

SUPERIOR COURT OF WASHINGTON
IN AND FOR KING COUNTY

WILD FISH CONSERVANCY; CENTER)	No. 20-2-03704-4 SEA
FOR FOOD SAFETY; CENTER FOR)	
BIOLOGICAL DIVERSITY; and FRIENDS)	
OF THE EARTH,)	NOTICE OF APPEAL TO
)	SUPREME COURT
Petitioners/Appellants,)	
)	
v.)	
)	
WASHINGTON DEPARTMENT OF FISH)	
AND WILDLIFE,)	
)	
Respondent/Appellee,)	
)	
and)	
)	
COOKE AQUACULTURE PACIFIC, LLC,)	
)	
Intervenor-)	
Respondent/Appellee.)	
_____)	

Wild Fish Conservancy, Center for Food Safety, Center for Biological Diversity, and Friends of the Earth, Petitioners, respectfully seek review by the Washington Supreme Court of the Superior Court’s “Order on Appeal,” entered on November 6, 2020.

A copy of this order is attached to this notice.

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DATED this 23rd day of November 2020.

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Diversity & Friends of the Earth*

CERTIFICATE OF SERVICE

I, Emma Bruden, declare under penalty of perjury of the laws of Washington State that I am co-counsel for Petitioners Wild Fish Conservancy, Center for Biological Diversity, Center for Food Safety, and Friends of the Earth and that on November 23, 2020, I caused the Notice of Appeal to Supreme Court to be served on the following in the manner indicated:

<p>Joseph V. Panesko Noelle L. Chung Washington State Office of the Attorney General P.O. Box 40100 Olympia, WA 98504-0100 Email: Joe.Panesko@atg.wa.gov Diane.Newman@atg.wa.gov Noelle.Chung@atg.wa.gov fwdef@atg.wa.gov</p> <p><i>Counsel for Respondent Washington Department of Fish and Wildlife</i></p>	<p><input type="checkbox"/> Messenger (hand delivery) <input type="checkbox"/> U.S. Mail (postage prepaid) <input checked="" type="checkbox"/> E-mail (per agreement with counsel)</p>
<p>Douglas J. Steding David O. Bechtold Lisa Chalet Rahman Northwest Resource Law PLLC 101 Yesler Way, Suite 205 Seattle, WA 98104 Email: dsteding@nwresourcelaw.com dbechtold@nwresourcelaw.com kwilliams@nwresourcelaw.com lrahman@nwresourcelaw.com ehinkes@nwresourcelaw.com</p> <p><i>Counsel for Intervenor-Respondent Cooke Aquaculture Pacific, LLC</i></p>	<p><input type="checkbox"/> Messenger (hand delivery) <input type="checkbox"/> U.S. Mail (postage prepaid) <input checked="" type="checkbox"/> E-mail (per agreement with counsel)</p>

s/ Emma Bruden
Emma Bruden, WSBA No. 56280

ATTACHMENT

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SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF KING

WILD FISH CONSERVANCY;
CENTER FOR FOOD SAFETY;
CENTER FOR BIOLOGICAL
DIVERSITY; and FRIENDS
OF THE EARTH,

Petitioners,

v.

WASHINGTON DEPARTMENT OF FISH
AND WILDLIFE,

Respondent,

and

COOKE AQUACULTURE PACIFIC,
LLC,

Intervenor-Respondent.

NO. 20-2-03704-4 SEA

Order on Appeal

Clerk's Action Required

1 WDFW received over 3,500 comments during the commenting period prior to issuing
2 the Permit. AR 04414-AR 04432.² During the course of this appeal, the Court has received
3 an *amicus curiae* brief from the Swinomish Indian Tribal Community, as “present day
4 successor in interest to certain tribes and bands that signed the 1855 Treaty of Point Elliott.”
5 Amicus Curiae Brief, p. 1. Multiple interested parties observed oral argument before this
6 Court on September 24, 2020.

7 In sum, this litigation is the subject of considerable public interest, given the potential
8 impact posed by the Permit to environmental health, commercial, Tribal, and sport fisheries,
9 food delivery models, and the local economy. The ruling set forth herein is not a personal
10 expression of this Court’s balancing of those interests, which at times are competing. The
11 Court is not permitted to take a position on whether fish aquaculture is a preferable food
12 delivery model. Those questions are reserved to the members of our community who are
13 called upon to make business and environmental policy decisions. The question before this
14 Court is quite narrow: Did WDFW follow applicable law in issuing the Permit? The answer
15 to that question is yes.

16 **II. ANALYSIS**

17 *a. Procedural History*

18 The threshold question posed to WDFW under SEPA was whether issuance of the
19 Permit would have “a probable significant, adverse environmental impact.” RCW
20 43.21C.031(1). Projects adjudged to have a significant environmental impact
21 (“Determination of Significance,” or “DS”) are further evaluated pursuant to an
22 Environmental Impact Statement (“EIS”). RCW 43.21C.031; WAC 197-11-330. Projects

23 ² The record herein is voluminous, and the Court has reviewed it in full. Where appropriate, and for ease of
24 reference, the Court cites to WDFW’s Justification for the Mitigated Determination of Non-Significance (MDNS)
25 for Washington Department of Fish and Wildlife SEPA 19-056 and for the Approval of Cooke Aquaculture
26 Pacific’s Marine Aquaculture Permit Application. AR 04501-4546. This document serves as an index of all of
the data considered by WDFW during the permit application process. Most documents referenced in the
Justification memo also appear in full elsewhere in the record.

1 adjudged to have “no probable significant adverse environmental impacts” are issued a
2 “Determination of Non-significance” or “DNS.” WAC 197-11-340. Such projects may
3 proceed without further environmental review. Following review of an Environmental
4 Checklist (“EC”) prepared by Cooke³, WDFW issued a Mitigated Determination of Non-
5 Significance (“MDNS”). AR 04501-4546. An MDNS is appropriate where the reviewing
6 agency “specifies mitigation measures on an applicant’s proposal that would allow [issuance
7 of] a DNS, and the proposal is clarified, changed, or conditioned to include those measures.”
8 WAC 197-11-350(3). WDFW’s MDNS was issued after imposition of 29 mitigation
9 provisions on Cooke’s Permit application. AR 04534-36.

10 *b. Standard of Review*

11 The Court’s review of the Permit is governed by the Administrative Procedure Act
12 (“APA”), RCW 34.05.010 *et seq.* “The burden of demonstrating the invalidity of agency
13 action is on the party asserting invalidity.” RCW 34.05.570(1)(a). This Court is not bound by
14 WDFW’s interpretation of the SEPA, but does owe “deference to an agency interpretation of
15 the law where the agency has specialized expertise in dealing with such issues.” PT Air
16 Watchers v State, Dept. of Ecology, 179 Wn.2d 919, 925 (2014). “An agency’s decision to
17 issue an MDNS and not require an EIS is accorded substantial weight.” Indian Trail Property
18 Owner’s Ass’n v. City of Spokane, 76 Wn.App. 430, 442 (1994) (citing RCW 43.21C.090).
19 The Court applies a “clearly erroneous” standard of review. Anderson v. Pierce County, 86
20 Wn.App. 290, 302 (1997). “A finding is clearly erroneous when, although there is evidence
21 to support it, the reviewing court on the record is left with the definite and firm conviction
22 that a mistake has been committed.” Id. (internal citations omitted).

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³ Cooke was also required to submit supplemental answers posed by WDFW. AR 00049-00092.

1 c. *Assignments of Error*

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3 **i. Did WDFW Utilize an Invalid Baseline for its Analysis of Probable
4 Significant Adverse Environmental Impact**

5 Cooke’s Permit application arises at an unusual time in Washington State. Non-native
6 finfish aquaculture has been banned, rendering Cooke’s historical business model obsolete.
7 Cooke has a current permit to farm Atlantic Salmon. That permit is valid until its leases with
8 the Washington State Department of Natural Resources (“DNR”) expire in 2022. Per statute,
9 permits for non-native finfish aquaculture cannot be re-issued once the DNR lease expires.
10 See RCW 77.125.050.

11 Petitioners argue that the Permit application must be weighed against an assumption
12 that, without issuance of the Permit, there will otherwise be no finfish aquaculture in Puget
13 Sound. WDFW and Cooke urge the Court to compare the environmental impacts of the
14 Permit against the current practice of non-native aquaculture in our local waters. The Court is
15 aware of no authority that addresses the precise factual question before this Court: How does
16 the Court measure probable, significant adverse environmental impact when an industry is
17 slated to change at a future date?

18 This dispute hinges on the meaning of a “probable, significant adverse environmental
19 impact.” See RCW 43.21C.031(1). These terms are not defined by statute or regulation. See
20 Norway Hill Preservation and Protection Ass’n v. King County Council, 87 Wn.2d 267, 276-
21 77 (1976) (Noting the challenges inherent in applying the SEPA threshold determination
22 standard without such definitions). Generally, an EIS is required “whenever more than a
23 moderate effect on the quality of the environment is a reasonable probability.” Id. at 278.
24 Environmental impact must be analyzed “against existing uses, not theoretical uses.”
25 Chuckanut Conservancy v. Washington State Dept. of Natural Resources, 156 Wn.App. 274,
26 290 (2010).

1 The Court concludes that comparison to Atlantic Salmon aquaculture is not
2 mandatory, but is useful. Atlantic Salmon aquaculture has been robustly studied over
3 multiple decades. The impact of such aquaculture on the environment generally, and on
4 Puget Sound specifically, is fairly well understood. By analyzing available data about
5 Steelhead aquaculture in light of known information about Atlantic Salmon aquaculture,
6 WDFW was able to explore the potential impact on the quality of the Puget Sound
7 environment posed by the Permit.

8 The Court concludes that WDFW’s consideration of Atlantic Salmon aquaculture data
9 was a proper consideration of “environmental factors...in a manner sufficient to amount to
10 prima facie compliance with the procedural requirements of SEPA.” See Chuckanut
11 Conservancy, 156 Wn.App. at 286-87.

12
13 **ii. Did WDFW Fail to Adequately Address and Mitigate Significant**
14 **Impacts in ESA-Listed Species**

15 In evaluating the environmental impacts of the Permit, WDFW considered a 1990 EIS
16 prepared in conjunction with the Departments of Ecology, Natural Resources, and
17 Agriculture. AR 04506. That EIS, which was mandated by the Washington State Legislature,
18 assessed the adequacy of then-existing regulations affecting commercial net-pen aquaculture,
19 and identified actions intended to reduce or eliminate environmental harm. Id. WDFW’s
20 consideration of the 1990 EIS was a permissible part of the threshold determination process.
21 See WAC 197-11-330(2)(a). Reliance on the 1990 EIS, alone, would likely have constituted
22 an insufficient threshold determination review. However, WDFW also referenced regulatory
23 changes that post-dated the 1990 EIS (AR 04503), consulted with the Swinomish Indian
24 Tribal Community (AR 04506), reviewed over 300 scientific publications (AR 04507; 04537-
25 04546), consulted with experts, required supplemental information from Cooke (AR 00049-
26 00092), and considered public comment (AR 04507).

1 This Court has neither the scientific expertise nor the authority at law to engage in a
2 substitute threshold determination review. “Selection of environmental review process and
3 protection is left to the sound discretion of the appropriate governing agency, not this court.”
4 Anderson, 86 Wn.App. at 302. “For the MDNS to survive judicial scrutiny, the record must
5 demonstrate that environmental factors were adequately considered in a manner sufficient to
6 establish prima facie compliance with SEPA, and that the decision to issue an MDNS was
7 based on information sufficient to evaluate the proposal’s environmental impact.” Id.
8 (internal quotations and citations omitted).

9 In conducting its evaluation, WDFW paid particular attention to scientific studies that
10 post-dated the 1990 EIS. AR 04537-04546. WDFW also considered, with notable detail, the
11 probable environmental impacts posed by aquaculture of sterile, female, Pacific Steelhead as
12 compared to fertile Atlantic Salmon. AR 04501-04546. This Court is mindful that the Puget
13 Sound ecosystem is particularly fragile, and that there are endangered species whose survival
14 are in peril. However, on this record, the Court does not hold a “definite and firm conviction
15 that a mistake has been committed.” Anderson, 86 Wn.App. at 302 (citations omitted).

16 **iii. Did WDFW Err in Determining that an EIS was not Required**

17 For the reasons set forth in Section 2(c)(ii), *supra*, the Court finds no error.

18 **iv. Did WDFW Err in Failing to Consider Alternatives to the Permit**
19 **When there were Unresolved Conflicts Concerning Alternative Uses**
20 **for the Puget Sound Area**

21 Pursuant to RCW 43.21C.030(2)(e), WDFW is obligated to “study, develop, and
22 describe appropriate alternatives to recommended courses of action in any proposal which
23 involves unresolved conflicts concerning alternative uses of available resources.” The parties
24 agree that there is no appellate authority in Washington interpreting this statutory provision.
25 Petitioners identify alternative uses associated with the placement of Cooke’s net-pens.
26 Petitioner’s Opening Brief, p. 38-39. However, the placement of the net pens was not the

1 subject of the Permitting process. See AR 04507 (“WDFW’s SEPA review and determination
2 is limited in scope to Cooke’s proposed action, which does not include siting issues related to
3 already existing net-pen infrastructure.”). Petitioner has failed to identify any “unresolved
4 conflicts concerning alternative uses of available resources,” and the Court declines to find an
5 erroneous interpretation of RCW 43.21C.030(2)(e).

6 **v. Did WDFW Erroneously Assume Lead Agency Status**

7 Petitioners argue that WDFW erroneously assumed lead agency status, when the
8 Permit arose from a “private project[] requiring a license or lease to use or affect state lands.”
9 WAC 197-11-938. Petitioners urge that, because the Washington Department of Natural
10 Resources (“DNR”) manages State-owned aquatic leases, DNR was by administrative
11 mandate the lead agency for the Permit. Petitioners misstate the scope of the Permit. Cooke
12 has already obtained leases for the siting of its aquaculture net-pens. Those siting decisions
13 will be subject to further review upon expiration of the leases. The sole question posed by the
14 Permit was whether the pens, *as currently sited*, could properly be used for the farming of
15 female, sterile, Pacific Steelhead. The Legislature has delegated to WDFW “responsibility for
16 preserving, protecting, perpetuating, and managing fish and wildlife in the lands and waters of
17 the state, including offshore waters.” WAC 220-101-020. See also WAC 220-370-010 et
18 seq. (WDFW’s regulatory authority over aquaculture), RCW 77.125.010 et seq. (same).

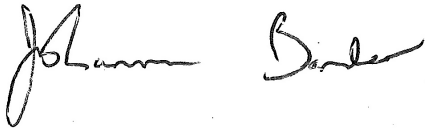
19 The Court concludes that WDFW did not err in assuming lead agency status.⁴

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23 ⁴ WDFW urges this Court to find that Petitioners failed to exhaust their administrative remedies below with
24 respect to the question of lead agency status. The Court rejects this argument. It is true that this issue was not
25 raised during the public comment period. However, “the exhaustion rule is not absolute.” Prisk v. City of Poulsbo,
26 46 Wn.App. 793, 797 (1987). The issue before the Court is a legal one: Who has administrative authority over
the Permit? Under such circumstances, “considerations of fairness and practicality” may outweigh reliance on the
exhaustion doctrine. See Id. at 798 (concluding that where there is no factual dispute between the parties, there is
no need to defer to agency fact-finding procedures).

King County Superior Court
Judicial Electronic Signature Page

Case Number: 20-2-03704-4
Case Title: WILD FISH CONSERVANCY ET AL vs WASHINGTON STATE
OF FISH AND WILDLIFE
Document Title: ORDER RE APPEAL

Signed by: Johanna Bender
Date: 11/6/2020 9:00:00 AM



Judge/Commissioner/ProTem: Johanna Bender

This document is signed in accordance with the provisions in GR 30.

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