



STAFF REPORT

Date: May 27, 2013

File No.: DE 6500-02

To: Denman Island Local Trust Committee
For meeting of June 4, 2013

From: Aleksandra Brzozowski
Island Planner

CC: Courtney Simpson, Regional Planning Manager
Rob Milne, Island Planner

Re: Review of policies and regulations regarding impacts of shellfish farming on the marine environment

Owner: Local Trust Committee initiated project

THE PROPOSAL:

The first priority on the Denman Island Local Trust Committee (LTC) work program is a review of policies and regulations regarding impacts of shellfish farming on the marine environment. The Association of Denman Island Marine Stewards (ADIMS) has advocated for the LTC to review the Official Community Plan (OCP) and Land Use Bylaw (LUB) in order to amend policies to better protect the marine environment from the impacts of shellfish farming. ADIMS has identified the following three actions as the highest priorities:

- Removal of predator netting from the beach
- Banning driving on the foreshore
- Banning beach modification

A preliminary report at the April 3, 2012 LTC meeting provided background information. A second report at the February 26, 2013 meeting presented further information on the extent of the LTC's authority to regulate activities that negatively impact the marine environment in Baynes Sound.

At its regular business meeting of February 26, 2013, the LTC passed the following resolution:

DE-009-2013

It was **MOVED** and **SECONDED** that the Denman Island Local Trust Committee request staff to draft amendments to Bylaw No. 186 which would restrict all structures in the W3 Zone and to add amendments which ban vehicular driving on the foreshore in the W3 Zone.

The purpose of this staff report is to provide discussion on draft language for potential amendments to Bylaw No. 186, the Denman Island Land Use Bylaw.

SITE CONTEXT:

Shellfish aquaculture activity in the Denman Local Trust Area is located in Baynes Sound, between Vancouver Island and Denman Island bordered to the north by Comox Harbour and to the South by Deep Bay.

Aquaculture tenures in the Denman Island Planning Area are designated in the LUB as Water 3 – Aquaculture zones. Shellfish Aquaculture licenses are granted by the Department of Fisheries and Oceans.

CURRENT PLANNING STATUS OF SUBJECT LANDS:

The Denman Island Land Use Bylaw is currently silent on vehicular use on the foreshore and the use of predator netting. Please refer to the staff report presented at the April 3, 2012 LTC meeting for further information on other relevant current planning policy.

DISCUSSION ON A PROPOSED AMENDMENT REGARDING PREDATOR NETTING

Predator netting is a plastic netting used to cover clam beds to protect them from predators such as crabs, snails, and birds. The typical practice is to remove this netting for harvest, however a significant amount of predator netting is unmaintained, poorly secured, and discarded, creating a hazard for fish, animals, birds, boats and swimmers.

As predator nets are typically staked into the ocean floor, it was suggested that predator netting could be regulated as a structure. Staff drafted language for an amendment to the Denman Island Land Use Bylaw that would exclude structures accessory to permitted uses in the Water 3 zone.

Based on legal advice, it is the position of staff that it is unlikely that the definition of *structure* could encompass predator netting and that if the LTC wished to pursue regulation relating to predator netting, it would be necessary to regulate it through the definition of permitted use rather than as a structure. In this case, shellfish aquaculture use would be re-defined as excluding the use of predator netting. However, enforcing such a re-definition would meet with difficulties once matters of jurisdiction were considered, as explained below.

Permitted Use of Predator Netting in Aquaculture Tenures

The Department of Fisheries and Oceans grants Shellfish Aquaculture licenses, and licensees are required to abide by the agency's Pacific Aquaculture Regulations. These regulations include a section on the use of predator netting, as follows:

Shellfish Aquaculture Licence Under the Pacific Aquaculture Regulations 2012

PART B. General Licence Conditions

9 Predator Control

9.4 The licence holder shall confine predator exclusion devices (netting) to the licensed area.

9.5 The licence 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.

Prohibiting the use of predator netting through local regulation would be found to be an intrusion into exclusive federal jurisdiction over fisheries and would not be enforceable.

DISCUSSION ON A PROPOSED AMENDMENT PROHIBITING DRIVING ON THE FORESHORE

Aquaculture operators often use vehicles to reach their intertidal leases and deliver equipment and supplies directly to the site. The Baynes Sound Coastal Plan for Shellfish Aquaculture, 2002, identifies that driving on the beach has the potential for significant environmental impacts in some cases, and that mitigation may be required.

Staff drafted the following language for an amendment to the Denman Island Land Use Bylaw that would prohibit the use of ground-based machinery in all water zones: *“In the water zones, use of ground-based machinery is prohibited along the foreshore.”*

Staff chose the term “ground-based machinery” as it is an existing term in the Denman Island Land Use Bylaw that comprises a broader definition than only vehicles. *Ground-based machinery* is defined as “powered vehicles that move by means of wheels or tracks in contact with the ground including trucks, skidders, loaders, excavators, backhoes, and tractors”.

Permitted Uses in Aquaculture Tenures

Within Section 10 (“Protection of Fish Habitat”) of its Conditions of License for Shellfish Aquaculture Licenses, the Department of Fisheries and Oceans requires licensees to operate machinery “in a manner that minimizes disturbance to the intertidal areas and other fish habitat”. This condition addresses only the aquaculture tenure itself; however, such authorization of machinery operation as part of an aquaculture tenure (which is exclusively under federal jurisdiction) would render unenforceable a local bylaw prohibiting their use to access the tenure site.

Upon advice from legal counsel, a prohibition of vehicles on the foreshore could be worded in the Denman Island Land Use Bylaw as follows: “In water zones, the use of vehicles and ground-based machinery is prohibited except where specifically authorized by an aquaculture license issued by the Department of Fisheries and Oceans.” Such a regulation would therefore not address the concerns brought forward regarding driving on the foreshore, and would be only marginally effective at addressing the negative impacts created by shellfish aquaculture practices.

Implications on Bylaw Enforcement

Enforcement of a prohibition of vehicle and ground-based machinery use in the Water zones would be particularly onerous, not only due to their mobility and transitory nature, but also as it would be difficult to quickly ascertain whether use of the powered vehicle in question was authorized by the federal government as part of a DFO Shellfish Aquaculture License.

STAFF COMMENTS:

Based on legal advice, it is staff’s opinion that the prohibition of predator netting in the Denman Island Land Use Bylaw is not within the LTC’s jurisdiction and is therefore not recommended.

Note that discarded and/or detached predator nets are in contravention of condition 9.5(b) of the Pacific Aquaculture Regulations (2012). In lieu of attempting to prohibit predator netting through regulatory means, engaging with the Department of Fisheries and Oceans on this matter could be a more effective approach in curbing the misuse of predator netting on aquaculture tenures in Baynes Sound. Advocacy on this matter squarely falls in line with the Denman Island OCP's Marine Environment Advocacy Policy 2, which includes the assertion that "Fisheries and Oceans Canada is encouraged to monitor aquaculture practices to ensure compliance with regulations intended to protect the marine environment".

The LTC could also advocate that the Department of Fisheries and Oceans review their policies and standards on the authorization of predator netting. This would also be consistent with the Islands Trust Policy Statement, in particular Part III Ecosystem Preservation and Protection, Policy 3.1.9, which states that Trust Council encourages actions and programs of other government agencies which:

- place priority on the side of protection for Trust Area ecosystems when judgment must be exercised,
- protect the diversity of native species and habitats in the Trust Area, and
- prevent pollution of the air, land and fresh and marine waters of the Trust Area.

A bylaw amending the LUB to prohibit ground-based machinery in the Water zones could be considered by the LTC, as such regulation is within its authority, excepting the use of ground-based machinery granted access by the conditions of a DFO aquaculture license. However, the LTC should recognize that such a regulation would be one made as a matter of principle rather than a pragmatic method to mitigate negative impacts on the foreshore, and would be an onerous regulation for bylaw enforcement and enforceability would be limited. Staff does not recommend this option as it would be of little effect.

Should the LTC choose to prohibit ground-based machinery in the Water zones, the LTC may wish to explore options to facilitate Islands Trust enforcement of such a regulation. One option would be to request that the Department of Fisheries and Oceans establish a demarcation system (such as a vehicle sticker) that would readily identify authorized ground-based machinery.

Should the LTC choose not to prohibit ground-based machinery in the Water zones, the LTC may wish to explore advocating for a review of access conditions in Baynes Sound, potentially restricting vehicular access to aquaculture tenures in the area.

RECOMMENDATIONS:

Based on the above considerations, staff recommends THAT the Denman Island LTC:

- 1) Assess the implications of amending the Denman Island Land Use Bylaw to prohibit ground-based machinery in the Water zones; and,
- 2) Request staff to propose strategies to engage the Department of Fisheries and Oceans around the subject of stricter monitoring and enforcement of predator netting requirements in the short term, and a review regarding permitted use of predator netting in their Pacific Aquaculture Regulations over the long term.

Prepared and Submitted by:

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May 10, 2013

Date

Concurred in by:

Courtney Simpson

May 27, 2013

Date