/2001, s. 1.

⁴⁶ *Streamside Protection Regulation*, B.C. Reg. 10/2001, s. 1.

⁴⁷ *Streamside Protection Regulation*, B.C. Reg. 10/2001, ss. 1 and 2.

⁴⁸ *Streamside Protection Regulation*, B.C. Reg. 10/2001, s. 1.

⁴⁹ *Streamside Protection Regulation*, B.C. Reg. 10/2001, s. 5.

⁵⁰ Craig Godsoe, “Re: New British Columbia Streamside Protection Regulation,” Borden Ladner Gervais, LLP, June 2001 <http://www.blg.com/en/newsandpublications/publication41_en>.

⁵¹ Peter Kenward, “British Columbia’s Riparian Areas Regulation: A Bold Step Forward... Or Is It?” McCarthy Tetrault, 1 October 2004 <http://www.mccarthy.ca/article_detail.aspx?id=1810>.

⁵² Ray Young, Lidstone, Young, Anderson Client Bulletin, 29 January 2001, cited in J. Martin Kyle, “The Streamside Protection Regulation,” May 2001, 15 <http://www.expropriationlaw.ca/articles/art02900_files/art02901.pdf>.

⁵³ Urban Development Institute, *Annual Report 2004*, 2004, 11.

In October 2001, the provincial government created the Streamside Protection Regulation Advisory Group to assess concerns that had arisen about the implementation of the *SPR*.⁵⁴ The Ministry of Environment expressed concerns that the *SPR* was too inefficient and inflexible to determine, on a site-specific basis, the appropriate level of protection for riparian areas.⁵⁵ In addition, the ministry said that implementation of the *SPR* required significant government resources.⁵⁶ With the Advisory Group, the ministry sought input on how to protect fish habitat while allowing flexibility to meet individual circumstances.⁵⁷

Riparian Areas Regulation

In March 2005, the government repealed the *SPR* and brought into force the new *Riparian Areas Regulation (RAR)*. The *RAR* focuses on protecting the habitat of specified kinds of fish: salmonids, “game fish” and “regionally significant fish.”⁵⁸ The *RAR* applies to streams that provide fish habitat. The word “stream” is defined in the Regulation and includes (a) a watercourse, whether or not it usually contains water; (b) a pond, lake, river, creek or brook; and (c) a ditch, spring or wetland connected by surface flow to something referred to in (a) or (b). The *RAR* relies on qualified and registered professionals to determine the size of the riparian area around the stream that must be protected and the measures necessary to ensure its protection.

Under the *RAR*, if a proposed residential, commercial or industrial development is located fully or partially within a riparian assessment area, a qualified environmental professional (QEP) must assess the property and determine the applicable streamside protection and enhancement area (SPEA) according to specified assessment methods. The extent of a riparian assessment area is usually about 30 metres (about 98 feet) from the high water mark of a stream, although this may vary if the stream is located in a ravine, as illustrated in Figure 1.⁵⁹

⁵⁴ Ministry of Water, Land and Air Protection, “Streamside Protection Regulation Advisory Group: Draft Terms of Reference,” 7 November 2001.

⁵⁵ Ministry of Environment, “Riparian Areas Regulation – Frequently Asked Questions,” February 2006, 5 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/frequently_asked_questions.pdf>.

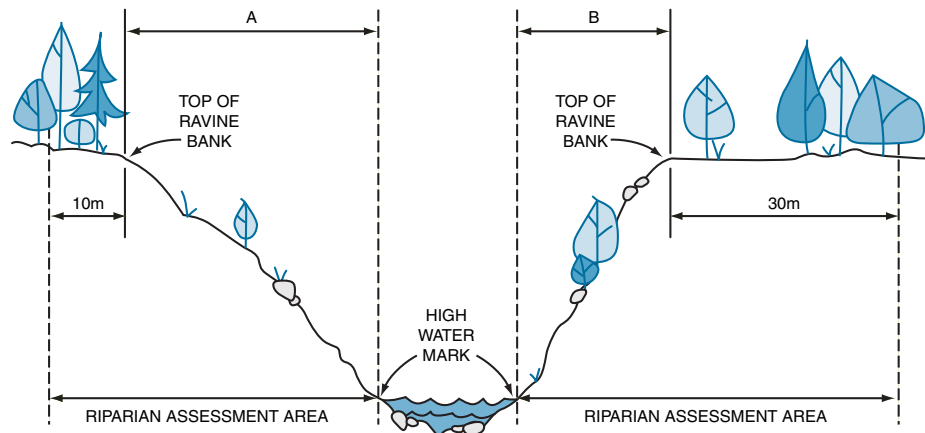
⁵⁶ Ministry of Environment, “Riparian Areas Regulation – Frequently Asked Questions,” February 2006, 5 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/frequently_asked_questions.pdf>.

⁵⁷ Ministry of Water, Land and Air Protection, “Streamside Protection Advisory Group: Draft Terms of Reference,” 7 November 2001.

⁵⁸ According to the *RAR* assessment methods, “Game fish are defined federally and include: trout, char, whitefish, bass, kokanee, arctic grayling, burbot, white sturgeon, black crappie, northern pike, yellow perch, walleye, goldeye, inconnu and crayfish.” Regionally significant fish “will be determined by MOE.” The provincial government has determined that it is not necessary to develop a definition for “regionally significant fish”; according to the Ministry of Forests, Lands and Natural Resource Operations, it is extremely rare that streams or other water bodies that fall under the *RAR*’s geographical jurisdiction do not contain either salmonid or game fish populations.

⁵⁹ The *Riparian Areas Regulation*, B.C. Reg. 376/2004 defines a “riparian assessment area” as:
 “(a) for a stream, the 30 metre strip on both sides of the stream, measured from the high water mark,
 “(b) for a ravine less than 60 metres wide, a strip on both sides of the stream measured from the high water mark to a point that is 30 metres beyond the top of the ravine bank, and
 “(c) for a ravine 60 metres wide or greater, a strip on both sides of the stream measured from the high water mark to a point that is 10 metres beyond the top of the ravine bank.”

Figure 1: Riparian Assessment Area of a Ravine.



A represents a ravine more than 60m wide while B represents a ravine less than 60m wide.

The RAR requires that one of two assessment methods be used: “simple” or “detailed.” The “simple” assessment method uses default SPEAs based on the width of vegetation or potential vegetation, and whether the stream is permanent or non-permanent. It essentially applies the setback criteria that were contained in section 6 of the former *Streamside Protection Regulation*. The “detailed” assessment method takes into account a greater number of factors than the simple assessment, including stream width and channel type. In a detailed assessment, the assessor determines the “zones of sensitivity” for the features, functions and conditions of the riparian area. The SPEA width is then calculated based on the largest zone of sensitivity. There is the potential for the SPEA to be smaller as a result of a detailed assessment, as it looks more closely at specific characteristics of a site to define the zones of sensitivity and the measures that must be taken to protect the SPEA. This can be contrasted with the simple assessment, which looks at fewer characteristics and applies minimum and maximum SPEA widths.

Once the QEP has determined the SPEA, he or she must provide an opinion that the development, as proposed, either will not cause a harmful alteration, disruption or destruction (HADD), or that any HADD can be avoided if certain measures are taken to protect the SPEA. The definition of a HADD in the RAR is similar – but not identical to – the definition that was in the federal *Fisheries Act* before November 2013. The RAR is aimed at preventing harmful alteration, disruption or destruction of the “natural features, functions and conditions that support fish life processes in the riparian assessment area.”⁶⁰ If, in the opinion of the QEP, a HADD cannot be avoided, the project proponent must obtain authorization from DFO to proceed.

After assessing and determining the SPEA and any required protection measures, the QEP submits the assessment report to the Ministry of Forests, Lands and Natural Resource Operations using an electronic notification system called the Riparian Areas Regulation Notification System (RARNS). Submitting a report triggers an immediate electronic notification to the applicable local government that a report has been received. The local government can then proceed with issuing development permits or other approvals for the planned development. A local government cannot allow development in an area that is subject to the RAR until it has received this notification from the ministry.

⁶⁰ *Riparian Areas Regulation*, B.C. Reg. 376/2004, s. 4(b). By contrast, the definition in the *Fisheries Act* included any activity where “the biophysical attributes of fish habitat are modified such that the habitat is rendered less suitable for fish production.” Source: Fisheries and Oceans Canada, Lower Fraser Area, “*Fisheries Act* and the Project Review Process,” November 2002, 5 <http://www-heb.pac.dfo-mpo.gc.ca/publications/pdf/lwr_fraser_proj_rev_process_e.pdf>.

The Intergovernmental Cooperation Agreement

Section 2(b) of the *RAR* enables the creation of intergovernmental cooperation agreements between the ministry responsible for the Regulation, Fisheries and Oceans Canada (DFO), and the Union of British Columbia Municipalities (UBCM).⁶¹ In July 2008, the Ministry of Environment (which was then responsible for the *RAR*) signed an Intergovernmental Cooperation Agreement (ICA) with DFO and the UBCM regarding the implementation of the *RAR*. The ICA establishes the responsibilities of the parties, including a commitment by the ministry to report publicly on the progress in implementing the ICA.⁶²

The ICA also creates a *RAR* Steering Committee, which includes members from all three signatories. The Steering Committee is responsible for reporting annually on the implementation of the ICA, including information on the status of implementation, number of notifications provided to local government, results from any compliance monitoring, results of any effectiveness monitoring, and any recommendation for revisions to the *RAR*. The Steering Committee is tasked with setting monitoring priorities, considering any reviews of the QEP training course and developing a protocol for making complaints to the professional associations representing QEPs.

Union of British Columbia Municipalities

The UBCM is a province-wide organization established under the *Union of British Columbia Municipalities Act*⁶³ to represent the interests of local governments. The UBCM's board is composed of representatives from local governments throughout the province.

The UBCM has specific legislated roles under the *Fish Protection Act* and the *RAR*:

- A policy directive under section 12 of the Act can be established only after the minister has consulted with representatives of the UBCM.⁶⁴
- The UBCM must be involved in intergovernmental cooperation agreements with the ministry and DFO regarding the implementation of the regulation.⁶⁵

Local Governments

The local governments subject to the *RAR* include municipalities (cities, towns and villages) and regional districts. Figure 2 shows that the *RAR* applies to the following regional districts and the municipalities within their borders: Capital, Central Okanagan, Columbia-Shuswap, Comox Valley, Cowichan Valley, Fraser Valley, Greater Vancouver (but not the City of Vancouver), Nanaimo, North Okanagan, Okanagan-Similkameen, Powell River, Squamish-Lillooet, Strathcona, Sunshine Coast and Thompson-Nicola.⁶⁶ These regional districts collectively account for about 17.5 per cent of British Columbia's land mass and 74 per cent of its population.

⁶¹ *Riparian Areas Regulation*, B.C. Reg. 376/2004, s. 2(b).

⁶² Intergovernmental Cooperation Agreement Respecting the Implementation of British Columbia's Riparian Areas Regulation, 2008, Richmond, B.C., s. 13 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/RAR_ICA_agreement.pdf>.

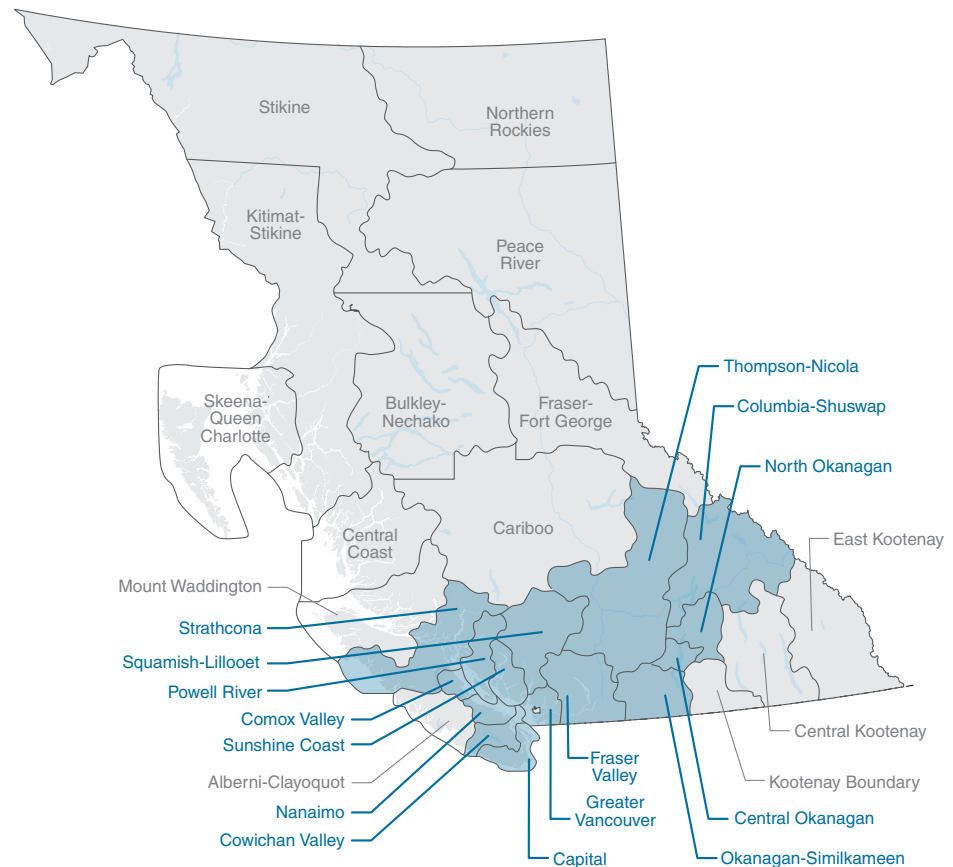
⁶³ *Union of British Columbia Municipalities Act*, R.S.B.C. 2006, c. 1.

⁶⁴ *Fish Protection Act*, S.B.C. 1997, c. 21, s. 12(2).

⁶⁵ *Riparian Areas Regulation*, B.C. Reg. 376/2004, s. 2(b).

⁶⁶ *Riparian Areas Regulation*, B.C. Reg. 376/2004, s. 3(1). The *RAR* refers to Comox-Strathcona Regional District as one of the areas subject to the Regulation. In February 2008, this regional district was divided into two separate regional districts: the Comox Valley Regional District (which includes the municipalities of Comox, Cumberland and Courtenay) and Strathcona Regional District (which includes Campbell River, Sayward, Gold River, Tahsis and Zeballos).

Figure 2: Regional Districts Subject to the RAR.



Two local governments not subject to the *RAR* have adopted requirements that mirror the *RAR* as part of their own development approval process.

The *Fish Protection Act* and the *RAR* impose two requirements on local governments:

- First, local governments must implement the *RAR* by including in their zoning and rural land use bylaws provisions that comply with the *RAR*, or they must ensure that their bylaws and permits under Part 26 of the *Local Government Act* provide a level of riparian protection that, in the opinion of the local government, is comparable to or exceeds the *RAR*'s requirements.
- Second, local governments must not “approve or allow” certain types of development within a riparian assessment area until they are notified that both the provincial ministry and DFO have received a copy of the QEP's assessment report.⁶⁷ Local governments are notified immediately when a QEP submits a report to the ministry through the electronic Riparian Areas Regulation Notification System.

⁶⁷ *Riparian Areas Regulation*, B.C. Reg. 376/2004, s. 4.

The *RAR* defines “development” as certain acts, including construction of structures, the disturbance of soils or the development of drainage systems, related to residential, commercial or industrial activities that are regulated or approved by local governments under Part 26 of the *Local Government Act*.⁶⁸ Part 26 establishes a local government’s bylaw-making powers with respect to planning and land use management, including powers related to the development of official community plans and zoning regulations, the designation of development permit areas, and the issuing of development permits and subdivision requirements.

Local governments have flexibility in deciding how they implement the *RAR*. While this allows them to apply the *RAR* in a way that best suits their area, it also has resulted in a varied patchwork of regulation, reflecting different local governments’ priorities, budgets and expertise.

When the *RAR* was first introduced, some local governments had already developed rules and guidelines under the previous *Streamside Protection Regulation (SPR)*. In recognition of this, local governments that had already established SPEAs in accordance with the *SPR* are deemed to have met the requirements of the *RAR*.⁶⁹ Only 15 local governments (of the 106 to which the *RAR* applies) have taken an approach that is similar to the *SPR*. For example, one local government on Vancouver Island has chosen to define the riparian areas within its boundaries and determine the applicable SPEAs. Landowners can then apply a pre-determined SPEA, which ranges from 5 to 30 metres, when planning their development.⁷⁰ If they wish to vary from the pre-determined SPEA, they must hire a QEP who, using the detailed method, will determine a specific SPEA for the property. This approach provides greater certainty in protecting riparian areas and helps those who wish to develop property adjacent to riparian areas, but also represents a greater up-front cost for a local government, because it must map its streams and assess the applicable SPEA.

In addition, some local governments participated in environmental review committees with officials from DFO before the *RAR* was enacted. Environmental review committees were used to coordinate reviews of development proposals and applications to change SPEAs. The Ministry of Environment ended its participation in environmental review committees in 2002 as part of its move to a professional reliance model.⁷¹ When the *RAR* was introduced, the Ministry of Environment and DFO agreed that DFO-local government environmental review committees could continue under the *RAR* if they were already in place at the time of the agreement.⁷² During our investigation, we learned that DFO ended its participation in environmental review committees in 2013, leaving local governments to review development proposals on their own.

⁶⁸ *Riparian Areas Regulation*, B.C. Reg. 376/2004, s. 1. See the Glossary for a full list of all activities included in the definition of development.

⁶⁹ *Riparian Areas Regulation*, B.C. Reg. 376/2004, s. 8.

⁷⁰ Note that the pre-determined SPEAs are calculated using the *RAR* simple assessment methodology, and are different from the default setback of 30 metres found in the *RAR*.

⁷¹ Environmental Review Committees (ERCs) were first established in the 1990s. Originally, all levels of government were involved, including the provincial government and, when appropriate, other regional authorities. However, according to testimony heard by the Cohen Commission, in 2002 the provincial government withdrew from all ERCs as it moved to a “results-based” approach to riparian management: Public Hearings, Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River, June 8, 2011, Panel No. 42, 21.

⁷² Ministry of Environment and Department of Fisheries and Oceans letter to UBCM, 23 May 2006.

Structure of the Report

The next seven sections of this report detail our investigation into the administration of the *Riparian Areas Regulation*. These sections focus on:

- Administration of the *Riparian Areas Regulation*
- Qualified Environmental Professionals
- Monitoring QEP Compliance
- Monitoring Proponent Compliance
- Public Information and Access
- Concerns and Complaints
- Evaluating the Effectiveness of the *Riparian Areas Regulation*



ADMINISTRATION OF THE *RIPARIAN AREAS REGULATION*

Although the provincial government has primary responsibility for administering the *Riparian Areas Regulation (RAR)*, intergovernmental cooperation is a fundamental part of this environmental protection program, as it is in many other aspects of environmental protection. The *RAR* involves all three levels of government – federal, provincial and local. This section outlines the roles and responsibilities of the provincial government and local governments under the *RAR* and the impact of recently enacted changes to the federal *Fisheries Act* on the Regulation.

Who Is Responsible for the *Riparian Areas Regulation*?

From 2005 to October 2010, the Ministry of Environment was responsible for administering the *Riparian Areas Regulation (RAR)*.⁷³ In October 2010, the provincial government announced a major reorganization of the provincial natural resources ministries with the stated goal of consolidating them to provide more efficient service delivery to British Columbians.⁷⁴ The reorganization created the Ministry of Natural Resource Operations, which was given responsibility for administering the *RAR*. On October 24, 2010, an order-in-council transferred responsibility for the *Fish Protection Act* from the Ministry of Environment to the new Ministry of Natural Resource Operations.⁷⁵ In 2011, this ministry was expanded and became the Ministry of Forests, Lands and Natural Resource Operations. It still administers the *RAR* today.⁷⁶

When the *RAR* was part of the Ministry of Environment, it was administered by the Habitat Section of the ministry's Ecosystems Branch. Shortly before the Ministry of Forests, Lands and Natural Resource Operations assumed responsibility for the *RAR*, the Habitat Section, along with its responsibility for administration of the Regulation, shifted to the Ministry of Environment's Fish, Wildlife and Habitat Branch. In October 2010, the Fish, Wildlife and Habitat Branch moved to the newly formed Ministry of Natural Resource Operations. The Habitat Section moved in December 2012 to the Resource Management Objectives Branch of the Ministry of Forests, Lands, and Natural Resource Operations. Despite these organizational changes, staff responsible for the *RAR* in Victoria have remained the same. Until December 11, 2013, when they moved to a Ministry of Forests, Lands and Natural Resource Operations building, they were located in a Ministry of Environment building. Regional ministry staff told us that the shift to the new ministry did not have a major impact on their work, as the regional districts for which each office was responsible did not change.

In addition to the *RAR* coordinator who is located in Victoria, a total of five regional employees in four offices have a role in administering the *RAR*: Nanaimo (West Coast region; two employees), Surrey (South Coast region; one employee), Revelstoke (Kootenay region; one employee) and Penticton (Thompson-Okanagan region; one employee).

⁷³ Formerly the Ministry of Water, Land and Air Protection, the responsible ministry's name was changed by Order-in-Council 450 on 16 June 2005, to the Ministry of Environment. The ministry's responsibilities were not affected by this name change.

⁷⁴ Ministry of Forests, Lands and Natural Resource Operations, *Revised 2011/12–2013/14 Service Plan*, May 2011 <<http://www.bcbudget.gov.bc.ca/2011/sp/pdf/ministry/flnr.pdf>>.

⁷⁵ Order-in-Council, 652, 25 October 2010.

⁷⁶ Order-in-Council, 063, 14 March 2011.



Intergovernmental Cooperation

The *Fish Protection Act* and the *RAR* establish a process in which it is expected that federal, provincial and local governments will work cooperatively to protect and enhance fish habitat. The Intergovernmental Cooperation Agreement (ICA) signed by the province, Fisheries and Oceans Canada (DFO) and the Union of British Columbia Municipalities (UBCM) advances this goal by establishing clear roles and responsibilities for each of these parties. The ICA preamble states that “effective cooperation ... will lead to certainty and predictability of environmental regulation, and promote public confidence and sound economic planning.”⁷⁷ Effective intergovernmental cooperation requires the ministry to recognize and act on its role as the party responsible for the legislation and as outlined in the ICA.

Under the ICA, the ministry is responsible for:

- investigating incidents resulting in the harmful alteration, disruption or destruction of fish habitat (HADD)
- creating and maintaining a publicly accessible notification system for reports from qualified environmental professionals (QEPs)
- developing a training course for QEPs
- increasing public awareness of the *RAR*
- meeting with professional associations
- maintaining contact with and providing assistance to local governments⁷⁸

The ministry shares some of these responsibilities with DFO and the UBCM.

Local Governments and the *Riparian Areas Regulation*

The ministry has made several commitments to support local governments in implementing the *RAR*. In the ICA, the ministry committed to:

- report on the status of implementation of the *RAR* by local governments to help the local governments learn from each other⁷⁹
- participate in joint communications between the ministry and local governments where practical
- provide local governments with contacts to assist them with their queries during the implementation and ongoing delivery of the *RAR* program
- work with local governments to assist in applying the *RAR* to watershed planning⁸⁰

As a representative for local governments, the UBCM was involved in the initial development of the *RAR*. On several occasions, the UBCM raised concerns about how implementation of the *RAR* would affect local governments. At their

⁷⁷ Intergovernmental Cooperation Agreement Respecting the Implementation of British Columbia's Riparian Areas Regulation, 2008, Richmond, B.C., 2 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/RAR_ICA_agreement.pdf>.

⁷⁸ Intergovernmental Cooperation Agreement Respecting the Implementation of British Columbia's Riparian Areas Regulation, 2008, Richmond, B.C., Annex 2 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/RAR_ICA_agreement.pdf>.

⁷⁹ Intergovernmental Cooperation Agreement Respecting the Implementation of British Columbia's Riparian Areas Regulation, 2008, Richmond, B.C., s. 12 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/RAR_ICA_agreement.pdf>.

⁸⁰ Intergovernmental Cooperation Agreement Respecting the Implementation of British Columbia's Riparian Areas Regulation, 2008, Richmond, B.C., Annex 2, s. 8(c) <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/RAR_ICA_agreement.pdf>.

2004 convention, UBCM members passed a resolution calling on the provincial government to provide:

- a comprehensive legal and logistical review of the Regulation by an objective party to identify, assess and address the implications of the Regulation to local governments
- comprehensive liability protection for local governments
- assurance of open involvement of local governments in the development of the compliance, enforcement and implementation strategies
- assurance of open involvement of local governments in development of a guidebook for the implementation of the Regulation⁸¹

As a result of the concerns raised by the UBCM, the ministry developed pilot projects prior to full implementation of the *RAR* in March 2005,⁸² obtained and posted on its website a legal opinion on the liability of local governments in October 2005,⁸³ published an implementation guidebook for local governments in January 2006,⁸⁴ and took steps to educate and train local government employees.

Subsequent UBCM resolutions indicate that local governments continue to have concerns with the administration of the *RAR*. In 2012 and 2013, UBCM members endorsed two further resolutions related to monitoring and enforcement of the *RAR*.⁸⁵

Local Government Implementation of the *Riparian Areas Regulation*

Many local governments indicated they were not able to implement the *RAR* when it was first enacted in March 2005. At the request of the UBCM, local governments were given an extension until June 2005⁸⁶ and then until March 2006⁸⁷ to implement the *RAR*.

Since March 2006, the ministry has not given local governments any further extensions to implement the *RAR*. Eight years later, most local governments have implemented the *RAR*, but there are still some that, according to the ministry, do not have adequate bylaws in place or are allowing development to go ahead without a *RAR* assessment. The ministry was not able to provide us with an exact number of non-compliant local governments because it has not undertaken any recent assessments of local government compliance. In those jurisdictions with no or insufficient bylaws, the *RAR* is ineffective. The ministry told us that it has taken steps to increase local government compliance, including:

- speaking with local governments about the *RAR* and the importance of following the *RAR*

⁸¹ Union of British Columbia Municipalities, Resolution 2004-B75, "Riparian Areas Regulation."

⁸² Ministry of Environment, "Pilot Studies" <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/local.html#ffth>.

⁸³ McDannold Stewart Staples, "Riparian Areas Regulation Assessment of Risk of Liability and Other Related Issues," October 2005 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/SMSlegalopinion.pdf>.

⁸⁴ Ministry of Environment, *Riparian Areas Regulation Implementation Guidebook*, January 2006 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/ImplementationGuidebook.pdf>.

⁸⁵ See the Monitoring QEP Compliance and Monitoring Proponent Compliance sections of this report for more details.

⁸⁶ Minister of Water, Land and Air Protection, "Time Period Extension Order," 31 March 2005.

⁸⁷ Minister of Environment, "Time Period Extension Order," 30 June 2005.

- visiting local governments to assist them in enacting *RAR* bylaws, and attending public meetings or presentations on proposed bylaws

However, these efforts are hampered by the inability of the ministry to require local governments to take any steps to implement the *RAR*.

The ministry has also not reported regularly on local government implementation of the *RAR*, as it committed to do in the ICA.⁸⁸ A spreadsheet developed by the ministry in 2008 lists local government compliance with the *RAR*.⁸⁹ This spreadsheet describes the approach that each local government has adopted to meet the *RAR*'s requirements, and indicates whether the local government is on the *RAR* notification system. This spreadsheet is available on the *RAR* website, but has not been updated since February 2008.

Local Government Use of the Riparian Areas Regulation Notification System

Section 12(4) of the *Fish Protection Act* requires local governments to either implement the *RAR* or ensure that its bylaws "provide a level of protection that, in the opinion of the local government, is comparable to or exceeds that established" by the *RAR*. This means that while all local governments must provide riparian protection at a level comparable to the *RAR*, they can choose whether the process established by the *RAR* applies in their jurisdiction. During our investigation, the ministry told us it is aware of three local governments that do not use the ministry's Riparian Areas Regulation Notification System (RARNS) as part of their process. RARNS is the electronic system through which the individuals completing *RAR* assessments submit the reports to the ministry. Local governments are then notified a report has been received.

These local governments decided to not use RARNS because, according to the ministry, they believe their methods of riparian protection do not require them to. Two of the three local governments follow an approach to riparian protection where development is prohibited within pre-determined areas.

For example, in one of these local governments, there are two categories of "Riparian Management Area," which establish setbacks of either 5 metres or 15 metres where no development can occur. The fact that this local government's bylaw only requires a maximum 15-metre setback, while the process established under the *RAR* allows for a setback of up to twice that distance, raises questions about how the local government's bylaw is comparable to or exceeds the *RAR*'s requirements. Under the *Fish Protection Act*, however, it is up to a local government to assess the adequacy of its own bylaws, not the province.

Two of these local governments do not have in their bylaws a process where a project proponent must hire a QEP to determine the setback that would apply to an individual property. As a result, no assessment reports are submitted to the ministry from those areas. The third local government uses a modified version of the process found in the *RAR*, including requiring QEPs to submit assessment reports, and is registered with RARNS. However, city staff advise QEPs to submit their reports to the local government directly instead of to the ministry through RARNS.

⁸⁸ Intergovernmental Cooperation Agreement Respecting the Implementation of British Columbia's Riparian Areas Regulation, 2008, Richmond, B.C., s.12 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/RAR_ICA_agreement.pdf>.

⁸⁹ Ministry of Environment, "Database of Local Governments with RAR Bylaws," February 2008 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/RAR_Local_Govt_Impl_Status_s.xls>.

As of November 2013, RARNS contains only 20 assessment reports from this local government (submitted between 2006 and 2013), which the ministry suggested is not representative of the amount of recent development that has occurred in that area.

In 2008, the Ministry of Environment, which was then responsible for the *RAR*, sent a memo to local governments through the UBCM in which it explained the need for all local governments to register with RARNS, even if they had adopted an approach that was in their opinion comparable to or exceeded the *RAR*'s requirements. The ministry said in that memo that protection of fish habitat "is enhanced through [the province's] monitoring of development sites" and that RARNS provides a database of completed assessments through which compliance and effectiveness monitoring can occur.⁹⁰ This memo has not been complied with. The ministry told us it cannot conduct any compliance monitoring in jurisdictions that do not use RARNS because without any reports submitted through RARNS, the ministry has no way of knowing which sites to visit.

Analysis

The *Fish Protection Act* allows local governments to decide themselves if their bylaws meet the *RAR*'s requirements. It does not give the ministry the power to decide whether the standards set out in the bylaw are in fact comparable to the *RAR*, or to enforce local government compliance with the *RAR*.⁹¹

Two local governments are not registered with RARNS, as their approaches to implementing the *RAR* do not involve QEPs and, therefore, there are no assessment reports to submit to the ministry. Another local government does not require QEPs to use RARNS, even though it has implemented the *RAR* process in its bylaws. Although the ministry is aware of this, it has not reported publicly on local government compliance within the past five years. That a local government does not implement the process set out in the *RAR* and is still compliant with the *Fish Protection Act* raises questions about the effectiveness of the approach established in the legislation. It also undermines the ministry's compliance monitoring process because the ministry cannot conduct any site visits within these jurisdictions.

Additionally, local governments that choose to opt out of the *RAR* process under section 12(4)(b) of the *Fish Protection Act* do not need to meet an objective standard of riparian protection. Determining whether a local government's bylaws "are comparable to or exceed" the *RAR* requires only the local government's opinion. This weakens the purposes of the *RAR*. The variation between local government approaches to protecting riparian areas means that the *RAR* is not being applied consistently across the regions of the province subject to the *RAR*.

Similarly, the fact that some local governments have not implemented the *RAR* more than eight years after it was enacted illustrates the challenges of designing a regulation that needs to be implemented by over 100 local governments and which can be implemented in multiple different ways. Because the ministry does not have updated information on local government compliance, however, the extent to which these gaps in implementation may affect riparian protection is unknown.

⁹⁰ Ministry of Environment, "Memo to Local Governments – RAR Notification System," 2008.

⁹¹ *Fish Protection Act*, S.B.C. 1997, c. 21, s.12(4).

Finding & Recommendations

- F1** The Ministry of Forests, Lands and Natural Resource Operations does not have the ability to ensure local governments implement the *Riparian Areas Regulation (RAR)*. It also does not have the ability to ensure that local governments implement the *RAR* in a way that allows the ministry to conduct compliance monitoring.
- R1** The Ministry of Forests, Lands and Natural Resource Operations review, by October 1, 2014, local government implementation of and compliance with the *Riparian Areas Regulation* and report publicly on the results of that review.
- R2** The Ministry of Forests, Lands and Natural Resource Operations work with local governments to bring them into compliance with the *Riparian Areas Regulation (RAR)*. If the ministry is not able to achieve full compliance by local governments with the *RAR*, the ministry should, by October 1, 2015, develop a mechanism to allow the ministry to require local government compliance with the *RAR*.
-

Exercise of Variance Powers by Local Governments

Before July 2011, the ministry and DFO allowed local governments to, at a proponent's request, make minor variations to the streamside protection and enhancement areas (SPEAs) defined in an assessment report by qualified environmental professionals (QEPs).⁹² The local government could authorize owners of previously developed small, urban lots to "flex" (vary) the SPEA boundaries when:

- an intrusion into the SPEA, which would not affect fish habitat, was necessary to accommodate reasonable development plans
- the SPEA would otherwise prevent the kind of development consistent with existing zoning

This power is outlined in the *Riparian Areas Regulation Implementation Guidebook*⁹³ and is referenced in the assessment methods.⁹⁴ In cases where the proposed variance to the SPEA would cause a harmful alteration, disruption or destruction of fish habitat (HADD), the developer could apply to DFO for authorization to build within the SPEA.⁹⁵

Yanke v. Salmon Arm (City)

In its July 2011 decision in *Yanke v. Salmon Arm (City)*,⁹⁶ the British Columbia Court of Appeal found that there was no legal foundation in the *RAR* for local governments to vary SPEAs established by QEPs. The proponent in the case wanted to build a house 15 metres from the average annual high water mark of Shuswap Lake. The proposal required an assessment report from a QEP because the site fell within a riparian assessment area as defined by the *RAR*.

In the report, the QEP provided an opinion that the construction of the house would not result in a HADD to fish habitat in the riparian assessment area. As a result, the City of Salmon Arm authorized the development but made it subject to approval by

⁹² Assessment reports are discussed further in the Monitoring QEP Compliance section of this report.

⁹³ Ministry of Environment, *Riparian Areas Regulation Implementation Guidebook*, January 2006, 33.

⁹⁴ Ministry of Environment, Schedule of Assessment Methods, 10 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/assessment_methods.pdf>.

⁹⁵ Ministry of Environment, *Riparian Areas Regulation Implementation Guidebook*, January 2006, 36.

⁹⁶ *Yanke v. Salmon Arm (City)*, 2011 BCCA 309.

the Ministry of Environment and DFO, giving those agencies the final decision on the project. When the Ministry of Environment and DFO failed to notify the City of Salmon Arm that they had approved the development, the proponent questioned whether the *RAR* applied to his case and launched a petition in the Supreme Court of British Columbia.⁹⁷ The Supreme Court determined that the *RAR* did not apply to the proponent's land, as the City had implicitly established a SPEA on the land through a restrictive covenant and subdivision plan. The court said in the alternative that if the *RAR* did apply, ministry or DFO approval of the assessment report was not a prerequisite for the City to approve the development. The government appealed this decision to the British Columbia Court of Appeal.

The Court of Appeal disagreed with the Supreme Court's finding that a covenant establishes the SPEA, but agreed that the City had the final say on development. Regarding a local government's power to vary a SPEA, the Court of Appeal said:

It appears that the Ministry of Environment, in consultation with the Department of Fisheries and Oceans and the Union of B.C. Municipalities, has developed a detailed (though not entirely consistent) regulatory framework for administering the *Riparian Areas Regulation*. This framework is reflected in the *Riparian Areas Regulation Implementation Guidebook*, in an agreement styled "Intergovernmental Cooperation Agreement Respecting the Implementation of British Columbia's Riparian Areas Regulation" and in a document published by the provincial government entitled "Variances to the BC Riparian Areas Regulation". The regulatory framework described in those documents prohibits all development within streamside protection and enhancement areas. It allows . . . a local government to make minor adjustments to the area by a process known as "flexing". Unfortunately, the elaborate regulatory framework described in those documents is not supported by the *Fish Protection Act* or the *Riparian Areas Regulation*, and therefore has no basis in law.

It is not clear why there came to be such a dissonance between the statutory provisions and the regulatory framework that is actually applied. What is clear, however, is that the Court must be guided by the legislative provisions rather than by the *Guidebook*, the Intergovernmental Agreement, or provincial government publications.⁹⁸

The court pointed out that variances by local governments are not supported by the *Fish Protection Act* or the *RAR*. We asked the ministry how often this "flexing" of a SPEA boundary occurred. The ministry told us that it had not tracked this information since 2009, when it stopped reviewing every report received. The records that do exist indicate that this option was not used often. In 2008 and 2009, the ministry received 84 reports that contained an opinion under section 4(2)(b)(iii)(A) of the *RAR* supporting development, but only subject to certain measures being taken.⁹⁹ Of these, 15 involved a "flexing" of a SPEA boundary authorized by a local government. The rest involved variances where DFO had given approval.¹⁰⁰ Some local governments told us they are reluctant to approve any "flexing" of SPEAs,

⁹⁷ *Yanke v. Salmon Arm (City)*, 2011 BCCA 309, paras 20–21, 25.

⁹⁸ *Yanke v. Salmon Arm (City)*, 2011 BCCA 309, paras 25–26.

⁹⁹ Section 4(2)(b)(iii)(A) states: "if the development is implemented as proposed there will be no harmful alteration, disruption or destruction of natural features, functions and conditions that support fish life processes in the riparian assessment area": *Riparian Areas Regulation*, B.C. Reg. 376/2004.

¹⁰⁰ The ministry received a total of 732 assessment reports in 2008 and 2009. Because it stopped reviewing all reports in July 2009, this number may not fully represent the number of reports in these two years where a local government approved a "flexing" of a SPEA.

as they believe they lack the proper expertise to properly assess whether riparian values are adequately protected.

Analysis

The Court of Appeal's July 2011 decision in *Yanke* raised important questions about the exercise of variance powers by local governments. It said that local governments could not vary the SPEA established by a QEP in an assessment report. In two and a half years after the decision, the ministry did not formally respond to this issue. The ministry's publications, including the *Riparian Areas Regulation Implementation Guidebook*, have not been updated to reflect the court's ruling. As of November 2013, they continued to describe a process for local governments to vary a SPEA.

The ministry needs to ensure that local government powers under the *RAR* are clearly defined and communicated to the local governments required to implement the Regulation. This requires responding to the Court of Appeal's finding in *Yanke v. Salmon Arm (City)* by updating the ministry's materials, including the implementation guidebook.

Finding & Recommendation

- F2** The Ministry of Forests, Lands and Natural Resource Operations has not updated the *Riparian Areas Regulation Implementation Guidebook* to accurately reflect the scope of local government power to vary streamside protection and enhancement areas following the Court of Appeal's decision in *Yanke v. Salmon Arm (City)*.
- R3** The Ministry of Forests, Lands and Natural Resource Operations clarify the scope of the authority of local governments to vary streamside protection and enhancement areas in accordance with the *Riparian Areas Regulation* and, once it has done so, update the *Riparian Areas Regulation Implementation Guidebook*.
-

The Riparian Areas Regulation and Changes to the Fisheries Act

Until November 25, 2013, section 35(1) of the *Fisheries Act* prohibited harmful alteration, disruption or destruction of fish habitat (HADD).¹⁰¹ Fish habitat was defined as "spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes."¹⁰² The *RAR* is meant to serve as a provincial complement to the *Fisheries Act*.

In 2012, the federal government passed legislation amending the *Fisheries Act*, including section 35. The amendments refocused section 35(1) to prohibit "serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery."¹⁰³

¹⁰¹ *Fisheries Act*, R.S.C. 1985, c. F-14, s. 35(1), before amendment by *Jobs, Growth and Long-Term Prosperity Act*, S.C. 2012, c. 19, s. 142(2).

¹⁰² *Fisheries Act*, R.S.C. 1985, c. F-14, s. 34(1), before amendment by *Jobs, Growth and Long-Term Prosperity Act*, S.C. 2012, c. 19, s. 141. Before it was amended, the definition of fish in the *Fisheries Act* included all fish, as well as shellfish, crustaceans and marine animals.

¹⁰³ *Fisheries Act*, R.S.C. 1985, c. F-14, s. 35(1), as amended by *Jobs, Growth and Long-Term Prosperity Act*, S.C. 2012, c. 19, s.142(2) to (4).

These amendments took effect on November 25, 2013.¹⁰⁴ As a result, the *Fisheries Act* no longer mentions HADD. Instead, the prohibition on “serious harm to fish” is defined as “the death of any fish or any permanent alteration to, or destruction of, fish habitat.”¹⁰⁵ Fish habitat is still defined as it was before the amendments and includes riparian areas.

With these changes, the terminology used in the *Fisheries Act* and the *RAR* differ significantly, but they do not appear to be in conflict. The revised *Fisheries Act* has a narrowed focus: it is concerned with permanent – rather than transient but harmful – alteration or destruction of fish habitat. The definition of “fish” remains the same as it was before the amendments, but the prohibition against causing “serious harm” under section 35(1) of the *Fisheries Act* applies to a narrower class of fish. The Act continues to require protection of fish habitat, but only for fish that are part of a fishery. DFO has explained that it encourages proactive fisheries protection initiatives by the provincial government. DFO has indicated more broadly that it will continue to support existing regulatory arrangements with provincial governments.¹⁰⁶ Although federal management of the fisheries is undergoing significant changes, the provinces can still undertake initiatives to protect fish habitat.

During our investigation, the ministry told us that changes to the *RAR* were on hold until the amendments to the *Fisheries Act*, along with the resulting structural changes at DFO, came into force.¹⁰⁷ It is understandable that the ministry wishes to cooperate closely with DFO and that changes to the *Fisheries Act* may have made that difficult. However, even before DFO announced the proposed changes, there were important differences between the definitions of HADD in the *Fisheries Act* and in the *RAR*. In the *RAR*, a qualified environmental professional (QEP) is asked to provide an opinion that there will be no “harmful alteration, disruption or destruction of natural features, functions and conditions that support fish life processes in the riparian assessment area.”¹⁰⁸ The opinion provided by a QEP under the *RAR* is related to, but separate from, the definition of HADD that was in the *Fisheries Act*. An important distinction between these two definitions is that the *RAR* requires QEPs to consider not only existing riparian vegetation but also the potential vegetation that could exist in a previously disturbed area if it were restored. In contrast, the *Fisheries Act* protects only existing fish habitat. The recent changes to the *Fisheries Act* have introduced a different standard for protecting fish habitat, but even before these amendments were made, the provincial and federal standards differed. While the *RAR* was intended to complement the *Fisheries Act*, that is not its only role.

The findings and recommendations in this report are aimed at ensuring fair and effective administration of the *RAR*. Pending changes to the *Fisheries Act* are

¹⁰⁴ Order Fixing November 25, 2013 as the Day on which Certain Provisions of the Act Come into Force, SI/2013-116, (2013) C Gaz II, Vol. 47, No. 23 (*Jobs, Growth and Long-Term Prosperity Act*).

¹⁰⁵ *Fisheries Act*, R.S.C. 1985, c. F-14, s. 2(2). DFO further interprets this definition in its policy. Serious harm includes “a permanent alteration to fish habitat of a spatial scale, duration or intensity that limits or diminishes the ability of fish to use such habitats as spawning grounds, or as nursery, rearing, or food supply areas, or as a migration corridor, or any other area in order to carry out one or more of their life processes” or “the destruction of fish habitat of a spatial scale, duration, or intensity that fish can no longer rely upon such habitats for use as spawning grounds, or as nursery, rearing, or food supply areas, or as a migration corridor, or any other area in order to carry out one or more of their life processes.” See Fisheries and Oceans Canada, *Fisheries Protection Policy Statement*, October 2013, 8.2 <<http://www.dfo-mpo.gc.ca/habitat/cg2/pol/index-eng.html>>.

¹⁰⁶ Fisheries and Oceans Canada, *Fisheries Protection Program Operational Approach*, November 2013, 7.

¹⁰⁷ According to DFO, “the new Fisheries Protection Program organizational structure took effect on April 2, 2013.” See Fisheries and Oceans Canada, *Fisheries Protection Program Operational Approach*, November 2013, 3.

¹⁰⁸ *Riparian Areas Regulation*, B.C. Reg. 376/2004, s. 4(1)(iii)(A).

not a reason for inaction. Successful operation of the *RAR* does not depend on particular definitions or wording in the *Fisheries Act*. In fact, given the changes to the *Fisheries Act*, it is even more important that the provincial government take a leadership role in ensuring adequate protection of fish habitat through regulations such as the *RAR*. The *RAR* is part of an intergovernmental approach to fish habitat protection, but it is ultimately a provincial regulation, and the necessary changes that are outlined in this report can be accomplished by the provincial government.



QUALIFIED ENVIRONMENTAL PROFESSIONALS

The *Riparian Areas Regulation (RAR)* prohibits local governments from approving or allowing development in a riparian assessment area until the Ministry of Forests, Lands and Natural Resource Operations has received an assessment report from a qualified environmental professional (QEP).¹⁰⁹ The use of professionals to prepare reports is the distinguishing feature of a professional reliance model such as the *RAR*. The use of this model has grown significantly in the past 15 to 20 years.

In the professional reliance model, the proponent of a development hires a person who identifies him or herself as a QEP to conduct an assessment and prepare an assessment report. To complete their reports, QEPs are required to understand and follow the assessment methods set out in the Regulation and ensure their conduct is consistent with the standards established by their professional association.¹¹⁰ Since the role of the individuals who complete assessment reports is to ensure that the riparian area they are assessing is adequately protected, they are expected to act with due diligence and independently of a proponent's interests.¹¹¹

In late 2011, the provincial government established the Professional Reliance Cross-Ministry Working Group on the use of qualified persons in the natural resource sector. Although its work is not yet complete, the working group has developed a Draft Framework for the Use of Qualified Persons outlining some of the elements that are an essential part of a successful professional reliance model.¹¹² The three key elements of this draft framework are:

- Competency: A QEP's competencies must be supported by appropriate education, training and experience. QEPs must be able to act independently.
- Clarity of expectations: Qualified persons need clear guidance on the relevant objectives, standards, guidelines and protocols. Clear expectations also support quality assurance. Standards, guidelines and protocols can be used to monitor and audit performance.
- Accountability: There must be clear accountability mechanisms with consequences for qualified persons in the case of unacceptable performance. Accountability can be achieved through complaint resolution, government compliance and enforcement actions, monitoring, or independent audits to assess individual competence.¹¹³

This draft framework has informed our investigation of the role of QEPs in the administration of the *RAR*. We considered the existing processes that ensure competency, clarity of expectations and accountability of individuals who are conducting assessments. In this section of the report, we examine who can act as QEPs, what training they have, and what standards and professional guidelines

QUALIFIED ENVIRONMENTAL PROFESSIONALS



Professional reliance is "the ability to rely on the work of qualified persons ... due to a system that includes competency requirements for QPs, standards for their work, and measures to ensure accountability."

Source: Professional Reliance Cross-Ministry Working Group, Presentation to College of Applied Biology Conference, March 9, 2012.

¹⁰⁹ *Riparian Areas Regulation*, B.C. Reg. 376/2004, s. 4.

¹¹⁰ The first of these two requirements is contained in the definition of "assessment report" in the *Riparian Areas Regulation*, B.C. Reg. 376/2004, s. 1(1): "a report prepared in accordance with the assessment methods to assess the potential impact of a proposed development in a riparian assessment area and which is certified for the purposes of this regulation by a qualified environmental professional."

¹¹¹ See, for example, College of Applied Biology, "Code of Ethics" <<https://www.cab-bc.org/ethics>>.

¹¹² Ministry of Forests, Lands and Natural Resource Operations, "Draft Framework for the Use of Qualified Persons," March 2012 <http://www.nro.gov.bc.ca/nrs/qp/documents/qp_framework.pdf>. In April 2013, the Professional Reliance Cross-Ministry Working Group followed up the draft framework with a new report, *Use of Qualified Persons in the Natural Resource Sector*. In the new report, the working group renamed the "clarity of expectations" element to "guidance." The working group also established an implementation cycle as the second part of the draft framework.

¹¹³ Ministry of Forests, Lands and Natural Resource Operations, "Draft Framework for the Use of Qualified Persons," March 2012, 5 <http://www.nro.gov.bc.ca/nrs/qp/documents/qp_framework.pdf>.

govern their work. Although we have focused on the *RAR* specifically, the issues raised and the ensuing recommendations can be applied to other legislation that uses qualified professionals as part of the decision-making process.

Who Are Qualified Environmental Professionals?

The *RAR* defines a QEP as an applied scientist or technologist registered and in good standing with an appropriate professional association in British Columbia. The definition requires a QEP's area of expertise to be recognized in the *RAR* assessment methods, and he or she must act within that area of expertise when preparing a report.¹¹⁴ The *RAR* does not list which professional associations are "appropriate." It does, however, define a professional association as one that is constituted under an act of the Legislature, and QEPs belonging to that association must be subject to its disciplinary action.¹¹⁵

The Schedule of Assessment Methods in the *RAR* recognizes certain professional associations whose members are qualified to conduct all or part of an assessment. Appendix 2 of the Schedule lists the skills required to complete reports, and sets out the "likely [professional] designation" that a person should have to perform each skill competently. As a result, all QEPs have one or more of the following professional designations:

- Professional Biologist (R.P.Bio.)
- Professional Agrologist (P.Ag.)
- Professional Forester (RPF)
- Professional Geoscientist (P.Geo.)
- Professional Engineer (P.Eng.)
- Applied Science Technologist (A.Sc.T.)¹¹⁶

All of the above professional designations are issued by professional associations that are established under provincial legislation. These professional associations are:

- College of Applied Biology
- British Columbia Institute of Agrologists
- Association of British Columbia Forest Professionals
- Association of Professional Engineers and Geoscientists of British Columbia
- Applied Science Technologists and Technicians of British Columbia

However, not all of the professionals listed above have the skills and experience necessary to complete each of the tasks required in an assessment report. For example, only professional geologists or engineers can determine mitigation measures where slope stability is an issue. In situations that involve slope stability, an engineer or geoscientist may become involved in an assessment as a "secondary QEP" and may provide his or her opinion only about these specific concerns.

As discussed above, the Schedule of Assessment Methods in the *RAR* sets out the minimum experience, skill set and professional designations a QEP should have when conducting a *RAR* assessment.¹¹⁷ However, a person who is a member of an appropriate professional association determines whether his or her skills and

¹¹⁴ *Riparian Areas Regulation*, B.C. Reg. 376/2004, s. 1.

¹¹⁵ *Riparian Areas Regulation*, B.C. Reg. 376/2004, s. 1.

¹¹⁶ Ministry of Environment, Schedule of Assessment Methods, Appendix 2: QEP Skill Sets <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/assessment_methods.pdf>.

¹¹⁷ Ministry of Environment, Schedule of Assessment Methods, Appendix 2: QEP Skill Sets <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/assessment_methods.pdf>.

experience are sufficient to individually conduct the assessment. This process of “self-declaration” means a person conducting an assessment needs to have a good understanding of, and pay attention to, the parameters of permissible professional conduct, as well as be willing to refuse work that falls outside his or her particular training, knowledge and expertise.

Any person who has determined that they can act as a QEP is required to confirm his or her status when submitting an assessment report, by using a template designed by the Ministry of Environment. The template asks individuals to declare that they:

- are qualified as defined in the Schedule of Assessment Methods
- are qualified to carry out the specified part of the assessment of the development proposal
- have assessed the development proposal and that their assessment is detailed in the assessment report
- have, when conducting the assessment, followed the methods set out in the Schedule¹¹⁸

The pool of professionals who could potentially act as QEPs is large. It includes approximately 40,000 people. The College of Applied Biology has approximately 2,000 members, the Association of BC Forest Professionals has about 5,400 members, the Institute of Agrologists has over 1,300 members, the Association of Professional Engineers and Geoscientists of BC has 21,000 members who are professional engineers and 1,600 who are professional geoscientists, and the Applied Science Technologists and Technicians of BC has about 9,600 members.

Confirming QEPs Are Registered with a Professional Association

The *RAR* requires that any person who conducts a *RAR* assessment and submits a report is a member in good standing of an appropriate professional association. Individuals submitting reports must provide their professional association registration number when they submit an assessment report to the ministry. However, this number is not verified in any way by the ministry such as by cross-referencing it with any of the professional associations. As well, the ministry’s electronic database, the Riparian Areas Regulation Notification System (RARNS), does not have a process for checking that the number of digits entered corresponds with those used by the relevant professional association.

During our investigation, we found two people who had submitted reports as registered professional biologists but whose names did not appear on a membership list we obtained from the College of Applied Biology.¹¹⁹ These individuals had submitted a total of 10 assessment reports between December 2006 and October 2008. We also determined that another individual had submitted an assessment report in July 2013, more than a year after he ceased to be a member of the College of Applied Biology. RARNS is not set up to monitor whether individuals submitting reports are members in good standing of their stated professional association at the time a report is uploaded, so the ministry cannot reliably identify instances where individuals complete and submit reports without meeting one of the basic qualifications to act as a QEP.

¹¹⁸ Ministry of Environment, “Form 1 – Assessment Report” <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/Form_1.dot>.

¹¹⁹ As of July 2013, a total of 213 people had submitted assessment reports as QEPs.

We also found a case during our investigation where a person had submitted a report through RARNS that was not a *RAR* assessment report. The person who submitted this report was also not qualified as a QEP, and did not indicate that she belonged to an appropriate professional association as part of her submission. Nevertheless, the report was uploaded and accepted by the system. While the uploading of the report made some sense as it was related to an assessment report that had been submitted, this illustrates how a person who is not a QEP can upload information that does not meet the content requirements of an assessment report. In addition, we found three individuals who had submitted a total of nine reports to RARNS but whose professional designation was not specified in the assessment methods.¹²⁰ The reports themselves did not indicate anywhere within them that they were reviewed or approved by a person who did have a recognized professional designation.

The ministry told us that it could check registration if an issue arose with a QEP or a QEP's work, but that staff had not found it necessary to routinely confirm that a person acting as a QEP was registered and in good standing.

When a primary QEP submits a report, he or she must also list the names of any secondary QEPs involved. The decisions made by a secondary QEP – for example, if he or she is a professional engineer assessing the stability of a slope in the riparian assessment area – may be a crucial part of the overall report. However, while information about secondary QEPs appears on the ministry's electronic system, it is not searchable. If a person has acted only as a secondary QEP, a search for that person's name would not return any results, even if he or she had been involved in completing many reports. As a result, the ministry's ability to know exactly who is involved in preparing assessment reports and, in turn, to ensure that those people are also registered and in good standing with their professional associations, is limited.

Analysis

The professional reliance model for administering the *RAR* depends on the individuals who complete assessment reports being members of a professional association which has a code of ethics that guides a professional's conduct and a discipline process in cases of misconduct or incompetence. QEPs have broad powers to determine whether and how a proposed development will affect fish habitat. Their conclusions, in turn, influence the local government's decision to approve a development proposal.

The public as well as the ministry needs to be confident that those who conduct *RAR* assessments can be held accountable by their professional association if issues arise with their work. Confirming that QEPs are registered and in good standing with their professional association is a basic, and essential, part of ensuring that assessments are reliable and that the professionals conducting them are accountable.

The ministry does not check that QEPs are both registered and in good standing with their professional association. This is highlighted by our investigation, which found that individuals who do not comply with QEP requirements have submitted assessment reports through RARNS.

The ministry needs to work with the professional associations to review assessment reports that have been submitted to confirm that the individuals submitting them were, at the time, members of an appropriate professional association. In a model

¹²⁰ The designation was Registered Forest Technician (RFT), member of the Association of British Columbia Forest Professionals.

that relies on professionals to ensure that adequate measures are being taken to protect the environment, the ministry must also develop a process to confirm on an ongoing basis that each person submitting a report, and each person involved in preparing that report, possesses the qualifications set out in the Regulation.

Finding & Recommendation

- F3** The Ministry of Forests, Lands and Natural Resource Operations has not taken adequate steps to confirm that all persons acting as primary or secondary qualified environmental professionals (QEPs) and who submit assessment reports to the Riparian Areas Regulation Notification System are registered and in good standing with an appropriate professional association.
- R4** The Ministry of Forests, Lands and Natural Resource Operations develop a reliable process for confirming that, at the time an assessment report is submitted, all qualified environmental professionals (QEPs) involved in its preparation are registered and in good standing with one of the appropriate professional associations.

Ensuring QEPs Are Acting within Their Area of Expertise

An assessment report must be “prepared in accordance with the assessment methods.”¹²¹ A QEP’s expertise, therefore, must include both knowledge of fish habitat and riparian areas and an understanding of and ability to correctly apply the required assessment methods. The *RAR* relies on individuals to determine whether they have the required expertise to complete the report they are being paid to do. This leaves the *RAR* process open to individuals who do not have the required expertise to conduct assessments, or who do not understand the limits of their expertise or the assessment process itself.

The provincial government’s Professional Reliance Cross-Ministry Working Group has developed a Draft Framework for the Use of Qualified Persons that provides guidance for systems using qualified professionals, and a list of conditions supporting the use of professionals in the natural resource sector. Included in this list is the need for an organization “responsible for determining that professionals have the expertise necessary to do the work to the desired standard.”¹²² In the context of the *RAR*, the professional associations could be seen as suitable to fulfill this role.

To date, however, professional associations have had little involvement in responding to complaints about the work of their members under the *RAR*. As a result, they have had few opportunities to assess and set standards for the work their members do under the *RAR*. For example, although the majority of individuals submitting *RAR* assessment reports are members of the College of Applied Biology, the College has publicly reported on the results of only two complaint investigations about its members’ role as QEPs under the *RAR*:

- The first case involved a complaint against two registered professional biologists. The complainant alleged that the QEPs engaged in professional

¹²¹ *Riparian Areas Regulation*, B.C. Reg. 376/2004, s. 1.

¹²² Professional Reliance Working Group, Natural Resource Authorization Coordination Committee, “Reliance on Professionals in the Provincial Administration and Management of Natural Resources in British Columbia: Inventory and Status Report,” June 2011 (amended February 2012), 10 <http://www.nro.gov.bc.ca/nrs/qp/documents/pr_inventory_report.pdf>.

misconduct while conducting a *RAR* assessment. In particular, the complainant asserted that the QEPs did not correctly identify a high water mark. An assessment conducted by a different QEP reached conflicting conclusions about the location of the high water mark. The College's discipline committee considered the complaint and dismissed it, concluding that the assessment of the high water mark appeared to meet regulatory requirements and was consistent with the professional standards of the association. The committee concluded that the different assessments of the high water mark amounted to a "difference in professional opinion," and noted that the professionals were working together on a resolution. The committee accepted that these differences were not necessarily the result of professional deficiencies on the part of either QEP.¹²³

- The second complaint was related to the first and was described by the College as an attempt to reopen the issues raised during the previous complaint resolution process. The discipline committee determined that it was not able to reopen the matter. The committee also indicated that it did not have any jurisdiction to consider concerns about the structure of the *RAR* itself. In the end, the committee considered the complaint to be withdrawn since the complainant failed to provide additional requested information.¹²⁴

The Applied Science Technologists and Technicians of BC (ASTTBC) also received a complaint about the work of one of its members who was acting as a QEP. The complaint concerned the member's understanding of the *RAR* and assessment process. To resolve the issue, the member committed to becoming more familiar with the *RAR*. The ASTTBC already requires individuals applying for membership with the association to provide references in support of their application, but as a result of this complaint now asks these references to provide information about a potential member's familiarity with the *RAR* and its processes.

The information we gathered in our investigation, and in particular the information on QEP compliance gathered in the West Coast region (see the Monitoring QEP Compliance section of this report), suggests that the above complaints do not accurately reflect the extent to which QEP expertise and understanding of the assessment methods is an issue. Professional associations have an important role in regulating QEP conduct, but it is not sufficient to rely on them to ensure that QEPs are completing assessment reports within their area of expertise. QEPs come from a variety of backgrounds and professional associations, and they conduct assessments within a regulatory framework that establishes specific methods and requirements. It is reasonable, and consistent with the Professional Reliance Cross-Ministry Working Group's draft framework, for the ministry to establish competency and accountability mechanisms that relate specifically to the role of QEPs in the administration of the *RAR*.

The *RAR* process of "self-declaration" can be contrasted with the model used under the *Contaminated Sites Regulation*, which also relies on qualified professionals.¹²⁵ That model uses a "roster" system where only those who have been appointed to the roster are considered "approved professionals" for the purpose of contaminated sites remediation. People can be appointed to the roster if they are members in good standing of the Society of Contaminated Sites Approved Professionals of

¹²³ College of Applied Biologists of BC, Discipline File Number 09-01 <<https://www.cab-bc.org/files/Discipline%20File%20009-01.pdf>>.

¹²⁴ College of Applied Biologists of BC, Discipline File Number 10-03 <<https://www.cab-bc.org/files/Discipline%20File%20010-03.pdf>>.

¹²⁵ *Contaminated Sites Regulation*, B.C. Reg. 375/1996.

British Columbia (CSAP), or if they have special expertise in other disciplines.¹²⁶ To become a member of CSAP, a person must first be a member in good standing of a designated professional association.¹²⁷ Applicants must have at least 10 years of relevant and direct documented experience, and must have successfully passed the approved professionals examinations, which cover both technical and regulatory requirements.¹²⁸

The Ministry of Environment's contaminated sites assessment procedures and CSAP's own bylaws require CSAP to undertake performance assessments aimed at ensuring that approved professionals maintain an acceptable quality of work "such that their recommendations to the ministry are accurate, complete and valid."¹²⁹ CSAP must report to the ministry semi-annually on these assessments, and the director (who is a public service employee) must review the assessments to determine whether action is needed, including a suspension or removal from the roster.¹³⁰

According to CSAP guidelines, the society carries out performance assessments by reviewing one in every eight submissions by an approved professional. In addition, CSAP can conduct a targeted assessment if it deems this necessary, or the ministry or the CSAP board requests it.¹³¹ If a submission is reviewed and found to be deficient, the approved professional will be subject to remedial measures, potentially including referral to the CSAP Discipline Committee. Approved professionals can appeal a performance assessment review.¹³²

The CSAP Performance Assessment Committee creates "lessons learned" from each assessment. In its 2012/13 annual report, CSAP stated that it forwarded information to the Ministry of Environment about these lessons, suggesting where additional direction to practitioners may be required. In addition, areas for improvement to education, guidance and policy were shared with the membership.¹³³ Since 2008, the committee has completed between 6 and 20 performance assessments each year.¹³⁴ CSAP also requires that its members complete at least 30 hours of professional

¹²⁶ Ministry of Environment, Environmental Protection Division, "Ministry Procedures for the Roster of Approved Professionals," 12 November 2009, s. 3.1 <http://www.env.gov.bc.ca/epd/remediation/policy_procedure_protocol/procedure/pdf/roster_procedure.pdf>.

¹²⁷ These professional associations are: Association of Professional Engineers and Geoscientists of BC; BC Institute of Agrologists; College of Applied Biologists of BC; and Association of the Chemical Profession of BC.

¹²⁸ Society of Contaminated Sites Approved Professionals of British Columbia, *CSAP Membership Guidelines*, February 2013 <<http://www.csapsociety.bc.ca/sites/default/files/Membership%20Guidelines%20FEB%20202013.pdf>>.

¹²⁹ Ministry of Environment, Environmental Protection Division, "Ministry Procedures for the Roster of Approved Professionals," 12 November 2009, s. 10.1 <http://www.env.gov.bc.ca/epd/remediation/policy_procedure_protocol/procedure/pdf/roster_procedure.pdf>.

¹³⁰ Ministry of Environment, Environmental Protection Division, "Ministry Procedures for the Roster of Approved Professionals," 12 November 2009, s. 10 <http://www.env.gov.bc.ca/epd/remediation/policy_procedure_protocol/procedure/pdf/roster_procedure.pdf>.

¹³¹ Society of Contaminated Sites Approved Professionals of British Columbia, *Guidelines for Performance Assessment of Submissions by Contaminated Sites Approved Professionals* <<http://www.csapsociety.bc.ca/sites/default/files/PA%20guidelines%20%20Jan%2017%202013.pdf>>.

¹³² Society of Contaminated Sites Approved Professionals of British Columbia, *Guidelines for Performance Assessment of Submissions by Contaminated Sites Approved Professionals*, 6 <<http://www.csapsociety.bc.ca/sites/default/files/PA%20guidelines%20%20Jan%2017%202013.pdf>>.

¹³³ Society of Contaminated Sites Approved Professionals of British Columbia, *Annual Report 2012–2013*, June 2013, 16 <<http://www.csapsociety.bc.ca/sites/default/files/CSAP%20Annual%20Report%202012-2013%20final.pdf>>.

¹³⁴ Society of Contaminated Sites Approved Professionals of British Columbia, *Annual Report 2011–2012*, June 2012, 17 <<http://www.csapsociety.bc.ca/sites/default/files/CSAPAnnual%20Report%202011-2012-Web.pdf>>. The numbers are inexact because the chart provided in the annual report is unclear.

The course “was very clear and highlighted the important components of completing a RAR” assessment report.

Source: Vancouver Island University Student Course Evaluation.

development each year, and 150 hours over every three-year period. CSAP provides professional development activities for its members.

This comparison with the program for regulating contaminated sites demonstrates two important elements for the fair administration of a professional reliance model where a professional is involved in interpreting and applying a specific, complex set of regulatory requirements. If this model was applied to the *RAR*, all QEPs would receive a basic level of training on the Regulation's assessment methods and access to regular updates on any changes to how the *RAR* is administered. In addition, adequate processes would be in place to review QEP compliance with the assessment methods, and to address any concerns that may arise about an assessment report's accuracy or the QEP's understanding of the process. Both training and adequate compliance mechanisms are elements identified by the Professional Reliance Cross-Ministry Working Group's Draft Framework for the Use of Qualified Persons.¹³⁵

Training and Professional Development

As part of its commitments under the Intergovernmental Cooperation Agreement (ICA), the ministry established a *RAR* training course through Malaspina College – now Vancouver Island University (VIU).¹³⁶ The course provides a detailed overview of the *RAR* and the methodology used to conduct assessments. Course participants also learn about the roles and responsibilities of government, the proponent and the QEP in the assessment process.

The course is taught over a three-day period. There is one day of classwork and two days of fieldwork, with an open-book exam at the end. The cost of the course is \$750 per participant, and no academic or professional prerequisites are required for admission.¹³⁷

The licensing agreement between VIU and the ministry gives the ministry the right to approve course materials and to annually review (either independently or jointly with VIU) the training course to ensure it meets the province's standards.¹³⁸ Development of course materials is a collaborative effort between the course instructor (who is a private contractor), VIU and ministry staff. We reviewed the course handout materials and found that they were up to date, covering recent events such as the 2013 amendments to the federal *Fisheries Act*.

The *RAR* course is the only training available for individuals who are, or wish to become, QEPs. While the ministry recommends that professionals complete the course before performing duties as a QEP under the *RAR*,¹³⁹ the course is not mandatory.

¹³⁵ Ministry of Forests, Lands and Natural Resource Operations, “Draft Framework for the Use of Qualified Persons,” March 2012, 5 <http://www.nro.gov.bc.ca/nrs/qp/documents/qp_framework.pdf>.

¹³⁶ Intergovernmental Cooperation Agreement Respecting the Implementation of British Columbia's Riparian Areas Regulation, Annex 2 – Roles and Responsibilities of DFO, MOE, and UBCM under the Intergovernmental Cooperation Agreement Respecting the Implementation of British Columbia's Riparian Areas Regulation (draft), 2008, 2 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/RAR_ICA_agreement.pdf>.

¹³⁷ Vancouver Island University, “Riparian Areas Regulation Methods” <<http://www.viu.ca/nrep/environment/rar.asp>>.

¹³⁸ Ministry of Water, Land and Air Protection, “WLAP Course Development and License Agreement,” discussion draft, 13 July 2005, ss. 3.04, 7.02.

¹³⁹ Ministry of Environment, “Riparian Areas Regulation – QEP Resources” <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/qep.html#second>; Vancouver Island University, “Riparian Areas Regulation Methods” <<http://www.viu.ca/nrep/environment/rar.asp#description>>.

Feedback from those who have participated in the course support its value as a training tool. We reviewed recent course evaluations completed by participants in the course, and all of them rated the value of the course content as “excellent” or “good.”¹⁴⁰ Similarly, all of the participants indicated on the evaluation form that they either agreed or strongly agreed that they would recommend the course to others.¹⁴¹

The course has been offered 42 times since 2005. According to VIU records, 528 people completed the course by July 2013. Ten participants failed the course. Because participation in the course is not limited to people who fall within the definition of QEP, the 10 who failed were not necessarily members of an appropriate British Columbia professional association. Failing the course, however, does not prevent such a person from conducting assessments and submitting RAR assessment reports.

Some course participants are on a public list of participants that is published by VIU. We compared information from RARNS, which lists the names of QEPs who have submitted reports, with VIU’s public list of course participants. The VIU list has the names of 319 people, which represents 60 per cent of the 528 course participants. Only 99 of the people on this list have submitted a report to RARNS as a QEP.¹⁴²

Based on this information, it is likely that a majority of the people who take the course are not QEPs. They may be employees of a local government subject to the RAR or individuals taking the course for interest.

As of July 2013, 213 different individuals had submitted reports through RARNS. Of those, 99 (fewer than 50 per cent) are identified in publicly available documents as having successfully taken the QEP course. The remaining 114 QEPs may have either taken the course but for some reason chose to keep this information private, or have not taken the course at all. We are concerned that it is not possible to verify whether a QEP has taken the course. While an individual’s privacy is important, the ministry and the public’s confidence in the process would be enhanced by being able to verify if a person completing an assessment report has received specific RAR training.

In October 2012, the ministry considered implementing a certification process for QEPs that would, at a minimum, ensure all QEPs had taken the training course.¹⁴³ However, to date no such steps have been taken.

Analysis

The Professional Reliance Cross-Ministry Working Group’s Draft Framework for the Use of Qualified Persons recognizes the need to adequately train professionals.¹⁴⁴ For example, a person who wants to be on the contaminated sites roster of approved professionals must successfully write an exam.¹⁴⁵

It is “difficult to get [an] up to date list of [QEPs] in our area.”

Source:
Ombudsperson questionnaire.

¹⁴⁰ The other options were “needs improvement” or “not applicable.” Neither of these were chosen. One person did not answer this section of the evaluation form.

¹⁴¹ The other options, which no one chose, were “neutral,” “disagree,” “strongly disagree” or “not applicable.”

¹⁴² We calculated this number by searching for each of the participants in the RAR course using RARNS. We assumed that a person who had acted as a QEP has submitted at least one assessment report through RARNS.

¹⁴³ Riparian Areas Regulation Coordination Committee meeting minutes, 17 October 2012.

¹⁴⁴ Ministry of Forests, Lands and Natural Resource Operations, “Draft Framework for the Use of Qualified Persons,” March 2012, 5 <http://www.nro.gov.bc.ca/nrs/qp/documents/qp_framework.pdf>.

¹⁴⁵ *Environmental Management Act*, S.B.C. 2003, c. 53, s. 42.

The *RAR* assessment methods are complex. The process of self-declaration and the fact that QEPs come from diverse professional backgrounds mean there is no guarantee that all QEPs will have similar levels of experience and familiarity with riparian area protection or with the *RAR* assessment methods. Currently, it is up to individuals to determine whether their existing education and experience needs to be further supplemented with the *RAR* training course. Our analysis found that a majority of those who have submitted *RAR* assessments have either not taken the course, or for some reason have decided not to make their participation in the course public. This makes it difficult for clients, the public and the ministry to know how to evaluate the qualifications of those who conduct *RAR* assessments.

The training course is an important way of ensuring that everyone who is identified as qualified to complete *RAR* assessments has the same knowledge base to draw from when preparing reports. This would contribute to the consistency and reliability of assessment reports. Requiring all individuals who submit assessment reports to take *RAR* training would confirm for proponents that the people they are hiring have had their expertise verified by an external body. It would allow the ministry, local governments and the public to easily know who has and who has not received specific training in completing assessment reports. Currently, as noted above, the pool of individuals who could potentially complete an assessment report is large (over 40,000 people), and there is no clear process for identifying which of these individuals is qualified to prepare assessment reports.

We recognize that creating and implementing the *RAR* training course was an important first step. However, the reliability of *RAR* assessments will continue to vary if this course remains only voluntary, and if those who fail the course are not prevented from conducting assessments.

Finding & Recommendation

- F4** The Ministry of Forests, Lands and Natural Resource Operations has not taken any steps to ensure that all individuals who are eligible to conduct assessments under the *Riparian Areas Regulation (RAR)* have successfully completed the *RAR* training course.
- R5** The Ministry of Forests, Lands and Natural Resource Operations take steps to amend the *Riparian Areas Regulation (RAR)* to ensure that successful completion of a training course is mandatory for all individuals who are eligible to conduct assessments under the *RAR* and that a list of individuals who have successfully completed the course is publicly available.
-

Ensuring QEP Knowledge Is Current

Successfully completing a *RAR* training course is not the only step that should be taken by individuals who intend to act as QEPs. The way the *RAR* is administered may change over time as a result of regulatory amendments, court decisions or shifts in ministry operations. It is important that QEPs remain aware of changes that may affect their work and the conclusions they draw in their assessment reports.

During our investigation, we learned that West Coast region staff (initially with the Ministry of Environment, now with the Ministry of Forests, Lands and Natural Resource Operations) have, since 2006, held annual meetings with QEPs in that region to provide information and feedback. As they review most of the reports they receive, staff in this region are also able to provide QEPs with individualized feedback on the quality of their reports. West Coast region staff have also used

information gathered through their reviews to determine the topic of their regular training workshops.

Unfortunately, we learned that because of an anticipated lack of resources, the West Coast region was not planning to continue this best practice of holding workshops in 2013. Instead, staff hoped to establish a practice in which QEPs would share information among themselves aimed at improving the quality of their work. Thompson-Okanagan is the only other region where ministry staff conducted some QEP training. This was done during workshops for QEPs in various topics in 2011 and 2012.

The Society of Contaminated Sites Approved Professionals of British Columbia (CSAP) has taken a different approach to ensuring members have access to up-to-date information that may affect their practice. It posts regular members updates on its website. For example, in spring 2013, the CSAP posted an update for members that included “comments, tips and suggestions” based on recent reviews of reports.¹⁴⁶ This is a good way of ensuring that all members have access to consistent and clear information on issues of concern and suggestions for improvement.

Analysis

While the administration of the *RAR* has changed since the Regulation was introduced, there is no consistent, province-wide process to ensure that all QEPs have access to information about these changes. The steps taken by the West Coast region are positive and are likely to lead to improved practice in that region. All QEPs should have access to similar ongoing professional development and information that can improve the quality of their work.

As all *RAR* assessment reports are submitted electronically, it would be a relatively simple process for the ministry to email a *RAR* update bulletin to these individuals on a regular schedule and whenever major decisions are made. The bulletin could also be copied to local government staff. The ministry could also post regular updates about *RAR* changes on its website.

Finding & Recommendation

- F5** The Ministry of Forests, Lands and Natural Resource Operations has not established a province-wide process for ensuring that all individuals who conduct assessments under the *Riparian Areas Regulation (RAR)* are regularly provided with up-to-date information on changes to the *RAR* or its administration.
- R6** The Ministry of Forests, Lands and Natural Resource Operations establish a process for regularly providing all individuals who conduct assessments under the *Riparian Areas Regulation (RAR)* with updates about changes to the *RAR* or its administration.

Development of Professional Guidelines

The Schedule of Assessment Methods set out in the *RAR* provides QEPs with instructions on how to conduct a *RAR* assessment and write an assessment report. However, the assessment methods offer no guidance as to how QEPs should handle ethical issues that might arise in the course of their work, nor do they establish

¹⁴⁶ Society of Contaminated Sites Approved Professionals of British Columbia, “CSAP Members Update Spring 2013” <<http://www.csapsociety.bc.ca/node/89>>.

"Government can play a role articulating and supporting a framework that serves the public interest, and clarifying respective responsibilities for the use of [qualified persons]."

Source: Professional Reliance Cross-Ministry Working Group, "Draft Framework for the Use of Qualified Persons," March 2012.

enforceable standards of conduct that relate specifically to the work of QEPs under the *RAR* such as, for example, avoiding conflict of interest.

In this report, we have highlighted the extent of the ministry's reliance on professionals and their regulating associations to ensure an acceptable standard of QEP conduct. In the course of our investigation, we consulted with professional associations about their experiences with the *RAR*. Two professional associations noted the lack of professional guidelines for QEPs and contrasted the *RAR* with other professional reliance models in the natural resources sector. We learned during our investigation that the ministry had done some initial work with the professional associations on developing guidelines for QEPs under the *RAR*. Although the ministry recognized the merits of this project, work on developing guidelines ceased in 2008. The reason identified for this was a lack of funding.

In other areas, such as forestry, the ministry has worked closely with professional associations to develop guidelines for their members that establish enforceable standards of professional conduct. Examples include guidelines for:

- Legislated Landslide Assessments
- Legislated Flood Assessments
- Forest road and bridge construction
- Terrain Stability Assessments
- Contaminated Sites Approved Professional services

The guidelines on forest road and bridge construction and terrain stability assessments were developed by the Association of Professional Engineers and Geoscientists of British Columbia and the Association of British Columbia Forest Professionals, and the guidelines apply to members of both associations. Although each association has a distinct role, they have worked together to develop guidelines for the work of their members in these specific contexts.

Some of the information in the above list of guidelines is similar to that in the *RAR* assessment methods, but includes greater emphasis on a professional's ethical obligations and responsibilities as they relate to specific activities. As each professional association has helped draft the guidelines and endorsed them, they now constitute standards of professional conduct to which a professional can be held accountable.

Beyond the technical instructions on how to conduct an assessment and submit a report, these guidelines contain information such as:

- professional roles and responsibilities in conducting an assessment
- quality assurance
- standards of professional ethics, with reference to bylaws and enabling statutes
- detailed lists of the minimum education, experience and skill sets required for specific tasks

The professional associations we spoke with expressed interest in working with the ministry to draft guidelines for their members who conduct riparian assessments. At the same time, the associations emphasized the need for the ministry to take the lead and provide expertise and support – financial and technical – to draft authoritative guidelines that would be taken seriously by all stakeholders.

Analysis

The Draft Framework for the Use of Qualified Persons identifies “clarity of expectations” around the work of qualified professionals as an essential part of a professional reliance model. Similarly, the working group’s updated framework document requires that guidance is provided to enable qualified persons to fulfil obligations and to meet expectations. Expectations can be effectively clarified through the use of professional guidelines that are specific to the work being performed. These documents provide a link between the specifics of how to do the work required under the legislation and the ethical obligations imposed on professionals by their association. Guidelines establish such expectations in public, accessible documents.

Although the assessment methods explain the steps involved in conducting an assessment under the *RAR*, they do not address how QEPs are expected to exercise their professional judgment when doing so. Professional guidelines could fill this gap. The ministry has previously acknowledged the importance of developing professional guidelines for QEPs, and it is important to the fair administration of the *RAR* that this work be completed.

Finding & Recommendation

- F6** The assessment methods set out in the *Riparian Areas Regulation* provide insufficient guidance on conducting assessments and do not hold individuals who are authorized to conduct assessments to an enforceable standard of professional conduct.
- R7** The Ministry of Forests, Lands and Natural Resource Operations work with professional associations to draft professional guidelines for use by individuals who conduct assessments under the *Riparian Areas Regulation* that are designed to constitute an enforceable standard of professional conduct.
-





MONITORING QEP COMPLIANCE

For the effective and fair administration of the *Riparian Areas Regulation (RAR)*, individuals who conduct assessment reports must be accountable for the work they perform. The Draft Framework for the Use of Qualified Persons prepared by the Professional Reliance Cross-Ministry Working Group recommends that professionals be held accountable for their work to “help ensure acceptable performance with consequences if performance is unacceptable.”¹⁴⁷ According to the draft framework, this can be achieved in part through monitoring or audits to assess individual competence.

The Ministry of Forests, Lands and Natural Resource Operations can monitor a QEP’s work in two ways. First, staff review assessment reports to determine whether the QEP followed the *RAR* assessment methods.¹⁴⁸ Second, staff visit a sample of development sites to confirm that the QEP correctly assessed the site and that the project proponent followed the QEP’s directions.

This section of the report focuses on our investigation of the ministry’s compliance monitoring of QEPs. We examined the ministry’s procedures for reviewing assessment reports and conducting site visits, and assessed whether the existing practices are adequate. We also investigated limits on the ministry’s ability to review assessment reports and address any issues of non-compliance it might find.

What Is an Assessment Report?

An assessment report sets out the details of the *RAR* assessment conducted by a QEP. This document, which is provided to the ministry, contains information about the nature of the riparian area at a proposed development site. A person who prepares an assessment report must follow the assessment methods set out in the Schedule to the Regulation.¹⁴⁹ The Regulation defines an assessment report as a report “prepared in accordance with the assessment methods to assess the potential impact of a proposed development in a riparian assessment area and which is certified for the purposes of this regulation by a qualified environmental professional.”¹⁵⁰ This means that a report inconsistent with the assessment methods is not an assessment report as defined in the *RAR*.

To help ensure that reports are consistent and contain all the required information, the ministry has developed a template for both detailed and simple assessment reports. The detailed assessment report template contains the following sections:

- contact information for the QEP and developer
- description of fisheries resource values and development proposal: the species present, type of fish habitat, current condition of riparian vegetation, connectivity to downstream habitats, nature and location of development, specific activities proposed, timelines
- results of riparian assessment: width of the streamside protection and enhancement area (SPEA)
- site plan: the proposed development and riparian areas

¹⁴⁷ Ministry of Forests, Lands and Natural Resource Operations, “Draft Framework for the Use of Qualified Persons,” March 2012, 5 <http://www.nro.gov.bc.ca/nrs/qp/documents/qp_framework.pdf>.

¹⁴⁸ Ministry of Environment, Schedule of Assessment Methods <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/assessment_methods.pdf>.

¹⁴⁹ *Riparian Areas Regulation*, B.C. Reg. 376/2004, s. 7.

¹⁵⁰ *Riparian Areas Regulation*, B.C. Reg. 376/2004, s. 1.

- measures to protect and maintain the SPEA: requirement only for a detailed assessment, and includes dealing with danger trees, windthrow, slope stability, protection of trees, encroachment, sediment and erosion control, floodplain and stormwater management
- environmental monitoring: explanation of the monitoring regimen, which includes the monitoring schedule, communications plan, and the requirement for a post-development report
- photos of the site
- professional opinion and QEP certification: demonstration that the author is qualified to carry out the assessment, has followed the assessment methods to prepare the report, and is providing an opinion consistent with either s.4(2)(b)(iii)(A) or (B) of the *RAR*

The parts of the report most significant to riparian protection are the results of the assessment section, which determines SPEA width (the area that must be protected from development) and the measures section. The measures are the steps the proponent must take to protect the integrity of the SPEA to ensure the proposed development does not cause a harmful alteration, disruption or destruction (HADD) of fish habitat. Measures can include: establishment of fencing or other barriers to prevent encroachment on the SPEA; removal of danger trees; revegetation with native species; and steps to prevent erosion and sedimentation of the watercourse. The measures section of the report is only required if a detailed assessment is completed.

Uploading an Assessment Report

QEPs must submit their reports electronically to the Ministry of Forests, Lands and Natural Resource Operations through the ministry's Riparian Areas Regulation Notification System (RARNS). In order to upload a report to RARNS, QEPs must have a basic BCeID account. A basic BCeID account does not require users to verify their identity, and registration can be completed entirely online. On the RARNS website, the report author enters basic information such as his or her name and qualifications, the proponent's name, the location and nature of the development and the stream affected. The person then uploads a PDF of the report and is asked a series of questions intended to satisfy the requirements set out in section 4(2)(b) of the *RAR*. The questions ask whether the person:

- is a QEP
- can confirm that all other professionals involved in the assessment are QEPs
- has carried out the assessment of the development proposal following the assessment methods
- is of the opinion that no HADD will result from the development if implemented as proposed or if the measures identified in the report are implemented
- has attached a complete assessment
- commits to retaining a signed and sealed copy of the assessment report on file

If a person answers "no" to any of the above questions, he or she will be unable to proceed with the report submission process.

Once a report is uploaded, an automatic notification email is immediately sent to the ministry, DFO, the relevant local government and the QEP. This meets the

requirements of section 4 of the *RAR* and allows the local government to proceed with the development approval process.

RARNS gives QEPs the ability only to search the reports they have submitted: QEPs do not have access through the system to the reports that may have been prepared by other QEPs for adjacent or nearby properties. Those reports may, however, be available through a freedom of information request or through the local government considering the development proposal.

Report Expiry Dates

Once a report is uploaded to RARNS, it remains on the system indefinitely and cannot be removed. If a QEP later needs to amend a report, he or she must upload a new version. QEPs can change their own or the proponent's contact information but not their name, the proponent's name or the details of the development. The ministry told us that a new report is needed if the details of the development or the proponent change. However, the ministry has no authority in the *RAR* to require an updated or new report.

Project proponents sometimes obtain (and the QEPs submit to the ministry) *RAR* assessments well in advance of development. For example, during our review of assessment reports, we noted one report that had been submitted to RARNS in October 2008 for a project with a proposed start date of 2014. The assessment report stated that the proponent had no specific development plans for the site, but that the site could be developed for single-family homes at some point in the next five years. As of the fall of 2013, no development appeared to have occurred on the site. As the report was completed well before an actual development plan, the mitigation measures in the report were incomplete. For example, the QEP wrote that no stormwater management plan was currently required, but one would be needed once the development plan was created "to minimize the disruption of the natural hydrologic pathway on the lot and in the riparian area." The QEP provided suggestions about the measures a stormwater management plan could contain, but did not offer these in the context of a specific development plan. However, because the report has been submitted, the proponent has technically met the requirements of the *RAR*. That is, when the report was submitted in 2008, a notification was sent to the local government at that time.

Analysis

The ministry has not established a specific time period after which a *RAR* assessment report expires. Assessment reports may be completed without a clearly defined development plan, and many years in advance of any development actually occurring. In the intervening time, environmental conditions at the site in question may be altered by flooding, upstream or downstream development or other natural events or human activities – new conditions that in turn might alter the riparian areas, and so render the previous assessment determinations out of date. Allowing reports to be submitted years in advance, and sometimes without a specific development proposal, means they are less likely to contain site-specific measures to protect riparian habitat. It also means that they may be inaccurate when the development plan does move forward.

There are various steps that the ministry could take to integrate expiry dates into the existing electronic system. For example, the ministry could ensure that the notification sent when a report is first uploaded to RARNS includes the expiry date, so that the proponent and QEP have a reasonable opportunity to, if necessary, update the report before it expires.

Finding & Recommendations

- F7** The Ministry of Forests, Lands and Natural Resource Operations has not established an expiry date for assessment reports.
- R8** The Ministry of Forests, Lands and Natural Resource Operations establish an expiry date for assessment reports.
- R9** The Ministry of Forests, Lands and Natural Resource Operations establish a process to ensure that ministry staff, Fisheries and Oceans Canada (DFO) and local governments, qualified environmental professionals (QEPs) and proponents involved in a project that requires an assessment report are automatically notified when that assessment report has expired.

How the Ministry Monitors for QEP Compliance

In the 2008 Intergovernmental Cooperation Agreement (ICA), the province committed to developing a monitoring framework to ensure compliance with the *RAR*.¹⁵¹ To meet this commitment, the ministry uses assessment report reviews and site visits to:

- gather information
- correct errors found in assessment reports
- determine whether compliance with the *RAR* meets the ministry's objectives

Ministry Review of Assessment Reports

Part of the ministry's QEP compliance monitoring process is to review assessment reports submitted through RARNS. The ministry told us its goal in these reviews is to gather information on QEP compliance and identify issues. By doing so, the ministry aims to better administer the *RAR*.

Ministry staff review assessment reports using a checklist.¹⁵² To be complete, a report must:

- include initial data, such as contact information and details on the nature and location of the development
- follow the required steps for either the simple or detailed assessment method (for example, correctly determine the SPEA)
- present a clear and legible site plan
- detail measures to protect and maintain the SPEA
- include environmental monitoring details
- state clearly that a post-development report is a requirement
- include photos that are representative of site conditions
- present a professional opinion that is consistent with the information in the report

Until July 2009, the ministry reviewed every assessment report it received. The ministry reported on the results of this monitoring in May 2009. According to that report, the ministry sent approximately 25 per cent of assessment reports back

¹⁵¹ Intergovernmental Cooperation Agreement Respecting the Implementation of British Columbia's Riparian Areas Regulation, 2008, Richmond, B.C., Annex 2, s. 6 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/RAR_ICA_agreement.pdf>.

¹⁵² See Appendix 2 for a copy of the *RAR* Assessment Report Review Checklist.

to the individuals who authored them for corrections.¹⁵³ In a sample of 100 reports from 2009, 28 required amendments and 5 contained “substantive errors” that, if followed by the proponent, would have resulted in damage to the riparian area.¹⁵⁴ The ministry told us it has taken steps to improve QEP compliance, including publishing a Frequently Asked Questions document¹⁵⁵ and a list of the “top 10” problems with assessment reports. However, the information we gathered in our investigation raised questions about how effective those steps have been.

Table 1 shows that since 2008 the ministry has received between 310 and 422 assessment reports per year.

Table 1: Number of Reports Received by Calendar Year

Calendar year	Number of assessment reports received
2008	422
2009	310
2010	345
2011	370
2012	376
2013 (as of November 29)	322
Total	2,145

The regional districts with the highest number of reports submitted over the five-year period from 2008 to 2012 were:

- Okanagan-Similkameen (209 reports)
- Cowichan Valley (204 reports)
- Columbia-Shuswap (168 reports)
- Nanaimo (162 reports)
- Capital (154 reports)

During the same five-year period, the ministry received the fewest reports from:

- Powell River (15)
- Strathcona (34)

In July 2009, the ministry stopped reviewing 100 per cent of assessment reports, despite the high levels of non-compliance reported in May 2009. In 2008, the ministry worked with a statistician from Simon Fraser University to develop a monitoring framework for site visits. In July 2009, the ministry decided to apply elements of this site visit framework to the assessment report review process. As a result, since July 2009, the ministry’s goal has been only to review 20 per cent of reports.

In accordance with this plan, headquarters expected that staff in each regional office would review a random sample made up of every fourth or fifth report received. We were not able to determine, in our investigation, whether this decision to review 20 per cent of reports in each region provided the ministry with an accurate

¹⁵³ Ministry of Environment, *Annual Report on the Implementation of the Riparian Areas Regulation (RAR) 2008–2009* (draft), 5 May 2009, 13.

¹⁵⁴ Ministry of Environment, *Annual Report on the Implementation of the Riparian Areas Regulation (RAR) 2008–2009* (draft), 5 May 2009, 13–14.

¹⁵⁵ Ministry of Environment, “Riparian Areas Regulation—Frequently Asked Questions,” February 2006 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/frequently_asked_questions.pdf>.

picture of non-compliance. Table 2 shows the number of reports, by regional district, the ministry actually reviewed each year from 2010 to 2012.

Table 2: Number of Reports Received and Reviewed by Regional District, 2010–2012

Regional district	Number of reports received, 2010–2012	Number of reports reviewed (paper review), 2010–2012	Percentage of reports reviewed, 2010–2012 (%)
Capital	84	47	56
Central Okanagan	33	3	9
Columbia-Shuswap	113	1	<1
Comox Valley	64	30	47
Strathcona	17	10	59
Cowichan Valley	118	59	50
Fraser Valley	64	6	9
Greater Vancouver (other than within the boundaries of the City of Vancouver)	95	9	9
Nanaimo	91	37	41
North Okanagan	92	5	5
Okanagan-Similkameen	129	8	6
Powell River	9	0	0
Squamish-Lillooet	36	4	11
Sunshine Coast	59	4	7
Thompson-Nicola	87	2	2
Total	1091	225	21

While the total numbers in Table 2 show that from 2010 to 2012 the ministry reviewed slightly more reports than its target of 20 per cent, the ministry did not meet this goal province-wide. This is seen in Figure 3, which shows the percentage of assessment reports reviewed by regional offices between 2008 and 2012, inclusive.

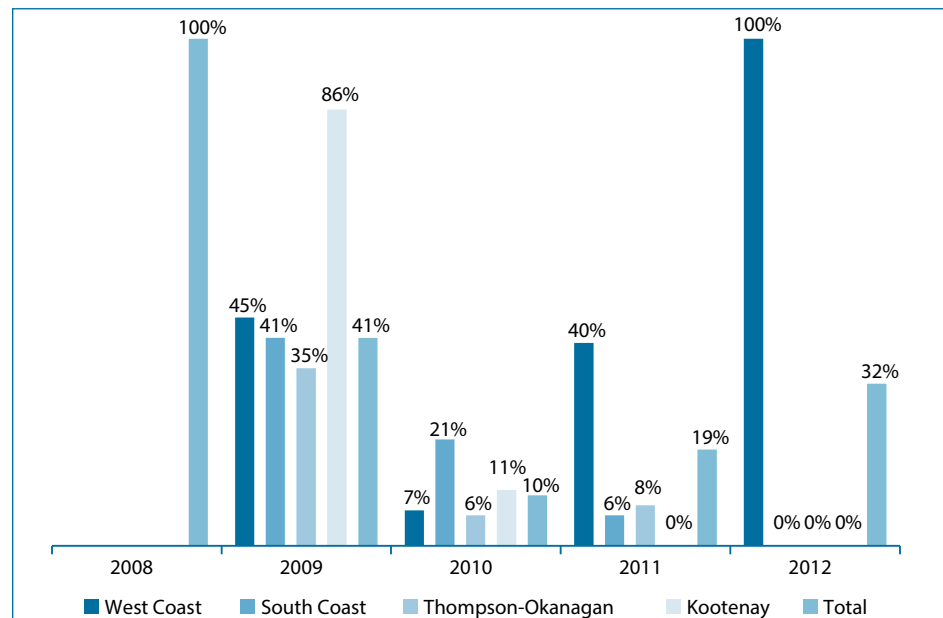
The overall percentage of reports reviewed by the ministry in 2012 was, at 32 per cent, higher than the goal set by the ministry. Of all the regional offices, however, only the West Coast office reviewed any reports. In 2011, 52 of the 69 reports reviewed by the ministry were done by the West Coast office. In 2010, only the South Coast region met its goal of reviewing 20 per cent of assessment reports.

The ministry has met its goal of reviewing 20 per cent of reports in every region only once, in 2009, the year the process was established. This is easily explained since until July 2009, the ministry was still operating under its old system and reviewing all reports it received. In fact, the ministry has not met its own requirements for reviewing 20 per cent of reports from all regions in the nearly five years since establishing them.

At the 2012 UBCM convention, local governments resolved that the ministry “appears to be lacking the dedicated resources to review the reports forwarded by Qualified Environmental Professionals (QEPs),” and called on the provincial government to “take immediate steps to provide the necessary staff resources to review the reports forwarded by QEPs so that the provincial Riparian Areas Regulation fully achieves its goal of protecting our fish habitat.”

Source: Union of British Columbia Municipalities, Resolution 2012-B73, “Qualified Environmental Professionals.”

Figure 3: Percentage of Assessment Reports Reviewed by Each Regional Office, 2008–2012*



* Note that although some regional districts are covered by more than one ministry office, for the purpose of this report, Squamish-Lillooet and Fraser Valley regional districts were assigned to the South Coast region, and Columbia-Shuswap reports were split between the Kootenay region and the Thompson-Okanagan region. The previously separate Thompson and Okanagan regional offices were merged for the purposes of the RAR in 2011 and are considered to be one region in this graph.

Thompson-Okanagan, Kootenay and South Coast regions review a report only if an issue is brought to the attention of regional staff by local governments, DFO, a QEP or the public.

- In 2011 and 2012, the South Coast region did not conduct routine reviews of reports.
- In 2011, the Thompson-Okanagan region received 123 reports from the Central Okanagan, Columbia-Shuswap, North Okanagan and Okanagan-Similkameen Regional Districts and reviewed only 10 of them, or 8 per cent.
- In 2012, the Thompson-Okanagan region received 134 reports from the Central Okanagan, Columbia-Shuswap, North Okanagan and Okanagan-Similkameen Regional Districts and reviewed none of them. The Columbia-Shuswap Regional District includes Shuswap Lake, which contains important salmon spawning areas and is subject to multiple competing land use pressures, including residential and commercial developments along the lakeshore.¹⁵⁶

As of August 2013, only the West Coast region reviewed reports at a rate at or above the ministry’s 20 per cent goal. Clearly, compliance monitoring varies dramatically between regions. The ministry told us that these disparities are a result of regional priority setting and budgetary constraints. South Coast, Thompson-Okanagan and Kootenay regions each assign only one staff member to RAR-related work, and the majority of these people’s responsibilities are non-RAR related. The ministry’s West Coast office was able to review the required number of reports, however, because it had two staff members devoted to the administration of the RAR rather than one staff member as was the case in other regions.

It is clear from the example of the West Coast office that small increases in staffing levels can result in effective monitoring, which is necessary if a professional reliance model is used.

¹⁵⁶ See, for example, the Shuswap Lake Integrated Planning Process <<http://www.slippbc.ca/documents-and-resources/plans/66-strategic-plan>>.

To ensure a professional reliance model works as intended, the government must take steps to confirm acceptable QEP performance. This can be achieved through monitoring or auditing reports to assess compliance with the *RAR*.

When the ministry reported on compliance with the *RAR* in 2009, it was clear that there were significant problems with non-compliance. However, later that year, the ministry significantly reduced its monitoring efforts. The ministry decided that reviewing 20 per cent of reports submitted in each region would be an appropriate representative sample of the quality of all assessment reports submitted in the province. The ministry has not achieved that rate of review.

Given the levels of non-compliance that were identified in the ministry's 2009 report, the ministry has not adequately justified its decision to reduce the number of reports reviewed. Although the ministry explained that reviewing 20 per cent of reports was based on the statistical framework for site reviews, it did not provide adequate information that would confirm that reviewing 20 per cent of reports, rather than continuing to review all reports, provided an accurate picture of non-compliance.

Further, the ministry has not, in fact, met its reduced goal of reviewing 20 per cent of reports. The failure to review at least 20 per cent of reports across all its regions has severely limited the ministry's ability to identify issues that could lead to better administration of the *RAR*, and it has reduced the likelihood that staff will detect a problematic assessment report.

The last year in which all the regional offices met the ministry's goal of reviewing 20 per cent of assessment reports was 2009, where for the first seven months of the year, the ministry was reviewing every report. In the nearly five years that this goal has been in place, it has not been met. It is surprising that the ministry has consistently failed to meet this goal across all regions. Ministry staff can readily access assessment reports through RARNS and, as we learned during our investigation, completing a review by following the ministry's own checklist takes only about 30 minutes. (So, for example, to meet the ministry's goal, staff in the South Coast region office in 2011 would have needed to review 17 of the 85 reports they received that year, which would have taken a total of about 8.5 hours. To review all 85 reports would have taken about 42.5 hours.) While a paper review may determine that the ministry needs to follow up with the QEP, any follow-up work is a separate matter from the initial report review. This analysis suggests that reviewing all reports would not impose a significant resource burden on the ministry.

In addition, there are significant benefits to the ministry reviewing all of the assessment reports it receives. Conducting these reviews would give the ministry a comprehensive understanding of the quality of assessment reports it is receiving in each region and across the province. An initial review of all assessment reports could identify, for example, how well QEPs understand and apply the assessment methods, whether QEPs have used inadequate boilerplate language, or whether QEPs have appropriately described the riparian area or the proposed development.

The ministry cannot meet its responsibility for oversight of the *RAR* in another way that is as reliable as reviewing all assessment reports. Before the ministry can take steps to improve the administration of the *RAR*, it must first ensure it has the information necessary to support sound decision making. The assessment reports the ministry receives are an important source of this information, and the ministry's own records indicate that the reports that it does review often have significant problems. Those problems must be identified and addressed.

Fairness requires that processes be administered consistently in all areas of the province where they apply. For the *RAR*, this means that reviews should be conducted by all regions. While regional environmental and natural resource priorities will differ, it is important that all regions review assessment reports unless there are exceptional circumstances. In the course of our investigation, the ministry did not identify any exceptional circumstances that would justify the failure of most regions to meet the ministry's goal of reviewing 20 per cent of reports.

Tracking regional assessment report reviews and making that information available is important because it would allow the ministry to determine whether its 20 per cent goal is adequate. However, because the ministry does not meet its own review targets, it has no way of knowing whether reviewing 20 per cent of assessment reports is sufficient to ensure an acceptable level of QEP compliance. When the ministry reviewed all reports, it was able to develop measures aimed at improving compliance, including a list of "top 10" problems with assessment reports. As well, the West Coast region uses information gathered through its review of assessment reports to determine topics for QEP workshops. Taking such steps is difficult or impossible, however, unless the ministry has first reviewed all reports.

The ministry simply does not have the information to determine whether its current goal of reviewing 20 per cent of reports is adequate or appropriate, and, as a result, whether assessment reports are meeting the ministry's minimum requirements. Consequently, the ministry should immediately begin reviewing all assessment reports when they are received.

Finding & Recommendation

F8 The Ministry of Forests, Lands and Natural Resource Operations has failed to ensure that each region meets the ministry's goal of reviewing 20 per cent of *Riparian Areas Regulation* assessment reports submitted each year and has failed to establish that, even if complied with, this goal would reliably identify an acceptable level of compliance by qualified environmental professionals (QEPs).

R10 The Ministry of Forests, Lands and Natural Resource Operations review all of the *Riparian Areas Regulation* assessment reports submitted to the ministry each year.

Non-Compliant Assessment Reports

By reviewing assessment reports, the ministry has collected some information on the number of reports that are not compliant with the *RAR* (see Table 3). However, because of the limited number of reviews the ministry has completed, this information is incomplete and unreliable. The ministry told us that no information is available for 2009 and 2010 because data collected from report reviews was not recorded in a format that allows the ministry to report on this information. Additionally, when read in conjunction with the information presented in Figure 3 on the review rates of regional offices, it becomes clear that even the data available for years 2011 and 2012 is not reliable as an indicator of QEP compliance. In 2011, 52 of the 69 reports were reviewed by a single region, West Coast. In 2012, all of the report reviews were done by the West Coast region. The compliance data from 2011 and 2012, then, is focused only on one area of the province. This makes it of limited use in assessing QEP compliance with the *RAR* province-wide. The last year for which there is province-wide data on QEP compliance is 2008.

Table 3: Number of Assessment Reports Requiring Amendment, 2008–2012

Calendar year	Reviewed reports requiring amendment
2008	111/422 (26%)
2009	No data available
2010	No data available
2011	15/69 (22%)
2012	20/122 (16%)

The ministry has also assessed QEP compliance with the *RAR* by conducting site visits. As part of our investigation, we reviewed all the 67 files since 2008 where the ministry found, during a site visit, encroachment into a streamside protection and enhancement area (SPEA). Encroachment means that the riparian area within the SPEA is disturbed by human development, such as building or landscaping. One of the purposes of our file review was to determine how often encroachment was due to an error by the person completing the assessment report. Our file review found that in 36 per cent of files, encroachment occurred because the assessment report did not comply with *RAR* assessment methods. In 46 per cent of cases, encroachment resulted because the QEP had failed to properly mark the SPEA on the ground. Both of these types of encroachment result from errors made by the QEP when completing the assessment report.

Table 4 shows the three main reasons why proponents encroach on SPEAs and how many times each of these reasons for encroachment was recorded during the ministry's site visits.

Table 4: Instances of Encroachment Found during Ministry Site Visits, 2008–2012

	Encroachment due to non-compliant report	Encroachment because the SPEA not marked on site	Encroachment despite SPEA markings and QEP report*
Number of instances	29	37	15
Percentage of instances of encroachment (%)	36	46	18

* See the Monitoring Proponent Compliance section of this report for a discussion of this category of encroachment. The number of instances of encroachment in this table is greater than the 67 files we reviewed because a site may have had more than one reason for encroachment.

"Encroachment due to non-compliant report" means that while the proponent may have followed the QEP's prescribed measures in the report, those measures were not sufficient to protect the riparian area. The proponent proceeded with the project according to the measures detailed in the assessment report and subsequently encroached on the SPEA. Problems in reports that led to encroachment include:

- calculating the SPEA incorrectly
- failing to identify watercourses on the development site
- failing to identify structures already occupying land within the SPEA
- prescribing insufficient measures to protect the riparian area
- allowing encroachment on the SPEA without a letter of permission from DFO

In 2010 and 2011, the ministry's West Coast office hired an independent contractor to conduct site visits of developments subject to the *RAR* on Vancouver Island. The contractor noted some problems with assessment reports that were, in his view, evidence of unsatisfactory work, including:

"There does not seem to be any publicly available information regarding provincial government auditing of qualified professionals and RAR assessments. It would be interesting to know if the 'results-based qualified professional model' is working."

Source:
Ombudsperson questionnaire.

- Some statements in the assessment reports were “unsupported by a rationale or observations made at the site.”
- Measures prescribed to protect the fish habitat in the SPEA were “sometimes too brief to really act as a guide to the proponent.”
- The section of the report for prescribed measures sometimes explained why a given measure was important, but “never actually suggested a measure for it.”
- Some measures contained “‘boiler plate’ statements” that were repeatedly used by the same QEP on different reports.
- QEPs had difficulty prescribing measures in cases of the subdivision of land where no actual development was proposed.

“Encroachment because the SPEA not marked on site” was the most common reason for non-compliance by the proponent and is the result of the QEP not fully following the assessment methods. Marking the SPEA can avoid encroachment, as anyone working at the site can be sure of where the SPEA begins and development must end. Section 3.8 of the Schedule of Assessment Methods requires a QEP to mark the SPEA boundary with a flag.¹⁵⁷ It is clear from our file review that when the SPEA is not properly marked, encroachment by the proponent becomes more likely.

Responding to Non-Compliant Assessment Reports

In 2005, the ministry developed a protocol that outlines the process local governments, ministry staff and DFO can follow to address instances of non-compliance with the *RAR*. The Protocol of Interaction for Responding to Non-Compliance provides a framework for intergovernmental cooperation and specific suggestions for dealing with instances of QEP or proponent non-compliance with the *RAR*.¹⁵⁸ (See also the Monitoring Proponent Compliance section of this report.)

The protocol is referenced in the 2008 Intergovernmental Cooperation Agreement (ICA) and requires both the ministry and DFO to set enforcement priorities, examine options for enforcement, and share expert witnesses and technical support within an area subject to the *RAR*.¹⁵⁹ The protocol sets out three ways in which the ministry can respond to non-compliance by a QEP:

- The ministry may inform a QEP when concerns arise about how the QEP completed a report.
- The ministry may forward its concerns to the appropriate local government for action.
- The ministry may forward its concerns regarding a QEP to the appropriate professional association.¹⁶⁰

¹⁵⁷ Ministry of Environment, Schedule of Assessment Methods, 54 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/assessment_methods.pdf>.

¹⁵⁸ Ministry of Environment, “Riparian Areas Regulation: A Protocol of Interaction for Responding to Non-Compliance,” 8 November 2005 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/ProtocolofInteraction.pdf>.

¹⁵⁹ Intergovernmental Cooperation Agreement Respecting the Implementation of British Columbia’s Riparian Areas Regulation, 2008, Richmond, B.C., Annex 2, s. 7 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/RAR_ICA_agreement.pdf>.

¹⁶⁰ Ministry of Environment, “A Framework for Monitoring Compliance with the British Columbia Riparian Area Regulation,” March 2008, 8.

The protocol states that when QEP non-compliance is “minor,” such as “an error in fact that can be easily corrected,”¹⁶¹ a ministry staff member may contact the QEP to have the error fixed. The QEP then submits an amended report electronically. When “major” non-compliance is found, the protocol states that the ministry should contact the appropriate local government and recommend that it delay or stop development on a site.

Complaints to a Professional Association

Under the Intergovernmental Cooperation Agreement, the province committed to developing a protocol for reporting QEPs to their professional associations.¹⁶² In October 2008, the Ministry of Environment developed guidelines entitled *Guidance for Responding to Unsatisfactory Performance by Qualified Professionals*, which are used by the Ministry of Forests, Lands and Natural Resource Operations in the RAR assessment report monitoring process.¹⁶³

The guidelines state that unless there is a “significant” actual or potential risk to the environment, human health or safety, the onus for addressing unacceptable QEP performance should be on the proponent.¹⁶⁴ This means that even if the ministry encounters evidence of QEP non-compliance in an assessment report, the guidelines discourage ministry staff from directly addressing concerns about a QEP’s work. However, the proponent is unlikely to have the specialized knowledge to question the extent to which a QEP’s report does or does not meet the requirements of the RAR. Furthermore, making the proponent responsible for addressing QEP non-compliance is inconsistent with the Protocol of Interaction for Responding to Non-Compliance. Fortunately, staff in the regional offices have developed a practice that improves on the inadequate policy set out in the guidelines. During our investigation, we obtained examples of ministry staff, in cases where they had reviewed reports, directly contacting QEPs rather than the proponent to raise concerns about the content of an assessment report. We believe this is a more effective approach, and the ministry should address this divergence between the actual practice of its staff and the guidelines.

The guidelines also suggest that ministry staff should have “respectful regard” for the judgment of professionals.¹⁶⁵ This is defined as acknowledging the exercise of professional judgment by a QEP even if that judgment is not consistent with ministry guidelines or expectations. At the same time, however, the guidelines emphasize that having respectful regard for QEPs does not mean ministry staff must accept reports without comment: on the contrary, staff are still expected to review reports and provide suggestions for report improvements, as necessary. When the ministry is reviewing few or no reports in many of its regions, however, this “respectful regard” for professional judgment can quickly become complete deference. A return to reviewing all reports would result in a balance being struck between professional expertise and effective public oversight.

¹⁶¹ Ministry of Environment, “Riparian Areas Regulation: A Protocol of Interaction for Responding to Non-Compliance,” 8 November 2005, 8 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/ProtocolofInteraction.pdf>.

¹⁶² Intergovernmental Cooperation Agreement Respecting the Implementation of British Columbia’s Riparian Areas Regulation, 2008, Richmond, B.C., Annex 2, s. 7(b) <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/RAR_ICA_agreement.pdf>.

¹⁶³ Ministry of Environment, *Guidance for Responding to Unsatisfactory Performance by Qualified Professionals*, October 2008.

¹⁶⁴ Ministry of Environment, *Guidance for Responding to Unsatisfactory Performance by Qualified Professionals*, October 2008, 1.

¹⁶⁵ Ministry of Environment, *Guidance for Responding to Unsatisfactory Performance by Qualified Professionals*, October 2008, 2.

The guidelines also define professional misconduct and suggest what staff should do when they suspect it.¹⁶⁶ According to the guidelines, staff should establish and verify the facts, keep records and consult with professional colleagues. They are also expected to decide if a misconduct matter should be resolved through discussions with the QEP, through consultation with management or by a formal complaint to the QEP's professional association.

Despite this, the ministry only provided one example since 2005 of a complaint about a QEP being forwarded to a professional association. This complaint concerned the possible false use of a designation by a person submitting assessment reports.¹⁶⁷ One barrier to an active reporting program is that ministry staff anticipate there would be a significant amount of work in preparing a submission to a professional association, and then responding to anything received from the QEP in question if the professional association investigated the complaint. Staff believe fitting this extra work into their schedules would be difficult.

Guidance for Responding to Unsatisfactory Performance by Qualified Professionals was developed in 2008, at a time when the ministry was reviewing all assessment reports. Currently, however, most of the Ministry of Forests, Lands and Natural Resource Operations' regional offices are reviewing few or no reports and as a consequence staff are not gathering the compliance information that would support action under the guidelines and, in particular, a complaint to a QEP's professional association. If the ministry returns to reviewing 100 per cent of reports, then this policy may again provide useful guidance to staff in addressing non-compliance by the individuals who are submitting assessment reports.

West Coast Region Practices

The ministry's West Coast region is the only one of four regions that actively monitors QEP compliance with the *RAR*. In 2012, staff in this region reviewed all *RAR* reports and tracked the results of those reviews on a spreadsheet organized according to the name of the QEP who authored them. As a result, West Coast region staff can identify patterns of non-compliance by particular QEPs. Non-compliance includes assessment reports that:

- do not correctly identify the SPEA
- do not determine the high water mark of a stream
- do not appropriately identify the measures necessary to protect the SPEA
- do not address proposed development in the SPEA

Table 5 shows the findings of assessment report reviews by the West Coast office in 2012. A majority – 53 per cent – of the reports had one or more instances of non-compliance.

¹⁶⁶ Ministry of Environment, *Guidance for Responding to Unsatisfactory Performance by Qualified Professionals*, October 2008, 5.

¹⁶⁷ The individual in question had indicated he was a professional biologist on an assessment report while not a member of the College of Applied Biology. The individual was, however, a member of a different professional association and therefore met the requirement that a QEP be a member of an appropriate professional association.

Table 5: West Coast Region Report Compliance Data for January–December 2012

	Incorrectly applied methodology	Incorrectly prescribed appropriate measures	Incorrectly calculated SPEA	No non- compliance identified
Number of reports*	62	50	13	73
Percentage of total reports (%)	40	32	8	47

* Note that because this table reflects all instances of each error, an assessment report containing more than one error would be entered more than once in the table. A total of 156 reports were reviewed.

Because of the thoroughness of the West Coast region's 2012 review process, and the lack of information available from other regions, we used this data to inform our conclusions about overall QEP compliance with the *RAR*. The region's data showed that a large percentage (40 per cent) of QEP reports did not correctly apply the methodology as set out in the *RAR* assessment methods. A smaller number of reports were found to have more serious specific problems, such as incorrectly prescribed protective measures and incorrectly calculated SPEAs.

Staff in the West Coast region combined their reviews with data gathered through earlier visits to development sites. The site visits identified problems that resulted from either an inadequate report or the improper implementation of the report. Problems included:

- encroaching on the SPEA
- failing to mark the SPEA
- failing to identify a watercourse
- reducing the area of the SPEA

West Coast region staff presented this information to the QEPs in question and offered to meet with them to discuss the problems that had been identified. Regional staff told us that this was a useful process. Some QEPs told the region they would use the information to improve their compliance. Others accepted the offer to meet with ministry staff to discuss the assessment of their performance.

After August 2013, due to a reduction in staff, the West Coast region did not expect to be able to continue to review 100 per cent of assessment reports in the future. Instead, West Coast region staff plan to use data from earlier report reviews to focus ongoing reviews on those QEPs with a history of non-compliance.

The West Coast region's practice of working with QEPs to correct non-compliance and of collecting information for potential referral to professional associations is the kind of work that the Protocol of Interaction for Responding to Non-Compliance requires. Without such information, the ministry has no way of knowing whether QEPs are doing their work properly, whether fish habitat is being appropriately protected, and whether any problems that have been identified are being corrected.

Analysis

The professional reliance model requires that adequate and appropriate government resources will be allocated to monitor the work done by QEPs. The importance of ongoing monitoring is recognized in the ministry's own *RAR* documents, such as its 2009 annual report,¹⁶⁸ and the Draft Framework for the Use

¹⁶⁸ Ministry of Environment *Annual Report on the Implementation of the Riparian Areas Regulation (RAR) 2008–09* (draft), 5 May 2009.

of Qualified Persons prepared by the Professional Reliance Cross-Ministry Working Group in March 2012.

However, reviewing assessment reports, recording information and making formal complaints with professional associations all require staffing resources, and RAR monitoring is not a priority in most regions. The monitoring that has been done, primarily by the West Coast region office, has identified significant levels of non-compliance (53 per cent) that need following up to ensure that QEPs are working within the requirements of the RAR. The West Coast region has developed practices to complement the ministry's *Guidance for Responding to Unsatisfactory Performance by Qualified Professionals* and the protocol, making them both more effective. For example, West Coast region staff have until recently reviewed all assessment reports, recorded their reviews on spreadsheets and tracked individual QEPs' non-compliance. This allowed staff to easily retrieve information should a formal complaint to a professional association be necessary. Additionally, because West Coast staff until recently reviewed all the assessment reports they received, they have been able to work informally with QEPs to resolve compliance problems. This process has also allowed them to adopt a principled approach to reducing the number of reports they review: because they know which QEPs are more likely to be non-compliant, they can focus their reviews on those reports. It is not immediately clear, however, how this process works if a new QEP begins submitting reports in the region.

Addressing non-compliance by QEPs is a concern of the ministry, and it has developed the tools to help it detect and respond to such non-compliance – the *Guidance for Responding to Unsatisfactory Performance by Qualified Professionals* and the Protocol of Interaction for Responding to Non-Compliance. However, these tools are not being fully used because the ministry is reviewing so few reports. This means that the ministry is missing opportunities to identify and address non-compliance.

Finding & Recommendation

- F9** The Ministry of Forests, Lands and Natural Resource Operations has not ensured that adequate processes are in place to identify and effectively address the non-compliance of qualified environmental professionals (QEPs) with the *Riparian Areas Regulation*.
- R11** The Ministry of Forests, Lands and Natural Resource Operations ensure adequate processes are in place and utilized in each region to detect and follow up on concerns about non-compliance with the *Riparian Areas Regulation* by a qualified environmental professional (QEP) identified through compliance monitoring and, where necessary, to make a complaint to the QEP's professional association.
-

Limits on the Ministry's Authority

Compliance monitoring is of limited use unless the ministry has authority to take action on assessment reports it determines are inadequate. The policies described in the previous section rely on a QEP voluntarily addressing any problems that the ministry might identify. The Riparian Areas Regulation Notification System (RARNS) notifies local government and DFO automatically and immediately when a QEP uploads an assessment report. Having received the notification, the local government can then consider the development application. As it is automatic, this notification occurs even if the report is incomplete, incorrect or otherwise deficient.

Any reviews conducted by the ministry only take place after the notification has been given.

During our investigation, local governments told us that, in the absence of a clearly defined process for ensuring accountability, they are taking various measures to review QEP reports.

Until recently, some local governments participated in Environmental Review Committees (ERCs) with officials from DFO. Local governments could bring to DFO any development projects they thought required DFO's attention, including those subject to the RAR. DFO could then investigate and, for example, allow development to proceed under section 35(2) of the *Fisheries Act* or prohibit development altogether. We learned in our investigation that, due to recent changes at DFO, in 2013 the federal government stopped participating in ERCs, leaving local governments that relied on ERCs with little support in reviewing assessment reports.

One large local government from the lower mainland has implemented, as an interim measure following the loss of its ERC, a process in which all reports must be peer-reviewed by another QEP. This local government told us the peer-review process adds an additional cost for the proponent and delays the approval process. Some smaller local governments told us that they do not have the resources or expertise to look at reports themselves, so they have no choice but to accept them as written. We also learned of one small local government that, in its bylaw, requires ministry approval of assessment reports as a condition for a development permit. However, as 9 of the 19 assessment reports submitted to RARNS from that area had not been reviewed by the ministry, and the most recent review was done in 2008, this requirement is ineffective.

Local governments often do not have the resources to do a comprehensive review of local development projects and rely on the ministry's assessment report review process. The ministry, with a staff that includes biologists and other resource professionals, is in the best position to review reports and determine whether the QEP has acted within his or her area of expertise and has followed the assessment methods. Ministry staff who review a report are expected to complete that review within 10 days of receipt. We reviewed a sample of reports and found that, in general, this is the case (although, as noted above, the number of reports reviewed is still low).

Case Summary

A complainant contacted us about the ministry's review of the assessment report submitted by a QEP he had hired. The complainant told us he had planned a development on property next to a lakeshore. He believed the ministry had prevented the project from receiving the necessary approvals. We investigated the ministry's role in reviewing the assessment report.

In response to our investigation, staff at a regional office of the ministry told us that they had included the report in their routine review process. When staff reviewed the report, they had identified a number of significant errors. Specifically, the QEP had incorrectly applied the RAR assessment methods, which could result in a miscalculated SPEA. When ministry staff contacted the QEP with their concerns, he refused to amend the report. Ministry staff contacted the appropriate local government's planning department and suggested that, because of the problems with the report, the local government should not approve the complainant's development. The local government chose to rely on the information provided by the ministry to refuse the necessary approvals.

While the complainant was understandably frustrated to hear that the report he had paid for was inadequate, this is a good example of the importance of routine compliance monitoring. Local governments are ultimately responsible for enforcing the requirements of the *RAR*, but may lack the resources to effectively monitor compliance. Local governments are not bound by ministry recommendations; however, the information the ministry can provide by routinely reviewing assessment reports can help local governments better protect riparian areas.

Ministry Response to *Yanke v. Salmon Arm (City)*

In July 2011, the British Columbia Court of Appeal addressed the ministry's administration of the *RAR* in the case of *Yanke v. Salmon Arm (City)*.¹⁶⁹ The case was one where a landowner who wanted to build on his waterfront property questioned first, whether the *RAR* applied to his property, and second, the role of the ministry in reviewing and notifying the local government that it had received a report.

The Court of Appeal found that the ministry does not have discretion to withhold the notification to local government that it has received a report from a QEP concerning a particular development as required by section 4 of the *RAR*.¹⁷⁰ This decision had and continues to have important implications for the ministry's work, and casts serious doubt on what the ministry can do even if it reviews a report and determines that it is non-compliant with the requirements of the *RAR*. Prior to *Yanke*, if it determined there were problems with an assessment report, the ministry would send a letter to the QEP, local government and DFO stating:

This assessment report requires amendments to meet *RAR* submission requirements. The Qualified Environmental Professional must address the incomplete entries on the attached checklist and resubmit the assessment. Please defer local government development permit review until the report has been updated and [the ministry] advises that the report has been accepted.

The letter would also include a copy of the completed report review checklist. The ministry would outline to the QEP how the report could be improved. The QEP was required to resubmit the report and the ministry, upon receiving the automatic notification, would again review the report and either accept it or require that more work be done.

Ministry practice did not change in response to the Court of Appeal's decision in *Yanke v. Salmon Arm (City)*, although the effect of that work was significantly altered. More than two years after the *Yanke* decision, if the ministry reviews an assessment report and finds errors in the process followed by the QEP, it will still provide the person who completed the report with the checklist and will encourage him or her to resubmit. However, the ministry acknowledges that it cannot require an individual to amend a report. If the person who completed the report decides not to make amendments or disagrees with the ministry's assessment, the ministry may follow up with a letter asking the person who completed the report to justify those conclusions that the ministry believes are inconsistent with the assessment methods. Even in this case, the ministry cannot require any changes to be made.

The ministry told us that if it finds errors in a report, its usual practice is to also inform the local government so that it can decide whether to continue with the approval process. The local government may respond by delaying related

¹⁶⁹ *Yanke v. Salmon Arm (City)*, 2011 BCCA 309.

¹⁷⁰ *Yanke v. Salmon Arm (City)*, 2011 BCCA 309, paras 30–31. For a summary of the facts of the case, see the Administration of the *Riparian Areas Regulation* section of this report.

development permits and approvals until the ministry is satisfied. The ministry does not have the authority to reject a report or to delay notification to a local government. A fair and effective system would give the ministry clear authority to review and require amendments to assessment reports before the notification is sent to local governments.

In August 2011, the ministry considered the implications of *Yanke* in a decision note.¹⁷¹ The note recommended amending section 4 of the *RAR* to require the ministry to confirm that an assessment report is in an acceptable form and contains no deficiencies. This proposed amendment would address concerns about the ministry's authority to review and require changes to reports. The problems identified if the amendments to the Regulation were not made included:

- The ministry will not have authority to reject reports that do not meet *RAR* requirements.
- The ministry will not meet its commitments in the Intergovernmental Cooperation Agreement.
- Local governments will not be able to rely on the ministry to require changes to developments that are non-compliant with the *RAR*.
- The ministry will give increased deference to professionals.
- The workload of regional staff will potentially increase if the ministry decides to turn off the automatic notification and review each report as it comes in.¹⁷²

This proposed amendment has not yet been implemented. The ministry has explained that since 2011 it decided to delay any and all amendments to the *RAR* as it waited for changes to the federal *Fisheries Act*, announced in June 2012, to take effect.¹⁷³

Analysis

The ministry delayed action in responding to the concerns identified in *Yanke* for more than two years because of pending changes to the federal *Fisheries Act* even though the pending changes did not affect the ministry's powers under the *RAR*. While the *RAR* is part of an intergovernmental fish habitat protection strategy, it also regulates land use by imposing requirements on local governments – subject matters entirely within provincial government jurisdiction. It is important to follow a coordinated approach when issues affect multiple levels of government, but equally important is that the ministry address the gaps affecting the fair administration of the *RAR* in a timely fashion. The ministry clearly identified the problem, the potential solution, and the negative consequences of doing nothing at all in August 2011.

¹⁷¹ Ministry of Forests, Lands and Natural Resource Operations, decision note, 10 August 2011.

¹⁷² Ministry of Forests, Lands and Natural Resource Operations, decision note, 10 August 2011.

¹⁷³ As discussed in the Administration of the *Riparian Areas Regulation* section of this report, the amendments came into force on November 25, 2013: Order Fixing November 25, 2013 as the Day on which Certain Provisions of the Act Come into Force, SI/2013-116, (2013) C Gaz II, Vol. 47, No. 23 (*Jobs, Growth and Long-Term Prosperity Act*).

Finding & Recommendation

F10 The Ministry of Forests, Lands and Natural Resource Operations has not taken reasonable steps to amend the *Riparian Areas Regulation (RAR)* since the 2011 Court of Appeal decision in *Yanke v. Salmon Arm (City)* to allow the ministry to postpone notification to local governments until its reviews of assessment reports are complete, and any required amendments to reports to ensure compliance with the *RAR* assessment methods have been made.

R12 The Ministry of Forests, Lands and Natural Resource Operations take steps, on or before October 1, 2014, to have the *Riparian Areas Regulation (RAR)* amended to allow the ministry to postpone notification to local governments until its reviews of assessment reports are complete and any required amendments to reports to ensure compliance with the *RAR* assessment methods have been made.

Site Visits

In addition to reviewing assessment reports, staff from the Ministry of Forests, Lands and Natural Resource Operations can visit development sites to assess both proponent and QEP compliance with the *RAR*. This type of monitoring may be done by ministry employees or by independent QEPs on contract to the ministry.

During a site visit, the person doing the monitoring (the “monitor”) uses a checklist to compare the QEP report received by the ministry with the conditions observed on site. The monitor determines whether:

- the SPEA is clearly marked
- the QEP’s measurements of the site are correct
- the measures prescribed by the QEP to protect the riparian area are sufficient and substantiated
- the proponent has implemented the QEP’s measures
- the proponent has encroached on the riparian area by developing in the SPEA
- the QEP’s post-development report, if it exists, is consistent with what the monitor observes

In the West Coast region, staff use a spreadsheet to organize the data that would normally be contained in the review checklist. One advantage to this practice is that the data collected becomes searchable and can be filtered and organized in a variety of ways. This is helpful when analyzing a large number of reports for specific information or patterns of possible non-compliance.

Number of Site Visits

In 2008, the ministry, DFO and a statistician from Simon Fraser University developed a framework for determining the minimum number of site visits per year needed to give the ministry a satisfactory level of confidence in *RAR* compliance. The framework, developed from a statistical model, specifies the target number of site visits the ministry must conduct, and the maximum number of non-compliant sites that result from the site visits, to be 90 per cent confident that non-compliance with the *RAR* is 10 per cent or less. That target number of site visits is not fixed: rather, it is based on the number of assessment reports the ministry received in the previous year. For example, according to the framework, if the ministry receives

300 assessment reports one year, it must conduct 85 site visits the following year. Somewhat disconcertingly, the monitoring framework describes assessment reports as “analogous to a production line of widgets or bullets,” which suggests that the framework sees *RAR* assessment reports as identical and interchangeable rather than as unique assessments of environmental conditions at specific sites.

The framework also states that if the ministry conducts the required number of site visits and finds non-compliance at more than a set number of those sites, the ministry cannot be certain that its *RAR* compliance goals are being met. Using the same example as above, this means that if the ministry conducts 85 site visits and finds more than five non-compliant sites (the maximum acceptable number set by the framework), then the ministry cannot be 90 per cent confident that non-compliance is 10 per cent or less. Table 6 shows the number of site visits conducted by each regional office from 2009 to 2012 (covering reports submitted from 2008 to 2011) and the number of these sites where the ministry found non-compliance in the form of encroachment on the SPEA.

Table 6: Number of Site Visits and SPEA Encroachments by Region, 2009–2012

Region	Number of site visits	Sites with SPEA encroachment	Percentage of site visits with SPEA encroachment (%)
West Coast	131	44	34
South Coast	46	7	15
Thompson-Okanagan	31	16	52
Kootenay	17	0	0
Total	225	67	29

Table 7 shows the overall number of reports received per year, the number of site visits conducted, the number of site visits the ministry should have conducted in accordance with the monitoring framework, the number of sites that showed encroachment on the SPEA, and the maximum number of instances of encroachment permitted under the monitoring framework. The framework document describes encroachment as “major” non-compliance. Any encroachment on the SPEA, for whatever reason, is directly contrary to the protections in the *RAR*, so we focused our file review on encroachment. However, there are also other kinds of non-compliance that are not reflected in Table 7.

Table 7: Number of Reports Received, Site Visits Made and SPEA Encroachments Detected across the Province, 2008–2012

Year*	Total number of reports received	Number of site visits: conducted (required)	Number of sites with SPEA encroachment: actual (maximum allowable)
2008	422	87 (87) [†]	22 (5)
2009	310	43 (85)	11 (5)
2010	345	81 (85)	16 (5)
2011	370	74 (85)	18 (5)
2012	376	3 (85)	0 (5)
Total	1,823	288 (427)	67 (25)

* This represents the year the report was received by the ministry; in accordance with the monitoring framework, site visits are conducted the year after the report is received. The data on site visits conducted for reports received in 2012 is accurate as of November 29, 2013.

† Of the 87 developments that received site visits, 7 were from assessment reports submitted in 2007.

The data in Tables 6 and 7 show that the ministry does not regularly conduct the minimum number of site visits its own model requires to be confident of *RAR*

compliance. The ministry should have completed between 85 and 87 site visits for each of the years between 2008 and 2011. However, this was accomplished only once, for reports submitted in 2008. This number is also problematic because seven of the sites visited had their assessment report submitted in 2007, not 2008. In 2013, the ministry conducted only three visits to sites for which it received reports in 2012. In addition, the number of sites found with SPEA encroachment each year far exceeds the maximum of five set out in the framework. As Table 7 indicates, the number of non-compliant sites is, for all years except 2012, three to four times the acceptable number.

Analysis

Site visits are essential to the ministry's compliance monitoring process because they allow the ministry to clearly determine whether riparian areas are being adequately protected. If QEPs do not properly survey a development site and prescribe the correct measures to protect the riparian area, and if proponents do not comply with the measures proposed by QEPs, the *RAR* is ineffective.

The ministry has not conducted the number of site visits required by its own compliance framework since the framework was established. Additionally, the number of sites with encroachment on the SPEA is significantly more than the maximum allowable under the framework. Clearly, the ministry has never met its goal of being 90 per cent certain that non-compliance in any given year is less than 10 per cent since it established the framework. The ministry has not taken steps to address these issues.

As with the assessment report reviews, there are also noticeable disparities between the regions in the number of site visits conducted. The South Coast region, for example, did not conduct any routine on-site monitoring in 2009 and 2011 and, citing lack of staff, indicated it did not anticipate conducting any site visits in 2013. Only the Kootenay region conducted any site visits in 2013 (for reports received in 2012).

Some communities gain the benefits of site visits while others clearly do not. Conducting a fair and proportionate number of site visits in regions subject to the *RAR* depends on the ministry ensuring that this is a priority.

As the ministry has never met its goal of being 90 per cent confident that non-compliance in any given year is less than 10 per cent, and given that disparities exist in the number of regional site visits being done, there is currently no way for anyone, including the ministry, to be able to conclude that the requirements of the *RAR* are being met.

The ministry must meet its requirements for the number of site visits it conducts. However, because the levels of non-compliance found in the site visits have been so much higher than the framework expects, the ministry should also consider, as a way of reducing non-compliance, changing the timing of some site visits. A site visit conducted before the start of development would enable the ministry to assess QEP compliance by determining whether the SPEA is clearly marked, the QEP's site measurements are correct and the QEP's prescribed measures are sufficient. Such site visits could mitigate future proponent non-compliance by ensuring, for instance, that the SPEA is clearly marked from the outset so the proponent can avoid encroachment.

When the framework was developed in 2008, the ministry knew that certain types of developments were at higher risk to cause a HADD, with single family residential, commercial development and subdivisions with more than six lots in

the “high risk” category. The framework discusses potential future changes such as using a risk-based analysis to determine the samples used for site visits, so that the majority of reports would be from the high risk category. The ministry needs to look at revising this framework so that the ministry has a greater focus on reducing non-compliance in identified “high risk” categories.

Finding & Recommendation

F11 The Ministry of Forests, Lands and Natural Resource Operations is not conducting the minimum number of site visits required by its own monitoring framework and consequently is not meeting its established goal of being 90 per cent confident that non-compliance is no greater than 10 per cent.

R13 The Ministry of Forests, Lands and Natural Resource Operations ensure all regional offices conduct a number of site visits each year that is consistent with the ministry’s site visit framework, and if the goal of 90 per cent confidence that non-compliance is no greater than 10 per cent is not met, take further steps to ensure compliance.

Determining Which Sites to Visit

The Ministry of Forests, Lands and Natural Resource Operations conducts a site visit the year after receiving an assessment report to allow time for development to begin. For example, a report submitted in 2012 could be subject to a site visit in 2013. The ministry told us that it is ineffective to visit sites where no development has occurred, as it is impossible at that stage to assess whether the proponent has complied with the measures prescribed by a QEP. The monitoring framework anticipates that the ministry will only be conducting visits to sites where the ministry has verified that construction has started.

Ministry headquarters provides each region with a randomized list of developments for site visits, drawn from the assessment reports submitted in that region during the previous calendar year. Before a site visit, the monitor contacts the proponent to determine whether construction has started and to request permission to enter the site to inspect the development.

If development has not yet begun, no visit takes place. The site is removed from the list of randomized site visits and is not monitored in any future years. As a result, the ministry does not visit any sites where the start of development is delayed beyond the date when site visits are scheduled for that year.

Analysis

The fact that some development sites may never be subject to site visits by the ministry merely because of the timing of development is a gap in the process. For site visits to be effective, proponents and QEPs must understand that the possibility of a random site visit is part of the *RAR* process. Proponents and QEPs should not be exempted from this monitoring process if the proponent postpones the start of a development beyond the date when the ministry schedules site visits.

Finding & Recommendation

- F12** The current process used by the Ministry of Forests, Lands and Natural Resource Operations for selecting sites to visit unreasonably exempts sites where development has not commenced at the time a site visit is scheduled.
- R14** The Ministry of Forests, Lands and Natural Resource Operations develop a system of site monitoring that ensures all development sites that have not yet been subject to a site visit remain eligible for selection for a site visit.
-

Tracking and Recording Compliance Information

Ministry headquarters in Victoria does not keep copies of all site visit checklists. Rather, this information is retained by the regional offices in a variety of disconnected forms.

In response to our requests for information, we received Excel spreadsheets, electronic copies of site visit checklists and reports by independent QEPs contracted by the ministry that described site visits in varying levels of detail. The difficulties we encountered gathering the information from several sources and the variety of forms in which it was received indicates that the ministry does not consistently and thoroughly compile, track or organize essential information gathered in the course of its own monitoring process.

In a 2009 report, the ministry outlined three purposes of compliance monitoring:

- It can reveal “improvements that are needed in the RAR program” and which can be addressed through the ministry’s own practices.
- It can allow for greater understanding of the project types that “have a greater potential for causing HADDs.”
- It can enable the ministry to report to the public on compliance with the RAR.¹⁷⁴

In order to achieve these objectives through compliance monitoring, the ministry must organize the information it records in an accessible and useful way.

The ministry could also provide us with only limited information on the outcome of its monitoring and compliance work, including what actions were taken to address any non-compliance found as a result of site visits. The ministry has no central process to track the outcome of site visits and how and whether non-compliance issues identified in site visits are dealt with.

This meant that when we conducted our file review, it was not evident whether the problems the ministry found during the site visits were ever addressed. For example, in some of the cases we reviewed, the site monitor wrote that a development might have caused a HADD. In these instances, the proponents did not have a letter of authorization from DFO or they acted in direct violation of DFO instructions. In other cases, the SPEA was seriously damaged, requiring revegetation of the area or some other form of remediation that was not done. In still other cases, proponents had significantly harmed the riparian area by, for example, building roads and/or removing trees. In none of these cases did the site visit reports indicate that encroachment was referred to DFO or to the appropriate local government for further investigation and possible action. This may have happened or it may not have. No records of it happening were contained in the site visit records.

¹⁷⁴ Ministry of Environment, “Compliance with the Riparian Areas Regulation (RAR): Report on Monitoring Activities for Assessments Submitted in 2007” (draft), May 2009, 2.

Headquarters staff told us that they believed regional staff would follow up on any non-compliance, but were not able to confirm this.

Analysis

The ministry is responsible for monitoring QEP and proponent non-compliance through site visits.¹⁷⁵ In the Intergovernmental Cooperation Agreement, the Ministry of Environment committed to submitting its monitoring reports to a central system.¹⁷⁶ This responsibility transferred to the Ministry of Forests, Lands and Natural Resource Operations in 2010 and, since then, the ministry has not taken any steps to ensure that site visit monitoring and compliance information is stored in a central, accessible way.

Local governments or DFO are responsible for enforcement when the ministry finds non-compliance. The ministry needs to record and track when and how often it refers instances of non-compliance to a local government or DFO. The ministry needs to record and track these other agencies' responses to the non-compliance.

Finding & Recommendation

F13 The Ministry of Forests, Lands and Natural Resource Operations does not record or track, in a centralized and accessible way, the information it collects through compliance monitoring, including information on whether non-compliance is referred to another public agency and, if it is, the nature of the other agency's response.

R15 The Ministry of Forests, Lands and Natural Resource Operations develop a system that:

- A) tracks, in a centralized and accessible way, the results of compliance monitoring
- B) records whether non-compliance is referred to another agency and, if it is, how that agency responds to the non-compliance



¹⁷⁵ See the Monitoring Proponent Compliance section of this report for a discussion of proponent non-compliance.

¹⁷⁶ Intergovernmental Cooperation Agreement Respecting the Implementation of British Columbia's Riparian Areas Regulation, 2008, Richmond, B.C., Annex 2, 3(c) <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/RAR_ICA_agreement.pdf>.



At the 2013 UBCM convention, local governments endorsed a resolution stating that “there is a lack of cooperative, consistent and available enforcement efforts at all agency levels (local, provincial, federal) with respect to the contravention of Riparian Area Regulations.” The resolution called on the provincial government to “appropriately enforce the RAR and provide adequate funds for said enforcement.”

Source: Union of British Columbia Municipalities, Resolution 2013-B70, “Riparian Area Regulations.”

MONITORING PROPONENT COMPLIANCE

In the previous section of this report, we discussed how the Ministry of Forests, Lands and Resource Operations monitors the quality of a qualified environmental professional’s (QEP’s) work. The focus in this section is on the proponent of a development project, and how the ministry ensures that the assessment report recommendations are implemented.

The ministry, as part of its site visits, collects information about proponent compliance with the *Riparian Areas Regulation (RAR)*.

Although the ministry’s reports on the *RAR* have been limited, it is clear from those that do exist that proponent non-compliance with the *RAR* is an issue. In 2008, the Ministry of Environment (which was then responsible for the *RAR*) partnered with the Conservation Officer Service to monitor 63 sites on Vancouver Island for *RAR* compliance. That monitoring identified the proponent non-compliance rate as 62 per cent.¹⁷⁷ In the Lower Mainland, proponents were responsible for more than half (52 per cent) of all cases of non-compliance.¹⁷⁸ A 2010 audit of compliance with the *RAR* on Vancouver Island, based on reports submitted in 2008, found that of the 43 sites visited, the proponent was responsible for some or all of the non-compliance in 16 cases.¹⁷⁹ The audit commented in 2010:

Developers who encroach do not seem to face consequences. Local governments are unlikely to examine the *RAR* assessment in the detail necessary to judge compliance on the part of the developer. Local government may have limited tools or desire to correct an encroachment. Encroachment occurs and is observed by the *RAR* auditor, but then what? Monitoring results is important for results-based regulations, but there need to be teeth in it if results show non-compliance.¹⁸⁰

During our investigation, we received information about similar concerns about the *RAR*’s lack of enforcement measures. The *RAR* has no provisions to enforce proponent compliance with the measures set out in the assessment report. A proponent who does not follow the measures prescribed in a QEP’s report can end up encroaching on streamside protection and enhancement areas (SPEAs), potentially damaging important fish habitat.

Existing Enforcement Processes

Two mechanisms do currently exist for addressing a proponent’s non-compliance with the *RAR*. The first mechanism is enforcement under the federal *Fisheries Act*. If non-compliance results in serious harm to certain fish, including the permanent alteration or destruction of fish habitat, Fisheries and Oceans Canada (DFO) can

¹⁷⁷ Ministry of Environment, *Annual Report on the Implementation of the Riparian Areas Regulation (RAR) 2008-09* (draft), 5 May 2009, 15.

¹⁷⁸ Ministry of Environment *Annual Report on the Implementation of the Riparian Areas Regulation (RAR) 2008-09* (draft), 5 May 2009, 15.

¹⁷⁹ Brian Wilkes, “Auditing Compliance with the Riparian Area Assessment Regulation: Report on Audits of RAR Assessment Reports for Vancouver Island, Submitted in 2008,” Draft 1, March 22, 2010, 9-11.

¹⁸⁰ Brian Wilkes, “Auditing Compliance with the Riparian Area Assessment Regulation: Report on Audits of RAR Assessment Reports for Vancouver Island, Submitted in 2008,” Draft 1, 22 March 2010, 8.

investigate whether a violation of the *Fisheries Act* has occurred.¹⁸¹ If it has, DFO can consider prosecution.

However, DFO prosecutions can take a significant amount of time to conclude and the consequences, including fines, do not prevent damage to fish habitat from occurring. A recent British Columbia provincial court case illustrates this well.¹⁸² The case involved land developers charged (under the version of the *Fisheries Act* that was in force prior to November 2013) with causing the harmful alteration, disruption or destruction (HADD) of fish habitat in early 2008. The developers ignored a plan developed by an environmental consultant to help them meet their environmental responsibilities, including the protection of fish habitat in a nearby creek. Contrary to the plan, the developers removed and uprooted many trees. The court found that this activity caused a HADD. The developers were not sentenced until more than five years later, in November 2013. The significant impact of the developers' actions was clear: the prosecution said that they had "caused the health of this fish habitat to be set back twenty years."¹⁸³ As a result, the developers were ordered to pay \$26,540 to a local environmental organization that had engaged in restoration efforts to mitigate the HADD, in addition to a fine of \$80,000. This penalty, however, did not prevent the damage to the fish habitat from occurring in the first place.

Today, the *Fisheries Act* has an even narrower focus, so it is important to look at enforcement tools beyond those in the federal legislation. The *RAR* seeks to protect riparian areas from encroachment that, while not necessarily causing a HADD, could still change the nature of the riparian fish habitat. It is therefore in the interests of riparian protection that non-compliance with the *RAR* be addressed even in those cases where no serious harm to fish or fish habitat is caused.

The second existing enforcement mechanism is local government bylaws that may allow local governments to address *RAR* non-compliance arising during the course of development. Local governments can choose to include enforcement mechanisms in their *RAR* bylaws, official community plans or permits.¹⁸⁴ If non-compliance with an assessment report is a breach of the local government bylaw or permit, the local government can address the non-compliance through actions such as fines or stop-work orders. There is, however, no consistent local government approach to implementing the *RAR*, and there is also no consistent local government approach to enforcement.

The ministry's 2010 audit of development sites on Vancouver Island found that local governments are not always in the best position to assess whether a proponent has followed the measures prescribed in a *RAR* assessment report. Any enforcement by local governments is dependent on them learning of a problem and having the necessary tools in their own bylaws to address it. In some cases, a local government may learn about non-compliance through ministry site visits that uncover a problem. However, as we discussed in the previous section, the ministry does not have the capacity to conduct site visits of every development. Moreover, the current schedule for ministry site visits means that they are not necessarily timed to coincide with the end of development – they may occur while development is ongoing, or after it has been completed.

¹⁸¹ *Fisheries Act*, R.S.C. 1985, c. F-14, s. 35(1). Prior to November 25, 2013, the standard for possible DFO prosecution was whether a person had caused a harmful alteration, disruption or destruction of fish habitat: *Fisheries Act*, R.S.C. 1985, c. F-14, s. 35(1) before amendment by *Jobs, Growth and Long-Term Prosperity Act*, S.C. 2012, c. 19, s. 142(2).

¹⁸² *R. v. Larson and Mission Western Developments Ltd.*, 2013 BCPC 92.

¹⁸³ *R. v. Larson and Mission Western Developments Ltd.*, 2013 BCPC 92, para 21.

¹⁸⁴ For example, see *Community Charter*, S.B.C. 2003, c. 26, s. 260; *Local Government Act*, R.S.B.C. 1996, c. 323, Part 6, Division 3.

Monitoring proponent compliance is part of enforcement. By gathering, tracking and reporting information about proponent compliance, the Ministry of Forests, Lands and Natural Resource Operations would assist both local governments and DFO in identifying and responding to problems when they arise. The ministry can and should take a leadership role in ensuring that there is a consistent approach to proponent non-compliance across the province. In doing this, the ministry would benefit from working with UBCM and local governments to develop guidelines on how local governments can respond to proponent non-compliance with the *RAR*. The ministry's role in ensuring proponents face consequences for non-compliance can also be strengthened by the ministry requiring proponents to provide post-development reports and by establishing clear consequences for failure to submit those reports.

Policies for Responding to Proponent Non-Compliance

Under the *Fish Protection Act* and the *RAR*, the ministry has not been given powers to take action on proponent non-compliance. The ministry is one of the main parties who agreed on a Protocol of Interaction for Responding to Non-Compliance which was developed in 2005 and outlines steps for the ministry, DFO and local governments to follow in responding to proponent non-compliance.¹⁸⁵

If the non-compliance is "minor," the protocol states that the proponent and the QEP should be contacted, and assumes corrective action will follow.¹⁸⁶ If the non-compliance is "major and requires project redesign," the protocol states that DFO, the ministry or a local government may take action.

While the ministry indicates that it is guided by this protocol, there is no statutory or regulatory authority under the *Fish Protection Act* or the *RAR* to require proponents to make changes to their development to bring it into compliance, or to impose consequences on proponents if they do not make the necessary changes.

Post-Development Reports

In October 2012, the Professional Reliance Cross-Ministry Working Group produced a draft discussion paper on the use of QEPs for "compliance verification and enforcement."¹⁸⁷ While emphasizing that government "retains a responsibility to verify compliance with [statutory] requirements,"¹⁸⁸ the paper concluded that:

[Qualified professionals] play an important role in providing information, measurements, professional opinion and procedural oversight on which compliance determinations can be made.¹⁸⁹

¹⁸⁵ This document is currently on the Ministry of Environment's website at <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/ProtocolofInteraction.pdf>.

¹⁸⁶ Ministry of Environment, "Riparian Areas Regulation: A Protocol of Interaction for Responding to Non-Compliance," 8 November 2005, 11 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/ProtocolofInteraction.pdf>.

¹⁸⁷ Kevin Bertram and Marty Roberts, "The Use of Qualified Persons for Compliance Verification and Enforcement," Draft for Discussion, 22 October 2012 <http://www.nro.gov.bc.ca/nrs/qp/documents/compliance_verification.pdf>.

¹⁸⁸ Kevin Bertram and Marty Roberts, "The Use of Qualified Persons for Compliance Verification and Enforcement," Draft for Discussion, 22 October 2012, 4 <http://www.nro.gov.bc.ca/nrs/qp/documents/compliance_verification.pdf>.

¹⁸⁹ Kevin Bertram and Marty Roberts, "The Use of Qualified Persons for Compliance Verification and Enforcement," Draft for Discussion, 22 October 2012, 7 <http://www.nro.gov.bc.ca/nrs/qp/documents/compliance_verification.pdf>.

In making the case for the use of QEPs in government compliance verification procedures, the authors noted that “determination of compliance is complex” and “measurement is specialized.”¹⁹⁰ Requiring QEPs to conduct compliance verification could be useful if they have the necessary training and ongoing support to ensure they have the knowledge and skills to do this work.

Currently, the *RAR* requires an assessment report to be completed before development occurs on a site.¹⁹¹ If the ministry were to require a post-development report completed by a QEP, the ministry could ensure that the proponent has complied with the requirements to protect the SPEA set out in the initial assessment report. This, in turn, would allow for a timely response if something does go wrong.

Post-development reports are an effective and efficient way of mitigating the need for enforcement by providing proponents with motivation to follow the QEP’s recommendations and encouraging the ongoing involvement of the QEP throughout the project. They also provide local governments, DFO and the ministry with the information necessary to take enforcement measures in cases of non-compliance.

During our investigation, we reviewed assessment reports submitted to the ministry through the Riparian Areas Regulation Notification System (RARNS). QEPs had, in some cases, submitted a post-development report, certifying that the development was complete and that the measures identified to protect the SPEA had been followed. However, in a list of 40 reports completed by 40 different QEPs, a post-development report was submitted to RARNS in only four instances. In other cases, the QEP had written in the initial report that a post-development report would be filed, but there was no evidence that this was done.

Existing Requirements

We found conflicting information about whether post-development reports are required under the *RAR*, and who might be responsible for them. This may explain why some QEPs submit post-development reports and other QEPs do not.

Section 5(a) of the *RAR* states that local governments “must cooperate” in developing strategies with the ministry and DFO “for obtaining certificates by qualified environmental professionals that the conditions set out in assessment reports have been properly implemented.”¹⁹² The *RAR* anticipates that all levels of government will be involved in ensuring QEPs follow up on their assessment reports. While section 5(a) uses the term “certificates,” the ministry has accepted that post-development reports are equivalent to the certificates referred to in the *RAR*. For consistency, we have used the term “post-development reports” when referring to section 5(a) of the *RAR*.

When we asked the ministry for a copy of any strategies that have been developed under section 5(a), we were referred to the 2005 Protocol of Interaction for Responding to Non-Compliance. Although this document guides the ministry’s compliance monitoring, it does not make any reference to section 5(a), nor does it discuss post-development reports.

Other documents produced by the ministry suggest that post-development reports are required in all cases. A document listing the “top 10” problems with assessment

¹⁹⁰ Kevin Bertram and Marty Roberts, “The Use of Qualified Persons for Compliance Verification and Enforcement,” Draft for Discussion, 22 October 2012, 7
<http://www.nro.gov.bc.ca/nrs/qp/documents/compliance_verification.pdf>.

¹⁹¹ *Riparian Area Regulations*, B.C. Reg. 376/2004, s. 4.

¹⁹² *Riparian Area Regulations*, B.C. Reg. 376/2004, s. 5(a).

reports includes, as number 9, “didn’t include requirement for a post-development report.” The document further states:

As per section 5 (a) of the Regulation, a compliance certificate must be submitted upon completion of the development project. QEPs must ensure the *RAR* Assessment Report includes the requirement for a post-development report to be completed and submitted to the notification system and advise their clients of this requirement.¹⁹³

To add to the confusion, the ministry also told us that it does not direct QEPs to complete a post-development report and cannot direct local governments to require a post-development report as a condition of their approval. The assessment report template does suggest that QEPs inform the proponent of the “requirement” to submit a completed post-development report. According to the ministry, this is part of the QEP’s professional responsibilities. One QEP dealt with this issue by including the following statement in the Environmental Monitoring section of the assessment report:

A final site visit should be carried out once the construction is extensively complete ... and a report summarizing the final assessment should be prepared and submitted to the City ... [including] if the measures provided in this report have been followed ... and the SPEA protected.

According to the ministry, the proponent may retain the QEP who originally prepared the assessment report or a new QEP. However, there are no consequences for proponents if they do not have a post-development report done.

Some local governments require post-development reports as part of their own permit process, which can make it easier for QEPs to persuade their client that one is needed. For example, one regional district requires the proponent to provide a letter from a QEP or registered professional biologist that any land clearing or development works within specified development permit areas has been done in compliance with the assessment report. Other local governments have required proponents to post security based on a QEP’s estimate of the cost of implementing the protective measures.

Local government actions such as those described above represent best practices for ensuring proponents arrange for a post-development report, given the existing regulatory framework. However, in the absence of a clear requirement in the *RAR* for post-development reports, standards differ between local governments. Many local governments do not expressly require any post-development reports or certification. We reviewed a sample of 34 local government bylaws; of this group, 26 (76 per cent) either did not require a post-development report or certification, or would consider on a case-by-case basis whether one was necessary.

We also reviewed all of the assessment reports submitted to RARNS from one area where the local government’s official community plan requires the QEP to certify to the local government that a development has been carried out in accordance with the assessment report. Of the 19 separate reports submitted since 2006, all mentioned the requirement for a post-development report. However, no post-development reports or other certifications have been submitted to the ministry via RARNS. While the local government employs a best practice of requiring certification, because no follow-up information has been submitted to RARNS there is no information on that system about the outcome of the development. This is

¹⁹³ Ministry of Forests, Lands and Natural Resource Operations, “Top 10 Problems Observed with Riparian Area Regulation (RAR) Assessment Reports,” 4.

unfortunate, as it means that RARNS does not contain useful information about compliance that may have already been collected.

The lack of a provincial standard results in intermittent and inconsistent use of post-development reports across the province, which, in turn, creates inconsistency in the effectiveness of the *RAR*.

Tracking Post-Development Reports

There is currently no way to submit a post-development report through RARNS that distinguishes it from any other documents or initial assessment reports. If an individual completes and submits a post-development report, he or she must upload a new file under the assessment number already created when the initial report was uploaded. This is reported to the ministry not as a post-development report but only as a modification to the previous report. The ministry does not have a process to track or report publicly on the number of post-development reports that have been submitted.

The *RAR* Coordination Committee is mandated to discuss issues arising in the administration of the *RAR* and includes representatives from the ministry and DFO. This sub-committee of the *RAR* Steering Committee has discussed developing a tracking system to ensure post-development reports are submitted and any recommendations are followed.¹⁹⁴ This would require developing both a way of identifying post-development reports as separate from the initial assessment, and a framework for reviewing and determining whether these reports are adequate. The ministry has also contemplated making the lack of submission of a post-development report a criterion to trigger a site visit, although there are no plans to put this into place.

A Good Practice: Effectiveness of Post-Development Reports

During our review of the ministry's assessment report files, we found a post-development report related to a project in the Okanagan. This development provides a good example of the benefits that can come from a post-development report. A proponent planned to construct a new single-family residence. In accordance with the *RAR*, a QEP who was a registered professional biologist conducted an assessment of the riparian area. In the assessment report, the QEP recommended measures to protect the SPEA and the trees within it, including:

- flagging and identifying the SPEA boundary, and placing physical barriers to protect the tree root systems
- ensuring machinery was free of leaks and a spill clean-up procedure was in place
- replacing any damaged vegetation

The QEP also incorporated into the report measures for sediment and erosion control and storm water management.

After construction was complete, the QEP submitted a post-development report to the ministry through RARNS. The report detailed the QEP's site monitoring efforts, which occurred weekly before construction began and then less frequently during construction. The QEP reported prohibited activities occurring within the SPEA, including moving the fence delineating the SPEA boundary closer to the lake,

¹⁹⁴ Ministry of Forests, Lands and Natural Resource Operations, RARCC conference call minutes, 17 October 2012.

storing building materials and debris within the SPEA, and unapproved removal of riparian vegetation. As well, four unapproved structures were built within the SPEA, including structures not described in the original assessment report. Because the report was submitted through RARNS, the ministry and local government were both notified.

Officials from the local government visited the site and issued a stop-work order. The owner took remedial measures within the SPEA so that the order could be lifted. In the post-development report, the QEP wrote that not enough native vegetation had been replanted. After the owner addressed this matter, the QEP concluded that the property was in compliance.

This example shows that when a QEP monitors a development site for the purposes of completing a post-development report, instances of non-compliance can be promptly discovered and corrected, and the ministry is notified of what has happened.

Analysis

As the above example demonstrates, riparian area protection is not accomplished merely by completing and submitting an assessment report before development starts. Rather, the involvement of a responsible QEP during and after development can help to mitigate non-compliance by ensuring that a person with specialized knowledge of riparian areas is present on the site to record and address any encroachments into the SPEA or other instances of non-compliance.

Unfortunately, the ministry's own materials contain contradictory information about whether post-development reports are currently required and as a result, practices are inconsistent. Some QEPs submit post-development reports while other QEPs do not. Some local governments make the reports a condition of final approval of a development, but other local governments do not. Even in cases where a post-development report is submitted, the ministry does not track, consistently review or respond to post-development reports.

Post-development reports are clearly contemplated under section 5(a) of the *RAR*, which requires local governments to cooperate with the ministry in developing strategies for obtaining them. As local governments are obligated to cooperate in developing such strategies, the ministry can take a leadership role in addressing the existing confusion as to whether post-development reports are required and how they are submitted. The ministry has told QEPs that these reports are required but has not established any clear authority for the requirement. It is unreasonable for the ministry to expect QEPs and proponents to comply with a "requirement" that is not set out in the *RAR* or its associated assessment methods.

Post-development reports are an efficient and effective way of gathering compliance information and allowing for enforcement where necessary. The ministry should take steps to enshrine the requirement for post-development reports in the *RAR* process and impose consequences where that requirement is not met.

Finding & Recommendation

F14 The Ministry of Forests, Lands and Natural Resource Operations has not established adequate and consistent requirements for monitoring proponent compliance with the *Riparian Areas Regulation* after an assessment report has been accepted by the ministry.

R16 The Ministry of Forests, Lands and Natural Resource Operations develop a process, under section 5(a) of the *Riparian Areas Regulation (RAR)* for every development that triggers a *RAR* assessment, that:

- A) requires a post-development report be prepared by a qualified environmental professional (QEP) to show that the measures set out in the assessment report have been properly implemented
- B) tracks whether a local government has given initial approval to the development, whether development has started, and whether a post-development report has been submitted
- C) alerts the ministry when a post-development report has not been submitted within a reasonable time after development is complete
- D) requires the ministry to take appropriate action if no post-development report is submitted
- E) requires the ministry to review post-development reports that have been submitted and take appropriate action where the post-development report identifies non-compliance with the *RAR*





"Constantly changing names and responsibilities makes it very difficult to figure out who to contact about what."

Source:
Ombudsperson questionnaire.

PUBLIC INFORMATION AND ACCESS

The provision of adequate public information is central to the democratic principles of openness and transparency. Information is a cornerstone of administrative fairness as it allows the public to know and understand whether programs are being operated in a fair and reasonable manner. Public information about environmental protection programs allows the public to have confidence that the government is meeting its obligations as a steward of the environment and our province's natural resources, and contributes to a more informed public discussion.

Our investigation of the administration of the *Riparian Areas Regulation (RAR)* focused on three aspects of public information. First, we examined whether the public has been adequately informed of changes in who administers the program, and whether the information that is currently available about the *RAR* is accurate. Second, we investigated whether the ministries responsible for the *RAR* since it was enacted have taken adequate steps to inform the public, through regular reporting, about how well the program is working. Third, we investigated public access to assessment reports.

Ensuring Clear, Updated and Consistent Public Information

The Ministry of Forests, Lands and Natural Resource Operations has been responsible for administering the *RAR* since October 2010. As part of this role, the ministry should provide public information about the *RAR* that is clear, accessible, up to date and accurate. This includes notifying the public in a timely manner if the program is moved from one ministry to another.

Communicating the Transfer of Responsibility for the *Riparian Areas Regulation*

The orderly transfer of programs between ministries is an issue that arises from time to time within government. The transfer of the *RAR* program to a new ministry in 2010 illustrates the problems that can occur if a coordinated approach is not followed.

The government provided little public information when it transferred responsibility for the *Fish Protection Act* and the *RAR* from the Ministry of Environment to the Ministry of Natural Resource Operations (later renamed the Ministry of Forests, Lands and Natural Resource Operations). The news release announcing the reorganization of the natural resources sector in October 2010¹⁹⁵ did not include any reference to the move of the *RAR* program to the new ministry, and we were unable to find anything on either of the ministries' websites that announced the change. The only publicly available information stating which ministry was responsible for the *RAR* was the order-in-council authorizing the transfer.¹⁹⁶ Although orders-in-council are publicly available, they can be difficult to find without specialized legal or research knowledge.¹⁹⁷

¹⁹⁵ Office of the Premier, "Premier Campbell Announces Cabinet Changes," 25 October 2010.

¹⁹⁶ Order-in-Council 652, 25 October 2010.

¹⁹⁷ Orders-in-Council can be accessed through the *BC Gazette* or online at QPLegaleze <<http://www.qplegaleze.ca/>> and BC Laws' webpage "Order in Council and Ministerial Order Resumes" <<http://www.qp.gov.bc.ca/statreg/oic/>>.

Availability of Online Information

During our investigation, we heard from local governments that their staff spent significant time educating the public on the *RAR* because landowners did not have the information they needed to follow the requirements of the regulation.

Increasingly, people are turning to the internet as a first point of contact to find information about government programs. Our investigation found that there is information available about the *RAR* on provincial government websites. However, the Ministry of Forests, Lands and Natural Resource Operations has failed to ensure that the information reflects current responsibility for the *RAR* and is updated on a regular basis.

As discussed above, responsibility for the *Fish Protection Act* (and by extension, the *RAR*) was transferred to its current ministry in October 2010. However, as of February 2014, information about the *RAR* was still hosted on the Ministry of Environment's website.¹⁹⁸ In addition, the brochures, guidebooks and other publications describing the *RAR* continue to refer to the Ministry of Environment. The provincial government websites do not indicate that the Ministry of Environment is no longer responsible for administering the *RAR* program.

While the natural resources sector ministries are working on a redesign of their websites, this has not been implemented for the *RAR*. The Ministry of Forests, Lands and Natural Resource Operations told us that it planned to keep *RAR* information in its current location on the Ministry of Environment website until the redesign is completed even though the transfer of responsibility occurred in 2010.

The failure to provide public information about the change in responsibility is confusing and misleading to the public.

Analysis

It is important that when responsibility for a program is transferred between ministries, clear and accessible information about the change be made available to the public and stakeholders. Providing this information helps to ensure a seamless transition in the delivery of public services.

Administrative fairness also requires that public information about a government program be accurate and consistent. Accurate information allows the public and affected parties to know exactly who to contact if they have questions or concerns. Ensuring that this information is internally consistent helps to minimize public confusion.

The *RAR* is an example of a program where there is a lack of accurate and up-to-date public information. Since 2010, when the *RAR* program transferred to a new ministry, neither the change in responsibility nor any additional useful information has been reflected on the Ministry of Forests, Lands and Natural Resource Operations' website.

People learn that the RAR applies to their property in a variety of ways: through the internet, local governments or the ministry.

In the Kootenay region, where only Golden, Revelstoke and part of the Columbia-Shuswap Regional District are subject to the Regulation, Ministry of Forests, Lands and Natural Resource Operations staff distributed RAR information brochures to all residents of the City of Revelstoke who live adjacent to streams. Ministry staff also provided these brochures to the City of Golden for distribution. This is an easy way to ensure that those affected by the RAR have the resources necessary to make informed decisions.

¹⁹⁸ See webpage: Ministry of Environment, "*Riparian Areas Regulation*" <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/riparian_areas.html>.

Additional information about the RAR is available online through various sources. Develop With Care 2012: Environmental Guidelines for Urban and Rural Land Development in British Columbia, a resource developed by the Ministry of Environment and the Ministry of Forests, Lands and Natural Resource Operations, is one example. Despite the guidelines' relevance to the Regulation, the RAR webpage makes no reference to them.

Findings & Recommendations

- F15** The Ministry of Forests, Lands and Natural Resource Operations failed to adequately communicate the transfer of responsibility for administration of the *Riparian Areas Regulation (RAR)* in October 2010 and has still not ensured that public information accurately reflects its responsibility for the *RAR*.
- R17** The Ministry of Forests, Lands and Natural Resource Operations, by June 30, 2014, update all its publicly available information to accurately reflect the ministry's responsibility for the *Fish Protection Act* and the *Riparian Areas Regulation*.
- F16** The Ministry of Forests, Lands and Natural Resource Operations has failed to ensure that all public information about the *Riparian Areas Regulation* is up to date.
- R18** The Ministry of Forests, Lands and Natural Resource Operations review, on an annual basis, all programs it is responsible for to ensure that publicly available information is up to date and accurate.

Reporting on the Operation of the *Riparian Areas Regulation*

Our investigation found that, despite commitments made by the ministry under the Intergovernmental Cooperation Agreement (ICA), there is little information available publicly about how the *RAR* program is working.

The Ministry of Environment entered into the ICA with DFO and the Union of British Columbia Municipalities (UBCM) in 2008. The ICA required the establishment of a *RAR* Steering Committee responsible for overseeing the ongoing monitoring, evaluation, adaptive management and reporting requirements of the *RAR*.¹⁹⁹ According to the ICA, the *RAR* Steering Committee must report annually to the ministry, DFO and the UBCM on the implementation of the ICA and on activities related to the administration of the *RAR*, including:

- status of implementation of the *RAR*
- the number of notifications (equivalent to the number of assessment reports received)
- compliance monitoring results
- effectiveness monitoring results
- any recommendations for revisions to the *RAR*²⁰⁰

The ICA requires the Steering Committee to report annually to the ministry, DFO and the UBCM until the committee decides another reporting period is appropriate.²⁰¹ The Steering Committee has issued only one "annual" report, in May 2009.²⁰²

¹⁹⁹ Intergovernmental Cooperation Agreement Respecting the Implementation of British Columbia's Riparian Areas Regulation, 2008, Richmond, B.C., 4 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/RAR_ICA_agreement.pdf>.

²⁰⁰ Intergovernmental Cooperation Agreement Respecting the Implementation of British Columbia's Riparian Areas Regulation, 2008, Richmond, B.C., Annex 1, para 7 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/RAR_ICA_agreement.pdf>.

²⁰¹ Intergovernmental Cooperation Agreement Respecting the Implementation of British Columbia's Riparian Areas Regulation, 2008, Richmond, B.C., Annex 1, para 6 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/RAR_ICA_agreement.pdf>.

²⁰² The ministry also completed a draft report entitled "Compliance with the Riparian Areas Regulation (RAR): Report on Monitoring Activities for Assessments Submitted in 2007," May 2009.

There is no record that the committee has decided another reporting period is more appropriate. The 2009 report covers the first three years of the *RAR*'s operation, contains information on the Ministry of Environment's *RAR* monitoring and compliance efforts, and highlights areas for improvement. Although the report was included in documents submitted to the Cohen Commission, it is not currently on the *RAR* webpage.

During our investigation, we determined that the Steering Committee – which under the ICA is responsible for producing reports on the *RAR* – does not meet on a regular basis. The ministry attributed this to the 2010 reorganization within the provincial government and staffing changes at DFO. According to the ministry, the Steering Committee met eight times between May 2007 and its last meeting in May 2009. The Steering Committee has not met a single time since May 5, 2009.

The *RAR* Steering Committee, whose membership consisted of people in senior director-level positions at the ministry, DFO and UBCM, established a sub-committee in February 2009 called the *RAR* Coordination Committee. The purpose of this sub-committee was to “assist with *RAR* implementation and ensure efficiency and consistency.”²⁰³ This sub-committee consisted of representatives who held less responsible positions within the three agencies. Its mandate was different from the Steering Committee. It was authorized to report and make recommendations to the Steering Committee, but not to report publicly on its activities. Responsibility for completing an annual report on the *RAR* remains with the Steering Committee.

Analysis

As a party to the ICA, the provincial government made a commitment to annual reporting on the *RAR*. Although the provincial government signatory to the ICA is the Ministry of Environment, that responsibility transferred to the Ministry of Forests, Lands and Natural Resource Operations in 2010 and remains with this ministry.

The Steering Committee that is responsible for reporting on the *RAR* has not met since May 2009. In these circumstances, it is perhaps not surprising that there has been no reporting on the *RAR*. There were no *RAR* annual reports produced in 2010, 2011 or 2012 and none planned for 2013. The Steering Committee's failure to report on the *RAR* over the past four years means that the ministry has not met its commitments under the ICA. The ministry needs to meet its obligation to support the Steering Committee to meet on a regular basis, gather information and report on the activities related to the administration of the *RAR* as set out in the ICA.

While the Steering Committee is being re-established, the ministry must take a lead in reporting on its own activities related to the *RAR*. Most of the areas on which the Steering Committee is supposed to report – for example, compliance monitoring – are activities that the ministry is responsible for and, therefore, has the relevant information necessary to complete a report. The current list of items on which the Steering Committee is supposed to report can only be considered the minimum amount of information that the ministry should include in its reports on the administration of the *RAR*. It would be useful to broaden the scope of annual reports to include any information gathered through improved monitoring and compliance activities.

The annual reports are also public documents. The 2009 report is public, and reporting on the administration of the *RAR* allows the public, local governments, environmental groups and other stakeholders to readily access current, comprehensive information about the *RAR*.

²⁰³ Riparian Areas Regulation Coordination Committee terms of reference, February 2009.

Finding & Recommendations

F17 The Ministry of Forests, Lands and Natural Resource Operations has not reported publicly on the implementation or administration of the *Riparian Areas Regulation (RAR)* since it became responsible for administering the *RAR* in October 2010.

R19 The Ministry of Forests, Lands and Natural Resource Operations report publicly on an annual basis about its administration of the *Riparian Areas Regulation (RAR)*, including reporting on the activities related to the *RAR* set out in the Intergovernmental Cooperation Agreement. The 2014 annual report be accompanied by annual reports for each of the years 2010, 2011, 2012 and 2013.

R20 Beginning in 2014, the Ministry of Forests, Lands and Natural Resource Operations, in addition to reporting on the activities set out in the Intergovernmental Cooperation Agreement, report publicly on an annual basis about its administration of the *Riparian Areas Regulation (RAR)*, including:

- A) the number of notifications received and the number of assessments reviewed by each region, the issues identified in those reviews and measures taken to address any issues
 - B) steps taken by the ministry to monitor the compliance of qualified environmental professionals (QEPs), proponents and local governments with the *RAR*, the results of that monitoring, and measures taken to improve compliance
 - C) steps taken by the ministry to monitor the effectiveness of the *RAR*, the results of that monitoring, and measures taken to improve the effectiveness of the *RAR*
 - D) any regulatory or administrative changes affecting the *RAR*
-

Public Access to Assessment Reports

During our investigation, we heard from members of the public who had concerns about the limited amount of publicly available information about the *RAR*, including assessment reports.

In the 2008 ICA, the ministry committed to making assessment reports publicly available, searchable and accessible.²⁰⁴ The ministry has contemplated making the Riparian Areas Regulation Notification System (RARNS) accessible to the public but has not done so to date. Currently, RARNS is accessible only to qualified environmental professionals (QEPs) (with access limited to their own reports), local governments and ministry employees.

In some cases, reports may be made public because they are attached to the development permit application considered by the approving local government. The ministry itself, however, does not routinely disclose assessment reports or its conclusions to the public. While the public can access reports by requesting a copy

²⁰⁴ Intergovernmental Cooperation Agreement Respecting the Implementation of British Columbia's Riparian Areas Regulation, 2008, Richmond, B.C., Annex 2, s. 3(b) <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/RAR_ICA_agreement.pdf>.

from the local government or the ministry under the *Freedom of Information and Protection of Privacy Act*,²⁰⁵ this does not meet the ministry's own commitments under the ICA to make all QEP reports searchable and accessible by the public.

The RAR is an environmental protection regulation, and the assessment reports are the tool through which this protection is achieved. The public's ability to access reports is important, not just because the ministry told us that it relies, in large part, on complaints from the public to learn about areas of concern and to respond, but also because the public is less likely to be able to raise any concerns if they do not have access to the report or its conclusions. The following case summary illustrates the important impact that an informed public can have on ensuring the RAR is effective in maintaining riparian protection.

Case Summary

A group of concerned citizens contacted our office with a complaint about the process followed by the ministry in approving a RAR assessment report. The report determined the streamside protection and enhancement area (SPEA) applicable to a proposed large commercial development. At the time, it was ministry practice to approve assessment reports before allowing local governments to proceed with the development permit process. The ministry identified problems with the assessment report and required the QEP to amend and re-submit the report three times. While the fourth version of the assessment report was, in the ministry's opinion, correct on paper, the ministry did not visit the proposed development site before approving the report.

The citizens were concerned about the impact of the proposed development on important salmon habitat. They obtained and reviewed a copy of the assessment report from their local government, and questioned whether the QEP had correctly followed the RAR's assessment methods. Some of the citizens had training in biology, which increased their ability to understand and respond to the report. The citizens contacted the ministry with their concerns, and, as a result, the ministry, for the first time in the history of the RAR, hired an outside consultant to review the QEP's work. The ministry ultimately required the QEP to submit a fifth assessment report. This resulted in a reduction of the area available for the development from more than 24 hectares to approximately 6.5 hectares.

When our office investigated the citizens' complaint, we were satisfied that in this case the ministry responded appropriately because it had listened to the citizens' concerns and took the extraordinary step of hiring a contractor itself to visit the development site to review the original QEP's findings and report back to the ministry. However, this only happened because a group of concerned citizens, who were familiar with the development site and who had the expertise to critique the QEP's assessment report, was able to obtain the assessment report through their local government and bring the matter to the ministry's attention. In the course of our investigation, we determined that the amount of work done by ministry staff on this project was unusual. Ministry staff told us they had done more work on this case than in 95 per cent of the ministry's RAR monitoring activities.

Assessment reports also contain valuable information about the environmental conditions of a stream and the SPEA that has been established. In the process of preparing a report, QEPs are required to produce detailed maps of the property showing the extent of the riparian area and the SPEA. This information could, if provided in a usable format, assist local governments in mapping the protection of riparian areas in their community. The ministry could support this process by

²⁰⁵ *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165.

requiring QEPs to provide their electronic assessment report mapping files when an assessment report is uploaded and then, in turn, making this information publicly available. Having this information publicly available could assist in the better protection of riparian areas. For example, when a property subject to the *RAR* is sold, there is currently no guarantee that the new owner will know or have access to the assessment report or the resulting SPEA. If existing assessment reports and information about the SPEAs are made readily available through a public database, the new owners of a property could learn about, and continue to protect, the riparian areas. The ministry has considered developing a system to track SPEAs that have already been established, but this is not in place.²⁰⁶

Analysis

The Ministry of Environment administers a publicly accessible ecological reports catalogue called EcoCat, which allows anyone with internet access to view digital reports and publications using a word or map-based search.²⁰⁷ The kinds of reports that are included in this catalogue include fish and fish habitat impact assessments; management and restoration reports; flora and fauna inventory reports; well construction reports; assessments of possible impacts of proposed septic systems on Agricultural Land Reserve land; stream surveys; water quality assessments; habitat assessments; and other similar reports.

The provincial government as signatory to the ICA committed to making assessment reports available to and searchable by the public. This responsibility now rests with the Ministry of Forests, Lands and Natural Resource Operations. Having assessment reports and their associated mapping data available publicly would assist stakeholders, including property owners, local governments, and members of the community in protecting riparian areas. By incorporating *RAR* assessment reports and their mapping information into EcoCat or another similar publicly accessible database, the ministry could meet the commitment it made in the ICA in a relatively quick and inexpensive way.

Finding & Recommendation

F18 The Ministry of Forests, Lands and Natural Resource Operations has not made *Riparian Areas Regulation* assessment reports available to the public.

R21 The Ministry of Forests, Lands and Natural Resource Operations work with the Ministry of Environment to make *Riparian Areas Regulation* assessment reports and their associated electronic mapping files available to the public through EcoCat or a similar publicly accessible, searchable electronic database by October 1, 2014.



²⁰⁶ Ministry of Forests, Lands and Natural Resource Operations, RARCC conference call minutes, 17 October 2012.

²⁰⁷ Ministry of Environment, "EcoCat: The Ecological Reports Catalogue" <<http://www.env.gov.bc.ca/ecocat/>>.

People who live, work and play near riparian areas are in a good position to alert the ministry about unauthorized activities that may harm the environment. Their concerns can draw the ministry's attention to issues that may affect the administration of the *Riparian Areas Regulation (RAR)*. While the ministry should not rely solely on complaints to trigger monitoring and enforcement, citizens' concerns and complaints can make the ministry aware of a problem and the need to resolve it.

A complaints process is only useful if there are clear procedures for receiving, responding to and tracking complaints. Our investigation focused on determining what information about how to register concerns and complaints is publicly available, how the ministry tracks and responds to concerns and complaints, and whether the existing process adequately and consistently reflects ministry policies.

Policy Framework for Responding to Complaints

Under the 2008 Intergovernmental Cooperation Agreement, the province committed to developing a monitoring framework that would include complaint monitoring and informational materials to increase public awareness of *RAR* requirements and processes.²⁰⁸

The 2005 Protocol of Interaction for Responding to Non-Compliance describes the province's *RAR* complaint process. While regional staff told us they used the protocol in responding to complaints, because the ministry does not track its process for responding to concerns and complaints in a centralized way, they could not demonstrate that this is the case.

The protocol states that the responsible ministry may receive complaints about non-compliance with the *RAR* from a citizen or interest group. These complaints may assert that an assessment report is not being followed.²⁰⁹ The protocol states that a toll-free number for receiving and monitoring complaints would provide "one window" access for the public.²¹⁰

The protocol proposes a complaint-based monitoring framework, which includes the following steps for receiving and responding to a complaint:

1. An involved agency, such as local government, DFO or the ministry, receives a complaint.
2. The agency asks the complainant to lodge the complaint through the toll-free number.
3. The operator at the toll-free number directs the complaint to the appropriate conservation officer services, DFO or local government office in the region or area.
4. The region or area contact verifies the complaint and determines whether it has merit.
 - a. If the complaint has no merit, no further action is taken.

²⁰⁸ Intergovernmental Cooperation Agreement Respecting the Implementation of British Columbia's Riparian Areas Regulation, 2008, Richmond, B.C., Annex 2, s.6 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/RAR_ICA_agreement.pdf>.

²⁰⁹ Ministry of Environment, "Riparian Areas Regulation: A Protocol of Interaction for Responding to Non-Compliance," 8 November 2005, 4 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/ProtocolofInteraction.pdf>.

²¹⁰ Ministry of Environment, "Riparian Areas Regulation: A Protocol of Interaction for Responding to Non-Compliance," 8 November 2005, 14 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/ProtocolofInteraction.pdf>.



"Who can we talk to in Victoria to meet with or at least communicate with?"

Source:
Ombudsperson questionnaire.

"We called a local rep to mention that our neighbours were violating the RAR but I don't think there was any follow-up. [We] suggest a central, toll-free reporting number for the public to call."

Source:
Ombudsperson questionnaire.

- b. If the complaint does have merit, the appropriate agency investigates, determines the potential impacts of non-compliance, and seeks compliance and/or remediation.
5. If necessary, the agency takes further steps, such as requiring the local government to take enforcement action, taking enforcement action under the *Fisheries Act*, or lodging a complaint to a professional association.

According to the protocol, the ministry will document the complaint process both when it receives a complaint through the toll-free number and when it responds to the complaint. As the protocol states, a "regional RAR team would be responsible for the filing of a brief report on the complaint and the outcome. A standardized format could be available on-line for this purpose."²¹¹

Raising a Concern or Making a Complaint

People who have a complaint about the RAR may contact the ministry, their local government or DFO. We found in our investigation, however, that the ministry provides limited information about:

- what constitutes a RAR complaint
- who the public can contact to make a complaint
- how that complaint will be handled by the ministry

The complaint process described in the protocol lacks a clear and accessible description of what kinds of complaints about the RAR the ministry will accept and address. Public input to our investigation demonstrates that people may have wide-ranging concerns about the RAR. The protocol, by contrast, indicates that complaints may be limited to concerns about an assessment report not being followed. In our view, the ministry has not clearly defined what constitutes a "complaint" about the RAR.

In our office's 2001 report, *Developing an Internal Complaint Mechanism*, we identified that agencies should decide what kind of complaints they will accept and provide this information in publicly available written materials. Doing so helps ensure the public has appropriate and realistic expectations of the agency's process.²¹² The ministry needs to define what constitutes a RAR complaint, and describe that definition in its written materials so the public knows when it is appropriate to contact the ministry with an issue of concern.

When we began our investigation, there was no direct contact information for Ministry of Forests, Lands and Natural Resource Operations staff on the RAR webpage, which was, and remains, on the Ministry of Environment's website. During our investigation, the Ministry of Forests, Lands and Natural Resource Operations added a link on the Ministry of Environment's RAR website stating: "For RAR enquiries, click here." By clicking on the link, the public can generate an email to the RAR staff at the Ministry of Forests, Lands and Natural Resource Operations and raise questions about the RAR. Although email provides a direct point of contact with the staff who administer the RAR, it is not the same as providing clear and accessible written information about the complaint process.

²¹¹ Ministry of Environment, "Riparian Areas Regulation: A Protocol of Interaction for Responding to Non-Compliance," 8 November 2005, 17 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/ProtocolofInteraction.pdf>.

²¹² Office of the Ombudsperson, *Developing an Internal Complaint Mechanism*, Public Report No. 40, British Columbia: Legislative Assembly, September 2001, 3 <https://www.ombudsman.bc.ca/images/resources/reports/Public_Reports/Public%20Report%20No%20-%2040.pdf>.

The only toll-free number for public complaints related to the environment is the Ministry of Environment's Report All Poachers and Polluters hotline (the "RAPP line"). The ministry told us that the public may contact the provincial Conservation Officer Service with *RAR* complaints using this 24-hour, toll-free number, but this information is not included in any *RAR* website reference, publication or brochure. Use of a toll-free number is consistent with the process envisioned in the protocol. However, the Ministry of Environment told us that RAPP line operators do not make direct referrals to the Ministry of Forests, Lands and Natural Resource Operations. Any *RAR* complaint received through the RAPP line is forwarded to the Conservation Officer Service, and the receiving conservation officer may refer it to the Ministry of Forests, Lands and Natural Resource Operations if necessary.

Given the lack of information available to the public and the convoluted process, it is not surprising that, according to the Ministry of Environment's records, there are only three reports in the Conservation Officer Online Reporting System which mention the *RAR*. When we followed up with the Ministry of Environment, we learned that these reports were actually about either the *Water Act* or the federal *Fisheries Act*.

During our investigation, local government staff informed us that they routinely receive complaints from the public about the *RAR* but have limited ability to take action to address the issues raised. If the ministry clearly identified where the public should be making complaints about the *RAR*, then these complaints to local governments might be reduced or avoided altogether.

The public can learn how the ministry should handle a *RAR* complaint by reviewing the protocol. The protocol is available on the *RAR* "Local Government Resources" webpage.²¹³ This title does not make it seem like the protocol is intended for the public, and there is no link to this page from the ministry's homepage. This inaccessibility, combined with the bureaucratic title of the protocol, makes it unlikely that anyone interested in how the ministry responds to complaints about the *RAR* would find this information. Even if people do find the protocol, it is unreasonable to expect them to review a 20-page document to find out how the ministry will respond if they make a complaint.

In *Developing an Internal Complaint Mechanism*, we outlined the "integral role" of a documented complaints process in an effective, responsive and fair internal complaints mechanism.²¹⁴ Public information about a complaints process should "clearly outline the steps that must be taken to make a complaint," and what the agency will do to respond.²¹⁵ In addition, a complaints process should be as accessible to the public as any other program offered by that agency. The public information currently available about the *RAR* does not meet this standard. The ministry should review its existing complaints process to ensure it meets the requirements of fairness. At a minimum, the following information should be included:

- up-to-date contact information that clearly identifies how to make a complaint

"We had to phone around quite a bit to find out who to call ... it was extremely difficult to find out who to report to."

Source:
Ombudsperson questionnaire.

²¹³ Available online at http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/local.html.

²¹⁴ Office of the Ombudsperson, *Developing an Internal Complaint Mechanism*, Public Report No. 40, British Columbia: Legislative Assembly, September 2001, 4 <https://www.ombudsman.bc.ca/images/resources/reports/Public_Reports/Public%20Report%20No%20-%2040.pdf>.

²¹⁵ Office of the Ombudsperson, *Developing an Internal Complaint Mechanism*, Public Report No. 40, British Columbia: Legislative Assembly, September 2001, 4 <https://www.ombudsman.bc.ca/images/resources/reports/Public_Reports/Public%20Report%20No%20-%2040.pdf>.

- the process for responding to a complaint, including what kinds of complaints the ministry will accept and any steps the ministry and other authorities may take to respond to the complaint

Finding & Recommendation

- F19** The Ministry of Forests, Lands and Natural Resource Operations has not taken steps to develop a clearly documented and accessible process that allows people to raise concerns or make complaints about the operation of the *Riparian Areas Regulation*.
- R22** The Ministry of Forests, Lands and Natural Resource Operations establish a clearly documented and accessible process that allows people to raise concerns or make complaints about the operation of the *Riparian Areas Regulation*.
-

Tracking and Reporting on Concerns and Complaints

The Protocol of Interaction for Responding to Non-Compliance assumes that staff will maintain a record of complaints received and report on the outcome of complaint investigations. It recommends that complaints be entered into an electronic reporting system and that this reporting information form part of the ministry's annual report on the administration of the *RAR*.²¹⁶ We therefore asked the Ministry of Forests, Lands and Natural Resource Operations to provide us with copies of complaint files so we could assess how the ministry had responded to the public's concerns. The ministry could not provide us with complaint information in the way we had requested.

Ministry staff told us that it is difficult to track *RAR* complaints specifically, as a complaint may also involve other provincial environmental legislation or local government bylaws. For example, a complaint about a "backhoe in a creek" may be about non-compliance with a *RAR* assessment report, but it may also be about the *Water Act*, which concerns work "in and about a stream."²¹⁷ The public rarely distinguishes between the different applicable legislation when making a complaint, and complaints may come from a variety of sources (for example, phone calls directly to ministry staff, or referrals from local government or DFO). As a first step in responding to a complaint, the ministry must determine whether it is about the *RAR*.

The ministry does not have a central location (either physical or electronic) where it stores information. Rather, regional offices respond to the majority of complaints and maintain information on their own regional servers. Complaint information is tracked separately by each region. Staff in other regions or in headquarters do not have regular access to any complaint information recorded by regional offices.

Further, some complaints from the public may be resolved by a quick phone call. Staff do not maintain regular records of every complaint made by phone by a member of the public. Staff also do not necessarily keep records of their responses

²¹⁶ Ministry of Environment, "Riparian Areas Regulation: A Protocol of Interaction for Responding to Non-Compliance," 8 November 2005, 17 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/ProtocolofInteraction.pdf>.

²¹⁷ *Water Act*, R.S.B.C. 1996 c. 483, s. 9. On March 11, 2014, the government introduced legislation to repeal the *Water Act* and replace it with a new *Water Sustainability Act*, effective spring 2015. Ministry of Environment, "Historic new water legislation introduced," 11 March 2014.

to these calls so the ministry has no overall understanding of how many complaints are received or the outcome of those complaints.

For example, staff in the South Coast region were able to recall only two site visits since 2010 in response to complaints, and both of these cases were referrals from DFO rather than complaints from the public. The small number of complaints is a concern because, during this same time period, staff in South Coast region have not been conducting regular reviews of *RAR* assessment reports and have told us the region instead relied on public complaints to inform decisions about which sites to visit.

Staff in all of the regional offices informed us that they have significant contact with the public and are engaged in responding quickly to any concerns raised. However, we were not able to obtain the records to support these anecdotal observations because the ministry does not track or monitor complaints in a centralized, accessible way.

Analysis

The *RAR* applies to almost 20 per cent of the province's land. For the ministry to directly observe the development that is occurring in all of the regional districts where the *RAR* applies would require significant resources. In these circumstances, it is often members of the public who can most readily observe the conditions under which development is occurring and identify if something does not seem right. The ministry itself relies on concerns and complaints from members of the public to identify cases of possible non-compliance with the *RAR* that it should investigate. A well-known, well-functioning, easily accessible complaints process is an integral part of the effective functioning of the *RAR* program. If a complaints process does not meet these requirements, it will not be effective in helping the ministry to monitor and ensure compliance with the *RAR*.

The ministry has already established the Riparian Areas Regulation Notification System (RARNS), which tracks assessment reports received. A complaint tracking process that added to this existing database and allowed the number and type of complaints to be tracked by region, local government, proponent or qualified environmental professional (QEP) would seem to be most useful. Analysis of these complaints could help the ministry identify trends or patterns and prompt changes to its monitoring and compliance programs. In addition, tracking the types of concerns raised or complaints made may inform necessary changes to the Regulation.²¹⁸ Reporting on complaints is important because it allows the public to be satisfied that their contribution – raising concerns with the ministry – is reflected in the operation of the program. People who live in areas near development are significant stakeholders in the process established by the *RAR*.

Tracking, analyzing and reporting on *RAR* complaints is an essential part of the fair administration of the *RAR* program and is consistent with the ministry's existing protocol and its commitments under the Intergovernmental Cooperation Agreement.

²¹⁸ Office of the Ombudsperson, *Developing an Internal Complaint Mechanism*, Public Report No. 40, British Columbia: Legislative Assembly, September 2001, 7 <https://www.ombudsman.bc.ca/images/resources/reports/Public_Reports/Public%20Report%20No%20-%2040.pdf>.

Finding & Recommendations

- F20** The Ministry of Forests, Lands and Natural Resource Operations does not have consistent and reliable data about the number of concerns or complaints about the operation of the *Riparian Areas Regulation* it receives or how it has responded to those complaints.
- R23** The Ministry of Forests, Lands and Natural Resource Operations establish an electronic complaint tracking process that allows the ministry to accurately track, analyze and respond to concerns and complaints it receives about the *Riparian Areas Regulation*.
- R24** The Ministry of Forests, Lands and Natural Resource Operations publicly report regional data about concerns and complaints on an annual basis.
-



EVALUATING THE EFFECTIVENESS OF THE *RIPARIAN AREAS REGULATION*

When the *Fish Protection Act* was introduced in the Legislature in 1997, the then minister described the intended goals of the legislation. It was supposed to protect and restore fish habitat, and allow for a renewed focus on protection and enhancement of riparian areas.²¹⁹ The *Riparian Areas Regulation (RAR)* is the tool the government has developed to protect and enhance riparian vegetation (and therefore, fish habitat) in urban areas. The preamble to the 2008 Intergovernmental Cooperation Agreement (ICA), which was developed to assist with implementing the *RAR*, states that “the well-being of British Columbia’s economy and society is integrally linked with the health of its environment” and that all parties are “committed to conserving, enhancing and protecting ... fish habitat.”²²⁰

The *RAR* has now been in effect for more than eight years. It is essential that the government assess whether this environmental protection program is achieving its stated goals of protecting and enhancing riparian areas and fish habitat. Evaluating the effectiveness of the *RAR* can inform and improve the operation of the Regulation, and ensure that it contributes to environmental sustainability.

An evaluation of how the *RAR* is meeting the goals of the *Fish Protection Act* might examine whether the required buffers between a watercourse and a development are helping to maintain the ecology of the riparian area, whether the protections required under the *RAR* have led to revegetation of previously disturbed riparian areas or whether current limits are too restrictive.

In earlier sections of this report, we examined the ministry’s role in monitoring the compliance of qualified environmental professionals (QEPs) with the *RAR* and how the ministry needs to develop and strengthen mechanisms to ensure proponents apply the work of QEPs on the ground. This compliance monitoring, while important, is focused on individual development sites. Compliance monitoring does not, in itself, allow the ministry to be confident that the larger purposes of the Regulation are being met. It is only through effectiveness monitoring that the ministry can make this evaluation. In this section, we focus on the steps the ministry should take to evaluate the effectiveness of the *RAR* in protecting riparian areas.

Lack of Evaluation of the Effectiveness of the *Riparian Areas Regulation*

In the ICA, the province and DFO committed to developing annual work plans that included an effectiveness monitoring framework.²²¹ Despite these commitments, our investigation found that the Ministry of Forests, Lands and Natural Resource Operations does not currently have a process in place for monitoring the effectiveness of the *RAR* in protecting riparian areas.

During the course of our investigation, we heard from groups that said they believed the *RAR* had been useful in protecting fish habitat and riparian areas, but this was

²¹⁹ Hon. C. McGregor, British Columbia Legislative Assembly, Hansard, 17 July 1997, 5965 <www.leg.bc.ca/hansard/36th2nd/h0717pm2.htm>.

²²⁰ Intergovernmental Cooperation Agreement Respecting the Implementation of British Columbia’s Riparian Areas Regulation, 2008, Richmond, B.C., 2 <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/RAR_ICA_agreement.pdf>.

²²¹ Intergovernmental Cooperation Agreement Respecting the Implementation of British Columbia’s Riparian Areas Regulation, 2008, Richmond, B.C., Annex 2, 6(a) and (b) <http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/RAR_ICA_agreement.pdf>.



“The Parties recognize the importance of fisheries resources and fish habitats for the economic well being and social fabric of British Columbia communities and are committed to conserving, enhancing and protecting the fisheries resource, fish habitats and the aquatic environment.”

Source:

Preamble, Intergovernmental Cooperation Agreement, 2008.

based on anecdote rather than systematic study. We heard from local governments who told us that while they support the *RAR* and continue to implement it, they are unsure whether it is working. They pointed to a lack of information about effectiveness monitoring and its results.

Developing a Program to Evaluate the Effectiveness of the *Riparian Areas Regulation*

The Ministry of Forests, Lands and Natural Resource Operations has been working to adapt a form of the provincial Forest and Range Evaluation Program (FREP) for use as an effectiveness evaluation program for the *RAR*. The FREP is currently used to assess whether the *Forest and Range Practices Act*²²² and its related regulations are effectively meeting government objectives. For that Act, those objectives are “to maintain high environmental standards, and promote innovation and cost-effective forest resource management.”²²³

The FREP has three key focus areas:

- collecting and analyzing high quality, relevant monitoring data
- communicating science-based information to improve the knowledge of professionals and inform decision making and continuous improvement
- ensuring continuous improvement²²⁴

According to the ministry, the proposed effectiveness monitoring program for the *RAR* will focus on assessing environmental impacts on a watershed scale, the physical and biological characteristics of streams subject to the *RAR*, and the ability to maintain riparian values in light of the effects of climate change. The development of this protocol is still in the early stages.

The FREP process includes a field checklist used to assess the health of streams in areas subject to logging. The ministry has adapted this checklist to apply to streams in urban areas that are the focus of the *RAR*. A major change by the ministry to the original checklist was to add questions about the impacts of various land use activities on a watershed scale.

Currently in draft form, the checklist is made up of questions – requiring simple yes or no answers – aimed at gathering information in the field about the physical and biological characteristics of a stream. Based on the answers, a qualified assessor can form an opinion about the health or functioning of the stream reach. For example, a “no” to a question indicates poor health in some aspect of a stream’s functioning, and this information can be used to identify the specific activity that might be harming the health of a stream.

The ministry told us that the next steps in implementing this monitoring tool will be to complete the checklist, to conduct field testing to ensure that the checklist is appropriately designed, and to make any necessary changes. Funding, however, is not currently in place for this work.

²²² *Forest and Range Practices Act*, S.B.C. 2002, c. 69.

²²³ Ministry of Forests, Lands and Natural Resource Operations and Ministry of Environment, “What Is FREP?” <<http://www.for.gov.bc.ca/hfp/frep/about/index.htm>>.

²²⁴ Ministry of Forests, Lands and Natural Resource Operations, *Forest and Range Evaluation Program Strategic Plan 2011–2013*, 8 November 2011, 1 <<http://www.for.gov.bc.ca/ftp/hfp/external/publish/frep/library/FREP-Strategic-Plan-2011.pdf>>.

Analysis

It is not enough to hope an environmental protection program works as its legislative drafters intended. This is particularly important for an environmental program such as the *RAR*, where there is some uncertainty about whether compliance with regulatory requirements will protect and enhance riparian areas in the way the program's developers hoped.

Ongoing evaluation of the effectiveness of the *RAR* would contribute important information that could then be used to make any necessary improvements to the *RAR*. It is clear that the province recognized the importance of this kind of evaluation when it committed in the ICA to a monitoring framework that included effectiveness monitoring. This type of evaluation of the *RAR* is also consistent with the goals of the *Fish Protection Act*.

The Ministry of Forests, Lands and Natural Resource Operations points to the effectiveness monitoring it conducts through its existing evaluation program, FREP, as being an important part of government's role in a results-based management framework. The *RAR* aims to protect similar environmental values as the *Forest and Range Practices Act*. It would be consistent with the other programs it administers, and with commitments made in the ICA, for the ministry to devote resources to effectiveness monitoring for the *RAR*.

While the development of a checklist is an important first step, the ministry's timeline for introducing an effectiveness monitoring program remains far from clear. Despite the *RAR* being in effect since 2005, a field assessment checklist is still only in draft form.

The ministry needs to commit to developing a policy framework for effectiveness monitoring of the *RAR* – a framework that establishes what tools will be used in effectiveness monitoring, how and by whom those tools will be used, the frequency with which monitoring will be conducted, and how the results of that monitoring will be reported and used to inform future planning.

Finding & Recommendation

F21 The Ministry of Forests, Lands and Natural Resource Operations has not developed and implemented a program to monitor the effectiveness of the *Riparian Areas Regulation* in protecting riparian areas.

R25 The Ministry of Forests, Lands and Natural Resource Operations take steps to implement a program of regular effectiveness monitoring in all regions subject to the *Riparian Areas Regulation*.





FINDINGS AND RECOMMENDATIONS

Administration of the Riparian Areas Regulation

Local Government Implementation of the *Riparian Areas Regulation*

- F1** The Ministry of Forests, Lands and Natural Resource Operations does not have the ability to ensure local governments implement the *Riparian Areas Regulation (RAR)*. It also does not have the ability to ensure that local governments implement the *RAR* in a way that allows the ministry to conduct compliance monitoring.
- R1** The Ministry of Forests, Lands and Natural Resource Operations review, by October 1, 2014, local government implementation of and compliance with the *Riparian Areas Regulation* and report publicly on the results of that review.
- R2** The Ministry of Forests, Lands and Natural Resource Operations work with local governments to bring them into compliance with the *Riparian Areas Regulation (RAR)*. If the ministry is not able to achieve full compliance by local governments with the *RAR*, the ministry should, by October 1, 2015, develop a mechanism to allow the ministry to require local government compliance with the *RAR*.

Exercise of Variance Powers by Local Governments

- F2** The Ministry of Forests, Lands and Natural Resource Operations has not updated the *Riparian Areas Regulation Implementation Guidebook* to accurately reflect the scope of local government power to vary streamside protection and enhancement areas following the Court of Appeal's decision in *Yanke v. Salmon Arm (City)*.
- R3** The Ministry of Forests, Lands and Natural Resource Operations clarify the scope of the authority of local governments to vary streamside protection and enhancement areas in accordance with the *Riparian Areas Regulation* and, once it has done so, update the *Riparian Areas Regulation Implementation Guidebook*.

Qualified Environmental Professionals

Confirming QEPs Are Registered with a Professional Association

- F3** The Ministry of Forests, Lands and Natural Resource Operations has not taken adequate steps to confirm that all persons acting as primary or secondary qualified environmental professionals (QEPs) and who submit assessment reports to the Riparian Areas Regulation Notification System are registered and in good standing with an appropriate professional association.
- R4** The Ministry of Forests, Lands and Natural Resource Operations develop a reliable process for confirming that, at the time an assessment report is submitted, all qualified environmental professionals (QEPs) involved in its preparation are registered and in good standing with one of the appropriate professional associations.

Training and Professional Development

- F4** The Ministry of Forests, Lands and Natural Resource Operations has not taken any steps to ensure that all individuals who are eligible to conduct assessments under the *Riparian Areas Regulation (RAR)* have successfully completed the *RAR* training course.
- R5** The Ministry of Forests, Lands and Natural Resource Operations take steps to amend the *Riparian Areas Regulation (RAR)* to ensure that successful completion of a training course is mandatory for all individuals who are eligible to conduct assessments under the *RAR* and that a list of individuals who have successfully completed the course is publicly available.

Ensuring QEP Knowledge is Current

- F5** The Ministry of Forests, Lands and Natural Resource Operations has not established a province-wide process for ensuring that all individuals who conduct assessments under the *Riparian Areas Regulation (RAR)* are regularly provided with up-to-date information on changes to the *RAR* or its administration.
- R6** The Ministry of Forests, Lands and Natural Resource Operations establish a process for regularly providing all individuals who conduct assessments under the *Riparian Areas Regulation (RAR)* with updates about changes to the *RAR* or its administration.

Development of Professional Guidelines

- F6** The assessment methods set out in the *Riparian Areas Regulation* provide insufficient guidance on conducting assessments and do not hold individuals who are authorized to conduct assessments to an enforceable standard of professional conduct.
- R7** The Ministry of Forests, Lands and Natural Resource Operations work with professional associations to draft professional guidelines for use by individuals who conduct assessments under the *Riparian Areas Regulation* that are designed to constitute an enforceable standard of professional conduct.

Monitoring QEP Compliance

Report Expiry Dates

- F7** The Ministry of Forests, Lands and Natural Resource Operations has not established an expiry date for assessment reports.
- R8** The Ministry of Forests, Lands and Natural Resource Operations establish an expiry date for assessment reports.
- R9** The Ministry of Forests, Lands and Natural Resource Operations establish a process to ensure that ministry staff, Fisheries and Oceans Canada (DFO) and local governments, qualified environmental professionals (QEPs) and proponents involved in a project that requires an assessment report are automatically notified when that assessment report has expired.

Ministry Review of Assessment Reports

- F8** The Ministry of Forests, Lands and Natural Resource Operations has failed to ensure that each region meets the ministry's goal of reviewing 20 per cent of *Riparian Areas Regulation* assessment reports submitted each year and has failed to establish that, even if complied with, this goal would reliably identify an acceptable level of compliance by qualified environmental professionals (QEPs).
- R10** The Ministry of Forests, Lands and Natural Resource Operations review all of the *Riparian Areas Regulation* assessment reports submitted to the ministry each year.

Non-Compliant Assessment Reports

- F9** The Ministry of Forests, Lands and Natural Resource Operations has not ensured that adequate processes are in place to identify and effectively address the non-compliance of qualified environmental professionals (QEPs) with the *Riparian Areas Regulation*.
- R11** The Ministry of Forests, Lands and Natural Resource Operations ensure adequate processes are in place and utilized in each region to detect and follow up on concerns about non-compliance with the *Riparian Areas Regulation* by a qualified environmental professional (QEP) identified through compliance monitoring and, where necessary, to make a complaint to the QEP's professional association.

Limits on the Ministry's Authority

- F10** The Ministry of Forests, Lands and Natural Resource Operations has not taken reasonable steps to amend the *Riparian Areas Regulation (RAR)* since the 2011 Court of Appeal decision in *Yanke v. Salmon Arm (City)* to allow the ministry to postpone notification to local governments until its reviews of assessment reports are complete, and any required amendments to reports to ensure compliance with the *RAR* assessment methods have been made.
- R12** The Ministry of Forests, Lands and Natural Resource Operations take steps, on or before October 1, 2014, to have the *Riparian Areas Regulation (RAR)* amended to allow the ministry to postpone notification to local governments until its reviews of assessment reports are complete and any required amendments to reports to ensure compliance with the *RAR* assessment methods have been made.

Number of Site Visits

- F11** The Ministry of Forests, Lands and Natural Resource Operations is not conducting the minimum number of site visits required by its own monitoring framework and consequently is not meeting its established goal of being 90 per cent confident that non-compliance is no greater than 10 per cent.
- R13** The Ministry of Forests, Lands and Natural Resource Operations ensure all regional offices conduct a number of site visits each year that is consistent with the ministry's site visit framework, and if the goal of 90 per cent confidence that non-compliance is no greater than 10 per cent is not met, take further steps to ensure compliance.

Determining Which Sites to Visit

- F12** The current process used by the Ministry of Forests, Lands and Natural Resource Operations for selecting sites to visit unreasonably exempts sites where development has not commenced at the time a site visit is scheduled.
- R14** The Ministry of Forests, Lands and Natural Resource Operations develop a system of site monitoring that ensures all development sites that have not yet been subject to a site visit remain eligible for selection for a site visit.

Tracking and Recording Compliance Information

- F13** The Ministry of Forests, Lands and Natural Resource Operations does not record or track, in a centralized and accessible way, the information it collects through compliance monitoring, including information on whether non-compliance is referred to another public agency and, if it is, the nature of the other agency's response.
- R15** The Ministry of Forests, Lands and Natural Resource Operations develop a system that:
- A) tracks, in a centralized and accessible way, the results of compliance monitoring
 - B) records whether non-compliance is referred to another agency and, if it is, how that agency responds to the non-compliance

Monitoring Proponent Compliance

- F14** The Ministry of Forests, Lands and Natural Resource Operations has not established adequate and consistent requirements for monitoring proponent compliance with the *Riparian Areas Regulation* after an assessment report has been accepted by the ministry.
- R16** The Ministry of Forests, Lands and Natural Resource Operations develop a process, under section 5(a) of the *Riparian Areas Regulation (RAR)* for every development that triggers a *RAR* assessment, that:
- A) requires a post-development report be prepared by a qualified environmental professional (QEP) to show that the measures set out in the assessment report have been properly implemented
 - B) tracks whether a local government has given initial approval to the development, whether development has started, and whether a post-development report has been submitted
 - C) alerts the ministry when a post-development report has not been submitted within a reasonable time after development is complete
 - D) requires the ministry to take appropriate action if no post-development report is submitted
 - E) requires the ministry to review post-development reports that have been submitted and take appropriate action where the post-development report identifies non-compliance with the *RAR*

Public Information and Access

Ensuring Clear, Updated and Consistent Public Information

- F15** The Ministry of Forests, Lands and Natural Resource Operations failed to adequately communicate the transfer of responsibility for administration of the *Riparian Areas Regulation (RAR)* in October 2010 and has still not ensured that public information accurately reflects its responsibility for the RAR.
- R17** The Ministry of Forests, Lands and Natural Resource Operations, by June 30, 2014, update all its publicly available information to accurately reflect the ministry's responsibility for the *Fish Protection Act* and the *Riparian Areas Regulation*.
- F16** The Ministry of Forests, Lands and Natural Resource Operations has failed to ensure that all public information about the *Riparian Areas Regulation* is up to date.
- R18** The Ministry of Forests, Lands and Natural Resource Operations review, on an annual basis, all programs it is responsible for to ensure that publicly available information is up to date and accurate.

Reporting on the Riparian Areas Regulation

- F17** The Ministry of Forests, Lands and Natural Resource Operations has not reported publicly on the implementation or administration of the *Riparian Areas Regulation (RAR)* since it became responsible for administering the RAR in October 2010.
- R19** The Ministry of Forests, Lands and Natural Resource Operations report publicly on an annual basis about its administration of the *Riparian Areas Regulation (RAR)*, including reporting on the activities related to the RAR set out in the Intergovernmental Cooperation Agreement. The 2014 annual report be accompanied by annual reports for each of the years 2010, 2011, 2012 and 2013.
- R20** Beginning in 2014, the Ministry of Forests, Lands and Natural Resource Operations, in addition to reporting on the activities set out in the Intergovernmental Cooperation Agreement, report publicly on an annual basis about its administration of the *Riparian Areas Regulation (RAR)*, including:
- A) the number of notifications received and the number of assessments reviewed by each region, the issues identified in those reviews and measures taken to address any issues
 - B) steps taken by the ministry to monitor the compliance of qualified environmental professionals (QEPs), proponents and local governments with the RAR, the results of that monitoring, and measures taken to improve compliance
 - C) steps taken by the ministry to monitor the effectiveness of the RAR, the results of that monitoring, and measures taken to improve the effectiveness of the RAR
 - D) any regulatory or administrative changes affecting the RAR

Public Access to Assessment Reports

- F18** The Ministry of Forests, Lands and Natural Resource Operations has not made *Riparian Areas Regulation* assessment reports available to the public.
- R21** The Ministry of Forests, Lands and Natural Resource Operations work with the Ministry of Environment to make *Riparian Areas Regulation* assessment reports and their associated electronic mapping files available to the public through EcoCat or a similar publicly accessible, searchable electronic database by October 1, 2014.

Concerns and Complaints

Raising a Concern or Making a Complaint

- F19** The Ministry of Forests, Lands and Natural Resource Operations has not taken steps to develop a clearly documented and accessible process that allows people to raise concerns or make complaints about the operation of the *Riparian Areas Regulation*.
- R22** The Ministry of Forests, Lands and Natural Resource Operations establish a clearly documented and accessible process that allows people to raise concerns or make complaints about the operation of the *Riparian Areas Regulation*.

Tracking and Reporting on Concerns and Complaints

- F20** The Ministry of Forests, Lands and Natural Resource Operations does not have consistent and reliable data about the number of concerns or complaints about the operation of the *Riparian Areas Regulation* it receives or how it has responded to those complaints.
- R23** The Ministry of Forests, Lands and Natural Resource Operations establish an electronic complaint tracking process that allows the ministry to accurately track, analyze and respond to concerns and complaints it receives about the *Riparian Areas Regulation*.
- R24** The Ministry of Forests, Lands and Natural Resource Operations publicly report regional data about concerns and complaints on an annual basis.

Evaluating the Effectiveness of the *Riparian Areas Regulation*

- F21** The Ministry of Forests, Lands and Natural Resource Operations has not developed and implemented a program to monitor the effectiveness of the *Riparian Areas Regulation* in protecting riparian areas.
- R25** The Ministry of Forests, Lands and Natural Resource Operations take steps to implement a program of regular effectiveness monitoring in all regions subject to the *Riparian Areas Regulation*.





Ref: 204890

February 14, 2014

Kim S. Carter
Ombudsperson, Province of British Columbia
P.O. Box 9039 Stn Prov Govt
Victoria, British Columbia
V8W 9A5

Dear Ms. Carter:

The Ministry of Forests, Lands and Natural Resource Operations would like to thank you for providing us with the opportunity to review and respond to your draft report: "Striking a Balance: The Challenges of Using a Professional Reliance Model in Environmental Protection- British Columbia's Riparian Areas Regulation". We are proud that in British Columbia we have riparian provisions on private land for the protection of fish habitat and we are pleased that the Ombudsperson agrees this to be a worthwhile endeavour. Your recommendations will help us improve this important program and we look forward to seeing the results of these improvements in the coming years.

I appreciate the report's focus on professional reliance as this is a results based model used increasingly in the natural resource sector, and we are continuously looking for ways to ensure that this model is helping us meet our resource stewardship goals. Your report highlights ways in which we can strengthen the professional reliance model as it applies to RAR to increase the public's confidence that the RAR is working to achieve its intended purpose. To this end, we accept recommendations 4, 6, 7, 11, 13, 14, and 15 and will work to implement them. We agree with recommendations 5, 12, and 16 and will pursue the regulatory changes required to implement them by October 1, 2014.

Following on the theme of professional reliance, the RAR was developed to ensure consistent results. A key component of the model is a science-based assessment methodology that is measurable, repeatable and independent of observer. Once a qualified environmental professional (QEP) is familiar with the methodology, and follows the methodology, we can be reasonably confident that reports are being prepared in a way that will consistently provide the best advice available for protecting riparian fish habitat. As a result, the RAR was not designed with the intention that the ministry would review and comment on every report, but rather that we would monitor a sample of reports and audit compliance to ensure we are achieving the intended results. However, we will agree to review all reports for 2 years at

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Ministry of Forests, Lands and
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which time we will report out on the results of this review and determine the appropriate level of review based on this empirical evidence. We believe that reviewing reports for 2 years will provide focus and a strong priority to create enduring mechanisms to ensure that RAR reports are compliant with the regulation. If we have not reached a satisfactory level of compliance after 2 years, and we do not think that a system of stratified sampling will be effective, then we will continue to review all reports.

Since RAR was brought into force in March 2006, we have seen significant improvements to local government bylaws for the protection of riparian fish habitat. As the RAR is a directive to local governments to bring in bylaws that protect riparian areas during development, we understand the importance of local government compliance and cooperation with the regulation. We will continue to try to bring local governments into compliance and if this is not achieved within the timeline you have set then we will explore further mechanisms to require local governments to comply with RAR, as provided by recommendation 2. We are initiating a project to review local government compliance with RAR as set out in recommendation 1 and we accept recommendation 3 that involves clarifying the role of local governments in granting variances.

Your report recommends that the ministry establish expiry dates for RAR reports, which you have indicated includes applying an expiry date retroactively to those reports already submitted. Currently, there is no regulatory authority allowing the ministry to apply expiry dates to RAR reports. We will work to make the required regulatory changes to implement recommendations 8 and 9 in a manner that respects the rights of individuals and subject to ensuring that there are no legal barriers to doing so.

Publicly available information is also a priority for the province and we appreciate the recommendations on ways to improve processes to allow people to make complaints and receive information on the RAR. Therefore, we accept recommendations 17, 19, 20, 22, 23 and 24. For recommendation 18, we commit to a process of continuous improvement to ensure that all publicly available material is up to date. We are committed to meeting recommendation 21; the ministry is making all RAR reports publicly available subject to the requirements of the *Freedom of Information and Protection of Privacy Act*.

As your report highlights, we have always recognized that we must ensure that the program is working to achieve its objectives and, to that end, the ministry is developing an effectiveness monitoring program for RAR. We accept recommendation 25 and will continue the work we have begun to finalize the effectiveness monitoring framework with field procedures to carry it out.

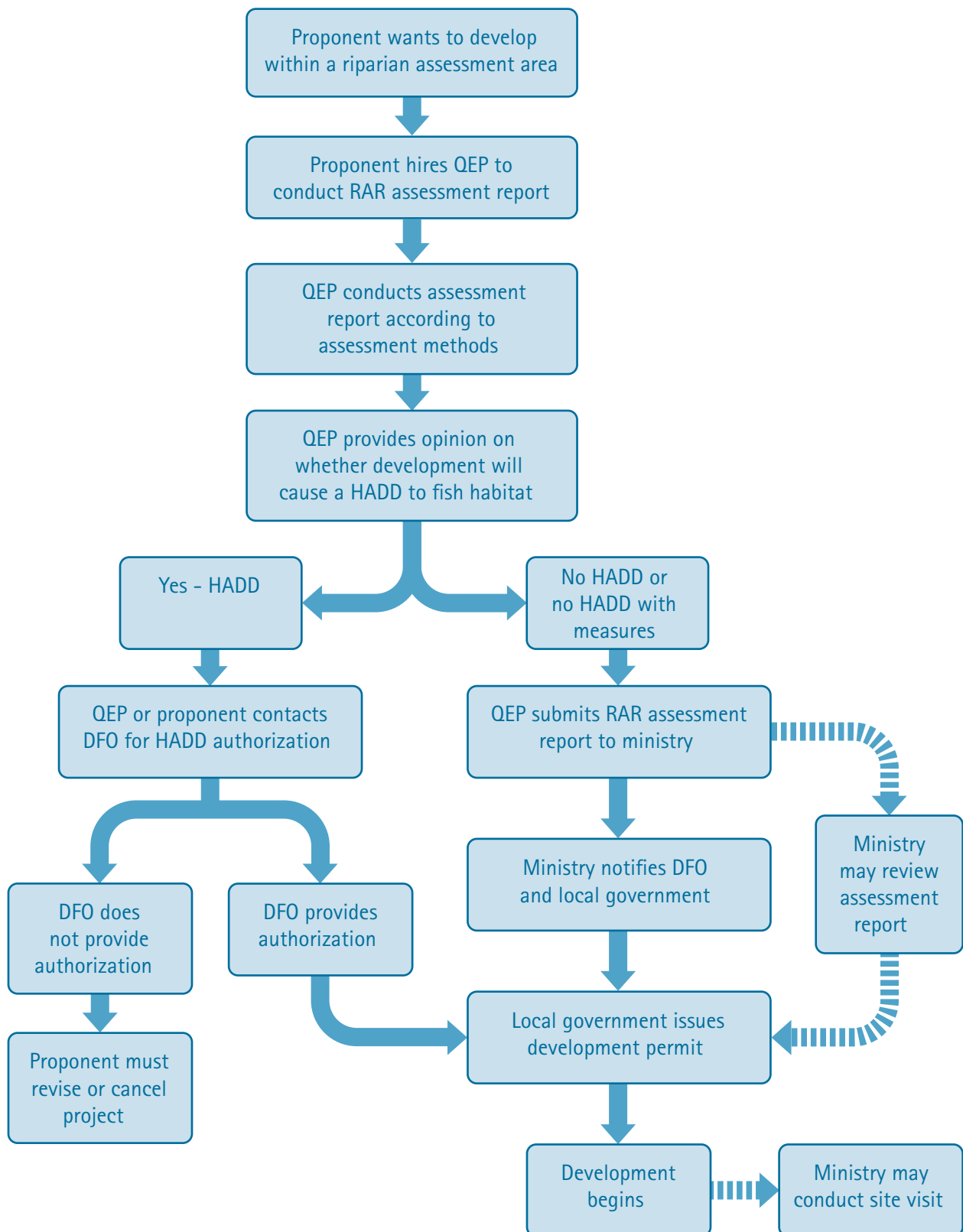
Thank you once again for directing your attention and resources to the RAR; your report provides confirmation for us that riparian protection is a worthwhile priority for the province and highlights the areas where we face challenges. Most importantly, it offers us specific ways to improve the program that will translate into better protection for riparian fish habitat.

Sincerely,

A handwritten signature in black ink that reads "Steve Thomson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Steve Thomson
Minister

APPENDIX 1

Development Process Under the *Riparian Areas Regulation*

APPENDIX 2

RAR Assessment Report Review Checklist**RAR Assessment No.****Review Date:****If submitted under as previous Assessment No.****Original report** ☐**Reviewed by (FLNR):****Amendment report** ☐**Reviewed by (DFO):****1. TOMBSTONE DATA****Complete N/A Incomplete****I. Primary QEP contact info**☐ ☐ ☐

Secondary QEP contact info noted, either for conducting the overall assessment or for specific measures (go to measures section and confirm if secondary QEPs used, and if contact information is provided):

Hazard tree

☐ ☐ ☐

Windthrow

☐ ☐ ☐

Slope Stability

☐ ☐ ☐

Protection of Trees in SPEA

☐ ☐ ☐

Encroachment

☐ ☐ ☐

Sediment & Erosion Control

☐ ☐ ☐

Stormwater

☐ ☐ ☐

Floodplain

☐ ☐ ☐**II. Developer information (contact information provided)**☐ ☐ ☐**III. Development Information**

Type of development (Subdivision, construction etc)

☐ ☐ ☐

Area of development

☐ ☐ ☐

Lot Area (in acres)

☐ ☐ ☐

Riparian length (in meters)

☐ ☐ ☐

Nature of development (new or re-development)

☐ ☐ ☐

Project Start date

☐ ☐ ☐

Project End Date

☐ ☐ ☐**IV. Location of Development information**

Local Government contact info (Correct LG)

☐ ☐ ☐

Stream Name and Watershed code

☐ ☐ ☐

Stream type

☐ ☐ ☐

PID and Address

☐ ☐ ☐

Lat/Long

☐ ☐ ☐

2. ASSESSMENT DATA**Complete N/A Incomplete****Description of Fisheries Resource Values**

Description of fish habitat, species present & site conditions

☐☐☐**Results of Riparian Assessment (SPEA width)****Form 2. Simple Assessment**☐

Riparian Assessment Area (30m X 400m) marked on

the ortho-photo

☐☐☐

Potential Riparian Width (m)

☐☐☐

Mean of 11 measurements

☐☐☐

Measured from Top of Bank (marked on

the ortho-photo)

☐☐☐

Ortho or air photo with transect data

☐☐☐

Vegetation Category correct, (based on Mean width)

☐☐☐

Professional Opinion provided

☐☐☐

Fish bearing

☐☐☐

Fish absence (Appendix 3 applied, justification report included)

☐☐☐

Professional Opinion

☐☐☐

Stream Permanence

Permanent (surface flow >6 months)

☐☐☐

Non-permanent (justification report included)

☐☐☐SPEA correct (based on veg category, fish bearing, and stream
permanence and distance to top of bank of existing permanent
development on the lot)☐☐☐

Professional Opinion provided

☐☐☐**Form 3. Detailed Assessment**☐

Bank Full Width (BFW) transect data (11 sets)

☐☐☐

Mean BFW (Drop high & low, average of remaining 9)

☐☐☐

	Complete	N/A	Incomplete
Mean Gradient (minimum of 2 measurements)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Channel type (R/P – C/P – S/P), as per Figure 3-4	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Professional Opinion	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
SPVT			
SPVT (TR, SH or LC)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Appropriate justification for SPVT other than TR	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Polygons (correct size)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Professional Opinion	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
ZOS's			
LWD, Bank & Channel Stability (Table 3-2)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Litter fall & Insect drop (Table 3-4)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Shade (Table 3-5)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Professional Opinion	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Ditch			
Justification for Ditch as per Table 3-6	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Channel Width (midpoint between invert and top of bank)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Fish Absence (Appendix 3 applied, justification report included)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Professional Opinion	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
SPEA (Detailed Assessment) measured from HWM			
Stream	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Wetlands/Lakes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Ditch	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Professional Opinion	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

	Complete	N/A	Incomplete
Site Plan			
Clear and legible	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Defines:			
High Water Mark (for Detailed assessment)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Top of Bank (for Simple assessment)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Riparian Assessment Area	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
ZOS's (Detailed assessment only)			
LWD, Bank & Channel Stability	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Litter fall & Insect drop	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Shade	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

SPEA (For Simple and Detailed Assessment)

Stream / Watercourse	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Wetland / Lake	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Ditch	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Proposed building envelope	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Road right of ways	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Ditches	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
North Arrow	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Key / legend	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Measures to protect & maintain SPEA

Actions & contingencies to be undertaken (if no measure provided, has it been justified)

Hazard Trees	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Windthrow	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Slope Stability	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Protection of Trees in SPEA	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Preventing Encroachment in the SPEA	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sediment and Erosion Control	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Stormwater Management	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Floodplain Concerns	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Environmental Monitoring

Actions required	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Monitoring Schedule	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Communications plan	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Post Development Report (to be completed and submitted to MOE-RAR)

To be clearly stated in the Assessment Report as a requirement.

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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Form 5 Photos

Representative of site conditions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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Report Professional Opinion

QEP signed Section 7 2(a), or	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
QEP signed Section 7 2(b) (ensure correct opinion option has been chosen)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Date	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Developer name	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Professional Opinion	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

	Complete	N/A	Incomplete
4. Local Government, Letter of Flex attached	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. Fisheries and Oceans, Letter of Advice attached	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Date referred back to QEP:

Specific comments:

QEP Comments:

assessment methods

A schedule to the *Riparian Areas Regulation* that instructs qualified environmental professionals (QEPs) how to properly complete an assessment report. Under section 7 of the *Riparian Areas Regulation*, a QEP must use the assessment methods to prepare an assessment report and can conduct either a simple assessment or a detailed assessment. See “detailed assessment” and “simple assessment.”

assessment report

The report that is produced by a QEP who, using the assessment methods, determines the size of a streamside protection and enhancement area (SPEA) at the site of a proposed development and the measures required to protect and enhance the SPEA.

detailed assessment

A method of conducting an assessment under the *Riparian Areas Regulation*. Under this method, the QEP determines the “zones of sensitivity” for the features, functions and conditions of the riparian area, and the SPEA width is then calculated based on the largest zone of sensitivity. There is the potential for the SPEA to be smaller as a result of a detailed assessment, as it looks more closely at specific characteristics of a site to define the zones of sensitivity and the measures that must be taken to protect the SPEA. This can be contrasted with the simple assessment, which looks at fewer characteristics and applies minimum and maximum SPEA widths. (See “simple assessment”.)

development

Defined in the *Riparian Areas Regulation* as the following residential, commercial or industrial activities that are subject to local government approval under Part 26 of the *Local Government Act*:

- removal, alteration, disruption or destruction of vegetation
- disturbance of soils
- construction or erection of buildings or structures
- creation of nonstructural impervious or semi-impervious surfaces
- flood protection works
- construction of roads, trails, docks, wharves and bridges
- provision and maintenance of sewer and water services
- development of drainage systems
- development of utility corridors
- subdivision as defined in section 872 of the *Local Government Act*

Draft Framework for the Use of Qualified Professionals

See, “Professional Reliance Cross-Ministry Working Group.”

encroachment

Any disturbance to a streamside protection and enhancement area by a proponent, including development and dumping or storing materials.



Fish Protection Act

Legislation enacted in 1997 which allows the Lieutenant Governor in Council (Cabinet) to establish policy directives for the protection and enhancement of riparian areas that may be subject to residential, commercial or industrial development.

Fisheries Act

Federal legislation that regulates Canada's fisheries, enacted under section 91(12) of the *Constitution Act, 1867*. The *Riparian Areas Regulation* was originally meant to complement section 35(1) of the *Fisheries Act*. (See "harmful alteration, disruption or destruction (HADD)".)

Fisheries and Oceans Canada (DFO)

The federal government department responsible for administering the *Fisheries Act*.

harmful alteration, disruption or destruction (HADD)

A term used in the *Riparian Areas Regulation (RAR)* to encompass all acts that impair or damage "natural features, functions and conditions that support fish life processes."²²⁴ Under section 4 of the *RAR*, a local government cannot approve a development until either a qualified environmental professional (QEP) certifies that a development will not cause a HADD, or Fisheries and Oceans Canada approves the HADD caused by the development. Prior to November 2013, section 35(1) of the *Fisheries Act* prohibited HADD of fish habitat. Section 35(1) has since been amended and the *Fisheries Act* no longer uses the term.

Intergovernmental Cooperation Agreement (ICA)

An agreement signed by the Ministry of Environment, Fisheries and Oceans Canada (DFO) and the Union of British Columbia Municipalities in 2008. It has three purposes:

- to define the roles and responsibilities of the parties
- to create a management structure for the administration of the *Riparian Areas Regulation*
- to define review, reporting and resource requirements

local government

Defined in section 1 of the *Fish Protection Act* as the council of a municipality, the board of a regional district, and the Islands Trust. Section 3 of the *Riparian Areas Regulation* specifies the regional districts subject to the Regulation.

Ministry of Environment

The ministry originally responsible for the administration of the *Riparian Areas Regulation*. Before 2005, it was known as the Ministry of Water, Land and Air Protection.

Ministry of Forests, Lands and Natural Resource Operations

The ministry responsible for the administration of the *Riparian Areas Regulation* since October 2010.

²²⁴ *Riparian Areas Regulation*, B.C. Reg. 376/2004, s. 4.

professional association

An organization created by statute that regulates the practice of a profession and ensures that its members act in the public interest.

professional reliance

A model of public administration in which the government relies upon opinions, decisions or information from qualified professionals to achieve policy goals.

Professional Reliance Cross-Ministry Working Group

A group created with members from various ministries to develop a common framework for professional reliance across the natural resources sector, including the areas governed by the Ministry of Forests, Lands and Natural Resource Operations.

proponent

An entity, normally a property owner, seeking to develop property he or she owns or has a legal interest in. In this report, the term “proponent” is used interchangeably with “landowner” and “developer.”

Protocol of Interaction for Responding to Non-Compliance

A document used by the Ministry of Forests, Lands and Natural Resource Operations to guide how it responds to non-compliance with the *Riparian Areas Regulation*.

qualified environmental professional (QEP)

Section 1 of the *Riparian Areas Regulation* describes a QEP as “an applied scientist or technologist, acting alone or together with another qualified environmental professional.” In addition, according to the RAR:

- the QEP must be registered and in good standing in British Columbia with an appropriate professional organization constituted under an Act of the legislature, acting under that association’s code of ethics and subject to disciplinary action by that association
- the QEP’s area of expertise must be recognized in the assessment methods as one that is acceptable for the purposes of providing all or part of an assessment report in respect of that development proposal
- the QEP must be acting within his or her area of expertise²²⁵

QEPs perform riparian area assessments on a property and submit them to the Ministry of Forests, Lands and Natural Resource Operations. Under section 4 of the *Riparian Areas Regulation*, a QEP must submit a report before a local government can approve a development in a riparian area.

Report All Poachers and Polluters Hotline (RAPP line)

A 24-hour, toll-free telephone number operated by the Ministry of Environment that allows members of the public to report violations of fisheries, wildlife or environmental protection laws. The RAPP line number is 1-877-952-7277. Alternatively, a person can report a violation online at: <http://www.env.gov.bc.ca/cos/rapp/form.htm>.

²²⁵ *Riparian Areas Regulation*, B.C. Reg. 376/2004, s. 1.

riparian area

The land surrounding rivers, lakes and streams. The *Riparian Areas Regulation* defines “riparian area” as a “streamside protection enhancement area” which, in turn, is defined as an area “adjacent to a stream that links aquatic to terrestrial ecosystems and includes both existing and potential adjacent upland vegetation that exerts an influence on the stream.”²²⁶

Riparian Areas Regulation Notification System (RARNS)

The electronic system used by the ministry to receive assessment reports. RARNS allows qualified environmental professionals (QEPs) to upload their assessment reports, and notifies the ministry, local governments and Fisheries and Oceans Canada (DFO) when a report is submitted.

riparian assessment area

Under section 1 of the *Riparian Areas Regulation*, the strip of land on either side of a stream, measured from the high water mark, within which a qualified environmental professional (QEP) conducts an assessment. The riparian assessment area is 30 metres from the high water mark of a stream, unless the stream is in a ravine. If the ravine is greater than or equal to 60 metres wide, the riparian assessment area is the distance from the high water mark of the stream to a point 10 metres past the top of the ravine bank. If the ravine is less than 60 metres wide, the riparian assessment area is the distance from the high water mark to a point 30 metres past the top of the ravine bank.

simple assessment

A method of conducting an assessment under the *Riparian Areas Regulation*. Under this method, the qualified environmental professional (QEP) uses default streamside protection and enhancement areas (SPEAs) based on the width of vegetation or potential vegetation, and whether the stream is permanent or non-permanent.

stream

Defined in section 1 of the *Riparian Areas Regulation* as any of the following that provides fish habitat:

- a watercourse, whether it usually contains water or not
- a pond, lake, river, creek or brook
- a ditch, spring or wetland that is connected by surface flow to one of the above waterbodies.

streamside protection and enhancement area (SPEA)

The area adjacent to a stream in which, under the *Riparian Areas Regulation*, no development can occur. The *Riparian Areas Regulation* defines a SPEA as an area:

- adjacent to a stream that links aquatic to terrestrial ecosystems and includes both existing and potential riparian vegetation and existing and potential upland vegetation that exerts an influence on the stream
- the size of which is determined according to the *Riparian Areas Regulation* on the basis of an assessment by a qualified environmental professional (QEP) in respect of a development proposal²²⁷

Union of British Columbia Municipalities (UBCM)

An organization established under the *Union of British Columbia Municipalities Act* to represent the interests of all local governments in British Columbia. Under the *Fish Protection Act* and the *Riparian Areas Regulation*, the UBCM is the designated representative of local government interests for the purposes of consultation.²²⁸

variance

A practice where local governments or Fisheries and Oceans Canada (DFO) change the size or boundaries of the streamside protection and enhancement area (SPEA) set out by the qualified environmental professional (QEP) in his or her assessment report. The Court of Appeal decision in *Yanke v. Salmon Arm (City)* pointed out that variances by local governments are not supported by the *Fish Protection Act* or the *Riparian Areas Regulation*.²²⁹



²²⁷ *Riparian Areas Regulation*, B.C. Reg. 376/2004, s. 1(1).

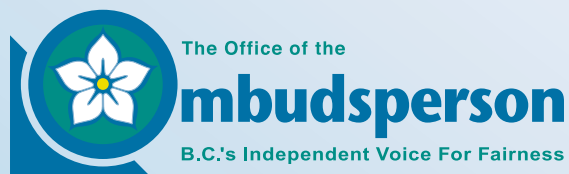
²²⁸ *Fish Protection Act*, S.B.C. 1997, c. 21, s. 12(2); *Riparian Areas Regulation*, B.C. Reg. 376/2004, s. 2(b).

²²⁹ *Yanke v. Salmon Arm (City)*, 2011 BCCA 309, 25.

Notes

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