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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.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Carol Murphy)

APPELLANT COOKE AQUACULTURE PACIFIC, LLC'S OPENING
BRIEF

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I. INTRODUCTION

In 2017, the Washington Department of Natural Resources (“DNR”) terminated an aquatic lands lease that it had issued to Cooke Aquaculture Pacific, LLC, to operate a fish farm in Port Angeles Harbor (the “Lease,” available at REC2415-55¹). The farm had operated under various DNR leases since the mid-1980s, and the terminated Lease was not to expire until 2025. DNR justified the termination on three newly alleged defaults of the Lease and provided Cooke no opportunity to cure. A review of the administrative record for DNR’s decision shows that Cooke was not in default. Even if it was in default, DNR did not have a lawful basis for imposing the extreme remedy of lease forfeiture without providing an opportunity to cure.

Cooke challenged the termination, in part, under RCW 79.02.030, which allows a lessee to challenge DNR’s actions as a landlord. The statute expressly requires the superior court to conduct a de novo review of DNR’s quasi-judicial leasing decisions and such de novo review must include independent findings of fact and conclusions of law. In this case, however, the superior court refused to review the termination de novo. Instead, the court deferred to the legal and factual findings contained in

¹ DNR Bates numbered the Administrative Record (typically cited as “AR”) as “REC.” Cooke cites to the Record using the REC number for consistency.

the letter DNR sent to Cooke terminating the Lease (the “Termination Letter,” REC1756-57) and dismissed Cooke’s challenge under the arbitrary and capricious standard of review. CP709-11. The superior court’s deference to DNR was improper under RCW 79.02.030 and its failure to review DNR’s decision de novo was error.

In its first assignment of error, Cooke asserts that the superior court erred when it applied an arbitrary and capricious standard of review to DNR’s termination decision. Cooke requests that the Court hold that (1) DNR’s decision to terminate the Lease was a quasi-judicial action; and (2) under RCW 79.02.030, the superior court should have reviewed DNR’s quasi-judicial termination of the Lease de novo for substantial supporting evidence rather than deferring to the findings of fact and conclusions of law contained in DNR’s Termination Letter.

This Court need only consider Cooke’s second assignment of error if it finds that the superior court should have applied the de novo standard of review to the RCW 79.02.030 claim. In its second assignment of error, Cooke asserts that the superior court erred by affirming DNR’s termination decision. A proper de novo review would have showed that the alleged defaults did not occur, and DNR’s Lease interpretations were legally incorrect, making DNR’s Lease termination unlawful. Cooke asks the Court to perform its own de novo review of the record and set aside

DNR's Lease termination decision as unlawful. Alternatively, Cooke asks the Court to remand the matter for the superior court to make findings of fact and conclusions of law consistent with its de novo review obligations.

The Court need only consider Cooke's third assignment of error if it finds that the superior court properly applied the arbitrary and capricious standard of review to the Lease termination. Cooke's third assignment of error challenges the superior court's determination that the Lease termination was not arbitrary, capricious, or otherwise illegal. The record demonstrates that DNR acted in a willful, unreasoned, and illegal manner by terminating the Lease. Specifically, it shows that none of the alleged defaults occurred, but instead were mere pretenses for terminating a politically unpopular tenant. If the Court reaches the third assignment of error, Cooke requests that the Court find that DNR acted arbitrarily and capriciously in terminating the Lease based on factually incorrect default determinations and improper legal interpretations of the Lease.

II. ASSIGNMENTS OF ERROR AND LEGAL ISSUES

A. Assignments of Error.

1. The superior court erred by applying an arbitrary and capricious standard of review to DNR's decision to terminate the Lease. The superior court should have reviewed the termination de novo, as required by RCW 79.02.030. CP710.

2. The superior court erred in affirming the termination decision because a de novo review shows that the termination was unlawful.

3. Alternatively, the superior court erred in finding that DNR's decision was not arbitrary and capricious. CP710-11.

B. Issues Related to Assignments of Error.

1. Does DNR act in a quasi-judicial capacity when it decides to terminate a tenant's lease based upon the agency's own findings of fact and legal interpretations? (Assignment No. 1)

2. When DNR acts in a quasi-judicial capacity to terminate a lease, what is the proper standard of review under RCW 79.02.030? (Assignment No. 1)

3. Under Lease Section 14.2, was Cooke entitled to an opportunity to cure, or disprove, the alleged defaults prior to DNR terminating the Lease, and was DNR's refusal of that right a breach of the Lease's terms, including the duty of good faith and fair dealing that is inherent in every contract? (Assignments No. 2 and No. 3)

4. Applying a de novo standard of review to the law and facts of the case, was DNR's termination of the Lease lawful? (Assignment No. 2)

5. Applying an arbitrary and capricious standard of review to the law and facts of the case, was DNR's termination of the Lease lawful? (Assignment No. 3)

III. STATEMENT OF THE CASE – STANDARD OF REVIEW

This appeal requires two separate analyses. The Court must determine the proper standard of review by determining whether DNR’s decision to terminate the Lease was an administrative or quasi-judicial action (Assignment No. 1). Second, the Court must determine whether DNR had legal justification to terminate without an opportunity to cure (Assignment Nos. 2-3). Cooke has provided separate statements of the case and separate legal analysis sections for each issue.

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.

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. REC4494-504.² The relevant 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 Lease, DNR and Cooke continued to enjoy a productive relationship. In August 2017, a 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. The fish release 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. This included hiring an independent marine engineer, Mott MacDonald, to inspect the facility. REC4195-232. Mott MacDonald used a subcontractor, Collins Engineers, to inspect the facility's anchoring system. *Id.* 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

² Over the course of the tenancy, the farm has operated under various corporate names, most recently Cooke Aquaculture Pacific. REC2457-67. The company name on the Lease is Icycle Acquisition, Subsidiary, LLC.

December 15, 2017, citing to three alleged defaults. It gave Cooke no opportunity to cure the alleged defaults or otherwise disprove them. *See* alleged defaults discussed *supra* at Section V.B.

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. DNR continues to lease other aquatic lands to Cooke for the operation of similar farms. The record is clear that instead of acting to prohibit salmon farming as a matter of public policy, DNR acted as a landlord. It asserted that Cooke defaulted on the Lease and that it was contractually permitted to immediately terminate the Lease. *Id.* This lawsuit focuses on whether DNR's contractual termination of the Lease without an opportunity to cure was proper; it is not a review of a policy decision to permit or exclude salmon farming from Port Angeles Harbor.

B. The Termination Letter and Cooke's Response.

DNR articulated its legal and factual rationale for terminating the Lease in its two-page Termination Letter dated December 15, 2017. REC1756-57. The letter noted that "Cooke is not in compliance with Exhibit B, Paragraphs 2.B. and 2.K, and Section 11.2 of the Lease. DNR is exercising its right to terminate under Lease Sections 14.2 and 14.3(a)." *Id.* The letter described the alleged defaults and articulated DNR's two legal arguments for why Cooke was not entitled to an opportunity to cure.

Id. Each alleged default is described, and refuted, at *supra* Section V.B.

Upon receipt of the Termination Letter, Cooke recognized the factual flaws in DNR's assertions and responded with documentary evidence of Lease compliance on December 28, 2017. REC1892-930. DNR never replied to Cooke's response, and DNR never reconsidered the factual or legal bases of its Lease termination decision. The Termination Letter was both the first and final word from DNR on Lease termination.

C. The Superior Court's Proceedings and its Administrative Deference to DNR's Termination Letter.

A party seeking court review of a DNR leasing decision may bring a claim under RCW 79.02.030 within 30 days of the decision. Cooke filed a timely Notice of Appeal seeking review and reversal of the termination decision under RCW 79.02.030. Cooke's complaint also asserted a declaratory judgment action under RCW 7.24.020 and a civil breach of contract claim. In April 2019, the superior court severed Cooke's case into two separate lawsuits, ordering the RCW 79.02.030 claim be heard in a separate administrative hearing. CP353. The separate RCW 79.02.030 case was heard by the superior court on February 7, 2020, and the court affirmed the termination decision by an order dated February 28, 2020. CP709-12. Only the RCW 79.02.030 claim is the subject of this appeal.

A major issue before the superior court was the appropriate standard of review to apply in the RCW 79.02.030 administrative hearing. Cooke argued that the Lease termination decision was quasi-judicial and the superior court was required to review DNR's factual and legal determinations under RCW 79.02.030's expressly provided de novo standard. The court rejected Cooke's arguments and declined to review the case de novo. Instead, the court's final Order adopted DNR's argument that the termination decision was administrative in nature and should be reviewed under the arbitrary and capricious standard of review. CP709-11. Applying this deferential standard, the superior court affirmed DNR's decision and held "that DNR's decision was not arbitrary and capricious even if there is room for two opinions as to one or more of the reasons cited by DNR." *Id.* The superior court expressly made no findings of fact, nor did it undertake any detailed review of DNR's legal conclusions. *Id.*

IV. ARGUMENT – STANDARD OF REVIEW

A. Standard of Review Applicable to First Assignment of Error.

A court's determination of the proper standard of review is a purely legal question. As such, this Court reviews de novo a superior court's standard of review determination. *In re Marriage of Wright*, 147 Wn.2d 184, 189, 52 P.3d 512, 515 (2002) (noting that "purely legal" issues are reviewed de novo on appeal).

B. Under RCW 79.02.030, DNR’s Quasi-Judicial Actions Must Be Reviewed De Novo.

RCW 79.02.030 requires that the “hearing and trial of said appeal in the superior court shall be de novo before the court.” (emphasis added). Given separation of powers concerns, this de novo review requirement has been interpreted to apply only when DNR acts in a quasi-judicial capacity, and courts are to apply the arbitrary and capricious standard when DNR acts in an administrative capacity. *Nw. Alloys, Inc. v. Dep’t of Nat. Res.*, 10 Wn. App. 2d 169, 184, 447 P.3d 620 (2019), *review denied*, 194 Wn.2d 1019, 455 P.3d 138 (2020).

Before the superior court, DNR argued that “*Northwest Alloys* squarely holds that in managing aquatic land leases, DNR is acting in an administrative capacity and the standard of review under RCW 79.02.030 is the arbitrary and capricious standard.” CP635. DNR interprets *Northwest Alloys* as holding that all aquatic lands leasing issues are categorically administrative. But *Northwest Alloys* did not excuse DNR from being accountable when it breaches the terms of aquatic lands leases. Instead, *Northwest Alloys* followed established precedents requiring a court to analyze the specific agency action under review to determine whether it was administrative or quasi-judicial in nature. *Nw. Alloys*, 10 Wn. App. 2d at 184.

DNR's position is overbroad and ignores the long-recognized rule that the "State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives." *Carlstrom v. State*, 103 Wn.2d 391, 396, 694 P.2d 1, 5 (1985). This doctrine arises from the contracts clause of the Washington Constitution, Article I, Section 23, and generally prohibits the State from using its legislative and administrative powers to breach otherwise valid contracts. *Pierce Cty. v. State*, 159 Wn.2d 16, 27, 148 P.3d 1002, 1009 (2006). DNR's assertion that all of its actions related to aquatic lands leases are administrative, if taken to its logical conclusion, would permit the agency to violate its leases and then have courts defer to those contractual determinations without meaningful review—directly running afoul of the contracts clause.

Here, however, constitutional issues do not directly arise because DNR did not invoke any administrative or legislative powers to terminate the Lease. Instead, it purported to contractually terminate the Lease as the result of three alleged contractual defaults. REC1756-57. Where the State justifies terminating a contract based solely on the terms of a contract, the law is straightforward: "[t]here is not one law for the sovereign and another for the subject," and the State's rights under the contract are to be determined as if it were a private party. *State v. Clausen*, 44 Wash. 437, 441, 87 P. 498, 499–500 (1906).

The case law and RCW 79.02.030 are clear that if the Lease termination was quasi-judicial then a de novo standard of review applies. Such a standard is appropriate as it allows DNR to exercise broad administrative power in determining the uses to which aquatic lands will be applied, but it also protects tenants by ensuring that the terms of their leases are honored by DNR. The key question is thus whether DNR's Termination Letter embodies a quasi-judicial or administrative action, and not simply whether the action tangentially relates to DNR's authority to issue aquatic lands leases or its public trust obligations.

C. The Lease Termination was a Quasi-Judicial Action by DNR and the De Novo Standard of Review Applies.

DNR's Lease termination decision was a quasi-judicial action. In *Northwest Alloys*, this Court followed the four-test analysis for determining whether an action is quasi-judicial as outlined by the Supreme Court in *Francisco v. Board of Directors*, 85 Wn.2d 575, 579, 537 P.2d 789 (1975). *Northwest Alloys* requires case-by-case analysis of "whether (1) the court could have been charged in the first instance with the responsibility of making the decision; (2) the function of the agency is one that courts have historically performed; (3) the agency performs functions of inquiry, 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 (citing *Francisco*, 85 Wn.2d at 579); *see also Yaw v. Walla Walla Sch. Dist. No. 140*, 106 Wn.2d 408, 414, 722 P.2d 803, 807 (1986). Each of the four tests is discussed below and each show that DNR’s Lease termination decision was a quasi-judicial action.

1. The first *Francisco* test: The court could have been charged in the first instance with the responsibility of making the decision.

The first *Francisco* test demonstrates that DNR’s Lease termination decision was quasi-judicial in nature because courts are empowered in the first instance to interpret contractual leases and determine defaults. The Washington Constitution grants superior courts “broad general jurisdiction over real estate disputes,” including disputes related to leases. *Tacoma Rescue Mission v. Stewart*, 155 Wn. App. 250, 254, 228 P.3d 1289, 1291 (2010), *as corrected* (Apr. 27, 2010) (citing Const. art. IV, § 6); *see also* RCW 2.08.010 (“The superior court shall have original jurisdiction . . . in all cases at law which involve the title or possession of real property . . .”). The courts have original jurisdiction over lease disputes of this nature, and there is no reason why this dispute should not be heard by the judiciary in the first instance. The understanding that the judiciary is charged with resolving contractual lease disputes is why RCW 79.02.030 expressly requires de novo review.

Washington courts have spent over a century establishing voluminous caselaw on the specific issues of how to interpret leases and determine defaults. *See, e.g., Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 711, 334 P.3d 116, 119 (2014). This history of courts interpreting lease provisions demonstrates the quasi-judicial nature of DNR's action. *See Francisco*, 85 Wn.2d at 580 (holding that matters historically in the purview of courts are quasi-judicial).

2. The second *Francisco* test: The function of the agency is one that courts have historically performed.

As noted above, interpreting leases, determining defaults, and determining the appropriateness of contractual remedies is a core function of the courts. *See id.* Despite this, DNR is asking the Court to defer to DNR's lease interpretations, default determinations, and remedy determinations. Such determinations have always been the purview of the courts, and DNR has never administratively adjudicated contractual disputes. Therefore, no deference is due.

DNR convoluted this issue before the superior court by arguing that in terminating the Lease it was acting pursuant to its public trust obligations. CP646-47. DNR made this argument to bring it within *Northwest Alloys'* holding that courts defer to DNR's decisions related to the administration of DNR's public trust obligations. *See Nw. Alloys*,

10 Wn. App. 2d at 186. In *Northwest Alloys*, an aquatic lands tenant sought to sublease its facility to a new tenant that intended to change the very nature of the facility into the West Coast's largest coal export facility. *Id.* at 174. In denying that request to sublease—which was actually a request to change the use of the land in a profound manner—this Court found that DNR had acted in its administrative capacity as a public trust land manager. *Id.* at 184-85.

Unlike *Northwest Alloys*, this case does not implicate DNR's public trust obligations. *See id.* Cooke had no intention of changing the use of the leasehold. It intended to farm salmon as it has done for the past 30 years and as it was permitted to continue to do until 2025 by the existing Lease. Cooke was not requesting to change its operations in a manner that would have forced DNR to make an administrative decision about the appropriateness of the operation in light of the public trust.

It is also important to note that DNR did not, in fact, terminate the Lease due to its public trust obligations. The Termination Letter says nothing about DNR's trust obligations, nor does it detail any potential risks that Cooke's ongoing operations posed to the environment or public trust assets. Instead, DNR laid out purely contractual reasons for terminating the Lease. REC1756-57.

The contractual conclusions of the Termination Letter are not entitled to the deference that DNR is entitled to in making administrative land use decisions. If DNR's legal theory was upheld, then the agency could concoct a legal rationale for terminating any aquatic lands lease, and then shield itself from meaningful judicial review by asserting that all aquatic lands issues arise from its public trust mandate. Such a theory would make DNR the judge, jury, and executioner as to all its leases, and leave DNR's lessees with no meaningful contractual assurances.

3. The third *Francisco* test: The agency performs functions of inquiry, investigation, declaration, and enforcement of liabilities as they stand on present or past facts under existing laws.

The third *Francisco* test requires a court to consider whether the agency was determining established rights or future policies. *Francisco*, 85 Wn.2d at 580-81. A judicial action involves evaluation of existing rights based on existing circumstances, while an administrative action “looks to the future and changes existing conditions by making a new rule, to be applied thereafter.” *Id.* (quoting *Floyd v. Dep't of Labor & Indus.*, 44 Wn.2d 560, 571, 269 P.2d 563, 569 (1954)).

Here, DNR acted to interpret the existing 2015 Lease, based on the farm's existing condition in 2017. REC1756-57. DNR was adjudicating established rights, not determining a future policy related to fish farming.

DNR's decision in *Northwest Alloys*, however, directly implicated a major policy decision, *i.e.* whether to lease (via a sublease) a property for the construction of the West Coast's largest coal export facility. *Nw. Alloys*, 10 Wn. App. 2d at 174. Thus, in *Northwest Alloys*, DNR was forced to answer the question of whether as a matter of public policy it wanted to authorize future coal exports from the state of Washington. *See id.* Here, the question was not one of public policy, but instead the judicial interpretation of a pre-existing contract.

4. The fourth *Francisco* test: The agency's action is comparable to the ordinary business of courts.

Determining the rights and remedies available to parties under a contract is the ordinary business of the courts. Aggrieved parties do not go to an agency like DNR to determine their rights and remedies under a leasing contract, they go to a court.

As detailed above, all four *Francisco* tests endorsed by *Northwest Alloys* reveal that DNR's decision to contractually terminate the Lease was a quasi-judicial action. *See id.* When DNR acts in a quasi-judicial manner, RCW 79.02.030 requires a court to review the law and facts de novo.

D. Superior Court's Error and Appropriate Appellate Remedy.

The superior court made no findings of fact and reviewed only the administrative record to determine if DNR's termination decision was

arbitrary and capricious. CP709-11. The superior court did not interpret key Lease terms (for example, whether Exhibit B, Paragraph K was intended to force Cooke to move its anchors or whether termination without opportunity to cure was appropriate under Section 14). The superior court made no effort to weigh the evidence to determine if the alleged defaults had occurred, nor did it apply the law to any independent factual findings. *See Campbell v. Bd. for Volunteer Firefighters*, 111 Wn. App. 413, 417, 45 P.3d 216, 218 (2002) (“The court engaging in a de novo review of an administrative decision, determines whether the facts found by the agency are supported by substantial evidence and then independently determines the law and applies it to those facts.”).

Given the superior court’s failure to undertake a de novo review of the administrative record, there are no factual findings to review on appeal. To remedy this failure, the Court may either 1) remand to the superior court to undertake the proper de novo review, or alternatively, 2) conduct its own de novo review of the administrative record. *See Durham v. Dep’t of Emp’t Sec.*, 31 Wn. App. 675, 676, 644 P.2d 154 (1982) (finding that “[b]ecause we review the same record on the same basis as the superior court, . . . findings of fact and conclusions of law entered by the superior court are superfluous to our review.”). If the Court undertakes its own de novo review, it should find the Lease termination unlawful.

V. STATEMENT OF THE CASE – TERMINATION

This second statement of the case focuses on the factual circumstances surrounding the defaults alleged in the Termination Letter, which is most relevant to Assignments Nos. 2 and 3.

A. The 2017 Cypress Island Incident and DNR’s Subsequent Review of Cooke’s Port Angeles Farm.

The Port Angeles farm operated in a cooperative fashion with DNR for approximately 30 years. This relationship devolved rapidly in the aftermath of the structural failure of a separate Cooke fish farm located at Cypress Island in Skagit County in August 2017. REC1653-94. The Cypress Island event was catastrophic and resulted in a major escape of salmon into surrounding waters. *Id.* This event catalyzed anti-salmon farming advocates and resulted in major political backlash against Cooke and the salmon farming industry.

In the wake of the Cypress event, DNR, with Cooke’s willing participation, began an exhaustive review of the structural integrity of Cooke’s other fish farms. This included an in-depth review of the Port Angeles fish farm. REC4195-232. Cooke assisted DNR in conducting this review and made clear its intent to work with DNR to ensure that all its facilities were safe and not at risk of collapse. The Cooke family of companies had only purchased the farms in June 2016 and stood willing to

make any necessary capital improvements to ensure that its Washington investments could continue to operate. REC5221-301.

DNR's on-site inspection of the Port Angeles farm occurred on December 4 and 5, 2017. The inspection was conducted by a private marine engineering firm, Mott MacDonald, with the assistance of DNR staff and a second subcontracted firm, Collins Engineers. REC4195-232. Mott MacDonald reduced its findings to a written report that was issued on December 18, 2017 (three days after the termination decision was made). *Id.* The Mott MacDonald report concluded that the Port Angeles farm was in "fair condition," and identified some minor recommended repairs which Cooke quickly made. REC4225. Mott MacDonald's report did not conclude that the facility was unsafe, at risk of collapse, or improperly maintained. *See generally* REC4195-232. DNR's engineering contractor did not conclude that the facility needed to be closed or that it was in violation of the Lease. *Id.* DNR did not undertake any investigation as to whether Cooke was capable of making the recommended repairs. DNR made no analysis of whether the farm posed an environmental hazard or a risk to the public trust assets that DNR manages.

B. DNR's Stated Rationales for Terminating the Lease.

DNR was unquestionably under substantial political pressure following the Cypress Island collapse to be tough on Cooke. Much of this

pressure came from groups that believe fish farming is environmentally risky. DNR did not, however, terminate the Lease based on a need to protect public resources or the environment. REC1756-57. Instead, DNR asserted that Cooke was in default of its contractual lease obligations and that termination was an appropriate contractual remedy. *Id.*

Each of the four alleged defaults that DNR used to justify termination are laid out below (foam encapsulation, anchor locations, anchor attachments, and failure to timely pay rent).

1. Exposed Styrofoam – Lease Exhibit B, Paragraph 2.B

The Termination Letter alleged: “Exhibit B, Paragraph 2.B. 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.” REC1756-57. The Termination Letter goes on to assert that because Exhibit B identified December 1, 2016 as the deadline to encapsulate the foam, DNR was entitled to declare an Event of Default and terminate the Lease without providing Cooke an opportunity to cure as generally required by Section 14.2. *Id.*

The record shows that DNR was wrong about Cooke not completing the foam encapsulation work by December 1, 2016. To fully

understand this issue, it is important to understand how Exhibit B was generated. When DNR reviews a lease renewal application, it conducts a site visit to evaluate compliance with the prior lease and make recommendations for the new lease. For the 2015 renewal, this review occurred on August 4, 2015, and was conducted by Brad Pruitt, who was a Habitat Stewardship Specialist employed by DNR. REC4893. Mr. Pruitt's site visit noted concerns with unencapsulated Styrofoam, tractor tires used as fenders, and an old dilapidated wooden float. REC4893. These observations were the basis for the requirements that were set forth in Exhibit B of the 2015 Lease. *Compare* REC2447-49 *with* REC4893. DNR set specific deadlines by which Cooke was to satisfy some of the new lease obligations added in Exhibit B, including the December 1 encapsulation deadline. REC2447-49.

While the Lease Termination Letter asserts that Cooke failed to meet this deadline, both DNR's and Cooke's records show that Cooke had fully encapsulated the Styrofoam on the concrete float by December 1, 2016. REC4955 (post-deadline email confirmation); REC4848 (DNR permitting file that includes notation on February 21, 2017 that "Tenant has met stewardship requirements Exhibit B2(B.)(C.)(K.)"). Cooke accomplished the work by welding metal sheets onto the barge to encapsulate the Styrofoam. *See* REC1900-07 (pictures of work). The

record is clear that the work occurred before the December 2016 deadline.

Shortly before DNR's December 2017 visit to the site, some of the encapsulation welds failed and an area of Styrofoam was again exposed. REC1894. It is not uncommon for maintenance issues to arise on Cooke's farms given that they operate in saltwater environments and are constantly shifting with currents, winds, and tides. Cooke quickly cured the encapsulation issue after DNR's visit, and the issue never presented any risk to the facility's structural safety. REC1894. Despite Cooke's explanation, DNR did not investigate the issue to determine what happened but instead simply assumed the foam was not encapsulated a year earlier in 2016. Cooke provided pictures and documentary evidence to DNR to demonstrate full compliance in response to the termination decision and immediately cured the new exposure. REC1894, 1900-07.

2. Location of Anchors - Lease Exhibit B, Paragraph 2.K

The Termination Letter alleged: "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." REC1756. As with the Styrofoam

encapsulation, DNR asserted that because Exhibit K identified October 1, 2016 as the deadline for the work to occur, it was entitled to declare an Event of Default and terminate the Lease without providing Cooke an opportunity to cure as generally required by Section 14.2. *Id.*

Paragraph 2.K's requirement to move improvements onto the leasehold also arose from DNR's site investigation conducted during the 2015 Lease renewal process. Mr. Pruitt found during his review that, if the map he was relying on was correct, "a portion of the south end of the largest set of net pens is positioned just outside of the lease area." REC4894, 4905. The Lease addressed this concern regarding the location of the net pens by requiring that "[b]y October 1, 2016, Tenant will ensure that all Improvements are located entirely on the Property." REC2448.

At no point during development of the Lease was Cooke told that the anchor locations were a problem or that the anchors needed to be moved. Instead, DNR noted only that a small portion of the net pens may have been outside the leasehold. REC4894, 4905. Cooke later confirmed that the pens were in fact in the lease area and only appeared outside based on outdated aerial photos. DNR also confirmed in its records that this requirement was satisfied. REC4955 (post-deadline email confirmation); REC4848 (DNR permitting file with notation on February 21, 2017 that "Tenant has met stewardship requirements Exhibit B2(B.)(C.)(K.)").

In terminating the Lease, DNR did not assert that the net pens were outside the leasehold, as identified as a potential problem during the Lease renewal process. DNR instead reinterpreted Paragraph 2.K to assert that Cooke was required to move the farm's anchors inside the leasehold. However, the prior actions of the parties demonstrate that both parties knew the anchors were located outside the leasehold in 2015 (and for many years before that), and DNR never intended that Cooke move them.

To fully understand the anchor placement issue, it is important to understand the physics of anchoring a net pen style fish farm. To properly anchor the floating net pens, the anchors cannot extend straight to the sea floor. Each anchor must be set away from the pen to hold the pen in place while allowing the pen to move with waves and currents. The distance between the anchor and the facility is known as the anchor's "scope." To work properly, an anchor usually needs a scope length of three times the water depth. Anchor line scope ratios for mooring floating structures, docks, recreational boats, and commercial vessels are common knowledge of mariners, marine engineers, and most people involved with fisheries or other marine related industries.

The need to scope the anchors out from the farm has always been recognized in the farm's leases. For instance, the 1995 lease states that "[t]here is 350 feet horizontal distance between the anchors and the

mooring buoys giving a scope of approximately three to one.” REC4526. The 2005 lease notes that the mooring system (meaning the lines and connectors between the anchors and the pens) was configured with “[p]roper scope ratios . . . maintained in accordance with internationally known and recognized anchoring techniques.” REC2196. The 2005 lease contained a diagram showing the farm’s floating net pen system against the lease boundaries (the “Lease Area Diagram”), followed directly by a mooring diagram showing the farm’s anchors extending up to 690 feet to the south of the farm (the “Anchoring Diagram”). REC2202 (lease area diagram); REC2203 (anchoring diagram). While the Anchoring Diagram shows the anchors being 690 feet south of the farm, the Lease Area Diagram shows the distance to the edge of the lease area as only 61 feet to the south of the floating net pens. *Compare* REC2203 (anchoring diagram) with REC2202 (lease area diagram). Thus, in 2005 DNR knew and approved of the anchors being hundreds of feet outside of the leasehold. DNR’s evaluation of the application for the 2015 Lease used the description of the mooring system from the 2005 Lease, which also showed that the anchors did not fall directly inside the leasehold, but instead were placed outside the leasehold where they had appropriate scope to hold the net pens in place. *See* REC4909.

Before 2017, DNR never told Cooke that the anchors needed to be brought onto the leasehold, despite having knowledge of the issue and having numerous opportunities to ask Cooke to move them or have a new survey completed to redraw the lease boundaries around the anchors. Notably, in 2014 the United States Navy began a pier expansion project next to the Port Angeles farm. DNR, the Navy, and Cooke (then named American Gold Seafoods) began significant negotiations as to what impacts the Navy's expansion might have on the farm. REC185-89. This investigation focused on how vessel traffic might impact the mooring lines running from the anchors on the seafloor to the pens. REC320-26, 352-58, 375-82, 391-99, 420-26, 427-28. These negotiations included Cooke providing the Navy and DNR with information about the farm's anchor positions to allow them to ascertain whether the Navy's expansion might cause conflicts. REC446-62. The parties specifically looked to see how the farm lined up with the leasehold and (like Mr. Pruitt in 2015) found it relatively difficult to accurately overlay the lease on aerial photos. REC310, 433-44.

The voluminous record related to the Navy negotiations is important because it demonstrates that despite an intensive focus on the location of the farm's anchors, DNR never objected to their location or asked that they be moved onto the lease area. *See* REC546-48; 553; 557-

99; 600-01; 602-09; 616-18; 626-36; 637-39; 646-55; 2411-14. The record demonstrates that the parties intended to permit anchors to extend outside the leasehold to the extent necessary to achieve the scope required to safely hold the farm in place.

Additionally, the record contains ample discussion between Cooke (then American Gold) and DNR related to the Stewardship Requirements contained in Exhibit B of the 2015 Lease. REC543-44; 546-48; 549; 550-52; 553; 554; 555-56; 557-99; 601; 602-09; 610-15; 616-18; 619-24; 625; 626; 637-39. Despite this voluminous discussion, the record is devoid of evidence that the parties agreed—or ever discussed—that anchors needed to be moved into the lease area, which pragmatically would have been difficult, if not impossible, without redrawing the lease boundaries.

The first time the issue of anchors being outside the leasehold was raised with Cooke as a problem was at a meeting with DNR on November 29, 2017—over two years after the parties had entered into the 2015 Lease. REC5225. The November 29 meeting was called by DNR in the aftermath of the Cypress Island collapse and was aimed at creating a “complete plan to address all issues associated with net pen leases held by Cooke throughout the inland waters of Washington.” REC5221. At that meeting, DNR demanded that Cooke provide it a complete plan for ensuring its operations were in full compliance by December 1 (two days

later), a deadline Cooke strained to meet. REC5221-301. In its plan, Cooke demonstrated a strong desire to work with DNR to address all DNR's newly voiced concerns. *Id.* DNR never responded to Cooke's December 1 plan but instead terminated the Lease on December 15, 2017, in part based on the anchoring issued that was first raised 17 days earlier.

In summary, DNR knew the anchors were off-lease for years but never raised the issue until November 29, 2017. Exhibit B, Paragraph 2.K was not intended to require anchor relocation. It was intended to communicate the requirement that Cooke ensure the pens were on the leasehold. DNR terminated the Lease based on the anchors being off-lease on December 15, 2017, with no opportunity to cure.

3. Anchor Connections – Lease Section 11.2

The Termination Letter alleged: "Section 11.2 of the Lease requires Cooke to 'keep and maintain the [leasehold] and all improvements ... in good order and repair, in a clean, 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." REC1757. The Termination Letter's conclusion that the facility was not being maintained in violation of Section 11.2 is expressly contradicted by DNR's field notes from the December 2017 site visit. Specifically, DNR

field staff checked “yes” to confirm that “the improvements and property generally appear well-maintained and in good condition.” REC4162. The DNR staff then noted some general maintenance issues but found the farm to be in satisfactory condition and well-maintained. *Id.*

DNR’s independent marine engineer, Mott MacDonald, further supported this conclusion. Mott MacDonald’s final report following the December 2017 inspection did not find that the facility was neglected or unsafe. REC4225 (finding the facility was in “fair condition” and identifying “some recommended repairs”). Mott MacDonald retained Collins Engineers to conduct subsurface investigations of the anchors. After investigating the anchoring system with divers and remote operated vehicles, Collins concluded that the anchors were “in satisfactory to fair condition.” REC1724. Neither contractor suggested the anchoring system was unsafe or unmaintained, or that it needed substantial attention.

In its Termination Letter, DNR did not assert that Cooke had generally violated Section 11.2’s requirement that the facility be maintained in a clean and safe manner. Instead, it asserted that it had found two anchors disconnected and a third compromised during its December 2017 site investigation. REC1756-57. DNR’s declaration of default ignores the reasons the anchors were disconnected. As detailed by Cooke in response to DNR’s Termination Letter, Cooke had

“communicated to both [DNR employee] Sean Carlson (on December 2, 2017) and then to [DNR employee] Dennis Clark (on December 8, 2017), these two anchors were disconnected from the Port Angeles fourteen-cage system as part of the ongoing annual maintenance of this facility, and were scheduled to be reinstalled during the week of December 11. As Port Angeles is a low-current environment, the disconnection of these two anchors in no way posed any hazard to the facility. In fact, during maintenance or when boat access is needed at the facility, it is a common practice to disconnect moorings, as was done here.” REC1895. The disconnected anchors were reattached the following week, as planned. *Id.* DNR never responded to Cooke’s explanation for why the anchors were disconnected, which was provided both in-person during the inspection and in response to the Termination Letter. *Id.*

DNR also asserted that a link on one anchor chain was compromised. REC1756-57. Cooke had already identified this maintenance concern, and the anchor was scheduled for replacement the week of December 11. REC1895. Given the size/weight of the anchors used, replacing them is a substantial task that requires prior scheduling. The compromised chain was replaced as originally scheduled, and the compromised link was still able to pull the 4,000-pound anchor to the surface without failure. *Id.* The record shows that Cooke was aware of this

one anchor issue and actively addressing it. Otherwise, nothing in the record suggests that the anchors were in disrepair.

4. Failure to Timely Pay Rent – Lease Section 4.1(a)

DNR did not terminate the Lease for a failure to pay rent. The Termination Letter declared that “On October 20, 2017, DNR notified Cooke that it was in default of the Lease for failing to comply with Section 4.1(a) of the Lease. As additional defaults have occurred within the six-month period following this notification of default, DNR elects to deem Cooke’s default under Section 11.2 of the Lease an Event of Default under Section 14.2(c), and to terminate the Lease under Section 14.3(a).” REC1756-57. Section 4.1 is the “Annual Rent” section of the Lease and subsection (a) requires payment of a minimum annual rent by October 1. REC2418-19. On October 20, 2017, Cooke received a letter from DNR noting that Cooke had failed to make the minimum annual payment due on October 1, 2017. REC1536-37. DNR gave Cooke until December 19 to make the payment to avoid the declaration of “an event of default under Section 14(c) of the Lease.” *Id.* Cooke paid the full amount on October 25, 2017, within five days of receipt of notice. REC5200. DNR does not contest that Cooke immediately cured the untimely rent payment.

October 2017 was not the first time that Cooke had failed to pay rent before October 1. *See e.g.* REC4954 (Port Angeles rent overdue in

2016). A notable 2011 email reveals that the farm was making late rent payments going back to at least 2008. *See* REC4891. Nowhere in the record does DNR threaten to terminate any of Cooke’s leases based on late payments. Instead, DNR began charging interest on post-due balances. *Id.*

The only instance in which DNR departed from its pattern and practice of accepting late rent payments was in late 2017, when DNR suddenly declared a default, and then used that default as a basis to deprive Cooke of an opportunity to cure the alleged Section 11.2 default.³

VI. ARGUMENT – LAWFULNESS OF TERMINATION

A. Standard of Review Applicable to Merits.

DNR’s decision to terminate the Lease, as reflected in the Termination Letter, was a quasi-judicial decision and the appropriate standard of review is *de novo*. *See Northwest Alloys*, 10 Wn. App. 2d at 186. Cooke’s second assignment of error is that the termination cannot withstand *de novo* review. Under the *de novo* standard, the Court first determines “whether the facts found by the agency are supported by substantial evidence and then independently determines the law and applies it to those facts.” *Campbell*, 111 Wn. App. at 417. Substantial

³ DNR did not predicate its argument for why Cooke was not entitled to cure the alleged defaults of Exhibit B, Paragraphs 2.B and 2.K on the rent default. *See* REC1756-57. As such, the prior rent default is only relevant to the alleged Section 11.2 default.

evidence is the “quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.” *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Thus, under the de novo standard, the Court is to first determine if DNR’s factual conclusions regarding the alleged defaults are supported by substantial evidence. Then, the Court determines whether DNR’s termination was lawful, considering the facts, the terms of the Lease, the duty of good faith and fair dealing, and all other applicable law.

If the Court applies an arbitrary and capricious standard of review (Assignment No. 3), then the Court must determine if the termination was a “willful and unreasoning action, without consideration and in disregard of facts or circumstances.” *See Cosmopolis Consol. Sch. Dist. No. 99 v. Bruno*, 61 Wn.2d 461, 467, 378 P.2d 691 (1963). In applying the arbitrary and capricious standard, this Court reviews the administrative record de novo and does not defer to the superior court’s record determinations. *Wilson v. Emp’t Sec. Dep’t of State*, 87 Wn. App. 197, 200, 940 P.2d 269 (1997) (“In reviewing an administrative decision, the appellate court stands in the same position as the superior court.”).

B. The Terms of the Lease Must be Interpreted in Light of the Parties’ Intent when Executed in 2015.

The Lease is a contract between DNR and Cooke and the Court’s

purpose is to enforce the intent of the parties and the plain language of the Lease. *Seattle-First Nat'l Bank v. Westlake Park Assocs.*, 42 Wn. App. 269, 272, 711 P.2d 361, 363 (1985) (finding that “[w]hat controls in a lease is the intent of the parties at the time of its execution, and the plain meaning of the language used”). Washington courts interpret the parties’ mutual intent under the “context rule” adopted in *Berg v. Hudesman*, 115 Wn.2d 657, 667-69, 801 P.2d 222 (1990), in which the Washington Supreme Court interpreted the parties’ intent in a lease. The rule allows courts to “consider the surrounding circumstances leading to execution of the agreement . . . as well as the subsequent conduct of the parties . . . for the purpose of determining the parties’ intent.” *Id.* at 666-67. The rule “is not limited to cases where it is determined that the language used is ambiguous.” *Id.* at 668. If, however, the meaning of a lease provision is ambiguous—meaning it is uncertain or is subject to two or more reasonable interpretations after analyzing the language and considering extrinsic evidence—any ambiguities are to be construed against the drafter of the lease. *See, e.g., Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 105, 267 P.3d 435 (2011) (explaining when a lease provision is ambiguous); *Johnny’s Seafood Co. v. City of Tacoma*, 73 Wn. App. 415, 420, 869 P.2d 1097 (1994) (resolving ambiguities in a lease drafted by a lessor in favor of the lessee).

In interpreting the Lease, DNR is not to be given any special administrative deference. *Clausen*, 44 Wash. at 441 (finding that “[t]here is not one law for the sovereign and another for the subject”). DNR is to be treated as a private party, and as the drafter of the Lease, all ambiguities are to be construed against DNR. By deferring to DNR’s Termination Letter, which was in large part a legal interpretation of the Lease, the superior court failed to recognize that Cooke, as the non-drafting party, was entitled to have any potential ambiguities resolved in its favor. *See Johnny’s Seafood Co.*, 73 Wn. App. at 420. Instead, the trial court erred by deferring in blanket fashion to DNR’s Lease interpretation.

C. Termination of a Lease is a Remedy that the Law Abhors and Which Must be Avoided Where Possible.

Termination of a lease is a drastic remedy, and one that is catastrophic to persons and businesses that rely on leases. There are strong public policy reasons to disfavor termination to protect tenants from landlords who may be seeking to aggressively remove tenants. Washington courts have long recognized the general principal that “the law abhors forfeitures[.]” *Dutton v. Christie*, 63 Wash. 372, 374, 115 P. 856, 857 (1911). This is a clear rule that instructs courts in the real estate context to “promptly seize upon any circumstances arising out of the contract or the actions and relations of the parties in order to avoid a

forfeiture.” *Moeller v. Good Hope Farms*, 35 Wn.2d 777, 782, 215 P.2d 425 (1950); *see also Gray v. Gregory*, 36 Wn.2d 416, 419, 218 P.2d 307 (1950) (agricultural landlord did not provide an opportunity to cure and therefore could not maintain “a cause of action for forfeiture of the lease”); *Income Props. Inv. Corp. v. Trefethen*, 155 Wash. 493, 504–05, 284 P. 782 (1930) (rejecting landlord’s attempt to forfeit a commercial lease “until such time as they perform their part of the lease contract”).

As a matter of law, no conditions existed at the Port Angeles farm in 2017 that supported DNR’s demand that Cooke immediately forfeit all rights in the Lease. The Lease’s cure provisions and the law’s distain for forfeiture, at the very least, required that DNR give Cooke an opportunity to cure or disprove the defaults before being forced to forfeit its rights.

D. All of DNR’s Actions as a Landlord are Bound by the Duty of Good Faith and Fair Dealing.

The duty of good faith and fair dealing is inherent in every contract and “requires faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.” *Edmonson v. Popchoi*, 172 Wn.2d 272, 280, 256 P.3d 1223, 1227 (2011). “This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.” *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356, 360 (1991).

The parties intended that the Lease allow Cooke to operate a fish farm with contractual assurances that its landlord (DNR) could not unreasonably terminate the agreement. Central to this case is Lease Section 14.2, titled “Tenant’s Right to Cure.” REC2439. Section 14.2 gives Cooke the opportunity to address alleged defaults and either cure them or demonstrate that the defaults had not occurred. DNR’s Termination Letter is in large part a legal explanation as to why Section 14.2 did not provide a right to cure. A review of the Termination Letter and the relevant facts reveals that DNR’s failure to give Cooke an opportunity to cure was inconsistent with the parties’ expectations. It was a pretense to remove Cooke from the leasehold in light of political pressures and was a breach of the duty of good faith and fair dealing.

Similarly, several of the alleged breaches involved DNR changing its course of conduct from the parties’ prior practices, such as suddenly requiring the anchors to be moved and strictly requiring timely rent payments. While DNR certainly has the right to insist that all terms of the Lease are satisfied, it violated the duty of good faith and fair dealing when it suddenly changed a well-established practice and then refused to provide an opportunity to cure. DNR’s sudden reversal of historical practices is the type of self-serving landlord behavior that the duty of good faith and fair dealing prohibits.

E. DNR's Interpretation of the Lease's Remedy Provisions is Incorrect and Cooke was Contractually Entitled to an Opportunity to Cure any Alleged Defaults.

Section 14.2 of the Lease generally requires that DNR give Cooke an opportunity to cure any default before termination becomes an available contractual remedy. REC2439. DNR recognized that its ability to terminate the Lease without an opportunity to cure was highly restrained, and in the Termination Letter it made two legal arguments for why termination without an opportunity to cure was legal.

First, DNR asserted that Cooke had defaulted on the requirements of Exhibit B, Paragraphs 2.B and 2.K, and such defaults justified immediate termination. REC1756. These paragraphs dealt with encapsulating foam and ensuring improvements were within the leasehold boundaries. REC2447-48. DNR asserted that Section 14.2(b) excused it from providing Cooke an opportunity to cure these alleged defaults because Exhibit B's provisions contained deadlines by which the work needed to be completed. REC1757.

DNR misreads the Lease. Section 14.2(b) reads in pertinent part: "Unless expressly provided elsewhere in this Lease, the cure period is sixty (60) days." REC2439. DNR argues that the Exhibit B deadlines are "expressly provided" cure periods within the meaning of Section 14.2(b).

As such, DNR argues, any defaults of those provisions after the deadlines are not entitled to an opportunity to cure. REC1757.

The terms of the Lease do not support DNR's legal theory. Exhibit B was not a declaration of defaults, nor did it set any cure periods; it merely established "Additional Obligations" and provided dates by which the new additional obligations were to be fulfilled. REC2447. It was impossible for Cooke to be in default of these terms until the deadlines passed; thus, any applicable cure period would have had to extend beyond the default deadlines. Nothing in Paragraph B suggests that if the deadlines were missed (or if the repairs later failed) DNR could immediately terminate the Lease without providing an opportunity to cure. DNR simply reads an express cure provision into Exhibit B that is not there. At the very least, whether the deadlines in Exhibit B constituted "expressly provided" cure periods within the meaning of Section 14.2(b) is ambiguous, and that ambiguity must be resolved in Cooke's favor as the non-drafter of the Lease.

DNR's second legal argument for why termination without an opportunity to cure was a justified contractual remedy was only asserted as to the alleged default of Section 11.2 (the anchor connections). REC1757. In the Termination Letter, DNR argued that the alleged Section 11.2 default could be declared an Event of Default without an opportunity

to cure under Section 14.2(c) because Cooke had defaulted under Section 4.1(a) in the prior six months due to a late rent payment. *Id.* Cooke contests that it was in default of either Section 11.2 or Section 4.1(a). Nevertheless, even if the defaults occurred, DNR's reliance on its declaration of a default under Section 4.1(a) to terminate the Lease was a violation of DNR's duty of good faith and fair dealing.

As discussed above, the purported default of Section 4.1(a) was simply the continuation of a decade-long practice of Cooke making late rent payments. DNR had never objected to this practice or threatened termination and had agreed to simply charge interest on outstanding balances. REC4891. The duty of good faith and fair dealing requires "consistency with the justified expectations of the other party." *Edmonson*, 172 Wn.2d at 280. While DNR certainly could demand that Cooke begin paying rent on a timely basis, DNR could not suddenly ignore its historic practice and weaponize this lease provision to terminate the Lease. This is an example of a landlord looking for a default to get rid of a tenant and finding one in the common pattern and practice of the parties. The duty of good faith and fair dealing exists specifically to protect tenants from this type of self-serving action. At a minimum, the duty of good faith and fair dealing required DNR to honor Section 14.2 and provide Cooke an opportunity to cure any alleged defaults.

F. Cooke was Not in Default of Lease Exhibit B, Paragraph 2.B Because the Record Shows the Styrofoam was Fully Encapsulated by December 1, 2016.

As discussed above (*see infra* Section V.B.1), the first basis for terminating the Lease without an opportunity to cure was exposed Styrofoam on a concrete float. REC1756. Exhibit B, Paragraph 2.B required this Styrofoam to be encapsulated by December 1, 2016, and the record demonstrates that Cooke met this deadline. DNR followed up with Cooke after the December 1 deadline and confirmed that the Styrofoam was encapsulated consistent with Exhibit B. REC4955 (post-deadline email confirmation); REC4848 (DNR permitting file noting on February 21, 2017 that “Tenant has met stewardship requirements Exhibit B2(B.)(C.)(K.)”). In response to the Termination Letter, Cooke provided pictures confirming that the work had occurred prior to December 1, 2016. REC1900-07 (pictures of work). The record shows that the Styrofoam had been encapsulated with eighth-of-an-inch thick metal sheets in 2016, and that what DNR saw a year later was not a failure by Cooke to complete the encapsulation work, but recent failure of welds. REC1894. This recent failure was immediately cured by Cooke after DNR’s inspection. *Id.*

Cooke’s farms operate in salt water, and are continuously shifting with tides, waves, storms, and watercraft wakes. Maintenance issues understandably arise, and Cooke diligently works to stay on top of them.

The Lease envisions maintenance issues arising and requires Cooke to maintain the facility “in good order and repair, in a clean, attractive, and safe condition.” REC2437. This does not mean that things like a metal sheet will not rust and fail; it simply means that Cooke needs to stay on top of maintenance to ensure the site is safe, clean, and well maintained. To gauge whether Cooke had met this requirement, DNR hired Mott MacDonald, who found that while the facility was old it was in fair condition and Cooke had not ignored its maintenance obligations. REC4195-4232. The exposed Styrofoam posed no risk to the farm’s overall safety and DNR never asserted it posed such a risk.

DNR’s termination of the Lease based on the alleged Paragraph 2.B default is not supported by the factual record, nor is it supported by the Lease’s right to cure provisions. DNR asserted that the extreme remedy of immediate Lease forfeiture was an available remedy because of the express deadlines contained in Paragraph B. *See infra* Section VI.E. But these deadlines were never intended to displace Cooke’s right to cure, which was ensured by Lease Section 14.2. DNR’s proper, good faith course of action would have been to raise the Styrofoam issue and give Cooke a reasonable opportunity to cure the problem or otherwise demonstrate compliance. It was unreasonable and unlawful to simply terminate the Lease based on the recent Styrofoam exposure.

G. Cooke was Not in Default of Lease Exhibit B, Paragraph 2.K Because the Record Shows that Paragraph 2.K was Never Intended to Force Cooke to Move the Anchors.

DNR's second basis for terminating the Lease without an opportunity to cure was its assertion that Cooke was required to move the net pen anchors to within the leasehold area and it failed to do so. DNR states that Cooke's failure to move the anchors was a default under Lease Exhibit B, Paragraph 2.K. However, DNR had known for years that the anchors were outside of the leasehold and the parties never intended that Cooke relocate them. *See infra* Section V.B.2.

As discussed above, Exhibit B, Paragraph 2.K memorialized the findings of DNR's review of the leasehold as part of the 2015 lease renewal process. DNR's 2015 review found that "a portion of the south end of the largest set of net pens is positioned just outside of the lease area." REC4894, 4905. The 2015 Lease addressed this specific concern—the location of the net pens, not the anchors—by requiring that "[b]y October 1, 2016, Tenant will ensure that all Improvements are located entirely on the Property." REC2448. Cooke confirmed the floating pens were situated on the leasehold and DNR subsequently confirmed Cooke's compliance with Paragraph 2.K. REC4955 (post-deadline email confirmation); REC4848 (DNR permitting file noting on February 21, 2017 that "Tenant has met stewardship requirements Exhibit

B2(B.)(C.)(K.)”). In its 2017 review, DNR did not find that the floating pens were outside of the leasehold, which was its concern in 2015.

The above demonstrates that Cooke complied with Paragraph 2.K’s requirements as they were understood by the parties at the time the Lease was executed. It is this intent that the Court is to effectuate. *See Seattle-First Nat’l Bank*, 42 Wn. App. at 272 (finding that “[w]hat controls in a lease is the intent of the parties at the time of its execution”). DNR attempts to reinterpret Paragraph 2.K as an affirmative requirement that Cooke move the farm’s anchors by October 1, 2016. REC2448. There simply was no such directive. DNR had long known the anchors were off the leasehold and had never objected before November 2017.

DNR supports its reinterpretation by arguing that anchors are “improvements” within the meaning of the Lease. *See* REC2421 (Lease Section 7.2). But this splicing of language does not change the fact that in 2015 the focus was solely on the pens; DNR knew the positions of the anchors and did not raise the issue. In fact, the off-leasehold position of the anchors was repeatedly endorsed by DNR’s actions. DNR’s proposed interpretation of Paragraph 2.K requires this Court to entirely ignore the prior dealings of the parties.

Additionally, as noted above, even if the anchors’ positions constituted a default, the October 2016 deadline for moving them does not

displace the Lease's cure provisions. DNR's appropriate recourse was to work with Cooke in good faith to cure the problem, not terminate the Lease with immediate effect. Indeed, the Lease contains a provision for adjusting lease boundaries in the event that it is necessary to ensure the farm is properly situated. REC2416 ("State reserves the right to retroactively adjust rent if at any time during the term of the Lease State discovers a discrepancy between Tenant's property description and the area actually used by Tenant."). Cooke suggested this remedy when DNR first raised concerns about anchors outside of the lease area on November 29, 2017. REC5228. Cooke repeated its request to employ this remedy in response to the Termination Letter. REC1895. DNR entirely ignored this provision, which is in addition to the general cure provision, and gave Cooke no opportunity to cure the perceived problem.

H. Cooke Was Not in Default of Lease Section 11.2 Because the Anchors Were Appropriately Maintained.

DNR's third basis for terminating the Lease without an opportunity to cure was DNR's allegation that Cooke failed to maintain the farm's anchors in compliance with the Lease. As described above, DNR discovered two disconnected anchors and one compromised anchor chain during its lease renewal inspection of the farm. *See infra* Section V.B.3.

Fish farms operate in dynamic environments that are hard on equipment. Corrosion and rust caused by saltwater, combined with the stress and tension of tides, currents, and wave action make wear and tear on a facility a certainty. Section 11.2 is a general mandate that Cooke “keep and maintain the Property and all improvements (regardless of ownership) in good order and repair, in a clean, attractive, and safe condition.” REC2437. The Lease does not detail the meaning of this general provision in the context of a facility actively operating in a dynamic environment. The provision is thus ambiguous. But even so, there is nothing in the record showing that Cooke fell short of this lease requirement. Indeed, DNR’s marine engineering contractor failed to find that Cooke had ignored its maintenance responsibilities. *See* REC4195-4232 (Mott MacDonald Report). But DNR chose not to rely on its contractor’s findings to terminate the Lease and instead claimed that the existence of two disconnected anchors and a third compromised anchor were a valid basis to terminate the Lease. REC1757.

To ensure the farm’s safety, Cooke conducts regular maintenance on the anchors and anchor lines. Given the depths of the anchors at the Port Angeles facility (over 100 feet), and the anchors’ weights (thousands of pounds), the only way to conduct routine maintenance requires disconnecting anchors and bringing them to the surface. The Port Angeles

farm is situated behind the Ediz Hook, which protects it from high currents, and it is safe to temporarily disconnect anchors for maintenance.

At the time of DNR's inspection, the Port Angeles farm was conducting routine maintenance on its mooring system. There is no debate that two anchor lines were disconnected on the date of DNR's site inspection. But DNR failed to consider why those lines were disconnected. Cooke noted the maintenance work to DNR employees before and during the inspection, and DNR's contractors did not attribute any error to the practice. The anchors were reinstalled on December 11 and 13. REC1895-96. Cooke reiterated this in response to the Termination Letter. REC1895. This was information that DNR had and this information should have informed its termination decision.

One anchor with a potentially compromised link was, on its own, not an appropriate reason to terminate the Lease. Indeed, the issue had been identified by Cooke as part of its maintenance checks and was scheduled for replacement the week of December 11 when the other two anchors were to be reconnected. REC1895. The compromised anchor chain was replaced, and even with the compromised link, the chain was able to pull the 4,000-pound anchor to the surface. REC1895.

It is also important to note that Section 11.2 does not include specific maintenance mandates, but instead broadly requires that Cooke

keep the facility “in good order and repair, in a clean, attractive, and safe condition.” REC2437. What this provision precisely means is ambiguous. DNR’s contractor used divers and remote operated vehicles to inspect the anchoring system and found that the system was “in satisfactory to fair condition.” REC1724. DNR’s contractors did not find that the anchors were in disrepair, or in a condition that violated the Lease. The record shows that the anchors were maintained and functional.

There is nothing in the record that suggests that Cooke was not adequately maintaining the farm’s anchors. DNR identified two violations of Section 11.2 by ignoring facts and taking facts out of context. Meaningful review of the status of the anchors would have resulted in a conclusion similar to Mott MacDonald’s—that the system was functional and adequately maintained. The anchors were not in a state of disrepair to constitute a default of Section 11.2’s general requirement to maintain the facility in good working condition. Nor were they in any state of disrepair that could not be cured. Indeed, the issues DNR identified were cured before the Termination Letter was even issued. REC1895-96.

I. DNR’s Treatment of the Late Rent Payment in October 2017 Demonstrates the Agency’s Bad Faith.

DNR did not terminate the Lease based on the untimely payment of rent, but instead declared a default as a result of a late payment and then

used that default to justify its termination of the Lease without providing Cooke an opportunity to cure. REC1757. Cooke cured the late payment within five days of notice. REC5200. The record shows that Cooke had routinely paid the rent late going back to at least 2008. REC4891. DNR had instituted a system of charging interest on Cooke's untimely payments, but it never declared a default or otherwise suggested that the Lease was in jeopardy of termination as a result of those consistently late payments. *Id.* DNR's sudden change of behavior in declaring a default shows a bad faith effort by DNR to terminate the Lease.

VII. CONCLUSION

DNR's termination decision was unlawful under either a de novo or arbitrary and capricious standard of review because DNR's default determinations were not supported by the record. Instead of giving Cooke a good faith opportunity to demonstrate compliance, DNR asserted a misinterpretation of the Lease to immediately terminate the Lease without giving Cooke any opportunity to cure. DNR's termination constitutes a breach of the Lease's express terms and a breach of the inherent duty of good faith and fair dealing. At the very least, Cooke was entitled to some opportunity to work with DNR to cure the alleged defaults.

RESPECTFULLY SUBMITTED this 24th day of June, 2020.

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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 24th day of June, 2020, in Seattle, Washington.

s/Eliza Hinkes
Eliza Hinkes, Paralegal

NORTHWEST RESOURCE LAW PLLC

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