January 10, 2006

To: Interested Parties:

Re: Ministry of Environment's Responses to the Staples, McDannold and Stewart Riparian Area Regulation Assessment of Risk of Liability and Other Related Issues of October 4, 2005

Introduction:

The legal opinion by Staples, McDannold and Stewart was jointly commissioned by the Ministry of Environment and the Union of British Columbia Municipalities to address resolution passed at the 2004 UBCM annual convention. The questions asked were jointly developed by the two commissioning agencies. This document provides the ministry's response to the Summary Conclusions and Recommendations from the opinion. For ease of reference the Conclusions and Recommendations from the legal opinion are included followed by the Ministry's response to them. No response is included where the conclusion/recommendation speaks for itself. Local governments having further questions in regard to liability are encouraged to seek their own legal council.

Summary Conclusions and Recommendations from Staples, McDannold and Stewart opinion

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.

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Response:
The government has taken a risk management approach to reducing local government's exposure as a consequence of actions taken against developers under the *Fisheries Act* in respect of development to which the Riparian Area Regulation (RAR) applies. Reducing the probability of damage to fish habitat reduces the potential for litigation against local governments and developers.
Those measures are:

- The detailed science based assessment that is part of the actual RAR, as laid out in the Assessment Methods.
- Training course on the Assessment Methods for qualified environmental professionals (QEPs).
- Description of required QEP skill set for the various components of the Assessment Methods.
- Requirement in the RAR for notifications to senior governments with the results of the assessment of proposed development.
- Requirement in the RAR for certification by the QEPs that they are qualified and have followed the Assessment Methods, and for statement of their professional opinion on the impact of the proposed development on fish habitat and on any necessary prescriptions to avoid impact.
- Requirement in the RAR for development of strategies for final review sign-off by QEPs and reporting back to senior governments by the QEPs on the implementation of the assessment prescriptions.
- Compliance and efficacy monitoring.
- Working with the professional associations in the training, responsibility and accountabilities of their members.
- Education and brochure.

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.

Response:
The Ministry has developed a monitoring strategy that will set out:

1. Risk and temporal stratification to be used in selecting what proposed development or development to review and at what stage to review it;
2. Number of proposed developments or developments to review;
3. Both compliance and ecological effectiveness monitoring;

4. A protocol of interaction for determining how to respond to non-compliance;
5. The roles and responsibilities of the three levels of governments in conducting and responding to monitoring.

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.

Response:

The Ministry will be putting forward, for consideration by Cabinet, a proposal to amend section 4(2)(a) and 4(2)(b) of the RAR in line with the recommendations made so that the RAR is consistent with the original intent of not requiring local government review of QEP reports.

The proposal will be that the provisions in section 4(2)(a)(i) and (ii) of the RAR be moved into Section 4(2)(b)(ii)(C) of the RAR.

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.

Response:

See the responses to points 3, 4, and 5 in regards to measures taken to reduce local government’s liability.

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.

Response:

The Ministry intends to amend the assessment report template and notification system to include this recommendation.

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 wilful 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.

Response:

See point 5 re: proposal to amend section 4 in line with the original intent of not requiring local government review of QEP reports.

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.

Response:

The RAR provides direction to local governments in respect of the protection and enhancement of riparian areas subject to residential, commercial and industrial development through the exercise by them of their Part 26 powers. In relation to the exercise of those powers, the RAR relies on existing regulatory tools available to

local governments. The RAR is a tool that allows for due diligence in relation to proposed developments and their impacts. :

1. *Fisheries Act;*
2. *Water Act;*
3. Local government Bylaws, *Community Charter, Local Government Act*.

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".

Response:

It is recognized that local government's powers in regard to subdivision approval are limited. Local governments have the ability to establish bylaws that would be considered by the subdivision approving officer. The inclusion of subdivision in the definition of development would only relate to the exercise by local government of those limited powers. Subdivision will remain 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.

Response:

The Ministry will be putting forward, for consideration by Cabinet, a proposal to amend section 3(1) of the RAR to change its application from "*the exercise of Part 26 powers*" to its application to "*the exercise of Part 26 powers in relation to development"*.

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..

Response:

The intent of the inclusion of the word “allow” was to address those situations in which local government had no direct mechanism in place for approving development. The word “allow” contemplates a positive obligation on local governments, in the exercise of their Part 26 powers, to include prohibitions in regulatory bylaws, such as those under section 909 of the *Local Government Act*, to the effect that particular development in the riparian assessment area is dependent on satisfying the condition in section 4(2) or 4(3) of 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.

Response:

The RAR cannot provide direction beyond that authorized by the legislation. Under the *Fish Protection Act* (FPA) local governments can proceed under either section 12(4)(a) or section 12(4)(b). Therefore, a local government meeting 12(4)(a) of the FPA will have met the requirements of the Act, as well as of the RAR. In other words, the RAR can be met through either section 12(4)(a) or section 12(4)(b) of the FPA. Of course, it is open to a local government that has proceeded to implement the RAR through the option of section 12(4)(a) of the FPA, to provide additional regulatory protection using other Part 26 of the *Local Government Act* powers consistent with 12(4)(b) of the FPA, if that local government so desires.

The Ministry will conduct a legal analysis with the view to making recommendations to Cabinet for amendment to the RAR to make it more clear that implementation of either of these options will achieve compliance with the RAR.

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*.

Response:

The RAR cannot provide direction beyond that authorized in the legislation. Consequently, there may be no need to amend the RAR given that, on the basis of the FPA, the RAR can be met through either section 12(4)(a) <u>or</u> section 12(4)(b) of the Act.

In particular, section 12(4)(b) of the FPA allows a local government to provide a level of protection that, in the opinion of the local government, is comparable to or exceeds that of the RAR using tools in Part 26 of the *Local Government Act*. In terms of what is the test for the level of protection to be met, we expect that might be defined by the results of an assessment as defined in the RAR.

The RAR Assessment Methods have two assessment options: the simple or the detailed assessment. We expect that the test of equivalency would be defined by the level of protection afforded by either assessment option.

A local government that determined, and had required development to follow, setbacks across all or portions of its jurisdiction by following the simple assessment would, in our view, have established a level of protection that is equivalent to that required by the RAR.

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.

Response:

See point 5 re: proposal to amend section 4 in line with the original intent of not requiring local government review of QEP reports.

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 contains 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.

Response:

The Ministry will ensure that the notification it sends by e-mail to local governments includes the information stipulated in 4(2)(b) of the RAR.

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.

Response:

The protocol of interaction developed as part of the monitoring strategy identifies the roles of the three levels of government in addressing non compliance determined through monitoring that includes review of QEP reports by a local government (or by the senior levels of government).

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.

Response:

It is recognized by the Ministry that the RAR does not provide additional powers to local governments beyond those otherwise available to them in the *Local Government Act*, the *Community Charter* and other statutes.

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.

Response:

It is recognized by the Ministry that, in implementing the RAR, local governments must act in accordance with the provisions of the legislation which governs them, particularly Part 26 of the *Local Government Act*, and cannot exceed the authority granted to them.