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Dear Ms. Meret:

Re: Riparian Areas Regulation
Assessment of Risk of Liability and Other Related Issues

You have asked for an opinion answering the questions raised in your letter of February 24, 2005 about the Riparian Areas Regulation, B.C. Reg. 376/2004, adopted under the *Fish Protection Act*, SBC 1997, Chapter 21.

Part I - Assessment of Risk of Liability

Questions

A. ***What is current local government exposure, if any, to liability in relation to development approvals in riparian areas as a consequence of impacts on fish habitat and possible Fisheries Act enforcement? What is the extent in nature of any liability exposure?***

A.1 Liability from Prosecution

Can local government be prosecuted under the federal *Fisheries Act* for work carried out as a result of an approval granted by the local government?

Existing Court decisions involving local government and sections 35 or 36 of the *Fisheries Act* involve the local government itself causing damage to fish habitat, either because of a failure or a malfunction of the local government's works or facilities, or because while carrying out construction or repair of its works or facilities, deleterious substances have been released into a fish habitat or fish habitat has suffered harmful alteration.

We have been unable to locate any case where a local government has been prosecuted under the *Fisheries Act* for activities carried out by others under some local government approval.

Sections 35 and 36 of the *Fisheries Act* create offences when a person deposits a deleterious substance into a fish habitat or harmfully alters a fish habitat. The act of local government granting development approval related to a fish habitat area could not be federally prosecuted under these sections of the *Fisheries Act*. The local government would not have the requisite *mens rea* in relation to the offence, nor would it have committed the requisite *actus rea* of the offence. There is no provision in the *Fisheries Act* that makes it an offence to approve or allow development resulting in harm to fish habitat.

It is highly unlikely that a prosecution of a local government in these circumstances would be successful in light of criminal law principles.

A.2 Civil Liability

Does local government face any civil liability for work carried out under a local government approval that results in a prosecution of a third party under the *Fisheries Act*?

The answer to this question is set out in B below.

B. Is there any experience with litigation against local government by developers or other third parties, such as for alleged negligent approval or permitting, as a result of enforcement action under the Fisheries Act in relation to development in riparian areas?

We have been unable to find any cases which deal with this specific circumstance. One might argue that a person found guilty of a criminal offence and fined cannot sue in a civil action for "damages" in the amount of that fine; the fine imposed upon the defendant might not be considered "damages" resulting from negligent action.

Even if the Federal Government chose to prosecute a developer or owner for work carried out in accordance with a development approval granted under the provisions of the *Fish Protection Act* or the Riparian Areas Regulation ("RAR"), it would be difficult for the prosecutor to overcome the officially induced error or the due diligence defences available to the developer or owner. You have advised that the Department of Fisheries and Oceans ("DFO") has formally accepted the standards established in the RAR as standards, which, if followed, will not result in a violation of sections 35 or 36 of the *Fisheries Act*. If the owner or developer can show that it was diligent in following the scheme of the legislation it would have a very strong defence.

Also, where an accused has been charged with a regulatory offence and has committed that offence in reasonable reliance on an opinion of an appropriate official, the courts have considered the excuse of officially induced error. If an accused can establish the necessary elements of officially induced error, the courts will find that the state is disentitled to a conviction and that the proceeding should be stayed. In order to establish negligent misrepresentation, the accused would have to establish that he or she violated the *Fisheries Act* in reliance on the advice or opinion of a local government and that this reliance was reasonable. If the accused could establish the necessary elements of negligent misrepresentation, then he or she could also likely establish the elements of officially induced error in the criminal proceedings, and thus could avoid any fine or other penalty. Officially induced error is a defence that may be used when prosecuted for an offence. This is not the circumstance if a person is directed by an inspector under section 38(6) of the *Fisheries Act* to take remedial action for the deposit of a deleterious substance in water frequented by fish.

There are a number of different circumstances outside the enforcement of the *Fisheries Act* which may give rise to a developer or owner suing a local government in negligent misrepresentation or misstatement as a consequence of the local government giving advice or approval in relation to a development. A fuller discussion regarding the exposure to liability of local government in these circumstances will be set out in Part 2.

C. To what extent does local government implementation of the RAR requirements potentially decrease any exposure to liability?

D. To what extent does local government implementation of the RAR requirements potentially increase any exposure to liability?

If the liability referred to in these two questions relates to a local government's exposure to be prosecuted under the *Fisheries Act*, then these questions are not applicable as it has been determined under Question A that local government has never been prosecuted

under sections 35 and 36 of the *Fisheries Act* because it granted a development approval that resulted in contraventions by a third party of sections 35 and 36 of the *Fisheries Act*. It is highly unlikely that local government would be exposed to any liability in this regard.

Additionally, if the liability referred to in these questions refers to liability of local government from actions pursued by third parties as a result of enforcement action taken against the third parties under the *Fisheries Act*, again the question is not applicable as it has been determined under Question B that there are no cases setting such a precedent and if there were, the prosecution would most likely be stayed based on a defence of due diligence or officially induced error.

If the questions posed in Questions C and D refer to liability, other than liability referred to under Questions A and B, then the general answer is that the implementation of the RAR requirements will not have the potential to decrease a local government's exposure to liability. Rather, the implementation of the RAR requirements will potentially increase local government's exposure to liability.

With the implementation of any additional regulatory regime that requires some action on the part of local government, a potential increase in liability is present because there are added actions taken by local government that are subject to review by the Courts. Local government actions may be reviewed by the Courts under the *Judicial Review Procedure Act* ("JRPA") or may be found by a Court to be negligent or grossly negligent; also, they may give rise to a conviction for an offence, under section 5 of the *Offence Act*, and under section 12(4) of the FPA, or sections 4(1) or 6 of the RAR.

There are measures included in the RAR, had they not been included, would have meant potentially greater liability to local government. Subject to my suggested revisions to the RAR being made, the reliance on a Qualified Environment Professional's ("QEP") opinion, and the notification from the Ministry of Environment of

the QEP's opinion, reduces the number of actions local government will take in implementing the regulatory scheme , and thereby reduces the opportunity for liability to arise.

E. To what extent is any exposure to liability shared with senior governments? Are the senior governments more likely to be responsible in respect of any exposure to liability?

It would appear that the Ministry of Environment and Fisheries and Oceans Canada have liability in relation to their role in implementing the RAR contained at section 4(2)(b) of the RAR. This section of the RAR requires the Ministry of Environment to notify a local government if the Ministry and Fisheries and Oceans Canada have been notified of the development proposal and have been provided with a copy of an assessment report prepared by a QEP. The assessment report prepared by the QEP must certify that the QEP is qualified to carry out the assessment, that assessment methods have been followed and the assessment report must contain a professional opinion that meets the requirements of sections 4(2)(a)(i) or (ii) of the RAR as to the potential impact of the development on the riparian assessment area.

In the Ministry of Environment's role under section 4(2)(b) of the RAR, there is potential liability to the Ministry if it mistakenly notifies local government that conditions in section 4(2)(b) have been satisfied, when in fact they have not been satisfied.

The implementation guidebook sets out the method by which the QEP will file its assessment report electronically in Appendix 2. In particular, in Step 6, the QEP is obligated to answer four questions which correspond with the conditions in section 4(2)(b) of the RAR.

Do the Ministry of Environment and Fisheries and Oceans Canada have an obligation under section 4(2)(b) to determine whether in fact the QEP has provided an assessment

report that certifies that he or she is qualified to carry out the assessment, certifies that the assessment method has been followed and provides the professional opinion that meets sections 4(2)(a)(i) or (ii) of RAR? It is the minimum obligation of both the Ministry of Environment and Fisheries and Oceans Canada to confirm that these conditions have been satisfied prior to notifying local government in accordance with section 4(2)(b). It is not difficult to confirm that they have been notified of the development proposal, or even that the QEP certifies that he or she is qualified to carry out the assessment and has followed the assessment methods. The QEP is required to answer "yes" to these questions before they are able to submit the report.

However, the condition contained in section 4(b)(ii)(C) of the RAR requires the Ministry of Environment and Fisheries and Oceans Canada to confirm that they have been provided with a copy of an assessment report **that contains a professional opinion** that analyzes the riparian assessment area and **makes a determination** whether sections 4(2)(a)(i) or (ii) apply. If section 4(2)(a)(ii) applies then the report **must include measures** which protect the integrity of those riparian areas from the effects of development. The online submission of the report that requires the QEP to answer yes to the question "Have you attached a complete assessment report?" is not sufficient to discharge the obligation of the Ministry of Environment and Fisheries and Oceans Canada to confirm the existence of an assessment report as it is defined in the RAR, or that the report contains the requisite professional opinion and measures, if any are required.

Clause 2, section 7 of Form 1 of the Assessment Report is not sufficient to discharge the obligation of the Ministry of Environment and DFO to confirm the existence of an assessment report, or that the report contains the professional opinion and measures, if any are required.

Quoting the Supreme Court of Canada in *Rothfield v. Manolakos* [1989] 2 S.C.R. 1259, the Court in *Cook v. Bowen Island Realty Ltd.* [1997] BCJ No. 2319 quoted La Forest J. at page 383*:*

> "It seems to me, however that it is incumbent on the City to at least examine the specifications and sketches.
>
> …
>
> Inadequacy in the sense of insufficiency is one thing, however; inadequacy in the sense of an obvious departure from the standards required by the bylaw is another. In the present case, it was clear from the specifications that the project was inadequately designed.
>
> …
>
> It is to be expected that contractors, in the normal course of events, will fail to observe certain aspects of the building bylaws. That is why municipalities employ building inspectors. Their role is to detect such negligent omissions before they translate into dangers to health and safety."

In the *Bowen Island Realty* decision, the Court found the Public Health Engineer and the Public Health Inspector to be negligent when they recommended allowing a permit to be issued for a sewage disposal system when the specifications and drawings appended to the application made by a professional engineer, were in part contradictory and in part inconsistent with the Ministry of Health standards.

Similarly, in the decision of *Dha v. Ozdoba* [1990] BCJ No. 768 (BCSC) the Court held the municipality one third liable on the grounds that the City's Building Inspector, a

professional engineer, did not examine an engineer's drawings to see whether they complied with the Building Code.

If the Ministry of Environment notifies local government in accordance with section 4(2)(b), but a mistake is made and no assessment report is attached, or the report that is attached is incomplete and does not contain a professional opinion or fails to identify the measures necessary to protect the riparian assessment areas, arguably, both the Ministry of Environment and Fisheries and Oceans Canada may, in certain circumstances, have liability in negligence for failing to properly follow the regulatory scheme.

If a local government relied on the Ministry of Environment notification and was sued by a third party in negligent misrepresentation, the local government might have an action over as against the Ministry of Environment and Fisheries and Oceans Canada in negligent misrepresentation.

In this event, presumably the Ministry of Environment and DFO would also have an action over as against the QEP for the QEP's negligence or gross negligence depending on the circumstances.

The Ministry of Environment has advised that some auditing of the online assessment reports will be conducted. This will assist in finding incomplete or missing assessment reports, but will not identify all problems. The Ministry may elect to adopt a policy setting out the limitations of its review as a basis to argue a policy defence should the need arise. However, such a policy defence argument may be subject to the challenge that specific statutory duty overrides what would be a more general policy; e.g. a policy that said the Ministry will review only those assessment reports that are audited sets a lesser standard than does section 4(2)(a) or (b) of the RAR.

F. Are there any further steps that might be taken by local government to reduce exposure to liability?

The answer to this question is yes. Local government may adopt policies on how it will implement the provisions to meet the requirements in the RAR. On a standard negligence model, public authorities can avoid or negative liability by adopting policies which are reasonable in all the circumstances. The nature of the policies will be specified in Part 2 of this opinion when dealing with the questions regarding the RAR implementation. Essentially such policies should specify the extent and nature of the local government's review of each assessment report and what evidence of the QEP's qualifications will be accepted.

The same liability issues that arise for the senior levels of government discussed under paragraph E regarding the receipt and review of the QEP's certifications and reports apply to local government as a consequence of section 4(2)(a) of the RAR.

Section 4(1) of the RAR establishes a mandatory obligation on local government not to approve or allow development to proceed in riparian assessment areas unless the development proceeds **in accordance with subsection 4(2) or 4(3).**

Section 4(2) of the RAR sets out the requirement that local government may allow development to proceed if both conditions contained in subparagraph (a) and subparagraph (b) are satisfied. Subparagraph (b) is the notification to be received from the Ministry of Environment. However, the requirements in subsection 4(2)(a) of the RAR establish an independent requirement on local government to review and confirm those matters stipulated in subparagraph (a) regarding the nature of the QEP's qualifications and assessment report. It is not possible to interpret subsection 4(2)(a) as not applying to local government given the construction of the subsection and the conjunction of subparagraphs (a) and (b).

If it was not the intention of the Ministry of Environment to impose this additional obligation on local government, it is recommended that subparagraph 4(2)(a) of the RAR be removed and the meanings of the terms in subparagraphs 4(2)(a) be incorporated within subparagraph 4(2)(b). This would have the effect of there being only one condition that must be satisfied before local government may allow development to proceed, and that is being notified by the Ministry in accordance with subsection 4(2)(b).

G. ***Is there any express provision in the RAR that would provide protection to local governments from any liability resulting from impacts on fish habitat and possible Fisheries Act enforcement as a consequence of development approval in riparian areas?***

No.

H. ***Is there any implicit provision in the RAR that would provide protection to local government from any liability resulting from impacts on fish habitat and possible Fisheries Act enforcement as a consequence of development approval in riparian areas?***

No, other than there are measures included in the RAR, had they not been included, would have meant potentially greater liability to local government. Subject to my suggested revisions to the RAR being made, the reliance on a QEP's opinion, and the notification from the Ministry of Environment of the QEP's opinion, reduces the number of actions local government will take in implementing the regulatory scheme , and thereby reduces the opportunity for liability to arise.

I. ***Is there authority under section 12 of the Fish Protection Act to include liability protection as a policy directive to local government or, would that exceed the***

authority conferred on the Lieutenant Governor in Council under section 12 of FPA?

Section 41(a) of the *Interpretation Act* empowers the local government, for the purposes of carrying out the intent of an enactment, "to make regulations as are considered necessary and advisable, are ancillary to it, and are not inconsistent with it.". In our opinion, despite this section, there is not sufficient authority in section 12 of the FPA for the inclusion in the RAR of liability protection to local government. Section 12(1) of the FPA limits the ability of the Lieutenant Governor in Council to establish policy directives for the **protection and enhancement of riparian areas** that the Lieutenant Governor in Council considers may be subject to residential, commercial or industrial development. Provisions protecting local government from liability are not carrying out the intent of the FPA or necessary, advisable or ancillary to establishing directives to protect or enhance riparian areas.

J. Does local government have any recourse against the Qualified Environmental Professional("QEP") if local government faces liability claims after reliance on the developers assessment report?

The answer to this question depends on who retains the Qualified Environmental Professional and for what purpose. If local government retains the QEP for the purposes of receiving his or her opinion on how to implement the provisions of the RAR under sections 12(4)(a) or (b) of the *Fish Protection Act*, the QEP owes a duty of care to the local government and may be sued in negligence if the QEP fails to meet the standard of care. Further, local government may have a contractual remedy against the QEP depending on the terms of the contract between the local government and the QEP.

The other possibility is that a property owner or developer retains the QEP for the purposes of satisfying section 4 of the RAR. Section 4(2) requires the QEP to certify that

he or she is qualified to carry out the assessment, has followed the assessment methods and provided a professional opinion that meets the provisions of the RAR. There is no requirement that the QEP assessment report contain a statement that the QEP acknowledges that the report will be relied upon by a local government, the Ministry of Environment and Fisheries and Oceans Canada. If such a statement was included in the assessment report, it would be a more straight forward matter to third party the QEP if the local government faced some kind of liability having relied on the QEP's assessment report.

Following the Supreme Court of Canada decision *Edgeworth Construction Ltd. v. D. Lea and Associates* (1993) 83 BCLR (2d) 145, it is possible to argue that even without a reliance statement, a QEP prepared the assessment report knowing that it would be relied upon by a definable group of persons. If a representation is made knowing that another may rely on it, and it is relied on to that person's detriment, the person making the representation may be liable. It does not matter that there is no contractual relationship between QEP and the definable group of persons relying on the information.

The Supreme Court of Canada in *Edgeworth* considered whether an engineering firm was liable in negligent misrepresentation to a contractor who relied on the reports of the engineer contained in a tender. No contractual relationship existed between the engineering firm and the contractor. The Court found that the engineering firm owed a duty of care to the contractor and was liable in negligent misrepresentation, and therefore subject to a claim in pure economic loss.

Where a property owner enters into a contract with a QEP to carry out an assessment report in accordance with section 4 of the RAR, it would appear that a QEP could still be liable for negligent misrepresentation to the local government, because the local government is an identifiable group that the QEP knows will rely on the information under the regulatory scheme in the RAR. This, despite there being no contract between

the QEP and a local government. It would seem reasonable for the local government to rely on the assessment report prepared by the QEP, making him or her susceptible to liability in negligent misrepresentation.

However, in order for there to be recourse against the QEP in negligent misrepresentation, the local government would, in fact, have had to rely on the assessment report and suffer loss or damages as a consequence.

To what extent will a local government rely on the QEP's opinions?

Given the manner in which section 4(2) of the RAR is constructed, a local government may only allow development to proceed if two conditions are satisfied.

Under section 4(2)(a), a QEP must carry out an assessment, certify that he or she is qualified to carry out the assessment and that the assessment methods have been followed. Further, the QEP must provide a professional opinion that the development as proposed will not harm the riparian assessment area or that the streamside protection and enhancement areas identified in the report will be protected following identified measures.

The second condition contained in section 4(2)(b) of the RAR requires that the local government be notified by the Ministry of Environment that the Ministry of Environment and Fisheries and Oceans Canada have been notified of the development proposal and have been provided with a copy of the assessment report prepared by a QEP, which also certifies he or she is qualified to carry out the assessment, certifies that the assessment methods have been followed and provides the professional opinion referenced above.

Arguably, in order to discharge the regulatory requirement contained in section 4(2) of the RAR, a local government must ensure that both conditions established in

subsections 4(2)(a) and 4(2)(b) are met. In order to ensure that the conditions established in section 4(2)(a) are met, the local government must review the assessment report prepared by the QEP and determine that the report contains the certification that the QEP is qualified to carry out the assessment and that the assessment methods have been followed. Additionally, the local government must ensure that the assessment report contains a professional opinion of the QEP which meets either sections 4(2)(a)(i) or (ii). This will require that the local government read and consider portions of the report which contain these stipulations.

To the extent that a local government is required to rely on these portions of the assessment report in making a decision to allow development, the QEP may be liable in negligent misrepresentation if one or more of the stipulations is incorrect.

If section 4(2)(a) is removed as suggested, local government may not be required to review the assessment report at all and consequently will not rely on the assessment report in approving or allowing development.

K. Are the relationship, responsibilities and potential liabilities different if the Qualified Environmental Professional is employed by local government?

Yes. Unlike the circumstance in which a local government may contract with a QEP or rely on a report which has been prepared under a contract between a property owner and a QEP, the QEP who is an employee of a local government is not liable to its employer for work it conducts under the terms of his or her employment unless the employee's conduct amounts to dishonesty, gross negligence or malicious or willful misconduct. This limitation is found in sections 287.1(5) and (6) of the *Local Government Act*. It applies to regional districts by section 847 of the *Local Government Act*.

A local government that retains a person to assist the local government in achieving compliance with the RAR, in accordance with section 12(4) of the *Fish Protection Act*, by

providing information to the local government so that it can ensure its bylaws and permits under Part 26 of the *Local Government Act* are comparable to or exceed the standards established in the RAR, is in a different situation than a local government that has hired a QEP to provide assessment reports in accordance with section 4(2) of the RAR on behalf of property owners.

You have advised that some local governments are opting to retain a QEP to provide assessment reports on behalf of property owners or developers. A local government may be vicariously liable for the actions of its employees. If a QEP employee prepares an assessment report for a property owner that turns out to be mistaken, the owner or developer relying on the report may sue the local government in negligent misrepresentation for any losses or damages it has incurred or suffered as a consequence of its reliance on the QEP's report. The losses or damages to be incurred or suffered by an owner or developer might arise from: (1) having to take remedial action under order of an inspector in accordance with section 38(6) of the *Fisheries Act* for deposit of a deleterious substance into a fish habitat; (2) having to "undo" the development and/or relocate or abandon the intended use as a result of the Ministry of Environment action to seek compliance with the RAR.

The owner or developer relying on the QEP's report would still have the officially induced error defence if prosecuted under the *Fisheries Act* or the RAR.

L. What, if any, responsibility does local government have under the RAR to confirm the qualifications of a Qualified Environmental Professional? What potential liability does local government face if it fails to meet that responsibility, if any? If there is a responsibility, to whom is it owed?

Unless section 4(2)(a) is altered as suggested in this opinion, it requires that the local government confirm that a number of stipulated conditions have been satisfied before it may allow development. One of the conditions is that in the assessment report, the

QEP has certified that he or she is qualified to carry out the assessment. At the very least, the local government has an obligation to confirm that the assessment report contains this certification regarding the QEP's qualifications.

If the local government fails to confirm this, and nevertheless proceeds to allow development, there is a potential for the local government to be exposed to liability in two separate ways. First, if as a consequence of a local government failing to confirm the existence of the QEP's certification a riparian area is not protected, the local government faces being charged with an offence under sections 4(1) or 6 of the RAR because it has failed to protect the riparian area in accordance with the RAR. Second, local government may be subject to a claim in negligent misrepresentation in the event that the permission of the local government to develop was relied on to the detriment of a developer or property owner.

Arguably, section 4(2)(a) of the RAR requires local government to confirm that it is a QEP that is carrying out the assessment in addition to ensuring he or she has certified his or her qualifications. It is difficult to say whether a Court would require that a local government look behind the statement of certification contained in the report made by the QEP to confirm that the person making the assessment report is in fact a QEP as defined in the RAR.

Should a local government investigate whether or not the QEP is a scientist or technologist registered and in good standing with an appropriate professional organization, and whether that individual's area of expertise is recognized in the assessment methods as one that is acceptable for the purpose of providing the assessment report in respect of the development in question? And further, whether the individual is acting within the individual's area of expertise?

A Court may determine that a failure on the part of local government to make enquiries as to whether the individual presenting the assessment report is in fact a QEP, as defined, is a failure to satisfy this added condition in section 4(2)(a).

M. What, if any, responsibility does local government have under the RAR to monitor and enforce implementation of the recommendations in an assessment report? What potential liability does local government face if it fails to meet that responsibility, if any? If there is responsibility, to whom is it owed?

The RAR does not impose upon local government responsibility to monitor and enforce the recommendations contained in an assessment report. At most, under section 5 of the RAR, the local government is obligated to cooperate in developing strategies with the Ministry of Environment and Fisheries and Oceans Canada to check that the assessment report has been properly implemented, that the assessment report follows the assessment methods and for public education relating to the protection of riparian areas. It is very difficult to assess how a court would view the degree to which local government is obligated to cooperate because of the inherent vagueness of this provision.

Depending on how a local government elects to comply with the FPA, there may be more or less opportunity for local government to enforce the recommendations in an assessment report. It may be the case that a local government incorporates riparian area protections within its development bylaws and permits under Part 26 of the *Local Government Act* and in that case has discretion to enforce its own bylaws; this may have the effect that measures are properly implemented. For example, if a local government chose to satisfy section 12(4) of the *Fish Protection Act* by following the requirement under subsection (b) to ensure its bylaws and permits under Part 26 of the *Local Government Act* provide a level of protection that meets or exceeds that established in the RAR, it may well establish in its OCP development permit areas to protect riparian areas that would be consistent with the recommendations in an assessment report.

Section 928 of the *Local Government Act* requires that land be developed strictly in accordance with a development permit.

On the other hand, a local government may satisfy its obligation under section 12(4)(a) of the *Fish Protection Act* by including in its zoning bylaw riparian assessment area protection provisions in the form of "no-build/use" setbacks in the riparian assessment areas. In this instance, local government would also have discretion to enforce its zoning bylaw and the "no-build/use" setback. A "no build/use" setback cannot include all the items that may be contained in an assessment report. The enforcement of the zoning setback may not have the same effect as enforcement of the recommendations in an assessment report. Further, variance to the "no-build/use" setback could be granted by development variance permit, or rezoning. (It should be noted that a development variance permit cannot contain conditions.)

Any local government enforcement authority in relation to riparian areas will be contained in local governments' own statutory authority and bylaws and the exercise of that authority is discretionary in accordance with an extensive body of case law: *Polai v. Toronto (City)* [1973] SCR 38; *Port Coquitlam (City) v. Hoffer* (unreported) February 9, 1988, Vancouver Registry No. A871564 (BCSC); *Dusevic v. Columbia Shuswap (Regional District)* [1989] B.C.J. No. 668; *Burnaby (City) v. Porcnic* (1999) 6 M.P.L.R. (3d) 250 (BCCA).

Local government regulatory authority and related enforcement powers under Part 26 of the *Local Government Act* are not authorized under the RAR. There is no authority in the RAR, for example, to permit entry onto property for the purposes of inspection. There is no offence created in the RAR against owners and developers should they fail to properly implement, or implement at all, the recommendations in an assessment report.

N. Within the authority conferred by section 12 of the Fish Protection Act, are there any improvements that might be made to the RAR?

For the purposes of certainty, there may be some beneficial amendments to be made to the RAR.

N.1 Subdivision

The definition of "development" includes, at subparagraph (j), "subdivision" as defined in section 872 of the *Local Government Act*. This definition is critical to the application of section 4 of the RAR, as there is a prohibition against local government approving or allowing "development" to proceed in riparian assessment areas. Additionally, section 6 of the RAR makes it mandatory that a local government protect its riparian areas in accordance with the regulation when exercising its powers with respect to development.

A local government does not approve or allow a subdivision; this is a function of the approving officer within a municipality and the Ministry of Transportation, if within an electoral area of a regional district. The position of an approving officer is statutorily created and is separate and apart from a local government. If an approving officer approved a subdivision, a local government cannot unapprove it. As the approval or allowing of a subdivision is not within the jurisdiction of a local government, the Ministry may wish to consider deleting subparagraph (j) from the definition of "development".

If the intent of the Ministry was to include within the definition of "development" activities associated with obtaining subdivision approval in respect of land, it may wish to consider whether the activities it has listed under the definition of "development" in subparagraphs (a) through (i) cover these activities.

Section 938 of the *Local Government Act* contains the subdivision servicing requirements and permits a local government to include in a bylaw the regulation and prescription of standards for highways, sidewalks, boulevards, boulevard crossings, transit bays, street lighting and underground wiring, water distribution systems, fire hydrant systems, sewage collection systems, sewage disposal systems, drainage collection systems or drainage disposal systems.

Section 939 of the *Local Government Act* deals with the provision of excess or extended services under a latecomer agreement and deals with the provision of works and services related to highway, water, sewage or drainage systems.

Under section 940 of the *Local Government Act* these works and services must be constructed and installed prior to subdivision approval unless a development agreement is entered into requiring the installation of the works and services by a specific date. Such agreement provides for security in relation to the cost of constructing and installing such works and services.

If the intention of the Ministry was to ensure that the installation and construction of the subdivision works and services occurs in a manner that is consistent with the RAR then the question becomes whether the items contained in (a) through (i) in the definition of "development" cover those subdivision development activities. There would appear to be many of these activities already contained in items (a) through (i). However, the construction of roads may be more narrowly defined and not be viewed as including sidewalks, boulevards, boulevard crossings and transit bays. Therefore, you may wish to consider using the word "highways" in place of the word "roads". Highway is defined in the *Community Charter* as "including a street, road, lane, bridge, viaduct in any other way open to the public use, other than a private right of way on private property".

Also, there is no mention in the definition of "development", items (a) through (i), of the installation of street lighting, underground wiring or a fire hydrant system. It may well be that the installation and construction of these items would end up falling into Item (b) related to the disturbance of soils or item (a) related to the removal, alteration, disruption or destruction of vegetation. Nevertheless, given that some of the other items such as the development of utility corridors, the construction of roads and the development of drainage systems or water and sewer systems would not likely be possible without the disturbance of soils or the removal, alteration, disruption or destruction of vegetation, there may be an inference that the provision of street lighting and a fire hydrant system must be listed separately as well, rather than relying on items (a) and (b).

N.2 Development and Part 26 Powers

Section 3 of the RAR makes the regulation apply to the exercise of local government powers under Part 26 of the *Local Government Act*. And yet, in section 4 and section 6 of the RAR, the directives are limited to the local government exercising its powers with respect to "development" or the approval or allowance of "development" as "development" is defined in the RAR.

"Development", as defined, does not include many Part 26 powers such as zoning, the establishment of development permit areas, the issuance of development variance permits, development permits and temporary commercial and industrial permits. If the intent of the RAR is to deal with "development" as that has been defined, the regulation need not apply to the exercise of local government powers under Part 26 as set out in section 3 of the RAR. It can be limited to the exercise of local government powers with respect to "development". The only offences in the RAR are created under sections 4 and 6 of the RAR and these are in relation to "development" and not the exercise of Part 26 powers. Section 3(1) of the RAR appears to be overly broad and creates confusion. Is

the intention that the RAR apply to the exercise of all Part 26 powers or just those associated with "development"?

It is recommended that section 3(1) of the RAR be amended to apply to the exercise of local government powers with respect to "development" as defined.

N.3 Allow and Approve

In the RAR, section 4(1), contains the following: "A local government must not **approve or allow** development…". In section 4(2), the words "approve or" are deleted: "A local government may allow development to proceed…". The Ministry of Environment may wish to consider making these consistent by adding "approval" to section 4(2) of the RAR or deleting "approve" from section 4(1) of the RAR. This decision will be determined partly by how the Ministry of Environment decides to deal with the issues I raise below regarding the "no approval or allowance required" problem and partly by how the Ministry of Environment decides to deal with the problem caused by the "added obligation" in section 4(1) of the RAR over and above that established in section 12(4)(a) of the FPA.

N.4 No Approvals or Allowances Required

"Allow" would appear to have broader meaning than "approve" in the land development context. A discussion of this follows below.

"Approval" would normally be interpreted as requiring some positive action such as the issuance of a permit. This presupposes that the development activity in question requires a permit to be issued in accordance with the authority of a local government under Part 26 of the *Local Government Act*. There are a number of activities listed in the definition of "development" that do not necessarily require a permit or application of any kind under Part 26 of the *Local Government Act*. For example, the removal,

alteration, disruption or destruction of vegetation, the disturbance of soils and the construction or erection of buildings and structures.

Some powers under Part 26 of the *Local Government Act* are purely regulatory in nature and do not contain authority to require applications and permits or formal approvals.

N.4.1 Screening and Landscaping - Example #1

For example, under section 909 of the *Local Government Act*, a local government may, by bylaw, regulate and set standards for screening and landscaping.

A bylaw such as this may well include provisions allowing the removal, alteration, disruption or destruction of vegetation as in subparagraph (a) of the definition of "development". However, there is no requirement on the part of a person subject to the bylaw to apply for any approval. It is a regulatory bylaw and may be enforced if someone contravenes its provisions. In this circumstance, how will the local government not "approve" or "allow" the development as required by section 4(1) of the RAR?

Further, it is possible that a bylaw under section 909 of the *Local Government Act* [screening and landscaping] would allow the very thing prohibited under the RAR. For example, require planting vegetation in a riparian assessment area to create screening.
If the local government has elected to comply with the FPA under section 12(4)(b) and has created Development Permit Areas for the protection of riparian areas, the activity of vegetation destruction as in subparagraph (a) of the definition of "development" would not be caught by restrictions in a Development Permit Area ("DPA") because section 920 of the *Local Government Act* [development permits] does not require a permit for vegetation removal alteration or destruction unless such activity is to such a degree that it alters the land.

If a local government elected to comply with the FPA under section 12(4)(a) of the FPA, this activity of vegetation destruction would not be caught by a zoning setback under section 903 of the *Local Government Act* [zoning] because it is not a "use" of land and involves no buildings or structures.

N.4.2 Works and Services - Example #2

Another example can be found under section 940 of the *Local Government Act* [works and services]. Works and services may be installed prior to subdivision approval or the issuance of a building permit; this would include the provision and maintenance of sewer and water services referred to under subparagraph (g) in the definition of "development" in the RAR. However, there is no obligation on the developer to apply for or receive any approval before constructing these works. The works must conform with the standards set out in the Subdivision Servicing Bylaw authorized by section 938 of the *Local Government Act*. In this circumstance, how will the local government not "approve" or "allow" the development as required by section 4(1) of the RAR?

This activity would be caught by a DPA under section 919.1(a) or (b) of the *Local Government Act* [designation of development permit areas] because it involves the alteration of land. A person wishing to carry out this activity would be required to first obtain a Development Permit under section 920 of the *Local Government Act* [development permits].

However, this activity might not be caught by a zoning setback even if it could be regulated under the siting of a structure because these kinds of works are often excluded from a definition or "structure". Further, it might never come to the attention of local government because a "no build" setback is regulatory in nature and does not contain an application requirement.

N.4.3 Inability of Local Government to Comply with Duty to Not Approve or Allow Development

There are a number of other examples where a "development" activity does not give rise to any application for a permit or approval under Part 26 of the *Local Government Act* even if the riparian assessment area is protected under a "no build" setback in the zoning bylaw. For example, the creation of nonstructural impervious surfaces, the disturbance of soils, and the construction of roads.

In both the examples set out relating to sections 909 and 940 of the *Local Government Act* [screening and landscaping], [works and services], there is no mechanism by which the development proposal comes to the attention of the local government such that they could refuse to "approve" or "allow" it.

Even if a local government elected to comply with the FPA under section 12(4)(b), the removal, alteration, disruption or destruction of vegetation would not require a development permit unless it was to such an extent that it could be said to alter the land.

In these cases, there is no way for local government to comply with its duty to not allow or approve development under sections 4(1) or 6 of the RAR. Further there is no authority in Part 26 of the *Local Government Act* under which a local government may require an application for approval in these cases.

There is no easy solution to this fundamental difficulty other than redefining "development" in the RAR to include only those activities for which an approval or permit is required or amending Part 26 of the *Local Government Act* to include approval requirements in relation to "development" activities as defined in the RAR.

N.5 Not Allow Development

It is possible that a court might interpret the obligation to "not allow development" in section 4(1) of the RAR to include a positive obligation to provide prohibitions in any regulatory bylaw under Part 26 of the *Local Government Act* that covers "development" activities. For example, to include in its screening and landscaping bylaw under section 909 of the *Local Government Act*, a requirement that no alteration or destruction of vegetation be permitted within a riparian assessment area unless sections 4(2) or (3) of the RAR is satisfied; or, a requirement in a subdivision servicing bylaw under section 938 of the *Local Government Act* [subdivision servicing], that no construction of subdivision works and services such as water or sewer services commence within a riparian assessment area unless sections 4(2) or (3) of the RAR is satisfied.

Those subject to these provisions wishing to take advantage of section 4(2) of the RAR would have to submit an assessment report in relation to the proposed development.

Even if a local government includes riparian area protection provisions in other Part 26 bylaws, this may not discharge the statutory duty of a local government to not "allow" development. It is possible that a court would interpret the obligation to "not allow development" as a duty of local government to take steps to stop the activity, such as by way of a court injunction. The word "allow" is ambiguous. What is the evidence of local government "not allowing" development? " Is it a prohibition in a bylaw? Is it a legal action? Is it both?

It is possible that a court would find a local government guilty of an offence under section 4(1) of the RAR for failing to satisfy its obligation to not allow development by failing to do what it can in its Part 26 bylaws to protect riparian areas or by failing to take positive steps to stop the activity by legal action. In the latter case it becomes impossible for local government to comply with section 4(1) by taking action, when

there is no mechanism which brings the development proposal to the attention of local government such that they could refuse to allow it and take legal action.

N.6 Obligation Over and Above FPA

If section 4(1) of the RAR could be interpreted by a court to impose the obligation on local government to include riparian area protection provisions in all Part 26 bylaws, it does create some difficulty in light of section 12(4) of the *Fish Protection Act*. A local government may satisfy its statutory obligation under the *Fish Protection Act*, by including in its zoning bylaw, riparian area protection provisions in accordance with the RAR under section 12(4)(a) **OR**, by ensuring that its bylaws and permits under Part 26 of the *Local Government Act* meet or beat this standard as established by the RAR under section 12(4)(b). If a local government relies on section 12(4)(a) only, its only obligation is to do what it can in a zoning bylaw. Section 12(4)(a) does not require it to include in any of its other Part 26 bylaws, provisions to protect riparian areas. However, if section 4(1) of the RAR requires local government to include riparian area protection provisions in all its Part 26 bylaws, this would appear to add a further obligation over and above what is in section 12(4)(a) of the FPA.

Arguably, section 4(1) of the RAR is supported by section 12(1) of the *Fish Protection Act* in light of section 41(a) of the *Interpretation Act*. Section 12(1) of the *Fish Protection Act* authorizes regulations regarding the protection and enhancement of riparian areas that may be subject to residential, commercial or industrial development. Section 41(a) of the *Interpretation Act* authorizes the Lieutenant Governor in Council, for the purpose of carrying out the enactment according to its intent to make regulations that are considered necessary and advisable, are ancillary to the enactment and are not inconsistent with the enactment. Arguably, section 4(1) of the RAR may be considered a regulation necessary and advisable for the purposes of carrying out the intent of the *Fish Protection Act*; in particular, the intent set out in section 12(1). Further, if section 4(1) of the RAR is interpreted as including the additional requirement to include

riparian area protection provisions in other Part 26 bylaws besides zoning bylaws, it would not appear to be necessarily inconsistent with sections 12(1) or 12(4)(b) of the *Fish Protection Act*. Nevertheless, it does create a confusing statutory scheme as section 12(4) of the *Fish Protection Act* implies, in subsection (a), that a local government has met its statutory obligation by including riparian area protection provisions in **only** its zoning bylaws.

If section 4(1) of the RAR is interpreted by a court to include the same statutory obligations as in section 12(4)(b) of the FPA in respect of other Part 26 bylaws without explicitly providing so, the interpretation of the regulatory scheme becomes very strained. If section 4(1) of RAR does include this requirement to include riparian area protection provisions in other Part 26 bylaws, it is redundant because the requirement is already provided for in section 12(4)(b) of the *Fish Protection Act*. Presumably there was an intention under section 12(4) to provide two different methods of complying with the legislation, and yet in the face of section 4(1) of the RAR, it would appear that this distinction is one without a difference. Section 12(4)(a) of the FPA and section 4(1) of the RAR together have an effect no different than 12(4)(b) of the FPA. This creates confusion for those who must follow the RAR and uncertainty in how a court would interpret the parent and subordinate legislation together. There would appear to be little motive for a local government to elect to proceed under section 12(4)(a) of the FPA if all of its Part 26 bylaws must be amended.

The Ministry may consider amending the definition of "development" in the RAR to cover circumstances where, under Part 26 of the *Local Government Act*, an application or approval for development is required. However, this has the effect that some "development" activities will not be stopped or be subject to an assessment report requirement, especially where a local government has chosen to comply under section 12(4)(a) of the *Fish Protection Act* or, when dealing with vegetation, when a local government has chosen to comply under section 12(4)(a) or (b) of the *Fish Protection Act*.

The Ministry may wish to consider carrying out some amendments to the legislation to clarify the relationship between section 12(4)(a) of the *Fish Protection Act* and section 4(1) of the RAR. If the intention is for a local government to amend not just its zoning bylaw in accordance with section 12(4)(a) of the *Fish Protection Act* but also all other Part 26 bylaws that may regulate "development" activities, section 12(4)(a) could be deleted from the *Fish Protection Act* on the grounds that section 12(4)(b)is the same as the combination of sections 12(4)(a) and section 4(1) of the RAR.

N.7 RAR Applies to Local Government Using Section 12(4)(b)

You have advised that it is the intention of the Ministry that section 12(4)(b) of the *Fish Protection Act* be interpreted as satisfying any requirement that may be imposed on local government under section 4 of the RAR. In other words, if local government satisfies section 12(4)(b) there is no need for a QEP to prepare an assessment report and provide it to the Ministry, or for the Ministry to notify the local government or for local government to allow development to proceed. This is not clear from a reading of section 12(4)(b) and section 4 of the RAR. There is nothing in the RAR currently that negates the application of section 4 in the event that a local government has elected to proceed under section 12(4)(b) of the *Fish Protection Act*. It is recommended that section 4 of the RAR contain a qualification that it not apply if a local government has elected to proceed under section 12(4)(b) of the *Fish Protection Act*.

You have asked an additional question about how a local government would satisfy its obligations in section 12(4)(b) of the *Fish Protection Act*. A local government must be of the opinion that whatever changes it has made to its bylaws and permits under Part 26 of the *Local Government Act*, those provisions provide a level of protection that is comparable to or exceeds that established by the RAR. Presumably, the clearest way to reach such an opinion would be to employ a QEP, who, in following the RAR would recommend to the Council or Board all the necessary Part 26 bylaw amendments.

Further to my discussion under N.4, in this option there may be "development" activities that will not be brought to the attention of local government under its Part 26 bylaws, making it difficult for local government to comply with its obligation to protect its riparian areas when exercising it powers with respect to "development" as required by section 6 of the RAR.

Another option for local government would be to map out all the riparian assessment areas, identify these as development permit areas for the protection of the natural environment, its ecosystems and biological diversity in accordance with section 919.1 of the *Local Government Act* [designation of development permit areas]. Any "development," as defined in section 920 of the *Local Government Act*, in these areas would be subject to a development permit under section 920 of the *Local Government Act* [development permits]. Section 920(7) sets out the conditions that may be contained in a development permit in relation to lands designated for the protection of the natural environment. A development permit may:

1. Specify areas of land that must remain free of development, except in accordance with any conditions contained in the permit;

2. Require specified natural features or areas to be preserved, protected, restored or enhanced in accordance with the permit;

3. Require natural watercourses to be dedicated;

4. Require works to be constructed to preserve, protect, restore or enhance natural watercourses or other specified natural features of the environment;

5. Require protection measures including that vegetation or trees be planted or retained in order to preserve, protect, restore or enhance fish habitat or riparian areas, control drainage or control erosion or protect banks.

This method has the disadvantage of regulating large streamside areas without being able to be as flexible in their use and development as would be the case if they were streamside protection and enhancement areas, the size of which is determined on the basis of an assessment report provided by a QEP. Also, development permit areas will not cover Item (a) in the definition of "development" as discussed. The removal , alteration, disruption or destruction of vegetation does not trigger the need for a development permit.

Further to my discussion under N.4, in this option there may be "development" activities that will not be brought to the attention of local government under its Part 26 bylaws, making it difficult for local government to comply with its obligation to protect its riparian areas when exercising it powers with respect to "development" as required by section 6 of the RAR.

Part II - Riparian Areas Regulation Implementation

Questions

O. What is a local government's duty of care in approving development in riparian areas in accordance with the RAR requirements? To whom is the duty owed? What standard of care must a local government meet in approving development in riparian areas in accordance with the RAR requirements?

Section 4(1) of the RAR imposes a duty on local government not to approve or allow development in riparian assessment areas unless the conditions in section 4(2) or 4(3) are satisfied. This is a statutory duty. Accordingly, there is a duty of care on the part of a local government to exercise the duty without negligence. There is no question that a duty of care exists under section 4(1) of the RAR, and is owed to those wishing to develop in riparian assessment areas.

In accordance with the principles enunciated in the Supreme Court of Canada case *Kamloops v. Nielson* (1984) 26 M.P.L.R. 81 (SCC), the Court, in considering the distinction between statutory powers and statutory duties, concluded that a breach of a statutory duty, if it causes plaintiffs damage, will result in liability. If a local government exercises the statutory duty negligently, it will have breached the standard of care. The most blatant breach of the duty would be the approval or allowance of development without any consideration of whether sections 4(2) or 4(3) of the RAR have been satisfied.

If paragraph 4(2)(a) of the RAR is removed as discussed in Part I of this opinion, the opportunities for negligence to arise are greatly diminished. Under section 4(2)(b) of the RAR there is only one condition that must be met prior to approval or allowance of development in a riparian assessment area; the local government must ensure that it has been notified by the Ministry that the conditions in subparagraphs 4(2)(b)(i) and (ii) have been met. In this case, there is little discretion exercised by the local government. Either it receives the notification from the Ministry or it does not.

If paragraph 4 of the RAR is made not to apply to those local governments who elect to proceed under section 12(4)(b) of the FPA as discussed in Part I of this opinion, the duty of care for those local governments arises as a consequence of the statutory duties under section 12(4)(b) of the FPA and section 6 of the RAR to protect riparian areas and is owed to those wishing to develop in riparian assessment areas. If a local government exercises the duty negligently, it will have breached the standard. For example, a local government might be found by the Courts to have failed to ensure its bylaws and permits under Part 26 of the *Local Government Act* provided a level of protection that was comparable to or exceeded the RAR, as a result of employing a person who is not a QEP or by failing to take steps recommended by a QEP.

Under section 4(3), the obligation of the local government depends on whether the Ministry of Fisheries and Oceans has authorized harmful alteration destruction of natural features, functions and conditions that support fish life processes in riparian assessment areas. In order to meet the standard of care under section 4(3), a local government should insist on a written authorization from the Ministry of Fisheries and Oceans to this effect prior to allowing development.

There may be some question regarding the duty of care in relation to the meaning of "approve or allow" in section 4(1) of the RAR. Given the definition of "development", it may be difficult to interpret the extent of the meaning of "approve or allow" when many of the activities in the definition of "development" do not trigger an application for a permit or requirement for an authorization or approval. Given this, what does allow mean? If "allow" is interpreted to mean "permitting by failing to prohibit", the nature of the duty imposed under the legislation may require something more than simply issuing a written approval or a permit in relation to the development.

As discussed in Part I, section N of this opinion, "approve" or "allow" may require local governments who elect to proceed under section 12(4)(a) to amend other Part 26 bylaws so that they contain a general regulation prohibiting specific activities in riparian assessment areas unless those activities comply with the RAR. This is highly problematic, as discussed previously in N.5 and N.6, because there is no explicit authority in the FPA or the RAR to do this and section 12(4)(b) of the FPA includes this requirement making no difference between section 12(4)(a) and (b) of the RAR.

Further, the use of both "allow" and "approve " may be interpreted to impose an even greater statutory duty on local government. If "approve" means issuing a permit then "allow" might mean "permitting by failing to prohibit". A local government may be required to not allow development by taking legal action to stop development from occurring in a riparian assessment area when sections 4(2) or 4(3) have not been satisfied.

If section 4(2)(a) remains in the RAR, local government will be required to take other steps in order to meet the standard of care. As discussed in Part I of this opinion, section 4(2)(a) requires a local government to determine that a QEP has carried out an assessment and provided a professional opinion, as well as certifying that he or she is qualified to carry out the assessment and that the assessment methods have been followed.

If this section remains, in order for a local government to meet the standard of care, it must review the QEP's report to determine if the report has met these conditions. It may further require local government to assess whether the QEP is a QEP as that term is defined in the RAR.

P. What Steps can a local government take to minimize or eliminate any liability associated with approving development in riparian areas in accordance with RAR requirements?

Although section 4(1) contains a statutory duty on the part of local government, the length to which a local government should go in carrying out that statutory duty involves some policy considerations.

The considerations in the Supreme Court of Canada decision in *Kamloops v. Nielson* (1984) 26 M.P.L.R. 81(SCC) make it clear that despite the imposition of a public law duty, a response to that duty often involves decisions on alternative courses of conduct which may be considered operational in their character.

In dealing with satisfying section 4(2)(b) of the RAR, the statutory duty of a local government is simply to confirm that it has been notified by the Ministry of Environment that Fisheries and Oceans Canada and the Ministry of Environment have been notified of the development proposal and provided with a copy of the assessment

report prepared by a QEP that certifies he or she is qualified to carry out the assessment, certifies that the assessment methods have been followed and provides a professional opinion that meets the requirements of subsections 2(a)(i) or 2(a)(ii) as to the potential impact of the development on the natural features, functions and conditions that support fish life processes in the riparian assessment area. A local government should ensure that the notification from the Ministry contains this information.

Assuming section 4(2)(a) is removed from the RAR, a local government, having satisfied itself that a notification containing the above-noted information has been given by the Ministry of Environment, it may then approve or allow the development. Subject to the qualification regarding how "approve or allow" will be interpreted, it will have met its statutory duty.

It would appear that the only operational aspect of satisfying this duty is the form of the notification from the Ministry. If a local government adopted a policy that it would require that notification to repeat the information contained in section 4(2)(b) of the RAR, then there is no alternative course of action open to the local government in meeting its statutory duty and therefore no grounds on which to allege negligence in not having received the proper form of notification.

Obviously if local government has not received the notification as prescribed in section 4(2)(b) of the RAR, and the local government approves or allows development in a riparian assessment area, the local government will have breached its duty and liability may arise.

If section 4(2)(a) remains in the RAR, there are a number of alternative courses of conduct which may be taken by a local government in satisfying the statutory duty to ensure that section 4(2)(a) has been satisfied. In this event, local government should establish policies on the limit of its review of the QEP report. The policies should require local governments to review only those parts of the report that contain the

certification that the QEP is qualified and that the report has followed the assessment methods and that the report contains the QEP's professional opinion. Such a policy should also set out the steps a local government will take to determine that the QEP is a QEP as defined in the RAR such as investigating the QEP's credentials.

If section 4(2)(a) is removed from the RAR, and the obligation of local government is merely to confirm receipt of notification from the Ministry of Environment under section 4(2)(b); there will be no statutory obligation on local government to review the QEP report.

Q. What is the legal relationship between local government, a developer and a Qualified Environmental Professional in relation to development in a riparian area in respect of which an assessment report has been prepared by the Qualified Environment Professional? What responsibilities arise from that relationship? What, if any, potential liability does local government face if it fails to meet those responsibilities?

This question has largely been answered in Part I of this opinion, sections J and K. The answer depends on who retains the QEP.

If the developer retains the QEP, there is a contractual relationship between the developer and the QEP. Despite there being no contract between the QEP and the Provincial and Federal Governments, there is nevertheless an expected reliance by the Provincial and Federal Governments on the assessment report (Assuming section 4(2)(a) is removed from the RAR, there would be no expected reliance by local government unless local government elects to review the assessment reports). If the QEP has prepared a report negligently, the QEP is susceptible to an action in negligent misrepresentation brought by those who have relied on the report and suffered loss as a consequence.

If a local government retains the QEP as a contractor or employee for the purposes of preparing an assessment report on behalf of the property owner, the local government is liable for any negligence on the part of the QEP.

If the QEP is hired as a contractor for the local government to provide advice to the local government about how it may ensure that its bylaws and permits under Part 26 of the *Local Government Act* provide a level of protection that is comparable to or exceeds that established by the RAR, local government may have an action against the QEP as a contractor for breach of contract or negligent misrepresentation. If the local government hires the QEP as an employee to carry out this work, the local government does not have a claim against the employee except if it is in gross negligence.

R. What is local government's responsibility if it notes an error in an assessment report prepared by a Qualified Environmental Professional? If there is responsibility, to whom is it owed? What is local government's exposure to liability for failure to meet any responsibility?

If section 4(2)(a) of the RAR is removed, a local government will not be responsible to review an assessment report at all and therefore a local government will not be in a position to note an error.

If section 4(2)(a) of the RAR is removed, but a local government reviews an assessment report in any event and notes an error, it should report the error to the Ministry and establish a policy to this effect. If the Ministry withdraws its notification, then a local government should not allow or approve the development. If the Ministry does not withdraw its notification, local government may face an application in mandamus requiring it to grant approval on the grounds that all statutory pre-conditions of its approval have been met.

If section 4(2)(a) of the RAR remains, then there will be an obligation on the part of local government to review the assessment report. If it notes an error in the report, it should not allow or approve development. It should notify the Ministry in such an event and establish a policy to this effect.

If section 4(2)(a) of the RAR remains, and a local government uncovers an error in the assessment report and despite this allows or approves the development, a local government would be liable to the developer who has relied on the approval to proceed with the development and suffered losses or damages as a consequence. Further, the local government may be prosecuted under the RAR for committing an offence by allowing a development when section 4(2)(a) of the RAR has not been met.

S. Does the RAR require local government to exceed their enforcement powers in implementing RAR requirements?

The answer to this question depends on what is meant by enforcement. If enforcement is meant to pick out the actions of ensuring that a development has followed requirements contained in an assessment report, there is no requirement in the RAR that local government monitor or enforce in this regard. The only obligation is for local government to cooperate in developing strategies with the Ministry of Environment and Fisheries and Oceans under section 5 of the RAR.

A local government is authorized to use its enforcement powers in the *Local Government Act* associated with the exercise of its Part 26 powers. If it has incorporated the satisfaction of requirements of assessment reports, in its Part 26 bylaws where possible, it may exercise its discretionary powers in enforcing those bylaws. See Part I - Section M.

T. What risk of liability, if any, does a local government face if it fails to implement RAR requirements? What is the nature and extent of any such liability? To whom might the local government be liable in such case?

In order to address this question, consideration of section 12(4) of the *Fish Protection Act* is necessary. If a local government is within the geographic area prescribed under the RAR as being subject to the RAR, it must satisfy either section 12(4)(a) or 12(4)(b) of the *Fish Protection Act*. If a local government has no zoning or rural land use bylaws and if it does not issue permits or have other bylaws under Part 26 of the *Local Government Act*, section 12(4) of the *Fish Protection Act* does not require it to enact these bylaws.

Section 12(4) of the *Fish Protection Act* includes the phrase "… in its zoning and rural land use bylaws" and "… its bylaws and permits under Part 26 of the *Local Government Act*". If the Legislature had intended to require local governments to adopt zoning and rural land use bylaws or other bylaws and permits under Part 26, it should have used the phrase "A local government must adopt or amend zoning and rural land use bylaws to include provisions for the protection of riparian areas". This is further supported by a review of section 12(5) of the *Fish Protection Act* which verifies, that for the purpose of transition, a local government may if necessary, amend its bylaws in order to meet the requirements. If the Legislature had intended that the local government adopt new bylaws for this purpose, the provision should have referred to adopting bylaws as well as amending existing bylaws.

Further, section 3(1) of the RAR says the regulation applies to the exercise of local government powers under Part 26. If local government does not exercise those powers under Part 26, then the requirements of the RAR would not apply. Of course, section 4(1) of the RAR would never apply to a local government that did not exercise any local government powers under Part 26 of the *Local Government Act*.

However, if a local government does have a zoning bylaw or exercises any powers under Part 26 of the *Local Government Act*, it has a legal obligation under section 12(4) of the *Fish Protection Act*. If it fails to carry out either of the options under subsections (a) or (b), local government may be convicted of an offence under the FPA.

Further, as discussed in Part I - N.6, section 4(1) of the RAR may impose a duty over and above that contained in section 12(4) of the *Fish Protection Act*. Whether or not they have included riparian area protection provisions in their zoning bylaws or provided that their bylaws and permits under Part 26 provide a level of protection that is comparable to or exceeds that established by the RAR, there would appear to be a "stand-alone" obligation on the part of local government to not approve or allow development in a riparian assessment area unless the conditions in sections 4(2) or 4(3) are met. A failure to satisfy this requirement may result in a local government being prosecuted for an offence. (This would not apply to local governments that elected to proceed under section 12(4)(b) if they are exempt from section 4 of the RAR as discussed in N.7.)

U. What risk of liability, if any, does a local government face if it fails to use its powers to require the implementation of recommendations from an assessment report? What is the nature and extent of any such liability? To whom might local government be liable in such a case?

Assuming section 4(2)(a) of the RAR is removed, there is no statutory obligation in the RAR for a local government to review an assessment report; there is no obligation or risk of liability under the RAR to local government for ensuring implementation of the recommendations contained in an assessment report.

Section 5 of the RAR requires a local government to cooperate in developing strategies for monitoring and enforcement to ensure the assessment reports are properly implemented. It is difficult to determine how a Court might interpret the nature of the

"cooperation" required; certainly it could not require local government to take action that is beyond its authority.

If a local government elected to proceed under section 12(4)(a) and created "no-build/use" setbacks in its zoning bylaws for its riparian assessment areas, then building upon and use of these setbacks would be prohibited. If an owner wished to be granted a development variance or a rezoning to permit use of or building in the setback, he or she would have to meet the RAR requirements. Presumably this would be a provision added to the zoning bylaws.

Assume the owner obtained a QEP assessment report and submitted it to the Ministry; the Ministry must be satisfied that all conditions in section 4(2)(b) of the RAR are met before notifying the local government. Once properly notified, the local government could agree to grant a variance or rezone. Section 4 of the RAR does not require the local government to impose conditions as part of its approval of the development; there is no explicit statement in section 4 that a local government is required to approve or allow development with conditions: for example, that the rezoning or variance be granted provided the assessment report is followed. Section 4(2) says it may allow development if the events in sections 4(2)(a) and (b) occur.

If this was not the intent of the Ministry then section 4 of the RAR requires amendment. Local government does not have authority in granting a variance or rezoning to impose the conditions in an assessment report.

V. What risk of liability, if any, does a local government face if it acts in excess of local government powers in requiring the implementation of recommendations from an assessment report? What is the nature and extent of any such liability? To whom might the local government be liable in such a case?

There are no powers given to local government in the RAR to ensure the implementation of recommendations contained in an assessment report.

If a local government had proceeded under section 12(4)(b) of the *Fish Protection Act*, it may have relied on an assessment report for the purposes of amending its Part 26 bylaws. In this event, the powers of local government to require the implementation of the recommendations in such an assessment report are limited to those powers it has under Part 26 of the *Local Government Act*. This is also the case if a local government has elected to satisfy section 12(4)(a) with its zoning bylaw; its authority is limited to the usual powers it has to enact and enforce its zoning bylaw. If a local government attempts to prohibit development in a manner which exceeds those powers, it is open for a developer to apply to the Court under the *Judicial Review Procedure Act* for an Order of Mandanus requiring the local government to issue a permit or approval if any are required.

W. What, if any, is local government's liability for "enforcing" landscaping prescription in the QEP report (over and above building setbacks)? What, if any, is local government's liability if it attempts to enforce measures outlined in the QEP report but does not have specific authority in its OCP or bylaws?

In my opinion, this question is a subset of the question under paragraph V above. The RAR does not establish any duty on a local government to ensure that the assessment reports have been properly implemented, other than its requirement under section 5 to cooperate in developing strategies for this. If a local government has chosen to proceed under section 12(4)(b) of the *Fish Protection Act*, then it may use its powers in Part 26 to regulate landscaping, by bylaw.

If a local government has chosen to proceed under section 12(4)(a) of the FPA, then it may or may not have a landscaping bylaw. As discussed, if section 4(1) of the RAR is viewed as imposing a greater duty on local government to include riparian assessment

area protections in other Part 26 bylaws, a local government that does have a landscaping bylaw may be required to include in it riparian areas protections. However, there is nothing in the regulation requiring local government to ensure implementation of the landscaping requirements in an assessment report. Section 6 does impose a duty on local government, when exercising its powers with respect to development, to protect its riparian areas in accordance with the regulation. However, satisfying section 4 of the RAR would be acting in accordance with the Regulation.

X. Does a local government have flexibility to vary from the QEP recommendations without liability to meet other local government requirements (i.e. public hearing process, zoning, stormwater, infrastructure etc.)?

Assuming section 4(2)(a) of the RAR is removed, local government has no duty to review the QEP recommendations; given this, it would seem there would not be a circumstance arising where it would vary the QEP's recommendations.

If section 4(2)(a) of the RAR is not removed, and a local government does review an assessment report, there is no flexibility for a local government to vary a QEP's recommendations because the notification provided by the Ministry is based on that particular QEP report and its recommendations. Further, there is no explicit authority for local government to vary recommendations in a QEP report. This conclusion would apply even if section 4(2)(a) of the RAR was removed, but the local government chose to review the assessment report anyway.

Y. If the Department of Fisheries and Oceans issues a stop work order on a project due to a problematic QEP report, what is the local government liability for having issued permits (i.e. could local government be sued by the developer)?

If section 4(1)(a) of the RAR is removed, a local government will have no obligation to review a QEP report and therefore if there is a problematic QEP report associated with

an approval or an allowance by local government under section 4(1) of the RAR, although a developer may sue a local government for erroneously granting approval or allowing the development, the local government would be in a position to third-party the Ministry of Environment, having relied on the Ministry's notification under section 4(2)(b).

Z. What, if any, responsibility does a local government have to review the QEP report?

If section 4(2)(a) of the RAR is removed, local government has no responsibility to review a QEP report prepared in furtherance of the RAR. If section 4(2)(a) is not removed, the QEP report must be reviewed to determine that it satisfies those conditions established in section 4(2)(a) and section 7 of the RAR.

AA. What are the liability implications if a local government reviews the QEP report (for whatever reason)?

This question is related to section R and section U. If a local government adopts a practice of reviewing the QEP reports, it may open itself up to potential liability for allowing or approving development in accordance with section 4(1) of the RAR in the face of a defective assessment report. It may well be open for a Court to find that having a practice of reviewing the QEP report prior to approving or allowing development under section 4(1) of the RAR, means a local government owes a duty of care to the developer on the basis that there is a sufficiently close relationship between them and that a local government may foresee that the developer may suffer harm as a consequence of allowing the development in the face of an incomplete or mistaken assessment report; it may be obligated to warn the developer of this potential harm.

It is recommended that should a local government choose to review the QEP reports on a regular basis that it adopt a policy regarding the limits of that review. The party

reviewing the assessment report may not have the same expertise as the QEP, and in this instance, those aspects of the report depending on that expertise should not be reviewed. If a local government discovered an error which could be considered to be on the face of the assessment report, for example some portion of the report was missing or clearly did not follow the assessment methods, the local government should include in its policy the steps it would take in such an event. A local government should have a policy to notify the Ministry as well as the developer of the error observed.

Even assuming section 4(2)(a) of the RAR is removed, local government may still have liability if it gives development approval when it knows the assessment report is defective. Should Fisheries and Oceans require remediation under the *Fisheries Act*, which may include the removal of buildings or structures, the developer may well suffer an economic loss.

There are a number of cases involving decisions of local government and actions against local government for pure economic loss. In a B.C. Court of Appeal decision, *Prince George (City) v. Rahn Brothers Logging Ltd.* [2003] B.C.J. No. 77, the Court of Appeal found in favour of Rahn on the basis that the City had erroneously issued a building permit and then sought an injunction for an illegal use of the property. Rahn counterclaimed for damages for negligent misrepresentation in issuing a building permit. The Court determined that Rahn was entitled to be placed in the position it would have been in if it were not for the misrepresentation. Rahn was therefore entitled to the replacement cost of the building, less the deduction for the useful life of the present building already expended, and a discount for contingencies such as the possibility that the logging industry would not improve. As a result Ran Brothers was awarded $475,000.00.

BB. Will local government be protected from liability under the RAR when following due process in the delivery of this regulation, including but not limited to the areas of:

- ***checking or not checking the qualifications of a declared Qualified Environmental Professional,***
- ***carrying out regulatory authority, including approving permits that rely on the report of a Qualified Environmental Professional,***
- ***development delays due to disputes or amendments to a Qualified Environmental Professional report,***
- ***accepting amendments to the Streamside Protection and Enhancement Area (SPEA) recommendations by a Qualified Environmental Professional based on requirements of other environment legislation or site development constraints,***
- ***performing or not performing monitoring or evaluation of the implementation of Qualified Environmental Professional prescriptions,***
- ***subsequent damages to fish habitat (i.e. developer interests, subject sites or neighbouring sites etc.) where the development has been approved or proceeded based on a faulty or incomplete Qualified Environmental Professional report?***

Some of the questions in this paragraph have been addressed under earlier paragraphs.

If section 4(2)(a) of the RAR is removed, many of the potential grounds of liability flowing to local government contained in these questions do not apply as a local government need not review the assessment reports and has no authority to enforce the implementation of the recommendations in the assessment report.

In order to meet the standard of care, the local government must confirm the notification from the Ministry of Environment as contained in section 4(2)(b) of the

RAR. Local government will not have a role in accepting amendments to assessment reports.

If following approval of a development under section 4(1) of the RAR, subsequent damage to fish habitat occurs and it is learned that the assessment report is faulty or incomplete, local government may be sued by a developer for negligently approving the development. However, a local government would have an action over against the Ministry for negligently notifying it under section 4(2)(b) of the RAR assuming the assessment report was defective.

If paragraph 4 of the RAR is made not to apply to those local governments who elect to proceed under section 12(4)(b) of the FPA as discussed in Part I of this opinion, the duty of care for those local governments arises as a consequence of the statutory duties under section 12(4)(b) of the FPA and section 6 of the RAR to protect riparian areas and is owed to those wishing to develop in riparian assessment areas. If a local government exercises the duty negligently, it will have breached the standard. For example, a local government might be found by the Courts to have failed to ensure its bylaws and permits under Part 26 of the *Local Government Act* provided a level of protection that was comparable to or exceeded the RAR, as a result of employing a person who is not a QEP or by failing to take steps recommended by a QEP.

CC. Where might local government be held liable when using Qualified Environmental Professional reports under the RAR?

If section 4(2)(a) is removed, a local government does not have to rely on QEP reports. In fact, it may never itself be in possession of the assessment reports.

If a local government proceeds under section 12(4)(b) of the *Fish Protection Act*, it may retain a QEP to provide advice on how to amend its bylaws under Part 26 of the *Local Government Act* to provide a level of protection that is comparable to or exceeds that contained in the RAR, including the preparation of assessment reports for the local

government area. If local government relies on the QEP reports and they are in error, local government may have committed an offence under section 12(4)(b) by having failed to meet that condition in the *Fish Protection Act*. If a developer, following the regulatory scheme established under Part 26 by the local government must "undo" the development and subsequently suffers damages or economic loss, the developer may have an action against the local government in negligence for approving its development. The losses or damages suffered by the Developer may be the result of a prosecution or order for remediation action required by Fisheries and Oceans Canada.

Part III - Summary Conclusions and Recommendations

1. Liability from Prosecution

We have been unable to locate any case where a local government has been prosecuted under the *Fisheries Act* for activities carried out by others under a local government land development approval.

2. Civil Liability

If the Federal Government chose to prosecute a developer or owner for work carried out in accordance with development approval granted under the provisions of the *Fish Protection Act* or the RAR, it would be difficult for the prosecutor to overcome the officially induced error or due diligence defences available to the developer or owner.

3. Exposure to Liability

With the implementation of any additional regulatory regime that requires some action on the part of local government, there is a potential increase in liability to local government. The measures included in the RAR, had they not been included, would have meant potentially greater liability to local government.

4. Liability of Senior Governments

The Ministry of Environment and Fisheries and Oceans Canada have an obligation under section 4(2)(b) of the RAR to ensure the satisfaction of the conditions in this section. Although the online submission of the assessment report requires the QEP to respond positively to questions which relate to the conditions set out in section 4(2)(b) of the RAR, unless the Ministry of Environment or Fisheries and Oceans Canada review each assessment report to determine that these conditions are satisfied, there is potential liability to both levels of government if the report does not satisfy these conditions.

Both levels of government may choose to adopt a policy setting out the limitations of its review of the requirements under section 4(2) of the RAR, in particular, setting out the frequency of its audits and what steps it will take in investigating the qualifications of the QEP. Such a policy may or may not provide some limited protection from liability depending on whether a Court views the policy as a reasonable limit on the general and broader duty contained in section 4(2)(b) of the RAR.

5. Liability of Local Governments

It is recommended that section 4(2)(a) of the RAR be removed and the meanings of the terms in 4(2)(a) be incorporated within subparagraph 4(2)(b) of the RAR. This would have the effect of there being only one condition that must be satisfied by local government before it may allow development to proceed, and that is being notified by the Ministry in accordance with subsection 4(2)(b) of the RAR.

If subsection 4(2)(a) remains, a local government, must ensure that all conditions in this section are satisfied before allowing development to proceed. In order to do this, it must review each assessment report to ensure that the assessment methods have been followed and the report contains the QEP's professional opinion. Additionally, local

government must confirm that the report contains a certification by the QEP that he or she is qualified to carry out the assessment. Further, local government may wish to take steps to investigate the credentials of the QEP.

If section 4(2)(a) of the RAR remains in the RAR, local government should establish a policy specifying the extent and nature of local governments' review of each assessment report and what evidence of the QEP's qualifications will be accepted.

6. Liability Protection for Local Government in the RAR

Section 12 of the *Fish Protection Act* does not include any authority for the inclusion of liability protection to local government as a policy directive. The *Fish Protection Act* would have to be amended to include a provision granting authority to include liability protection to local government as a policy directive.

7. Liability of QEP

It is recommended that the assessment report contain a statement that the QEP acknowledges that the report will be relied on by local government, the Ministry of Environment and Fisheries and Oceans Canada. Although case law would make it possible to argue that even without a reliance statement, the QEP may be liable, a statement as suggested would make it a more straightforward matter to third party the QEP if the local government, the Provincial Government or the Federal Government face some kind of liability having relied on the QEP's assessment report.

The liability of the QEP will depend on who retains the QEP and for what purpose.

8. The QEP as a Local Government Employee

A QEP who is an employee of a local government is not liable to its employer for work it conducts under the terms of his or her employment, unless the employee's conduct amounts to dishonesty, gross negligence or malicious or willful misconduct.

A local government may face liability should it retain a QEP to provide assessment reports in accordance with section 4(2) of the RAR on behalf of property owners if the assessment reports are defective.

9. Confirming Qualifications of QEP

If section 4(2) of the RAR remains in place, local government has an obligation to confirm that the assessment report contains a certification regarding the QEP's qualifications. Arguably, given the definition of a QEP, a Court may find that a failure on the part of local government to make enquiries as to whether the individual presenting the assessment report is in fact a QEP, as defined, is a failure to satisfy the stipulated condition in section 4(2)(a) of the RAR.

10. Local Government Responsibility to Implement and Monitor Recommendations in Assessment Report

The RAR does not impose upon local government responsibility to monitor and enforce the recommendations contained in an assessment report. At most, under section 5 of the RAR, the local government is obligated to cooperate in developing strategies with the Ministry of Environment and Fisheries and Oceans Canada to check that the assessment report has been properly implemented, that the assessment report follows the assessment methods and for public education relating to the protection of riparian areas. It is difficult to assess how a Court would view the degree to which local

government is obligated to cooperate because of the inherent vagueness of this provision.

Depending on how a local government elects to proceed under section 12(4) of the *Fish Protection Act* will determine what existing powers a local government may use under Part 26 of the *Local Government Act*, and the exercise of that regulatory authority is discretionary.

Local government regulatory authority and related enforcement powers under Part 26 of the *Local Government Act* are not authorized under the RAR. There is no authority in the RAR, for example, to permit entry onto property for the purposes of inspection. There is no offence created in the RAR against owners and developers should they fail to properly implement, or implement at all, the recommendations in an assessment report.

11. Subdivision

I recommended that the inclusion of "subdivision" at subparagraph (j) of the definition of "development" be removed. Subdivision approval is not within the jurisdiction of local government. If the intent of the legislation was to regulate activities associated with subdivision, then these specific activities should be included in the definition of "development".

12. Development and Part 26 Powers

I recommend revising section 3(1) of the RAR by replacing the reference to the exercise of powers under Part 26 of the *Local Government Act* with the exercise of powers in relation to development. This makes section 3 consistent with sections 4 and 6 of the RAR.

13. No Approvals or Allowances Required

The fundamental difficulty with the structure of the *Fish Protection Act* and the RAR is the assumption that a local government's imposition of a regulatory scheme under its zoning bylaw or under its Part 26 powers provides it with an ability to not approve or allow "development" as that is defined in the RAR. The definition of "development" in the RAR contains many activities that may be regulated but the authority under which they may be regulated does not contain any mechanisms by which the development activity comes to the attention of the local government such that they could refuse to approve or allow it. This makes it impossible for local government to comply with its duty under sections 4(1) and 6 of the RAR and there is no authority in Part 26 of the *Local Government Act* under which a local government could impose mechanisms by which the development activity could be made come to the attention of local government.

There is no easy solution to this fundamental difficulty other than redefining "development" in the RAR to include only those activities for which an approval or permit is required, or amending Part 26 of the *Local Government Act* to include approval requirements in relation to "development" activities as defined in the RAR..

14. Obligation Over and Above FPA

It is possible that the obligation to not allow development contained in section 4(1) of the RAR might include a positive obligation to provide prohibitions in any regulatory bylaw under Part 26 of the *Local Government Act* that covers "development" activities. If this is the intent of section 4(1), it would appear to make section 12(4)(b) of the *Fish Protection Act* redundant. The combination of section 12(4)(a) of the *Fish Protection Act and section 4(1) of the RAR together have the same effect as section 12(4)(b) of the Fish Protection Act*. The *Fish Protection Act* would seem to suggest, on its face, that a local government may achieve compliance by satisfying either section 12(4)(a) **or** section

12(4)(b). If a local government relies on section 12(4)(a) only, its only obligation is to do what it can in a zoning bylaw. However, if section 4(1) of the RAR requires local government to include riparian area protection provisions in all its Part 26 bylaws, this would appear to add a further obligation over and above what is contained in section 12(4)(a) of the *Fish Protection Act*, without explicit authority. There would appear to be little motive for a local government to elect to proceed under section 12(4)(a) of the FPA if all its Part 26 bylaws must be amended.

The Ministry may wish to consider carrying out some amendments to the legislation to clarify the relationship between section 12(4)(a) of the *Fish Protection Act* and section 4(1) of the RAR. If the intention is for local government to amend not just its zoning bylaw in accordance with section 12(4)(a) of the *Fish Protection Act*, but also all other Part 26 bylaws that may regulate "development" activities, then section 12(4)(a) of the *Fish Protection Act* could be deleted.

15. RAR Applies to Local Government Using Section 12(4)(b)

If it is the Ministry's intention that section 12(4)(b) of the *Fish Protection Act* be interpreted as satisfying any requirement that may be imposed on local government under section 4 of the RAR, then section 4 of the RAR should be amended to contain a qualification that section 4 of the RAR does not apply to a local government that has elected to proceed under section 12(4)(b) of the *Fish Protection Act*.

16. Local Governments' Duty of Care in Approving Development in Riparian Areas

If section 4(2)(a) of the RAR is removed, opportunities for negligence of local government to arise are greatly diminished. Under section 4(2)(b) of the RAR there is only one condition that must be met prior to approval or allowance of development in a riparian assessment area; the local government must ensure that it has been notified by

the Ministry that the conditions in subsections 4(2)(b)(i) and (ii) have been met. In this case, there is little discretion exercised by local government; either it receives the notification from the Ministry or it does not.

If paragraph 4 of the RAR is made not to apply to those local governments who elect to proceed under section 12(4)(b) of the FPA as discussed in Part I of this opinion, the duty of care for those local governments arises as a consequence of the statutory duties under section 12(4)(b) of the FPA and section 6 of the RAR to protect riparian areas and is owed to those wishing to develop in riparian assessment areas. If a local government exercises the duty negligently, it will have breached the standard. For example, a local government might be found by the Courts to have failed to ensure its bylaws and permits under Part 26 of the *Local Government Act* provided a level of protection that was comparable to or exceeded the RAR, as a result of employing a person who is not a QEP or by failing to take steps recommended by a QEP.

17. Local Government Policy Development

A local government should ensure that the notification from the Ministry under section 4(2)(b) of the RAR contains the information stipulated in that section. Assuming section 4(2)(a) of the RAR is removed, the only operational aspect of satisfying this duty is the form of the notification from the Ministry. If a local government adopted a policy that it would require that notification to repeat the information contained in section 4(2)(b) of the RAR, then there is no alternate course of action open to the local government in meeting its statutory duty, and therefore no ground on which to allege negligence in not having received the proper form of notification.

If section 4(2)(a) of the RAR remains, there are a number of alternate courses of conduct which may be taken by local government in satisfying its statutory duty to ensure that the conditions in section 4(2)(a) of the RAR have been satisfied.

In this event, local government should establish policies on the limit of its review of the QEP report. The policies should require local governments to review only those parts of the report that contain the certification that the QEP is qualified and that the report has followed the assessment methods and that the report contains the QEP's professional opinion. Such a policy should also set out the steps a local government will take to determine that the QEP is a QEP as defined in the RAR, such as investigating the QEP's credentials.

18. Review of QEP's Assessment Reports

If section 4(2)(a) of the RAR is removed, local government will not be responsible to review an assessment report. However, if it elects to do so, and notes an error, it should report the error to the Ministry and establish a policy to this effect. If section 4(2)(a) of the RAR remains, there will be an obligation on the part of local government to review the assessment report. If it notes an error in the report, it should not allow or approve the development, it should notify the Ministry in such an event and it should establish a policy to this effect.

19. Local Government Powers to Enforce RAR Requirements

There is no requirement in the RAR that local government monitor or enforce requirements contained in an assessment report. The only obligation is for local government to cooperate in developing strategies with the Ministry of Environment and Fisheries and Oceans under section 5 of the RAR. A local government is authorized to use its enforcement powers in the *Local Government Act* associated with the exercise of its Part 26 powers. If it has incorporated the satisfaction of requirements of assessment reports in its Part 26 bylaws where possible, it may exercise its discretionary powers in enforcing those bylaws. In the event that a local government elected to proceed under section 12(4)(a) of the *Fish Protection Act,* and recreated a no-build/setback in its zoning bylaws for its riparian assessment areas, once properly notified by the Ministry of

Environment under section 4(2)(b) of the RAR, the local government could agree to grant a variance or rezone. Section 4 of the RAR does not require the local government to impose conditions as part of its approval of the development; there is no explicit statement in section 4 that a local government is required to approve or allow development conditions. Section 4(2) says it may allow development if the events in sections 4(2)(a) or (b) occur.

If this was not the intent of the Ministry, then section 4 of the RAR requires amendment. Local government does not have authority in granting a variance or rezoning to impose the conditions contained in an assessment report.

20. Implementation of Assessment Report

There are no powers given to local government in the RAR to ensure the implementation of recommendations contained in an assessment report.

If a local government had proceeded under section 12(4)(b) of the *Fish Protection Act*, it may have relied on an assessment report for the purposes of amending its Part 26 bylaws. In this event, the powers of local government to require the implementation of the recommendations in such an assessment report are limited to those powers it has under Part 26 of the *Local Government Act*. This is also the case if a local government has elected to satisfy section 12(4)(a) with its zoning bylaw; its authority is limited to the usual powers it has to enact and enforce its zoning bylaw. If a local government attempts to prohibit development in a manner which exceeds those powers, it is open for a developer to apply to the Court under the *Judicial Review Procedure Act* for an

Order of Mandanus requiring the local government to issue a permit or approval if any are required.

Yours truly,

STAPLES McDANNOLD STEWART

Per:
Kathryn Stuart

KS/kp