



REPORT TO THE DENMAN ISLAND LOCAL TRUST COMMITTEE

Review of Land Use Bylaw Options to Address Specific Aquaculture Related Activities

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REPORT



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Executive Summary

This report to the Denman Island Local Trust Committee is prepared in accordance with the terms of reference in the Service Contract No. 2012-0065. The purpose of the report is to research land use bylaw options to address citizen concerns with predator netting, driving of motorized vehicles on the foreshore, and physical beach modification to accommodate shellfish aquaculture. In undertaking this analysis, it became apparent that there are nuanced areas of constitutional and other law that would benefit from further analysis by a legal professional. Golder specifically notes that our analysis is focused on mechanisms by which local government might be able to effect the changes it seeks to bring about; however, we wish to be clear that we are not offering, nor was it in our scope of work to offer, legal analyses or opinions.

Summary of Findings:

- 1) Enacting *Denman Island Land Use Bylaw* regulations to address shellfish aquaculture **predator netting** may be an intrusion into areas of sole federal jurisdiction. If that is the case, such bylaws, if challenged could be stricken down as unconstitutional.
- 2) There may be jurisdiction under the *Islands Trust Act and Local Government Act* **to ban or restrict access to driving on the foreshore** through the *Land Use Bylaw* provided such regulation is clearly designed to address those areas within local government jurisdiction. Banning operation of motor vehicles lawfully associated with shellfish aquaculture operations, for reasons that seek to regulate areas of federal jurisdiction, may be unenforceable.
- 3) The spatial extent of motor vehicle use and access for the purpose of aquaculture operations should be reviewed in the context of the spatial bounds of the permits and approvals under which that operation is subject. This evaluation should identify if vehicle use is occurring outside the “four corners” of approval documents.
- 4) Beach modification activities such as the construction of seawalls are prohibited within the zoning setback area for all zones (Section 2.3(3) of the *Denman Island Land Use Bylaw*) and presumably other forms of modification could be restricted in accordance with s. 903 of the *Local Government Act*, where the footprint of such walls is on land under provincial jurisdiction, as the management of lands (with the exception of federally-owned lands) is within the constitutional jurisdiction of the Provinces.
- 5) There is the possibility that the review process under which licenses were granted may have fallen short of the necessary scope of review, particularly as many aquaculture operations were originally licensed provincially, prior to the Morton Decision. There are examples where permits have been rescinded because of lack of adherence to process. It was beyond our scope to evaluate whether this was the case at Denman Island and whether such opportunity might exist would be a matter for a legal professional to ascertain.



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1.0 INTRODUCTION AND SCOPE

1.1 Local Trust Committee Resolution

On May 1, 2012 the Denman Island Local Trust Committee resolved the following:

It was **MOVED** and **SECONDED** that the Local Trust Committee request staff to provide a report on bylaw enforcement mechanisms to:

- a) Remove predator netting;
- b) Ban driving on foreshore;
- c) Ban beach modification.

Islands Trust staff clarified this resolution to mean “how those three things could be regulated in the Land Use Bylaw and how enforceable such regulations would be.”¹ Golder Associates Ltd. (Golder) was retained to assist the Denman Island Local Trust Committee with this resolution. This report provides perspectives with respect to controls for predator netting, driving on the foreshore and beach modification. In undertaking this analysis, it became apparent that there are nuanced areas of constitutional and other law that would benefit from further analysis by a legal professional. Golder specifically notes that our analysis is focused on mechanisms by which local government might be able to effect the changes it seeks to bring about; however, we wish to be clear that we are not offering, nor was it in our scope of work to offer, legal analysis or opinion. The authors are not qualified to do so.

2.0 CONTEXT

2.1 Shellfish Aquaculture Activity and Denman Island

Shellfish aquaculture activity in the Denman Island Local Trust Area occurs in Baynes Sound, between Vancouver Island and Denman Island, extending between Comox Harbour to the north and Deep Bay in the south. A staff report to the Denman Island Local Trust Committee, dated March 13, 2012, identifies Baynes Sound as one of the most significant commercial shellfish farming areas in the province as well as an ecologically diverse and important area.

Golder Associates staff, James van Hemert, visited the area on December 10, 2012 in order to familiarize himself with the nature and extent of shellfish aquaculture activity in Baynes sound. The visit involved walking the beaches, observing evidence of beach driving, shellfish farming debris, and farming infrastructure such as rafts and the location of farming leases. A PowerPoint slide presentation provided to Golder by the Association for Denman Island Marine Steward’s (ADIMS) provided additional information on the extent of farming, images of the use of predator netting (not observable during the site visit), their environmental concerns related to beach modification, impacts to wildlife, the extent of farming debris and their concerns related to the industrialization of the shellfish farming and its impacts on the Sound’s ecological functions.

Golder also visited the Deep Bay Marine Field Station which is concerned with the area’s marine ecology and provides information on the practices and interests of the shellfish industry.

¹ E-mail from Courtney Simpson, Acting Regional Planning Manager, Islands Trust Northern Office, dated February 5, 2013.



2.2 Local Trust Committee Existing Policy & Land Use Bylaw Summary

The Islands Trust Policy Statement provides policy direction in two relevant areas: Ecosystem Preservation and Protection (Part III) and Stewardship of Resources (Part IV). Subsections 3.4.2 through 3.4.5 of the former speak to the importance of protecting marine areas and adopting coastal zone management principles in consultation with all relevant agencies, governments, property owners and occupiers. Official community plans and regulatory bylaws are used to support and implement this policy direction and to address development and municipal operations such that they are carried out in a way that minimizes the impact on sensitive coastal areas. Subsections 4.5.1 through 4.5.7 of the bylaw, Stewardship of Resources, recognizes aquaculture is a valuable activity, provided that it is compatible with maintenance of ecosystems and community character. It is also evident to Golder that the conservation of ecological values is one aspect of “community character” of Denman Island. The policies provide direction with respect to aquaculture activities, provided they do not interfere with natural coastal processes, restrict public access, are directed away from areas of recreational significance, conflict with established or designated upland uses, and do not result in site alteration. A staff report, to the Local Trust Committee, dated March 13, 2012, provides further detail.

Consistent with the Islands Trust Policy Statement, Section C.3 of the Official Community Plan for Denman Island identifies objectives and policies related to the marine environment. Objective 8 recognizes that aquaculture is a valuable activity in the Trust area if compatible with maintenance of ecosystems and community character, practiced in a low impact, environmentally sound manner and encourages the employment of island residents in the industry. Policies 4 & 5 were added in 2010 to address shoreline management including the potential future adoption of a Marine Shorelines Development Permit Area. The policies envision the use of zoning and the use of setbacks and, where there is supporting mapping, the use of development permit areas to:

- Protect the integrity of the foreshore, shoreline, and natural coastal and intertidal processes;
- To discourage filling, deposition, excavation, or removal of foreshore and seabed materials;
- To discourage uses that disrupt natural features and processes;
- To allow for natural erosion and accretion processes, without endangering structures;
- Encourage owners of shoreline properties to retain, whenever possible, natural vegetation and natural features on areas adjacent to the foreshore; and
- To discourage filling, deposition, excavation, or removal of foreshore and seabed materials, except for maintenance of navigational channels and existing facilities.

Advocacy Policy 2, encourages Fisheries and Oceans Canada (DFO) to monitor aquaculture practices to ensure compliance with regulations intended to protect the marine environment, protect hearing spawning areas; and to prevent the discharge of sewage from private and commercial vessels traveling in Baynes sound or Lambert Channel.

Advocacy Policy 3 encourages the Ministry of Agriculture and Lands to give prior notification to the local trust committee and adjacent upland owners when existing aquaculture tenures come up for renewal, and to increase dialogue on agriculture practices and community interests with the Local Trust Committee through a community engagement program.



The Denman Island Land Use Bylaw (LUB) establishes the Water 3 Zone to cover areas of aquaculture leases current at the date of adoption of the bylaw. The intent of this zoning is to require that any new or expanded aquaculture operations apply for rezoning.

Staff noted in its review of policies and regulations regarding the impacts of shellfish farming on the marine environment (report of March 13, 2012), that they did not believe that the shellfish aquaculture industry, Integrated Land Management Bureau (ILMB) of the Province, or DFO would support any land use regulations requiring the removal of predator netting from the beach, restricting driving on the foreshore, or banning beach modification. Staff recommended that, as an alternative to pursuing a specific aquaculture-related land use bylaw to address the concerns of ADIMS, the LTC could instead focus a project on marine shorelands planning pursuant to OCP policies 4 & 5 in section C.3 (the Marine Environment). The project would be supported by strategy 2.3.2 of the 2008 – 2011 Islands Trust Council Strategic Plan: “develop and implement new planning tools for shoreline and Marine protection.” In the words of staff, “such a project would involve reviewing the new shoreline classification mapping for Denman, organizing public education and consultation events on the importance of protecting shoreline area, and potentially adopting a development permit area for marine shorelines.”²

2.3 Stakeholder interests

2.3.1 Association for Denman Island Marine Steward’s

The Association for Denman Island Marine Steward’s (ADIMS) is a citizen’s group that seeks to protect and preserve the Denman Island Shores. It has been active in beach cleanup and advocacy and has made presentations of its concerns to the local trust committee. The group has expressed concern about the industrialization of the shellfish industry in Baynes sound, and is concerned about the extent to which the industry is impacting the environment and local residents. In a presentation made to Golder staff on December 10, 2012, representatives of ADIMS discussed their views on the extent and cumulative effects of the industry, environmental degradation and beach alterations, pollution with respect to noise, smell, and visual elements, hazards, and industry debris.

2.3.2 Aquaculture Shellfish Industry

The BC Shellfish Grower’s Association (BCSGA) is seen as the voice of the shellfish industry and represents 70% of shellfish growers in BC as well as suppliers and service providers to the industry. Their stated mission is:

“To advance the sustainable growth and prosperity of the BC shellfish industry in a global economy by providing leadership, communication and advocacy to members, government, the public and other stakeholders while maintaining and improving the integrity of the marine environment.”

² Staff Report to the Denman Island Local Trust Committee, “Review policies and regulations regarding impacts of shellfish farming on the marine environment,” March 13, 2012



The BCSGA website states that shellfish aquaculture provides over 1,000 full-time jobs in rural and coastal communities and is an economic driver accounting for over \$33 million in farm gate sales yearly.³

The BCSGA has drafted the Code of Practice for Shellfish Farming with the stated intent to:

*“...serve as a guideline to shellfish aquaculture companies to ensure their operations are conducted in a manner that works in concert with the marine environment. The COP [Code of Practice] will provide guidance for addressing and minimizing negative environmental impacts and maximizing positive impacts related to normal farm practices on shellfish aquaculture tenures.”*⁴

The Code recognizes the operational practices of beach modification, predator netting, and vehicle use in the foreshore area as being consistent with relevant regulations:

- 1) **Beach modification** may be necessary to optimize intertidal shellfish production. While modifications vary according to the site, species and culture methods, the following are typical examples of intertidal site preparation: gravelling of substrate, building of berms or raking of debris to optimize production.
- 2) There are a variety of pests and predators that can destroy shellfish crops. Shellfish farmers must ensure that their operational practices are conducted in a manner that minimizes impacts to both terrestrial and aquatic wildlife. **Exclusion is the primary and preferred strategy to minimize damage by predators.** However, improperly secured or damaged netting can prove to be harmful to birds or other marine life.
- 3) Marine vessels and equipment are an integral part of a shellfish operation. Marine vessels are necessary for the safe transport of employees as well as for handling and transporting of product. **Depending on the site, vehicles may also be necessary for the transport of employees, equipment and product over intertidal areas.**⁵

Based on the Code of Practice, the activities which are the subject of this report are integral aspects to the normal operation of a shellfish growing facility and to the extent that bylaws would seek to interfere with these, they could be viewed as being unconstitutional.

2.3.3 Fisheries and Oceans Canada

Under the *Fisheries Act* and in accordance with the *Constitution Act (1867)* the federal government (as represented by DFO) has ultimate jurisdiction over all fisheries, including aquaculture shellfish farming. Shellfish farming has been determined by the courts to be a fishery (Morton Decision). DFO regulates the aquaculture industry in British Columbia, including marine finfish, shellfish and freshwater operations, but not marine plants.

A DFO Conservation and Protection (C&P) unit has been created under the BC Aquaculture Regulatory Program (BCARP), with the primary role of enforcing compliance with the *Fisheries Act* and the new *Pacific Aquaculture Regulations* for aquaculture operations.

³ BCSGA website. Retrieved February 12, 2013 at <http://bcsga.ca/>

⁴ Code of Practice for Shellfish Farming, 2002, p. 2.

⁵ Ibid; pp. 3, 4, & 13.



2.3.4 Province of BC

The Province of BC has interests in the strategic development of the aquaculture industry, managing the aquaculture sector and in interacting with the federal government on licensing and tenure matters. Additional details on responsibilities are provided in the following sections.

2.4 Overview of Government Roles and Regulatory Authority

Jurisdiction over coastal areas in BC is split among federal, provincial and local governments, with some variation depending on the location along the coast and the relationship to the shore. All of BC's coast is subject to aboriginal claims based on traditional use by First Nations.⁶ At a high level, the federal government is responsible for seacoast and inland fisheries, while the provinces are responsible for the management of lands. One area of underlying ecological overlap is that a component of fish habitat (e.g., riparian vegetation) grows on land. The riparian vegetation is part of fish habitat and DFO can have a say over the vegetation, so long as their intervention does not transgress into the constitutional domain of the provinces (land management). This situation has been approached through collaborative efforts at stewardship and local governments have been playing a "front line" role in conserving the ecological uses of riparian zones through development processes, environmentally sensitive areas and various other mechanisms. Overall, the outcome of such collaboration has been beneficial to environmental stewardship as well as to community sustainability and even property values.

The following descriptions of government roles are adapted from the Green Shores publication series⁷.

2.4.1 The Provincial Government

According to provincial publications, the Province of BC owns most of the foreshore (the area between the low water level and the natural boundary)⁸ as well as the beds of inland seas such as the Strait of Georgia, Juan de Fuca Strait and Johnstone Strait. These are Provincial Crown⁹ lands. The Integrated Land Management Bureau administers these aquatic lands and issues permits, licences or leases for a wide range of uses – private and public moorage, wharves, marinas, and log storage to name a few. The Province also establishes regional coastal zone plans where these are needed.¹⁰ Following the 2009 BC Supreme Court decision on fisheries jurisdiction, the province no longer issues licenses for aquaculture farming. Additional detail is provided in the section on "Removal of Predator Netting from the Beach."

Prior to the BC Supreme Court ruling of February 2009, which affirmed all jurisdiction for fisheries in the hands of the federal government and asserted that aquaculture is a fishery, BC's Right to Farm act covered **shellfish aquaculture** activities. The Act still applies to **plant aquaculture**¹¹. The Right to Farm Act expressly states that farmers are not liable for nuisance due to normal farming practices such as odour, noise, dust, and disturbance.¹² It does not exempt them from compliance with other legislation such as the *Fisheries Act*.

⁶ Province of BC, Coastal Shore Stewardship: A Guide for Planners, Builders, and Developers on Canada's Pacific Coast, p. 36.

⁷ Ibid.

⁸ The common definition of natural boundary is "the visible high water mark of any lake, stream, or other body of water where the presence and action of the water are so common and usual and so long continued in all ordinary years as to mark upon the soil of the bed of the lake, river stream, or other body of water a character distinct from that of the banks, both in vegetation and in the nature of the soil itself" (BC Land Act). In marine systems, the natural boundary is generally determined as the lower elevation of terrestrial vegetation or the upper boundary of distinctive aquatic vegetation.

⁹ Crown land is a general term for all lands or lands covered by water that are not privately owned and remain in public ownership with either the federal or provincial government. In BC, the vast majority of Crown land (94% of all land in the Province) lies with the Province. When an individual or organization wishes to these lands, the Province may agree to enter into a tenure agreement to lease the land for a certain purpose over a set period of time.

¹⁰ Green Shores Series, Province of BC, Issues sheet, 2009.

¹¹ <http://www.al.gov.bc.ca/fisheries/>

¹² Farm Practices Protection (Right to Farm) Act RSBC (1996] CHAPTER 131. Retrieved on February 13, 2013 at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96131_01



Golder notes that matters respecting ownership of the seabed are complex and there is considerable variation from location to location. For instance, there are portions of the Burrard Inlet seabed that are under private ownership. Additional complexity is added to this issue where ownership of waterlots is concerned. In the event that it becomes important to identify specific ownership at a given site, title should be established at that time.

2.4.2 The Federal Government

The federal government has jurisdiction over the seacoast and inland fisheries— from seaward of the low water mark. The DFO is responsible for managing and protecting fish populations and fish habitat under the *Fisheries Act*, including shoreline riparian habitats (but not the land), as well as for maintaining maritime safety through the Coast Guard. Transport Canada is responsible for preserving the public right of navigation under the *Navigable Waters Protection Act*¹³. The DFO has final jurisdiction and oversight of all fisheries in accordance with the *Constitution Act (1867)*.

2.4.2.1 Shellfish Aquaculture License Conditions

DFO's Shellfish Aquaculture License Conditions define "Aquaculture activities" to include the seeding, culturing and harvesting of fish (the term "fish" has a broad definition under federal law; it is not limited to finfish), the operation of machinery including vehicles and vessels, the installation of structures and anchors and the maintenance of machinery, structures and equipment.¹⁴

Aquaculture license condition 9.4 anticipates **predator exclusion devices (netting)**, stating that "The licence holder shall confine predator exclusion devices (netting) to the licensed area."

It further provides for the appropriate use of exclusion devices and the prohibition against dredging, infilling, or redistribution of native beach materials.

9.5 The license holder shall ensure that when predator exclusion devices are approved in a shellfish site management plan:

(a) Predator exclusion devices are constructed of an acceptable material and of acceptable size to minimize entrapment and potential injury to fish species or wildlife; and

(b) Predator exclusion devices are maintained, inspected and repaired on a regular basis.

10.1 Dredging, infilling or redistribution of native beach materials is prohibited by this license, unless expressly approved in the DFO-approved site management plan.

2.4.3 Local Governments

Local governments (municipalities, Islands Trust local trust committees, and regional districts) hold the authority to plan and regulate land use within their respective boundaries, which may extend over foreshore and nearshore areas. They do this through official community plans, zoning, development permits, subdivision authority, building permits, and a variety of regulatory bylaws that affect land development.¹⁵

¹³ Green Shores Series, Province of BC, Issues sheet, 2009.

¹⁴ Shellfish Aquaculture License Under the Pacific Aquaculture Regulations 2012

¹⁵ Stewardship Series



Their powers are defined under BC's *Local Government Act* and as of December 2003, under the *Community Charter for Municipalities*. As such, local governments can have significant influence on land based activities that affect coastal shores and nearshore areas. These planning and regulatory powers also extend to areas covered by water. The *Local Government Act* defines land to include "the surface of water," and states that municipal boundaries can include "the whole or part of adjoining foreshore and any area below low water mark." This implies that the power to plan, zone and permit land uses covers freshwater bodies and marine foreshore and nearshore areas. Many local governments extend zoning into nearshore areas.¹⁶ Water zoning usually addresses such matters as whether and to what dimensions docks may be constructed to serve abutting upland properties, whether vessels moored or docked in the zone may be used as residential accommodation, and so forth.¹⁷ Lessees of the federal crown are not bound by local zoning bylaws, but those of the provincial crown are¹⁸.

3.0 REMOVAL OF PREDATOR NETTING FROM THE BEACH

3.1 Regulatory Authority

Predator netting within the foreshore (referenced by the Local Trust Committee as "the beach") is part of the operational management of a shellfish aquaculture operation. The practices of shellfish aquaculture are overseen and administered by DFO. Aquaculture is deemed a fishery and a matter of exclusive federal jurisdiction. In February 2009, the BC Supreme Court ruled that marine finfish aquaculture on the coast of BC is a fishery and a matter of exclusive federal jurisdiction under the *Constitution Act [1867]*.^{19 20} This ruling is known as the "Morton decision." The Court ordered that the existing regulatory framework stay in place for 12 months after which sections of the *BC Fisheries Act* (power to make regulations for aquaculture), the *Farm Practices Protection (Right to Farm) Act*, and the *Aquaculture Regulation* in its entirety will only have effect as they apply to the cultivation of marine plants.²¹ In December 2010, the federal government assumed regulation of the finfish and shellfish aquaculture industries in BC. However, the provincial government continues to license marine plant cultivation and issue tenures where operations take place on Crown land, and maintains the mandate to protect the provincial public interest in sustainable aquaculture development.²²

In December 2010 the Canada-British Columbia Agreement on Aquaculture Management was signed. This agreement replaced the 1988 Memorandum of Understanding on Aquaculture Development and takes into account the changed jurisdictional picture arising from the Morton Decision. The 2010 Agreement's preamble notes that Canada and BC share the common goal of having an economically, socially and environmentally sustainable aquaculture sector in British Columbia, and that the parties recognize the need to develop collaborative regulatory and management arrangements designed specifically for the province.²³

¹⁶ Stewardship Series

¹⁷ William Buholzer, *British Columbia Planning Law and Practice*, Section 7.6 "The Use of the Surface of Water," LexisNexis, Markham, Ontario.

¹⁸ Ibid.

¹⁹ Department of Oceans and Fisheries Canada (2013). Retrieved February 7, 2013 from <http://www.dfo-mpo.gc.ca/aquaculture/aquDec-20091030-eng.htm>.

²⁰ *Morton v. British Columbia* (Agriculture and Lands), 2009 BCSC 136.

²¹ BC Ministry of Agriculture, Provincial Aquaculture and Commercial Fisheries website, retrieved by Islands Trust staff in 2009.

²² BC Ministry of Agriculture, provincial aquaculture and commercial fisheries website, accessed February 7, 2013, <http://www.al.gov.bc.ca/fisheries/>.

²³ Policy and Practice Report: Aquaculture Regulation in British Columbia, Item 39, pp. 24 & 25, July 28, 2011; forming a portion of the "Cohen Commission" report.



REPORT TO THE DENMAN ISLAND LTC ON LAND USE BYLAW REGULATIONS AND AQUACULTURE

The agreement identifies respective responsibilities, management activities and implementation. It applies to the management of aquaculture in the Province of BC. Specific federal responsibilities include:

- The conservation and protection of fish and fish habitat, proper management and control of fisheries, including aquaculture, and pollution prohibition measures (s. 5.2.1);
- Ensuring that a regulatory regime for the fisheries aspects of aquaculture is in place in British Columbia (s. 5.2.2); and
- Management of federal crown lands and may issue tenures and operating licenses with respect to proposed or existing aquaculture facilities that are located on federal lands (s.5.2.3)

Specific Provincial responsibilities include:

- 5.3.1 The British Columbia Ministry of Agriculture is the lead provincial agency for the strategic **development of the aquaculture industry** in British Columbia and for interacting with Canada on Aquaculture matters;
- 5.3.2 The British Columbia Ministry of Natural Resource Operations is the lead provincial agency for the **management of the aquaculture sector and for interacting with Canada on aquaculture licensing and tenure matters**;

With respect to management activities:

- 6.1 Canada may issue aquaculture licenses under the *Fisheries Act* for all aquaculture activities to be undertaken in the Province of British Columbia;
- 6.2 British Columbia may issue land tenures under the *Land Act* for aquaculture purposes; and
- 6.3 The Parties will make best efforts to harmonize their decision making criteria;²⁴

The passing of bylaws that would be seen to interfere with the normal operation of a shellfish farm may be in conflict with Section 91(12) of the *Constitution Act (1867)* which gives Canada jurisdiction over the seacoast and inland fisheries. On the presumption that an aquaculture operator would view predator nets as a necessary component of their operation (in our view, this is a reasonable inference to draw and is part of the Code of Practice for such operations), it would be in their commercial interests to challenge any bylaws that fetter their operation and it would seem that such bylaws would infringe on areas of federal responsibility (per S.91 [12] of the *Constitution Act [1867]*).

²⁴ BC Aquaculture Regulatory Program, archived materials retrieved from <http://www.dfo-mpo.gc.ca/media/infocus-alaune/2010/04/agreement-entente-eng.htm>, accessed February 13, 2013.



To the extent that the predator nets are causing an issue of public access or other nuisance, a possibility that could be explored is whether or not a sufficient environmental assessment was carried out at the time of the granting of permits (use of the term “permits” here is intended to broadly imply various forms of permits such as permits, licenses, approvals, authorizations, etc.) and whether the scope of the assessment adequately considered the impacts of the operation on others. Review of such details is beyond the scope of Golder’s present assignment and would require access to and detailed review of files and correspondence as well as specialized legal advice. Such files may be accessible through an *Access to Information Act* request. There are examples of permits/authorizations being revoked because of an environmental assessment that did not adequately adhere to the required process; however, there is also the possibility that after expending considerable effort in this regard, it may be determined that the process withstands scrutiny. The details of such an evaluation would require the services of a qualified legal professional.

4.0 BANNING DRIVING ON THE FORESHORE

Driving activity within the foreshore could possibly be regulated through the Land Use Bylaw as a land-use activity in accordance with s. 903 of the *Local Government Act*. While the use of land use bylaws (*i.e.*, zoning) to regulate beach driving is common in the USA, we are not aware of local governments in BC that have exercised their land use regulatory powers to regulate vehicle driving. However, a search was not part of the scope of work carried out here.

Given that shellfish aquaculture license conditions may include the operation of vehicles in the definition of “aquaculture activities”,²⁵ a prohibition against beach driving may be viewed as an extension into matters that are under federal jurisdiction (seacoast and inland fisheries). It would be necessary to regulate in a fashion that discriminates between driving that is necessary for shellfish farming and driving for other purposes. Potentially, it may be necessary to consider alternative means by which a shellfish grower could carry on their operation without driving vehicles on the beach to assist in differentiating necessity for the operation of a shellfish growing facility.

Local government may also control public access points to the beach and thereby discourage driving on the beach for community and land use reasons. The use of gates and other structures that restrict vehicular access while enabling public access (on foot) is commonly used in many areas and such a system could potentially be set up. Legal advice should be sought if this approach is pursued but control of access for reasons of controlling nuisance to residents would seem to be an appropriate basis for enactment of bylaws by local governments and within their reasonable authority.

The use of cooperative, multiparty approaches may result in greater progress with respect to citizen concerns. Depending on site-specific considerations, driving certain types of vehicles on a beach to an extent that results in substrate compression or other modification could result in negative environmental disturbance to the affected area. However, we understand that because aquaculture is deemed to be a fishery, such damage would be incidental to the operation of the fishery, in a manner similar to that of a bottom trawl fishery, where disturbance of the seabed is an inevitable outcome of such a fishery. It is difficult to reconcile the habitat protection function of DFO with a permitting function enabling such an activity in an ongoing basis and we do not attempt to do so here. As noted elsewhere in this report, multiparty approaches can be credited with positive conservation outcomes.

²⁵ Shellfish Aquaculture Licence under the Pacific Aquaculture Regulations 2012, Department of Fisheries and Oceans.



5.0 BANNING BEACH MODIFICATION

Beach modification activities such as the construction of seawalls are prohibited within the zoning setback area for all zones (Section 2.3(3) of the *Denman Island Land Use Bylaw* and presumably similar forms of modification could be restricted in accordance with s. 903 of the *Local Government Act*, provided they do not interfere with any approved aquaculture licenses.

S. 903(1) of Part 26 of the Local Government Act states that a local government may, by bylaw, (c) regulate within a zone the (i) the use of land, buildings and other structures (S.903 (1) (c) (i).

6.0 NON-REGULATORY MECHANISMS

The Stewardship Series publication on Coastal Shores Stewardship jointly published by the Province of BC and the Government of Canada identifies a number of important non-regulatory mechanisms to enhance environmental stewardship.²⁶ Some of the considerations are described briefly below:

Stakeholder Involvement in Community Planning and Regional Growth Strategies

A stakeholder review is useful, either as a part of the primary Official Community Plan process or as a separate, special planning process. It identifies issues that affect planning and management of coastal areas in the community or region. A list of coastal stakeholders may include coastal landowner groups, aquaculture industries, recreational users and conservation organizations as well as regulatory agencies. Institutional stakeholders may include port corporations, harbour authorities, universities and research centres, and regional offices of Fisheries and Oceans Canada and Provincial ministries. The special place and role of First Nations, particularly where natural resources are concerned, must also be recognized.

Planning efforts can focus on strategic actionable items to promote coastal stewardship such as:

- Developing tactics to protect, restore and enhance natural coastal systems
- Providing opportunities for public recreational use and enjoyment of coastal areas.
- Planning for marine oriented industrial and commercial development.
- Planning an integrated coastal strategy with other levels of government.

²⁶ Coastal Shores Stewardship, a component of the Stewardship Series, published jointly by the Province of BC and the Government of Canada, p. 44.



Partnership Policies

Local governments can use intergovernmental agreements and partnerships with nongovernmental organizations to help achieve community goals for coastal areas. For example, these could be used to:

- Coordinate inventory and shore mapping with the provincial Coastal Management and Planning Office, the Conservation Data Centre, and others;
- Develop awareness of best management practices, and run workshops for agencies, developers, waterfront landowners, NGOs and staff; and
- Establish a Coastal Zone Technical Committee.

Partnerships can lead to collaboration in developing Environmental Management Programs such as the Little Qualicum River Estuary Regional Conservation Area 2010-2019 or such as collaboration between the Regional District of Nanaimo, Department of Fisheries and Oceans, BC Ministry of the Environment, and Ducks Unlimited²⁷. Such programs enable a broader range of issues to form the basis of decision making and provide a forum to identify areas where research of alternatives may be necessary or desired.

7.0 FINDINGS

- 1) Enacting Denman Island Land Use Bylaw regulations to address shellfish aquaculture predator netting may be an intrusion into areas of federal jurisdiction. If that is the case, such bylaws, if challenged could be determined to be unconstitutional. Legal advice in this regard is necessary.
- 2) There may be jurisdiction under the *Islands Trust Act* and *Local Government Act* to ban or restrict driving on the foreshore through the *Land Use Bylaw* provided such regulation is clearly designed to address those areas within local government jurisdiction. This may preclude operation of motor vehicles lawfully associated with shellfish aquaculture operations.
- 3) The spatial extent of motor vehicle use and access for the purpose of aquaculture operations should be reviewed in the context of the spatial bounds of the permits and approvals under which that operation is subject. This evaluation should identify if vehicle use is occurring outside the “four corners” of approval documents.
- 4) Beach modification activities such as the construction of seawalls are prohibited within the zoning setback area for all zones (Section 2.3(3) of the *Denman Island Land Use Bylaw*) and presumably other forms of modification could be restricted in accordance with s. 903 of the *Local Government Act*, where the footprint of such walls is on land under provincial jurisdiction, as the management of lands (with the exception of federally-owned lands) is within the constitutional jurisdiction of the Provinces.
- 5) There is the possibility that the review process under which licenses were granted may have fallen short of the necessary scope of review, particularly as many aquaculture operations were originally licensed provincially, prior to the Morton Decision. There are examples where permits have been rescinded because of lack of diligence in process. It was beyond our scope to evaluate whether this was the case at Denman Island and whether such opportunity might exist would be a matter for a legal professional.

²⁷ Little Qualicum River Estuary Regional Conservation Area 2010-2019, Regional District of Nanaimo, retrieved February 13, 2012 at [PDF] LQRERCA Management Plan - Regional District of Nanaimo www.rdn.bc.ca/cms/wpattachments/wplD2040atID3337.pdf



8.0 RECOMMENDATIONS

- 1) We recommend multi-party engagement to address social, environmental, enforcement and farming issues. These may possibly be conducted in cooperation with the Association of Vancouver Island Coastal Communities, or other suitable parties/mechanisms. It is anticipated that Fisheries and Oceans Canada will need to participate in a multi-party strategy as they hold the legal authority that would be needed to bring about changes to the three main areas of concern addressed in this document.
- 2) We recommend consideration of a Development Permit Area for marine shorelines under S. 919.1 of the *Local Government Act* for “protection of the natural environment, its ecosystems, and biological diversity.” A well-crafted set of guidelines could steer clear of any conflict with the federal *Fisheries Act* and existing shellfish aquaculture license provisions. As staff have pointed out in their report of March 13, 2012 to the Denman Island Local Trust Committee, such guidelines for new development “would provide an opportunity to organize public education and consultation events on the importance of protecting the shoreline area.”²⁸
- 3) We recommend that the Local Trust Committee engage a legal expert to review, evaluate the propriety of and prepare changes to the *Land Use Bylaw* to address driving on the beach and beach modification in a manner that does not interfere with the constitutional jurisdiction of Canada in managing the shellfish aquaculture licenses.

²⁸ Staff Report to the Denman Island Local Trust Committee, “Review policies and regulations regarding impacts of shellfish farming on the marine environment,” March 13, 2012.



9.0 CLOSURE

We trust that the information contained in this report meets your present requirements. Please contact us if you have any questions or concerns regarding the above.

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