

RIPARIAN AREAS REGULATION:

**A PROTOCOL OF INTERACTION
FOR RESPONDING TO NON-COMPLIANCE**

Prepared From a Workshop November 8, 2005

BC Ministry of Environment

**Prepared by:
Brian Wilkes, R.P.Bio.
TROW ASSOCIATES INC.
Unit E, 761 Enterprise Crescent
Victoria, BC
V8Z 6P7
250-658-8114**

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1.0 INTRODUCTION

A Protocol of Interaction is presented that will guide the process that the main partners in the Riparian Area Regulation (RAR) will follow when monitoring reveals non-conforming QEP Assessment Reports, inaccurate recommendations or other problems. The main partners are the province, the Department of Fisheries and Oceans (DFO), and local governments (LGs). It is expected that both regional and headquarters operations in MOE will be engaged in the interactions, as well as Area and HQ staff at DFO, depending on the issue. The present Protocol focuses on the interactions between levels of government. It does not elaborate on the detailed internal roles and responsibilities when regional or HQ attention is triggered.

It is the opinion of DFO that a proponent who has fully implemented the recommendations certified by a Qualified Environmental Professional who has correctly and fully followed the RAR Assessment Methods and measures has exercised all due diligence in preventing the harmful alteration, disruption and destruction of fish habitat due to the removal of riparian vegetation.

The RAR Process

The RAR requires local governments (cities, regional districts, municipalities) to protect riparian areas through the development approval process, using recommendations contained in Assessment Reports prepared by a QEP (qualified environmental professional as defined in the regulation). When there is encroachment into a streamside assessment area (defined in the regulation), a QEP will prepare a report in a prescribed format stipulating a streamside protection and enhancement area (SPEA) within the assessment area. The report by the QEP will specify a set back and other measures to protect the SPEA that must be met by the developer. There is agreement between MOE and DFO that if the QEP files this report using the prescribed methods, a HADD will not occur.

The developer is the QEP's client, so the developer will get a copy of the Assessment Report. It is intended that the Assessment Reports filed by the QEP become not just an instruction to the developer, but a condition of development or building permits issued by local government. The local government may, on the basis of the Assessment Report, approve, modify or reject the development proposal, and it is advisable for the QEP to be involved as early in the planning stages as possible.



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The Assessment Reports from QEPs are uploaded into the MOE notification system, but are not formally submitted to the province or the Department of Fisheries and Oceans (DFO) for review or approval. The report does not go into the referral system of government. Instead, a stratified random sample of the Assessment Reports from the QEPs will be selected and monitored for compliance with the regulation. The approach to the sampling method is currently being developed. It is intended that QEP Assessment Reports on developments posing the highest risks to riparian environments will get more attention than others. It has not yet been determined who will lead and do the selection and inspection of assessment reports. An intergovernmental cooperation agreement will be signed between UBCM, DFO and the Province that establishes an RAR Executive Committee. This committee will direct the development of the monitoring strategy.

Three types of monitoring are required, this protocol addresses results from the first two;

1. Monitoring of the QEP Assessment Reports;
2. Monitoring of the actual development before, during and after construction;
3. Effectiveness monitoring to determine if the RAR is achieving its objectives

The types of problem scenarios that are envisioned to emerge as a result of monitoring include:

- The Assessment Report filed by the QEP is reviewed through the monitoring program, and found to be inadequate or improperly completed or filed, or the QEP is not qualified.
- A municipality has issued a permit on the basis of an Assessment Report. The Report is then found through the monitoring program to be improper.
- A QEP files a proper Assessment Report but it is not used by the municipality or complied with by the developer, as discovered through the monitoring program.
- If a QEP report is found deficient before municipal permitting and before construction begins;
- If a report is found deficient after municipal permitting and before construction begins;
- If a report is found deficient after municipal permitting and after construction begins
- A citizen or interest group files a complaint that an Assessment Report is not being complied with.
- The developer follows the Assessment Report but the development results in a HADD anyway, as revealed through a monitoring inspection by government or through a complaint.

The Protocol of Interaction should identify:



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- The roles and responsibilities for monitoring, including the distribution of the results.
- How each of the problem areas listed above will be handled,
- The roles and responsibilities of local and senior governments.
- Roles and responsibilities when enforcement is contemplated or required.

Guiding Principles

1. The RAR can only work where all interactions are based on an atmosphere of cooperation and good will, and are conducted in a timely manner. There is a commitment to cooperate among the three levels of government to make the RAR work.
2. The focus of the RAR is to encourage cooperation and voluntary compliance within the development industry and to find alternatives to command and control as a means of protecting riparian resources and aquatic systems.
3. While in general the MOE is the lead agency in coordinating the delivery of the RAR, the agency best situated to lead in any given set of circumstances should do so.
4. To the greatest extent possible, a “one window” approach will be taken to simplify the process and improve access by developers and the public.



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2.0 OPTIONS FOR INTERACTIONS TO SUPPORT MONITORING

Mackinnon (2005) made a good start in identifying the flow of general steps related to the three forms of monitoring, and these were used as the basis for discussing the specific mechanisms of interaction that are required at each step. A point Mackinnon makes cannot be overemphasized: “To maximize effectiveness and efficiency regarding this process, a high degree of cooperation among the three levels of government is envisaged”. Cooperation is not only envisaged, it is essential, or else these mechanisms will breakdown easily.

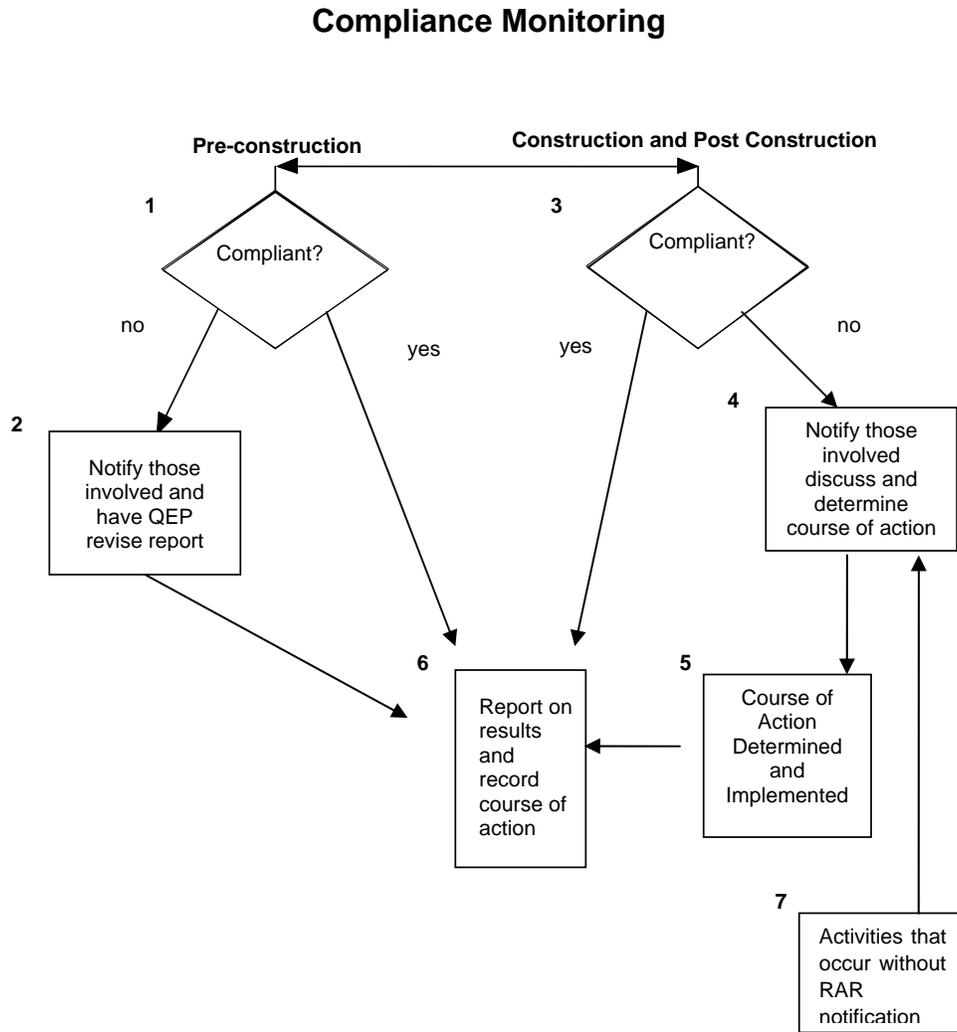
2.1 Compliance Monitoring

Figure 2-1 is adapted from Mackinnon and was amended at the November 8 workshop. It outlines the general approach to what is referred to as *compliance* monitoring. This could cover monitoring related to types one and two in the list above, and could raise the problem scenarios already identified. A key piece that was not discussed in the workshop was the details of the monitoring strategy to be used to identify what gets monitored, how often and by whom. This strategy is to be worked out by the RAR Executive Committee, to be established under an Intergovernmental Cooperation Agreement.

Therefore the starting point for the discussion on November 8 was to assume a monitoring process is in place, and that monitoring has revealed problem cases. The question for the workshop was: What happens next?



Figure 2-1: Flowchart of 'RAR compliance monitoring' (adapted from Mackinnon, 2005, and amended at November 8 workshop)





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The following numbers correspond to the steps that are shown within figure 2-1 and provide some explanation of the elements of the flowchart. In the column on the right, the discussion at the workshop is reflected on options and the details of interactions between agencies.

Step	Description Adapted From Mackinnon, (2005)	Guidance for Interaction
1	<p>Pre-construction compliance monitoring looks at whether the QEP has been compliant with the Assessment Methodology. Specifically the QEP report will be looked at for one or more of the following outcomes:</p> <ul style="list-style-type: none"> ▪ Has the Assessment Report been prepared by a QEP? ▪ Has the QEP followed the Assessment Methodology? - (this could be a potential error in the measurements, an error in interpretation or a deliberate departure from the methodology). 	<ul style="list-style-type: none"> ▪ Mechanism for how this is done will be contained in the Monitoring Strategy. (Cautions were expressed about judging another QEP’s qualifications. The skill set descriptions in the assessment methodology will assist this determination) ▪ Monitoring has revealed a QEP report that complies: go to step 6 ▪ Monitoring reveals a QEP report that does not comply with methodology, or is in error: <ul style="list-style-type: none"> ▪ LG or DFO could identify a non-compliance at this step ▪ Go to step 2
2	<p>Lead agency for monitoring will be responsible for notifying other agencies involved as well as the QEP and the Developer. At this stage if the local government receives notification of non-compliance prior to construction commencing, they may not issue, or may suspend approval for the development.</p> <p>Include results in compliance tracking and reporting mechanism.</p>	<p>If QEP report is not in compliance with the regulation (pre-permit, pre construction):</p> <ul style="list-style-type: none"> ▪ Monitoring lead person discusses with members of regional team or others as required, and decision on appropriate action determined ▪ If non compliance is minor such as an error in fact that be easily corrected: <ol style="list-style-type: none"> i. Contact the QEP ii. QEP fixes error iii. QEP submits amended report ▪ If non compliance is major and requires project redesign <ol style="list-style-type: none"> i. Local Government takes action depending on stage of development. LG may withhold further processing of an application Permits may already be issued by LG, but construction not started. LG may have to issue a stop work order or suspend permit. ii. QEP and developer notified by email by the Monitoring lead or LG, as agreed in the discussion, with reasons



Step	Description Adapted From Mackinnon, (2005)	Guidance for Interaction
		<ul style="list-style-type: none"> iii. QEP revises report and re-submits revised assessment report through notification system. The Report number or file is flagged for re-examination in the monitoring program. iv. If re-submission is in compliance, LG can re-start processing permit applications from developer v. Incorrect certification or opinion by QEP could result in reporting to professional association.
3	<p>During and Post construction compliance monitoring will look at whether the QEP is compliant with the methodology (see 2 above) and whether the Developer is compliant with the QEP Assessment Report. Specifically the development will be looked at for one or more of the following outcomes:</p>	<ul style="list-style-type: none"> ■ Monitoring has revealed a QEP report that complies and is not in error of fact: go to step 6 ■ Monitoring reveals a QEP report that does not comply with methodology, or is in error of fact: Go to step 4. ■ Monitoring reveals a QEP report that complies and is not in error of fact but the developer is not consistent with the QEP report. Go to step 4 ■ Monitoring reveals a report is compliant and work is compliant with the report but a HADD occurs anyway. Go to step 6. ■ Possible Outcomes: <ul style="list-style-type: none"> ■ QEP complies with methodology. ■ Developer is compliant with the QEP Assessment Report. ■ Developer is compliant with the QEP Assessment Report but the report itself is in error as to facts, conclusions or measures. ■ QEP complies with methodology but developer is non compliant with the QEP Assessment Report ■ Developer is non-compliant with the QEP Assessment Report and the report itself is in error as to facts, conclusions or measures. ■ Everything is compliant but results in a HADD
4	<p>If QEP Assessment Report is non compliant, the situation would be discussed among the regional RAR team members. The potential environmental impact of the non-compliance will be determined, and a course of</p>	<ul style="list-style-type: none"> ■ If monitoring picks up an Assessment Report that does not comply or where the QEP report complies but developer does not follow it., but permits are already issued by the LG, and construction has already started. ■ First step is for Regional RAR team to discuss the matter thoroughly and determine a course of action dependent of the seriousness of the non compliance (impacts or potential impacts).



Step	Description Adapted From Mackinnon, (2005)	Guidance for Interaction
	<p>action discussed and decided.</p> <p>Significant non-compliance will be forwarded for further investigation. Note: MOE compliance policy to be followed.</p>	
5	<p>Investigate significant impacts from non-compliance. Action taken depends on the severity of the impact. Investigation could lead to a host of possible outcomes using a variety of tools. Some are listed as follows:</p> <ul style="list-style-type: none"> ▪ Voluntary compliance by Developer and QEP; ▪ Remediation by Developer and/or LG (charged against bond); ▪ Inspectors direction (<i>Fisheries Act</i>) to Developer ▪ Ticket to developer under LG bylaw; ▪ Warning letter with or without advice ▪ Charges against Developer under the <i>Fisheries Act, Water Act</i> or LG Bylaws; ▪ Professional Association sanctions against the QEP; ▪ Civil action against QEP by developer; ▪ Engineer's Orders to Developer under <i>Water Act</i>. 	<ul style="list-style-type: none"> ▪ Regional RAR team may recommend an investigation if a HADD occurs. Lead agency for enforcement will be determined by following the <i>Memorandum of Understanding between British Columbia Conservation Service and Department of Fisheries and Oceans, Conservation and Protection, Fisheries Management Sector, Pacific Region Respecting Mutual Assistance</i>. MOE compliance policy requires 3 RMs to approve investigations. If CO Services investigate, the MOE compliance matrix will apply ▪ Enforcement actions are discussed with regional RAR team and enforcement officer, so everyone knows the approach. ▪ Standard letters will be created to advise developers that a HADD is likely to occur unless there is a change to the development activity. ▪ Minor occurrences without a HADD may be ticketed by LG. ▪ Warning letters should still be sent from DFO or CO services if no formal action is taken. (needs standard format). ▪ Field inspection and confirmation that the problem is rectified is needed by investigating officer or selected member of the regional RAR team, and notification to all members. LG can lift stop work order if applicable. ▪ Investigator or RAR team member must follow-up to ensure that the problem is solved and the developer and QEP know the outcome. ▪ If QEP non compliance is minor such as an error in fact that be easily corrected: <ul style="list-style-type: none"> ▪ Contact the QEP ▪ QEP fixes error ▪ QEP submits amended report ▪ If QEP non compliance is major and requires project redesign <ul style="list-style-type: none"> ▪ Local Government or DFO, or MOE take action



Step	Description Adapted From Mackinnon, (2005)	Guidance for Interaction
		<p>depending on stage of development. LG may have to issue a stop work order or suspend permit. Corrective action and time limits could be ordered by DFO or MOE under appropriate legislation (Section 35 of Fisheries Act. or Section 9 of Water Act).</p> <ul style="list-style-type: none"> ▪ QEP and developer notified by email by the Monitoring lead or LG, as agreed in the discussion, with reasons ▪ QEP revises report and re-submits revised assessment report through notification system. The Report number or file is flagged for re-examination in the monitoring program. ▪ If re-submission is in compliance, Government action initiated in step i is may be removed or removed with conditions ▪ Developer may need to redesign and/or remediate ▪ Incorrect certification or opinion by QEP could result in reporting to professional association. ▪ Developer may take civil action against QEP <ul style="list-style-type: none"> ▪ If Developer non compliance is minor and can be easily corrected: <ul style="list-style-type: none"> ▪ Contact the Developer ▪ Inform QEP ▪ Developer fixes error ▪ If Developer non compliance is major and requires project redesign <ul style="list-style-type: none"> ▪ Local Government or DFO, or MOE take action depending on stage of development. LG may have to issue a stop work order or suspend permit. Corrective action and time limits could be ordered by DFO or MOE under appropriate legislation (Section 35 of Fisheries Act. or Section 9 of Water Act). ▪ Developer and QEP notified by email by the Monitoring lead or LG, as agreed in the discussion, with reasons ▪ Developer redesigns and remediates following agency direction. QEP should be involved to help redesign and remediation prescriptions. ▪ QEP may revise report and re-submit revised



Step	Description Adapted From Mackinnon, (2005)	Guidance for Interaction
		<p>assessment report through notification system. The Report number or file is flagged for re-examination in the monitoring program.</p> <ul style="list-style-type: none"> ▪ If re-submission is in compliance, Government action initiated in step i is may be removed or removed with conditions ▪ QEP may be reported to association for failure of project monitoring responsibilities
6	<p>Reporting covers several different topics. Reporting on the results of the monitoring work must be prepared. The overall result of RAR compliance monitoring ought to be tracked and recorded. This ultimately will be a valuable tool for reporting to senior management or RAR executive committee (within government), as well as to inform Professional Associations.</p> <p>If a QEP is found to have acted unprofessionally, a report may be needed to a professional association.</p> <p>If work has been ordered to correct or stop a HADD, the results of a site inspection will have to be reported.</p> <p>Finally, on completion of the development, the Regulation requires a report from the QEP through the notification system.</p>	<ul style="list-style-type: none"> ▪ A mechanism for reporting on results of the monitoring program to be developed as part of the monitoring strategy directed by the RAR Executive Committee. A standard format could be developed so that regional reports can be rolled up into a provincial report. ▪ The regional RAR team would discuss the seriousness of a breach of professionalism, and recommend if and when a QEP would be reported on to the respective professional association. A report would come from MOE, DFO or LG as agreed by the team. ▪ Report will also make adaptive management recommendations as appropriate. ▪ If the methodology is followed, but there are impacts, the RAR Executive Committee is notified by MOE or DFO regional lead to review the methodology during the program review



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Step	Description Adapted From Mackinnon, (2005)	Guidance for Interaction
7	<p>It is expected that some activities will occur without a RAR notification. Some activities may be identified through this process that are external to RAR process. For example some development may be identified where no Assessment Report has been completed but should have been. Alternatively, a specific activity may not be included in the definition of "Development" under the RAR and hence is outside the purview of the RAR. These should be reported to the appropriate government agency as well as tracked and recorded.</p>	<ul style="list-style-type: none"> ■ Activities within riparian zones or in- stream works are still subject to normal regulatory processes within the framework of existing legislation. Activities not properly authorized would be handled according to established processes. ■ Activities that should have had a QEP Assessment and notification to governments but were not to go to box 4



2.2 Complaint-based Monitoring

It is anticipated that members of the public, or officials from other agencies, will observe activities close to watercourses and report their concerns. MacKinnon suggested that the majority of these complaints will come to the local government. However, complaints will also be received by senior governments, especially in more rural areas. Complaint need to be assessed to determine if they report a non-compliance.

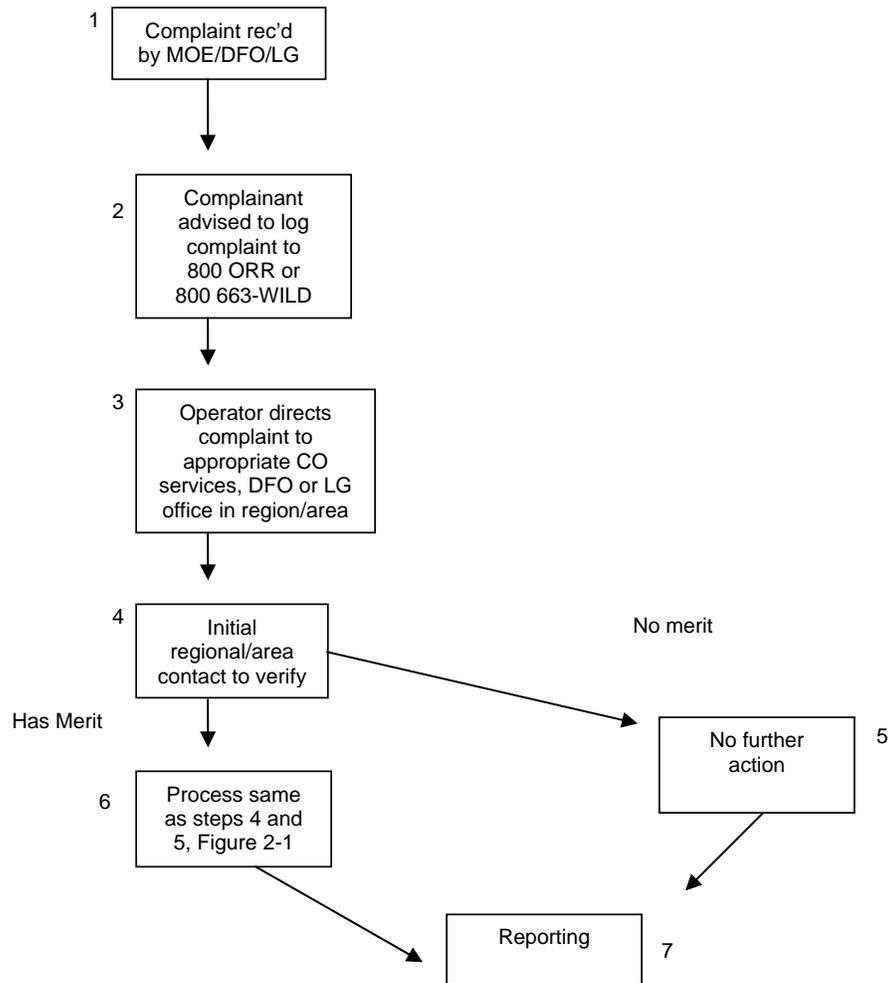
Mackinnon proposed that complaint-based monitoring be conducted according to a scheme that starts with lodging a complaint through a 1-800 number. Consistent use of this approach would provide a “one window” process for the public. Both MOE and DFO have 1-800 numbers for reporting complaints. The operators are capable of identifying the closest community to the complaint, and quickly identify the appropriate enforcement officer to relay the complaint to.

A call to the MOE 1-800 number is referred to the CO Service (COS) in region, not the ecosystems section staff who administer the RAR. Similarly, if a complaint is received by the DFO 1-800 number, it is normally referred to a fishery officer, not to the habitat section person in the Area. In either case, the complaint may be a matter for an enforcement officer to investigate. However, the officer must determine if the complaint is about a RAR matter. How this will happen needs to be established. As part of the interactions, the agencies themselves need to put in place internal referral procedures that work, so that the right information quickly gets to the right person, once a complaint is lodged.



Figure 2-2: Flowchart for Complaint-Based Monitoring for the Riparian Area Regulation.

Complaint-Based Monitoring





The following numbers correspond to the numbered steps that are shown within the figure and provide some explanation of the elements of the flowchart. The column on the right describes guidance for interactions as discussed at the workshop.

Step	Description Adapted From Mackinnon, (2005)	Guidance for Interaction
1	Complaint is received by any involved agency: LG, DFO, MOE, etc	<ul style="list-style-type: none"> • Agency personnel who observe something that could be reported should check the Assessment Report on line for the development in question before making the complaint. • If complainant is an official of a cooperating agency, he/she should approach a regional RAR team member directly. This could include the LG contact. • A complaint to a member of a RAR team could be dealt with directly, in the interests of time and efficiency. If this course is chosen, go to Step 6. • LG, MOE or DFO reception should direct complainant to the appropriate 800 number.
2	Complainant is asked to lodge complaint through the 800 number mechanism of either MOE or DFO Note: MOE: 1-800-663-9453 DFO: 1-800-465-4336	<ul style="list-style-type: none"> • This is the usual starting point for public complaints • LG, DFO and MOE need to refer to this procedure in public messages, training, phone books, etc • A complaint received via 1-800 number needs to be documented.
3	Complaints identified for further action are forwarded to enforcement officers in region, to RAR team members or both.	<ul style="list-style-type: none"> • Lead agency for enforcement will be determined by following the <i>Memorandum of Understanding between British Columbia Conservation Service and Department of Fisheries and Oceans, Conservation and Protection, Fisheries Management Sector, Pacific Region Respecting Mutual Assistance</i>. • Operators will normally refer the complaint to an enforcement officer closest to the location of the complaint. • Operators could be encouraged to refer such complaints to a RAR team member, either in LG, MOE or DFO. This could be done either



Step	Description Adapted From Mackinnon, (2005)	Guidance for Interaction
		<p>in addition to or without contacting an enforcement officer. (Enforcement officers come in at Step 6)</p>
4	<p>The RAR team will assess the complaint (based on their own knowledge of the location, the project, the complainant, and other risk factors) to determine the merit of the complaint.</p>	<ul style="list-style-type: none"> • May require a site visit by members of the RAR team or technical staff in MOE/DFO/LG. • The complaint, if valid, may be a time sensitive matter, and it may be useful to identify an alternate person to handle it in the team member's absence.
5	<p>Some complaints may receive no further action because they lack sufficient merit for follow up (screen out for further action).</p> <p>Lead agency investigates and informs other agencies of results.</p>	<ul style="list-style-type: none"> • It is recommended that the complainant be notified of decision for action.
6	<p>Agencies will contact one another to discuss the complaint to ensure they have full information prior to undertaking an investigation. There will be discussions among agencies as to who takes lead to investigate. Cooperation amongst three levels of government to ensure effective and efficient use of resources.</p>	<ul style="list-style-type: none"> • If complaint has merit, regional RAR team discusses and chooses appropriate course of action, as provided in Steps 4 and 5 of Figure 2-1 above. • LG would be notified as part of the RAR team that a valid complaint is in play. • Developer must be notified that a complaint is being investigated. • Developer may voluntarily respond and correct the cause of the complaint.
7	<p>Reporting on the number of complaints and how they were handled would be part of the Annual Report</p>	<ul style="list-style-type: none"> • The regional RAR team would be responsible for the filing of a brief report on the complaint and the outcome. • A standardized format could be available on-line for this purpose.



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Step	Description Adapted From Mackinnon, (2005)	Guidance for Interaction
	prepared by the RAR Executive Committee.	<ul style="list-style-type: none">• Complaints should be entered into the Conservation On-line Reporting System (COORS), or the equivalent, to ensure a record is kept and to enable reporting.



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3.0 SUMMARY OF INTERACTIONS

The basic work unit for RAR monitoring is a team in regions consisting of designated members from MOE, DFO and a contact from the appropriate local government. Depending on geographic area or local government, the team members may be different for each monitoring or complaint case.

Generally, the MOE member of a regional RAR monitoring team would be regarded as the team leader, unless in a team discussion another member takes the lead on a specific case. The guiding principle of “best situated to act” should be used as a guide when deciding what team member takes the lead on individual cases.

In the event that regional RAR monitoring team members cannot agree on an approach or some other matter, the case can be referred to the RAR Executive Committee, which may in turn refer it to a sub-committee to resolve.

MOE Regions and HQ need to coordinate the RAR monitoring delivery. If a complaint is referred to a conservation officer, how will it be relayed to the MOE RAR team member? If a complaint is received by the DFO 1-800 number, how will the fishery officer relay the message to the habitat biologist? Will HQ be the central location for and administer the monitoring report data base?

LGs should determine who their RAR point person will be, and make this known to MOE and DFO for listing on the web;

An on-line format and guide would help and simplify the monitoring reporting process;

Finalized descriptions of interaction protocols for each step in the process will be available to all.

Agree in principle on enforcement levels; minor non-compliance could be ticketed by LGs, major ones and those with significant impact handled by CO service or DFO;

Agree on a workshop 6-8 months into the program to review monitoring reports and refine a risk-based approach for on-going monitoring, determine if the RAR assessment methodology needs to be amended, and employ an adaptive management approach to revising the program.



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4.0 REFERENCES

Mackinnon, G. 2005. *Monitoring Framework for the Riparian Areas Regulation*. Gordon Mackinnon and Associates Ltd. Nanaimo.