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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THURSTON COUNTY

COOKE AQUACULTURE PACIFIC,  
LLC, a Washington limited liability  
company,

Plaintiff,

v.

WASHINGTON STATE DEPARTMENT  
OF NATURAL RESOURCES, and  
HILARY FRANZ, the Washington  
Commissioner of Public Lands,

Defendants.

Case No.

NOTICE OF APPEAL UNDER RCW  
79.02.030 AND COMPLAINT FOR BREACH  
OF THE DUTY OF GOOD FAITH AND  
FAIR DEALING, VIOLATION OF DUE  
PROCESS, AND FOR INJUNCTIVE RELIEF

**I. INTRODUCTION**

1. The Washington State Department of Natural Resources (“DNR”), ignoring science and the need for fresh, locally produced seafood, has engaged in a multi-year and multi-dimensional effort to run one of its tenants out of business. Rather than acting as a rational landlord and a steward of state lands, DNR has cast aside 40 years of fish farming in Washington and well-paid jobs for political favor with certain stakeholders. Such an action is perplexing at best, punitive at worst, and is contrary to science and the direction the Washington State Legislature has given DNR in how to properly manage state lands.

2. Aquaculture is an activity of statewide importance. The Washington Legislature

1 has long recognized the value of utilizing Washington waters for aquaculture, and DNR has a  
2 mandate to encourage the use of Washington waters for food production.

3 3. DNR now seeks to implement by executive action that which the Legislature  
4 declined to: a ban of commercial fish farming in Washington. DNR seeks to accomplish this ban  
5 by forcing Cooke Aquaculture Pacific, LLC (“Cooke”) to abruptly and permanently close its  
6 farms that have operated in Washington for 40 years. DNR seeks to implement this ban  
7 untethered from science and sound policy considerations, both of which demonstrate that fish  
8 farming has minimal impacts to the environment. Copies of those lease application denials are  
9 attached as **Exhibit A** and **Exhibit B**.

10 4. At the peak of production, Cooke’s farms provided 11,500 tons of fresh fish to  
11 local and national markets annually. The farms are an important part of domestic food  
12 production and are desperately needed to curb a massive seafood deficit where 70% of seafood  
13 consumed in the United States is imported.

14 5. Until 2017, DNR had steadfastly managed its lands to balance food production  
15 and its stewardship responsibilities. However, after the collapse of a salmon farm near Cypress  
16 Island, DNR chose to trade these farms for political favor with certain activist stakeholders and  
17 tribes in Washington. In the words of Hilary Franz, the Commissioner of Public Lands, as she  
18 stated to her Chief of Staff in 2018, DNR set out to “bury” Cooke by engaging in a multi-year  
19 politically motivated quest to punish Cooke for the collapse of that salmon farm. These words,  
20 which were said in private but have since been revealed in litigation, show the true punitive  
21 intent of the Commissioner of Public Lands in how she has managed and viewed Cooke’s leases  
22 in Washington.

23 6. The collapse of the farm in 2017 resulted in no damage to wild fish stocks or the  
24 environment. A multi-agency investigation in which DNR participated concluded that the  
25 escaped fish were unable to forage in the wild and died out in the months following the collapse.  
26 This outcome was predicted by many years of scientific studies that showed these domesticated

1 fish fared poorly if they escaped, and as a result have little adverse impacts on the environment.

2 7. Fish farming is unpopular among some environmental groups. Some of  
3 Washington’s tribes are also against fish farming, yet other tribes engage in it or are interested in  
4 farming to further their own sovereign interests and treaty rights. The environmental groups that  
5 do not believe fish farming should occur in Washington aligned with the tribes that opposed fish  
6 farming and conspired with the Commissioner of Public Lands to eliminate these farms. Ignoring  
7 science and the Legislative mandate to manage aquatic lands to produce food, DNR participated  
8 in lobbying the Legislature to ban commercial fish farming entirely during the 2018 legislative  
9 session. The Legislature declined to take such a dramatic step, and instead passed Engrossed  
10 House Bill 2957, Laws of 2018, ch. 179 §§ 1-12, phasing out the farming of non-native species  
11 such as Atlantic salmon, and explicitly allowing the farming of native species.

12 8. Between 2018 and 2022, Washington’s regulatory framework governing fish  
13 farms strengthened, and Cooke welcomed those changes as a steward of the environment seeking to  
14 regain the social license to farm fish in Washington. Cooke embraced voluntary monitoring and  
15 reporting protocols proposed by DNR to increase the transparency of its operations, and  
16 welcomed more stringent permit requirements from the Washington State Department of  
17 Ecology (“Ecology”) and the Washington State Department of Fish and Wildlife (“WDFW”) to  
18 further build public confidence in fish farming in Washington. Cooke has increased monitoring  
19 of water and sediment quality at its farms, and that monitoring—supervised by Ecology—shows  
20 little to no impacts from the farms. Cooke has increased coordination with WDFW regarding fish  
21 health at its farms. And Cooke has engaged third-party engineers to assess its facilities regularly.  
22 Importantly, the results of those assessments were shared with DNR, Ecology, and WDFW.  
23 DNR’s own engineers would independently review the reports, provide feedback on the  
24 conclusions of the engineer, and then DNR would only allow fish to be planted in Cooke’s farms  
25 after DNR’s own engineers were satisfied that the farms were structurally sound.

26 9. In response to the public outcry regarding farming Atlantic salmon in

1 Washington, and HB 2957's phase-out of farming of non-native species, Cooke transitioned its  
2 farms to sterile all-female rainbow trout in 2019. That transition prompted a deep analysis of fish  
3 farming environmental impacts by WDFW, who concluded that, subject to appropriate permit  
4 limitations, the farms did not have the potential to cause significant adverse environmental  
5 impacts. WDFW then issued new permits to Cooke that contained 29 new operating conditions,  
6 which Cooke readily accepted and has since complied with.

7 10. Placed in this context, the decision by DNR not to renew Cooke's leases is not  
8 justified and completely arbitrary. The decision is contrary to DNR's mandate to manage aquatic  
9 lands for the production of food, and is unjustified given the Legislature's recent confirmation  
10 that native species of fish can be farmed in Washington's waters and the extensive work done by  
11 Cooke and state agencies to strengthen the regulatory framework governing such farms.

12 11. DNR's actions are also contrary to science, which DNR ignored when making its  
13 decision not to renew Cooke's leases. A large volume of data exists regarding the lack of  
14 potential negative impacts of fish farms generally, and Cooke's farms in particular.

15 12. In addition to wrongfully denying Cooke's lease renewal applications, DNR's  
16 demands of Cooke to permanently and abruptly close its operations create risk for Cooke, its  
17 employees, and the environment. DNR initially demanded that Cooke remove 360,000 fish and  
18 all of its equipment from the water at both the Rich Passage and Hope Island sites (collectively  
19 four farms) in 30 days. In response to reasonable objections by Cooke, DNR arbitrarily extended  
20 the harvest deadline a month and gave Cooke until April 14, 2023 to remove all the equipment  
21 from the sites. DNR is fully informed that this request is impossible to meet. Cooke has already  
22 lost skilled employees due to DNR's announcement. Its remaining employees must focus on  
23 safely harvesting the remaining fish in its farms while continuing to conduct maintenance,  
24 inspections, and other farming activities. DNR arbitrarily asks Cooke to accelerate harvest and  
25 also start to remove equipment from the water at the same time, which would stress Cooke's  
26 remaining workforce past its breaking point. Cooke explained to DNR that the request created

1 safety risks for its employees and would result in the loss of millions of dollars of revenue  
2 because there was no market for the fish large enough to absorb that sudden harvest. Cooke has  
3 used all commercially reasonable efforts to complete the harvest as quickly as possible, but will  
4 be unable to safely meet the arbitrary deadline imposed by DNR. An accelerated harvest schedule  
5 provides no benefit to the citizens of Washington, and poses safety risks to Cooke's employees  
6 and the environment. The only benefit conferred by this schedule is the Public Lands  
7 Commissioner scoring political points with certain constituencies.

8 13. While DNR deserves deference from the judicial branch when acting as a land  
9 manager, that deference should not extend to the point of this Court looking past DNR's  
10 arbitrary, capricious, punitive, and politically motivated actions to "bury" Cooke. Cooke  
11 respectfully turns to this Court to impose a sense of order, fairness, and rationality to DNR's  
12 management of Cooke's farms.

## 13 II. PARTIES

14 14. Plaintiff Cooke is a Washington limited liability company, formerly known as  
15 Icicle Acquisition Subsidiary, LLC.<sup>1</sup> Prior to 2017, Cooke operated eight farms that were  
16 governed by four leases. Two of those leases, for three farms in Rich Passage and one farm at  
17 Hope Island, are the subject of this Complaint.

18 15. Defendant DNR is an agency of State of Washington. DNR is the state agency  
19 through which the State of Washington leases aquatic lands held in trust by the State of  
20 Washington in a proprietary capacity. DNR leased aquatic lands in Skagit County to Cooke's  
21 predecessor, American Gold Seafoods, LLC through Lease Number 20-B12356 (the "Hope  
22 Island Lease") and in Kitsap County through Lease Number 20-B10237 (the "Rich Passage  
23 Lease").

24 16. Defendant Hilary Franz is the elected Washington Commissioner of Public Lands

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25 <sup>1</sup> In 2016, Icicle Acquisition Subsidiary, LLC was purchased by the Cooke family of companies, and Icicle  
26 Acquisition Subsidiary, LLC's name was changed to Cooke Aquaculture, LLC.

1 (the “Commissioner”). Under RCW 43.30.105, the Commissioner is the administrator of DNR.  
2 All decisions by DNR regarding the purported termination of the lease of aquatic lands described  
3 below were done at her direction and under her control.

### 4 III. JURISDICTION AND VENUE

5 17. This Court has jurisdiction under RCW 79.02.030, RCW 7.24.020, and the  
6 Washington State Constitution.

7 18. Venue is proper in this Court pursuant to RCW 4.92.010(5) because Cooke asserts  
8 claims against DNR, an agency of the state.

### 9 IV. STATEMENT OF THE CASE

#### 10 A. The Washington State Legislature Has Expressed a Consistent Policy Encouraging the 11 Use of Washington Waters for the Production of Food.

12 19. The Washington State Legislature has long encouraged aquaculture as a use of  
13 state waters. Ecology, the agency charged with developing rules to implement the Shoreline  
14 Management Act, RCW ch. 90.58, recognizes that the farming of fish is an “activity of statewide  
15 interest” that can result in long-term benefit to the State of Washington in the form of food  
16 production and revenue generation from state lands. WAC 173-26-241(3)(b).

17 20. The concept of fostering water-dependent uses such as fish farming was also  
18 recognized by the Legislature in passing the Aquatic Lands Act, RCW ch. 79.105, which governs  
19 how DNR manages aquatic lands. Through the Aquatic Lands Act, the Legislature found that  
20 water-dependent industries and activities “have played a major role in the history of the state and  
21 will continue to be important to the future.” RCW 79.105.010. The Legislature directed DNR to  
22 continue to foster these water-dependent uses, to preserve and enhance those uses, and explicitly  
23 directed DNR to manage aquatic lands to produce food. RCW 79.105.030; RCW 79.105.050.

24 21. The need to produce food locally is more acute than ever. In the United States,  
25 over 70% of fish consumed is imported. The seafood trade deficit for the United States is more  
26 than \$11 billion. Wild fish catches cannot meet the projected demand for seafood, so aquaculture

1 is essential to preserving wild fisheries.

2           22. The National Oceanic and Atmospheric Administration (“NOAA”) recently  
3 released its strategic plan for aquaculture<sup>2</sup> in the United States. That plan is intended to “help  
4 achieve a thriving, resilient and inclusive U.S. aquaculture industry as part of a competitive  
5 domestic seafood sector.” That plan specifically acknowledges that aquaculture in the United  
6 States is “[p]roduced responsibly” and that “farmed seafood is good for people, good for the  
7 economy and good for the planet.” NOAA also has acknowledged that domestic aquaculture is  
8 an important factor in ensuring food security in the United States, supports local economies, and  
9 will be “increasingly important as we face a changing climate and uncertain future  
10 environmental conditions.” Fish farming in Washington has played an important role in meeting  
11 these national priorities.

12 **B. History of Fish Farming in Washington State.**

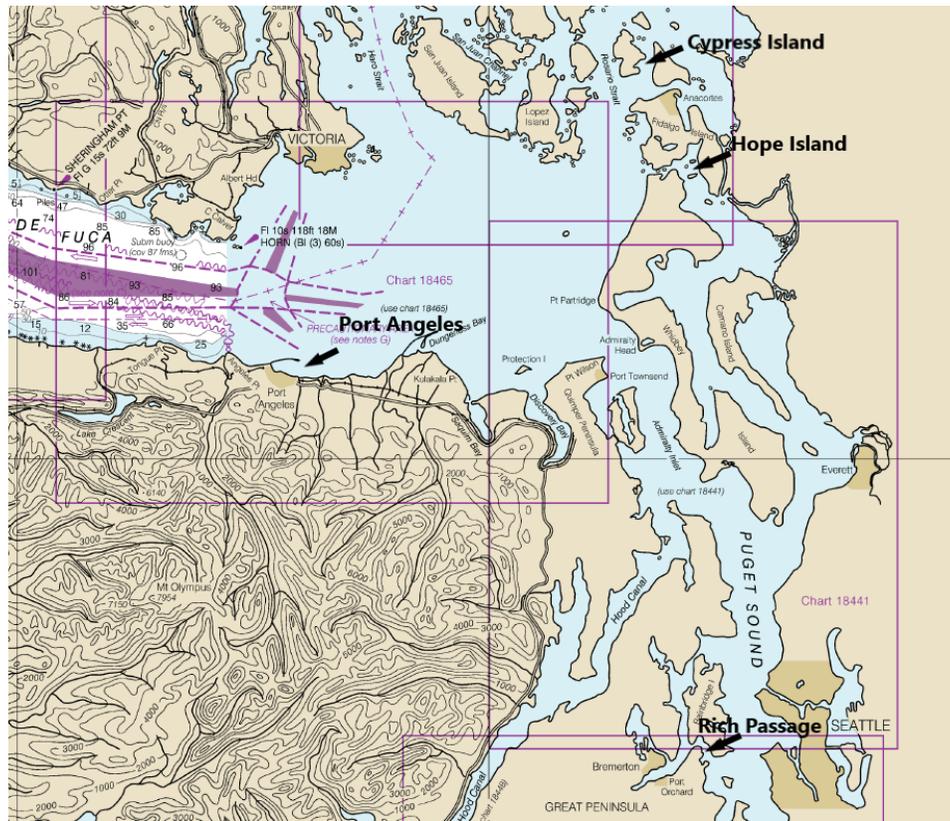
13           23. Fish farms in Washington have been in continual operation since the early 1970s,  
14 with the federal government beginning these farms by raising coho salmon (*Oncorhynchus*  
15 *kisutch*), Atlantic salmon (*Salmo salar*), or rainbow trout (*Oncorhynchus mykiss*). These farms  
16 consisted of floating facilities with net enclosures to contain fish and have continued in the same  
17 basic design since then, but with significant upgrades to the strength and integrity of the farms as  
18 technology advanced.

19           24. In Washington, eight total facilities that were the subject of four leases by DNR  
20 have operated since the 1980s. Those eight farms involved 172 acres of bed lands leased to the  
21 fish farmers and covered 21 total surface acres, a tiny fraction (0.0018%) of the approximately  
22 1.16 million acres that comprise the total area of Puget Sound and the Strait of Juan de Fuca. The  
23 farms are referred to as “Port Angeles,” “Cypress Island,” “Rich Passage,” and “Hope Island.”  
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25 <sup>2</sup> See NOAA Aquaculture Strategic Plan (2023-2028), available at  
26 <https://www.fisheries.noaa.gov/resource/document/noaa-aquaculture-strategic-plan-2023-2028> (last visited  
December 12, 2022).

1 The location of the farms is shown in the map below:



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16 25. DNR terminated the Port Angeles lease in 2017, and that termination is the  
17 subject of ongoing litigation between Cooke and DNR. DNR also terminated the Cypress Island  
18 lease in early 2018, and that termination is no longer the subject of litigation between Cooke and  
19 DNR.

20 26. In addition to commercial fish farms, Puget Sound is home to several research and  
21 delayed-release facilities used by state and federal agencies and tribes to enhance Puget Sound  
22 salmon operations. Delayed release farms hold hatchery salmon for one to six months before  
23 releasing to the wild, resulting in greater survival of those fish and a higher rate of return to  
24 Puget Sound waters.

25 27. From the late 1980s until recently, Atlantic salmon were the predominant farmed  
26 species in Washington waters and grown globally, with stocks that have been domesticated in

1 much the same way that chickens or other agricultural livestock have been developed. Atlantic  
2 salmon ceased to be grown at these farms in 2019, and up until recently, the only species grown  
3 at the farms was all-female sterile rainbow trout sourced from the same hatchery that supplies  
4 rainbow trout to the State of Washington for stocking streams and rivers.

5 **C. The Environmental Impacts of Fish Farming Are Well Known and Not Significant.**

6 28. The environmental impacts of fish farming in Washington are well known and  
7 have been proven to be minor with appropriate permit requirements and regulations in place. In  
8 1990, the Washington Department of Fisheries (now WDFW) completed a Programmatic  
9 Environmental Impact Statement for fish farms in Washington. That environmental impact  
10 statement found that all significant adverse environmental impacts to the environment associated  
11 with fish farming could be avoided through imposition of appropriate mitigation measures.

12 29. After the issuance of the Programmatic Environmental Impact Statement in 1990,  
13 state agencies in Washington began to implement the mitigation measures. In 1996, Ecology  
14 issued the first water quality permits for fish farms in Washington. Those permits required  
15 monitoring of sediments and water quality and imposed measures to minimize the impacts to  
16 both. The permits were the subject of litigation, with the Washington State Pollution Control  
17 Hearings Board upholding the permits and, again, finding no significant adverse environmental  
18 impacts to be associated with fish farming. *Marine Environmental Consortium v. Dep't of*  
19 *Ecology*, PCHB Nos. 96-257 through 96-266 & 97-110, 1998 WL 933353 (November 30, 1998).

20 30. Federal agencies also took a hard look at fish farming more than two decades ago,  
21 coming to the same conclusions that the Washington Department of Fisheries did with respect to  
22 no significant adverse impacts to the environment being associated with fish farming. In 2001,  
23 the National Marine Fisheries Service ("NMFS") published National Oceanic and Atmospheric  
24 Administration's Technical Memorandum NMFS-NWFSC-49, titled "The Net-pen Salmon  
25 Farming Industry in the Pacific Northwest." This technical memorandum reviewed the state of  
26 the science and found three areas of potential impacts to the environment: (1) deposition of bio-

1 deposits; (2) impacts of heavy metals to sediments; and (3) impacts from the use of therapeutic  
2 compounds for control of sea lice at farms. For the first two areas of risk, the NMFS concluded  
3 that well-sited farms and monitoring could address the risk. The third risk—sea lice and  
4 treatments for sea lice—was recognized to not be present in Washington State because of low  
5 abundances of sea lice. The NMFS went on to note that eight other issues “appear to carry a low  
6 risk,” including the risk of low dissolved oxygen, toxic effects from bio-deposits under fish pens,  
7 toxic effects from algal blooms enhanced by fish pens, changes in the benthic communities  
8 located under fish farms, and the spread of pathogens from fish farms. NMFS then noted that  
9 there was “little to no risk” from fish escapes. This technical memorandum went on to further  
10 recommended steps to manage the risks identified, through site selection, permits and other  
11 measures.

12 31. After 2001, scientists continued to assess the possible environmental impacts of  
13 net pen fish farming. The conclusions of that research were the same as the conclusions of the  
14 Washington Department of Fisheries in 1990 and the NMFS in 2001: properly sited and  
15 regulated fish farms posed very little risk to the environment.

16 **D. The Fish Farms that Are the Subject of this Appeal.**

17 32. There are four farms subject to two leases that are relevant to this appeal. Three  
18 farms (Clam Bay, Rich Passage, and Fort Ward) are located off of the south end of Bainbridge  
19 Island and are governed by the Rich Passage Lease. This close up of the navigational chart  
20 shows the locations of those farms, which has been substantially the same since the farms were  
21 first installed:

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14 34. DNR has issued leases for these fish farms since the 1970s. Those leases have  
15 been renewed at least four times. Often, DNR would allow the leases to go into sustained  
16 holdover once the lease terms expired. The most recent lease for Rich Passage held over from  
17 November 2007 until May 2008, and the most recent lease for Hope Island held over from  
18 March 2006 to April 2007.

19 35. In 2007, all the farms in Washington, including the Rich Passage and Hope Island  
20 fish farms, were consolidated under a single owner, a private equity firm based in New York  
21 City. That private equity firm operated the fish farms until 2016, when the farms were sold to  
22 Cooke Aquaculture Inc., the parent company of the plaintiff in this matter.

23 36. Cooke Aquaculture Inc. purchased these farms with the intent of upgrading aging  
24 facilities. Before it could do so, another farm—not one of the Rich Passage farms or Hope Island  
25 farms—collapsed, resulting in the release of Atlantic salmon and a large response coordinated  
26 between Cooke and state regulators, including DNR.

1 **E. The Response to the Cypress Island Collapse.**

2 37. Cooke worked with state regulators to salvage the collapsed facility and recover  
3 the Atlantic salmon. In the month following the collapse, Cooke paid tribal fishers \$1.5 million  
4 for recovery of the escaped fish and spent months cleaning the seafloor of any human-sourced  
5 item in the area, regardless of whether it was from the collapsed farm. All the materials from the  
6 collapse were recovered and the farm site was not rebuilt.

7 38. The public outcry over the collapse was considerable. Area tribes expressed  
8 concerns that the escaped fish would cause adverse impacts to native salmon species. Multiple  
9 state and federal agencies launched an intensive monitoring effort to assess possible impacts to  
10 native salmon. Those investigations showed that the escaped fish did not spread disease to native  
11 salmon, did not compete with native salmon, did not interbreed with native salmon, and did not  
12 consume juvenile native salmon. Hundreds of captured fish were examined by these agencies,  
13 and none of them proved able to forage for food in the wild. Within a few months, WDFW and  
14 other agencies concluded the escaped fish had died. By January 2018, the panel of state  
15 investigators assigned to the collapse—which included DNR representatives—concluded:

- 16 • There was no evidence that the escaped Atlantic salmon were eating native fauna.
- 17 • The escaped fish were not sexually mature.
- 18 • The escaped fish contracted diseases native to the marine ecosystem, resulting in  
19 decreased health status.
- 20 • No Atlantic salmon were present in state-run hatcheries for native fish.
- 21 • There were limited numbers of fish found in freshwater, but they were not sexually  
22 mature or feeding.

23 In sum, while causing significant outcry in the public, and creating worry among tribal members  
24 who view wild fish as their spiritual connection to their ancestors, their heritage, and their future,  
25 the scientific studies regarding the fate of the fish from the Cypress Island collapse showed  
26 minimal impacts to the environment.

1 **F. Legislative Response to the Collapse—No More Atlantic Salmon Farming.**

2 39. Long-simmering objections to the farming of Atlantic salmon in the waters of  
3 Washington led to a concerted effort by western Washington tribes to seek a ban of the practice  
4 of farming Atlantic salmon in Washington. During the 2018 Legislative session, multiple bills  
5 were introduced to ban all fish farming entirely. Ultimately, the Legislature wisely declined to  
6 pass such a ban.

7 40. Instead, the Legislature passed Engrossed House Bill 2957, Laws of 2018, ch. 179  
8 §§ 1-12 (“HB 2957”). That bill amended the statutory authorities of DNR, WDFW, and Ecology  
9 to phase out the farming of Atlantic salmon by the end of the current Rich Passage and Hope  
10 Island Leases. The Legislature also gave additional authority to these three agencies to ensure  
11 that a collapse like the one at Cypress Island would never occur again. Specifically, the  
12 Legislature required third-party inspections of fish farms in Washington every two years using a  
13 marine engineer approved by WDFW and gave WDFW the ability to deny permits to transfer  
14 fish to farms where those farms were in danger of releasing fish. Cooke embraced these changes.

15 **G. Transition of Farming to All-Female Sterile Rainbow Trout.**

16 41. Cooke began working on transitioning its farms to farming native species well  
17 ahead of the deadline established by HB 2957. In 2019, Cooke applied to WDFW for new farm  
18 registrations that would allow Cooke to raise all-female sterile rainbow trout.

19 42. WDFW determined that Cooke’s application triggered the requirements of the  
20 State Environmental Policy Act, RCW ch. 43.21c (“SEPA”) and directed Cooke to prepare an  
21 environmental checklist and an update to the 1990 Programmatic Environmental Impact  
22 Statement that had previously analyzed fish farming impacts in Washington.

23 43. Cooke retained the services of two fisheries scientists who had almost 100  
24 combined years of research experience specific to salmon and steelhead in response to WDFW’s  
25 request.

26 44. Those two scientists prepared a 43-page document that provided an update on the

1 state of the science with respect to possible impacts from net pen farms in Washington. Also  
2 prepared was an annotated bibliography of scientific studies conducted since 2000 that addressed  
3 issues of concern regarding farming of rainbow trout in Washington waters.

4 45. WDFW then expanded its review of possible impacts associated with farming  
5 steelhead trout in Washington waters, reviewing 300 publications, consulting with fisheries  
6 experts at universities and tribes, and applying its own significant in-house expertise.

7 46. After months of analyses, WDFW concluded that the farming of rainbow trout in  
8 Washington waters as proposed by Cooke would not have probable significant adverse impacts  
9 on the environment. WDFW came to this conclusion after developing 29 conditions it proposed  
10 to include in Cooke’s permit to ensure those impacts would not occur. Under SEPA, this process  
11 is memorialized in a “Mitigated Determination of Non-Significance” (“MDNS”).

12 47. WDFW published a draft of this MDNS and solicited public comments. Notably,  
13 DNR submitted comments on the proposed MDNS, which were thoroughly addressed by  
14 WDFW prior to finalizing the MDNS.

15 **H. WDFW’s Permit for Farming Rainbow Trout Is Upheld by the State Supreme Court.**

16 48. After WDFW’s MDNS was finalized, a group of anti-fish farming environmental  
17 organizations challenged it under SEPA.

18 49. A hearing was held on the groups’ challenges in King County Superior Court on  
19 September 24, 2021. On November 11, 2021, the Honorable Johanna Bender issued a 12-page  
20 opinion completely upholding WDFW’s determination, noting that “WDFW paid particular  
21 attention to scientific studies that post-dated the 1990 EIS,” and had “also considered, with  
22 notable detail, the probable environmental impacts posed by aquaculture of sterile, female,  
23 Pacific Steelhead as compared to fertile Atlantic Salmon.”

24 50. Judge Bender’s decision was the subject of direct review by the Washington  
25 Supreme Court. After oral argument, the Court unanimously affirmed the permit issued by  
26 WDFW, finding that WDFW did not err in concluding that the farming of rainbow trout as

1 proposed by Cooke and as conditioned by WDFW would not have a probable significant adverse  
2 impact on the environment. *Wild Fish Conservancy v. Washington Dep't of Fish & Wildlife*, 198  
3 Wn. 2d 846, 887, 502 P.3d 359 (2022).

4 **I. The NMFS Concludes the Farming of Rainbow Trout Will Not Jeopardize Endangered  
5 or Threatened Species or Habitats.**

6 51. Throughout this timeframe, NMFS—the federal agency tasked with ensuring  
7 compliance with the Federal Endangered Species Act—was engaged in a comprehensive  
8 evaluation of the possible impacts of fish farming on federally listed endangered species,  
9 including wild steelhead, Chinook salmon, chum salmon, rockfish, green sturgeon, eulachon,  
10 humpback whales, and Southern Resident Killer Whales.

11 52. On February 16, 2022, NMFS issued a 210-page Biological Opinion (the “BiOp”)  
12 that concluded fish farming at or below historic maximums in Washington—when appropriately  
13 regulated—would not jeopardize endangered species or habitat that supports those species.

14 **J. State Agencies Issue Guidance on Siting New Net Pen Facilities.**

15 53. In April 2022, two months after NMFS issued its BiOp concluding that fish  
16 farming would not jeopardize endangered species or habitat, the Washington State Department  
17 of Agriculture, Ecology, WDFW, and DNR issued guidance for local and state governments to  
18 use in assessing new or existing net pen operations under Washington’s Shoreline Management  
19 Act (the “2022 Net Pen Aquaculture Guidance”).

20 54. The 2022 Net Pen Aquaculture Guidance was not intended as a document to  
21 support a ban of net pen fish farming in Washington, as DNR has effectively done by denying  
22 the lease renewal applications by Cooke. It explicitly recognizes that “[c]ommercial marine  
23 finfish net pens are part of Washington’s aquaculture industry,” and was authored to help  
24 “permitting authorities understand some key management issues to be aware of and consider  
25 when making decisions about net pen projects.”

26 55. The 2022 Net Pen Aquaculture Guidance recognized that “[c]areful site analysis  
and selection can significantly reduce negative effects on water quality, sensitive habitats and

1 native species and more,” and also outlined the strong regulatory environment that governs those  
2 operations in Washington, including the roles of tribes, local governments, WDFW, Ecology,  
3 DNR, and federal agencies. Importantly, it outlines the role DNR has taken in coordinating with  
4 other agencies to understand possible impacts from existing net pen operations like the ones at  
5 Rich Passage and Hope Island, noting that DNR, WDFW, and Ecology “meet regularly to  
6 discuss ways to improve interagency coordination with respect to inspections and enforcement,  
7 and permitting,” and that by “working together closely, the three agencies work in coordination  
8 to manage net pen aquaculture in Washington.” Unfortunately, DNR’s unilateral arbitrary denial  
9 of Cooke’s lease application casts aside this careful coordination between DNR and its sister  
10 agencies, and does so in a way that defeats DNR’s mandate to foster water-dependent uses and  
11 food production from aquatic lands.

12 **K. Cooke Applies for a New Lease for Rich Passage and Hope Island.**

13 56. The Rich Passage Lease held by Cooke had been issued for a 15-year term by  
14 DNR in 2007, expiring on November 10, 2022. The Hope Island Lease held by Cooke also had a  
15 15-year term and was issued by DNR in 2007 as well, expiring on March 31, 2022.

16 57. Cooke needs to continually produce fish for its customers. It does this by rotating  
17 fish generations through individual farms because each farm can only have one generation of fish  
18 in the water at a time. DNR is fully involved and informed of the timelines for the production of  
19 fish and has to approve the structural integrity of the farms prior to any fish being transferred to  
20 the farms. Cooke worked with DNR and other agencies to ensure that both farms were  
21 structurally sound prior to them being stocked with fish. DNR has been fully informed regarding  
22 the timeframes of Cooke’s current fish production since Fall 2021.

23 58. On May 10, 2021, Cooke provided notice of its intent to continue to farm at the  
24 Rich Passage and Hope Island facilities, submitting a letter providing notice of intent to renew  
25 the aquatic leases and DNR’s form acknowledging the intent to renew.

26 59. DNR and Cooke’s predecessors worked together cooperatively for decades to

1 renew the leases for fish farms. DNR’s usual practice would be to conduct a “Habitat  
2 Stewardship” visit of the farms to identify issues to be addressed in renewing the lease. DNR  
3 never proposed such a visit for either the Rich Passage Lease or the Hope Island Lease, nor did  
4 DNR solicit more information from Cooke or correspond with Cooke at all regarding the lease  
5 renewal application.

6 60. This silence by Cooke’s landlord was unprecedented in the history of DNR’s  
7 management of the farms. Cooke was never given the opportunity to understand any of DNR’s  
8 concerns regarding the potential re-leasing of the Rich Passage or Hope Island farm sites.

9 61. The 2022 Net Pen Aquaculture Guidance, which DNR participated in preparing,  
10 explicitly recognized the need to evaluate site-specific conditions in considering new or  
11 continued fish farms in Washington. Both the Hope Island and Rich Passage farms have been the  
12 subject of intensive environmental monitoring for decades, and more recently the subject of  
13 third-party engineering review and analysis. None of that information was considered by DNR in  
14 evaluating Cooke’s application for renewal.

15 62. On November 14, 2022, after carefully coordinating the announcement with anti-  
16 fish environmental organizations and the press, DNR denied Cooke’s lease applications for Rich  
17 Passage and Hope Island. Cooke was given less than 15 minutes’ notice of this application  
18 denial, with DNR calling Cooke minutes before sending the letters denying the lease applications  
19 that effectively ended more than four decades of farming in Washington. DNR and the  
20 Commissioner appear to have carefully coordinated this announcement to maximize the political  
21 value of shutting down these farms. On November 11, 2022, one of the primary proponents of  
22 banning net pens in Washington hinted in a fundraising email blast that “The Countdown is  
23 Over, a Major Decision Deciding the Fate of Puget Sound Net Pens is Coming Next Week.”  
24 Within an hour of Cooke’s receipt of the letters, the *Seattle Times* was reporting on the issue, and  
25 Cooke was receiving multiple media inquiries showing that DNR had leaked the application  
26 denials to its preferred stakeholders and supporters as well as the press before Cooke received

1 those denials.

2 63. Right after announcing the lease application denials and a subsequent  
3 announcement of a complete ban of commercial finfish aquaculture in Washington waters, the  
4 Commissioner pivoted to using the announcements to fundraise for her reelection campaign, a  
5 stinging insult to the families who were now faced with losing jobs right before the holidays.

6 64. DNR relied upon the 2022 Net Pen Aquaculture Guidance in denying Cooke’s  
7 applications to renew its leases. That guidance was intended to be used by local governments in  
8 siting or permitting net pen farms in Washington. It explicitly recognized that it was a “starting  
9 point” and that individual farms needed to undergo “significant scrutiny by permitting and  
10 leasing authorities” to ensure that a proposed farm did not result in negative impacts to the  
11 environment.

12 65. Contrary to the 2022 Net Pen Aquaculture Guidance, DNR arbitrarily determined  
13 not to perform any site-specific analysis of the Rich Passage or Hope Island farms with respect to  
14 the risks those farms may pose to the environment. Had it done so, it would have concluded—as  
15 WDFW and other agencies had done—that the risks it relied on in denying Cooke’s lease  
16 renewals were minimal to nonexistent when placed in the context of Cooke’s ongoing  
17 operations.

18 66. The risks to the benthic environment associated with Cooke’s net pen operations  
19 in Rich Passage and Hope Island are well quantified. DNR’s own staff has recognized a lack of  
20 deposition of organic matter below the net pens, which is attributed to careful feeding of the fish  
21 and the location of the farms.

22 67. Likewise, while DNR pointed to the risk of biofouling as a reason to deny the  
23 lease application, DNR has also worked cooperatively with Cooke for years on a monitoring  
24 program of Cooke’s farms. That monitoring had shown that Cooke had already successfully  
25 implemented the “best practices” identified in the 2022 Net Pen Aquaculture Guidance to  
26 minimize risk from biofouling.

1           68.     DNR likewise did not assess any risks to water quality associated with the Rich  
2 Passage or Hope Island facilities. Cooke’s operations are governed by National Pollutant  
3 Discharge Elimination System (“NPDES”) permits issued by Ecology. Those NPDES permits  
4 were significantly revised after the 2017 Cypress collapse, resulting in increased water quality  
5 and sediment quality monitoring. DNR raised concerns regarding reduced dissolved oxygen from  
6 release of nutrients and organic matter. If DNR had reviewed the extensive monitoring under  
7 Cooke’s NPDES permit, DNR would have been guided to a conclusion that this is a hypothetical  
8 risk which is not present at Cooke’s Rich Passage or Hope Island farms.

9           69.     DNR likewise relied on hypothetical risks regarding fish health, misleading the  
10 public. DNR argued that net pen farms will result in the introduction of non-native pathogens or  
11 the amplification of pathogens back into the environment which can infect wild fish. In fact,  
12 these “risks” were directly copied from the 2022 Net Pen Aquaculture Guidance that identified  
13 these “risks” as “[c]ommonly expressed concerns.” That guidance went on to fully explain the  
14 strict regulatory environment that prevents these types of concerns, spending 17 pages discussing  
15 the federal and state framework that ensures farming of fish does not cause these concerns. In  
16 short, the hypothetical “concerns” relied upon by DNR are not born out by an examination of  
17 Cooke’s Rich Passage or Hope Island operations—where there is no evidence that these  
18 “concerns” have in fact been translated into risks to wild fish.

19           70.     DNR also disingenuously argued that “the consequences of escaped native or  
20 endemic species of farmed finfish interacting through reproduction with wild stocks are major  
21 concerns with open net pen finfish aquaculture.” Again, DNR made no site-specific  
22 determination or examination of Cooke’s Rich Passage or Hope Island operations. DNR also  
23 failed to recognize that the fish grown by Cooke are the exact strain of sterile trout used by  
24 WDFW to stock lakes and rivers throughout Washington.

25           71.     WDFW—DNR’s sister agency that has the primary task of ensuring the health of  
26 wild fish stocks in Washington—has examined the risks of escapes in detail in permitting the

1 farming of sterile all-female rainbow trout by Cooke and concluded that such risks were not  
2 major concerns. WDFW found that using sterile all-female trout would mean that such fish could  
3 not interact through reproduction with wild stocks, refuting entirely DNR’s claim that such  
4 reproduction with wild stocks was a “major concern” with respect to Cooke’s farms. Notably,  
5 WDFW’s analysis of this issue was fully litigated by anti-fish farming groups, with the state  
6 Supreme Court concluding that the farming of these fish in fact did not pose the risks that DNR  
7 pointed to as a basis for denying Cooke’s lease applications.

8         72. At the time of the denial of the lease application, Cooke had approximately  
9 360,000 total fish in the water between the Clam Bay farm in Rich Passage and at Hope Island.  
10 Those fish had been placed in the farms during Fall 2021. Hope Island began harvesting in  
11 September 2022 and was scheduled to be completed by the end of January 2023. Cooke had just  
12 begun an initial “grading” harvest at Clam Bay, where the largest fish are selectively removed  
13 from the farm. Clam Bay’s harvest was scheduled to occur over a period of months and to be  
14 concluded by the end of April 2023. DNR, through its close supervision of these farms with its  
15 sister agencies WDFW and Ecology, was fully aware of the timeframes needed to produce and  
16 harvest these fish.

17         73. DNR initially gave Cooke 30 days to remove all of the fish from the Clam Bay  
18 facility. Cooke immediately informed DNR that such a deadline was infeasible. Cooke did not  
19 have the resources to remove the fish from Clam Bay and Hope Island that quickly and  
20 expressed concern for the safety of its employees and its farm.

21         74. DNR and Cooke engaged in telephone calls on November 21 and 22, 2022.  
22 Cooke outlined to DNR that it was feasible to remove the fish from Clam Bay and Hope Island  
23 by April 2023, but that removing equipment from the water would take longer due to the nature  
24 of that work and the need to perform it safely, worker and contractor availability, and permitting  
25 requirements.

26         75. Cooke also inquired regarding the fate of 332,000 fish that were in its hatchery

1 and scheduled to be moved to one of its farms shortly. Cooke manages farms for a continuous  
2 production of fish. These fish in the hatchery had been growing since late 2021, and Cooke  
3 expected it would be able to move these fish to one of its farms. DNR has denied Cooke's  
4 request to do so, and these fish will need to be destroyed if Cooke cannot find a buyer for them.

5 76. On November 23, 2022, DNR declined Cooke's request for a reasonable amount  
6 of time to harvest fish and remove the equipment from the water. DNR arbitrarily agreed to give  
7 Cooke 31 additional days to harvest the fish at Clam Bay and Hope Island and also directed  
8 Cooke to remove all the equipment at Rich Passage and Hope Island by April 14, 2023. Cooke  
9 has repeatedly explained to DNR why these deadlines pose safety risks to its workers, risks to  
10 the environment, and risk of financial loss in the form of destroyed crops. DNR has repeatedly  
11 and arbitrarily ignored these explanations.

## 12 V. CAUSES OF ACTION

### 13 FIRST CAUSE OF ACTION

#### 14 BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

15 77. Cooke realleges paragraphs 1 through 76.

16 78. Every contract contains an implied duty of good faith and fair dealing.

17 79. The duty of good faith and fair dealing requires the parties to a contract to  
18 perform in good faith the obligations imposed by their agreement so that each party may obtain  
19 the full benefit of performance.

20 80. The Rich Passage and Hope Island Leases are contracts that contain an implied  
21 duty of good faith and fair dealing.

22 81. Cooke has fully complied with the terms of the Rich Passage and Hope Island  
23 Leases, including payment of royalty fees to DNR based on the production of fish at the site and  
24 annual lease payments.

25 82. DNR was fully informed of the stocking schedule at both Clam Bay and Hope  
26 Island, and therefore fully informed of the probable harvesting schedules. In fact, DNR gave

1 permission to Cooke to stock those farms after working with Cooke to ensure that the farm  
2 structures were in a good order and repair and suitable to contain fish throughout the grow-out  
3 cycle.

4 83. DNR has consistently allowed holdover of expired fish farm leases in Washington  
5 State and allowed Cooke more than 16 months to grow fish at its Port Angeles farm after DNR  
6 terminated that lease in 2017.

7 84. After receiving the letter denying the lease application for Rich Passage and Hope  
8 Island, Cooke clarified with DNR that it had just begun to harvest fish at that site and that it  
9 would take “at least four months” to harvest the fish.

10 85. Cooke asked for the time to harvest those fish and stated to DNR it would need  
11 months more to remove the equipment from the water, which involves the use of specialized  
12 heavy equipment, permitting by multiple agencies, and consideration of “work windows” to  
13 protect wild fish.

14 86. DNR summarily and arbitrarily rejected Cooke’s request, reasoning that Cooke  
15 would be able to harvest the fish from its facilities in 46 days. DNR based that estimate on past  
16 production at Cooke’s farms, when it had twice as many employees and a regular, predictable  
17 harvest of Atlantic salmon as well as markets for those fish.

18 87. DNR summarily and arbitrarily rejected Cooke’s request to grow out the  
19 remaining 332,000 fish in its hatchery, which may need to be destroyed as a result.

20 88. DNR failed to perform in good faith by not working with Cooke on the reasonable  
21 wind-down of its lease.

22 89. DNR failed to perform in good faith by trading Cooke’s lease renewals for  
23 political favor with certain constituencies and closely coordinating the announcement of the lease  
24 application denials in a manner that damages Cooke and leveraging that announcement for  
25 fundraising purposes.  
26





1 the fish contained therein are a property right of Cooke, protected under the due process clauses  
2 of the Washington State Constitution and the United States Constitution.

3 108. At the time of the lease application denial, Cooke had 360,000 fish in its farms.  
4 Those fish were scheduled to be harvested to meet contractual obligations to Cooke's customers  
5 and be delivered as fresh fish between November 2022 and April 2023. DNR, arbitrarily and  
6 without a meaningful opportunity for Cooke to be heard, ordered Cooke to remove the fish from  
7 both farms within 61 days. Cooke then lost buyers for that fish. Cooke has been forced to freeze  
8 the fish and sell them at a much lower price to Asian markets. The total loss to Cooke remains  
9 unknown at this time but is estimated to be more than \$6 million.

10 109. Cooke also had 332,000 fish in its hatchery that were ready for transfer to its  
11 farms. These fish had been growing in the hatchery for almost a year. Cooke sought permission  
12 from DNR to grow those fish out in its farms, and that permission was denied. Cooke has been  
13 unable to sell these fish and will face a loss of millions of dollars if forced to destroy them. DNR  
14 is fully informed regarding the timeframes and process by which Cooke produces fish and never  
15 gave any indication that Cooke could not rely on lease renewals when Cooke started this  
16 production of fish.

17 110. 42 U.S.C. § 1983 provides a cause of action for damages for violation of a  
18 person's right to substantive and/or procedural due process.

19 111. All of Defendants' acts are as officials of and as representatives of the State of  
20 Washington. Their actions are the actions of the State of Washington. As such, they cannot  
21 deprive Cooke of property without due process of law.

22 112. Before depriving Cooke of its property, procedural due process requires that  
23 Defendants provide Cooke with an opportunity to be heard to guard against erroneous  
24 deprivation, and that the opportunity to be heard is to be at a meaningful time and in a  
25 meaningful manner.  
26



1 from the water, and denied permission to grow out the remaining fish at Cooke's hatchery  
2 because their actions were politically motivated, not based on facts, arbitrary and capricious,  
3 irrational, and invidious.

4 119. Cooke is entitled to have the denial of its lease application declared to be invalid,  
5 null, and void under the Washington constitution because of the violation of its substantive due  
6 process rights. In addition, it is entitled under 42 U.S.C. § 1983 to recover its damages and  
7 attorneys' fees incurred because of Defendants' violation of its federal substantive due process  
8 rights.

9 **FIFTH CAUSE OF ACTION**

10 **REQUEST FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF**

11 120. Cooke realleges paragraphs 1 through 119.

12 121. Cooke will suffer irreparable injury unless the Court enters preliminary injunctive  
13 relief to allow it reasonable time to harvest the fish at Rich Passage and Hope Island in a safe  
14 manner, and at a minimum allow it reasonable time to safely remove the farming facilities during  
15 the pendency of this appeal.

16 122. The Court should enter such preliminary relief as is necessary to prevent Cooke  
17 from incurring irreparable injury during the pendency of this litigation.

18 123. The Court should enter such permanent injunctive relief as is necessary to allow  
19 Cooke to fully exercise its right under the Rich Passage and Hope Island Leases.

20 **APPEAL BOND**

21 Cooke is filing with the Court cash or a bond to the state in the amount of \$200.00 at the  
22 time of filing this Notice of Appeal or within five days thereafter in accordance with RCW  
23 79.92.030.

24 **PRAYER**

25 Wherefore, Cooke asks that the Court grant the following relief:  
26



# Exhibit A



**DEPARTMENT OF  
NATURAL RESOURCES**

**AQUATIC RESOURCES DIVISION**

1111 WASHINGTON STREET SE  
OLYMPIA, WA 98504

**360-902-1100**

ARD@DNR.WA.GOV  
WWW.DNR.WA.GOV

November 14, 2022

VIA EMAIL AND CERTIFIED MAIL

Kevin Bright  
Environmental Permit Coordinator  
Cooke Aquaculture Pacific, LLC  
P.O. Box 669  
Anacortes, WA 98221  
[kevin.bright@cookeaqua.com](mailto:kevin.bright@cookeaqua.com)

Subject: Application to reauthorize Lease No. 20-B10237—Rich Passage

Dear Mr. Bright:

This letter serves as notice to Cooke Aquaculture Pacific, LLC and Glenn Cooke AGS Holdings, Inc. (Cooke) that the Washington Department of Natural Resources (DNR) hereby denies Cooke's application to reauthorize Lease No. 20-B10237 and terminates any holdover tenancy of the property as of December 14, 2022. This decision is based on DNR's determination that it is not in the best interests of the State to reauthorize this lease. *See* RCW 79.130.040 (No re-lease of bedlands unless DNR "deems it to be in the best interest of the state to re-lease the area."). Considerations that went into this determination include:

**1. Contract Noncompliance and Failures to Perform**

Cooke has been a tenant on state-owned aquatic land since May 2016, when it executed a Notice of Change in Ownership for four commercial finfish aquaculture leases with DNR. Since 2016, DNR has notified Cooke regarding at least six lease defaults including:

- August 25, 2017—Notice of Default under Lease No. 20-B12517, for not keeping and maintaining leasehold improvements in good order and repair;
- September 19, 2017—Notice of Default under Lease No. 20-B12517, for improvements located outside of the leasehold;
- October 20, 2017—Notice of Default under Lease 22-B02777, for not paying rent;

- November 11, 2017—Event of Default under Lease No. 20-B12517, for failure to cure a default under the lease;
- December 15, 2017—Notice of Default and Termination under Lease 22-B02777, for: (i) not replacing unencapsulated flotation material, (ii) improvements located outside of the leasehold, and (iii) not maintaining leasehold improvements; and,
- February 22, 2018—Event of Default and Termination under Lease No. 20-B12517, for: (i) improvements located outside of the leasehold, (ii) installing improvements without prior consent, and (iii) not maintaining leasehold improvements, resulting in catastrophic damage to improvements on the site leading to a significant fish escapement event at the Cypress Island facility in 2017.

These incidents of noncompliance demonstrate that reauthorization of this lease by DNR, allowing Cooke to continue operating at this site, poses risks to Washington State including, but not limited to: (i) environmental harm to state-owned aquatic lands resulting from lack of adherence to lease provisions, and (ii) increased costs to DNR associated with contract compliance, monitoring, and enforcement.

## **2. 2019 Maintenance Concerns—Structural Deficiency at Orchard Rocks South Facility**

On the weekend of October 19-20, 2019, at the Orchard Rocks South Site, water entered one of the southeastern corner pontoons, reducing the buoyancy enough that the corner of the walkway went under water. This event demonstrated the structural deficiency of the net pen as well as maintenance issues with the net pen, which increase the risk of an accidental fish escapement or structural failure. Cooke’s issues with the structural integrity and maintenance of its net pen facilities demonstrates to DNR that reauthorizing this lease poses a risk to Washington State of a pen failure and/or fish escapement.

## **3. Unpermitted Relocation of Fort Ward Net Pens to Orchard Rocks**

In March 2022, Cooke relocated the Fort Ward net pen array to the Orchard Rocks location without first obtaining a shoreline substantial development permit or shoreline exemption from the City of Bainbridge Island. This is a violation of Section 2.3 of the lease, which requires tenants to “keep current and comply with all conditions and terms of any permits, licenses, certificates, regulations, ordinances, statutes, and other governmental rules and regulations regarding its use or occupancy of the property.” Cooke proceeded with this work despite receiving correspondence from DNR, prior to moving the net pen array, informing Cooke that it must comply with all permit requirements. Finally, without all requisite permits, DNR cannot approve Cooke’s renewal application under WAC 332-30-122(1)(c).

#### **4. Risks to State-Owned Aquatic Land**

In reviewing aquatic land use authorization applications, WAC 332-30-122(2)(a) directs DNR to consider whether or not the applicable facility is properly designed, constructed, maintained and conducted in accordance with sound environmental practices, and whether or not the proposed use causes adverse environmental impacts that cannot be mitigated to avoid substantial change to the environment. The commercial marine net aquaculture guidance document, *Commercial Marine Finfish Net Pen Aquaculture in Puget Sound and Strait of Juan de Fuca*,<sup>1</sup> completed jointly by the Washington Department of Ecology, the Washington Department of Fish and Wildlife, and DNR in early 2022 (Guidance Document), notes that commercial net pen aquaculture presents a number of potential risks to state-owned aquatic land. These risks include, but are not limited to, the following:

- **Benthic environment**—Deposition of organic matter leading to degradation of the benthic environment is a documented risk associated with net pen aquaculture;
- **Biofouling**—Biofouling impedes water flow through the nets, diminishing dissolved oxygen levels inside the pen and negatively affecting the fish. Biofouling also increases drag on net pens, which can cause stress on the infrastructure, resulting in deformed cages and, in extreme cases, net pen failure. In addition, biofouling can impact the benthic sediments underneath the net pens through the organic buildup of dislodged organisms when the nets are cleaned;
- **Water quality**—Commercial finfish net pen aquaculture is considered a concentrated animal feeding activity and regulated as a pollution point source. The release of nutrients and organic matter can enrich the surrounding waters, giving rise to increased algae production in the affected areas and potentially leading to reduced dissolved oxygen from decomposition and respiration;
- **Fish health**—Open net pen finfish aquaculture: promotes the introduction of non-native pathogens, amplifies rate of infection and therefore amplifies pathogen abundance, promotes the increase in virulence of existing pathogens or is the nexus for the emergence of new pathogens, and promotes disease in wild finfish;
- **Fish genetics**—The consequences of escaped native or endemic species of farmed finfish interacting through reproduction with wild stocks are major concerns with open net pen finfish aquaculture;

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<sup>1</sup> *Commercial Marine Finfish Net Pen Aquaculture in Puget Sound and Strait of Juan de Fuca*, Publication No. 22-06-008, April 2022.

- Ecological issues—Risks to wild populations from open net pen finfish aquaculture also include the attraction of wild populations to the net pen facilities and the potential entrapment and inadvertent harvest of wild fish within the net pen cages;
- Escape prevention and response—Fish escapes are a reality of finfish net pen aquaculture due to the dynamic and unpredictable nature of marine environments. Fish domesticated for and raised in a commercial marine operation are not managed or regulated for release into Puget Sound for fishery enhancement.

While some of these risks may be mitigated through, for example, provisions in a lease providing for prevention plans, water quality monitoring, and/or implementing best management practices into daily operations, not all risk can be eliminated even if following the management practices provided in the Guidance Document.

The inherent risks of finfish aquaculture are compounded by additional risks where, such as here, DNR lacks confidence that Cooke will consistently comply with lease mitigation requirements. DNR concludes that the risks to the State’s aquatic lands from renewal of Cooke’s lease on this site are high, and therefore that Cooke’s proposed renewal is not in the best interests of the State.

## **5. No Renewal Option**

Pursuant to Section 3 of the lease, there is no renewal option. Section 3.2 provides that: “Tenant shall have the option to renew this Lease for Zero additional terms of Zero (0) years each. The initial term of this lease, and all renewal terms, shall not exceed Fifteen years (15) in the aggregate.” The initial term of the lease was fifteen years, beginning on November 11, 2007 (*See* Section 3.1). Accordingly, Cooke is not entitled to renew this lease.

## **6. Treaty Rights**

The Suquamish Tribe expressed opposition to DNR regarding continued fin fish aquaculture in Puget Sound. The Suquamish assert treaty rights in this location as part of their usual and accustomed fishing grounds. Tribal fishing rights under the Stevens Treaties consist of two components: (i) a “fair share” component; and (ii) a “geographical,” or right of access, component. *See Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1511 (W.D. Wash. 1988); *Northwest Sea Farms, Inc. v. U.S. Army Corps of Engineers*, 931 F. Supp. 1515, 1521-22 (W.D. Wash. 1996). The courts in both *Muckleshoot* and *Northwest Sea Farms* determined that treaty access rights would be impaired by proposals to construct improvements within the tribes’ usual and accustomed fishing grounds. Renewal of Cooke’s lease here presents a similar problem.

As such, and given DNR’s statutory guidance to manage state-owned aquatic lands to provide a balance of public benefits for all citizens, including to ensure environmental protection and encourage direct public use and access (*See* RCW 79.105.030), DNR recognizes the impacts to state-owned aquatic lands as described above may also directly impact treaty rights. Therefore,

in considering the appropriate balance of public benefits, which in this case compete with one another, DNR hereby determines the environmental protection and public access use, including but not limited to the Tribes, outweigh the benefits that would be received from authorizing continued use of the site to Cooke for finfish net pen aquaculture use.

#### 7. Best Interests of the State

DNR is aware of and reviewed the recent Supreme Court decision upholding WDFW's SEPA process for Cooke's fish transfer permit. However, the standards DNR is required to consider in evaluating whether a proposed use of the State's aquatic lands is in the best interests of the State necessarily go beyond the procedural requirements of the State Environmental Policy Act (SEPA, RCW 43.21C).

The Legislature delegated the responsibility to manage state-owned aquatic lands to DNR "for the benefit of the public." RCW 79.105.010. DNR is required to "strive to provide a balance of public benefits for all citizens of the state." RCW 79.105.030. DNR manages state-owned aquatic lands in trust for the public by virtue of the Washington Constitution. *Pope Res. v. Dep't of Nat. Res.*, 190 Wn.2d 744, 754, 418 P.3d 90 (2018), and DNR "executes its leasing authority with a view towards the State's duty to protect the public trust." *Id.* Through the aquatic lands statutes, "the State has granted sovereign powers to DNR for protection of the State's interest in the trust." *Id.* As such, "DNR is vested with the discretionary, administrative responsibility to reject a bid to lease state lands as the interests of the State or affected trust require." *Nw. Alloys, Inc. v. Dep't of Nat. Res.*, 10 Wn.App.2d 169, 185, 477 P.3d 620 (2019). Based on the above considerations, and in light of the applicable statutes and regulations, DNR is denying Cooke's application to reauthorize net pen aquaculture at Rich Passage, because it is not in the best interests of the State.

Pursuant to Section 3.5 of the lease, DNR hereby notifies Cooke that any holdover tenancy on the Property will be terminated as of **December 14, 2022**.

DNR will contact you separately regarding the next steps in wrapping up operations under the existing lease, and required clean up and restoration of the leasehold (*See, e.g.*, Sections 3.4, 7.4, 11, and 12 of the lease). In the meantime, if you have any questions about this decision or ongoing management of your existing lease, please reach out to Sean Carlson, District Manager, by phone at (360) 301-0422 or by email at [sean.carlson@dnr.wa.gov](mailto:sean.carlson@dnr.wa.gov).

Sincerely,



Thomas Gorman  
Aquatic Resources Division Manager

- c: District File, TRO File: 20-B10237  
Michael Szemerda, Global Chief Sustainability Officer, Cooke Aquaculture Pacific, LLC, [mszemerda@cookeaqua.com](mailto:mszemerda@cookeaqua.com)  
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# Exhibit B



**DEPARTMENT OF  
NATURAL RESOURCES**

**AQUATIC RESOURCES DIVISION**  
1111 WASHINGTON STREET SE  
OLYMPIA, WA 98504

**360-902-1100**  
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November 14, 2022

VIA EMAIL AND CERTIFIED MAIL

Kevin Bright  
Environmental Permit Coordinator  
Cooke Aquaculture Pacific, LLC  
P.O. Box 669  
Anacortes, WA 98221  
[kevin.bright@cookeaqua.com](mailto:kevin.bright@cookeaqua.com)

Subject: Application to reauthorize Lease No. 20-B12356—Hope Island

Dear Mr. Bright:

This letter serves as notice to Cooke Aquaculture Pacific, LLC and Glenn Cooke AGS Holdings, Inc. (Cooke) that the Washington Department of Natural Resources (DNR) hereby denies Cooke's application to reauthorize Lease No. 20-B12356 and terminates any holdover tenancy of the property as of December 14, 2022. This decision is based on DNR's determination that it is not in the best interests of the State to reauthorize this lease. *See* RCW 79.130.040 (No re-lease of bedlands unless DNR "deems it to be in the best interest of the state to re-lease the area."). Considerations that went into this determination include:

**1. Contract Noncompliance and Failures to Perform**

Cooke has been a tenant on state-owned aquatic land since May 2016, when it executed a Notice of Change in Ownership for four commercial finfish aquaculture leases with DNR. Since 2016, DNR has notified Cooke regarding at least six lease defaults including:

- August 25, 2017—Notice of Default under Lease No. 20-B12517, for not keeping and maintaining leasehold improvements in good order and repair;
- September 19, 2017—Notice of Default under Lease No. 20-B12517, for improvements located outside of the leasehold;
- October 20, 2017—Notice of Default under Lease 22-B02777, for not paying rent;
- November 11, 2017—Event of Default under Lease No. 20-B12517, for failure to cure a default under the lease;

- December 15, 2017—Notice of Default and Termination under Lease 22-B02777, for: (i) not replacing unencapsulated flotation material, (ii) improvements located outside of the leasehold, and (iii) not maintaining leasehold improvements; and,
- February 22, 2018—Event of Default and Termination under Lease No. 20-B12517, for: (i) improvements located outside of the leasehold, (ii) installing improvements without prior consent, and (iii) not maintaining leasehold improvements, resulting in catastrophic damage to improvements on the site leading to a significant fish escapement event at the Cypress Island facility in 2017.

These incidents of noncompliance demonstrate that reauthorization of this lease by DNR, allowing Cooke to continue operating at this site, poses risks to Washington State including, but not limited to: (i) environmental harm to state-owned aquatic lands resulting from lack of adherence to lease provisions, and (ii) increased costs to DNR associated with contract compliance, monitoring, and enforcement.

## **2. Risks to State-Owned Aquatic Land**

In reviewing aquatic land use authorization applications, WAC 332-30-122(2)(a) directs DNR to consider whether or not the applicable facility is properly designed, constructed, maintained and conducted in accordance with sound environmental practices, and whether or not the proposed use causes adverse environmental impacts that cannot be mitigated to avoid substantial change to the environment. The commercial marine net aquaculture guidance document, *Commercial Marine Finfish Net Pen Aquaculture in Puget Sound and Strait of Juan de Fuca*,<sup>1</sup> completed jointly by the Washington Department of Ecology, the Washington Department of Fish and Wildlife, and DNR in early 2022 (Guidance Document), notes that commercial net pen aquaculture presents a number of potential risks to state-owned aquatic land. These risks include, but are not limited to, the following:

- Benthic environment—Deposition of organic matter leading to degradation of the benthic environment is a documented risk associated with net pen aquaculture;
- Biofouling—Biofouling impedes water flow through the nets, diminishing dissolved oxygen levels inside the pen and negatively affecting the fish. Biofouling also increases drag on net pens, which can cause stress on the infrastructure, resulting in deformed cages and, in extreme cases, net pen failure. In addition, biofouling can impact the benthic sediments underneath the net pens through the organic buildup of dislodged organisms when the nets are cleaned;

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<sup>1</sup> *Commercial Marine Finfish Net Pen Aquaculture in Puget Sound and Strait of Juan de Fuca*, Publication No. 22-06-008, April 2022.

- Water quality—Commercial finfish net pen aquaculture is considered a concentrated animal feeding activity and regulated as a pollution point source. The release of nutrients and organic matter can enrich the surrounding waters, giving rise to increased algae production in the affected areas and potentially leading to reduced dissolved oxygen from decomposition and respiration;
- Fish health—Open net pen finfish aquaculture: promotes the introduction of non-native pathogens, amplifies rate of infection and therefore amplifies pathogen abundance, promotes the increase in virulence of existing pathogens or is the nexus for the emergence of new pathogens, and promotes disease in wild finfish;
- Fish genetics—The consequences of escaped native or endemic species of farmed finfish interacting through reproduction with wild stocks are major concerns with open net pen finfish aquaculture;
- Ecological issues—Risks to wild populations from open net pen finfish aquaculture also include the attraction of wild populations to the net pen facilities and the potential entrapment and inadvertent harvest of wild fish within the net pen cages;
- Escape prevention and response—Fish escapes are a reality of finfish net pen aquaculture due to the dynamic and unpredictable nature of marine environments. Fish domesticated for and raised in a commercial marine operation are not managed or regulated for release into Puget Sound for fishery enhancement.

While some of these risks may be mitigated through, for example, provisions in a lease providing for prevention plans, water quality monitoring, and/or implementing best management practices into daily operations, not all risk can be eliminated even if following the management practices provided in the Guidance Document.

The inherent risks of finfish aquaculture are compounded by additional risks where, such as here, DNR lacks confidence that Cooke will consistently comply with lease mitigation requirements. DNR concludes that the risks to the State's aquatic lands from renewal of Cooke's lease on this site are high, and therefore that Cooke's proposed renewal is not in the best interests of the State.

### **3. No Renewal Option**

Pursuant to Section 3 of the lease, there is no renewal option. Section 3.2 provides that: "Tenant shall have the option to renew this Lease for Zero additional terms of Zero (0) years each. The initial term of this lease, and all renewal terms, shall not exceed Fifteen years (15) in the aggregate." The initial term of the lease was fifteen years, beginning on April 1, 2007 (*See* Section 3.1). Accordingly, Cooke is not entitled to renew this lease.

#### **4. Treaty Rights**

In February 2022, the Swinomish Tribe requested that DNR deny Cooke's application for a new net pen lease at Hope Island stating that "*the continued operation of the net pens violates our treaty fishing rights, is contrary to our historic and current tribal use of the area, and is contrary to the best interest of the state.*" In their letter, they indicate that their treaty rights are adversely affected by the net pens through interference with historical access to fishing, including physical displacement and impacts to fishing gear, and given the impacts to fish and fish habitat in Skagit Bay, which is crucial to the cultural, spiritual, subsistence and commercial activities of the Swinomish Tribe. Furthermore, they indicated the net pens are located near Lone Tree Point, a sacred cultural area for the tribe.

Tribal fishing rights under the Stevens Treaties consist of two components: (i) a "fair share" component and (ii) a "geographical," or right of access, component. *See Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1511 (W.D. Wash. 1988); *Northwest Sea Farms, Inc. v. U.S. Army Corps of Engineers*, 931 F. Supp. 1515, 1521-22 (W.D. Wash. 1996). The courts in both *Muckleshoot* and *Northwest Sea Farms* determined that treaty access rights would be impaired by proposals to construct improvements within the tribes' usual and accustomed fishing grounds. Renewal of Cooke's lease here presents a similar problem.

As such, and given DNR's statutory guidance to manage state-owned aquatic lands to provide a balance of public benefits for all citizens, including to ensure environmental protection and encourage direct public use and access (*See RCW 79.105.030*), DNR recognizes the impacts to state-owned aquatic lands as described above may also directly impact treaty rights. Therefore, in considering the appropriate balance of public benefits, which in this case compete with one another, DNR hereby determines the environmental protection and public access use, including but not limited to the Tribes, outweigh the benefits that would be received from authorizing continued use of the site to Cooke for finfish net pen aquaculture use.

#### **5. Best Interests of the State**

DNR is aware of and reviewed the recent Supreme Court decision upholding WDFW's SEPA process for Cooke's fish transfer permit. However, the standards DNR is required to consider in evaluating whether a proposed use of the State's aquatic lands is in the best interests of the State necessarily go beyond the procedural requirements of the State Environmental Policy Act (SEPA, RCW 43.21C).

The Legislature delegated the responsibility to manage state-owned aquatic lands to DNR "for the benefit of the public." RCW 79.105.010. DNR is required to "strive to provide a balance of public benefits for all citizens of the state." RCW 79.105.030. DNR manages state-owned aquatic lands in trust for the public by virtue of the Washington Constitution. *Pope Res. v. Dep't of Nat. Res.*, 190 Wn.2d 744, 754, 418 P.3d 90 (2018), and DNR "executes its leasing authority with a view towards the State's duty to protect the public trust." *Id.* Through the aquatic lands statutes, "the State has granted sovereign powers to DNR for protection of the State's interest in

the trust.” *Id.* As such, “DNR is vested with the discretionary, administrative responsibility to reject a bid to lease state lands as the interests of the State or affected trust require.” *Nw. Alloys, Inc. v. Dep’t of Nat. Res.*, 10 Wn.App.2d 169, 185, 477 P.3d 620 (2019). Based on the above considerations, and in light of the applicable statutes and regulations, DNR is denying Cooke’s application to reauthorize net pen aquaculture at Rich Passage, because it is not in the best interests of the State.

Pursuant to Section 3.5 of the lease, DNR hereby notifies Cooke that any holdover tenancy on the Property will be terminated as of **December 14, 2022**.

DNR will contact you separately regarding the next steps in wrapping up operations under the existing lease, and required clean up and restoration of the leasehold (*See, e.g.*, Sections 3.4, 7.4, 11, and 12 of the lease). In the meantime, if you have any questions about this decision or ongoing management of your existing lease, please reach out to Sean Carlson, District Manager, by phone at (360) 301-0422 or by email at [sean.carlson@dnr.wa.gov](mailto:sean.carlson@dnr.wa.gov).

Sincerely,



Thomas Gorman  
Aquatic Resources Division Manager

- c: District File, TRO File: 20-B10237  
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