

Variances to the BC Riparian Areas Regulation

In most cases, compliance with the Streamside Protection and Enhancement Areas (SPEA) determined by the BC Riparian Areas Regulation (RAR) will not deprive a landowner of all uses of their land¹. However, there will be some instances where application of the SPEA causes the property owner undue hardship and in these instances the property owner may seek a variance to the SPEA. As set out in the RAR, SPEA variances require approval from DFO (Fisheries and Oceans Canada).

This document is intended to provide land owners, Qualified Environmental Professionals (QEPs) and Local Governments with guidance on what constitutes undue hardship in this context and the process to apply for a variance to the SPEA when those criteria are met.

Criteria for Undue Hardship with respect to the RAR

A determination of undue hardship will be made where no private uses remain available to the landowner and the land has essentially been converted to a public use (for a more complete explanation see footnoted document).

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 the fish habitat legislation and guidelines of the day; and
- b) cannot be developed at all with current zoning and the 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.

A SPEA is an ecologically important area so all developments that meet undue hardship criteria must be designed to minimize their intrusion into the SPEA and to compensate for their encroachment.

Step 1: Contact your Local Government

The first step towards obtaining a SPEA variance is asking the Local Government to evaluate whether the SPEA will create undue hardship for the property owner. Property owners should contact their Local Government to discover the specific information that is needed to allow the Local Government to make this evaluation. Local Governments should consider options to relax other requirements or restrictions (e.g., front yard setbacks) which could avoid or reduce the proposed encroachment into the SPEA. If the Local Government determines the property owner meets the criteria they should provide their support for the variance request in writing to the land owner,

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.

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including any changes they recommend to the original proposal and describing their efforts to relax other development requirements. Local Governments are advised not to include their opinion on whether the proposal will protect fish habitats as this could expose them to unnecessary liability.

Step 2: Applying to DFO

The land owner or their QEP will forward their application to DFO along with supporting letter from the Local Government. While a land owner may forward an application for a variance directly to DFO, DFO will contact the Local Government to discuss their interests and will consider their lack of support for the variance when evaluating the application. Variance requests should be sent directly to local DFO Area offices except where Environmental Review Committees (ERC) between DFO and the Local Government exist to manage them. If it appears significant design revisions will be required, the Local Government will be included in the discussions with DFO to ensure they remain supportive of the project.

Support for variances does not create precedents. Each application will be evaluated on its own merits. Applicants may refer to previous variance decisions if they wish but are not guaranteed the same outcome. In making decisions on RAR variances, DFO seeks to prevent the harmful alteration, disruption or destruction of fish habitat (as per the Federal *Fisheries Act*) and to meet the spirit of the RAR by maintaining adequate riparian widths to maximize the potential for natural, self-sustaining riparian functions to establish. DFO strives to be fair, coherent and transparent in making these decisions.

Where a number of existing properties face a similar level of hardship they may, if deemed appropriate, be considered as a group with one evaluation being made to apply to each of the properties individually but this does not mean each property will receive the same variance to the SPEA.

Variations requests may result in:

- a) *a Letter of Advice permitting the variance* - the QEP includes this and the letter from the Local Government in their Assessment Report and submits it to the provincial RAR notification system. DFO will provide a copy of this letter to the Local Government.
- b) *an authorization under s.35(2) of the Fisheries Act for the harmful alteration, disruption or destruction of fish habitat that permits the variance* - DFO will provide a copy to the local government for use in their approval process.; OR
- c) *a letter objecting to the proposed variance*

Information that should be provided to DFO

1. A description of why the proposed variance is needed (why property cannot be developed consistent with its' zoning).
2. A listing of what relaxations were considered by the Local Government and an explanation of those which were not employed.
3. Confirmation that creation of the property and its zoning complied with fish habitat legislation and guidelines of the day.
4. A copy of the RAR report prepared by the QEP following the RAR Assessment Methods.
5. A description of the proposed mitigation and compensation for the impact to fish habitat related with the proposed encroachment.
6. A site plan showing the RAR outcome(s) and the proposed variance using accurate dimensions. Include complete footprints of proposed structures.