No. 100896-1

SUPREME COURT OF THE STATE OF WASHINGTON

No. 54564-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

COOKE AQUACULTURE PACIFIC, LLC,

Appellant,

vs.

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

Respondents.

PETITION FOR REVIEW

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Appendix A: The Court of Appeals's decision, dated December 12, 2021, Case No. 54564-1-I.

Appendix B: The Court of Appeals's order denying motion for reconsideration, dated March 31, 2022, Case No. 54564-1-I.

Appendix C: RCW 79.02.030.

TABLE OF AUTHORITIES

Cases

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I. IDENTITY OF PETITIONER

Cooke Aquaculture Pacific, LLC ("Cooke"), appellant, seeks review as outlined below.

II. COURT OF APPEALS DECISION

Cooke seeks review of the Court of Appeals's Unpublished Opinion in *Cooke Aquaculture Pac., LLC v. Washington State Dep't of Nat. Res.*, 20 Wn. App. 2d 1030 (2021) (hereinafter the "Opinion"). The Opinion was filed by the Court of Appeals on December 14, 2021. Cooke filed a timely motion to reconsider, which was denied on March 31, 2022. A copy of the Unpublished Opinion and the Order Denying Motion for Reconsideration are included in Appendixes A and B, respectively.

III. ISSUES PRESENTED FOR REVIEW

1) Where the Department of Natural Resources ("DNR") enters into an aquatics lands lease, is the agency's subsequent decision to terminate that lease reviewed under Washington contract law as if DNR were a private party, or do DNR's

public trust obligations insulate the agency's decision from full judicial review?

2) Where a court is tasked with interpreting a lease, must the court take into consideration the history and context of the lease's implementation and negotiation in determining whether a termination decision was proper as it would if DNR were a private party?

3) Does substantial evidence support DNR's finding that Cooke was in breach of the lease agreement and that it could be terminated without providing any opportunity to cure?

IV. STATEMENT OF THE CASE

A. The Lease and the Events Leading to its Termination.

Upon statehood, the State of Washington asserted ownership over the beds and shores of all navigable waters up to the line of ordinary high tide. Const. art. XVII, § 1. The State retains ownership over these "aquatic lands" and DNR, on behalf of the State, manages them for many purposes. RCW 79.105.030, .050. Facilities that interface with Washington's

aquatic lands, be they private docks or international ports, generally require an aquatic lands lease from DNR, which manages thousands of such leases. Ensuring that these leases are enforced in consistent, equitable fashion is critical to Washington's economy and the protection of its natural environment.

This case involves an aquatic lands lease for a net pen fish farm in Port Angeles Harbor (the "Lease"). The farm had operated pursuant to a line of renewed leases since the mid-1980s. REC4494-504. The Lease was most recently renewed in 2015 with an expiration date in 2025. REC2415-55. The 2015 Lease revisions resulted from significant negotiation and built upon a well-established landlord-tenant relationship.

For the first two years of the 2015 Lease, DNR and Cooke enjoyed a productive relationship. In August 2017, a different Cooke fish farm located near Cypress Island in Skagit County suffered mooring and structural failures, which resulted in a major fish escape event. *See generally* REC1653-94. Those

escaped fish became headline news throughout the region and resulted in significant political backlash against Cooke. Following the collapse, DNR undertook a review of Cooke's Port Angeles farm, which is the subject of this litigation. This review included hiring an independent marine engineer, Mott MacDonald, to inspect the facility. REC4195-232. Following on-site investigations on December 4 and 5, 2017, and exhaustive review of other sources of information regarding the farm, DNR's contractors found the site to be safe and in fair condition given its age. REC4225. Despite these findings, DNR terminated the Lease on December 15, 2017, citing to three alleged defaults in the relevant termination letter. REC1756-57. DNR gave Cooke no opportunity to cure the alleged defaults or otherwise disprove them with evidence, even after Cooke immediately pointed to many factual infirmities in DNR's assertions. CP597-98 (citing REC1892-930).

In terminating the Lease, DNR did not invoke its public trust obligations or otherwise determine that net pen

aquaculture was not in the public interest. REC1756-57. It instead sought the thinnest of pretext to terminate the lease, part of an effort by the agency to "bury" Cooke. CP596 (citing REC5405). DNR acted as a landlord in terminating the Lease and was not making the type of public policy decision that warrants administrative deference. DNR's termination letter simply asserted that Cooke defaulted on the Lease and that DNR was contractually permitted to immediately terminate the Lease. REC1756-57. That decision, which DNR took as a landlord, has had major negative impacts on Cooke, including forcing it to shutter the Port Angeles operation. This appeal focuses on whether DNR's contractual termination of the Lease without an opportunity to cure was proper, and more specifically what the role of courts is in adjudicating DNR's decisions under its pre-existing lease agreements.

B. Procedural History of Litigation.

This case was filed in January 2018 to challenge DNR's December 2017 termination of the Lease. The initial action

included three separate claims, the first being an administrative claim under RCW 79.02.030, the second a breach of contract, and the third a breach of the duty of good faith and fair dealing. Originally filed in Clallam County, the case was transferred to Thurston County.

On April 26, 2019, the Thurston County Superior Court determined that the complaint included administrative law claims (RCW 79.02.030) which were to be heard on an administrative record, and also general civil claims for which discovery was required. To avoid confusion, the Superior Court ordered the complaint severed into two separate cases, and also instructed that the more limited administrative claim be heard before the broader civil claims. CP353-54. On February 7, 2020, the Superior Court conducted an administrative hearing, and on February 28, 2020, it issued an opinion denying Cooke's RCW 79.02.030 administrative claims. CP709-712.

The Superior Court found that the RCW 79.02.030 claim was controlled by *Northwest Alloys, Inc. v. Dep't of Natural*

Resources, and as such DNR's decision to terminate the lease was reviewed under the arbitrary and capricious standard of review. CP710; *Northwest Alloys, Inc. v. Dep't of Natural Resources*, 10 Wn. App. 2d 169, 447 P.3d 620 (2019), *review denied*, 194 Wn.2d 1019 (2020) (hereinafter "*Northwest Alloys*"). Under the Superior Court's view, all of the conclusions in DNR's termination letter were reviewed under the arbitrary and capricious standard, despite the letter (available at REC1756-57) making various legal assertions related to DNR's rights under the Lease. CP710-11.

Cooke timely appealed the Thurston County opinion asserting, among other things, that the Superior Court had misapplied *Northwest Alloys* and should have reviewed the termination decision de novo because DNR's termination letter was not an administrative action, but instead a quasi-judicial action. The December 14, 2021 Court of Appeals's decision agreed with Cooke in part and laid out a different standard of review than the Superior Court had adopted. Specifically, the

Court of Appeals held that DNR's legal interpretation of the lease must be reviewed de novo, but that DNR's decision to terminate the lease was shielded from full legal review by the arbitrary and capricious standard of review. Opinion at 10-11.

Cooke sought reconsideration of the Court of Appeals's decision, and that request was rejected on March 31, 2022. *See* Appendix B. The request for reconsideration focused primarily on the Court of Appeals's failure to apply basic rules of contract interpretation that require it to analyze the context of the dealings between Cooke's predecessors and DNR to understand terms of the lease. The Opinion ignored many facts relevant to the interpretation of the lease terms at issue, including many years of practice which showed the intent and agreement of the parties.

The current appeal only applies to Cooke's RCW 79.02.030 claim, and Cooke's common law contract claims remain active in the Superior Court.

V. ARGUMENT

Discretionary review should be granted under RAP 13.4(b)(1), (2), and (4), because the Court of Appeals's opinion conflicts with both Supreme Court and Court of Appeals precedent, and also involves issues of substantial public interest. The issue of substantial public interest, the appropriate standard of review that applies to DNR's decisions when it makes a decision pursuant to a public lands lease, has become an issue of significant legal debate in Washington in recent years, and its resolution is critical to protecting Washington's economy and also its natural environment.

The Opinion also conflicts with Washington precedents in two meaningful ways. First, the fashion in which the Court of Appeals resolved the appropriate standard of review (the issue of substantial public interest identified above) conflicts with longstanding Washington precedents that state agencies are treated no differently than private parties in contractual disputes. *See State ex rel. Gillette v. Clausen*, 44 Wash. 437,

441, 87 P. 498 (1906); *see also Architectural Woods, Inc. v. State*, 92 Wn.2d 521, 529, 598 P.2d 1372 (1979) (quoting *State ex rel. Gillette*); *Metro. Park Dist. Of Tacoma v. Dep't of Nat. Res.*, 85 Wn.2d 821, 827-28, 539 P.2d 854 (1975) ("[W]hen the State undertakes to dispose of public lands, either by lease or sale, it then acts in its proprietary capacity."). While the Opinion does not give deference to DNR's legal interpretation of the Lease, a mistake the Superior Court made, it extends deference to the agency's determination to terminate the lease. What the Opinion fails to recognize is that DNR's decision to terminate the lease, which was based on it completely reversing its prior positions and manner of doing business, was also a quasi-judicial decision requiring de novo review.

Second, Washington precedents are clear that in interpreting any contract, a court must consider the context and history of the relationship. *Berg v. Hudesman*, 115 Wn.2d 657, 667-69, 801 P.2d 222 (1990). While the Opinion claims to conduct a de novo review of the legal terms of the Lease, the

opinion does not look at the history and relationship of the lease in any meaningful detail. Indeed, Cooke presented evidence that explicitly contradicts the alleged defaults identified by DNR. Cooke also presented evidence showing that the parties clearly intended the Lease to not carry the interpretation that DNR later asserted—for example, DNR argues the Lease required the facilities' anchors to be on the leasehold, but the evidence showed that DNR knew the anchors were not on the leasehold for many years and had approved that practice. By not looking at the context, i.e., DNR's longstanding approval and acquiescence of Cooke's actions, the Court of Appeals erred in strictly applying lease provisions against Cooke in a manner that they were never intended to be applied.

A. In Recent Years, Confusion Has Arisen Over the Proper Standard of Review that Applies to DNR Actions Taken Pursuant to its Lease Agreements.

This is the second time in the past three years that this Court has been asked to provide guidance on the standard of review that applies to a DNR leasing decision that is challenged

under RCW 79.02.030. *See Northwest Alloys*, 10 Wn. App. 2d at 171-72. In the present case, the Superior Court and Court of Appeals both looked to *Northwest Alloys*, yet applied differing standards of review, with the Superior Court applying the "arbitrary and capricious" standard while the Court of Appeals applied both the "de novo" and "arbitrary and capricious" standards of review to different aspects of the appeal.

The confusion related to the appropriate standard of review in this case was foreseeable following the Court of Appeals's 2019 *Northwest Alloys* decision, which applied the arbitrary and capricious standard of review to DNR's decision to prohibit a lessee from subleasing a DNR-owned property. *Id.* at 184-85. The *Northwest Alloys* court reasoned that the arbitrary and capricious standard applied because the decision to approve a sublease for a new facility was administrative in nature, as opposed to quasi-judicial. *Id.* The Court of Appeals made that decision despite the relevant lease stating that DNR could not unreasonably withhold its consent to a sublease. *Id*. at

185-86. The Court of Appeals reasoned that the decision to withhold consent to a sublease pursuant to the terms of the lease was not a quasi-judicial decision because DNR had an obligation to determine whether the sublease was consistent with public trust responsibilities placed on DNR by the Washington Constitution and relevant statutes. *Id*. at 186. The upshot of this determination was that DNR was given deference in determining whether it properly followed the Lease's subleasing provisions.

In this case, DNR has argued that the holding in *Northwest Alloys* means that the agency's decision to terminate a lease on aquatic lands can only be reviewed under the arbitrary and capricious standard of review. CP635. DNR made this claim despite RCW 79.02.030 explicitly calling for the review to be "de novo before the court," and also longstanding precedents which hold that the government is to be treated no differently than a private party in the context of contractual disputes. *See e.g.*, *State ex rel. Wash. Paving Co. v. Clausen*, 90

Wash. 450, 452, 156 P. 554 (1916); *State ex rel. Gillette*, 44 Wash. at 441. These long-standing precedents are critical to private businesses that rely on leases from DNR. If DNR is treated differently than a private party, and its lease termination and interpretation decisions are given deference, the agency will be empowered to act as the judge, jury, and executioner when it comes to lease disputes. This type of arrangement will have major negative impacts on the numerous businesses that rely on DNR leases to conduct their businesses. It will also empower DNR to terminate leases of other tenants, like Cooke and Northwest Alloys, who find themselves politically unpopular at a particular moment in time. Resolution of the questions raised in this case and *Northwest Alloys* is critical to providing assurances to the many businesses that rely on DNR leases. Indeed, this uncertainty undermines the fundamental purpose of contract law—to protect society's reliance interest in the performance of promises. *Alejandre v. Bull*, 159 Wn.2d

674, 682, 153 P.3d 864 (2007) ("contract law is concerned with society's interest in performance of promises…").

The Opinion affords deference to DNR where none should be given because, as *Northwest Alloys* rightly concluded, the administrative act DNR performs with respect to aquatic leases is the decision to lease aquatic lands or allow subleasing of those lands. After that decision is made, DNR is to be treated by courts as any other private landlord. While the Opinion notes that "whether DNR had the *right* to terminate the lease based on the lease provisions was quasi-judicial," it then goes on to hold that "DNR's decision to terminate the lease was administrative, not quasi-judicial, and thus, the correct standard of review of DNR's termination decision is whether it was arbitrary and capricious." Opinion at 10-11 (emphasis in original). The problem with that reasoning is simple if the statutory analysis performed by *Northwest Alloys* is followed. The Washington State Legislature gave DNR broad discretion to "review and reconsider any of its official acts relating to

state-owned aquatic lands *until such time as a lease, contract, or deed is made, executed, and finally issued*," but after that lease is issued, DNR can only "recall any lease, contract, or deed issued for the purpose of correcting mistakes or errors, or supplying omissions." RCW 79.105.130 (emphasis added). If DNR had been performing such a recall of the lease to correct mistakes or errors or to supply omissions, the courts below should have given deference to such actions. But DNR did not recall the lease; it terminated the lease under the terms of a contract. Giving deference to that decision by applying the arbitrary and capricious standard was improper.

In essence, the standard that the Court of Appeals has now articulated gives DNR the green light to terminate its leases for any minor infraction, even if that infraction is a mere pretense to remove or avoid a disfavored tenant. Here, DNR weaponized numerous small infractions that were never before enforced to oust a suddenly very unpopular tenant that had become a political lightning rod.

"The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties." *Berg*, 115 Wn.2d at 663 (quoting Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 Cornell L.Quar. 161, 162 (1965)). By giving DNR discretion in determining whether to terminate the contract, regardless of surrounding circumstances, the Court of Appeals has effectively ruled that the intent of the contract is immaterial. Here, the intent of the contract was to allow Cooke to operate a fish farm, and it was doing so in a responsible and safe fashion. DNR decided to divorce itself from that intent and find a way to terminate the lease. By applying administrative deference to this decision, the Court of Appeals essentially has validated DNR's efforts to generate rationales to terminate the contract, which is a violation of the intent of the Lease and a dangerous precedent.

B. The Opinion Narrowly Looks to the Written Terms of the Lease, but Ignores the Context of the Lease as Required by Controlling Precedents.

This Court has adopted the context rule for contract interpretation and has endorsed the commentary to the Second Restatement of Contracts. *Berg*, 115 Wn.2d at 667-68. While the Opinion attempted to interpret the written terms of the lease, it ignored Cooke's voluminous argument about the past practice of the parties. For example, DNR purported to terminate the lease because the net pens anchors were outside the leasehold, but the evidence showed that DNR knew the anchors were off the leasehold (and physically had to be off the leasehold) for nearly two decades. CP587-90, 93, 603-07; REC1613-14. Despite evidence presented that DNR had never alleged a default for anchor placement before, and that DNR had renewed the Lease with knowledge of the anchors' locations, the Opinion expressly refuses to "disregard the plain language" of the Lease. Opinion at 12. While a court should be hesitant to disregard the language of a lease, where the parties have clearly

acted in a different manner for nearly 20 years, and the text of the lease as interpreted clearly conflicts with the parties' intent, *Berg* requires a court to enforce the intent and context of the lease, and not simply the language. *Berg*, 115 Wn.2d at 667. Similarly, the Opinion ignores the context of the other claimed infractions. For example, it claimed a default for disconnected anchors as a violation of maintenance provisions. But the record clearly shows that the anchors were disconnected to facilitate necessary maintenance, not because Cooke was ignoring the facility. CP607-08; REC5225-25, 5300; CP581 (legible version of REC5300). Similarly, the record shows that Cooke had repaired exposed Styrofoam on a floating barge consistent with DNR requirements. CP603 (citing REC1900-07, REC4848, and REC4955). Instead of engaging in analysis of the facts of these claimed defaults, the Court of Appeals simply read the terms of the Lease and ignored more than two decades of conduct between the parties and the administrative record that reflected that conduct. The record shows that Cooke

was in compliance with DNR's expectations, and the claimed violations were trumped-up pretenses to expel an unpopular tenant. Had the Opinion reviewed the context in which the Lease was negotiated and implemented, it would have interpreted the Lease consistent with the parties' intent and found that Cooke was in full compliance. By ignoring *Berg* and the context rule, the Court of Appeals misinterpreted the lease and ignored controlling precedents.

C. The Evidence in this Case Demonstrates that Termination of the Lease was Improper.

The Court should review the entire lease termination decision de novo, providing clarity to the relevant standard for a review under RCW 79.02.030. That de novo review should inform the Court's interpretation of the Lease under *Berg*, which requires a court to consider the context of a lease in addition to the plain language. This review will conclusively show that Cooke was not in default of the Lease, but instead the claimed defaults were merely pretenses used to oust an unpopular tenant.

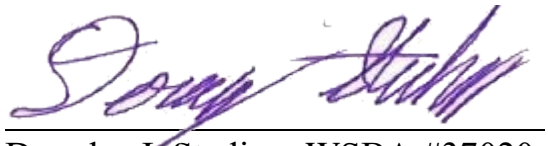
VI. CONCLUSION

DNR's lessees have become increasingly uncertain about their rights vis-à-vis DNR if the agency decides it no longer wants to be a business partner. This is the second time in three years that such a lessee has petitioned this Court to help clarify these issues. Both this case and the prior *Northwest Alloys* case have applied the arbitrary and capricious standard to at least part of DNR's decision pursuant to a lease. This has created a distinction between the agency and a private party when administering a lease, but voluminous caselaw holds that no such distinction should exist. The Supreme Court should accept this petition and clarify the applicable standards and ensure that Cooke receives a full de novo review of DNR's termination decision and rationales.

This document contains 3,411 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 2nd day of May, 2022.

NORTHWEST RESOURCE LAW PLLC



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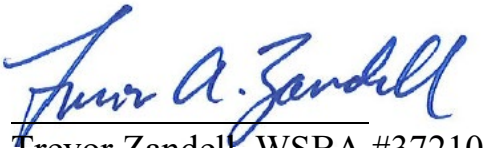

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DECLARATION OF SERVICE

I declare that I caused the foregoing to be served to each of the following via email and electronic notification via the electronic court filing system:

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I declare under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct to the best of my knowledge.

DATED this 2nd day of May, 2022, in Seattle, Washington.

s/Eliza Hinkes
Eliza Hinkes,
Paralegal

4846-0222-3543, v. 1

Appendix A

Filed
Washington State
Court of Appeals
Division Two

December 14, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

COOKE AQUACULTURE PACIFIC, LLC, Appellant, v. WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES, and HILARY FRANZ, the Washington Commissioner of Public Lands, Respondent.	No. 54564-1-II UNPUBLISHED OPINION

VELJACIC, J. — Cooke Pacific, LLC (Cooke) appeals the superior court's order affirming the Department of Natural Resources' (DNR)[1] termination of Cooke's lease. The Commissioner of DNR, Hillary Franz, terminated the lease based on Cooke's default of its lease obligations. Cooke asserts the superior court erred by applying the arbitrary and capricious standard of review, rather than the de novo standard of review, to DNR's decision to terminate the lease. It also asserts the court erred by affirming the termination decision because a de novo review shows that the termination was unlawful. Alternatively, Cooke asserts the court erred in finding that DNR's decision was not arbitrary and capricious.

We hold that the superior court properly applied the arbitrary and capricious standard of review because DNR's decision to terminate the lease was administrative, and that DNR's decision

[1] The respondents are the Commissioner of Public Lands, Hillary Franz (in her official capacity), and the Washington State DNR. Because Cooke's allegations relate primarily to DNR's decision regarding its lease, we refer to respondents collectively as "DNR" except where indicated otherwise.

to terminate the lease was not arbitrary and capricious. Accordingly, we affirm the superior court's final order upholding DNR's lease termination decision.

FACTS

I. BACKGROUND

Since 1984, several private companies have successively leased aquatic lands in Port Angeles harbor from DNR for finfish aquaculture, which involved the use of floating net pen structures. Cooke's Port Angeles fish farm is used "for the net pen farming of Atlantic Salmon . . . . This includes stocking, husbandry, harvesting, and other activities related to and in support of this activity." Administrative Record (AR) at 2447. The facility has two floating net pen structures within the leasehold area. Cooke uses ancillary equipment within the lease area, to include a floating wooden support raft, a feeding machine, generators, pumps, pressure washers, and air compressors. The cage system is moored in place with 38 Danforth-style anchors, chains, and lines. Tractor tires are used as fenders on the steel structure and come in contact with the water. The facility also has a staff building located on the larger net pen structure.

In 2014, the United States Navy proposed constructing a pier and support facilities adjacent to the Port Angeles net pen leasehold. While discussing its project with DNR, the Navy told DNR that some of Cooke's anchor and anchor lines were located outside of Cooke's leasehold area. Cooke denied that any of its anchors were outside of the leasehold area.

II. 2015 LEASE

Cooke applied to DNR to renew its lease at the Port Angeles location. Ultimately, the parties signed the lease, and it became effective on October 1, 2015. It was set to expire on September 30, 2025.

A. Timely Rent

Section 4.1(a) of the lease provided that Cooke must pay DNR rent annually, with rent due on or before the commencement date (October 1). Historically, Cooke had failed to timely pay its rent on several occasions.

B. Good Condition and Required Improvements

Section 11.2(a) required Cooke to keep the property and improvements "in good order and repair, in a clean, attractive, and safe condition." AR at 2437.

Cooke was also required under the lease to make certain improvements to the property. Section 7.1(a) of the lease defines "improvements" as "additions within, upon, or attached to the land," including "fill, structures, bulkheads, docks, pilings, or other fixtures." AR at 2421. Section 7.2 defines "existing improvements" as including "thirty-eight (38) Danforth-style anchors." AR at 2421.

Exhibit B to the lease provided that Cooke was also required to "replace existing unencapsulated floatation materials with encapsulated floatation materials" by December 1, 2016. AR at 2447. This referred to certain floating Styrofoam near a wooden float on the leasehold. Cooke was also required to ensure that all improvements, defined to include the anchors, were located entirely on the property within the leasehold by October 1, 2016. As noted above, DNR had been informed that Cooke placed anchors outside its leasehold.[2]

[2] During lease negotiations, DNR staff wrote an internal memorandum requesting to enter into the new lease and described the issues, including issues with some of the anchoring system being located outside the lease area that Cooke was aware of. The memo stated, in relevant part:

> Additional obligations were added to Exhibit B. They pertain to . . . ensuring that all improvements are located on the Property. The improvements in question are anchoring systems that may be outside of the current lease area.

AR at 498.

C. Leasehold Boundaries

Relatedly, under section 1.2(a) of the lease, Exhibit A provided a legal description of the property, which Cooke warranted was a true and accurate description of the lease boundaries:

> (a) State leases to [Cooke] and [Cooke] leases from State the real property described in Exhibit A together with all the rights of State, if any, to improvements on and easements benefiting the Property, but subject to the exceptions and restrictions set forth in this Lease (collectively the "Property").

AR at 2416.

D. Default and Event of Default

Section 14.1 of the lease defines "default" to include (1) the failure to pay rent when due and (2) the failure to comply with any other provision of the lease.

The lease also provided remedies in the event that a party breached provisions in the lease. Section 14.2(c) defines an "Event of Default":

> State may elect to deem a default by Tenant as an Event of Default if the default occurs within six (6) months after a default by Tenant for which State has provided notice and opportunity to cure and regardless of whether the first and subsequent defaults are of the same nature.

AR at 2439. If an event of default occurred, DNR had the remedies listed in section 14.3, which included the option to terminate the lease.

III. COMPLIANCE, DNR'S INVESTIGATION, AND DNR'S TERMINATION OF THE LEASE

A. Confirmation of Compliance

On February 10, 2017, DNR asked Cooke to confirm that Cooke was in compliance with the lease provisions. In particular, DNR inquired whether Cooke was in compliance with the requirement that Cooke replace the unencapsulated flotation materials and ensure that all improvements, which includes anchors, were located within the leasehold. Cooke responded three days later and confirmed that it was in compliance. Cooke stated, "all the tires have been removed

along with the wooden dock. The repairs were made to the concrete barge that sealed up the broken areas and exposed Styrofoam. And all the improvements are located within the property." AR at 1468.

B. Cypress Island Collapse and Failure to Timely Pay Rent

In August 2017, a net pen at Cooke's Cypress Island commercial fish farm suffered a structural collapse resulting in the release of Atlantic salmon into the surrounding waters.

DNR began an exhaustive review of the structural integrity of the Cypress Island fish farm, the cause of the collapse, and the structural integrity of Cooke's other farms throughout the state.

In October, Cooke failed to timely pay DNR its annual rent. DNR sent Cooke a notice of default and provided it a 60-day cure period. Cooke cured this default five days later.

C. Mott MacDonald Inspection

In November, DNR hired a marine engineering firm, Mott MacDonald, which contracted with Collins Engineers, to inspect Cooke's net pen locations. Mott MacDonald and Collins Engineers inspected the Port Angeles net pen on December 4 and 5. At this inspection, they noticed several anchors that were located outside the leasehold boundaries.

On December 15, the Mott MacDonald firm issued its preliminary findings. It found that the anchor lines were "deemed to be in satisfactory to fair condition." AR at 1724. It found "numerous errant/abandoned anchor line ropes . . . either draped over or wrapped around the anchor lines of the two net pens systems." AR at 1724. Mott McDonald also found unencapsulated floatation material: "[t]here was an 8 ft long by 5 ft tall area of missing concrete with exposed reinforcing wire at the southeast corner." AR at 1727. Mott McDonald found that, "[i]nspections conducted by the Owner do not appear in accordance with manufacturer's recommendations or

industry standards." AR at 1730. And "[s]ome anchors are likely outside the limits of the leased area." AR at 1730.

On December 18, Mott MacDonald sent DNR its full report. The report noted that while there are deficiencies with multiple anchors one "must be addressed immediately" because "[t]here is a broken link in the section of chain near the anchor." AR at 4218. The report also stated that mooring lines were "missing" and were "wrapped around other lines," among additional problems. AR at 4218. Finally, it noted that the float supporting the shed was in disrepair: "[c]oncrete float has a large damaged area along the eastern face." AR at 4220.

D. Lease Defaults

Based on the December 15, preliminary findings, DNR determined that Cooke had three defaults related to the lease requirements:

> Exhibit B, Paragraph 2.B, [of the October, 2015 lease] identified an existing concrete float on the site, and required Cooke to "replace all unencapsulated floatation material on the concrete float by December 1, 2016." In violation of this provision, as of December 9, 2017, the Styrofoam floatation material on the concrete float remained unencapsulated.
>
> Exhibit B, Paragraph 2.K, required, "By October 1, 2016, [Cooke] will ensure that all Improvements are located entirely on the Property." In violation of this provision, as of December 9, 2017, anchors associated with both the primary and secondary net pen arrays at the site were located outside of the leasehold. Section 7.2 of the Lease explicitly defines anchors as "Existing Improvements" at the site.
>
> . . .
>
> Furthermore, Section 11.2 of the Lease requires Cooke to "keep and maintain the [leasehold] and all improvements . . . in good order and repair, in a clear, attractive, and safe condition." In violation of this provision, as of December 9, 2017, two net pen anchor chains were disconnected from their anchors, and a third anchor chain had an open link that is vulnerable to complete failure.

AR at 1719-20.

Due to these defaults, DNR sent a notice of default and termination of the lease to Cooke on December 15. The notice stated that DNR was terminating the lease based on an event of

default: the untimely rent that occurred within a six-month period of three other defaults. DNR did not give Cooke any additional time to cure its defaults.

IV. PROCEDURAL HISTORY

On January 4, 2018, Cooke filed a "notice of appeal under RCW 79.02.030" (lease termination action) and a complaint for declaratory judgment in Clallam County Superior Court.[3] DNR moved to change venue because the lease contained a forum selection clause that designated Thurston County as the proper venue. The court granted DNR's motion.

Upon transfer, DNR moved to bifurcate the lease termination action and the declaratory action. Cooke did not oppose DNR's motion and the court granted the motion. This case involves the lease termination action.

On December 23, 2019, Cooke filed a brief on the merits. With respect to the standard of review, Cooke argued that DNR's decision to terminate the lease agreement was quasi-judicial rather than administrative in nature. Therefore, Cooke argued, the trial court should review DNR's findings of fact for substantial evidence, and review de novo whether those findings supported its conclusion of law. Accordingly, it contended that DNR's findings of fact were not supported by substantial evidence in the record, and therefore, those findings did not support DNR's decision to terminate the lease. In the alternative, Cooke argued that if the arbitrary and capricious standard of review applied, then DNR's decision to terminate the lease was arbitrary and capricious because its action was willful, unreasoning, and in disregard of the facts and circumstances.

[3] For the declaratory judgment action, Cooke argued that it was not in default of the lease; that DNR did not have a basis to terminate the lease; and that DNR failed to act in good faith and fair dealing by terminating the lease.

Additionally, Cooke appeared to argue that it was entitled to a cure period under the lease agreement, and therefore, its lease was erroneously terminated. Further, Cooke appeared to argue that DNR breached its duty of good faith and fair dealing in terminating the lease.

In response, DNR argued the trial court should affirm its decision to terminate the lease. First, relying on *Northwest Alloys, Inc. v. Dep't of Natural Resources*, 10 Wn. App. 2d 169, 447 P.3d 620 (2019), *review denied*, 194 Wn.2d 1019 (2020), DNR contended that its decision to terminate Cooke's lease was administrative in nature, and therefore, it contended that proper standard of review was the arbitrary and capricious standard. Under that standard, DNR argued that its decision "was well reasoned and made after having considered the relevant facts and surrounding circumstances," and therefore, it "lawfully and reasonably exercised [the] option provided under the contract to terminate Cooke's Lease for a series of defaults." CP at 647.

The trial court agreed with DNR that the arbitrary and capricious standard of review applied based on *Nw. Alloys*, 10 Wn. App. 2d 169. And based on that standard of review, "the court [found] that there [was] a basis in the record to support the termination decision." Report of Proceedings at 83. Accordingly, the court affirmed DNR's decision to terminate Cooke's lease. Cooke timely filed this notice of appeal.

ANALYSIS

I. STANDARD OF REVIEW

The parties disagree as to the appropriate standard of review. Cooke argues that DNR made a quasi-judicial determination when terminating the lease. DNR argues that it was acting in its administrative capacity in terminating the lease and that we, like the superior court, should apply the arbitrary and capricious standard of review under *Northwest Alloys*, 10 Wn. App. 2d 169. We agree with DNR.

A. Legal Principles

A determination of the correct standard of review is a purely legal question that we review de novo. *See End Prison Indus. Complex v. King County*, 192 Wn.2d 560, 566, 431 P.3d 998 (2018).

RCW 79.02.030 provides that:

> Any applicant to purchase, or lease, any public lands of the state . . . and any person whose property rights or interests will be affected by such sale or lease, feeling aggrieved by any order or decision of the . . . commissioner, concerning the same, may appeal therefrom to the superior court of the county in which such lands or materials are situated . . . . The hearing and trial of said appeal in the superior court shall be de novo before the court, without a jury, upon the pleadings and papers so certified. . . . Any party feeling aggrieved by the judgment of the superior court may seek appellate review as in other civil cases.

"Although RCW 79.02.030 uses the language 'de novo' review, such a review of an administrative agency's decision 'is only permissible when the agency acts in a quasi-judicial manner.'" *Nw. Alloys*, 10 Wn. App. 2d at 184 (quoting *Yaw v. Walla Walla Sch. Dist. No. 140*, 106 Wn.2d 408, 413, 722 P.2d 803 (1986)). "In cases in which the agency acted in its administrative function, review is limited to whether the agency acted arbitrarily, capriciously, or contrary to law." *Nw. Alloys*, 10 Wn. App. 2d at 184. "'Allowing only limited appellate review over administrative decisions, rather than original or appellate jurisdiction as a matter of right, serves an important policy purpose in protecting the integrity of administrative decision-making.'" *Nw. Alloys*, 10 Wn. App. 2d at 184 (internal quotation marks omitted) (quoting *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 295, 197 P.3d 1153 (2008)).

Our Supreme Court identified a four-part test to determine whether an agency's action was administrative or quasi-judicial in *Francisco v. Board of Directors of Bellevue Public School*, 85 Wn.2d 575, 579, 537 P.2d 789 (1975). The action is quasi-judicial only if (1) the court could have been charged in the first instance with making the decision; (2) the agency function is one that

courts typically perform; (3) the agency is performing functions of investigation, declaration, and enforcement of liabilities as they stand on present or past facts under existing laws; and (4) the agency's action is comparable to the ordinary business of courts. *Nw. Alloys*, 10 Wn. App. 2d at 184 (applying the four-part test from *Francisco*, 85 Wn.2d at 579).

B. Right to Terminate under Lease Provisions

An application of the *Francisco* factors shows that whether DNR had the *right* to terminate the lease based on the lease provisions was quasi-judicial. The interpretation of lease provisions is something with which the court could have been charged, and that function typically is one that courts perform. DNR was declaring and enforcing liabilities under the lease. And DNR's action was comparable to the ordinary business of the courts. Therefore, the correct standard of review for whether DNR had the right to terminate the lease is de novo.

C. Decision to Terminate the Lease

An application of the *Francisco* factors shows that the *decision* whether to terminate the lease was administrative. First, "[t]hrough the aquatic lands statutes, the State granted sovereign powers to DNR for protection of the State's interest in the [public] trust." *Nw. Alloys*, 10 Wn. App. 2d at 185. Like denying the opportunity to sublet, as in *Northwest Alloys*, DNR is vested with the discretionary, administrative responsibility to terminate a lease if the leaseholder breaches the lease as the interests of the State or affected trust require. In contrast to functions a court could be charged with, DNR clearly holds a unique, constitutionally mandated position vis a vis its management of navigable waters and underlying lands.

Second, courts have not "historically managed aquatic lands held in public trust because that is a function DNR performs." *Id.* at 186.

Third, in deciding to terminate the lease, DNR performed no formal inquest or inquiry, made no formal declaration of rights among parties as a court would do in a declaratory judgment action, and conducted no enforcement of liabilities aside from enforcing remedies available to it in the contract with Cooke.

Fourth, what DNR was doing here was, in its capacity as property manager or landlord, acting upon a contractual remedy available to it through its lease with Cooke. While courts may terminate leases as a remedy to a cause of action, courts do not, in the ordinary course, act as property managers or landlords.

We hold that DNR's decision to terminate the lease was administrative, not quasi-judicial, and thus, the correct standard of review of DNR's termination decision is whether it was arbitrary and capricious.

II. DNR HAD THE RIGHT TO TERMINATE THE LEASE UNDER THE LEASE PROVISIONS

There is no question that Cooke's failure to pay rent on October 1, 2017 constituted a default under section 14.1(a) of the lease. This means that under section 14.2(c), DNR could declare an event of default if another default occurred within six months. And under section 14.3(a), DNR had the option to terminate the lease if an event of default occurred. We conclude that additional defaults did occur within six months of October 1, 2017.

First, exhibit B, paragraph 2.K—defined in section 7.2 to include anchors—required Cooke to ensure that by October 1, 2016 all improvements were located within the leasehold area. There is no question that Mott McDonald's investigation revealed that some anchors remained outside the limits of the leased area. Under section 14.1(c), this failure to comply with a lease provision constituted a default.

Cooke admits that the anchors securing the fish farm apparatus were outside the leasehold, but that DNR had "known for years that the anchors were outside the leasehold." Appellant's Br. at 44. It also argues that it was not required by paragraph 2.K of exhibit B to relocate the anchors to inside the leasehold. But anchors are defined as "improvements" in the lease. Paragraph 2.K of exhibit B, listing Cooke's additional obligations reads, "*By October 1, 2016, [Cooke] will ensure that all Improvements are located entirely on the Property*." AR at 2448 (emphasis added). Cooke proceeds to argue that this obligation was really about the net pens, which they had confirmed were within the leasehold prior to termination. To the extent Cooke is asking us to disregard the plain language of the lease and read the requirement that "all Improvements [be] located on the Property," AR at 2448, excludes anchors, we decline to do so.

Second, Mott McDonald documented serious deficiencies with multiple anchors, including that two net pen anchor chains were disconnected from their anchors, and that a third anchor chain had an open link that made it subject to failure. These deficiencies violated section 11.2(a) of the lease, which required Cooke to keep all improvements in good repair and in a safe condition. Under section 14.1(c), this failure to comply with a lease provision constituted a default.

Cooke does not refute that the anchor chains were disconnected from their anchors or that the third chain had an open link, but instead argues that the final Mott McDonald report found that the facility was in "fair condition" and that the anchors themselves (versus the lines) were in satisfactory to fair condition. But even if there is an alternative interpretation of the facts, we review an agency's factual findings for substantial evidence, asking whether the record contains

evidence sufficient to convince a rational, fair-minded person that the finding is true. *B & R Sales, Inc. v. Dep't of Labor & Indus*., 186 Wn. App. 367, 374, 344 P.3d 741 (2015). Substantial evidence is that which is sufficient "'to persuade a fair-minded person of the truth of the declared premises.'" *Ames v. Wash. State Health Dep't Med. Quality Health Assurance Comm'n*, 166 Wn.2d 255, 261, 208 P.3d 549 (2009) (internal quotation marks omitted) (quoting *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433, 909 P.2d 1294 (1995)).

Cooke ignores other portions of the Mott McDonald report which clearly described that two of the anchor lines were disconnected from their anchors and that one had an open link. Under a substantial evidence standard, we are only concerned with whether Mott McDonald's observation was sufficient to persuade a fair-minded person that the two anchor chains were disconnected and that one had an open link. We conclude that substantial evidence supports DNR's claim that as of December 9, 2017, two anchor chains were disconnected from their anchors and one anchor chain had an open link.

Cooke argues that it was contractually obligated and entitled to an opportunity to cure any alleged defects prior to the termination of the lease. In support of this assertion, Cooke relies on section 14.2(b) of the lease, which provides a 60-day cure period for a defaults. However, by the plain terms of section 14.2(b), it only applies "[u]nless expressly provided elsewhere in this Lease." AR at 2439. "Elsewhere in this Lease" includes section 14.2(c), by which DNR may deem a default an "Event of Default" if the default occurs within six months after a default in which DNR provided Cooke notice and an opportunity to cure. AR at 2439.

DNR provided notice and an opportunity to cure regarding Cooke's default of the rent provision on October 20, 2017. On December 9, 2017, DNR became aware of additional defaults of the lease regarding the property itself. At that point, DNR could deem one or more of the subsequent defaults an event of default. Cooke was not entitled to an opportunity to cure.[4]

Accordingly, we hold that DNR had the right under the terms of the lease to terminate Cooke's lease.

IV. DNR'S DECISION WAS NOT ARBITRARY AND CAPRICIOUS

Next, Cooke argues that DNR's decision to terminate its lease was arbitrary and capricious.[5] DNR argues that its termination of the lease was based on the facts and was authorized under the lease, therefore its decision to terminate the lease was not arbitrary and capricious. We agree with DNR.

> Agency action is arbitrary and capricious if it is willful, unreasoned, and taken without regard to the attending facts or circumstances. Where there is room for two opinions, agency action taken after due consideration is not arbitrary and capricious even if a reviewing court may believe it to be erroneous. Deference will be given to the specialized knowledge and expertise of the administrative agency. The party who challenges an agency action under this standard carries a heavy burden.

[4] Cooke also argues that DNR breached the lease by failing to act in good faith and fair dealing because the parties' course of conduct established that DNR accepted Cooke's late rental payments for years prior to terminating the lease. Cooke argues that DNR failed to act in good faith and fair dealing because it did not allow Cooke a cure period for the unencapsulated Styrofoam and the improvements prior to its termination of the lease. But these arguments are waiver arguments by another name, and Cooke did not assign error to the superior court's determination that waiver did not apply. Accordingly, we do not reach these arguments.

[5] Cooke also argues that the superior court erred in not making findings and conclusions. But the superior court is not required to enter written findings of fact under RCW 79.02.030. *Nw. Alloys*, 10 Wn. App. 2d at 183 ("[u]nder RCW 79.02.030, the superior court defers to the factual findings of the commissioner and limits its review to the application of law to the admitted facts."). Accordingly, the superior court did not err by not entering findings of fact.

Nw. Alloys, 10 Wn. App. 2d at 187 (internal citations omitted). "'[N]either the existence of contradictory evidence nor the possibility of deriving conflicting conclusions from the evidence renders an agency decision arbitrary and capricious.'" *Squaxin Island Tribe v. Dep't of Ecology*, 177 Wn. App. 734, 742, 312 P.3d 766 (2013) (quoting *Rios v. Dep't of Labor & Indust.*, 145 Wn.2d 483, 504, 39 P.3d 961 (2002)).

DNR terminated the lease under section 14.2(c), which states that the

> State may elect to deem a default by Tenant as an Event of Default if the default occurs within six (6) months after a default by Tenant for which State has provided notice and opportunity to cure and regardless of whether the first and subsequent defaults are of the same nature.

AR at 2439. "Default" includes, among other things a "[f]ailure to pay rent or other expenses when due" and "[f]ailure to comply with any other provision of this Lease." AR at 2439. As set out above, substantial evidence supports that Cooke failed to make the timely rent payment by October 1, 2017 and failed to maintain the property and all improvements in good order and repair in a clean, attractive, and safe condition by allowing disconnected anchors and an open link on another anchor chain. As the lease describes, once an event of default occurs, the State may elect to terminate the lease: "14.3 Remedies . . . (a) Upon an Event of Default, State may terminate this Lease and remove Tenant by summary proceedings or otherwise." AR at 2439.

DNR's decision to terminate the lease was based on facts supported by substantial evidence, pursuant to plain terms of the contract, was well reasoned and made with due regard to the facts and circumstances.

CONCLUSION

We affirm the superior court's final order upholding DNR's lease termination decision.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, J.

We concur:

Maxa, P.J.

Cruser, J.

Appendix B

Filed
Washington State
Court of Appeals
Division Two

March 31, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

COOKE AQUACULTURE PACIFIC, LLC, Appellant, v. WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES, and HILARY FRANZ, the Washington Commissioner of Public Lands, Respondent.	No. 54564-1-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Cooke Aquaculture Pacific, moves this court to reconsider its December 14, 2021. Respondents, Washington State Department of Natural Resources and Hilary Franz, responded to Appellant's motion. After consideration, we deny the motion.

IT IS SO ORDERED.

Panel: Jj. Maxa, Cruser, Veljacic

FOR THE COURT:

Veljacic, J.

Appendix C

RCW 79.02.030

Court review of actions.

Any applicant to purchase, or lease, any public lands of the state, or any valuable materials thereon, and any person whose property rights or interests will be affected by such sale or lease, feeling aggrieved by any order or decision of the board, or the commissioner, concerning the same, may appeal therefrom to the superior court of the county in which such lands or materials are situated, by serving upon all parties who have appeared in the proceedings in which the order or decision was made, or their attorneys, a written notice of appeal, and filing such notice, with proof, or admission, of service, with the board, or the commissioner, within thirty days from the date of the order or decision appealed from, and at the time of filing the notice, or within five days thereafter, filing a bond to the state, in the penal sum of two hundred dollars, with sufficient sureties, to be approved by the secretary of the board, or the commissioner, conditioned that the appellant shall pay all costs that may be awarded against the appellant on appeal, or the dismissal thereof. Within thirty days after the filing of notice of appeal, the secretary of the board, or the commissioner, shall certify, under official seal, a transcript of all entries in the records of the board, or the commissioner, together with all processes, pleadings and other papers relating to and on file in the case, except evidence used in such proceedings, and file such transcript and papers, at the expense of the applicant, with the clerk of the court to which the appeal is taken. The hearing and trial of said appeal in the superior court shall be de novo before the court, without a jury, upon the pleadings and papers so certified, but the court may order the pleadings to be amended, or new and further pleadings to be filed. Costs on appeal shall be awarded to the prevailing party as in actions commenced in the superior court, but no costs shall be awarded against the state, the board, or the commissioner. Should judgment be rendered against the appellant, the costs shall be taxed against the appellant and the appellant's sureties on the appeal bond, except when the state is the only adverse party, and shall be included in the judgment, upon which execution may issue as in other cases. Any party feeling aggrieved by the judgment of the superior court may seek appellate review as in other civil cases. Unless appellate review of the judgment of the superior court is sought, the clerk of said court shall, on demand, certify, under the clerk's hand and the seal of the court, a true copy of the judgment, to the board, or the commissioner, which judgment shall thereupon have the same force and effect as if rendered by the board, or the commissioner. In all cases of appeals from orders or decisions of the commissioner involving the prior right to purchase tidelands of the first class, if the appeal is not prosecuted, heard and determined, within two years from the date of the appeal, the attorney general shall, after thirty days' notice to the appellant of the attorney general's intention so to do, move the court for a dismissal of the appeal, but nothing herein shall be construed to prevent the dismissal of such appeal at any time in the manner provided by law.

[**2003 c 334 § 397**. Prior: **1988 c 202 § 59**; **1988 c 128 § 56**; **1971 c 81 § 139**; **1927 c 255 § 125**; RRS § 7797-125; prior: 1901 c 62 §§ 1 through 7; **1897 c 89 § 52**; **1895 c 178 § 82**. Formerly RCW **79.01.500**, **79.08.030**.]

NOTES:

Intent—2003 c 334: See note following RCW **79.02.010**.

Severability—1988 c 202: See note following RCW **2.24.050**.

NORTHWEST RESOURCE LAW PLLC

May 02, 2022 - 3:39 PM

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