Aquaculture Regulation in the Post Doelle-Lahey Era: An Analysis of Nova Scotia's New Regulatory Framework

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1.0 Introduction

In response to the Report of the Independent Aquaculture Regulatory Review Panel (the 'Doelle-Lahey Report') and a commitment to implement the recommendations of the Report, the government of Nova Scotia released new Regulations under the *Fisheries and Coastal Resources Act* (FCRA). These Regulations come after a two-year moratorium on new aquaculture applications and an expectation by industry that the moratorium will be imminently lifted.

In this Report ECELAW staff lawyer, Lisa Mitchell, and executive director, Aaron Ward, analyze some of the key provisions of the new Aquaculture Lease and Licensing Regulations (ALLR) and the Aquaculture Management Regulations (AMR) and consider how the government's approach compares to the Doelle-Lahey recommendations.

The new approach is an improvement from the former regulatory framework. The new Regulations introduce third party auditing, enhanced reporting requirements, mandatory farm management plans and mandatory public notice and public hearings for some applications. These changes will lead to some practical improvements in site management and in accountability.

The new regulatory approach to aquaculture, however, falls far short of the Doelle-Lahey recommendations and does not reflect government's own commitment to oversight, transparency and trust:

> "Today we're beginning the process to implement the advice we received in the recent Doelle Lahey report," said Fisheries and Aquaculture Minister Keith Colwell. "We need stronger oversight and to release information more proactively, and this is the first step to make that a reality and build trust between the public, government and the industry."[1]

Despite calls by many for the transfer of responsibility for aquaculture out of the Department of Fisheries and Aquaculture and into the Department of Environment, the Doelle-Lahey Report recommended that the regulation of aquaculture remain with the Department of Fisheries and Aquaculture, but **only if** the recommendations in the Doelle-Lahey Report were fully implemented.

[1] DFA news release, April 21, 2015 novascotia.ca/news/release/?id=20150421002

In the opening paragraph of the section of the Doelle-Lahey Report entitled 'Restructuring the Administration of the Regulatory Framework', the Report highlights three vital themes that must be in place to legitimize continued regulation by the DFA:

> While we conclude that the regulatory framework should continue to be administered by and on behalf of the Minister of Fisheries and Aquaculture, we also conclude that important changes need to be made to how the regulatory framework is administered by DFA to address legitimate concerns about its independence, objectivity, dependability and effectiveness. The changes required include much greater levels of openness, transparency and clarity; a transfer of responsibility for the monitoring component of the Environmental Monitoring Program to the Department of Environment; and legislative changes that reduce the regulatory process's dependency on ministerial discretion (at p. 48).

The ECELAW analysis finds a regulatory framework that is a skeleton that follows the basic approach put forward by Doelle-Lahey but lacks substance in key areas of planning, transparency, and effectively addressing Ministerial discretion.

2.0 Overarching Principles for Environmental Impact Assessment

In 2012, amendments to the federal *Canadian Environmental Assessment Act* virtually eliminated federal environmental impact assessment for marine aquaculture. The province of Nova Scotia relied on the federal assessment process to consider the environmental impacts of aquaculture operations. This huge gap in assessment was recognized by the Doelle-Lahey Panel and is reflected in their vision of an aquaculture lease and licensing process that ensures biophysical and socio-economic impacts are properly and openly considered.

> "The licensing process should in other words be conducted as a kind of specialized environmental assessment" (at p. xvii)

The Doelle-Lahey Report recommended that the licensing process include principles to guide the aquaculture assessment and that these principles be based on six key areas. The ALLR pick up on this in section 3, entitled 'Factors to be Considered in Decisions related to Marine Aquaculture Sites.' The table below compares the six areas identified in the Doelle-Lahey Report with the ALLR section 3 factors to be considered.

Doelle-Lahey Report (at p. xvii)	ALLR (at s.3)
Compatibility with pubic rights of navigation	The public right of navigation.
Compatibility with fisheries activities, including lobster fishery	Fishery activities in the public water surrounding the proposed aquaculture operation.
Compatibility of the nature and scale of a proposed operation relative to the biophysical oceanographic and community context.	The oceanographic and biophysical characteristics of the public waters surrounding the proposed aquacultural operation.
Compatibility with the activities of other users or beneficiaries of the public waters in question.	The other users of the public waters surrounding the proposed aquacultural operation.
Responsiveness to the cumulative effect of aquaculture in the area.	The number and productivity of other aquaculture sites in the public waters surrounding the proposed aqua cultural operation.
Contribution of the proposed project to net community socio-economic effects.	The contribution of the proposed operation to community and Provincial economic development.
	The sustainability of wild salmon.
	The optimum use of marine resources.

At first blush the lists look the same, but closer examination identifies some notable differences. The approach outlined in the Doelle-Lahey Report focuses on assessing 'compatibility' requiring the decision-maker to consider the balance of a baseline scenario with the proposed new operation. The ALLR does not reflect this balance but merely requires that the existence of these factors be considered before making a decision.

Further, the Doelle-Lahey Report specifically states that the assessment must be responsive to the 'cumulative effect' of aquaculture in the area. To properly consider cumulative effects the decision-maker must look beyond the proposed operation to consider the impacts of all aquaculture in the area. The ALLR avoids the cumulative effects language altogether, requiring only that the decision-maker consider that other aquaculture operations exists.

Finally, the Doelle-Lahey Report focuses on 'net community socio-economic' effects. This requires broad consideration of community impacts and seeks a demonstration of a net positive contribution to the community. The ALLR has taken a very different approach focused only on the contribution of the new project to economic development without consideration of the broader socio-economic effects. Additionally, the ALLR dilutes consideration of community impacts by including contribution to provincial economic development in the same factor.

These differences may appear subtle, but the net effect is significant. Not only is the decision-maker guided by the section 3 factors, but also members of the public seeking to comment on an application for a proposed aquaculture operation are restricted to commenting on the section 3 factors only. The interpretation is not clear but it remains to be seen if cumulative impacts and socio-economic impacts will be considered under the ALLR.

3.0 The Option to Lease

The Option to Lease was recommended by the Doelle-Lahey Report as a means of ensuring community awareness of a proposed project at an early stage, while at the same time protecting the proponent's interests in a particular site (DLR p.88-89).

The ALLR introduces the Option to Lease requirement (ALLR ss. 4-9) in a way similar to the Doelle-Lahey Report recommendations. The Minister is required to notify members of the public 'as soon as reasonably possible' (ALLR s. 9) and the proponent's option is guaranteed for a minimum of 6 months (ALLR s. 8).

4.0 Pre-Application Scoping Process

The Doelle-Lahey Report recommendation for an open and transparent pre-application scoping process together with a detailed background document (scoping report) serves as a key feature of their recommendations. The Report points out that the value of the pre-application scoping process is in facilitating communication and information sharing between the proponent, communities and the public at an early stage. It is an opportunity for community members to learn about the project and for the proponent to access local knowledge that may be relevant to their decision to move forward with the application (at p. 90).

The ALLR includes a mandatory scoping process as the first step in the application process following the option to lease. However, neither the goal nor the approach recommended by the Doelle-Lahey Report is reflected in the ALLR approach. The

ALLR requires nothing more than one mandatory 'public information meeting.' All other elements of the scoping process are 'to be determined by the Minister.' A scoping process, the details of which are fully at the discretion of the Minister, is counter to the open and transparent approach contemplated by the Doelle-Lahey Report.

5.0 Background Document (Scoping Report)

The consultation process recommended by the Doelle-Lahey Report includes a comprehensive Background Document (Scoping Report). The Background Document would become '…the primary factual foundation for the application' (at p.90). The Doelle-Lahey Report includes a list of key items to be addressed in the Background Document and clearly states that this Document would be available to members of the public.

The key items to be addressed in the Background Document:

- A detailed description of the lease site and operation
- Biophysical conditions of the site
- Overview of activities that may interact cumulatively with the coastal ecosystem
- Presence of endangered species
- Measures proposed by the applicant to reduce environmental impacts
- Overall levels of support for or opposition to the proposed operations
- Community views on several topics including, the location, scale, species, compatibility with existing activities, impacts, benefits, risks, ways to minimize impacts of the operation (at p. 90-91).

The FCRA and ALLR do not require a Background Document. The FCRA and ALLR require the proponent to prepare an application that includes a 'report on the scoping session' and a 'development plan' (FCRA s. 45, ALLR s. 11(2)). The remaining contents of the application are at the discretion of the Minister (FCRA s. 46). The criteria for the development plan are also at the discretion of the Minister.

To summarize, the Doelle-Lahey Report includes detailed recommendation for a pre-application scoping session and background document. The ALLR implementation of these recommendations includes one mandatory 'public information session' and a 'report on the scoping session' provided to the Minister. The criteria for the information session and the report are at the discretion of the Minister and the ALLR make no mention of public access to any of the information.

6.0 Screening Phase

The pre-application scoping process and the creation of the Background Document are part of an early screening phase recommended by the Doelle-Lahey Report. In essence the screening phase would enable an initial review of the proposal, including opportunities for public consultation and comment. The Doelle-Lahey Report recommended the Administrator have the authority, following the screening phase, to seek more information from the proponent, allow the proposal to move forward to assessment or reject the proposal with reasons (at p. 92).

The government's regulatory approach ignores the screening phase. Every application for a lease or license proceeds to an Administrator or Review Board regardless of the information received during the pre-application scoping session (FCRA s. 47).

7.0 Public Hearings and Decisions

The Doelle-Lahey Report recommended public hearings to be part of the application process for all licenses (at p. 93). The hearings would be administrative or adjudicative. Only adjudicative hearings would follow a formal hearing process and take place in person. Regardless of the type of hearing, the Report recommended the following:

- All participants have access to the same information.
- Participants have the opportunity to present submissions subject only to relevance and reasonable limits.

The ALLR contemplates the creation of 'aquaculture development areas' in the province (see below). Only an original aquaculture lease or license application or significant amendment for a marine site outside of an aquaculture development area must proceed by way of adjudicative hearing. Other applications proceed by way of Administrative decision (ALLR s. 38).

The ALLR approach to the adjudicative and administrative hearings meets with the recommendations of the Doelle-Lahey Report in that it includes an independent review panel (or Administrator), timelines, public notice and public input. Where the ALLR process moves away from the Doelle-Lahey Report recommendations is in the area of openness and transparency. As described above, the ALLR does not specifically speak to the release of any of the documents developed by the proponent, including the application, the summary of the scoping session document, or the development plan. The public notice for the adjudicative hearing includes basic information such as the location of the site and the species. The public may receive additional information at the

discretion of the Review Board (ALLR s.19). The information is not detailed or guaranteed.

Further, the ALLR approach specifically limits public comment to the factors set out in section 3 of the ALLR (ALLR, ss. 32 and 41). We cannot comment on the interpretation of the section 3 factors, however, there is no clarity on whether members of the public can submit information or comment on cumulative effects or socio-economic impacts.

The ALLR adjudicative hearing process includes a formal intervenor process for persons the Board determines are 'substantially and directly affected' by the hearing. An intervenor is a recognized party to the hearing and is therefore entitled to receive all of the documents received through the hearing (ALLR s. 24). The indication, however, is that these documents would not be made available to the broader public. Further, the ALLR provides no clarification on the criteria that must be met to establish 'substantial and direct effect.'

The final decision on applications is made independent of the Minister through the Review Board or the Administrator. The decisions must be in writing, available on the DFA website and include reasons for the decision. These additions to the regulatory framework match the recommendations of the Doelle-Lahey Report.

8.0 Aquaculture Development Areas

One of the "core recommendations" (at pg. vii) of the Doelle-Lahey Report was the adoption of a classification system under which coastal areas would be assessed and designated as Green, Yellow, or Red based on their relative suitability for finfish aquaculture. Such a system is used in Scotland and is generally viewed as an important element of the regulatory system in that region.

As per the Report (at pgs. 71-79), Green zones would be considered generally suitable for finfish aquaculture and thus should be exposed to a reduced regulatory burden, Red zones would be generally unsuitable, would require very rigorous assessment and would be unlikely to receive a licence, and Yellow zones would occupy the space in between.

According to the Report:

> … the classification of a coastal area would determine how applications for a fin-fish licence would be evaluated and the likelihood of an application for such a licence being approved. It would also play a central role in determining the terms and conditions under which licences would be issued. (at pg. vii)

Unfortunately, the FCRA and the ALLR are silent with regard to implementing this critical classification system and instead draw upon the Minister's power to designate an 'Aquaculture Development Area' (ADA) found in the FCRA. The Minister has had this authority for some time, but it was amended in April 2015 to enable an Administrator to issue an aquaculture lease or licence in an ADA on terms and conditions set by the Administrator (FCRA as amended s.57).

The Minister designates ADAs following consultation with federal and provincial governments and any other person the Minister 'considers necessary' (FCRA s.56).

Once an area has been designated as an ADA the Minister may issue a call for proposals enabling proponents to submit a lease and license application. The criteria to assess the proposals are set by an Administrator who then evaluates the proposals and determines in his or her 'sole discretion' the criteria for selection and which proposals will be selected (ALR at ss. 68-69).

Presumably, these ADAs are intended to be analogous to the Green zones contemplated in the Doelle-Lahey Report. Applications in ADAs do not require an option to lease, a pre-scoping session or a review board hearing (ALLR s. 17). The process is purely administrative with minimal public or community engagement (ALLR at s. 38). What is unclear and of concern is the complete discretion with which the ADAs are established. The Doelle-Lahey Report envisioned an open and transparent strategic environmental assessment process as a means of identifying coastal areas that could be considered Green zones for aquaculture development (at p. 78).

Although not identified specifically as such, it is arguable that the default process for new applications or significant amendments to existing licenses outside of ADAs follow a process which is similar to that suggested for Yellow zones in the Doelle-Lahey Report: a public hearing subject to independent review.

What is most troubling is the lack of corresponding designation in the ALLR of Red zones, in order to counterbalance the decreased regulatory burden of "Green zone" ADAs. There are many areas in Nova Scotia that would likely be unsuitable for marine

finfish aquaculture, including areas that are biophysically improper, pose a danger to an important species such as wild salmon, an established industry, or are proximal to protected lands, such as national parks. These concerns were directly raised in the Doelle-Lahey Report (at p. 76) and yet are all but ignored in the new framework.

In effect, the Regulations have perverted the Doelle-Lahey Report recommendation of a balanced approach to coastal zone management into a potential loophole for industry to avoid fulsome regulatory scrutiny and public participation for a discretionary and as-yet undetermined swath of Nova Scotia's coastline.

In all, the Regulations as proposed regarding ADAs signal a disturbing about-face from core Doelle-Lahey Report principles including public participation, openness and transparency, and limiting discretion.

9.0 Regulatory Transparency

A transparent and open process is necessary for the aquaculture industry to gain social licence and for communities and the public to accept the DFA regulatory framework.

The Doelle-Lahey Report recommended a complete overhaul regarding how information pertaining to aquaculture is stored and shared. Under the former regulatory regime, members of the public who sought information regarding an aquaculture site often had to turn to the *Freedom of Information and Protection of Privacy Act* (FOIPOP), which is fraught with costs and delays and serves to undermine public confidence that the regulatory system was doing its job. For that reason, the Doelle-Lahey Report recommended that:

> "…information relevant to understanding the operation and effectiveness of the regulatory process as it applies to each proposed and approved site should be readily available to the public. This principle should be set out in legislation to ensure that it is binding on the DFA and to ensure that public access to information covered by the principle does not require the making of an application under the Freedom of Information and Protection of Privacy Act (FOIPOP) process." (at p. xiv)

While it was noted in the Doelle-Lahey Report that confidential business information should be excluded from this proactive disclosure, it was stressed that this exception should only apply to a "narrow and precise" (at p. 58) scope of information. There is clearly concern that this exception may be used too broadly, to allow industry to prevent

the release of information that may cast finfish aquaculture in a negative light but is not truly confidential.

Unfortunately, the provisions regarding the release of information in the Regulations fall short of the standard set by the Doelle-Lahey Report. While certain sections of the Regulations provide for proactive disclosure of basic information on the government's website, the vast majority of information pertaining to the regulation of finfish aquaculture in Nova Scotia is not mandated to be disclosed by the statute or regulations. Instead, most information will only be released at the Minister's discretion, or by way of a FOIPOP application.

The Doelle-Lahey Report recommended that the DFA file on each application be open and accessible to members of the public. Amendments to the FCRA in April of 2015 established the aquaculture registry. The aquaculture registry includes licences, leases and information related to reallocation of sites. [2] Although the ALLR provides for certain information to be posted on the DFA website, the Regulations do not require information to be posted in the aquaculture registry.

Section 4 of the AMR sets out the standards for release of information to the public. The decision to release information, the manner in which it is released and the timing of the release is entirely at the discretion of the Minister. Sections 40 to 41 of the AMR are under the heading “Records, Reports and Release of Information, however, there are no provisions on the release of information.

The table below compares the minimum amount of information to be made public as recommended by the Doelle-Lahey Report and the actual amount of information required to be released under the new regulatory framework.

[2] Note that the FCRA also includes a public registry at section 8. Creating the public registry is at the discretion of the Minister, none of the information prescribed the Doelle-Lahey Report is in the registry and all information in the registry is explicitly subject to the Freedom of Information and Protection of Privacy Act.

Doelle-Lahey Report recommended minimum public information	Aquaculture Regulatory Framework actual public information
All information provided by the applicant	
All information in the DFA generated as part of the assessment.	Notice of an option to lease, notice of a hearing, notice inviting comments. Lease and Licence.
All information provided in respect of the application by third parties.	
Conclusions and reasons on application decisions.	Review Board decision. Administrator's decision.
Consideration and decision of any appeal that follows from a decision on a licence or lease	
All data, information and reports prepared by the operator as per the legislation, terms and conditions of a licence or required by an order.	Minimum requirements for farm management plans, but not the actual plans. List of reportable diseases but not disease events.
All inspection reports, warning letters and orders.	
All documents pertaining to complaints received by DFA and response	

Following is a list of items required by the FCRA and Regulations but not identified in the regulatory framework as available to the public:

- Farm management plans
- Quarantine orders
- Mandatory notification of suspected breach of an aquaculture site
- Environmental monitoring plans and reports
- Mitigation plans
- Containment management plans
- Fish health records
- Required laboratory tests
- Mandatory reports of antibiotic use and sea lice treatments
- Reports of mass mortality or knowledge of disease
- Results of mandatory third party audit of containment management
- Certificate of health transfer
- Report of the scoping process

- Application for a lease
- Application for a licence
- Performance reviews
- Report on the outcome of consultations
- Public comments on proposed lease or licence
- Annual reports
- Remediation plans
- Certificate of discharge
- Minister's criteria for selecting a proposal for an aquaculture development area
- Minister's decision to accept a proposal for an aquaculture development area

As demonstrated above, an entire suite of important information regarding the regulation of aquaculture in this province may not be proactively disclosed, despite the clear recommendations made in the Doelle-Lahey Report.

Additionally, sections 8(5) and 19 of the FCRA were recently amended having the effect of exempting certain aspects of veterinary records from the provisions of FOIPOP. While it is unclear going forward exactly what aspects of veterinary records will be released subject to a FOIPOP request by a member of the public, it appears as though it will be impossible for a member of the public to be able to tie a particular veterinary record to a given aquaculture site, unless consented to by the owner of the animal in question. As noted above, confidential business information is already protected from release under FOIPOP. This additional exception to important provincial legislation will only serve to undermine public confidence and participation in the new regulatory system.

Of additional concern is the failure of the new regulatory regime to implement another important aspect of public participation in the regulatory process. The Doelle-Lahey Report sets out a key recommendation regarding the ability, set out in legislation, for a member of the public to apply for the revocation of an aquaculture licence. This request would be considered by the Independent Aquaculture Review Board and only granted in situations where "there is clear evidence of biophysical unsuitability of the site, or where there is a clear pattern of substantial non-compliance with terms and conditions of the licence." (at p. 117).

This recommendation, clearly included to ensure transparency and accountability into the regulatory process, is conspicuously absent from the Regulations. While the Regulations do include enhanced enforcement tools, including the issuance of fines, the public is disappointingly shut out. If Regulations truly seek to create an environment

where finfish aquaculture receives social licence to operate, then this should be considered a missed opportunity.

10.0 Conclusion

The Aquaculture Lease and Licensing Regulations and the Aquaculture Management Regulations are an improvement from the former regulatory framework. At the same time, the Regulations fall far short of the Doelle-Lahey recommendations.

ECELAW urges the Minister of Fisheries and Aquaculture to amend the regulatory framework by fully implementing the recommendations of the Doelle-Lahey Report. A failure to take all Report recommendations seriously threatens the ability for finfish aquaculture to operate with social licence from the people of Nova Scotia, and may result in an atmosphere where public calls for a permanent moratorium are stronger than ever.