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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

COOKE AQUACULTURE PACIFIC, LLC,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,
and HILARY FRANZ, COMMISSIONER OF PUBLIC LANDS,

Respondents.

**RESPONSE BRIEF OF RESPONDENTS DEPARTMENT OF
NATURAL RESOURCES AND COMMISSIONER OF PUBLIC
LANDS HILARY FRANZ**

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE ISSUES2

III. COUNTERSTATEMENT OF THE CASE3

 A. The Lease.....3

 1. Background.....3

 2. Lease Negotiations.5

 3. Lease Provisions.....6

 a. General Provisions.6

 b. Improvements.....7

 c. Termination.....8

 d. Exhibit B—Additional Obligations, Habitat Stewardship, and Deadlines.9

 4. Cooke and DNR’s Communications About Lease Obligations.9

 B. Site Inspections and Reports.....10

 1. Cypress Island Net Pen Collapse.....10

 2. Site Inspection.11

 C. Lease Termination.13

 1. DNR’s Termination Notice.13

 D. Procedural History.15

 1. The Complaint.15

2.	RCW 79.02.030 Administrative Appeal.	15
a.	Arguments Below.	15
b.	Superior Court’s Ruling.	16
IV.	STANDARD OF REVIEW.....	17
V.	ARGUMENT	17
A.	The Superior Court Correctly Applied the Arbitrary and Capricious Standard of Review to RCW 79.02.030 Under <i>Northwest Alloys</i>	17
1.	DNR’s Administrative Aquatic Lands Leasing Decisions Are Not Quasi-Judicial.	18
2.	The Standard of Review Under RCW 79.02.030 Requires Deference to DNR’s Use of Discretion Reserved Under the Lease.	20
3.	DNR Fulfills Its Public Trust Obligations Through Its Leasing Authority Granted Under the Aquatic Lands Statutes.....	21
B.	DNR’s Termination of Cooke’s Lease Was Based on the Facts and Authorized Under the Lease. It Was Not Arbitrary and Capricious.....	23
1.	Any Ambiguity in the Lease Must Be Construed Liberally in Favor of DNR and Strictly Against Cooke.....	24
2.	DNR Did Not Waive Its Rights Under the Lease and Cooke Fails to Assign Error to the Superior Court’s Conclusion That There Was No Waiver.	25
3.	DNR Relied on the Terms of the Lease When It Exercised Its Right to Terminate. Cooke Had No Right to Cure Under the Lease.	29

4.	The Presence of Un-Encapsulated Floating Material on Cooke’s Concrete Float Violated the Terms of Cooke’s Lease and Constituted a Default.	31
5.	Cooke’s Anchors Were “Improvements” the Parties Specifically Listed on the Lease.....	33
6.	The Lease Required Cooke to Accurately Describe the Area Under the Lease and Locate All Improvements in This Area.	35
7.	Cooke Failed to Keep Its Improvements in Good Order and Repair.	38
C.	Termination of Cooke’s Lease Was an Appropriate Remedy to Protect the State’s Aquatic Lands. Cooke Was Subject to a Contract Rescission, Not a Forfeiture.	41
D.	DNR Acted in Good Faith in Terminating Cooke’s Lease. Cooke’s Failure to Raise This Argument at the Superior Court Waives It on Appeal.	42
E.	Termination of Cooke’s Lease Was Particularly Appropriate Given DNR’s Role as the Manager of State-Owned Aquatic Lands Held in Trust for the People of Washington.	43
VI.	CONCLUSION	45

TABLE OF AUTHORITIES

Cases

<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990).....	35
<i>Caminiti v. Boyle</i> , 107 Wn.2d 662, 732 P.2d 989 (1987).....	24
<i>Campbell v. Hauser Lumber Co.</i> , 147 Wash. 140, 265 P. 468 (1928)	30
<i>Chelan Basin Conservancy v. GBI Holding Co.</i> , 190 Wn.2d 249, 413 P.3d 549 (2018).....	25, 34
<i>Cornerstone Equip. Leasing, Inc. v. MacLeod</i> , 159 Wn. App. 899, 247 P.3d 790 (2011).....	27
<i>Davidson v. State</i> , 116 Wn.2d 13, 802 P.2d 1374 (1991).....	24
<i>Dutton v. Christie</i> , 63 Wash. 372, 115 P. 856 (1911)	41
<i>Estate of Petelle</i> , 195 Wn.2d 661, 462 P.3d 848 (2020).....	26
<i>Estate of Petelle</i> , 8 Wn. App. 2d 714, 440 P.3d 1026 (2019).....	26
<i>Francisco v. Bd. of Directors</i> , 85 Wn.2d 575, 537 P.2d 789 (1975).....	19
<i>Gray v. Gregory</i> , 36 Wn.2d 416, 218 P.2d 307 (1950).....	41
<i>Hearst Commc'ns, Inc. v. Seattle Times Co.</i> , 154 Wn.2d 493, 115 P.3d 262 (2005).....	35

<i>Herberg v. Swartz</i> , 89 Wn.2d 916, 578 P.2d 17 (1978).....	42
<i>Hood Canal Sand & Gravel, LLC v. Goldmark</i> , 195 Wn. App. 284, 381 P.3d 95 (2016).....	20, 24
<i>Household Fin. Corp. v. State</i> , 40 Wn.2d 451, 244 P.2d 260 (1952).....	17
<i>In re Personal Restraint of Matteson</i> , 142 Wn.2d 298, 12 P.3d 585 (2000).....	17
<i>Income Props. Inv. Corp. v. Trefethen</i> , 155 Wash. 493, 284 P. 782 (1930)	41
<i>Jones v. Best</i> , 134 Wn.2d 232, 950 P.2d 1 (1998).....	26
<i>Malmo v. Case</i> , 28 Wn.2d 828, 184 P.2d 40 828 (1947).....	20
<i>Moeller v. Good Hope Farms</i> , 35 Wn.2d 777, 215 P.2d 425 (1950).....	27, 41
<i>Northwest Alloys v. Dep't of Nat. Res.</i> , 10 Wn. App. 2d 169, 447 P.3d 620 (2019), <i>review denied</i> , 194 Wn.2d 1019, 455 P.3d 138 (2020).....	passim
<i>Pearl Oyster Co. v. Heuston</i> , 57 Wash. 533, 107 P. 349 (1910)	34
<i>Pelly v. Panasyk</i> , 2 Wn. App. 2d 848, 413 P.3d 619 (2018).....	34
<i>Pope Resources v. Dep't of Nat. Res.</i> , 190 Wn.2d 744, 418 P.3d 90 (2018).....	23, 43
<i>Rekhter v. Dep't of Soc. and Health Servs.</i> , 180 Wn.2d 102, 323 P.3d 1036 (2014).....	43

<i>Republic Inv. Co. v. Naches Hotel Co.</i> , 190 Wash. 176, 67 P.2d 858 (1937)	41
<i>Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council</i> , 165 Wn.2d 275, 197 P.3d 1153 (2008).....	34
<i>Squaxin Island Tribe v. Dep’t of Ecology</i> , 177 Wn. App. 734, 312 P.3d 766 (2013).....	40
<i>State ex rel. White v. Bd. of State Land Comm’rs</i> , 23 Wash. 700, 63 P. 532 (1901)	20
<i>T-Mobile USA Inc. v. Selective Ins. Co. of Am.</i> , 194 Wn.2d 413, 450 P.3d 150 (2019).....	34
<i>Vehicle/Vessel LLC v. Whitman Cty.</i> , 122 Wn. App. 770, 95 P.3d 294 (2004).....	26, 27, 28
<i>Weden v. San Juan Cty.</i> , 135 Wn.2d 678, 958 P.2d 273 (1998).....	22, 44
<i>Wilcox v. Basehore</i> , 187 Wn.2d 772, 389 P.3d 531 (2017).....	42
<i>Yaw v. Walla Walla School Dist. No. 140</i> , 106 Wn.2d 408, 722 P.2d 803 (1986).....	18
<i>Yim v. City of Seattle</i> , 194 Wn.2d 682, 451 P.3d 694 (2020).....	22

Statutes

RCW 79.02.030	passim
RCW 79.105	23
RCW 79.105.010	22
RCW 79.105.030	22, 31

RCW 79.105.170	11
RCW 79.105.200	23
RCW 79.110	23
RCW 79.125	23
RCW 79.130	23
RCW 79.135	23
RCW 79.140	23
RCW 79.145.010	31
RCW 79.36.355	23

Constitutional Provisions

Const. art. XVII.....	24
Const. art. XVII, § 1.....	22, 43

I. INTRODUCTION

A major failure at Cooke Aquaculture Pacific, LLC's (Cooke) net pen facility near Cypress Island, Washington, resulted in the collapse of the net pens and the release of thousands of non-native Atlantic salmon into the habitat of threatened Washington salmon. After the release, the Department of Natural Resources and Commissioner of Public Lands Hilary Franz (DNR) took a closer look at Cooke's operations state-wide. What DNR found was concerning, and, as the steward of the State's aquatic lands, as well as the administrator of the State's public trust responsibilities over those lands, could not be ignored.

Cooke conducts fish farming operations on state-owned aquatic lands at several facilities throughout the state. Relevant to this appeal is Cooke's operations in Port Angeles Harbor, and DNR's termination of Cooke's lease at that facility due to Cooke's repeated and serious failures to comply with the terms of its aquatic lands lease.

Cooke presents the Court with one excuse after another for its failures to comply with the terms of its Lease. None of Cooke's justifications have merit. In addition to its failure to timely pay rent, Cooke defaulted under the terms of its Lease by: (1) failing to encapsulate floatation material on a concrete float; (2) failing to ensure that its improvements were located entirely within the leasehold boundary; and

(3) failing to properly maintain its net pens as required by Section 11.2(a) of the Lease, as evidenced by two disconnected anchorage chains and a chain with a broken chain link. These violations were significant, and given the previous collapse of Cooke's Cypress Island facility, warranted DNR's termination of the Lease.

In reviewing DNR's decision to terminate Cooke's Port Angeles lease, the superior court correctly applied an arbitrary and capricious standard of review under RCW 79.02.030, and properly affirmed DNR's termination. Under *Northwest Alloys v. Dep't of Natural Resources*, 10 Wn. App. 2d 169, 447 P.3d 620 (2019), *review denied*, 194 Wn.2d 1019, 455 P.3d 138 (2020), DNR's aquatic lands leasing decisions are administrative, not quasi-judicial, and as such, these decisions are reviewed under an arbitrary and capricious standard. The superior court's decision to uphold DNR's termination of Cooke's lease was correct, and should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the superior court correctly conclude that the applicable standard of review for DNR's aquatic lands leasing decisions under RCW 79.02.030 is arbitrary and capricious, as established in *Northwest Alloys*?

2. Under *Northwest Alloys*, does DNR act in an administrative, as opposed to a quasi-judicial, capacity when it administers an aquatic lands lease?

3. Did the superior court correctly conclude that DNR's termination of Cooke's lease was not arbitrary and capricious, and therefore properly affirm DNR's termination of Cooke's lease?

III. COUNTERSTATEMENT OF THE CASE

A. The Lease.

1. Background.

The aquatic lands at issue in this case are located in Port Angeles Harbor and have been used for finfish aquaculture since the mid 1980's by various lessees.¹ See REC-2081.² In 2015, Icicle Acquisition Subsidiary, LLC (Icicle), operating as American Gold Seafoods, negotiated a new lease with DNR. REC-2354. In 2016, Glenn Cooke AGS Holding, Inc. purchased

¹ For a timeline of the prior tenants and acquisitions, see Clerk's Papers (CP) at 626.

² Citations to the Clerk's Papers are designated "CP," and citations to the Administrative Record (the Record) are designated "REC-." When referring to the Administrative Record, zeros as placeholders have been omitted for ease of reference, i.e. REC-0000001 becomes REC-1.

The Record is contained on two discs. One disc contains the Final Record, which has four subfolders: (1) Correspondence (REC-1-2079); (2) Lease (REC-2080-2491); (3) Regulatory Permits (REC-2492-3219); and (4) Reports (REC-3220-4493). The other disc contains the Final Supplemental Record (Final Supp. Record) (REC-4494-5441).

Icicle and changed the name of the business to Cooke Aquaculture Pacific, LLC. REC-2457, 2468; *see* Clerk's Papers (CP) at 240.

In 2014, shortly before Icicle applied to renew its lease,³ the United States Navy proposed constructing a pier and support facilities on Ediz Hook, near the Port Angeles net pen leasehold. REC-127, 161. The pier would allow the Navy to provide increased security for Navy vessels traveling to and from Naval Base Kitsap Bangor in the Hood Canal. REC-161, 134.

The Navy's proposed pier was adjacent to and encroached on Icicle's Port Angeles leasehold. REC-135, 308. The Navy wanted an accurate and complete understanding of where Icicle's anchors and anchor lines were located. *See* REC-134–35, 141, 185, 377, 433–34, 446. During the Navy's discussions with DNR and Icicle, the Navy noted that several anchor lines were beyond the lease area. *See* REC-134, 446. Icicle told the Navy that its "mooring lines are well within [its] current lease boundaries[,]” and expressed concern that the Navy's proposed plans would disturb its leasehold and interfere with its business. REC-377, 308, 317, 467.

³ Aquatic Lands Net Pen Lease No. 22-B02777.

In light of the Navy's proposed facility, Icicle began planning to replace and relocate the Port Angeles net pen farm with a new farm at a different location. Icicle's plans were referred to as "Port Angeles-East Marine Net Pen Relocation Project." REC-2704, 2706, 2707-714, 2715-775, 2776, 2777-778, 2779-846, 2864-877, 3017-103.

2. Lease Negotiations.

While Icicle pursued permits for the relocation project, Icicle applied to DNR to renew its lease at the existing net pen site in Port Angeles. REC-2353-360. The parties spent several months negotiating the lease terms, including the habitat stewardship requirements. REC-498, 546-47, 555, 2364-365, 2411-414, 4893, 4897-900, 4947-951.

In a memorandum from DNR staff seeking permission to enter into the new lease, DNR staff described the issues and how these issues were resolved:

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. The contract provides one year from Commencement for [Cooke] to confirm that all improvements are located on Property.

REC-497-98, 4849-850, 1876. DNR then presented a lease offer to Icicle. REC-499, 4850. The lease offer listed anchors as existing "Improvements." REC-566. The lease offer included the condition that "by October 1, 2016,

Tenant will ensure that all improvements are located entirely on the Property.” REC-593. Icicle responded to the lease offer with concerns about specific lease provisions, but its response did not identify issues with anchors being considered an improvement, or with the requirement that Icicle move the improvements. *See* REC-557, 612–13.

In 2015, DNR issued Icicle a new lease (the Lease),⁴ effective October 1, 2015, until September 30, 2025.⁵ REC-2415 (Lease at 1), 2417 (Lease at 3).

3. Lease Provisions.

This case centers on several provisions contained within the Lease and the parties’ understanding of those provisions.

a. General Provisions.

The Property consists of 993,168 square feet, described in Exhibit A of the Lease. REC-2416 (Lease at 2), 2446 (Lease at 32, Ex. A). The term “Property” is a defined term of the Lease and refers to the area of land described in Exhibit A of the Lease. REC-2416 (Lease at 2, ¶ 1.1(a)). The Lease provides that Cooke prepared Exhibit A, and warrants that Exhibit A is a true and accurate description of the Lease boundaries and the

⁴ The new lease remained under Aquatic Lands Net Pet Lease No. 22-B02777.

⁵ In 2016, Cooke acquired Icicle, and Icicle assigned the Lease to Cooke. REC-2457, 2468; CP at 240.

improvements to be constructed or already existing in the Lease area. REC-2416 (Lease at 2, § 1.2(a)).

The Lease requires Cooke to maintain the Property in good order and repair, and in a clean, attractive, and safe condition. REC-2437 (Lease at 23, § 11.2(a)).

The Lease provides that the waiver of any default under any Lease term is not a waiver of the term. REC-2442 (Lease at 28, ¶ 18.5). Further, any waiver of any default is not a waiver of any subsequent default of that same term or any other term. REC-2442 (Lease at 28, ¶ 18.5). The Lease expressly states that “TIME IS OF THE ESSENCE as to each and every provision of this Lease.” REC-2442 (Lease at 28, § 18.7) (emphasis in original).

b. Improvements.

The Lease defines “Improvements” as “additions within, upon, or attached to the land.” REC-2421 (Lease at 7, § 7.1). The Lease identifies the following Improvements located on the Property:

Two (2) separate steel cage structures consisting of fourteen (14) net pens and six (6) net pens respectively, twenty (20) individual containment nets, two (2) predator nets, *thirty-eight (38) Danforth-style anchors*, one (1) wooden barge for storing nets, one (1) steel structure for housing feed, one (1) structure used for staff quarters and an unknown quantity of tractor tires used as fenders and encapsulated billets used for floatation.

REC-2421 (Lease at 7, § 7.2) (emphasis added).

c. Termination.

DNR's authority to terminate the Lease to Cooke arises from the terms of the Lease. REC-2439–440 (Lease at 25-26, § 14). Section 14 of the Lease provides the parties' agreement regarding defaults and remedies, including termination. REC-2439–440 (Lease at 25-26, § 14).

A “default” occurs when Cooke fails to timely pay rent or other expenses, or fails to comply with any other Lease provision. REC-2439 (Lease at 25, ¶ 14.1); *see* REC-2420 (Lease at 6, ¶ 6.1). Generally, Cooke has sixty (60) days to cure a default, unless the Lease otherwise provides a different timeline. REC-2439 (Lease at 25, ¶ 14.2(b)). But, upon an Event of Default, DNR can terminate the Lease without providing Cooke an opportunity to cure. REC-2439 (Lease at 25, ¶ 14.2(a), ¶ 14.3(a)).

A default becomes an “Event of Default” in two ways. REC-2439 (Lease at 25, ¶¶ 14.2(a), (c)). First, a default constitutes an Event of Default if Cooke fails to cure a default within the cure period after receiving notice from DNR. REC-2439 (Lease at 25, ¶ 14.2(a), (b)).

Second, DNR may, in its discretion, deem a default to be an Event of Default “if the default occurs within six (6) months after a default by [Cooke] for which [DNR] has provided notice and opportunity to cure and regardless of whether the first and subsequent defaults are of the same

nature.” REC-2439 (Lease at 25, ¶ 14.2(c)). If DNR elects to deem a default an Event of Default, DNR is not required to provide Cooke an opportunity to cure. *See* REC-2439 (Lease at 25, ¶¶ 14.2(a), (c), 14.3(a)).

d. Exhibit B—Additional Obligations, Habitat Stewardship, and Deadlines.

The Lease imposed various additional obligations on Cooke. REC-2447 (Lease at 33, Ex. B). The Lease required Cooke to replace un-encapsulated floatation materials under deadlines. Cooke was required to replace the un-encapsulated floatation materials on the wooden float by December 1, 2015; and to replace the un-encapsulated floatation material on the concrete float by December 1, 2016. REC-2447 (Lease at 33, Ex. B, ¶ 2(B)); *see* REC-555. Cooke was also required to “ensure that all Improvements are located entirely on the Property,” which included the anchors among other things, by October 1, 2016. REC-2448 (Lease at 34, Ex. B, ¶ 2(K)), 2421 (Lease at 7, ¶ 7.2).

4. Cooke and DNR’s Communications About Lease Obligations.

On February 10, 2017, DNR asked Cooke to confirm that Cooke was in compliance with the Lease’s additional obligations. REC-1467 (citing Lease at 33-34, Ex. B ¶¶ 2(B), (C), (K)). Specifically, DNR inquired about the status of the obligations to replace un-encapsulated floatation materials on the concrete float by December 1, 2016; and the obligation to

ensure that all Improvements, including anchors, are contained within the leasehold Property. REC-1467 (citing Lease at 33-34, Ex. B ¶¶ 2(B), (C), (K)). On February 13, 2017, Cooke responded to DNR, saying: “[t]he 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.” REC-1468.

B. Site Inspections and Reports.

1. Cypress Island Net Pen Collapse.

In August 2017, a net pen at Cooke’s Cypress Island commercial fish farm collapsed, releasing thousands of Atlantic salmon. REC-1513, 5026. The net-pen collapse attracted a great deal of public interest in Cooke’s net pen farms, in the wisdom of raising a non-native salmon species in the Puget Sound, in DNR’s leasing practices, and in state and federal regulation of the net pen industry. REC-1499, 1512, 1542, 1584, 1936, 5016–023, 5024, 5040, 5069, 5394, 5407. Certain tribes were particularly critical of Cooke and the State’s handling of the incident and aquaculture involving a non-native species with the potential of transmitting disease to Washington’s endangered wild salmon. REC-5016–023, 5026. Shortly after the Cypress Island net pen collapsed, Cooke’s plans for relocating the Port

Angeles net pen farm ended when Governor Inslee placed a moratorium on new net pen farms.⁶ REC-3199–201.

2. Site Inspection.

Following the net pen collapse at Cooke’s Cypress Island farm, DNR began investigating the causes of the collapse, and inspecting Cooke’s other salmon farms for compliance with its maintenance obligations and general lease terms. REC-1556; *see* REC-4193. Meanwhile, in October 2017, Cooke failed to timely pay the required Annual Rent on the Port Angeles leasehold. REC-1533–534. DNR sent Cooke a Notice of Default providing Cooke sixty (60) days to cure its default.⁷ REC-1533-534.

In approximately November 2017, to aid in its inspections of Cooke’s sites, DNR hired a marine engineering firm, Mott MacDonald, which contracted with Collins Engineers, to investigate the cause of the net pen collapse, and inspect and report on all of Cooke’s remaining net pen sites. REC-4238, 4246, 4371, 1556. On December 4, 2017, and December 5, 2017, DNR staff, Mott MacDonald, and Collins Engineers inspected Cooke’s Port Angeles site. REC-4260. DNR staff observed lease anchors extending beyond the leasehold. REC-1789, 1755.

⁶ In 2018, the Legislature enacted RCW 79.105.170 prohibiting DNR from allowing nonnative marine finfish aquaculture and from renewing and extending any such operations in existence on June 7, 2018.

⁷ The parties agree that Cooke cured its default by paying its past due rent in October 2017.

On December 15, 2017, Mott MacDonald provided DNR its preliminary findings, which were expanded upon in subsequent reports.⁸ REC-1723, 4168, 4195, 4238, 4371. Mott MacDonald noted that its inspection revealed areas of “major concern,” critical conditions, serious deficiencies, and severe damage, although the net pen facilities were otherwise in “fair condition.” REC-4225, 4218, 4394. Specifically, the inspection revealed un-encapsulated flotation material on the concrete float. REC-4279, 4267, 4269. The report identified critical conditions affecting the mooring lines and the distribution of anchor loads, including two disconnected anchor chains, and a third anchor chain with an open link. REC-4218-219, 4221, 4261-262, 4400. The site had “numerous errant/abandoned anchor line ropes” and “the anchor lines running between the two [net pen] systems crossed at numerous locations and crab pot lines were frequently wrapped around the anchor lines.” REC-1724. Further, the report noted that the secondary pen’s mooring system was “a significant concern.” REC-4400.

⁸ See REC-4168 (Mott MacDonald’s preliminary findings, issued December 15, 2017), 1723 (Mott MacDonald’s and Collins Engineers’ preliminary findings, emailed to DNR on December 15, 2017), 4195 (Mott MacDonald’s Primary Engineering Assessment, issued December 18, 2017), 4238 (Mott MacDonald Primary Engineering Assessment, January 29, 2018), 4371 (Mott MacDonald Secondary Engineering Assessment, January 29, 2018).

Mott MacDonald also determined that anchors on both the primary and secondary net pen were located outside of the leasehold boundary. REC-4226, 4269, 4401. Mott MacDonald's report stated that "[m]ooring anchor modifications have been made to the facility without documented engineering calculations of review to support the modifications." REC-4225. Further, the "mooring system design documentation was not available and there was insufficient information to verify adequacy for site conditions." REC-4225, 4400. Mott MacDonald determined that Cooke was not conducting inspections of the net pens in accordance with the manufacturer's recommendations or industry standards, and identified the presence of corrosion and damage to various components. REC-4225-226.

C. Lease Termination.

1. DNR's Termination Notice.

DNR determined that Cooke was in default of the Lease due to three⁹ failures to comply with the terms set forth in Exhibit B and in Section 11.2. REC-1719. Specifically, (1) Cooke's failure to encapsulate flotation material on the concrete float by December 1, 2016 violated Exhibit B, paragraph 2B's requirement to do so; (2) Cooke's failure to

⁹ In October 2017, DNR determined that Cooke's untimely rent payment constituted a default. Section 14.2(c) triggered when subsequent defaults occurred in December 2017 within six months of that untimely rent payment. REC-1720, 1536, 2439 (Lease at 25, ¶ 14.2(c)), 2439 (Lease at 25, ¶ 14.3(a)).

ensure all anchors were located within the leasehold boundaries violated Exhibit B paragraph 2K's requirement to ensure that all Improvements were located entirely on the Property; and (3) the disconnected anchor chains and anchor chain with an open link violated Section 11.2's requirement to maintain the Property and Improvements in good order and repair, in a safe, clean, and attractive condition. REC-1719–720; *see* REC-2447 (Lease at 33, Ex. B, ¶ 2(B)), 2448 (Lease at 34, Ex. B, ¶ 2(K)); 2437 (Lease at 23, ¶ 11.2(a)), *see also* 4218–219, 4221, 4226, 4279.

On December 15, 2017, after receiving and reviewing Mott MacDonald's preliminary findings, DNR deemed Cooke's default for failure to comply with Section 11.2 an Event of Default. REC-1720, 1723, 1731, 1536, 2439 (Lease at 25, ¶ 14.2(c)).¹⁰ DNR then terminated the Lease, as DNR had the discretion to do under the agreed-upon terms of the Lease. REC-1719, 1536, 2439 (Lease at 25, ¶ 14.2(a)),¹¹ 2439 (Lease at 25, ¶ 14.3(a)).¹²

¹⁰ Paragraph 14.2(c) provides that DNR: "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 [DNR] has provided notice and opportunity to cure and regardless of whether the first and subsequent defaults are of the same nature."

¹¹ Paragraph 14.2(a) provides that upon an Event of Default, DNR may pursue remedies under Section 14.3.

¹² Paragraph 14.3(a) provides that: "Upon an Event of Default, [DNR] may terminate this Lease and remove Tenant by summary proceedings or otherwise."

D. Procedural History.

1. The Complaint.

Cooke filed suit, appealing under RCW 79.02.030 DNR’s decision to terminate the Lease; seeking a declaratory judgment that Cooke was not in default of the Lease and that DNR did not have a basis to terminate the Lease; and alleging that DNR breached the duty of good faith and fair dealing when it terminated the Lease.¹³ CP at 251–52. The superior court severed the claim under RCW 79.02.030 (“the administrative appeal”) from the remaining claims, ruling the administrative appeal to be heard first.¹⁴ CP at 353-54.

2. RCW 79.02.030 Administrative Appeal.

a. Arguments Below.

On February 7, 2020, Cooke and DNR appeared before Judge Murphy for a hearing in Cooke’s administrative appeal. VRP (Feb. 7, 2020) at 1; CP at 709. Cooke argued that DNR does not act in an administrative capacity when it acts as a landlord, and DNR’s decision to

¹³ Cooke first filed its complaint in Clallam County. CP at 238. DNR moved to change the venue from Clallam County to Thurston County pursuant to the terms of the Lease. CP at 198-99. Clallam County Superior Court granted DNR’s motion and transferred venue to Thurston County Superior Court. CP at 9-10.

¹⁴ The superior court was “concerned that the case may have been initiated as two case types in one action,” and requested briefing on procedural posture of the case. CP at 331. DNR argued that Cooke’s claims should be bifurcated; Cooke did not oppose bifurcation. CP at 346, 351 (DNR’s brief); CP at 334 (Cooke’s brief).

terminate the Lease was a quasi-judicial decision. CP at 600-01; VRP (Feb. 7, 2020) at 18, 21, 24. Noting that the decision at issue in *Northwest Alloys* arose from DNR's interpretation of lease terms and management of an aquatic-land lease, Cooke argued that DNR's decision here is nevertheless quasi-judicial and therefore *Northwest Alloys* is inapplicable. CP at 600-01. Cooke argued that because DNR's decision was quasi-judicial, the superior court should review it de novo to determine whether substantial evidence supports DNR's decision. CP at 601.

DNR argued that *Northwest Alloys*, which held that DNR acts in an administrative capacity when managing aquatic-land leases, governs here. CP at 635. Accordingly, DNR argued that the superior court should review challenges to those management decisions under an arbitrary and capricious standard. CP at 635.

b. Superior Court's Ruling.

The superior court reviewed the Administrative Record, which includes the Lease. CP at 709-10; *see* REC-2415 (Lease). The superior court rejected Cooke's claim that DNR's decision to terminate was quasi-judicial, and therefore concluded that the appropriate standard of review was arbitrary and capricious. CP at 710; VRP (Feb. 7, 2020) at 82. The superior court ruled that DNR's decision to terminate the Lease was factually supported, and was not arbitrary and capricious, "even if there is room for

two opinions” as to DNR’s reasons. CP at 710-11; VRP (Feb. 7, 2020) at 82-83. The court also concluded that DNR did not waive the Lease provisions requiring timely payment of rent. CP at 710; VRP (Feb. 7, 2020) at 83. Cooke timely appealed.

IV. STANDARD OF REVIEW

Under the “de novo” language of RCW 79.02.030, this Court reviews the superior court’s conclusions of law de novo, and, in applying this standard directly to DNR’s record, reviews DNR’s decision to terminate Cooke’s lease under the arbitrary and capricious standard. *Nw. Alloys*, 10 Wn. App. 2d at 182-86.

V. ARGUMENT

A. **The Superior Court Correctly Applied the Arbitrary and Capricious Standard of Review to RCW 79.02.030 Under *Northwest Alloys*.**

The superior court correctly applied the arbitrary and capricious standard of review in evaluating whether DNR properly terminated Cooke’s lease.¹⁵ Under RCW 79.02.030, any person aggrieved by a DNR leasing decision has an appeal right to the superior court, and the superior court

¹⁵ The superior court applied the correct standard of review, but if it did not, then remand would be the appropriate remedy. An interpretation of RCW 79.02.030 that would allow the Court to substitute its judgment for DNR’s on the Lease termination would render the statute unconstitutional on separation of powers principles. *See Household Fin. Corp. v. State*, 40 Wn.2d 451, 456-57, 244 P.2d 260 (1952). The Court should avoid a construction of the statute that would render it unconstitutional. *In re Personal Restraint of Matteson*, 142 Wn.2d 298, 307, 12 P.3d 585 (2000) (“Whenever possible, it is the duty of this court to construe a statute so as to uphold its constitutionality.”).

conducts its review of DNR's record under a "de novo" standard. The superior court correctly held that this language requires an arbitrary and capricious standard of review.¹⁶ CP at 710.

Cooke is correct that the appropriate standard of review under the "de novo" language of RCW 79.02.030 turns on whether DNR's actions were administrative or quasi-judicial. Br. of Appellant at 12. Indeed, "[a]lthough 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 School Dist. No. 140*, 106 Wn.2d 408, 413, 722 P.2d 803 (1986)). However, Cooke largely ignores the holding of *Northwest Alloys*, which determined that DNR's decisions under an aquatic lands lease were administrative, and not quasi-judicial. *See Nw. Alloys*, 10 Wn. App. 2d at 184-85.

1. DNR's Administrative Aquatic Lands Leasing Decisions Are Not Quasi-Judicial.

Cooke argues that DNR's aquatic lands leasing decisions under the Lease are quasi-judicial. Br. of Appellant at 12. The *Northwest Alloys* court

¹⁶ Cooke appears to confuse the subject matter jurisdiction of the Court with the appropriate standard of review the Court applies to the "de novo" language of RCW 79.02.030. Br. of Appellant at 11. Contrary to Cooke's assertions, DNR is not arguing that its aquatic lands leasing decisions are unreviewable, or that it is unaccountable. However, DNR does assert, based on established law, that such decisions are reviewable under an arbitrary and capricious standard under RCW 79.02.030.

rejected the same arguments. *Nw. Alloys*, 10 Wn. App. 2d at 184-86. In *Northwest Alloys*, an aquatic lands lessee appealed a DNR decision to deny a request to sublease state-owned aquatic lands for a coal terminal on the Columbia River near Longview. *Nw. Alloys*, 10 Wn. App. 2d at 171-72. The *Northwest Alloys* court was required to interpret specific provisions of an aquatic lands lease. *Id.* at 189. Similar to the arguments Cooke makes here, the lessee in *Northwest Alloys* asserted that, when acting under a contract, an agency is performing essentially a judicial function. *Id.* at 185-86. The court rejected these arguments, stating that DNR was acting in an administrative capacity when it made its aquatic lands leasing decisions, recognizing that “DNR holds state-owned aquatic lands in trust for the public by virtue of the Washington constitution.” *Id.*

Under the *Francisco*¹⁷ test as applied by the *Northwest Alloys* court, DNR’s decision to terminate Cooke’s lease was administrative, not quasi-judicial. *Nw. Alloys*, 10 Wn. App. 2d at 184-85. Specifically, courts do not, and indeed have not, “historically managed aquatic lands held in public trust because that is a function DNR performs.” *Id.* at 186. Similarly, DNR’s administration of aquatic lands leases are not comparable to the ordinary business of courts, and courts are not charged in the first instance with the

¹⁷ *Francisco v. Bd. of Directors*, 85 Wn.2d 575, 579, 537 P.2d 789 (1975).

responsibility of making aquatic lands leasing decisions. *See Nw. Alloys*, 10 Wn. App. 2d at 186. As *Northwest Alloys* correctly determined, DNR’s aquatic lands leasing decisions are administrative, not quasi-judicial, and are therefore reviewed under an arbitrary and capricious standard. *Nw. Alloys*, 10 Wn. App. 2d at 184-186.

2. The Standard of Review Under RCW 79.02.030 Requires Deference to DNR’s Use of Discretion Reserved Under the Lease.

Exercising the discretion the Legislature vested in DNR to determine and enforce the conditions under which state-owned aquatic lands are authorized is an administrative function, and accordingly deference should be given to DNR’s decisions. *See Nw. Alloys*, 10 Wn. App. 2d at 184 (“Allowing only limited appellate review over administrative decisions, . . . ‘serves an important policy purpose in protecting the integrity of administrative decision-making.’”) (internal citations omitted); *see also Hood Canal Sand & Gravel, LLC v. Goldmark*, 195 Wn. App. 284, 305-08, 381 P.3d 95 (2016) (DNR issuance of easement was not quasi-judicial for purposes of statutory writ of review); *State ex rel. White v. Bd. of State Land Comm’rs*, 23 Wash. 700, 705, 63 P. 532 (1901) (reversing issuance of writ of prohibition because decision to issue harbor area lease was solely an administrative action); *Malmo v. Case*, 28 Wn.2d 828, 836, 184 P.2d 40 828 (1947) (“[W]e conclude that, under

the contracts, the Commissioner of Public Lands had the power to grant, or refuse to grant, extensions. His refusal to do so was in entire good faith. He did not act arbitrarily or capriciously.”). The fact that DNR’s decision here was made under a Lease does not alter the conclusion that DNR’s action was administrative, and Cooke simply ignores long-standing precedent to the contrary.

While Cooke implies that it was improper for the superior court to refrain from issuing findings of fact, Br. of Appellant at 9, “[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.” *Nw. Alloys*, 10 Wn. App. 2d at 183. The superior court is therefore not required to issue written findings of fact under RCW 79.02.030, and such deference is appropriate under RCW 79.02.030. *Id.*

3. DNR Fulfills Its Public Trust Obligations Through Its Leasing Authority Granted Under the Aquatic Lands Statutes.

At statehood, Washington State asserted full, fee ownership of the beds and shores of all navigable waters up to the line of ordinary high tide.

Const. art. XVII, § 1. Aquatic lands¹⁸ are subject to the public trust doctrine, which is rooted in the Washington Constitution. Const. art. XVII, § 1; *Nw. Alloys*, 10 Wn. App. 2d at 184-85. The public trust doctrine “protects public ownership interests in certain uses of navigable waters and underlying lands, including navigation, commerce, fisheries, recreation, and environmental quality.” *Weden v. San Juan Cty.*, 135 Wn.2d 678, 698, 958 P.2d 273 (1998), *partially abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2020).

The Legislature delegated the responsibility to manage state-owned aquatic lands to DNR “for the benefit of the public.” RCW 79.105.010. DNR is required to “strive to provide a balance of public benefits for all citizens of the state.” RCW 79.105.030. These various public benefits include encouraging and fostering public use and access and water-dependent uses, ensuring environmental protection, utilizing renewable resources, and generating revenue in a manner consistent with those benefits. RCW 79.105.030.

¹⁸ The term “aquatic lands” includes “all tidelands, shorelands, harbor areas, and the beds of navigable waters.” RCW 79.105.060(1). “Tidelands” are defined as those lands lying between ordinary high water and extreme low water and subject to the flow of the tides. RCW 79.105.060(4), (18), (22). “Bedlands” or “beds of navigable waters” are those aquatic lands lying waterward of the line of extreme low water and are generally subject to tidal flow. RCW 79.105.060(2).

As authorized by statute, DNR strives to balance these public benefits by engaging in a variety of proprietary activities such as selling, leasing, and exchanging certain aquatic lands; granting easements, rights of way, and use authorizations; and selling valuable materials gathered from aquatic lands. *See* RCW 79.105.200 (power to lease vested in DNR); *see generally* RCW 79.36.355; RCW 79.105; RCW 79.110; RCW 79.125; RCW 79.130; RCW 79.135; RCW 79.140.

DNR “cannot contract itself out of its statutorily mandated duty to exercise discretion in furtherance of the public trust.” *Nw. Alloys*, 10 Wn. App. 2d at 186. Thus, contrary to Cooke’s arguments, whether or not DNR explicitly cited the public trust doctrine in its termination letter to Cooke is immaterial. Exercising its discretion in administering leases under the aquatic lands statutes *is* how DNR carries out its public trust obligations. *See Pope Resources v. Dep’t of Nat. Res.*, 190 Wn.2d 744, 755, 418 P.3d 90 (2018) (“Through the aquatic lands statutes, the State granted sovereign powers to DNR for protection of the State’s interest in the trust.”).

B. DNR’s Termination of Cooke’s Lease Was Based on the Facts and Authorized Under the Lease. It Was Not Arbitrary and Capricious.

DNR’s termination of Cooke’s Lease was based on Cooke’s multiple defaults and repeated failures to comply with the terms of its lease. As discussed below, this termination was based on the facts and the explicit

language of the Lease, and therefore was not arbitrary or capricious. An arbitrary action is one taken without consideration that disregards the facts or circumstances. *Hood Canal*, 195 Wn. App. at 307. While Cooke disputes the reasons for DNR's termination of the Lease, DNR's decision was based on evidence, and that evidence, even if it is disputed by Cooke, is not arbitrary. *Id.*

1. Any Ambiguity in the Lease Must Be Construed Liberally in Favor of DNR and Strictly Against Cooke.

Cooke is incorrect that any ambiguities in the Lease are to be construed against DNR. Br. of Appellant at 35-36. To the extent any Lease terms may be ambiguous, those terms are to be strictly construed in favor of DNR. *See Davidson v. State*, 116 Wn.2d 13, 20, 802 P.2d 1374 (1991) (“[O]rdinary rules of contract interpretation do not apply here. Where a deed or grant from the State fails to define or limit the boundary of the grant, the boundary will be interpreted most strongly against the grantee rather than the grantor state.”). The Port Angeles aquatic lands leased by Cooke are part of the body of navigable waters identified in article XVII of the state constitution to which the State obtained title upon statehood. *See Caminiti v. Boyle*, 107 Wn.2d 662, 666-67, 732 P.2d 989 (1987). Although DNR leased the property to Cooke, the property remains subject to the rights of the public under the public trust doctrine. *Chelan Basin Conservancy v. GBI*

Holding Co., 190 Wn.2d 249, 261, 413 P.3d 549 (2018). As the Supreme Court recently noted for such lands, “[t]he general rule of construction applying to grants of public lands by a sovereignty to corporations or individuals is that the grant must be construed liberally as to the grantor and strictly as to the grantee, and that *nothing shall be taken to pass by implication.*” *Chelan Basin Conservancy*, 190 Wn.2d at 263 (emphasis added) (citations omitted). Thus, Cooke’s arguments that any ambiguities in the Lease are to be construed against DNR are simply wrong as applied to grants from the State in its aquatic lands.¹⁹

2. DNR Did Not Waive Its Rights Under the Lease and Cooke Fails to Assign Error to the Superior Court’s Conclusion That There Was No Waiver.

Cooke cites to a course of conduct between the parties to essentially argue waiver based on Cooke’s ongoing disregard of various Lease requirements, such as the timely payment of rent and confining its use of state-owned aquatic lands to the area within the leasehold boundaries. Br. of Appellant at 33, 45. Importantly, Cooke does not assign error to the superior court’s conclusion that “waiver cannot apply to avoid compliance with the Lease provisions with DNR.” CP at 710. Regardless of how Cooke decides to repackage its waiver arguments on appeal, these arguments are

¹⁹ Accordingly, the cases cited by Cooke are also inapposite in this context. See Br. of Appellant at 35-36.

misplaced. Cooke's repeated and ongoing violations of the Lease did not require DNR to turn a blind-eye to Cooke's continuing violations. Simply put, DNR did not waive any requirements of the Lease, and DNR appropriately terminated the Lease for Cooke's multiple defaults.

Waiver is a unilateral, intentional, or voluntary relinquishment by a party of a known right. *Estate of Petelle*, 8 Wn. App. 2d 714, 720, 440 P.3d 1026 (2019), *aff'd*, *Estate of Petelle*, 195 Wn.2d 661, 462 P.3d 848 (2020). Waiver can be expressed in an agreement or implied from circumstances. *Estate of Petelle*, 195 Wn.2d at 665. An implied waiver requires unequivocal acts or conduct evidencing an intent to waive because intent will not be inferred from doubtful or ambiguous facts. *Vehicle/Vessel LLC v. Whitman Cty.*, 122 Wn. App. 770, 778, 95 P.3d 294 (2004). The intention to relinquish the right or advantage must be proved, and the burden is on the party claiming waiver. *Jones v. Best*, 134 Wn.2d 232, 241-42, 950 P.2d 1 (1998). Cooke fails to demonstrate any waiver.

The Lease provides that the waiver of any default under any Lease term is not a waiver of the term. REC-2442 (Lease at 28, ¶ 18.5). Further, any waiver of any default is not a waiver of any subsequent default of that same term or any other term. REC-2442 (Lease at 28, ¶ 18.5). The Lease requires Cooke to pay the Annual Rent by the close of business on October 1st of every year. REC-2418 (Lease at 4, § 4.1), 2417 (Lease at 3,

§ 3.1) (specifying Commencement Date), 2419 (Lease at 5, § 4.1 (a)) (Annual Rent due on Commencement Date and on same date of each year thereafter). Cooke failed to do so. REC-1533. The Lease provides that the failure to pay rent is a default. REC-2439 (Lease at 25, § 14.1 (a)).

Cooke appears to argue, based on implied waiver, that DNR waived these provisions by accepting late rent payments in the past. Br. of Appellant at 32-33. Implied waiver must be proved by unequivocal acts evidencing a clear intent to waive. *Vehicle/Vessel*, 122 Wn. App. at 778. Moreover, when waiver is given without consideration, the waiving party may reinstate the rights that have been waived upon reasonable notice that gives a reasonable opportunity to comply. *Cornerstone Equip. Leasing, Inc. v. MacLeod*, 159 Wn. App. 899, 909, 247 P.3d 790 (2011); *Moeller v. Good Hope Farms*, 35 Wn.2d 777, 215 P.2d 425 (1950).

In the case of Cooke's failure to pay its rent on time in October 2017, DNR retracted any implied waiver when it provided Cooke notice that DNR would consider the late payment of rent a default in the October 20, 2017, letter. REC-1533–534. DNR properly exercised its right in October 2017 and placed the Lease in default, notified Cooke of the default, and provided Cooke the opportunity to cure.

Cooke also implies that DNR waived its rights under the Lease to enforce the leasehold boundaries based on DNR not objecting to Cooke's

use of the property beyond the leasehold boundaries. Br. of Appellant at 45. Again, Cooke is arguing waiver by implication.

As explained above, Cooke's argument for implied waiver must be supported by unequivocal acts, or conduct evidencing DNR's intent to waive the Lease provision that requires Cooke to ensure that all improvements are located entirely within the Lease boundaries. *See Vehicle/Vessel*, 122 Wn. App. at 778. First, nothing in the record shows that DNR agreed that a previous tenant (Sea Farms Washington) in 1999 could place the anchors outside of the leasehold boundaries established in the 1996 lease. The Joint Aquatic Resource Permit Application (JARPA) documents from 1999 provide no information about anchor location in relation to the lease boundaries. REC-4546; 4359, 4548–552. Even if information supplied in the 1996 lease and information supplied in 1999 rises to the level of unequivocal evidence of an intent to waive lease rights, this waiver would only have applied to the 1996 lease and the tenant at that time.

Moreover, the 2005 survey does not provide unequivocal evidence that DNR intentionally waived its right under the Lease. REC-2156–159. Anchors and anchor lines cannot be viewed from the surface of the water, and the 2005 survey does not depict the location of anchors and anchor lines in relation to the leasehold boundary. REC-2156–159. If the anchors and

anchor lines are not depicted on the survey, then there is no unequivocal evidence that DNR intentionally relinquished its rights.

Importantly, the parties here are governed by the terms of the Lease, which was executed in 2015. Even if DNR had previously waived its right, the Lease retracted any potential prior waiver by expressly requiring Cooke to ensure that all Improvements were located entirely within the Lease boundaries. REC-2448, 2421. Given that specific language in the Lease lists the 38 anchors as an “Improvement,” Cooke cannot establish waiver by implication or otherwise, and DNR was entitled to exercise its rights under the Lease to terminate.

3. DNR Relied on the Terms of the Lease When It Exercised Its Right to Terminate. Cooke Had No Right to Cure Under the Lease.

DNR terminated the Lease under Section 14.2(c), which allows DNR to terminate for additional defaults without first providing an opportunity to cure. REC-2439. The Lease defines “default” as any failure to pay rent, any failure to comply with the law, and any failure to comply with the Lease. REC-2439 (Lease at 25, § 14.1(c)). Section 14.2(c) allows DNR to deem a default by Cooke as an “Event of Default” if the default occurs within six months of a default for which the State has provided notice and opportunity to cure. Once an “Event of Default” occurs, the Lease allows DNR the option of terminating the Lease. “Upon an Event of

Default, State may terminate this Lease and remove Tenant by summary proceedings or otherwise.” REC-2439 (Lease at 25, §14.3(a)). The successive defaults need not be of the same nature as the original default. REC-2439 (Lease at 25, §14.2(c)).

Cooke first defaulted by failing to pay rent by October 1, 2017. DNR provided Cooke notice of this default and an opportunity to cure. REC-1533–534. In December 2017, DNR discovered the following additional defaults under the terms of the Lease: (1) Cooke’s failure to encapsulate floatation material on the concrete float by December 1, 2016; (2) Cooke’s failure to ensure that improvements were located entirely within the leasehold boundary; and (3) Cooke’s failure to properly maintain the net pens as required by Section 11.2(a), evidenced by two disconnected anchorage chains and a chain with a broken chain link. REC-1724-730; 1719; REC-2447–448.

Cooke does not dispute the existence of these conditions, but questions whether these conditions are defaults and, if so, whether these defaults are sufficient to warrant termination under Section 14.2(c).²⁰ Br. of Appellant at 42-49. These conditions violated material terms of the Lease and DNR reasonably exercised its contract right to terminate the Lease.

²⁰ Courts generally require that the contract termination can only occur if a breach is material or substantial. *Campbell v. Hauser Lumber Co.*, 147 Wash. 140, 143, 265 P. 468 (1928).

Based on Cooke’s repeated violations of the Lease, Cooke explicitly had no right to cure under the terms of the Lease. Cooke asserts (without citation to the record or authority) that “Section 14.2 gives Cooke the opportunity to address alleged defaults and either cure them or demonstrate that the defaults had not occurred.” Br. of Appellant at 38. Section 14.2 provides that, unless provided elsewhere in the Lease, Cooke has 60 days to cure a default. REC-2439 (Lease at 25, ¶ 14.2(b)). However, once Cooke’s defaults became an Event of Default, Cooke was no longer entitled to an opportunity to cure. REC-2439 (Lease at 25, ¶ 14.2(a), ¶ 14.3(a)) (“Upon an Event of Default, [DNR] may seek remedies under Paragraph 14.3.”).

4. The Presence of Un-Encapsulated Floating Material on Cooke’s Concrete Float Violated the Terms of Cooke’s Lease and Constituted a Default.

Cooke argues that its un-encapsulated foam material never presented any structural risk to the facility, and therefore implies that this defect was insignificant. Br. of Appellant at 23. Cooke’s argument also assumes that the only material or significant defects are those that risk “structural safety,” which is unsupported. *Id.* The Legislature has determined that the presence of plastic garbage in the waters and along the shores of the State is a threat to public health and safety. RCW 79.145.010. In an effort to ensure environmental protection under RCW 79.105.030,

DNR generally requires its tenant to eliminate use of un-encapsulated floatation material in order to prevent plastic from entering the waters and sediments of the State and from harming wildlife. *See* REC-4487. Floatation material exposed to water and sunlight degrades, breaking down into small beads that enter the water or settle in sediments. REC-4487-488.

Cooke has a 35 feet by 20 feet reinforced concrete foam-filled barge that supports a wooden building housing an office and a generator. REC-4266. Consistent with the goal of reducing plastic in the marine environment, the Lease has an overarching requirement that all un-encapsulated floatation material be replaced with encapsulated floatation material. REC-2447. This provision bans the use of un-encapsulated floatation material. With respect to the concrete barge, the Lease provided Cooke a grace period: Cooke was required to replace all un-encapsulated floatation material on the concrete float by December 1, 2016. REC-2447.

DNR, and a marine engineering firm hired by DNR, inspected the Port Angeles site on December 4th and 5th, 2017, and found “sizable damage” to the concrete barge that exposed the floatation material. REC-4161–162, 4164, 4267, 4269, 4279. The presence of the exposed floatation material violated the terms of Cooke’s Lease. The fact that Cooke took steps to encapsulate the floatation material by December 1, 2016, does

not relieve Cooke of the requirement to keep the floatation material encapsulated after that date. The objective of requiring the tenant to replace all existing un-encapsulated foam with encapsulated foam is to ensure that encapsulated foam is not exposed to the sunlight and water. DNR found the un-encapsulated foam in December 2017 and this constituted a violation of the Lease.

5. Cooke's Anchors Were "Improvements" the Parties Specifically Listed on the Lease.

Contrary to Cooke's assertion, the Lease expressly identified "thirty-eight (38) Danforth-style anchors" as an "Existing Improvement." REC-2421 (Lease at 7, ¶ 7.2). The list of "Existing Improvements" is specific to the Lease and was not part of the "standard form" DNR lease. REC-2421. Exhibit B was also developed by the parties to address the specific conditions present on the leasehold, and provides that "by October 1, 2016, Tenant will ensure that all Improvements are located entirely on the Property." REC-2448. The words "Improvements" and "Property" are capitalized and are defined within the Lease. "Property" is the area of real property described in Exhibit A and is the area that Cooke leases from the State. REC-2416, 2421. "Improvements" is generally defined in Lease Section 7.1(a) and listed in more specificity in Section 7.2.

The parties chose these words and accepted how these terms were defined in the Lease.

“A basic rule of textual interpretation is that the specific prevails over the general.” *T-Mobile USA Inc. v. Selective Ins. Co. of Am.*, 194 Wn.2d 413, 423, 450 P.3d 150 (2019); *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 309, 197 P.3d 1153 (2008). Washington courts follow this rule when interpreting statutes and contracts. *T-Mobile*, 194 Wn.2d at 423. This specific language was chosen by the parties and should be enforced. The anchors are expressly included as “Improvements” under a lease provision that was specifically drafted for Cooke. While the context rule may allow the use of extrinsic evidence to discern the intent of the parties, extrinsic evidence cannot be used to alter the terms of the written lease. *Pelly v. Panasyk*, 2 Wn. App. 2d 848, 865-66, 413 P.3d 619 (2018).

Even if there is ambiguity in the use of the term “Improvements” in the Lease, this ambiguity should not be construed in Cooke’s favor. As discussed above, grants made by the State are construed most strongly against the grantee. *Pearl Oyster Co. v. Heuston*, 57 Wash. 533, 538, 107 P. 349 (1910); *Chelan Basin Conservancy*, 190 Wn.2d at 263 (“The general rule of construction applying to grants of public lands by a sovereignty to corporations or individuals is that the grant must be

construed liberally as to the grantor and strictly as to the grantee, . . .”). The anchors should be considered Improvements under the Lease.

6. The Lease Required Cooke to Accurately Describe the Area Under the Lease and Locate All Improvements in This Area.

The Washington Supreme Court adopted the “context rule.” *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). The context rule recognizes that the “intent of the contracting parties cannot be interpreted without examining the context surrounding” the making of the contract. *Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 502, 115 P.3d 262 (2005).

The context surrounding the negotiation of the Lease shows the intention of both parties to address the location of the Improvements, including anchors, with respect to the leasehold boundaries. When DNR and Icicle entered negotiations for the Lease, both had been involved with the Navy’s planning and constructing of a pier adjacent to the leasehold boundaries, and both were aware of the concern that several anchor lines extended beyond the boundary of the leasehold. REC-134, 190–94, 320–26, 352–58, 375–82, 391–99, 420–26, 427–28, 466, 1709, 1711.

Lease Section 1.2 (a) obligates Cooke to prepare Exhibit A, which is to be an accurate description of the Lease boundaries, and provides that “Tenant’s obligation to provide a true and accurate description of the

Property boundaries is a material term of this Lease.” REC-2416. By agreeing to the terms of the Lease, Cooke warranted that Exhibit A was accurate. REC-2416. The Lease also obligated Cooke to “ensure that all Improvements [we]re located entirely on the Property,” as defined in Exhibit A. REC-2448, 2416. These provisions can be interpreted as requiring Cooke to relocate the anchors back onto the Property. These provisions could also be construed as requiring Cooke to update Exhibit A so that the legal description of the boundary includes both the net pens and the anchors. This latter construction is consistent with a discussion between Cooke and DNR in December 2016 and January 2017 in which the parties discussed the need to resurvey all three of the Cypress Island net pens to “re-center the lease boundaries around the pens so that the anchors were inside the lease area.” REC-5224-225, 5277. Cooke also recognized in its December 1, 2017, letter to DNR that Cooke would “review the anchor locations for each of its other sites, and if they are outside the lease area, to have the new surveys prepared as soon as a surveyor can do so, so that the lease exhibits can be amended appropriately.” REC-5225. However, whether the parties intended that Cooke move the anchors onto the Property

or correct the legal description of the lease boundaries is an academic exercise. Cooke did neither by October 1, 2016.²¹ REC-2448.

Cooke convolutes the inquiry by emphasizing that DNR knew the anchors were outside the Property boundaries before executing the Lease. *See* Br. of Appellant at 26, 27, 28. The issue is not whether DNR knew the anchors were outside the Property boundaries—the record demonstrates that DNR knew the anchors were outside the Property boundaries. REC-497–98. The issue, rather, is whether the Lease required Cooke to ensure that its Improvements, which include the anchors under Section 7.2, are located entirely within the Property. It does. Cooke also asserts that DNR failed to inform Cooke that the anchors were an issue. Br. of Appellant at 27, 28. However, the Lease identified the leasehold boundaries, and the Lease required Cooke to ensure the Improvements are located within the Property. Cooke failed to do so.

²¹ Cooke asserts that DNR never objected to the location of Cooke’s anchors or asked that they be moved within the lease area, and that “the record contains ample discussion” related to the Lease obligations but “is devoid of evidence that the parties agreed—or ever discussed—that anchors needed to be moved into the lease area.” Br. of Appellant at 27, 28 (citing REC-543–44, 546, 549, 552–56, 557–99, 601, 602–09, 610–15, 616–18, 619–24, 625, 626, 637–39, 2411). The pages cited are an email thread between Icicle and DNR discussing Icicle’s concerns with the lease offered by DNR. The discussion of lease obligations occurred in response to Icicle’s objections to specific concerns. Icicle’s acceptance of the Lease terms and entering into the Lease is the evidence that the parties agreed to the terms. The lack of objections to Exhibit B’s requirement to move the Improvements within the lease area, or to the Lease including anchors as an Improvement, do not demonstrate that the parties did not agree to these terms.

7. Cooke Failed to Keep Its Improvements in Good Order and Repair.

Cooke is required to maintain the property and all improvements in good order and repair, and in a safe condition. REC-2437 (Lease at 23, ¶ 11.2(a)). DNR's determination that Cooke failed to maintain its facilities in good order and repair, as required by Section 11.2 of the Lease, was well reasoned and made with due regard to the facts and circumstances.

Before making its determination, DNR performed a walk-through inspection of the facility. REC-4162. In its report following the inspection, DNR's land manager noted that DNR needed to further evaluate whether Cooke was in compliance with Section 11.2 of the Lease. *See* REC-4162. DNR's experts, Mott MacDonald, thoroughly inspected the Port Angeles site. REC-4196, 4238. Mott MacDonald found that Cooke was operating with disconnected anchors and a broken link on an anchor chain, which made the system vulnerable to failure. REC-1719–720, 4218. Specifically, the engineering report concluded that the missing anchors created a “critical condition as the anchor loads cannot be evenly distributed with missing anchors.” REC-4219. Further, the broken link in anchor line 14 also created a “critical condition” in the system. REC-4218. In short, the engineering report showed that the missing anchors and link in the anchor line created

serious deficiencies, and made the system vulnerable to failure. REC-4218–219.²²

Although Cooke argues that “there is nothing in the record that suggests that Cooke was not adequately maintaining the farm’s anchors,” Br. of Appellant at 49, the record indicates that some anchors were exposed and another was in critical condition. REC-4218, 4261. Moreover, the record also indicates that there was “severe damage on some [anchor] lines” and “serious deficiencies in some areas.” REC-4218–21; *see also* REC-4394–395.

Cooke states that Mott MacDonald “identified some minor recommended repairs which Cooke quickly made.” Br. of Appellant at 20 (citing REC-4225). But REC-4225 does not contain information about Cooke’s subsequent repairs or response to Mott MacDonald’s report. Cooke also asserts that the Port Angeles facility “is situated behind the Ediz Hook, which protects it from high currents, and it is safe to temporarily disconnect

²² Cooke asserts that Mott MacDonald and Collins Engineers “did not conclude that the facility needed to be closed or that it was in violation of the Lease.” Br. of Appellant at 20. The record does not indicate that Mott MacDonald or Collins Engineers were asked to opine on whether the facility should be closed, or to interpret the Lease and determine whether the conditions constituted a violation of the Lease. Cooke further states that “Mott MacDonald’s report did not conclude that the facility was unsafe, at risk of collapse, or improperly maintained,” and that Mott MacDonald and Collins Engineers “found the site to be safe and in fair condition given its age.” Br. of Appellant at 20 (citing REC-4225). The Mott MacDonald and Collins Engineers reports do not use the word “safe.” *See* REC-4225, and Mott MacDonald did not perform “structural analysis.” REC-4203, 4226.

anchors for maintenance.” Br. of Appellant at 47-48. However, Mott

MacDonald’s report states that:

[T]he net pens were exposed to low to moderate current speeds, lower than at other net pen sites in Puget Sound such as Cypress Island and Hope Island. However, the current[s] at this site were not trivial and can exert substantial loads on the nets, structure and mooring system. Current induced drag forces need to be accounted for during design.

REC-4225.

Cooke’s disconnected anchors were a risk, and DNR properly considered them a default. Indeed, “neither 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). Despite Cooke’s repeated attempts to minimize the problems at its Port Angeles facility, the engineering report concluded that the status of the anchors and anchor lines were deficient with severe damage in places. REC-4218–219, 4226. DNR’s determination that Cooke failed to maintain its facilities in good order and repair reasonably follows from the engineering report’s conclusions.

C. Termination of Cooke’s Lease Was an Appropriate Remedy to Protect the State’s Aquatic Lands. Cooke Was Subject to a Contract Rescission, Not a Forfeiture.

Cooke relies on several cases involving forfeiture under a contract to argue that termination of Cooke’s lease was somehow improper. Br. of Appellant at 36-37. However, none of the cases cited by Cooke are in the aquatic lands context. The cases cited by Cooke all address scenarios in which tenants or purchasers forfeit sums of money previously paid due to a default, and none of them address DNR’s unique role in administering the State’s public trust obligations as the manager of the State’s aquatic lands.²³ While Cooke has appropriately lost the benefit of the future leasehold at this location, Cooke has not experienced forfeiture in the same sense as that experienced by a defaulting real estate vendee.

The focus of Cooke’s consternation is better characterized as contract rescission. Rescission is an unusual remedy. In the context of leasing land, a landlord cannot rescind a lease unless a provision in the lease so allows. *Republic Inv. Co. v. Naches Hotel Co.*, 190 Wash. 176, 179, 67 P.2d 858 (1937). In this case, the Lease expressly grants DNR the option of terminating the contract. REC-2439. Cooke agreed to these terms when

²³ See e.g. *Dutton v. Christie*, 63 Wash. 372, 115 P. 856 (1911); *Moeller v. Good Hope Farms*, 35 Wn.2d 777, 215 P.2d 425 (1950); *Gray v. Gregory*, 36 Wn.2d 416, 218 P.2d 307 (1950); *Income Props. Inv. Corp. v. Trefethen*, 155 Wash. 493, 284 P. 782 (1930).

the parties executed the Lease. Given the unique circumstances of this case, even principles of equity would allow for rescission.

D. DNR Acted in Good Faith in Terminating Cooke's Lease. Cooke's Failure to Raise This Argument at the Superior Court Waives It on Appeal.

Cooke asserts that DNR's sudden reversal of allowing Cooke's ongoing violations of the Lease breached the duty of good faith and fair dealing. Br. of Appellant at 38. Cooke appears to reframe its argument that DNR waived the Lease term requiring timely rent payment as an argument that the duty of good faith and fair dealing prevents DNR from deeming Cooke's late rent payment a default.²⁴ Br. of Appellant at 41. As discussed above, Cooke does not assign error to the superior court's determination that the doctrine of waiver does not apply to "avoid compliance with the Lease provisions." CP at 710. Furthermore, Cooke did not argue good faith and fair dealing before the superior court in the administrative appeal below,²⁵ and this Court generally does not review claims that are raised for the first time on appeal. RAP 2.5(a); *Wilcox v. Basehore*, 187 Wn.2d 772, 788, 389 P.3d 531 (2017); *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978). Regardless, the doctrine of good faith and fair dealing

²⁴ Paradoxically, Cooke also acknowledges that DNR did not terminate the Lease for failure to timely pay rent. Br. of Appellant at 32.

²⁵ See CP at 582-611; 659-73.

does not allow Cooke to continue violating the explicit terms of its Lease. Nor does the doctrine prevent DNR from enforcing the terms of the Lease in an effort to protect the State's aquatic lands.

DNR terminated the Lease due to Cooke's repeated failures to comply with the Lease terms, and following closely on the heels of the collapse of Cooke's Cypress Island facility. The explicit language of Section 14.2 of the Lease allowed termination. "[T]he implied covenant of good faith and fair dealing cannot add or contradict express contract terms and does not impose a free-floating obligation of good faith on the parties." *Rekhter v. Dep't of Soc. and Health Servs.*, 180 Wn.2d 102, 113, 323 P.3d 1036 (2014). Accordingly, DNR did not breach the covenant of good faith and fair dealing; DNR acted in good faith in carrying out its role as the manager of aquatic lands held in trust for the public.

E. Termination of Cooke's Lease Was Particularly Appropriate Given DNR's Role as the Manager of State-Owned Aquatic Lands Held in Trust for the People of Washington.

As discussed above, DNR manages state-owned aquatic lands in trust for the public by virtue of the Washington Constitution. *Pope Res.*, 190 Wn.2d at 754; *Nw. Alloys*, 10 Wn. App. 2d at 185. The public trust doctrine is rooted in article XVII, section 1 of the Washington Constitution and protects "public ownership interests in certain uses of navigable waters and underlying lands, including navigation, commerce, fisheries, recreation,

and environmental quality.” *Weden*, 135 Wn.2d at 698; *Nw. Alloys*, 10 Wn. App. 2d at 185.

Lease Paragraph 14.2(c) states that DNR “may elect to terminate” the Lease when multiple defaults arise. DNR made this election in the context of the strong public interest in public lands and DNR’s obligation to protect the public’s interest in these lands. *See Nw. Alloys*, 10 Wn. App. 2d at 185-86 (holding that DNR must follow the terms of the lease, but cannot contract itself out of its statutorily mandated duty to exercise discretion in furtherance of the public trust).

The circumstances surrounding DNR’s decision to terminate Cooke’s Port Angeles Lease are very similar to the election DNR made to deny DNR’s consent to the subleasing of aquatic lands for the bulk storage terminal in *Northwest Alloys*. *See Nw. Alloys*, 10 Wn. App. 2d at 173, 179, 180. As in deciding to withhold consent in *Northwest Alloys*, DNR was required to act in the public interest in deciding whether to terminate the Lease. *Nw. Alloys*, 10 Wn. App. 2d at 185-86.

DNR’s decision was well reasoned and made after having considered the relevant facts and surrounding circumstances. DNR lawfully and reasonably exercised an option provided under the contract to terminate Cooke’s Lease for a series of defaults. DNR appropriately considered the public’s interest in state-owned aquatic lands and did not behave in an

arbitrary and capricious manner in deciding to terminate the Lease. Cooke defaulted when it failed to comply with several Lease provisions within a six month period. DNR's termination of Cooke's lease was not arbitrary; it was based on the facts and carried out in a manner that best serves the public's interests.

VI. CONCLUSION

For the foregoing reasons, DNR respectfully requests this Court affirm the superior court and uphold DNR's termination of Cooke's Port Angeles Lease.

RESPECTFULLY SUBMITTED this 21st day of August, 2020.

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on August 21, 2020, as follows:

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I certify under penalty of perjury, under the laws of the state of Washington, that the foregoing is true and correct.

DATED this 21st day of August, 2020, at Olympia, Washington.

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