

Protocol for Management of Riparian Area Regulation Variances
Between the Department of Fisheries & Oceans
and the Ministry of Environment

Purpose:

The Department of Fisheries and Oceans (DFO) and the Ministry of Environment share responsibility for the delivery of conservation and protection measures for fish and fish habitat under the *Fisheries Act (FA)*. In the case of riparian vegetation, this is primarily through S. 35(1) of the *FA* which makes it illegal to harmfully alter, disrupt or destroy (HADD) fish habitat unless Authorised by S. 35(2) of the *Act*. Additional responsibilities for riparian protection derive from the *Riparian Areas Regulation (RAR)* of the *BC Fish Protection Act*. Section 4(3) of the RAR allows for development to proceed within the Streamside Protection and Enhancement Area (SPEA) if DFO provides approval. The conditions upon which such approvals will be granted is explained in Section 3.4.2 of the *Riparian Area Regulation Guidebook* (January, 2006); specifically, approvals, known as variances, will be granted when there is a hardship, or special circumstance. This protocol provides additional specific information detailing the conditions and circumstances when such variances will be considered.

The following variance protocol is for local governments (LG), developers and RAR-compliant Qualified Environmental Professionals (QEP's) and is intended to inform all parties as to how Streamside Protection and Enhancement Area (SPEA) variance RAR referrals will be managed, including guidance relevant to final decision-making by DFO and the Ministry of Environment (MoE). The variance protocol provides specific standards and methods to determine the amount of allowable encroachment into the SPEA in cases of undue hardship and is based on site specific considerations such as the property size, configuration and present environmental condition (Appendix 1).

An important change to the previous process is that LG letters of support pertaining to undue hardship will no longer be required, as the methodology within the protocol will determine if there is a justification of hardship.

Variance requests for which there is no undue hardship will not be supported by either agency.

Undue Hardship:

DFO and MoE will only consider variance requests in circumstances where there is undue hardship. A determination of undue hardship will be made where no private development of the land remains available to the landowner¹.

For example, a determination of undue hardship can be made where the project is a single, legal lot which:

- a) was created in accordance with fish habitat legislation and guidelines of the day;

¹ Riparian Protection and Compensation – Fish Protection Act – prepared by Linda Nowlan, West Coast Environmental Law Research Foundation for the BC Ministry of Environment, Lands and Parks, January 1999.

- b) cannot be reasonably developed for the purpose for which the lot was created with the current zoning and the required SPEA; and,
- c) the Local government has relaxed other development restrictions as much as reasonably possible.

Situations where application of the SPEA still allows some uses of the land, even if those uses are unsatisfactory or less economical to the landowner will not be considered to have undue hardship. At the subdivision stage or rezoning stage a loss of development potential will not be considered undue hardship.

Through the provincial RAR, the SPEA is recognized as an ecologically important area that is to remain protected from development. Therefore, development sites that meet the undue hardship criteria must be designed to minimize the development footprint within the SPEA and to provide offsetting measures (i.e. mitigation or compensation) for any unavoidable encroachment (Appendix 2).

Period of Effectiveness:

The variance protocol will remain in effect until December 31, 2010 at which time it may be retained for a specified period of time, updated or discontinued. The protocol may also be modified at any time should changes to RAR and/or policy warrant this action. Any changes to this protocol will be registered on the MoE RAR website.

Geographic Area of Effectiveness:

The variance protocol applies to all portions of the Province of BC in which the RAR applies (i.e. portions of Vancouver Island, the Lower Mainland and Sunshine Coast, the Thompson-Nicola Regional District, the Columbia-Shuswap Regional District, and the Okanagan, Kettle and Similkameen areas, covering in whole or in part all of Ministry of Environment Regions 1, 2, 3, 5 and 8 (see attached map, Appendix 3).

Variance Protocol:

The RAR places certain responsibilities on DFO and MoE as they relate to variances of the Streamside Protection and Enhancement Area (SPEA).

Variances are of two forms:

1. The SPEA can not be accommodated by the development plan, or local government permitting agency, and there is likely a HADD of fish habitat requiring a *Fisheries Act* S. 35(2) Authorisation.
2. The SPEA can not be maintained by the development plan, or local government permitting agency, but there is not necessarily a HADD of fish habitat.

The intent of the RAR is to protect areas of both existing and potential vegetation. Therefore, prior to applying this protocol to Non-HADD SPEA Variances or considering and applying to DFO for a SPEA variance with a HADD, the QEP/proponent *must* undertake the following:

- a) The project proposal must be assessed for all reasonable redesign and relocation options to avoid need for a SPEA Variance.

- b) The QEP/Proponent must work with the LG to consider changes to other municipal restrictions such as adjusting other property line setback requirements or frontage distances prior to their request for variance of the SPEA boundary.
- c) Local Governments have some limited discretionary power to “flex” the SPEA boundary. Therefore, work with the Local Government to apply “flexing” where appropriate.
- d) Determine that there is no option to undertake a reasonably sized development appropriate for the zoning, and therefore there would be an Undue Hardship if a variance was not granted (direction in determining “reasonable” is provided in Appendix 1).

If there is still a requirement to encroach into the SPEA that can not be accommodated by any of the above options, then the QEP must provide written verification that there has been every effort made to relax other LG restrictions on the development such as front and side yard setbacks. Appendix 4 provides a template letter the QEP and LG’s can use to document the verification.

Additional considerations in the determination of Variance allowances, as per Appendix 1, include the present condition of the property and the relative health and environmental function of the riparian zone.

- Properties that have been previously developed and have a relatively low riparian function are defined as “Brownfield” and the QEP will be expected to assure agencies that the project will not cause a HADD of fish habitat. To determine if a riparian area is modified to such a degree as to be defined as “Brownfield”, if less than 30% of the site potential vegetation is remaining, the site is to be considered a Brownfield site. The alteration must be from historic activities and not relate to recent property modifications.
- Properties that are in a relatively unmodified state and have good riparian function, are considered “Greenfield”. Greenfield Variances will likely result in a HADD determination. Therefore, if 30% or more of the riparian site potential vegetation is remaining, it is a “Greenfield” site.

Only after all the above considerations have been made can:

- the variance protocol be applied to Non-HADD SPEA variances with submission of notification to DFO; or,
- the proponent apply to DFO for a SPEA Variance with a HADD.

The Methodology to Determine the Degree of Allowable Encroachment into the RAR SPEA under an Undue Hardship Justification in Appendix 1 is to be followed to determine the size, location and configuration of a development within the SPEA.

Encroachment will require offsetting measures. Brownfield sites requiring mitigation shall follow the *Mitigation Measures Process and Standards* in Appendix 2. For Greenfield sites, compensation will be negotiated by a DFO Habitat Management assessor.

Process Completion:

Non-HADD SPEA Variance

If upon the completion of an RAR assessment, a QEP determines that the SPEA can not be accommodated, an undue hardship exists and confirms that in their opinion that there **will not be a HADD** of fish habitat after the application of redesign, relocation and mitigation measures, then the project may proceed provided that all the following have occurred:

- the *Methodology to Determine the Degree of Allowable Encroachment into the RAR SPEA under an Undue Hardship Justification* in Appendix 1 is followed;
- the mitigation measures defined in Appendix 2 are applied; and
- all the QEP's guidance and direction and any additional measures that may be required to avoid a HADD of fish habitat are incorporated into the design.

The project can then be submitted to DFO. DFO will review the project if it is in salmon bearing habitat. For resident only habitat, the project will be referred to MoE to undertake the review and decision. If DFO or MoE's decision supports the variance request, a letter will be issued by DFO that must then be appended to the RAR assessment and submitted to the RAR Registry. A RAR SPEA Variance can not be registered without such a letter of approval.

When registering their RAR Assessment in the notification system, the QEP will be required to include, attached to their assessment report, a letter stating:

1. that the project is deemed to be a non-HADD and explain how the brownfield determination was made;
2. that their results were reached following this protocol document;
3. how the SPEA variance requirement was determined;
4. the notification is being made in accordance with direction provided by the DFO-MoE Variance Protocol document; and,
5. their professional opinion that if the development is implemented as proposed there will be no harmful alteration, disruption or destruction of natural features, functions and conditions that support fish life processes in the riparian assessment area.

The agencies will monitor notifications to verify the accuracy and appropriateness of QEP HADD determinations, the compliance of developments with QEP-prescribed mitigation measures and the effectiveness of these measures in avoiding a HADD of fish habitat.

SPEA Variance with HADD

If, upon the completion of a RAR assessment, a QEP determines that the SPEA can not be accommodated, a situation of undue hardship exists, and that there **will be a HADD** of fish habitat after application of redesign, relocation, mitigation and other local government measures, and as such the development will require a *FA S. 35(2)* Authorisation with compensation to legally proceed, the development proposal is to be submitted for review by DFO. The project will still be required to follow the *Methodology to determine the degree of allowable encroachment into the RAR SPEA under an Undue Hardship Justification* in Appendix 1. If DFO agrees that

no other options exist, proposed compensation options for the HADD may be discussed with the appropriate DFO Habitat Management assessor. In order for the Department to properly assess the development proposal and come to a decision as to whether to Authorise the proposed HADD or not, it will likely be necessary for the proponent and QEP to provide the Department with more information than is provided in an RAR assessment.

For all proposed HADD's in both salmon (anadromous) and resident (non-anadromous) habitat, the development proposal should be submitted to DFO with all information detailed in the *Proponent's Guide to Information Requirements for Review Under the Fish Habitat Protection Provisions of the Fisheries Act*. DFO will forward non-anadromous HADD project proposals to MoE to assess risk to resident habitat and fish stocks.

Once a completed proposal for compensation is received by DFO, DFO will review the information provided and when applicable also consider MoE's assessment of foreshore and habitat values in resident fish habitat. DFO will then determine if the proposed HADD of fish habitat should be authorised and will subsequently notify the appropriate parties (i.e. the QEP, MoE and the local government) of the decision. DFO will also consider MoE advice and recommendations for appropriate compensation requirements in resident fish habitat areas. In most instances, a decision by the Department to issue a *FA* s. 35(2) Authorisation will trigger an environmental assessment under the *Canadian Environmental Assessment Act* (CEAA).

Authorisations will be monitored for compliance with their terms and conditions.

It is the proponents' responsibility to ensure that all other legislation and regulations are met including, but not limited to, the *Wildlife Act*, the *Species at Risk Act*, the *Water Act*, and Local Government Bylaws. Although it is not a requirement of RAR, it is recommended that this information be included in the assessment report.

Appendix 1.

Methodology to Determine the Degree of Allowable Encroachment into the RAR SPEA under an Undue Hardship Justification.

1. Work with Local Government (LG) to maximise LG setbacks and flexing options to accommodate the development footprint. The submission to DFO should provide written documentation of the efforts made to avoid encroachment into the SPEA, and that other options to accommodate the development footprint are not feasible.
2. Assess the total potential developable area of the site above the Mean Annual High Water Mark (MAHWM), or designated lake elevation / floodplain elevation. The developable area is the portion of the property that is not constrained by non-SPEA development restrictions. However, the SPEA may be included in the overall property area for the purpose of calculating the total developable area. Easements, right-of-ways (ROW), LG property setbacks and topographical constraints significant enough to preclude development should be subtracted from the overall property area to determine the developable area, unless the restriction, or a portion of it, can reasonably be incorporated into the SPEA. See the attached diagram (Figure 1) for assistance.
3. A QEP is required to assess if the site is a Brownfield or Greenfield.
4. Undue hardship will only be considered in those situations where:
 - The development footprint is less than 40% of the developable area on **Brownfield** lots, or
 - The development footprint is less than 30% of the developable area on **Greenfield** lots (see pg. 3 of the Protocol for definitions of “Brownfield” & “Greenfield”).

If the development footprint can not be achieved without encroachment into the SPEA, and an Undue Hardship exists, a SPEA variance may be requested.

The development footprint is to include all buildings and other hard surface features, including proposed and existing buildings, outbuildings including garages, sheds, upland boathouse, gazebos, driveways, walkways, paths, patios, and decks.

5. The proposed development footprint within the SPEA is to be configured in such a way as to minimise the encroachment toward fish habitat (e.g. water’s edge); therefore, the proposed development is to be located as far upland as possible. The footprint is to be tight to front yard and side yard setbacks, and there will be no feature projections into the SPEA, such as a building wing, pool, deck or overhanging structures.

A project that clearly demonstrates that all standards have been achieved is likely to be approved without significant delay in the review process. Projects that do not meet the variance protocol measures or are likely to cause a HADD, will require a more detailed review. DFO will consider if the review can be accommodated through local government Environmental Review Committee’s, a semi-annual project review meeting held between DFO, MoE and the LG, or via other legislative mechanisms such as review under CEAA.

Any proposals that exceed the allowable percentage will be rejected.

Figure 1. *Example Site Plan to Determine the Developable Area of a Brownfield Site using the RAR Variance Protocol.*

Appendix 2

Mitigation Measures Process and Standards

The term “mitigation” will apply to non-HADD or Brownfield SPEA Variances.

The goal is to ensure that the objectives of RAR to protect and enhance the stream side riparian area are achieved, even in situations where a SPEA encroachment is required under an Undue Hardship justification. Therefore, it is required that any encroachment will be offset by mitigative measures.

Mitigative requirements will escalate with the increasing amount of encroachment and habitat condition.

Site Environmental Condition	Area of Encroachment (m2)	Mitigation Ratio
Brownfield / Non-HADD	1 – 50	1:1
	51 – 100	1.5:1
	101 – 200	2:1
	201+	3:1

A consultant is developing a guidance document regarding appropriate standards for:

- Zonally appropriate Tree/shrub species and mix
- Planting density
- Plant size and age, etc

Appendix 4

Local Government Letterhead

Date

File #:

Contact Name

Company Date

Address

City, BC, Postal Code

Dear Sir or Madam:

QEP Assessment # - Site Address (Legal)

Local Government Template Letter to Confirm Local Government Setback Relief

The (City/District/Village/Regional District) has reviewed the Riparian Areas Regulation (RAR) assessment report for the above Property and the proposed modified side yard and front yard setbacks.

The report proposes a modified Streamside Protection and Enhancement Area (SPEA), such that in the opinion of the Qualified Environmental Professional (QEP), the overall riparian area will function to protect and enhance fish habitat values. In order to achieve the desired outcomes, the development is required to be placed as far from the high water mark/natural boundary as reasonable. We acknowledge the level of effort given in the development plan to avoid the SPEA boundary.

The (LG) has agreed and approved the reduction of front and side yard setbacks from X metres to Y metres in order to maximise the development's setback from the high water mark/natural boundary.

This report will form the basis for support of a Development Variance Permit to (LG) Council with regards to the protection of the natural features, functions and conditions that support fish life processes.

Respectfully,

(Name)

(Title)

Figure 1: RAR Variance Protocol - Site Plan

