



Corporate Report

2004

NO: R226

COUNCIL DATE: September 7,

REGULAR COUNCIL

TO: Mayor & Council DATE: September 1,
2004

FROM: General Manager,
Engineering FILE: 0410-
20(MWLAP)
0250-07

SUBJECT: Riparian Areas Regulation - Ministry of Water
Land and Air Protection

RECOMMENDATIONS

1. That Council receive this report for information purposes.
2. That Council be aware of the inadequate timelines afforded Local Governments to implement the new Regulations.
3. That Council be aware of the potential downloading associated with the Regulations and additional resource demands that may be placed on the City.
4. That a copy of this report be forwarded to the Provincial and Federal Governments and UBCM.

BACKGROUND

In 2001, the new Provincial Government decided to revisit the Streamside Protection Regulation that had been adopted by Cabinet in January 2001 under the previous Government. Since early 2002, there has been no consultation with Local Governments on this matter. While Union of British Columbia Municipalities (UBCM) staff has reviewed drafts of a revised Regulation, they have had to sign a confidentiality agreement that information on the draft not be disseminated to other parties.

Approximately 16 municipalities expressed concern to the Provincial Government and UBCM on the proposed Legislation changes and lack of involvement. In June 2004, a corporate report (attached) was presented to Council outlining the concerns. As a result, Surrey Council recommended that a resolution be forwarded to UBCM for consideration during the 2004 UBCM convention and to also have the City Clerk forward a copy of the Corporate Report to the Provincial and Federal Governments requesting a delay in Legislation. Surrey has yet to

receive a reply from the Provincial or Federal Governments. The Provincial Government enacted the Legislation on July 27, 2004.

DISCUSSION

The Riparian Areas Regulation

The Provincial Government, on July 27, 2004, enacted the Riparian Areas Regulation. It calls on Local Governments, by March 31, 2005, to have endorsed and developed protocols to reflect the Riparian Areas Regulations. This timeline is far less than the year originally discussed, and less time than what is deemed practical, to implement such Legislation considering it will require some by-law amendments, new business practices, and possible education and enforcement.

The intent of the Regulation was to provide consistency, a uniform approach, and clarity in Riparian Area determinations throughout the Province. Upon review of the Legislation, several key issues emerge:

- Setbacks are based on Qualified Environmental Professional (QEP) reports, which are to be submitted to the Ministry of Water, Land & Air Protection (WLAP) and Fisheries & Oceans Canada (DFO). The City must wait for letters from both agencies before advancing the development file. This may actually take longer than the current process. The City is not to review the report or suggest changes, but is to accept the report.
- QEP reports may be inconsistent between property owners on the same stream reach due to the limited focus of the assessment. Property owners along the same reach may not all have the same setbacks.
- Setback determination now requires a higher level of effort than current methods. It will likely cost the development community more for consultant evaluation.
- The Riparian Area Setbacks are not necessarily consistent with other setback requirements along stream corridors from other Legislation. There may be differing setback requirements based on floodplain issues, geotechnical issues, wildlife requirements or parkland acquisition.
- Streams discharging directly to marine environments that do not support fish habitat are not included in the Regulations. These streams still provide a drainage and habitat function and will now require the development of a separate process.
- Pilot testing and implementation strategies have yet to be conducted for the Regulations. It is unlikely that these will be completed in sufficient time for Local Governments to develop their own business practices.

Foremost in the Regulations is the requirement for Local Governments to cooperate in developing strategies with the Ministry and DFO regarding obtaining certificates by the QEP during the process, for monitoring and enforcement of the QEP report recommendations implemented, and for public education surrounding the

Regulations. At briefing meetings held in the spring of 2004, Local Governments were deemed as a partner expected to assist with the implementation, monitoring plus short and long term enforcement of the Regulations. These components could require a significant increase in resources for the City. No additional resources are forthcoming with this Legislation, the costs will need to be borne by the Local Government.

Environmental managers from BC held a brainstorming session to discuss potential implications of the legislation in particular how it supported the UBCM concerns expressed to the province previously. The summary findings have been included as an attachment.

The Ministry of Water, Land & Air Protection is hosting a briefing session at the Guildford Sheraton Hotel on September 9, 2004, to outline the Regulations to Local Government staff. In addition, there will be a briefing session at the UBCM on September 21, 2004 regarding the Regulations.

Overall, the Riparian Areas Regulation appears to be less certain than current methodology. It does potentially provide more flexibility, but in turn requires more study work on the part of the land developer, as well as requiring more resources from Local Governments for application processing, implementation, compliance monitoring and enforcement. The implementation timeline is short and may cause confusion within the development community in terms of how different files will be managed already in process.

CONCLUSION

The success of any Riparian Areas Regulation requires effective partnerships between Local Governments, the Province, and the DFO. For the Riparian Areas Regulation to successfully proceed pragmatic, open, and meaningful consultation is needed with local governments to ensure that the revised Regulation adequately covers issues, such as liability protection, resourcing, variances, implementation agreements, monitoring, and roles and responsibilities.

It is therefore recommended that this report be forwarded to the Provincial and Federal Governments and to the UBCM, urging that the implementation of the Regulation be delayed until open and meaningful review can be conducted and that the issue of additional Municipal resources needed for implementation, monitoring, and enforcement be addressed.

Paul Ham, P.Eng.
General Manager, Engineering

CAB/rdd/brb
Attachment

g:\wp-docs\2004\utilities\drainage & env\08260806cb.doc
BRB 9/7/04 9:42 AM



Corporate Report

NO: R128

COUNCIL DATE: June 7, 2004

REGULAR COUNCIL

TO: **Mayor & Council** DATE: **June 2, 2004**
FROM: **General Manager,
Engineering** FILE: **0410-20
(MWLAP)**
SUBJECT: **Proposed Riparian Area Regulations - Ministry of
Water, Land & Air Protection**

RECOMMENDATIONS

It is recommended that Council:

1. Request that the draft resolution contained in the body of this report be forwarded to the UBCM for consideration during the 2004 UBCM convention; and
2. Authorize the City Clerk to forward a copy of this report to the Provincial and Federal governments and UBCM with a letter requesting that changes to the Streamside Protection Regulation be delayed to allow for meaningful open consultation with local government regarding the content of and processes for implementing such changes.

BACKGROUND

In 2001, the new Provincial government decided to revisit the Streamside Protection Regulation that had been adopted by Cabinet in January 2001 under the previous government. Since early 2002, there has been no consultation with local governments on this matter. While Union of British Columbia Municipalities (UBCM) staff have reviewed drafts of a revised Regulation, they have had to sign a confidentiality agreement that information on the draft not be disseminated to other parties.

City staff now understand that the Province is intending to make a decision on the Regulation sometime in June 2004. The following report outlines consultation so far, the need for further consultation before the Regulation is revised, and a recommended resolution for the September 2004 UBCM convention.

DISCUSSION

The Streamside Protection Regulation

On January 19, 2001, the Provincial Government enacted the Streamside Protection Regulation to support the 1997 Fish Protection Act. Local governments were given 5 years to fully implement the regulation. The purpose of the regulation was to bring clarity and transparency for protection of streamside vegetation through the development process.

The Province conducted detailed and extensive consultations with local governments prior to enacting these Regulations, including pilot projects in Surrey and other selected municipalities to refine the proposed methodologies, including variance processes and implementation approaches. In reviewing the final draft of the Regulations in the fall of 2000, the Union of British Columbia Municipalities (UBCM) supported the Regulations, subject to adequate provision of funding for implementation and liability protection to local governments.

Proposed Riparian Area Regulation

In 2001, the new Provincial government decided to revisit the Streamside Protection Regulation and struck a task

group to seek consensus on whether to abandon or amend the regulation. The task group included representatives from Department of Fisheries and Oceans (DFO), municipal environmental managers, UBCM, stream stewards, and land developers. While the task group did not wish to abandon the regulation, they could not reach consensus on amendments. As such, by 2002, the task group was disbanded. To replace the task group, the Province established an internal working group, involving staff from DFO and the Provincial Ministry of Water, Land & Air Protection (MWLAP) but no representation from local governments. Over the past year and a half, this working group has been seeking to develop a new method for defining streamside protection areas and amending the Streamside Protection Regulation. The revised name of the Regulation is the proposed Riparian Area Regulation (RAR).

Staff and representatives from UBCM have reviewed the draft RAR and have sought to ensure that it continues to meet the spirit and intent of the formerly approved Streamside Protection Regulation. However, the Province required that any individual reviewing of the draft RAR sign a confidentiality agreement and that information would not be disseminated to other parties. As such, there has been no review of the Regulation by local government staff through UBCM. Since 2001, City staff have enquired on numerous occasions to the Province, DFO, and UBCM about the status of the revised Regulation, but have been told that information was not available.

In late April 2004, City staff were finally invited to review the draft Regulation, on the condition that they also sign a confidentiality agreement that the contents would not be shared with any other parties, including other City staff or Council. This approach was deemed unacceptable, and staff from different local governments requested an open discussion process including pilot testing of the revised Regulation.

The Province agreed to meet with local government environmental managers on May 12, 2004, to brief them on the revised Regulation. The Province emphasized that this was a briefing and not consultation. Surrey staff attended this meeting. Copies of the revised Regulation were not available at the meeting, but elements of the Regulation were discussed. Without seeing the proposed Regulation, meaningful comment was not possible.

The Province noted that Cabinet was seeking to make a final decision by June 2004 on whether to adopt the new RAR or entirely eliminate the Streamside Protection Regulation. If the RAR is adopted, the Province envisages a phase-in process of a year or more, in which the process and details could be refined. At the meeting, staff expressed frustration at the lack of consultation and ability to meaningfully comment on a Regulation that has significant implications for local governments. In addition the one-year phase-in deadline was thought to be too limiting as the new legislation would possibly require some by-law amendments, additional resources, new business practices and possible education and enforcement.

It appears that the RAR, if adopted, will place more responsibility on local governments for the administration of environmental legislation which, in effect, will be “downloading” with no transfer of resources. Further, changes to the regulations will introduce additional uncertainty in the development process, which does not appear to have been given adequate consideration to date. Additionally, the RAR needs to be fully coordinated with DFO processes so that there is a ‘one window’ approach to approvals.

A subsequent meeting was held on May 27, 2004, involving UBCM staff and staff of local municipalities to discuss concerns with the proposed legislation. A list of specific issues was drafted by the joint municipalities. The outcome included a draft resolution for concerned municipalities to bring forward at the September UBCM convention. **The following is the proposed resolution.**

“Whereas UBCM resolved in 2002 that a new riparian assessment regulation:

- *Provide liability protection for local government when making land use decisions based on a report by a Qualified Environment Professional on fish habitat;*
- *Ensure that no new responsibilities are downloaded on local government and that all training costs and management costs required to implement the new regulation are paid for by either the federal or provincial government;*
- *Ensure the process is timely and cost effective, from the community perspective;*
- *Ensure an integrated approach is implemented to avoid conflicts between the different levels of government;*
- *Ensure that a balance is maintained between development and protection of the environment.*

And given that the Province has been proceeding with development of the riparian area regulation without open consultation with local governments, therefore let it be further resolved that UBCM not sign onto the tripartite agreement for implementing a Riparian Area Regulation unless the following measures have been met:

- *Legal review of regulation to determine implications to local governments;*
- *Full liability protection for local governments;*
- *Involvement of local governments in Guidebook development.*

And let it be further resolved that the RAR be extended to apply to institutional land uses, including federal and provincial crown lands.”

CONCLUSIONS

The success of any Riparian Area Regulation requires effective partnerships between local governments, the Province and the DFO. For the RAR to successfully proceed, pragmatic, open and meaningful consultation is needed with local governments to ensure that the revised Regulation adequately covers issues, such as liability protection, resourcing, variances, implementation agreements, monitoring, and roles and responsibilities.

It is, therefore, recommended that Council:

1. Request that the draft resolution contained in the body of this report be forwarded to the UBCM for consideration during the 2004 UBCM convention; and
2. Authorize the City Clerk to forward a copy of this report to the Provincial and Federal governments and UBCM with a letter requesting that changes to the Streamside Protection Regulation be delayed to allow for meaningful open consultation with local government regarding the content of and processes for implementing such changes.

Paul Ham, P.Eng.
General Manager, Engineering

PH/VL/CAB/brb

c.c. - General Manager, Planning & Development

g:\wp-docs\2004\utilities\drainage & env\08260806cb.doc
BRB 9/7/04 9:42 AM

Riparian Area Regulation Potential Specific Issues

NB The comments outlined in this table are based on an understanding of the new Riparian Assessment Regulations

UBCM Concern ^[1]	RAR Proposed Approach ^[2]	Specific Issues
1. Provide liability	LG has no liability, so long	a. Is liability protection for LG explicitly

<p>protection for local government when making land use decisions based on a report by a Qualified Environment Professional on fish habitat;</p>	<p>as it follows prescription by QEP. It is expected that LG will simply accept the QEP report and proceed without a review by LG, DFO, or Province. It is proposed that once the Province acknowledges receipt of the QEP report, then the LG can proceed.</p>	<p>worded in the Regulation?</p> <ul style="list-style-type: none"> b. If a LG issues a permit (rezoning, subdivision, building permit) for works, consistent with the QEP recommendations, is the LG non-labile for any subsequent damage to fish habitat? c. Does the LG have any role in "checking" the QEP report, on receipt? Is there an approval process for the QEP report? What is minimum due diligence in process for liability protection? d. What (if any) is the LG liability if they note an error in the QEP report? Are they required to report or respond to the error? e. What (if any) is LG liability for "enforcing" the landscaping prescription in the QEP report (over and above building setbacks)? f. Does the LG have flexibility to vary from the QEP recommendations without liability to meet other LG requirements? g. How do LGs know if the senior agencies have concerns with QEP report? How long do they have to wait until processing the QEP application? If the LG approves permits after the allotted timeframe, are they non-labile for any subsequent issues? h. Will DFO be available through ERCs to consult on variances to the QEP recommendations to meet LG needs? i. Will the provincial or federal governments sign the restrictive covenants? j. Could developers challenge the legality of the LG implementing the RAR? k. If DFO issues a stop-work order on a project due to a problematic QEP report, is the LG liable for having issued permits (i.e. could the LG be sued by the developer)? l. The LG's agreements are with the developer as opposed to the QEP. What is the legal relationship between the LG, developer and QEP? m. <u>LG's review of the QEP report (for whatever reason) opens the LG for implied liability, and there is no explicit liability protection once that occurs.</u>
<p>2. Ensure that no new responsibilities are downloaded on local government and that all training costs and management costs required to implement the new regulation are paid for by either the</p>	<p>LG just receives QEP recommendations and implements. Very minor administrative role.</p>	<ul style="list-style-type: none"> a. Will a LG need to enact a by-law in response to the regulation, or will the RAR simply create a new provincial requirement that all development applications must meet? b. If a by-law is required, this action will require resources (planning, legal, public consultation, etc). Grants must be available.

federal or provincial government;

- c. By-law enactment can be facilitated through Provincially-proposed model by-laws (Guidebook). As the Guidebook has not yet been prepared, and the RAR has had only preliminary field testing, it may be appropriate to phase in implementation and deadlines for by-law enactment. For example - Phase 1 (1 year) = test sites, development of draft Guidebook with LG input, training; Phase 2 (1 year) = test with representative municipalities, finalize guidebook. Phase 3 (1 additional years) = timeline for all other municipalities to comply. Funding should be available for adaptive management phase.
- d. We can expect that RAR will have “teething” pains. How will the Province ensure through the adaptive management process, that problems with the process are not downloaded to LGs (e.g. auditing, enforcement, monitoring).
- e. Will the Province be providing educational materials on the requirements? The LG could assist by distributing the materials.
- f. What role (if any) does the LG hold for managing bonding for riparian area protection as prescribed by QEP? Who will authorize release of bonding and conditions? Over what time-period is it expected to be held?
- g. What (if any) is the LG role for monitoring, auditing, enforcement of the RAR? Will there be ongoing funding for this role? What resources (\$\$ and FTEs) is the Province proposing for these critical tasks? Where will the FTEs be placed (DFO, province, local governments)? How can the Province/ DFO work with LGs and streamkeepers to make optimum use of resources? Who will take and respond to complaints on the RAR process?
- h. What support do LG's have if they note that requirements have not been met in QEP report? Review process? Is the review process available to the public? The public may review the reports through the Public Hearing process.
- i. What resources are available for base-mapping, for those sites which simply wish to follow SPR. Base-mapping should ideally show stream locations, permanent vs non-permanent streams, fish bearing vs non-fish-bearing. If no base-mapping funding, will all sites need a QEP to interpret SPR setbacks?
- j. What training has been budgeted? Training needs include the following: undertaking the assessment; administering the applications; liaising with agencies.

		<p>k. Are LGs expected to track submission of assessments over time for specific properties?</p>
<p>3. Ensure the process is timely and cost effective, from the community perspective;</p>	<p>QEP recommendation can be quickly incorporated into RZ, SD, BP</p>	<p>a. At what stage in the development process is the QEP report expected - design stage, pre-construction and build stage?</p> <p>b. What is the process for varying from the QEP recommendations, if the design changes (e.g. servicing requirements lead to increased incursions into the riparian areas?) How is the QEP's RAR notification amended? How are LGs satisfied that the amendment is satisfactory to the Province / DFO?</p> <p>c. How will the QEP report and recommendations integrate the potential impacts with other aspects of the environment and other legislation (e.g. SARA, wildlife, water quality, stormwater management)?</p> <p>d. Will single lot redevelopment or renovations within the 30m setback boundary require QEP reports? What size of redevelopment would trigger a report (e.g. a deck)?</p>
<p>4. Ensure an integrated approach is implemented to avoid conflicts between the different levels of government;</p>	<p>DFO signs off that RAR meets their requirements.</p>	<p>a. What timely/cost-effective conflict resolution process is available for those sites where LG "disagrees" with QEP report? Are inadequate reports simply addressed reactively (i.e. after damage occurs)?</p> <p>b. When / how are site audited? What (if any) is the LG role in the auditing?</p> <p>c. How does the RAR fit with existing inter-agency programs (e.g. FREMP and BIEAP)?</p> <p>d. How does RAR relate to other issues (e.g. flood management)?</p> <p>e. Are there provisions for LG to determine additional fisheries and wildlife habitat compensation requirements for developments over and above QEP recommendations?</p>
<p>5. Ensure that a balance is maintained between development and protection of the environment.</p>	<p>The proposed approach is a suitable balance</p>	<p>a. What are the variance opportunities for sites where a net environmental gain can occur with a lesser setback - e.g. a RAR prescription of 15m, but where setback is entirely asphalt. Could the setback be reduced to 10m, so long as asphalt area is revegetated?</p> <p>b. The RAR report may not have considered some critical LG issues (e.g. servicing). How can the LG be assured that their issues are incorporated into the prescription?</p>

		<p>c. What is the process for ensuring the credentials of the QEPs?</p> <p>d. How does RAR address cumulative impacts at a watershed scale? What is relationship between RAR and CEAA?</p>
Other Issues		
Confidence in new proposed model	Model will be adapted based on the implementation experiences.	<p>a. What test studies / monitoring is proposed? Testing should occur in representative habitat types. How are LGs involved? How will the Province evaluate the effectiveness? <u>Monitoring effectiveness appears to be geared towards effectiveness in executing the RAR assessment methodology. What monitoring will be done to assess effects on environmental health?</u></p> <p>b. What external peer review is proposed for the model? Peer review is critical for a “science-based” approach.</p> <p>c. Does the model consider hydrological factors?</p> <p>d. Does the model address erosion issues?</p> <p>e. How will the long-term monitoring on the ecological impacts of the RAR implementation be undertaken for adaptive management purposes?</p>
Exclusions		<p>a. Why does the RAR not address non-fish bearing watercourses that drain to the sea? How else are these watercourses protected? The Fisheries Act presumably still addresses these watercourses.</p> <p>b. Will RAR be extended to institutional (including federal and provincial crown) land uses?</p> <p>c. How is agriculture addressed?</p> <p>d. How are marine areas treated?</p> <p>e. Please clarify “stream” definition re: surface flow. What is surface flow? Storm pipes? Gravel?</p>
		Some LGs have already adopted SPR default setbacks. Is this sufficient, or will additional RAR process required? Please clarify s. 8(2).

Acronyms

LG = Local Government

RAR = Riparian Area Regulation

SPR = Streamside Protection Regulation

DFO = Department of Fisheries and Oceans

QEP = Qualified Environmental Professionals

[\[1\]](#) From the September 2002, UBCM resolution

[\[2\]](#) The proposed approach is our understanding of the regulation as presented at the May 12 "Briefing on Riparian Area Regulation"