

1 EXPEDITE
2 No Hearing Set
3 Hearing is set:
4 Date: January 6, 2023
5 Time: 9:00am
6 Judge/Calendar: Thomas

7
8 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
9 IN AND FOR THURSTON COUNTY

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

12 Plaintiff,

13 v.

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

17 Defendants.

Case No. 22-2-03398-34

PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION

18 **I. INTRODUCTION AND RELIEF REQUESTED**

19 Cooke Aquaculture Pacific, LLC ("Cooke") is the current operator of four fish farms,
20 three located at Rich Passage and one at Hope Island, which have been in operation for more
21 than 40 years. DNR has steadfastly renewed leases with fish farmers for those operations
22 throughout that time. The farms are operated on a production cycle that spans almost three years,
23 with fish produced in a freshwater hatchery for the first year and a half and then grown to market
24 size in these farms. Cooke works closely with the Washington State Department of Natural
25 Resources ("DNR") and DNR's sister agencies, the Washington State Department of Ecology
26 ("Ecology") and the Washington Department of Fish and Wildlife ("WDFW") to ensure that its

1 farms have minimal impacts to the environment.

2 Unfortunately, for the past five years, DNR has been—as the Commissioner of Public
3 Lands once texted to her Chief of Staff—on a quest to “bury” Cooke by punishing it for the
4 collapse of one of its fish farms at Cypress Island. At that time, the farm was growing Atlantic
5 salmon and the public outcry from the collapse was considerable.¹ Area tribes opposed to fish
6 farming saw the collapse as an opportunity to end fish farming in Washington and lobbied the
7 state legislature to do just that. DNR joined the tribes in that effort. Ultimately, the legislature
8 declined to end fish farming entirely in Washington and instead crafted a compromise where
9 native species could continue to be farmed, but non-native species such as Atlantic salmon could
10 not.

11 Cooke worked with state regulators to completely revamp the oversight of its farms.
12 Cooke welcomed that oversight and the regulation of its farms became more stringent, including
13 third-party engineering reviews of the structures, increased environmental monitoring, and more
14 regular inspections by agencies. Cooke thought that it had mended its relationship with DNR,
15 and routinely received positive feedback from DNR staff regarding the safety and upkeep of its
16 facilities. With that in mind, Cooke applied for lease reauthorizations from DNR on May 10,
17 2021 for Hope Island and Rich Passage. Based on past experience, Cooke fully expected DNR to
18 renew its leases.

19 DNR, however, remained on a scientifically unjustified quest to end fish farming in
20 Washington. On November 14, 2022, DNR sent a letter to Cooke notifying Cooke that DNR was
21 denying Cooke’s application for reauthorization of both leases and terminating the tenancy by
22 holdover of both leases effective December 14, 2022. DNR purported to justify its decisions with
23

24 ¹ Thankfully, the environmental impacts from the Cypress Island collapse proved to be minimal. State and federal
25 agencies investigated the possible impacts from the escaped fish and concluded that the fish could not feed in the
26 wild and likely succumbed to disease within months of the escape. No Atlantic salmon from the Cypress Island
collapse have been found in Washington waters since April 2018.

1 environmental concerns that are unsubstantiated by available scientific information. DNR's
2 termination of the holdover status at Hope Island and Rich Passage was an unprecedented event
3 in the history of the management of the leases. Despite intimate knowledge of fish farming and
4 Cooke's operations, and despite knowing that it would be impossible to remove the 360,000 fish
5 in Cooke's farms along with its tons of equipment (including dozens of anchors that weigh
6 3,000-10,000 pounds each), DNR arbitrarily ordered Cooke to completely remove the fish and its
7 farms in 30 days.

8 Cooke was shocked and seriously worried about worker safety. After Cooke informed
9 DNR that it would be impossible to remove all fish and equipment from the water at the facilities
10 under both leases within 30 days, DNR arbitrarily and insignificantly extended the deadline to
11 remove all fish from the facility by January 14, 2023 and remove all equipment by April 14,
12 2023. These deadlines are still impossible to meet without risks to Cooke's employees that
13 Cooke will not accept. DNR's refusal to provide sufficient time to responsibly remove fish and
14 equipment from the water is inconsistent with DNR's prior dealings with Cooke. If DNR's
15 unreasonable demand is permitted to stand, it will unnecessarily expose Cooke's employees to
16 dangerous working conditions, increase perceived environmental risks, and impose significant
17 financial harm on Cooke.

18 Cooke respectfully requests that the Court maintain the status quo of allowing Cooke to
19 remove the nearly 360,000 fish remaining in the water pursuant to its predetermined harvest
20 schedule. DNR was aware of that schedule at the time it terminated Cooke's leases. Under that
21 schedule, Cooke will responsibly and safely remove all fish from the facilities under both the
22 Hope Island and Rich Passage leases by mid-April. Once that work is complete, Cooke will have
23 the regulatory clarity and safe working conditions that will allow it to remove all equipment from
24 the water. And, although Cooke maintains that DNR's perception of environmental harm
25 associated with Cooke's operations are without scientific basis, allowing Cooke to proceed as
26 originally planned will prevent increasing any of DNR's perceived environmental risks. Without

1 such an injunction, the harms associated with DNR’s unreasonable demands will not be
2 remedied by a ruling on the merits in Cooke’s favor at the conclusion of this dispute.

3 II. STATEMENT OF FACTS

4 Cooke and its predecessors have maintained fish farms in four facilities pursuant to what
5 are known as the Rich Passage (three facilities) and Hope Island (one facility) leases since the
6 1970s. Kevin Bright Declaration (“Bright Decl.”) at ¶¶ 6-8. Both leases have previously gone
7 into “holdover” status after one term expires and while Cooke and DNR have negotiated
8 reauthorizations or lease extensions. *Id.* at ¶ 8. The Hope Island lease was in holdover for more
9 than 18 months, between March 2006 and October 2007, before it was last reauthorized. *Id.* The
10 Rich Passage lease was last in holdover for six months before it was reauthorized in 2008. *Id.*
11 Cooke became a holdover tenant at both locations after the Hope Island lease expired on March
12 31, 2022 and the Rich Passage lease expired on November 10, 2022. *Id.* at ¶¶ 12-13, Exs. B and
13 C.

14 Cooke sought reauthorization of both leases on May 10, 2021, well before either lease
15 expired. *Id.* at ¶ 14, Ex. A. DNR did not conduct any site visits or investigations regarding the
16 reauthorization of operations under either lease. *Id.* at ¶ 16.

17 On November 14, 2022, DNR sent two letters to Cooke informing Cooke that it was
18 denying Cooke’s application to reauthorize Cooke’s leases at Hope Island and Rich Passage. *Id.*
19 at ¶ 18, Exs. B and C. The letters also notified Cooke that DNR was terminating Cooke’s
20 holdover tenancy under both leases effective December 14, 2022. *Id.* DNR cited the same seven
21 environmental health concerns in each letter, including: (1) degradation of the benthic
22 environment; (2) risks associated with biofouling on the net pens; (3) impacts to dissolved
23 oxygen and water quality; (4) risks to health of wild fish; (5) concerns over genetics of wild fish;
24 (6) potential entrapment or inadvertent harvest of wild fish; and (7) risks of fish escapes. *Id.* at
25 Ex. B at 2-3 and Ex. C at 3-4.

26 Cooke reached out to DNR to gain further clarification on these decisions in light of prior

1 practices between the two parties when handling holdover tenancy or terminated leases. *Id.* at
2 ¶ 20, Ex. D. DNR informed Cooke that it expected Cooke to remove all fish and equipment from
3 the locations by December 14, 2022. *Id.* at ¶ 20. Cooke informed DNR that 30 days was an
4 insufficient amount of time to harvest the approximately 360,000 fish in the water under those
5 leases and remove all equipment in the water associated with the four net pen facilities. *Id.* at
6 ¶¶ 20-21. DNR had actual knowledge that Cooke was not set to finish harvesting at the two sites
7 until April 2023. *Id.* at ¶¶ 6-7.

8 On November 23, 2022, DNR responded to these concerns by giving Cooke until January
9 14, 2023 to remove all fish and April 14, 2023 to remove all equipment from the water. *Id.* at
10 ¶ 22, Ex. E. DNR based its updated deadline on outdated and inapplicable harvest numbers that
11 Cooke was able to achieve in 2017 and 2018. *Id.* at ¶ 22-26, Ex. E at 2. DNR's extensions do not
12 make its demands more possible. Cooke has limited employees and only one harvest vessel. *Id.*
13 at ¶ 27. Given the capacity of its staff and the travel time required for the lone harvest vessel,
14 Cooke is limited to two days of harvest each week. *Id.* DNR's belief that Cooke could match its
15 harvest levels of 2017 and 2018 ignores crucial differences between Cooke's situation then and
16 now. Cooke now has 24 employees, less than half of what Cooke had during those years. *Id.* at
17 ¶ 28. Additionally, the fish in Cooke's facilities now are roughly half the size of those harvested
18 in 2017-18. *Id.* at ¶ 25. The capacity of the processing plant is based on the number of fish, not
19 weight, as erroneously assumed by DNR. *Id.* Thus, the plant would need to process roughly
20 twice as many fish as it did in 2017 and 2018 to maintain the same rate. Lastly, harvesting will
21 be slowed by the upcoming holidays, given the holiday schedules of Cooke's already dwindling
22 work force and holiday hours at the plant. *Id.* at ¶¶ 26, 28, 30. DNR's reliance on 2017-18
23 harvest rates is misplaced.

24 Furthermore, with significant efforts imposed on expedited harvesting and a lack of
25 certainty regarding the permission to remove the equipment from local and federal authorities,
26 Cooke will be unable to remove equipment from the water by April 14, 2023. *Id.* at ¶ 22-33.

1 Although it is not possible to meet DNR’s demands, Cooke attempted to increase its
2 harvest schedule in response to DNR’s schedule at significant economic loss to Cooke. *Id.* at
3 ¶ 23. In response, buyers that had agreed to receive fresh fish from Cooke into April canceled
4 their contracts with Cooke. *Id.* As a result, Cooke will be forced to freeze fish for later sale on
5 foreign markets. *Id.* This has more than halved the value of those fish. *Id.* Thus, even if Cooke
6 could meet DNR’s schedule, it would result in millions of dollars in damages to Cooke. *Id.*

7 Beyond the logistical implications of DNR’s arbitrary timeline, the timeline imposes
8 unnecessary safety risks on Cooke’s employees. The work at issue is physically demanding. *Id.*
9 at ¶ 28. Staffing is limited on the farms. *Id.* at ¶ 30. Cooke has observed that accelerating this
10 work, particularly when divers are used to clean net pens, places too much strain on the crew and
11 increases risks of accidents. *Id.* These risks are further compounded by winter conditions. *Id.* at
12 ¶ 31. Enforcing DNR’s arbitrary deadlines would remove Cooke’s flexibility to adjust to weather
13 conditions and unacceptably place Cooke employees at risk. Although Cooke detailed these
14 safety concerns to DNR in its December 2, 2022 and December 9, 2022 weekly reports to DNR,
15 DNR has refused to adjust its demands. *Id.* at ¶ 34, Exs. F and G.

16 DNR’s decisions are contrary to typical practice between Cooke and DNR. Cooke’s
17 leases have repeatedly gone into holdover for months at a time, including as many as 18 months
18 at Hope Island. *Id.* at ¶ 8. When leases between Cooke and DNR have gone into holdover, they
19 have always been reauthorized. *Id.* Despite DNR’s knowledge of the existing harvest schedules,
20 DNR gave no indication prior to its November 14, 2022 letter that it would not follow that
21 customary practice with respect to these two leases. *Id.* at ¶ 18. Further, in instances where DNR
22 has terminated Cooke’s existing leases at other facilities, DNR has provided sufficient time for
23 Cooke to maintain its previously set harvest schedules in order to properly close operations. *Id.*
24 at ¶ 9. With respect to one lease, although DNR terminated the lease for, in part, Cooke’s alleged
25 improper maintenance of the facility, DNR still allowed Cooke to grow and harvest the fish on
26

1 the predetermined schedule for 16 months after DNR terminated the lease.² *Id.* Here, Cooke has
2 complied with both leases and DNR has not found Cooke to be in default. Nevertheless, DNR
3 has refused to follow customary practice between these parties under these two leases and is
4 demanding an expedited timeline that is infeasible.

5 Given DNR’s refusal to consider reasonable timelines to best close operations in a safe,
6 efficient, and responsible manner, Cooke has been forced to seek injunctive relief from the
7 Court.

8 III. STATEMENT OF ISSUES

9 1. Should the Court enjoin DNR from requiring Cooke to remove all fish from the
10 Hope Island and Rich Passage facilities by January 14, 2023, preserving the status quo of
11 Cooke’s predetermined harvest schedule?

12 IV. EVIDENCE RELIED UPON

13 This Motion relies on the Declaration of Kevin Bright and the exhibits attached thereto.

14 V. AUTHORITY AND ARGUMENT

15 A. Standard for Preliminary Injunction.

16 The Court may order a preliminary injunction pursuant to both its inherent equitable
17 powers and authority pursuant to statute. *Rabon v. City of Seattle*, 135 Wn.2d 278, 284, 148 P.2d
18 621 (1998); RCW 7.40.020. A preliminary injunction serves the “general purpose” of
19 “preserv[ing] the status quo until the trial court can conduct a full hearing on the merits.”
20 *Ameriquist Mortgage Co. v. State Atty. Gen.*, 148 Wn. App. 145, 157, 199 P.3d 468 (2009), *aff’d*
21 *on other grounds sub nom. Ameriquist Mortgage Co. v. Washington State Office of Atty. Gen.*,
22 170 Wn.2d 418, 241 P.3d 1245 (2010). “Status quo” refers to the “last actual, peaceable,
23 noncontested condition which preceded the pending controversy.” *Id.* (internal quotation marks
24 omitted). “A party seeking preliminary injunctive relief must establish (1) a clear legal or
25

26 ² This alleged default of Cooke’s lease is subject to ongoing litigation between Cooke and DNR.

1 equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the acts
2 complained of either have or will result in actual and substantial injury.” *Beauregard v.*
3 *Washington State Bar Ass’n*, 197 Wn.2d 67, 73, 480 P.3d 410 (2021). Given the equitable
4 powers of the Court, those three factors “must be examined in light of equity, including the
5 balancing of the relative interests of the parties and the interests of the public.” *Rabon*,
6 135 Wn.2d at 284. Here, those factors and the relevant equities warrant a preliminary injunction
7 maintaining Cooke’s predetermined harvest schedule.

8 **B. Cooke Is Likely to Prevail on the Merits of Its Claims Against DNR.**

9 In determining whether a clear legal or equitable right exists, courts “examine the
10 likelihood that the moving party will prevail on the merits.” *Beauregard*, 197 Wn.2d at 73
11 (internal quotation marks and brackets omitted). As the moving party, Cooke bears the burden of
12 demonstrating that likelihood. *Ameriquet Mortgage Co.*, 148 Wn. App. at 156. Because Cooke
13 is likely to prevail on the merits of multiple claims against DNR, the first factor supporting a
14 preliminary injunction is satisfied.

15 **1. DNR Did Not Abide by Good Faith and Fair Dealing Practices When**
16 **Inequitably Accelerating the Closure of Operations at Hope Island and Rich**
17 **Passage.**

18 “There is in every contract an implied duty of good faith and fair dealing [that] obligates
19 the parties to cooperate with each other so that each may obtain the full benefit of performance.”
20 *Estate of Carter v. Carden*, 11 Wn. App. 2d 573, 583, 455 P.3d 197 (2019) (internal quotation
21 marks omitted). Cooke has fully complied with the terms of both the Hope Island lease and the
22 Rich Passage lease, including payments of base rent and annual royalty fees. Bright Decl. at
23 ¶¶ 12-13. Thus, DNR has received the full benefit of the lease. However, despite DNR’s
24 awareness of Cooke’s existing harvest schedules under both leases, and DNR’s prior practice of
25 allowing Cooke to harvest fish on the appropriate schedule when leases are in holdover or have
26 been terminated, DNR is refusing to extend the full benefit of performance to Cooke. In fact,
going a step further, DNR has threatened taking action for unauthorized use and occupancy if

1 Cooke cannot meet DNR’s unreasonable demands. *Id.* at Ex. E at 2-3.

2 DNR’s conduct pertaining to this lease represents a substantial departure from the regular
3 course of business between Cooke and DNR, and Cooke is likely to succeed on its good faith and
4 fair dealing claim.

5 **2. DNR’s Expedited Closure of Operations at Rich Passage Violated Procedural
6 and Substantive Due Process.**

7 The Civil Rights Act, 42 U.S.C. § 1983, provides a cause of action if a party is deprived
8 of a property interest without due process. *Durland v. San Juan Cnty.*, 182 Wn.2d 55, 70, 340
9 P.3d 191 (2014). “The Due Process Clause provides two kinds of protection, procedural due
10 process and substantive due process.” *Nieshe v. Concrete Sch. Dist.*, 129 Wn. App. 632, 640, 127
11 P.3d 713 (2005). Here, Cooke is likely to succeed on the merits of claims regarding both kinds of
12 due process protection.

13 Procedural due process requires “the right to notice and a meaningful opportunity to be
14 heard.” *Webb v. Washington State Univ.*, 15 Wn. App. 2d 505, 517, 475 P.3d 1051 (2020). As
15 detailed above, DNR did not investigate the leases for reauthorization and Cooke was not given
16 notice or meaningful opportunity to be heard on DNR’s decision to depart from typical business
17 practices with Cooke by demanding that Cooke’s fish be removed from the water by an
18 unreasonable deadline. When Cooke attempted to increase its pace of harvest, it lost preexisting
19 contracts for the purchase of fish and the value of its early harvested fish was more than halved.
20 Bright Decl. at ¶ 23. DNR’s immediate and future devaluation of Cooke’s fish without an
21 opportunity to be heard violates the state and federal procedural due process clauses.

22 “Substantive due process generally asks whether the government abused its power by
23 arbitrarily depriving a person of a protected interest, or by basing the decision on an improper
24 motive.” *Nieshe*, 129 Wn. App. at 640–41 (emphasis omitted). Here, DNR’s decision to
25 terminate the leases and demand an expedited timeline to remove fish and equipment from the
26 properties was arbitrary. DNR apparently believes that Cooke should be able to harvest the same

1 level as it did in 2017. However, as Cooke has explained to DNR, there are a variety of factors
2 rendering that level of harvest impossible. In 2017, Cooke had approximately 60 employees.
3 Bright Decl. at ¶ 28. Now, Cooke has approximately 24 employees and that number is reducing,
4 as some employees have begun to give their notice after learning of DNR's actions. *Id.* at ¶¶ 28,
5 30.

6 Furthermore, DNR phrased the 2017 harvest rates in pounds. However, fish processing
7 facilities are limited by the number of fish, not total weight of a harvest. *Id.* at ¶ 25. Under
8 DNR's expedited harvest schedule, Cooke is being forced to harvest fish that are six to eight
9 pounds, essentially half the size of the 12-16 pound fish that were harvested in 2017. *Id.* DNR
10 also refused to consider the holiday season and the availability of Cooke's workers during that
11 time. *Id.* at ¶ 26. Those factors, coupled with DNR's willingness to allow Cooke to harvest on
12 reasonable schedules in the past, indicates that DNR's arbitrary timeline is based on an improper
13 political motive. Cooke is likely to succeed on its substantive due process claim.

14 **C. Cooke Has a Well-Founded Fear of an Immediate Invasion of Its Property Interests.**

15 It is undisputed that DNR's demand that Cooke remove all fish by January 14, 2023
16 presents an immediate invasion of Cooke's ability to obtain value for the fish in the Hope Island
17 and Rich Passage facilities. *Id.* at ¶ 23. Failing to revert back to the status quo of a reasonable
18 harvest schedule will result in an immediate invasion of Cooke's property interests.

19 **D. DNR's Inequitable Termination Schedule for the Rich Passage and Hope Island Leases
20 Will Result in Actual, Substantial, and Irreparable Harm.**

21 If the status quo—Cooke's predetermined harvest schedule—is not maintained, the harm
22 that could result cannot be cured by a later decision in Cooke's favor on the merits. DNR's
23 unreasonable demand presents three categories of harm.

24 First, DNR is imposing an unacceptable safety risk to Cooke's employees. Without
25 taking into account holiday availability, Cooke's staff is already stretched thin and is losing
26 members. *Id.* at ¶ 30. Those issues, coupled with the dangerous conditions that are inherent to

1 winter weather, present a safety risk to Cooke’s employees—whether diving or working on the
2 net pen structures—that is entirely unreasonable. *Id.* at ¶¶ 30-31. Cooke must maintain the
3 flexibility to adjust to weather and harvest at the safest times. *Id.* at ¶ 31. Cooke must also wait
4 until harvest is completed before being able to remove equipment from the water in a stable
5 manner that does not create a risk of an accident. *Id.* at ¶ 32. Without sufficient staff or
6 appropriate weather conditions, that work is dangerous. *Id.* An injunction is necessary to keep
7 Cooke’s employees out of harm’s way and maintain the necessary flexibility to safely harvest
8 and remove equipment from the water.

9 Second, DNR risks increasing the environmental harm that it perceives is associated with
10 the Rich Passage and Hope Island leases. As discussed, when denying Cooke’s application for
11 lease reauthorization and terminating Cooke’s holdover tenancy under both leases, DNR cited
12 seven environmental health concerns. *Id.* at Exs. B and C. Those concerns included risks of
13 accidents such as fish escapes. Cooke maintains that its facilities do not pose risk of
14 environmental harm under normal operating conditions and that DNR’s perceived risk of harm is
15 no justification for rushing the harvest and equipment removal process. As detailed above, there
16 are significant staffing and weather concerns with forcing rushed action over these next few
17 winter months. If DNR is truly concerned about possible environmental impacts, it should give
18 Cooke the leeway to complete the requisite work in a timely yet responsible manner. Cooke is
19 only seeking what DNR has regularly given Cooke before: the time to do things right. While
20 Cooke disagrees with DNR’s incorrect perception of environmental risk, the logical extension of
21 DNR’s perception supports injunctive relief. If DNR is concerned with environmental impacts,
22 its goal should be to permit Cooke to take the time to close its operations in a safe and
23 responsible manner consistent with industry best practices ordinarily employed by Cooke.
24 Rushing the closure of Cooke’s operations only increases risks. Stated differently, although
25 Cooke maintains that no environmental harm results from its operations, a future ruling on the
26 merits will be unable to remedy any environmental harm that occurs from DNR’s unreasonable

1 timeline.

2 Lastly, DNR's expedited timeline will also impose substantial financial harm on Cooke.
3 Given the current market and Cooke's attempts to boost its harvests and sales, Cooke stands to
4 lose millions of dollars in revenue if it is required to harvest or otherwise remove all the fish
5 from the facility by January 14, 2023. *Id.* at ¶ 23.

6 The harm from DNR's unreasonable demands warrants injunctive relief.

7 **VI. CONCLUSION**

8 Cooke respectfully requests that the Court maintain the status quo of Cooke's
9 predetermined harvest schedule and then allow Cooke to remove equipment from the water at a
10 reasonable time following the completion of harvests. The requested injunctive relief is
11 necessary to ensure that Cooke can safely and responsibly take the necessary actions if it is
12 required to close its operations at Hope Island and Rich Passage.

13 DATED this 20th day of December, 2022.

14 NORTHWEST RESOURCE LAW PLLC

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